

1 OFFICE OF THE ATTORNEY GENERAL
2 STATE OF NEVADA
3

4 In the matter of:
5 MINERAL COUNTY BOARD OF
6 COUNTY COMMISSIONERS
7

OAG FILE NO.: 13897-314
**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

8 **BACKGROUND**

9 Thomas A. Bergeron Sr. filed a complaint (Complaint) with the Office of the Attorney
10 General (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the Mineral
11 County Board of County Commissioners (Board) concerning a Board meeting held on
12 September 5, 2018. The Complaint alleges that the Board violated the OML as follows:

13 **ALLEGATION:** The agenda and resulting minutes for the Board meeting held on
14 September 5, 2018, were deceptive and misleading.¹

15 The OAG has statutory enforcement powers under the OML and the authority to
16 investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS
17 241.040. The OAG's investigation of the Complaints included a review of the following: the
18 Complaint and supplemental attachments; the public notice agenda, supporting materials,
19 audio recording and minutes for the Board meeting held on September 5, 2018; and written
20 responses to the Complaint and supporting materials from the Board.

21 After investigating the Complaint, the OAG determines that the Board violated the
22 OML by failing to include a "clear and complete statement of topics to be considered" on
23 the September 5, 2018 meeting agenda. The OAG further finds that the Board violated the
24 OML by failing to keep written minutes of the September 5, 2018, meeting in compliance
25 with the requirements of NRS 241.035.

26
27 ¹ Mr. Bergeron submitted a supplement to his Complaint making additional claims
28 involving the Board's alleged failure to promulgate regulations before issuing a cannabis
license. Such matters fall outside the OAG's statutory authority on OML matters;
therefore, those allegations are not discussed herein.

1 **FINDINGS OF FACT**

2 1. The Board is a "public body" as defined in NRS 241.015(4) and is subject to
3 the OML.

4 2. The agenda for the September 5, 2018, meeting included the following:

5 **7. Business License Applications** – The following
6 applications will be presented for discussion and possible action.
(Public comment following each application):

7 ...
8 **D. Mark Eberhart;** Creative Condos IV, LLC; 195 Highway
50 Zephyr Cove, NV 89448; New Applicant

9 3. The supporting material for agenda item 7.D. included the business license
10 application for Creative Condos IV, LLC. The business license application describes the
11 business nature of Creative Condos IV, LLC as "[c]annabis cultivation, manufacturing and
12 sales."

13 4. During the introduction of agenda item 7.D., the Board acknowledged that the
14 business license application was for "cannabis manufacturing and sales."

15 5. Following public comment and discussion concerning the entrances, exits,
16 flood control, and proximity of Creative Condos IV, LLC to schools, the Board unanimously
17 voted to approve the business license application.

18 6. The September 5, 2018, Board meeting minutes for agenda item 7.D. state in
19 its entirety:

20 Public Comment: Karen Watson, Mineral County
Superintendent asked how close this was to the schools.

21 Mr. Eberhart advised they were outside the buffer zone.

22 Mr. Hamrey, Public Works Director asked about flood control
23 and the entrances and exits from the property.

24 **A MOTION WAS MADE BY** Commissioner Price, seconded by
25 Commissioner Hegg and unanimously carried by the Board to
approve the business license application for Creative Condos IV,
26 LLC.

27 Mr. Eberhart advised they had 32 acres off of Armory road [sic]
where they will have greenhouses for production and eventually
28 there will be sales.

1 7. On November 13, 2018, the OAG received the undated Complaint, alleging
2 “deliberate deception” in both the meeting notice and minutes for the Board meeting held
3 on September 5, 2018, because there was no indication that agenda item 7.D. was a
4 business license application for the production and sales of cannabis.

5 LEGAL STANDARDS AND CONCLUSIONS OF LAW

6 1. **The Board violated the OML by failing to include a “clear and complete**
7 **statement of topics to be considered” on the September 5, 2018 meeting**
8 **agenda.**

9 An agenda for a meeting of a public body must include a “clear and complete
10 statement of the topics to be considered during the meeting.” NRS 241.020(2)(d)(1). Strict
11 adherence with the “clear and complete” standard for agenda items is required for
12 compliance under the OML. *Sandoval v. Bd. Of Regents of Univ.*, 119 Nev. 148, 154 (2003).
13 The OML “seeks to give the public clear notice of the topics to be discussed at public
14 meetings so that the public can attend a meeting when an issue of interest will be
15 discussed.” *Id.* at 155. Further, “a ‘higher degree of specificity is needed when the subject
16 to be debated is of special or significant interest to the public.” *Id.* at 155-56 (quoting
17 *Gardner v. Herring*, 21 S.W.3d 767, 773 (Tex. App. 2000)).

18 The licensing of a business that proposed to engage in “Cannabis cultivation,
19 manufacturing and sales” is a subject of special or significant public interest under
20 *Sandoval*. The legality of the cultivation, manufacture and sale of Marijuana was the
21 subject of a statewide ballot initiative in 2016. The legalization proposition passed, with
22 602,463 Nevadans supporting legalization, and 503,644 opposing it.² The United States
23 Drug Enforcement Agency currently lists marijuana as a Schedule One controlled
24 Substance.³ As marijuana is a schedule one controlled substance, its manufacture is
25 prohibited under Part D of Title 21 of the United States Code. Based on the aforementioned

26 ² Secretary of State 2016 Official Statewide General Election Results
27 ([https://www.nvsos.gov/SOSelectionPages/results/2016StateWideGeneral/ElectionSumma
28 ry.aspx](https://www.nvsos.gov/SOSelectionPages/results/2016StateWideGeneral/ElectionSummary.aspx))

³ Drug Enforcement Agency Number 7360, Page 10,
https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf

1 facts, the proposed license held special or significant interest to the public under *Sandoval*.
2 As such, this agenda item required a higher degree of specificity to comply with the OML.

3 Here, agenda item 7.D. for the Board's September 5, 2018 meeting failed to provide
4 notice to the public that the Board planned to deliberate and possibly take action on a
5 business license application for the production and sale of cannabis. The agenda simply
6 stated the name of a local contact person (Mark Eberhart), the name of the business entity
7 seeking licensure (Creative Condos IV, LLC), the corporate address (195 highway 50
8 Zephyr Cove, NV 89445), and that the application was for a new applicant. The agenda was
9 not "clear and complete," whereby the public would have sufficient notice of the nature of
10 the business requesting license approval by the Board. A citizen could reasonably assume
11 that Creative Condos IV, LLC was seeking a license for a business venture involving
12 condominiums.

13 While the supporting materials for agenda item 7.D. included the business license
14 application that identified the nature of the business as one in which cannabis would be
15 cultivated, manufactured and sold, the Board cannot rely on such to comply with the "clear
16 and complete" requirement for its agenda. The plain language of the OML does not
17 authorize a public body to rely on information contained in its supporting materials in order
18 to meet the "clear and complete statement" requirement. *See* NRS 241.020(2)(d)(1). As a
19 result, considering the higher standard required for an item of special or significant
20 interest, the agenda was not "clear and complete," so as to provide the public with enough
21 information to determine whether agenda item 7.D. was a matter of interest, resulting in
22 an OML violation by the Board.

23 The OAG notes that while action taken in violation of the OML is void, any suit
24 brought to have an action declared void must be commenced within 60 days after the action
25 objected to was taken. NRS 241.036; NRS 241.037(3)(b). Here, the undated Complaint was
26 received by the OAG on November 13, 2018, after the 60 day period had elapsed.

27 ...

28 ...

1 2. The Board violated the OML by failing to maintain written minutes of the
2 September 5, 2018 meeting.

3 NRS 241.035(1) requires that written minutes be kept by all public bodies of each
4 meeting and include the following:

- 5 (a) The date, time and place of the meeting.
- 6 (b) Those members of the public body who were present,
7 whether in person or by means of electronic communication, and
8 those who were absent.
- 9 (c) The substance of all matters proposed, discussed or
10 decided and, at the request of any member, a record of each
11 member's vote on any matter decided by vote.
- 12 (d) The substance of remarks made by any member of the
13 general public who addresses the public body if the member of
14 the general public requests that the minutes reflect those
15 remarks or, if the member of the general public has prepared
16 written remarks, a copy of the prepared remarks if the member
17 of the general public submits a copy for inclusion.
- 18 (e) Any other information which any member of the public
19 body requests to be included or reflected in the minutes.

20 The OML does not, pursuant to NRS 241.035, require a verbatim memorialization
21 of a meeting. Rather, only the "substance of all matters proposed, discussed or decided"
22 need to be reflected in the minutes of a public body's meeting.

23 Here, the meeting minutes for agenda item 7.D. are silent as to the substance of the
24 business license application that was considered by the Board. While the minutes mention
25 "greenhouses for production and eventually there will be sales," the minutes are devoid of
26 what is actually being produced and ultimately sold. It is unclear from the minutes that
27 agenda item 7.D. was an application for a business license to manufacture and sell
28 cannabis. Therefore, the Board violated the OML by failing to comply with the content
requirements for minutes outlined in NRS 241.035.

SUMMARY AND INCLUSION OF AGENDA ITEM

If the Attorney General investigates a potential OML violation and makes findings
of fact and conclusions of law that a public body has taken action in violation of the OML,
"the public body must include an item on the next agenda posted for a meeting of the public

1 **CERTIFICATE OF SERVICE**

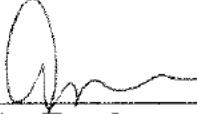
2 I hereby certify that on the 7th day of May, 2019, I served the **FINDINGS OF**
3 **FACT AND CONCLUSIONS OF LAW** by depositing a copy of the same in the United
4 States mail, properly addressed, postage prepaid, CERTIFIED MAIL addressed as follows:

5
6 Mineral County Board of County Commissioners
7 Sean A. Rowe, District Attorney
8 P.O. Box 1210
9 Hawthorne, Nevada 89415

10 **Certified Mail No.** 7014 2120 0003 0405 2537

11 Thomas A. Bergeron Sr.

12 **Certified Mail No.** 7012 1640 0000 6149 2878

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15 _____
16 An Employee of the
17 Office of the Attorney General
18 State of Nevada
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