March 5, 1999
No. I99-006(R99-002)

Question Presented

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 15-253(B) (school district attorneys shall submit their opinions relating to school law matters to the Attorney General for review), on January 5, 1999, you submitted for review a twenty-six page legal opinion that you issued to the Amphitheater School District regarding use of an open "call to the audience" at governing board meetings.(1) In particular, your opinion addressed five questions:

1. Whether use of an open call to the public violates Arizona's Open Meeting Law, A.R.S. §§ 38-431 to -431.09 ("OML")?

2 If an open call to the public is allowed, may members of the public body(2) respond to public comments about a matter not on the agenda?

3. If an open call to the public is used, may a public body place restrictions on speakers?

4. If restrictions are placed on speakers during an open call to the public, in what manner may the restrictions be enforced?

5. Do alternatives to an open call to the public exist that would allow the public to raise matters of concern?

Summary Answer

Pursuant to A.R.S. § 15-253(B) (the Attorney General may concur, revise, or decline to review school law opinions issued by school district attorneys)(3):

1. Your opinion is revised to reflect that a properly conducted open call to the public does not violate the OML.

2. Your opinion correctly concludes that if a public body uses an open call to the public, then members of the public body may not respond to or discuss the items raised, other than to individually direct staff to review the item or ask to have it placed on a future agenda.

3. Your opinion correctly concludes that a public body may impose on speakers reasonable time, place, and manner restrictions, and that any content-based restrictions must be narrowly tailored to effectuate a compelling state interest.

4. Your observation that A.R.S. § 13-2911 allows disruptive meeting attendees to be removed merits concurrence, but your evaluation and conclusion regarding enforcing restrictions on speakers during an open call to the public are not reviewed because particularized facts may affect the analysis.

5. Because the OML allows public bodies to use open calls to the public to receive public input about matters of concern, your discussions about alternatives to an open call to the public are not reviewed.

Background

Arizona's Open Meeting Law requires that "[a]ll meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01(A). To give meaning to the public's right to attend, a public body must post a public notice of its meetings at least twenty-four hours in advance. A.R.S. § 38-431.02(A), (C), and (D). To allow members of the public to decide whether they want to attend a particular meeting and to permit members of the public body to prepare themselves for meetings, the required notice must include an agenda of the matters to be discussed or decided at the meeting.(4) A.R.S. § 38-431.02(G). In particular,

> [a]gendas required under this section shall list the specific matters to be discussed, considered, or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.

A.R.S. § 38-431.02(H) (emphasis added). The Legislature has explicitly declared that "[i]t is the public policy of this state . . . that notices and agendas be provided for . . . meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.09.

While the OML grants members of the public an absolute right to *attend* public meetings, the OML neither requires nor prohibits participation by the public in the discussions and deliberations of a public body. Ariz. Att'y Gen. Op. Nos. I78-001 and I83-049. As your opinion notes, the Amphitheater Governing Board currently allows members of the public to address items identified on its meeting agendas, and the Board is now considering adding an open call to the public as well. If such an open call is used, audience members may then address the Board on any item of concern involving District business, even if the item does not appear on the agenda for that meeting. With an open call to the public, therefore, the Board may be presented with comments, concerns, or questions regarding non-agenda items.

Analysis

1. Public Bodies May Use an Open "Call to the Public."

After noting that you "found no authority which [definitively] establishes that an open call to the audience would or would not be permissible" under the OML, your opinion speculates (at 6) that while "Arizona courts could clearly go either way on this issue . . . it is more likely that an open call to the audience would be viewed as a violation of the Open Meeting Law. . . ." You reached

this conclusion by relying upon an exceptionally expansive interpretation of one word: "consider." That interpretation is wrong. Accordingly, that portion of your opinion is revised to conclude that a *properly conducted* open call to the audience will not violate the OML.

The cardinal rule of statutory construction is to ascertain the Legislature's intent. *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984). If statutory language is clear and unambiguous, the text of the statute will establish legislative intent. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983). Here, the Legislature has not unambiguously decreed whether the OML permits open calls to the public. To find legislative intent in such a situation, the context of the statute, the language used, the subject matter, the historical background, the effects and consequences, and the spirit and purpose of the law provide tools to uncover the Legislature's intent. *Arizona Newspapers Ass'n, Inc. v. Superior Court*, 143 Ariz. 560, 562, 694 P.2d 1174, 1176 (1985). Additionally, because the OML is without a specific provision addressing calls to the public, a determination of legislative intent necessarily requires a review which encompasses the entire statutory scheme. *See State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) ("[i]f reasonably practical, a statute should be explained in conjunction with other statutes . . . [and] the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes").

Historically, Arizona has always favored an open government and informed citizenry. *Arizona Newspapers Ass'n*, 43 Ariz. at 564, 694 P.2d at 1178. In 1962, the Arizona Legislature adopted the OML to ensure that the public's business was conducted openly, and that the public would be able to attend and listen to the deliberations and proceedings. 1962 Ariz. Sess. Laws ch. 138, § 2. The legislative directive for interpreting the OML also powerfully supports this concept of openness:

It is the public policy of this state . . . that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discusssed or decided. Toward this end, any person or entity charged with the interpretations of this article shall take into account the policy of this article and shall construe any provision of this article in favor of open and public meetings.

A.R.S. § 38-431.09.

In enacting the OML, the Legislature did not demonstrate an intent to preclude the public from bringing matters to the public body's attention during a meeting where the public body invited comment by including an open call on the agenda.[(5)] Rather, the Legislature enacted the OML "to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). The interests of the public in having "open and public meetings," as required by A.R.S. § 38-431.09, are better served by allowing issues to be raised in an open meeting rather than requiring a concerned citizen

to approach Board members in private to request that an item be placed on a future agenda. *Cf. White v. City of Norwalk*, 900 F.2d 1421, 1425 & n.4 (9th Cir. 1990) (recognizing two procedures for citizens to address the City Council, including an open call; "City Council meetings . . ., where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests."); *Leventhal v. Vista Unified Sch. Dist.*, 973 F.Supp. 951, 960-61 (S.D. Cal. 1997) ("The public entrusts school boards with the education of its children, and the schools play a critical role in the social, ethical, and civic development of those students. To relegate discussion on the education of a community's children to closed, back-room sessions would deprive the public of the most appropriate forum to debate these issues."). The context, spirit, and purpose of the OML thus support an open call to the audience.

As you correctly note, the language of the OML limits public body discussion, consideration, or decisionmaking to matters listed on the agenda. A.R.S. § 38-431.02(H). However, to follow the construction urged in your opinion -- to essentially interpret the word "consider" in A.R.S. § 38-431.02(H) to mean listening to, hearing, or thinking about comments made during an open call to the public -- would not be harmonious with the statutory scheme and legislative purpose.(6) Examining the language of the OML within the legislative framework as a whole leads to the conclusion that "consider" means more than to individually and passively "listen" or "think about."

First, the language of the OML encompasses collective action by members of the public body, not passive individual thought. *See* A.R.S. § 38-431(3) ("'meeting' means a gathering of a quorum of members") and (2) ("'legal action' means a collective decision, commitment or promise"). Second, in the OML, the word "consider" is used in the context of a group taking action, not individuals simply listening. *See generally* MASONS MANUAL OF LEGISLATIVE PROCEDURE §§ 726 through 739 and 293 through 300 (1989); *Roberts Rules of Order* §§ 13, 51 (1981). Third, interpreting "consider" to mean "listen," "think about," or "hear" would result in an absurdity because it would mean that members of public bodies would violate the OML when they attend the same conferences or seminars, read the same correspondence from constituents, or watch the same television news programs. Such a result is obviously untenable. *See Robinson v. Lintz*, 101 Ariz. 448, 452, 420 P.2d 923, 927 (1966) (stating that a statute should be interpreted "to give it a fair and sensible meaning").

Finally, for more than 17 years, the Attorney General's Office has recognized that a "call to the public" may be used if the members of the public body properly limit their responses to any item raised. *See Romo v. Kirschner*, 181 Ariz. 239, 240, 889 P.2d 32, 33 (App. 1995) (an agency's interpretation of a statute that it implements is generally afforded great weight). For example, Section 7.7.2 of the *Arizona Agency Handbook* (revised 1993) provides as follows:

A public body may include in its agenda items such as "call to the public" to designate that part of the meeting at which members of the public may address the public body, since the public body will generally not know what

"specific" matters will be raised. The more difficult question is whether the public body, in addition to "considering and discussing" the public comment, may take action on the matters raised. The public body may discuss, consider, or decide only "matters listed on the agenda and other matters related thereto." A.R.S. § 38-431.02(H). If a matter raised during "call to the public" is not on the agenda, the public body should not discuss it during the meeting being conducted, but rather should request that it be added to the agenda of a future meeting for discussion.

S*ee also Local Government Handbook*, Section 4.7.2 and Form 4.10 (1988). This statement, which recognizes the benefits of giving the public a forum for presenting its concerns to its representatives, but requires advance notice of any actual discussion or consideration of an item, continues to be valid.

Accordingly, traditional principles of statutory construction require the conclusion that the mere act of using an open "call to the public" does not violate the OML. The more difficult issues, however, relate to what occurs during these calls to the public.

2. Members of Public Bodies Generally May Not Respond to Comments Made During an Open "Call to the Public" About Non-Agenda Matters.

Your opinion correctly advises (at 8) that members of a public body may not discuss an item raised by an audience member during an open call to the public that is not on the agenda. *See Arizona Agency Handbook* § 7.7.2 ("If a matter raised during 'call to the public' is not on the agenda, the public body should not discuss it during the meeting being conducted, but rather should request that it be added to the agenda of a future meeting for discussion."), and Form 7.10 ("Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date."). In fact, any responsive discussion by a member of the public body would violate the notice requirements of the OML. *See* A.R.S. § 38-431.02(H) ("public body may discuss, consider or make decisions *only* on [specific] matters listed on the agenda") (emphasis added). Accordingly, the best practice would be to insert something similar to the following language in the public agenda to explain in advance the reason for the silence from the public body during the open call to the public:

Call to the Public.

Consideration and discussion of comments and complaints from the public. Those wishing to address the [public body] need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.

Arizona Agency Handbook Form 7.10.

3. A Public Body May Impose Reasonable Time, Place, and Manner Restrictions on Speakers, and Any Content-

Based Restrictions Must Be Narrowly Tailored to Effectuate a Compelling State Interest.

Your opinion correctly notes (at 12) that if a public body permits a call to the public, it creates a "limited public forum." *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Your related conclusions - that (i) the public body may place reasonable time, place, and manner restrictions on speakers, and (ii) any content-based regulation must be narrowly drawn to effectuate a compelling state interest - also warrant concurrence.

> More specifically, your opinion properly concludes (at 21) that a public body

may place time limits on the speakers, may require that speakers speak only during an open call portion of the meeting and only when called upon . . ., can prohibit the speaker from engaging in disruptive activities during the meeting, and can require the speaker to provide information concerning himself/herself [e.g., name, so minutes may comply with A.R.S. § 38-431.01(B)(4)]. . . .

Indeed, courts have found the following types of restrictions to be constitutionally acceptable:

- Setting Time Limits - Serves a significant government interest in conserving time and ensuring that others are given a chance to speak. *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984) (limiting speech time to five minutes per speaker); *Jones v. Heyman*, 888 F.2d 1328, 1333 n.9 (11th Cir. 1989) (two or three minutes); *Collinson v. Gott, 895 F.2d 994, 996 (4th Cir. 1990)* (two minutes).

- Banning Repetition - Serves a significant government interest in efficiently providing an opportunity for all viewpoints to be timely and productively heard. *See White v. City of Norwalk*, 900 F.2d at 1425.

- Prohibiting Disruptive Behavior (including words likely to provoke immediate combat or speech that exceeds pre-set time limits, is unduly repetitive, or extends discussion by irrelevancies) - Serves a significant government interest in preventing actions that block a public body from accomplishing its businesses in a reasonably efficient manner and interferes with the rights of other speakers. *White v. City of Norwalk*, 900 F.2d at 1425-26; *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991) (speaker can be prevented from commenting during board's deliberative portion of hearing).

Of course, each public body must make its own policy decisions on which restrictions, if any, are necessary and permitted. Again, the best practice is to decide in advance so that speakers have prior notice about the restrictions that the public body has set. In this way, the public body may be able to prevent allegations that it either treated speakers differently or used content-based

restrictions.

4. Public Bodies Must Be Cautious When Enforcing Restrictions on Speakers During an Open Call to the Public.

Your opinion correctly concludes (at 26) that "[a]ny reasonable time, place and manner restrictions which the District places on audience members participating in the call to the audience could be enforced by law enforcement authorities in accordance with A.R.S. § 13-2911." That statute provides that a person interferes with the peaceful conduct of educational institutions (a class 1 misdemeanor) by "knowingly":

> 1. Going upon or remaining upon the property of any educational institution in violation of any rule of such institution or for the purpose of interfering with the lawful use of such property by others or in such manner as to deny or interfere with the lawful use of such property by others; or
> 2. Refusing to obey a lawful order given pursuant to subsection B of this section.

A.R.S. § 13-2911(A). Subsection B then provides that to maintain order, the chief administrative officer of the educational institution (or a designee), upon reasonable grounds to believe that a person is interfering with the peaceful conduct of any educational institution, may order such person to leave the educational institution's property.(7)

Although it is legally appropriate to stop a speaker who is reasonably perceived as threatening, disorderly, or impeding the fair progress of discussion, public bodies must be cautious not to halt a speaker because of the speaker's viewpoint. *See Collinson v. Gott*, 895 F.2d at 1000. The line is not always easily recognized, especially when a public body is confronted with divergent viewpoints and intense public concern. Hence, while a ruling of "we will not listen to your views on capital punishment at this public hearing on rezoning" should pass constitutional muster, a ruling of "we will not listen to yours or any views favoring rezoning at this rezoning hearing" would not. See City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 & n.8 (1976). Because these situations are fact-specific and may involve a variety of policy decisions, your analysis and conclusion regarding enforcing restrictions on speakers during an open call to the public are not reviewed.(8)

5. Decline to Review Your Opinion Regarding Alternatives.

Evaluation of your discussion of possible alternatives to a call to the audience is unnecessary because the OML does not bar public bodies from offering open calls to the audience, and resolution of a particular proposal would depend heavily upon specific facts not presented in your opinion.

* * *

To the extent that this Opinion does not specifically concur with or revise an issue in your letter, the proposition or conclusion is not reviewed, pursuant to A.R.S. § 15-253(B).

Conclusion

The Open Meeting Law permits public bodies to allow members of the public to comment at meetings during a properly conducted "open call to the public." At properly conducted open calls to the public, individual members of the public body may request that staff follow up on an item or that the item be placed on a future agenda, but they may not dialogue with the presenter or collectively discuss, consider, or decide any item not listed on the agenda. Public bodies may impose reasonable time, place, and manner restrictions on speakers, but any content-based restrictions must be narrowly tailored to effectuate a compelling state interest. Pursuant to certain Arizona statutes, disruptive attendees of meetings may be removed to permit the public body to continue to conduct the public's business.

---

[1] An "open call to the audience" or "open call to the public" is a time period for members of the public to address a public body on any item of concern relating to subject matter within the public body's jurisdiction, even if the item is not specifically listed on the agenda.

[2] Although your opinion focused on school governing boards, the analysis herein applies to all "public bodies," which the OML defines expansively to include entities such as state boards and commissions, county boards of supervisors, city and town councils, school governing boards, and boards of special improvement districts, and all standing, special, and advisory committees of such public bodies. *See generally* A.R.S. § 38-431(5).

[3] Technically, A.R.S. § 15-253(B) requires the Attorney General to review all opinions relating to school matters issued by "county attorneys," which has led to the suggestion that this Office should not review your opinion because you are a private attorney. That suggestion is rejected for three reasons. First, the Legislature has authorized school districts to retain private counsel, who in essence step into the shoes of county attorneys. *See* A.R.S. § 15-343(B). Second, the public policy purpose of Attorney General review of school law opinions - to ensure consistency in interpretation of education law in Arizona - would be defeated if the opinions of private attorneys (whether contract or in-house) could escape scrutiny. Third, based on the foregoing reasons, this Office has interpreted A.R.S. § 15-253 for more than two decades to allow review of private counsel's education law opinions, *see, e.g.*, Ariz. Att'y Gen. Op. Nos. I75-108, I81-038, and I96-012, which interpretation the Legislature has left undisturbed.

[4] The agenda requirement is one of many ways that the Open Meeting Law operates simultaneously as a sword to protect the public's rights and a shield to

protect members of the public body. Other examples include the notice requirement (*sword*: the public must be given notice when a meeting will be held; *shield*: all members of the public body must be notified, thus preventing any attempts to exclude certain members by not inviting them to meetings) and the requirement to kepp minutes (*sword*: the public and future members of public body will have an accurate institutional memory of what occured; *shield*: members of the public body will have an accurate account to avoid being accused later of doing something different).

[5] Indeed, that would be antithetical to our system of government. *See* U.S. CONST. amend. I ("Congress shall make no law respecting . . . the right of the people . . . to petition the Government") and ARIZ.CONST. art. II, § 5 ("The right of petition, and of the people peaceably to assemble for the common good, shall never by abridged.").

[6] Page 5 of your opinion states as follows:

It would be difficult to argue that Governing Board members who are presented with comments concerning non-agenda items are not "considering" those comments, as that term is commonly understood. "Consider" has been defined as meaning "to fix the mind on in order to understand; to think on with care; to ponder." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, Unabridged, at 389 (2d ed. 1983). In fact, if the Board is not "considering" the comments with which it is presented, the open call is completely meaningless.

[7] *See also* A.R.S. § 13-2904(A) (a person commits disorderly conduct by, among other things, engaging in "seriously disruptive behavior," making "unreasonable noise," or making "any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering, or procession").

[8] By declining to review a legal opinion relating to school matters pursuant to A.R.S. § 15-253(B), the Attorney General does not express an opinion on the accuracy of either the legal analysis or legal conclusion of the school attorney. Ariz. Att'y Gen. Op. I98-006 n.2. Factors that weigh toward deciding to decline to review include whether resolution of the question encompasses situations that turn on a narrow legal issue, is dependent on specific facts that are not provided or do not have broad statewide applicability, or would reflect on issues of educational policy that are best left with educators. *Id*

Back to 1999 Opinions

return to top