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OFFICE OF THE ATTORNEY GENERAL

555 East Washington Avenue, Suite 3900
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February 2, 2022

Via Certified and Email

Denell Hahn
Black Mountain Neighborhood Association
631 East Fairway Road
Henderson, Nevada 89015
Email: [REDACTED]

**Re: Open Meeting Law Complaint, OAG File No. 13897-378,
Henderson City Council and Planning Commission**

Dear Mr. Hahn:

The Office of the Attorney General (OAG) is in receipt of your complaint alleging violations of the Open Meeting Law (OML) by the Henderson City Council and the Henderson City Planning Commission (collectively, Respondents) regarding private briefings that occurred in February and March, 2020.

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. Nevada Revised Statutes (NRS) 241.037; NRS 241.039; NRS 241.040. In response to your complaints, the OAG reviewed your complaint and attachments; Respondents' response and attachments, including declarations from all City Council and Planning Commission members; the agendas, recordings and minutes of the Planning Commission's May 18, 2020 meeting and the City Council's June 2, 2020 meeting; and spoke to the witness listed on the Complaint.

FACTUAL BACKGROUND

Respondents are "public bodies" as defined in NRS 241.015(4) and subject to the OML. The City Council consists of five elected members, including the Henderson City Mayor, and the Planning Commission consists of seven members appointed by the City Council members and the Mayor.

On February 18, 2020, two City Council members and two Planning Commission members attended a briefing by the developer of a proposed project at the Black Mountain Golf and Country Club. On February 19, 2020, one City Council member and

two Planning Commission members attended a similar briefing. On March 10, 2020, the Mayor, one City Council member and three Planning Commission members attended a third briefing on the project. No members of either public body attended more than one of the briefings.

During the briefings at issue, the developer made a presentation and offered an opportunity for City Council and Planning Commission members to ask questions. Each City Council and Planning Commission member stated that they did not discuss their opinions, weigh or reflect upon the reasons for or against the project with any other City Council or Planning Commission members in the time period between the first briefing on February 18, 2020 and their respective public meetings on the issue in May and June, 2020. They further stated that they did not discuss how they planned to vote on the proposal with other members or staff during the same time period.

On March 11, 2020, the Director of Community Development for the City sent a letter to the developer outlining revisions to the planned development that the City's Community Development staff would like to see and stating that staff would support the development plan in front of the City Council and Planning Commission if those revisions were made.

Some time after the briefings at issue, the Black Mountain Neighborhood Association requested a meeting with the City Council and Planning Commission to present their views on the development, but were declined.

On May 18, 2020, the Planning Commission held a public meeting via virtual means. The developer gave a presentation on the planned development and then the Planning Commission received public comment specific to the development item, lasting half an hour. Public members were able to submit written comments that were read into the record or make live public comment via virtual meeting software. The Planning Commission discussed the details of the project and the concerns of the public while deliberating on the item and ultimately voted to approve the development plan, including certain conditions.

On June 2, 2020, the City Council held a public meeting via virtual means. The developer made a presentation on the planned development and then the City Council received public comment specific to the agenda item, lasting about 45 minutes. Public members were able to submit written comments that were read into the record or make live public comment via virtual meeting software. The City Council spent half an hour deliberating on the item and voted to approve it with conditions, adding to those recommended by staff.

Your complaint alleges that the private back-to-back briefings between the developer and Respondent members violates the OML as serial communications

creating a constructive or “walking quorum.” You further allege that the March 11 letter from City staff is evidence that Respondent members came to a consensus regarding the development’s approval outside of a public meeting.

DISCUSSION AND LEGAL ANALYSIS

The legislative intent of the OML is that actions of public bodies “be taken openly, and that their deliberations be conducted openly.” NRS 241.010(1); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) (“the spirit and policy behind NRS chapter 241 favors open meetings”). The OML is not intended to prohibit every private discussion of a public issue. *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 94 (2003). Instead, the OML only prohibits collective deliberations or actions where a quorum is present. *Id.* at 94-95. The OML defines a “meeting” as:

- (1) The gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, 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, whether in person or by means of electronic communication, 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.

NRS 241.015(3)(a). Thus, a quorum is a bright line standard necessary to apply the OML to a given situation. *Dewey* at 95, 98. However, a quorum gathered by serial communications, whether physical or electronic, together with deliberation or action meets the definition of a meeting. *Del Papa v. Board of Regents of University and Community College System of Nevada*, 114 Nev. 388, 400 (1998).

It is undisputed that less than a quorum of the City Council or Planning Commission was present at each of the three briefings at issue. The issues here, are whether a constructive quorum was made, considering all three briefings together, and if the briefings were held with the specific intent to circumvent the requirements of the OML. The circumstances here are very similar to those in *Dewey*, where back-to-back briefings were held with less than a quorum of public body members to receive information from the public body’s staff regarding issues that would ultimately come before the public body for consideration. *Dewey* at 89. The Nevada Supreme Court found that “mere back-to-back briefings, standing alone, do not constitute a

constructive quorum.” *Id.* at 100. To be a violation, there must be sufficient evidence of serial communications between the briefings or that the purpose of the briefings is to circumvent the OML. *Id.*; *Del Papa* at 400.

Here, the OAG does not possess evidence that serial communications occurred between the meetings. Each member of the Respondent public bodies submitted a signed declaration stating that they did not discuss opinions, or weigh or reflect upon reasons for or against approval of the project, with any other members during the time period at issue. The March 11, 2020, letter from the Director of Community Development does not contain any indication that it was sent at the direction of anyone other than Community Development staff. Thus, the OAG does not find that a constructive quorum occurred in violation of the OML.

Further, the OAG does not possess evidence that the intent of the briefings was to take action on the development decision outside of a public meeting. The stated purpose of the briefings was for the Respondent public body members to receive information regarding the development proposal and have an opportunity to ask questions. Both Respondent public bodies discussed the proposal in detail during their public deliberations prior to voting on the matter. Thus, the OAG does not find that the intent of the briefings was to avoid the provisions of the OML.

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred on which formal findings should be made. The OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

By: /s/ Rosalie Bordelove
ROSALIE BORDELOVE
Chief Deputy Attorney General

cc: Nicholas G. Vaskov, City Attorney

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**AMENDED
CERTIFICATE OF SERVICE
(Amended Copy Sent via U.S. Mail February 7, 2022)**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on February 2, 2022, I mailed the foregoing document via Certified Mail, postage paid to the following:

Denell Hahn
Black Mountain Neighborhood Association
631 East Fairway Road
Henderson, Nevada 89015

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Nicholas G. Vaskov, City Attorney
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Certified Mail No.: 7020 0640 0000 7651 8473

/s/ Debra Turman
An Employee of the Office of the
Attorney General