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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).<sup>1</sup>

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.<sup>2</sup> 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

<sup>1</sup> **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.

<sup>2</sup> See AG File No. 10–044; complaint filed against the BOCC’s standing committee–Jail Committee.

1 Board.<sup>3</sup> Mr. Charles Newness was one of two individuals selected by the Silver Springs  
2 Advisory Board and submitted to the BOCC for appointment. It is the BOCC that appoints  
3 members to county advisory boards. The relevant portion of the audio of the discussion of the  
4 proposed appointments during the December 2, 2010 BOCC meeting, item #12, is set forth  
5 below. Chairman Joe Mortensen called item #12 to the floor. Commissioner Roberts was the  
6 first Commissioner to speak:

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

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

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

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

23 **Commissioner Roberts:** “Yeah, I guess you’d have to talk to  
24 them. Yeah, I might not have a problem if I were able to talk to  
25 him, I don’t take this lightly, I’ve never challenged any appointment  
26 to an advisory council, but the verbiage in his complaint was  
27

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28 <sup>3</sup> 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.”



1 IV.

2 **DISCUSSION AND ANALYSIS**

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

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

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

26 It matters not that Commissioner Roberts prefaced his remarks with the caution that  
27 Mr. Newness's application to the Silver Springs Advisory Board *may be self-serving*. His  
28 comments clearly inserted Mr. Newness's character into the discussion. It caused the BOCC

1 to table the matter so that personal interviews would have to be conducted. Commissioner  
2 Roberts' comments concerned Mr. Newness's character.

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

12 **V.**

13 **CONCLUSION**

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

23 The BOCC did not act on the appointment, rather the matter was returned to the Silver  
24 Springs Advisory Body for election of two appointees by the citizens. The complainant is  
25 satisfied with this process and he is in agreement that no further action by this office is  
26 necessary other than this warning. We strongly caution this Board to carefully consider the  
27 ramifications of discussion of any person's character even if it is unintentional and even if it  
28 suddenly arises during any agenda item. Remember to stick to the agenda. The character of



1 **CERTIFICATE OF MAILING**

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

5 Charles Newness  
6 1325 Cooney Drive  
7 Silver Springs, Nevada 89429

8 Joe Mortensen, Chair  
9 Lyon County Board of Commissioners  
10 680 Miller Lane  
11 Fernley, Nevada 89408

12 Chuck Roberts, Vice Chair  
13 Lyon County Board of Commissioners  
14 680 Miller Lane  
15 Fernley, Nevada 89408

16 Phyllis Hunewill  
17 Lyon County Board of Commissioners  
18 680 Miller Lane  
19 Fernley, Nevada 89408

20 Ray Fierro  
21 Lyon County Board of Commissioners  
22 409 Keystone Drive  
23 Dayton, Nevada 89403

24 Larry McPherson  
25 Lyon County Board of Commissioners  
26 680 Miller Lane  
27 Fernley, Nevada 89408

28 Robert L. Auer  
Lyon County District Attorney  
801 Overland Loop, Suite 308  
Dayton, Nevada 89403

\_\_\_\_\_  
/s/ Carole Gourley  
An Employee of the Office of  
the Attorney General



1 three votes necessary for that decision. Chairman Olson told her he did not support their  
2 position, but for the good of the County he asked her to resign.

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

### 11 III.

#### 12 ISSUE

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

### 16 IV.

#### 17 FINDINGS OF FACT

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

23 The certainty of Ms. Pross removal was "apparent" to Mr. Olson for three reasons.  
24 First, he thought newly elected Commissioner Lee Bonner would support her removal  
25 because he had been highly critical of Ms. Pross based on her letter to the editor endorsing  
26 his opponent. Mr. Bonner told Mr. Olson in an email that Ms. Pross had made grandiose  
27 personal attacks on him. He stated in that email that she should not be representing the  
28 county as a PC.

1           Secondly, Mr. Olson learned from a meeting with Nancy McDermid, who had been  
2 re-elected to the BOCC, that she too, favored asking Ms. Pross to resign to save the County  
3 from a potentially volatile public hearing. She also volunteered in her affidavit that she would  
4 not have voted to reappoint Ms. Pross in 2010, but for the support Ms. Pross had from the  
5 agricultural community.

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

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

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

27           The fifth Commissioner, Doug Johnson did not have any contact with Mr. Olson about  
28 the removal effort until after Mr. Olson had asked Ms. Pross to resign.

1 Mr. Olson stated he did not speak to Mr. Bonner after the election concerning  
2 Ms. Pross. Mr. Bonner's affidavit stated that Mr. Olson did not respond to his pre-election  
3 email, nor did he speak with Mr. Olson about Ms. Pross's removal until after Mr. Olson had  
4 asked Ms. Pross to resign.

5 But by December 15, 2010, Mr. Olson had learned from the D.A.'s office that the BOCC  
6 did not possess the power to remove Ms. Pross from her seat on the PC except for conduct  
7 amounting to malfeasance, neglect of duty, or inefficiency. Mr. Olson was told Ms. Pross's  
8 letters to the editor did not subject her to removal for any of these reasons. On December 16,  
9 2010 following a luncheon for outgoing Commissioner Dave Brady, Mr. Olson approached  
10 Ms. Pross for a short face-to-face conversation about his request that she resign. He stated in  
11 his affidavit that he told her then he had been wrong in asking for her resignation.

12 **V.**

13 **DISCUSSION**

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

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

20 A quorum of the BOCC did not physically meet before Mr. Olson called Ms. Pross to  
21 seek her resignation. There were contacts among three commissioners prior to Mr. Olson's  
22 December 7, 2010 telephone call when he asked Ms. Pross to resign, but these contacts were  
23 all serial in nature. Mr. Olson was the serial messenger.

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1 A serial or collective quorum is formed through a series of gatherings of members  
2 either face-to-face, and/or by telephone or other forms of electronic communication to  
3 deliberate toward a decision or to take action on any matter over which the public body has  
4 supervision, jurisdiction, control, or advisory power. NRS 241.015(2).<sup>1</sup>

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

7 Nevada’s OML Manual states: “if a majority of the members of a public body should  
8 gather, even informally, to deliberate toward a decision or to take any action on any matter  
9 over which the public body has supervision, control, jurisdiction, or advisory power, it must  
10 comply with the Open Meeting Law.” NEVADA’S OPEN MEETING LAW MANUAL § 5.02 (10th ed.  
11 2005).

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

19 Action is defined in statute.<sup>2</sup> Essentially action is taken when a quorum decides a  
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21 <sup>1</sup> NRS 241.015(2). “Meeting”:

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

22 (1) The gathering of members of a public body at which a quorum is present to deliberate toward a  
23 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:

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

25 (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.

26 <sup>2</sup> **NRS 241.015 Definitions.** As used in this chapter, unless the context otherwise requires:

27 1. “Action” means:

(a) A decision made by a majority of the members present during a meeting of a public body;

28 (b) A commitment or promise made by a majority of the members present during a meeting of a public  
body;

1 matter under its control or jurisdiction. Action also takes place whenever a quorum of a public  
2 body makes a commitment or promise with regard to a matter under its control or jurisdiction.

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

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

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

20 The court further clarified the scope of the OML when it stated: "The constraints of the  
21 Open Meeting Law apply only where a quorum of a public body, *in its official capacity as a*  
22 *body*, deliberates toward a decision or makes a decision." *Id.* 114 Nev. at 400, 956 P.2d at  
23 778–779.

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

26 [t]he Board utilized University resources, [and] because the  
27 advisory was drafted as an attempted statement of University  
28 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).

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(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.

1 The Court's view that these facts showed that the Board of Regents' actions  
2 constituted action in its official capacity is indicative of the scope of the concept of a public  
3 meeting. The most important fact for this case was the finding that the Board of Regents  
4 actually voted in private on a matter of University policy. Assuming that the issue of the  
5 removal of Ms. Pross from the PC implicated County control and jurisdiction, we still did not  
6 find any evidence that a quorum of the BOCC actually voted or made promises or  
7 commitments to Mr. Olson, which could be construed as acting in its official capacity. As the  
8 *Del Papa* court made clear, the OML does not prevent members of a public body from  
9 discussing public business or lobbying for votes. Our investigation revealed only one contact  
10 between Mr. Olson and Nancy McDermid where the discussion of removal of Ms. Pross  
11 approached deliberation about the necessity of removal and the process to accomplish it.  
12 Even if their conversation exceeded the strictures placed on public bodies under the OML,  
13 their conversation did not violate the OML because two members of the BOCC do not  
14 constitute a quorum.

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

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

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

28 ///







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

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

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

15 **III.**

16 **ISSUES**

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

20 **IV.**

21 **FINDINGS OF FACT**

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

25 When item #12<sup>1</sup> on the BOCC January 3, 2011 agenda was called, Chairman Olson  
26 asked for public comment. Hearing none, he returned the matter to the Commission.  
27 Commissioner McDermid led the discussion when she began by saying, “It's a new year and  
28

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<sup>1</sup> 12. Discussion and possible action on appointments to the PC.

1 we have a new board. I think we need a fresh perspective. I would nominate for appointment  
2 to the Planning Commission— Jeremy Davidson, Frank Goedecke, and Donald Miner.”

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

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

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

22 Neither Chairman Olson nor Commissioner Johnson nominated anyone.

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

1 V.

2 **DISCUSSION AND ANALYSIS**

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

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

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

18 She met with Commissioner Lynn prior to the January 3, 2011 BOCC meeting in a  
19 2-on-1 meeting with the County Manager. She told Commissioner Lynn that she wanted to  
20 appoint Jeremy Davidson, Frank Godecke, and Don Miner to the PC and she informed him it  
21 should be "all or none" with regard to the appointments. She recalled that Commissioner Lynn  
22 concurred with the "all or none" approach.

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

28 ///

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

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

17 Commissioner McDermid had wanted to discuss an idea she had for "recycling" the  
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23 **VI.**

24 **CONCLUSION**

25 If a quorum of a public body gathers to deliberate toward a decision or take action on  
26 any matter within its control or jurisdiction with the intent to avoid the provisions of the OML, it  
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<sup>2</sup> NRS 241.015(2). “Meeting”:  
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25 (1) The gathering of members of a public body at which a quorum is present to deliberate toward a  
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27 advisory power.

28 (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.

1 Nevada’s Open Meeting law manual states: “if a majority of the members of a public  
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3 any matter over which the public body has supervision, control, jurisdiction, or advisory power,  
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matter in a public meeting.

14 *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

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19 There is no evidence that the BOCC intentionally tried to avoid the OML despite the  
20 fact that all five members knew or felt there was a desire to replace the sitting Commissioners.  
21 We did not find any evidence that a quorum of the BOCC actually voted, or made promises or

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

3 DATED this 19th day of April, 2011.

4 CATHERINE CORTEZ MASTO  
5 Attorney General

6  
7 By:                   /s/ George H. Taylor                    
8 GEORGE H. TAYLOR  
9 Senior Deputy Attorney General  
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1 nominated in Commissioner McDermid's original omnibus motion. None of the three  
2 incumbent Planning Commissioners—all of whom applied for re-appointment—were  
3 nominated.

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

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

### 15 III.

### 16 ISSUES

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

### 20 IV.

### 21 FINDINGS OF FACT

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

25 When item #12<sup>1</sup> on the BOCC January 3, 2011 agenda was called, Chairman Olson  
26 asked for public comment. Hearing none, he returned the matter to the Commission.  
27 Commissioner McDermid led the discussion when she began by saying, “It's a new year and  
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<sup>1</sup> 12. Discussion and possible action on appointments to the PC.

1 we have a new board. I think we need a fresh perspective. I would nominate for appointment  
2 to the Planning Commission— Jeremy Davidson, Frank Goedecke, and Donald Miner.”

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

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

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

22 Neither Chairman Olson nor Commissioner Johnson nominated anyone.

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

1 V.

2 **DISCUSSION AND ANALYSIS**

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

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

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

18 She met with Commissioner Lynn prior to the January 3, 2011 BOCC meeting in a  
19 2-on-1 meeting with the County Manager. She told Commissioner Lynn that she wanted to  
20 appoint Jeremy Davidson, Frank Godecke, and Don Miner to the PC and she informed him it  
21 should be "all or none" with regard to the appointments. She recalled that Commissioner Lynn  
22 concurred with the "all or none" approach.

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

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

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

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3 DATED this 19th day of April, 2011.

4 CATHERINE CORTEZ MASTO  
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6  
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