ARIZONA COURT OF APPEALS

DIVISION ONE

AZNH REVOCABLE TRUST, by and through **JOHN and SUSAN SULLIVAN, TRUSTEES, REAL PARTIES IN INTEREST** Plaintiff/Appellant/Cross-Appellee v. **SUNLAND SPRINGS VILLAGE HOMEOWNERS ASSOCIATION**, Defendant/Appellee/Cross-Appellant	No. 1 CA-CV 25-0424 Maricopa County Superior Court CV 2023-096192

COMBINED
REPLY BRIEF ON APPEAL and
ANSWERING BRIEF ON CROSS-APPEAL
BY PLAINTIFF/APPELLANT/CROSS-APPELLEE
AZNH REVOCABLE TRUST

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Table of Contents

Table of Citations

Argument

A. Reply Brief on Appeal

i. In Re, § 33-1804(C)

Sunland Springs Village Homeowners Association ("HOA") states:

> The trial court correctly ruled that a homeowner's association may designate the statutory section from Ariz. Rev. Stat. ("A.R.S.") § 33-1804(A) for a meeting notice administratively outside of an open meeting.

HOA Answering/Cross-Appeal Brief ("HOA Brief") p.9(I).

In truth, the Superior Court ruled:

> A.R.S. § 33-1804(C) states, '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.' On this issue, the Court agrees with Defendant. As long as a meeting notice identifies the subsection of A.R.S. § 33-1804(A) that authorizes it to meet in a closed session, Defendant has satisfied its obligations under A.R.S. § 33-1804(C).

(IR 50, last ¶ continuing to p.4.)

And, the Court's Judgment reads, in relevant part:

> HOA has satisfied its obligations under A.R.S. § 33-1804(C).

(IR 56.)

The Superior Court did not address or analyze the requirement that, "the board shall identify the paragraph under subsection A of this section that authorizes the board to close the meeting."

AZNH Revocable Trust ("Homeowner") has consistently argued:

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

(IR 34, p.7, lines 9-12, and Homeowner Opening Brief, p.5).

When the open meeting provisions of A.R.S. § 33-1804 are read as a whole, one should conclude that once the Board (by majority action, in open session) identifies the applicable subsection which authorizes a closed session of the Board, the Board may: (1) go immediately into a closed "portion" of the existing meeting; *or*, (2) schedule a separate closed meeting for a future date. See A.R.S. § 33-1804(A) stating, "Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of" five subject categories. Once the Board has identified the applicable, authorizing subsection, they need not repeat the identification action for a future, closed meeting. But the future meeting notice must contain the information required by A.R.S. § 33-1804(C), (D) & (F).

The HOA has a seven (7) member, elected Board so that all HOA business is guided by multiple perspectives with majority rule. Additionally, a plenary meeting of the Board provides some assurance that the Board is conducting all HOA business in a manner consistent with fiduciary responsibilities, including some assurance that closed meetings are actually lawful.

McNally v. Sun Lakes Homeowners Ass'n #1, Inc., 241 Ariz. 1 (Div. 1, 2016) is illuminating. In *McNally*, a Board member ("McNally") disclosed information considered by the Board in a closed session and the other Board members excluded McNally from future closed sessions. In finding such exclusion unlawful, this

Court stated, "As a member of the Board, Arizona law requires McNally to participate in managing the affairs of the Association." *Id*. at 3, ¶13, citing A.R.S. § 10–3801(B) and § 10–801(B) ("All corporate powers shall be exercised by or under the authority of and the business and affairs of the corporation shall be managed under the direction of its board of directors."). This Court further stated, "Notice to all directors is required because when a number of directors are elected to manage the affairs of the corporation, it is contemplated that the corporation shall have the benefit of the judgment, counsel and influence of all of those directors." *Id*. at 4, ¶16, quoting 2 William Meade Fletcher et al., *Fletcher Cyclopedia of Law of Corporations* § 406 (perm. Ed., rev. vol. 2014).

The HOA's practice of allowing the Board President and the contracted HOA manager to identify and schedule matters for a closed meeting is disobedient to § 33-1804(C) and has the effect of excluding Board members from performing their statutorily imposed duty to manage the affairs of the HOA.

ii. In Re, Meeting Notices & Agendas

Homeowner has argued that all the HOA's Board meeting notices and agendas are non-compliant under § 33-1804(D) & (F) because they fail to provide statutorily required information. Homeowner Opening Brief, p.12, sec. II, et seq.

The HOA has limited its Answer to arguing that their closed meeting notices and agendas are statutorily compliant. HOA Brief, p.18, sec. II, et seq. The HOA offers no argument defending their deficient open meeting notices and agendas. Consequently, the HOA has conceded that their open meeting notices and agendas are non-compliant with A.R.S. § 33-1804 for the reasons stated in the Homeowner's Opening Brief. See Ariz. R. Civ. App. P. 15(a)(2) and 13(b)(1) & (a)(7).

The Homeowner's Opening Brief has explained, in detail, the HOA's overall failure to comply with notice and agenda requirements. Because the HOA's

Answer is limited to closed meeting notices and agendas, the Homeowner shall likewise limit this Reply per Ariz. R. Civ. App. P. 13(c).

The HOA argues:

> The notice and agenda requirement in subsection F only applies to open meetings. The statute states Arizona's policy regarding open meetings and states that requirements for notices and agendas apply for "those meetings" – i.e., open meetings. Ariz. Rev. Stat. 33-1804(F). Accordingly, the Legislature's requirement for notices and agendas was intended to apply only to open meetings.

HOA Brief, p.19, 1st ¶. The HOA ignores § 33-1804(D) which requires notices and agendas for all Board meetings without exception.

The entire process related to closed Board meetings is secret:

> The HOA has admitted that prior to all Board meetings the HOA community manager decides which matters appear on an open meeting or closed meeting agenda, and prepares proposed meeting agendas. (IR 44, p.4, ¶ 8). Thereafter, the Board President meets with the HOA manager to review the proposed meeting agendas to confirm that each item has been placed on the correct agenda. *Id*. At that time, the Board president approves the Board's open and closed meeting agendas. *Id*.

See Homeowner's Opening Brief, p.5, 1st ¶. And, because the Board does not meet openly to comply with A.R.S. § 33-1804(A), (C) & (F), the Homeowner has no opportunity to speak "after the board has discussed a specific agenda item but before the board takes formal action on that item." A.R.S. § 33-1804(A) & (F).

After the President and HOA manager meet, the HOA publishes obscure meeting notices:

> Closed to Owners in accordance with
> ARS §33-1804 A.1, A.3, and A.5
> Executive Meetings are posted per law, and not
> open to Owners except by invitation.

(IR 46, Exhibit B, 8 closed meeting notices). See Homeowner's Opening Brief, p.12. And, because closed meeting agendas are only available at the closed meeting [§ 33-1804 (E)(1)], the Homeowner is never provided with "the information that is reasonably necessary to inform the members of the matters to be discussed or decided." A.R.S. § 33-1804(F).

The Superior Court correctly found:

> Arizona law limits the topics that can be considered during closed meetings. Any matters that do not fall directly under one of the express provisions of A.R.S. § 33-1804(A) must be considered in open meetings.

(IR 50, p.4, 1st full ¶.)

Formal Board action is required under § 33-1804(C) to identify the 'express provision' of § 33-1804(A) which permits a closed Board meeting. That formal action does not fall under one of the "express provisions" allowing a closed meeting. Thus, the Board must meet in open session to identify the applicable 'express provision.'

Prior to such open meeting, the HOA must publish a notice and agenda for any matter which might be subject to identification for a closed Board session. A.R.S. § 33-1804(D) & (F). And per § 33-1804(D) & (F), the HOA's notices and agendas must "inform" the Homeowner of the matters to be discussed or decided. The Homeowner's Opening Brief discusses the scope of information which must be provided. See, e.g., Homeowner's Opening Brief, p.13, last ¶ et seq.

B. Answering Brief on Cross-Appeal

i. Key Statutory Provisions

The statute at issue has three key provisions:

a. [§ 33-1804(A) (bold added)]

all meetings of the . . . board of directors, and any regularly scheduled committee 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 may place reasonable time restrictions on those persons speaking during the meeting but shall allow a member or member's designated representative 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.

b. [§ 33-1804(A)]
Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of [five enumerated topics]; and,

c. [§ 33-1804(F)]
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 . . . 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 . . . shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.

ii. Superior Court's Ruling & Judgment

Acting upon Homeowner's Motion for Summary Judgment, the Superior Court correctly interpreted and applied A.R.S. § 33-1804(A) when it ruled:

> Given the language of A.R.S. § 33-1804(F), the Court must construe the statute in favor of open meetings. The statute expressly authorizes HOAs to close portions of meetings for the "consideration" of the

> limited subjects set forth in the statute. Consideration of issues is different from voting on issues. Consideration encompasses, thought and discussion about matters. It does not encompass voting, which is the formal expression of a final decision that occurs after a matter has been considered. Thus, the Court agrees with Plaintiff's interpretation of the statute with regard to the necessity that all votes by the HOA must occur in open meetings.

(IR 50, p. 1st full ¶.)

And the Superior Court Judgment reads:

> All voting or formal actions by the HOA Board of Directors must be done in open session.

(IR 50.)

iii. Opinion of the Arizona Attorney General on A.R.S. § 33-1804

In Superior Court, the HOA cherry-picked excerpts from Op. Ariz. Att'y Gen. I97-012 (1997) ("AG Opinion") to bolster its argument that the HOA Board may vote in closed session. (IR 41, pp.5-25.) But when the AG Opinion is read as a whole, it fully supports the Homeowner's argument that the HOA Board is prohibited from taking formal action (or voting) in a closed session. The AG Opinion accompanies this filing in **Appendix A**.

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)(public body quorum), 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*.

The Arizona House of Representatives requested the above Opinion twenty-eight (28) years ago and the Legislature has not modified or amended A.R.S. § 33-1804 in any way which would alter the AG Opinion that Planned Communities are prohibited from secret decision-making. Thus, it is apparent the Legislature is satisfied that the AG Opinion represents applicable law.

iv. <u>The HOA's Current Argument</u>

The HOA's interpretation of the statute allows some HOA business to be conducted entirely in secret rather than conducting a "portion" of a Board meeting which is "limited" to deliberations of specific topics. Under the HOA's interpretation, the Homeowner is never informed of the "of the matters to be discussed or decided" and the Homeowner never has an opportunity to speak before a vote of the board of directors is taken. The HOA relies exclusively on their perception of statutory "policy objectives" for their interpretation and they argue: "[R]equiring the board of directors to vote in an open meeting on items discussed in a closed meeting is a meaningless administrative burden that does not accomplish the policy objective of A.R.S. § 33-1804(F)." HOA Brief, p.24.

Inexplicably, the HOA also argues the correct interpretation:

- [HOA Brief, p.20, end of ¶ at top of page.]
  (Describing the purpose of closed Board meetings as: "to allow for confidential consideration of sensitive topics.")

- [HOA Brief, p.22, 1st full ¶ et seq.]

> "A.R.S. § 33-1804(F) explains the policy of favoring open meetings exists to ensure that sufficient information is provided to members about the meetings so that they know what will be 'discussed and 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.' As such, the policy of favoring open meetings exists for the purpose of ensuring homeowners the ability to hear the board's discussion and be able to comment on agenda items before a vote is taken. Despite the policy and purpose, A.R.S. § 33-1804(A) expressly carves out five topics and unequivocally affirms that homeowners are not entitled to hear the discussion of the board regarding these five topics."

v. Legislative Policy No Longer a Basis for Statutory Interpretation

This Court has recognized and adopted a refined doctrine for statutory interpretation announced in a *concurrence* by a majority of the Supreme Court in *State ex rel. Arizona Dep't of Revenue v. Tunkey*, 254 Ariz. 432, ¶11 et seq. (2023). See *3 SL Fam., LLC v. State*, 258 Ariz. 523, 526, ¶11 (Div. 1, 2024), *review granted* (Apr. 1, 2025)(recognizing and adopting the refined doctrine). Any prior case law which conflicts with the refined doctrine of *Tunkey* has been impliedly overruled to the extent of the conflict.

In *Tunkey*, the Justices emphatically rejected statutory interpretation based upon a court's perception of legislative "policy." *Tunkey* at 438, ¶28. Instead, the Justices declared the proper role of the Court is found in *Flowing Wells Co. v. Culin*:

> [I]t is the duty of all courts to confine themselves to the words of the Legislature—nothing adding thereto; nothing demitting. The court has no authority to extend a law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law, or because the Legislature did not use proper words to express its meaning.

Id. citing *Flowing Wells Co. v. Culin,* 11 Ariz. 425, 429 (1908).

The *Tunkey* Justices also stated that the prior practice of interpreting statutes by "legislative intent' or "plain meaning" can lead to "different outcomes and underscore why [the Court] should cogently and consistently apply a plain meaning approach to statutory interpretation going forward." *Tunkey* at 437, ¶24. "If the legislature agrees on findings, purposes, or definitions, it becomes our duty to ascertain statutory meaning through those prisms." *Tunkey* at 438, ¶27.

The Legislature did not say that a Planned Community Board may "act" on specified matters in a closed session. The Legislature said, in summary:

> All meetings of the board of directors 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 after the Board has discussed a specific agenda item and before the Board takes formal action on that item.
>
> A portion of a Board meeting may be closed only if that closed portion is limited to consideration of five enumerated topics.
>
> It is the policy of Arizona as reflected in this statute that all meetings of the board of directors be conducted openly, and notices and agendas be provided to members in advance of those meetings to inform the members of the matters to be discussed or decided and to ensure that members have the opportunity to speak after the Board's discussion of agenda items but before the Board acts on those items. Any person or entity charged with interpretation of the statute's provisions shall take into account this stated policy and construe any provision of this statute in favor of open meetings.

A.R.S. § 33-1804(A) & (F)(summarized). The foregoing is a concise summary and not a direct quote.

Using the above "prism", it is evident that open meetings consist of "deliberations and proceedings." It is also evident that the Legislature allows (but does not require) a Board to meet in a closed session for the limited purpose of deliberation on specified confidential and privacy matters, but any formal Board action ("proceedings") must be conducted in an open session. These conclusions are evident because the Legislature has commanded that the statute must be construed in favor of open meetings. And open meetings require, inter alia: (1) notice to the Homeowner of the matters to be discussed or decided; and, (2) the Homeowner must be provided with an opportunity to speak about a matter before the Board takes formal action on that matter.

vi. <u>No Dictionary Combat</u>

The use of a dictionary to define "consideration" is secondary in statutory interpretation and Homeowner declines to engage in dictionary combat. Words are construed according to the common and approved use of the language. A.R.S. § 1-213. By also following the doctrine announced in *Tunkey* (supra), one can properly interpret the statute.

The Superior Court correctly ruled:

> Consideration encompasses, thought and discussion about matters. It does not encompass voting, which is the formal expression of a final decision that occurs after a matter has been considered.

(IR 50, p.3.)

The Superior Court's ruling is consistent with the concept that deliberations are "thought and discussion" while proceedings are the formal actions (voting) by the Board. The Superior Court correctly applied the legislative directive that the statute be construed in favor of open meetings. Therefore, the Superior Court's

Ruling and Summary Judgment are supported by the record and ought to be upheld.

vii. No Closed Meeting Minutes - No Problem

Voting and formal actions are not allowed in closed session under the Planned Communities Act, A.R.S. § 33-1804. Closed meeting minutes, *if any*, are irrelevant to compliance with § 33-1804.

Homeowner does not see any conflict between § 33-1804 and the statutory provisions of the Nonprofit Corporation Act, Title 10, chapters 24-40. But, if there is a conflict with record-keeping requirements, the Nonprofit Corporation Act states that a planned community shall comply with the Planned Communities Act in any conflict. A.R.S. § 10-11601(F).

viii. No Conflict, in re: § 33-1804 and § 33-1805

In the Superior Court, the HOA stated:

> Plaintiff's Motion [for Summary Judgment] includes the argument that A.R.S. § 33-1804 and A.R.S. § 33- 1805 do not conflict. SSV HOA agrees that there is no conflict between statutes and Plaintiff concedes the same. Therefore, SSV HOA need not provide further reasoning for an uncontested issue.

(IR 41, p.7, lines 21-25.)

Homeowner asserts that the HOA is barred from making a conflict argument in this Court. Homeowner responds to the HOA argument herein as a matter of prudence should the Court believe the HOA is entitled to their argument.

There is no conflict between § 33-1804 and § 33-1805 – full compliance with both statutes is possible. A conflict exists only when statutes "cannot be harmonized to give each effect and meaning." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7, ¶24 (2013).

The HOA asserts they cannot vote in open session because it would reveal protected information. See, generally, HOA Brief, pp. 23-25 & p.32, sec. V. See HOA Brief, p.24, bottom of page, where the HOA uses this example:

> Board Member No. 1.: 'I move to accept the payment plan of $100.00 per month proposed by Ms. Smith to resolve her $4000 delinquency because she is going through chemotherapy to treat her breast cancer.'

Compliance with Planned Community open meeting requirements and protection of privacy information is easily achieved this way:

> Board Member No. 1.: 'I move to accept the payment plan of $100.00 per month proposed by the homeowner in matter # 25-007 *[or any other unique identifier]* to resolve their $4000 assessment delinquency.

C. **CONCLUSION**

Homeowner respectfully requests this Court:

1. Set this matter for **Oral Argument** as a matter of first impression and of state-wide importance;
2. **Affirm** the Superior Court Judgment, to wit:
   All voting or formal actions by the HOA Board of Directors must be done in open session;
3. **Issue an Opinion** declaring that the HOA has construed and applied A.R.S. § 33-1804(C) in a manner which deprives the Homeowner of the exercise and benefit of statutory, open meeting rights under A.R.S. § 33-1804(A) & (F);
4. **Issue an Opinion** declaring that the HOA has construed and applied A.R.S. § 33-1804(F) in a manner which deprives the Homeowner of the

statutory right to receive meeting notices and agendas which inform Homeowner of the matters to be discussed or decided;

5. **Vacate & Reverse** the Superior Court Ruling & Judgment, to wit: HOA has satisfied its obligations under A.R.S. § 33-1804(C); and, HOA's descriptions given in meeting notices and agendas are sufficient under A.R.S. § 33-1804(F);
6. Grant Homeowner its costs on appeal per A.R.S. § 12-341;
7. Deny any and all relief to the HOA; and,
8. Grant such other and further relief as justice requires.

Respectfully submitted,

/s/ *John F. Sullivan*

Atty. John F. Sullivan, Bar # 023018
On Behalf of AZNH Revocable Trust and Trustees
Plaintiff/Appellant/Cross-Appellee