

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL March 11, 2008	No. I08-001 (R08-001) Re: Effect of an Open Meeting Law Violation Concerning an Improperly Noticed Agenda Item on the Validity of Properly Noticed Agenda Items
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TO: Candyce B. Pardee
Deputy County Attorney
Cochise County Attorney's Office

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253, you submitted for review an opinion that you prepared for the Superintendent of the Valley Union High School District. This Office concurs with your conclusion that when a meeting subject to the Open Meeting Law ("OML") is properly noticed, a violation of the OML during the meeting with respect to a single agenda item does not render all legal action taken with respect to other agenda items null and void. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the OML. See Ariz. Att'y Gen. Op. I06-003 (stating that review may be granted when facts have broad statewide applicability).

Questions Presented

Does the OML render null and void all legal action taken at a meeting when a public body violates the OML at that meeting by discussing, proposing, or taking legal action on a single improperly noticed agenda item?

Summary Answer

The OML does not render null and void all legal action taken at a meeting at which an OML violation occurs with respect to a single improperly noticed agenda item.

Analysis

“The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret.” Ariz. Att’y Gen. Op. I05-004 (citing *Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979)); *see also* A.R.S. § 38-431.09.¹ “A meeting held in the spirit of this enunciated policy is a valid meeting.” *Karol*, 122 Ariz. at 97, 593 P.2d at 651.

The OML protects the public’s right to attend and to listen to the deliberations and proceedings of public bodies. A.R.S. § 38-431.01(A). Public bodies obstruct this right when they hold discussions, make propositions, or take legal actions outside of a properly noticed open meeting or concerning matters not properly noticed on an open meeting agenda. *See* A.R.S. §§ 38-431.01(A) (stating that all legal action must occur during a public meeting); 38-431.02(H) (stating that a public body may only hold discussions or take legal action concerning items on an agenda). When these types of OML violations occur, the OML’s ratification procedures restore the public’s right to attend and to listen to a public body’s proceedings and deliberations by requiring that the public have at least seventy-two hours’ advance notice of the meeting at which

¹ Section 38-431.09 provides in pertinent part as follows: “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 discussed or decided.”

ratification will occur and advance access to a “detailed written description of the action to be ratified and all deliberations, consultations and decisions . . . related to such action.” A.R.S. § 38-431.05(B)(2)-(4). This allows the public to learn what discussions it missed when the improper act took place and to be present when the public body considers the matter in accordance with the OML. The question posed here involves how to treat legal action *properly* taken at a meeting at which an OML violation occurred.

In *Karol*, the Arizona Supreme Court considered whether a Board’s refusal, in violation of the OML, to allow members of the public to record a meeting made all business conducted at the meeting null and void. The plaintiffs argued that A.R.S. § 38-431.05, which has since been amended, invalidated all action taken at the meeting. At the time, the statute provided as follows: “All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void.” *See Karol*, 122 Ariz. at 97, 593 P.2d at 651. The court rejected the plaintiffs’ broad interpretation of the statute in light of a reading of the OML as a whole. Instead, the court held that

a technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature

Id. at 98, 593 P.2d at 652. Consequently, this Office has explained that *Karol* “imposes a substantial compliance test and requires a weighing of the equities before a court will declare an action void.” *Arizona Agency Handbook* § 7.12.1 (Ariz. Att’y Gen. 2001).

Karol preceded amendments to A.R.S. § 38-431.05 that specifically authorize public bodies to ratify legal action taken in violation of the OML in accordance with certain procedures. *See* A.R.S. § 38-431.05(B). Although courts have not addressed whether these amendments affect *Karol*’s holding, this Office believes that *Karol*’s guidance is relevant to the question

presented here.² For example, A.R.S. § 38-431.05(A) is substantially similar to the statute that the court considered in *Karol*.³ Additionally, the ratification procedures, which correct notice deficiencies, would become superfluous if they were extended to action taken on properly noticed agenda items. When a public body takes action on an item properly set out in the agenda of a properly noticed meeting, the public's right to attend and to listen to the deliberations has been satisfied with respect to that action. For that action, there is no notice deficiency for the ratification procedures to correct.

A properly noticed meeting at which a public body takes action on properly noticed agenda items complies with the OML. A.R.S. § 38-431.09. If the public body also takes action at that meeting on a single item not properly noticed on the agenda, that particular action violates the OML and is null and void. *Johnson*, 199 Ariz. at 570, 20 P.3d at 1151; A.R.S. § 38-431.05(A). The public body may ratify the action pursuant to A.R.S. § 38-431.05(B), although the violation may still subject the public body to the penalties described in A.R.S. § 38-431.07.⁴

² Three cases have considered A.R.S. § 38-431.05 since the enactment of the 1982 amendments. *See Tanque Verde Unified Sch. Dist. No. 13 v. Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003); *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 20 P.3d 1148 (App. 2001); *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 803 P.2d 891 (1990). *Tanque Verde* held that action taken during an executive session in violation of the OML could be ratified and did not address whether any other action taken during the meeting required ratification. 206 Ariz. at 208-10, 76 P.3d at 882-84. *Johnson* affirmed that legal action taken in violation of the OML is itself null and void, but it did not address any other action taken at the meeting. 199 Ariz. at 570, 20 P.3d at 1151. *City of Prescott* held that members of a public body could meet in executive session with the public body's attorney to discuss aspects of proposed legislation including its legal propriety, phrasing, and scope because such discussions fell within the legal advice exception to the OML requirement but that discussions concerning the merits of enacting the legislation or what action the body should take based on the attorney's advice fell outside the exception and must be open to the public. 166 Ariz. at 485-86, 803 P.2d at 896-97.

³ Compare A.R.S. § 38-431.05(A) (2008) ("All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.") with A.R.S. § 38-431.05 (1974) ("All business transacted in any body during a meeting or public proceedings held in violation of the provisions of this article shall be null and void."). *See also* A.R.S. § 38-431.05(B) ("A public body may ratify legal action taken in violation of this article.").

⁴ Section 38-431.07 allows a court to impose civil penalties, order payment of attorneys' fees, and remove public officers from office for OML violations.

The actions taken on the properly noticed agenda items are not void.⁵ *Karol*, 122 Ariz. at 98, 593 P.2d at 652.

Conclusion

When a public body violates the OML by discussing, proposing, or taking legal action on a matter not properly noticed on the agenda, that violation does not nullify all other legal action taken at the meeting when the violation has no demonstrated prejudicial effect on the complaining parties

⁵ There may be some situations in which an action taken on a properly noticed agenda item is so interrelated with an action taken at the same meeting on an improperly noticed agenda item that both actions become void, but those facts are not presented here. *Cf. Karol*, 122 Ariz. at 98, 593 P.2d at 652 (finding “no demonstrated prejudicial effect”).