

1 OFFICE OF THE ATTORNEY GENERAL
2 STATE OF NEVADA

3 In the matter of:
4 MESQUITE CITY COUNCIL

OAG FILE NO.: 13897-414

5 **FINDINGS OF FACT AND**
6 **CONCLUSIONS OF LAW**

7
8 **BACKGROUND**

9 David Ballweg filed a complaint with the Office of the Attorney General (“OAG”)
10 alleging violations of the Nevada Open Meeting Law (“OML”) by the Mesquite City Council
11 (“MCC”), during the MCC’s May 18, 2021, Special Meeting, asserting that there were
12 insufficient public comment periods provided.

13 The OAG has statutory enforcement powers under the OML and the authority to
14 investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS
15 241.040. The OAG’s investigation of the Complaint included a review of the following:

- 16 1. The Complaint and all attachments thereto;
- 17 2. The response filed on behalf of the MCC and all attachments thereto;
- 18 3. The video recordings of the May 18, 2021, meetings;¹
- 19 4. The agendas of the May 18, 2021, meetings;
- 20 5. The video recordings of the June 15, 2021, meetings; and
- 21 6. The agendas of the June 15, 2021, meetings.

22 After investigating the Complaint, the OAG determines that the MCC violated the
23 OML by failing to provide adequate public comment periods where members of the public
24 could address the MCC during its May 18, 2021, Special Meeting.

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28 ¹ The OAG reviewed the agendas and video recordings of the MCC’s May 18, 2021 and June
15, 2021 meetings at: <https://www.mesquitenv.gov/meetings-agendas>.

1 **FINDINGS OF FACT**

2 1. The MCC posted three (3) separate agendas for meetings held on May 18,
3 2021. Specifically, the MCC posted a notice for each of the following: (1) a Special Meeting
4 to begin at 1:15 p.m.; (2) a Technical Review Meeting to begin at 1:30 p.m.; and (3) a Budget
5 Work Session to begin at 1:45 p.m.

6 2. Each of the Agendas indicated that the meetings would be held at the City
7 Council Chambers – City Hall, located at 10 E. Mesquite Blvd.

8 3. The Agenda for the MCC’s Special Meeting noticed two items: (1) an
9 Administrative Item for the appointment of an Interim City Manager; and (2)
10 Adjournment. Under the Agenda Item relative to the appointment of an Interim City
11 Manager, the MCC noticed (i) a Public Comment period and (ii) Discussion and Possible
12 Action. No other Public Comment periods were noticed on the MCC’s Special Meeting
13 Agenda.

14 4. The Agenda for the MCC’s Technical Review Meeting noticed the following:
15 (1) two Public Comment periods, one at the beginning and one at the end immediately prior
16 to adjournment; (2) a Consent Agenda, of which each item included a “public comment”
17 period; (3) Special Items, which included a “public hearing” period; (4) Resolutions and
18 Proclamations, of which each item included either a “public comment” or “public hearing”
19 period; (5) Introduction of Bills, of which each item included a “public comment” or “public
20 hearing” period; (6) Administrative Items, of which each item included either a “public
21 comment” or “public hearing” period; and (7) Adjournment.²

22 5. The Agenda for the MCC’s Budget Work Session noticed the following: (1) two
23 Public Comment periods, one at the beginning and one at the end immediately prior to
24 adjournment; (2) Administrative Items, of which each item included a “public comment”
25 period.

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28 ² The Agenda also included an item for “Department Reports”. However, these were not indicated “for possible action” and did not include a portion for public comment.

1 6. At 1:15 p.m. on May 18, 2021, the Mayor of Mesquite called the Special
2 Meeting to order. The Mayor noted on the record that there was only one agenda item on
3 the Special Meeting Agenda for the Council to consider.

4 7. Upon review of the video recording of the meeting, Complainant David
5 Ballweg asked whether the Council would be receiving public comment. In response, the
6 MCC's staff noted that pursuant to NRS 241.020(3)(d)(3), public comment could be received
7 in the beginning and end of the meeting or upon each item so long as public comment is
8 allowed prior to any determination being made. Staff also noted that there would be four
9 additional periods of public comment for the day, in different meetings.

10 8. The Mayor then proposed a recommendation for the Interim City Manager
11 position and asked the Council for discussion. During a pause, the Mesquite City Attorney
12 stated that the Council should first receive public comment and then proceed to discussion.

13 9. At that point, the Council began receiving public comments. Mr. Ballweg
14 made his public comment and was interrupted by the City Attorney who noted that public
15 comment should be limited to the agenda item before the MCC.

16 10. After the MCC received public comment, the Mayor called for discussion, and
17 the MCC held discussion regarding the proposal previously presented by the Mayor.

18 11. Thereafter, a motion was made and approved by the MCC to accept the
19 proposal to hire an Interim City Manager for a period of 120 days.

20 12. The Mayor then adjourned the MCC's May 18, 2021, Special Meeting.

21 13. At 1:30 p.m. on May 18, 2021, the Mayor called the Technical Review Meeting
22 of the MCC to order.

23 14. The Technical Review Meeting Agenda provided for two periods of public
24 comment. In addition, periods for public comment and public hearing were slated under
25 each item on the agenda.

26 15. The first item on the agenda for the Technical Review Meeting was the first
27 general Public Comment period. At that time, Mr. Ballweg and other individuals were able
28 to provide public comment to the MCC.

1 16. After proceeding through all agendized items, the Mayor adjourned the MCC's
2 May 18, 2021 Technical Review Meeting.

3 17. At 1:49 p.m. on May 18, 2021, the Mayor called the Budget Work Session
4 meeting to order.

5 18. The Budget Work Session Agenda provided two periods of public comment. In
6 addition, periods for public comment and public hearing were slated under each item on
7 the agenda.

8 19. In attendance at all three MCC meetings held on May 18, 2021, were Mayor
9 Allan S. Litman as well as Council Members Wes Boger, Karen Dutkowski, George Gault,
10 Sandra Ramaker, and Brian Wursten.

11 20. Each of the MCC's three agendas noted that any person desiring to address
12 the MCC could do so during Public Comments or on a particular item on the agenda. Each
13 Agenda also noted that individuals had three minutes to address the MCC and that the
14 presiding officer or a majority of the MCC could prohibit comment that was irrelevant,
15 repetitious, slanderous, offensive, inflammatory, or a personal attack, or was not within
16 the authority of the public body.

17 **LEGAL STANDARDS AND CONCLUSIONS OF LAW**

18 The Mesquite City Council ("MCC") is a "public body" as defined in NRS 241.015(4);
19 therefore, the Board is subject to the OML.

20 **1. The MCC violated the OML's requirement to hold public** 21 **comment periods during its open meetings.**

22 The OML requires that public bodies adopt one of two alternative public comment
23 agenda plans. NRS 241.020(3)(d)(3). First, a public body may comply by agendizing one
24 public comment period before any action items are heard by the public body and then
25 provide for another period of public comment before adjournment. NRS 241.020(3)(d)(3)(I).
26 Alternatively, the public body may utilize multiple periods of public comment but only after
27 discussion of each agenda action item and before the public body takes action on the item.
28 NRS 241.020(3)(d)(3)(II). Regardless of which method is chosen, the public body must also

1 allow members of the public time to comment on any matter not specifically included on
2 the agenda as an action item some time before adjournment. NRS 241.020(3)(d)(3).
3 Further, it is well-settled law that statutes or regulation are to be interpreted by their plain
4 meaning unless the statute or regulation is ambiguous, the plain meaning would provide
5 an absurd result, or the interpretation clearly was not intended. *Young v. Nevada Gaming*
6 *Control Board*, 473 P.3d 1034, 1036, 136 Nev. Adv. Op. 66 (2020) (citations omitted).

7 Here, in the response to the Complaint, the MCC's counsel noted that at the time
8 the agenda for the Special Meeting was published, counsel was unaware of the requirement
9 of a general comment period under NRS 241.020(3)(d)(3). However, counsel positions that
10 the OML's requirement for public comment periods was fulfilled during the subsequent
11 meetings' general public comment periods. Upon review of the video recording of the MCC's
12 three May 18, 2021 meetings, the OAG notes that there were in fact four additional general
13 public comment periods afforded to the public – two public comment periods in the MCC's
14 Technical Review meeting and two public comment periods in the MCC's Budget Work
15 Session meeting. It was also confirmed that Mr. Ballweg provided additional general public
16 comment during the first of two public comment periods scheduled in the Technical Review
17 meeting that began three minutes after adjournment of the MCC's Special Meeting.

18 While Mr. Ballweg was eventually allowed to provide general public comment to the
19 MCC on May 18, 2021, the MCC's Special Meeting Agenda failed to comply with the
20 requirement under NRS 241.020(3)(d)(3) related to public comment periods. On its face,
21 the MCC's agenda did not include a period for public comment where the public could
22 provide comments to the MCC on matters that were not on the agenda but under MCC's
23 supervision, control, jurisdiction or advisory power. Rather, only one period for public
24 comment was listed, which was specific to the Administrative Item for the consideration
25 and approval of the appointment of an Interim City Manager. The OML specifically calls
26 out that **some time before adjournment of the meeting**", the public body must allow
27 the general public to comment on any matter that is not specifically included on the agenda
28 as an action item. NRS 241.020(3)(d)(3) (emphasis added). In this case, the MCC agreed

1 that the Special Meeting had been adjourned at approximately 1:27 p.m., without the
2 requisite general public comment period commencing. Accordingly, the OAG finds that a
3 technical violation of the OML has occurred.³

4 Moreover, the OAG looked at agendas for the MCC's prior meetings from 2016 to the
5 present. Of those meetings, the OAG found at least 10 instances where the MCC agendized
6 and posted notices for two or more meetings that were held on the same day, similar to
7 what it had done on May 18, 2021.⁴ It is notable that on each of these prior agendas and
8 notices, the MCC agendized two individual public comment periods per meeting. This was
9 not done so in this matter, thus further supporting the OAG's finding of a violation relative
10 to the May 18, 2021, Special Meeting.

11 The OAG reiterates that Complainant was able to make general public comment in
12 this instance and there was no evidence of intent to avoid the requirements of the OML.
13 Adjournment of the meeting prior to accepting general public comment as opposed treating
14 all three meetings as one is what resulted in a technical violation of the OML.

15 **2. The MCC did not violate the OML when it required public comments**
16 **to be related to a particular agenda item.**

17 When public comment is allowed during the consideration of a specific topic, the
18 chairperson may require public comment to be relevant to the topic, provided the restriction
19 is viewpoint neutral. *See Attorney General Nevada Open Meeting Law Manual, Section 7.05*
20 *Reasonable time, place, and manner restrictions apply to public meetings, Twelfth Ed.,*
21 *January 2016 (updated March 26, 2019).* Courts have also ruled that public bodies may be

22 ³ This opinion has limited applicability to the specific facts of this Complaint. It should not
23 be construed as requiring public comment periods other than those required under NRS
24 241.020(3)(d)(3), especially in instances where public bodies comprised of the same
25 individual members sit as multiple public bodies during the same meeting issued under
the same notice and agenda.

26 ⁴ The OAG noted that the MCC held multiple meetings on the following days: February 2,
27 2016, May 17, 2016, November 15, 2016, May 16, 2017, February 13, 2018, June 19, 2018,
28 October 9, 2019, October 16, 2018, November 13, 2018, January 8, 2019, February 12, 2019,
December 10, 2019, April 28, 2020, May 19, 2020, November 17, 2020, December 8, 2020,
and May 18, 2021.

1 justified in limiting their meetings to discussion of specified agenda items and in imposing
2 reasonable restrictions to preserve the civility and decorum necessary to further the forum's
3 purpose of conducting public business. *Steinburg v. Chesterfield Cnty. Planning Com'n*, 527
4 F.3d 377, 385 (4th Cir. 2008).

5 In the present case, Mr. Ballweg attempted to provide public comment wherein he
6 expressed his concerns that the Mayor allowed public comments of the prior City Manager
7 during the public comment period designated for the discussion of the appointment of an
8 Interim City Manager. While Mr. Ballweg was attempting to make his comments, he was
9 interrupted by the City Attorney who noted that the comments should relate to that agenda
10 item. From reviewing the video, the City Attorney noted that the Mayor, as chair of the
11 meeting, could allow for additional comment, at which point the Mayor declined to allow
12 comment not related to the agenda item. As such, the OAG does not find that the MCC
13 violated the OML when it appeared to the MCC that Mr. Ballweg's comments were
14 unrelated to the agenda item being addressed during the Special Meeting.

15 **3. There is insufficient evidence that the Mayor and City Attorney**
16 **engaged in collusion so as to warrant individual liability under the**
17 **OML.**

18 The OML provides that it is a misdemeanor for a member of a public body to
19 knowingly attend a meeting of that public body where action is taken in violation of the
20 OML. NRS 241.040(1). Further, each member of a public body is subject to a civil penalty
21 for knowingly participating in a willful violation of the OML. NRS 241.040(4).
22 "Enforcement against a member of a public body based on 'participation' only may occur
23 when the member makes a commitment, promise, or casts an affirmative vote to take action
24 on a matter under the public body's jurisdiction or control when the member knew his/her
25 commitment, promise, or vote was taken in violation of the OML." *Attorney General*
26 *Nevada Open Meeting Law Manual*, Section 10.14 Monetary penalty for willful violation;
27 one-year limitations period. However, the OML contains a safe harbor provision that
28 shields against a criminal penalty or administrative fine against a member of a public body,

1 where such violation was a result of legal advice provided by an attorney employed or
2 retained by the public body. NRS 241.040(6).

3 Here, the Complaint asserts that the Mayor colluded with the City Attorney and
4 that the City Attorney expressed undue influence by providing legal advice to the MCC
5 before any Council Member spoke or when such advice was unsolicited. Based on the
6 information provided to the OAG, the OAG finds that there is insufficient evidence that
7 members of the MCC colluded with the City Attorney so as to warrant personal liability
8 under the OML.

9 **4. The remaining concerns raised by Mr. Ballweg are not within the**
10 **jurisdiction of the OAG under the OML, and therefore, the OAG will**
11 **refrain from providing any opinions on the same.**

12 Mr. Ballweg further alleges that the appointment of a City Manager historically was
13 done publicly, and that the City's prior practice was to take applications, make
14 announcements, and discuss the candidates. As noted by Mr. Ballweg, the OML does not
15 dictate how a public body must accept applications for a City Manager. However, to the
16 extent that the MCC considers the character, misconduct, or competence of a City Manager
17 during a meeting, it must abide by the provisions of NRS 241.031.

18 Second, the Complaint brings up that the City of Mesquite has a municipal ordinance
19 requiring generalized periods of public comment in any public meeting, codified under
20 Mesquite Municipal Code 1-6-5(F)(1). The OAG has no jurisdiction to interpret municipal
21 codes in relation to open meeting laws. Accordingly, the OAG will refrain from determining
22 whether the MCC violated Mesquite Municipal Code 1-6-5(F)(1).

23 **5. The MCC took sufficient corrective action to address the alleged OML**
24 **Violations.**

25 The OML allows a public body to take action to correct an alleged violation within
26 30 days after the alleged violation, and if done, the OAG may decide not to commence
27 prosecution of the alleged violation if the OAG determines foregoing prosecution would be
28 in the best interests of the public. NRS 241.0365(1). The inclusion of an item on the agenda
for a meeting of the public body to correct an alleged violation is not deemed an admission

1 of wrongdoing for the purposes of civil action, criminal prosecution, or injunctive relief.
2 NRS 241.0365(2). Further, NRS 241.037 confers upon the OAG the power bring suit “in
3 any court of competent jurisdiction to have an action taken by a public body declared void
4 or for an injunction against any public body or person to require compliance with or prevent
5 violations of [NRS 241].” NRS 241.037(1).

6 On June 15, 2021, the MCC held three additional meetings, namely a Special
7 Meeting, a Technical Review Meeting, and a Redevelopment Agency Meeting. According
8 to the Agenda for the Special Meeting, the MCC discussed two administrative items,
9 specifically: (1) “Consideration for approval of the appointment of an Interim City Manager
10 for the City of Mesquite”; and (2) “Ratification of all actions taken by Andy Barton on behalf
11 of the City of Mesquite from May 18, 2021 to present.” It is notable that each of these
12 Notices clearly agendizes two periods for public comment – one at the beginning of the
13 meeting and one immediately prior to adjournment.

14 During one of the public comment periods afforded during the June 15, 2021,
15 meeting, and in response to a comment made by Mr. Ballweg, the City Attorney explained
16 that the reason that this meeting was held was to redo the action by the MCC on May 18,
17 2021, namely, to appoint an Interim City Manager, and to correct any alleged or perceived
18 violations of the OML.

19 At the Special Meeting on June 15, 2021, the MCC considered and ultimately voted
20 to approve the appoint of an Interim City Manager for the City of Mesquite, the same action
21 the MCC attempted to take on May 18, 2021. Additionally, during the June 15, 2021,
22 Special Meeting, the MCC further voted to ratify all actions taken by Andy Barton on behalf
23 of the City of Mesquite from May 18, 2021 through the present. The OAG finds that the
24 actions by the MCC on June 15, 2021, were taken as a means to correct any alleged
25 violations of the OML that may have occurred during its May 18, 2021, Special Meeting.

26 While the OAG finds that the MCC violated the OML during its May 18, 2021,
27 meeting for failing to allow for public comment periods pursuant to NRS 241.020(3)(d)(3),
28 the OAG will forego filing a lawsuit in this matter to declare the MCC’s action on May 18,

1 2021, void. The OAG finds that by re-agendizing the matter on its June 15, 2021, meeting
2 and holding a subsequent vote ratifying the actions thereto, the MCC corrected the alleged
3 violation.

4 Nevertheless, given the aforementioned findings of a violation of the OML by the
5 MCC, the OAG directs the MCC to include as an item on its next agenda posted for a
6 meeting which acknowledges the existence of these Findings of Fact and Conclusions of
7 Law (“Opinion”). NRS 241.0395(1). The public body must treat the opinion of the Attorney
8 General as supporting material for the agenda item(s) in question for the purpose of NRS
9 241.020. *Id.* Accordingly, the MCC must also place an item on its next meeting agenda
10 wherein they acknowledge the instant Opinion and must also include the OAG Opinion in
11 the supporting materials.

12 Lastly, NRS 241.037 confers upon the OAG the power bring suit “in any court of
13 competent jurisdiction to have an action taken by a public body declared void or for an
14 injunction against any public body or person to require compliance with or prevent
15 violations of [NRS 241].” NRS 241.037(1). Further, NRS 241.0365(1) provides that if a
16 public body takes action to correct an alleged violation within 30 days of the alleged
17 violation, the Attorney General may decide not to commence prosecution of the alleged
18 violation if the Attorney General determines foregoing prosecution would be in the best
19 interests of the public. Here, while the OAG finds that an OML violation has occurred, it
20 is the OAG’s position that the foregoing remedies required of the MCC are sufficient to
21 address the violation.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2022, I served the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** by depositing a copy of the same in the United States mail, properly addressed, postage prepaid, **CERTIFIED MAIL** addressed as follows:

David Ballweg

[Redacted address]

Certified Mail No.:

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Emailed July 1, 2022.

/s/ Debra Turman

An employee of the Office of the
Nevada Attorney General