

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:

No. 25F-H050-REL

8 Marilyn J Fogelsong

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9 **Petitioner,**

10 v.  
11 Park Townhouses Homeowners  
12 Association, INC.

13 **Respondent.**

14  
15 **HEARING:** July 16, 2025 at 1:00pm

16 **APPEARANCES:** Petitioner Marilyn J. Fogelsong on her own behalf. Respondent  
17 did not appear.

18 **ADMINISTRATIVE LAW JUDGE:** Nicole Robinson

19 **EXHIBITS ADMITTED INTO EVIDENCE:** Arizona Department of Real Estate  
20 Packet ("Packet"); Notice of Hearing; Notice of Petition; Respondent's Response.

21 **FINDINGS OF FACT**

22 **BACKGROUND AND PROCEDURE**

23 1. The Arizona Department of Real Estate ("Department") is authorized by  
24 statute to receive and to decide petitions for hearings from members of homeowners'  
25 associations and from homeowners' associations in Arizona.

26 2. On or about March 31, 2025, Marilyn J. Fogelsong ("Petitioner") filed a  
27 four issue petition with the Department which alleged that Park Townhouses  
28 Homeowners Association, Inc. ("Respondent") violated ARIZ. REV. STAT. § 33-1811;

1 ARIZ. REV. STAT. § 33-1804(A) and (F); ARIZ. REV. STAT. 10-830(A); and its Covenants,  
2 Conditions, and Restrictions (“CC&Rs”).<sup>1</sup>

3 3. The relief requested by Petitioner, other than ordering Respondent to pay  
4 to Petitioner the filing fee required by ARIZ. REV. STAT. § 32-2199.01 if Petitioner  
5 prevailed, included the following – (1) Order a party to abide by the Arizona statute  
6 specified in the complaint section, and (2) Order a party to abide by the section(s) of the  
7 condominium/planned community document(s) specified.<sup>2</sup>

8 4. On April 23, 2025, the Department sent a Homeowner’s Association  
9 (“HOA”) Notice of Petition (“Notice of Petition”) to Respondent which informed  
10 Respondent of the petition initiated against it.<sup>3</sup> In addition, the Notice of Petition  
11 informed Respondent to send a timely response to the Department and to Petitioner no  
12 later than May 13, 2025.<sup>4</sup>

13 5. On or about May 8, 2025, Respondent returned its ANSWER to the  
14 Department whereby it denied Petitioner’s claims.<sup>5</sup>

15 6. On or about May 19, 2025, the Department referred this matter to the  
16 Office of Administrative Hearings (“OAH”), an independent state agency, for an  
17 evidentiary hearing to address the issues set forth as follows:

18 The Petitioner’s allegation within the petition stated as follows:

19 **Petitioner’s Issue #1:** The HOA failed to disclose conflicts-of-interest  
20 [*sic*] when hiring an HOA property manager to manage the HOA which is a  
21 violation of ARS 33-1811.

22 **Petitioner’s Issue #2:** The HOA has violated paragraph 19 of the CC&Rs  
23 by directing an HOA property manager to pursue an unsanctioned project  
24 for individual townhouses which is beyond the scope of HOA management  
25 for common areas.

26 **Petitioner’s Issue #3:** The board has violated the open meeting laws of  
27 ARS 33-1804 (A) and (F) by: holding a private board meeting without  
28 notice; failing to provide material information, minutes, financial

27 <sup>1</sup> See Packet at pdf pages 1-3.

28 <sup>2</sup> *Id.* (Four issues claimed in Petition cost Petitioner a \$2,000.00 filing fee.)

29 <sup>3</sup> See Notice of Petition.

30 <sup>4</sup> *Id.*

<sup>5</sup> See Park Townhouses Association Response Re Case #25F-HO50.

1 statements, and a budget upon request; and by failing to communicate via  
2 the designated representative.

3 **Petitioner's Issue #4:** The board has violated ARS 10-830(A) by failing  
4 to act in good faith with the care an ordinarily prudent person in a like  
5 position would act by failing to perform their duties.<sup>6</sup>

#### 6 THE PARTIES AND GOVERNING DOCUMENTS

7 7. Respondent is a Planned Community Association whose members own  
8 properties in the **Park Townhouses** residential real estate development located in  
9 Tucson, Pima County, Arizona. The community consists of eight townhome units.

10 8. Petitioner is a Park Townhouses property owner and a member of the  
11 Association. Petitioner is a partial owner of 2467 East 1<sup>st</sup> Street with her son; the son  
12 lives in the unit and is the majority owner.<sup>7</sup>

13 9. Tucson Realty & Trust Company, Management Services, LLC ("TRT"),  
14 was voted on and approved by Park Townhouses owners on February 17, 2025, for  
15 HOA management services. TRT had a separate division that managed individual  
16 townhome units and that individual management division managed a few units at the  
17 Park Townhouses.<sup>8</sup>

18 10. The governing document includes the *Declaration of Covenants,*  
19 *Conditions and Restrictions for Park Association.*

20 11. The **Declaration of CC&Rs for Park Association**<sup>9</sup> provides, in pertinent  
21 part, these sections:

22 The Indigo Company, an Arizona Partnership hereinafter referred to as  
23 Indigo, is the owner of the real property situated in Pima County Arizona,  
24 described as follows:

25 Lots 14, 15 and 16 in block 1 of Speedway Heights, a  
26 subdivision of Pima County, Arizona, according to the map  
27 of record in the Pima County Recorder's Office in book 3 of  
28 maps and plats at page 104:

29 <sup>6</sup> See Packet at pdf page 2.

30 <sup>7</sup> See Packet at pdf page 63.

<sup>8</sup> See Respondent's Response.

<sup>9</sup> See Packet at pdf pages 53-54.

1 Except that portion (sic) of lot 16 conveyed to the city of  
2 Tucson, by deed recorded July 25, 1949 in Docket 184 at  
3 page 576.

4 And it is the desire and intention of Indigo to sell the real  
5 property and to impose on it mutual beneficial restrictions  
6 under a general plan or scheme of improvements for the  
7 benefit of all that real property and the future owners of the  
8 various parts of it:

9 NOW, THEREFORE, INDIGO hereby declares various covenants,  
10 conditions and restrictions relating to the aforesaid real property, which is  
11 hereinafter sometimes referred to as "the premises". This declaration  
12 hereby establishes a plan for the individual ownership of Lots 1 to 9  
13 inclusive, and the improvements contained thereon, in Park Townhouses  
14 as recorded in Book 33 of Maps, Page 40, Official Records, Pima County,  
15 Arizona, together with ownership by a non-profit corporation of all  
16 recreation areas and streets and other common areas, which are  
17 hereinafter defined and referred to as "common area" or as "common  
18 elements", and which are designated upon the aforesaid plat of Park  
19 Townhouses as common area A, and common area B. The said  
20 covenants, conditions and restrictions are as follows:

21 19. . . . [a]ny action necessary or appropriate to the proper  
22 maintenance, safety, control and upkeep of all or any of the  
23 common elements, and any action necessary or appropriate to the  
24 maintaining of, if provided, television antennae and cable systems  
25 to the lots, security or guard services for the premises or any  
26 portion thereof, streets, common areas, swimming pools and other  
27 recreational facilities, shall be taken through the Park Home  
28 Owners Association.<sup>10</sup>

#### 29 HEARING EVIDENCE

30 12. Petitioner testified on her own behalf. No representative appeared on  
behalf of Respondent at the hearing. Administrative notice was taken of the  
Department's electronic file and NOTICE OF HEARING. The substantive evidence of  
record is as follows:

- a. **Petitioner's Issue #1:** On February 17, 2025, Respondent held an HOA  
meeting and on the agenda was whether to hire an HOA Manager. Only one  
proposal was presented to ownership and that proposal was accepted and TRT

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<sup>10</sup> *Id.*

1 got the bid. TRT was also the community's prior HOA Manager in 2022.  
2 Petitioner objected to this hire due to a conflict of interest. Petitioner argued that,  
3 because TRT had a separate division that managed two, individual townhouses  
4 in the community, TRT had a conflict of interest which was a violation of ARIZ.  
5 REV. STAT. § 33-1811. In addition, Petitioner alleged that in the past, TRT  
6 collected parking violation fines and did not remit them to the HOA and failed to  
7 disclose tenant information, among other issues.

8 b. **Petitioner's Issue #2:** Petitioner testified on March 31, 2025, TRT met  
9 with a painting company to solicit bids to paint the exteriors of all the townhouses  
10 in the townhouse community. Petitioner argued that the HOA had no authority to  
11 manage an improvement to the individual townhomes and that paragraph 19 of  
12 the CC&Rs gave authority to the HOA to manage the common areas.

13 c. **Petitioner's Issue #3:** Petitioner testified that the HOA had violated the  
14 open meeting laws of ARIZ. REV. STAT. § 33-1804 (A) and (F) by failing to provide  
15 requested paint bids; the February 17, 2025, HOA meeting was not properly  
16 noticed; failed to give Petitioner minutes from a December 10, 2024, HOA  
17 meeting upon request; and a March 5, 2025, email went out from the HOA to the  
18 owners regarding the landscaping, but Petitioner did not receive one.

19 d. **Petitioner's Issue #4:** Petitioner testified that the HOA had violated  
20 ARIZ. REV. STAT. § 10-830(A) by failing to act in good faith with the care an  
21 ordinarily prudent person in a like position would exercise by failing to perform  
22 these duties, as follows: to timely review bills and records; to check the HOA  
23 post office box; to schedule a backflow test with the irrigation system which cost  
24 additional fees; to elect officers in a timely manner, to update the Arizona  
25 Corporation Commission filing with the new officers and directors; to manage the  
26 bank account, to invoice for January 2025 semi-annual dues, and to provide  
27 financial statements or a budget upon request.

### 28 **CONCLUSIONS OF LAW**

29 1. The Department has jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102  
30 and 32-2199 *et seq.*, regarding a dispute between an owner and a planned community

1 association. The owner or association may petition the Department for a hearing  
2 concerning violations of community documents or violations of the statutes that regulate  
3 planned communities as long as the petitioner has filed a petition with the Department  
4 and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

5 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-  
6 2199.01(D), 32-2199.02, and 41-1092 *et seq.*, OAH has the authority to hear and  
7 decide the contested case at bar. OAH has the authority to interpret the contract  
8 between the parties.<sup>11</sup>

9 3. In this proceeding, Petitioner bears the burden of proving by a  
10 preponderance of the evidence that Respondent violated the aforementioned ARIZ. REV.  
11 STAT. §§ 33-1811, 33-1804, 10-830, and the Park Townhouses CC&Rs.<sup>12</sup>

12 4. A preponderance of the evidence means “proof which leads the [trier of  
13 fact] to find that the existence of the contested fact is more probable than its  
14 nonexistence.”<sup>13</sup>

15 5. In regards to Petitioner’s Issue #1, Petitioner argued that the hiring of TRT  
16 was a conflict of interest and a violation of ARIZ. REV. STAT. § 33-1811 which states:

17 If any contract, decision or other action for compensation taken by or on  
18 behalf of the board of directors would benefit any member of the board of  
19 directors or any person who is a parent, grandparent, spouse, child or  
20 sibling of a member of the board of directors or a parent or spouse of any  
21 of those persons, that member of the board of directors shall declare a  
22 conflict of interest for that issue. The member shall declare the conflict in  
23 an open meeting of the board before the board discusses or takes action  
24 on that issue and that member may then vote on that issue. Any contract  
25 entered into in violation of this section is void and unenforceable.

26 6. The evidence established that TRT had served as the HOA manager in  
27 the past with Park Townhouses and prior to TRT, the McElwain Company was the HOA  
28 manager at the Park Townhouses. In addition, McElwain managed several individual  
29 townhouse units, as well. McElwain went out of business and TRT was voted back in at  
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<sup>11</sup> See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

<sup>12</sup> See ARIZ. ADMIN. CODE R2-19-119.

<sup>13</sup> *In re William L.*, 211 Ariz. 236, 238 (App. 2005) (quoting *Matter of Appeal in Maricopa Juv. Action No. J-84984*, 138 Ariz. 282, 283 (1983)).

1 the February 17, 2025, HOA meeting. Petitioner failed to prove by a preponderance of  
2 the evidence that the hiring of TRT, for a second or third time, as the HOA manager for  
3 Park Townhouses constituted a conflict of interest per ARIZ. REV. STAT. § 33-1811.

4 7. In regards to Petitioner's Issue #2, Petitioner argued that the HOA has the  
5 authority to manage the common areas in the community and not individual townhouses  
6 per paragraph 19 of the CC&Rs. However, Petitioner did not submit the entirety of the  
7 Park Townhouses CC&Rs and Bylaws. The Tribunal received snippets of these  
8 governing documents which are in evidence. As such, Petitioner failed to prove by a  
9 preponderance of the evidence that the HOA had violated the CC&Rs by soliciting a bid  
10 to paint the exterior of the entire community. There was no evidence that work was  
11 actually performed on the individual units.

12 8. ARIZ. REV. STAT. §§ 33-1804(D) and (F) states in pertinent part:

13 (D) Notice to members of meetings of the board of directors is not  
14 required if emergency circumstances require action by the board before  
15 notice can be given. Any notice of a board meeting shall state the date,  
16 time and place of the meeting. The failure of any member to receive  
17 actual notice of a meeting of the board of directors or a meeting agenda  
18 does not affect the validity of any action taken at that meeting.

19 (F) It is the policy of this state as reflected in this section that all meetings  
20 of a planned community, whether meetings of the members' association or  
21 meetings of the board of directors of the association, be conducted openly  
22 and that notices and agendas be provided in advance for those meetings  
23 that contain the information that is reasonably necessary to inform the  
24 members of the matters to be discussed or decided and to ensure that  
25 members have the ability to speak after discussion of agenda items, but  
26 before a vote of the board of directors is taken.

27 9. In regards to Petitioner's Issue #3, the February 17, 2025, HOA meeting  
28 provided notice through email<sup>14</sup> and included the date, time and virtual link which  
29 adheres to ARIZ. REV. STAT. § 33-1804(D). Petitioner argued that she did not receive  
30 the March 5, 2025, landscaping email, which is accurate.<sup>15</sup> However, Petitioner's co-  
owner of unit 2467, did receive the landscaping email.<sup>16</sup> If unit 2467 received HOA

<sup>14</sup> See Packet at pdf page 58-60.

<sup>15</sup> See Packet at pdf page 70-71.

<sup>16</sup> *Id.*

1 correspondence and information, then this Tribunal does not find that the HOA violated  
2 Park Townhouses Bylaws or ARIZ. REV. STAT. §§ 33-1804 (A), (F) or (D).

3 10. Furthermore, ARIZ. REV. STAT. § 33-1804(D) states that “[n]otice to  
4 members of meetings of the board of directors was not required if emergency  
5 circumstances require action by the board before notice can be given,” and this adheres  
6 to the December 2024, emergent meeting between the Board members.

7 11. In regards to Petitioner’s Issue #4, Petitioner asserted that the HOA  
8 violated ARIZ. REV. STAT. § 10-830. The Office of Administrative Hearings has no  
9 jurisdiction to enforce this statute. ARIZ. REV. STAT. § 32-2199 provides:

10 Pursuant to title 41, chapter 6, article 10, an administrative law judge shall  
11 adjudicate complaints regarding and ensure compliance with:

- 12 (1) Title 33, chapter 9 and condominium documents.  
13 (2) Title 33, chapter 16 and planned community documents.

14 12. As such, the undersigned Administrative Law Judge concludes that,  
15 because Petitioner failed to meet her burden of proof that Respondent committed the  
16 alleged violations, her petition must be denied.

17 **ORDER**

18 Based on the foregoing,

19 **IT IS ORDERED** that Petitioner’s petition be **DENIED**.

20 **NOTICE**

21 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on**  
22 **the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT.**  
23 **§ 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for**  
24 **rehearing in this matter must be filed with the Commissioner of the**  
25 **Department of Real Estate within 30 days of the service of this Order**  
26 **upon the parties.**

27 Done this day, August 5, 2025.

28 /s/ Nicole Robinson  
29 Administrative Law Judge

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Transmitted by either mail, e-mail, or facsimile August 5, 2025 to:

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