IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AZNH REVOCABLE TRUST, Plaintiff, vs. SUNLAND SPRINGS VILLAGE HOMEOWNERS ASSOCIATION, Defendant.	No. CV2023-096192

Phoenix, Arizona
February 10, 2025
3:00 p.m.

BEFORE THE HONORABLE RODRICK COFFEY

TRANSCRIPT OF PROCEEDINGS

Oral Argument

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

MALEAH GILLETTE
Transcriptionist

I N D E X

February 10, 2025

M I S C E L L A N E O U S

APPEARANCES

February 10, 2025

Judge: Rodrick Coffey

For the Plaintiff:

John Sullivan

Witnesses:

None

For the Defendant:

Tehaura R. Henning

Witnesses:

None

Phoenix, Arizona

February 10, 2025

(The Honorable Rodrick Coffey Presiding)

ORAL ARGUMENT:

THE COURT: Good afternoon. We're on the record in CV2023-096192. It is the matter of AZNH Revocable Trust v. Sunland Springs Village Homeowners Association. Please announce appearances.

MR. SULLIVAN: Attorney John Sullivan for AZNH Revocable Trust.

THE COURT: Thank you.

MS. HENNING: Attorney Tehaura Henning, on behalf of the Homeowners Association.

THE COURT: All right. Thank you. So we were scheduled to have oral argument on Plaintiff's motion for summary judgment on January 3. Not sure why, Mr. Sullivan, but you didn't call in that day, so we rescheduled it for today. I've read the motion and response and reply. It's your motion, Mr. Sullivan. So we'll start with you.

MR. SULLIVAN: Thank you, Judge. The Sunland Springs Village is a community -- a planned community -- of about 2,500 homes, and it has about 4,000 residents. The homeowners pay annual assessments to the Homeowners Association, and there's a seven-member elected board that's been in place since 2019, when the developer left the community. And they operate the

the HOA.

And open board meetings are very important. Every year, millions of dollars are collected and spent in operating the community. And the default requirement under the planned community open meeting statute, which is 33-1804, requires open meetings. A closed board meeting is allowed if the board follows several procedural steps. One of the procedural steps is found in subsection C of the statute, and it requires the board to identify the statutory paragraph in subsection A that allows a closed meeting.

But the board hasn't been doing that. What's been happening is that the HOA manager has been deciding what matters appear on an open or closed meeting agenda, and then prepares proposed agendas for those meetings. And then the board president meets with the community manager to review the proposed agendas. And at that time, the board president approves the open and closed meeting agenda.

And that doesn't comply with the statutory requirements. As I said, the statute requires the board -- and not just the president of the board -- but the board acting as a group to identify the paragraph allowing a closed meeting. The statute does not allow a closed meeting for that purpose. Consequently, because that's an act of the board, that act must be conducted in an open session, and all of the open meeting requirements apply.

The requirement of a notice and agendas that provide information necessary to inform homeowners of the matters to be discussed or decided. The homeowner must be allowed to attend the open meeting, and homeowners must be allowed to speak before the board acts on any matter. So the process they've been following doesn't comply with the requirements for having a closed meeting.

And then in the closed sessions, the board has been voting, and it's our position that the statute doesn't allow voting in a closed session. The statute limits a closed session to consideration, and that's the word the statute uses. It says consideration, and consideration of a qualifying matter. There's no definition of consideration in the statute. So then we, following Arizona law, we would apply the common and approved use of the word.

And consideration has been defined by Merriam-Webster's Dictionary as continuous and careful thought, a matter weighed or taken into account when formulating an opinion or plan, or an opinion obtained by reflection. And as I said, that's Merriam-Webster's Collegiate Dictionary, 11th edition.

And I'm suggesting to the Court, Judge -- and I think it's clear that when you combine the definition of consideration with the policy statement that the legislature has specifically placed in the statute, which is that meetings

are to be conducted openly, that notices and agendas must be provided to provide the necessary information, and that homeowners must be allowed to speak before the board acts or votes, and that the statute must be construed in favor of open meetings -- I believe the conclusion is inescapable, that taking formal action or voting is not allowed in a closed session.

The formal action of the board or voting is the act of directing or managing the Association's business, which is patently distinct from consideration of a matter. So it's our position, Judge, that they can conduct a closed session if they follow the steps that follow up to a closed session. And they can give consideration, which is basically deliberation on an issue. But if they have a decision to take formal action, or they want to vote, they need to do that in an open session.

THE COURT: So let me ask a question though, because in looking at the relief you've asked for, it's a number of declarations from the Court about what the statutes say or what they must do. I'm struggling with this a little bit because, typically, what the Court is going to do is look at, someone took a particular action, they did this on a certain day, or they didn't do this on a certain day. And the question is whether that's a violation of the law. It's sort of unusual for the Court to be asked to declare what the statute says or what it means. And I'm trying to understand why that's an

appropriate request of the Court on a summary judgment motion. So maybe you can help me with that.

MR. SULLIVAN: Well, Judge, under the summary judgment statute, 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. And what we're saying, and I think we've demonstrated in our factual statement, is that there's a pattern of conduct where the HOA is not complying with the open meeting requirements.

And that has to do with the way they're initially setting up their closed meetings. What happens with the closed meetings is that the board president and the HOA manager are making a decision, rather than the board, as to what's supposed to appear on the closed meeting agenda. And then it goes on to the closed meeting agenda, and then no agenda or notice is published to the owners about what it is that they're going to discuss or decide. And then they go into a closed meeting and they discuss or decide an issue, and whatever action they take is never revealed because it's just never disclosed.

So from beginning to end, there are issues that are considered and decided that the membership, and in particular the AZNH Revocable Trust, has absolutely no idea about. And in fact, there were 85 instances of matters that they acted on

that just were not disclosed to the homeowners. And so it's our position that we're entitled to the Court's intervention here to tell the parties what the rights of the parties are, and what the statute requires of each party -- or in this case, at least the HOA, Judge.

THE COURT: And that's pursuant to the declaratory judgment statute?

MR. SULLIVAN: Right, Judge. We're not looking for coercive relief. We're just looking for you to say, hey, folks, this is what the statute requires.

THE COURT: Okay. Okay.

MR. SULLIVAN: Does that address your question, Judge?

THE COURT: It does.

MR. SULLIVAN: All right. Now, the other thing I'd like to talk about is the meeting notices and agendas. There's some examples of notices of agendas, with the facts and the reply brief. And it's our position that they lack the required information. And the statute is not particularly helpful about what would be required information.

So we're going to rely for guidance on Karol v. Board of Education/Trustees, which is 122 Arizona 95, which is a Supreme Court decision -- Arizona Supreme Court decision from 1979. And it explains the public body open meeting minimum notice requirements. And we're suggesting that the intent of

the open meeting statute requires that all board meetings be preceded by disclosure of information sufficient to apprize the homeowners of the basic subject matter for discussion or decision, so that a homeowner, or any person attending, can scrutinize the action taken during the meeting.

And we realized that the statute itself doesn't necessarily help in that regard. But we think that, under the doctrine of in pari materia, that Karol v. Board of Education is a good guide in that regard. And if you look at the notices and agendas, all they really do is they insert a number, an item number, and then they follow the number, the item number, on the agenda with a statutory reference.

So for instance, one statutory reference might be Section 33-1804.3, as they put it on the notice, that it's personal health financial information about individual member or employee of contractor. It just recites the grounds by which they can hold a closed session. But it doesn't tell us the substantive essence of what it is that they're going to disclose. It's just a very broad and vague description. They need something more specific than that. That's our argument on that, Judge.

It's our position that the current practices of the meetings, as I said, when they conduct these closed meeting sessions, their process hides the board's actions and shields them from scrutiny or accountability by the homeowners. And in

doing so, it deprives the homeowners, and in particular, AZNH Revocable Trust, of the right to receive notices and agendas which provide the information reasonably necessary to inform homeowners of the matters to be discussed or decided. It deprives us of the right to attend the meetings, which are required to be open, and it deprives us of the right to speak before the board votes on or takes formal action. And it deprives us of the right to have the statute interpreted in favor of open meetings.

THE COURT: What about the Defendant's argument that HOAs are not public bodies and not within the scope of the open meeting laws?

MR. SULLIVAN: Well, that's true, Judge. What we're saying is, is that because there isn't anything, that we can point to anyways, that discusses the requirements as they apply to a planned community. That the doctrine of in pari materia allows you to consider, for whatever persuasive value it has, other areas of the law. And there's actually a very big discussion on the public policy behind the planned community open meetings, in the opinion of the Attorney General, which is opinion 97-012. That was raised by the HOA in its response, and we addressed it in our reply, and we attached the entire opinion to the reply. And I think if you look at that, you'll find that very persuasive about what should be required for the planned communities.

Now, Judge, our statement of facts and memorandum and reply brief provide, I think, comprehensive detail on the facts, the law, and the argument that we're applying. And our memorandum sets forth, as you noted, our requested relief. So unless there's something specifically you want me to discuss, you've said you've read those documents, so I don't want to just fill your courtroom with air. I'd be happy to answer any questions. Otherwise, I think I've summarized our position, Judge.

THE COURT: Well, let me give -- yes, since we're about halfway through our allotted time, let me give Ms. Henning a chance to respond, and then you'll get the last word, Mr. Sullivan.

So Ms. Henning.

MS. HENNING: Yes. Thank you, Your Honor. And thank you, Mr. Sullivan. We believe, certainly my client believes, that the relief sought is entirely inappropriate and completely overbroad. Even pursuant to the declaratory judgment action statute, we believe that Mr. Sullivan's motion -- and unfortunately, because he is both Plaintiff as well as Plaintiff's counsel -- I intend no offense to Mr. Sullivan, but Mr. Sullivan's motion consists of unsupported legal conclusions, inapplicable case law, specifically the Johnson matter, and a fundamental lack of common sense. That his statutory interpretation, when taken to its logical conclusion,

would yield absolutely absurd, untenable, and impractical results.

Mr. Sullivan essentially asked the Court to second-guess the collective decision-making process of the HOA, a common interest community, when the statute explicitly provides it with discretion. I think the parties agree that the statute is to be interpreted in every possible respect to facilitate and to encourage open meetings. However, as Your Honor appropriately pointed out, A.R.S. 38-431.01, which is the public body open meeting law, has much more stringent requirements than those set forth in 33-1804, which is the Planned Communities Act and their version of the Open Meeting Law.

There are concerns at issue with public bodies and their open meetings, which justify those more stringent requirements. Specifically, due process concerns. Specifically, public monies which are being implicated and spent. That is simply not the case. It's on a much, much smaller scale. And again, in private residential communities, in these private collective bodies.

And therefore, we assess this motion and subsequent pleadings to make a series of bold and brash allegations without really any supporting statutory authority. We fundamentally disagree with Mr. Sullivan's interpretation of 33-1804, and aver that the law specifically recognizes that

there are exceptions to these open meeting requirements, or the interpretation of the statute as encouraging and facilitating these open meetings.

And to conclude otherwise would fundamentally contradict the language of 1804(A)(1) through (5), which sets forth the statutorily enumerated exceptions. As well as A.R.S. 33-1805(B)(1) through (5), which again reinforces those confidential and privileged enumerated exceptions by permitting the HOA to maintain confidential records corresponding to (A)(1) through (5), to those specifically enumerated categories. And we believe that Mr. Sullivan conflates the requirements set forth in 38-431.01 with 33-1804, the Planned Communities Act.

The logical outcome of such, I would pose, absurd statutory interpretation, would fly in the face of all reason and common sense. The board would essentially be required to meet openly to determine if a certain confidential matter was subject to the (A)(1) through (5) exceptions, right. Thereby, inevitably disclosing the nature of the confidential matter. And then to then conduct a closed, confidential discussion, but not be able to take any appropriate voting action, right.

So it would be to determine and reveal to the public, to the open body at large, rather, to all members at large, the potentially confidential subject matter, and then conduct what would be permitted to be a closed, confidential discussion --

or consideration, as Mr. Sullivan claims -- and then to return to an open session to take comments on what is a confidential matter, which obviously cannot be, cannot be posed to the public at large, to then open -- to then facilitate further discussion or related discussion and then open the vote?

Again, if a matter is confidential, it is confidential from start to finish. It is not confidential in consideration only, then to be opened back up to public conversation and discussion and discourse, and then a public vote. That would completely take the teeth and all common sense out of the (A)(1) through (5) statutory enumerated exceptions. It would essentially render moot those exceptions. And as to Mr. Sullivan's arguments that 33-1804(C) set forth how the board -- or how the HOA -- should be providing adequate notice, again, what -- I guess, at the end of the day, what does Mr. Sullivan claim is specifically lacking? What would be sufficient for Mr. Sullivan? What would pass muster? What would, or what should be required of the HOA going forward?

Neither the motion nor his subsequent reply spoke to that. And to analogize again, what is required for public body open meeting notice requirements is really factually distinguishable. Again, because the stakes are very different. You have those due process concerns and public monies, and the implication of public monies is the expenditure of the same. So how does the HOA's current practice of having the board

president identify the (A)(1) through (5) enumerated subcategories, how does that violate the statute? It simply does not.

The board president is in the best position to identify the applicable subsections. What does the statute require the HOA to -- where, specifically, does the statute require the HOA to meet openly to render that determination? It simply does not. Whether Mr. Sullivan agrees with that or not is really of no moment. The statute, per the language of the statute, it simply does not require the board in its entirety to meet in an open session to then determine confidential subject matters. It just, it flies in the face of anything ever being confidential in the first place. No portion of the meeting must be open if only confidential matters are being discussed.

It would be a different scenario if the HOA were to structure its meetings to combine confidential and/or privileged subject matters -- the enumerated (A)(1) through (5) subject matters -- with matters that are conducive for public discourse. However, that's not how the HOA has chosen to structure its meetings. And again, there is nothing in the statute that prevents them from operating accordingly. Also 33-1805, which provides the HOA with -- or facilitates the HOA's interpretation, and further reinforces the HOA's interpretation of 1804 -- prevents disclosure of materials

pertaining specifically to those (A)(1) through (5) subcategories, right?

Specifically, 33-1805(B)(3), it protects from disclosure, quote, "meeting minutes or other records of a session of a board meeting that is not required to be open pursuant to 33-1804". There's no statutory basis. There is simply no statutory basis precluding the board from voting during closed sessions, if it is voting on an enumerated, confidential matter. Consideration of confidential matters, consideration -- this word that Mr. Sullivan, wishes Your Honor to interpret -- consideration of confidential subject matters goes hand in hand with the board ultimately reaching a consensus in a meeting of the minds.

And consideration, then logically, would yield voting, as consideration and voting go hand in hand. If the consideration itself is protected from disclosure, why would the accompanying vote not also be protected? And again, the Open Meeting Law that pertains to public bodies does, in fact, prohibit voting from taking place during executive sessions. But 33-1804 does not. And whether Mr. Sullivan believes that that should be the case, that shouldn't be the case, setting forth expectations that the HOA should conform to the requirements provided by the legislature for these public body open meetings, it's comparing apples with oranges. And it is factually distinguishable.

Further, 1804(F), which speaks to the notice requirements for HOA members, only requires that the HOA provide information that is reasonably necessary to inform members of the matters to be discussed and decided; without revealing the confidential nature of the confidential information -- giving rise to the fact that it is a specifically statutorily enumerated exception -- nothing more than the than the statutory subsection can be revealed. If the HOA provided any more substantive information, it would no longer be a confidential or privileged matter.

And we believe, as that subsection, subsection F specifically requires -- any person or entity charged with the interpretation of these provisions, to construe them in favor of open meetings. We believe that the board is currently walking that fine balance between being as transparent with its members as possible, and also protecting statutorily protected information. There is no evidence that the HOA's interpretation of the statute yields a contrary result.

It simply, again, strikes this balance between recognizing and enforcing the statutory exceptions to the open meeting interpretation required by the legislature, while still protecting this privilege and confidential information. Again, and as Mr. Sullivan discussed the agendas, not providing sufficient information to inform the homeowners of the subject matter to be discussed. What is provided is what is reasonably

necessary to inform, which is providing that statutorily protected subsection. If any additional information were provided by the HOA, it would virtually render moot the purpose of having these statutorily enumerated exceptions in the first place.

And again, we believe that, with all respect to Mr. Sullivan, that he is just missing the mark and that his statutory interpretation, specifically of 1804 and 1805, are such that would yield an absurd, impractical, and untenable conclusion.

THE COURT: Okay. Mr. Sullivan, you get the last word.

MR. SULLIVAN: Judge, under subsection A, there are five areas that the board is allowed to consider in a closed session. But what's important, I think the important distinction here, from what Ms. Henning is telling you, is that the statute does not say that those five areas are confidential. And it doesn't say that they're statutorily protected in any way. All that the statute does, is it requires that all meetings be open. But the board can choose among those five paragraphs to consider those matters in a closed session. And so it's terrible --

THE COURT: Well, let me ask this question. I mean, one of the things that I heard from Ms. Henning was, why isn't the voting part of consideration?

MR. SULLIVAN: Because under subsection F, the legislature specifically stated that when interpreting and construing the statute, it must be construed in favor of open meetings. So the statute allows them to give consideration to a matter, but it doesn't allow them to vote. Consideration does not include voting.

Voting or formal action is, as I said, patently distinct from something that's being considered or deliberated upon. Voting or formal action is the act of managing or directing the affairs of the association. It's not the same as discussing things. And that's why when the statute is construed, it must be construed in favor of an open meeting and all the open meeting requirements.

And Judge, she seems to suggest -- and doesn't suggest but merely, specifically states -- that there's really nothing wrong with the board president making this determination. Well, yes, there is, because it's a board decision. There's seven board members. That means that if all seven board members are present, that at least four of them -- a majority -- has to agree that that particular matter should be discussed by the board, or considered by the board, in a closed session. It's not a decision to be made solely by the board president. Particularly, there shouldn't be any involvement by the community manager in making that decision either.

And if you look at the Attorney General's opinion, which deals specifically with Section 1804, you'll see that they say that when the board meets, they have to follow the open meeting requirements. Or when they act, they have to follow the -- when they vote or they act -- they have to follow the open meeting requirements. And then with respect to 1805, Judge, there's no conflict. And there's no conflict with describing the substantive essence of the subject matter to be discussed or decided.

So for instance, they might have a situation where they want to discuss a contemplated or pending litigation. But I think something more than that needs to be said for the members, to understand what it is that the board is doing. So for instance, if they're getting advice on contemplated litigation, they should tell the community what the contemplated or proposed litigation is about. They don't necessarily have to disclose something that might be considered privileged as a communication between the attorney and the association. But the association members need to have an understanding of what the board is doing and how their money is being spent, so that the association members can decide whether these board members are doing the job that they've been elected to do, and if they're doing it correctly and to the satisfaction of the community. That's one of the most important parts about the open meeting requirements, Judge.

THE COURT: And how would you have them do that in that example of contemplated litigation? How would they disclose to the members anything about contemplated litigation without waiving the attorney-client privilege if they've not commenced the litigation or haven't made any public statement about it? How would they disclose that to the members and preserve the privilege?

MR. SULLIVAN: Well, Judge, let's say, for instance, it's the landscaping company. I suggest to you, Judge, that, that the minimum disclosure they need to make is that it's contemplated litigation regarding an association vendor. I think that would be satisfactory.

But to just to say that it's contemplated litigation, that's not enough, because the association members need to be able to scrutinize the behavior of the board. And if a member of the association wants to, they need to have enough information to investigate further. So if they find out that there's contemplated litigation regarding an association vendor, then they can conduct whatever investigation they might to find out what it's all about.

THE COURT: Okay. Anything else?

MR. SULLIVAN: No, I think I've covered it, Judge.

THE COURT: Okay. Well, I'm going to take this under advisement. I will get you a written ruling as soon as I'm able. Completely separate from the issues that were argued

today, is there anything else that should be -- we should be addressing for this case right now, Mr. Sullivan?

MR. SULLIVAN: Not that I'm aware of, Judge.

THE COURT: All right. Ms. Henning, same question.

MS. HENNING: No, Your Honor.

THE COURT: Okay.

MS. HENNING: Thank you very much.

THE COURT: Well, thank you both.

MS. HENNING: Thank you for your consideration.

THE COURT: Okay. Thank you both. And have a nice afternoon. We are adjourned.

MS. HENNING: Thank you.

(Proceedings concluded at 3:31 p.m.)

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