

Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute unless appealed

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of

AZNH Revocable Trust,
Petitioner,

v.

Sunland Springs Village Homeowners
Association,
Respondent.

No. 24F-H047-REL

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: September 18, 2024

APPEARANCES: Attorney John F. Sullivan represented AZNH Revocable Trust (Petitioner). Attorney Chad M. Gallacher represented Sunland Springs Village Homeowners Association (Association).

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

EXHIBITS ADMITTED INTO EVIDENCE: Department's electronical file; Petitioner Exhibits 1 through 15; Association Exhibits 1 through 15.

FINDINGS OF FACT

1. The Arizona Department of Real Estate (Department) is authorized by statute to receive and to decide petitions for hearings from members of homeowners' associations and from homeowners' associations in the State of Arizona.

2. On or about April 20, 2024, Petitioner filed a single issue petition (Petition) with the Department which alleged that, pursuant to Arizona Revised Statutes (ARIZ. REV. STAT.) § 33-1812(A)(7), the Association had failed to comply with Petitioner's February

1 28, 2024, voting records inspection request¹ to inspect “all ballots, envelopes, related
2 materials and sign-in sheets” with regard to an election that had taken place on February
3 27, 2024.² Petitioner indicated the Association failed to produce all voting materials,
4 noting that “about 1500 ballots” had not been produced.

5 3. On or about May 13, 2024, Association returned its Answer to the
6 Department wherein it denied Petitioner’s claim.³

7 4. On May 15, 2024, the Department referred this matter to the Office of
8 Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing
9 on July 12, 2024 to determine whether a violation of ARIZ. REV. STAT. § 33-1812(A)(7)
10 occurred.⁴

11 5. Association ByLaws Section 3.2 provides that the Board of Directors
12 (Board) may be elected through paper or electronic ballots pursuant to procedures set
13 forth in the ByLaws.⁵ Those procedures in Section 3.3.3 require that the Board provide
14 each member of the Association 30-day notice of the ballot, either by mail or
15 electronically, for the election of the Directors.⁶ Further, Section 3.3.3 requires that
16 “[v]oting shall be by “secret ballot.”

17 6. In preparation for the February 27, 2024 election at the Annual Meeting,
18 Association arranged with a company, *Vote HOA Now*, to conduct electronic balloting.

19 7. A paper ballot was created for members to cast in-person at the Annual
20 Meeting or by mail (*i.e.*, in absentia).⁷

21
22
23 ¹ See Petitioner’s Exhibit 5.

24 ² See Department’s electronic file. Petitioner’s Petition included twenty-two (22) attachments consisting of
25 emails back and forth with Association Secretary/Treasurer Cathy Braun and with Association General
26 Manager Kathy Fowers. These emails document not only Petitioner’s request for inspection of the
27 documents but also Petitioner’s multiple issues with the electronic voting process, the management of the
28 electronic voting process, and the overall receipt of documents Petitioner believed necessary to have been
29 provided to it.

30 ³ See Department’s electronic file.

⁴ After a continuance, the hearing was conducted on September 18, 2024.

⁵ See Petitioner Exhibit 2.

⁶ *Id.*

⁷ See Association Exhibit 1.

1 8. Association members were voting on several items: on Directors;⁸ on a
2 proposed amendment to the Association ByLaws;⁹ on a resolution that the Association act
3 in accordance with an IRS Revenue Ruling regarding excess income;¹⁰ and to approve
4 the Minutes from the 2023 Annual Meeting.¹¹

5 9. *Vote HOA Now* was given the Association's "ballot" information and the
6 member and member property information necessary for *Vote HOA Now* to provide
7 electronic ballots to members for the election voting. *Vote HOA Now* created the
8 electronic ballot.

9 10. Association members received multiple email reminders regarding the
10 upcoming election; the emails contained a link to the online voting website.¹² The email
11 reminders contained specific instructions about how to vote:

12 Please [CLICK HERE](#) to go to the online voting website
13 (your personal registration code **5494477908** will prefill)
14 Make your choices on the electronic ballot and submit
15 (once your vote is submitted it is final)
16 A confirmation of your vote will appear onscreen and
17 be sent to your email

18 11. Association also created instructions about the options: to vote
19 electronically, and how to accomplish online voting; by submitting a paper ballot, dropping
20 it off at the office; or in person at the meeting.¹³

21 12. Kathy Fowers, the General Manager of Association and the Custodian of
22 Records, approved the "proof" of the electronic ballot created by *Vote HOA Now* after she
23 determined that the *Vote HOA Now*-created electronic ballot matched the paper ballot.¹⁴
24
25

26 ⁸ See Association Exhibit 7.

27 ⁹ See Association Exhibit 9.

28 ¹⁰ See Association Exhibit 7.

29 ¹¹ See Association Exhibit 12.

30 ¹² See Petitioner Exhibit 3.

¹³ See Petitioner Exhibit 4.

¹⁴ Ms. Fowers testimony.

13. Eighteen (18) members cast votes at the Annual Meeting.¹⁵ One hundred fifty four (155) members cast absentee ballots.¹⁶ Fourteen hundred sixty-one (1,461) members cast electronic votes.

14. Petitioner cast an absentee ballot.¹⁷

15.

16. After the election, Ms. Fowers received the electronic voting results from *Vote HOA Now*.

17. *Vote HOA Now* provided the following documents to Association:

- a. A tally report of the votes for Directors, for the Revenue Ruling, for approval of the 20213 Minutes, and for the ByLaws amendment.¹⁸
- b. A listing verification of the homeowners (with property addresses) who voted electronically.¹⁹
- c. A listing of the member votes cast for Directors.²⁰
- d. A listing of the member votes for the ByLaws amendment.²¹
- e. A listing of the member votes for the Revenue Ruling.²²
- f. A listing of the member votes for the 2023 Minutes.²³

18. Association retained the following:

¹⁵ *Id.* See also Association Exhibits 2 and 4 (Annual Meeting sign-in sheets).

¹⁶ See Association Exhibits 8 and 13.

¹⁷ Mr. Sullivan testimony at hearing; see also Association Exhibit 5 at SSV00171. While Petitioner voted an absentee ballot, Petitioner hand delivered its inspection request on February 28, 2024, the day after the Annual Meeting. See Petitioner Exhibit 5.

¹⁸ See Association Exhibit 10.

¹⁹ See Association Exhibit 11. This document contains the following: a member name; the member's property address; the [Vote HOA Now] registration number and account number; an IP address for the member; the date and time the vote was cast; and, the indication that one vote was cast for each listed member.

²⁰ See Association Exhibit 3. This document contains the following: the [Vote HOA Now] registration number and account number; the IP address for each single vote; and, the date and time the one vote was cast.

²¹ See Association Exhibit 15. This document contains the following: the election item (the ByLaws amendment); whether the vote was to approve or disapprove; the indication that one vote was cast; the IP address for each single vote; and, the date and time the one vote was cast.

²² See Association Exhibit 14. This document contains the following: the two elections (the 2023 Minutes and the IRS Revenue Ruling); whether the vote was to approve or disapprove; the indication that one vote was cast; the IP address for the single vote; and, the date and time the one vote was cast.

²³ *Id.*

- 1 a. Two sign-in sheets used at the Annual Meeting.²⁴
2 b. Ballots cast in person at the Annual Meeting.²⁵
3 c. Envelopes which contained the absentee ballots received.²⁶
4 19. The Association Board created the following:
5 a. An affidavit of the election results.²⁷
6 b. A tally sheet of the election results.²⁸
7 20. Petitioner has received the *Vote HOA Now* documents and the documents
8 created and retained by Association regarding the election.
9 21. Petitioner's argument is that Petitioner has not received all of the voting
10 documents because Petitioner has not received an image of each of the actual online
11 ballots as were posted by *Vote HOA Now* and, thus, as were voted on by any/each
12 member. Petitioner also argued that there was no mechanism to check whether the
13 voting results were accurate because, without seeing the image of each ballot, it could not
14 be determined if the electronic ballot met the requirements.²⁹
15 22. Petitioner's position is that those actual online ballots are, in fact,
16 Association records required to be kept by the Association and, to be available to
17 members for inspection, arguing that *Vote HOA Now* is required to retain images of those
18 actual online ballots for "recount, inspection and review purposes" pursuant to ARIZ. REV.
19 STAT. § 10-3708(F).
20 23. The Association position is that it has provided all of the election documents
21 created and retained by the Association. Further, that the Association has provided all of
22 the electronic documents received from *Vote HOA Now*. The Association argues that the
23 *Vote HOA Now* electronic documents which Association received, specifically its Exhibits
24 3, 14 and 15, represent the electronic information version of the electronic votes cast in

25 ²⁴ See Association Exhibits 2 and 4.

26 ²⁵ See Association Exhibit 1.

27 ²⁶ See Association Exhibit 5.

28 ²⁷ See Association Exhibit 6.

29 ²⁸ See Association Exhibit 8.

30 ²⁹ Presuming that Petitioner was also concerned whether the electronic "ballot" contained all of the election items, the hearing record demonstrated that Kathy Fowers had approved the "proof" of the electronic ballot created by *Vote HOA Now* after she determined that the *Vote HOA Now*-created electronic ballot matched the paper ballot.

the election and demonstrate, electronically, the same information for each vote as would have been demonstrated to have been cast on a paper ballot.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a planned community association. An owner or an association may petition the department for a hearing concerning violations of community documents or violations of the statutes that regulate planned communities as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.³⁰

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1812(A) (7).³¹ Respondent bears the burden of establishing any affirmative defenses by the same evidentiary burden.³²

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."³³ A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."³⁴

5. In Arizona, when construing statutes, we look first to a statute's language as the best and most reliable index of its meaning. If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of

³⁰ See *Tierra Rancho Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

³¹ See Arizona Administrative Code (ARIZ. ADMIN. CODE) R2-19-119.

³² *Id.*

³³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

³⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 statutory construction, unless applying the literal language would lead to an absurd result.
2 Words should be given "their natural, obvious, and ordinary meaning."³⁵

3 6. Statutes should be interpreted to provide a fair and sensible result.
4 *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234,
5 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable
6 construction on statutes.").

7 7. When the legislature uses a word or words in one section of a statute, but
8 not another, the tribunal may not read those words into the section where the legislature
9 did not include them.³⁶ Unless defined by the legislature, words in statutes are given their
10 ordinary meanings.³⁷

11 8. Each word, phrase, clause, and sentence of a statute or rule must be given
12 meaning so that no part will be void, inert, redundant, or trivial.³⁸

13 9. ARIZ. REV. STAT. § 10-3708(F), Action by written ballot; online voting
14 provides that if a vote is to be conducted by electronic means, *the written ballot may be*
15 *delivered through an online voting system that* does all of the following:

- 16 a. Authenticates the member's identity;
- 17 b. Authenticates the validity of each electronic vote to ensure that the vote
18 is not altered in transit;
- 19 c. Transmits a receipt to each member who casts an electronic vote; and
- 20 d. *Stores electronic votes for recount, inspection and review purposes.*

21 Emphasis added here.

22 10. ARIZ. REV. STAT. § 33-1812, Proxies; absentee ballots; definition
23 provides, in relevant parts, as follows:

24 A. Notwithstanding any provision in the community documents, after
25 termination of the period of declarant control, votes allocated to a unit may
26 not be cast pursuant to a proxy. *The association shall provide for votes to*
27 *be cast in person and by absentee ballot and, in addition, the association*
28 *may provide for voting by some other form of delivery, including the use of*
29 *e-mail and fax delivery.* Notwithstanding section 10-3708 or the provisions

30 ³⁵ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

³⁶ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

³⁷ *Id.*

³⁸ See *Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

1 of the community documents, any action taken at an annual, regular or
2 special meeting of the members shall comply with all of the following if
3 absentee ballots or ballots provided by some other form of delivery are
4 used:

5
6

7 6. The completed ballot shall contain the name, address and
8 signature of the person voting, except that if the community documents
9 permit secret ballots, only the envelope shall contain the name, address and
10 signature of the voter.

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

14 Emphasis added here.

15 11. ARIZ. REV. STAT § 33-1258 provides, in pertinent part, as follows:

16 A. Except as provided in subsection B of this section, all financial and
17 other records of the association shall be made reasonably available for
18 examination by any member or any person designated by the member in
19 writing as the member's representative.

20 12. In the instant case, the Association has provided to Petitioner
21 electronic or paper copies of all of the *Vote HOA Now* records it received regarding
22 the electronic voting process as well as the Association meeting sign-in sheets, the
23 paper ballots received in absentia and at the meeting, the envelopes for the
24 absentee ballots received, and the association created tally sheet and election
25 results affidavit.

26 13. Petitioner's argument that the Association must provide an image of
27 each "electronic ballot", as was voted by each member, is not well supported by
28 ARIZ. REV. STAT. § 10-3708(F). ARIZ. REV. STAT. § 10-3708(F)(4) requires an
29 online voting system to perform certain actions, one of which is that the online
30 voting system "*stores electronic votes* for recount, inspection and review
purposes."³⁹ There is no evidence that *Vote HOA Now* either retains or "stores

³⁹ Emphasis added here.

1 electronic votes” in any form other than the data list format that was received by the
2 Association, specifically as was documented in Association Exhibits 3, 14 and 15.
3 Those *Vote HOA Now* data lists, taken as a whole, document each vote for each
4 member for each election item, in identifiable ways. ARIZ. REV. STAT. § 10-3708(F)
5 (4) requires storage of “electronic votes” not electronic ballots.

6 14. Petitioner’s argument fails that without seeing an image of each
7 electronic ballot, it was not possible to determine whether the election results were
8 accurate. The online voting system allowed only one vote per election item per
9 personal registration number, and the *Vote HOA Now* data lists demonstrate that,
10 per each IP addresses and the personal registration number, only one electronic
11 vote per election item was cast by that member.

12 15. Based on the foregoing, the Administrative Law Judge concludes
13 that Association is in compliance with ARIZ. REV. STAT. § 33-1812(7) by retaining
14 the *Vote HOA Now* data lists which demonstrate the electronic ballots “in electronic
15 ... format.” Further, that Petitioner has received from Association, pursuant to his
16 February 28, 2024 request, “all ballots, envelopes, related materials and sign-in
17 sheets.”

18 16. Based on the foregoing, the Administrative Law Judge concludes
19 that Petitioner did not sustain the burden of proof that the Association committed a
20 violation of ARIZ. REV. STAT. § 33-1812(A)(7) and, therefore, the Petition must be
21 denied.

22 **FINAL ORDER**

23 Based on the foregoing,

24 **IT IS ORDERED** that Petitioner’s petition is denied.

25 **NOTICE**

26 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
27 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
28 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
29 **must be filed with the Commissioner of the Department of Real Estate**
30 **within 30 days of the service of this Order upon the parties.**

Done this day, November 5, 2024

/s/ Kay A. Abramsohn
Administrative Law Judge

Transmitted electronically November 5, 2024 to:

Susan Nicolson, Commissioner
Arizona Department of Real Estate

Chad Gallacher
cgallacher@hoalaw.biz

John F. Sullivan
info@sullivanappeals.com

By: OAH Staff