



STATE OF NEVADA
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June 7, 2012

James Slade
589 Leelan Drive
Gardnerville, Nevada 89460

Re: Open Meeting Law Complaint / AG File No. 12-007
Douglas County Board of Commissioners

Dear Mr. Slade:

BACKGROUND

This Open Meeting Law (OML) complaint arose out of the March 1, 2012 Douglas Board of County Commissioners (BOCC) public meeting when the Commission considered agenda item #9:

"9. For Possible Action. Discussion on adoption of Resolution 2012R-0014 amending Resolution 2011R-014 establishing a monthly sewer rate for Douglas County sewer customers of \$63.33 per equivalent dwelling unit effective July 1, 2012 through June 30, 2012."

Several OML violations are alleged as follows:

1. The public was not allowed to comment on a factor directly related to sewer rates.
2. Two Commissioners violated the OML when they were allowed to discuss standby sewer fees.
3. The BOCC's failure to "cure" or take corrective action upon a violation of the OML. (Manual at §11.01).
4. The BOCC failed to stick to the agenda because a matter not agendized was discussed – debt coverage ratios.
5. The Commission failed to provide the public with supporting materials.

This office initiated an investigation and required the public body to provide relevant materials in addition to the notice, agenda, and audio recording of the March 1, 2012 meeting. Counsel for the BOCC provided this office with affidavits from Chairman Lee Bonner, Ms. Leann Teter, Deputy Clerk/Treasurer, and we were provided a copy of Mr. Stuart Posselt's written public comment. In addition counsel for the BOCC provided her legal review and analysis of the complaint and defense to the allegations.

FACTS

Shortly, after this office received this complaint, counsel sent a notice to this office informing us that agenda #9 was being voluntarily re-agendized to June 7, 2012. June 7, 2012 was chosen in order to comply with statutory publication notice requirement in NRS 318.199.

Chairman Bonner's affidavit stated that the issue of standby fees had not been agendized for the March 1, 2012 meeting primarily because he asked the County Manager to split it off from the sewer rate and water rate issues. His rationale was that in 2011 the Commission had set a policy that there would not be any "availability fees." Further discussion or action would require a rate study to be completed which would require notice to the public. He asked the County Manager to agendize "availability fees" for a May meeting, but it was discussed on April 19, 2012 under the administrative agenda by the County Manager within the context of enterprise funds.

Chairman Bonner stated in his affidavit that he noticed in Mr. Posselt's written comments handed to him before the March 1, 2012 meeting that Mr. Posselt would be discussing sewer availability fees. At a break in the meeting he informed Mr. Posselt that discussion of sewer rate availability fees would not be allowed during the Commission's consideration of item #9 because it was not agendized as a topic but would be considered at a later meeting. However, because Commissioners McDermid and Lynn both asked about "availability fees" during the same discussion, Chairman Bonner felt that Mr. Posselt should be given another shot at public comment. No other member of the public asked to speak about these fees.

Chairman Bonner did not limit Mr. Posselt's comment regarding "sewer debt coverage ratios," nor was the public forbidden to speak about the matter.

Clerk Teter's affidavit stated that Mr. Posselt handed her a written copy of his public comment regarding sewer rates and Resolution 2012-014 just shortly before the meeting. Mr. Posselt said he had already provided copies to the Commissioners. She made ten copies and placed them on the public information table prior to Chairman Bonner calling the meeting to order. She also stated that no one asked for copies of Mr. Posselt's statement.

CONCLUSION

The Board has voluntarily agreed to consider and rehear Resolution 2012R-014 because it recognizes the setting of sewer rates is an item of significant interest to the public. BOCC asserts that an investigation into the Board's adoption of Resolution 2012R-014 on March 1, 2012 setting the sewer rates would be rendered moot because it has been re-agendized. We agree.

The OML Manual encourages public bodies to take corrective action as soon as an OML conflict becomes apparent. Examples of ways to stop, contain, and correct violations are described in the OML Manual at §11.02. Furthermore, the OML Manual explicitly states that reconsideration of a matter previously considered and voted upon is not forever precluded.¹

BOCC does not admit that its actions on March 1, 2012 were in violation of the OML, but it re-agendized item #9, Resolution 2012R-014, out of an abundance of caution. This office encourages self-review and "cure." This practice results in efficiencies in the business of government and it serves the public. We have reviewed counsel's response and we believe that determining whether a violation occurred through investigation is not necessary, especially since the BOCC agreed soon after the filing of this complaint to voluntarily re-agendize consideration of Resolution 2012R-014.

The factual findings set out above provide evidence there was no OML violation with regard to any of the five issues set out in the complaint as indicated at the beginning of this letter which might exist independently of the County's decision to re-agendize consideration of the Resolution.

Prohibition against discussion of "availability fees" was based on the Chair's determination and instruction to the County Manager not to provide information or briefing to the BOCC about it at the meeting. The Chairman's rationale for splitting that matter from the sewer rate setting was explained to the meeting. Clearly it was related to sewer rates, but the public should have been noticed that their only opportunity to speak about it was public comment. Re-agendizing the Resolution may "cure" this issue since the issue has since been discussed in another public meeting.

There is no requirement in the OML for a public body to provide written comment received at the meeting to every other member of the public who had previously asked for and received from the public body a copy of available supporting materials.

¹ § 11.04 Rescheduling an action that is void.

A public body that takes action in violation of the Open Meeting Law, which action is null and void, is not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona Western College District Governing Board*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974). However, mere perfunctory approval at an open meeting of a decision made in an illegally closed meeting does not cure any defect of the earlier meeting or relieve any person from criminal prosecution for the same violation. *Scott v. Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967). The matter should be put on an agenda for an open meeting and reheard.

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Ms. Teter's placement of ten copies on the public information table before the meeting complies with the OML requirement. There was no violation with regard to the availability of supporting materials.

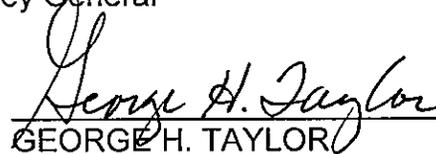
There was no violation with regard to the allegation that the BOCC's discussion of "debt coverage ratios" was a violation since it was just as important to setting sewer rates as the matter of "availability fees" was. Complainant asks why discussion of one matter was prohibited whereas the other matter—arguably just as important—was allowed. The prohibition of discussion of "availability fees" was not a discretionary OML decision but was supported by a local policy decision the Chair made in discussions with the County Manager. The OML cannot interfere with public body policy decisions, which do not offend the OML.

We are closing our file on this matter.

Sincerely,

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Attorney General

By:



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GHT/CG

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