



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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January 29, 2013

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Susan D. Severt
5981 Smokey Canyon Drive
Sun Valley, NV 89433

Re: Open Meeting Law Complaint / A.G. File No. 12-034
Sun Valley General Improvement District

Dear Ms. Severt:

This Office investigated your Open Meeting Law (OML) complaint alleging that the Sun Valley General Improvement District (SVGID) violated your right to public comment. This Office has jurisdiction to investigate OML complaints and seek civil remedies against public bodies, including injunctive relief, to require compliance with the OML, or to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

BACKGROUND

The complaint alleged a violation of a protected right to speak to the SVGID Board of Trustees (Trustees) under its published public comment rule during the Trustee's October 11, 2012 public meeting. During our investigation we reviewed the meeting agenda, the minutes from the October 11, 2012 meeting, and an audio tape of relevant portions of that meeting. We also reviewed an affidavit from Margaret Reinhardt, the Chair of SVGID, and one from Jennifer Merritt, administrative assistant with the SVGID. Both affidavits responded to the allegations in the complaint. We also asked for and received a statement from legal counsel who had attended the meeting.

The complaint alleged that the SVGID Chair, Margaret Reinhardt, "purposefully violated" the OML because she had refused to recognize you during public comment on two separate agenda items, even though you had your hand up seeking recognition and on at least one item, you had submitted a "request to speak card."

FACTS

You submitted a request to comment card for item 10 on the agenda. It was submitted to Ms. Jennifer Merritt, who then gave it to Chair Reinhardt while the SVGID was discussing the item. The Chair allowed comment from audience members, but did not recognize you even though the Chair had been given the request to comment card. The Chair called for the Board's vote on item 10 without recognizing your request to comment. Following the vote on item 10, you were recognized after the Chair had been reminded by Ms. Merritt that she had not recognized your request to speak before the vote. You replied that your comment was no longer needed.

Next the SVGID considered item 11. The Chair accepted public comment prior to the Trustee's vote, but did not recognize you even though your hand had been raised and other audience members spoke to the Trustees more than once.

During the Trustee's last general comment session, you told the Trustees that you had been deliberately ignored by the Chair when you had raised your hand and even submitted a comment card. Later, the Chair explained that she does not always see or remember audience members who had their hand up. She apologized for not calling on those who sought to be recognized. She asked that audience members fill out "request to speak cards" so it could be carried to the Chair in a timely manner.

DISCUSSION

NRS 241.020(2)(c)(3) sets out the minimum public comment requirements which must be met by public bodies:

(3) Periods devoted to comments by the general public, if any, and discussion of those comments. Comments by the general public must be taken:

(I) At the beginning of the meeting before any items on which action may be taken are heard by the public body and again before the adjournment of the meeting; or

(II) After each item on the agenda on which action may be taken is discussed by the public body, but before the public body takes action on the item.

Public comment during meetings of public bodies is a right protected by both the U.S. and the Nevada Constitutions:

[T]hrough the Open Meeting Law, the Nevada Legislature has given members of the public the right to address public bodies. NRS 241.020(2)(c)(3) Although there is no constitutional right to participate in an open session of a public body, *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 283 (1984), once a person is given a

right to address a public body, [thereafter] that right may be limited only within constitutional parameters. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); see *White v. City of Norfolk*, 900 F.2d 1421, 1425-27 (9th Cir. 1990); *Leventhal v. Vista United School District*, 973 F. Supp. 951 (S.D. Cal. 1997); Tex. Op. Atty. Gen. 96-111 (Oct. 28, 1996) (in restricting public participation at an open meeting, public body must not discriminate on the basis of the particular views expressed).

OMLO 2001-22 (April 27, 2001); see also, *Black v. Mecca Twp. Bd. of Trustees*, 91 Ohio App.3d 351, 632 N.E.2d 923 (1993), citing 1992 Ohio Atty.Gen.Ops. No. 92-032, citing *Jones v. Heyman* (C.A.11, 1989), 888 F.2d 1328; (If the public body does, however, choose to allow public participation, such participation is subject to the protections of the First and Fourteenth Amendments to the Constitution.)

The right of all Nevadans to address public bodies was given by the Legislature in NRS 241.020(2)(c)(3).

The constitutional parameters of public comment addressed to a public body was described by the Court of Appeals for the 9th Circuit in *Walter White v. City of Norwalk*, 900 F.2d. 1421, 1424-26 (9th Cir. 1990). These are familiar parameters known as "time, place, and manner" restrictions on public comment and are set out in NRS 241.020(2)(c)(7)(restrictions on public comment must be reasonable and may restrict the time, place, and manner of the comment). The *White* court explained the meaning of time place and manner restrictions:

[A public body] does not violate the First Amendment when it restricts public speakers to the subject at hand. *Madison School Dist.*, 429 U.S. at 175 n. 8, 97 S.Ct. at 426 n. 8; see *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985) (public forum may be created by government designating "place or channel of communication. . . for the discussion of certain subjects"). While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 60-61, 103 S.Ct. 948, 963, 74 L.Ed.2d 794 (1983) (Brennan, J., dissenting), it certainly may stop him if his speech becomes irrelevant or repetitious. A speaker may disrupt [a public body] meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is

disrupted because the public body is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

Id. at 1424-26.

The foregoing recitation of authorities was purposeful so as to amplify the importance of this very important right and the concomitant duty to protect that right regardless of the context in which it is asserted. Our investigation did not show that time, place, or manner restrictions on public comment played any part in the Chair's failure to recognize complainant's "raised hand" attempt to address Trustees. The Chair admits that the complainant's request to comment card and her raised hand were simply overlooked.

Public bodies may exceed the minimum statutory public comment requirements. SVGID's public meeting minutes indicate that it exceeds the minimum. However, SVGID's public comment notice on its agenda for October 11, 2012 stated that the Chairperson reserved discretion to allow comment on all posted agenda items:

"4) Public comments are welcome during the Public Comment agenda item and, at the discretion of the Chairperson, on all posted agenda items. The chairperson will limit each member of the public wishing to speak to three minutes during the public comment periods. No discussion by the Board will occur on a matter brought forward on the public Comments agenda item but may be individually referenced by a board member on the Board Comments agenda item."

SVGID's response to the complaint asserts that even though the Chair only overlooked complainant's comment card and her raised hand, the Trustee's public comment notice set out in the agenda (set out above) does not require that everyone wishing to speak, whether through comment card or raised hand, be acknowledged on individual agenda items. We disagree and suggest that the notice on the agenda can only be read to allow the Chair to decline to take comment on certain agenda items; it is not an arbitrary discretion to allow comment from some audience members, but not others. Any other interpretation would be counter to statute and settled First Amendment interpretation as set out herein.

SVGID's public comment notice must comply with NRS 241.020(2)(c)(3). In order for the phrase ". . .at the discretion of the Chairperson," in SVGID's public comment notice to comply with NRS 241.020(2)(c)(3), it can only refer to the Chairperson's discretion regarding all posted individual agenda items, but it cannot mean that the Chair can arbitrarily choose who will be recognized from audience members who have submitted a request to speak card or who have raised their hands

wishing to speak. Once the right to speak has been given, even on an individual agenda item, the right applies to everyone in attendance that signifies his/her desire to comment.

Using request to speak cards is a convenience so that the Chair of a public body can gauge the number of people wishing to speak, but speaker cards are not a substitute for ensuring that anyone who wishes to speak will enjoy that right. We suggest that after members have been recognized pursuant to submitted "request to comment cards" during any kind of public comment, the Chair should verbally ask the audience if there is anyone else wishing to speak. Only then has there been compliance with the constitutional right to address a public body.

Audience members who wish to speak, even if they decide at the last moment before the public body moves on to the next item, should speak up if it appears that the Chair has not seen or heard them. They should speak loudly enough so that the Chair can hear them. The right to speak during public body meetings is so important that the public body must do all it can to recognize everyone who wishes to speak.

CONCLUSION

Our review of the audio of the relevant portions of the meeting, together with review of the minutes and the Chair's affidavit contains no evidence or reason to doubt the Chair's assertion that she did not purposefully refuse to recognize complainant. But, the Chair did not take adequate precautions to assure that everyone who wished to speak on individual agenda items, for which she had allowed public comment, had been given that opportunity.

We urge the Chair to make at least one verbal request for public comment before voting or taking other action on an agenda item, and also make the request at the conclusion of general public comment sessions. Speaker cards may continue to be used, but no one in the audience who wishes to speak should go unrecognized. In her affidavit, the Chair has recognized that adjustments must be made to ensure that everyone who wishes to address the SVGID may do so. We trust that her recognition of the significance of public comment will prevent future problems with public comment.

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Our investigation revealed an inadvertent failure to recognize a member of the public who wanted to make public comment. We do not believe a deliberate violation of the OML occurred, so we will only warn the Chair to take adequate precautions to assure that every person who wishes to comment will be given that opportunity.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



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GHT/CG

cc: Madelyn Shipman, Legal Counsel
Board Members:
Margaret Reinhardt, Chair
Linda Woodland, Vice-Chair
Robert Fink, Trustee
Sandra Ainsworth, Secretary
Garth Elliott, Treasurer