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July 23, 2013

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

Re: Open Meeting Law Complaint / AG File No. 13-017
Incline Village General Improvement District

Dear Mr. Katz:

Background: Allegations in the Compliant

This Open Meeting Law (OML) Complaint alleged OML violations by the Incline Village General Improvement District (IVGID) during a Board of Trustee meeting on May 29, 2013. Four OML violations are alleged; three of these allegations relate to IVGID's public comment procedures.

It was alleged that failure to call for public comment, on three items on the agenda, was in violation of the OML. 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, nor did he call for public comment before the Trustees took action on Item "G" and Item "H."

The Complaint's fourth allegation is that the minutes of IVGID's May 8, 2013, regular meeting failed to include the "substance of all matters discussed" during consideration of agenda Item K. NRS 241.035(1)(c). The allegation included further characterization that the summary of Item K in the minutes did not accurately or impartially reflect the substance of matters proposed, discussed, or decided, and that it appeared to Complainant that the proposed minutes exhibited a favorable staff spin. We reviewed the agenda, and the minutes of the May 8, 2013, and May 29, 2013, IVGID meetings before rendering this Opinion.

Failure to Call for Public Comment before Action Taken

The Complaint alleges that an OML violation occurred because the Chairman failed to call for public comment before Trustees took action on agenda Item "C" (Approval of the Agenda.) Agenda Item C. called for "APPROVAL OF THE AGENDA (for possible action)."

NRS 241.020(2)(c)(3)(I) requires that "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."¹ The agenda for May 29, 2013, listed "Approval of the Agenda (for possible action)," before the first general public comment period. Items "G" and "H" were listed later in the agenda but were not General Business items. Public comment before the Board took action on them was not required, although either of the two general periods of public comment could have been used to comment on them.

Statutory public comment alternatives allow a public body to choose how the public may address the Board and the agenda. NRS 241.020(2)(c)(3). IVGID's agenda provides two periods of general public comment, which alone are sufficient to comply with the OML. IVGID's response to the Complaint states that the public enjoys a "completely unfettered right to offer public comment" on any subject. A public body may limit the subject matter of its meetings, but a 2011 legislative amendment ensures the right of the public to comment on any matter not specifically included on an agenda as an action item. NRS 241.020(2)(c)(3).

The Legislature urges public bodies to allow more public comment than the minimum comment required by either NRS 241.020(2)(c)(3)(I) or (II)². IVGID's public comment choice complies with (I) but IVGID also goes further and allows comment on all general business agenda items before action by the Board. General business items are clearly denominated on the agenda. Items "G" and "H" were not listed under General Business items so the Board was not in violation when no public comment was called for during their discussion. The public could have used either of the two general public comment sections to speak to these items.

Beginning with the June 12, 2013, meeting, IVGID placed Approval of the Agenda following the first period of public comment. This modification of the agenda brings the agenda into literal compliance with the statute's requirement that public comment be taken before any items listed "for possible action" are heard by the public body.³ IVGID has taken corrective action of its own volition.

¹ NRS 241.020(2)(c)(3)(I). The current requirement for public comment before any item calling "for possible action" was the result of Legislative Conference Committee amendments, which are not recorded so there are no minutes of those committee meetings. Amendments CA6 and 591 were both adopted by the conference committee.

² Subsections (I) and (II) are set out in the statute in the disjunctive.

³ We recognize that "literal compliance with the statute" is required notwithstanding our statement in AG File No. 13-008 (July 5, 2013) concerning this same issue. We said in that letter opinion

IVGID defended its former practice of placing Approval of the Agenda before the first period of public comment by characterizing the Approval of the Agenda as a ministerial act, implying that the matter does not rise to the level of other action items so it need not occur after public comment even though it is listed "for possible action."⁴

But, approval of the Agenda is not simply a ministerial act as proven by the Trustee's own public meeting on March 27, 2013 when failure to approve the agenda on a 3-2 vote resulted in adjournment of the meeting. Clearly, this item is not ministerial; it rises to the level of any other item listed for possible action.

Where should the first period of public comment occur was an issue during the 2011 Legislature. Legislative history sheds some light on the meaning of statutory language, "At the beginning of the meeting," even though this phrase was adopted towards the end of the session following a legislative conference committee composed of members of the Assembly and the Senate. Although Legislative Conference Committee minutes of meetings are not provided in legislative history of AB 257 (2011), earlier committee minutes provide some context for the ultimate amendment requiring a period of public comment before any item listed "for possible action."

During Senate Government Affairs committee meeting on May 2, 2011, Senator Settlemeyer, Senator Manendo and AB 257 sponsor Assemblyman Ellison discussed the meaning of the phrase "At the beginning of the meeting." Senator Settlemeyer asked Assemblyman Ellison whether "beginning" meant "after the quorum [is determined] before the secretary's minutes, before the treasurer's report or just prior to an action item? I am trying to establish legislative intent for the record." Minutes of the Senate Committee on Government Affairs, p. 28, May 2, 2011. Later during this discussion, Vice Chair Manendo implied that there should be language in the bill to say that public comment should happen prior to consideration of items on the agenda designated as action items. There never was a mention of other items such as Approval of the Agenda, but as long as an item is "for possible action," a public comment period must occur prior to its consideration.

Even though the Complaint alleges IVGID "willfully" and "callously" disregarded the rights of its citizens by placing Approval of the Agenda" before public comment, we disagree with the allegation that IVGID's view was a willful violation of the OML. Generally, the approval of the agenda is routine and accomplished in short order so that the business of the District may be get done. It seldom attracts much attention. Complainant, who spoke during public comment immediately following the approval of

that Public comment taken after Approval of the Agenda was in compliance with NRS 241.020(2)(c)(3)(I). We rescind that statement and adopt the finding in this Opinion.

⁴ IVGID also cites to this office's previous opinion AG File No. 13-010 (June 26, 2013) wherein we characterized Trustee's action to approve the agenda as a procedural motion, which in that case was followed by another procedural motion to adjourn. But, the Complaint in 13-010 did not complain the Trustees violated the OML because they did not take public comment before taking action on Approval of the Agenda. Our characterization of the motion as procedural does not an exempt the item from the plain language of NRS 241.020(2)(c)(3)(1).

the agenda, did not complain to the Trustees that they had just committed an OML violation for not taking public comment before voting on the agenda. The placement of Approval of the Agenda before public comment did not merit a remark from anyone, including the Complainant, during public comment immediately following. We do not find any intentional conduct that violated the OML.

Agenda Item K: May 8, 2013⁵

The Complaint's fourth allegation is that minutes of IVGID's May 8, 2013, regular meeting, specifically Item K, Board of Trustees Update, failed to include the substance of all matters discussed. This issue arose during Trustee Hammerel's portion of Board Update, agenda Item K. Complainant alleges a violation of NRS 241.035(1)(c).

Complainant alleges that Trustee Hammerel asked questions about IVGID's legal counsel's billing for the month of March and if it had been paid. Director of Finance, Gerry Eick, allegedly replied asserting that the billing had been returned to legal counsel for modification because of "irregularities" in the bill. The Complaint alleged that this colloquy between Trustee Hammerel and Gerry Eick had been omitted from the minutes of Item K. Complainant alleged that this omission violated the statutory requirement that minutes reflect the "substance of all matters proposed, discussed or decided." Item K was simply an update on the District from each Trustee; the item was not for discussion or action.

We reviewed the audio recording of Item K in its entirety. There was no omission in the minutes of such a colloquy between Trustee Hammerel and Gerry Eick. The minutes of Item K accurately reflect Trustee Hammerel's comments. There was no discussion among the Trustees about legal counsel's billing.

⁵ **NRS 241.035 Public meetings: Minutes; aural and visual reproduction; transcripts.**

1. Each public body shall keep written minutes of each of its meetings, including:
 - (a) The date, time and place of the meeting.
 - (b) Those members of the public body who were present and those who were absent.
 - (c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.
 - (d) The substance of remarks made by any member of the general public who addresses the public body if the member of the general public requests that the minutes reflect those remarks or, if the member of the general public has prepared written remarks, a copy of the prepared remarks if the member of the general public submits a copy for inclusion.
 - (e) Any other information which any member of the public body requests to be included or reflected in the minutes.

Conclusion

IVGID has taken remedial corrective action which places its first public comment period before Approval of the Agenda item. Open Meeting Law Manual, §11.01-11.04 (11th Ed. 2012). Items "G" and "H" were not general business items and were not subject to NRS 241.020(2)(c)(3)(II) requirement that the public have the right to comment before action by the Board.


Our review of the audio record of IVGID's May 8, 2013, general meeting Item K, Board Update, did not support the allegation in the Complaint that IVGID failed to include in the minutes the substance of all matters proposed, discussed, or decided. There was no violation of NRS 241.035.

No further action by this office is necessary. We are closing our file on this matter.

Sincerely,

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Attorney General

By:



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GHT/rmh

cc: T. Scott Brooke, Esq., Counsel to IVGID
IVGID board members:
Bruce Simonian, Chairman
Joe Wolfe, Vice Chairman
Bill Devine, Treasurer
Jim Smith, Secretary
Jim Hammerel, Trustee