

ARIZONA SUPREME COURT

THE CITY OF FLAGSTAFF,)	Supreme Court
Petitioner,)	No. CV-25-0087-PR
)	
v.)	Court of Appeals, Div. One
)	No. 1 CA-SA 24-0189
DESERT MOUNTAIN ENERGY CORP.,)	
Respondent.)	Coconino Superior Court
)	No. CV2020-00624
)	

**BRIEF OF AMICUS CURIAE
LEAGUE OF ARIZONA CITIES AND TOWNS
IN SUPPORT OF PETITIONER
CITY OF FLAGSTAFF**

(LODGED WITH MOTION FOR LEAVE TO FILE)

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INTEREST OF AMICUS CURIAE

This amicus curiae brief (“Brief”) is submitted by the League of Arizona Cities and Towns (“League”) pursuant to Rules 14 and 16 of the Arizona Rules of Civil Appellate Procedure (“ARCAP”) in support of Petitioner City of Flagstaff (“City”). The League is neither a party to the appeal, nor controlled by any party to the appeal. No person or entity other than the League provided financial resources for the preparation or submission of this Brief. The League requested consent to file the Brief from all the parties. The City consented to the filing of this Brief, but Respondent Desert Mountain Energy Corp. (“DME”) opposed. For this reason, the League is lodging a Motion for Leave to File Amicus Curiae Brief per ARCAP 16(b). The League read the filings in this case and is familiar with the questions involved in this appeal.

The League is a voluntary association of all 91 incorporated cities and towns in Arizona. These members represent approximately 79% of Arizona’s total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and amongst its members. The League also files amicus briefs in cases with potential statewide impacts on its members like this one.

The League's members have significant interests in the issues raised in the Petition for Review. First, the League's members are all subject to Arizona's Open Meetings Law, A.R.S. §§ 38-431 to 38-431.09 (the "OML"). The OML in § 38-431.03(D) allows their public bodies to hold executive sessions for the purpose of instructing the city and town attorneys regarding contemplated litigation. As a result, the Court of Appeals' opinion is concerning to the League's members because it dismissed the plain language of § 38-431.03(D) and applied the OML based on incorrect assumptions about cities and towns in Arizona.

Second, the League's members are concerned about the unintended impacts of the Court of Appeals' opinion on their attorney-client relationship. In the private area, the right of privileged communications is nearly limitless. Municipal attorneys do not possess this same freedom. If the Court of Appeals' opinion stands, the League's members are concerned about eroding protections in the OML for privileged communications between councilmembers and the attorney. *See* Ariz. R. Sup. Ct. 42, ER 1.4 (Communication) and ER 1.6 (Confidentiality). This Brief seeks to assist the Court by providing the local government's perspective on the wide-ranging ways they make litigation decisions and how they communicate with their attorneys as constituent parts of an organizational client.

INTRODUCTION

There was no improper secrecy in this matter. The City had the ability to hold privileged discussions with its attorneys and instruct them in executive session to initiate litigation. *See* A.R.S. § 38-431.03(D). The City did not circumvent the OML; it *relied* on the OML for its established purposes. It was rightfully protecting the public interest by not divulging litigation tactics or sensitive items that could be detrimental to the public's only viable future drinking water supply. Moreover, the City Council properly ratified its instruction in a properly noticed public meeting five days after being informed that DME's claim was alleging the City Council's instruction violated the OML. *See* APP042–44, APP084, APP089–90, APP095, APP100.

The League respectfully asks this Court to grant the City's Petition for Review because the Court of Appeals discredited the plain language of 38-431.03(D), incorrectly assumed that local governments are the same as school districts, and ignored any public interest that is derived from a local government having the full benefits of the attorney-client relationship. Without a correction of the Court of Appeals' opinion, local governments will be uncertain about their authority to instruct their attorneys as permitted in 38-431.03(D) and their ability to act through their duly authorized client representatives.

ARGUMENT

I. LOCAL GOVERNMENTS MUST BE ABLE TO INSTRUCT THEIR ATTORNEYS IN A CONFIDENTIAL SETTING.

Courts interpret statutes “in view of the entire text, considering the context and related statutes on the same subject.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). Clear and unequivocal language determines a statute's meaning, reading each word, phrase, clause, and sentence in such a manner that ensures no part of the statute is void or trivial. *See Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471 (1991). Under this plain meaning analysis, courts first look to the statute’s language: “if the language is clear, judicial construction is neither required nor proper.” *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992) (citation omitted). This analysis “presume[s] that the legislature knows the existing laws when it enacts or modifies a statute.” *State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990). Statutory terms must be given effect “in accordance with their commonly accepted meanings ‘unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended.’ ” *State v. Reynolds*, 170 Ariz. 233, 234 (1992) (internal citation omitted) (quoting *Mid Kan.*

Fed. Sav. & Loan Ass'n of Wichita v. Dynamic Dev. Corp., 167 Ariz. 122, 128 (1991)).

The text of the OML is plain and unambiguous. The OML expressly authorizes a public body to instruct its attorney regarding contemplated litigation in executive session, and such an instruction accordingly does not constitute a “legal action involving a final vote or decision.” A.R.S. § 38-431.03(A)(4), (D). A.R.S. § 38-431(3) defines “legal action” as “a collective decision, commitment or promise made by a majority of the members of a public body pursuant to the constitution, their charter or bylaws or specified scope of appointment or authority, and the laws of this state.” “Pursuant to” means “as authorized by.” *Black's Law Dictionary* (12th ed. 2024); *see also Reynolds*, 170 Ariz. at 234 (stating courts may refer to established and widely used dictionaries when determining commonly accepted meanings). Despite the broad definition of legal action, the “discussions, deliberations, considerations or consultations” need not be conducted in an open meeting if an executive session is authorized. *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 484 (1990). While § 38-431.03(D) prohibits the public body from taking a legal action that involves a final vote or decision in executive session, the provision *specifically allows* a public body to instruct its attorneys and representatives as follows:

- The public body may “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.” § 38-431.03(A)(4) (citation omitted).
- The public body may “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.” § 38-431.03(A)(5) (citation omitted).
- The public body may “instruct its representatives regarding negotiations for the purchase, sale or lease of real property.” § 38-431.03(A)(7) (citation omitted).

To “instruct” means “to give an order or command to.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/instruct> (last visited May, 20, 2025).

Here, the City Council instructed its attorneys in executive session to initiate litigation against DME. The Court of Appeals concluded the instruction was not permitted in executive session because it had the effect of “commit[ting] public funds to the litigation venture [and once] funds are committed, the decision is binding; as such, a vote committing funds to litigation must be public.” *See Opinion*

at APP011 ¶¶ 30–31. This Court of Appeals’ opinion is problematic for several reasons. First, it ignores the plain language of § 38-431.03(D) that specifically authorizes a public body to instruct its attorneys regarding contemplated litigation in executive session. This express grant of authority consequently means the instruction cannot constitute a “legal action involving a final vote or decision.”

Second, the Court of Appeals’ reliance on cases involving school boards is misplaced. *See* Opinion at APP007 ¶¶16-17 (discussing *Tanque Verde Unified Sch. Dist. No. 13 of Pima Cnty. v. Bernini*, 206 Ariz. 200 (Ct. App. 2003), *as corrected* (Nov. 6, 2003) and *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 570 ¶ 17 n.1 (App. 2000)). Neither *Tanque Verde* nor *Johnson* discussed the exception in § 38-431.03(D) that specifically allows a public body to instruct its attorneys regarding contemplated litigation. *Johnson* also relied on a previous version of the statute—a fact the lower court deemed “[im]material.” Opinion at APP010 ¶ 32. Moreover, what constitutes a “legal action” by a school board is not automatically the same as what constitutes a “legal action” by a city or town council. *Tanque Verde* concluded the school board violated the OML when it selected a site for a new high school and initiated an condemnation action in executive session because the school board did not follow the mandatory *public* process in A.R.S., Title 15. *See Tanque Verde*, 206 Ariz. at 203, 214 (agreeing with

the trial court that the school board violated the OML in executive session because it did not follow the three-step public process for selecting and funding new schools); *see generally, e.g.*, A.R.S. §§ 15-341; 41-5741 (renumbered from A.R.S. § 15-5741).

The Court of Appeals in this case applied a “commitment of funds” test that was used in the school board cases, but its application was based on incorrect assumptions about local governments. While all city and town councils approve annual budgets pursuant to state law, many local charters and codes authorize the managers and other employees to retain outside legal counsel, initiate certain legal claims, approve settlements, or otherwise commit funds within the confines of their allocated budgets. In addition, city and town attorneys have authority to initiate certain civil and criminal actions pursuant to the local code and state law. *See, e.g.*, A.R.S. §§ 3-2097 (sale of meat); 3-1721 (seizure of livestock); 9-500.10 (advertising of escort services); 12-804 (bawdy houses); 12-813 (nuisances); 12-818 (obscenity); 12-991 (nuisances); 12-992 (nuisances); 12-998 (nuisances); 12-999 (nuisances); 13-3505 (injunctions to prevent the distribution of obscenity); 13-2917 (action to prevent public nuisance); 16-1021 (election laws); 19-119 (deceptive mailings); 40-1206 (gas appliances); 40-1207 (gas appliances); 41-1491.13 (fair housing complaints); 44-1710 (credit services); 44-1748 (dance studio contracts); *see*

generally A.R.S. §§ 22-402 (municipal courts); 9-500.21 (enforcement of municipal ordinances).

Finally, the Court of Appeals' interpretation of the OML works to the public's *disadvantage* because it ultimately voided legal claims that were filed by the City for the purpose of *protecting the public's only viable future drinking water supply*. The important public benefits of protecting this water supply far outweigh any burden associated with privileged instructions to attorneys, especially in Arizona where there are real concerns over water scarcity and contamination.

Since a council can only act by achieving consensus in some form of a majority, the instruction to the attorney can only be obtained if the council members can provide some indication of their *collective* objective or intent. Giving and receiving that instruction, while preserving the attorney-client privilege, is a significant component of the provision of legal advice. A.R.S. § 38-431.03(D) recognizes the importance of this confidential exchange of information. To force a public body to make the instruction to the local government's attorney in a public meeting would render the exception in § 38-431.03(D) meaningless. *See generally State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 5 (2014) (stating a court can resort to alternative methods of statutory construction when it finds statutory language ambiguous, such as examining the consequences of competing interpretations).

The League asks this Court to grant review because the Court of Appeals' opinion undermines the intentions of the OML by discounting the plain language of 38-431.03(D) that allows a public body to instruct its attorneys in executive session regarding contemplated litigation. While this Brief does not address ratification under the OML, the League also asks this Court to address a local government's ability to cure violations of the OML, including any purported error that does not undermine the intent of the OML. Local governments should not be disincentivized from correcting mistakes in the implementation of the OML or penalized for mistakes that do not undermine transparency. By ensuring the goals of the OML are met, cure opportunities prevent public business from being delayed or invalidated.

II. A LOCAL GOVERNMENT IS ENTITLED TO THE FULL BENEFITS OF THE ATTORNEY-CLIENT RELATIONSHIP.

Local governments must be able to rely on the full benefits of the attorney-client relationship. *See, e.g., State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 296 (Ct. App. 2006) (stating a city can act through its agents like other legal entities); *Ariz. Dep't of Econ. Sec. v. O'Neil*, 183 Ariz. 196, 198 (App. 1995) (holding that governmental entities may assert attorney-client privilege to prevent disclosure of information otherwise required by statute). They rely heavily on the advice and assistance of their attorneys to ensure compliance, assert or defend their interests

(and those of their residents), evaluate the scope of their authority, and assess any potential liability in the making of local laws.

One benefit of the attorney-client relationship is the ability to act through client representatives. Like private corporations, municipal corporations in Arizona are organizational clients¹ that act through their duly authorized client representatives. *See* Ariz. R. Sup. Ct. 42, ER 1.13 (providing that a government lawyer employed or retained by an organizational client represents the organization acting through its duly authorized client representatives); *see also* Ariz. R. Sup. Ct. 42, ER 1.0(r) (defining “client representative”).

The Court of Appeals assumed that a local government’s authority to authorize litigation belongs exclusively to its city or town council. That is not necessarily the case when it comes to cities and towns in Arizona. Local charters and codes in Arizona authorize a wide variety of client representatives. The identities of the client representatives and their scope of authority may depend on the legal status of municipality (charter city or general law city), type of management structure (strong-mayor or council-manager), or the nature of the issue (legislative, administrative, judicial, quasi-judicial). For example, the council in a “strong

¹ City and town attorneys are usually appointed by city councils, but not always. In some cities, the city or town attorney is hired by the mayor or the city manager. In some cities, the city or town attorney is also the prosecutor for the city or town.

mayor” structure is typically the client representative over legislative matters, but the mayor is the client representative over administrative matters. The municipal attorney operating under a strong-mayor structure may also have significant administration and enforcement duties. In contrast, a municipality with a council-manager structure will typically authorize the city manager, risk manager, insurance representative, or another employee as the client representative who can authorize litigation administratively.² When these client representatives authorize litigation, the OML does not apply because there is no quorum of the public body involved. *See* A.R.S. § 38-431(4). The role of the municipal attorney under a council-manager structure will vary widely and is largely dependent on the strength of the manager.

Many municipal charters, codes, policies, and contracts also give independent authority to the city or town attorney to initiate claims, file charges, and settle certain claims. This is consistent with ER 1.2, comment 1, which provides in part:

There may be circumstances where authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships has been delegated to a government lawyer pursuant to applicable law, and in that instance, the client representative with decision-making authority is the government lawyer.

Ariz. R. Sup. Ct. 42, ER 1.2, cmt. 1 (2003 comment as amended in 2025).

² The city or town council is not necessarily the only “public body” of a local government. Their public bodies may also include a planning commission, design review board, board of adjustment, and a multitude of other committees and subcommittees.

Another benefit of the attorney-client relationship is the client’s ability to hold confidential discussions. Arizona codified the attorney-client privilege in the 1913 Civil Code: “An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment[.]” 1913 Ariz. Civil Code § 1677(4). The current statutes creating the attorney-client privilege are similar. *See* A.R.S. §§ 12-2234 (attorney-client privilege related to civil proceedings); 13-4062(2) (1989) (attorney-client privilege related to criminal proceedings). The privilege “is rigorously guarded to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” *State v. Sucharew*, 205 Ariz. 16, 21 ¶ 10 (App. 2003). More specifically, “[t]he privilege serves a critical function by encouraging a client to speak truthfully with his or her lawyer.” *Clements v. Bernini in & for Cnty. of Pima*, 249 Ariz. 434, 439 ¶ 7 (2020). “Unless the lawyer knows the truth, he or she cannot be of much assistance to the client.” *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501 (1993).

The OML neither restricts a local government’s ability to act through its duly authorized client representatives, nor does it *require* the client representative to obtain the public body’s instruction or permission to initiate litigation. Instead,

A.R.S. § 38-431.03(D) recognizes that attorney-client privilege is in the interest of *both* the local government and the public when a public body is instructing its attorney regarding contemplated litigation.

Despite the importance of the attorney-client relationship and its worthy purposes, the Court of Appeals dismissed the plain language of § 38-431.03(D) that allows a public body to instruct its attorneys in executive session regarding contemplated litigation. These instructions facilitate the effective representation of the local government client. The public disclosure of an adverse party's name, the nature of a lawsuit, or the public body's position on settlement or compromise could easily harm the local government's litigating position. The detrimental effect is perhaps even more apparent if litigation has only been threatened. The possibility that matters discussed during an open meeting may be used by opposing parties to the people's detriment is very relevant in considering whether the legislature intended a particular topic to be discussed openly.

When a city attorney deals with a city council that is comprised of multiple councilmembers, the attorney's communications may need to be tailored to ensure each councilmember's questions are fully answered and the collective instruction is correctly understood by everyone. In some cases, the instructions may be complex because they are based on the adverse party's responses, applicable statutes of

limitations, and other factors. For example, the council could instruct the attorney to send a demand letter to the adverse party and file a lawsuit if the adverse party does not respond within a certain number of days. If the adverse party responds by saying it is willing to pay the amount in installments and it agrees to a late penalty, attempt to negotiate an amendment to the agreement before the statute of limitations expires for a lawsuit. The OML cannot reasonably be understood to mean that such instructions be made in public.

In sum, the Court of Appeals' interpretation of the OML is not consistent with the nature of local governments as organizational clients.

CONCLUSION

The League respectfully asks the Court to grant review because Court of Appeals' opinion creates substantial uncertainty for local governments regarding how they can effectively instruct their attorneys in executive session.

RESPECTFULLY SUBMITTED this 22nd day of May 2025 by:

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