

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Gary W. Moselle,
4 Petitioner,

5 vs.

6 Desert Mountain Master Association,
7 Respondent.

No. 18F-H1817005-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** April 20, 2018

9 **APPEARANCES:** Petitioner Gary W. Moselle appeared on his own behalf.
10 Respondent Desert Mountain Master Association was represented by Curtis Ekmark.

11 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

12
13 **FINDINGS OF FACT**

14 1. Desert Mountain Master Association (Respondent or DMMA) is an
15 association of homeowners located in Scottsdale, Arizona.

16 2. On or about September 1, 2017, Gary W. Moselle (Petitioner) filed a petition
17 with the Arizona Department of Real Estate (Department), alleging that Respondent had
18 violated the provisions of A.R.S. Title 33, Chapter 16, Sections 33-1801 to 33-1818.
19 Petitioner specifically alleged, in relative part, as follows:

20 Chair of the Communications Committee, Desert Mountain Master
21 Association (DMMA), alleges that a scheduled meeting of his committee is
22 "closed," open only to committee members, and not subject to Arizona's
23 open meeting statute. DMMA is an Arizona Planned Unit Development,
governed by A.R.S. Title 33, Chapter 16, Sections 33-1801 to 33-1818.

24 3. On or about September 5, 2017, the Department issued a notice to
25 Respondent regarding the petition.

26 4. On or about September 6, 2017, the DMMA Communications committee
27 held a closed meeting that Petitioner was not allowed to attend.

28 5. On or about September 18, 2017, Respondent filed an answer to the
29 petition denying all allegations.
30

1 6. On or about September 25, 2017, the Department issued a Notice of
2 Hearing to the parties notifying them that a hearing on the petition would be conducted by
3 the Office of Administrative Hearings.

4 7. On November 17, 2017, a hearing was held on the petition and the parties
5 presented evidence and argument regarding the violation alleged in the petition.

6 8. At the November 17, 2017 hearing, Petitioner argued that Respondent
7 improperly asserted that the September 6, 2017 meeting of the DMMA Communication
8 committee was not subject to the open meetings law and could be closed to the DMMA
9 members.

10 9. At the November 17, 2017 hearing, Respondent argued that the DMMA
11 Communication committee did not meet regularly and therefore was not subject to the
12 open meetings law. Respondent presented testimony that in 2016 and 2017, the DMMA
13 Communication committee held only four meetings, twice in April 2016, once in June
14 2017, and the September 6, 2017 meeting. Respondent further asserted that the
15 recommendation the DMMA Communication committee made to the DMMA Board of
16 Directors (Board), that an email blast be sent regarding the matter at issue, was not acted
17 upon by the Board, as further evidence that the DMMA Communication committee was
18 not conducting any actual business of the Board.¹

19 10. On December 7, 2017, the Administrative Law Judge issued an
20 Administrative Law Judge Decision in which Petitioner's petition was denied.

21 11. On or about January 4, 2018, Petitioner filed a request for rehearing with the
22 Department. In the request for rehearing, Petitioner cited newly discovered material
23 evidence in that an email had been sent by Respondent on November 17, 2017, after the
24 hearing concluded. Petitioner also argued that a rehearing should be granted "to evaluate
25 whether" Respondent misled the Administrative Law Judge regarding the Board's actions
26 with regard to the committee's recommendation. Petitioner also argued the December 7,
27 2017 decision was contrary to law.

28 12. On January 26, 2017, the Department granted Petitioner's request for

29 ¹ Petitioner argued in his prehearing brief in the instant matter that this statement "include[d] two errors."
30 While Petitioner may disagree with the underlying truthfulness of Respondent's statements or position,
 those were Respondent's arguments during the November 17, 2017 hearing. Thus, the Administrative Law
 Judge did not err in stating that "Respondent further asserted"

rehearing.

13. On April 20, 2018, a rehearing was conducted at the Office of Administrative Hearings. The Administrative Law Judge took administrative notice of the record in the prior proceeding.

14. At the April 20, 2018 hearing, Petitioner again argued that “regularly scheduled” could have multiple meanings and was not defined in the statute as meaning meeting on a regularly scheduled time frame, *i.e.* on the third Monday of the month, on the 15th of every month, quarterly, or annually. Rather, Petitioner again asserted that “regularly scheduled” should be interpreted to mean scheduled in a normal fashion. In his prehearing brief, Petitioner asserted there were “six functioning DMMA committees” and of those six committees, five meet “at the request of the chair.” In support of his assertion, Petitioner included a page from Respondent’s website entitled “VOLUNTEER REQUEST” indicating that at the January 29th Board Meeting, “new Committee Chairs were appointed and they are searching for volunteers to serve on their committees.” On cross-examination, Petitioner acknowledged he had been permitted to attend other open committee meetings including the Covenants Committee, Rental Committee, and Elections Committee. When asked why he wrongly asserted in his brief that Respondent had only the six committees he referenced, Petitioner stated that five of the committees listed in the Volunteer Request page “meet at the request of the chair *and they’re not regularly scheduled.*” Hearing record 30:52 – 31:15 (emphasis added).

CONCLUSIONS OF LAW

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

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

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

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

1 A. Notwithstanding any provision in the declaration, bylaws or other
2 documents to the contrary, all meetings of the members' association and
3 the board of directors, and *any regularly scheduled committee meetings*,
4 are open to all members of the association or any person designated by a
5 member in writing as the member's representative and all members or
6 designated representatives so desiring shall be permitted to attend and
7 speak at an appropriate time during the deliberations and proceedings.

8
9 F. It is the policy of this state as reflected in this section that all meetings of
10 a planned community, whether meetings of the members' association or
11 meetings of the board of directors of the association, be conducted openly
12 and that notices and agendas be provided for those meetings that contain
13 the information that is reasonably necessary to inform the members of the
14 matters to be discussed or decided and to ensure that members have the
15 ability to speak after discussion of agenda items, but before a vote of the
16 board of directors or members is taken. Toward this end, any person or
17 entity that is charged with the interpretation of these provisions, including
18 members of the board of directors and any community manager, shall take
19 into account this declaration of policy and shall construe any provision of
20 this section in favor of open meetings.

21 Emphasis added.

22 5. When construing a statute, the primary goal is to ascertain the legislature's
23 intent. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App.
24 2007). This is accomplished by first looking to the text of the statute. *Id.* If the language is
25 clear, its plain meaning is ascribed, unless it would lead to absurd results. *Id.*; *Marsoner*
26 *v. Pima County*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991). If ambiguity exists,
27 secondary principles of statutory construction are used to determine the intent. *Contes*,
28 216 Ariz. at 527.

29 6. Petitioner asserted that because the September 6, 2017 meeting was
30 scheduled in a normal manner, that meant that the meeting was "regularly scheduled" and
subject to the open meetings law. Petitioner also pointed to the policy statement in A.R.S.
§ 33-1804(F) that "all meetings of a planned community" be conducted openly in support
of his assertion that the September 6, 2017 DMMA Communications committee meeting
should have been open to the members.

7. Respondent argued that the phrase "regularly scheduled" in the statute
meant that the meetings occurred at regular intervals, such as on the third Thursday of

1 every month, quarterly, or even annually, and that because the DMMA Communications
2 committee met so infrequently and without any established interval, the committee did not
3 have “regularly scheduled” meetings that would render it subject to the open meetings
4 law.

5 8. The plain language of the A.R.S. § 33-1804(A) that all “regularly scheduled
6 committee meetings” must be open to the members applies to those meetings that occur
7 at regular intervals. It is acknowledged that, as Petitioner asserted, “regularly scheduled”
8 could mean “scheduled in a normal or ordinary fashion.” However, the fact that the phrase
9 “regularly scheduled” could have multiple meanings does not mean that it cannot be
10 interpreted according to its plain language. In fact, during his testimony, Petitioner stated
11 that the five committees he referenced in his prehearing brief met at the request of the
12 chair and did not have “regularly scheduled” meetings.

13 9. The general policy statement in favor of open meetings set forth in A.R.S. §
14 33-1804(F) does not override the specific provisions of A.R.S. § 33-1804(A) that only
15 “regularly scheduled” committee meetings must be open to the members.

16 10. The Administrative Law Judge concludes that that at the time of the
17 September 6, 2017 meeting, the DMMA Communication committee did not hold “regularly
18 scheduled” meetings, and therefore was not subject to the open meetings law. As such,
19 Respondent’s determination that the September 6, 2017 DMMA Communication
20 committee meeting was not open to the members was not a violation of A.R.S. § 33-1804.

21 ORDER

22 IT IS ORDERED that Petitioner’s petition is denied.

23 NOTICE

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

30 Done this day, May 10, 2018

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile May 10, 2018 to:

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