

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

2
3 **ALJFIN ALJ Decision final by statute**

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

6
7 In the Matter of

8
9 John Krahn, Janet Krahn, Joseph Pizzicaroli,
10 Michael Holland, John R Krahn Living Trust,
11 and Janet Krahn Living Trust

12 Petitioners

13 vs

14 Tonto Forest Estates Homeowners
15 Association

16 Respondent

**No. 24F-H033-REL
25F-H002-REL
25F-H006-REL
25F-H009-REL
25F-H011-REL
25F-H020-REL**

**ADMINISTRATIVE LAW JUDGE
DECISION**

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18
19 **HEARING:** December 16, 2024, March 3, 2025, March 19, 2025 and May 5,
20 2025, with the record held open until May 16, 2025 for submission of written closing
21 arguments.

22 **APPEARANCES:** John Krahn, Michael Holland appeared on behalf of
23 Petitioners. Dwight Jolivette appeared on behalf of Respondent Tonto Forest Estates
24 Homeowners Association.

25 **ADMINISTRATIVE LAW JUDGE:** Adam D. Stone

26 **EXHIBITS ADMITTED INTO EVIDENCE:**

- 27 **24F-H033-REL:** Complainant's 1-11, and 13.
- 28 **25F-H002-REL:** Complainant's 1-9, and 11-23.
- 29 **25F-H006-REL:** Complainant's 1-25.
- 30 **25F-H009-REL:** Complainant's 1-3, 5-12, and 14-23.
- 25F-H011-REL:** Complainant's 1, 6, 9, and 18-19.
- 25F-H020-REL:** Complainant's 1-9.

1
2 After review of the hearing record in this matter, the undersigned Administrative
3 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues
4 this ORDER to the Commissioner of the Arizona Department of Real Estate
5 (“Department”).

6 **FINDINGS OF FACT**

7 **BACKGROUND AND PROCEDURE**

8 1. The Department is authorized by statute to receive and to decide petitions
9 for hearings from members of homeowners’ associations and from homeowners’
10 associations in Arizona.

11 2. Petitioners filed multiple single-issue petitions against the Tonto Forest
12 Estates Homeowners Association (TFE), with the Department. Petitioner tendered
13 \$500.00 to the Department with each petition.

14 3. TFE timely responded to each petition, and the Department referred the
15 matter to the Office of Administrative Hearings (“OAH”), an independent state agency,
16 for an evidentiary hearing. For the sake of judicial economy, the tribunal consolidated
17 the matters.

18 4. Respondent is a homeowners’ association whose members own
19 properties in a residential real estate development located in Maricopa County, Arizona.

20 5. Petitioners are property owners and member of TFE.

21 6. TFE is governed by its Covenants, Conditions, and Restrictions
22 (“CC&Rs”), and overseen by a Board of Directors (“the Board”). The Association is also
23 regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes (“ARIZ. REV.
24 STAT.”)

25 **24F-H033-REL**

26 7. On January 31, 2024, the Department issued a Notice of Hearing in this
27 case, with the following dispute:

- 28 1. CC&R 4.32 by ‘assessing empty/undeveloped lots to pay for
29 septic related expenses which are expressly not their
30 responsibility’

1 2. ARS §33-1802 by 'assessing empty/undeveloped lots to pay for
2 septic related expenses which are not their 'obligation under the
3 declaration'

4 8. Mr. Krahn and other members of TFE, owned empty lots in addition to
5 their primary residence in TFE. Mr. Krahn testified that TFE was charging an
6 assessment for septic-related obligations to every lot, regardless of whether there was a
7 dwelling unit on the same or whether it was empty. Mr. Krahn also testified that he had
8 attempted to bring this issue up at TFE Board meetings but that he was not allowed to
9 speak. Mr. Krahn was seeking a civil penalty of \$500.00.

10 9. Mr. Joliette testified that every lot was intended to pay the full amount, and
11 that nothing had been done in bad faith. Mr. Jolivet also did not dispute that there
12 were empty lots within TFE with no dwelling units. Further, Mr. Jolivet testified that
13 trying to enforce section 4.32 should be taken in context with the other provisions of the
14 CC&Rs.

14 **25F-H002-REL**

15 10. On August 22, 2024, the Department issued a Notice of Hearing in this
16 case, with the following dispute:

17 Petitioners allege the Respondent of violating CC&R 4.32 by
18 making, 'an improper payment...in a manner that violated the
19 governing documents'

20 11. Mr. Krahn testified that TFE used association funds to reimburse a former
21 Board member and homeowner \$75.00 for a replacement to his septic system.¹ Mr.
22 Krahn testified that the "P-Series Float" was a replacement part and not a repair, which
23 made reimbursement under CC&R 4.32, impermissible. Mr. Krahn testified that he was
24 seeking a civil penalty of \$500.00 as TFE was acting in bad faith.

25 12. Mr. Jolivet testified that there was a lot of ambiguity as to whether this
26 was a replacement or a repair, as the invoice did not specify the same. Because of this,
27 Mr. Jolivet argued, the Board had the right to reimburse the homeowner the \$75.00.

28 **25F-H006-REL**

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30 ¹ See Petitioner's Exhibit 2 in 25F-H0002-REL.

1 13. On November 15, 2024, the Department issued a Notice of Hearing in this
2 case, with the following dispute:

3 Petitioners allege Respondent of violating ARS §33-1803(D)(1) by
4 ‘attempt[ing] to enforce compliance with wording NOT FOUND
5 (emphasis in original text) in [the] CCRs.’

6 14. Mr. Krahn testified that he received a notice from TFE on or about August
7 12 2024, informing him that his tree needed to be cut back.² Mr. Krahn testified further
8 that he requested an appeal on the violation, but that his appeal was never scheduled
9 before the Board.³ Mr. Krahn also testified that Mr. Pizzacaroli also received a fine
10 notice from TFE regarding cutting his tree(s) back.⁴ Mr. Krahn testified that the notice
11 was also improper because there were no governing sections as to “aesthetics” in the
12 neighborhood, and also demonstrated other properties which appeared to need their
13 trees cut back as well.⁵ Mr. Krahn testified he was seeking a civil penalty of \$500.00.

14 15. Mr. Jolivette testified that as the new Board President, he has been
15 working to ensure that everything is done within compliance of statues. He also testified
16 that the technical issues found in the letters had been remedied, and that as a general
17 proposition, TFE was not interested in trying to collect fines from homeowners.

18 **25F-H020-REL**

19 16. On December 9, 2024, the Department issued a Notice of Hearing in this
20 case, with the following dispute:

21 Petitioner alleges that Respondent violated Bylaw 3.9 by adding a
22 ‘signature verification page...to every ballot, allowing anyone to see
23 how much member voted’.

24 17. Mr. Krahn testified that the bylaw mandated that all elections be
25 conducted by secret written ballot, and that Respondent violated the bylaw, as they
26 attached the envelopes and the ballots together after the election to store the
27

28 ² See Petitioner’s Exhibit 1 in 25F-H0006-REL.

29 ³ See Petitioner’s Exhibit 18 in 25F-H0006-REL.

30 ⁴ See Petitioner’s Exhibit 14 in 25F-H0006-REL.

⁵ See Petitioner’s Exhibit 19 in 25F-H006-REL.

1 information.⁶ Mr. Krahn testified that this was concerning as anyone could request the
2 records and it would be easy to determine who voted.

3 18. Finally, Mr. Krahn testified that he was not seeking a civil penalty.

4 19. Mr. Jolivette testified that the bylaw did not address ballot storage after the
5 conclusion of the election. However, Mr. Jolivette testified that moving forward, the
6 Board had updated their storage policy to ensure anonymity even after the election.

7 **25F-H009-REL**

8 20. On November 15 2024, the Department issued a Notice of Hearing in this
9 case, with the following dispute:

10 Petitioners allege Respondent of violating ARS §33-1804(A) by
11 deciding, 'to file a claim with the Directors and Officers (D&O)
12 insurance company' outside the confines of an Open meeting.

13 21. Mr. Krahn testified that this issue stemmed from a lawsuit for defamation
14 by himself against the Board, after the Board accused him of embezzling \$250.00. Mr.
15 Krahn testified that the Board decided to make a claim on its liability insurance policy to
16 obtain counsel for its defense, and did so in a closed session, where members were not
17 entitled to vote on the same. Because of this, Mr. Krahn argued that the insurance
18 policy was cancelled,⁷ and that the Board was now forced to find new coverage at a
19 much increased price.⁸

20 22. Further, Mr. Krahn testified that this was a discretionary financial choice
21 made behind closed doors, without open meeting discussion. Mr. Kahn agreed
22 however, that the Board was allowed to discuss the matter in closed session, but once a
23 decision needed to be made, it should have been done in an open meeting.

24 23. Finally, Mr. Krahn was seeking a civil penalty in the amount of \$500.00.

25 24. Mr. Jolivette testified that the Board had every right to decide to invoke its
26 insurance coverage as it was a legal decision during the pendency of a lawsuit by one
27 of its homeowners. Mr. Jolivette testified it was as if Mr. Krahn wanted to be in the
28 "huddle" to know what the Board was doing, and it ultimately threw his case for a "loop".

29 ⁶ See Petitioner's Exhibit 3 in 25F-H020-REL

⁷ See Petitioner's Exhibit 9 in case 25F-H009-REL.

⁸ See Petitioner's Exhibit 8 in case 25F-H009-REL.

1 25. Mr. Jolivette also testified that the increase cost in coverage was not
2 necessarily tied to the claim made, and that their insurance coverage was not dropped
3 because of the claim, rather the company was no longer offering such policies.

4 **25F-H011-REL**

5 26. On November 15 2024, the Department issued a Notice of Hearing in this
6 case, with the following dispute:

7 Petitioners allege Respondent of violating ARS §33-1805(A) by
8 failing, 'to fulfill [Petitioner's] request for REDACTED (emphasis in
9 original text) association records within ten business days.'

10 27. Mr. Krahn testified that on August 19, 2024 he submitted a written request
11 via e-mail for all violation notices which contained similar to the one he received in 25F-
12 H006-REL concerning his tree and "aesthetics" of the neighborhood. Mr. Krahn also
13 requested that the notices be redacted from containing personally identifying
14 information. Mr. Krahn testified that to date, Respondent had failed to produce the
15 records. Mr. Krahn also testified that he was not seeking a civil penalty.

16 28. Mr. Jolivette testified that the Board withheld the documents after advice
17 from its attorney as it was a part of the ongoing litigation.

18 **CONCLUSIONS OF LAW**

19 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
20 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
21 planned community association, the owner or association may petition the department
22 for a hearing concerning violations of community documents or violations of the statutes
23 that regulate planned communities as long as the petitioner has filed a petition with the
24 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

25 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
26 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

27 3. In this proceeding, Petitioner bears the burden of proving by a
28 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.⁹

29 _____
30 ⁹ See ARIZ. ADMIN. CODE R2-19-119.

1 4. "A preponderance of the evidence is such proof as convinces the trier of
2 fact that the contention is more probably true than not."¹⁰ A preponderance of the
3 evidence is "[t]he greater weight of the evidence, not necessarily established by the
4 greater number of witnesses testifying to a fact but by evidence that has the most
5 convincing force; superior evidentiary weight that, though not sufficient to free the mind
6 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
7 side of the issue rather than the other."¹¹

8 **24F-H033-REL**

9 5. CC&R 4.32 provides:

10 **Required Sewage Treatment System.** Each owner who purchases
11 a Lot within the Property acknowledges that it shall be required to
12 construct and install, at such Owner's sole cost and expense, an
13 AdvanTex sewage treatment system manufactured by Orenco
14 Systems...as part of the construction of an Dwelling Unit on such
15 Owner's Lot...After installation of the Required Sewage Treatment
16 System, the Association shall assume responsibility for the
17 monitoring, maintenance and repair of the Required Sewage
18 Treatment System, with the costs thereof to be included as part of the
19 Assessments payable by such Owner. If the Required Sewage
20 Treatment System requires any capital improvements or
21 replacements, such capital improvements or replaces shall be the
22 responsibility of the Owner.

23 6. After review of the relevant testimony and evidence, the tribunal finds that
24 only lots with dwelling units should be subjected to the assessment. To divide the costs
25 amongst the empty lots would result in those property owners paying "more" of share of
26 the assessment while owners with only one lot would pay less of share. Certainly, when
27 one of those empty lots is converted to include a dwelling unit then an owner should
28 expect to contribute to a greater share of the assessment. However, until that time, the
29 CC&R is clear that only lots with dwelling units are required to share in the
30 Assessments issued. As to the issue of a civil penalty, the tribunal declines to award
the same.

25F-H002-REL

¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹¹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 7. CC&R 4.32 provides:

2 **Required Sewage Treatment System.** Each owner who purchases
3 a Lot within the Property acknowledges that it shall be required to
4 construct and install, at such Owner's sole cost and expense, an
5 AdvanTex sewage treatment system manufactured by Orenco
6 Systems...as part of the construction of an Dwelling Unit on such
7 Owner's Lot...After installation of the Required Sewage Treatment
8 System, the Association shall assume responsibility for the
9 monitoring, maintenance and repair of the Required Sewage
10 Treatment System, with the costs thereof to be included as part of the
11 Assessments payable by such Owner. *If the Required Sewage
12 Treatment System requires any capital improvements or
13 replacements, such capital improvements or replacements shall be
14 the responsibility of the Owner.* (emphasis added)

15 8. After review of the relevant testimony and evidence, the tribunal finds that
16 the P-Series float in question was a replacement part, and therefore was the responsibility
17 of the homeowner, not subject to reimbursement by the Board. As to the issue of a civil
18 penalty, the tribunal declines to award the same.

19 **25F-H006-REL**

20 9. ARIZ. REV. STAT. § 33-1803(C) and (D)(1) provide follows:

21 C. A member who receives a written notice that the condition of the
22 property owned by the member is in violation of the community
23 documents without regard to whether a monetary penalty is imposed
24 by the notice may provide the association with a written response by
25 sending the response by certified mail within twenty-one calendar
26 days after the date of the notice. The response shall be sent to the
27 address identified in the notice.

28 D. Within ten business days after receipt of the certified mail
29 containing the response from the member, the association shall
30 respond to the member with a written explanation regarding the
notice that shall provide at least the following information unless
previously provided in the notice of violation:

1. The provision of the community documents that has allegedly
been violated.

10. After review of the relevant evidence, the tribunal finds that although the
notice was merely a "Friendly Reminder" and not an actual fine notice, notice of

1 violation or something similar, it still did not provide Mr. Krahn with guidance as to which
2 section of the CC&R's was violated, and exactly how far back to cut his tree without
3 reference to a specific section. As to the request for civil penalty, the tribunal declines
4 to award the same as to this position, as the tribunal finds Mr. Jolivette credible that
5 future notices will contain the specifics needed to comply with the statutes.

6 **25F-H020-REL**

7 11. Bylaw 3.9 provides:

8 **Election of Directors.** Election to the Board shall be by secret
9 written ballot. At such election the Members or their proxies may
10 cast, in respect to each vacancy, as many votes as they are entitled
11 to exercise under the provisions of the Declaration. The persons
12 receiving the largest number of votes shall be elected to the vacant
13 positions. Cumulative voting for directors shall not be required or
14 permitted.

15 12. While it is true that the Bylaw does not reference storage following the
16 election, it would necessarily follow that all ballots after counting, should be stored in a
17 similar anonymous fashion. Therefore, while the tribunal finds for Petitioner on this
18 issue, the tribunal also finds Mr. Jolivette credible that ballots storage following an
19 election shall maintain the anonymity of the voters.

20 **25F-H009-REL**

21 13. A.R.S. § 33-1804(A) provides in pertinent part:

22 A. Notwithstanding any provision in the declaration, bylaws or other
23 documents to the contrary, all meetings of the members' association
24 and the board of directors, and any regularly scheduled committee
25 meetings, are open to all members of the association or any person
26 designated by a member in writing as the member's representative
27 and all members or designated representatives so desiring shall be
28 allowed to attend and speak at an appropriate time during the
29 deliberations and proceedings. The board may place reasonable
30 time restrictions on those persons speaking during the meeting but
shall allow a member or member's designated representative to
speak once after the board has discussed a specific agenda item but
before the board takes formal action on that item in addition to any
other opportunities to speak. The board shall provide for a

1 reasonable number of persons to speak on each side of an issue.
2 Persons attending may audiotape or videotape those portions of the
3 meetings of the board of directors and meetings of the members that
4 are open. The board of directors of the association shall not require
5 advance notice of the audiotaping or videotaping and may adopt
6 reasonable rules governing the audiotaping and videotaping of open
7 portions of the meetings of the board and the membership, but such
8 rules shall not preclude such audiotaping or videotaping by those
9 attending, unless the board audiotapes or videotapes the meeting
10 and makes the unedited audiotapes or videotapes available to
11 members on request without restrictions on their use as evidence in
12 any dispute resolution process. Any portion of a meeting may be
13 closed only if that closed portion of the meeting is limited to
14 consideration of one or more of the following:

15 1. Legal advice from an attorney for the board or the association. On
16 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 meeting
19 except for matters that are required to remain confidential by the
20 terms of a settlement agreement or judgment.

21 2. Pending or contemplated litigation.

22 . . .

23 14. The tribunal finds that Petitioners have not met their burden to
24 prove Respondent was in violation of the statute. There was no dispute that there
25 was pending litigation, and the Board was within its right to discuss *and* decide to
26 invoke the insurance policy to cover the costs of the litigation, per number 2,
27 above. There was nothing in the statute that requires that only the discussion
28 must be in private and not the actual action/decision to be made in open,
29 especially when the litigation involved a homeowner/member of the Association.

30 **25F-H011-REL**

15. A.R.S. § 33-1805(A) provides in pertinent part:

Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available

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

11 16. The tribunal finds that Respondent wrongfully withheld the notices
12 requested, as they were not privileged in anyway. The tribunal disagrees with
13 Mr. Jolivette's interpretation of "pending litigation" as defined in this statute, as
14 the notices were drafted and sent out by the Association's manager, prior to this
15 pending litigation.

16 **ORDER**

17 **IT IS ORDERED** that Petitioner's petition in **24F-H033-REL** be granted and that
18 Respondent shall follow the CC&R's. **IT IS FURTHER ORDERED**, that Respondent
19 shall reimburse Petitioner's \$500.00 filing fee as required by ARIZ. REV. STAT. § 32-
20 2199.01. **IT IS FURTHER ORDERED** that no civil penalty is awarded.

21 **IT IS ORDERED** that Petitioner's petition in **25F-H002-REL** be granted and that
22 Respondent shall follow the CC&R's. **IT IS FURTHER ORDERED**, that Respondent
23 shall reimburse Petitioner's \$500.00 filing fee as required by ARIZ. REV. STAT. § 32-
24 2199.01. **IT IS FURTHER ORDERED** that no civil penalty is awarded.

25 **IT IS ORDERED** that Petitioner's petition in **25F-H006-REL** be granted and that
26 Respondent shall follow the Arizona statutes. **IT IS FURTHER ORDERED**, that
27 Respondent shall reimburse Petitioner's \$500.00 filing fee as required by ARIZ. REV.
28 STAT. § 32-2199.01. **IT IS FURTHER ORDERED** that no civil penalty is awarded.

29 **IT IS ORDERED** that Petitioner's petition in **25F-H020-REL** be granted, and that
30 Respondent shall follow the Bylaws. **IT IS FURTHER ORDERED** that Respondent shall
reimburse Petitioner's \$500.00 filing fee as required by ARIZ. REV. STAT. § 32-2199.01.
IT IS FURTHER ORDERED that no civil penalty is awarded.

