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June 20, 2014

Douglas Kagan
12320 William Street
Omaha, NE 68144

RE: *File No. 13-M-105; Papio-Missouri River Natural Resources District Board of Directors; Douglas Kagan, Complainant*

Dear Mr. Kagan:

This letter is in response to your complaint sent to us on April 12, 2013, via the Attorney General's on-line constituent complaint form, in which you alleged a violation of the Open Meetings Act [Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012) (the "Act")], by Fred Conley, Chairman of the Papio-Missouri River Natural Resources District Board of Directors (the "Board"). On May 13, 2013, we received by mail a copy of essentially the same complaint, addressed to Liz Eberle, our constituent services director. We have consolidated your complaints for purposes of this disposition letter. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to the district's chairman, Fred Conley. On May 16, 2013, attorney Paul Peters responded on behalf of the Board. We have now had an opportunity to consider your complaint and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

FACTS

Our understanding of the facts in this matter is based on your complaints and the information contained in the Board's response.

In your April 12, 2013, e-mail, you indicate that the final agenda for a Board meeting scheduled for April 11, 2013, contained the following item: "A Vote to Issue Bonds for Dam Site 15A." You indicate that Mr. Conley refused you and others in attendance from speaking on this agenda item because he ruled the agenda item out of order as shown on the Power Point projected on the wall. You state that "no such ruling appears on the paper, hard copy agenda available to the public." You were not allowed

to speak either during the meeting or at the end of the meeting, when you requested to speak again. You assert that Mr. Conley may have violated Neb. Rev. Stat. § 84-1411 of the Open Meetings Act, which prohibits public bodies from altering the agenda within twenty-four hours of the commencement of a public meeting.

In your May 7, 2013, complaint, you indicate that Mr. Conley "declared that he had removed this item from the agenda, that the board therefore would not vote on this item at that time, and then refused to allow the public to comment on this agenda item, after I had requested an opportunity to speak on it." You assert that, based on your interpretation of § 84-1411, the Board should have been able to discuss this particular agenda item, and the public should have been able to discuss it when it appeared on the printed agenda.

According to Mr. Peters, an agenda item entitled—"Review and Recommendation on A Vote to Issue Bonds for Dam Site 15A -- Director Scott Japp"—appeared on the district's Finance, Expenditure and Legal Subcommittee April 9, 2013, meeting agenda. According to the meeting minutes for this item:

> Director Japp requested that the Subcommittee vote on whether or not to use bonds to pay for the construction of Dam Site 15A.
>
> It was moved by Director Woodle and seconded by Director Frost that the Subcommittee recommend to the Board of Director that bonds be issued to construction [*sic*] Dam Site 15A.
>
> *Director Tesar ruled the motion out of order as the amount of bonding is unknown at this time.*

(Emphasis added.) As a result, when the agenda item "A Vote to Issue Bonds for Dam Site 15A" came up for discussion at the August 11, 2013, meeting of the entire Board, the "Chairperson ruled this item out of order at Subcommittee." *See* Papio-Missouri River Natural Resources District Board of Director Meeting Minutes April 11, 2013, Meeting Minutes, p. 8. Mr. Peters states:

> It is noted that the agenda for the April 11, 2013 meeting of the Board of Directors was never modified or altered. It is clear that consideration of Dam Site 15A bonds was simply passed over at the April 11, 2013 Board of Directors meeting because the question posed by the agenda item was not ready for discussion and decision.

Mr. Peters further informs us that the question of the issuance of the Dam Site 15A bonds was discussed at the May 9, 2013, Board meeting, where several individuals spoke on the matter. He states that while the Board acted in good faith and had good cause to postpone public discussion on the issue, it is regrettable that "the reason for

postponing discussion might not have been made more clear to Mr. Kagan at the time." Finally, Mr. Peters calls our attention to Neb. Rev. Stat. § 84-1412(2), which provides, in pertinent part: "A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings."

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act provides:

> *It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.*
>
> *Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.*

The primary purpose of the public meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska public meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

The statute at issue, § 84-1411 provides, in relevant part:

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. <u>Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality.</u> The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

(Emphasis added.) The legislative history of the highlighted provision indicates that it was added to the statute in 1983 to prevent addition of last minute matters to an agenda which did not really represent emergencies.[1]

You have alleged that the Board altered the agenda during its April 11, 2013, meeting in violation of § 84-1411. "In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense . . . ." *Harris v. Omaha Housing Authority*, 269 Neb. 981, 989, 698 N.W.2d 58, 65 (2005). "Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 159, 804 N.W.2d 611, 615 (2011). In that regard, the word "alter," as that term is used in § 84-1411, means "to change, make different, modify . . . ." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 52 (2nd ed. 1983). Our review of the record indicates that the agenda item at issue had been ruled out of order at the subcommittee meeting on April 9 and, consequently, was not ready to be discussed when presented to the entire Board on April 11. As a result, the agenda item was passed over, and public comment on the item was not allowed. The Board did not change, make different, or modify its agenda—it simply declined to discuss a matter that was not ready to be discussed. We conclude that the Board's action did not constitute a violation of the Open Meetings Act.

You have also asserted that both the Board and the public should have had the opportunity to speak on the "Dam Site 15A" agenda item regardless of it being ruled "out of order" by Mr. Conley. Neb. Rev. Stat. § 84-1412 of the Open Meetings Act sets out several provisions relating to members of the public attending and speaking at public meetings, including the following:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies, and all or any part of a meeting of a public body, except for closed sessions called pursuant to section 84-1410, may be videotaped, televised, photographed, broadcast, or recorded by any person in attendance by means of a tape recorder, camera, video equipment, or any other means of pictorial or sonic reproduction or in writing.
>
> (2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings. <u>A body may not</u>

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[1] <u>Floor Debate on LB 43</u>, 88th Nebraska Legislature, First Session, March 22, 1983, at 1896.

> be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.

(Emphasis added.)

We understand that the Board has implemented a rule which governs the public's right to speak at Board meetings. *See* attached Papio-Missouri River Natural Resources District Director's Policy Handbook, Operations Policy 4.8 Board Meetings – Right to Speak [December 5, 1986]. According to this rule, prior to a meeting citizens who wish to address the Board can sign up to do so, indicating on which agenda item or items they wish to be heard. The rule further provides:

> During the consideration of each agenda item the Chairperson shall call upon citizens who have indicated a desire to be heard on such item, in the order in which the Chairperson shall determine. The Chairperson, in his or her discretion, may also allow other citizens to be heard after all those who have given prior indication of a desire to speak have been heard on such item.

As discussed above, the Board did not consider the agenda item at issue. Consequently, Mr. Conley did not allow those individuals who may have signed up to speak on this particular item to address the Board. Under the circumstances here, Mr. Conley's actions were not unreasonable, and appear to be consistent with the Board's rule. Moreover, as indicated above, there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item.

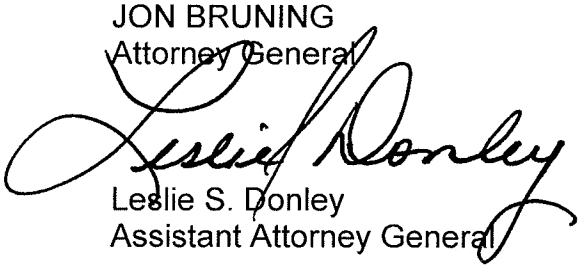
Finally, Mr. Peters indicates in his response that the Board's reason for postponing discussion on the Dam Site 15A agenda item could have been made clearer to you. We agree. Accordingly, we would suggest to the Board, by sending a copy of this disposition letter to Mr. Peters that, in the future, the Board should clearly convey to the public the reasons for passing over any particular agenda item, especially when members of the public have indicated their desire to speak on the matter.

CONCLUSION

For the foregoing reasons, we believe that the Papio-Missouri River Natural Resources District Board of Directors did not violate the Open Meetings Act at its meeting on April 11, 2013, with respect to its agenda or your inability to speak on a particular agenda item. Consequently, since no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis under the Open Meetings Act, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



Leslie S. Donley
Assistant Attorney General

Attachment

cc: Paul Peters

49-1127-30

4.6 Board Meetings - Rules of Order. Unless superseded by law, by these policies, or by prior or future resolution, Robert's Rules of Order, Newly Revised, will govern the conduct of all meetings of the Board.

[December 5, 1986]

4.7 Board Meetings - Minutes. Minutes of all Board meetings showing the time, place, members present and absent, the action taken, and the vote thereon, shall be prepared.

[December 5, 1986]

4.8 Board Meetings - Right to Speak. The following rules and regulations shall govern the conduct and privilege to speak of persons attending open meetings of the District:

A. Prior to the convening of the meeting, the General Manager shall post an agenda at the door of the meeting room.

B. A Request to Address the Board sheet shall be posted with the agenda and citizens wishing to speak at the meeting shall so indicate on this sheet and specify the agenda item or items on which they desire to be heard.

C. During the consideration of each agenda item the Chairperson shall call upon citizens who have indicated a desire to be heard on such item, in the order in which the Chairperson shall determine. The Chairperson, in his or her discretion, may also allow other citizens to be heard after all those who have given prior indication of a desire to speak have been heard on such item.

D. Every citizen speaking at the meeting shall begin his or her remarks by stating his or her name and postal address.

E. All citizens' remarks shall be directed to the Chairperson who shall determine by whom any appropriate response shall be made.

F. The Chairperson may limit or allot the time allowed for the remarks of citizens called upon to be heard, and may rule any such citizen out of order for exceeding such limitation, or for remarks which are repetitious or irrelevant.

[December 5, 1986]

4.9 Board Meetings - Meeting Materials Distribution.

A. Meeting materials for the Board Meetings will be posted to the District web site at www.papionrd.org. pursuant to the following: