

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

July 8, 2021

VIA ELECTRONIC MAIL ONLY

Tularosa Community Ditch Corporation Board of Commissioners
Christopher Cole, Commissioner/Secretary
P. O. Box 1094
Tularosa, NM 88352
Email: chris@safe-extract.com

Re: Open Meetings Act Complaint – Karen Lerner

Dear Mr. Cole:

Thank you for your response to our inquiry into the complaint submitted to the Office of the Attorney General by Ms. Karen Lerner alleging that the Tularosa Community Ditch Corporation Board of Commissioners (hereinafter the “Board”) violated the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, Ms. Lerner has alleged that the Board violated OMA on a number of occasions in 2019 and 2020. After carefully reviewing both Ms. Lerner’s complaint and your response to our inquiry, it appears that the Board has indeed violated OMA by taking action outside of open meetings and by failing to draft and approve sufficiently detailed meeting minutes. We recommend that the members of the Board thoroughly familiarize themselves with OMA and its requirements for meetings. Most importantly, the Board must be aware that a quorum of its members cannot discuss public business or take action outside of an open meeting.

Background

Ms. Lerner’s complaint to our Office appears to arise out of an annual meeting of the Board on December 2, 2019. We understand that, at this meeting, the shareholders of the Tularosa Community Ditch Corporation voted to elect individuals to serve on its three-member Board. The vote of the shareholders was to replace the three previously serving members (the “old Board”) with three new members (the “current Board”). Ms. Lerner alleges that impropriety occurred during this election and that one of the new members “removed” the documentation necessary to verify that a quorum was present. For its part, the current Board explained in response to our

inquiry that minutes from its December 2, 2019 meeting are entirely unavailable because the previous Board was responsible for preparing those minutes. We deduce from this that the minutes from the Board's December 2, 2019 meeting were never prepared.

We understand that a great deal of animosity has developed between the current Board and the old Board, and each side has alleged that the other engaged in various types of misconduct. Most of these are outside the scope of OMA (and therefore this letter). For instance, Ms. Lerner alleges that the Board's current chairman failed to abide by proper parliamentary procedure at various meetings, yelled during one or more meetings, and at one point changed the locks on the Corporation's office and mailbox. Similarly, the current Board alleged in response to our inquiry that members of the old Board improperly attempted to call for a vote of no confidence in the current chairman and that the Corporation's former bookkeeper has refused to allow the current Board "access to the Tularosa Community Ditch desktop and online QuickBooks accounts." Because none of these allegations involve OMA, we do not address them.

However, from these various communications and arguments we have been able to identify two distinct OMA allegations. First, and most importantly, we will address the matter of a quorum of the Board having apparently acted outside of an open meeting. Although Ms. Lerner has identified only two such instances of this occurring, it appears to be a routine practice for the Board. Secondly, we will also address the deficiencies in the Board's meeting minutes, including those of its June 30, 2020 meeting and those missing for its meeting on December 2, 2019.

Action Outside of Open Meetings

The most important OMA issue raised by Ms. Lerner's complaint is the allegation that the Board took action outside of an open meeting. Although Ms. Lerner's complaint alleges only that the Board's chairman acted outside of a meeting, the Board responded to our inquiry by suggesting instead that a quorum of its members had taken action outside of an open meeting. If true, this would represent a serious violation of OMA and one that could invalidate any of these out-of-meeting actions.

In New Mexico, the public is entitled to "the *greatest possible information* regarding the affairs of government and the official acts of those officers and employees who represent them." Section 10-15-1(A) (emphasis added). This public policy provides the basis for the Open Meetings Act, which provides generally that all meetings of a public body must be open to the public. *See* § 10-15-1(A) (declaring that, "All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.").

OMA specifically provides that public bodies may only, with limited exceptions, discuss public business, formulate public policy, or take action in open meetings. *See* § 10-15-1(B) (providing that OMA applies to any meeting of a quorum "held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board,

commission or other policymaking body”); *see also* § 10-15-1(H) (creating ten exceptions permitting public bodies to discuss matters in closed session). This requirement also prohibits public bodies from engaging in a series of individual discussions among members of a public body that, taken together, involve a quorum. *See* OMA Guide, p. 8; *see also* La. Att’y Gen. Op. No. 12-0177 (2012) (describing the rolling quorum as “a device used to circumvent the Open Meetings Law so as to allow a quorum of a public body to discuss an issue through the use of multiple discussions of less than a quorum”). In practice, this means that a public body violates OMA whenever a quorum of its members takes action or even discusses public business outside of an open meeting without providing prior notice to the public. So long as the discussion or action involves a quorum of the public body and involves public business, it must take place at a properly noticed meeting.

Here, in response to Ms. Lerner’s allegations that the Board’s chairman had acted on the Board’s behalf outside of an open meeting, the Board instead suggested that the Board itself – through a quorum of its members – had repeatedly acted outside of a meeting. That is, according to the Board’s response to our inquiry, “the Board made decisions based upon Memorandums that were signed by all Commissioners” but were apparently discussed and approved outside of open meetings. The Board provided us several such memoranda summarizing actions taken by the Board, including approving a settlement of unpaid dues by a shareholder, approving a \$2,000 withdrawal from one of the Corporation’s financial accounts, and filling a vacancy on the Board itself. None of these memoranda indicate that the Board had voted to approve these actions at an open meeting, and we understand the Board’s response to our inquiry to state that it had taken these actions entirely outside of open meetings. According to the Board, “This [practice] continues today.”

To be clear, as a public body in New Mexico, the Board simply cannot act through memoranda or similar pronouncements. A quorum of the Board may only discuss public business at a meeting compliant with OMA, and under no circumstances may the Board take action outside of such a meeting. If indeed the Board acted outside of open meetings through its issuance of memoranda, without those actions having been approved by a vote of the Board at an open meeting, then those actions were taken in violation of OMA and are therefore almost certainly invalid. *See* § 10-15-3(A) (providing that no action of any public body “shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978”). To the extent that the Board may have previously misapprehended its responsibilities under OMA, we implore it to familiarize itself with this most basic legal obligation.

Meeting Minutes

We also find that Ms. Lerner has correctly identified violations of OMA with respect to the minutes of the Board’s meetings on December 2, 2019 and June 30, 2020. As the Board is aware, OMA requires public bodies to prepare minutes following each meeting to document the proceedings. *See generally* § 10-15-1(G). Meeting minutes must contain at least “the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted.” *Id.*

OMA requires public bodies to prepare draft minutes within *ten working days* of each meeting, which then must be “approved, amended or disapproved at the next meeting where a quorum is present.” *Id.*

Preliminarily, with respect to the missing minutes of the Board’s December 2, 2019 meeting, we reject the current Board’s contention that it is not responsible for the minutes because its members were not currently serving at the time of the meeting. Regardless of which members served at any particular meeting, it is the public body’s obligation as a legal entity to satisfy its obligations under OMA and Section 10-15-1(G). This includes both preparing and ultimately approving those minutes. Since the Board has apparently not done so, we would urge it to prepare the minutes from its December 2, 2019 meeting, at least to the extent it is able to do so.

The minutes from the Board’s June 30, 2020 meeting are also noncompliant with Section 10-15-1(G), in that the minutes indicate that the Board took several votes at the meeting without describing in the minutes “how each member voted.” *Id.* For instance, when approving the quarterly financial report, the minutes reflect that one identified member made a motion to approve the report and this motion was seconded by another identified member. The vote, however, is described only as “Motion Carried.” The minutes describe the other votes at the meeting similarly, but this is insufficient under Section 10-15-1(G) because the statute specifically requires each member’s vote to be reflected in the minutes. Because, at present, the minutes from the June 30, 2020 meeting are inadequate, the Board should supplement these minutes by vote at a future meeting.

Conclusion

Because it appears the Board has repeatedly acted on public business outside of an open meeting, and because the minutes from the Board’s meetings on December 2, 2019 and June 30, 2020 are clearly insufficient, we recommend that the Board take “prompt, appropriate and effective” remedial action. *Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 30. This should consist of reconsidering and voting in an open meeting (after providing reasonable notice and an agenda to the public) on any items of business upon which the Board took action outside of a meeting.¹ In addition, the Board will need to prepare and supplement the minutes from the Board’s meetings on December 2, 2019 and June 30, 2020.

More broadly, it is quite evident that the members of the Board need to familiarize themselves with the requirements and limitations of OMA. A quorum of the Board cannot discuss, much less act on, public business outside of an open meeting. It must act through a vote taken in an open meeting, not a memorandum or decree. After any meeting, it is the Board’s obligation to draft accurate and sufficiently detailed meeting minutes, regardless of its membership at the time of the meeting. In general, the Board must be aware that it is obligated to provide “the greatest possible information” about its affairs to the public. Section 10-15-1(A).

¹ If the Board did not take action outside of an open meeting, then it need not take remedial action on those prior actions.

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For your reference, a copy of the OMA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Karen Lerner