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1           7.       The evidence presented during the rehearing established that the topics for  
2 which unanimous written consents were being obtained, an individual from the community  
3 management company would email each member of the Board of Director individually  
4 and ask them the reply to the email indicating whether they were voting yes or no on the  
5 proposal. The items for which all of the members of the Board of Directors voted yes were  
6 considered passed by unanimous consent. The Board President would then sign the  
7 unanimous written consent on behalf of the Board of Directors.

8           8.       At hearing, Respondent argued the individual emails did not constitute a  
9 meeting of the Board of Directors outside of an executive session such that the meeting  
10 had to be open to the members of the association.

11           9.       All Findings of Fact from the initial hearing are incorporated by reference as  
12 if set forth herein.

### 13                               **CONCLUSIONS OF LAW**

14           1.       The Department has jurisdiction to hear disputes between a property owner  
15 and a condominium owners association. A.R.S. § 32-2199 *et seq.*

16           2.       In this proceeding, Petitioner bear the burden of proving by a  
17 preponderance of the evidence that Respondent violated A.R.S. § 33-1804. A.A.C. R2-  
18 19-119.

19           3.       A preponderance of the evidence is “[e]vidence which is of greater weight or  
20 more convincing than the evidence which is offered in opposition to it; that is, evidence which  
21 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW  
22 DICTIONARY 1182 (6th ed. 1990).

23           4.       A.R.S. § 33-1804 provides, in relevant part, as follows:

24           A. Notwithstanding any provision in the declaration, bylaws or other  
25 documents to the contrary, all meetings of the members’ association and  
26 the board of directors, and any regularly scheduled committee meetings,  
27 are open to all members of the association or any person designated by a  
28 member in writing as the member’s representative and all members or  
29 designated representatives so desiring shall be permitted to attend and  
30 speak at an appropriate time during the deliberations and proceedings. . . .  
Any portion of a meeting may be closed only if that closed portion of the  
meeting is limited to consideration of one or more of the following:

1 1. Legal advice from an attorney for the board or the association. On  
2 final resolution of any matter for which the board received legal  
3 advice or that concerned pending or contemplated litigation, the  
4 board may disclose information about that matter in an open meeting  
except for matters that are required to remain confidential by the  
terms of a settlement agreement or judgment.

5 2. Pending or contemplated litigation.

6 3. Personal, health or financial information about an individual  
7 member of the association, an individual employee of the association  
8 or an individual employee of a contractor for the association,  
including records of the association directly related to the personal,  
9 health or financial information about an individual member of the  
association, an individual employee of the association or an  
individual employee of a contractor for the association.

10 4. Matters relating to the job performance of, compensation of,  
11 health records of or specific complaints against an individual  
12 employee of the association or an individual employee of a contractor  
of the association who works under the direction of the association.

13 . . . .

14 D. Notwithstanding any provision in the declaration, bylaws or other  
15 community documents, for meetings of the board of directors that are held  
16 after the termination of declarant control of the association, notice to  
17 members of meetings of the board of directors shall be given at least forty-  
18 eight hours in advance of the meeting by newsletter, conspicuous posting or  
any other reasonable means as determined by the board of directors. . . .  
Notice to members of meetings of the board of directors is not required if  
emergency circumstances require action by the board before notice can be  
given. . . .

19 F. It is the policy of this state as reflected in this section that all meetings of  
20 a planned community, whether meetings of the members' association or  
21 meetings of the board of directors of the association, be conducted openly  
22 and that notices and agendas be provided for those meetings that contain  
23 the information that is reasonably necessary to inform the members of the  
24 matters to be discussed or decided and to ensure that members have the  
25 ability to speak after discussion of agenda items, but before a vote of the  
26 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.

27 5. A.R.S. § 10-3821 provides, in pertinent part, as follows:

28 A. Unless the articles of incorporation or bylaws provide otherwise, action  
29 required or permitted by chapters 24 through 40 of this title to be taken at a  
30

1 directors' meeting may be taken without a meeting if the action is taken by  
2 all of the directors. The action must be evidenced by one or more written  
3 consents describing the action taken, signed by each director and included  
4 in the minutes filed with the corporate records reflecting the action taken.

5 6. When construing a statute, the primary goal is to ascertain the legislature's  
6 intent. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App.  
7 2007). This is accomplished by first looking to the text of the statute. *Id.* If the language is  
8 clear, its plain meaning is ascribed, unless it would lead to absurd results. *Id.*; *Marsoner*  
9 *v. Pima County*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991). If ambiguity exists,  
10 secondary principles of statutory construction are used to determine the intent. *Contes*,  
11 216 Ariz. at 527.

#### 12 Non-privileged Association Business Conducted in Closed Session

13 7. While A.R.S. § 10-3821 may allow the board of a non-profit corporation to  
14 take actions without a meeting by unanimous consent, A.R.S. § 33-1804 requires that all  
15 meetings of the board of directors of a homeowners association, outside of an executive  
16 session, must be open to the members.

17 8. Respondent improperly conducted association business in closed sessions  
18 *via email* rather than in meetings open to the members.<sup>1</sup>

19 9. Accordingly, Petitioner established by a preponderance of the evidence that  
20 Respondent committed the alleged violation set forth as Complaint #1.

21 10. Consideration is given to the fact that Respondent was faced with an  
22 unprecedented global pandemic while balancing the need to comply with the applicable  
23 statutes and conduct association business. Therefore, the Administrative Law Judge  
24 finds no civil penalty is appropriate given the circumstances.

#### 25 **ORDER**

26 **IT IS ORDERED** that Petitioner's petition is affirmed as to the limited issue brought  
27 for this rehearing.

28  
29 <sup>1</sup> The Administrative Law Judge Decision in the initial hearing incorrectly concluded the association  
30 business was conducted in closed sessions *via conference call*.

**IT IS FURTHER ORDERED** that Respondent reimburse Petitioner her \$500.00 filing fee for the issue on which she prevailed.

**IT IS FURTHER ORDERED** Respondent is directed to comply with the requirements of A.R.S. § 33-1804 going forward.

**NOTICE**

**This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. A.R.S. § 12-904(A).**

Done this day, March 17, 2021.

/s/ Tammy L. Eigenheer  
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile March 17, 2021 to:

Judy Lowe, Commissioner  
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By FDS