

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

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

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7 REX E. DUFFETT,

8 Petitioner,

9 vs

10 SUNTECH PATIO HOMES INC.,

11 Respondent.

**No. 14F-H1414006-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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14 **HEARING:** July 24, 2014, at 8:00 a.m.

15 **APPEARANCES:** Rex E. Duffett (hereinafter “Mr. Duffett” or “Petitioner”)  
16 appeared on his own behalf. Suntech Patio Homes Inc. (hereinafter “Suntech” or  
17 “Respondent”) failed to appear.

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

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

22 **FINDINGS OF FACT**

- 23 1. The Department of Fire, Building and Life Safety (the “Department”) is authorized  
24 by statute to receive Petitions for Hearings from members of planned community  
25 associations and from planned community associations in Arizona.
- 26 2. Suntech is a planned community association located in Chandler, Arizona.
- 27 3. Mr. Duffett owns a residence in and is a member of Suntech.
- 28 4. Mr. Duffett filed a petition with the Department alleging that Suntech had violated  
29 the provisions of A.R.S. § 33-1805. Mr. Duffett’s petition provides, in relevant part, as  
30 follows:

1 The board has failed to respond to repeated written requests for  
2 copies of association records made pursuant to A.R.S. § 33-1805.  
3 Documents requested: meeting minutes and meeting notice of the  
4 meeting where the association fee increase was approved,  
5 Architectural guidelines, and association rules and regulations.  
6 Initial request 3/23/14.

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

All of the complaint items have been resolved.

6. On May 27, 2014, the Department of Fire, Building and Life Safety (hereinafter "Department") issued a letter to Mr. Duffett that provided, in relevant part, as follows:

If this response is true, and the matter has been resolved to your satisfaction, please advise this Office and the case will be dismissed. If this response does not resolve the issues, the next step will be to schedule the matter for a formal hearing at the Office of Administrative Hearings. Once the hearing is scheduled you will receive a Notice of Hearing advising you of the date, time and place of the hearing.

Please review the documents and respond, in writing, to this Office within thirty (30) days from the date of this letter concerning this information and your satisfaction or dissatisfaction with the Respondent's response.

7. On or about May 8, 2014, Mr. Duffett filed a response that provided, in relevant part, as follows:

For your information, I have received an email from The Management Trust that they are going to inform you that the matter has been resolved. I disagree with conclusion since I have never received the documents that I requested.

8. On June 2, 2014, the Department issued a letter to the parties that provided, in relevant part, as follows:

The [Department] has recently received your responses and request to move forward to hearing. We are notifying all parties in the petition that the next step will be to schedule the matter for a formal hearing at the Office of Administrative Hearings. Once the hearing is scheduled the next communication from the Department will be the Notice of Hearing advising you of the date, time and place of the hearing.

1 9. The Department issued a Notice of Hearing on June 11, 2014. The Notice of  
2 Hearing advised the parties of the date, time, and location of the hearing. The Notice  
3 of Hearing provided, in relevant part, as follows:

4 You may present evidence through your own testimony and  
5 through the testimony of witnesses on your behalf. It is your  
6 responsibility to secure the attendance of your witnesses. Refer  
7 to the enclosed Informational Guide of the Office of Administrative  
8 Hearings for information on subpoenas. If the Respondent does  
9 not appear, the hearing will proceed in the Respondent's absence.  
10 If the Petitioner does not appear, the Petition may be dismissed.

### 11 **Testimony of Rex E. Duffett**

12 10. Mr. Duffett testified that in November 2013, he received a notice from Suntech's  
13 management company informing that his homeowners' association fees were going  
14 up.<sup>1</sup> Mr. Duffett stated that he believed that Suntech was in violation of Arizona's open  
15 meeting laws. Mr. Duffett testified that he contacted Suntech's management company  
16 and asked for the meeting notice and meeting minutes for the meeting at which the  
17 association fees were increased.

18 11. Mr. Duffett testified that approximately three months later, after he had not  
19 received the requested information, he emailed Suntech's management company for  
20 copies of the meeting notice and meeting minutes for the meeting when the  
21 association fees were increased.<sup>2</sup>

22 12. Mr. Duffett testified that he repeatedly emailed Suntech's management company  
23 without success, until he threatened "to initiate legal proceedings to obtain the  
24 requested documents."<sup>3</sup> Mr. Duffett stated that Suntech's management company then  
25 informed him that there were no meeting minutes as there was no meeting.<sup>4</sup> Mr.  
26 Duffett acknowledged that the statute (A.R.S. § 33-1805) may not apply in this situation  
27 but that Mr. Duffett thought that there should be a penalty as Suntech had failed to  
28 properly respond to his request for documents in a timely manner.

29 13. Mr. Duffett testified that on March 23, 2014, he requested via email that

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30 <sup>1</sup> See Exhibit 1 (11/25/13 Letter from The Management Trust-Arizona).

<sup>2</sup> See Exhibit 1 (3/21/14 Email).

<sup>3</sup> See Exhibit 5 (4/3/14 Email).

<sup>4</sup> See Exhibit 6 (4/4/14 Email).

1 Suntech's management company provide him with copies of Suntech's Patio Homes  
2 Rules and Regulations and Architectural Guidelines.<sup>5</sup> Mr. Duffett stated that Suntech  
3 failed to comply with his request in a timely manner.

4 14. Mr. Duffett testified that on June 16, 2014, he made a second request via email  
5 that Suntech's management company provide him with copies of Suntech's Patio  
6 Homes Rules and Regulations and Architectural Guidelines.<sup>6</sup> Mr. Duffett stated that  
7 there was nearly a three-month delay before Suntech's management company  
8 provided him with the requested copies of Suntech's By-Laws. Mr. Duffett  
9 acknowledged that Suntech complied with his document request on June 16, 2014,  
10 and that the requested Architectural Guidelines may not exist.

11 15. Mr. Duffett testified that he wanted Suntech and its management company to  
12 respect the law and respond in an appropriate and timely manner when a document  
13 request is made.

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15 **PROVISIONS OF LAW REFERENCED AT HEARING**

16 1. A.R.S. § 33-1805 provides as follows:

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

30 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:

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<sup>5</sup> See Exhibit 7 (3/23/14 Email).

<sup>6</sup> See Exhibit 8 (6/16/14 Email).

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 to  
6 section 33-1804.<sup>7</sup>

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8 <sup>7</sup> A.R.S. § 33-1804 provides, in relevant part, as follows:

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

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

2. Pending or contemplated litigation.

3. 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, 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.

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

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

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

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

16 **CONCLUSIONS OF LAW**

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

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

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

28 4. A.R.S. § 33-1805 provides that an association shall have ten business days after  
29 a member has made a request to make documents available for examination. Within  
30 ten business days after any member or any person designated by the member as the  
member's representative has requested in writing to purchase of copies of records by

1 in writing, the association is required to provide copies of the requested records.  
2 Undisputed credible testimony established that Suntech failed to respond to Mr.  
3 Duffett's document requests within ten business days as required by A.R.S. § 33-1805.  
4 This Tribunal concludes that Suntech violated the charged provision of A.R.S. § 33-  
5 1805.

6 **RECOMMENDED ORDER**

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

9 It is further ORDERED that Suntech comply with the applicable provisions of  
10 A.R.S. § 33-1805 in the future.

11 It is further ORDERED that Suntech pay Mr. Duffett his filing fee of \$550.00, to  
12 be paid to directly to Mr. Duffett within thirty (30) days of this Order.

13 No Civil Penalty is found to be appropriate in this matter.

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

17 Done this day, August 4, 2014.

18 /s/ M. Douglas  
19 Administrative Law Judge

20 Transmitted electronically to:

21 Gene Palma, Director  
22 Department of Fire Building and Life Safety  
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