OFFICE OF THE ATTORNEY GENERAL STATE OF NEVADA

3

1

2

4 In the Matter of:

CITY OF RENO CITY COUNCIL.

AG FILE NO.: 13897-220

FINDINGS OF FACT AND CONCLUSIONS OF LAW

7

6

5

8

9

1011

12

13 14

15

16

17

18 19

20

 $\frac{21}{22}$

2324

25

26

2728

BACKGROUND

George "Eddie" Lorton (Complainant) filed a Complaint with the Office of the Attorney General (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the City of Reno (City) City Council (Council) through his attorney Stephanie Rice, Esq. The Complaint alleges that the Council's meeting agendas for November 16, 2016, and December 14, 2016, violated the OML's clear and complete rule.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The investigation of the Complaint included OAG review of the meeting agendas, supporting material, and meeting minutes for the Council's October 12, 2016, November 16, 2016, and December 14, 2016, meetings, as well as the Council's written response to the Complaint through its counsel, Reno City Attorney Karl Hall.¹

LEGAL STANDARD

The Nevada Legislature intends that the actions of public bodies "be taken openly and that their deliberations be conducted openly." NRS 241.010(1); see also McKay v. Bd. of Supervisors, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("The spirit and policy behind NRS chapter 241 favors open meetings.").

The OML requires an agenda that includes a "clear and complete statement of the topics scheduled to be considered during the meeting." NRS 241.020(2)(d)(1). Action may

¹ This opinion does not address Complainant's alleged violations of NRS Chapters 278B, 338, or 354 as they are outside the scope of the OAG's OML duties.

only be taken on items noted as action items by the phrase "for possible action" and the 1 contemplated action must be clearly described on the agenda. NRS 241.020(2)(d)(2). $\mathbf{2}$ Strict adherence with the "clear and complete" standard for agenda items is required for 3 compliance under the OML. Sandoval v. Bd. of Regents, 119 Nev. 148, 154, 67 P.3d 902, 4 905 (2003). The OML "seeks to give the public clear notice of the topics to be discussed at 5 public meetings so that the public can attend a meeting when an issue of interest will be 6 discussed." Id. at 155, 67 P.3d at 906. Further, "a 'higher degree of specificity is needed 7 when the subject to be debated is of special or significant interest to the public." Id. at 8 155-56, 67 P.3d at 906 (quoting Gardner v. Herring, 21 S.W.3d 767, (Tex. App. 2000)). 9 Accordingly, in Sandoval, the Court concluded that the respondents violated the OML 10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

I

because the agenda was not clear and complete.

FINDINGS OF FACT

- 1. The Council is a "public body" as defined in NRS 241.015(4) and is subject to the OML.
- 2. The November 16, 2016, Council meeting agenda contained item N.1 which stated "Staff Report (For Possible Action): Presentation, discussion, and potential direction to staff regarding the Park Lane site and infrastructure improvement offset; including but not limited to approval of an agreement."
- 3. While agenda item N.1 mentions an "offset," it does not include the dollar amount of any proposed offset.
- 4. The proposed agreement with the Developer for the Park Lane Project (Agreement) was included with the supporting materials for the November 16, 2016, meeting.
 - 5. After discussion, the Council approved the Agreement.
- 6. Subsequently, on December 2, 2016, the Complainant complained that agenda item N.1 was not clear and complete as required by NRS 241.020(2)(d) because it failed to state that the Agreement provided a \$3.5 million subsidy to the Developer.

 \parallel / / /

7 8

28 || / / /

- 7. The City Attorney's Office reviewed Complainant's allegations and issued a memorandum to the Council on December 2, 2016, indicating that the Council did not violate the OML, but in "the spirit of complete openness and transparency, the City Attorney's Office recommends that the [Council] ratify the Agreement at the next regularly scheduled [Council] meeting."
- 8. The December 14, 2016, Council meeting agenda contained item J.4 which stated "Staff Report (For Possible Action): Ratification and approval of Infrastructure Improvement Agreement between the City and Park Lane Associates, LLC dated November 23, 2016, pursuant to direction given by City Council on October 12, 2016, and subsequent City Council approval on November 16, 2016 (Park Lane Sit Development) in conformance with NRS 241.0365(2)."
- 9. A note beneath this agenda item in italics read "No dollar amount is or was included on this item because the City is not providing any financial subsidy to the Project or waiving any fees. The plan for the Project requires the Developer to pay the City's sewer fund \$7 million for sewer connection fees. The agreement allows the Developer to pay half of the \$7 million dollar obligation in-kind by relocating and dedicating \$3.5 million dollars' worth of sewer and [storm water] improvements to the City's sewer fund."
 - 10. After discussion, the Council voted to ratify the Agreement.
- 11. The Agreement and the City Attorney's December 2, 2016, memorandum to the Council were both included with the supporting materials for the December 14, 2016, meeting.
- 12. In its January 26, 2017, Response to the Complaint, the Council asserts that the supporting materials for both meetings included the Agreement and implies that because the dollar amount of the \$3.5 million offset or in-kind payment included in the supporting materials for the November 16, 2016, meeting, the November 16, 2016, meeting agenda satisfies the "clear and complete" standard.

- 13. The Council also asserts that the Agreement does not waive any fees or provide any financial assistance to the Developer but instead allows "the Developer to pay (or offset) half of its sewer connection fee obligation in-kind by relocating, constructing and dedicating \$3.5 million dollars' worth of sewer and [storm water] improvements to the City's sewer fund."
- 14. The Council further asserts that under the Agreement "the Developer still pays the City \$7 million dollars—\$3.5 million in cash, and \$3.5 million in City owned public sewer and [storm water] improvements." (Emphasis omitted.)
- 15. The OML requires that the agenda contain a "clear and complete statement of the topics scheduled to be considered at the meeting." NRS 241.020(2)(d)(1).
- 16. The OML requires that the Council include the name and contact information for the person designated to provide supporting materials for the meeting upon request to the public and a list of the locations where the supporting material is available to the public. NRS 241.020(2)(c).
- 17. The Council also must post its supporting material for each meeting on its website not later than the time the material is provided to the members of the Council. NRS 241.0202(8).²
- 18. The plain language of the OML does not authorize a public body to rely on information contained in its supporting materials in order to meet the requirement that its agenda include a "clear and complete statement of the topics scheduled to be considered during the meeting." See NRS 241.020(2)(d)(1).
- 19. All residents and businesses in the City with sewer access pay for sewer services directly or indirectly.
- 20. Issues regarding sewer fees and sewer relocation and improvements are of substantial public interest.

² If supporting materials are made available to the members of the Council at the meeting, those materials must be posted on the Council's website not later than 24 hours after the meeting ends.

- 21. Whether the Agreement allows the Developer to pay \$3.5 million of its \$7 million obligation to the City "in-kind by relocating, constructing and dedicating \$3.5 million dollars' worth of sewer and [storm water] improvements to the City's sewer fund" is an issue that is of substantial public interest both due to the dollar amounts involved and the public's interest in the maintenance of the City's sewer services.
- 22. The OML encourages public bodies to take corrective action after it discovers an alleged violation.
- 23. To take corrective action, a public body must include a clear and complete agenda item that is denoted "for possible corrective action." See NRS 241.020(2)(d)(2); NRS 241.0365.

CONCLUSIONS OF LAW

- 1. The "clear and complete" standard in NRS 241.020(2)(d)(1) is a "stringent" requirement which is not met by applying the "germane³" standard. *Sandoval*, 119 Nev. at 151, 67 P.3d at 903.
- 2. The Legislature enacted the OML to "ensure that all public bodies deliberate and take action openly because 'all public bodies exist to aid in the conduct of the people's business." *Id.* at 154, 67 P.3d at 905.
- 3. The legislative history of NRS 241.020(2)(d)(1) "illustrates that the Legislature enacted the statute because 'incomplete and poorly written agendas deprive citizens of their right to take part in government." *Id*.
- 4. Public bodies must comply with all provision of the OML "to the extent not specifically precluded by the specific statute." NRS 241.020(1). In other words, for a public body to rely on its supporting materials to comply with the "clear and complete" requirement for its agenda, the OML must specifically include supporting materials in the "clear and complete" agenda requirement contained in NRS 241.0202(2)(d)(1). In

³ Under the "germane" standard, any discussion that is "germane" to an agenda topic does not violate open meeting laws. Although the standard may be accepted by some out-of-state courts, it was rejected by the Nevada Supreme Court in favor of the "stringent" standard in *Sandoval*. 119 Nev. at 154, 67 P.3d at 905.

28 | / / /

addition, each individual meeting agenda must be clear and complete on its own and agendas for previous meetings are not relevant to whether a current meeting agenda is "clear and complete."

- 5. With no evidence to the contrary, the OAG takes the Council at its word that it did not believe it was required to include a dollar amount on its November 16, 2016, agenda for item N.1.
- 6. Accordingly, the OAG does not find that the Council purposefully or knowingly violated the OML.
- 7. Nonetheless, the Council violated the OML when its November 16, 2016, agenda failed to include the dollar amount of the \$3.5 million off-set or in-kind payment the Developer would make to the City pursuant to the Agreement.
- 8. Ratification of a previous decision of a public body and/or adding an agenda item to a meeting agenda that does not state "for possible corrective action" does not constitute corrective action. See NRS 241.020(2)(d)(2); NRS 241.0365.
- 9. The Council's December 14, 2016, meeting agenda item J.4 does not constitute "corrective action" under NRS 241.0365.

SUMMARY

Because the OAG finds that the Council has taken action in violation of the OML, the Council must place on its next meeting agenda these Findings of Fact and Conclusions of Law and include them in the supporting material for the meeting. The agenda item must acknowledge these Findings of Fact and Conclusions of Law to be the result of the OAG investigation in the matter of Attorney General File No. 13897–220, and that it has been placed there as a requirement of NRS 241.0395. Further, the Council must take corrective action at its next meeting as described in NRS 241.0365 and note this as "for possible corrective action" as required by NRS 241.020(2)(d)(2) on its meeting agenda.

1	Furthermore, the OAG strongly recommends that all Council members and staff
2	receive training in the OML; the OAG is available to provide OML training upon request.
3	DATED this Quiday of May, 2017.
4	ADAM PAUL LAXALT Attorney General
.5	Actorney General
6	By: Old BRADLEY
7	Senior Deputy Attorney General Boards and Open Government Division 100 North Carson Street
8	100 North Carson Street Carson City, Novada 89701 4717
9	Carson City, Nevada 89701-4717 Telephone: (775) 684-1213
10	
11	
12	·
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

-7-

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this day of May, 2017, I caused to be deposited for mailing, a true and correct copy of the foregoing, FINDINGS OF FACT AND CONCLUSIONS OF LAW, to the following via U.S. Mail, with courtesy copies sent by e-mail:

George "Eddie" Lorton c/o Winter Street Law Group 98 Winter Street Reno, NV 89503

Karl S. Hall, Reno City Attorney 1 E First Street, 3rd Floor PO Box 1900 Reno, NV 89505

An employee of the

Office of the Attorney General

State of Nevada