March 7, 2017

OPINION NO. 2017-03

OPEN MEETING LAW: BOARDS AND COMMISSIONS: PUBLIC BODIES: The Board of Directors of the Nevada Northern Railway Foundation, Inc. is not a “public body” as defined in NRS 241.015(4), and therefore not subject to the Open Meeting Law.

Charles H. Odgers, Esq.
City Attorney
City of Ely
480 Campton Street
Ely, Nevada 89301

Dear Mr. Odgers:

You have requested a formal opinion from the Office of the Attorney General pursuant to Nevada Revised Statute (NRS) 228.150 on the following question:

QUESTION

Is the Board of Directors of the Nevada Northern Railway Foundation, Inc. a “public body” required to comply with NRS Chapter 241, the Nevada Open Meeting Law (OML)?

SUMMARY CONCLUSION

The Board of Directors of the Nevada Northern Railway Foundation, Inc. is not a “public body” as defined in NRS 241.015(4), and therefore not subject to the OML.
BACKGROUND

In November 1986, the Kennecott Corporation donated historic railroad items to the Nevada Northern Railway Foundation Inc. (Foundation),\(^1\) a non-profit entity formed pursuant to Chapter 82 of the Nevada Revised Statutes.\(^2\) At that time, the Foundation’s governance documents designated the Ely City Council to serve as a Board of Trustees for the Foundation. However, the Foundation’s governance documents were revised in 2016 to discontinue the Ely City Council’s direct administration through the creation of a separate Board of Directors (Board) for the Foundation, and to provide additional language to clarify the purpose of the Foundation.\(^3\)

ANALYSIS

Public bodies working on behalf of Nevada citizens must conduct open meetings in conformity with the statutory requirements of the OML including the requirement to publish an agenda that provides full notice and disclosure of discussion topics and any possible action. The Foundation’s Board is subject to the OML if the Board is a public body. NRS 241.015(4)(a) defines a “public body” in relevant part as:

\[(a)\] Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof . . . if the administrative, advisory, executive or legislative body is created by:

(1) The Constitution of this State;
(2) Any statute of this State;
(3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;

\(^1\) White Pine Historical Railroad Foundation Amended and Restated Articles – Certified Copy (July 12, 2016) (filing of which changed the entity’s name to the Nevada Northern Railway Foundation Inc.).

\(^2\) See Gift by Grant, Bargain and Sale Deed between Kennecott Corporation (Grantor) and the White Pine Historical Railroad Foundation and the City of Ely (Grantees), dated December 29, 1986.

\(^3\) See Nevada Northern Railway Original Articles dated November 8, 1984; White Pine Historical Railroad Foundation Amended and Restated Articles – Certified Copy.
(4) The Nevada Administrative Code;
(5) A resolution or other formal designation by such a
body created by a statute of this State or an ordinance of a
local government;
(6) An executive order issued by the Governor; or
(7) A resolution or an action by the governing body of a
political subdivision of this State;

NRS 241.015(4)(a).

As quoted above, the statutory definition of "public body" was amended in
2011 to modify the attributes of a public body; since 2011, the attributes of a public body
concern the manner of its creation in addition to its function.⁴

Accordingly, the Board is not a "public body" unless it has two essential attrib-
utes. First, the Board must be an "administrative, advisory, executive or legislative body
of the State or a local government consisting of at least two persons" and created by one
of the means enumerated in NRS 241.015(4)(a)(1)-(7).⁵ Second, the Board must either
(1) expend, disburse, or be supported in whole or in part by tax revenue, or (2) advise or
make recommendations to any entity which expends, disburses, or is supported in whole
or in part by tax revenue.⁶

The second statutory element relates to the function of a body and requires a nexus
to taxpayer funds. This requirement of NRS 241.015(4)(a) is met because the Founda-
tion receives a 2% room tax as part of its regular funding.⁷

However, the Foundation’s governance documents establish that the first statutory
element regarding the manner of creation is not met. Neither the Foundation nor the
Board are created by one of the means enumerated in NRS 241.015(4)(a)(1)-(7). Rather,
they are created and governed by the revised Articles of Incorporation and By-laws.⁸ The

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⁵NRS 241.015(4)(a).
⁶Id.
⁷Ely City Code 3-3-5(d)(1) (providing two percent (2%) of the total eleven and
one-half percent (11.5%) of the room tax set forth in subsection A of this section shall be
specifically allocated and dedicated to the White Pine Historical Railroad Foundation).
⁸White Pine Historical Railroad Foundation Amended and Restated Articles –
Certified Copy.
Foundation is a non-profit entity formed pursuant to Chapter 82 of the Nevada Revised Statutes and governed by the Board.\footnote{Two of the seven board directors are appointed by the Mayor of Ely with approval from the Ely City Council. The remaining five board directors are elected by the current Board Directors.}

CONCLUSION

The Board of Directors of the Nevada Northern Railway Foundation, Inc. is not a "public body" as defined in NRS 241.015(4), and therefore not subject to the OML.\footnote{Note that per Section 4 of the Foundation’s Development Agreement, between the City of Ely and the Foundation, the Board has agreed to conduct one meeting per year in conformity with the OML. The scope of this opinion covers only the application of NRS Chapter 241. Whether the Board has a contractual obligation to comply with the underlying requirements of the OML is not covered by this opinion.}

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:

ASHEESH S. BHALLA
Deputy Attorney General
Division of Boards and Open Government
Office of the Nevada Attorney General

ASB/DKT