



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

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July 8, 2013

Mr. Aaron L. Katz  
P. O. Box 3022  
Incline Village, Nevada 89450

Re: Open Meeting Law Complaint / AG File No. 13-008  
Incline Village General Improvement District

Dear Mr. Katz:

**Background: Allegations in the Compliant**

Three Open Meeting Law (OML) Complaints from one complainant alleged Open Meeting Law (OML) violations by the Incline Village General Improvement District (IVGID) during a series of three Board of Trustee meetings on March 27, 2013. Each Complaint (one for each meeting that occurred that day) alleged that Chairman Bruce Simonian did not call for public comment before action was taken on the agenda item that called for adoption of the meeting agenda. Each meeting agenda item indicated "for possible action." The series of meetings began at 9:00 a.m., the second began at 1:00 p.m., and the third meeting began at 6:00 p.m. The meeting agenda for 9:00 a.m. failed on a 3-2 vote. That meeting was promptly adjourned.

The Complaint also alleged the public was deprived of a properly noticed public meeting because it had already been approved by the Chairman based on IVGID Policy No. 3.1.8. Policy 3.1.8 states in part: "... the general manager in, cooperation with the Board Chair, is responsible for preparing the agenda for each meeting." It is alleged that Policy 3.1.8 renders unnecessary the approval of one or more agenda items.

Finally, the Complaint alleged that three Trustees, who voted not to approve the 9:00 a.m. Special Meeting agenda, had engaged in private serial communications prior to their vote, a violation of NRS 241.015(2)(a)(2).

We reviewed the audio recording and the minutes of the March 27, 2013, IVGID Special Meeting before rendering this opinion and sworn Declarations from Trustees Bruce Simonian, Joe Wolfe, and Bill Devine. We also reviewed IVGID's meeting notice and agenda for each meeting on March 27, 2013 and the response from IVGID's counsel.

### **Failure to Call for Public Comment before Action Taken**

The Trustee's vote against approval of the 9:00 a.m. IVGID Special Meeting agenda and the immediate subsequent vote to adjourn were procedural votes, which standing alone did not raise an OML issue. However, it is alleged that an OML violation occurred because the Chairman failed to call for public comment under agenda item C before the vote. Item C. on the Special Meeting Agenda was listed as "APPROVAL OF THE AGENDA (for possible action)".

The absence of a call for public comment under Item C did not state an OML claim in the context of IVGID's published public comment notice, agenda item D. It complies with the alternatives expressed in statute allowing a public body to choose how the public may address the Board and the agenda. NRS 241.020(2)(c)(3).

Item D on IVGID's agenda expresses the choice made by the Board, which complies with the OML. Item D provides public notice of when the public may address the Board regarding items on the agenda and for matters not appearing on the agenda. IVGID's agenda provides two periods of general public comment. The public is allowed to use both periods to comment on any matter not on the agenda as an item "for possible action." So far, this process complies with alternative (I). NRS 241.020(2)(c)(3)(I). Under alternative (II) a public body may choose to allow public comment under each agenda item "for possible action" as long as public comment is heard before action is taken. The Legislature also urged public bodies to allow more public comment than the minimum comment required by NRS 241.020(2)(c)(3)(I) and (II). IVGID's public comment choice complies with (I) but it also goes further and allows comment on all general business agenda items.

Item C., Approval of the Agenda, is not a general business item for which public comment is allowed by IVGID's public comment notice. Public comment was allowed after the vote, but before adjournment, which is in compliance with the OML alternative (I) and IVGID's published public comment rule. No OML violation based on the alleged failure to call for public comment before the vote to approve the agenda occurred.

### **Agenda not Approved; Meeting Adjourned**

Some members of the public may have felt that an underlying purpose of denial of approval of the agenda was to block review of certain member's actions taken in the performance of their duties as IVGID elected representatives, but the votes were done in the open meeting accompanied by unrestricted public comment (Item D).

Where legislative elected official's political motives were alleged to be suspect based on his or her vote, courts (and this office) are loathe to review the decisions, regardless of the allegations, as long as the votes are procedurally regular.

Recently, in a companion opinion, this office found no legal support for insinuating improper motives as the basis for seeking to invalidate action taken by Trustees Simonian, Devine and Wolfe because they did not approve the March 27th agenda. We said in A.G. File No. 13-010, June 26, 2013:

[B]ut even if the complaint's allegation that three members impermissibly, and with improper motives, "blocked review" of three agenda items, no violation occurred.

First, there is no authority in the OML to require a public body to conduct a public meeting even after the posting of an agenda. Agenda items may be pulled at any time (NRS 241.020(2)(c)(6)(III)). We believe this means the entire agenda may be pulled and the meeting cancelled or adjourned without discussion of any agenda item issue. This happened at the March 27th IVGID meeting. The Nevada Supreme Court determined that the Open Meeting law has no provision requiring public bodies to discuss or take action on all agenda items. *Schmidt v. Washoe County*, 123 Nev. 128,135, 159 P.3d 1099,1104 (2007) *abrogated on other ground by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

The March 27th agenda listed approval of the agenda as an item "for possible action." Motions to approve the agenda followed by a motion to adjourn were procedural motions properly executed. No Open Meeting law issue is raised by the Board's discussion and action on this item.

Even in the face of the public's First Amendment protection of rights, a governmental body has significant discretion to regulate its own meetings in the manner it sees fit. *See e.g.*,

*City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 n.8, 97 S. Ct. 421, 91976)(public bodies may confine their meetings to specified subject matter).

The First Amendment provides the private citizen with an important bulwark against government power, but it does not immunize an elected official from the ire of political adversaries:

A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what the other members say on or off the floor or because of what the newspapers, television commentators, polls, letter writers, and members of the general public say. We may not invalidate such legislative action based on improper motives of legislators.

*Zilich v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994).

In our view, neither the OML nor the public citizen's first amendment rights were at risk. The OML cannot be used to intervene on behalf of one side of these issues, important as they are. The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering and neither is the Open Meeting law.

### **Serial Communications**

Finally, the complainant alleges that a quorum of Trustees, Bruce Simonian, Joe Wolfe and Bill Devine engaged in direct meetings or serial meetings, which resulted in the Board's 3-2 vote against approval of the 9:00 a.m. meeting agenda, in violation of the OML. NRS 241.015(2)(a)(2)(proscription against serial meetings involving a quorum of a public body). This allegation was asserted on complainant's belief, conjecture, and speculation, based on his view that competing political motives were responsible for the vote against approval of the minutes. He also theorizes that this vote could only have occurred because three Trustees engaged in serial meetings. The complaint did not allege any factual support for his assertion, other than the 3-2 vote.

This office reviewed sworn statements from Trustees Simonian, Wolfe and Devine. Each Trustee denied participating in any serial communication or serial meetings with the other two Trustees prior to the Special meeting of IVGID Board on

March 27, 2013. Trustee's sworn Declarations are conclusive evidence that no serial communications happened. There was no other evidence to investigate this matter any further.

**Was the Public Deprived of a Public Meeting?**

Finally, we address the third allegation that the public was deprived of a properly noticed public meeting when the Board did not approve the agenda for the 9:00 a.m. public meeting which vote then led to adjournment of that meeting. The Complaint asserts an OML violation based on IVGID policy #3.1.8. This office has jurisdiction over the public body's compliance with the OML, but we do not construe bylaws or policies that do not result in interference with the OML. The cited Policy 3.1.8 in this context has no connection to the OML nor does it interfere with IVGID's compliance with the OML. This claim is not cognizable as an OML claim.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO  
Attorney General

By:

  
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GHT/rmh

cc: T. Scott Brooke, Esq., Counsel to IVGID Board of Trustees  
Incline Village General Improvement District, Board of Trustees  
Bruce Simonian, Chairman  
Joe Wolfe, Vice Chairman  
Bill Devine, Treasurer  
Jim Smith, Secretary  
Jim Hammerel, Trustee