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**IN THE STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL**

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**IN THE MATTER OF:
INCLINE VILLAGE GENERAL
IMPROVEMENT DISTRICT; its BOARD
OF TRUSTEES.**

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**FINDINGS OF FACT AND
CONCLUSIONS OF LAW

OPEN MEETING LAW OPINION
Attorney General File No. 13897-164**

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BACKGROUND

The Board of Trustees for Incline Village General Improvement District (IVGID) asserts that it took corrective action on September 23, 2015, after a member of the public complained that an action agenda item from a previous public meeting was not “clear and complete” in compliance with NRS 241.020(2)(d)(1). Public bodies may take action to correct alleged violations of the Open Meeting Law (OML) pursuant to NRS 241.0365.¹

FINDINGS OF FACT

1. The Trustees reorganized and reassigned leadership responsibility, including the chairman, vice chairman, secretary and treasurer on August 26, 2015. Trustee Bill Devine (Devine) sought to reorganize the Board officers based on his displeasure with the Chairman's “management style.” Devine explained his view and his belief that reorganization of officers was needed during that public meeting. The Trustees’ discussion and action to reorganize

¹ **NRS 241.0365 Action taken by public body to correct violation of chapter; timeliness of corrective action; effect.**

1. Except as otherwise provided in subsection 4, if a public body, after providing the notice described in subsection 2, takes action in conformity with this chapter to correct an alleged violation of this chapter within 30 days after the alleged violation, the Attorney General may decide not to commence prosecution of the alleged violation if the Attorney General determines foregoing prosecution would be in the best interests of the public.

2. Except as otherwise provided in subsection 4, before taking any action to correct an alleged violation of this chapter, the public body must include an item on the agenda posted for the meeting at which the public body intends to take the corrective action in conformity with this chapter. The inclusion of an item on the agenda for a meeting of a public body pursuant to this subsection is not an admission of wrongdoing for the purposes of civil action, criminal prosecution or injunctive relief.

3. For purposes of subsection 1, the period of limitations set forth in subsection 3 of NRS 241.037 by which the Attorney General may bring suit is tolled for 30 days.

4. The provisions of this section do not prohibit a public body from taking action in conformity with this chapter to correct an alleged violation of the provisions of this chapter before the adjournment of the meeting at which the alleged violation occurs.

5. Any action taken by a public body to correct an alleged violation of this chapter by the public body is effective prospectively. (Added to NRS by 2013, 727).

1 leadership responsibility was taken under item F.8.² Trustee Devine had included in the
2 Board's supporting materials packet, a one page memorandum addressed to the Board of
3 Trustees for the August 26th public meeting. Devine stated in the memorandum that he felt it
4 was time to reorganize the Board and that he would lead the discussion of this agenda item.
5 However, agenda item F.8 did not give any notice that the topic for discussion was
6 reorganization of leadership officers. The memorandum was only addressed to the Board, not
7 to the public.

8 2. The Trustees reorganized leadership officers by vote taken under item F.8.
9 Chairman Jim Smith (Smith) was voted out of the chairman's office. Smith resigned from the
10 Board within twenty-four hours of his displacement as chairman.

11 3. The Office of the Attorney General (OAG) received an OML complaint alleging
12 that agenda item F.8 was not *clear and complete* in compliance with
13 NRS 241.020(2)(D)(1). The complaint asserted, "This item gives the public absolutely no
14 indication as to the actual intent of the item or the shocking events which followed."

15 4. The Board of Trustees agendized corrective action for its September 23, 2015,
16 meeting as agenda item G.3.³

17 5. Item G.3 was introduced by the Trustees' legal counsel (Counsel). He told the
18 Trustees that the item was in response to the OML complaint and a letter from the OAG.
19 Counsel stated item G.3's sole purpose was to confirm the August 26th vote for new officers.
20 Counsel told the Board that the *clear and complete* rule (NRS 241.020) is not defined. There
21 was no discussion or deliberation before the Trustees' duplicate perfunctory vote to confirm
22 the same leadership officers already selected on August 26th.

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25 ² Item F.8. Incline Village General Improvement District Board of Trustees Policy 3.1.0, Conduct Meetings of
the Board of Trustees, Specific Section - 0.11 Officers of the Board (Requesting Trustee Bill Devine).

26 ³ Item G.3. Re-organization of Board of Trustees to confirm officers chosen at August 26, 2015, meeting.
27 Officers being confirmed are Kendra Wong, Chairwoman, Jim Hammerel, Vice-Chair, Tim Callicrate, Secretary,
28 Bill Devine, Treasurer. This action is being taken in conformity with the Nevada Revised Statutes (NRS) Chapter
241.0364 to proactively address an alleged violation of the Nevada (Open Meeting Law (Requesting Staff
member: District General Counsel Devon Reese).

1 6. The OAG reviewed the video of the September 23rd meeting as part of this
2 investigation. The OAG also requested statements from the Trustees. Three Trustee's
3 submitted affidavits in response to the complaint and specific questions from the OAG
4 investigation. Trustee Tim Callicrate (Callicrate) did not submit an affidavit. Trustee Jim
5 Smith resigned within twenty-four hours of the meeting; he did not submit an affidavit.

6 7. Trustee Devine's Affidavit said he requested item F.8 be placed on an agenda,
7 but Chairman Smith refused. Trustee Devine insisted he would stand by his request to place
8 his requested item on an agenda. Smith finally approved it for placement on the agenda for
9 August 26, 2015. Trustee Devine also said in his affidavit that he did not discuss, deliberate
10 and/or agree to take any action on the item with Trustees Kendra Wong or Callicrate prior to
11 the August 26, 2015, meeting.

12 8. The OAG requested that Trustee Devine explain in a statement why agenda
13 item F.8 did not specify that its topic for discussion was reorganization of the Trustee's
14 leadership offices. Devine had sent the Trustees a short explanation that the topic was
15 reorganization and that memo was included in the agenda packet, but he did not include
16 reorganization as the topic in agenda item F.8. He did not answer the OAG's question.

17 9. Trustee Jim Hammerel (Hammerel) responded to discovery questions with an
18 affidavit. Hammerel said he spoke with Trustee Devine on August 15, 2015, so he could ask
19 him what his intentions were with the item. Hammerel said that Trustee Devine was the only
20 trustee he spoke with before the meeting.

21 10. Trustee Wong said that she did not speak with any other board members about
22 Trustee Devine's August 26th agenda item.

23 11. The Trustees did not discuss the OML complaint during the September 23rd
24 public meeting. No Trustee asked why a confirming vote would correct the August 26th
25 violation, or whether the item should be reconsidered from the beginning. No Trustee asked
26 for a legal explanation about the *clear and complete* rule. There was no further discussion by
27 the Trustees. The Trustees did not rescind their August 26th vote, which reshuffled the
28 Trustees into new positions as Board officers. Reorganization of leadership officers on

1 September 23rd was a perfunctory duplication of its earlier August 26th vote.

2 12. Two persons made public comment during this meeting. Frank Wright,
3 complainant herein, reminded the Trustees that corrective action should be more than mere
4 affirmation of the action. Mr. Wright suggested that the Board should take new nominations
5 for the positions to be reorganized and then revote on the new nominations if they intended to
6 take corrective action.

7 **ISSUES AND ANALYSIS**

8 **Whether Item F.8 on IVGID's August 26, 2015, public meeting agenda was *clear***
9 ***and complete* within the meaning of NRS 241.020(2)(d)(1).**

10 **Whether Item G.3 on IVGID's September 23, 2015, public meeting agenda was in**
11 **conformity with the OML so that it constituted corrective action within the meaning of**
12 **NRS 241.0365.**

13 **ISSUE No. 1**

14 **Whether Item F.8 on IVGID's August 26, 2015, public meeting agenda was *clear***
15 ***and complete* within the meaning of NRS 241.020(2)(d)(1).**

16 The Nevada Supreme Court has twice analyzed the phrase *clear and complete* as
17 used in NRS 241.020(2)(d)(1).⁴ In *Sandoval* the Court rejected a so-called "germane
18 standard" because it was too lenient and allowed a public body to stray from its agenda. The
19 Court said that "[T]he legislative history of NRS 241.020(2)(c)(1) illustrates that the Legislature
20 enacted the statute [the *clear and complete* rule] because 'incomplete and poorly written
21 agendas deprive citizens of their right to take part in government.'" Id. 119 Nev. at 154, 67
22 P.3d at 905. [NRS 241.020(2)(c)(1) is now codified at (2)(d)(1)]. The Court emphasized that
23 the purpose of the agenda is to give the public, not Board members, clear notice of the topics
24 listed for discussion.

25 In *Schmidt* the Court said that, "In the past, we have recognized that '[b]y not requiring
26 strict compliance with agenda requirements, the '*clear and complete*' standard would be
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28 ⁴ *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P3d. 902 (2003); *Schmidt v. Washoe County and Washoe
County Board of County Commissioners*, 123 Nev. 128, 159 P.3d 1099 (2007)

1 rendered meaningless because the discussion at a public meeting could easily exceed the
2 scope of a stated agenda topic, thereby circumventing the notice requirement.” *Schmidt v.*
3 *Washoe County*, 123 Nev. 128,138, 159 P.3d 1099,1103 (2007) (abrogated on other grounds,
4 *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 fn.6 (2008)). The
5 Court approved the agenda topic in *Schmidt* because the Court found that the item explicitly
6 listed the topics for discussion thereby meeting all notice requirements.

7 The public must be given notice in fact of what is to be discussed, and possibly acted
8 upon, by the public body. Notice “in fact” means that the agenda item should have listed the
9 topic to be discussed for possible action: re-organization of Board officers. Merely listing a
10 Board Policy for possible action and a subsection of that policy without explicitly stating the
11 real topic of consideration, constitutes a poorly drafted agenda—one that violates the *clear*
12 *and complete* rule.

13 The Board’s packet of supporting materials contained a memo from Trustee
14 Devine stating that he wished to pursue reorganization; however, supporting materials are not
15 part of the agenda item. The *clear and complete* rule applies only to the agenda and explicitly
16 requires that the item inform the public of the topics to be discussed and possibly acted on.

17 The *Sandoval* Court said that public bodies must utilize a “higher degree of specificity
18 [in drafting agenda items] when the subject to be debated is of special or significant interest to
19 the public.” *Sandoval*, 119 Nev. at 154-155. Specificity means that the public should have
20 been made aware that reorganization of the Board officers was to be considered.
21 Reorganization of Board officers is a significant topic. The complaint in this matter makes that
22 very clear. Further proof that this agenda item was of significance is that within 24 hours
23 following the Trustee’s vote to reorganize Chairman Smith resigned from the Board of
24 Trustees. Despite legal counsel’s belief that *clear and complete* is a phrase that should be
25 defined, the undefined rule has served the public very well since 1989 and is capable of
26 application to public meeting agendas. *Sandoval* at p.154.

27 **ANSWER TO ISSUE No. 1**

28 **Item F.8 on the Trustee’s August 26, 2015, agenda was not *clear and complete* as**

1 required by NRS 241.020(2)(d)(1). It failed to provide notice, in fact, of the topic for
2 discussion and possible action.

3 ISSUE No. 2

4 **Whether Item G.3. on IVGID's September 23, 2015, public meeting agenda was in**
5 **conformity with the OML and constituted corrective action within the meaning of**
6 **NRS 241.0365.**

7 Because agenda item F.8 from August 26th was not *clear and complete*, the action
8 taken by the Trustees at the meeting was void. NRS 241.036. The analysis must now
9 consider the second issue herein: whether the action taken by the Trustees on September
10 23rd was effective to correct the violation.

11 NRS 241.0365(1) requires that corrective action must be taken in conformity with the
12 OML. The OAG may determine whether the asserted corrective action was in conformity with
13 the OML. If the Attorney General is satisfied that corrective action is in conformity with the
14 OML, then the Attorney General may forego prosecution of the public body if foregoing
15 prosecution would be in the best interests of the public. NRS 241.0365(3) extends the OML's
16 120 day limitations period (NRS 241.037) for another 30 days to determine if the public body's
17 corrective action is in compliance with the OML.

18 The OAG has encouraged public bodies to use corrective action long before the
19 enactment of NRS 241.0365. The OAG OML Manual at §11.04: **Reconsidering an action**
20 **that is void** provides the reader with examples of how corrective action has been applied in
21 the past. The Manual at §11.04 indicates that mere perfunctory approval of the prior action
22 during a subsequent meeting does not cure a violation. Such a matter should be placed on a
23 subsequent agenda and reheard.

24 Nevada's OML as well as other jurisdiction's Open Meetings Acts are silent as to how a
25 void action is to be remedied or cured by the public body. NRS 241.0365; NRS 241.036.
26 The OAG has always urged a public body to rehear or reconsider a matter where action was
27 taken allegedly in violation of the OML. The Nevada Supreme Court has not considered this
28 issue, nor has it interpreted NRS 241.0365 which states that corrective action must be in

1 conformity with the OML. Other states have considered this issue. The cases below provide
2 guidance.

3 Massachusetts recognizes that violations of the open meeting law may be corrected by
4 subsequent *independent deliberative action*. *Pearson v. Selectmen of Longmeadow*,
5 49 Mass.App.Ct. 119, 125, 726 N.E.2d 980 (2000). Such *independent deliberative action*
6 “helps[s] to accomplish the purpose of the open meeting law.” *Benevolent & Protective Order*
7 *of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 558, 531 N.E.2d 1233
8 (1988).

9 Courts in Florida rejected corrective action taken at meetings that were merely a
10 ceremonial acceptance or a perfunctory ratification of secret decisions, because such
11 perfunctory subsequent action plainly does not help to accomplish the purpose of the open
12 meeting law, and will not operate as a corrected action. *Id.* at 125, 726 N.E.2d 980, quoting
13 from *Tolar v. School Bd. of Liberty County*, 398 So.2d 427, 429 (Fla.1981). Thus, under *Tolar*,
14 a full, open and independent public hearing of the disputed issue can remedy the earlier
15 violation. See *Zorc v. City of Vero Beach*, 722 So.2d 891, 902 (Fla. 4th DCA 1998), *review*
16 *denied*. Only full, open and independent public hearings can correct a violation of the OML.

17 Colorado case law supports an interpretation of the OML that permits a state or local
18 public body to correct an OML violation by holding a subsequent meeting that complies with
19 the open meeting laws as long as it is not a mere rubber-stamping of an earlier decision. See
20 *Hyde v. Banking Bd.*, 38 Colo.App. 41, 44, 552 P.2d 32, 34 (1976); *Colorado Off-Highway*
21 *Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132,1136,
22 Ct of App. Div. 5 (2012). See *Cole v. State*, 673 P.2d 345, 349 (Colo.1983) (“The intent of the
23 **Open Meetings Law** is that citizens be given the opportunity *to obtain information about and*
24 *to participate in the legislative decision-making process A citizen does not intelligently*
25 **participate in the legislative decision-making process merely by witnessing the final**
26 **tallying of an already predetermined vote.”) See *Cole v. State*, 673 P.2d 345, 349
27 (Colo.1983).**

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1 The Wyoming Supreme Court held that a public agency could cure a void action made
2 in violation of the Public Meetings Act “by conducting a new and substantial reconsideration of
3 the action in a manner which complies with the Act.” *Gronberg v. Teton County Housing*
4 *Authority*, 247 P.3d 35, 42 (Wyo. 2011).

5 California’s Brown Act (Open Meeting Act governing legislative bodies of local agencies
6 as defined therein) has been interpreted by the California courts to require a “true de novo
7 reconsideration of the actions taken in violation of the Brown Act.” *Boyle v. City of Redondo*
8 *Beach* (1999) 70 Cal.App.4th 1109 (*Boyle*). In *Boyle*, an individual sued a city council upon
9 allegations that the council violated the Brown Act by discussing litigation not listed on its
10 posted agenda. *Id.* at p. 1114. The appellate court found a violation of agenda requirements
11 but concluded that the city council corrected the violation by holding a second meeting in
12 which the council discussed the litigation and rescinded all action taken at the initial meeting.
13 (*Id.* at pp. 1115, 1117-1118.)

14 Finally, the New Jersey Supreme Court weighed in on the proper way to correct a
15 violation of its open meetings laws. The Court rejected a claim from a public body that
16 corrective action was satisfied by *substantial compliance*. The Court held that strict
17 adherence to the letter of the law is required in considering whether a violation of the Act has
18 occurred. The Court, citing the statutory requirement, said that a public body might take
19 corrective or remedial action by “acting *de novo* at a public meeting held in conformity with this
20 act.” N.J. S.A. 10:4-15(a); *Polillo v. Deane*, 379 A.2d 211,218-219 (N.J. 1977)

21 The OAG concurs with conclusions of the jurisdictions reviewed above. In each case
22 cited above, the public’s right to participate in the public body’s decision making was given
23 considerable deference. Corrective action must comply with the OML—it must not be a
24 rubber-stamp of a prior action whether it was taken in private or in public. *Substantial*
25 *compliance* is not a standard recognized by the Nevada Supreme Court as compliance with
26 the OML—instead strict compliance with the requirements of the OML is necessary.
27 Duplication of the August 26th vote on September 23rd as simply a rubber-stamp of prior
28 action and did not correct the violation.

ANSWER TO ISSUE No. 2

Action taken by the Trustees under Item G.3. did not constitute corrective action under NRS 241.0365. Confirmation of the August 26th vote on September 23rd was simply duplication of the prior vote, and not sufficient to correct the Board's violation of the *clear and complete* rule on August 26, 2015.

CONCLUSIONS OF LAW

1. The public must be able to view and participate in a public body's deliberations and actions. The notice and agenda item F.8, posted by the Trustees on its August 26th meeting, was not *clear and complete*. NRS 241.020(2)(d)(1) A member of the public viewing the agenda item would not have known or understood what topic was to be discussed and perhaps acted upon. Item F.8's non-compliance with the *clear and complete* rule created the violation—not the reorganization of the officers.

2. The gravamen of the complaint is that the public had no notice that the Trustee's leadership positions would be re-shuffled. Reconsideration of item F.8 on the Trustee's September agenda could have been corrective action. Agenda item G.3 was a matter of special and significant interest to the public.

3. Corrective action requires that the public body engage in an *independent deliberative action* in full compliance with the OML. *De novo* reconsideration of the reorganization of officers or a full open and independent action in compliance with the OML achieves corrective action. A perfunctory rubber-stamp is not in compliance with NRS 241.0365 because it is only a duplication of a prior action that corrected nothing.

4. The OAG is cognizant of the Trustee's effort to take corrective action. The Trustees attempted to comply with the OML within 30 days of the August 26th meeting. Both meetings were conducted in the open and all evidence indicates that they were conducted in good faith.

5. Action taken under item F.8 is void. NRS 241.036. Trustee's action taken on September 23rd under G.3 is void because the violation from the August 26th agenda item F.8 is still void.

CLOSING SUMMARY

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2 Corrective action was placed on the September 23, 2015, agenda, but the action taken
3 did not correct the violation from the August 26, 2015, public meeting. Trustees failed to
4 reconsider the matter in an independent fashion complete with discussion and deliberation.
5 Only such reconsideration would be corrective action as permitted by NRS 241.0365.

6 The OAG warns the Board to ensure that its agenda topics are clearly and completely
7 stated. The Trustees may not stray into other matters of discussion not clearly and completely
8 stated on its agenda. The OAG will take further action should this violation reoccur.

9 Because the OAG finds that IVGID has taken action in violation of the OML,
10 IVGID must place this Opinion on its next meeting agenda and also make the Opinion a part
11 of the meeting's supporting material. The agenda item must acknowledge the Findings of
12 Fact and Conclusions of Law to be the result of the OAG investigation in the matter of
13 Attorney General File No. 13897-164 and has been placed there as a requirement of
14 NRS 241.0395.

15 DATED THIS 25th day of January, 2016.

16 Sincerely,

17 ADAM PAUL LAXALT
18 Attorney General

19 By:


20 GEORGE H. TAYLOR
21 Senior Deputy Attorney General
22 Bureau of Government Affairs
23 Open Meeting Law

24 Cc: Devon Reese, Esq.
25 Jim Smith

26 Members:

27 Tim Callicrate
28 Kendra Wong
Jim Hammerel
Bill Devine
Philip Horan
Matthew Dent

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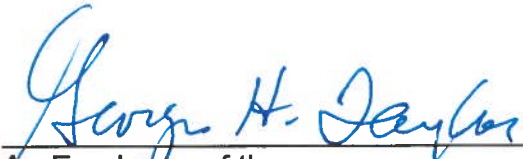
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Office of the Attorney General of the State of Nevada, and that on the 25th day of January 2016, I mailed a true and correct copy of the forgoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW, OPEN MEETING LAW OPINION**, by U.S. Mail, Postage prepaid to the following interested parties:

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