

1 OFFICE OF THE ATTORNEY GENERAL
2 STATE OF NEVADA
3

4 In the matter of:

OAG FILE NOS.: 13897-224 & 226

5 INCLINE VILLAGE GENERAL
6 IMPROVEMENT DISTRICT
7

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

8 **BACKGROUND**

9 Frank Wright filed two separate complaints on February 16, 2017, and April 3, 2017,
10 (Complaints) with the Office of the Attorney General (OAG) alleging violations of the
11 Nevada Open Meeting Law (OML) by the Incline Village General Improvement District
12 Board of Trustees (Board). The Complaints allege that the Board violated the OML as
13 follows:

14 **ALLEGATION NO. 1:** The Board improperly required Mr. Wright to face the
15 Board, as opposed to the audience, during his public comment at the beginning of the
16 Board's meeting on February 8, 2017.

17 **ALLEGATION NO. 2:** The Board's legal counsel improperly cut off Mr. Wright's
18 public comment during the February 8, 2017, meeting.

19 **ALLEGATION NO. 3:** The Board held two training sessions without noticing them
20 in accordance with the OML.

21 **ALLEGATION NO. 4:** The Board held meetings with its legal counsel in violation
22 of the OML.

23 The OAG has statutory enforcement powers under the OML and the authority to
24 investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS
25 241.040. The OAG's investigation of the Complaints included a review of the agenda and
26 recording of the February 8, 2017 meeting, together with written responses to the
27 Complaints and supporting materials from Jason Guinasso, Esq., counsel to the Board, and
28 a sworn affidavit from Mr. Guinasso regarding Allegation No. 4.

1 After investigating these Complaints, the OAG determines that no clearly cognizable
2 OML violations occurred, but that the Board's approach to public concerns failed to
3 encourage openness and participation, both of which are key tenets of the OML.

4 More particularly, the manner in which the Board and its counsel hold training
5 sessions approaches a potential violation of the OML. Furthermore, the Board and
6 counsel's approach to public comment periods may discourage public participation in its
7 meetings, which does not comport with the spirit and policy behind the OML.

8 FINDINGS OF FACT

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

11 2. The Board's February 8, 2017, agenda provided for general periods of public
12 comment at the beginning of the meeting and before adjournment, and contained the
13 following Public Comment Advisory Statement, which Mr. Guinasso read into the record
14 prior to the first general public comment period:

15 PUBLIC COMMENTS* - Conducted in accordance with Nevada Revised
16 Statutes Chapter 241.020 and limited to a maximum of three (3) minutes in
duration.

17 Public Comment Advisory Statement – A public body has a legitimate interest
18 in conducting orderly meetings. IVGID may adopt and enforce reasonable
19 restrictions on public comment to ensure the orderly conduct of a public
20 meeting and orderly behavior on the part of persons attending the meeting.
21 Public comment, as required by the Nevada Open Meeting Law, is an
22 opportunity for people to publicly speak to the assembled Board of Trustees.
23 Generally, it can be on any topic, whether or not it is included on the meeting
24 agenda. In other cases, it may be limited to the topic at hand before the Board
25 of Trustees. Public comment cannot be limited by point of view. That is, the
26 public has the right to make negative comments as well as positive ones.
27 However, public comment can be limited in duration and place of presentation.
28 While content generally cannot be a limitation, all parties are asked to be polite
and respectful in their comments and refrain from personal attacks. Willful
disruption of the meeting is not allowed. ***Equally important is the
understanding that this is not the time for the public to express their
respective views, and is not necessarily a question and answer period.***
This generally is not a time where the Board of Trustees responds or directs
Staff to respond. If the Chair feels there is a question that needs to be
responded to, the Chair may direct the General Manager to coordinate any
such response at a subsequent time. ***Finally, please remember that just
because something is stated in public comment that does not make the
statement accurate, valid, or even appropriate. The law mitigates
toward allowing comments, thus even nonsensical and outrageous***

1 *statements can be made. However, the Chairperson and/or General*
2 *Counsel may cut off public comment deemed in their judgment to be*
3 *slanderous, offensive, inflammatory and/or willfully disruptive.*
4 *Counsel has advised the Staff and the Board of Trustees not to respond*
5 *to even the most ridiculous statements.* Their non-response should not be
seen as acquiescence or agreement just professional behavior on their part.
IVGID appreciates the public taking the time to make public comment and will
do its best to keep the lines of communication open.

5 *(Emphasis added).*

6 3. On February 8, 2017, Mr. Wright began his public comment during the first
7 general public comment period by facing the audience. The Board Chair, Kendra Wong,
8 cut Mr. Wright off and forced him to face the Board when speaking. Less than two minutes
9 later, Mr. Guinasso cut off Mr. Wright's public comment citing slander after Mr. Wright
10 made statements regarding Mr. Guinasso's 2016 candidacy for Nevada State Assembly
11 District 26.

12 4. Board Secretary, Tim Callicrate, interceded and requested that a portion of
13 Mr. Wright's allotted time be returned to him so that Mr. Wright could have the
14 opportunity finish his public comment. Over Mr. Guinasso's objections, Chair Wong
15 granted Mr. Wright 15 additional seconds to finish his public comment and then abruptly
16 cut Mr. Wright off at the end of the 15 seconds.

17 5. The Board sets a three-minute timer for each public member's comment
18 period. When the timer goes off, the speaker is cut off, at times mid-sentence.

19 6. Multiple members of the public complained during the two public comment
20 periods of the February 8, 2017, meeting, stating that the Board had stopped accepting
21 public comment on specific agenda items and that the Board's decision impaired the
22 public's ability to be heard on issues before the Board.

23 7. Mr. Wright received an uninterrupted three minutes of public comment time
24 during the general public comment period at the end of the February 8, 2017, meeting.

25 8. Immediately following the January 18, 2017, Board meeting, the Board
26 attended a training session ("January Training Session") conducted by Mr. Guinasso. The
27 January Training Session was directed solely at the Board.

28 9. Notice of the January Training Session was posted on the evening of January

1 17, 2017, at the Board administrative offices and the morning of January 18, 2017, at the
2 location of the session. The Board did not post or distribute any other notices regarding
3 the January Training Session. The Notice of the January Training Session stated that the
4 Board “may” attend. The Notice was silent as to whether members of the public may attend
5 the January Training Session.

6 10. The Board held another public meeting on March 8, 2017. Immediately
7 preceding the March 8th Board meeting, the Board attended another training session
8 (“March Training Session”) conducted by Mr. Guinasso and conducted solely for the Board.
9 Also on March 8th, Mr. Guinasso conducted a gathering with Board members to discuss
10 pending or existing litigation involving IVGID.

11 11. On February 27, 2017, notice of the March Training Session was posted at the
12 Board administrative offices and at the location of the meeting. The Board did not post or
13 distribute any other notices regarding the March Training Session. The Notice of the
14 March Training Session stated that the Board “may” attend. The Notice was silent as to
15 whether members of the public may attend the March Training Session.

16 12. The January and March Training Sessions were entitled “So, You Were
17 Elected an IVGID Trustee, Now What?” The support materials for both training sessions
18 posed specific questions directly related to matters within the Board’s jurisdiction and
19 control. The questions included the following: “Who are the people I am serving with, what
20 are their priorities and ideas, and how can I work with them to accomplish my goals and
21 serve the public well?”, “What are the priorities of the District?” and “What powers,
22 duties/responsibilities and obligations do I have?”

23 LEGAL STANDARDS AND CONCLUSIONS OF LAW

24 1. **The OAG Possesses Insufficient Evidence to Find that the Board Training**
25 **Sessions Were “Meetings” Under the OML.**

26 NRS 241.020 governs open and public meetings and it provides that “all meetings
27 must be open and public, and all persons must be permitted to attend any meeting of these
28 public bodies” except as otherwise provided by specific statute. NRS 241.020(1). A

1 “meeting” generally requires a “gathering of members of a public body at which quorum is
2 present, whether in person or by means of electronic communication, to deliberate toward
3 a decision or to take action on any matter over which the public body has supervision,
4 control, jurisdiction or advisory power.” NRS 241.015(3). “Deliberate’ means collectively
5 to examine, weigh and reflect upon the reasons for or against the action. The term includes,
6 without limitation, the collective discussion or exchange of facts preliminary to the ultimate
7 decision.” NRS 241.015(2).

8 The OML provides an exception for a gathering “which occurs at a social function if
9 the members do not deliberate toward a decision or take action on any matter over which
10 the public body has supervision, control, jurisdiction or advisory power.” NRS 241.015(3).
11 The spirit and policy behind the OML favors open meetings and any exceptions should be
12 strictly construed. *Chanos v. Nevada Tax Commission*, 124 Nev. 232, 234, 181 P.3d 675,
13 677 (2008); *Del Papa v. Board of Regents*, 114 Nev. 388, 394, 956 P.2d 770, 774 (1998).
14 “[T]he narrow construction of exceptions to the Open Meeting Law stems from the
15 Legislature’s use of the term ‘specific’ in NRS 241.020(1) and that such exceptions must be
16 explicit and definite.” *Chanos*, 124 Nev. at 239, 181 P.3d at 680. “[E]xceptions to the Open
17 Meeting Law extend only to the portions of a proceeding specifically, explicitly, and
18 definitely excepted by statute.” *Id.* The exceptions to the OML requirements, “must not
19 be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an
20 open and public meeting, upon a matter over which the public body has supervision,
21 control, jurisdiction or advisory powers.” NRS 241.016(4).

22 The January and March Training Sessions were organized by the Board, specifically
23 directed to its members, conducted by its counsel, and contemplated attendance only by its
24 members. The OAG cautions that the questions that formed the basis for the Training
25 Sessions may be perceived as inviting interactive communications among the Trustees and

26 ...

27 ...

28 ...

1 a collective discussion or exchange of facts.¹ If such discussions or exchanges of facts were
2 preliminary to some action or decision of the Board, they would constitute deliberations
3 under NRS 241.015(2). Where a gathering of a quorum of a public body includes
4 deliberation, the gathering necessarily meets the definition of a “meeting” contained in the
5 OML.

6 According to evidence obtained by the OAG from IVGID, the trustees’ responses to
7 the questions posed in the training materials suggest they discussed the priorities of the
8 Board in general terms. However, the OAG does not possess specific evidence that the
9 discussion which occurred during the Training Sessions, together with any exchange of
10 facts, were preliminary to, or resulted in, any action or decision of the Board. As a result,
11 the evidence does not support a finding that the interaction among trustees that occurred
12 during the Training Sessions qualifies as “deliberation.” NRS 241.015(2). Absent
13 “deliberation,” the Training Sessions would not constitute “meetings” under NRS
14 241.015(3). It follows that evidence does not support a finding that the January and March
15 Training Sessions violated the OML.

16 The OAG cautions IVGID and its counsel that while no OML violation is found here,
17 IVGID should take reasonable actions to clearly and purposefully comply with the OML,
18 avoiding, where possible, the specter of violation. This may include opening the Training
19 Sessions to the public and noticing and conducting them as public meetings, absent some
20 important reason to continue with its current Training Session practices.

21 **2. The March 8, 2017, Attorney-Client Conference Regarding Potential or**
22 **Existing Litigation Is an Exception to the OML.**

23 A gathering of members of a public body, at which quorum is actually or collectively
24 present, does not constitute a meeting pursuant to the OML when the purpose of the
25 gathering is for the members “to receive information from the attorney employed or

26 ¹ The overview of questions posed in the training materials include, but are not limited to,
27 the following: (1) What are the priorities of the District?; (2) Who are the people I am
28 serving with, what are their priorities and ideas, and how can I work with them to
accomplish my goals and serve the public well?

1 retained by the public body regarding potential or existing litigation involving a matter
2 over which the public body has supervision, control, jurisdiction or advisory power and to
3 deliberate toward a decision on the matter, or both.” NRS 241.015(3)(b)(2).

4 The OAG does not possess any evidence that the March 8, 2017, conference between
5 the Board and its counsel involved any action other than the sharing of information
6 regarding potential or existing litigation. Counsel’s sworn affidavit provides that the only
7 matters discussed during the March 8, 2017 conference concerned specific existing or
8 potential litigation involving the Board. Therefore, the March 8, 2017, conference
9 constituted an attorney-client conference that falls within the OML exception as provided
10 in NRS 241.015(3)(b)(2). The Board did not violate the OML by holding and attending the
11 March 8, 2017, attorney-client conference.

12 **3. The Board’s Counsel Has Not Demonstrated a Recognition of the**
13 **Importance of Public Comment Periods to the Fulfillment of the Spirit of**
14 **the OML.**

15 In Nevada, public bodies exist to aid in the conduct of the people’s business. NRS
16 241.010(1). Public bodies must allot time to allow comments from the general public either
17 “at the beginning of the meeting before any items on which action may be taken are heard
18 by the public body and again before the adjournment of the meeting” or “after each item on
19 the agenda on which action may be taken is discussed by the public body, but before the
20 public body takes action on the item.” NRS 241.020(2)(d)(3). The OML exists to ensure
21 that the public is able to meaningfully participate in government. *See* NRS 241.010.

22 Every citizen may freely speak, write and publish his sentiments on all subjects
23 being responsible for the abuse of that right; and no law shall be passed to restrain or
24 abridge the liberty of speech or of the press. Nev. Const. art. I, § 9. The United States
25 Supreme Court created a federal rule consistent with the Nevada Constitution in *N.Y.*
26 *Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), that protects even a defamatory falsehood
27 in certain circumstances. *N.Y. Times Co.*, 376 U.S. at 279-280. The public has important
28 First Amendment interests in its ability to comment before public governmental bodies.
White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).

1 The OML requires public bodies to offer at least two periods of public comment
2 during public meetings—one at the beginning of the meeting before any items on which
3 action may be taken are heard, and another at the end of the meeting prior to adjournment.
4 NRS 241.020(2)(d)(3). Restrictions on public comment must be included in the agenda and
5 must be reasonable restrictions to the time, place and manner of the comments, but may
6 not restrict comments based upon viewpoint. NRS 241.020(2)(d)(7). The interpretation
7 and enforcement of rules during public meetings are highly discretionary functions. *See*
8 *White, supra*, 900 F.2d 1421 at 1426. The decision to stop a speaker is left to the discretion
9 of the presiding officer of the public body. *Id.* A public body may impose restrictions on
10 public comments that are repetitious, irrelevant, or disruptive comment. *Id.*

11 Here, the Board fails to provide a reasonable basis for requiring Mr. Wright to face
12 it during public comment. While reasonable rules and regulations during public meetings
13 ensure orderly conduct of a public meeting and ensure orderly behavior on the part of those
14 persons attending the meeting, the Board presents no evidence that the requirement to
15 face the Board was necessary to ensure that the speaker's comments could be properly
16 heard or recorded, or to otherwise ensure the orderly conduct of the meeting.

17 Determining whether public comments are repetitious, irrelevant, or disruptive
18 should be left to the presiding officer of the meeting, namely Chair Wong. The Board's legal
19 counsel should refrain from interjecting his opinions, or silencing speakers, during public
20 comment periods.² The Board's public comment advisory statement, which is contained in
21 its agenda, improperly authorizes and empowers the Board's legal counsel to stop public
22 comment when such authority lies solely with the Board's Chairperson. Moreover, the
23 general tone of the advisory statement appears to misunderstand the centrality and dignity
24 of public comment in providing the public with the opportunity to participate in the conduct

25
26 ² The Board's counsel, who is not the presiding officer of the meetings, has a history of
27 interrupting and cutting off members of the public from speaking during public comment.
28 *See* OMLO 13897-171/180. The OAG cautions the Board that counsel's continued actions
to hinder public comment may lead to legal liability for the Board for any resulting OML
violations.

1 of *public* bodies. The OAG advises the Board to revise its public comment advisory
2 statement to grant the discretion to stop public comment to the Board's Chair and to show
3 appropriate respect to the citizenry in whom ultimate democratic authority rests.

4 Ultimately, the Board allowed Mr. Wright to make his comments during both public
5 comment periods and so it did not commit a formal violation of the OML. Still, actions of
6 Board counsel have shown a lack of sufficient regard for public comment and its role in the
7 OML.

8 SUMMARY

9 Upon investigating these Complaints, the OAG determines that the Board did not
10 commit any provable OML violation. However, the Board's general attitude, combined with
11 the conduct of its counsel, discouraged public participation in its meetings and actions and
12 thus has not properly recognized the spirit of the OML.

13 DATED: October 19, 2017.

14 ADAM PAUL LAXALT
15 Attorney General

16
17 By: 
18 CAROLINE BATEMAN
19 Chief Deputy Attorney General
20 Boards and Open Government Division
21
22
23
24
25
26
27
28