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100 North Carson Street  
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May 8, 2017

via U.S. Mail

Jeanne Shizuru  
PO Box 723  
Gardnerville, NV 89410

Re: Open Meeting Law Complaint, A.G. File No. 13897-229  
Douglas County Board of County Commissioners

Dear Ms. Shizuru:

The Office of the Attorney General (OAG) is in receipt of your complaint alleging a violation of the Open Meeting Law (OML) by the Douglas County Board of County Commissioners (Board) during a public meeting held on April 6, 2017. The substance of the complaint is that the Board violated the OML by recessing the meeting to consult legal counsel during consideration of agenda item No. 14.

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. In response to the complaint, the OAG reviewed the public notice, agenda, supporting material, and video recording for the April 6, 2017, meeting, together with a response to the complaint from the Douglas County District Attorney's Office and an affidavit from Chief Deputy District Attorney Douglas Ritchie.

**FACTUAL BACKGROUND**

The Board is a "public body" as defined in NRS 241.015(4), subject to the OML. Agenda item No. 14 for the Board's April 6, 2017 meeting was identified for possible action and read as follows:

14. For possible action. Discussion to approve abandoning a "Deed Restriction for Open Space Preservation" on an 8.24-acre parcel. The parcel was originally restricted to "Open Space" with no development rights per Phase 1 of the Job's Peak Ranch Planned Development in 1997. The applicant is Mark Forsberg, Esq., Oshinski & Forsberg, Ltd. Development Application (DA) 17-007. (APN 1219-15-002-028) (Steve Mason 10 min) 30 min

At the Board's April 6, 2017, meeting, agenda item No. 14 was considered for approximately 90 minutes, with extensive testimony from Douglas County staff and the applicant, as well as public comment. During the course of discussion and deliberation on agenda item No. 14, significant legal issues were raised. Furthermore, there is litigation pending regarding the parcel in question, although Douglas County is not currently a party. *See* Case No. 16-CV-0193, Ninth Judicial District Court.

Eventually, Chairman Barry Penzel called a 10-minute recess prior to any Board action. When the meeting resumed, Chief Deputy District Attorney Douglas Ritchie disclosed on the record that a quorum of the Board had met with him pursuant to NRS 241.015(3)(b)(2). Although Mr. Ritchie did not state on the record that the attorney-client conference concerned agenda item No. 14, his affidavit confirms that he provided information to the Board on potential or existing litigation involving agenda item No. 14.

Chairman Penzel then allowed further public comment. Finally, Commissioner Steve Thaler moved to continue agenda item No. 14 to the next Board meeting to allow Douglas County staff and legal counsel to research the matter thoroughly. The motion was seconded by Commissioner Nancy McDermid and passed unanimously.

### DISCUSSION AND LEGAL ANALYSIS

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) ("[t]he spirit and policy behind NRS chapter 241 favors open meetings"). All exceptions to the OML must be construed narrowly and in favor of openness. *Chanos v. Nevada Tax Comm'n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008). "[T]he narrow construction of exceptions to the Open Meeting Law stems from the Legislature's use of the term 'specific' in NRS 241.020(1) and that such exceptions must be explicit and definite." *Id.* "[E]xceptions to the Open Meeting Law extend only to the portions of a proceeding specifically, explicitly, and definitely excepted by statute." *Id.*

NRS 241.015(3)(b)(2) provides an exception to the public meeting requirement for conferences between public bodies and their attorneys "regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power." This exception permits a public body "[t]o receive information from the attorney . . . and to deliberate toward a decision on the matter, or both." *Id.* However, the public body must take any action on the matter in a public meeting. *See* OMLO 2002-21 (May 20, 2002).

Although the OML was first enacted in 1960, the exception for attorney-client conferences regarding potential or existing litigation was not created until the passage of Assembly Bill 225 in 2001. Act of June 5, 2001, ch. 378 § 2, 2001 Nev. Stat. 1836. Prior to this statutory exception, attorneys for public bodies were limited to communicating confidentially with members of a body singly or in groups smaller than a quorum, or in writing. *McKay v. Board of County Comm'rs*, 103 Nev. 490, 495-96, 746 P.2d 124, 127 (1987).

The attorney-client conference during consideration of agenda item No. 14 on April 6, 2017, falls squarely within the provisions of NRS 241.015(3)(b)(2). The abandonment of the recorded deed restriction on the parcel in question is a matter within the jurisdiction of the Board. See NRS chapters 278 and 278A, Douglas County Code, Title 20. The matter is the subject of both pending and threatened litigation and further litigation could likely follow. The Board could foreseeably become a party to such litigation as a result of taking action on agenda item No. 14.

### CONCLUSION

Based upon the evidence presented, and accepting the Board's representations as true - having received no evidence to contradict them - the attorney-client conference during consideration of agenda item No. 14 on April 6, 2017, was permitted under NRS 241.015(3)(b)(2). Therefore, the Board did not violate NRS 241.020(1). The OAG will be closing its file this matter.

Sincerely,

ADAM PAUL LAXALT  
Attorney General

By: \_\_\_\_\_

  
Brett Kandt

Chief Deputy Attorney General

WBK/klr

cc: Mark Jackson, Douglas County District Attorney