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E-MAIL AND UNANIMOUS WRITTEN CONSENT

HOW TO CONDUCT BOARD MEETINGS IN LIGHT OF RECENT LAW CHANGES

Authored and presented by

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This document is intended to provide general information. It does not and cannot provide specific legal advice. For additional information or answers to questions, you may contact Augustus H. Shaw IV, Esq. of Shaw & Lines, LLC at 480-456-1500 or send questions to ashaw@shawlines.com.

This course is approved by Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification. www.Camicb.org.

Syllabus

Learning Objectives:

This seminar will discuss the laws that regulate Homeowner Association Board Meetings, with a special emphasis on the evolving law concerning the use of e-mails and unanimous written consent. *This Guide is available to download from our website at: <http://www.shawlines.com>.*

I. INTRODUCTION.

II. UNANIMOUS WRITTEN CONSENT.

- a. What is unanimous written consent
- b. Arizona Statutes that authorize unanimous written consent
- c. When may unanimous written consent be used
- d. Unanimous written consent and e-mails
- e. Unanimous written consent best practices

III. BOARD MEMBER USE OF E-MAIL.

- a. What's the legal issue with Board Member e-mail use
- b. Statutes that apply to Board Member e-mail use
- c. When may Board Members communicate via e-mail
- d. Board Member e-mail best practices.

IV. CONCLUSION AND FINAL THOUGHTS.



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*THIS COURSE IS APPROVED BY COMMUNITY ASSOCIATION
MANAGERS INTERNATIONAL CERTIFICATION BOARD
(CAMICB) TO FULFILL CONTINUING EDUCATION
REQUIREMENTS FOR THE CMCA® CERTIFICATION. WWW.
CAMICB.ORG.*

**What is the Real Issue with
Unanimous Written Consent and E-mails?**

- A.R.S. 33-1804(E) (Planned Communities) and A.R.S. 33-1248(E) (Condominiums) states that the Statutes regarding HOA Board meetings shall be interpreted “in favor of open meetings”

What is Unanimous Written Consent?

- Unanimous Written Consent is a procedure where a HOA Board, without conducting a Board Meeting, may approve of action items so long as **all** Board Members sign a written consent (E-mail signatures are allowed).
- Unanimous written consent is based on a provision of the Arizona Non Profit Corporations Act (A.R.S. §10-3821) or the HOA Bylaws.

**Common Uses of
Unanimous Written Consent**

- The HOA desires to engage an attorney to obtain advice, file or defend a lawsuit.
- **This decision may be made outside of an open Board Meeting via e-mail pursuant to A.R.S. §33-1804(A) and A.R.S. §33-1248(A).**

**Common Uses of
Unanimous Written Consent**

- The HOA has to respond to an emergency situation.
- **This decision may be made outside of an open Board Meeting via e-mail pursuant to A.R.S. §33-1804(D)(2) and A.R.S. §33-1248(D)(2).**

**Common Uses of
Unanimous Written Consent**

- The HOA desires to make a decision regarding an individual owner's delinquent account or violation status.
- **This decision may be made outside of an open Board Meeting via e-mail pursuant to A.R.S. §33-1804(A) and A.R.S. §33-1248(A).**

**Common Uses of
Unanimous Written Consent**

- The HOA desires to make a decision regarding spending funds (non-emergency).
- Unanimous Written Consent may be used but waiting for an open Board Meeting is preferable.

**When Should
Unanimous Written Consent Be Used?**

- When it is nearly impossible for the Board to meet (i.e. Board is gone for the summer months).
- If a Board meets quarterly and a non-emergency issue arises.

**Best Practices
Unanimous Written Consent**

- Make sure the writing or e-mail clearly states the action authorized.
- Ratify the decision at the next open Board meeting.
- All documents regarding Unanimous Written Consent are records of the Association and should be saved.

What's the Issue with E-mail?

- A.R.S. 33-1804(D)(4) (Planned Communities) and A.R.S. 33-1248(D)(4) (Condominiums) states:
Any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice provisions of this section without regard to whether the board votes or takes any action on any matter at that informal meeting.
- **The fundamental phrase of the statute is “to discuss association business.”**

E-mail as Records of the Association

- An argument may be asserted that since e-mail is not listed under the standard records required to be kept under A.R.S. 10-11601(Non-Profit Corporations Act) and since A.R.S. 33-1805 and A.R.S. 33-1258 does not define e-mail as a record, e-mails are not records of the Association.
- An argument may also be asserted that any e-mail where Association business is discussed may be considered a record of the Association because it is a written statement.

E-mail Use Best Practices

- Be very careful what you write in an e-mail.
- Have to-the-point “RE” Lines.
- Save all e-mails – Who Owns the E-mail.

E-mail Use Best Practices

- Try to discourage e-mail “debates” or “discussions.”
- Create a HOA specific e-mail address for Board Members - Board Members should not use personal or work e-mail addresses for Association business.

E-mail Use Best Practices

- If you make a decision via e-mail, ratify the decision at the next Board Meeting.
- Know when an e-mail is confidential – executive session. Keep a separate file for confidential – executive session e-mails.



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The Misnomer of Unanimous Written Consent

By Augustus H. Shaw IV, Esq., CCAL

Increasingly, many homeowners associations (HOAs) and their Boards of Directors are using a method of effectuating HOA business without a Board meeting called unanimous written consent. While the use of unanimous written consent was fully appropriate a few years ago, recent statutory changes makes the use of unanimous written consent problematic. This article is designed to explain what unanimous written consent is and how it should properly be used.

In simple terms, unanimous written consent is a procedure where a HOA Board, without conducting a Board Meeting, may approve of action items so long as **all** Board Members sign a written consent (A.R.S. §10-3821(E) allows for electronic and e-mail signature). Unanimous written consent is based on a provision of the Arizona Non Profit Corporations Act (A.R.S. §10-3821) which states:

Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by chapters 24 through 40 of this title to be taken at a directors' meeting may be taken without a meeting if the action is taken by all of the directors. The action must be evidenced by one or more written consents describing the action taken, signed by each director and included in the minutes filed with the corporate records reflecting the action taken.

Unanimous written consent is often used to obtain Board approval via e-mail regarding urgent or confidential matters. The interesting note in said usage is that unanimous written consent is rarely, if ever, needed in the HOA setting. This is because the common reasons to use unanimous written consent may be effectuated without actually using unanimous written consent. Some common examples of this are:

1. The HOA desires to engage an attorney to obtain advice or file a lawsuit. This decision may be made via e-mail pursuant to A.R.S. §33-1804(A) and A.R.S. §33-1248(A). Unanimous written consent is not needed.
2. The HOA has to respond to an emergency situation. This decision may be made via e-mail pursuant to A.R.S. §33-1804(D)(2) and A.R.S. §33-1248(D)(2). Unanimous written consent is not needed.
3. The HOA desires to make a decision regarding an individual owner's delinquent account or violation status. This decision may be made via e-mail pursuant to A.R.S. §33-1804(A) and A.R.S. §33-1248(A) and unanimous written consent is not needed.

The use of unanimous written consent has become increasingly problematic due to recent changes in Arizona law and policy. This may be seen in a recent change to the meetings statutes, as may be found in A.R.S. §33-1804(E) and A.R.S. §33-1248(E), which states, in part:

It is the policy of this state as reflected in this section that all meetings of a planned community (or 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 is taken.

In this current extremely litigious HOA climate, HOAs should shy away from using unanimous written consent and instead take advantage of the exceptions in the open meeting requirements found in A.R.S. §33-1804(A), A.R.S. §33-1248(A), A.R.S. §33-1804(D)(2) and A.R.S. §33-1248(D)(2). While unanimous written consent is still technically able to be used, HOAs should use it only as an absolute last resort.



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EDUCATION

University of Arizona James E. Rogers College of Law - J.D. 2000

University of Arizona - B.A. 1996

PROFESSIONAL LICENSES

Member, State Bar of Arizona.

Member, U.S. District Court Bar for the District of Arizona.

Member, State Bar of Nebraska.

Member, U.S. District Court Bar for the District of Nebraska.

Member, United States Tax Court Bar.

AWARDS AND ACHIEVEMENTS

2010 Leadership Centre Brian L. Zemp Community Leadership Award.

2008 Member – Community Association Institute College of Community Association Lawyers.

2006 Leadership Centre Instructor of the Year.

CONTINUING LEGAL EDUCATION SEMINARS TAUGHT

June, 2017 - Arizona State Bar Convention CLE Panel Entitled *Advanced Issues in Land Use: Navigating the Dangers of Deed Restrictions in Residential and Commercial Development.*

January, 2017 - Community Associations Institute College of Community Association Lawyers National Law Seminar CLE Entitled *The Insurance Defense Dilemma; Conflicts of Interest Regarding Insurance Defense Under a Reservation of Rights.*

May, 2015 - Community Associations Institute National Annual Conference Seminar Entitled *I am the Association! How to Handle the Overbearing Board Member.*

November, 2014 – State Bar of Arizona CLE Seminar Entitled *Let Slip the Dogs of Peace: The ADA, Fair Housing Act and the Use of Service Animals to Help America's Returning Veterans.*

April, 2013 - Arizona Association of Landlord-Tenant Attorneys CLE Seminar Entitled *An Overview of Property Tax Appeals, HOA Laws and Remedies When a Foreclosure Goes Wrong.*



February, 2011 - Community Associations Institute (Central Arizona Chapter) Trade Show Seminar Entitled *Going Rogue, What to do with the Rogue Association Board Member*.

May, 2010 - Community Associations Institute National Annual Conference Seminar Entitled *Board Member Decision Making – The Business Judgment Rule Plus*.

January, 2010 - Community Associations Institute College of Community Association Lawyers National Law Seminar CLE Entitled *Board Member Decision Making – The Business Judgment Rule Plus*.

January, 2007 - Lorman Educational Services Seminar Entitled *Issues Concerning the Development, Creation and Operation of the Arizona Office Condominium Association*

June, 2006 - Arizona Association of Community Managers Seminar Entitled *Changes in the Laws Affecting Community Associations*.

May 2005 - Maricopa County Bar Association Seminar Entitled *How to Collect Assessments and Enforce Restrictions Concerning Homeowner Associations*.

ARTICLES AND PUBLICATIONS

Spring (2016) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *There is Method to the Madness: How to Choose the Best Method of Enforcement*.

Fall (2014) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *The Importance of Trade Names and Trademarks in the Social Media Age*.

Spring (2013) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *The Hatfields and the McCoys: HOA Involvement in Neighbor Disputes*.

September/October (2012) Community Associations Institute National Magazine *Common Ground* Article Entitled *Curmudgeon Cure*.

Issue 4 (2011) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *Association Record Keeping in the Digital Age*.

Issue 1 (2011) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *We Are All in This Together - Sustaining Members' Interest in Their Community Association*.

Issue 4 (2010) Community Associations Institute Central Arizona Chapter Magazine *Community Resource* Article Entitled *Why HOAs are Good in a Bad Economy*.



Issue 2 (2010) Community Associations Institute Central Arizona Chapter Magazine
Community Resource Article Entitled *The Ins and Outs of Owner Bankruptcy – What
Community Associations Need to Know*.

Columnist for the weekly Column entitled “Ask the HOA GUY” published by the
Arizona Republic and the *East Valley/Scottsdale Tribune* (2004-2006).

LECTURER FOR THE FOLLOWING HOA ACADEMIES:

- 2010-Present City of Scottsdale, AZ HOA Academy.
- 2010-Present City of Chandler, AZ HOA Academy.
- 2010-Present City of Casa Grande, AZ HOA Academy.

SERVICE ORGANIZATIONS

Member, Community Associations Institute College of Community Association Lawyers
Board of Governors (2017); Vice President (2014 to 2015), Member of the Board of
Directors (2013 to Present) of the Central Arizona Chapter of Community Associations
Institute (CAI); Member, State Bar Committee of Minorities and Women in the Law
(2002-2003), Vice Chair, City of Tempe Redevelopment Review Commission (2003-
2004), Secretary, Maricopa County Bar Association Foundation (2002-2003), Member,
Maricopa County Board of Adjustment (2005-2006), Member, Maricopa County
Community Development Advisory Commission (2005-2006), Member, Maricopa
County Merit Commission (2006), Board Member, The Leadership Centre (2002-
Present), Member, City of Tempe Transportation Commission (2009-2011), First Vice
Chairman, Arizona Republican Party (2009 – 2012).

PROFESSIONAL LEGAL EXPERIENCE

Shaw & Lines, LLC

Founding Member and Managing Member (April 2005 – Present)

Provide legal advice to Homeowner Associations, Property Owner Associations, Office
Condominium Associations and non-profit corporations in a variety of general real estate
and corporate transactions. Specifically, creation of corporate entity for home owners
associations, creation and interpretation of governing documents of homeowner
associations, creation and negotiation of complex sales and lease agreements, creation of
land conveyance documents, representation of home owner and property owner
associations in zoning matters, representation of homeowners associations in collection
litigation matter and document enforcement matters.

Carpenter Hazlewood, PLC

Associate – Real-Estate and General Corporate Law (March 2002 to November 2004)



Kutak Rock, LLP - Omaha, Nebraska

Associate – Tax, Public Finance (May 2000 to September 2001)

Summer Associate (Summer 1999)

SERVICE TO COUNTY

Honorably discharged from the U.S. Navy, August 1992.