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**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
REPLY BRIEF**

(Unclassified Civil)

**Assigned to
Hon. Joseph Mikitish**

**I. Looks Like a Duck, Walks Like a Duck and Quacks Like a Duck –
It's a Ballot**

The HOA has had two attorneys from the same law firm – Atty. Gallacher for the administrative hearing and Atty. Baillio in this appeal.

1 Throughout this controversy, the Trust has repeatedly recited:

2 The HOA Bylaws require that Association Directors “shall be elected by Members
3 of the Association by electronic or paper ballot” and the HOA “shall provide a
4 ballot by mail or electronically to each Member of the Association.” Petitioner's
5 [Admin. Hearing] Exhibit 2, p.6, secs. 3.2. & 3.3.3. Ms. Fowers testified at the
6 hearing: “Bylaws require secret ballot.” Tr. p. 48, line 9.

7 See Opening Brief, p.3, lines 10-13.

8 Despite that fact, Atty. Gallacher claimed that electronic voters did not use a ballot, but a
9 “user interface” and, therefore, there were no ballots to retain for inspection. At hearing, he
10 argued:

11 The process for casting a vote electronically occurs in a similar form as -- sorry, in a
12 similar manner as using a Google form. The voting homeowner follows a link to a
13 secure website where the homeowner must use a unique identifier to confirm that
14 they are, in fact, a homeowner and they had not voted already. But once logged into
15 the secure website, the voting homeowner engages with an electronic user interface
16 on the computer screen to select their choices of candidates. And then they press
17 submit.

18 Tr. p.13, lines 4-12.

19 Atty. Baillio apparently realizes that electing directors with a “user interface” instead of an
20 electronic ballot, is a violation of the bylaws. His Answering Brief alleges, “voting data” was
21 “captured from [HOA] members who cast their vote through the **electronic ballot user**
22 **interface**” and the voting data includes votes “cast for each proposed action on the ballot.” Ans.
23 Brief, p.4, lines 1-7 (bold added).

24 VoteHOANow’s 50 second video confirms that an electronic ballot is delivered to the
25 voter; the voter makes their selections (or elections) for candidates and propositions, and click’s
26 submit to deliver their ballot to the HOA via VoteHOANow. Nothing happens and no votes are
27 recorded until the voter clicks ‘submit’ on the ballot. (The Trust has mailed VoteHOANow’s 50

1 second video on a flash drive to the Court’s Judicial Assistant.) The HOA manager’s hearing
2 testimony confirms that electronic voters make their elections on the ballot and they “click”
3 submit to have their vote counted. Tr. p.36-37, lines 15-25 and 1-4 respectively.
4

5 **II. O, What a Tangled Web We Weave, When First We Practice to Deceive**¹

6 The following one sentence paragraph from the HOA Opening Brief epitomizes their overall
7 specious argument:

8 “The statute mandates the retention of ballots, envelopes, and related materials in
9 either electronic or paper format but does not prescribe what an ‘electronic ballot’
10 must look like or specify the format in which electronic ballots must be stored.”

11 Opening Brief, p.7, lines 8-10 [referencing A.R.S. § 33-1812(A)(7)].

- 12 1. The statute does mandate retention of ballots and related materials in either electronic or
13 paper format;
- 14 2. The HOA decides (and did decide) what the electronic ballot shall look-like (see Exhibit
15 A, attachments 1 & 2, of the Trust’s memorandum supporting introduction of additional
16 evidence [the HOA-approved electronic ballot]); and,
- 17 3. The statute *does* specify the format in which electronic ballots must be retained (stored) –
18 see #1 above.

19 20 **III. Merely Collecting Votes Does Not Fulfill Statutory Requirements**

21 The HOA has focused its statutory interpretation on “some other form of delivery” as a basis
22 to justify failure to retain for inspection either: the electronic ballots; the ‘user interfaces’; or,
23 the ‘electronic ballot user interfaces’ (however designated). The gist of their argument is that
24 VoteHOANow captures the votes and such capture is “some other form of delivery” so there is
25 no need to retain the ballot. That narrow basis for statutory interpretation ignores the statute as a
26 whole and frustrates legislative intent.

¹ Sir Walter Scott, *Marmion: A Tale of Flodden Field* (Canto 6, stanza 17)(February 1808).

1 The legislature was obviously aware of the provisions of A.R.S. § 10-3708 of the Nonprofit
2 Corporation Act when it required different retention and inspection requirements under A.R.S. §
3 33-1812 of the Planned Communities Act. A.R.S. § 33-1812(A) reads, in pertinent part:

4 The association shall provide for votes to be cast in person and by absentee ballot and,
5 in addition, the association may provide for voting by *some other form of delivery*,
6 including the use of e-mail and fax delivery. Notwithstanding § 10-3708 or the
7 provisions of the community documents, any action taken at an annual, regular or
8 special meeting of the members shall comply with all of the following if absentee
9 ballots or ballots provided by *some other form of delivery* are used:

10 * * *

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

14 A.R.S. § 33-1812(A)(bold, italics added).

15 The leading treatise on Arizona’s Planned Community Act clarifies that “*some other form of*
16 *delivery*” means delivery of a “completed ballot” to the HOA. Scott B. Carpenter, *Community*
17 *Association Law in Arizona*, § 2.16 at 151 (6th ed. 2019). See **Exhibit A** in accompaniment.
18 That interpretation of § 33-1812 illuminates the quintessential difference from § 10-3708 which
19 requires that an “online voting system” “stores electronic votes for recount, inspection and
20 review purposes.” A.R.S. § 10-3708(F).

21 If the Court were to accept the HOA’s interpretation that collecting and storing votes suffices
22 for compliance with § 33-1812, such interpretation would render the ballot retention and
23 inspection requirements § 33-1812 void, superfluous and insignificant – a result which must be
24 avoided. Where possible, the Court’s goal is to interpret each word or phrase of a statute so that
25 no word or phrase is rendered void, superfluous, contradictory or insignificant. Welch-Doden v.
26 Roberts, 202 Ariz. 201, 206 (Ct. App. 2002). “The primary purpose is to determine and give

1 effect to the legislative intent behind the statute, considering among other things the context of
2 the statute, the language used and the spirit and purpose of the law.” *Id.*

3 Given the legislature’s express differentiation between §§ 33-1812 & 10-3708, one must
4 conclude that merely collecting the votes does not fulfill the legislature’s intent that ballots and
5 related materials shall be retained in electronic or paper format and made available for HOA
6 member inspection per § 33-1812(A)(7). The Trust respectfully suggests that the Court should
7 also avoid a *de facto* approval of an election process which violates the HOA Bylaws, *supra*,
8 sec. I.

March 24, 2025

Plaintiff/Appellant, AZNH Revocable Trust

By:

/s/ *John F. Sullivan*

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A copy hereof shall be sent by email on March 24, 2025, to:

Atty. B. Austin Baillio (counsel for Sunland Springs Village Homeowners Assoc.) at his email address: abaillio@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

Exhibit A

PLANNED COMMUNITIES

statutory sanction to a director of a nonprofit corporation voting after a declared conflict of interest is anathema to corporate law and custom.

A.R.S. § 33-1811 is in conflict with the Arizona Nonprofit Corporation Act and creates a problem for those planned communities that are also incorporated as nonprofit corporations. A.R.S. §§ 10-3860 through 10-3864 imposes strict requirements on directors who contemplate “conflicting interest transactions.”⁶⁰ A.R.S. § 10-3862(B)(2) prohibits a director who has a “conflicting interest” with respect to a proposed transaction from participating in the discussions of the matter or voting on the matter. In addition, A.R.S. § 10-3830 requires that directors act in “good faith” and with the “care an ordinarily prudent person in a like position would exercise under similar circumstances.” Therefore, directors who vote on “conflicting interest” transactions in violation of the Arizona Nonprofit Act will do so at significant risk. Although the planned community statute might prevail as being more specific to associations, all directors who are involved in potential conflicting interest transactions would be prudent to recuse themselves from all discussions and votes on any issue that is a conflict of interest, despite the language in A.R.S. § 33-1811.

§ 2.16 Proxies and Absentee Ballots

A.R.S. § 33-1812 sets forth the rules regarding voting absentee ballots and proxies. A.R.S. § 33-1812 states that “after the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy.” Instead, planned community associations must provide for votes to be cast in person and by absentee ballot (and may provide for voting by some other form of delivery⁶¹). The absentee ballot must:

1. Set forth each proposed action;
2. Provide an opportunity to vote for or against each proposed action;

⁶⁰ Addressed herein at § 3.11.

⁶¹ Presumably, this “other form of delivery” refers to other permissible forms of voting without a proxy such as conducting all association business that requires a vote of the membership by mail as authorized by A.R.S. § 10-3708, addressed herein at § 3.4.6.

See highlighted paragraphs on next 2 pages.

COMMUNITY ASSOCIATION LAW IN ARIZONA

3. Specify the time and date by which the ballot must be delivered to the board of directors in order to be counted (this date cannot be any sooner than 7 days after the date the board of directors delivers the unvoted absentee ballot to the member);
4. Not authorize another person to cast votes on behalf of any member; and
5. Shall contain the name, address and signature of the person voting, except that if the community documents permit secret ballots, only the envelope shall contain the name, address and signature of the voter.

The absentee ballot is only valid for one specified election or meeting of the members and expires immediately after the election or meeting. Votes cast pursuant to an absentee ballot are valid for purposes of establishing the quorum. Ballots, envelopes and related materials, including sign-in sheets if used, shall be retained in electronic or paper format and made available for member inspection for at least one year after completion of the election.

Nothing in A.R.S. § 33-1812 requires associations to mail every owner an absentee ballot (although many do in the hope that doing so will increase participation). The association must “provide for” voting by absentee ballot. Logically, mailing is a way to do so.

A.R.S. § 33-1812 contains the following provision, “The association shall provide for votes to be cast in person and by absentee ballot and, in addition, the association may provide for voting by some other form of delivery, including the use of e-mail and fax delivery.” In general, ballots are “delivered” twice – first by the association to the voting member and then by the member, filled out, to the association. Changes to A.R.S. § 33-1812⁶² modified A.R.S. § 33-1812 to allow the association to permissively allow “delivery” by email and fax. Does this solely refer to owners being able to “deliver” their completed ballots to the association via email or facsimile? Or can the association “deliver” the blank ballot to the owner via email or facsimile? The language that the association “may provide for VOTING” by “some other form of delivery including email and facsimile” implies that the “delivery” that is permitted via email and fax is the delivery of the completed ballot to the association. A “best practice” developed requiring

⁶² See SB 1482, 51st Leg., 2nd Reg. Sess. (Ariz. 2014).

PLANNED COMMUNITIES

the association to inform in the meeting notice and ballot whether the association would or would not accept email or facsimile ballots.

Allowing "delivery" of ballots via email or fax is the association's option. The association does not have to allow it. At a minimum, if an association allows voting by email, the association should require that the ballot be scanned and emailed as opposed to an owner simply sending an email to the association with the text "I vote for John for the Board ..."

See "About the Author"
on last page below.

§ 2.17 Removal of Board Members

There are times when the members of the planned community desire to remove the directors of the association. A.R.S. § 33-1813 states that, regardless of what is set forth in the declaration or bylaws of a planned community association, the unit owners, by a majority vote of members entitled to vote and voting on the matter at a meeting of the members called pursuant to A.R.S. § 33-1813 and at which a quorum is present, may remove any member of the board of directors with or without cause (other than a member of the board appointed by the declarant.) This provision, found in A.R.S. § 33-1813, is absolute by its terms.

In order to call a membership meeting to remove directors pursuant to A.R.S. § 33-1813, the following rules apply:

1. If the association has 1,000 or fewer members, if a petition is signed calling for the removal of a member of the board of directors by 25% of the votes in the association or 100 votes, whichever is less, the board of directors must call and provide written notice of a special meeting of the association within 30 days after receipt of the petition.
2. If the association has more than 1,000 members, if a petition is signed calling for the removal of a member of the board of directors by 10% of the votes in the association or 1,000 votes, whichever is less, the board of directors must call and provide written notice of a special meeting of the association within 30 days after receipt of the petition.
3. A quorum is present at a removal meeting of the members held pursuant to A.R.S. § 33-1813 if the number of owners to whom at least 20% of the votes or 1,000 votes, whichever is less, are allocated is present at the meeting in person or as otherwise permitted by law.

COMMUNITY ASSOCIATION LAW IN ARIZONA

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ABOUT THE AUTHOR

Scott B. Carpenter is a founding partner with the law firm CARPENTER, HAZLEWOOD, DELGADO & BOLEN, PLC in Tempe. Mr. Carpenter and Carpenter, Hazlewood, Delgado & Wood, PLC devote their practice of law to the representation of condominium and planned community associations throughout Arizona and New Mexico. Mr. Carpenter is a frequent contributor to continuing legal education courses on the topic of mandatory membership community associations.

Mr. Carpenter graduated from Wheaton College with a B.A. in political science, and from Baylor University School of Law and is licensed to practice law in Arizona, Texas, Colorado, Utah and Oregon. He served as the President of the Central Arizona Chapter of the Community Associations Institute in 2002, a national nonprofit organization dedicated to furthering the interests of community associations, and served on the Community Associations Institute's Business Partners Council. Mr. Carpenter is a member of the national faculty of the Community Associations Institute and received the national Award of Excellence in Government and Public Affairs from the Community Associations Institute in 2004 for his work in improving the body of statutory law governing community associations. He has the distinguished honor of membership in the Community Associations Institute's College of Community Association Lawyers and serves on its Board of Governors.

Mr. Carpenter is a past board member of the Southeast Valley Neighborhood Leadership College, now known as The Leadership Centre, and was named the Brian L. Zemp Instructor of the Year for 2000 and 2001. Mr. Carpenter serves as a Judge Pro Tem of the Maricopa County Superior Court.