Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-007839 12/15/2022

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA, et al.

MICHAEL S CATLETT

v.

JANN-MICHAEL GREENBURG, et al.

LISA ANNE SMITH

ROBERT D HAWS
JUDGE FOX

UNDER ADVISEMENT RULING ON MOTION TO DISMISS

Pending before the Court are the "Motion to Dismiss" (the "Greenburg Motion") filed by Defendant Jann-Michael Greenburg ("Greenburg") on July 25, 2022, and "Defendant Scottsdale Unified School District's Motion to Dismiss and Joinder to Defendant Jann-Michael Greenburg's Motion to Dismiss" (the "District's Motion") filed on July 26, 2022. On October 17, 2022, after both motions were fully briefed, the Court heard oral argument. As explained below, after considering all the parties' arguments, the Court denies both motions.

Factual Background

In 2021, the Arizona Legislature provided school districts an alternative to traditional in-class instruction to meet the instructional hour requirements for students. The alternative, an instructional time model, is codified at A.R.S. § 15-901.08. A.R.S. § 15-901.08(B) provides that "for the purposes of meeting the instructional time and instructional hours requirements prescribed [by Arizona law], a school district governing board, **after at least two public hearings in the school district**, . . . may adopt any instructional time models as prescribed in this section. . . ." (emphasis added).

On August 17, 2021, the governing board (the "Board") of Defendant Scottsdale Unified School District No. 48 (the "District") held its first public hearing on the instructional time model.[1] The agenda provided notice that public comments would be permitted during the public hearing as follows:

> D. Public Comments (the public will be provided with an opportunity to speak by telephone by calling **480-484-SUSD (7873)**--First Read of the Instruction Time Model for 2021-2022 in accordance with House Bill 2862.

(Complaint, Exhibit A (emphasis in original)).

The parties dispute whether the agenda language advised that public comments during the public hearing would be limited to the instructional time model. (*Compare* Complaint, ¶ 12 ("The agenda did not reflect that the subject of public comment would be limited to the instructional time model.") *with* District Motion at 3:1-2 ("The agenda provided notice that public comments during the public hearing would be limited to the instructional time model[.]")). But the parties agree that, during the public hearing, the Board (i) advised meeting attendees that comments would be limited to those addressing the instructional time model, and (ii) did not permit comments on other topics. Shortly after the public hearing was adjourned, the Board convened a duly noticed special board meeting. The Board did not provide an open "call to the public" during this special board meeting.

On August 23, 2021, the Board held its second public hearing on the instructional time model. The agenda provided the same notice regarding public comments as the August 17 agenda. (Complaint, Exhibit B). The parties again dispute whether the agenda provided notice that comments would be limited to the instructional time model. (*Compare* Complaint, ¶ 21 ("The agenda did not reflect that the subject of public comment would be limited to the instructional time model." *with* District Motion at 3:20-4:2 ("The agenda provided notice that public comments during this second statutorily required public hearing on this topic would also be limited to the instructional time model[.]")). Prior to the meeting, however, the Board issued a written "Update" to clarify that "[w]hen public hearings are required, those are conducted separately on the agenda and any member of the public may speak to the *specific topic* under consideration." (Complaint, ¶ 25 (emphasis in original)). The Board also advised meeting attendees that public comment would be limited to the instructional time model. (*Id.*, ¶ 29). Two members of the public offered comments at this hearing, which comments pertained only to the proposed instructional time model. (*Id.*, ¶ 30).

[1] At the time, and at all other relevant times, Greenburg served as president of the Board. The Board subsequently removed Greenburg as the Board's president. (Complaint, ¶ 5).

On August 24, 2021, the Board held a regular board meeting. The agenda included time for public comments on agenda, non-agenda, information/discussion, consent agenda and action agenda items. Members of the public made approximately 39 public comments on various topics, including the District's masking protocols.

On June 20, 2022, the State of Arizona acting through the Arizona Attorney General (the "State") filed a Complaint initiating this action. The State asserts one claim for "Violation of Open Meeting Law" and alleges that Greenburg and the Board violated Arizona's Open Meeting Law ("OML") codified at A.R.S. § 38-431.01 *et seq.* More specifically, the State contends that Greenburg and the Board violated the OML "by knowingly structuring an agenda and meeting so as to prohibit public comment about a proposed mask mandate and other subjects within the jurisdiction of the [Board], knowingly applying unauthorized content-based restrictions on public comment made during a Board meeting, and knowingly cutting off or otherwise interrupting speakers during a call to the public." (Complaint, ¶ 1). The State seeks equitable relief and civil penalties for the alleged OML violations. (*Id.*).

Analysis

Greenburg and the Board separately seek dismissal of the Complaint under Arizona Rule of Civil Procedure 12(b)(6), arguing that the Complaint fails to state a claim upon which relief can be granted as a matter of law. The issue before the Court is one of statutory construction, not a constitutional issue. (*See* Response to District Motion at 2:3-4 ("[T]he State is asserting violations of the Open Meeting Law, not violations of the Constitution.")).

Applicability of the OML

A.R.S. § 38-431.01(H) provides:

> A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

(emphasis added).

The parties dispute whether allowing public comments limited to the instructional time model at the August 17, 2021 and August 23, 2021 public hearings constituted a call to the public pursuant to A.R.S. § 38-431.01(H). The State contends that it did constitute a call to the public, and the Board violated A.R.S. § 38-431.01(H) by not allowing individuals to address the Board "on any issue within the jurisdiction of the" Board. Greenburg and the District disagree, drawing a distinction between a "typical school board meeting" and a "public hearing."

The District contends that "[t]he Arizona Legislature has repeatedly made clear that a statutorily required public hearing is not a typical school board meeting."[2] (District Motion at 6:5-6). As support, the District cites A.R.S. § 15-905(B), which requires the governing board of each school district to hold "a public hearing and board meeting" for consideration of the district's proposed annual budget. A.R.S. § 15-905(D) requires the governing board to "hold the public hearing and present the proposed budget to the persons attending the hearing" and "[o]n request of any person, [to] explain the budget." As the District points out, this process of explaining the budget at a public hearing differs from the process during an open call to the public at a public meeting--where A.R.S. § 38-431.01(H) generally limits the public agency to "respond[ing] to criticism made by those who have addressed the public body, . . . ask[ing] staff to review a matter or . . . ask[ing] that a matter be put on a future agenda."

The District further contends that the Attorney General recognizes the distinction in the Attorney General's Agency Handbook:

> While the public must be allowed to attend and listen to deliberations and proceedings taking place in all public meetings, A.R.S. § 38-431.01(A), the Open Meeting Law does not establish a right for the public to participate in the discussion or in the ultimate decision of the public body. Ariz. Att'y Gen. Op. 78-1. Other statutes may, however, require public participation or public hearings. For example, before promulgating rules, state agencies must permit public participation in the rule making process, including the opportunity to present oral or written statements on the proposed rule. *See* Chapter 11. *See also* Section 7.7.7 for a discussion of the authorization (but not requirement) for public bodies to use an open call to the public

Arizona Agency Handbook at 7-26, § 7.10.1 (Rev. 2018). The Attorney General issued an opinion making a similar distinction:

> Arizona's Open Meetings Act does not require that members of the public be permitted to speak at public meetings. Governing bodies, however, should remember that in some instances specific statutory provisions relating to certain

[2] Greenburg joined in the District's argument.

> meetings may require that the governing body permit the public to speak and participate in the deliberations of the body. *See, e.g.,* A.R.S. § 41-1002.

Ariz. Atty. Gen. Op. I78-1, 1978 WL 18641 at *2.

The State counters that A.R.S. § 15-901.08, the statute authorizing the alternative instructional time model, "has no language remotely supporting that the hearings required thereunder are exempt from the Open Meeting Law." (Response to District Motion at 5:4-5). And, although the OML makes exceptions for various types of hearings (*see* A.R.S. § 38-431.08), the OML contains no exception for public hearings generally or for public hearings conducted in compliance with A.R.S. § 15-901.08. When the legislature intends to create such exceptions, it does so expressly.

The OML's definition of "meeting" is broad. In this regard, A.R.S. 38-431(4)(a) defines "meeting" as "the gathering, in person or through technological devices, of a quorum of the members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to that action." On its face, this definition includes the public hearings the District conducted pursuant to A.R.S. § 15-901.08 to consider adopting an instructional time model.

Perhaps the Court would agree with the District that taking public comment at the public hearing under A.R.S. § 15-901.08 did not constitute an open call to the public, ***if*** that statute imposed upon the District a requirement to allow public participation and comment. But it does not. Unlike the District's example of A.R.S. § 15-905(D)--which requires a district's governing board to explain the budget if asked by an individual in a public hearing--A.R.S. § 15-901.08 does not impose any requirements as to how the public hearing is to be conducted. As such, A.R.S. § 15-905(D) does not create an exception to the OML. Indeed, the District expressly gave notice of the August 17, 2021 and August 23, 2021 public hearings pursuant to the OML.[3]

The bottom line is that the Board's August 17, 2021 and August 23, 2021 public hearings were meetings subject to the OML. When the Board decided to allow public comment, it had to do so in compliance with A.R.S. § 38-431.01(H).[4]

[3] *See* Complaint, Exhibits A and B (giving notice of the meeting "[p]ursuant to A.R.S. § 38-431.02").

[4] Given the Court's conclusion, the Court need not address the District's argument that the public hearing and the special meeting were two separate and distinct proceedings.

Restrictions on Open Calls to the Public

The District contends that, although the OML authorizes a public body to allow an open call to the public, "[t]his authority does not restrict other narrower forms of public comment." (District Motion at 8:9-10). As support, the District cites several cases that do not address the OML. The District also asserts that "[t]he Attorney General's **own opinion** confirms that a public body may limit public comments to agenda items." (*Id.* at 9:8-9 (emphasis in original) (citing Ariz. Atty. Gen. Op. I99-006 (1999))).[5]

In 1999, when the then-Attorney General issued Opinion I99-006, the OML was silent as to whether a public body could allow public comment during a meeting. As such, the Attorney General relied on authorities addressing constitutionally permissible restrictions when she reviewed the Pima county attorney's opinion as to the restrictions a school district could impose during an open call to the public. In 2000, the legislature amended the OML to expressly allow public bodies to allow an open call to the public. In doing so, the legislature provided that an open call to the public is "subject to reasonable time, place and manner restrictions." A.R.S. § 38-431.01(H).

The issue before the Court is whether A.R.S. § 38-431.01(H) permitted the District to impose content-related restrictions on public comment at the public hearings--not whether such restrictions would pass constitutional muster. In this regard, the legislature is permitted to enact statutes providing greater protections for individual speech than the United States Constitution provides. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035, 2041 (1980).

A.R.S. § 38-431.01(H) grants public bodies discretion to "make an open call to the public during a public meeting . . . to allow individuals to address the public body on any issue within the jurisdiction of the public body." (emphasis added). The only restriction the legislature expressly placed on an open call to the public is that it is "subject to reasonable time, place and manner restrictions." If the legislature intended public bodies to be able to impose other restrictions, such as content-based restrictions, it presumably would have added such restrictions to the time, place and manner restrictions allowed by the statute. Indeed, if a public body was permitted to impose any constitutional restriction unrelated to time, place and manner, then the phrase "subject to reasonable time, place and manner restrictions" would be superfluous. *See Vega v. Morris*, 184 Ariz. 461, 463 (1996) ("We agree with the court of appeals that generally 'the legislature does not

[5] The District cites the following language from Opinion I99-006: "the language of the OML limits public body discussion, consideration, or decision making to matters listed on the agenda." (District Motion at 9:9-11). Notably, the quoted language refers to limitations on the public body --not to limitations on what the public may address in an open call to the public.

include in statutes provisions which are redundant, void, inert, trivial, superfluous, or contradictory.'").

In short, the Court determines that A.R.S. § 38-431.01(H) does not permit public bodies to impose content-based restrictions on open calls to the public so long as the public comments pertain to "any issue within the jurisdiction of the public body." Here, the Board's limitation on public comment to the instructional time model was content-based--not a reasonable, time, place or manner restriction.

Whether the Board Knowingly Violated the OML and Whether Greenburg Acted in Good Faith

The State alleges that the Board and Greenburg "knowingly" violated the OML. (Complaint, ¶¶ 66-69). The District contends that the Board "could not knowingly violate the OML given the law and opinions cited" in the District Motion. (District Motion at 12:17-18). Similarly, Greenburg contends that he is immune from liability under A.R.S. § 38-446, which provides that "notwithstanding any provision of law to the contrary, no public officer or employee is personally liable for acts done in his official capacity in good faith reliance on written opinions of the attorney general." Greenburg also contends he is immune from personal liability under A.R.S. § 15-381(C), which provides that "[m]embers of a governing board are immune from personal liability with respect to all acts done and actions taken in good faith within the scope of their authority during duly constituted regular and special meetings." Greenburg notes that the State did not allege that he acted in bad faith.

Of course, in ruling on a motion to dismiss, the Court must assume the truth of the factual allegations. Here, the State alleged that the Board and Greenburg acted knowingly. Moreover, the immunities asserted by Greenburg are affirmative defenses. Courts generally do not resolve such affirmative defenses on a motion to dismiss. *See Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 514 ¶ 15 (2021) ("Therefore, given the minimal requirements of Arizona's notice pleading standard and the lack of any requirement to address an affirmative defense, it is clear that Shepherd's complaint was not deficient due to a failure to allege bad faith on the part of Costco or to rebut the good faith presumption of § 12-2296. It was therefore error for the trial court to grant the motion to dismiss on this basis.").

To be sure, the District and Greenburg ultimately may prevail based on the State's inability to prove they acted knowingly or because Greenburg acted in good faith and is entitled to statutory immunity. But those determinations are for another day after development of the factual record.

The Court cannot dismiss the Complaint at this juncture based on the District's and Greenburg's arguments.[6]

Disposition

For the foregoing reasons,

IT IS ORDERED denying the District Motion and the Greenburg Motion.

[6] Greenburg seeks dismissal on two other bases: (i) his interruption of a speaker during the August 24, 2021 meeting did not violate the OML; and (ii) the relief sought by the State against Greenburg is not available. The Court declines to dismiss the Complaint on these bases and will address available remedies if the State ultimately establishes a violation of the OML.