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IN THE SUPERIOR COURT OF THE

COUNTY OF MARICOPA, STATE OF ARIZONA

AZNH REVOCABLE TRUST, by and through JOHN and SUSAN SULLIVAN, Trustees, Real Parties In Interest,

Plaintiff/Appellant,

vs.

ARIZONA DEPARTMENT OF REAL ESTATE; and SUNLAND SPRINGS VILLAGE HOMEOWNERS ASSOCIAITION,

Defendants/Appellees.

Case No. LC2025-000025 -001

OPPOSITION TO MOTION FOR EVIDENTIARY HEARING TO INTRODUCE ADDITIONAL EVIDENCE

Assign to:
Hon. Joseph Mikitish

I. INTRODUCTION

This case concerns the interpretation of A.R.S. § 33-1812(A)(7) and whether electronic voting records satisfy the statute's ballot retention requirements. Appellant contends that the HOA violated the statute by failing to retain "electronic ballots" for inspection. However, the Department of Real Estate ruled in favor of Appellee, Sunland Springs Village Homeowners Association (the "Association"), and the Association maintains that no statutory violation occurred.

Appellant subsequently filed a *Motion for an Evidentiary Hearing to Introduce Additional Evidence* that was not presented during the administrative hearing, citing A.R.S. § 12-910 and JRAD Rule 10. However, Appellant's motion improperly conflates two distinct statutory provisions, rendering the motion procedurally defective. Additionally, Appellant fails to adequately explain why the matter should not be remanded to the Office of

Administrative Hearings—particularly given the apparent confusion between a Motion to Introduce Additional Evidence and a Request for an Evidentiary Hearing.

Given these procedural deficiencies, the most appropriate course of action is either: (1) remanding the matter to the Office of Administrative Hearings so that the Administrative Law Judge who presided over the original hearing can properly address Appellant's arguments, or (2) having this Court determine the narrow issue of whether the additional evidence should be admitted—without an evidentiary hearing—while reserving the hearing itself until after the appeal briefs have been submitted.

If the Court elects to take the second course of action, the Association has shown in this opposition that the evidence should be excluded.

II. LEGAL ARGUMENT

A. Appellant's Motion Improperly Combines Two Different Forms Of Relief.

Appellant improperly combined two distinct forms of relief into a single motion, creating procedural confusion. Appellant cites A.R.S. § 12-910 as justification for an evidentiary hearing. However, an evidentiary hearing under A.R.S. § 12-910(A) is intended to resolve the *ultimate issue* of whether the agency action should be affirmed, vacated, or remanded. While A.R.S. § 12-910(B) outlines exceptions to when additional evidence may be admitted, it does not provide a mechanism for holding an evidentiary hearing solely to determine the admissibility of additional evidence. Thus, Appellant's request for a hearing for that limited purpose exceeds the scope of what is procedurally necessary.

Appellant further conflates his request for an evidentiary hearing with a motion to admit additional evidence under Rule 10 of the *Rules of Procedure for Judicial Review of Administrative Decisions* ("JRAD"). Under JRAD Rule 10(a), a party may file a written motion to introduce exhibits or testimony not offered during the administrative hearing. However, nothing in Rule 10 suggests that an evidentiary hearing is required—or even appropriate—to decide the motion. Instead, Rule 10(b) merely requires the moving party to provide legal authority supporting the admission of additional evidence and to explain why the case should not be remanded under A.R.S. § 12-911(A)(7).

Appellant's misuse of this procedural mechanism appears to be a pretext for rearguing the merits of his appeal. More than 80% of Appellant's memorandum in support of the motion consists of arguments that properly belong in his *Opening Brief on appeal*, rather than in a motion to introduce additional evidence. There is little to no substantive discussion in the motion itself explaining why the evidence should be admitted.

Given this apparent procedural abuse, the Association respectfully requests that this Court either: (1) strike the portions of the moving papers that improperly argue the merits of the appeal, or (2) remand the case to the Administrative Law Judge who presided over the original hearing, as that judge is already familiar with the context of Appellant's improper arguments.

B. The Evidence Appellant Seeks To Introduce Is Not Only Inadmissible, But Belongs To VoteHOANow And Are Not Records Of The Association.

Appellant falsely asserts that the Association withheld the additional evidence that is the subject of the Motion despite Appellant's numerous requests for said records. However, Appellant falsely asserts that the evidence belonged to the Association or was within its possession, custody, or control. Neither piece of evidence, i.e. the "user interface" or the "50-second video" belong to the Association or were part of the election records it was required to keep. Appellant also failed to authenticate the evidence or lay any type of foundation for the evidence, making the evidence inadmissible.

1. The alleged user interface is inadmissible evidence and was not within the Association's possession, custody, or control.

Appellant asserts that it obtained the "user interface" used during the election process from an email exchange between VoteHOANow and Kathy Fowers, the Association's community manager. However, this characterization is inaccurate and misrepresents both the contents of the email chain and the information actually in the Association's possession.

First, Mr. Sullivan's Declaration states that an email from VoteHOANow to Ms. Fowers "contained an electronic link to the Vendor's proposed electronic ballot for the 2024 election." He then directs the Court's attention to what he claims is "the electronic ballot," attached as Attachment 1. However, Mr. Sullivan fails to provide the actual email purportedly containing this "electronic link" or to identify what the link was. He also provides no evidence

connecting the link he supposedly clicked with what appears in Attachment 1. In other words, there is no foundation for the document he is offering as evidence.

Additionally, no representative from VoteHOANow—the entity that supposedly created these materials—has authenticated Attachment 1 or explained its origin. Mr. Sullivan provides no details regarding how these documents were generated—whether they are screenshots from his computer, printouts from a website, or some other format. Without proper authentication, Attachment 1 lacks any evidentiary foundation and is therefore inadmissible.

Moreover, Mr. Sullivan concedes that the electronic link in the email directed Ms. Fowers to a proposal, not a finalized product. Even assuming that Attachment 1 represents what Mr. Sullivan claims, it would merely be a draft of a proposed user interface, not the actual one used in the election. A preliminary mock-up would not have been part of the official election records, nor would the Association have had any obligation to retain or produce it. Thus, Appellant's claim that the Association wrongfully withheld this document is entirely unfounded.

Finally, even if the pages in Attachment 1 originated from an electronic link, they represent only the user interface hosted on VoteHOANow's platform, a tool used to obtain and record electronic voting data. As such, any records of this interface would be in the exclusive custody, control, and possession of VoteHOANow, not the Association. Consequently, the Association had no duty to retain or produce these documents in response to Mr. Sullivan's requests.

For these reasons, Attachment 1 is inadmissible and does not constitute evidence the Association was obligated to produce during the administrative hearing.

2. <u>The alleged 50-second video is inadmissible evidence and was not within the Association's possession, custody, or control.</u>

Appellant also alleges that the Association concealed a 50-second video that was supposedly part of its election records. However, this claim is easily disproven by Appellant's own statements.

Mr. Sullivan testified that the video is hosted at https://www.votehoanow.com/how-it-works/voting-online-website.php, a webpage clearly owned and operated by VoteHOANow,

as indicated by the domain name. Additionally, Mr. Sullivan acknowledges that the video was created by VoteHOANow to demonstrate how its electronic voting system functions. By his own admission, this is not a record controlled by the Association.

Moreover, the existence of this instructional video does not make it part of the Association's election records. According to Mr. Sullivan's testimony, the video was created and maintained by VoteHOANow, and at no point did the Association take possession, custody, or control of it. Therefore, the Association had no legal obligation to provide a link to this publicly available video in response to Mr. Sullivan's requests.

Appellant's attempt to introduce this video is further undermined by the fact that it has been publicly available on VoteHOANow's website and YouTube. If Appellant believed the video was relevant, it could have obtained it at any time during the administrative hearing process but instead chose to raise the issue only after the matter was concluded. Appellant knew VoteHOANow was the electronic voting provider and could have easily subpoenaed the company or reviewed its website. Its failure to do so does not justify introducing the video at this late stage.

For these reasons, the 50-second video should be excluded from evidence, as it was never within the Association's control and was not something the Association had any obligation to provide during the administrative hearing.

C. The Office Of Administrative Hearings Has Extensive Expertise In Hearing And Resolving HOA Disputes And Should Be The Proper Venue For Resolving This Request.

Appellant contends that the question of whether to admit additional evidence cannot be remanded to the administrative agency because the Office of Administrative Hearings (OAH) lacks experience adjudicating disputes between private parties and is unfamiliar with HOA compliance matters. This assertion is patently false.

The Arizona Legislature established the HOA dispute resolution process in Laws 2006, Chapter 324. Since 2006, the OAH has been the designated body to conduct hearings on these disputes. Initially, petitions were filed with the Department of Fire, Building, and Life Safety until 2016, when the Department was eliminated and its duties were transferred to the

Department of Real Estate. Regardless of these changes, the OAH consistently handled these hearings. As a result, the OAH has been adjudicating HOA disputes for nearly 20 years.

Not only are Administrative Law Judges (ALJs) at the OAH well-versed in the HOA dispute process, but they also routinely and consistently apply the relevant statutes governing homeowners associations. Their experience extends to evaluating and admitting evidence in these matters. The suggestion that OAH lacks the competence to determine whether two pieces of evidence should be admitted after a hearing has concluded is baseless. As such, it is proper for this Court to remand the decision of whether to admit these pieces of evidence to the administrative agency.

III. CONCLUSION

For the foregoing reasons, Appellee Sunland Springs Village Homeowners Association respectfully requests that the Motion be denied based on procedural defects and based on the inadmissibility of the evidence Appellant presented. Alternatively, the Association requests that the Court remand the case back to the agency for the OAH to determine whether to admit the evidence.

RESPECTFULLY SUBMITTED this 17 day of February, 2025.

MAXWELL & MORGAN, P.C.

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ORIGINAL of the foregoing E-filed
this 17 day of February, 2025, to:

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COPY of the foregoing mailed and emailed
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