

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

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

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 NANCY SAXTON

8 Petitioner,

9 vs

10 THE LAKES COMMUNITY ASSOCIATION

11 Respondent.

**No. 13F-H1314007-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

12  
13  
14 **HEARING:** April 29, 2014, at 8:00 a.m. This record was held open until May  
15 20, 2014, to allow the parties' time to file memoranda with respect to the two separate  
16 motions to dismiss presented during the hearing. The issue of the first motion to  
17 dismiss was whether an Alternative Dispute Resolution amendment to the Bylaws of the  
18 Lakes Community Association requiring binding arbitration before filing an  
19 administrative action is binding on the Petitioner. The issue of the second motion to  
20 dismiss was whether Petitioner's claim was barred by the one-year statute of limitations  
21 set forth in A.R.S. § 12-541(5).

22 **APPEARANCES:** Nancy Saxton (hereinafter "Ms. Saxton") was represented by  
23 her attorney, Steven W. Cheifetz, Esq., Cheifetz, Iannitelli Marcolini, P.C. The Lakes  
24 Community Association (hereinafter "the Lakes") was represented by its attorney,  
25 Charles E. Maxwell, Esq., Maxwell & Morgan, P.C.

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

27  
28 Evidence and testimony were presented and the following Findings of Fact,  
29 Conclusions of Law and Recommended Order are made:

30 **FINDINGS OF FACT**

**Background**

1 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by  
2 statute to receive Petitions for Hearings from members of homeowners' associations  
3 and from homeowners' associations in Arizona.

4 2. The Lakes is a homeowners' association located in Tempe, Arizona.

5 3. Ms. Saxton owns a residence in and is a member of the Lakes.

6 4. Ms. Saxton filed a petition with the Department alleging that the Lakes had violated  
7 the provisions of A.R.S. § 33-1805. Ms. Saxton specifically alleged as follows:

8 Ms. Saxton delivered three separate demands to the HOA to  
9 inspect its financial records pursuant to A.R.S. § 33-1805. After  
10 much delay, she received heavily redacted and incomplete  
11 documentation that precluded evaluation of the HOA's  
12 expenditures. The HOA has refused to produce the documents  
13 without the improper redactions.

14 5. The Lake's Answer to the Petition alleged, in relevant part, as follows:

15 [The Lakes], through counsel under signed, hereby submits this  
16 Motion/Request for Dismissal of the above-referenced action for  
17 the following reasons warranting dismissal:

18 1. The Department lacks jurisdiction to hear this matter pursuant  
19 to the Bylaws governing the parties hereto;

20 2. [Ms. Saxton's] claim is barred by the applicable statute of  
21 limitations;

22 3. The claim must be dismissed due to [the Lakes'] prior admitted  
23 compliance with the records' request; and

24 4. The claim must be dismissed due to [the Lakes'] compliance  
25 with the statute.

## 26 TESTIMONY

### 27 Testimony of Marsha Hill

28 6. Marsha Hill (hereinafter "Ms. Hill") testified that she has lived in the Lakes for  
29 approximately thirty years. Ms. Hill stated that she is a CPA with her own accounting  
30 business. Ms. Hill testified that she had previously been chairman of the budget and  
finance committee for the Lakes.

7. Ms. Hill testified that she had reviewed some of the documents that Ms. Saxton  
had obtained from the Lakes. Ms. Hill stated that she did not recall when she reviewed

1 the records. Ms. Hill testified that she had prepared the Budget & Finance Committee  
2 Annual Report for 2012.<sup>1</sup>

### 3 **Testimony of Maureen Harrison**

4 8. Maureen Harrison (hereinafter “Ms. Harrison”) testified that she had been a  
5 homeowner at the Lakes for thirty-six years. Ms. Harrison stated that she had served  
6 on the Board of Directors for the Lakes (hereinafter “the Board”) from 1993 through  
7 2000, and from 2011 through 2012. Ms. Harrison testified that she was recalled from  
8 the Board of Directors in February 2013.

9 9. Ms. Harrison testified that she was familiar with the Board’s Policy Memorandum  
10 2008-2.<sup>2</sup> Ms. Harrison stated that it was still the current policy for obtaining information  
11 from the Board. Ms. Harrison testified that she had reviewed some of the documents  
12 that were provided to Ms. Saxton by the Lakes pursuant to Ms. Saxton’s November 5,  
13 2012 request.

14 10. Ms. Harrison testified that she reviewed the documents sometime in 2013. Ms.  
15 Harrison stated that she noticed redactions in the documents but did not recall when  
16 she noticed the redactions in the documents.

### 17 **Testimony of Nancy Saxton**

18 11. Ms. Saxton testified that she owned two properties at the Lakes. Ms. Saxton  
19 stated that she become concerned about the Lakes’ finances. Ms. Saxton testified that  
20 she believed that the Board was not transparent.

21 12. Ms. Saxton testified that she wanted to find out where the Lakes’ money was  
22 going. Ms. Saxton stated that she filed a written Request to Review Association  
23 Records with the Lakes.<sup>3</sup> Ms. Saxton testified that she received some of the records in  
24 February of “the following year” in a big plastic tub and that she received two manila  
25 envelopes with more records a few months later.

26 13. Ms. Saxton testified that she did not review the documents right away due to  
27 problems with her health and the recall of Board members that occurred in the  
28 community. Ms. Saxton stated that she reviewed the documents in the summer and

29 <sup>1</sup> See Exhibit 2 (Lakes Community Association Budget & Finance Committee Annual Report 2012).

30 <sup>2</sup> See Exhibit 3 (LCA Board of Directors Policy Memorandum-2008-2).

<sup>3</sup> See Exhibit 4 (Request to Review Association Records).

1 found that pages were missing from some records and some documents were so  
2 redacted that she could not tell what it was supposed to be. Ms. Saxton reviewed a  
3 portion of the documents that were produced and testified that the reductions were  
4 typical of the redactions that were made on all of the requested records. Ms. Saxton  
5 stated that there was not enough information in the documents to determine if the  
6 redactions were appropriate.<sup>4</sup>

7 14. Ms. Saxton testified she then caused her attorney to send a follow-up request for  
8 additional records from the Lakes.<sup>5</sup> Ms. Saxton stated that her attorney received a  
9 written response from the Lakes' attorney.<sup>6</sup> Ms. Saxton testified that her attorney then  
10 filed a response to the Lakes' response.<sup>7</sup> Ms. Saxton stated that the Lakes' attorney  
11 then filed an email in response to her attorney's response to the Lakes' response to her  
12 request.<sup>8</sup>

13 15. Ms. Saxton testified that she believed that she had reached an impasse with the  
14 Lakes. Ms. Saxton stated that the Lakes refused to agree to provide her with un-  
15 redacted documents. Ms. Saxton acknowledged that the Lakes offered to allow her to  
16 review the un-redacted documents at the Lakes' attorney's office. Ms. Saxton testified  
17 that she was "not keen" about going to the Lakes' attorney's office to identify  
18 documents. Ms. Saxton stated that she had already specified the records that she  
19 wanted to review and believed that a visit to the Lakes' attorney's office would be futile.

20 16. Ms. Saxton testified that she was still employed and worked approximately 30 to  
21 40 hours per week. Ms. Saxton stated that she was present at the annual meeting that  
22 occurred in 2013. Ms. Saxton testified that she did not remember whether she voted  
23 for or against the Alternative Dispute Resolution amendment that was passed in the  
24 Lakes' 2013 annual meeting.<sup>9</sup>

25 17. Ms. Saxton testified that she filed a November 5, 2012 Demand to Inspect  
26 Financial Records with the Lakes.<sup>10</sup> Ms. Saxton acknowledged that the Board's

27 <sup>4</sup> See Exhibits 5A and 5B (Check Registers and General Ledger 2011).

28 <sup>5</sup> See Exhibit 6 (9/12/13 Demand Letter).

29 <sup>6</sup> See Exhibit 7 (9/16/13 Letter).

30 <sup>7</sup> See Exhibit 8 (10/23/13 Letter).

<sup>8</sup> See Exhibit 9 (10/25/13 Email).

<sup>9</sup> See Exhibit A (Article XV Alternative Dispute Resolution).

<sup>10</sup> See Exhibit B (11/5/12 Demand to Inspect).

1 president filed a response to her Demand to Inspect on November 28, 2012.<sup>11</sup> Ms.  
2 Saxton stated that on or about November 29, 2012, she sent the Lakes another  
3 Request to Review Records.<sup>12</sup>

4 18. Ms. Saxton stated that she knew that there would be some redactions on the  
5 records that she had requested. Ms. Saxton testified that she received the 2012  
6 Reserve Study, the 2010 through 2012 Financials, the 2009 through 2011 Audits, and  
7 the 2010, 2011, and 2012 American Express Credit Account Bills from the Lakes on or  
8 about December 6, 2012.<sup>13</sup> Ms. Saxton stated that she received additional records in  
9 manila envelopes on December 14, 2012, and January 8, 2013. Ms. Saxton testified  
10 that she “glanced through” the documents with a friend who was an accountant.

11 19. Ms. Saxton testified that she paid the Lakes for the 3700 pages of requested  
12 documents that she received on or about February 19, 2013.<sup>14</sup> Ms. Saxton stated that  
13 she could not raise a redaction issue until she had time to review the records.

14 20. Ms. Saxton acknowledged that her previous attorney had issued a letter to the  
15 Lakes on or about April 19, 2013, that did not mention or refer to Ms. Saxton’s  
16 dissatisfaction with the redactions in the documents that had been delivered to her by  
17 the Lakes.<sup>15</sup>

18 21. Ms. Saxton acknowledged that she received a September 27, 2013 letter from  
19 the Lakes’ attorney offering to allow Ms. Saxton to inspect un-redacted documents in  
20 the Lakes’ attorney’s office.

21 22. Ms. Saxton acknowledged that her attorney received an email from the Lakes’  
22 attorney regarding the inspection of records at the Lakes’ attorney’s office.<sup>16</sup> Ms.  
23 Saxton stated that the email indicated that she would be able to examine un-redacted  
24 documents and obtain copies at 15¢ per page. Ms. Saxton testified that she did not  
25 want to go to the Lakes’ attorney’s office because she felt the records would be the  
26 same documents that she already had. Ms. Saxton stated that she did not want to be

27  
28 <sup>11</sup> See Exhibit C (11/28/12 Letter).

<sup>12</sup> See Exhibit D (11/29/12 Letter).

<sup>13</sup> See Exhibit E (12/6/12 Receipt for Documents).

<sup>14</sup> See Exhibit E (2/19/13 Receipt for Check).

<sup>15</sup> See Exhibit G (4/19/13 Letter).

<sup>16</sup> See Exhibit M (10/25/13 Email).

1 intimidated. Ms. Saxton testified that the Lakes' attorney did not specify that the  
2 records that would be available in his office would be un-redacted.

3 23. Ms. Saxton acknowledged that the Lakes had provided her with approximately  
4 3,700 pages of documents. Ms. Saxton testified that there were numerous redactions  
5 in the documents that the Lakes provided to her. Ms. Saxton stated that the redactions  
6 in the documents precluded a proper review of the documents.<sup>17</sup>

### 7 **Testimony of Christine Green Baldanza**

8 24. Christine Green Baldanza (hereinafter "Ms. Baldanza") testified that she is the  
9 community manager for the Lakes. Ms. Baldanza stated that she was the community  
10 manager in 2012. Ms. Baldanza testified that she was also the community manager  
11 for January and February 2013, but not for the entire year of 2013.

12 25. Ms. Baldanza testified that she prepared the December 6, 2012 Receipt for  
13 Documents.<sup>18</sup> Ms. Baldanza stated that additional documents were delivered to Ms.  
14 Saxton on December 14, 2012, and January 8, 2013. Ms. Baldanza testified that no  
15 additional documents were provided to Ms. Saxton after January 8, 2013.

16 26. Ms. Baldanza testified that the general ledgers were provided to Ms. Saxton in a  
17 plastic tub on January 8, 2013. Ms. Baldanza stated that the Lakes charged Ms.  
18 Saxton 10¢ per page rather than the 15¢ allowed by statute. Ms. Baldanza testified  
19 that the last ledgers were delivered to Ms. Saxton on January 8, 2013.

20 27. Ms. Baldanza testified that the only redactions that were made were those  
21 allowed by statute. Ms. Baldanza stated that private and personnel information was  
22 partially redacted from the ledgers. Ms. Baldanza testified that she provided all the  
23 ledgers to the Lakes' attorney's office. Ms. Baldanza stated that the general ledgers  
24 contain payroll information that was redacted from the ledgers. Ms. Baldanza testified  
25 that some private homeowner information was not redacted from the documents. Ms.  
26 Baldanza stated that every financial transaction was included in the ledgers.

27 28. Ms. Baldanza acknowledged that homeowners who are members of the Lakes  
28 are entitled to the Lakes' financial information. Ms. Baldanza testified that  
29 homeowners' names were redacted from the documents provided to Ms. Saxton. Ms.

30 <sup>17</sup> See Exhibits 5A and 5B (Check Registers and General Ledger 2011).

<sup>18</sup> See Exhibit E (12/6/12 Receipt for Documents).

1 Baldanza reviewed the General Ledger for 2011 (Exhibit 5B). Ms. Baldanza stated that  
2 there were numerous redactions in the General Ledger for 2011, because there were  
3 numerous pages that contained private homeowner information. Ms. Baldanza testified  
4 that she was asked to redact private information relating to employees and  
5 homeowners by the Board.

6 29. Ms. Baldanza testified that pursuant to the Board's direction, all of the requested  
7 documents were turned over to the Lakes' attorney and the attorney then determined  
8 which redactions to make in accordance with applicable statute. Ms. Baldanza stated  
9 that the documents provided to the Lakes' attorney were not redacted until the attorney  
10 redacted them. Ms. Baldanza testified that Ms. Saxton did not object to the redactions  
11 on the financial documents until she filed the petition at issue.

12 **PROVISIONS OF LAW REFERENCED AT HEARING**

- 13  
14 1. A.R.S. § 12-501 provides as follows:

15 A written agreement to submit any existing controversy to  
16 arbitration or a provision in a written contract to submit to  
17 arbitration any controversy thereafter arising between the parties  
18 is valid, enforceable and irrevocable, save upon such grounds as  
19 exist at law or in equity for the revocation of any contract.

- 20 2. A.R.S. § 12-541(5) provides as follows:

21 There shall be commenced and prosecuted within one year after  
22 the cause of action accrues, and not afterward, the following  
23 actions:

24 . . . .

25 5. Upon a liability created by statute, other than a penalty or  
26 forfeiture.

- 27 3. A.R.S. § 33-1805 provides as follows:

28 A. Except as provided in subsection B of this section, all financial  
29 and other records of the association shall be made reasonably  
30 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

1 to fulfill a request for examination. On request for purchase of  
2 copies of records by any member or any person designated by the  
3 member in writing as the member's representative, the association  
4 shall have ten business days to provide copies of the requested  
5 records. An association may charge a fee for making copies of not  
6 more than fifteen cents per page.

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

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

12 2. Pending litigation.

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

16 4. Personal, health or financial records of an individual member of  
17 the association, an individual employee of the association or an  
18 individual employee of a contractor for the association, including  
19 records of the association directly related to the personal, health  
20 or financial information about an individual member of the  
21 association, an individual employee of the association or an  
22 individual employee of a contractor for the association.

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

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

## BYLAWS

1. The amendment to the Lakes' Bylaws at Article XV Alternative Dispute  
Resolution provides, in relevant part, as follows:

### **Agreement to Avoid Litigation.**

1 The Association, its Officers, Directors, Committee Members,  
2 Owners, members and all persons subject to the Bylaws  
3 (collectively the "Parties" and singularly "Party") agree to  
4 encourage the amicable resolution of disputes involving corporate  
5 governance, including but not limited to election disputes, without  
6 the need of litigation. Accordingly, each Party agrees to submit  
7 those claims, grievances or disputes relating to the governance of  
8 the Association, including meetings of the Members, Directors,  
9 and Officers, selection, nomination, eligibility, election, removal  
10 and replacement of Officers, Directors and Committee Members  
11 ("Claims") shall be subject to the provisions of Section 2 in lieu of  
12 filing suit in any court or filing any administrative action in an  
13 administrative agency. Notwithstanding the above, unless all  
14 parties thereto otherwise agree, the following shall not be claims  
15 and shall not be subject to the provisions of Section 2:

16 a) Any lawsuit by the Association against any Member to collect  
17 Assessments, fines, fees or other charges owed by the  
18 Association;

19 b) Any dispute regarding the interpretation, application or  
20 enforcement of the Association's Declaration ("CC&Rs"), the  
21 Architectural Rules or any other related rule or guideline;

22 c) Any lawsuit in which any indispensable party is not a Party;  
23 and

24 d) Any lawsuit which otherwise would be barred by any applicable  
25 statute of limitations.

### 26 **CONCLUSIONS OF LAW**

27 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to  
28 file a petition with the Department for a hearing concerning violations of planned  
29 community documents or violations of statutes that regulate planned communities.

30 That statute provides that such petitions will be heard before the Office of  
Administrative Hearings, an independent agency.

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

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

4 4. The amendment to Article XV Alternative Dispute Resolution of the Lakes’  
5 Bylaws provides that “each Party agrees to submit those claims, grievances or disputes  
6 relating to the governance of the Association, including meetings of the Members,  
7 Directors, and Officers, selection, nomination, eligibility, election, removal and  
8 replacement of Officers, Directors and Committee Members (‘Claims’) shall be subject  
9 to the provisions of Section 2 in lieu of filing suit in any court or filing any administrative  
10 action in an administrative agency.”

11 5. Arbitration clauses should be construed liberally and any doubts as to whether or  
12 not the matter in question is subject to arbitration should be resolved in favor of  
13 arbitration.<sup>19</sup> This Tribunal concludes that under the Lakes’ duly enacted bylaws and  
14 the Arizona common-law, Ms. Saxton was required to submit her claims against the  
15 Lakes to arbitration.

16 6. A.R.S. § 12-541(5) provides that “[t]here shall be commenced and prosecuted  
17 within one year after the cause of action accrues, and not afterward, [certain] actions,”  
18 including “a liability created by statute, other than a penalty or forfeiture.” A statute of  
19 limitations starts running at the time a claim accrues. Ms. Saxton testified that she filed  
20 a Demand to Inspect Financial Records with the Lakes on November 5, 2012.<sup>20</sup> Ms.  
21 Saxton’s claim would have accrued no later than ten business days after Ms. Saxton  
22 filed her demand, when the Lakes was required by A.R.S. § 33-1805(A) to provide the  
23 requested records. The petition at issue was filed on or about November 25, 2013.  
24 The credible evidence of record failed to support a finding that would toll or extend the  
25 applicable one-year statute of limitations. This Tribunal concludes that Ms. Saxton’s  
26 petition was not filed within the applicable one-year period of time allowed by A.R.S. §  
27 12-541(5).

28  
29 <sup>19</sup> See *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Association, Inc.*, 12 Ariz. App. 13,  
16, 467 P.2d 88, 91 (1970).

30 <sup>20</sup> See Exhibit B ((11/5/12 Demand to Inspect)).

1 7. A.R.S. § 33-1805 provides, in part, that “all financial and other records of the  
2 association shall be made reasonably available for examination by any member or any  
3 person designated by the member in writing as the member's representative. The  
4 association shall not charge a member or any person designated by the member in  
5 writing for making material available for review. The association shall have ten  
6 business days to fulfill a request for examination.” The Lakes provided Ms. Saxton with  
7 approximately 3,700 pages of documents per Ms. Saxton’s request. When Ms. Saxton  
8 complained about the redactions in the documents, the Lakes provided un-redacted  
9 documents to the Lakes’ attorney. The un-redacted documents were then redacted by  
10 the Lakes’ attorney and made available for review by Ms. Saxton at the attorney’s  
11 office. Ms. Saxon chose not to review the documents and, instead, asked for un-  
12 redacted copies of the financial documents. This Tribunal concludes that the Lakes  
13 made the requested financial records reasonably available for Ms. Saxon’s review in  
14 accordance with the applicable provisions of A.R.S. § 33-1805.

15 **RECOMMENDED ORDER**

16 In view of the foregoing, it is ORDERED that the Lakes Community Association  
17 be deemed the prevailing party in this matter.

18 It is further ORDERED that this matter be dismissed.

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

22 Done this day, June 2, 2014.

23  
24 /s/ M. Douglas  
25 Administrative Law Judge

26  
27 Transmitted electronically to:

28  
29 Gene Palma, Director  
30 Department of Fire Building and Life Safety