

Atty. JOHN SULLIVAN
1909 E. Ray Rd., Suite 9198
Chandler, Arizona 85225
(480) 818-5070
Bar No. 023018
Attorney for Plaintiff

**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

v.

SUNLAND SPRINGS VILLAGE
HOMEOWNERS ASSOCIATION,

Defendant

No. CV2023-096192

**Plaintiff's Memorandum
Supporting
Motion for
Summary Judgment**

Oral Argument Requested

Tier 2 Case

**Assigned to:
Honorable Rodrick Coffey**

1 **I. Introduction**

2 The Defendant ("HOA") has been interpreting and applying A.R.S. §§ 33-1804 ("Open
3 Meeting Law") in a manner which deprives the Plaintiff ("Homeowner") of the exercise and
4 enjoyment of statutory rights, for example:

- 5 • The right to attend and speak during deliberations and proceedings at HOA Board
6 meetings which are required to be open for members.
7 • The right to speak before the HOA Board takes formal action or votes; and,

- The right to receive notices and agendas which provide information reasonably necessary to inform the Homeowner of the matters to be discussed or decided by the HOA Board.

The parties disagree on the construction of the Open Meeting Law, and the HOA denies that it has deprived the Homeowner of the rights granted by the statute. (PSOF # 1 & 2).

The Homeowner seeks declaratory judgment regarding the provisions of A.R.S. § 33-1804. “Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder. A.R.S. § 12-1832.

As used herein (and as used in the Open Meeting Law), the term “members” shall mean ‘members of the HOA.’ The acronym “PSOF” is used herein to identify the supporting statement of facts.¹

II. Statutory Requirements & Legislative Intent

Under subsection A of the Open Meeting Law (summarized):

All meetings of the board of directors are open to all members who shall be permitted to attend and speak at an appropriate time during the deliberations and proceedings. The Board shall permit members 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.

See A.R.S. § 33-1804(A).

Subsection F of the Open Meeting Law states (in full):

It is the policy of this state as reflected in this section that all meetings of a planned community, whether meetings of the members’ association or meetings of the board of directors of the association, be conducted openly and that notices and agendas be provided *in advance* for those meetings that contain the information that is reasonably necessary to inform the members of the matters to be discussed

¹ Personal & Subject matter jurisdiction, as well as venue, are proper in the Superior Court for Maricopa County. (PSOF # 12, 13 & 14). The parties agree this action raises questions of law and not questions of fact, and no witnesses are anticipated. (PSOF # 15).

1 or decided and to ensure that members have the ability to speak after discussion of
2 agenda items, but before a vote of the board of directors or members is taken.

3 Toward this end, any person or entity that is charged with the interpretation of
4 these provisions, including members of the board of directors and any community
5 manager, shall take into account this declaration of policy and shall construe any
6 provision of this section in favor of open meetings.

7 A.R.S. § 33-1804(F) (eff. Sept. 14, 2024) (italicized words “*in advance*” were added to current
8 version; otherwise, current and prior law are identical).

9 Subsection A further states:

10 “Any portion of a meeting may be closed only if that closed portion of the meeting
11 is limited to **consideration** of one or more of the following:”

- 12 1. Legal advice from an attorney . . .;
- 13 2. Pending or contemplated litigation;
- 14 3. Personal, health or financial information about an individual member of the
15 association, an individual employee of the association or an individual employee
16 of a contractor for the association, including records of the association directly
17 related to the personal, health or financial information about an individual member
18 of the association, an individual employee of the association or an individual
19 employee of a contractor for the association.
- 20 4. Matters relating to the job performance of, compensation of, health records of or
21 specific complaints against an individual employee of the association or an
22 individual employee of a contractor of the association who works under the
23 direction of the association.
- 24 5. Discussion of a member’s appeal of any violation cited or penalty imposed by the
25 association except on request of the affected member that the meeting be held in
26 an open session.

27 See A.R.S. § 33-1804(A) (bold added).

28

1 **III. Voting or Formal Action Not Permitted in Closed Meeting**

2 The HOA Board has been regularly taking formal action (voting) in closed meetings. (PSOF
3 # 5). Under the Open Meeting Law, “Any portion of a meeting may be closed only if that
4 closed portion of the meeting is limited to **consideration** of one or more” of five (5) identified
5 matters. A.R.S. § 33-1804(A) (1-5) (emphasis added) *supra*. The HOA *incorrectly* asserts that
6 its Board may take formal action on matters under their consideration in a closed Board meeting.
7 (PSOF # 3).

8 In Arizona, the words and phrases of a statute shall be construed according to the common
9 and approved use of the language. A.R.S. § 1-213. “**Consideration**” is defined as: continuous
10 and careful thought; a matter weighed or taken into account when formulating an opinion or
11 plan; or, an opinion obtained by reflection. Merriam-Webster’s Collegiate Dictionary, 11th Ed.

12 When the definition of “consideration” is combined with the requirement that the Open
13 Meeting Law “shall” be construed in favor of open meetings (*in which members have the*
14 *statutory right to speak “during proceedings” and “speak once after the board has discussed a*
15 *specific agenda item but before the board takes formal action”*) the conclusion is inescapable
16 that taking formal action (or voting) is not allowed in a closed session. The formal action of the
17 Board (or voting) is the act of directing or managing the Association’s business, which is
18 patently distinct from “consideration” of a matter. The legislature’s use of the phrase “any
19 portion of a meeting may be closed” further supports a conclusion that other portions of a Board
20 meeting (such as member comments & board formal actions) must occur openly.

21 Should there be any doubt about the meaning of “consideration,” that doubt must be resolved
22 in favor requiring all formal actions (voting) by the Board be conducted in an open session. See
23 A.R.S. § 33-1804, F (when interpreting the statute, all doubt resolved in favor of open meeting).

24 An analogue for a conclusion that voting is not allowed in a closed session, can be found in
25 *Johnson v. Tempe Elementary School District*, 199 Ariz. 567 (Div. 1, 2000). In *Johnson*, board
26 members (a public body) entered a closed session to obtain legal advice and then voted in closed
27 session to undertake an appeal of a Superior Court judgment.

1 Unlike the planned community Open Meeting Law, public bodies are specifically prohibited
2 from making a final vote or decision at an executive session. A.R.S. § 38-431.03(D) (2024).
3 But the circumstances and rationale in *Johnson* are applicable to, and aligned with, the
4 requirements of the Open Meeting Law.

5 In *Johnson*, the Appeals Court explained that the open meeting law is an effort to ensure that
6 the public can attend and monitor board meetings and, “the public’s right to know and to
7 participate in the decision-making process frequently comes into sharp conflict with the need for
8 confidentiality in certain areas.” *Johnson* at 568. Citing other case law, the Court found that
9 exceptions to the open meeting law “should be narrowly construed in favor of requiring public
10 meetings. Our legislature has declared that ‘any person or entity charged with the
11 interpretations of this article shall take into account the policy of this article and shall construe
12 any provision of this article in favor of open and public meetings.’ ” *Johnson* at 569, citing
13 *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 123 (App. 1995).

14 The *Johnson* Court further found that a closed session for legal advice is limited to discussion
15 or consultation with an attorney and, once that limited purpose concluded, the open meeting
16 statutes required that board members meet in public session to vote. *Johnson* at 570. The Court
17 held: “Under the statute, any discussions concerning strategy and the merits of the case could be
18 conducted in executive session, but the final vote or decision to appeal needed to be public.” *Id.*
19 *See Karol v. Board of Education Trustees*, 122 Ariz. 95, 98 (Ariz. 1979) (The intent of the open-
20 meeting law is that legal actions — proceedings which constitute a decision, commitment or
21 promise made by a majority of the members of a public body – be conducted openly.).

22 Under the planned community Open Meeting Law, open board meetings are required
23 (subsection A, all board meetings “are open to all members”; subsection F, a “policy” that all
24 board meetings “be conducted openly”) but “any portion of a meeting may be closed only if that
25 closed portion of the meeting is limited to **consideration** of” matters specified in subsection
26 A(1-5). The purpose of a closed session is to protect the discussions or deliberations of the
27 HOA Board on qualifying matters just as in *Johnson*, but nothing more.

1 **IV. A.R.S. § 33-1805 Does Not Nullify the Open Meeting Law**

2 The HOA contends that **A.R.S. § 33-1805(B)(3)** allows the Board to take formal action (vote)
3 in a closed session. (PSOF # 4). That statute requires the HOA to make their records available
4 for inspection by members, and it states (in relevant part):

5 “Books and records kept by or on behalf of the association and the board may be
6 withheld from disclosure to the extent that the portion withheld relates to any of
7 the following: . . . 3. Meeting minutes or other records of a session of a board
8 meeting that is not required to be open to all members pursuant to section 33-
9 1804.”

10 A.R.S. § 33-1805(B)(3).

11 The HOA asserts that because meeting minutes would include the Board’s formal actions and
12 because the closed meeting minutes may be withheld from members, the Board is allowed to
13 take formal actions or vote in closed session. (PSOF # 4).

14 But the HOA’s logic is flawed – if closed sessions are “limited to consideration,” then no
15 formal action should occur in closed session. Put another way, all formal actions or voting must
16 be done in open session and be recorded in the open meeting minutes.

17 The two statutes do not conflict; one statute addresses open meetings and the other addresses
18 records inspection. But, if there were a conflict, the more specific statute (§ 33-1804) controls.
19 “[A] well established rule of statutory construction dictates that where two statutes deal with the
20 same subject, the more specific statute controls.” *Pima County v. Heinfeld*, 134 Ariz. 133, 134
21 (Ariz. 1982). The Open Meeting Law makes a very clear policy statement (*supra*) that all Board
22 meetings “be conducted openly” (subject to a very specific, limited exception) and “that
23 members have the ability to speak after discussion of agenda items, but before a vote of the
24 board of directors or members is taken.” A.R.S. § 33-1804(F). And, anyone interpreting the
25 Open Meeting Law is required to “construe any provision of [A.R.S. § 33-1804] in favor of
26 open meetings.” *Id.* Thus, the more specific dictates of the Open Meeting Law control in any
27 conflict with § 33-1805.

28

1 **V. Open Board Meeting Required Prior to a Closed Meeting**

2 The Open Meeting Law requires:

3 Before entering into any closed portion of a meeting of the board of directors, or on
4 notice of a meeting under subsection D of this section that will be closed, the board shall
5 identify the paragraph under subsection A of this section that authorizes the board to
6 close the meeting.

7 A.R.S. § 33-1804(C) (subsection D establishes the minimum requirements for Board meeting
8 notices). The HOA acknowledges the requirements subsection C. (PSOF # 6).

9 The key requirement of Subsection C (*supra*) is “the board shall identify the paragraph under
10 subsection A of this section that authorizes the board to close the meeting.” Such Board action
11 does not qualify for a closed meeting under subsection A, 1-5. Therefore, this Board action
12 must be conducted in an open session and comply with all open meeting requirements.

13 The HOA has seven board members. Records show the Board *has not* (at any recent time)
14 identified the subsection which authorizes a closed session. (PSOF # 7 & 8). The HOA has
15 disclosed that prior to all Board meetings the HOA community manager decides which matters
16 appear on an open meeting or closed meeting agenda, and prepares proposed meeting agendas.
17 (PSOF # 8). Thereafter, the Board President meets with the HOA manager to review the
18 proposed meeting agendas to confirm that each item has been placed on the correct agenda.
19 (PSOF # 8). At that time, the Board president approves the Board’s open and closed meeting
20 agendas. (PSOF # 8).

21 The above procedure does not comply with the requirement that “the Board” identify the
22 applicable paragraph which authorizes a closed meeting.

23 The HOA has stated:

24 “Before each closed executive session, the Association posts a notice identifying
25 the applicable subsection(s) of A.R.S. § 33-1804 that permit the Board to conduct
26 a closed meeting. Therefore, it is the Association’s contention that it fully
27 complies with the requirements set forth in A.R.S. § 33-1804(C) by identifying on

1 the executive meeting notice the applicable statutory subsection authorizing the
2 Board to conduct a closed meeting.”
3 (PSOF # 9).

4 Once again, the above procedure does meet the requirement that “the Board” identify the
5 subsection which authorizes a closed meeting *and* it does not meet the requirement for making
6 such identification (a formal Board action) in an open meeting.

7 The HOA’s failure to conduct an open meeting is part of a scheme which deprives the
8 Homeowner of rights granted under the Open Meeting Law. See below, Deficient Agendas &
9 Meeting Notices.

10 11 **VI. Deficient Agendas & Meeting Notices**

12 Prior to Sept. 14, 2024, the Open Meeting Law (subsection D) required “notice to members of
13 meetings of the board of directors shall be given at least forty-eight hours in advance of the
14 meeting.” And prior to Sept. 14th, subsection E(1) stated, “The agenda shall be available to all
15 members attending.”

16 The current law (eff. Sept. 14, 2024) now requires (changes in **bold**):

- 17 • under subsection D, “notice to members of meetings of the board of directors
18 **and agendas** shall be given at least forty-eight hours in advance of the
19 meeting.”
- 20 • under subsection E(1), “The agenda shall be available **in advance for all**
21 members attending.”
- 22 • under subsection F, “It is the policy . . . that notices and agendas be provided **in**
23 **advance** for . . . [all board] meetings that contain the information that is
24 reasonably necessary to inform the members of the matters to be discussed or
25 decided.”

1 The HOA has regularly issued notices of closed meeting dates (PSOF # 9 & 10)², but has also
2 regularly avoided statutory disclosure requirements with intent to conceal information from
3 members through these methods:

- 4 • The HOA’s closed meeting notices lacked required information about the matters to be
5 discussed or decided. (PSOF # 9 & 10).
- 6 • The HOA meeting notices misrepresent that closed meetings are mandatory by law: “Per
7 Arizona state law, there are some topics of Association business that are considered
8 confidential, and are not open to homeowners or residents unless specifically invited by
9 the Board.” (PSOF # 11).
- 10 • The HOA has regularly created agendas for (and the Board met in) closed meetings
11 without a prior *open Board meeting* to authorize a closed session (PSOF # 7 & 8) and,
12 because members cannot attend closed meetings (PSOF # 10) and because the agenda
13 was only available to members attending the meeting [statute subsection E(1)], the HOA
14 did not provide members with agendas for closed meetings [thus, concealing information
15 about matters to be discussed or decided].

16 Using the above scheme of concealment, the Board took formal action (or voted) on
17 significant amounts of HOA business in complete secrecy. (PSOF # 5). Some examples (*in*
18 *closed meetings*) the Board: authorized a budget line item of \$917,000.00³; granted the
19 contracted community manager discretionary spending up to \$7,000.00⁴; addressed thirteen
20 (13) age waivers (HOA is age 55+ restricted community); and, authorized foreclosure actions
21 against two homeowners. (PSOF # 17 for all). The HOA Board met nine (9) times in closed
22 session and took formal action (voted) on eighty-five (85) matters between Jan. 2023, and April
23 2024 (PSOF # 5)⁵ and, because of the HOA’s concealment scheme, no information about those
24 meetings was ever disclosed to the Homeowner or other members.

² HOA admits the documents they produced to Homeowner are records of regularly conducted activity within the meaning of Ariz. R. Evid. 803. (PSOF # 16).

³ This matter does not qualify for a closed session under A.R.S. § 33-1804(A)(1-5).

⁴ *Ibid.*

⁵ The time period for which the HOA produced records.

1 Had the Board met in open session (as required) to identify the statutory subsection
2 authorizing a closed meeting, a properly composed open meeting agenda would have revealed
3 the information reasonably necessary to inform the Homeowner and other members of the
4 matters to be discussed or decided, and allowed the Homeowner and other members to speak
5 about those matters (prior to Board action); all as required by subsection F.

6 In August 2024, the HOA began providing members with agendas for closed Board meetings.
7 See **Exhibit A** (Affidavit of Susan Sullivan and recently published closed meeting agendas for
8 Aug. 16, 2024 & Sept. 9, 2024). Although the agendas were published before Sept. 14th, the
9 publishing of them is evidence of what to expect under the current law; especially in light of the
10 past practice of keeping closed meeting agendas secret. Neither of these agendas provide the
11 required information to inform members of the matters to be discussed or decided at the closed
12 Board meeting.

13 It is the Homeowner's position that both the past and current practices of the HOA are non-
14 compliant with the requirement that meeting notices and agendas be provided to members for all
15 Board meetings, and that such notices and agendas contain the information reasonably necessary
16 to inform the members of the matters to be discussed or decided. Closed meeting notices
17 produced by the HOA are attached to PSOF as Exhibit B. (PSOF # 9 & 10).

18 Here are the agenda items from the Sept. 9th closed meeting agenda (part of Exhibit A):

19 I. CALL TO ORDER

20 II. MINUTES

21 III. § 33-1804.1 LEGAL ADVICE

22 IV. § 33-1804.2 PENDING OR CONTEMPLATED LITIGATION

23 V. § 33-1804.3 PERSONAL/HEALTH/FINANCIAL INFORMATION

24 ABOUT INDIVIDUAL MEMBER OR EMPLOYEE OF CONTRACTOR

25 VI. DELINQUENCY REVIEW

26 VII. NON-COMPLIANCE

27 VIII. ADJOURNMENT

1 The above agenda (just like the Aug. 16th agenda) lacks the information reasonably necessary to
2 inform the members of the matters to be discussed or decided. The past and current practices of
3 the HOA warrant a declaration from the Court on the proper interpretation and application of the
4 statutory requirements for Board meeting notices and agendas.

5 **VII. Conclusion**

6 Open meetings provide homeowners with an opportunity to observe and participate in the
7 direction and management of the affairs and business of the Association. Meeting notices and
8 agendas alert homeowners to the matters under consideration by the Board, and the meeting
9 itself provides homeowners with an opportunity to speak about any matter before the Board
10 votes. Open meetings also provide homeowners with an opportunity to scrutinize the conduct of
11 the Board members and form an opinion about whether the Board is conducting business and
12 spending money in a manner which best serves the interests of the homeowners. The Open
13 Meeting Law is intended to preserve homeowner observation of, and participation in, Board
14 meetings and to narrowly restrict closed meetings to “consideration” of specific matters.

15 Historically, the HOA has been interpreting and applying the Open Meeting Law to minimize
16 information about their Board’s formal actions and deprive the Homeowner of the exercise and
17 enjoyment of open meeting rights, to wit:

- 18 • The HOA has failed to construe the provisions of the Open Meeting Law in favor of open
19 meetings and has held closed session meetings which were *not limited* to “consideration”
20 of authorized matters and thereby denied the Homeowner the right to attend and speak
21 before Board action (or at other times) at what should have been a required open meeting.
- 22 • The HOA has routinely failed to provide meeting notices and agendas for closed Board
23 meetings which contain the information that is reasonably necessary to inform the
24 Homeowner of the matters to be discussed or decided.
- 25 • The right to attend, and speak at, an open Board meeting where the Board identifies the
26 subsection of the Open Meeting Law which authorizes a closed meeting.

1 To determine the questions of construction and validity, and to declare the rights, status or
2 other legal relations under the Open Meeting Law (A.R.S. § 33-1804), the Homeowner
3 respectfully requests:

- 4 i. A declaration from this Court that, as used in A.R.S. § 33-1804(A), the word
5 ‘consideration,’ according to its common and approved use, means: continuous
6 and careful thought; a matter weighed or taken into account when formulating an
7 opinion or plan; or, an opinion obtained by reflection.
- 8 ii. A declaration from this Court that, to comply with the Open Meeting Law, a
9 closed meeting of the HOA Board of Directors is limited to **consideration** of the
10 matters identified in A.R.S. § 33-1804, (A)(1-5), and that there is nothing in the
11 Planned Communities Act (Title 33, Chapter 16 [A.R.S. §§ 33-1801 to 1820])
12 which allows the HOA Board of Directors to take formal actions, to vote, to make
13 collective decisions or to commit the HOA to any action or inaction in a closed
14 meeting.
- 15 iii. A declaration from this Court that, to comply with the Open Meeting Law, all
16 Board of Directors formal actions or voting must occur in an open session
17 meeting.
- 18 iv. A declaration from this Court that, to comply with the Open Meeting Law, the
19 Board of Directors must meet in open session (in compliance with all open
20 meeting requirements) prior to any closed meeting and, at an open meeting, act as
21 a group to identify the statutory subsection of A.R.S. § 33-1804(A)(1-5) which
22 authorizes a closed meeting.
- 23 v. A declaration from this Court that, to comply with the Open Meeting law, all
24 agendas (including agendas for closed meetings) and meeting notices must contain
25 the information that is reasonably necessary to inform the members of the matters
26 to be discussed or decided, and that reciting the statutory subsection which
27 authorizes a closed meeting is not sufficient (by itself) to provide the information
28 necessary to inform members of the matters to be discussed or decided.

- 1 vi. A declaration from this Court that, to comply with the Open Meeting law, the
2 HOA Board and the HOA community manager have an obligation to construe
3 A.R.S. § 33-1804 in favor of open meetings;
- 4 vii. A declaration from this Court that the Open Meeting Law provides the following
5 rights to the Homeowner:
- 6 a. The right to speak (subject to reasonable time restrictions) after the HOA
7 Board has discussed a specific agenda item but before the Board takes
8 formal action on that item in addition to any other opportunities to speak
9 (*statute subsections A & F, supra*);
- 10 b. The right to attend HOA Board meetings which are required to be open for
11 the Homeowner's attendance (*statute subsections A & F, supra*);
- 12 c. The right to receive notices and agendas for all HOA Board meetings that
13 contain the information that is reasonably necessary to inform the
14 Homeowner of the matters to be discussed or decided (*statute subsections*
15 *D & F, supra*); and,
- 16 d. The right to speak (subject to reasonable time restrictions) at open HOA
17 Board Meetings at an appropriate time during the deliberations and
18 proceedings (*statute subsection A, supra*).

19 The Homeowner further requests its costs pursuant to A.R.S. § 12-1840.

20 The Homeowner respectfully requests such other and further declarations or relief for the
21 Homeowner as this Honorable Court deems appropriate and proper.

22
23 Dated: Sept. 24, 2024

/s/ *John F. Sullivan*

24 John F. Sullivan, Esq. (Bar # 023018)
25 Attorney for Plaintiff
26 1909 E. Ray Rd.
27 Suite 9198
28 Chandler, AZ. 85225 480-818-5070
29 email: Info@SullivanAppeals.com
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CERTIFICATE OF SERVICE

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A copy hereof was served this date upon Defense counsel via the Court’s electronic filing service.

/s/ John F. Sullivan

John F. Sullivan, Esq. (Bar # 023018)
Attorney for Plaintiff