HOA ACTIONS IN LIEU AND THE DANGERS OF RATIFICATION
For Condominiums and Planned Communities

For many years boards have made many of their decisions via action in lieu with unanimous written consent. This has traditionally been authorized by the Non-profit Corporation Act, ARS 10-3821, which says that actions by a board "may be taken without a meeting if the action is taken by all of the directors." For the last several years, however, more and more judges are finding that this statute is trumped by the more restrictive, newer open meeting laws in Condominiums (ARS 33-1248) and Planned Communities (ARS 33-1804). Here are a few reasons why judges are choosing the more restrictive condo and planned communities statutes over the non-profit corporation act:

- Both ARS 33-1248 and 1804 trump an association's governing documents.
- Both ARS 33-1248 and 1804 say "all meetings" of the board must be open except for the express exemptions (i.e. attorney client, personal information, violations, etc.)
- Both ARS 33-1248 and 1804 say that even informal discussions are subject to the open meeting laws when a quorum of the board is present.

If the analysis was to stop here we may conclude that ARS 10-3821 still authorizes actions in lieu. However, it does not stop here because of the recent changes to the law which make actions in lieu much more risky. Here are a few of the reasons why:

- Both ARS 33-1248 and 1804 were changed to require open meetings even when a quorum of the board meets informally and discusses anything association related.
- Both ARS 33-1248 and 1804 were changed to require that a board first notify the members of when they meet in executive and to specify what specific subsection of the statute authorizes the executive meeting.
- Both ARS 33-1248 and 1804 were changed to require that directors and even the "community managers" keep in mind Arizona's "open meeting policy" and in fact placed an affirmative duty on "community managers" to keep to that policy. What is that "policy?" Both ARS 33-1248 and 1804 say

  "It is the policy of this state as reflected in this section that all meetings of a planned community [and condominium], whether meetings of the members' association or

> meetings of the board of directors of the association, **be conducted openly** and that notices and agendas be provided 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, 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**."

This policy statement requires three main things:

1. All meetings be "conducted openly."
2. The community "ensure that members have the ability to speak after discussion of agenda items, but before a vote of the board."
3. Any "community manager shall take into account" this "policy."

Since these changes judges now ask, "how can the community satisfy the requirements in the policy statement if they are doing actions in lieu?" Well, a lot of judges say they can't! To make it even clearer, Governor Ducey wrote:

> "I have signed H.B. 2411… because it promotes transparency and participation for all residents in homeowners' association governance."

Keep in mind that HB2411 is the law the governor signed that puts an affirmative duty on "community managers" to remember the state's open meeting directives and advise their boards of said directives.

Each year we see more and more restrictions on open meeting laws. Because each year's change makes the meeting laws more restrictive, more and more courts are ruling against actions in lieu, including one judge who recently sanctioned an association for making decisions outside a meeting even though they ratified those decisions in a subsequent open meeting.

Ratification may not save a board anymore, so the best practice is to hold open meetings. They are not hard to do. In fact, they can be telephonic and generally only require 48-hour notice to them members in any manner the board deems reasonable.