

EXHIBIT A
TO PLAINTIFF'S
REPLY ON SUMMARY JUDGMENT



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

August 18, 1997

GRANT WOODS
ATTORNEY GENERAL

MAIN PHONE : 542-5025
TELECOPIER : 542-4085

The Honorable Jerry Overton
Arizona House of Representatives
1700 West Washington Avenue
Phoenix, AZ 85007

Re: I97-012 (R97-018)

Dear Representative Overton:

You have asked whether the board of directors ("Board") of a homeowners association of a planned community can hold informal meetings to merely discuss, but not vote on or approve, Board matters without providing notice to association members and giving them the opportunity to attend. We conclude that the legislative directive in Arizona Revised Statutes Annotated ("A.R.S.") § 33-1804 prohibits a quorum of a Board from holding informal meetings to discuss Board business unless it provides notice to the association's members and an opportunity for them to attend the meetings.

Background

In 1994 the Legislature enacted a set of laws to govern meetings held by an association or Board of a planned community. 1994 Ariz. Sess. Law ch. 310, § 1 (enacting A.R.S. §§ 33-1901 through -1906, renumbered and now consisting of A.R.S. §§ 33-1801 through -1807). The legislation defines an "association" as:

a nonprofit corporation or unincorporated association of owners created pursuant to a declaration to own and operate portions of a planned community and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

A.R.S. § 33-1802(1). A "planned community" is:

a real estate development which includes real estate owned and operated by a nonprofit corporation or unincorporated association of owners, created for the purpose of managing, maintaining or

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improving the property, and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes.

A.R.S. § 33-1802(4).¹

According to A.R.S. § 33-1804(A), all meetings of an association and its Board must be open to all association members, and all members must be permitted to attend and listen to the deliberations and proceedings, with certain limited exceptions.² Notice of *association* meetings must be provided to each association member by hand-delivery or mail within at least ten days, but no more than fifty days, prior to the meeting, unless otherwise provided in the association's articles or bylaws. A.R.S. § 33-1804(B). Notice of *Board* meetings that are held after the termination of declarant control of the association must be given to association members by newsletter, conspicuous posting, or other reasonable means, A.R.S. § 33-1804(C), at least forty-eight hours prior to the meeting, unless the association's articles or bylaws provide otherwise. 1997 Ariz. Sess. Laws ch. 40, § 5 (effective July 21, 1997). However, Board meetings may be held without notice if emergency circumstances demand Board action before notice can be given. A.R.S. § 33-1804(C).

Confusion has arisen in the past with respect to the applicability of Arizona's Open Meeting Law, A.R.S. §§ 38-431 through -431.09, to meetings of homeowners associations. The Open Meeting Law applies only to public bodies.³ A.R.S. § 38-431.01. Homeowners

¹ Although your letter referred to a "homeowner's association," we assume from the context of your request that your question pertained to an informal meeting of Board members of an association of a planned community. Sections 33-1801 through -1807 are only applicable to associations of a planned community as defined in A.R.S. § 33-1804(1) and (4), quoted above. Condominium associations are governed by A.R.S. § 33-1201 through -1270, and are subject to a different open meeting statute, A.R.S. § 33-1248.

² Exceptions to the requirements of A.R.S. § 33-1804(A) allow the Board to hold closed meetings for consideration of employment or personnel matters; legal advice from the Board's or the association's attorney; pending or contemplated litigation; and pending or contemplated matters regarding enforcement of the association's documents or rules.

³ "Public body" is defined in A.R.S. § 38-431(5) as:

the legislature, all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

associations and their Boards are not public bodies and, therefore, are not within the purview of the Open Meeting Law. The Attorney General, County Attorneys, and other public lawyers are not authorized to enforce the special open meeting laws applicable to homeowners associations (A.R.S. § 33-1804) or condominium associations (A.R.S. § 33-1248).

Analysis

A. A.R.S. § 33-1804(A) Requires Association and Board Meetings to Be Open.

To determine whether the open meeting and notice requirements in A.R.S. § 33-1804 apply to informal Board meetings at which the Board does not vote or approve matters, we first look to the language of the statute. The primary rule of statutory construction is to determine legislative intent. *Mail Boxes v. Industrial Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best source of a statute's meaning is its language, and when the language is unambiguous, it is determinative of the statute's construction. *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). Section 33-1804(A), A.R.S., states that "all meetings of the association and board of directors are open to all members of the association and all members so desiring shall be permitted to attend and listen to the deliberations and proceedings"

Because A.R.S. § 33-1804 does not limit or define "meeting" or give direction as to when a gathering of Board members constitutes a "meeting," we look elsewhere for guidance. Section 1-216(B), A.R.S., states that a majority of a board or commission constitutes a quorum. We may also look to how the word is used in similar settings. See *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970)(statutes with the same general purpose should be construed together, even if the statutes do not reference one another or are in different chapters of the A.R.S.). Arizona's Open Meeting Law defines a "meeting" as a gathering of a quorum of members of a public body to propose or take legal action, including deliberations regarding such action. A.R.S. § 38-431(3). Piecing these components together, we conclude that if a quorum of the Board meets and discusses Board matters, either formally or informally, that constitutes a "meeting" and the Board must follow the open meeting and notice requirements of A.R.S. § 33-1804. If fewer than a quorum of Board members meet, the requirements of A.R.S. § 33-1804 do not apply.

The statute permits all association members to attend and listen to the "deliberations and proceedings" of the Board. A.R.S. § 33-1804(A). Neither A.R.S. §§ 33-1802 nor 33-1804 defines the terms "deliberations" and "proceedings." We must construe words according to their common and approved use. A.R.S. § 1-213. In the context of the Open Meeting Law, we previously concluded that "deliberations" include "any exchange of facts

that relate to a matter which foreseeably might require some final action” Ariz. Att’y Gen. Op. I79-4; *see also Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors*, 69 Cal. Rptr. 480, 485 (App. 1968)(deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision). “Proceedings” encompasses one step or a series of steps to accomplish something. WEBSTER’S THIRD NEW INT’L DICTIONARY 1807 (1993). The Legislature’s use of the terms “deliberations” and “proceedings” indicates that the two terms are separate and distinct steps of the decision-making process that must be open to the association’s members. *See Sacramento Newspaper Guild*, 69 Cal. Rptr. at 485. Based on the Legislature’s use of these expansive terms, A.R.S. § 33-1804 includes both informal and formal discussions regarding Board matters and other actions of the Board.

Where language is unambiguous, it is normally conclusive, absent clear legislative intent to the contrary. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). Because the language of A.R.S. § 33-1804(A) is unambiguous, we could stop our analysis here, but additional factors support our conclusion that the statute governs informal meetings as well as formal meetings of the Board.

B. Legislative History and Public Policy Reasons Support Interpreting the Statutory Language as Mandating Open Meetings.

The legislative history and general policies behind this specialized open meeting law also support our determination concerning the interpretation of A.R.S. § 33-1804. The purpose of the legislation creating A.R.S. §§ 33-1801 through -1807 was to open Board meetings and enhance homeowners’ rights by allowing them to attend the meetings. *See Minutes of the Senate Committee on Commerce and Economic Development*, 41st Legislature, 2nd Reg. Sess. (March 9, 1994). This intent parallels the intent behind the Open Meeting Law, which is to open the conduct of government business to the public’s scrutiny and to prohibit decision-making in secret. *See Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). Based on the Legislature’s intent, we will promote open meetings by interpreting A.R.S. § 33-1804 in a way that prohibits attempts to frustrate the statute’s purpose. *Cf. Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995)(exemptions to the Open Meeting Law must not be interpreted so broadly as to frustrate the Open Meeting Law).

Informal meetings may allow crystallization of decisions to a point just short of ceremonial acceptance. *See Sacramento Newspaper Guild*, 69 Cal. Rptr 480, 487 (App. 1968). Thus, interpreting A.R.S. § 33-1804 to allow the Board to meet informally without providing notice to association members subverts the law. Also, discussion that takes place at an informal meeting on an issue that will later come before the Board will limit discussion

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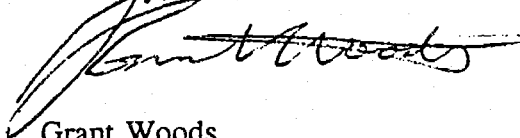
at a subsequent formal meeting on the issue, thus preventing association members from hearing the policy, motivations, and other important factual information involved in the Board members' decision. *Bagby v. School District No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974). Likewise, Board members not present at the informal meeting would also be disadvantaged by not being informed about the background information and informal discussions shared by members at the informal meeting. Moreover, while a Board is not a public body with obligations to the public, a Board of an association has duties that directly affect association members. For example, the association assesses members for the costs and expenses incurred in the performance of the association's obligations, A.R.S. § 33-1802(1) and (4), and the Board may penalize members who do not pay assessments or who are late in making payment. *See* A.R.S. § 33-1803.

We have previously opined with respect to a similar issue. In Ariz. Att'y Gen. Op. 188-055, we advised the Green Valley Community Coordinating Council, Inc., which was essentially a homeowners association, that "the council should be strongly encouraged to always conduct public meetings which are properly noticed. Because it is obvious that the council has a great deal of influence on community affairs, we believe the public should always be invited to attend, observe and even participate in the Council's deliberations." The Legislature's subsequent enactment in 1994 of the laws requiring planned communities' associations and their Boards to hold open meetings bolstered our advice that meetings of such groups should be open to the public.

Conclusion

We conclude that a Board of a planned community's homeowner association must follow the open meeting and notice provisions of A.R.S. § 33-1804 if a quorum of the Board meets informally to discuss Board matters, regardless of whether the Board votes or takes any action on any matters.

Sincerely,



Grant Woods
Attorney General