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SUPREME COURT, STATE OF COLORADO **2 East Fourteenth Avenue, Suite 300** **Denver, CO 80203**	
COURT OF APPEALS, STATE OF COLORADO Opinion of: Judge Carparelli, Judge J. Jones, Concurring Judge Casebolt, Dissenting	
DISTRICT COURT, GUNNISON COUNTY, STATE OF COLORADO J. Steven Patrick District Judge Case Number: 04CV10	**▲ COURT USE ONLY ▲**
THE TOWN OF MARBLE, COLORADO, a body corporate, THE TOWN COUNCIL OF THE TOWN OF MARBLE, and HAL SIDELINGER, ROBERT PETTIJOHN, and MIKE EVANS, in their official capacities as members of the Town Council, Petitioners v. LARRY DARIEN, DANA DARIEN, TOM WILLIAMS, and DAN BRUMBAUGH, Respondents	
Attorney for *Amicus Curiae:* Geoffrey T. Wilson, #11574 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Telephone: 303.831.6411 Telefax: 303.860.8175 E-mail: gwilson@cml.org	**Case Number: 07 SC 001** RECEIVED JUN 22 2007 CLERK COLORADO SUPREME COURT

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE TOWN OF MARBLE

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COMES NOW, the Colorado Municipal League (the "League") by its undersigned counsel, pursuant to Rule 29, Colo. App. R., and files this brief as *amicus curiae* in support of Petitioner, the Town of Marble (the "Town").

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the statement of facts and of the case in the opening brief of Petitioner, the Town of Marble.

STATEMENT OF ISSUE ON APPEAL

As announced in its Order of May 14, 2007 granting the Town's petition for certiorari, the issue before the Court in this appeal is whether the Court of Appeals erred in its interpretation of C.R.S. section 24-6-402(2)(c) when it determined that the Town of Marble violated the Open Meetings Law ("OML") in making a decision at its January 8, 2004 meeting.

SUMMARY OF ARGUMENT

The Colorado Open Meetings Law requires those jurisdictions that choose to provide notice of their meetings by posting to include with such posting "specific agenda information where possible." §24-6-402(2)(c) C.R.S. The issue before the Court of Appeals in the case at bar was whether the Town of Marble complied with this requirement.

In this case, the Town of Marble included with its posted meeting notice specific agenda information for an upcoming regular Town Board meeting. The

posted agenda included all information available to the Town clerk at the time she prepared the meeting agenda for posting. Thus, the Town included with its posting all agenda information it was "possible" to include, as that term is reasonably construed according to its plain and ordinary meaning.

Yet, in a 2-1 decision, the Court of Appeals found the Town's posted notice for its Board meeting deficient, voiding a legislative act of the Board. In its decision, the majority read into the Colorado Open Meetings law a role for meeting agendas, in jurisdictions that post their meeting notices, that would limit the discretion of such public bodies to discuss or take action on any matter not specifically identified in the posted agenda. The Court of Appeals' decision assigns a role for posted agendas that the General Assembly has not seen fit to adopt directly. The League respectfully urges that this decision of the Court of Appeals was error, and that this Court should reverse the decision of the Court of Appeals.

ARGUMENT

I. Introduction

The Colorado Open Meetings Law (OML) §24-6-401-402 C.R.S., prescribes openness, notice, minutes and executive session requirements for meetings of state and local public bodies, including municipal governing bodies, such as the Marble Town Board.

The OML's requirements concerning notice of meetings are set forth in §24-6-402(2)(c) C.R.S., which provides:

> Any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.

"Full and timely notice" is not defined in the OML, but Colorado courts have held that this is a "flexible standard," aimed at providing fair notice to the public. Benson v. McCormick, 195 Colo. 381, 383, 578 P.2d 651, 653 (1978); VanAlstyne v. Pueblo Housing Authority, 985 P.2d 97, 100 (Colo. App. 1999). Without foreclosing other potential forms of notice, the OML provides that notice by posting will be "deemed" full and timely notice. §24-6-402(2)(c) C.R.S.

> In addition to any other forms of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible. Id.

Here, the Town of Marble provided notice by posting of the date, time and location of an upcoming regular meeting of the Town Board. As required by the OML, the Town's posting also included specific agenda information relating to the upcoming meeting.

Thus, this case has never been about whether the Town included "specific agenda information" with its notice posting. There is no question that the Town did so. Rather, the focus of the Court of Appeals was whether the Town's meeting notice was defective, because it was "possible," by delaying discussion or action on particular items, to include *additional* "specific agenda information" in the posting.

II. The Court of Appeals erred in holding that the Town's posting of "specific agenda information" was deficient, under the OML.

Read in light of its evident purpose, the OML's somewhat colloquial requirement that posted notice of a meeting include specific agenda information "where possible" §24-6-402(2)(c) C.R.S., may reasonably be read to require that the posting include such agenda information "when possible" or "to the extent possible." Nothing in the OML suggests that this language is intended to provide public entities with guidance as to the *location* of their notice posting.

This section may also reasonably be read to define a particular point in time when its obligation must be met. The obligation is described in terms of what must be included with the posting of other meeting information. Thus, it is reasonable to presume that what must be included with such a posting is whatever specific agenda information it was "possible" to include, as of the date of posting. To the extent the person preparing the agenda is informed that discussion or action on a

particular topic is planned for the meeting, prior to time that agenda information is posted, that agenda information should be included in the posting, because it is reasonably "possible" to do so. And that is exactly what the Town of Marble did in the case at bar.

In construing the word "possible" in the context of the OML's agenda posting requirement, several well established rules of construction are helpful. First among these is that courts are guided by legislative intent, and "to discern that intent '[courts] afford the statutory language its ordinary and common meaning.'" Normandin v. People, 91 P.3d 383, 386 (Colo. 2004) quoting: Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue, 40 P.3d 1260, 1264 (Colo. 2002); Bd. of County Comm'rs. of Costilla Co. v. Costilla Co. Conservancy Dist., 88 P.3d 1188, 1193 (Colo. 2004) (words in the OML to be given their "plain and ordinary" meaning). It is presumed in such construction that the General Assembly intends a just and reasonable result, §2-4-201(1)(c) C.R.S.; Bd. of County Comm'rs of Park County v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693, 711 (Colo. 2002); In re marriage of Roosa, 89 P.3d 524, 528 (Colo. App. 2004) and one that is "feasible of execution." Section 2-4-201(1)(d), C.R.S.

The word "possible" has been defined as "being within or up to the limits of one's ability or capacity as determined by nature, authority, circumstances or other controlling factor" Webster's Third International Dictionary of the English

Language Unabridged, Merriam-Webster, Springfield, Mass. (3rd ed. 1993), and as "capable of happening. . . capable of occurring or being done without offense to character, nature or custom," American Heritage Dictionary of the English Language, Houghton-Mifflin, Co., Boston, Mass. (4th ed. 2000), as well as a thing "that may or can exist, be done, or happen; that is in a person's power, that one can do." Shorter Oxford English Dictionary on Historical Principles, Vol. 2, n2, Oxford Univ. Press, Oxford (5th ed. 2002).

In the case at bar, the record reveals that posted notices for meetings of the Town Board were regularly prepared by the town clerk. Rec. pps. 122-123 (testimony of Town clerk Karen Mulhall). As of the time that the meeting notice for the January 8, 2004 regular Town Board meeting was posted (along with agenda information) trustee Sidelinger had not decided to make a motion to terminate Town involvement in the permanent structure aspect of the Tomb of the Unknowns project. Rec. pps. 73-75; 78 (testimony of Mayor Hal Sidelinger). Having not formed the intention to make his motion, Sidelinger, of course, had not requested that such a topic be included in the agenda as of the date of posting. Rec. pps. 78 (Testimony of Mayor Hal Sidelinger); 154-155 (testimony of Town clerk Karen Mulhall). Indeed, as the trial court observed in its order, "Sidelinger had no preconceived intent nor planned to make the motion to withdraw support of the TOU project prior to the discussion which occurred at the meeting." Darien, et.

al., v. Town of Marble, et. al., Gunnison County District Court, No. 04CV10, Findings of Fact, Conclusions of Law and Order, February 2, 2005 (Order), at p. 13.

By requiring that specific agenda information be included with a posted meeting notice only "where possible," the General Assembly obviously contemplated that there would be circumstances when posting of agenda information with a meeting notice would *not* be possible. According the term "possible" its ordinary and common meaning, it is reasonable to assume that one of those occasions would be when no one requests that a particular matter be agendized prior to posting of the notice. It would be unreasonable and absurd to assume that the General Assembly intended its language to require those charged with posting meeting notice and agenda information to perform the impossible task of including in such posting information of which they are unaware. As Colorado courts have said, no provision of law should be interpreted in a way that requires an impossible task. People v. Interest of K.M.J., 698 P.2d 1380, 1382 (Colo. App. 1984); accord: Brady v. City of County of Denver, 181 Colo. 218, 220, 508 P.2d 1254, 1256 (1973).

Here, the Town posted specific agenda information as part of its notice, to the extent such information was available, at the time of posting. To paraphrase the definition of "possible" quoted above, the Town included with its posting

specific agenda information to the extent that it was within the ability or capacity of the Town to do so. In short, as Judge Casebolt concluded in his dissent, the Town complied with the requirements of the OML, as reasonably construed.

III. The Court of Appeals erred in assigning a role for posted meeting agendas that the General Assembly has not seen fit to enact.

In determining the extent of the obligation imposed by the OML's requirement that a posted meeting notice include specific agenda information "where possible," §24-6-402(2)(c) C.R.S., it is worth considering what the General Assembly has *not* chosen to make an obligation under the OML.

The General Assembly might have made it the law of the state of Colorado that "full and timely notice" of meetings *must* include a detailed agenda, listing *all* topics to be considered at an upcoming meeting. But this General Assembly has not done. Indeed, except in the case of notice by posting (and then only where inclusion of such information is "possible"), legally sufficient notices of meetings under the OML are not expressly required to include *any agenda information at all.*

The General Assembly might also have provided that a state or local public body in Colorado is limited to taking action only on those topics and only to the extent specifically identified in a previously posted agenda. The General Assembly might well adopt exceptions to such a requirement, perhaps applicable

in cases of bonafide emergencies, where it is "impossible" to foresee the necessity for consideration of a particular topic. But this also, significantly, the General Assembly has not done. As Judge Casebolt observed in his dissent:

> While the General Assembly could have limited a public body to taking action only on those items and topics and only to the extent specifically identified in its agenda, it did not do so. *The statutory language simply states no such thing.* Op. at 10 (dissent; see Appendix A) (emphasis added).

Yet, this is precisely what the majority opinion in the case at bar directs, at least for those jurisdictions that have chosen to *post* their meeting notices. The League respectfully urges that, in so ruling, the Court of Appeals went too far. The decision of whether or not to insert into the OML these dramatic new requirements is appropriately left to the General Assembly, following full debate on the numerous public policy considerations that would pertain.

The decision of the Court of Appeals elevates the requirement that posted meeting notices include specific agenda information "where possible" into a sweeping new requirement. Public bodies that choose this particular form of notice would now be confined to discussion or actions *specifically* forecast in their previously posted agenda.

Furthermore, as no agenda information *at all* need be part of "full and timely notice" of meetings provided by *publication*, or by any other means, this construction requires courts, as well as the state and Colorado's local governments,

to presume that the General Assembly intended application of this severe limitation on legislative prerogative to depend *entirely* upon the *form of notice* chosen by the public body. The unfortunate decision of the Court of Appeals thus plainly runs afoul of the well established rule that "a statutory interpretation leading to an illogical or absurd result will not be followed." Frazier v. People, 90 P.3d 807, 811 (Colo. 2004); accord: Bd. of County Comm'rs of Costilla Co. v. Costilla Co. Conservancy Dist., 88 P.3d at 1193; Concerned Parent of Pueblo Inc. v. Gillmore, 47 P.3d 311, 313 (Colo. 2002) (forced or strained construction of statute to be avoided, as well as construction that leads to an absurd result).

As Judge Casebolt's dissent so compellingly illustrates, there is an alternative, straightforward, practical and far more reasonable construction of the agenda posting requirement in §24-6-402(2)(c) of the OML.

This section of the OML may reasonably be read as reflecting a desire by the General Assembly, while not wishing to limit other forms of notice that might qualify as "full and timely," merely to add a somewhat relaxed agenda posting requirement, for those jurisdictions that choose to provide notice of their meetings by posting. Even as to these jurisdictions, however, posting of specific agenda information is not a *sine qua non* of legally sufficient "full and timely notice"; such agenda information is only required when it is reasonably "possible" to include it with the posting.

A reasonable interpretation of this requirement is that the General Assembly was simply expressing its desire that posted meeting notices include agenda information, as discussed above, to the extent such agenda information has been determined at the time of posting. Consideration of local fiscal impact might well have caused the General Assembly not to extend this requirement to jurisdictions that provide notice of their meetings by publication (publication costs can be significant, especially in smaller towns, which, under such a mandate, would be required to regularly purchase far more legal advertising from the local paper), as might have concerns about practicality (publication deadlines for local papers can be well in advance of a planned meeting, at a time when much of the agenda may still be undetermined). Requiring that this information be included with a *posted* notice, on the other hand, does not have the same practical or fiscal impacts, and serves to provide some additional, useful information to the public. It is evident in the General Assembly's choice of words that it did not want this modest agenda posting requirement to be burdensome on the government. That is why, rather than requiring specific agenda information be included with *all* forms of meeting notice, or tying public bodies to their agendas, the General Assembly required that agenda information accompany only *posted* notice, and then only when "possible."

It would certainly be inconsistent with this intent to permit the OML's agenda posting requirement to devolve into a device, used principally by those on the losing side of local political disputes, to overturn votes by identifying ways that, in hindsight, it would have been "possible," by postponing items (as suggested by the Court of Appeals here) or by rewording them, to make previously posted agenda information even more specific.

In the construction of statutes, courts consider the consequences that flow from a particular construction. Common Sense Alliance v. Davidson, 995 P.2d 748, 755 (Colo. 2000). It is worth considering where the construction of "where possible" suggested by the Court of Appeals would lead. One can readily anticipate numerous, interminable arguments in public meetings about whether the previously posted agenda was "specific" enough to permit proposed discussion or a particular action, or whether the item must (again) be postponed, until it is agreed that the requisite specificity in the posted agenda has been achieved. Meanwhile, public entities would scramble to avoid this unfortunate scenario, either by switching to some form of notice *other* than posting, or by posting in advance broad lists, providing notice of virtually every conceivable topic or action that the public body might reasonably wish to consider, in an effort to at once preserve the body's opportunity to act and inoculate it's actions from after-the-fact OML-based challenges.

As noted above, there is simply nothing in §24-6-402(2)(c) C.R.S., nor elsewhere in the OML, that indicates that the General Assembly intended to make posted specific agenda information a condition precedent to lawful discussion or action on any item under the OML, the role assigned to posted agendas by the Court of Appeals in the case at bar.

CONCLUSION

Under the facts of the present case, it is reasonable to conclude, as did the trial court and Judge Casebolt, dissenting in the Court of Appeals, that the Town of Marble's actions reveal no violation of the Open Meetings Law.

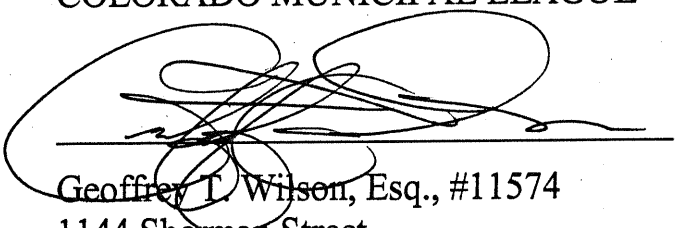
Here the Town timely posted notice of the date, time and location of its upcoming January 8, 2004 regular Town Board meeting. As part of its posted notice, and as required by the OML, this notice included all of the specific agenda information of which the official who handled the posting for the Town was aware, when the notice was posted. Nothing in the record indicates that, in posting its notice, the Town was acting in bad faith, concealing its intentions, or seeking to evade or manipulate the notice requirements of the OML in order to mislead the public.

The decision of the Court of Appeals invalidating an action of the Town and awarding attorneys fees to Respondents was error.

WHEREFORE, for the reasons stated herein and in the Brief of the Town of Marble, the League respectfully urges that the decision of the Court of Appeals be reversed.

Respectfully submitted this 22nd day of June 2007.

COLORADO MUNICIPAL LEAGUE



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--- P.3d ----, 2006 WL 3316281 (Colo.App.)
(Cite as: --- P.3d ----)

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Darien v. **Town** of Marble
Colo.App.,2006.
Only the Westlaw citation is currently available.
NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.
Colorado Court of Appeals,Div. IV.
Larry **DARIEN**, Dana **Darien**, Tom Williams, and Dan Brumbaugh, Plaintiffs-Appellants and Cross-Appellees,
v.
TOWN OF MARBLE Colorado, a body corporate; **Town** Council of the **Town** of Marble; and Hal Sidelinger and Robert Pettijohn, in their official capacities as members of the **Town** Council, Defendants-Appellees and Cross-Appellants.
No. 05CA0587.

Nov. 16, 2006.

Background: Residents brought action against **town** and **town** board of trustees, alleging violation of the Open Meetings Laws by not including specific agenda information regarding the board's decision not to undertake a construction project in **town** park. The District Court, Gunnison County, J. Steven Patrick, J., found no violation. Residents appealed.

Holding: The Court of Appeals, Carparelli, J., held that board's notice regarding meeting on construction project did not provide full and fair notice of meeting's agenda as required by the Open Meetings Law.

Reversed and remanded.

Casebolt, J., filed a dissenting opinion.

[1] Administrative Law and Procedure 15A 124

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak124 k. Meetings in General. Most Cited Cases
When applying the flexible standard established by the Open Meetings Law in regards to fair notice to the public, the Court of Appeals considers the nature of the governmental action, the importance of ensuring that the public has an opportunity to participate, and the extent to which giving notice would unduly interfere with the ability of public officials to perform their duties in a reasonable manner. West's C.R.S.A. § 24-6-402(2)(c).

[2] Administrative Law and Procedure 15A 124

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak124 k. Meetings in General. Most Cited Cases
Under the notice provisions of Open Meetings Law, to ensure the public has an opportunity to participate, the absence of a measure's proponent or of a witness who has important information may require that consideration of a measure be postponed to a later date; and when there are unforeseen developments, it may be reasonable for a governmental body to consider unexpected measures regarding which no notice was given or to consider a measure out of order. West's C.R.S.A. § 24-6-402(2)(c).

[3] Municipal Corporations 268 92

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k92 k. Rules of Procedure and Conduct of Business. Most Cited Cases
Town board of trustees' notice regarding meeting on the undertaking of a construction project in town park did not provide full and fair notice as required by the Open Meetings Law that the board would make a final decision regarding the project, where the notice explicitly stated that there would be a project committee update, an authorization for a survey of public opinion, and the appointment of an additional committee member, and the notice provided no basis for the public to infer that the board would vote on whether to accept or reject the project. West's C.R.S.A. § 24-6-402(2)(c).

[4] Municipal Corporations 268 ⇐92

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k92 k. Rules of Procedure and Conduct of Business. Most Cited Cases
The term "where possible" in notice provision of the Open Meetings Law, which required notice of specific meeting agenda information where possible, did not relieve town board of trustees of the requirement to provide full and fair notice of specific agenda information for meeting on whether to accept or reject construction project, even though the vote to reject the project came upon a motion by board member to depart from the specific matters stated in the agenda, where board was aware of the extensive public interest in project and the absence of the projects proponents from the meeting, there were no urgent circumstances that required an immediate vote, and postponement of the vote would not have unduly interfered with the ability of the board to perform its duties. West's C.R.S.A. § 24-6-402(2)(c).

Rikki A. Santarelli, Almont, Colorado; Luke J. Danielson, Gunnison, Colorado, for Plaintiffs-Appellants and Cross-Appellees.
Caloia, Houpt & Hamilton P.C., Sherry A. Caloia, Mary Elizabeth Geiger, Robert Gavrell, Glenwood Springs, Colorado, for Defendants-Appellees and Cross-Appellants.
Geoffrey T. Wilson, Denver, Colorado, for Amicus Curiae Colorado Municipal League.

JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS
Opinion by Judge CARPARELLI.
***1** Plaintiffs, Larry **Darien**, Dana **Darien**, Tom Williams, and Dan Brumbaugh, appeal the trial court's judgment in favor of defendants, the **Town** of Marble, the **Town** Board of Trustees of the **Town** of Marble, and Hal Sidelinger and Robert Pettijohn in their official capacities as members of the Board (collectively the **Town**). The **Town** cross-appeals for an award of attorney fees. We reverse and remand for further proceedings.

Plaintiffs alleged that the **Town** violated the Open Meetings Laws (OML), § 24-6-401, et seq., C.R.S.2006, and particularly § 24-6-402(2)(c), C.R.S.2006, by not including specific agenda information regarding the Board's January 8, 2004 decision not to undertake a construction project at a town park. The trial court found no violation, and this appeal followed.

I.

The Yule Marble Quarry, near the Town of Marble, is the source of marble that has been used for many well-known monuments, including the Tomb of the Unknowns in Arlington National Cemetery. Representatives for Arlington National Cemetery approached the owner of the quarry to obtain a replacement for the existing Tomb, which has deteriorated beyond long-term repair. The Marble Historical Society decided to oversee efforts to raise funds to quarry a new block for the Tomb. It appears from the record that the Historical Society asked the Town to appoint a committee to advise the Town Board regarding the project.

In October 2003, the quarry owner submitted a

formal proposal to the Board that one block of marble be quarried as a replacement for the Tomb, that a second block be quarried as insurance against the possibility of damage to the first block during transport to Arlington, and that both blocks be placed at Mill Site Park for finishing. Mill Site Park is owned by the **Town**, and is the historic site of the mill at which Yule Marble was milled. The owner also proposed that, if the second block were not needed, it be kept and permanently displayed at the park.

The **Town's** Board authorized the mayor to appoint members to the Mill Site Committee, and to define the committee's roles and responsibilities to include advising the Board about gathering public opinion on the project and available options. The mayor proposed that the committee comprise two Board members, two Historical Society members, and two at-large members.

On November 1, 2003, the Mill Site Committee held a public meeting, which attendees described as ugly, divisive, and confrontational. The matter was discussed again at the November 6, 2003 Board meeting. The quarry owner presented the question of whether a museum and visitor center memorializing quarrying, carving, and transporting marble for the Tomb should be located in the **Town** . The Board permitted six citizens to address the issue.

When the committee met on November 19, those in attendance agreed that three additional members should be appointed to the committee. Plaintiff Dana **Darien** was selected as committee chair, and one of the Board members, defendant Hal Sidelinger, was selected as co-chair. The committee agreed to meet once in December and twice in January. The mayor informed the committee that its role was to advise the Board regarding ways to gather public opinion on the proposal, to develop options, and to present them to the Board. The mayor told the committee it needed to report back to the Board by February 5, 2004.

***2** The agenda for the Board's regular December 4 meeting included, under the caption " Administrative," "Authorize Town Attorney to contact SBA." It also noted that the committee would meet on December 11.

The Small Business Administration (SBA) had conveyed the park property to the Town with a deed restriction that limited use of the property. The Board's meeting minutes show that the Board authorized the Town attorney to contact the SBA to obtain its opinion about whether a variance to the deed restriction could be obtained to permit the construction of a small nonprofit museum, gift shop, and visitor center at the park.

At the committee's December 11 meeting, the mayor rescinded the February 5 deadline to allow the committee more time to complete its work. The committee discussed options about how to gather valley-wide public opinion, agreed that a survey of property owners and voters was necessary, and agreed that it would be necessary to contact the mayor and the Historical Society about funding. It scheduled additional meetings for January 15 and January 29, 2004.

The Town posted notice that the Board's regular meeting would be held on January 8, 2004, together with the meeting agenda, which included fifteen minutes for the following:

6.	Mill Site Committee Update	Hal	7:30 to
		Sidelinger	7:45 PM

Authorization for Mill Site Committee survey expenditure(s)
Endorse replacement of MSC member.

The following notices appeared below the agenda.
The next Town Board meeting will be held Thursday, February 5, 2004
The next Mill Site Committee meeting will be held Thursday, January 15 at 7:00 p.m. in the school.

At the January 8, 2004 Board meeting, Sidelinger read a portion of the Town's master plan that stated: "The community does not want to host more visitors by promoting, exploiting or otherwise marketing the Mill Site as an attraction. The historic site should be left in its existing state." Based on this part of the plan, Sidelinger said he could not support the project with a museum at the site. He also said he could support the quarrying of the stone, and perhaps the carving of the stone, but felt there should be no permanent display of the second stone. Acting in his capacity as a member of the Board, he then made a motion that the Board not allow a permanent structure for the Tomb project at the site, nor allow the second block of marble to be on permanent display there. The Board approved and adopted the motion. The Board then appointed two new members to the Mill Site Committee to replace two who resigned. Although many townspeople who favored the project had attended several previous Board meetings on the project, none were present when the Board voted to reject it.

The minutes of the Mill Site Committee's January 15, 2004, meeting state that the committee's focus had changed and that the options that had been under consideration were no longer applicable because the Board had directed it to develop options for development of the site that fit the master plan. The committee cancelled the meeting that had been scheduled for January 29, 2004.

***3** During Board meetings in February and March, plaintiffs and others protested the January vote. Plaintiffs wanted a chance to address the issue at the public meeting before the Board voted, and they asked the Board to rescind the January 8 vote. After the Board declined to do so, plaintiffs filed suit alleging violations of the OML.

II.

Plaintiffs contend that the trial court erred when it concluded that the public notice for the January meeting complied with the OML. We agree.

A.

Because the application of statutory requirements is a question of law, we review the trial court's decision de novo. *Charnes v. Central City Opera House Ass'n,* 773 P.2d 546 (Colo.1989); *People ex rel. Woodard v. Colo. Springs Bd. of Realtors, Inc.,* 692 P.2d 1055 (Colo.1984); *Elrick v. Merrill,* 10 P.3d 689 (Colo.App.2000).

In accordance with § 24-6-401, "the formation of public policy is public business and may not be conducted in secret." To this end, a governmental body may hold a meeting at which it adopts, among other things, a policy or position only after "full and timely notice to the public." Section 24-6-402(2)(c). Such notice must be posted in accordance with the statute and include "specific agenda information where possible." Section 24-6-402(2)(c). The adoption of a policy or position without first providing "adequate and fair notice" to the public is contrary to the salutary purpose of the OML. *Benson v. McCormick,* 195 Colo. 381, 384, 578

P.2d 651, 653 (1978).

[1] Yet the supreme court has also stated that the statute establishes a "flexible standard aimed at providing fair notice to the public." *Benson v. McCormick, supra,* 195 Colo. at 384, 578 P.2d at 653. When applying this flexible standard, we consider the nature of the governmental action, the importance of ensuring that the public has an opportunity to participate, and the extent to which giving notice would unduly interfere with the ability of public officials to perform their duties in a reasonable manner.

[2] For example, because the nature of a committee meeting differs from that of a monthly board meeting, the requirement of full and timely notice for each also differs. *Benson v. McCormick, supra,* 195 Colo. at 384, 578 P.2d at 653. To ensure the public has an opportunity to participate, the absence of a measure's proponent or of a witness who has important information may require that consideration of a measure be postponed to a later date. And when there are unforeseen developments, it may be reasonable for a governmental body to consider unexpected measures regarding which no notice was given or to consider a measure out of order. *See Benson v. McCormick, supra,*

B.

Here, the action was that of a public board, and the Board's action rejected a project in which there was significant public interest. The community had formed a committee, which was investigating alternatives, had conducted meetings, and was scheduled to conduct two meetings in January. The Board had embraced the committee process, and the mayor had instructed the committee to suggest ways to obtain public opinion. Although the mayor first instructed the committee that it was to provide its report on February 5, he had extended that deadline before the Board met on January 8. It was anticipated that the new deadline would be in May.

*4 The Board's approval of the committee process and the mayor's request for guidance on ways to obtain public opinion demonstrated that the community and the Board agreed that the public should be involved in the decision-making process. The Board made its decision regarding the project on January 8 in the absence of the project's proponents. Given the original deadline of February 5, and the mayor's grant of an extension of time beyond that date, it does not appear that giving notice of the Board's intention to make a final decision about the project at a later meeting would have unduly interfered with the Board's ability to conduct its business in a reasonable manner.

These circumstances inform our determination of whether the Town gave full and fair notice that the Board would make a decision regarding the project at its January 8 meeting.

C.

[3] The notice explicitly stated that there would be a Mill Site Committee update, that the update was scheduled to take fifteen minutes, that it would include authorization of funding for a survey of public opinion, and that it would also include the appointment of an additional committee member.

We perceive no ambiguity in this notice. It explicitly conveyed that the committee would bring the Board up to date regarding its activities. It also said the Board would consider whether to authorize funding for a public opinion survey. This agenda item was consistent with the circumstances known to the public at the time of the notice. At its previous meeting, the committee agreed to advise the mayor and the Historical Society that funds were needed to conduct such a survey. The notice also stated that the committee would meet again the following week. Thus, the notice did not say that the Board would make a final decision and provided no basis for the public to infer that the Board would vote on whether to accept or reject the project at its January 8 meeting. Nonetheless, the Town asserts that the word "update" constitutes specific agenda information and includes the possibility of a vote during a town meeting.

"Update" means to bring up to date, *Webster's Third New International Dictionary* 2517 (1986),

or, to incorporate new information, *Random House Webster's College Dictionary* 1464 (1991). Although the trial court stated only that "update" *suggested* there would be a report and discussion, we conclude that it plainly conveyed that there would be a report and discussion.

Despite the plain meaning of update, the trial court stated that it would not be unusual for a discussion to lead to a consensus regarding the resolution of an issue and, on this basis, concluded that the notice complied with the statutory requirement.

However, the OML requires full and timely notice including specific agenda information. Although in other circumstances it might not be unusual for a discussion of an agenda item to lead to consensus regarding an issue, under the circumstances here, the notice did not provide full and fair notice that the Board would make a final decision regarding the project. Instead, the most straightforward meaning of the notice was that the committee would continue its work at a meeting the following week. To conclude otherwise would enable governmental bodies to act without notice regarding matters of broad public interest even when giving notice would not unduly interfere with the bodies' ability to perform their duties in a reasonable manner. This interpretation would defeat the explicit requirements of the OML.

***5** We conclude that the notice here conveyed that the committee's work would continue and, hence, that there would not be a final decision regarding the project. Therefore, we conclude that the notice was not full, adequate, or fair under the circumstances.

D.

[4] The Town also contends that it complied with the statute in that it was not possible to provide specific agenda information regarding the vote because it did not know there would be a vote. We are not persuaded.

The statute requires that notice include "specific agenda information where possible." Section 24-6-402(2)(c). The Town does not contend that circumstances beyond the Board's control made it impossible to include notice of the vote. To the contrary, it contends that, upon the motion of Board member Sidelinger, the Board decided to depart from the specific matters stated in the agenda. Nor does the Town contend that urgent circumstances required an immediate decision. As already noted, the mayor's most recent extension of time to the committee indicates there was no urgency.

We must interpret and apply the phrase "where possible" in a manner that is consistent with the OML's purpose of ensuring that public policy is not formulated in secret. Here, we conclude that the phrase "where possible" does not relieve the Board of the requirement to provide full and fair notice including specific agenda information. Given the Board's awareness of the extensive public interest, the absence of the project's proponents from the meeting, the lack of urgency, and the absence of evidence that postponement of the decision would have unduly interfered with the ability of the Board to perform its duties, application of the statutory phrase "where possible" as urged by the Town would be contrary to the OML's requirement of full notice. To decide otherwise would enable the Town to resolve a matter of known public interest away from the scrutiny of those known to be the most interested.

Therefore, we conclude the trial court erred when it held that the notice complied with the OML.

Under § 24-6-402(9), C.R.S.2006, in any action in which the court finds a violation of the section, the court has the authority to enforce the section by injunction and shall award the prevailing citizen reasonable costs and attorney fees. Accordingly, we remand to the trial court with instructions to issue an order declaring the January 8 vote regarding the project void and enjoining the Town to give public notice in accordance with the OML if it intends to vote on the Mill Site Park project again. We also direct the trial court to award plaintiffs their reasonable costs and attorney fees.

Because we reverse, we need not address the Town's cross-appeal for an award of attorney fees.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Judge J. JONES concurs.
Judge CASEBOLT dissents.
Judge CASEBOLT dissenting.
***6** In my view, the Town of Marble provided full and timely notice of its January 8, 2004, meeting and supplied the specific agenda information that the Open Meetings Law, § 24-6-401, et seq., C.R.S.2006, requires. I therefore respectfully dissent.

The Open Meetings Law, an initiative proposed and passed into law by the Colorado electorate, reflects the considered judgment of the People that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny. Indeed, the statute's declared purpose as set forth in § 24-6-401 is "that the formation of public policy is public business and may not be conducted in secret." To that end, the statute provides public access to a broad range of meetings at which public business is considered. *Benson v. McCormick,* 195 Colo. 381, 578 P.2d 651 (1978); *see also Bd. of County Comm'rs v. Costilla County Conservancy Dist.,* 88 P.3d 1188 (Colo.2004).

The statute should be interpreted broadly to further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance, so that meaningful participation in the decision-making process may be achieved. *See Cole v. State,* 673 P.2d 345 (Colo.1983).

Section 24-6-402(2)(c), C.R.S.2006, the operative provision at issue here, states:
Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public. In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible.

There are two key phrases in this provision. The first, "full and timely notice," is not a defined term in the statute. As the court recognized in *Benson v. McCormick, supra,* 195 Colo. at 383, 578 P.2d at 653, the plain language of the Open Meetings Law " neither establishes the manner in which notice must be given nor defines the content of the required notice." Instead, the term "establishes a flexible standard aimed at providing fair notice to the public. " *Benson v. McCormick, supra,* 195 Colo. at 383, 578 P.2d at 653.

The second phrase, added to the statute in 1991, mandates that "[t]he posting shall include specific agenda information where possible." That phrase is not defined in the statute, and there are no Colorado authorities interpreting or applying the term. Accordingly, this case presents an issue of first impression.

***7** We review statutory interpretation de novo. *McCall v. Meyers,* 94 P.3d 1271, 1272 (Colo.App.2004).

Our primary task in construing a statute is to determine and give effect to the intent of the General Assembly. *Colo. Dep't of Revenue v. Woodmen of World,* 919 P.2d 806 (Colo.1996); *Jones v. Cox,* 828 P.2d 218 (Colo.1992). We look primarily to the language of a statute to determine legislative intent. *Jones v. Cox, supra,* 828 P.2d at 221. In determining the meaning of a statute, we must adopt a construction that will serve the legislative purposes underlying the enactment. *Howard Elec. & Mech., Inc. v. Dep't of Revenue,* 771 P.2d 475, 479 (Colo.1989).

When reviewing a specific provision of a statute, we consider the statutory scheme as a whole in an effort to give consistent, harmonious, and sensible effect to all its parts. We give words and phrases

their plain and ordinary meaning. *Bd. of County Comm'rs v. Costilla County Conservancy Dist., supra,* 88 P.3d at 1192-93.

We presume that the General Assembly intends a just and reasonable result, § 2-4-201(1)(c), C.R.S.2006, and one that is feasible of execution. Section 2-4-201(1)(d), C.R.S.2006.

Applying those principles here, I note that in the second key phrase, the statute employs the word " posting" to refer to the physical notice that the public body places in a designated spot.

The statute indicates this posting "shall include" certain information. The word "shall" essentially means "must." Thus, there is an obligation to include the designated information. *See Skruch v. Highlands Ranch Metro. Dists. Nos. 3 & 4,* 107 P.3d 1140 (Colo.App.2004).

When posting is used as the method of notification to the public, the statute requires that the physical document be placed in the designated spot no less than twenty-four hours before the meeting commences. Thus, the statute defines a point in time at which the obligation must be met.

"Agenda information" connotes a list of things to be done or considered, as items of business or discussion to be brought up at a meeting. *See Blacks Law Dictionary* 85 (7th ed.1999); *Pokorny v. City of Schuyler,* 202 Neb. 334, 275 N.W.2d 281 (1979) (purpose of agenda requirement is to give some notice of the matter to be considered). And "specific " means definite or explicit. *See Black's Law Dictionary, supra,* at 1406.

"Where" in the context of "where possible" has several potential meanings. The word can mean location, *see Vsetecka v. Safeway Stores, Inc.,* 183 Or.App. 239, 51 P.3d 688 (2002), *rev'd on other grounds,* 337 Or. 502, 98 P.3d 1116 (2004), but that meaning does not fit here, because the statute already designates the place. In other contexts, " where" can mean "whenever," *see People v. Seto* 162 Misc.2d 255, 616 N.Y.S.2d 890 (N.Y.Sup.Ct.1994), or "if." *See B.F. Avery & Sons Co. v. Davis,* 192 F.2d 255 (5th Cir.1951), *disapproved of in part on other grounds by Katchen v. Landy,* 382 U.S. 323, 338-39, 86 S.Ct. 467, 477-78, 15 L.Ed.2d 391 (1966). Giving a consistent, harmonious, and sensible effect to all parts of the statute requires "where" in this context to mean "when" or "if."

***8** "Possible" has been defined as falling or lying within the powers of an agent, being within or up to the limits of one's ability or capacity, falling within the bounds of what may be done or may be attained, *Webster's Third New International Dictionary* 1771 (1976); capable of happening, occurring, or being done, *American Heritage Dictionary* 1370 (2000); or within a person's power, *Shorter Oxford English Dictionary* 2295 (2002).

In turn, "if possible" has been defined to mean "if feasible" or "if practicable," and implies the exercise of discretionary judgment. *See Headid v. Rodman,* 179 N.W.2d 767 (Iowa 1970); *State ex rel. Bd. of Fund Comm'rs v. Holman,* 296 S.W.2d 482 (Mo.1956).

Reasoning from these interpretations, and in the context of "fair notice," I conclude that the information that must be included within such a posting is whatever definite items of business or issues for discussion the public body knew or intended would arise when it posted the notice. Knowledge of or intent concerning what will arise or what will be decided is required because it would be unreasonable and unworkable to require the notice-giver to include in such posting items of which he, she, or it is unaware or does not intend will be discussed or acted upon. It is not feasible or practicable to include in a notice something about which the notice-giver does not know. *See* § 2-4-201(1)(c) (presumption that the General Assembly intends a just and reasonable result); § 2-4-201(1)(d) (presumption that the General Assembly intends a result that is feasible of execution); *Brady v. City & County of Denver,* 181 Colo. 218, 508 P.2d 1254 (1973)(no provision of the law should be interpreted in a way that requires an impossible task); *cf.* § 24-6-402(7), C.R.S.2006 (clerk of local public body shall maintain list of persons who have requested notification of meetings when certain specified policies will be

discussed and shall provide reasonable advance notice of such meetings, "provided however, that *unintentional* failure to provide such advance notice will not nullify actions taken at an otherwise properly published meeting" (emphasis supplied)).

To the extent the statutory phrase "where possible" is ambiguous, examination of the legislative intent reveals support for this interpretation. *See Allely v. City of Evans,* 124 P.3d 911 (Colo.App.2005) (if the language of a statute is ambiguous or conflicts with other provisions, court may look to legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme).

Representative Adkins offered the addition of the phrase "where possible" to the statute in the 1991 amendment to the Open Meetings Law. As her justification, she stated that "where possible" should be added because "you can't get an absolute agenda for every meeting, so I think you need the clarification [of] where possible." Hearings on S.B. 91-33 before the Senate Judiciary Committee, 58th General Assembly, 1st Session (Feb. 26, 1991).

***9** Therefore, the fairness and adequacy of the notice should be judged by what the notice-giver knew would be done or discussed, or intended would be done or discussed at the meeting, as measured at the time the notice is posted. Thus, when a public body or one of its members knows or intends that a definite item will be discussed or that a particular action will be proposed, it is clearly within his, her, or its capacity or ability to have that item included in the agenda contained in the public notice.

Here, no member of the Town Board had an intention to propose to take or actually to take final action on the mill site issue at or before the time the notice of the January 8 meeting was posted, and no member knew that such action would occur. Indeed, the person who made the motion to preclude a permanent structure for the Tomb project at the mill site testified at trial without contradiction that he had no preconceived intent or plan to do so. Instead, he formulated the motion only after discussion of the issue ensued when the "Mill Site Committee Update" item arose at the meeting. In addition, the town clerk, who prepares the notice of regular monthly meetings, testified without contradiction that she had no indication that any action was intended or would be proposed on the mill site issue.

Thus, the Town included within its posting all specific agenda information that was possible to include at the time it posted its notice. Accordingly, I disagree with the majority's determination that the public notice given for the January 8 meeting did not comply with the Open Meetings Law. It is clear from the record that the Board had no intention to make a final decision when the notice was posted and that none of its members or employees knew such action would be proposed or taken. The Board's lack of such knowledge or intent renders the notice full and timely, and the notice thus complies with the requirement that it include specific agenda information "where possible."

The majority acknowledges that the public notice did not convey that the Board would make a decision on the project. The notice specified that there would be a "Mill Site Committee Update" and that there would be "authorization for Mill Site Committee Survey expenditure(s)" and " replacement of a committee member." Such matters are what the Board knew would be discussed or authorized. Contrary to the majority, I do not think the statute requires more.

Given my analysis of what the statute requires, I do not perceive that the Board was prohibited from acting upon the motion concerning the placement of a permanent structure at the mill site during its January 8 meeting simply because the posted notice did not state that such action might occur. As the court noted in *Benson v. McCormick, supra,* when there are unforeseen developments, as here, it may be reasonable for a governmental body to consider unexpected measures regarding which no notice was given. And while it is unfortunate that supporters of a permanent structure at the mill site were not present when the Town Board acted, courts should not invalidate actions of a governmental body for that reason alone. Instead, only when a statutory violation occurs will such actions be negated. *See* § 24-6-402(8), C.R.S.2006

(no formal action shall be valid unless taken or made at a meeting that meets the requirements of § 24-6-402(2)); *Hyde v. Banking Bd.,* 38 Colo.App. 41, 552 P.2d 32 (1976).

***10** Nothing in the Town Board's actions before January 8 persuades me that a different result is warranted. Clearly the Town was interested in obtaining public input concerning the project: it had placed some of its board members on the Mill Site Committee and had asked the Committee to report to the Board. However, the record establishes that the Board had never committed to take a public survey and had never told the Committee or the public that it would wait until a particular date before making any decision on the issue.

Moreover, while it is true, as the majority states, that giving notice of the Board's intention to make a final decision regarding the project (assuming it had such an intention, which it clearly did not here) would not have unduly interfered with the Board's ability to conduct its business in a reasonable manner, I do not construe the Open Meetings Law to require that the Board affirmatively state that such action might occur at an upcoming meeting before such action can be valid under the law. The key issue in this case is not what information *could be* included in the notice; rather, the issue is what information the statute *requires* to be included. While the General Assembly could have limited a public body to taking action only on those items and topics and only to the extent specifically identified in its agenda, it did not do so. The statutory language simply states no such thing.

The majority's determination can be read to limit a board to doing only those things specifically stated in the notice and to preclude any action or discussion outside the narrow boundaries set thereby. Because the Open Meetings Law was not intended to "interfere with the ability of public officials to perform their duties in a reasonable manner," *Benson v. McCormick, supra,* 195 Colo. at 383, 578 P.2d at 653, and because the majority's view could unduly delay decisions of public officials, I cannot subscribe to it. In my view, the more flexible standard of including in the posted notice only those things that a board knows or intends will occur better serves the policy of noninterference. Hence, actions that were not foreseen or intended at the time notice is posted are not invalid.

In summary, this case does not present a situation in which decisional processes were closed to public scrutiny. Nothing in this case was decided in secret; indeed, the action was taken at an open meeting. Because it was not possible to include in the notice an action that no Town Board member contemplated at the time the notice was posted, I would conclude the Town complied with the Open Meetings Law.

Colo.App.,2006.
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--- P.3d ----, 2006 WL 3316281 (Colo.App.)

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CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of June 2007, I deposited a true and complete copy of the foregoing **Brief of the Colorado Municipal League as *Amicus Curiae* in Support of the Town of Marble** in the U.S. Mail, postage prepared, addressed as follows:

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