

TONTO HILLS IMPROVEMENT ASSOCIATION

**BOARD MEETING MINUTES
SPECIAL MEETING/EXECUTIVE SESSION**

6:30 PM, JAN 28, 2015

Christ the Lord Lutheran Church
9205 E. Cave Creek Rd, Carefree, AZ

- I. Call to Order – Vice-President Cheryl Kaufman called the meeting to order at 6:32 PM
- II. Roll Call
 - a. Members Present – Jackie Hoagland, Cheryl Kaufman, Dick Mocny, Keith Pierce, Diana Cole, Rick Nelson.
 - b. Members Absent –Richard Grady, Rick Leach.
 - c. ACC Attendees – Steve Rensel and Mark Battiste
- III. Conference Call with Charlene Cruz, Senior Attorney representing Mulcahy Law Firm, P.C. Board questions, summary of Beth Mulcahy’s written responses, and additional Q and A below.
 - a. Rick Nelson commented at the end of the call that he was disappointed that Ms. Mulcahy was not present for a meeting scheduled a week ago with a date and time of her choosing. Ms. Cruz said she would pass that on to Ms. Mulcahy.
- IV. Adjournment – 7:15.

Diana Cole Approved 2/17/2015

Diana Cole, Secretary

Action Items	Responsible Person	Due Date
To be discussed at Regular Board Meeting	Board	2/17/2015

THIA Questions for Legal Counsel

1/28/2015

Issue/Question	Relevant Requirement (D of R or other)	Beth Mulcahy's Written Response	Additional Q and A with Charlene Cruz
Petition in lieu of membership vote to amend D of R's			
Is it legal to replace a vote to amend our D of Rs with a petition?	This community followed the Maricopa County petition procedures when approving the formation of our water district.	In lieu of an in-person vote, I recommend using a mail-in ballot to amend the CC&Rs. My concern with a petition is that the Owners need to be aware of exactly what they are voting to amend. If the Association were to attempt a door-to-door petition process, it would be difficult for the Owners to review the entirety of the proposed Amended and Restated DoR's prior to voting. The mail-in ballot allows the Association to send each member a copy of the proposed Amended and Restated DoR's and then submit a ballot with their vote.	<p>Q: Is it legal to replace a vote to amend our D of R's with an independently certified petition?</p> <p>A: Yes. Make sure the owner is the one signing the petition during the process. For out of state owners, the same language can be mailed to them, with options to vote Yes or No and a place for their signature.</p>
Would you review the wording of a petition and then be willing to act as third party to monitor the process and verify / certify a valid petition? Can you estimate your fee for this activity?		<p>I would be happy to draft a ballot and assist in the amendment process.</p> <p>The estimated fee would depend upon the extent of the revisions and how involved you want my office to be in the amendment process. We charge everything on an hourly basis.</p>	

<p>Proxy voting</p>			
<p>What is the exact AZ Revised Statute (ARS #) prohibiting or limiting proxy voting by residential property organizations?</p> <p>Does it apply to all organizations at both general meetings and board meetings (i.e. HOAs, planned communities, & improvement associations)?</p> <p>If it does not apply to improvement associations, what are the legal risks if we continue proxy voting?</p> <p>If it applies to improvement associations, can we eliminate the D of R statement which authorizes it, or must we issue a ballot amendment to be complaint with the law?</p>		<p>There is a difference between proxy voting by members of the association and proxy voting by board members. Please see below.</p> <p><u>Proxy Voting by Board Members</u> Pursuant to ARS 10-3824(G) of the Arizona Non-Profit Corporation Act,</p> <p>The articles of incorporation or bylaws may authorize a director to vote in person or by proxy. The following provisions apply to voting by proxy:</p> <ol style="list-style-type: none"> 1. A director may appoint a proxy to vote or otherwise act for the director by signing an appointment form, either personally or by the director's attorney-in-fact. The appointment does not relieve the director of liability for acts or omissions imposed by law on directors. 2. An appointment of a proxy is effective when received by the secretary. An appointment is valid for one month unless a different period is expressly provided in the appointment form. 3. An appointment of a proxy is revocable by the director. 4. The death or incapacity of the director 	<p>Q: To clarify, our documents do not allow proxy voting by Board members.</p> <p>A: That is correct</p>

		<p>appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless written notice of the death or incapacity is received by the secretary before the proxy exercises its authority under the appointment.</p> <p>5. Subject to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as of the shareholder making the appointment.</p> <p>As such, proxy voting by a board member is only permitted if authorized by the bylaws or articles of incorporation. Pursuant to my review of the Bylaws and Articles of Incorporation, proxy voting is not expressly authorized by board members. As such, it is my legal opinion that proxy voting is not permitted by Board Members. If the Association wants to permit proxy voting by Board Members at Board Meetings, I recommend amending the Bylaws to specifically authorize proxy voting by Board Members at Board Meetings. If proxy voting is not authorized by the Governing Documents, then a proxy by a Board Member should not currently count towards quorum at a Board Meeting. If a Board Member is present via phone, they count towards quorum at a Board Meeting if a speakerphone is available in the meeting room that allows board members and association members to hear all parties who are</p>	
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		<p>speaking during the meeting</p> <p><u>Proxy Voting by Owners</u> Pursuant to ARS 33-1812(A) of the Planned Communities Act,</p> <p>Notwithstanding any provision in the community documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy.</p> <p>As such, after termination of the period of declarant control, owners are not permitted to vote by proxy, regardless of whether it's authorized by the bylaws or articles of incorporation.</p> <p>ARS 10-3824(G) applies to all Arizona Non-Profit Corporations; and ARS 33-1812 applies to all Arizona Planned Communities.</p> <p>The legal risk is that the Association is failing to abide by its Governing Documents. Any time an Association fails to abide by its Governing Documents, it opens itself to potential liability.</p> <p>Proxy voting by Owner is expressly prohibited by ARS 33-1812. Since the Association's Bylaws permits proxy voting by Owners, I recommend amending the Bylaws in order to prohibit proxy voting by Owners. As stated above, the Governing Documents do not permit proxy voting by Board Members. As such, there is no need to amend the</p>	<p>Q: There are three types of communities: 1) HOAs, 2) Planned Communities (where community property is owned by the association), 3) Other, which includes Improvement Associations, such as the THIA. Are we then only required to follow rules for Improvement Associations?</p> <p>A: Yes, but it may be wise to follow guidelines for planned communities.</p> <p>Q: We are not bound by the AZ statute ARS 33-1812 which prohibits proxy votes by property owners at the AGM, correct?</p> <p>A: Yes.</p> <p>Q: To clarify, Tonto Hills is only required to comply with ARS 10-3824(G) which applies to all Arizona Non-Profit Corporations. Since the THIA D of R's permit proxy voting at the AGM, do our</p>
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		Governing Documents in that regard.	current governing documents and rules for proxies at our Annual General Meeting stand? A: Yes.
Code of Conduct for Board Members			
Should the Association have procedures in place if an elected official declines to sign the code? What is your recommendation on consequences?		<p>If the Board, by majority vote, adopts a code of conduct, all board members will be subject to the Code of Conduct, regardless of whether they sign. However, if the Board opts to have each board member sign individually, I recommend requiring all board members to sign the Code of Conduct as a condition of board eligibility. <i>I have attached a Mulcahy Cheat Sheet on the Code of Conduct for your reference.</i></p> <p>http://mulcahylawfirm.com/news/Cheat%20Sheet%20The%20Board%20of%20Directors%20Code%20of%20Conduct%20SAGEBRUSH%20VELLUM%20MLF%208.1.13.pdf</p>	<p>Q: Is the ACC obligated to sign the same Code of Conduct?</p> <p>A: No. They are not obligated by statute. The Board would have to specifically make an amendment to the Bylaws requiring the signature for ACC or Board eligibility. The ACC is still obligated by default to follow the Code of Conduct as part of the Bylaws.</p> <p>Q: Please clarify- The Code of Conduct in the THIA Bylaws states:</p> <p><i>#16 New board members will be given a copy of these codes of conduct and will be asked to sign it to signify that they have received it, have</i></p>

			<p><i>read it and agree to abide by it.</i></p> <p>Does that not require a signature?</p> <p>A: No. It requires that they agree to abide by it, but they do not have to sign it.</p>
What is the penalty if a board member violates the code of conduct? Should penalties for violating the code be specified in our procedures?		Whether to specify penalties for violations of the Code of Conduct is at the discretion of the Board	
Is it appropriate for the BoD to make decisions concerning the code on a case by case basis?		Yes, any interpretation of the Code of Conduct would be analyzed on a case-by-case basis.	
Does signing the code of conduct make a board member more vulnerable to legal action?		No, signing the Code of Conduct would not expose ACC members to additional risk of personal litigation. Those risks are present regardless of whether the Code of Conduct is signed. Generally, a Board Member or Committee Member would only be subject to personal liability if they act outside of the scope of their fiduciary duties.	<p>Q: Can you provide us email guidelines?</p> <p>A: Yes, they have just been developed.</p>
Declaration of Scrivener's Error			
Is it sufficient to publish the details of the Scrivener's Error pertaining to our D of		It is not necessary to send out an amendment ballot. The Scrivener's Error amendment has already been recorded with the County Recorder's	Q: If an owner purchased their property years before the posting of the

<p>Rs or must we follow with a D of R ballot amendment?</p>		<p>Office. Yes, the recorded Scrivener's Error amendment is now considered part of the Association's DoRs and can be enforced just like any other provision.</p>	<p>Scrivener's Error, are they grandfathered or must they now comply with the new restriction? A: New construction must comply with the setback in the Scrivener's Error Document.</p>
<p>D of R interpretation – Amendment Voting</p>			
<p>Based on your experience and knowledge, what is your interpretation / opinion of this? Para 1.h.3 of our D of Rs states; "These covenants and restrictions are understood to be for the benefit of all lot and tract owners in Tonto Hills. They may be changed in any way by votes of more than fifty percent (50%) of the property owners in Tonto Hills, allowing one vote for each lot and tract...."</p>	<p>Because the word 'majority' is not used in this section, the following interpretation has been used in the past. a. A ballot amendment to change the D of Rs is not valid unless more than 50% of the members vote. b. If more than 50% of members vote and a majority (more than 50%) of those voting approve, then the ballot amendment passes. c. A ballot amendment to</p>	<p>Based on the language used in the DoRs, it is my legal opinion that an amendment requires the approval of 50% of the total members.</p>	<p>Q: Then we are required to have 50% plus one to amend our D of R's? A: No, just 50%.</p>

	<p>change the D of Rs does not require more than 50% of the total members approving the amendment.</p>		
<p>Member Complaints and Closed BoD Sessions</p>			
<p>When a complaint from a member is received, should that complaint always be considered / debated in closed session?</p>		<p>Pursuant to ARS 33-1804, a Board Meeting can be closed to discuss the following:</p> <ol style="list-style-type: none"> 1. Legal advice from an attorney for the board or the association. On final resolution of any matter for which the board received legal advice or that concerned pending or contemplated litigation, the 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. 2. Pending or contemplated litigation. 3. Personal, 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, including records of the association directly related to the personal, 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. 4. Matters relating to the job performance of, compensation of, health records of or specific 	<p>Rick Nelson proposed reframing this question to Beth Mulcahy. He will formulate the questions and forward to the board for review, then send to Cheryl to submit to Beth.</p> <p>Q: Can the minutes from this Executive Session meeting be posted for the community?</p> <p>A: Yes. It is at the Board's discretion.</p> <p>Q: Why was this meeting held in Executive Session?</p> <p>A: Legal advice is always given in Executive session.</p>

		<p>complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.</p> <p>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.</p> <p>As such, a complaint from a member should not be considered in closed session unless it also falls into one of the above enumerated categories (e.g. if the complaint involves pending or contemplated litigation)</p>	
<p>If a BoD deems it necessary to admonish or discipline a BoD member, should that also always be in closed session?</p>		<p>The issue of Board Member discipline can only be discussed in closed session if it falls into one of the above enumerated categories.</p>	
<p>What is your legal advice with regards to closed sessions?</p>		<p>My advice is to strictly comply with the Arizona Open Meeting laws. <i>I have attached a Mulcahy Cheat Sheet for your reference.</i></p> <p>http://mulcahylawfirm.com/news/Cheat%20Sheet%20Arizona%20Open%20Meeting%20Law%20SUNFLOWER%20MLF%208.1.13.pdf.</p>	
<p>One family member serving on the Board and ACC</p>			

<p>Per our documents, can the same family member serve on both the Board and the ACC?</p>	<p><u>Article Four Section 2 of the THIS Bylaws states;</u> "The number of Directors shall be no less than five, nor more than nine. Directors shall be elected at the annual meeting of the members, and the term of office of each Director shall be until the next annual meeting of members and the election and qualification of his successor. One member of each family shall be allowed to serve on the Board and one member of each family shall be allowed to serve on the Architectural Control Committee, but not more than one member of each family on each of these bodies." <u>Paragraph 1a of the THIA D of Rs states;</u></p>		<p>Q: Per our documents, can the same family member serve on both the Board and the ACC?</p> <p>A: Yes.</p> <p>Q: Does this set up a conflict of interest? Does our precedence in treating similar situations apply?</p> <p>A: Any conflict of interest is treated as it usually is with disclosure and recusal from voting. How this issue was handled in the past does not mean it is prohibited now.</p>
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	<p>"The owners of property in Tonto Hills shall organize a Tonto Hills Improvement Association (also referred to herein as the Association") whose membership shall consist of all owners of property in Tonto Hills. The owners shall elect the Board of Directors of the Association and its Architectural Control Committee which will consist of six members. The Architectural Control Committee is an arm of the Association; it shall be accountable to the Board of Directors of the Association and shall not be authorized to obligate funds except for minimal routine operating expenses."</p>		
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	<p><u>Paragraph 2 of the THIA D of Rs states;</u> "In event of any ambiguity in a provision of these restrictions, the interpretation of the Board of Directors of the Association as to the meaning intended shall prevail."</p>		
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