

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE CITY OF TOMBSTONE,
Plaintiff/Appellant,

v.

BEATTY'S GUEST RANCH AND ORCHARD, LLC; THOMAS BEATTY SR.;
EDITH M. BEATTY; AND BEATTY LIVING TRUST,
Defendants/Appellees.

No. 2 CA-CV 2013-0018
Filed November 27, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Cochise County
No. S0200CV201200499
The Honorable Ann R. Littrell, Judge

DISMISSED

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

MILLER, Judge:

¶1 The City of Tombstone (Tombstone) appeals from the judgment dismissing all of its water rights claims against Beatty's Guest Ranch and Orchard, LLC, et al. (the Beattys). Before we can review the trial court's decision, we must address the Beattys' argument that Tombstone's appeal is null and void because the decision to prosecute the appeal was not made in compliance with the open meeting law.

Factual and Procedural Background

¶2 The following pertinent facts are undisputed. Tombstone, a public body pursuant to A.R.S. § 38-431(6), timely appealed the dismissal of its water rights claims and filed its opening brief. In their timely answering brief, the Beattys contended this court lacked jurisdiction over Tombstone's appeal because the decision to appeal was made in violation of open meeting law; therefore, the appeal was null and void. After Tombstone filed its reply brief, we issued an order directing each party to "file supplemental briefs on this court's jurisdiction as it pertains to compliance with A.R.S. 38-431.03(D)." Both parties filed a supplemental brief.

Jurisdiction

¶3 Although Tombstone raises multiple issues on appeal, we address only the matter of jurisdiction, which we find dispositive. The Beattys' argument in their answering brief was based, in part, on the result of a records search submitted to the Tombstone City Clerk. Those records indicated that Tombstone

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consulted with the city attorney about pending litigation against the Beattys during an executive session¹ held several days after the trial court denied Tombstone's request for a new trial. Other than the executive session, the decision to appeal the court's judgment did not appear as an agenda item for any public meeting held between the date of the court's judgment and the filing of the notice of appeal. In its reply brief, Tombstone argued that there was no evidence Tombstone's city council decided to file this appeal during an executive session.

¶4 To determine if there were additional public records relevant to our jurisdiction, we allowed supplemental briefing and instructed Tombstone to "address whether a public vote was taken to make this appeal and provide any supporting documentation." Tombstone's supplemental brief includes minutes of a city council meeting held on October 8, 2013, as well as an affidavit from the mayor avowing that "no vote or other final action was taken" during the executive session with respect to an appeal of the Beattys' case. Tombstone also argues its attorney was not required to seek city council approval in order to file this appeal. Thus, Tombstone does not explicitly concede that its appeal was undertaken without a public, affirmative vote, but appears to stand on its arguments that it did not authorize the appeal in executive session and that a public vote was not necessary to prosecute this appeal. Tombstone argues in the alternative that it ratified the decision to file an appeal at a subsequent open meeting.

¶5 The Beattys provide documentation reflecting that the city council did not discuss the Beattys litigation or approve the appeal during an open session. They contend this was a failure to comply with Arizona's open meeting law that rendered Tombstone's notice of appeal null and void. We now address these arguments.

¹An "executive session" is "a gathering of a quorum of members of a public body from which the public is excluded." § 38-431(2).

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¶6 Arizona's open meeting law was enacted "to ensure that the public could attend and monitor the meetings of all public bodies." *Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 122-23, 912 P.2d 1345, 1351-52 (App. 1995), *citing* A.R.S. §§ 38-431 through 38-431.09. Section 38-431.03(D) requires a public vote "before any legal action binds the public body." "'Legal action' means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state." § 38-431(3).

¶7 This court has previously determined a school board violated open meeting law by making a decision to appeal a court's ruling while in executive session. *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Board*, 199 Ariz. 567, ¶¶ 6-7, 20 P.3d 1148, 1149 (App. 2000). In *Johnson*, the court concluded that a public body's decision to appeal "transcends 'discussion or consultation' and entails a 'commitment' of public funds." *Id.* ¶ 15, *quoting* § 38-431.03(A)(3)-(4) (outlining purposes for which an executive session may be held) and § 38-431(2) (1996)² (defining "legal action"). Accordingly, the open meeting statutes require that a final decision to appeal be made during a public meeting. *Id.*; *see also* § 38-431.03(D).

¶8 Tombstone contends that no vote, public or private, was necessary to file this appeal because such a decision "was simply a continuation of the litigation that is still pending in Superior Court and [] no additional authorization was necessary." It attempts to distinguish *Johnson* on the basis that, unlike the school board in that case, it did not decide to file an appeal during an executive session.

¶9 Tombstone construes *Johnson* too narrowly. The court concluded that any legal action taken by a public body in violation

²Although § 38-431 has been amended three times since the version cited by *Johnson*, the definition of "legal action" has not substantively changed. *See* 2000 Ariz. Sess. Laws, ch. 358, § 1; 2007 Ariz. Sess. Laws, ch. 71, § 1; 2012 Ariz. Sess. Laws, ch. 131, § 1.

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of the open meeting statutes is null and void, including the decision to appeal. *Id.* ¶ 17. Therefore, Tombstone would have violated § 38-431.03(D) if it did not vote to approve the appeal at a public meeting. *See Johnson*, 199 Ariz. 567, ¶ 17, 20 P.3d at 1151. It has failed to provide any documentation establishing that the decision to file this appeal was made during an open session in accordance with § 38-431.03(D).

¶10 Tombstone next argues that § 38-431.03(D) and *Johnson* do not apply because § 10-17-5 of the Tombstone City Code gives the city attorney authority to pursue an appeal without first obtaining city council approval. We disagree. Section 10-17-5 relates to enforcement of Tombstone's zoning ordinance and authorizes the city attorney to:

[I]nstitute any appropriate action or proceedings to prevent such unlawful erection, construction, placement, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violations, to prevent the occupancy of such buildings, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.

Nothing within § 10-17-5 addresses the city attorney's ability to take legal action binding the public body absent a public vote. *See* § 38-431.03(D); *cf. Long v. City of Glendale*, 208 Ariz. 319, ¶ 42, 93 P.3d 519, 531 (App. 2004) (unilateral acts by city official did not bind city; "[a]ll legal action by a public entity must occur at a public meeting"). Moreover, to the extent that § 10-17-5 in any way conflicts with § 38-431.03, it is superseded by the opening meeting law. *See City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 9, 32 P.3d 31, 34 (App. 2001) (where city ordinance conflicts with statute, and legislation involves area of statewide importance, state statute prevails).

¶11 Tombstone argues, in the alternative, that it ratified the filing of this appeal, pursuant to A.R.S. § 38-431.05(B), at a public

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meeting held on October 8, 2013. A public body may ratify legal action taken in violation of open meeting law at an open session held within thirty days “after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.” § 38-431.05(B)(1). Further, for ratification to be valid, a public body must meet certain notice requirements. *See* § 38-431.05(B).

¶12 We first address when the thirty-day deadline occurred, by which time Tombstone would have been required to ratify the appeal. In order for the ratification to be timely, Tombstone must have discovered the open meeting law violation no earlier than September 8, 2013. The Beattys filed their answering brief in this matter on August 18, 2013, wherein they alleged that Tombstone’s appeal was null and void because Tombstone failed to conduct a public vote on whether to appeal. Upon receipt of the answering brief, Tombstone discovered, or should have discovered through reasonable diligence, that its filing of this appeal without first holding a public vote violated § 38-431.03. *See* § 38-431.05(B); *Johnson*, 199 Ariz. 567, ¶ 15, 20 P.3d at 1151 (dismissing appeal as null and void and noting that “the open meeting issue was promptly raised in the appellate court”). But Tombstone did not conduct a public vote to ratify its decision to appeal until October 8, 2013, well past the thirty-day deadline permitting corrective ratification. *See* § 38-431.05(B). Moreover, Tombstone has not provided this court with any documentation to demonstrate it met the notice requirements for ratification. *See id.* Thus, Tombstone’s attempt to ratify the appeal, which was a legal action taken in violation of § 38-431.03(D), failed to comply with § 38-431.05(B), and was therefore ineffective.

¶13 In summary, we conclude that the decision to prosecute this appeal without a public vote constituted legal action in violation of the open meeting law. *See Johnson*, 199 Ariz. 567, ¶ 17, 20 P.3d at 1151. Where, as here, “the legal action violating the open meeting law was the very decision to file this appeal,” “the resulting appeal is null and void” and this court lacks jurisdiction. *Id.*; § 38-431.05(A); *see also James v. State*, 215 Ariz. 182, ¶ 11, 158 P.3d 905, 908 (App.

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2007) (where “appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal”), *quoting Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971).

Attorney Fees

¶14 The Beattys request an award of their attorney fees pursuant to A.R.S. § 12-348(A)(1). Because we dismiss this appeal for lack of jurisdiction, the Beattys have not prevailed in this action “by an adjudication on the merits,” as required by § 12-348(A)(1). *See Larkin v. State ex rel. Rottas*, 175 Ariz. 417, 430, 857 P.2d 1271, 1284 (App. 1992) (noting that where appellate court denied jurisdiction, party did not prevail by adjudication on the merits). Therefore, we deny the request and order that each party bear its own fees and costs.

Conclusion

¶15 For the foregoing reasons, we dismiss the appeal for lack of jurisdiction.