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June 26, 2013

Frank Wright
P.O. Box 186
Crystal Bay, Nevada 89402

Re: Incline Village General Improvement District 13-010
Chairman Bruce Simonian

Dear Mr. Wright:

This Open Meeting Law Complaint alleged two violations by the Incline Village General Improvement District Board of Trustees (IVGID). First, the Complaint alleged that email blind copying of other Trustees regarding upcoming board meetings has been a regular practice and is a violation of the OML although no specific provision of the OML was alleged. The practice was discussed by the Trustees during their public meeting on February 27, 2013. Minutes and audio of that meeting was provided by the District.

The second violation alleged Chairman Bruce Simonian blocked review of Trustees (by his vote), who allegedly participated in illegal blind copying as disclosed during its February 27, 2013, meeting. The vote occurred during a Special Trustee public meeting on March 27, 2013. It is alleged blind copying, involving a quorum of Trustees, is a violation of the OML, and that the Chairman's no vote to approve the March 27, 2013, special meeting agenda was a violation of the OML. The Complaint did not reference any provision of law that had allegedly been violated other than characterizing the no vote as censorship.

Email communication: Blind Copying

We reviewed the audio recording and transcribed minutes of the February 27, 2013, IVGID Trustee public meeting. During his segment of agenda item F. 1., Board

updates, Trustee Hammerel initiated a discussion about whether Trustees and staff engaged in a practice of email blind copying. He had been surprised when he received an email response from Chairman Simonian to an email, which he had sent only to General Manager Bill Horn. He thought that his email to Mr. Horn was private correspondence, but Mr. Horn blind copied the Chairman when he responded to Trustee Hammerel. Chairman Simonian then sent an email in response to Trustee Hammerel's email to Mr. Horn.

There was much discussion about this issue, even heated at times. Since Mr. Horn became General Manager, he admitted to blind copying Chairman Simonian with correspondence from other Trustees when he thought it was appropriate. Mr. Horn also stated he was within the OML since he knew he could communicate with two Trustees without violating the OML. He acknowledged that a communication with three Trustees could violate the OML because three is a quorum.

We have reviewed the meeting audio, the transcribed minutes, and the response from IVGID counsel. There is no evidence in the audio or the minutes, during their discussion of this issue to support the allegation in the Complaint, that Mr. Horn or any other Trustee violated the OML through serial communications as a result of email blind copying.

Chairman Simonian responded to Trustee Hammerel's board update issue. In the audio recording, Chairman Simonian can be heard clearly stating that his email practice was to copy, "the Chairman or another trustee so that there is usually two people involved in the situation." His statement of his practice seemed to us to mean that he avoided involving more than two Trustees in any email regarding public business. However, the transcription of the audio reads, "Chairman and another Trustee ...," which seems to imply that he could have involved three Trustees. The transcription is in error. Correct transcription should have replaced "and" with "or"; otherwise the meaning is different.

Finally, later in this lengthy discussion, Trustee Hammerel reviewed the history of a recent email train that could have possibly included three Trustees because of the practice of email copying or blind copying without knowing who had been involved at the beginning of the issue that generated the email train. The matter was a discussion between Mr. Horn and Susan Herron regarding customer service training initiative. Mr. Hammerel was concerned that three Trustees could have deliberated because Mr. Horn may have blind-copied Chairman Simonian without Trustee Jim Smith's knowledge. He said that deliberation could have occurred but for recognition by Trustee Hammerel that Trustee Smith had been involved at an initial meeting. Still, there is no evidence that three Trustees met serially to deliberate or vote on a matter within their jurisdiction.

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No Evidence of Serial Communications

NRS 241.015(2)(a) forbids serial meetings amongst a quorum of members of a public body where a consensus or vote or other decision is made.¹ Serial communications are private meetings, they are not noticed to the public, since less than a quorum is gathered at each meeting. These are also called "walking quorums" and can be used to form a secret consensus or vote out of sight of the public. The OML prohibits them as a violation of the letter and spirit of the OML.

When less than a quorum of the members of a public body gather to privately discuss public issues or even lobby for votes, the OML is not implicated. *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770,778 (1998); Section 5.08 of the Open Meeting Law Manual (11th ed. 2012). The OML is not intended to prohibit every private discussion of a public issue; it only prohibits collective deliberations or actions where a quorum is present. *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87,94–95, 64 P.3d 1070,1075 (2003).

There is no evidence that IVGID Trustees violated the OML's prohibition against serial communications because a quorum of the Trustees did not meet, deliberate, or take action on any matter within their jurisdiction through the practice of "blind copying."

Censorship

The second allegation of this Complaint is that Chairman Simonian voted to "block review of censorship of himself and Bill Horn and others who have participated in illegal blind copying violation open meeting laws." The use of "censorship" in the Complaint suggests a First Amendment issue, but as described below there is no evidence that anyone's speech was censored during IVGID's March 27, 2013, special meeting.

Trustees met in a special meeting on March 27, 2013, to consider three related agenda items. Item #1 sought to consider the character, misconduct, or competence of Chairman Bruce Simonian as an elected member of IVGID, his involvement in the

¹ 2. "Meeting":

(a) Except as otherwise provided in paragraph (b), means:

(1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) Any series of gatherings of members of a public body at which:

(I) Less than a quorum is present at any individual gathering;

(II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and

(III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

alleged blind copying issue, his role under IVGID's Board of Trustee's handbook, and an issue involving the Crystal Bay Visitors Bureau - a \$4,000,000 distribution at the Trustee's March 27, 2013, meeting. The second agenda item was similar to the item described above, except it named General Manager Bill Horn as the subject. The third agenda item only listed a performance review of legal counsel T. Scott Brooke.

Following the Pledge of Allegiance and roll call, the next item on the agenda was approval of the agenda. Trustee Smith made a motion to approve the agenda; it was seconded by Trustee Hammerel. The Chairman called for a vote. The motion to approve the agenda failed 3 – 2.

Next, legal counsel advised the Board to allow for public comment; several members of the public provided comment. There is no indication in the minutes that any member of the public was refused the right to speak or that their comment was censored by the Board.

After public comment, the meeting was brought back to the Board. Trustee Wolfe made a motion to adjourn for lack of an approved agenda. The motion passed 3 – 2 and the meeting was adjourned.

Discussion

The allegation of censorship (a First Amendment issue) does not find any support in the facts of the March 27, 2013, special meeting at which three Trustees voted to not approve the agenda, then by a second motion, they voted 3 – 2 to adjourn the meeting. The votes to not approve the agenda and to adjourn were procedural votes that complied with the OML. They were not unusual, that is, they did not on their face explicitly seek an illegal action or infringe on the public's rights. Some people may have felt that their underlying purpose was to block review of certain member's actions taken in the performance of their duties as their IVGID elected representatives. The votes were done in the open meeting accompanied by public comment for which there did not appear to be any restriction. No OML issue was raised on these facts.

The Complainant, members of the public, and the two Trustees who were in the minority may be incensed that the subject matter of the three agenda items would not be publicly discussed (the 3-2 votes "blocked review"), but 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. This happened at the March 27, 2013, IVGID meeting. The Nevada Supreme Court

determined that the OML 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 27, 2013, 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 OML issue is raised by the Board's discussion and action on this item.

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) (2013).

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 body² 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).

We agree with the foregoing quotation in *Zilich*. The Nevada OML will not seek to invalidate lawful procedural action by a public body based upon allegations of improper partisan, political, or ideological motives.

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² "Legislative bodies" include the governing bodies of local governments and the governing board of a district. Ralph M. Brown Act (Open Meeting Law) Cal. Gov't Code § 54952 (West 2013).

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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.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



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Open Meeting Law
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GHT/rmh

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