

1 **Final agency action regarding decision below:**

2
3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 ALEXANDER WINTER

8 Petitioner,

9 vs

10 CORTINA HOMEOWNERS
11 ASSOCIATION,

12 Respondent.

No. 13F-H1314005-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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15 **HEARING:** March 6, 2014; the record was held open until April 1, 2014.

16 **APPEARANCES:** Alexander Winter (hereinafter "Mr. Winter" or "Petitioner")
17 appeared on his own behalf. Cortina Homeowners Association (hereinafter "Cortina")
18 was represented by its attorney, Mark Sahl, Esq., Carpenter, Hazlewood, Delgado &
19 Bolen, PLC.

20 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

21
22 Evidence and testimony were presented and the following Findings of Fact,
23 Conclusions of Law and Recommended Order are made:

24 **FINDINGS OF FACT**

25 **Background**

- 26 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
27 statute to receive Petitions for Hearings from members of homeowners' associations
28 and from homeowners' associations in Arizona.
29 2. Cortina is a homeowners' association located in Queen Creek, Arizona.
30 3. Mr. Winter owns a residence in and is a member of Cortina.

1 4. On or about September 10, 2013, Mr. Winter filed a petition with the Department
2 alleging that Cortina had violated the provisions of A.R.S. §§ 33-1804(D) and 33-
3 1248(D). Mr. Winter specifically alleged as follows:

4 I have witnessed in general session, reference by the BOD [Board
5 of Directors] to vendors receiving increases and financial
6 compensation during executive session. My community manager
7 has also stated that the BOD has authorized financial
8 compensation beyond his original contract during exec. session
9 and therefore no record is available to me of those motions.¹

8 5. Cortina's Answer to the Petition provided, in part, as follows:

9 The Respondent categorically denies all of the allegations listed in
10 the Complaint.²

11 **Alexander Winter's Testimony**

12 5. Mr. Winter testified that on August 19, 2013, he had a meeting with Renaissance
13 Community Partners' ("RCP's") manager, Kevin Bishop (hereinafter "Mr. Bishop"). Mr.
14 Winter stated that during that meeting, Mr. Bishop informed him that the Cortina Board
15 of Directors had authorized him to charge Cortina a \$50.00 per hour fee for efforts in
16 answering information requests from homeowners.

17 6. Mr. Winter testified that on July 17, 2013, Mr. Bishop emailed him and informed him
18 that "your [Mr. Winter's] requests over the last month and a half have cost your
19 association \$400.00 in preparation costs."³ Mr. Winter stated that the \$50.00 charge that
20 Mr. Bishop was awarded in executive session was ongoing. Mr. Winter testified that on
21 August 8, 2013, he made a request to Cortina for a copy of the motion to authorize the
22 payment of a \$50.00 per hour fee to RCP for answering information requests from
23 homeowners.

24 7. Mr. Winter testified that Mr. Bishop explained to him that Cortina would not provide
25 him with the requested information because the motion was presented in an executive
26 session. Mr. Winter stated that Cortina's previous legal counsel, Mr. Shaw, had
27 provided him with an outline and informed him that the authorization to pay RCP \$50.00
28

29 ¹ See Petitioner's Exhibit A (Single Issue Petition).

30 ² See Petitioner's Exhibit A (Petition Responses).

³ 9/13/12 Hearing Record at 5:50-8:11.

1 per hour for its employees' time spent in answering homeowner requests was made in
2 executive session in June 2013.

3 8. Mr. Winter testified that on or about December 4, 2013, RCP received an increase in
4 its monthly service fee from \$4,360.00 per month to \$4,578.00 per month from the
5 Cortina board of directors. Mr. Winter stated that the December 4, 2013 pricing
6 information from RCP showed that RCP will receive \$50.00 per hour for staff and
7 \$75.00 per hour for Mr. Bishop for the time expended in answering homeowner
8 information requests. Mr. Winter acknowledged that the RCP's pricing document was
9 not issued until December 4, 2013, and that it did not become effective until January 1,
10 2014.⁴

11 9. Mr. Winter testified that he found no motions or discussion of a new RCP pricing
12 change or addendum in general session minutes for December 4, 2013.⁵ Mr. Winter
13 stated that the minutes of the Cortina Board of Directors' meeting on December 4, 2013,
14 did not show any evidence of a discussion regarding authorization for an increase in
15 billing charges from RCP. Mr. Winter testified that approval of the \$50.00 per hour
16 charge for RCP staff and \$75.00 per hour charge for Kevin Bishop for their time
17 expended in answering homeowner information requests did not exist before the
18 Cortina board of directors authorized the charge in executive session.

19 10. Mr. Winters testified that the Cortina Board of Directors' action authorizing the
20 additional charge in executive session violated the provisions of A.R.S. § 33-1248(D).
21 Mr. Winter stated that the Cortina Board of Directors' approval for a \$50.00 hourly
22 charge for RCP staff and \$75.00 hourly charge for Mr. Bishop for handling homeowner
23 information requests should have been done in open session.

24 11. Mr. Winter acknowledged that he had not been present during any of the Cortina
25 Board of Directors' executive sessions for the last two years.

26 12. Mr. Winter acknowledged that he had no first-hand knowledge of what was said or
27 done during the Cortina Board of Directors' executive sessions for the last two years.
28 Mr. Winter stated that he did not know the exact dates of any executive meetings that
29 may have taken place over the last two years.

30 ⁴ See Petitioner's Exhibit No. C (Pricing Addendum and Renaissance Pricing 2014).

⁵ See Petitioner's Exhibit No. E (12/4/13 Cortina Board of Directors Meeting Minutes).

1 13. Mr. Winter testified that Mr. Bishop told him that in a June 2013 executive session,
2 the Cortina Board of Directors authorized the payment of an hourly charge of \$50.00 for
3 RCP staff time and an hourly charge of \$75.00 for Mr. Bishop's time expended in
4 handling homeowner information requests.

5 14. Mr. Winter acknowledged that he did not know if a quorum of the Cortina Board of
6 Directors was present for the executive session in which the Board may have
7 authorized an hourly charge of \$50.00 for RCP staff and an hourly charge of \$75.00 for
8 Mr. Bishop for handling homeowner information requests.

9 15. Mr. Winter acknowledged that he had nothing in writing regarding a Cortina Board of
10 Directors' executive session meeting that authorized the charges for handling
11 homeowner information requests.

12 16. Mr. Winters acknowledged that A.R.S. § 33-1804(A) specifically allows the Cortina
13 Board of Directors to consider in executive sessions matters relating to an employee's
14 or contractor's job performance, compensation, health records, or specific complaints
15 against the employee or contractor who works under the direction of the association.

16 **PROVISIONS OF LAW REFERENCED AT HEARING**

17 1. A.R.S. § 12-541 provides as follows:

18 There shall be commenced and prosecuted within one year after
19 the cause of action accrues, and not afterward, the following
20 actions:

21

22 5. Upon a liability created by statute, other than a penalty or
23 forfeiture.

24 2. A.R.S. § 33-1804(A) provides as follows:

25 Notwithstanding any provision in the declaration, bylaws or other
26 documents to the contrary, all meetings of the members'
27 association and the board of directors, and any regularly
28 scheduled committee meetings, are open to all members of the
29 association or any person designated by a member in writing as
30 the member's representative and all members or designated
representatives so desiring shall be permitted to attend and speak
at an appropriate time during the deliberations and proceedings.
The board may place reasonable time restrictions on those
persons speaking during the meeting but shall permit a member

1 or member's designated representative to speak once after the
2 board has discussed a specific agenda item but before the board
3 takes formal action on that item in addition to any other
4 opportunities to speak. The board shall provide for a reasonable
5 number of persons to speak on each side of an issue. Persons
6 attending may tape record or videotape those portions of the
7 meetings of the board of directors and meetings of the members
8 that are open. The board of directors of the association may adopt
9 reasonable rules governing the taping of open portions of the
10 meetings of the board and the membership, but such rules shall
11 not preclude such tape recording or videotaping by those
12 attending. Any portion of a meeting may be closed only if that
13 closed portion of the meeting is limited to consideration of one or
14 more of the following:

- 15 1. Legal advice from an attorney for the board or the association.
16 On final resolution of any matter for which the board received legal
17 advice or that concerned pending or contemplated litigation, the
18 board may disclose information about that matter in an open
19 meeting except for matters that are required to remain confidential
20 by the terms of a settlement agreement or judgment.
- 21 2. Pending or contemplated litigation.
- 22 3. Personal, health or financial information about an individual
23 member of the association, an individual employee of the
24 association or an individual employee of a contractor for the
25 association, including records of the association directly related to
26 the personal, health or financial information about an individual
27 member of the association, an individual employee of the
28 association or an individual employee of a contractor for the
29 association.
- 30 4. Matters 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.
5. Discussion of a member's appeal of any violation cited or
penalty imposed by the association except on request of the
affected member that the meeting be held in an open session.

3. A.R.S. § 33-1248(D) provides as follows:

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, all of the following apply:

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

1 2. An emergency meeting of the board of directors may be called
2 to discuss business or take action that cannot be delayed until the
3 next regularly scheduled board meeting. The minutes of the
4 emergency meeting shall state the reason necessitating the
5 emergency meeting. The minutes of the emergency meeting shall
6 be read and approved at the next regularly scheduled meeting of
7 the board of directors.

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

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

17 4. A.R.S. § 33-1804(A) provides as follows:

18 Notwithstanding any provision in the declaration, bylaws or other
19 documents to the contrary, all meetings of the members'
20 association and the board of directors, and any regularly
21 scheduled committee meetings, are open to all members of the
22 association or any person designated by a member in writing as
23 the member's representative and all members or designated
24 representatives so desiring shall be permitted to attend and speak
25 at an appropriate time during the deliberations and proceedings.
26 The board may place reasonable time restrictions on those
27 persons speaking during the meeting but shall permit a member
28 or member's designated representative to speak once after the
29 board has discussed a specific agenda item but before the board
30 takes formal action on that item in addition to any other
opportunities to speak. The board shall provide for a reasonable
number of persons to speak on each side of an issue. Persons
attending may tape record or videotape those portions of the
meetings of the board of directors and meetings of the members
that are open. The board of directors of the association may adopt
reasonable rules governing the taping of open portions of the
meetings of the board and the membership, but such rules shall
not preclude such tape recording or videotaping by those
attending. Any portion of a meeting may be closed only if that
closed portion of the meeting is limited to consideration of one or
more of the following:

1 1. Legal advice from an attorney for the board or the association.
2 On final resolution of any matter for which the board received
3 legal advice or that concerned pending or contemplated litigation,
4 the board may disclose information about that matter in an open
5 meeting except for matters that are required to remain confidential
6 by the terms of a settlement agreement or judgment.

7 2. Pending or contemplated litigation.

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

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

21 5. Discussion of a member's appeal of any violation cited or
22 penalty imposed by the association except on request of the
23 affected member that the meeting be held in an open session.

24 5. A.R.S. § 33-1804(D) provides as follows:

25 Notwithstanding any provision in the declaration, bylaws or other
26 community documents, for meetings of the board of directors that are
27 held after the termination of declarant control of the association, all of
28 the following apply:

29 1. The agenda shall be available to all members attending.

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

3. A quorum of the board of directors may meet by means of a
telephone conference if a speakerphone is available in the meeting

1 room that allows board members and association members to hear
2 all parties who are speaking during the meeting.

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

8 **CONCLUSIONS OF LAW**

9 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
10 file a petition with the Department for a hearing concerning violations of planned
11 community documents or violations of statutes that regulate planned communities.
12 That statute provides that such petitions will be heard before the Office of
13 Administrative Hearings.

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

17 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade
18 the finder of fact that the proposition is "more likely true than not." *In re Arnold and
19 Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

20 4. In 1994, the Arizona Legislature enacted A.R.S. § 33-1804 and required that "all
21 meetings of the members association and board of directors are open to all members
22 of the association" except for any portions of a meeting relating to four exempted topics
23 (employment, legal advice, litigation, and enforcement matters). Also, the homeowner
24 association must supply notice of its meetings to all members unless the articles of
25 incorporation and bylaws provide otherwise. See A.R.S. § 33-1804(B). The credible
26 evidence of record is insufficient and fails to support a finding that that the Cortina Board
27 of Directors at an executive meeting authorized an additional payment to RCP for its
28 handling of homeowner information requests within the time frame between the date of
29 the filing of the petition and one year earlier (September 10, 2012 through September 10,
30 2013). Furthermore, even if such an executive meeting had taken place within the time
frame of the petition, matters relating to the job performance of, compensation of, health

1 records of, health records of, or specific complaints against an individual employee of the
2 association or an individual employee of a contractor of the association who works under
3 the direction of the association are exempted under the applicable provisions of A.R.S. §
4 33-1804(A)(4). This Tribunal concludes that Petitioner failed to meet his burden of
5 proving by a preponderance of the evidence that Cortina violated the charged provisions
6 of A.R.S. § 33-1804(D) and A.R.S. § 33-1248(D).

7 **RECOMMENDED ORDER**

8 In view of the foregoing, it is ORDERED that Respondent be deemed the
9 prevailing party in this matter.

10 It is further ORDERED that this petition be dismissed.

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

14 Done this day, April 17, 2014.

15 /s/ M. Douglas
16 Administrative Law Judge

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18 Transmitted electronically to:

19 Gene Palma, Director
20 Department of Fire Building and Life Safety
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