Clerk of the Superior Court
*** Electronically Filed ***
L. Sanchez, Deputy
10/28/2024 4:41:16 PM
Filing ID 18757586

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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 v. **SUNLAND SPRINGS VILLAGE HOMEOWNERS ASSOCIATION**, Defendant	No. CV2023-096192 **Plaintiff's Reply Brief on Motion for Summary Judgment** ***Oral Argument Requested*** **Tier 2 Case** **Assigned to: Honorable Rodrick Coffey**

I. No Material Facts Are In Dispute

The Defendant ("HOA") filed a "Response" to Plaintiff's Motion for Summary Judgment and, as explained herein-after, did not dispute any material facts.

With its Response, the HOA filed a "Statement of Facts in Opposition"[1] ("HOA filing") which has two sections: the HOA "disputes" Homeowner's facts 8, 10 & 11; and, a "Statement of Facts in Opposition."

a. HOA "Disputes" Homeowner's Facts 8, 10 & 11 – But Not Really

The HOA states, "Defendant disputes Plaintiff's asserted facts Nos. 8, 10 and 11." But, their so-called 'dispute' for facts 8, 10, & 11, is merely a criticism that the Plaintiff

[1] The full caption is "Defendant's Response to Plaintiff's Statement of Facts Supporting Summary Judgment and Defendant's Separate Statement of Facts in Opposition."

("Homeowner") did not quote the entire paragraph where the relevant and material facts are found. They give no explanation of how the full paragraphs they quote differ from, or alter, the relevant and material facts cited by the Homeowner. The HOA does not claim that any part of the Homeowner's statement of facts is inadmissible evidence. And, they did not identify any legal basis for their objection as required by Ariz. R. Civ. P. 56(c)(4) nor did they specify the admissible parts of the record that establish a dispute as required by Ariz. R. Civ. P. 56(c)(3)(B)(i).

b. Homeowner Objects to HOA Statement of Facts

The HOA statement of facts has 15 entries. Entries 1-4 and 7, are facts already in the record and are not in dispute. The remaining 10 entries are arguments or opinions, not facts.

For example, entries # 8 & 9:

> 8. The legislative intent of A.R.S. § 33-1804 (A) and (F) promote and encourage open session meetings. **(Complaint & Answer ¶¶ 10 and 11 – Exhibits A & B).**
>
> 9. The plain language of A.R.S. § 33-1804 does not provide any member of SSV HOA the absolute right to attend every Board meeting, or to speak on every single agenda item prior to the Board taking formal action. **(SSV HOA Amended Response to Interrogatory #3, p.4, lines 14-16 and 26-28, continuing to p.5, lines 1-4 – Exhibit F).**

Civil Rule 56(c)(3) prohibits the HOA from including inadmissible opinion statements or legal argument in their statement of facts.

> A 'fact' is 'a thing that is indisputably the case' or 'the truth about events as opposed to interpretation.' *Fact*, THE NEW OXFORD AMERICAN DICTIONARY (2001); *see also Fact*, BLACK'S LAW DICTIONARY (10th ed. 2014) ('Something that actually exists; an aspect of reality'); *Fact*, WEBSTER'S THIRD NEW

> INTERNATIONAL DICTIONARY UNABRIDGED (1981) (defining 'fact' as 'a thing done' or 'something that has actual existence').

Flowers v. ZBR Holdings, LLC, No. 05-16-00345-CV, at *8 (Tex. App. Aug. 15, 2017). The opinions or arguments of the HOA are not facts and they are not admissible as evidence. In ruling on summary judgment, the trial court should only consider those facts that would be admissible in evidence. *In the Matter of 1996 Nissan Sentra*, 201 Ariz. 114, 117 (Div. 2, 2001).

In their Response, the HOA cites the arguments and opinions contained in their purported statement of facts to support their Response; in other words - bootstrapping. For all the above reasons and pursuant to Ariz. R. Civ. P. 56(c)(3), the Homeowner respectfully requests that the Court reject the HOA's arguments or opinions in their entries 5 thru 6, and 8 thru 15, of their purported statement of facts.

c. Correction of Typographical Error

The HOA filing identified a typographical error in item # 8 of Plaintiff' Statement of Facts – there is an incorrect cite to the record where the stated facts are found. For the sole purpose to correct that typo, a CORRECTED Plaintiff's Statement of Facts has been filed separately with this Reply. There is no change to the facts.

II. <u>Summary Judgment May Be Granted</u>

In their Response, the HOA incorrectly claims:

> Should there be even the slightest doubt as to the operative facts, the court must deny summary judgment. Similarly, if there are any controverted issues of material fact, the court should categorically deny summary judgment.

HOA filing, p.2, lines 20-23, citing *Phoenix Feed & Seed Co. v. Adams*, 78 Ariz. 292, 296 (**1955**) and *Farmers Ins. Co. of Arizona v. Vagnozzi*, 138 Ariz. 443, 448 (**1983**). The HOA's cited standard has been abrogated by *Orme School v. Reeves 166 Ariz. 301* (1990).

In the next paragraph, the HOA states:

> Plaintiff brings this declaratory judgment action alleging that SSV HOA's construction and application of A.R.S. § 33-1804 deprives him of certain statutory rights. Fundamentally, the parties disagree on the construction and application of A.R.S. § 33-1804. Both parties agree that this action raises questions of law not fact.

HOA filing, p.2, line 28 continuing to p.3, lines 1-4.

Most notably, the HOA's Response is devoid of any factual dispute; it consists entirely of argument that the HOA is properly interpreting the law and that the Homeowner's interpretation of the statute is wrong.

The purpose of summary judgment "is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." *Orme School v. Reeves*, 166 Ariz. 301, 305 (Ariz. 1990).

There is no jury trial in this declaratory judgment action, and there is never going to be a jury. The Court, by itself, is the fact finder, so summary judgment shall not deprive the HOA of a jury trial. The HOA does not dispute the material facts, so the only remaining issue is interpretation and application of A.R.S. § 33-1804; a question of law.

III. <u>Interpretation and Application of A.R.S. § 33-1804</u>

The HOA correctly asserts:

> Courts may not "read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself." *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965). Additionally, a "court will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions." *State ex rel. Morrison v. Anway*, 87 Ariz. 206 (1960).

The above principles have been restated many times. See, e.g., *Empire Sw. LLC v. Ariz. Dep't of Revenue*, 422 P.3d 1082, 1086 (Div. 1, 2018):

> A statute's language is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction. The legislature is presumed to express its meaning as clearly as possible and therefore words used in a statute are to be accorded their obvious and natural meaning. Moreover, we may not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions, and we cannot read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself.

Empire at 1086. Citing *Ariz. Sec. Ctr., Inc. v. State*, 142 Ariz. 242, 244 (App. 1984); *Deatherage v. Deatherage*, 140 Ariz. 317, 320 (App. 1984); *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, (1965); and, *State ex rel. Morrison v. Anway* , 87 Ariz. 206, 209 (1960).

The legislature clearly stated their intent in A.R.S. § 33-1804(A), (C) & (F). A.R.S. § 33-1804(A) requires (in summary):

> All board of directors' meetings are open to all members of the association and all members so desiring shall be allowed to attend and speak at an appropriate time during the deliberations and proceedings. The board shall allow a member 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.
>
> * * *
>
> A portion of a board meeting may be closed only if that closed portion of the meeting is limited to consideration of one or more of the following:
>
> 1. Legal advice from an attorney;
> 2. Pending or contemplated litigation;
> 3. Personal, health or financial information about an individual;

4. Matters relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor;
5. Discussion of a member's appeal of any violation cited or penalty imposed by the association except on request of the affected member that the meeting be held in an open session.

Ariz. Rev. Stat. § 33-1804(C) states, in full:

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

A.R.S. § 33-1804(F) 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 or decided and to ensure that members have the ability to speak after discussion of agenda items, but before a vote of the board of directors or members is taken. Toward this end, any person or entity that is charged with the interpretation of these provisions, including members of the board of directors and any community manager, shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.

The HOA filings have acknowledged the above statutory provisions and the principles of statutory interpretation. But, nonetheless, the HOA claims that the HOA Board is not required to meet in open session when identifying the subsection of A.R.S. § 33-1804(A)

which authorizes a closed portion of a Board meeting. HOA Response p.8, sec. 7. That claim is plainly wrong.

The HOA ignores their own words in their Response: "By default, Board meetings and association meetings are open and accessible to all members unless enumerated topics are discussed." HOA Response, p.6, lines 15-16. The Board's duty to identify the applicable subsection for a closed portion of a meeting is ***not*** one of the enumerated matters which allow the Board to hold a closed portion of a meeting. Therefore, the Board must comply with all open meeting requirements when identifying the applicable subsection which allows a closed portion of a meeting. And, the Legislature has specified that it is the policy of this state, among other things, that notices and agendas be provided in advance for those meetings which contain the information that is reasonably necessary to inform the members of the matters to be discussed or decided and to ensure that members have the ability to speak after discussion of agenda items, but before a vote of the board of directors is taken. A.R.S. § 33-1804(F).

IV. The Arizona Attorney General Opinion: Interpretation & Application of A.R.S. § 33-1804

The HOA's Response cited excerpts from Op. Ariz. Att'y Gen. I97-012 (1997) ("AG Opinion") which answered an inquiry from the Arizona House of Representatives. That Opinion is attached as **Exhibit A**. The HOA cited this Opinion to bolster its argument that the HOA Board may vote in closed session. But, to the contrary, the AG Opinion strengthens the Homeowner's use of *Johnson v. Tempe Elementary School District*, 199 Ariz. 567 (Div. 1, 2000) to establish that the HOA Board is prohibited from taking formal action (or voting) in a closed session.

The question posed to the Attorney General ("AG") was "whether the board of directors ("Board") of a homeowners association of a planned community can hold informal meetings to merely discuss, but not vote on or approve, Board matters without

providing notice to association members and giving them the opportunity to attend." AG Opinion, p.1.

The AG presented a comprehensive analysis of A.R.S. § 33-1804, and in doing so, the AG explained that the public body "Open Meeting Law" (A.R.S. § 38-431, et seq.) was not applicable to planned communities, but did recognize that "statutes with the same general purpose should be construed together, even if the statutes do not reference one another or are in different chapters of the A.R.S." Citing *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970). AG Opinion, pp. 2-3. "Open Meeting Law" is the term used in the AG Opinion to reference A.R.S. § 38-431, et seq. – the public body open meeting law. For consistency, that term is used herein-below.

In the AG's analysis, he used the Open Meeting Law and A.R.S. 1-216(B), to piece these components together and conclude that anytime an HOA "Board meets and discusses board matters, either formally or informally, that constitutes a meeting and the Board must follow the open meeting and notice requirements of A.R.S. § 33-1804." AG Opinion, p.3.

The AG further stated that § 33-1804 permits all association members to attend and listen to the deliberations and proceedings of the HOA Board. *Id*. But, also observed that § 33-1804 did not define deliberations or proceedings. *Id*. The AG then used the Open Meeting Law to guide his analysis:

> In the context of the Open Meeting Law, we previously concluded that 'deliberations' include any exchange of facts that relate to a matter which foreseeably might require some final action .... Ariz. Att'y Gen. Op. 179-4; see also Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors, 69 Cal. Rptr. 480, 485 (App. 1968) (deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision). 'Proceedings' encompasses one step or a series of steps to accomplish something. WEBSTER'S THIRD NEW INT'L DICTIONARY 1807 (1993). The Legislature's use of the

terms ‘deliberations’ and ‘proceedings’ indicates that the two terms are separate and distinct steps of the decision-making process that must be open to the association’s members.” *Id*., pp. 3-4.

The AG also concluded that the legislative purpose of the Planned Communities Act was “to open Board meetings and enhance homeowner’s rights by allowing them to attend the meetings.” *Id*. The AG continued, “This intent parallels the intent behind the Open Meeting Law, which is to open the conduct of government business to the public’s scrutiny and to prohibit decision-making in secret.” *Id*.

Therefore, it is entirely appropriate for this Court to consider the circumstances and rationale in *Johnson* (199 Ariz. 567), *supra*, to interpret and apply A.R.S. § 33-1804 in this case. In so doing, the Court shall likely find that the Legislature’s specific, expressed policies in A.R.S. § 33-1804 require that all formal actions (or voting) by the HOA Board must be done in an open session in conjunction with all other open meeting requirements of the statute.

Dated: Oct. 28, 2024

/s/ *John F. Sullivan*

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CERTIFICATE OF SERVICE

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

/s/ *John F. Sullivan*

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