



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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August 15, 2012

John Nickerson
1894 William Street, Suite 4
Box 337
Carson City, Nevada 89701

Re: Open Meeting Law Complaint / AG File No. 12-011
Lyon County Board of Commissioners

Dear Mr. Nickerson:

We have investigated your Open Meeting Law (OML) complaint against the Lyon County Board of Commissioners (BOCC). This Office has jurisdiction to investigate OML complaints and seek civil remedies against public bodies, including injunctive relief, to require compliance with the OML, or to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

This complaint alleges that (1) BOCC failed to properly agendize on its May 3, 2012 meeting agenda, the Lyon County wind machine ordinance which amended Lyon County Code Title 10, Chapter 21; (2) BOCC failed to provide you with a copy of the proposed amended ordinance during its May 3, 2012 meeting and (3) BOCC approved an amended wind machine ordinance on May 3, 2012, but no copy was available at the meeting. Along with your complaint you sent a copy of the proposed wind machine ordinance that would amend Lyon County Code Title 10, Chapter 21: Alternative Energy Systems. It has been posted online on the County's web page under Building Department since the fall of 2011. The Lyon County BOCC denied all of the allegations contained in your complaint.

The BOCC responded to your request with a narrative of the history of the development of the proposed wind machine ordinance beginning in 2011. It is set out here because of its length and because it details the effort that underlies the eventual adoption of the ordinance and the BOCC's argument that it was properly agendized

multiple times, noticed, and published according to NRS 244.100. The wind energy ordinance agenda items for both March 1, 2012 and May 3, 2012 were properly agendized and provided sufficient notice to the public that an ordinance amending the Lyon County Code was to be considered. (See note 1 below)

Lyon County Building Department Director Nick Malarchik began the process of presenting a proposed wind machine ordinance in the fall of 2011 to six regional advisory boards at their public meetings. With feedback from the boards and the public he made changes to the draft wind machine ordinance. During this period of time he made two presentations to the Lyon County Planning Commission which resulted in additional changes.

The District Attorney's office reviewed the proposed wind machine ordinance. The BOCC reviewed it for the first time on January 19, 2012 and a version was filed with the County Clerk for public examination. (See note 1 below). Notice of filing of the ordinance with the clerk together with a summary of the ordinance and the date on which the public hearing of the ordinance would be held was published in a newspaper of general circulation in Lyon County ten days before the hearing.

The public hearing before the BOCC was held on March 1, 2012. You spoke during public comment on the proposed ordinance indicating that you have five wind machines on your property, and that you were against the mandatory requirement to hook up to the net metering system. Dayton resident Charlie Harris also spoke and presented a list of possible edits after having met with Nick Malarchik that morning. Mr. Harris also presented a revised ordinance to the BOCC at its final hearing on the ordinance on May 3, 2012, at which you were also present.

On March 1, 2012 the BOCC listened to public comment, discussed the proposed ordinance then directed Nick Malarchik to bring an amended version back to the BOCC for a final hearing and for consideration of adoption. In the meantime, on April 10, 2012, Mr. Malarchik also presented the amended version of the ordinance to the Planning Commission as a courtesy.

The amended ordinance was scheduled to be heard by the BOCC on May 3, 2012 for a final hearing pursuant to NRS 244.100.¹ Counsel for the BOCC in a written

¹ **NRS 244.100 Procedures for enactment; signatures; publication and effective date; publication of revised ordinance; hearing.**

1. All proposed ordinances, when first proposed, must be read by title to the board, immediately after which at least one copy of the proposed ordinance must be filed with the county clerk for public examination. Notice of the filing, together with the title and an adequate summary of the ordinance and the date on which a public hearing will be held, must be published once in a newspaper published in the county or, if no newspaper is published in the county, in a newspaper having a general circulation in the county, at least 10 days before the date set for the hearing. **The board shall adopt or reject the ordinance, or the ordinance as amended, within 35 days after the date of the close of the final public hearing, except that in cases of emergency, by unanimous consent of the whole board, final action may be taken immediately or at a special meeting called for that purpose.**

statement informed this office that the amended version of the ordinance was available on May 3, 2012 to the public in the meeting agenda packet on a table at the BOCC's meeting. Your complaint alleged it was not present and that you spoke from the audience to ask where it was. But even if it was not there, no OML violation occurred because the amended ordinance had been provided to members in their packets prior to the meeting. Mr. Harris had a copy because he fielded questions from the BOCC about differences between his version and Mr. Malarchik's version, so it had been made available to the public in accordance with the statute. NRS 241.020(6)(a). Upon these facts there is no OML requirement that the BOCC stop its meeting to make a copy for you. In fact the BOCC understood that you were asking for a copy of Mr. Harris' revised ordinance, not the Malarchik version.

We compared the amended ordinance that was included in the meeting backup or supporting material which was adopted by the BOCC, and is available online on the Lyon County website, with the codified version currently in the Lyon County Code. They are identical. It is clear to us that the amended/revised ordinance presented to the BOCC was "made available" to the public before the meeting thus negating your claim that they failed to provide you with a copy during the meeting. NRS 241.020(6)(a).

We also listened to the audio of the meeting and followed along with the description that Mr. Malarchik made to the BOCC regarding amendments he had made to the ordinance following the March BOCC meeting. He described changes, deletions, and/or amendments to the version of the ordinance included in the members meeting packet and set out online for this meeting as backup. NRS 241.020(6)(a) requires only that the supporting material for an item be "made available" to the public if it was provided to the members of the public body prior to the public meeting. BOCC complied with this statutory requirement.

After more than 30 minutes of discussion, Commissioner Arellano made a motion to approve Bill 12-02 (amended ordinance) as presented. The BOCC approved it unanimously. It is now codified in Title 10, Chapter 21 of the Lyon County Code.

As part of our investigation we listened to an audio of the BOCC meeting on May 3, 2012 when the BOCC adopted the proposed ordinance (Bill 12-02). Charlie Harris, a resident of Dayton, presented an alternative wind machine ordinance to the one proposed by Mr. Malarchik. Following Charlie Harris' lengthy presentation of an alternative wind energy ordinance and his argument that Mr. Malarchik's ordinance was in violation of NRS 278.02077, we heard someone in the audience ask for a copy of "his amended. . . ." There was no finish to this request, but the Chair recognized the request as a request for a copy of Charlie Harris' revised ordinance. The Chair immediately responded telling the person in the audience that he would have to get it from him. The reference to "him" meant Mr. Harris, not Mr. Malarchik, the Building Department head. Other voices also said you could get it after the meeting. No one mentioned Mr. Malarchik or indicated that he would supply it to you.

At the same time the Chair told the person in the audience he would have to get the Harris proposal from Mr. Harris, several Commissioners speaking almost at once, responded to the request, but the Chair, once again, clarified what had been requested by saying "no, no he's looking for Mr. Harris' revised one." It is clear the BOCC believed the request was directed to obtaining Charlie Harris' revised/amended competing ordinance, not Mr. Malarchik's ordinance proposed in Bill 12-02. The audience member can then be heard saying that it was not there. In the context of the discussion on the audio and the foregoing discussion between the BOCC and Charlie Harris, we believe that comment meant that the Harris ordinance "was not there" not the Malarchik ordinance. You have alleged in your complaint that you were the person speaking from the audience.

We spoke with you on July 17, 2012 seeking clarification of the allegation in your complaint about failure to agendize the ordinance and failure to provide copies upon request, because after our review of the BOCC's response and review of the audio of the meeting we did not find any violation. At this time we sent the BOCC's response to your complaint to you to assist you with our request for a reply/clarification. We invited another response based on issues addressed in the BOCC's response. On July 17, 2012 you hand delivered copies of the proposed wind machine ordinance and a copy of the BOCC approved ordinance (5.3.12) which is found online in the County Code. Those documents and your hand written note on the cover sheet of each document indicated to us that you believed the document approved by the BOCC was not available to you at the public meeting, although your written note concedes a copy of the ordinance was on the table. You also noticed that the Building Department web link page still had a link to the original proposed wind machine ordinance. This fact is not evidence that the amended ordinance approved at the May 3, 2012 meeting was not properly agendized. Our investigation does not support either allegation.

The BOCC's response to our investigation stated that the proposed amended ordinance was on the table during the May 3, 2012 meeting. Moreover, the audience member's request for a copy was believed by the BOCC to be directed to the Harris revised ordinance. The Chair of the BOCC believed you were asking for a copy of Mr. Harris' proposed amended ordinance. Only a few seconds elapsed from the time someone said "it's not there" before you arrived at the podium and spoke to the BOCC. You objected to the Malarchik ordinance because it represented a "takings" and you stated that the Harris' ordinance was reasonable. These comments were all that you said; you did not inquire further about obtaining a copy of any ordinance.

We do not find a violation of the OML regarding your allegation that the BOCC failed to properly agendize the proposed amended ordinance at its May 3, 2012 public meeting. Also, we do not find a violation with regard to the requirement to provide supporting materials. NRS 241.020(5) and (6). Finally, the BOCC approved an amended wind machine ordinance on May 3, 2012, not the original ordinance from 2011. Copies of the amended ordinance had been made available to the public prior to the meeting. That is all the OML requires of a public body.

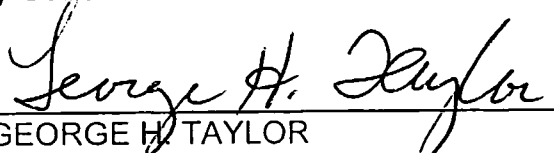
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We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:



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GHT/CG

cc: Robert L. Auer, District Attorney
Lyon County Commission Members:
Chuck Roberts, Chair
Ray Fierro, Vice Chair
Virgil Arellano, Member
Vida Keller, Member
Joe Mortensen, Member