

START:

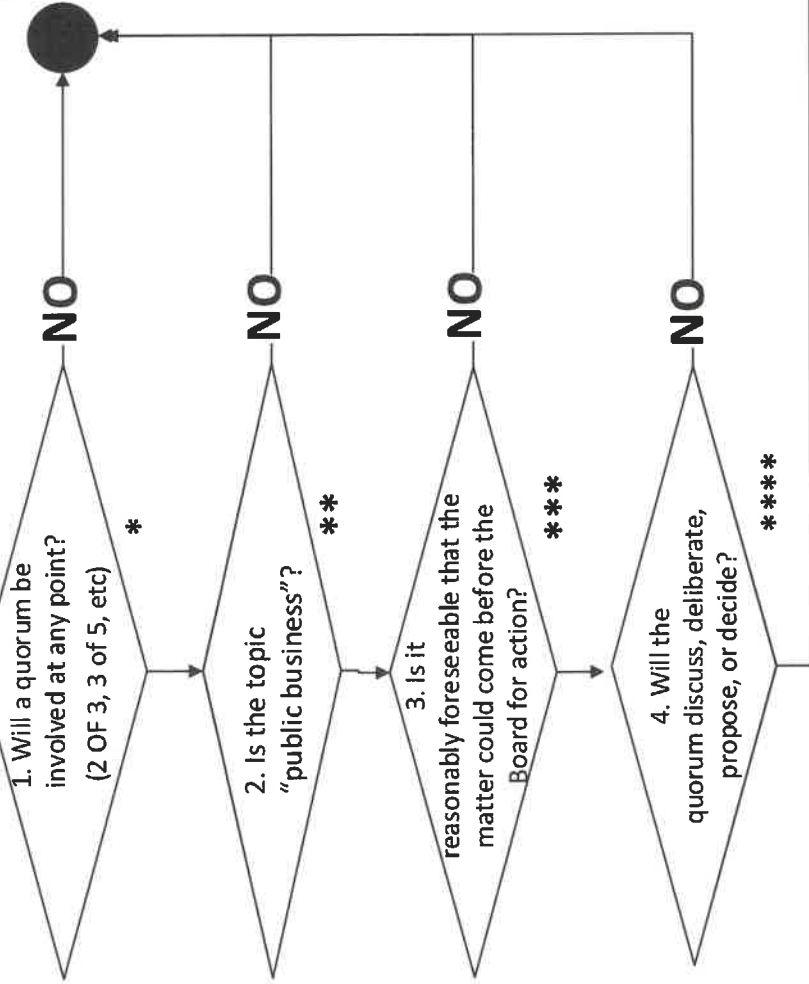
Proposed discussion among Board members

Arizona Open Meeting Law Decision Tree for BOS

Prepared by: Cochise County Civil Attorney's Office

NOT SUBJECT TO OML

- NOT subject to OML:**
- Less than quorum without serial chain
 - Social or ceremonial discussions
 - Topics not related to public business
 - Issues not foreseeable for Board action
 - Pure logistics/scheduling
 - Proposing items for agenda, without discussing merits
 - Information gathering without deliberation
 - Proposing a topic for a future agenda
 - Partisan caucuses of the legislature (AG Opinion I83-128)
 - Merely receiving information, not discussing info



Public meeting or executive session
(per A.R.S. 38-431.03 required)

SUBJECT TO OML

<p>* Quorum involvement: a) Discussions between a quorum of members; OR b) an Email from one member to a quorum, even if no response; OR c) Discussion with less than quorum but results will be shared with other members, resulting in a quorum; OR d) a series of communications, emails, or gatherings that collectively involve a quorum of a public body to discuss, propose, or deliberate legal action outside of a properly noticed public meeting (i.e. a serial meeting). OML only applies only to "gatherings of a quorum" (A.R.S. §38-431(4)).</p>	<p>** Public Business: Anything "foreseeably" within board authority. (<i>Valencia v. Cota</i>, AG 105-004, AG 108-001). Examples NOT Public Business:</p> <ul style="list-style-type: none"> - Personal/social conversations - Non-county issues - Matters the Board cannot act on - Pure ceremonial appearances - Events where no county decisions exist 	<p>** Board Action is Reasonably Foreseeable: If the topic might come to the Board for a decision, vote, directive, instruction, or policy, OML applies. (<i>Valencia v. Cota</i>: foreseeable future action = requires open meeting)</p>	<p>*** Discuss, Deliberate, Propose, or Decide?: Not limited to "final decisions," but anytime quorum discusses, deliberates, proposes legal action, or decides 'public business' will trigger OML (A.R.S. §38-431(3),(4)); AG 108-001). BUT, if members are merely receiving information and not discussing → not a meeting (AG 108-001, Ombudsman guide).</p>
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Note: Quorum involvement of sub-committees: This also applies to sub-committees created by BOS

38-431.03. Executive sessions; definitions

- A. On a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:
1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.
 2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.
 3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.
 4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.
 5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.
 6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.
 7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.
 8. Discussion or consideration of matters relating to school safety operations or school safety plans or programs.
 9. Discussions or consultations with designated representatives of the public body in order to discuss security plans, procedures, assessments, measures or systems relating to, or having an impact on, the security or safety of buildings, facilities, operations, critical infrastructure information and information technology maintained by the public body. Records, documentation, notes, or other materials made by, or provided to, the representatives pursuant to this paragraph are confidential and exempt from public disclosure under this chapter and title 39, chapter 1.
- B. Minutes of and discussions made at executive sessions shall be kept confidential except from:
1. Members of the public body that met in executive session.
 2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section.

3. The auditor general on a request made in connection with an audit authorized as provided by law.
4. A county attorney or the attorney general when investigating alleged violations of this article.
- C. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.
- D. Legal action involving a final vote or decision shall not be taken at an executive session, except that the public body may instruct its attorneys or representatives as provided in subsection A, paragraphs 4, 5 and 7 of this section. A public vote shall be taken before any legal action binds the public body.
- E. Except as provided in section 38-431.02, subsections I and J, a public body shall not discuss any matter in an executive session that is not described in the notice of the executive session.
- F. Disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.
- G. For the purposes of this section:
 1. "Critical infrastructure" has the same meaning prescribed in section 41-1801.
 2. "Information technology" has the same meaning prescribed in section 18-101.

Levine & Jarvi by Jerry Levine, Scottsdale, for defendants-appellees.

126 Ariz. 555
Court of Appeals of Arizona, Division 1, Department C.

Frank VALENCIA and Jimmy Molina, duly elected Town Councilmembers for the Town of Guadalupe, Arizona, a Municipal Corporation, Plaintiffs-Appellants,

v.

Frank COTA, Gabriel Alvarez, Frances Amaro, Felix Cons and Pat Villa, duly elected Town Councilmembers for the Town of Guadalupe, Arizona, a Municipal Corporation, Defendants-Appellees.

OPINION

JACOBSON, Judge.

No. 1 CA-CIV 4530

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Sept. 9, 1980.

The issue presented by this appeal from the granting of the defendants-appellees' motion to dismiss for failure to state a claim is whether the action of the majority of the members of the Town Council of Guadalupe in firing the town manager was in violation of the open meeting laws of Arizona, [A.R.S. s 38-431 et seq.](#)

Synopsis
Minority of town council appealed from an order of the Superior Court of Maricopa County, Cause No. C-360742, William T. Moroney, J., granting the motion by majority of town council to dismiss for failure to state a claim minority's action alleging that the action of majority of town council in firing the town manager was in violation of the open meeting law. The Court of Appeals, Jacobson, J., held that while majority properly alleged a violation of the open meeting law in alleging that the "final action" of firing town manager occurred either at an informal meeting or at executive session, such final action was subsequently ratified at a town meeting complying with the law, and thus the complaint failed to state a cause of action.

Affirmed.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

*555 **63 Ronald Wiltbank, P. C. by Brent E. Corwin, Mesa, for plaintiffs-appellants.

Since this matter was disposed of in the trial court upon a motion to dismiss, those facts that were well pled in the plaintiffs' complaint are considered to be true. [Folk v. City of Phoenix, 27 Ariz.App. 146, 551 P.2d 595 \(1976\).](#)

The plaintiffs and defendants constitute the entire duly elected Town Council of the Town of Guadalupe. At a regular public meeting of the town council held on August 11, 1977, one of the defendants, Frank Cota, as mayor of the town, requested that the council go into executive session for the purpose of discussing a personnel matter. Plaintiffs' complaint alleged that no vote of the council was taken on the executive session request, but nonetheless the executive session was conducted. During the executive session, Bill Hernandez, the town manager, was requested to resign and in the words of the complaint "little or no discussion or consideration thereof occurred."

*556 **64 Apparently, Mr. Hernandez declined the invitation to resign and the executive session terminated. What transpired next is alleged in the complaint:

That immediately after said executive session, and upon

returning to said regular meeting, the defendant, Pat Villa, moved that the Town Manager be terminated and the defendant, Gabriel Alvarez, seconded said motion, and a roll call vote upon said topic was taken and passed by the defendants (presumably by a vote of 5 to 2). The defendant Mr. Pat Villa then immediately moved that Mr. Fernando Vender be appointed to the position of Town Manager, which motion was seconded by Frances Amaro, and also passed by the defendants (again, presumably by the same 5 to 2 vote).

The complaint goes on to allege that these plaintiffs were not informed of the impending discharge of Mr. Hernandez or the contemplated hiring of Mr. Vender and that "the defendants assembled together either formally or informally and discussed and deliberated among themselves" prior to both the public meeting and the executive session at which time the firing and hiring occurred. The complaint alternatively alleges that "final action" was taken at the executive meeting and that all of these acts of the defendants were in violation of the open meeting law.

The applicable provision of Arizona's open meeting law¹ provides:

A.R.S. s 38-431.01. Meetings shall be open to the public.

A. All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.
The term "legal action" is defined in **A.R.S. s 38-431** as:

2. "Legal action" means a collective decision, commitment or promise made by a majority of the members of a governing body consistent with the constitution, charter or bylaws of such body, and the laws of this state.

In regard to "executive sessions", **A.R.S. s 38-431.03** provides in part:

A. This article shall not be construed to prevent governing bodies, upon majority vote of the members constituting a quorum, from holding executive sessions for only the following purposes:

1. Discussion or consideration of ... disciplining or resignation of a public officer, appointee or employee of any governing body
- C. No executive session may be held for the purpose of taking any final action or making any final decision.

Plaintiffs' basic contention is that the defendants, who constituted the majority of the town council, held a formal or an informal meeting, from which the plaintiffs were excluded, prior to the public meeting and discussed the firing of Hernandez and the hiring of Vender and reached a conclusive determination on these issues. Plaintiffs urge that such deliberations and discussions constituted "legal action" within the meaning of **A.R.S. s 38-431.01** and therefore were in violation of the open meeting law. They also contend that "final action" was taken at the executive session in violation of **A.R.S. s 38-431.03(C)**.

In dealing with plaintiffs' contentions that deliberations and discussions constitute "legal action", a distinction must be made between those matters which are subject to being handled in executive session and those which are not. As to non-executive session subject matter, we agree with Attorney General's opinion No. 75-8 (dated August 29, 1975) holding that deliberations by a majority of a public body in respect to a matter that foreseeably could come to a vote by that body constituted "legal action" *557 **65 for purposes of the open meeting law and therefore **A.R.S. s 38-431** et seq. must be complied with. Also see, **Sacramento Newspaper Guild v. Sacramento County Board of Supervisors**, 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968).

However, to apply this broad definition of "legal action" to matters which, by statute, can be discussed in executive session would render the "closed sessions" provisions of the statute nugatory. Obviously, if any meaningful action is going to be taken in the closed executive session, "deliberations and discussions" must take place. Thus, the attorney general's opinion concludes:

Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body, constitute "legal action" and must be conducted in open meeting, unless an executive session is authorized.

(Emphasis added.)

Since it is undisputed that calling for the resignation of the town manager would, under [A.R.S. s 38-431.03\(A\)\(1\)](#), constitute executive session subject matter, if prior to the public meeting the majority members of the town council of Guadalupe had merely met to "discuss and deliberate", we would have no hesitancy in holding such a meeting would not be in violation of the open meeting law.

However, [A.R.S. s 38-431.03\(C\)](#) prohibits "final action" from occurring in the executive session meeting and it is alleged that such "final action" occurred either at the informal meeting prior to the executive session or at the executive session itself.² We therefore assume for the purposes of this opinion, that the prior meeting of a majority of the council members was in violation of the open meeting law and therefore any business transacted therein was null and void under [A.R.S. s 38-431.05](#).³ The question is then presented as to what is the effect of that null and void legal action.

Here, according to plaintiffs' complaint, the issue of the discharge of Hernandez was brought before the open council meeting by a proper motion and second. There is no allegation that this "regular public meeting" of the town council was not called in compliance with the notice requirements of [A.R.S. s 38-431.02](#). Nor is there any allegation that after the motion was duly made, the plaintiffs, defendants or Mr. Hernandez did not have a fair opportunity to publicly air and discuss the pros and cons of the motion. In short, it appears from plaintiffs' complaint that the ultimate discharge of Mr. Hernandez and the hiring of Mr. Vender fully complied with all the provisions of the open meeting law.

The issue of whether a prior violation of the open meeting law forever precludes

the public body from legally taking the action which occurred in the void meeting was presented in [Cooper v. Arizona Western College District Governing Board](#), 125 Ariz. 463, 610 P.2d 465 (App.1980). In concluding that prior illegal action did not preclude subsequent legal action, the court held:

We find no provision in the Arizona statutes relating to public meetings which precludes a public body from adopting at a subsequent public meeting action which was legally ineffective from a previous meeting of the public body (citing [Spokane Education Association v. Barnes](#), 83 Wash.2d 366, 517 P.2d 1362 (1974)).

We believe the same matter may be considered and adopted again by the board at a duly-noticed public meeting, when *558 **66 the matter so considered is one ... which the statutes expressly allow to be discussed in executive session.

125 Ariz. at 468-69, 610 P.2d at 470-71.

We agree with this reasoning. Even though plaintiffs have properly alleged a violation of the open meeting law, plaintiffs' complaint also alleges that the prior action was subsequently ratified at a meeting complying with the law.

Under these circumstances the trial court properly concluded that plaintiffs' complaint failed to state a cause of action.

Judgment affirmed.

CONTRERAS, P. J., and OGG, C. J., concur.

All Citations

126 Ariz. 555, 617 P.2d 63

Footnotes

- ¹ All statutory citations are to the open meeting legislation in existence at the time the cause of action arose. See 1962 Ariz.Sess.Laws, ch. 138, as amended 1974 Ariz.Sess.Laws, ch. 196 and 1975 Ariz.Sess.Laws, ch. 48, s 1. Subsequently, the statute was significantly amended. See 1978 Ariz.Sess.Laws, ch. 86.
- ² We have some difficulty in squaring the “final action” at the executive session allegation with the allegation that after the request for Hernandez’ resignation “little or no discussion or consideration thereof occurred.” However, for the purposes of this opinion we deem this contradiction to be immaterial.
- ³ A.R.S. s 38-431.05 provides: “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.”