City of Benson
City Council Communication

Regular Meeting **September 28, 2015**

To: Mayor and Council Agenda Item # 6

From: William D. Stephens, City Manager

Subject:

Discussion and possible action to approve and ratify the letter from the Arizona Attorney General's office dated September 21, 2015 and to accept proposed agreement therein

Discussion:

The Arizona Attorney General's office (AG) determined on September 21, 2015 that that the Arizona Open Meeting Law (OML) was violated on March 9, 2015 when Councilmember Cook came off the dais and spoke from the podium during the call to the public about the budget and tax increase issues when neither were on the agenda. The AG did not believe this violation was done with the intent of evading the OML. Therefore, the AG believes the appropriate remedy is for the Council to receive some training about the OML. In accordance, the AG is offering to resolve this matter by requiring its September 21, 2015 letter be made available to the public, and that the Mayor and Council discuss the September 21, 2015 letter, approve and/or ratify it at this meeting, and thereafter sign an acceptance of the settlement document on or before October 30, 2015. If this settlement agreement is not acceptable, the AG states that it will move forward to enforce the OML, and seek any appropriate remedies it deems necessary.

Staff Recommendation:

Approve and ratify the letter from the Arizona Attorney General's office dated September 21, 2015 and to accept proposed agreement therein

MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

KEVIN R. SMITH
(602) 542-9758

September 21, 2015

Gary Cohen
Mesch Clark & Rothschild, PC
259 N. Meyer Ave.
Tucson, Arizona 85701-1090

RE: Open Meeting Law Complaint - Benson City Council

Dear Gary:

I would like to thank you and your client, the Benson City Council, for the letter dated July 16, 2015, which provided the information I requested for purposes of investigating the Open Meeting Law complaint in this matter. This letter will serve as formal notice that the Arizona Attorney General's Office ("Office") has concluded its review of the Open Meeting Law complaint against the Benson City Council ("Council"). Based upon a review of all of the information our Office has determined that the Council did violate the Arizona Open Meeting Law as outlined below.

Violation

1. Conducting a meeting in violation of the Open Meeting Law:

At the March 9, 2015, Council meeting, Councilman Jeff Cook spoke as a member of the public in the "Call to the Public" portion of the meeting. Mr. Cook addressed the budget in relation to a proposed sales tax increase which had been brought up by previous speakers during the "Call to the Public". Neither of these topics, each of which would have to come before the Council for final action, were listed on the agenda for that meeting. Mr. Cook's comments were primarily directed to the other Council members though he probably intended for the public to hear them as well. Regardless of the public's presence, a quorum of the Council was present and heard his comments and proposals. This constituted a meeting on the budget and tax increase issues. However, the meeting on these topics was not properly noticed in violation of the Open Meeting Laws as noted more fully below.

A.R.S. § 38-431.01 states that all meetings of any public body shall be open to the public. A.R.S. § 38-431(4) defines a meeting as "the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action." All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require final action or a final decision by the governing body, constitute "legal action".

A.R.S. § 38-431.02 sets forth the requirements for providing notice to the public of a meeting including the requirement for an agenda that identifies the specific matters to be discussed and decided. Except in the case of an emergency, a public body may only discuss, consider or decide matters listed on the agenda or other matters related thereto. A.R.S. § 38-431.02(H) and (J). Notice enables the public to attend public meetings by informing them of where and when the meeting will take place as well as what will be discussed. Arizona courts have emphasized the importance of sufficient notice. The Arizona Court of Appeals explained, "The notice provisions in the open meeting law are obviously designed to give meaningful effect to provisions such as A.R.S. §§ 38-431.01(A) and 38-431.09. The goal of exposing the public decision-making process to the public itself could be significantly, if not totally thwarted, in the absence of mandatory notice provisions and their enforcement." *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985 (Ariz. App. 1982).

The March 9, 2015 meeting minutes reflect that Mr. Cook discussed several possible Council actions in relation to cutting budgetary expenses. According to the meeting minutes he asked the Council if they should cut funding to numerous programs and entities including the following: the pool; Lions Park; the Gas, Water and Wastewater departments; the golf course; the library; the police department; and the fire department. These statements to the Council regarding the City budget constituted the discussion of legal action. They should not have occurred unless they were properly noticed, which they were not. The agenda for the meeting does not list the budget as a topic of discussion or action. Accordingly this meeting was held in violation of the Open Meeting Laws.

Members of a public body should not participate as speakers during "Calls to the Public" before a public body of which they are a member. They cannot simply "take off one hat and put on another". Any time they discuss legal action with a quorum of the public body members, it must be properly noticed. If a topic is on the agenda, it should be discussed at that time. If a topic is not on the meeting agenda, the members of the public body are unable to discuss it at that meeting without violating the notice provisions of A.R.S. § 38-431.02. The discussion must be set on the agenda for a future meeting so that the public can be properly notified of the meeting.

A review of the meeting minutes for April 13, 2015, showed that Mr. Cook also spoke during a "Call to the Public" at that meeting. However, in that instance he was responding to a criticism or attack directed at him by a member of the public who had previously spoken. Such responses to direct attacks on a member of a public body are permitted provided they are limited in scope and only address the specific criticism leveled at the member and do not go into other matters.

Settlement

The Arizona Attorney General's Office does not believe that the actions which constitute the violations listed above were done with the intent of evading the Open Meeting Laws. Therefore, we believe that the appropriate remedy in this case is for the Council to receive some training regarding the Open Meeting Laws, especially in regards to the requirements for notice. We also require that this letter and the proposed settlement terms shall be appropriately noticed on the agenda of the next regular Council meeting. The letter will be read aloud, discussed, and copies of the letter shall be made available to members of the public. The letter shall also be approved and/or appropriately ratified at the next regular Council meeting. A copy of the notice and agenda for that Council meeting shall be sent to me at the Arizona Attorney General's Office.

If the proposed agreement is acceptable to your client, please so indicate by having the Council members sign page four of this letter and return a signed copy of the entire letter to me on or before October 30, 2015. If this agreement is not acceptable the Arizona Attorney General's Office will move forward to enforce the Open Meeting Law and seek any appropriate further remedies it deems necessary.

Should you have any further questions, please feel free to contact me at the address or phone number listed on this letter.

Sincerely,

Kevin R. Smith
Assistant Attorney General

Cc: Complainant

PHX-#4673742

The Benson City Council and its Members agree to the terms set forth in this letter, and are authorized to enter into this agreement.

By _____ _____
Chairman/President Date

_____ _____
Member Date

_____ _____
Member Date

_____ _____
Member Date

_____ _____
Member Date

MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

KEVIN R. SMITH
(602) 542-9758

September 22, 2015

Gary Cohen
Mesch Clark & Rothschild, PC
259 N. Meyer Ave.
Tucson, Arizona 85701-1090

RE: Open Meeting Law Complaint - Benson City Council

Dear Gary:

This letter is to confirm our discussion today regarding my proposed settlement to resolve the Open Meeting Law complaint against the Benson City Council. As we discussed, I will leave it to your client's discretion whether or not my September 21, 2015 decision letter should be read out loud at the Council meeting provided that copies of the letter are available to anyone who would like a copy. This letter hereby modifies the settlement proposal accordingly.

Sincerely,

Kevin R. Smith
Assistant Attorney General

Cc: Complainant

PHX-#4676838

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