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3 **OFFICE OF THE ATTORNEY GENERAL**
4 **STATE OF NEVADA**

5 In the Matter of:

6 BOARD OF DIRECTORS OF DOUGLAS
7 COUNTY SEWER IMPROVEMENT
8 DISTRICT NO. 1.

A.G. FILE NO.: 13897-201

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11 **FINDINGS OF FACT**
12 **AND CONCLUSIONS OF LAW**

13 On or about July 18, 2016, Douglas County District Attorney Mark Jackson filed a
14 complaint (Complaint) with the Office of the Attorney General (OAG) pursuant to
15 NRS 241.039 alleging multiple repeated violations of the Nevada Open Meeting Law
16 (OML) by the Board of Directors of Douglas County Sewer Improvement District No. 1
17 (Board).

18 The OAG has statutory enforcement powers under the Open Meeting Law (OML)
19 and the authority to investigate and prosecute violations of the OML. NRS 241.037, .039,
20 .040. The OAG, having reviewed the public notice and agendas, supporting material,
21 minutes and audio recordings of multiple Board meetings, together with the Complaint
22 and the Board's response to the Complaint, issues the following FINDINGS OF FACT
23 AND CONCLUSIONS OF LAW.

24 **LEGAL STANDARD**

25 The legislative intent of the OML is that the actions of public bodies "be taken
26 openly, and that their deliberations be conducted openly." NRS 241.010(1); *see also*
27 *McKay v. Board of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("the spirit
28 and policy behind NRS chapter 241 favors open meetings"). Public bodies working on
behalf of Nevada citizens must conform to the statutory requirements for open meetings,
including operating under an agenda that provides full notice and disclosure of discussion

.....

1 topics and any possible action. *Sandoval v. Board of Regents*, 119 Nev. 148, 154-55, 67
2 P.3d 902, 905-06 (2003).

3 NRS 241.020(2)-(3) require a public body to provide notice of any meeting along
4 with an agenda consisting of a “clear and complete statement of the topics scheduled to be
5 considered during the meeting.” In *Sandoval v. Board of Regents*, the Nevada Supreme
6 Court interpreted the “clear and complete” requirement to mean that the agenda must
7 provide the public with “clear notice of the topics to be discussed at public meetings, so
8 that the public can attend a meeting when an issue of interest will be discussed.”
9 *Sandoval*, 119 Nev. at 155, 67 P.3d at 906. The Court rejected the so-called “germane
10 standard” from other jurisdictions—which allows public bodies to engage in any
11 discussion that is *germane* to an agenda topic—because it was too lenient and allowed a
12 public body to stray from its agenda. *Id.* at 154, 67 P.3d at 905.

13 The term “public body” includes any “administrative, advisory, executive or
14 legislative body of the State or a local government . . . which advises or makes
15 recommendations to any entity which expends or disburses or is supported in whole or in
16 part by tax revenue.” NRS 241.015(4)(a). The statutory definition was amended in 2011
17 to clarify that the definition includes bodies created by “an action by the governing body
18 of a political subdivision of this State.” Assemb. B. 59, 2011 Leg., 76th Sess. (Nev. 2011).
19 Consistent with this statutory definition, the OAG has previously held that a
20 multimember group appointed by a public body and given the task of making decisions for
21 or recommendations to that public body is also a “public body” subject to the OML. *See* §
22 2.04 NEVADA OPEN MEETING LAW MANUAL (12th ed. 2016) (and opinions cited
23 therein).

24 NRS 241.020(2)(d)(3) requires that meetings include periods devoted to public
25 comment, which at a minimum must be allowed at the beginning and again before the
26 adjournment of the meeting; or, alternatively, after each item on the agenda on which
27 action may be taken is discussed, but before any is taken on the item. NRS 241.033(1)
28 prohibits a public body from holding a meeting to consider the character, alleged

1 misconduct, professional competence, or physical or mental health of any person unless it
2 provided written notice to the person of the time and place of the meeting and received
3 proof of service of that notice. NRS 241.020(4) requires that for each of its meetings, a
4 public body shall document in writing that the public body complied with the minimum
5 public notice requirements. NRS 241.035(1) requires that the public body keep written
6 minutes of its meetings, including “the substance of all matters proposed, discussed or
7 decided” at each meeting.

8 A gathering held by a public body with its attorney to “receive information from the
9 attorney employed or retained by the public body regarding potential or existing litigation
10 involving a matter over which the public body has supervision, control, jurisdiction or
11 advisory power and to deliberate toward a decision on the matter” is not a meeting
12 subject to the requirements of the OML. NRS 241.015(3)(b)(2).

13 Any action taken in violation of the OML is void. NRS 241.036. Corrective action
14 requires that the public body engage in an **independent deliberative action** in full
15 compliance with the OML. *See, e.g., Page v. MiraCosta Cmty. Coll. Dist.*, 102 Cal. Rptr.
16 3rd 902, 930 (Cal. Ct. App. 2009); *Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of*
17 *Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-38 (Colo. App. 2012); *Zorc v. City of*
18 *Vero Beach*, 722 So. 2d 891, 902-03 (Fla. Dist. Ct. App. 1998); *Pearson v. Selectmen of*
19 *Longmeadow*, 726 N.E.2d 980, 985 (Mass. App. Ct. 2000); *Gronberg v. Teton County Hous.*
20 *Auth.*, 247 P.3d 35, 42 (Wyo. 2011).

21 SUMMARY OF ALLEGATIONS

22 The Complaint alleges the Board did not comply with the OML in the following
23 respects:

24 ALLEGATION #1: The Board’s agendas are vague, confusing and generic in
25 violation of NRS 241.020(2)(d)(1).

26 ALLEGATION #2: The Board fails to stick to its agendas during meetings.

27 ALLEGATION #3: The Board deliberated and took action outside of a properly
28 noticed meeting in violation of NRS 241.015 and 241.016.

1 ALLEGATION #4: The Board in certain instances did not provide personal notice
2 as required by NRS 241.033.

3 ALLEGATION #5: Only one period of public comment is provided at Board
4 meetings in violation of NRS 241.020(2)(d)(3).

5 ALLEGATION #6: The minutes of Board meetings do not reflect the substance of
6 all matters proposed, discussed or decided in violation of NRS 241.035(1)(c).

7 ALLEGATION #7: The Core Group is an advisory body or subcommittee of the
8 Board which meets in violation of the OML.

9 ALLEGATION #8: The Board fails to provide proper notice of its meetings in
10 violation of NRS 241.020(2)(a) and (b).

11 **FINDINGS OF FACT**

12 1. Douglas County Sewer Improvement District No. 1 was created pursuant to
13 Chapter 309 of the Nevada Revised Statutes and is governed by the Board.

14 2. The Board is a “public body” as defined in NRS 241.015(4) and is subject to
15 the OML.

16 3. The Board included the following item on its agendas at least during the
17 period of August 2015 through January 2016: “Consideration of plans for permitting,
18 construction and lining of effluent reservoir at the District’s Buckeye Creek property –
19 **for possible action.**” (Emphasis in originals).

20 4. The Board discussed open and subsurface mining, aggregate processing and
21 pending settlement discussions under that agenda item at multiple meetings.

22 5. The Board has supervision, control, jurisdiction and/or advisory power with
23 regard to open and subsurface mining, aggregate processing and pending settlement
24 discussions as discussed during the aforementioned agenda item.

25 6. Robert Hopkins is a Douglas County Sewer Improvement District No. 1
26 employee and falls within the supervision, control, jurisdiction and/or advisory power of
27 the Board. The Board considered Mr. Hopkins’ performance as District Manager on
28 several occasions in the period of October 2015 through May of 2016. Although Mr.

1 Hopkins was present at all meetings where the Board considered his performance, no
2 evidence was presented that Mr. Hopkins received the written notice required by
3 NRS 241.033.

4 7. The Board's agenda for its October 21, 2015, meeting included the following
5 item: "6-Month Performance Review, District Manager." This item did not have the term
6 "for possible action" placed next to it and did not indicate that possible action included a
7 salary increase.

8 8. The Board took the following action with regard to the aforementioned
9 agenda item, as reflected in its minutes for the October 21, 2015, meeting:

10 Each of the Directors expressed their satisfaction with Mr.
11 Hopkins' performance at the District and thanked him for his
12 efforts. It was moved by Director Koster, seconded by Chairman
13 Bradford and carried, 2-0, that the salary increase of \$5,000
14 annually as called for in the District's agreement with Mr.
15 Hopkins be implemented.

16 9. While the Board may have offered opinions concerning who the South Tahoe
17 Alliance of Resorts (STAR) retains to lobby on issues important to both the Board and
18 STAR and concerning ethics complaints filed by persons who are not affiliated with or
19 paid by the Board, the Board does not have supervision, control, jurisdiction or advisory
20 power over these matters.

21 10. The Board held non-public gatherings with its attorney. However, the OAG
22 was not presented with any evidence that such gatherings exceeded the scope of receiving
23 information regarding potential or existing litigation as permitted by
24 NRS 241.015(3)(b)(2).

25 11. The Board discussed at some of its meetings certain people with whom it
26 interacts, but who are not under the supervision, control or jurisdiction of the Board.

27 12. The Board's agendas reflect a single general period of public comment and
28 that public comment will be taken on each action item. However, there were meetings of
the Board where the Board did not call for public comment for each action item. This is
not in accordance with the following statement included on the Board's agendas: "[p]ublic

1 comment will be taken on any item on this agenda on which action may be taken, before
2 action is taken on the item.”

3 13. The Board, at its meeting held on December 15, 2015, discussed a potential
4 ethics complaint against Hope Sullivan in excess of 30 minutes without including any
5 mention of such potential ethics complaint in its minutes for the meeting.

6 14. The Core Group, as referenced in the Complaint, is not supported in whole
7 or in part by tax revenue, was not formed by the Board and is not empowered to advise or
8 make recommendations to the Board. The Core Group acts as a voluntary fact-finding
9 entity which provides information to the Board.

10 15. The cover sheet to each agenda of the Board contained the time, place and
11 location of the meeting, as well as a list of the locations where the public notice and
12 agenda had been posted.

13 16. While the Board documented its posting of agendas through certificates of
14 posting, it failed to document posting of the agendas at the Board’s principal office or at
15 the place of the meetings.

16 **CONCLUSIONS OF LAW**

17 1. The Complaint alleges that the Board’s agendas are vague, confusing and
18 generic and that the Board failed to stick to its agendas during meetings (Allegations #1
19 and #2). An agenda must provide a “clear and complete statement of the topics scheduled
20 to be considered during the meeting.” NRS 241.020(2)(d)(1). This requires that an
21 agenda item be phrased in a manner which will allow the public to know what will
22 actually be discussed during the item. Furthermore, “[A] higher degree of specificity is
23 needed when the subject to be debated is of special or significant interest to the public.”
24 *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906 (citations omitted). The Buckeye Creek
25 agenda item quoted above in Findings of Fact paragraph 4 did not provide notice to the
26 public that the Board would be deliberating and taking action on a matter of substantial
27 public interest: open and subsurface mining, aggregate processing and pending
28 settlement discussions. Therefore, the Board violated NRS 241.020(2)(d)(1).

1 2. The Complaint alleges that the Board took action outside of a properly
2 noticed agenda item (Allegation #3). An agenda must indicate on which items action may
3 be taken, provide a clear and complete description of what action may be taken, and
4 include the term “for possible action” next to the appropriate item. NRS 241.020(2)(d)(2).
5 The Board’s October 21, 2015, agenda item concerning the performance review of its
6 district manager did not have the term “for possible action” next to it, nor did the agenda
7 item specify a salary increase as a possible action. Therefore, the Board violated NRS
8 241.020(2)(d)(1) by failing to specify a possible salary increase, and the Board violated
9 NRS 241.020(2)(d)(2) by failing to identify the agenda item “for possible action.”

10 3. The Complaint alleges that the Board deliberated and took action outside of
11 a properly noticed meeting when it met privately with its legal counsel (Allegation #3).
12 The Complaint did not provide, and the OAG does not possess, evidence that the Board
13 took action during these attorney-client conferences or that these non-public gatherings of
14 the Board with its attorney exceeded the scope of NRS 241.015(3)(b)(2). Therefore, the
15 OAG finds no violation of NRS 241.020.

16 4. The Complaint alleges that the Board in certain instances did not provide
17 personal notice to certain persons of its meetings (Allegation #4). The Complaint provides
18 a list of people whose character, alleged misconduct, professional competence or physical
19 or mental health were purportedly discussed at meetings of the Board without the proper
20 written notice to those persons in conformance with NRS 241.033. Most of the people on
21 the list were not within the supervision, control, jurisdiction or advisory power of the
22 Board. *See* NRS 241.015(3)(a). Therefore, there was no violation of NRS 241.033.

23 5. For at least the October 21, 2015, meeting of the Board, no evidence was
24 presented showing Mr. Hopkins received written notice pursuant to NRS 241.033. Thus,
25 there was a technical¹ violation of NRS 241.033 with regard to Mr. Hopkins.

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27 ¹ This violation may have been waived by Mr. Hopkins attending this meeting and not
28 raising an objection. However, a waiver of an individual notice requirement under the OML
should be in writing so it is clear that an individual is waiving his right to notice.

1 6. The Complaint alleges that the Board only provided one period of public
2 comment at Board meetings (Allegation #5). While the Board's agendas comply with the
3 minimum public comment requirements of NRS 241.020(2)(d)(3), the minutes and audio
4 recordings of Board meetings reveal that public comment was not always called as
5 specified on the Board's agendas. The failure of the Board to call for public comment as
6 specified on the agenda and in accordance with the minimum statutory requirements is a
7 violation of NRS 241.020(2)(d)(3).

8 7. The Complaint alleges the minutes of Board meetings do not reflect the
9 substance of all matters proposed, discussed or decided; specifically, the Board's extensive
10 discussion of a potential ethics complaint against Hope Sullivan at a meeting held on
11 December 15, 2016 (Allegation #6). While the Board does not have supervision, control,
12 jurisdiction or advisory power over the Hope Sullivan ethics complaint, the ethics
13 complaint clearly has implications with regard to matters within the Board's supervision,
14 control, jurisdiction and/or advisory power. The Board should have reflected the
15 substance of its discussions regarding the ethics complaint in the minutes of its December
16 15, 2015, meeting. Therefore, this constitutes a violation of NRS 241.035(1)(c).

17 8. The Complaint alleges that the Core Group is an advisory body or
18 subcommittee of the Board which meets in violation of the OML (Allegation #7). The
19 Core Group functions as a private entity which voluntarily gives its input to the Board
20 from time to time in the manner any independently formed group may with regard to any
21 public entity. The Core Group is not a "public body" as defined in NRS 241.015(4)(a), and
22 is therefore not subject to the OML.

23 9. The Complaint alleges that the Board fails to provide proper notice of its
24 meetings (Allegation #8). The Board's agendas include a cover sheet containing notice of
25 the time, place and location of its meetings, as well as the list of locations where notice of
26 the meetings has been posted in compliance with NRS 241.020(2)(a)-(b). However, the
27 Board failed to document posting of the agendas at its principal office or the meeting
28 location. Thus, the Board violated NRS 241.20(4).

1 **CERTIFICATE OF SERVICE**

2 I, Rebecca Zatarain, certify that I am an employee of the Office of the Attorney
3 General, State of Nevada, and that on December 9th, 2016, I served a copy of the
4 foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by electronic mail, and
5 by causing a copy to be delivered to the Department of General Services, for mailing at
6 Reno, Nevada, addressed to:

7 Office of the District Attorney
8 Douglas County
9 Mark B. Jackson, District Attorney
10 P.O. Box 218
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12 mjackson@douglas.nv.gov

13 ***Complainant/Attorney for Complainant***

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24 ***Attorneys for Respondent(s)***

25 and causing a copy to be delivered to the Department of General Services, for mailing at
26 Reno, Nevada addressed to:

27 Douglas County Sewer Improvement District No. 1
28 Board of Directors
Mike Bradford, Chairman
P.O. Box 578
Zephyr Cove, Nevada 89448

29 
30 _____
31 Rebecca Zatarain, an employee of the
32 Office of the Nevada Attorney General