STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of
LYON COUNTY BOARD OF COMMISSIONERS

Attorney General File No. 10-062
OMLO 2011-01

I.
INTRODUCTION

This Open Meeting Law (OML) complaint alleged that a person’s character was impermissibly discussed by a member of the Lyon County Board of County Commissioners (BOCC) during a public meeting in violation of the notice requirements of NRS 241.033(1).¹

Mr. Charles Newness alleged Commissioner Chuck Roberts spoke about his character partially based on the fact that Mr. Newness had previously filed an OML complaint with the Attorney General’s office.² Mr. Newness’s complaint alleged Commissioner Robert’s comments during the public meeting impugned his character, effectively calling him a person “of less than truthful character.” He alleged he did not receive notice that the BOCC would consider his character during their meeting on December 2, 2010.

II.
FACTS

At least two members of the Lyon County BOCC spoke about Mr. Newness’s character during the agenda item to appoint two individuals to the Silver Springs Advisory

¹ NRS 241.033 Meeting to consider character, misconduct, competence or health of person or to consider appeal of results of examination: Written notice to person required; exception; public body required to allow person whose character, misconduct, competence or health is to be considered to attend with representative and to present evidence; attendance of additional persons; copy of record.
1. A public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has:
   (a) Given written notice to that person of the time and place of the meeting; and
   (b) Received proof of service of the notice.
2. The written notice required pursuant to subsection 1:
   (a) Except as otherwise provided in subsection 3, must be:
       (1) Delivered personally to that person at least 5 working days before the meeting; or
       (2) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.

² See AG File No. 10–044; complaint filed against the BOCC’s standing committee–Jail Committee.
Board.  Mr. Charles Newness was one of two individuals selected by the Silver Springs Advisory Board and submitted to the BOCC for appointment. It is the BOCC that appoints members to county advisory boards. The relevant portion of the audio of the discussion of the proposed appointments during the December 2, 2010 BOCC meeting, item #12, is set forth below. Chairman Joe Mortensen called item #12 to the floor. Commissioner Roberts was the first Commissioner to speak:

Commissioner Roberts: “Mr. Chairman I’m concerned that Charles Newness might have self-serving interests in this appointment and that’s based on a complaint that he filed against the County this year. The complaint in itself is certainly reasonable and appropriate but in the verbiage in the complaint there was information that I was privy to that is factual and causes me to believe that he doesn’t do all of his homework so I have reservations appointing him at least without some further clarification or an interview.”

Larry McPherson: “Well, I don’t understand what you are saying is ‘self-serving’. . .”

Commissioner Roberts: “I’m concerned that he might not be a team player and may represent some special interests that aren’t apparent to the County.

Commissioner McPherson: “Are they apparent to the Board. . . I wonder.”

Commissioner Roberts: “Yeah, I guess you’d have to talk to them. Yeah, I might not have a problem if I were able to talk to him, I don’t take this lightly, I’ve never challenged any appointment to an advisory council, but the verbiage in his complaint was

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3 Agenda item #12: “Appoint Charles Newness and Phil Rutherford to the Silver Springs Advisory Board (effective January 1, 2011), with terms expiring, December 31, 2014.”
erroneous and it was very apparent he failed to do his homework,
and I’m very concerned about that. . .”

Commissioner Roberts then stated that he had spoken to Mr. Newness and offered to
assist him in finding some information. Commissioner Roberts said Mr. Newness rejected
the offer of help. Commissioner Roberts commented that the rejection did not give him a
warm and fuzzy feeling that Mr. Newness is somebody he would want advising him on matters
representing the citizenry at large.

Commissioner McPherson interjected that based on what he knew of Mr. Newness, he
thought “he was a pretty bright man and he might have more to offer than we see.”

The Chair asked Commissioner Roberts if he had any documentation to help the other
Commissioners understand his comments. Commissioner Roberts said he did not bring
anything with him but he could provide something at a later date.

Further discussion among the Commissioners, staff, and the public resulted in tabling
the appointment of Mr. Newness subject to an interview by staff. County Manager Jeff Page
agreed to conduct interviews and bring the matter back to the Board with a recommendation
for appointment.

On December 16, 2010, Mr. Page returned to the BOCC with a recommendation for
appointment; however after further discussion with members of the Silver Springs Advisory
Board and the individual who had been recommended for appointment, the BOCC decided to
return the matter once again to the Advisory Board, so that an election by the citizens, in
compliance with its bylaws, could be held in order to select the appointee.

III.

ISSUE

Whether the Lyon County Board of County Commissioners violated NRS 241.033 by
discussing the character and/or competence of a person without giving that person statutory
notice.

4 The subject matter of the information Mr. Roberts offered to help with was not explicitly stated, but
perhaps it was related to the Lyon County Jail Committee which had been the subject of Mr. Newness’s previous
OML complaint. Commissioner Roberts served on the Jail Committee before it was dissolved by the BOCC in
the fall of 2010.
IV.

DISCUSSION AND ANALYSIS

First we must determine if Mr. Newness’s character or competence was the subject of the discussion. The key BOCC discussion of this matter has already been set out in this opinion.

NEVADA’S OPEN MEETING LAW MANUAL § 9.04 (10th ed. 2005), gives a general definition of the word “character” useful for considering this complaint. Character includes such personal traits as honesty, loyalty, integrity, reliability, and such other characteristics, good or bad, which make up one’s individual personality. In Op. Nev. Att’y Gen. No. 81–A (February 23, 1981), the Office of the Attorney General opined that the word encompassed that moral predisposition or habit or aggregate of ethical qualities, which is believed to attach to a person on the strength of the common opinion and report concerning him . . . a person’s fixed disposition or tendency, as evidenced to others by his habits of life, through the manifestation of which his general reputation for the possession of a character, good, or otherwise is obtained.

Commissioner Roberts’ comments were relevant to Mr. Newness’s character. His description of his reservations about Mr. Newness’s appointment revolved around Mr. Newness’s character. It is clear he felt Mr. Newness’s desire for appointment was “self-serving” and that he had failed to “do his homework” on the prior OML complaint. These comments concern personal traits. They are clearly character descriptions of an individual’s integrity or reliability. Finally, to insinuate that Mr. Newness’s self-serving character did not give him a warm and fuzzy feeling, that Mr. Newness was not someone he wanted to advise him regarding the general citizenry, is a comment about Mr. Newness’s reliability and truthfulness. Added to this speculation about Mr. Newness’s character was a comment that Mr. Newness might not be a team player.

It matters not that Commissioner Roberts prefaced his remarks with the caution that Mr. Newness’s application to the Silver Springs Advisory Board may be self-serving. His comments clearly inserted Mr. Newness’s character into the discussion. It caused the BOCC
to table the matter so that personal interviews would have to be conducted. Commissioner Roberts' comments concerned Mr. Newness's character.

Even though Commissioner Roberts' comments concerned Mr. Newness's character, the OML is not violated unless his comments caused the Board to redirect its agenda item to consider the character of Mr. Newness. NRS 241.033(1); OMLO 2005–10 (May 20, 2005); OMLO 2002–34 (August 2, 2002); accord OMLO 2006–04 (June 22, 2006). What is important for the application of notice requirements of NRS 241.033 is the focus of the meeting itself and review of what was actually discussed or considered by the public body to determine whether the comments were of such a nature that notice would be required under NRS 241.033. See OMLO 2002–24 (May 28, 2003); OMLO 2001–44 (September 18, 2001); OMLO 2003–18 (April 21, 2003); OMLO 2002–24 (May 28, 2003).

V.

CONCLUSION

Our prior opinions, which have considered the application of the notice provisions of NRS 241.033, when taken together and in consideration of the plain language of the statute, lead us to conclude that Commissioner Roberts' comments caused the BOCC to redirect the agenda item so that the focus of the discussion was Mr. Newness’s character. This was a violation of NRS 241.033. Commissioner Roberts' initial comments caused the redirection of the BOCC’s discussion of the item. The Board deliberated over the character issue eventually tabling the appointment over concern about Mr. Newness’s character. The act of tabling the appointment was analogous to an assessment of his character even though the assessment was inconclusive.

The BOCC did not act on the appointment, rather the matter was returned to the Silver Springs Advisory Body for election of two appointees by the citizens. The complainant is satisfied with this process and he is in agreement that no further action by this office is necessary other that this warning. We strongly caution this Board to carefully consider the ramifications of discussion of any person's character even if it is unintentional and even if it suddenly arises during any agenda item. Remember to stick to the agenda. The character of
any name submitted for appointment is relevant to the appointment, but the OML requires personal notice to the person five days before the item is discussed. In an abundance of caution anyone whose name appears on an agenda item, especially if it is subject to an appointment, should receive notice that their character or competence might be discussed. NRS 241.033.

DATED this 29th day of March, 2011.

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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 29th day of March, 2011, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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/s/ Carole Gourley
An Employee of the Office of the Attorney General
I. INTRODUCTION

This Open Meeting law (OML) complaint alleged that the Chair of the Douglas County Board of Commissioners (BOCC) engaged in serial communications with a quorum of Commissioners. The quorum allegedly deliberated and/or decided to ask for the resignation of a sitting Planning Commissioner (PC) all in violation of NRS 241.015(2) and NRS 241.030(5).

This office investigated the allegations in this complaint. The BOCC fully cooperated with our investigation as did the office of the Douglas County District Attorney (D.A). Initially, each Commissioner provided an affidavit to this office by and through the D.A.’s office. Further discovery in the form of face to face interviews was also undertaken. Each Commissioner made himself or herself available for interviews and then later, three Commissioners made themselves available for follow-up interviews.

II. FACTS

Complainant, Margaret Pross, alleged that a quorum of the BOCC deliberated toward a decision to remove her from the Douglas County Planning Commission at the BOCC’s January 3, 2011 meeting. Ms. Pross also alleged that the manner of the deliberation among the quorum showed it was done with specific intent to avoid the provisions of the OML.

The complaint alleged the Chairman of the BOCC, Mike Olson, asked her to resign her position on the PC in a December 7, 2010 telephone conversation. Ms. Pross alleged Mr. Olson asked her to resign or the BOCC would take action to remove her as they had
three votes necessary for that decision. Chairman Olson told her he did not support their position, but for the good of the County he asked her to resign.

Underlying Mr. Olson’s request for her resignation was Ms. Pross’s endorsement during the campaign leading up to the November election of two candidates for seats on the BOCC. Her letters were published in the Record Courier as letters to the editor. Neither individual she had endorsed won a seat in the general election. Nevertheless, Ms Pross alleged that Mr. Olson told her that Commissioners McDermid and Bonner (both won seats on the BOCC) could not be sure of her support from her seat on the PC because she had endorsed their opponents in the election. Mr. Olson told her they favored removing her from the PC.

III.
ISSUE

WHETHER A QUORUM OF THE BOCC MET SERIALLY AND DELIBERATED OR TOOK ACTION TO APPROVE THE CHAIR’S DECISION TO ASK A SITTING MEMBER OF THE PC TO RESIGN (VIOLATION OF NRS 241.015(2)).

IV.
FINDINGS OF FACT

Our investigation confirmed that Chairman Olson did request Ms. Pross’s resignation on December 7, 2010 from the PC to avoid what he characterized as the painful process of a public hearing. Mr. Olson told us that a public removal process would have divided the community, but he said in his affidavit that, “. . . the probability of Ms. Pross being removed was apparent.”

The certainty of Ms. Pross removal was “apparent” to Mr. Olson for three reasons. First, he thought newly elected Commissioner Lee Bonner would support her removal because he had been highly critical of Ms. Pross based on her letter to the editor endorsing his opponent. Mr. Bonner told Mr. Olson in an email that Ms. Pross had made grandiose personal attacks on him. He stated in that email that she should not be representing the county as a PC.
Secondly, Mr. Olson learned from a meeting with Nancy McDermid, who had been re-elected to the BOCC, that she too, favored asking Ms. Pross to resign to save the County from a potentially volatile public hearing. She also volunteered in her affidavit that she would not have voted to reappoint Ms. Pross in 2010, but for the support Ms. Pross had from the agricultural community.

The third reason motivating Mr. Olson’s decision to ask for Ms. Pross’s resignation was his view that Commissioner Lynn would support the removal. Mr. Olson told Ms. Pross on the telephone on December 7, 2010 that “they” had the three votes necessary to remove her from the PC even though he did not support their effort to remove her. When we questioned Mr. Olson about the meaning of “they” we learned that he believed Commissioner Greg Lynn would supply the third vote for removal. “They” meant Lynn, McDermid, and Bonner.

Mr. Olson’s assertion to Ms. Pross that “they” had three votes was based on what he believed to be obvious support for removal expressed in Lee Bonner’s email. He also had direct verbal support from Nancy McDermid regarding the removal. He believed that Greg Lynn would vote with Nancy McDermid since they “vote together every time” on county matters. Mr. Olson said his belief that Greg Lynn would vote with Nancy McDermid on this issue was solely based on observation because both he and Mr. Lynn stated that they had not discussed Ms. Pross’s removal prior to Mr. Olson’s call to her suggesting she resign.

Mr. Olson told outgoing Commissioner Dave Brady on December 7, 2010 following an agenda setting meeting, that he wanted to give him a “heads up” that he would be asking one of Mr. Brady’s supporters to resign from the Planning Commission. Mr. Brady wrote in his affidavit that he cautioned Mr. Olson not to take direction from other Commissioners on this issue. This conversation appeared to be limited to a courtesy “heads up” about the plan. Mr. Olson did not seek any advice from Mr. Brady. Mr. Brady was an outgoing Commissioner; he would leave office on January 1, 2011, two days before the new BOCC would meet for the first time.

The fifth Commissioner, Doug Johnson did not have any contact with Mr. Olson about the removal effort until after Mr. Olson had asked Ms. Pross to resign.
Mr. Olson stated he did not speak to Mr. Bonner after the election concerning Ms. Pross. Mr. Bonner’s affidavit stated that Mr. Olson did not respond to his pre-election email, nor did he speak with Mr. Olson about Ms. Pross’s removal until after Mr. Olson had asked Ms. Pross to resign.

But by December 15, 2010, Mr. Olson had learned from the D.A.’s office that the BOCC did not possess the power to remove Ms. Pross from her seat on the PC except for conduct amounting to malfeasance, neglect of duty, or inefficiency. Mr. Olson was told Ms. Pross’s letters to the editor did not subject her to removal for any of these reasons. On December 16, 2010 following a luncheon for outgoing Commissioner Dave Brady, Mr. Olson approached Ms. Pross for a short face-to-face conversation about his request that she resign. He stated in his affidavit that he told her then he had been wrong in asking for her resignation.

V.

DISCUSSION

The OML prohibits private deliberation and/or action by a quorum of a public body. Ms. Pross’s complaint alleged that a quorum deliberated secretly and planned to remove her from the PC and that they did it secretly to avoid the provisions of the OML.

For the following reasons we find that (1) a quorum of the BOCC did not deliberate or decide any matter related to the removal of Ms. Pross from the PC, and (2) what discussion did occur among the four Commissioners was not done with intent to avoid the OML.

A quorum of the BOCC did not physically meet before Mr. Olson called Ms. Pross to seek her resignation. There were contacts among three commissioners prior to Mr. Olson’s December 7, 2010 telephone call when he asked Ms. Pross to resign, but these contacts were all serial in nature. Mr. Olson was the serial messenger.
A serial or collective quorum is formed through a series of gatherings of members either face-to-face, and/or by telephone or other forms of electronic communication to deliberate toward a decision or to take action on any matter over which the public body has supervision, jurisdiction, control, or advisory power. NRS 241.015(2).\(^1\)

Critical to resolution of this complaint are the definitions of “deliberation” and “action.” It is necessary to apply these definitions to the facts in order to resolve the complaint.

Nevada’s OML Manual states: “if a majority of the members of a public body should gather, even informally, to deliberate toward a decision or to take any action on any matter over which the public body has supervision, control, jurisdiction, or advisory power, it must comply with the Open Meeting Law.” NEVADA’S OPEN MEETING LAW MANUAL § 5.02 (10th ed. 2005).

There is no definition of deliberation in NRS Chapter 241; however, the Nevada Supreme Court has supplied a definition. It is a process whereby public bodies “examine, weigh, and reflect upon the reasons for or against the choice. . . Deliberation thus connotes not only collective discussion, but also the collective acquisition or the exchange of facts preliminary to the ultimate decision.” See Dewey v. Redevelopment Agency of the City of Reno, 119 Nev. 87, 97, 64 P. 3d 1070, 1077 (2003) and Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968).

Action is defined in statute.\(^2\) Essentially action is taken when a quorum decides a

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\(^1\) NRS 241.015(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.

\(^2\) NRS 241.015 Definitions. As used in this chapter, unless the context otherwise requires:
1. “Action” means:
(a) A decision made by a majority of the members present during a meeting of a public body;
(b) A commitment or promise made by a majority of the members present during a meeting of a public body;
matter under its control or jurisdiction. Action also takes place whenever a quorum of a public body makes a commitment or promise with regard to a matter under its control or jurisdiction.

When the Nevada Supreme Court has considered whether gatherings are subject to the OML, it has required more than mere discussions of public business by members of a public body before it has determined that those discussions were subject to the OML. The scope of the OML’s definition of “meeting” is described in *Del Papa v. Board of Regents*.

In *Del Papa v. Board of Regents*, the Court looked at serial communications by members of a public body in some detail to determine whether a meeting had taken place. It held that:

> [a] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting. *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

The court further clarified the scope of the OML when it stated: “The constraints of the Open Meeting Law apply only where a quorum of a public body, *in its official capacity as a body*, deliberates toward a decision or makes a decision.” *Id.* 114 Nev. at 400, 956 P.2d at 778–779.

The *Del Papa* Court found that the Board of Regents acted in its official capacity because:

> [t]he Board utilized University resources, [and] because the advisory was drafted as an attempted statement of University policy, and because the Board took action on the draft, we hold that the Board acted in its official capacity as a public body. Thus, insofar as a quorum of the Board chose to take a position on the advisory, yea or nay, via a non-public vote, it violated the Open Meeting Law. *Del Papa v. Board of Regents*, 114 Nev. 388, 401, 956 P.2d 770, 779 (1998).

(c) If a public body may have a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body; or

(d) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.
The Court’s view that these facts showed that the Board of Regents’ actions constituted action in its official capacity is indicative of the scope of the concept of a public meeting. The most important fact for this case was the finding that the Board of Regents actually voted in private on a matter of University policy. Assuming that the issue of the removal of Ms. Pross from the PC implicated County control and jurisdiction, we still did not find any evidence that a quorum of the BOCC actually voted or made promises or commitments to Mr. Olson, which could be construed as acting in its official capacity. As the Del Papa court made clear, the OML does not prevent members of a public body from discussing public business or lobbying for votes. Our investigation revealed only one contact between Mr. Olson and Nancy McDermid where the discussion of removal of Ms. Pross approached deliberation about the necessity of removal and the process to accomplish it. Even if their conversation exceeded the strictures placed on public bodies under the OML, their conversation did not violate the OML because two members of the BOCC do not constitute a quorum.

Only if Mr. Olson created a collective or serial quorum with another member would the OML be implicated.

Our investigation revealed that Mr. Olson spoke with Commissioner Dave Brady prior to asking Ms. Pross to resign. But the facts of that conversation do not implicate the OML because Mr. Olson’s contact was merely a personal courtesy to Mr. Brady since it involved a political supporter from Mr. Brady’s campaign for a seat on the BOCC. Mr. Olsen did not seek Mr. Brady’s advice, nor did he engage him in a discussion of the merits of his plan. This contact simply did not rise to the level of deliberation, or action in an official capacity as members of the BOCC.

The contact with Lee Bonner occurred prior to the general election in November 2010. Mr. Olson did not respond to Mr. Bonner’s email at anytime nor did the two men meet or confer to discuss the removal of Ms. Pross from the PC. There was no contact of any kind with Commissioners Johnson and Lynn.

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Essentially, Mr. Olson’s claim that “they” had three votes to remove Ms. Pross was an indirect reference to Commissioners McDermid, Lynn, and Bonner. His claim was at best misguided, in that he acted unilaterally because he believed Ms. Pross would be removed in a during a public hearing unless he stepped in. At worst it was puffery, which did result in potential community embarrassment. He stated in his interviews that he thought he could, in his role as Chairman, save the community the embarrassment of a public hearing and vote on removal, if he secured Ms. Pross’s private resignation. His abortive plan was based on nothing more that one contact with Nancy McDermid and a hunch that Lee Bonner and Greg Lynn wanted to remove Ms. Pross from the PC.

VI.

CONCLUSION

Our investigation did not find that a quorum of Commissioners deliberated toward a decision or took action in furtherance of a plan by Chairman Olson to ask for the resignation of a sitting Planning Commissioner. Despite the contacts among three Commissioners, there is no evidence of intent to avoid the OML. NRS 241.015(2) and NRS 241.030(5).

DATED this 29th day of March, 2011.

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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 29th day of March, 2011, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of
DOUGLAS COUNTY BOARD OF COMMISSIONERS

Attorney General File No. 11-003
and
Attorney General File No. 11-004
OMLO NO. 11-003

I.

INTRODUCTION

These Open Meeting law (OML) complaints allege that at least four members of the Douglas County Board of Commissioners (BOCC) engaged in serial communications constituting deliberation and action with respect to the nominations and appointment of three new commissioners on the Douglas County Planning Commission (PC). It is alleged a quorum of the BOCC deliberated and/or decided to nominate and vote to appoint three new individuals to the PC in violation of NRS 241.015(2) and NRS 241.030(4)(e).

During our investigation of the allegations in these complaints, both the BOCC and the Douglas County’s Office of the District Attorney (D.A.) fully cooperated with our investigation. Initially, this office requested each Commissioner provide an affidavit in response to the allegations of the complaint by and through the D.A.’s office. There was further discovery in the form of face-to-face interviews. Each Commissioner made himself or herself available for interviews and then later, three Commissioners made themselves available for follow-up interviews.

II.

FACTS

Complainant Heather Howell alleged the BOCC appeared to have pre-arranged the process of nomination and selection of three new Planning Commissioners at its January 3, 2011 meeting because there was no discussion of the qualifications or merits of the candidates, yet four Commissioners voted together for the same three candidates previously

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nominated in Commissioner McDermid’s original omnibus motion. None of the three incumbent Planning Commissioners—all of whom applied for re-appointment—were nominated.

Additionally, it is alleged the video of the meeting supplied further evidence of a violation of NRS 241.015(2). Following Commissioner McDermid’s nomination of Jeremy Davidson and the 4–1 vote confirming him, Commissioner McDermid audibly whispered to Commissioner Lynn to “go next.” Later, when a third nomination was needed, she whispered to Commissioner Bonner to make the next nomination. Neither Commissioner Olson nor Commissioner Johnson interrupted the process with their own nomination, nor does it appear they were asked to do so by Commissioner McDermid.

It is alleged Commissioner McDermid’s public urging only to Commissioner Lynn and Bonner is further evidence of a pre-meeting arrangement among those Commissioners. Complainant claims this allegation is substantiated by the audio of the Board meeting during the discussion of item #12.

III.

ISSUES

Whether a quorum of the BOCC met or serially gathered to form a consensus regarding the nominations and appointment of the Planning Commissioners in violation of the OML.

IV.

FINDINGS OF FACT

The PC is not an elected Board. The BOCC has authority to appoint individuals to seats on the PC. In January of 2011, ten candidates sought appointment to the PC. Three of these candidates were incumbents seeking re-appointment.

When item #12 on the BOCC January 3, 2011 agenda was called, Chairman Olson asked for public comment. Hearing none, he returned the matter to the Commission. Commissioner McDermid led the discussion when she began by saying, “It’s a new year and
we have a new board. I think we need a fresh perspective. I would nominate for appointment to the Planning Commission—Jeremy Davidson, Frank Goedecke, and Donald Miner.”

After the D.A. informed Commissioner McDermid that her nomination of three people in one motion was improper, Commissioner McDermid made another motion to nominate a single individual; however, that individual was not one of the three persons seeking reappointment. There was a second to her motion and then the Commission voted 4–1 to approve the nomination. But, before the vote, Commissioner Johnson expressed a view contrary to the idea of replacing three sitting Commissioners whose work he praised. He thought replacing them would send a wrong message to the public. Commissioner Lynn countered that he felt involving as many people as possible in community service was a benefit to the County.

Following the approval of Commissioner McDermid’s motion to appoint Jeremy Davidson, she turned to Commissioner Lynn, who sat two seats away between Commissioner Johnson and Commissioner Bonner, and whispered that he should “go next.” Commissioner Lynn responded with his own motion to appoint Frank Goedecke. Before this motion was voted upon, Commissioner Johnson once again commented that it appeared to him the Commission was sending the wrong message to the community. The vote in favor of Goedecke was 4–1.

Commissioner McDermid then whispered to Commissioner Bonner, sitting next to her, to go next. He nominated Don Miner who was also approved by a vote of 4–1. All three votes were the same—only Commissioner Johnson voted nay.

Neither Chairman Olson nor Commissioner Johnson nominated anyone.

There was no discussion of any of the applicants at any time during the BOCC’s consideration of Item #12. Commissioners Lynn and McDermid each offered an explanation for the replacement of three sitting Commissioners. Commissioner Lynn stated he thought replacement would involve more people in local government. Commissioner McDermid stated that new commissioners would bring a new perspective to the upcoming Douglas County Master Plan update with a new perspective.
V.

DISCUSSION AND ANALYSIS

Each BOCC Commissioner admitted during interviews that he or she had received OML training and were aware that, when a quorum of a public body meets together or gathers serially by electronic means to discuss public business, they have violated the OML, unless the meeting has been noticed in compliance with the OML.

Our analysis begins with Commissioner McDermid, her affidavit, and our supplementary interview with her. Commissioner McDermid’s plan to nominate three new PC Commissioners began during the campaign before the election. She said that her supporters encouraged her to go in a “new direction,” and that she and Lee Bonner agreed on many ideas during the campaign.

Commissioner McDermid described 2-on-1 (two Commissioners and a staff member) meetings with other Commissioners. These meetings are used to go over agenda items and even discuss controversial matters. They might discuss matters and each other’s views. She said they might ask each other, “do you see it this way”? She was adamant that she never met with another Commissioner outside the 2-on-1 meetings about the appointments to the PC.

She met with Commissioner Lynn prior to the January 3, 2011 BOCC meeting in a 2-on-1 meeting with the County Manager. She told Commissioner Lynn that she wanted to appoint Jeremy Davidson, Frank Godecke, and Don Miner to the PC and she informed him it should be “all or none” with regard to the appointments. She recalled that Commissioner Lynn concurred with the “all or none” approach.

Commissioner Lynn recalled Commissioner McDermid’s desire to replace three sitting Commissioners to alter the dynamic of that body. Commissioner Lynn's primary interest with new appointments was to boost the representation of the agricultural and ranching community. He also said he heard there was interest in appointing Don Miner to the PC because of his experience with the County master plan.

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Commissioner Lynn also recalled a telephone call from Commissioner Johnson shortly before the January 3, 2011 BOCC meeting. Johnson was concerned about his reappointment to the Carson Water Sub Conservancy District, since he serves as chairman. Commissioner Lynn recalled that Commissioner Johnson also inquired about the PC appointments. Commissioner Lynn recalled telling Commissioner Johnson there was a desire for three new Planning Commissioners. Commissioner Johnson denied that Commissioner Lynn told him there was a desire to replace the sitting Commissioners. Commissioner Johnson’s affidavit stated that he did mention the PC appointments to Commissioner Lynn, but he said Commissioner Lynn told him it would appear to be vindictive to replace Commissioner Howell. Commissioner Johnson said Commissioner Lynn’s comment about Commissioner Howell reassured him Commissioner Lynn was comfortable with sitting Commissioner reappointments. He said he was caught off guard at the meeting the next day by the appointments of three new Commissioners. Both men adamantly stayed with their initial recollection of that telephone call even after being informed of the other’s recollection.

Commissioner McDermid stated in her interview that Commissioner Lynn did not tell her that Johnson was aware of her plan to replace three sitting PC Commissioners.

Commissioner McDermid had wanted to discuss an idea she had for “recycling” the three sitting PC Commissioners to other county-wide advisory bodies. She said this discussion would have gone a long way to explain why there was no discussion of the merits of the applicants when item #12 was called. She had anticipated discussing appointments to other county boards for the three replaced PC Commissioners during item #9; however, Commissioner Lynn unexpectedly pulled the item from the agenda. It was continued to another date. Because item #9 had been pulled, she was unable to discuss her plan.

She also blamed the lack of discussion of the merits of the PC applicants on Commissioner Johnson’s impassioned pleas on behalf of the sitting commissioners. She said his comments “circumvented the Board’s ability to discuss anything we would have said after that.”
Commissioner McDermid stated she discussed the PC appointments only with Commissioner Lynn. She stated there was no private arrangement among Commissioners Lynn, Bonner, Olson, and herself to appoint three new PC Commissioners despite the way the process looked to some members of the public. When asked why she took charge of the appointment process, turning to Commissioner Lynn and then Commissioner Bonner and urging them to “go next,” she said she felt it was her duty as Vice Chairman to make the Chair look good and move the process along. She said she only wanted to be helpful. She said any of the Commissioners could have nominated any of the ten applicants, but there was no pre-arrangement among them.

Commissioner Bonner’s affidavit states that prior to the January 3, 2011 meeting he spoke only with Commissioner Olson about the upcoming three PC appointments. That conversation was at a 2-on-1 meeting in the County Manager’s office shortly before the January 3, 2011 BOCC meeting. Commissioner Bonner said in his affidavit that he “voiced his preference” for three new PC appointments to be—Eric Reiman, Don Miner, and Jeremy Davidson. He also recalled asking how to choose one sitting commissioner should that be necessary. He said that once the appointment process began he “was in basic agreement with those Commissioner McDermid nominated.” He nominated Don Miner at the meeting so that the BOCC would look united.

Commissioner Olson did not recall the substance of the 2-on-1 meeting with Commissioner Bonner the same way as Commissioner Bonner did. Commissioner Olson remembered the meeting, but averred he did not speak to any other Commissioner about PC appointments. He recalled Commissioner Bonner stating he had a “concern” with one of the sitting PC Commissioners and then advised Commissioner Bonner to call that Commissioner. Commissioner Olson stated that there was no other discussion with Commissioner Bonner about PC appointments.

Commissioner Olson anticipated that the sense of the Board was to replace the sitting Commissioners. He voted with them to convey a united Board. He stated in his affidavit that he had independently concluded that Don Miner, Frank Godecke, and Jeremy Davidson
should be appointed based on his contact with each of them during the month of December. He said he rated these three applicants based on what they could bring to a new PC, but he did not have any issues with the sitting Commissioners.

When both Commissioners were given the opportunity to clarify these conflicting recollections, Commissioner Bonner recanted his recollection that he discussed three named individuals with Commissioner Olson in a 2-on-1 meeting. Even when asked to review his affidavit, he was adamant that he never discussed the three named individuals with Commissioner Olson.

Commissioner Lynn began his affidavit noting he was aware after the election there was an “appetite” amongst Board members for a change on the Planning Commission. He continued saying that “it is not difficult for Board members to divine the mood of their colleagues, either through County Manager briefings or other incidental communication at Board meetings or other functions where two Commissioners may be present.”

Commissioner Lynn claimed to have discussed the appointment of three new PC Commissioners only with Commissioner McDermid in a 2-on-1 meeting in County Manager Brown’s office. He expressed his recollection that there was a desire to replace all three sitting Commissioners to “alter the dynamic of that body to reflect the alteration of the dynamic of the Commission itself.”

Commissioner Lynn did not contact any of the applicants for PC seats. His view was that more community involvement in local government is beneficial. He said that PC members “tend to forget the BOCC is the ultimate arbiter. The longer they serve on the Planning Commission the more forgetful of that concept they seem to become.”

VI.

CONCLUSION

If a quorum of a public body gathers to deliberate toward a decision or take action on any matter within its control or jurisdiction with the intent to avoid the provisions of the OML, it is a violation of the OML, unless the meeting is noticed in accordance with the OML.²

² NRS 241.015(2). “Meeting”:
(a) Except as otherwise provided in paragraph (b), means:
After an extensive investigation of the facts of the BOCC’s appointment of three new PC Commissioners, we cannot find that a quorum of the BOCC violated the provisions of NRS 241.015(2).

Our opinion is based on our conclusion that the evidence of a quorum of three commissioners deliberating or taking action is very thin. What we did find—and it was admitted by the Commissioners involved—was that Commissioners McDermid and Lynn did directly discuss the appointment of three new PC commissioners during a 2-on-1 meeting with the County Manager. There was evidence that Commissioner Lynn and Commissioner Johnson discussed the PC appointments during a telephone conversation the night before the January 3, 2011 meeting, but the men do not agree with each other’s recollection.

Even if we assume that Commissioner Lynn told Commissioner Johnson there was a desire to appoint three new commissioners although he did not have any favorites, this statement standing alone without more evidence of that suggests there was polling of the favorites by the two men, does not mean the conversation was deliberative, or there was any commitment or promise made constituting action.

The other two Commissioners, Bonner and Olson, also met in a 2-on-1 with the County Manager and they too discussed the PC appointments. Commissioner Bonner and Commissioner Olson’s recollections also do not agree; however, even if Commissioner Bonner’s recollection that he identified his favorite three applicants to Olson is true, still there is no other evidence that this conversation was communicated to any other Commissioner prior to the appointments on January 3, 2011. In other words, there is still no evidence of a quorum of Commissioners gathered serially or collectively to deliberate or take action on the appointments outside the public meeting on January 3, 2011.

(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.
Nevada’s Open Meeting law manual states: “if a majority of the members of a public body should gather, even informally, to deliberate toward a decision or to take any action on any matter over which the public body has supervision, control, jurisdiction, or advisory power, it must comply with the Open Meeting Law." NEVADA’S OPEN MEETING LAW MANUAL § 5.02 (10 ed. 2005)

In Del Papa v. Board of Regents, the Court looked at serial communications by members of a public body in some detail to determine whether a meeting had taken place. It held that:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.


The court further clarified the scope of the OML when it stated: “The constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.” Id. 114 Nev. at 400, 956 P.2d at 778–779.

There is no evidence that the BOCC intentionally tried to avoid the OML despite the fact that all five members knew or felt there was a desire to replace the sitting Commissioners. We did not find any evidence that a quorum of the BOCC actually voted, or made promises or
commitments to each other, which could be construed as acting in its official capacity in violation of the OML.

DATED this 19th day of April, 2011.

CATHERINE CORTEZ MASTO
Attorney General

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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 19th day of April, 2011, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

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__________________________  
/s/ Carole A. Gourley  
An Employee of the Office of the Attorney General
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of
DOUGLAS COUNTY BOARD OF COMMISSIONERS

Attorney General File No. 11-003
Attorney General File No. 11-004

OMLO NO. 11-003

I.
INTRODUCTION

These Open Meeting law (OML) complaints allege that at least four members of the Douglas County Board of Commissioners (BOCC) engaged in serial communications constituting deliberation and action with respect to the nominations and appointment of three new commissioners on the Douglas County Planning Commission (PC). It is alleged a quorum of the BOCC deliberated and/or decided to nominate and vote to appoint three new individuals to the PC in violation of NRS 241.015(2) and NRS 241.030(4)(e).

During our investigation of the allegations in these complaints, both the BOCC and the Douglas County’s Office of the District Attorney (D.A.) fully cooperated with our investigation. Initially, this office requested each Commissioner provide an affidavit in response to the allegations of the complaint by and through the D.A.’s office. There was further discovery in the form of face-to-face interviews. Each Commissioner made himself or herself available for interviews and then later, three Commissioners made themselves available for follow-up interviews.

II.
FACTS

Complainant Heather Howell alleged the BOCC appeared to have pre-arranged the process of nomination and selection of three new Planning Commissioners at its January 3, 2011 meeting because there was no discussion of the qualifications or merits of the candidates, yet four Commissioners voted together for the same three candidates previously

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nominated in Commissioner McDermid’s original omnibus motion. None of the three incumbent Planning Commissioners—all of whom applied for re-appointment—were nominated.

Additionally, it is alleged the video of the meeting supplied further evidence of a violation of NRS 241.015(2). Following Commissioner McDermid’s nomination of Jeremy Davidson and the 4–1 vote confirming him, Commissioner McDermid audibly whispered to Commissioner Lynn to “go next.” Later, when a third nomination was needed, she whispered to Commissioner Bonner to make the next nomination. Neither Commissioner Olson nor Commissioner Johnson interrupted the process with their own nomination, nor does it appear they were asked to do so by Commissioner McDermid.

It is alleged Commissioner McDermid’s public urging only to Commissioner Lynn and Bonner is further evidence of a pre-meeting arrangement among those Commissioners. Complainant claims this allegation is substantiated by the audio of the Board meeting during the discussion of item #12.

III.

ISSUES

Whether a quorum of the BOCC met or serially gathered to form a consensus regarding the nominations and appointment of the Planning Commissioners in violation of the OML.

IV.

FINDINGS OF FACT

The PC is not an elected Board. The BOCC has authority to appoint individuals to seats on the PC. In January of 2011, ten candidates sought appointment to the PC. Three of these candidates were incumbents seeking re-appointment.

When item #12\(^1\) on the BOCC January 3, 2011 agenda was called, Chairman Olson asked for public comment. Hearing none, he returned the matter to the Commission. Commissioner McDermid led the discussion when she began by saying, “It’s a new year and

\(^1\) 12. Discussion and possible action on appointments to the PC.
we have a new board. I think we need a fresh perspective. I would nominate for appointment to the Planning Commission—Jeremy Davidson, Frank Goedecke, and Donald Miner.”

After the D.A. informed Commissioner McDermid that her nomination of three people in one motion was improper, Commissioner McDermid made another motion to nominate a single individual; however, that individual was not one of the three persons seeking reappointment. There was a second to her motion and then the Commission voted 4–1 to approve the nomination. But, before the vote, Commissioner Johnson expressed a view contrary to the idea of replacing three sitting Commissioners whose work he praised. He thought replacing them would send a wrong message to the public. Commissioner Lynn countered that he felt involving as many people as possible in community service was a benefit to the County.

Following the approval of Commissioner McDermid’s motion to appoint Jeremy Davidson, she turned to Commissioner Lynn, who sat two seats away between Commissioner Johnson and Commissioner Bonner, and whispered that he should “go next.” Commissioner Lynn responded with his own motion to appoint Frank Goedecke. Before this motion was voted upon, Commissioner Johnson once again commented that it appeared to him the Commission was sending the wrong message to the community. The vote in favor of Goedecke was 4–1.

Commissioner McDermid then whispered to Commissioner Bonner, sitting next to her, to go next. He nominated Don Miner who was also approved by a vote of 4–1. All three votes were the same—only Commissioner Johnson voted nay.

Neither Chairman Olson nor Commissioner Johnson nominated anyone.

There was no discussion of any of the applicants at any time during the BOCC’s consideration of Item #12. Commissioners Lynn and McDermid each offered an explanation for the replacement of three sitting Commissioners. Commissioner Lynn stated he thought replacement would involve more people in local government. Commissioner McDermid stated that new commissioners would bring a new perspective to the upcoming Douglas County Master Plan update with a new perspective.
V.

DISCUSSION AND ANALYSIS

Each BOCC Commissioner admitted during interviews that he or she had received OML training and were aware that, when a quorum of a public body meets together or gathers serially by electronic means to discuss public business, they have violated the OML, unless the meeting has been noticed in compliance with the OML.

Our analysis begins with Commissioner McDermid, her affidavit, and our supplementary interview with her. Commissioner McDermid’s plan to nominate three new PC Commissioners began during the campaign before the election. She said that her supporters encouraged her to go in a “new direction,” and that she and Lee Bonner agreed on many ideas during the campaign.

Commissioner McDermid described 2-on-1 (two Commissioners and a staff member) meetings with other Commissioners. These meetings are used to go over agenda items and even discuss controversial matters. They might discuss matters and each other’s views. She said they might ask each other, “do you see it this way”? She was adamant that she never met with another Commissioner outside the 2-on-1 meetings about the appointments to the PC.

She met with Commissioner Lynn prior to the January 3, 2011 BOCC meeting in a 2-on-1 meeting with the County Manager. She told Commissioner Lynn that she wanted to appoint Jeremy Davidson, Frank Godecke, and Don Miner to the PC and she informed him it should be “all or none” with regard to the appointments. She recalled that Commissioner Lynn concurred with the “all or none” approach.

Commissioner Lynn recalled Commissioner McDermid’s desire to replace three sitting Commissioners to alter the dynamic of that body. Commissioner Lynn's primary interest with new appointments was to boost the representation of the agricultural and ranching community. He also said he heard there was interest in appointing Don Miner to the PC because of his experience with the County master plan.
Commissioner Lynn also recalled a telephone call from Commissioner Johnson shortly before the January 3, 2011 BOCC meeting. Johnson was concerned about his reappointment to the Carson Water Sub Conservancy District, since he serves as chairman. Commissioner Lynn recalled that Commissioner Johnson also inquired about the PC appointments. Commissioner Lynn recalled telling Commissioner Johnson there was a desire for three new Planning Commissioners. Commissioner Johnson denied that Commissioner Lynn told him there was a desire to replace the sitting Commissioners. Commissioner Johnson’s affidavit stated that he did mention the PC appointments to Commissioner Lynn, but he said Commissioner Lynn told him it would appear to be vindictive to replace Commissioner Howell. Commissioner Johnson said Commissioner Lynn’s comment about Commissioner Howell reassured him Commissioner Lynn was comfortable with sitting Commissioner reappointments. He said he was caught off guard at the meeting the next day by the appointments of three new Commissioners. Both men adamantly stayed with their initial recollection of that telephone call even after being informed of the other’s recollection.

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should be appointed based on his contact with each of them during the month of December.

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did not have any issues with the sitting Commissioners.

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recollections, Commissioner Bonner recanted his recollection that he discussed three named
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CONCLUSION

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Our opinion is based on our conclusion that the evidence of a quorum of three commissioners deliberating or taking action is very thin. What we did find—and it was admitted by the Commissioners involved—was that Commissioners McDermid and Lynn did directly discuss the appointment of three new PC commissioners during a 2-on-1 meeting with the County Manager. There was evidence that Commissioner Lynn and Commissioner Johnson discussed the PC appointments during a telephone conversation the night before the January 3, 2011 meeting, but the men do not agree with each other’s recollection.

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(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.

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commitments to each other, which could be construed as acting in its official capacity in
violation of the OML.

DATED this 19th day of April, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ George H. Taylor
GEORGE H. TAYLOR
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CERTIFICATE OF MAILING

I hereby certify that I am employed by the Office of the Attorney General of the State of Nevada, and that on this 19th day of April, 2011, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Heather Howell
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