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STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of
DOUGLAS COUNTY BOARD OF
COMMISSIONERS

)
) Attorney General File No. 11-003
) and
) Attorney General File No. 11-004
)
OMLO NO. 11-003

I.

INTRODUCTION

These Open Meeting law (OML) complaints allege that at least four members of the Douglas County Board of Commissioners (BOCC) engaged in serial communications constituting deliberation and action with respect to the nominations and appointment of three new commissioners on the Douglas County Planning Commission (PC). It is alleged a quorum of the BOCC deliberated and/or decided to nominate and vote to appoint three new individuals to the PC in violation of NRS 241.015(2) and NRS 241.030(4)(e).

During our investigation of the allegations in these complaints, both the BOCC and the Douglas County's Office of the District Attorney (D.A.) fully cooperated with our investigation. Initially, this office requested each Commissioner provide an affidavit in response to the allegations of the complaint by and through the D.A.'s office. There was further discovery in the form of face-to-face interviews. Each Commissioner made himself or herself available for interviews and then later, three Commissioners made themselves available for follow-up interviews.

II.

FACTS

Complainant Heather Howell alleged the BOCC appeared to have pre-arranged the process of nomination and selection of three new Planning Commissioners at its January 3, 2011 meeting because there was no discussion of the qualifications or merits of the candidates, yet four Commissioners voted together for the same three candidates previously

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1 nominated in Commissioner McDermid's original omnibus motion. None of the three
2 incumbent Planning Commissioners—all of whom applied for re-appointment—were
3 nominated.

4 Additionally, it is alleged the video of the meeting supplied further evidence of a
5 violation of NRS 241.015(2). Following Commissioner McDermid's nomination of Jeremy
6 Davidson and the 4–1 vote confirming him, Commissioner McDermid audibly whispered to
7 Commissioner Lynn to “go next.” Later, when a third nomination was needed, she whispered
8 to Commissioner Bonner to make the next nomination. Neither Commissioner Olson nor
9 Commissioner Johnson interrupted the process with their own nomination, nor does it appear
10 they were asked to do so by Commissioner McDermid.

11 It is alleged Commissioner McDermid's public urging only to Commissioner Lynn and
12 Bonner is further evidence of a pre-meeting arrangement among those Commissioners.
13 Complainant claims this allegation is substantiated by the audio of the Board meeting during
14 the discussion of item #12.

15 **III.**

16 **ISSUES**

17 Whether a quorum of the BOCC met or serially gathered to form a consensus
18 regarding the nominations and appointment of the Planning Commissioners in violation of the
19 OML.

20 **IV.**

21 **FINDINGS OF FACT**

22 The PC is not an elected Board. The BOCC has authority to appoint individuals to
23 seats on the PC. In January of 2011, ten candidates sought appointment to the PC. Three of
24 these candidates were incumbents seeking re-appointment.

25 When item #12¹ on the BOCC January 3, 2011 agenda was called, Chairman Olson
26 asked for public comment. Hearing none, he returned the matter to the Commission.
27 Commissioner McDermid led the discussion when she began by saying, “It's a new year and
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¹ 12. Discussion and possible action on appointments to the PC.

1 we have a new board. I think we need a fresh perspective. I would nominate for appointment
2 to the Planning Commission— Jeremy Davidson, Frank Goedecke, and Donald Miner.”

3 After the D.A. informed Commissioner McDermid that her nomination of three people in
4 one motion was improper, Commissioner McDermid made another motion to nominate a
5 single individual; however, that individual was not one of the three persons seeking
6 reappointment. There was a second to her motion and then the Commission voted 4–1 to
7 approve the nomination. But, before the vote, Commissioner Johnson expressed a view
8 contrary to the idea of replacing three sitting Commissioners whose work he praised. He
9 thought replacing them would send a wrong message to the public. Commissioner Lynn
10 countered that he felt involving as many people as possible in community service was a
11 benefit to the County.

12 Following the approval of Commissioner McDermid's motion to appoint Jeremy
13 Davidson, she turned to Commissioner Lynn, who sat two seats away between Commissioner
14 Johnson and Commissioner Bonner, and whispered that he should “go next.” Commissioner
15 Lynn responded with his own motion to appoint Frank Goedecke. Before this motion was
16 voted upon, Commissioner Johnson once again commented that it appeared to him the
17 Commission was sending the wrong message to the community. The vote in favor of
18 Goedecke was 4–1.

19 Commissioner McDermid then whispered to Commissioner Bonner, sitting next to her,
20 to go next. He nominated Don Miner who was also approved by a vote of 4–1. All three votes
21 were the same—only Commissioner Johnson voted nay.

22 Neither Chairman Olson nor Commissioner Johnson nominated anyone.

23 There was no discussion of any of the applicants at any time during the BOCC's
24 consideration of Item #12. Commissioners Lynn and McDermid each offered an explanation
25 for the replacement of three sitting Commissioners. Commissioner Lynn stated he thought
26 replacement would involve more people in local government. Commissioner McDermid stated
27 that new commissioners would bring a new perspective to the upcoming Douglas County
28 Master Plan update with a new perspective.

1 V.

2 **DISCUSSION AND ANALYSIS**

3 Each BOCC Commissioner admitted during interviews that he or she had received
4 OML training and were aware that, when a quorum of a public body meets together or gathers
5 serially by electronic means to discuss public business, they have violated the OML, unless
6 the meeting has been noticed in compliance with the OML.

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18 She met with Commissioner Lynn prior to the January 3, 2011 BOCC meeting in a
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20 appoint Jeremy Davidson, Frank Godecke, and Don Miner to the PC and she informed him it
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23 Commissioner Lynn recalled Commissioner McDermid's desire to replace three sitting
24 Commissioners to alter the dynamic of that body. Commissioner Lynn's primary interest with
25 new appointments was to boost the representation of the agricultural and ranching
26 community. He also said he heard there was interest in appointing Don Miner to the PC
27 because of his experience with the County master plan.

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1 Commissioner Lynn also recalled a telephone call from Commissioner Johnson shortly
2 before the January 3, 2011 BOCC meeting. Johnson was concerned about his reappointment
3 to the Carson Water Sub Conservancy District, since he serves as chairman. Commissioner
4 Lynn recalled that Commissioner Johnson also inquired about the PC appointments.
5 Commissioner Lynn recalled telling Commissioner Johnson there was a desire for three new
6 Planning Commissioners. Commissioner Johnson denied that Commissioner Lynn told him
7 there was a desire to replace the sitting Commissioners. Commissioner Johnson's affidavit
8 stated that he did mention the PC appointments to Commissioner Lynn, but he said
9 Commissioner Lynn told him it would appear to be vindictive to replace Commissioner Howell.
10 Commissioner Johnson said Commissioner Lynn's comment about Commissioner Howell
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14 recollection of that telephone call even after being informed of the other's recollection.

15 Commissioner McDermid stated in her interview that Commissioner Lynn did not tell
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2 Commissioner Lynn. She stated there was no private arrangement among Commissioners
3 Lynn, Bonner, Olson, and herself to appoint three new PC Commissioners despite the way the
4 process looked to some members of the public. When asked why she took charge of the
5 appointment process, turning to Commissioner Lynn and then Commissioner Bonner and
6 urging them to “go next,” she said she felt it was her duty as Vice Chairman to make the Chair
7 look good and move the process along. She said she only wanted to be helpful. She said
8 any of the Commissioners could have nominated any of the ten applicants, but there was no
9 pre-arrangement among them.

10 Commissioner Bonner’s affidavit states that prior to the January 3, 2011 meeting he
11 spoke only with Commissioner Olson about the upcoming three PC appointments. That
12 conversation was at a 2-on-1 meeting in the County Manager’s office shortly before the
13 January 3, 2011 BOCC meeting. Commissioner Bonner said in his affidavit that he “voiced
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22 appointments. He recalled Commissioner Bonner stating he had a “concern” with one of the
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24 Commissioner Olson stated that there was no other discussion with Commissioner Bonner
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26 Commissioner Olson anticipated that the sense of the Board was to replace the sitting
27 Commissioners. He voted with them to convey a united Board. He stated in his affidavit that
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1 should be appointed based on his contact with each of them during the month of December.
2 He said he rated these three applicants based on what they could bring to a new PC, but he
3 did not have any issues with the sitting Commissioners.

4 When both Commissioners were given the opportunity to clarify these conflicting
5 recollections, Commissioner Bonner recanted his recollection that he discussed three named
6 individuals with Commissioner Olson in a 2-on-1 meeting. Even when asked to review his
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9 Commissioner Lynn began his affidavit noting he was aware after the election there
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12 colleagues, either through County Manager briefings or other incidental communication at
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15 Commissioners only with Commissioner McDermid in a 2-on-1 meeting in County Manager
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19 Commissioner Lynn did not contact any of the applicants for PC seats. His view was
20 that more community involvement in local government is beneficial. He said that PC members
21 “tend to forget the BOCC is the ultimate arbiter. The longer they serve on the Planning
22 Commission the more forgetful of that concept they seem to become.”

23 **VI.**

24 **CONCLUSION**

25 If a quorum of a public body gathers to deliberate toward a decision or take action on
26 any matter within its control or jurisdiction with the intent to avoid the provisions of the OML, it
27 is a violation of the OML, unless the meeting is noticed in accordance with the OML.²

28 _____
² NRS 241.015(2). “Meeting”:
(a) Except as otherwise provided in paragraph (b), means:

1 After an extensive investigation of the facts of the BOCC's appointment of three new
2 PC Commissioners, we cannot find that a quorum of the BOCC violated the provisions of
3 NRS 241.015(2).

4 Our opinion is based on our conclusion that the evidence of a quorum of three
5 commissioners deliberating or taking action is very thin. What we did find—and it was
6 admitted by the Commissioners involved—was that Commissioners McDermid and Lynn did
7 directly discuss the appointment of three new PC commissioners during a 2-on-1 meeting with
8 the County Manager. There was evidence that Commissioner Lynn and Commissioner
9 Johnson discussed the PC appointments during a telephone conversation the night before the
10 January 3, 2011 meeting, but the men do not agree with each other's recollection.

11 Even if we assume that Commissioner Lynn told Commissioner Johnson there was a
12 desire to appoint three new commissioners although he did not have any favorites, this
13 statement standing alone without more evidence of that suggests there was polling of the
14 favorites by the two men, does not mean the conversation was deliberative, or there was any
15 commitment or promise made constituting action.

16 The other two Commissioners, Bonner and Olson, also met in a 2-on-1 with the County
17 Manager and they too discussed the PC appointments. Commissioner Bonner and
18 Commissioner Olson's recollections also do not agree; however, even if Commissioner
19 Bonner's recollection that he identified his favorite three applicants to Olson is true, still there
20 is no other evidence that this conversation was communicated to any other Commissioner
21 prior to the appointments on January 3, 2011. In other words, there is still no evidence of a
22 quorum of Commissioners gathered serially or collectively to deliberate or take action on the
23 appointments outside the public meeting on January 3, 2011.

25 (1) The gathering of members of a public body at which a quorum is present to deliberate toward a
26 decision or to take action on any matter over which the public body has supervision, control, jurisdiction or
27 advisory power.

28 (2) Any series of gatherings of members of a public body at which:

(I) Less than a quorum is present 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.

1 Nevada’s Open Meeting law manual states: “if a majority of the members of a public
2 body should gather, even informally, to deliberate toward a decision or to take any action on
3 any matter over which the public body has supervision, control, jurisdiction, or advisory power,
4 it must comply with the Open Meeting Law.” NEVADA’S OPEN MEETING LAW MANUAL § 5.02
5 (10 ed. 2005)

6 In *Del Papa v. Board of Regents*, the Court looked at serial communications by
7 members of a public body in some detail to determine whether a meeting had taken place. It
8 held that:

9 [a] quorum of a public body using serial electronic communication
10 to deliberate toward a decision or to make a decision on any matter
11 over which the public body has supervision, control, jurisdiction or
12 advisory power violates the Open Meeting Law. That is not to say
13 that in the absence of a quorum, members of a public body cannot
privately discuss public issues or even lobby for votes. However, if
a quorum is present, or is gathered by serial electronic
communications, the body must deliberate and actually vote on the
matter in a public meeting.

14 *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

15 The court further clarified the scope of the OML when it stated: “The constraints of the
16 Open Meeting Law apply only where a quorum of a public body, *in its official capacity as a*
17 *body*, deliberates toward a decision or makes a decision.” *Id.* 114 Nev. at 400, 956 P.2d at
18 778–779.

19 There is no evidence that the BOCC intentionally tried to avoid the OML despite the
20 fact that all five members knew or felt there was a desire to replace the sitting Commissioners.
21 We did not find any evidence that a quorum of the BOCC actually voted, or made promises or

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1 commitments to each other, which could be construed as acting in its official capacity in
2 violation of the OML.

3 DATED this 19th day of April, 2011.

4 CATHERINE CORTEZ MASTO
5 Attorney General

6
7 By: /s/ George H. Taylor
8 GEORGE H. TAYLOR
9 Senior Deputy Attorney General
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24 **CONCLUSION**

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(III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

1 Nevada’s Open Meeting law manual states: “if a majority of the members of a public
2 body should gather, even informally, to deliberate toward a decision or to take any action on
3 any matter over which the public body has supervision, control, jurisdiction, or advisory power,
4 it must comply with the Open Meeting Law.” NEVADA’S OPEN MEETING LAW MANUAL § 5.02
5 (10 ed. 2005)

6 In *Del Papa v. Board of Regents*, the Court looked at serial communications by
7 members of a public body in some detail to determine whether a meeting had taken place. It
8 held that:

9 [a] quorum of a public body using serial electronic communication
10 to deliberate toward a decision or to make a decision on any matter
11 over which the public body has supervision, control, jurisdiction or
12 advisory power violates the Open Meeting Law. That is not to say
13 that in the absence of a quorum, members of a public body cannot
privately discuss public issues or even lobby for votes. However, if
a quorum is present, or is gathered by serial electronic
communications, the body must deliberate and actually vote on the
matter in a public meeting.

14 *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

15 The court further clarified the scope of the OML when it stated: “The constraints of the
16 Open Meeting Law apply only where a quorum of a public body, *in its official capacity as a*
17 *body*, deliberates toward a decision or makes a decision.” *Id.* 114 Nev. at 400, 956 P.2d at
18 778–779.

19 There is no evidence that the BOCC intentionally tried to avoid the OML despite the
20 fact that all five members knew or felt there was a desire to replace the sitting Commissioners.
21 We did not find any evidence that a quorum of the BOCC actually voted, or made promises or

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1 commitments to each other, which could be construed as acting in its official capacity in
2 violation of the OML.

3 DATED this 19th day of April, 2011.

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