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John F. Sullivan, Esq.
1909 E. Ray Rd., Suite 9198
Chandler, Arizona 85225
(602) 793-9301
Bar No. 023018
Attorney for Plaintiff/Appellant

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

**AZNH REVOCABLE TRUST,
by and through
JOHN and SUSAN SULLIVAN,
TRUSTEES, REAL PARTIES IN
INTEREST**

Plaintiff/Appellant

v.

**ARIZONA DEPARTMENT OF REAL
ESTATE,**

Defendant/Appellee

**SUNLAND SPRINGS VILLAGE
HOMEOWNERS ASSOCIATION,**

Defendant/Appellee

No. LC2025-000025-001

**PLAINTIFF/APPELLANT'S
OPENING BRIEF
(Unclassified Civil)**

Oral Argument Requested

Assigned to:
Hon. Joseph Mikitish

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I. INTRODUCTION

The Controversy

This case is about HOA non-compliance with A.R.S. § 33-1812(A)(7) (requiring retention of election ballots and related materials for inspection).

The evidence shows: an HOA held an electronic election; an electronic ballot was “used”; and, the ballots were neither retained nor made available for inspection.

The HOA contends no electronic ballots were used (only a “user interface”) and producing the election results on hundreds of pages of spreadsheets is “sufficient” to comply with A.R.S. § 33-1812(A)(7). The “user interface” was not retained or produced.

The administrative law judge says the HOA complied with A.R.S. § 33-1812(A)(7) by retaining “votes” as required by A.R.S. § 10-3708. But, A.R.S. § 33-1812(A)(7) says the HOA must comply with § 33-1812(A)(7) “notwithstanding” A.R.S. § 10-3708.

Who’s Involved

AZNH Revocable Trust (“Trust”) owns a home in Sunland Springs Village, a planned community of almost 2500 homes in Mesa. The Trust is a mandatory member of Sunland Springs Village Homeowners Association (“HOA”). The Trustees are John & Susan Sullivan.

Ms. Kathy Fowers is employed by FirstService Residential to provide day-to-day management of the HOA. She testified for the HOA at the administrative hearing.

The Arizona Department of Real Estate (“ADRE”) is charged by statute (A.R.S. § 32-2199.01) with receiving Petitions (complaints) on disputes between a homeowner and the HOA concerning violations of the Planned Communities Act (A.R.S. § 33-1801, et seq.).

The ADRE refers disputes to the Office of Administrative Hearings and they assign an Administrative Law Judge (“ALJ”) to conduct a hearing. See A.R.S. § 32-2199 (an ALJ “shall adjudicate complaints regarding and ensure compliance with” the Planned Communities Act).

The Trust filed a Petition with the ADRE complaining that the HOA violated A.R.S. § 33-1812(A)(7).

1 During the four (4) week election, the HOA sent all homeowners eleven (11), separate
2 invitations to vote electronically. Petitioner’s Exhibit 3. Each invitation contained an electronic
3 link to initiate voting and contained the following statements:

4 Your community needs your vote on the following ballots:

5 2024 Directors Election

6 2024 Bylaws Amendment"

7 Make your choices on the electronic ballot and submit.

8 Petitioner's Exhibit 3. *See* Decision, p.3, ¶ 10 (citing Petitioner’s Exhibit 3).

9 The HOA also sent instructions for electronic voting which stated, in part:

10 “Make your choices on the ballot and Submit. ... When you submit your electronic
11 ballot, you will receive a confirmation email from the voting vendor
12 (VoteHOANow) indicating your successful submission of a ballot.”

13 Petitioner's Exhibit 4. *See* Decision, p.3, ¶ 11 (citing Petitioner’s Exhibit 4).

14 HOA records show that 1,461 homeowners voted electronically. Respondent's Exhibit 8,
15 Bates # SSV00230.

16
17 **C. THE STATUTE**

18 A.R.S. § 33-1812(A), provides:

19 **A.** Notwithstanding any provision in the community documents, after termination
20 of the period of declarant control, votes allocated to a unit may not be cast
21 pursuant to a proxy. The association shall provide for votes to be cast in person
22 and by absentee ballot and, in addition, the association may provide for voting by
23 some other form of delivery, including the use of e-mail and fax delivery.

24 **Notwithstanding section 10-3708** or the provisions of the community documents,
25 any action taken at an annual, regular or special meeting of the members shall
26 comply with all of the following **if absentee ballots or ballots provided by some**
27 **other form of delivery are used:**

- 1 1. The ballot shall set forth each proposed action.
- 2 2. The ballot shall provide an opportunity to vote for or against each proposed
- 3 action.
- 4 3. The ballot is valid for only one specified election or meeting of the
- 5 members and expires automatically after the completion of the election or
- 6 meeting.
- 7 4. The ballot specifies the time and date by which the ballot must be delivered
- 8 to the board of directors in order to be counted, which shall be at least seven
- 9 days after the date that the board delivers the unvoted ballot to the member.
- 10 5. The ballot does not authorize another person to cast votes on behalf of the
- 11 member.
- 12 6. The completed ballot shall contain the name, address and signature of the
- 13 person voting, except that if the community documents permit secret ballots,
- 14 only the envelope shall contain the name, address and signature of the voter.
- 15 **7. Ballots, envelopes and related materials, including sign-in sheets if**
- 16 **used, shall be retained in electronic or paper format and made available**
- 17 **for member inspection for at least one year after completion of the**
- 18 **election.**

19 A.R.S. § 33-1812(A)(bold added). See statute, Petitioner’s Exhibit 11.

20

21 **D. INSPECTION REQUEST**

22 On February 28, 2024, the Trust submitted a written inspection request to the HOA which

23 read, in pertinent part:

24 “[With respect to the Annual Meeting of Members & election concluding on

25 February 27, 2024, the Trust requests that you either: (1) make available for

26 inspection all ballots, envelopes, related materials and sign-in sheets related to the

27 aforesaid meeting and election; or, (2) produce the aforesaid ballots, envelopes,

1 related materials and sign-in sheets in electronic form.. If you have some, but not
2 all, of the above-referenced materials in electronic form, please produce your
3 electronic materials in electronic form only.”

4 Petitioner's Exhibit 5. (Note: *Trust did not ask for paper copies of electronic ballots.*)

5 In response, the HOA produced over four hundred (400) pages of documents, but did not
6 produce any electronic ballots. Petitioner’s Exhibit 1, p.4, lines 12-27; *Id.* p.5, lines 6-11 and
7 lines 22-23. See Decision, pp. 4-5, ¶¶ 17-20 (ALJ list of documents produced by HOA - no
8 electronic ballots on list). See also Tr. pp. 54-55, lines 19-25 and 1-22 respectively (ALJ
9 **acknowledges that HOA dd not produce the electronic ballots**).

10
11 **E. PETITION AND RESPONSE**

12 On April 20, 2024, the Trust filed a Petition with the ADRE alleging:

13 On February 28, 2024, AZNH Revocable Trust submitted a written request,
14 pursuant to A.R.S. 33-1812, A, 7, to inspect all ballots, envelopes, related
15 materials and sign-in sheets related to an HOA election concluding on February
16 27, 2024, and the HOA has repeatedly failed or refused to produce all such
17 materials (about 1500 ballots have not been produced).

18 On May 13, 2024, the HOA filed a single-sentence Response: “All of the complaint items in
19 the Petition are denied.”

20
21 **F. HOA ADMISSIONS**

22 *Prior to the hearing*, the HOA filed a nine (9) page document with the ALJ (*Petitioner’s*
23 *Exhibit 1*) wherein the HOA admits the following:

- 24 1. the HOA hired a vendor (VoteHOANow) to assist in the 2024 annual election (p.3, lines
25 14-17);
- 26 2. prior to the election, the HOA provided a paper ballot to VoteHOANow and
27 VoteHOANow used the paper ballot to create an electronic ballot which was

1 distributed to HOA voters (pp.3-4, lines 14-28 and 1-9 respectively);

2 3. 1,461 voters submitted the electronic ballot (p.4, lines 8-9);

3 4. the HOA did not retain any of the electronic ballots (p.4, lines 12-19);

4 5. after the election, the Trust requested inspection of all election
5 materials, including all ballots (p.4, lines 20-21); and,

6 6. the HOA did not produce any of the 1,461 electronic ballots for the Trust's
7 inspection (p.5, lines 6-11 and 22-24).

8 See Petitioner's Exhibit 1 in general and the pincites shown above.

9 Some pertinent excerpts from the HOA's admissions are:

10 VoteHOANow provided the Association with a tally sheet showing the
11 results of the electronic vote. VoteHOANow also provided the Association with
12 the list of homeowners who cast electronic votes. However, as VoteHOANow
13 collected the votes electronically, it did not provide a separate paper ballot for each
14 vote cast electronically. Rather, it provided for the Association the results of the
15 electronic vote through the documents described above.

16 Petitioner's Exhibit 1, p.4, lines 12-18.

17 * * *

18 The Association explained to Petitioner that the electronic votes were reflected in
19 the results documents and voting member list provided by VoteHOANow, but that
20 VoteHOANow did not provide to the Association with a separate ballot for each
21 homeowner who voted electronically.

22 *Id.*, p.5, lines 6-11.

23 * * *

24 Petitioner already subpoenaed and received all the Association's records related to
25 the 2024 election. There is nothing else the Association can provide because there
26 is nothing else the Association has.

27 *Id.*, pp.7-8, lines 27 and 1-2 respectively.

1 **G. HOA DEFENSE**

2 The HOA contends that production of the results of the electronic election shown on
3 hundreds of pages of spreadsheets are “sufficient” to comply with the requirements of A.R.S.
4 § 33-1812(A)(7).

5 At the hearing, the HOA attorney told the ALJ:

6 The process for casting a vote electronically occurs in a similar form as -- sorry, in
7 a similar manner as using a Google form. The voting homeowner follows a link to
8 a secure website where the homeowner must use a unique identifier to confirm
9 that they are, in fact, a homeowner and they had not voted already. But once
10 logged into the secure website, the voting homeowner engages with an electronic
11 user interface on the computer screen to select their choices of candidates. And
12 then they press submit. Once the homeowner submits their votes, the information
13 entered on the interface screen is recorded on a spreadsheet.

14 Tr. p:13, lines 4-14.

15 * * *

16 The Association’s position with respect to this petition is they provided every
17 document that exists. And the documents that exist are sufficient.

18 Tr. p.61, lines 21-23.

19 The HOA did not retain, nor produce for inspection, a “user interface.” See Decision, pp. 4-5,
20 ¶¶ 17-20 (ALJ list of documents produced by HOA - no “user interface” on list).

21 In the Decision, the ALJ found:

22 [The] Association arranged with a company, Vote HOA Now, to conduct electronic
23 balloting. [Decision, p.2, ¶ 6.]

24 * * *

25 *Vote HOA Now* was given the Association’s ‘ballot’ information and the member
26 and member property information necessary for *Vote HOA Now* to provide

1 electronic ballots to members for the election voting. *Vote HOA Now* created the
2 electronic ballot (sic). [Decision, p.3, ¶ 9.]

3 * * *

4 Kathy Fowers, the General Manager of Association and the Custodian of
5 Records, approved the ‘proof’ of the electronic ballot created by *Vote HOA*
6 *Now* after she determined that the *Vote HOA Now*-created electronic ballot
7 matched the paper ballot. [Decision, p.3, ¶ 12.]

8 9 III. STATEMENT OF THE ISSUES

10 The issues presented for review are whether the Decision is:

- 11 1. Contrary to Law;
- 12 2. Not supported by substantial evidence;
- 13 3. Arbitrary and capricious or is an abuse of discretion.

14 15 IV. ARGUMENT

16 **A. The Standard & Burden of Proof in Administrative Hearings**

17 The Trust must prove the HOA violated A.R.S. § 33-1812 (*and the HOA must prove its*
18 *affirmative defense*) by a preponderance of evidence. Ariz. Admin. Code § 2-19-119.

19 “Preponderance of the evidence means such evidence as when weighed with that opposed to
20 it has more convincing force, and from which it results that a greater probability is in favor of
21 the party upon whom the burden rests.” *Brooks v. Industrial Commission*, 24 Ariz. App. 395,
22 399 (App. 1975) *citing Ison v. Western Vegetable Distributors*, 48 Ariz. 104, 111-12 (Ariz.
23 1936). Many courts have more succinctly stated that ‘preponderance of evidence’ means ‘more
24 likely than not.’ *See, e.g., “Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211
25 Ariz. 224, 228 ¶ 21, (2005) (acknowledging that “preponderance of the evidence” means “more
26 likely than not”).

1 An ‘*affirmative defense*’ is defendant’s assertion of facts and arguments that, if true,
2 will defeat the plaintiff’s claim, even if all the allegations in the complaint are true. *Defense*,
3 Black’s Law Dictionary 528 (12th ed. 2024). *See also, Memorandum Decision, Ball v.*
4 *Picarello*, 1 CA-CV 23-0650, at *4 (Ariz. Ct. App. Nov. 26, 2024) (adopting the definition).

5
6 **B. The Trust Proved the HOA Violated A.R.S. § 33-1812(A)(7)**

7 “To determine a statute’s meaning, the Court looks first to its text. When the text is clear and
8 unambiguous, the Court applies the plain meaning and the inquiry ends.” *Griffin Found. v. Ariz.*
9 *State Ret. Sys.*, 422 P.3d 1048, 1055 (Ariz. Ct. App. 2018).

10 A.R.S. § 33-1812(A) provides, “**Notwithstanding section 10-3708**,” the HOA must comply
11 with seven (7) specific requirements “if absentee ballots or ballots provided by some other form
12 of delivery are **used**” in the election (bold added). One of those requirements is:

13 “Ballots, envelopes and related materials, including sign-in sheets if used, shall be
14 retained in electronic or paper format and made available for member inspection
15 for at least one year after completion of the election.”

16 A.R.S. § 33-1812(A)(7).

17 The text of A.R.S. § 33-1812(A) is “clear and unambiguous” that its provisions apply in
18 addition to, *or apart from*, A.R.S. § 10-3708 (a section of the Arizona Nonprofit Corporation
19 Act). Thus, if electronic ballots are “used,” they must be retained and made available for
20 inspection.

21 The Statement of the Case and Facts (sec. II, *supra*) establish that it is more likely than not:

- 22 ➤ the HOA held an election using paper and electronic ballots; and,
23 ➤ the HOA did not retain the electronic ballots nor make them available for
24 inspection.

25 The Trust hearing exhibits show the HOA:

- 26 ➤ Conducted an annual election and meeting in February 2024 (Petitioner’s Exhibit
27 3);

- 1 ➤ Sent all homeowners eleven (11), separate invitations to vote electronically by
2 marking and submitting an electronic ballot (Petitioner’s Exhibit 3);
- 3 ➤ Sent voters specific instructions to vote electronically by marking and submitting
4 an electronic ballot (Petitioner’s Exhibit 4);
- 5 ➤ Despite the prior voting invitations and instructions, the HOA attorney argued at
6 the hearing (without any evidence) that voters voted electronically by marking and
7 submitting a “user interface” “in a similar manner as using a Google form.” (Tr.
8 p.13, lines 4-14);
- 9 ➤ Bylaws require a ballot for elections and the HOA must provide a ballot by mail or
10 electronically to each HOA member (Petitioner’s Exhibit 2);
- 11 ➤ **Admitted in writing** (Petitioner’s Exhibit 1 - pincites shown below):
- 12 1. The HOA hired a vendor (VoteHOANow) to assist in the 2024 annual
13 election (p.3, lines 14-17);
- 14 2. Prior to the election, the HOA provided a paper ballot to VoteHOANow and
15 VoteHOANow used the paper ballot to create an electronic ballot which was
16 distributed to HOA voters (pp.3-4, lines 14-25 and 1-9 respectively);
- 17 3. 1,461 voters submitted the electronic ballot (p.4, lines 8-9);
- 18 4. The HOA did not retain any of the electronic ballots (p.4, lines 12-19);
- 19 5. After the election, the Trust requested inspection of all election materials,
20 including all ballots (p.4, lines 20-21); and,
- 21 6. The HOA did not produce any of the 1,461 electronic ballots for the Trust’s
22 inspection (p.5, lines 6-11 and 22-24).

23 The HOA called (the only witness) Ms. Fowers to testify and offered into evidence hundreds
24 of spreadsheet pages which the ALJ found were “voting results” on “data lists” received from
25 VoteHOANow. (Decision, p.4, ¶¶ 16-17; p.8-9, ¶¶ 13-15) (hereinafter “**data lists**”). Ms.
26 Fowers never testified that a “user interface” was used in the election. She did testify, “Bylaws
27 require secret ballot.” Tr. p. 48, line 9.

1 Ms. Fowers also testified that she gave VoteHOANow a paper ballot, from which,
2 VoteHOANow creates a “proof” (proposed electronic ballot) and she approved the proof after
3 she “determined that the *Vote HOA Now*-created electronic ballot matched the paper ballot.”
4 Decision, p.3, ¶¶ 9 & 12; Tr. p.35, lines 16-22. The Trust produced the paper ballot for the ALJ.
5 Petitioner’s Exhibit 12.

6 Ms. Fowers further testified:

7 Q. So when a homeowner goes onto Vote HOA Now, what would they see? Do
8 you know what they would see?

9 A. I see the proof, so I see what they see.

10 Tr. pp.36-37, lines 4-25 & 1-4 respectively. Therefore, Ms. Fowers’ has testified that an
11 electronic voter sees an electronic ballot.

12 Ms. Fowers further testified about the **data lists**, and testified three (3) times that the data
13 came from a **ballot**. Tr. p.43, lines 16-21; Tr. p.46, lines 15-25 cont. to p.47, lines 1-4.

14 Additionally, the HOA attorney directed Ms. Fower’s attention to Respondent’s Exhibit 14
15 and asked, “Can you explain what this is?” Tr. p.50, lines 19-20. Ms. Fowers testified, “These
16 are the issues associated with the board of directors election **ballots**.” Tr. p. 51, lines 4-5 (bold
17 added). And, in further testimony about Exhibit 14, Ms. Fowers testified that election results
18 were derived from a **ballot**. Tr. p. 52, lines 4-13.

19 The Trust met its burden. The above body of evidence shows it is *more likely than not* that
20 the HOA violated A.R.S. § 33-1812(A)(7) by failing to retain, and make available for
21 inspection, the electronic ballots “**used**” in the 2024 annual election and meeting. The HOA
22 attorney’s unsupported argument that there was a “user interface” rather than a ballot is blatant
23 sophistry.

24 In addition, the Trust has asked this Court to supplement the record with the electronic ballot
25 which the HOA withheld from disclosure, and to include a fifty (50) second video showing that
26 the electronic election was conducted with a ballot. (See the Trust’s Motion dated Jan. 21,
27 2025.) The supplemental exhibits provide significant support for the Trust’s claims.

1 **C. An Abuse of Discretion**

2 “The terms ‘arbitrary, capricious and unreasonable conduct’ so as to constitute a manifest
3 abuse of discretion calling for judicial intervention means unreasoning action, without
4 consideration and in disregard for facts and circumstances; where there is room for two
5 opinions, the action is not arbitrary or capricious if exercised honestly and upon due
6 consideration, even though it may be believed that an erroneous conclusion has been reached.
7 *Tucson Public Schools, District No. 1 v. Green*, 17 Ariz. App. 91, 94 (App. 1972).

8 The Decision lacks due consideration of the Trust’s relevant facts and circumstances in a
9 manner comparable to the above. Had such consideration been given, it should have led to the
10 ALJ to compare the facts to the correct statute and avoid a decision which is contrary to law.
11 (Explained *infra*.) It is particularly noteworthy that Petitioner’s Exhibit 1 (the HOA’s
12 admissions) received no consideration whatsoever in the Decision.

13 Pursuant to § 33-1812(A), the Decision in this case is binary: either the HOA retained the
14 electronic ballots and made them available for inspection; or, they didn’t. The statute expressly
15 removes A.R.S. § 10-3708 from consideration of that binary determination. There is no room in
16 the Decision for the ALJ’s opinion that the HOA’s compliance with A.R.S. § 10-3708 equals
17 compliance with A.R.S. § 33-1812(A). Thus, the Decision is an abuse of discretion. (See the
18 related, ‘contrary to law’ discussion herein-below.)

19
20 **D. HOA’s Flawed Affirmative Defense**

21 The HOA attorney argued to the ALJ:

22 “We have already testified that Exhibits 3, 11, 13, 14, and 15 are the record of the
23 electronic vote. That is what we have presented; that is what we produced; that’s
24 what we have provided and testified of. That’s all there is.” Tr. p. 58, lines 8-12.

25 “The Association’s position with respect to this petition is they provided every
26 document that exists. And the documents that exist are sufficient.” Tr. p.61, lines
27 21-23.

1 Respondent's Exhibits 3, 11, 14, & 15 are the **data lists** received from VoteHOANow.
2 Respondent's Exhibit 13 are all the paper ballots received by the HOA from voters. As
3 previously stated, there are no electronic ballots in any of the HOA's exhibits.

4 The applicable statute (A.R.S. § 33-1812) does not allow substitutions or alternatives (e.g.,
5 **data lists**) to satisfy the requirement that ballots be retained and made available for inspection.
6 Therefore, the HOA has failed to prove its affirmative defense by a preponderance of evidence.
7 The HOA's affirmative defense also fails on the same basis that the Decision lacks substantial
8 evidence and is contrary to law as described below.

9
10 **E. Lack of Substantial Evidence & Contrary to Law**

11 **i. Substantial Evidence**

12 "Substantial evidence is any relevant evidence from which a reasonable mind might draw a
13 conclusion." *Mealey v. Arndt*, 206 Ariz. 218, 221, ¶ 12 (2003) (cleaned up). Whether substantial
14 evidence exists is a question of law for the Court's independent determination and the Court is
15 not bound by the ALJ's legal conclusions (*Gaveck v. Ariz. State Bd. of Podiatry Exam*, 222 Ariz.
16 433, 436 (App. 2009)) including those involving statutory interpretation (*J.L.F. v. Az. Health*
17 *Care Cost Containment*, 208 Ariz. 159, 161 (App. 2004)). An ALJ's statutory interpretations are
18 not infallible, and courts must remain the final authority on critical questions of statutory
19 construction. *See Swat Training Facilities LLC v. Ariz. Dep't of Revenue*, 490 P.3d 378, 382
20 (App. 2021)(state agency statutory interpretations not infallible).

21 **ii. Decision Not Supported By Substantial Evidence & Contrary to Law**

22 At the hearing, the ALJ asked for clarification of what the Trust was seeking from the HOA in
23 the following exchange:

24 The Court: Okay. So now I think I understand what Mr. Sullivan was
25 seeking and I want to know – One more question, Mr. Sullivan.
26 Essentially based on the information that we already have, you are

1 seeking the electronic copy of what each homeowner submitted as
2 their vote?

3 Mr. Sullivan: Each ballot that was used to submit their vote, yes.

4 Mr. Gallacher: And the Association's position is – Exhibits 3, 14, and 15
5 are exactly that.

6 Tr. pp.41-42, lines 20-25 and 1-3 respectively.² For same, see Tr. p.39, lines 5-21; Tr.
7 pp.20-21, lines 20-25 and 1-9 respectively.

8 Note that the Trust sought “each ballot used to submit” votes – the trust did not ask for
9 an image. See Tr. p.39, lines 5-21 (Trust wants each electronic ballot used by a voter).
10 The HOA was given the choice of producing the electronic ballots in electronic or paper
11 form. Tr. p. 20, lines 3-11; Petitioner's Exhibit 5 (inspection request).

12 The gravamen of the Decision is stated as follows:

13 **13.** Petitioner's argument that the Association must provide an image of each
14 'electronic ballot', as was voted by each member, is not well supported by Ariz.
15 Rev. Stat. § 10-3708. Ariz. Rev. Stat. § 10-3708(F)(4) requires an online voting
16 system to perform certain actions, one of which is that the online voting system
17 'stores electronic votes for recount, inspection and review purposes.' There is no
18 evidence that *Vote HOA Now* either retains or 'stores electronic votes' in any form
19 other than the **data list** format that was received by the Association, specifically as
20 was documented in Association Exhibits 3, 14 and 15. Those *Vote HOA Now data*
21 **lists**, taken as a whole, document each vote for each member for each election
22 item, in identifiable ways. Ariz. Rev. Stat. § 10-3708(F)(4) requires storage of
23 “electronic votes” not electronic ballots.

24
25 **14.** Petitioner's argument fails that without seeing an image of each electronic
26 ballot, it was not possible to determine whether the election results were accurate.

² Respondent's Exhibits 3, 14 & 15 are part of the **data lists**. See also Tr. p.4, fn. 19 to 22 (describing Respondent's exhibits and no ballots in description).

1 The online voting system allowed only one vote per election item per personal
2 registration number, and the *Vote HOA Now data lists* demonstrate that, per each
3 IP addresses and the personal registration number, only one electronic vote per
4 election item was cast by that member.

5
6 **15.** Based on the foregoing, the Administrative Law Judge concludes
7 that Association is in compliance with Ariz. Rev. Stat. § 33-1812(7) by retaining
8 the *Vote HOA Now data lists* which demonstrate the electronic ballots ‘in
9 electronic format.’ Further, that Petitioner has received from Association, pursuant
10 to his February 28, 2024 request, ‘all ballots, envelopes, related materials and
11 sign-in sheets.’

12
13 **16.** Based on the foregoing, the Administrative Law Judge concludes
14 that Petitioner did not sustain the burden of proof that the Association committed a
15 violation of Ariz. Rev. Stat. § 33-1812(A)(7) and, therefore, the Petition must be
16 denied.

17 Decision, p.8, ¶¶ 13-16 (bold added).

18 **At no time during the hearing, did the Trust, the HOA or the ALJ discuss, argue or**
19 **otherwise consider A.R.S. § 10-3708.** The hearing audio and transcript confirm so. (*See the*
20 *same misstatement by the ALJ at Decision, p.5, ¶ 22.*)

21 The Trust has consistently presented evidence and argued that:

- 22 ➤ the HOA held an election using paper and electronic ballots;
- 23 ➤ A.R.S. § 33-1812(A)(7) requires the HOA to retain all electronic ballots and
24 make them available for the Trust's inspection; and.
- 25 ➤ the HOA did not retain the electronic ballots nor make them available for
26 inspection.

1 See Trust opening (Tr. pp.9-10, lines 19-25 & 1-16 respectively); Trust testimony (Tr. p.16,
2 lines 10-20); and Trust argument (Tr. pp.62-65, line 16 of p.62 to line 8 of p.65).

3 The ALJ Decision (compliance with A.R.S. § 10-3708 also complies with A.R.S. § 33-1812)
4 **is not supported by substantial evidence.** As stated, substantial evidence is “relevant
5 evidence from which a reasonable mind might draw a conclusion” (*Mealey, supra*, defining
6 ‘substantial evidence’). The specific text of A.R.S. § 33-1812 makes the provisions of A.R.S. §
7 10-3708 **irrelevant** in forming a conclusion about whether the HOA complied with § 33-1812.
8 For the same reasons, the Decision is **contrary to law** because it allows the HOA to comply
9 with A.R.S. § 33-1812 in a manner not allowed by law. See A.R.S. § 13-105 (contrary to law
10 means not allowed by law). The Decision is also contrary to A.R.S. 32-2199 which specifically
11 requires the ALJ to “ensure compliance with” the Planned Communities Act.

12 13 V. CONCLUSION

14 A.R.S. § 33-1812(A) applies to HOA elections whenever “absentee ballots or ballots
15 provided by some other form of delivery are used.” Although the statute does not specify what
16 happens if the statute is violated, the fair import is that failure to retain the ballots, or make them
17 available for inspection, means the votes attributed to those ballots are not valid. This
18 conclusion is supported by A.R.S. § 32-2199 stating that an Administrative Law Judge “shall
19 adjudicate complaints regarding and ensure compliance with” the Planned Communities Act.
20 The only way to “ensure compliance” with the statute is to invalidate all votes attributed to the
21 unretained and undisclosed ballots. Otherwise, an HOA could perpetually ignore the statute
22 without deterrent consequences; an absurd result. *See, Memorandum Decision, Whitmer v.*
23 *Hilton Casitas Homeowners Ass'n*, 1 CA-CV 23-0350 (Ariz. Ct. App. Jan. 30,
24 2024)(recognizing availability of injunctive relief in HOA disputes, and setting forth specific
25 and temporal requirements).

26 //

27 //

1 The Trust requests the following relief:

2 1. A finding by the Court that a ‘ballot’ is defined as:

3 A means, or instrumentality, by which a voter secretly indicates his will or choice
4 so that it may be recorded as being in favor of a certain candidate or for or
5 against a certain proposition or measure. Black’s Law Dictionary 143 (6th ed.
6 1990).

7 2. A finding by the Court that:

8 The term ‘ballot’ as used in A.R.S. § 33-1812, includes any means, or
9 instrumentality, including electronic, which a voter uses to mark his will or
10 choice on paper or electronically so that it may be recorded as being in favor of a
11 certain candidate, or for or against a certain proposition or measure, regardless of
12 how that means or instrumentality is identified or denominated. The term ‘ballot’
13 includes the “user interface” described by the Sunland Springs Village
14 Homeowners Association in their filings and arguments in the prior
15 administrative hearing (Case # 24F-H047-REL).

16 3. An Order vacating the Decision of the Arizona Dept. of Real Estate, dated Nov. 5, 2024,
17 in the Matter of AZNH Revocable Trust (Petitioner) v. Sunland Springs Village
18 Homeowners Association (Respondent) (Case # 24F-H047-REL).

19 4. A finding that the Sunland Springs Village Homeowners Assoc. failed to retain, and
20 make available for inspection, all ballots and related materials used in their 2024 annual
21 election.

22 5. A finding that AZNH Revocable Trust is the prevailing party in this matter.

23 6. An Order that the Respondent shall forthwith reimburse Petitioner the filing fee paid to
24 the Arizona Dept. of Real Estate (five hundred dollars [\$500.00]) pursuant to A.R.S. §
25 32-2199.02(A).

26 7. An Order that the Respondent shall reimburse the Petitioner its costs on appeal,
27 including (but not limited to) the costs for preparation of the administrative hearing

1 transcript, within sixty (60) days of the Petitioner submitting an affidavit of costs to the
2 Court.

- 3 8. An Order, pursuant to A.R.S. § 32-2199.02(A), that Respondent shall, within sixty (60)
4 days of the Order, pay a civil penalty of five hundred dollars (\$500.00) to be deposited
5 into the condominium and planned community hearing office fund established by A.R.S.
6 § 32-2199.05 to offset the cost of administering the administrative law judge function.
- 7 9. An Order that all 1,461 votes attributed to the electronic voting in the Respondent's
8 February 2024 election are invalid *ab initio* and said votes are not to be counted to
9 determine any electoral matter or used to establish a quorum for the 2024 annual meeting
10 of the Sunland Springs Village Homeowners Association.
- 11 10. An Order that Sunland Springs Village Homeowners Association is prohibited from
12 conducting any future electronic election without retaining all ballots and related
13 materials and making those ballots or related materials available for inspection by
14 Association members for a period of one (1) year after the election. Such Order to end
15 no later than five (5) years from the date of the Order, but is subject to renewal or
16 extension by the Court upon cause brought by any Association member. *See,*
17 *Memorandum Decision, Whitmer, supra.*
- 18 11. Such other and further relief as justice requires.

February 3, 2025

Plaintiff/Appellant, AZNH Revocable Trust

By:

/s/ *John F. Sullivan*

John F. Sullivan, Esq. (Bar # 023018)
Attorney for Plaintiff/Appellant
1909 E. Ray Rd., Suite 9198
Chandler, AZ 85225
480-818-5070
Email: Info@SullivanAppeals.com
Facsimile: 480-210-8328

Certification of Word Count

The undersigned hereby certifies this document does not exceed the word limit set by JRAD Rule 8 according to the word count feature of the word processing system used.

CERTIFICATE OF SERVICE

A copy hereof shall be hand-delivered on February 3, 2025, to:
Sunland Springs Village Homeowners Assoc. at their office located at 11214 E. Laguna Azul Circle, Mesa, AZ 85209.

A copy hereof shall be sent by email on February 3, 2025, to:
Atty. Chad Gallacher and Atty. B. Austin Baillio (counsel for Sunland Springs Village Homeowners Assoc.) at their email address: cgallacher@hoalaw.biz and abailio@hoalaw.biz.

Asst. Atty. General Lynette Evans (counsel for Az. Dept. of Real Estate) at her email address Lynette.Evans@azag.gov

Judge Mikitish's Judicial Assistant at joel.grajeda@jbazmc.maricopa.gov.

/s/ *John F. Sullivan*

Attorney for Plaintiff/Appellant