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STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of the

FERNLEY CITY COUNCIL.

Attorney General File No. 12-003
OMLO 2012-01

I.

BACKGROUND

In preparation for its annual budget building cycle, the Fernley City Council (FCC) held a public meeting/workshop on January 25, 2012. This Open Meeting Law (OML) complaint arose out of that meeting.

The only item on the agenda for discussion during the workshop was item 4. Item 4 is set out in full below:

Fernley City Council Meeting
Workshop Agenda

All items are action items unless otherwise noted

4. PRESENTATION AND DISCUSSION REGARDING FISCAL YEAR 2012/2013 BUDGET INCLUDING BUT NOT LIMITED TO: BUDGET PROCESS, TIMELINES, EXISTING BUDGET, ASSESSMENT AND GOALS FOR THE NEXT YEAR."

The Fernley City Attorney's reply to the complaint stated that the meeting format indicated no action was intended to be taken on any budget item, only discussions of revenue cycles and anticipated approaches. However, agenda boilerplate stated that "all items are action items unless otherwise noted." No items were identified as non-action items.

Complainant questioned whether the agenda's boilerplate acted as a shield to justify certain action of the FCC culminating at one point in the Chair's statement that "it looks like it's 5-0 on that one." To the complainant, the Chair's words meant that the Board had voted unanimously, and may have taken action on a non-action item.

II.

FINDINGS OF FACT

Legislative changes to the OML in 2011 (NRS 241.020(2)(c)(2)) now require that every action item on a public body agenda at which action might be taken be denoted by placing the

1 term "for possible action" next to the appropriate item. The Legislature has disapproved of
2 use of the asterisk method hidden in boilerplate to identify action items. FCC's January 25,
3 2012 agenda did not employ this prohibited method, but used boilerplate language to denote
4 each item on its agenda as an action item unless otherwise noted in the individual agenda
5 item.

6 After an hour and forty minutes of discussion of other budget matters, the Chair called
7 for discussion of Item No. 2. Item No. 2 was also the second bullet on page 15 of the City
8 Manager's introductory Powerpoint presentation. It read: "Investigate refinancing of the
9 [Water] bond debt." Item No. 2 invited FCC's discussion of the possibility of refinancing the
10 City's water bond indebtedness. Following the discussion, each member was given the
11 opportunity to make an informal statement of his/her position regarding whether the issue
12 should appear on a future agenda.

13 After a lengthy discussion among the council members, several members made
14 comments that refinance of bond indebtedness should be reviewed further by staff and
15 brought back to the FCC at a future meeting.

16 After review of the audio of the meeting, it is evident the complaint correctly alleged that
17 Mr. Curt Chaffin, President pro-tem of the FCC, who acted as chair of the meeting in the stead
18 of the Mayor, indicated that the consensus and/or vote had been taken on the issue of
19 whether refinancing the water bond debt was a permissible approach. The result was 5-0 in
20 favor of bringing it back to the FCC on a future agenda.¹ The Chair specifically asked Kelly
21 Malloy and Don Parsons (Council members) if they agreed with earlier comments by
22 Cal Eilrich and Roy Edgington (Council members), both of whom reluctantly agreed further
23 consideration of the issue was necessary although it was a "bitter pill" for the FCC to consider.

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¹ A reasonable interpretation of the Chair's words in the context of the earlier lengthy discussion by all Council members does not lead us to conclude that the Council was voting to refinance bonds.

1 The acting City Manager, Fred Turnier, acted quickly to remind the FCC that no votes
2 would or could be taken, instead he suggested that Mr. Chaffin's statement meant that "you're
3 [the Council members] in support of that idea." "That idea" meant the issue of refinance would
4 appear on a future agenda. There was no formal vote, only a summary of comments by
5 Mr. Chaffin.

6 III.

7 ISSUES

8 1. Whether the FCC's expression of consensus approving further discussion on a
9 future FCC agenda of the issue of possible refinancing City's water bond indebtedness
10 violated NRS 241.020(2)(c)(2).²

11 2. Did notice given by the FCC on the refinance issue violate the OML's clear and
12 complete requirement?

13 3. Did the FCC violate the OML by considering other issues not listed on the
14 agenda?

15 IV.

16 **CONCLUSIONS OF LAW**

17 Resolution of Question 1 involves a fundamental OML issue. That issue is whether the
18 process used by FCC violated the OML definition of "action." NRS 241.015(1).³ The agenda
19 did not place "for possible action" next to any item. But review of the audio of the meeting

20 _____
21 ² NRS 241.020

22 2. Except in an emergency, written notice of all meetings must be given at least 3 working days
before the meeting. The notice must include: [2(a) and 2(b) have been omitted]

23 (c) An agenda consisting of:

(1) A clear and complete statement of the topics scheduled to be considered during the meeting.

24 (2) A list describing the items on which action may be taken and clearly denoting that action may be
taken on those items by placing the term "for possible action" next to the appropriate item.

25 ³ NRS 241.015 Definitions:

26 1. "Action" means:

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

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

(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

28 (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 clearly shows that the members were trying to hew closely to the OML and thought that even
2 though no action could be taken during workshops, arriving at an informal consensus was
3 appropriate.

4 In OMLO 99-09 (July 28, 1999) this office found a violation of the OML on facts similar
5 to the facts of this complaint. We said then that a workshop held by the Elko Board of County
6 Commissioners was a meeting within the OML and that the informal action (there was no
7 formal vote) taken by the BOCC was "action" within the meaning of NRS 241.015.
8 Furthermore the BOCC voted on matters that did not appear on the agenda.

9 The 1999 opinion stated:

10 The Commissioners honestly believed that because the meeting
11 was designated a "workshop," and because no formal votes
12 concerning the decisions were taken, they could make such
13 decisions without violating the Open Meeting Law. Such a
14 conclusion is grossly incorrect; an action is a decision,
15 commitment, or promise made by a majority of the members of a
16 public body. The Open Meeting Law does not speak to the manner
17 in which the decision, commitment, or promise is made, nor does it
18 distinguish between a decision made at a "workshop" versus a
19 decision made at a regularly scheduled meeting of the public body.
20 Any decision made by a majority of the members is an action
21 under the Open Meeting Law. The evidence is clear that the
22 Commissioners acted as a collective body in making decisions on
23 April 1, 1999.

19 The consensus announced by Chairman Chaffin was "action" within the meaning of
20 NRS 241.015.

21 Question 2 arose following our review of the audio.⁴ The January 25, 2012 workshop
22 agenda did not provide clear and complete notice and information to the public about the
23 topics for discussion. NRS 241.020(2)(c)(1). The workshop agenda only stated, "budget
24 process." Although some members of the public understand how budgets are built, refinance
25 of the City's water indebtedness is not one of those topics which are routinely discussed.
26 Refinancing the City's water indebtedness is a topic of significance to Fernley city residents
27 and should have been explicitly stated on the agenda.

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Complainant herein did not raise the issue of failure of the agenda to provide notice to the public, nor has
anyone else raised the issue. We raise it only to provide guidance to the FCC.

1 The Nevada Supreme Court in *Sandoval v. Board of Regents of the UCCSN*, 119
2 Nev.148, 154–55 (2003) interpreted the “clear and complete” requirement in
3 NRS 241.020(2)(c)(1) to require a “higher degree of specificity” on the agenda so as to give
4 clear notice to the public when the subject to be discussed or debated is of special or
5 significant interest to the public. Refinancing public indebtedness would be such a subject in
6 the context of the City of Fernley’s economic situation.

7 Refinancing water bond debt was discussed in conjunction with City Manager Turnier’s
8 Powerpoint presentation. The Powerpoint slide show provided the only notice to the public of
9 topics to be discussed. It is clear from review of the audio that the meeting was following a list
10 of topics; however the list was not from the published agenda. No one raised any issue of
11 lack of notice during public comment.

12 Resolution of Question 3 is similar to that of Question 2. All matters which are of
13 interest to the public, or are topics which the public body knows will be discussed must appear
14 on the agenda even if under a generic heading of “budget process”. NRS 241.020(2)(c)(1).

15 V.

16 CONCLUSION

17 In 1999 the Attorney General’s office’s issued an OML opinion which found that the
18 Elko Board of County Commissioners violated the OML after it informally voted on several
19 matters not listed as items or topics on its budget building workshop agenda including actual
20 budget cuts to its proposed budget. OMLO 99-09, (July 28, 1999).

21 The similarity between the facts in OMLO 99-09 and this matter is that the FCC took
22 informal action directing staff to bring certain matters back to the FCC on a future agenda.
23 Informal action is certainly allowable, but it is still “action” within the OML. Informal action is
24 not protected by the agenda boilerplate which had been inadvertently left on the agenda. The
25 absence of topics to be discussed on the agenda is a serious omission that violated the OML.

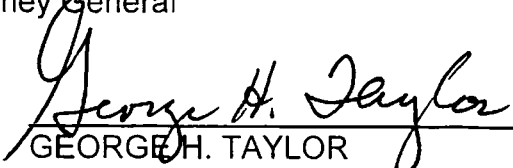
26 The OML applies to any meeting where decisions, choices, or options are committed to
27 (even by consensus), or where promises are made by the members regardless of whether it is
28 called a public meeting, workshop, retreat, or by any other name. Although we find violations

1 of the OML there is no need for further action. We issue this opinion to provide future
2 guidance when drafting workshop agendas and to expressly state the requirement for using
3 "for possible action" next to appropriate items.

4 DATED this 17th day of May, 2012.

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CATHERINE CORTEZ MASTO
Attorney General

By: 
GEORGE H. TAYLOR
Senior Deputy Attorney General
Nevada State Bar No. 3615
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1230

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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 17th day of May, 2012, I mailed a copy of the Findings of Fact and Conclusions of Law, by mailing true copies by U.S. Mail to:

Mayor LeRoy Goodman
City of Fernley
575 Silver Lace Boulevard
Fernley, Nevada 89408

Cal Eilrich, Council Member
Fernley City Council
575 Silver Lace Boulevard
Fernley, Nevada 89408

Kelly Malloy Council Member
Fernley City Council
575 Silver Lace Boulevard
Fernley, Nevada 89408

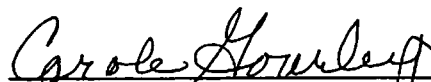
Don Parsons, Sr., Council Member
Fernley City Council
575 Silver Lace Boulevard
Fernley, Nevada 89408

Roy Edgington, Jr., Council Member
Fernley City Council
575 Silver Lace Boulevard
Fernley, Nevada 89408

Curt Chaffin, Council Member
Fernley City Council
575 Silver Lace Boulevard
Fernley, Nevada 89408

Ms. Janice Prichard
Post Office Box 1668
Fernley, Nevada 89408

Brandi Jensen, Esq.
Fernley City Attorney
City of Fernley
575 Silver Lace Boulevard
Fernley, Nevada 89408



An Employee of the Office of
the Attorney General