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November 27, 2012

Frank Wright
P.O. Box 186
Crystal Bay, NV 89402-0186

Re: Open Meeting Law Complaint / 12-030 IVGID

Dear Mr. Wright:

This office has investigated your Open Meeting Law (OML) complaint against the Incline Village General Improvement District (IVGID), which alleges IVGID violated the OML during its public meeting on September 26, 2012.

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.

ALLEGATION ONE

Your complaint alleges IVGID Chairman Ted Fuller issued a new and never before used public comment policy that violated the OML. Mr. Fuller's oral announcement preceded the Trustees' consideration of item K.1. He announced that only three members of the public could speak before the Trustees took action on a general business agenda item—K.1.

After investigation and review of the minutes and statements from the Chairman, we do not agree with your broad assertion that Chairman Fuller's announcement constituted a new public comment policy or that the announcement violated the OML. We find that Chairman Fuller's announcement prior to consideration of item K.1 on the September 26, 2012 meeting agenda did not signal any change to IVGID's public comment policy.

IVGID's public comment printed rule, appearing as boilerplate on the agenda, is consistent with the OML. The agenda's public comment announcement states in relevant part, "comments from the public, relating to a General Business agenda item, will be taken during the Board's consideration of that item."

We think IVGID's public comment policy statement (agenda item I) is consistent with 2011 Legislative changes to the OML. Review of IVGID's agenda indicates the Trustees will hear public comment during Trustee's consideration of each action item and then Trustees will hear comments during two general public comment sessions (on the September 26, 2012 those were items I and L) during which the public may comment on any matter over which the Trustees have jurisdiction or control, but the comment must not concern an item specifically included on the agenda as an action item. This policy is consistent with the OML. NRS 241.020(2)(c)(3).

You have alleged that the "new policy" announced by Chairman Fuller means that the public cannot comment on agenda items. The public may comment on agenda items, but only during the Trustee's consideration of that item during the meeting. NRS 241.020(2)(c)(3)(II). This restriction is consistent with the OML. IVGID's public comment policy restricts comments during its two public comment sections to only matters within its jurisdiction and control because it has combined the two choices the Legislature provided to public bodies. IVGID provides more public comment opportunities than is required by law.

ALLEGATION TWO

Your complaint alleges a broader claim that the Chair's announcement that only three members of the public would be allowed to speak during consideration of an agenda item was a permanent and general change in IVGID policy. IVGID's response identified the timing of the announcement item as crucial because it occurred before consideration of item K.1, and it was meant to only apply to public comment during item K.1.

Item K.1 was designated as a "General Business" item, but because of Mr. Fuller's announcement only three persons were allowed to comment. This restriction conflicted with boilerplate policy in item I because item K.1 was designated as a general business item.

IVGID's response to your complaint characterized K.1 as a special hearing of an appeal to the Board of Trustees regarding a disciplinary action taken by General Manager Horn against an IVGID member. But there was no reference in the item to a special hearing, or to disciplinary action against Mr. Homola. The item's sole subject matter was the suspension of Mr. Homola's recreational privileges.

IVGID denied that a special new policy was announced during the September 26, 2012 meeting; however, IVGID concedes that Chairman Fuller orally "made the statement" [only three members of the public could speak] just before taking public comment, but before the Trustees voted on Mr. Homola's appeal of his suspension of recreational privileges.

A partial explanation for the apparent conflict with IVGID public comment policy and the oral announcement is that the agenda item may have been mischaracterized. Our review of the minutes showed that Counsel was asked during the consideration of Mr. Homola's appeal whether the facts supported the General Manager's decision to apply a full suspension of recreational privileges. Counsel did not comment on the question because he said the matter was not subject to public comment. Nevertheless, Chairman Fuller asked for public comment after stating that only three members of the public would be allowed to speak.

Ordinance 7, § 67(c)(3)¹ was the source for the appeal to the Board of Trustees. Mr. Homola's character and, alleged misconduct (as a permit holder on IVGID's golf course) were discussed. This meeting could have been closed (assuming compliance with notice provisions of NRS 233.033) with or without language from Ordinance 7 and the public could have been excluded so that there would be no public comment. NRS 241.033.

IVGID's response did not explain why this matter was considered a general business item instead of describing it as a disciplinary matter pursuant to IVGID Ordinance 7, or simply closing the hearing. Ordinance 7 specifically requires the General Manager and department head to be present to respond to the user's allegations. Because the disciplinary hearing was a question of fact for the Trustees and resolution required application of IVGID policy (zero tolerance policy), public comment prior to action was not required because the Trustees are solely responsible under the Ordinance to decide the issue.

The public could have been informed on the agenda that no comment would be taken on this matter, because it was an exception to the rule of open meeting under NRS 241.030(1)(consideration of a person's character, misconduct, professional competence or physical or mental health). NRS 241.030 does not explain or specify whether public comment is required when the person whose character or alleged misconduct is at issue waives the closure of the meeting to request an open meeting. But, clearly there would be no public comment during a closed meeting simply because the public would be excluded to protect the person's privacy.

¹ Board of Trustees. The Board of Trustees shall hear the user's duly agendized appeal at the Board's next regularly scheduled public meeting. (NRS 241.030 (3) (d): nothing contained in the Chapter 241 shall require that any meeting be closed to the public.) Also at this hearing shall be the charging employee(s), the deciding Department Head, and General Manager, to respond to the user's assertions. The Board shall render its decision at this hearing. By its decision, the Board shall uphold, modify, or overturn, in whole or in part, the General Manager's decision. The Board's decision is final.

CONCLUSION

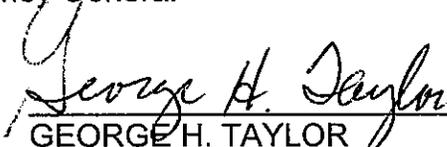
No new public comment policy was announced by Chairman Fuller. IVGID's description of item K.1 as a general business item coupled with a restriction on public comment certainly confused many of those in attendance. We understand the public's view that once public comment is allowed it should have included all who wanted to speak, especially since the underlying issue—enforcement and application of the Ordinance—was of significant interest. We are also mindful that the restriction announced was applicable only to this item, not because the restriction was an ad hoc application of the rules, but because the Chair had been advised that the item was not subject to public comment. These facts militate in favor of issuance of this letter opinion only as a guide to future conduct where restriction on public comment is an issue.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



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GHT/CG

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