

1 OFFICE OF THE ATTORNEY GENERAL
2 STATE OF NEVADA

3
4 In the matter of:
5 THE INCLINE VILLAGE GENERAL
6 IMPROVEMENT DISTRICT BOARD OF
7 TRUSTEES

OAG FILE NO.: 13897-257

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

8
9 **BACKGROUND**

10 Frank Wright filed a Complaint (Complaint) with the Office of the Attorney General
11 (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the Incline Village
12 General Improvement District (IVGID) Board of Trustees (Board). The Complaint alleges
13 that the Board violated the OML as follows:

14 **ALLEGATION NO. 1: The Board took action to approve the initiation of a**
15 **lawsuit during a closed session.**

16 **ALLEGATION NO. 2: The Board held a closed meeting that was not**
17 **properly noticed to the public.**

18 The OAG has statutory enforcement powers under the OML and the authority to
19 investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS
20 241.040. The OAG's investigation of the Complaint included witness interviews as well as
21 a review of the following: the Complaint and Supplements to the Complaint; the Response
22 and Supplemental Response to the Complaint from the Board's legal counsel; affidavits and
23 recorded statements from members of the Board as well as staff members of the Board; the
24 Board's agendas and minutes from its 2017 and 2018 meetings; and court filings with the
25 Second Judicial District Court of Nevada.

26 After investigating the Complaint, the OAG determines that the Board violated the
27 OML by failing to properly notice and approve the initiation of a lawsuit during a public
28 meeting. The OAG finds that the Board's closed session following its November 15, 2017,

1 meeting constituted an attempted attorney-client session that was exempt from the OML's
2 requirements.

3 FINDINGS OF FACT

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

6 2. The Board is comprised of five (5) elected voting members.

7 3. On or about April 28, 2017, the Board's legal counsel, Jason Guinasso, met
8 with Board Chair Kendra Wong, Vice Chair Philip Horan, and Trustee Peter Morris during
9 a closed attorney-client session (Attorney-Client Session). Board Trustee Tim Callicrate
10 did not attend the Attorney-Client session. Trustee Matthew Dent also did not attend the
11 Attorney-Client session after the Board's legal counsel asked him to leave the session due
12 to an alleged conflict of interest.

13 4. A quorum of Board members were present at the Attorney-Client session.

14 5. During the Attorney-Client Session, IVGID's General Manager, General
15 Counsel, and staff members discussed the impending initiation of a lawsuit with
16 Governance Sciences Group, Inc. (GSGI) with the Board members in attendance.

17 6. On or about May 12, 2017, the Board, by and through its General Manager and
18 General Counsel, initiated a lawsuit (Lawsuit) in the Second Judicial District Court of Nevada
19 against GSGI in case number CV17-00922.

20 7. The Board did not authorize the Lawsuit during a public meeting.

21 8. Neither the Board's Policies and Practices, its Policy and Procedure
22 Resolutions, nor its retainer agreement with legal counsel grant the authority to the
23 Board's General Manager or legal counsel to initiate lawsuits on behalf of the Board.¹

24 9. Policy 3.1.0(g) of the Board's Policies and Practices governs claims involving
25 the Incline Village General Improvement District (IVGID), and it provides the following:

26
27 ¹ The OAG notes that a public body's authority to delegate power to initiate lawsuits,
28 or other materials steps in a legal process, is not addressed in this Opinion. Rather, the
OAG finds that the Board did not delegate its authority to initiate lawsuits through its
existing policies or resolutions.

1 "The General Manager and General Counsel, and their designees,
2 are **authorized to negotiate on behalf of IVGID**, the
3 settlement of all property damage, personal injury, or liability
4 claims, unless otherwise ordered by the Board of Trustees. Final
5 Settlement of such claims may be authorized by the General
6 Manager, provided the amount attributed to IVGID is less than
7 the amounts per occurrence, including all sources of payment
8 (insurance, risk reserve, operating funds, or working capital). For
9 claims that exceed the amount, those must be approved by the
10 Board, the General Manager may authorize and accept a
11 tentative settlement, which shall not be final and binding upon
12 IVGID, unless and until approved by the Board of Trustees."

13 10. The Board's Policy and Procedure Resolution 1480 governs personnel
14 management and it provides that IVGID's General Manager "shall be responsible for
15 coordinating the work of [IVGID's legal counsel] with the activities of IVGID staff, and the
16 Board of Trustees."

17 11. Term 4.1.6 of the Board's retainer agreement with legal counsel, of the law firm
18 Reese Kintz Guinasso, LLC, provides that legal counsel shall "prosecute or defend litigation,
19 as directed by the IVGID General Manager, including mediation, validation proceedings, and
20 arbitrations before administrative boards, arbitrators, mediators, courts of all levels of the
21 county, state or federal governments and report to the IVGID General Manager on that
22 litigation regularly."

23 12. On November 15, 2017, the Board held a public meeting ("Meeting").

24 13. Following the Meeting, the Board's members entered a closed attorney-client
25 conference to discuss pending litigation matters with their legal counsel. Members of the
26 public were asked to leave or were escorted out of the meeting venue. Board Trustees Tim
27 Callicrate and Matthew Dent left the attorney-client conference prior to the start of the
28 session.

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1 members could meet with their legal counsel for an attorney-client session without noticing
2 the session pursuant to the OML, their session could not extend the deliberation regarding
3 the Lawsuit into taking action to initiate the Lawsuit. In exceeding permissible
4 deliberation regarding the Lawsuit, and taking action to approve initiation of the Lawsuit,
5 the Board exceeded the purview of a closed attorney-client session. By using the OML's
6 attorney-client exception to take action regarding the Lawsuit, the Board circumvented the
7 spirit of the OML to take all action during open and public meetings during which members
8 of the public may participate.

9 The Board argues that the authority to initiate the Lawsuit was delegated to its
10 General Manager and General Counsel through the Board's Policies and Practices, its
11 Policy and Procedure Resolutions, and its retainer agreement with legal counsel. However,
12 a careful reading of the noted documents fails to support the Board's claim. Policy 3.1.0(g),
13 which the Board argues delegates authority to initiate lawsuits, is silent regarding the
14 initiation of lawsuits. Rather, it allows the General Counsel and General Manager to
15 "negotiate on behalf of IVGID" **the settlement** of property damage, personal injury, or
16 liability claims. The settlement of an existing claim is clearly different from the initiation
17 of a lawsuit. Policy and Procedure Resolution 1480 governs personnel management of
18 IVGID employees and it provides that the General Manager is responsible for coordinating
19 the work of the Board's legal counsel with the activities of IVGID's staff and Board. Policy
20 and Procedure Resolution 1480 does not contemplate the delegation of the Board's
21 authority to initiate lawsuits. Finally, the Board's reliance on the retainer agreement with
22 legal counsel is misplaced given that the retainer agreement is silent regarding the
23 initiation of a lawsuit. Notwithstanding the fact that the retainer agreement is merely a
24 contract for payment, not a policy or resolution adopted by the Board, the agreement does
25 not authorize the Board's General Manager or legal counsel to initiate lawsuits. While
26 "prosecution" of litigation on behalf of the Board may include strategy decisions, filing
27 briefs, and representing the Board during hearings, the retainer agreement does not
28 delegate authority to the General Manager or legal counsel to initiate lawsuits or "charge"

1 misconduct on behalf of the Board. Absent action by the Board to delegate the authority to
2 initiate lawsuits to its General Counsel or General Manager, the Board was obligated to
3 take action to initiate the Lawsuit during a public meeting. The fact that the Lawsuit was
4 filed shortly after the Attorney-Client Session evidences Board approval, tacit or otherwise,
5 to initiate the Lawsuit.

6 Ultimately, the Board took action during its closed Attorney-Client Session to
7 authorize the initiation of the Lawsuit, when it had not delegated the authority to initiate
8 lawsuits to its staff, and it therefore violated the OML.

9 **2. The Board did not violate the OML by holding a Closed Attorney-Client**
10 **Conference that was not noticed to the Public.**

11 The OML requires that “all meetings of public bodies must be open and public, and
12 all persons must be permitted to attend any meeting of these public bodies” unless
13 otherwise provided by specific statute. Nevada Revised Statute (NRS) 241.020(1). The
14 OML defines a meeting to include the following: “the gathering of members of a public body
15 at which a quorum is present, whether in person or by means of electronic communication,
16 to deliberate toward a decision or to take action on any matter over which the public body
17 has supervision, control, jurisdiction or advisory power” or “any series of gatherings of
18 members of a public body at which: (I) Less than a quorum is present, whether in person
19 or by means of electronic communication, at any individual gathering; (II) The members of
20 the public body attending one or more of the gatherings collectively constitute a quorum;
21 and (III) The series of gatherings was held with the specific intent to avoid the provisions
22 of this chapter. NRS 241.015(3).

23 A meeting does not include a gathering, or series of gatherings, of a quorum of the
24 members of a public body, when the purpose of the gathering is for the members to receive
25 information from the public body’s attorney regarding potential or existing litigation
26 involving a matter over which the public body has supervision, control, jurisdiction, or
27 advisory power, and/or to deliberate toward a decision on the matter. NRS 241.015(3)(b)(2).

28 . . .

1 Here, following the conclusion of the Board's November 15, 2017, meeting, the
2 Board's members entered into a closed attorney-client session with their counsel to discuss
3 existing litigation. The record, including affidavits from the Board's members and counsel,
4 indicate that the closed attorney session never proceeded based on objections to the session
5 by Trustee Callicrate.² As the Board did not conduct a closed meeting without notice to
6 the public, it did not violate the OML. Moreover, even if the closed attorney-client session
7 had occurred, the Board would not have committed an OML violation so long as the session
8 was limited to discussion and deliberation on existing litigation that did not extend to
9 action by the Board.

10 SUMMARY AND INCLUSION OF AGENDA ITEM

11 If the Attorney General investigates a potential OML violation and makes findings
12 of fact and conclusions of law that a public body has taken action in violation of the OML,
13 "the public body must include an item on the next agenda posted for a meeting of the public
14 body which acknowledges the findings of fact and conclusions of law." NRS 241.0395. The
15 public body must treat the opinion of the Attorney General as supporting material for the
16 agenda item in question for the purpose of NRS 241.020. *Id.*

17 Here, upon investigating the present Complaint, the OAG makes a findings of fact
18 and conclusions of law that the Board committed an OML violation by taking action to
19 authorize the initiation of the Lawsuit during its closed Attorney-Client Session.
20 Therefore, the Board must place an item on its next Board Meeting agenda in which the
21 Board acknowledges the present Findings of Fact and Conclusions of Law ("Opinion")
22 which results from the OAG investigation in the matter of Attorney General File No. 13897-
23 257. The Board must also include the OAG Opinion in the supporting materials for its next
24 meeting.

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26 ² At the start of the closed attorney session, the Board's counsel, Mr. Guinasso, asked
27 Trustee Dent to leave due to an alleged conflict of interest on Trustee Dent's part. Trustee
28 Callicrate argued that Trustee Dent should be allowed to participate in the session. When
Board Chair Wong and Counsel Guinasso refused to allow Trustee Dent to participate in
the session, Counsel Guinasso cancelled the session and indicated that he would address
the legal matters with each trustee individually.

1 The OAG further notes that had it timely learned of the OML violation regarding
2 the initiation of the Lawsuit, that it would have filed suit in district court to have the action
3 declared void. Through no fault of Mr. Wright, who appears to have filed his Complaint
4 promptly after learning about the initiation of the Lawsuit during the closed session, the
5 OAG learned of the Board's initiation of the Lawsuit outside the OML's 60-day deadline for
6 the OAG to commence a suit to have the action declared void. As such, the OAG's only
7 available recourse is to require the Board's compliance with the agenda inclusion
8 requirements pursuant to NRS 241.0395.

9 DATED: January 17, 2019.

10 AARON D. FORD
11 Attorney General

12 By: 
13 CAROLINE BATEMAN
14 First Assistant Attorney General