



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

THOM M. GOVER
Acting Chief of Staff

September 26, 2014

Via U. S. Mail

Paula Carson
P.O. Box 925
McGill, Nevada 89318

Re: Letter Opinion Re: 14-016; Finding of Violation of the Open Meeting Law

Dear Ms. Carson:

Background

This office has investigated an Open Meeting Law complaint that alleged that the Ely City Council illegally issued an undated "Order to Correct Deficiencies" ("Order") on May 29, 2014, to Carson Unlimited, a construction company located in Ely, Nevada, because issuance of the Order was action taken without benefit of Notice or Agenda as required under NRS 241 of the Open Meeting law ("OML"). The Order was signed by the Mayor and five Councilmen but it was undated. The Order required Carson Unlimited to correct defects identified following construction of the Parker Avenue project.

The Attorney General has jurisdiction to investigate allegations of violations of NRS Chapter 241, the Open Meeting Law. This office may 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 for violations of the OML are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

Counsel for the Ely City Council responded to the complaint with an assertion that authority for the issuance of the Council's Order was action the Council took during a public meeting on August 22, 2013. We have reviewed the audio of that public

meeting and its notice and agenda. We also reviewed several subsequent Council public meetings in September of 2013 in which the Parker Avenue project had been discussed.

In none of these public meetings did the Council consider issuing an Order to Carson Unlimited to correct deficiencies.

Findings of Fact

Carson Unlimited (a construction company) bid a construction project in response to the City's Request for Proposal in 2011 (RFP), for the construction of certain underground water infrastructure on Parker Avenue in Ely, Nevada. The project was completed on October 19, 2011.

The City learned of certain construction deficiencies in the Parker Avenue project in November of 2012. In December 2012, the City learned that its former City Engineer (a city employee) had not prepared a letter of project completion, nor had he submitted "as built" drawings for the Parker Avenue project. He eventually submitted "as built" drawings and a Certificate of Completion on February 13, 2013, which confirmed inadequate inspection and significant deviations from approved plans for the project.

After determining that there had been inspection and deviation from approved plans, the City applied to the Nevada Department of Environmental Protection for approval of construction exceptions from the approved plans. In March of 2013, NDEP denied their application for special exceptions and advised the City to make appropriate plans for possible early replacements.

On August 22, 2013, the City Council met in public meeting (Agenda item #6) for "Consideration of possible defects in the Parker Street Water Project WP-4032-11 completed October 2011 and consideration of possible resolutions."

The Council began the discussion with a review of the history of the project since 2011. Councilman Westland suggested the matter be brought back to the Council again, but he stated that at the very least the issue of defects should be submitted as a question to the City of Ely's insurance carrier to determine whether grounds exist for an Errors and Omissions claim. He said clearly one of our employees made a mistake on the \$300,000 Parker Avenue project.

Councilman Derbridge moved to send a claim to the City's insurance carrier on the Errors and Omissions policy for mistakes made on the Parker Avenue project based on inadequate inspection and deviations from the approved plans. After further public comment, the council passed the motion 4-0.

Analysis

Counsel asserts that on August 22, 2013, the Council directed the City Attorney to pursue recovery for damages due to defective workmanship by Carson Unlimited. We reviewed the audio of the meeting agenda item but we did not hear any discussion or action from the Council directing the City Attorney to seek recovery of damages due to defective workmanship, nor was there any discussion of an "Order to Correct Deficiencies." We could not find any reference in any agenda item, even on future agendas prior to the issuance of the Order on May 29, 2014, regarding further proposed action, including authorization of litigation to recover damages for defects in workmanship, or the issuance of an Order to correct deficiencies.

Counsel for the Council defends issuance of the undated Order because the City is in litigation with the Carsons—the complainant in this matter—as though that fact alone supplants the OML's requirement that all action taken by a public body must be done in public for the public's benefit. We can find no legal authority supporting Counsel's claim and none has been proffered. The ongoing litigation with the Carsons is unrelated to defect issues alleged for the Parker Avenue project.

Clearly a public body may not take action in private. Action is appropriate only when a quorum of a public body meets in a correctly noticed meeting where the proposed action is clearly and completely stated in an agenda item. The only action noted on the agenda on August 22, 2013, was "consideration of possible resolutions." The possible issuance of an Order or Demand to correct deficiencies did not appear on that agenda item. No action had been clearly and completely stated on the agenda item. The matter of the issuance of an order was suggested by one of the Councilmen during the meeting. The Council voted to approve a motion to send an errors and omissions claim to its insurance company based on mistakes made by the City's engineer on the project. No Councilman even mentioned the possibility of a demand directed to Carson Unlimited to correct deficiencies.

Conclusions of Law

The Order was signed by the Mayor and all Councilmen, but no notice had been given to the public. Their action was in violation of the OML. NRS 241.015(1); NRS 241.020(2)(d). The Order is void until such time as the Council reconsiders the matter during a public meeting under an agenda item which clearly notices the public of the possibility that the Council could take action including the issuance of a demand to Carson Unlimited to correct deficiencies underlying the Parker Avenue project completed in 2011.

Please note the required legal requirements following finding of a violation by this office.

Paula Carson
September 26, 2014
Page 4

NRS 241.0395 Inclusion of item acknowledging finding by Attorney General of violation by public body on next agenda of meeting of public body; effect of inclusion.

1. If the Attorney General makes findings of fact and conclusions of law that a public body has taken action in violation of any provision of this chapter, the public body must include an item on the next agenda posted for a meeting of the public body which acknowledges the findings of fact and conclusions of law. The opinion of the Attorney General must be treated as supporting material for the item on the agenda for the purposes of NRS 241.020.

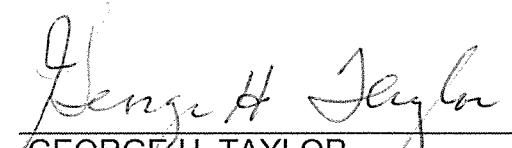
2. The inclusion of an item on the agenda for a meeting of a public body pursuant to subsection 1 is not an admission of wrongdoing for the purposes of a civil action, criminal prosecution or injunctive relief.

(Added to NRS by 2011, 2384)

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



GEORGE H. TAYLOR
Senior Deputy Attorney General
Open Meeting Law
100 North Carson Street
Carson City, Nevada 89701
Tele: (775) 684-1230

cc: Melody VanCamp, Mayor
Ely City Council Members
Rich Sears Esq., Counsel to the Ely City Council