CONCURRING OPINION BY GINOZA, J.

I concur with the majority that the Final Judgment entered by the Circuit Court of the Second Circuit (circuit court) should be affirmed. However, I reach that conclusion for different reasons with regard to the issue of whether memoranda prepared by members of Defendant Maui County Council disseminated to each of the other council members violated Hawaii's Sunshine Law, Hawaii Revised Statutes (HRS) Chapter 92, Part I.

In the proceedings below, the parties initially filed motions for summary judgment. Subsequently, however, the parties stipulated that there were no disputed material facts, stipulated to submit the matter to the circuit court for a decision on the merits based on the stipulated record, agreed to withdraw their respective summary judgment motions, and agreed to have a scheduled hearing treated as a trial on the merits. After hearing the matter and reviewing the stipulated record, the circuit court issued its extensive Findings of Fact, Conclusions of Law, and Order.

Plaintiffs-Appellants Daniel Kanahele, Warren Blum, Lisa Buchanan, James Conniff, and Cambria Moss (collectively Plaintiffs-Appellants) contend that the circuit court erred in concluding that the circulation of the memoranda among and between the entire council membership outside a duly noticed meeting did not violate HRS Chapter 92, Part I.

Based on the undisputed record and the circuit court's unchallenged findings of fact, there were fourteen memoranda prepared in relation to council meetings held on February 8, 11, and 14, 2008. Council Chair Riki Hokama prepared three memoranda from himself to the council members dated February 7, 2008. Council member Michelle Anderson prepared a total of six memoranda from herself to the Chair and the council members, one dated February 8, 2008, two dated February 11, 2008, and three dated February 13, 2008. Council member Michael Molina prepared three memoranda from himself to the Chair and the council members dated February 13, 2008. Council member Bill Medeiros prepared a

memorandum from himself to the Chair and the council members dated February 13, 2008. Council member Gladys Baisa prepared a memorandum from herself to the Chair and the council members dated February 13, 2008.

Each of the memoranda were admitted into evidence as part of the parties' joint exhibits. As found by the circuit court, the memoranda were done as a courtesy to the other council members and each of the memoranda set out amendments or reconsideration of conditions to the Wailea 670 Bills that the authoring council member would be proposing at the next council meeting. The circuit court further found that there was no evidence of discussions or interactions among the council members about the memoranda and none of the memoranda sought to secure a commitment to vote for any of the proposals. A review of the memoranda, however, establishes that each provided substantive explanations or justifications in support of the proposed amendments or proposed reconsideration, sometimes referring to testimony that had been received in prior meetings as a reason for the proposals contained in the memorandum.

As noted by the majority, and certainly an important consideration, the memoranda appear to have been treated in a public fashion in that they were copied to the County Clerk and openly referred to in the council meetings. Therefore, the council members were not secretive about the memoranda, nor does it appear that they intended to violate HRS Chapter 92, Part I. However, there also is no evidence that the memoranda were disseminated to the public or made available to the public at the meetings.

Under a plain reading of HRS Chapter 92, Part I, and particularly given the broad declaration of policy and intent articulated in HRS § 92-1, I conclude that these substantive memoranda disseminated to each council member outside of the public meetings do not comport with Hawaii's Sunshine Law because the memoranda were part of the council's deliberation toward their decision on first reading of the Wailea 670 Bills.

Pursuant to HRS § 92-3 (1993 Repl.), "[e]very meeting of all boards shall be open to the public[.]" There is no dispute that the Maui County Council comes within the statutory definition of a "board," and a "meeting" is defined as "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." HRS § 92-2 (1993 Repl.). There is no further explanation of what is meant by "convening of a board." In 1996, however, the legislature adopted HRS § 92-2.5 (Supp. 2011), entitled "[p]ermitted interactions of members," and explained that:

> The purpose of this Act is to improve the ability of boards to conduct the public's business without compromising the basic principle of the Sunshine Law that discussions, deliberations, decisions, and actions of governmental agencies should be conducted openly as established in part I, chapter 92, Hawaii Revised Statutes.
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> . . . The legislature recognizes that there are instances when it is appropriate for interactions to occur between members of a board or between members of a board and certain other parties outside the realm of a public meeting. . . . Accordingly, the purpose of this Act is to specify those instances and occasions in which members of a board may discuss certain board matters . . . in a manner that does not undermine the essence of open government.

1996 Haw. Sess. Laws Act 267, § 1 at 628. It thus appears that the legislature has specified the permitted interactions of board members "outside the realm of a public meeting." Even assuming one-way memoranda could be inferred as "permitted interaction," most of the permitted interactions under HRS § 92-2.5 preclude interaction between a quorum of the board, whereas here, the memoranda were distributed to all of the council members outside of the public meeting. Further, HRS § 92-5(b) (Supp. 2011) provides that "[n]o chance meeting, *permitted interaction*, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or *to deliberate toward a decision* upon a matter over which the board has supervision, control, jurisdiction, or advisory power." (Emphasis added).

When there is a Sunshine Law violation, HRS Chapter 92, Part I does not mandate voiding the board action. Rather, HRS § 92-11 (Supp. 2011) states:

> **§92-11 Voidability.** Any final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action.

(Emphasis added).[1] Chapter 92 does not define "final action" but by its plain meaning it appears to mean the final act required to carry out the board's authority on a matter. Cases from other jurisdictions hold that Sunshine Law violations can be cured by independent, final action done completely in the sunshine. Tolar v. Sch. Bd. of Liberty Cnty., 398 So.2d 427, 429 (Fla. 1981); Pearson v. Bd. of Selectmen of Longmeadow, 726 N.E.2d 980, 985 (Mass. App. Ct. 2000). Where, as here, the challenged memoranda were related to the council's first reading of the Wailea 670 Bills, there was a subsequent second reading and passage of the bills on March 18, 2008, and Plaintiffs-Appellants raise no challenge to the conduct of the March 18, 2008 council proceedings, it does not appear that there was a "final action" taken in violation of HRS § 92-3. That is, the challenged memoranda did not relate to the later "final action," to which there is no challenge.

Even assuming a "final action" was taken in violation of HRS § 92-3, HRS § 92-11 provides that it "*may* be *voidable* upon proof of violation." (Emphasis added). This language allows for discretion in determining whether to void a board action. Under the prior version of the statute, this court held that although there was a violation of the Sunshine Law, it was not wilful and thus the challenged action by the Land Use Commission was not

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[1] When initially adopted in 1975, HRS §92-11 (1993 Repl.) provided:

> **§92-11 Voidability.** Any final action taken in violation of sections 92-3 and 92-7 shall be voidable upon proof of wilful violation. A suit to void any final action shall be commenced within ninety days of the action.

(Emphasis added). The statute was amended to its current version in 2005.

voidable. Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 641-42, 675 P.2d 784, 790-91 (1983). Courts in other jurisdictions have also held that a violation of open meeting laws does not necessarily require voiding the action in question. See Peter G. Guthrie, Annotation, Validity, Construction, and Application of Statutes Making Public Proceedings Open to the Public, 38 A.L.R. 3d 1070, 1086-88, § 7[a] (1971). Moreover, cases construing language more stringent than HRS § 92-11 have concluded that "a technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature[.]" Karol v. Bd. of Ed. Trs., Florence Unified Sch. Dist., 593 P.2d 649, 652 (Ariz. 1979); City of Flagstaff v. Bleeker, 600 P.2d 49, 51 (Ariz. Ct. App. 1979) ("Substantial compliance will satisfy [open meeting law] requirements where a technical violation has no demonstrated effect on a complaining party."); see also Stinson v. State Bd. of Accountancy, 625 S.W.2d 589, 591-92 (Ky. Ct. App. 1981).

Here, although the memoranda did not technically comply with HRS Chapter 92, Part I, they were provided to the County Clerk, who was required to keep the record of council communications, and moreover, the memoranda were openly discussed at the council meetings. Additionally, Plaintiffs-Appellants have made no argument that they were affected in any way or prejudiced by the memoranda that they challenge. Even though Appellee Honua'ula Partners LLC argued in its answering brief that there must be prejudice to void the council action, Plaintiffs-Appellants raised no response in their reply brief that they suffered any prejudice. As detailed by the circuit court in its findings of fact, three of the Plaintiffs-Appellants testified during the subsequent March 18, 2008 meeting and they did not object to anything that occurred during the continued sessions of the February 8, 2008 first reading of the bills, even

though they could have raised any concerns about the February 8, 11, or 14, 2008 council meetings. The circuit court also found that none of the Plaintiffs-Appellants ever complained in testimony or written submissions to the council about any irregularities under the Sunshine Law.

Based on the circumstances in this case, I conclude that although the use of the challenged memoranda was a technical violation of HRS Chapter 92, Part I, voiding the actions taken by the Maui County Council is not warranted under HRS § 92-11. Therefore, I concur in affirming the Final Judgment of the circuit court.