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June 17, 2014

Marjorie G. Kennedy
9200 West Fletcher Ave.
Malcom, NE 68402

Stu Luttich
824 K Street
Geneva, NE 68361

Re: *File No. 13-M-126; Nebraska Environmental Trust Board; Complainants Kennedy and Luttich*

Dear Ms. Kennedy and Mr. Luttich:

This letter is in response to your correspondence received by us in which you both requested that this office investigate alleged violations by the Nebraska Environmental Trust Board (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum. Supp. 2012; Supp. 2013). As you each make the same complaint, your concerns will be addressed together. In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received documents relating to the July 18, 2013 meeting from the Board; the Board, however, did not provide written comments concerning your allegations. We have now had an opportunity to review your allegations and the Board's documentation in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence and the Board's documentation for the July 18, 2013 meeting, including the agenda, minutes and relevant portions of the "Board Book." On July 18, 2013, the Board held a meeting in which the agenda indicated the following item would be discussed:

5. Proposed Changes to Title 137, By Laws, Grant Applications and Policies

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f. Policy – Lobbying

Along with the agenda, the Board provided an advanced copy of the proposed changes to the Lobbying Policy prior to its meeting. Those changes are labeled "Proposed Change to Policy Manual of the Nebraska Environmental Trust: Draft for Discussion" and concern the item titled "Rights of Board Member Decent to Legislative Positions." The language proposed to be discussed on July 18, 2013 provided new rules of conduct for Board members in discuss a dissenting opinion on pending legislation for which the Board has taken a position. Your complaint is that the language adopted at the July 18, 2013 meeting was substantially different than that proposed for adoption, which you believe may be a violation of the Open Meetings Act.

ANALYSIS

The provision of the Open Meetings Act which best fits the nature of your complaint is the requirement that a public body provide advance notice of its meetings, including an agenda of the topics to be discussed at the meeting. Those agenda items are to be "sufficiently descriptive" to provide sufficient notice of what is to be discussed at the meeting. Neb. Rev. Stat. § 84-1411(1) provides the general agenda and notice requirements for purposes for the Open Meetings Act.

> 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. 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. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of these requirements is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

The agenda for the meeting in question contained the agenda item detailed above, concerning changes to the Board's lobbying policy. While the Board provided an advanced copy of the proposed change to be discussed, they were not required by the Open Meetings Act to do so. The Board's minutes indicate that the Board's Chair introduced the proposed language for discussion, and that another Board member, Mr. Ibach, then proposed differing language for adoption. After some discussion, the Board then passed the language proposed by Mr. Ibach, with a vote of 6 to 3.

We have reviewed both the language originally proposed and disseminated to the Board and the public prior to the July 18, 2013 meeting, and the language actually adopted at that meeting. We do agree with you that the language is very different. However, the question under the Open Meetings Act is not the whether the language proposed is sufficiently similar to that passed, it is whether the *agenda item* was sufficiently descriptive to provide enough notice to members of the public that this item would be discussed. We believe it is. It is reasonable to believe that any given agenda item will have a certain amount of discussion by any public body – that is the intent of a meeting. Changes to proposals are not uncommon; a public meeting is not intended to be called in order to rubber-stamp ideas that may have been circulated before the meeting. The purpose of an open meeting is for discussion of agenda items; such discussion often involves differing ideas and changes to initial proposals. If a public body were not permitted to make changes to proposals during a meeting, the hands of that public body would be tied, and meaningful discussion would not be conducted. While the changes to the proposed language here are drastic, we believe the adopted language still falls with the agenda item "Policy – Lobbying." We do not believe the Board has violated the Open Meetings Act with respect to your complaints.

We would note that following your complaints, the Board met on November 4, 2013 and rescinded the language adopted on July 18, 2013. Had there been any violation of the Open Meetings Act on July 18, that violation would have been cured by the Board's action on November 4. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Additionally, as the Board was proposing changes to its Rules and Regulations, Title 137, in adopting the changes to the lobbying policy, the public would have had an additional opportunity to address the proposed change. The Board must hold a public hearing before the proposed changes to the Rules and Regulations are officially adopted by the Board; the public is free to comment during that public hearing, or in writing during the 30-day period before the hearing. Any changes made on July 18, 2013 would not have been final following that meeting. They would only have been final

following the public hearing, adoption by the Board, and approval by the Attorney General and Governor.

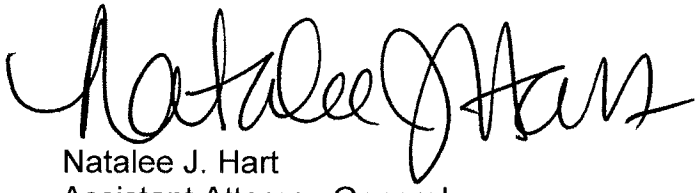
CONCLUSION

For the reasons stated above, we do not believe the Board has violated the Open Meetings Act related to the July 18, 2013 agenda item "Policy – Lobbying."

If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

Cc: Mark Brohman
Paul Dunn

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