



1 Montezuma asserts that Montezuma's failure to maintain the common area for  
2 Montezuma was not a violation of A.R.S. § 33-1247 because Petitioner had failed to pay  
3 her homeowner's dues for over two years and Montezuma was unable to pay for the  
4 maintenance of the common areas without Petitioner's dues. After review of the record  
5 for the both the original hearing and the rehearing, the following Findings of Fact,  
6 Conclusions of Law and Recommended Order on Rehearing are made:

7 **FINDINGS OF FACT**  
8

9 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by  
10 statute to receive Petitions for Hearing from members of condominium associations and  
11 from condominium associations in Arizona.

12 2. Montezuma is a condominium association consisting of seventeen condominium  
13 units located in Lake Montezuma, Arizona.

14 3. Petitioner owns three condominium units in and is a member of Montezuma.

15 4. Petitioner filed a Petition with the Department alleging that Montezuma had violated  
16 the provisions of A.R.S. §§ 33-1247, 33-1248, 33-1250, and 33-1805. Petitioner  
17 specifically alleged that:

18 a) Montezuma failed to maintain the common areas of  
19 Montezuma as required by A.R.S. § 33-1247.

20 b) Montezuma failed to conduct open meetings as required by  
21 A.R.S. § 33-1248.

22 c) Montezuma failed to hold proper elections as required by  
23 A.R.S. § 33-1250.

24 d) Montezuma failed to provide financial information as  
25 required by A.R.S. § 33-1258.

26 5. Respondent's Answer to the Petition alleged, in part, as follows:

27 a) Petitioner was delinquent in paying her association dues to  
28 Montezuma.

29 b) Petitioner was mailed written notice of an association  
30 meeting that was held on May 24, 2012, but Petitioner failed to  
attend to the scheduled meeting or to inform Montezuma of any  
issues that she wanted to have addressed.

1 c) Although the former association president had failed to call a  
2 meeting for several years, very few people ever attended any of  
3 the meetings.

4 d) Montezuma had been unable to perform some cosmetic  
5 maintenance work because Petitioner and two other members  
6 had failed to pay their association dues.

### 7 **Petitioner's Testimony<sup>1</sup>**

8 6. Petitioner testified that she purchased her first condominium unit in Montezuma  
9 during 2003. Petitioner stated that she purchased two additional condominium units in  
10 2011. Petitioner testified that she utilizes all three condominium units as rental  
11 properties.

12 7. Petitioner testified that that she filed the Petition against Montezuma because  
13 Montezuma failed to provide maintenance for the common areas of Montezuma.  
14 Petitioner stated that the lack of maintenance caused her to become concerned about  
15 the financial status of Montezuma and to request financial records from Montezuma.

16 8. Petitioner testified that only two family-sized trash containers are provided for the  
17 seventeen condominium units located in Montezuma. Petitioner stated that the two  
18 family-sized trash containers are constantly overflowing and that the weeds "are high" in  
19 the common areas.

20 9. Petitioner acknowledged that Montezuma had performed some maintenance on the  
21 front of the condominium building. Petitioner testified that the rear of the condominium  
22 building required proper maintenance and painting. Petitioner stated that there was a  
23 broken wall in the common area that had been damaged since 2003.

24 10. Petitioner testified that Montezuma had refused to provide her with the requested  
25 financial records until she filed the petition at issue. Petitioner acknowledged that  
26 Montezuma has provided the financial records that she requested. Petitioner stated  
27 that she requested that Montezuma furnish financial records in August 2011. Petitioner  
28 testified that she requested the information to "see where the money was going."  
29 Petitioner stated that Montezuma was not maintaining the common areas at that time.

30 11. Petitioner testified that in November 2012, she learned that there had been an

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<sup>1</sup> 3/28/13 Hearing Record (hereinafter "H.R.") at 18:45-1:25:45, and 11/20/13 Hearing Record (hereinafter "11/20/13 H.R." at 1:11:46-1:35:46.

1 association meeting on May 24, 2012. Petitioner stated that she received no notice of  
2 the association meeting. Petitioner testified that Montezuma had her email address and  
3 that she would have attended the association meeting had she received notice of the  
4 association meeting.

5 12. Petitioner acknowledged that she had utilized several different mailing addresses.  
6 Petitioner testified that she had provided Montezuma with her current address in one of  
7 her emails to Montezuma.

8 13. Petitioner acknowledged that Montezuma had provided additional trash containers  
9 for the units after the March 28, 2013 hearing.

10 14. Petitioner testified that she had received copies of the minutes for the May 24, 2012  
11 association meeting. Petitioner stated that there was no election of association officers  
12 during the May 24, 2012 association meeting. Petitioner testified that there has not  
13 been an election of association officers during the time that she has been a member of  
14 Montezuma.

15 15. Petitioner testified that she did not trust the members of the board of Montezuma.  
16 Petitioner stated that she filed the petition at issue because there had been no elections  
17 and Montezuma had failed to provide requested financial information. Petitioner  
18 acknowledged that she received the requested financial information in January or  
19 February 2012.

20 16. Petitioner testified that the only notice of an annual meeting from Montezuma that  
21 she received was in 2004. Petitioner stated that she had received no other notices of  
22 annual meetings from Montezuma.

### 23 **Carol Ann Klagge's Testimony<sup>2</sup>**

24 17. Carol Ann Klagge (hereinafter "Ms. Klagge") testified that she is the treasurer for  
25 Montezuma. Ms. Klagge stated that she has been the treasurer for Montezuma for over  
26 ten years.

27 18. Ms. Klagge testified that Montezuma is a small condominium association with  
28 seventeen units. Ms. Klagge stated that she owns three condominium units in  
29 Montezuma. Ms. Klagge testified that six owners of condominium units reside in the

30 \_\_\_\_\_  
<sup>2</sup> H.R. at 1:26:50-2:17:25, and 11/20/13 H.R. at 8:45-1:03.23.

1 State of Arizona. Ms. Klagge testified that the other owners of condominium units live  
2 out-of-state. Ms. Klagge stated that most of the condominium units are utilized as rental  
3 units.

4 19. Ms. Klagge testified that Petitioner had provided Montezuma with several different  
5 addresses.<sup>3</sup> Ms. Klagge stated that she mailed written notice of the May 24, 2012  
6 association meeting to Petitioner. Ms. Klagge testified that the written notice was not  
7 returned to Montezuma as being undeliverable.

8 20. Ms. Klagge testified that she and her husband, Jay Klagge (hereinafter “Mr.  
9 Klagge”), and Tony Sturgeon (hereinafter “Mr. Sturgeon”) were the only three  
10 association members who attended the May 24, 2012 association meeting. Ms. Klagge  
11 stated that according to Montezuma’s Bylaws, only members in good standing can  
12 participate in voting during the association meeting. Ms. Klagge testified that  
13 association dues are assessed according to the size of the condominium units, with  
14 larger units being assessed at a higher amount of dues than smaller units.

15 21. Ms. Klagge testified that she provided financial statements for Montezuma to all  
16 members who attended the May 24, 2012 association meeting. Ms. Klagge stated that  
17 she informed Petitioner in a previous email that she would be providing a financial  
18 statement for Montezuma to all members who attended the May 24, 2012 association  
19 meeting.

20 22. Ms. Klagge testified that Petitioner did not request that the financial statement be  
21 provided to her prior to the May 24, 2012 association meeting. Ms. Klagge stated that  
22 Petitioner did not attend the May 24, 2012 association meeting.

23 23. Ms. Klagge acknowledged that there was not an election of association officers  
24 during the May 24, 2012 association meeting. Ms. Klagge testified that there was no  
25 election because only three members were in attendance at the meeting. Ms. Klagge  
26 stated that all three attending members were already officers of Montezuma and that  
27 the three members agreed to continue in their current capacity. Ms. Klagge stated that  
28 Mr. Klagge was the secretary for Montezuma and Mr. Sturgeon was the vice-president  
29 for Montezuma. Ms. Klagge testified that they did not want to vote for themselves and

30 \_\_\_\_\_  
<sup>3</sup> See Exhibit R-4 (List of addresses for Petitioner).

1 that there appeared to be no purpose to have a vote when only three members were  
2 present and all three present members were willing to continue in their capacity as  
3 officers of the association.

4 24. Ms. Klagge stated that the president of Montezuma had previously resigned and that  
5 the position of president had not been filled. Ms. Klagge testified that she offered the  
6 position of president of Montezuma to Petitioner. Ms. Klagge stated that Petitioner  
7 declined the position. Ms. Klagge testified that it was hard to get anyone to help out and  
8 that the association needed help.

9 25. Ms. Klagge testified that Montezuma provides a common sewer line and septic tank,  
10 trash service, outside maintenance, and insurance for the exterior of the condominiums.  
11 Ms. Klagge stated that Montezuma had previously provided for the maintenance of the  
12 landscaping for the condominiums, the water for the landscaping, and nighttime exterior  
13 security lighting. Ms. Klagge testified that Montezuma was struggling financially and  
14 cutbacks in expenditures had to be made.

15 26. Ms. Klagge testified that Montezuma used to have two large multi-family sized trash  
16 dumpsters. Ms. Klagge stated that Montezuma did not have the need or money to  
17 provide two large multi-family sized dumpsters.

18 27. Ms. Klagge testified that the broken wall had been hit by a car. Ms. Klagge stated  
19 that Montezuma had not repaired the damaged wall because Montezuma could not  
20 afford to repair the wall. Ms. Klagge stated that the broken wall was still functional as a  
21 wall.

22 28. Ms. Klagge testified that after the March 28, 2013 hearing on this matter,  
23 Montezuma corrected the damaged wall, performed necessary painting work, and  
24 provided additional trash dumpsters for the tenants of Montezuma. Ms. Klagge stated  
25 that Montezuma was able to perform the remedial actions because Petitioner paid the  
26 dues for her three condominium units to Montezuma. Ms. Klagge testified that  
27 Montezuma had paid over \$7,000.00 for sewer repairs over the last twelve months. Ms.  
28 Klagge stated that Montezuma had very limited financial resources. Ms. Klagge  
29 acknowledged that Montezuma had increased its assessments by \$25.00 per lot for  
30 2013.

1 29. Ms. Klagge acknowledged that Montezuma did have the power to impose a special  
2 assessment if necessary. Ms. Klagge testified that there would be no need for a special  
3 assessment if all of the unit owners paid their dues.

4 30. Ms. Klagge acknowledged that the notice of the meeting did not contain the word  
5 “annual” and that it did not mention “elections” as a purpose for the meeting.

6 31. Ms. Klagge stated that there was no nomination of officers and no election of officers  
7 at the May 24, 2012 meeting. Ms. Klagge testified that only three people were present  
8 for the May 24, 2012 meeting. Ms. Klagge acknowledged that the three people present  
9 could have conducted a formal election of officers but decided not to. Ms. Klagge  
10 stated that Montezuma could not get members to become officers of Montezuma.

11 32. Ms. Klagge testified that Montezuma repeatedly tried to get members to run for  
12 election and that no one was willing to run for election.

13 **Helen Bartels’ Testimony<sup>4</sup>**

14 33. Helen Bartels (hereinafter “Ms. Bartels”) testified that she owns a condominium unit  
15 in Montezuma. Ms. Bartels stated that she used her condominium unit as rental  
16 property. Ms. Bartels testified that she received written notice of the May 24, 2012  
17 meeting. Ms. Bartels stated that she did not attend the May 24, 2012 meeting. Ms.  
18 Bartels testified that she received an annual financial statement from Montezuma.

19 34. Ms. Bartels testified that she became a member of the board for Montezuma after  
20 the March 28, 2013 hearing. Ms. Bartels stated that the condominium owners in  
21 Montezuma would be hard-pressed to pay a special assessment. Ms. Bartels testified  
22 that if sufficient money was available, the common areas should be maintained.

23 **PROVISIONS OF LAW REFERENCED AT HEARING**

24  
25  
26 1. A.R.S. § 12-541 provides as follows:

27 There shall be commenced and prosecuted within one year  
28 after the cause of action accrues, and not afterward, the  
29 following actions:

30 . . . .

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<sup>4</sup> H.R. at 2:17:25-2:21:40, and 11/20/13 H.R. at 1:04-1:11:16.

1                   5. Upon a liability created by statute, other than a penalty or  
2                   forfeiture.

3  
4           2.     A.R.S. § 33-1243(J) provides, in relevant part, as follows:

5                   Unless any provision in the condominium documents requires an  
6                   annual audit by a certified public accountant, the board of  
7                   directors shall provide for an annual financial audit, review or  
8                   compilation of the association. The audit, review or compilation  
9                   shall be completed no later than one hundred eighty days after the  
10                  end of the association's fiscal year and shall be made available  
11                  upon request to the unit owners within thirty days after its  
12                  completion.

13  
14           3.     A.R.S. § 33-1247 provides as follows:

15                   A. Except to the extent provided by the declaration, subsection  
16                   C of this section or section 33-1253, subsection B, the  
17                   association is responsible for maintenance, repair and  
18                   replacement of the common elements and each unit owner is  
19                   responsible for maintenance, repair and replacement of the  
20                   unit. On reasonable notice, each unit owner shall afford to the  
21                   association and the other unit owners, and to their agents or  
22                   employees, access through the unit reasonably necessary for  
23                   those purposes. If damage is inflicted on the common elements  
24                   or any unit through which access is taken, the unit owner  
25                   responsible for the damage, or the association if it is  
26                   responsible, is liable for the prompt repair of the damage.

27                   B. For any residential rental units that have been declared a  
28                   slum property by the city or town pursuant to section 33-1905  
29                   and that are in the condominium complex, the association is  
30                   responsible for enforcing any requirement for a licensed  
                    property management firm that is imposed by a city or town  
                    pursuant to section 33-1906.

                    C. In addition to the liability borne by the declarant as a unit  
                    owner under this chapter, the declarant alone is liable for the  
                    maintenance, repair and replacement of any portion of the  
                    common elements which the declarant reserves the right to  
                    withdraw from the condominium, as long as the unit owner  
                    maintains that right.

                    4.     A.R.S. § 33-1248 provides as follows:

1 A. Notwithstanding any provision in the declaration, bylaws or  
2 other documents to the contrary, all meetings of the unit  
3 owners' association and the board of directors, and any  
4 regularly scheduled committee meetings, are open to all  
5 members of the association or any person designated by a  
6 member in writing as the member's representative and all  
7 members or designated representatives so desiring shall be  
8 permitted to attend and speak at an appropriate time during the  
9 deliberations and proceedings. The board may place  
10 reasonable time restrictions on those persons speaking during  
11 the meeting but shall permit a member or a member's  
12 designated representative to speak once after the board has  
13 discussed a specific agenda item but before the board takes  
14 formal action on that item in addition to any other opportunities  
15 to speak. The board shall provide for a reasonable number of  
16 persons to speak on each side of an issue. Persons attending  
17 may audiotape or videotape those portions of the meetings of  
18 the board of directors and meetings of the members that are  
19 open. The board of directors of the association may adopt  
20 reasonable rules governing the audiotaping or videotaping of  
21 open portions of the meetings of the board and the  
22 membership, but such rules shall not preclude such  
23 audiotaping or videotaping by those attending. Any portion of a  
24 meeting may be closed only if that portion of the meeting is  
25 limited to consideration of one or more of the following:

18 1. Legal advice from an attorney for the board or the  
19 association. On final resolution of any matter for which the  
20 board received legal advice or that concerned pending or  
21 contemplated litigation, the board may disclose information  
22 about that matter in an open meeting except for matters that  
23 are required to remain confidential by the terms of a settlement  
24 agreement or judgment.

23 2. Pending or contemplated litigation.

24 3. Personal, health or financial information about an individual  
25 member of the association, an individual employee of the  
26 association or an individual employee of a contractor for the  
27 association, including records of the association directly related  
28 to the personal, health or financial information about an  
29 individual member of the association, an individual employee of  
30 the association or an individual employee of a contractor for the  
association.

1 4. Matters relating to the job performance of, compensation of,  
2 health records of or specific complaints against an individual  
3 employee of the association or an individual employee of a  
4 contractor of the association who works under the direction of  
5 the association.

6 5. Discussion of a unit owner's appeal of any violation cited or  
7 penalty imposed by the association except on request of the  
8 affected unit owner that the meeting be held in an open  
9 session.

10 B. Notwithstanding any provision in the condominium  
11 documents, all meetings of the unit owners' association and the  
12 board shall be held in this state. A meeting of the unit owners'  
13 association shall be held at least once each year. Special  
14 meetings of the unit owners' association may be called by the  
15 president, by a majority of the board of directors or by unit  
16 owners having at least twenty-five per cent, or any lower  
17 percentage specified in the bylaws, of the votes in the  
18 association. Not fewer than ten nor more than fifty days in  
19 advance of any meeting of the unit owners, the secretary shall  
20 cause notice to be hand delivered or sent prepaid by United  
21 States mail to the mailing address of each unit or to any other  
22 mailing address designated in writing by the unit owner. The  
23 notice of any meeting of the unit owners shall state the time  
24 and place of the meeting. The notice of any special meeting of  
25 the unit owners shall also state the purpose for which the  
26 meeting is called, including the general nature of any proposed  
27 amendment to the declaration or bylaws, any changes in  
28 assessments that require approval of the unit owners and any  
29 proposal to remove a director or officer. The failure of any unit  
30 owner to receive actual notice of a meeting of the unit owners  
does not affect the validity of any action taken at that meeting.

C. Notwithstanding any provision in the declaration, bylaws or  
other condominium documents, for meetings of the board of  
directors that are held after the termination of declarant control  
of the association, notice to unit owners of meetings of the  
board of directors shall be given at least forty-eight hours in  
advance of the meeting by newsletter, conspicuous posting or  
any other reasonable means as determined by the board of  
directors. An affidavit of notice by an officer of the association is  
prima facie evidence that notice was given as prescribed by  
this section. Notice to unit owners of meetings of the board of  
directors is not required if emergency circumstances require

1 action by the board before notice can be given. Any notice of a  
2 board meeting shall state the time and place of the meeting.  
3 The failure of any unit owner to receive actual notice of a  
4 meeting of the board of directors does not affect the validity of  
5 any action taken at that meeting.

6 D. Notwithstanding any provision in the declaration, bylaws or  
7 other condominium documents, for meetings of the board of  
8 directors that are held after the termination of declarant control  
9 of the association, all of the following apply:

10 1. The agenda shall be available to all unit owners attending.

11 2. An emergency meeting of the board of directors may be  
12 called to discuss business or take action that cannot be  
13 delayed until the next regularly scheduled board meeting. The  
14 minutes of the emergency meeting shall state the reason  
15 necessitating the emergency meeting. The minutes of the  
16 emergency meeting shall be read and approved at the next  
17 regularly scheduled meeting of the board of directors.

18 3. A quorum of the board of directors may meet by means of a  
19 telephone conference if a speakerphone is available in the  
20 meeting room that allows board members and unit owners to  
21 hear all parties who are speaking during the meeting.

22 4. Any quorum of the board of directors that meets informally to  
23 discuss association business, including workshops, shall  
24 comply with the open meeting and notice provisions of this  
25 section without regard to whether the board votes or takes any  
26 action on any matter at that informal meeting.

27 E. It is the policy of this state as reflected in this section that all  
28 meetings of a condominium, whether meetings of the unit  
29 owners' association or meetings of the board of directors of the  
30 association, be conducted openly and that notices and agendas  
be provided for those meetings that contain the information that  
is reasonably necessary to inform the unit owners of the  
matters to be discussed or decided and to ensure that unit  
owners have the ability to speak after discussion of agenda  
items, but before a vote of the board of directors is taken.  
Toward this end, any person or entity that is charged with the  
interpretation of these provisions shall take into account this  
declaration of policy and shall construe any provision of this  
section in favor of open meetings.

1 F. This section does not apply to timeshare plans or  
2 associations that are subject to chapter 20 of this title.

3 5. A.R.S. § 33-1250 provides as follows:  
4

5 A. If only one of the multiple owners of a unit is present at a  
6 meeting of the association, the owner is entitled to cast all the  
7 votes allocated to that unit. If more than one of the multiple  
8 owners are present, the votes allocated to that unit may be cast  
9 only in accordance with the agreement of a majority in interest  
10 of the multiple owners unless the declaration expressly  
11 provides otherwise. There is majority agreement if any one of  
12 the multiple owners casts the votes allocated to that unit  
13 without protest being made promptly to the person presiding  
14 over the meeting by any of the other owners of the unit.

15 B. During the period of declarant control, votes allocated to a  
16 unit may be cast pursuant to a proxy duly executed by a unit  
17 owner. If a unit is owned by more than one person, each owner  
18 of the unit may vote or register protest to the casting of votes by  
19 the other owners of the unit through a duly executed proxy. A  
20 unit owner may not revoke a proxy given pursuant to this  
21 section except by actual notice of revocation to the person  
22 presiding over a meeting of the association. A proxy is void if it  
23 is not dated or purports to be revocable without notice. The  
24 proxy is revoked on presentation of a later dated proxy  
25 executed by the same unit owner. A proxy terminates one year  
26 after its date, unless it specifies a shorter term or unless it  
27 states that it is coupled with an interest and is irrevocable.

28 C. Notwithstanding any provision in the condominium  
29 documents, after termination of the period of declarant control,  
30 votes allocated to a unit may not be cast pursuant to a proxy.  
The association shall provide for votes to be cast in person and  
by absentee ballot and may provide for voting by some other  
form of delivery. Notwithstanding section 10-3708 or the  
provisions of the condominium documents, any action taken at  
an annual, regular or special meeting of the members shall  
comply with all of the following if absentee ballots are used:

1. The absentee ballot shall set forth each proposed action.
2. The absentee ballot shall provide an opportunity to vote for or against each proposed action.

1 3. The absentee ballot is valid for only one specified election or  
2 completion of the election or meeting.

3 4. The absentee ballot specifies the time and date by which the  
4 ballot must be delivered to the board of directors in order to be  
5 counted, which shall be at least seven days after the date that  
6 the board delivers the unvoted absentee ballot to the member.

7 5. The absentee ballot does not authorize another person to  
8 cast votes on behalf of the member.

9 D. Votes cast by absentee ballot or other form of delivery are  
10 valid for the purpose of establishing a quorum.

11 E. Notwithstanding subsection C of this section, an association  
12 for a timeshare plan as defined in section 32-2197 may permit  
13 votes by a proxy that is duly executed by a unit owner.

14 F. If the declaration requires that votes on specified matters  
15 affecting the condominium be cast by lessees rather than unit  
16 owners of leased units all of the following apply:

17 1. The provisions of subsections A and B of this section apply  
18 to lessees as if they were unit owners.

19 2. Unit owners who have leased their units to other persons  
20 shall not cast votes on those specified matters.

21 3. Lessees are entitled to notice of meetings, access to records  
22 and other rights respecting those matters as if they were unit  
23 owners. Unit owners shall also be given notice, in the manner  
24 prescribed in section 33-1248, of all meetings at which lessees  
25 may be entitled to vote.

26 G. Unless the declaration provides otherwise, votes allocated to  
27 a unit owned by the association shall not be cast.

28 H. This section does not apply to timeshare plans or  
29 associations that are subject to chapter 20 of this title.

30 I. For the purposes of this section, "period of declarant control"  
means the time during which the declarant or persons  
designated by the declarant may elect or appoint the members

of the board of directors pursuant to the condominium documents or by virtue of superior voting power.

6. A.R.S. § 33-1258 provides as follows:

A. Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative. The association shall not charge a member or any person designated by the member in writing for making material available for review. The association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the association shall have ten business days to provide copies of the requested records. An association may charge a fee for making copies of not more than fifteen cents per page.

B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association.

2. Pending litigation.

3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1248.

4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.

5. Records relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.

C. The association shall not be required to disclose financial and other records of the association if disclosure would violate any state or federal law.

1 D. This section does not apply to an association for a timeshare plan  
2 that is subject to chapter 20 of this title.

3 7. A.R.S. § 33-1260 provides as follows:

4 A. For condominiums with fewer than fifty units, a unit owner  
5 shall mail or deliver to a purchaser or a purchaser's authorized  
6 agent within ten days after receipt of a written notice of a  
7 pending sale of the unit, and for condominiums with fifty or  
8 more units, the association shall mail or deliver to a purchaser  
9 or a purchaser's authorized agent within ten days after receipt  
10 of a written notice of a pending sale that contains the name and  
11 address of the purchaser, all of the following in either paper or  
12 electronic format:

13 1. A copy of the bylaws and the rules of the association.

14 2. A copy of the declaration.

15 3. A dated statement containing:

16 (a) The telephone number and address of a principal contact  
17 for the association, which may be an association manager, an  
18 association management company, an officer of the association  
19 or any other person designated by the board of directors.

20 (b) The amount of the common expense assessment for the  
21 unit and any unpaid common expense assessment, special  
22 assessment or other assessment, fee or charge currently due  
23 and payable from the selling unit owner. If the request is made  
24 by a lienholder, escrow agent, unit owner or person designated  
25 by a unit owner pursuant to section 33-1256, failure to provide  
26 the information pursuant to this subdivision within the time  
27 provided for in this subsection shall extinguish any lien for any  
28 unpaid assessment then due against that unit.

29 (c) A statement as to whether a portion of the unit is covered by  
30 insurance maintained by the association.

(d) The total amount of money held by the association as  
reserves.

(e) If the statement is being furnished by the association, a  
statement as to whether the records of the association reflect  
any alterations or improvements to the unit that violate the

1 declaration. The association is not obligated to provide  
2 information regarding alterations or improvements that occurred  
3 more than six years before the proposed sale. Nothing in this  
4 subdivision relieves the seller of a unit from the obligation to  
5 disclose alterations or improvements to the unit that violate the  
6 declaration, nor precludes the association from taking action  
7 against the purchaser of a unit for violations that are apparent  
8 at the time of purchase and that are not reflected in the  
9 association's records.

10 (f) If the statement is being furnished by the unit owner, a  
11 statement as to whether the unit owner has any knowledge of  
12 any alterations or improvements to the unit that violate the  
13 declaration.

14 (g) A statement of case names and case numbers for pending  
15 litigation with respect to the unit filed by the association against  
16 the unit owner or filed by the unit owner against the association.  
17 The unit owner or the association shall not be required to  
18 disclose information concerning the pending litigation that  
19 would violate any applicable rule of attorney-client privilege  
20 under Arizona law.

21 (h) A statement that provides "I hereby acknowledge that the  
22 declaration, bylaws and rules of the association constitute a  
23 contract between the association and me (the purchaser). By  
24 signing this statement, I acknowledge that I have read and  
25 understand the association's contract with me (the purchaser). I  
26 also understand that as a matter of Arizona law, if I fail to pay  
27 my association assessments, the association may foreclose on  
28 my property." The statement shall also include a signature line  
29 for the purchaser and shall be returned to the association within  
30 fourteen calendar days.

4. A copy of the current operating budget of the association.

5. A copy of the most recent annual financial report of the  
association. If the report is more than ten pages, the  
association may provide a summary of the report in lieu of the  
entire report.

6. A copy of the most recent reserve study of the association, if  
any.

1 7. A statement summarizing any pending lawsuits, except those  
2 relating to the collection of assessments owed by unit owners  
3 other than the selling unit owner, in which the association is a  
4 named party, including the amount of any money claimed.

5 B. A purchaser or seller who is damaged by the failure of the  
6 unit owner or the association to disclose the information  
7 required by subsection A of this section may pursue all  
8 remedies at law or in equity against the unit owner or the  
9 association, whichever failed to comply with subsection A of  
10 this section, including the recovery of reasonable attorney fees.

11 C. The association may charge the unit owner a fee of no more  
12 than an aggregate of four hundred dollars to compensate the  
13 association for the costs incurred in the preparation of a  
14 statement or other documents furnished by the association  
15 pursuant to this section for purposes of resale disclosure, lien  
16 estoppel and any other services related to the transfer or use of  
17 the property. In addition, the association may charge a rush fee  
18 of no more than one hundred dollars if the rush services are  
19 required to be performed within seventy-two hours after the  
20 request for rush services, and may charge a statement or other  
21 documents update fee of no more than fifty dollars if thirty days  
22 or more have passed since the date of the original disclosure  
23 statement or the date the documents were delivered. The  
24 association shall make available to any interested party the  
25 amount of any fee established from time to time by the  
26 association. If the aggregate fee for purposes of resale  
27 disclosure, lien estoppel and any other services related to the  
28 transfer or use of a property is less than four hundred dollars on  
29 January 1, 2010, the fee may increase at a rate of no more  
30 than twenty per cent per year based on the immediately  
preceding fiscal year's amount not to exceed the four hundred  
dollar aggregate fee. The association may charge the same fee  
without regard to whether the association is furnishing the  
statement or other documents in paper or electronic format.

D. The fees prescribed by this section shall be collected no  
earlier than at the close of escrow and may only be charged  
once to a unit owner for that transaction between the parties  
specified in the notice required pursuant to subsection A of this  
section. An association shall not charge or collect a fee relating  
to services for resale disclosure, lien estoppel and any other  
services related to the transfer or use of a property except as  
specifically authorized in this section. An association that

1 charges or collects a fee in violation of this section is subject to  
2 a civil penalty of no more than one thousand two hundred  
dollars.

3 E. This section applies to a managing agent for an association  
4 that is acting on behalf of the association.

5 F. A sale in which a public report is issued pursuant to sections  
6 32-2183 and 32-2197.02 or a sale pursuant to section 32-  
7 2181.02 is exempt from this section.

8 G. This section does not apply to timeshare plans or  
9 associations that are subject to chapter 20 of this title.

10 H. For the purposes of this section, unless the context  
11 otherwise requires, "unit owner" means the seller of the  
12 condominium unit title and excludes any real estate  
13 salesperson or real estate broker who is licensed under title 32,  
14 chapter 20 and who is acting as a salesperson or broker, any  
15 escrow agent who is licensed under title 6, chapter 7 and who  
16 is acting as an escrow agent and also excludes a trustee of a  
17 deed of trust who is selling the property in a trustee's sale  
18 pursuant to chapter 6.1 of this title.

19 8. A.R.S. § 33-1805 provides as follows:

20 A. Except as provided in subsection B of this section, all  
21 financial and other records of the association shall be made  
22 reasonably available for examination by any member or any  
23 person designated by the member in writing as the member's  
24 representative. The association shall not charge a member or  
25 any person designated by the member in writing for making  
26 material available for review. The association shall have ten  
27 business days to fulfill a request for examination. On request  
28 for purchase of copies of records by any member or any person  
29 designated by the member in writing as the member's  
30 representative, the association shall have ten business days to  
provide copies of the requested records. An association may  
charge a fee for making copies of not more than fifteen cents  
per page.

B. Books and records kept by or on behalf of the association  
and the board may be withheld from disclosure to the extent  
that the portion withheld relates to any of the following:

1 1. Privileged communication between an attorney for the  
2 association and the association.

3 2. Pending litigation.

4 3. Meeting minutes or other records of a session of a board  
5 meeting that is not required to be open to all members pursuant  
6 to section 33-1804.

7 4. Personal, health or financial records of an individual member  
8 of the association, an individual employee of the association or  
9 an individual employee of a contractor for the association,  
10 including records of the association directly related to the  
11 personal, health or financial information about an individual  
12 member of the association, an individual employee of the  
13 association or an individual employee of a contractor for the  
14 association.

15 5. Records relating to the job performance of, compensation of,  
16 health records of or specific complaints against an individual  
17 employee of the association or an individual employee of a  
18 contractor of the association who works under the direction of  
19 the association.

20 C. The association shall not be required to disclose financial  
21 and other records of the association if disclosure would violate  
22 any state or federal law.

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**By-Laws cited during hearing**

9. Section 3: Annual Meetings<sup>5</sup>

The general agenda of the meeting, convened and conducted  
by the President, is as follows:

- a. Call to Order.
- b. Reading of the Minutes of the previous meeting.
- c. Reading of the Treasurer's Report.
- d. Reading of the President's Report.
- e. Old Business.

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<sup>5</sup> See Exhibit No. R-7 (By-Laws).

1 f. New Business.

2 g. Election of Officers.

3 h. Adjournment.

4 10. Section 5: Elections and Officers<sup>6</sup>

5 The Offices of the Association include President, Vice  
6 President, Treasurer and Secretary. These offices are subject  
7 to the following guidelines:

8 a. Only members can nominate candidates to these offices.

9 b. Only members can vote for candidates for these offices.

10 c. Only duly elected members can hold these offices.

11 d. A member can only hold one office at any given time.

12 e. Officers must be elected by a majority vote (at least 51% of  
13 the lots represented by eligible voters) present at the meeting  
14 by presence or proxy.

15 f. Elections can only take place during formally announced  
16 meeting[s] of the Association.

17 **CONCLUSIONS OF LAW**

18  
19 1. A.R.S. § 41-2198.01 permits an owner or a condominium association to file a  
20 petition with the Department for a hearing concerning violations of planned community  
21 documents or violations of statutes that regulate planned communities. That statute  
22 provides that such petitions will be heard before the Office of Administrative Hearings.

23 2. The burden of proof at an administrative hearing falls to the party asserting a  
24 claim, right, or entitlement and the standard of proof on all issue in this matter is by a  
25 preponderance of the evidence. See A.A.C. R2-19-119.

26 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade  
27 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
28 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).

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<sup>6</sup> See Exhibit No. R-7 (By-Laws).

1 4. Credible testimony and evidence established that the common areas of  
2 Montezuma contained a broken wall that required correction, weeds, inadequately sized  
3 overflowing trash containers, and peeling paint on the exterior of the condominiums.  
4 This Tribunal concludes that Montezuma failed to maintain the common areas of the  
5 association in violation of the charged provision of A.R.S. § 33-1247. The fact that  
6 Montezuma has now repaired the wall and provided additional trash containers  
7 does not alter the fact that Petitioner prevailed on this issue at the March 28, 2013  
8 hearing.

9 5. Credible testimony and evidence established that Montezuma conducted an  
10 annual meeting on May 24, 2012. Notice of the meeting was mailed to Complainant in  
11 accordance with applicable statute. Petitioner failed to attend the May 24, 2012  
12 meeting. This Tribunal concludes that Petitioner failed to meet her burden of proving  
13 that Montezuma violated the charged provision of A.R.S. § 33-1248.

14 6. Montezuma failed to hold proper elections as required by applicable statute.  
15 Montezuma failed to hold proper elections as required by the provisions of section five  
16 of Montezuma's By-Laws. There was no dispute that there was no election. This  
17 Tribunal concludes that Montezuma violated the charged provision of A.R.S. § 33-1250.

18 7. Credible testimony and evidence established that Petitioner requested financial  
19 information from Montezuma via email on August 12, 2011. Montezuma responded to  
20 Petitioner's email but did not provide the requested financial information. There was no  
21 dispute that Montezuma provided Petitioner with the requested financial information  
22 prior to the administrative hearing in January or February, 2012. Petitioner sustained  
23 her burden of proving by a preponderance of the evidence that Montezuma failed to  
24 provide Petitioner with the requested financial reports within the ten (10) day period  
25 provided by A.R.S. § 32-1258. The Petition at issue was filed with the Department on or  
26 about November 14, 2012. A.R.S. § 12-541(5) provides a one-year statute of  
27 limitations. Petitioner did not file her petition with the Department within the one year  
28 period of time allowed by statute. This Tribunal concludes that the expiration of the one-  
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1 year statue of limitations precludes finding that Montezuma violated the charged  
2 provision A.R.S. § 33-1258.

3  
4 **RECOMMENDED ORDER ON REHEARING**

5  
6 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing  
7 party in this matter for two (2) of the four (4) violations charged in her petition.<sup>7</sup>

8 It is further ORDERED that Montezuma shall fully comply with the applicable  
9 provisions of A.R.S. § 33-1247, A.R.S. and § 33-1250 in the future.

10 It is further ORDERED that Montezuma pay Petitioner One Thousand Dollars  
11 (\$1,000.00), which constitutes one-half (1/2) of her filing fee of Two Thousand  
12 dollars (\$2,000.00), to be paid to the Department in this matter within ninety (90)  
13 days of this Order.

14 It is further ORDERED that Montezuma shall provide written proof to the  
15 Department within one hundred and eighty (180) days of this Order that (1) the  
16 weeds in the common areas have been eliminated or properly controlled.

17 *In the event of certification of the Administrative Law Judge Decision by the*  
18 *Director of the Office of Administrative Hearings, the effective date of this Order will*  
19 *be five (5) days from the date of that certification.*

20 Done this day, January 2, 2014.

21 /s/ M. Douglas  
22 Administrative Law Judge

23  
24 Transmitted electronically to:

25 Gene Palma, Director  
26 Department of Fire Building and Life Safety

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30 \_\_\_\_\_  
<sup>7</sup> This Tribunal finds that all four alleged violations were of equal substance.