

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

September 10, 2019

VIA ELECTRONIC MAIL ONLY

Morgan Spencer
P.O. Box 456
Elephant Butte, New Mexico 87935

RE: Open Meetings Act Complaint against City of Elephant Butte

Dear Ms. Spencer:

On December 13, 2018, the Office of the Attorney General Open Government Division ("OGD") received your complaint against the city's Planning and Zoning Commission for Elephant Butte ("Commission") alleging that the Commission took action on items that were not listed on the December 13, 2018 meeting agenda in violation of the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1979, as amended) ("OMA"). More specifically, you allege that at its regularly scheduled meeting held on December 13, 2018, the Commission discussed the "Zimmerman application", and while under oath, voted on whether any Commissioner saw the "site plan" while reviewing the application. You state that the discussion of the Zimmerman application was not listed as an action item on the agenda for the meeting.

Background

We understand that Ms. Zimmerman submitted an application to the City Council for Elephant Butte ("Council") for approval of a homebased business to be operated behind her home. Ms. Zimmerman did not submit a site plan as required by code and only identified one accessory structure, a shed. At its September 4, 2018 meeting, the Commission denied the application. Ms. Zimmerman appealed the denial of her application to the Council. A site plan identifying two accessory structures was submitted to the Council but was not included in the record for appeal since it had not been presented to the Commission.

On October 17, 2018, the Council heard the appeal, reversed the Commission's decision and approved Ms. Zimmerman's application to use the shed for her homebased business. At the December 5, 2018 Council meeting, it was disclosed to the Council that Ms. Zimmerman wanted to convert the second accessory structure, the garage, for use as a homebased business, not the shed. At the Commission's December 13, 2018 meeting, the City Manager provided a report to the Commission that included comments made at the December 5, 2018 Council meeting concerning the site plan showing two accessory structures.

Analysis

In response to our inquiry, the Commission states that the discussion of the Zimmerman application arose from an update provided to the Commission under the "Manager's Report" listed as Item 8 on the agenda. When the Commission reached Item 8, a discussion concerning the Zimmerman application began and included whether a site plan was submitted with the Zimmerman application when it was originally presented to the Commission. In connection with this discussion, the Commission chairman had the Commissioners sworn in under oath and asked each Commissioner whether they had seen the "site plan" that included two accessory structures as part of the zoning application previously submitted to the Commission by Ms. Zimmerman. All Commissioners stated that they had not seen the site plan when reviewing the application.

It is unclear why the Commissioners needed to be placed under oath. The discussion of the Zimmerman application evolved as a natural extension from information provided under the Manager's Report and the Commission's vote did not execute any action with respect to the status of the Zimmerman application. Hence, it appears the sole purpose of the vote was to determine whether any Commissioner had seen the site plan when reviewing the Zimmerman application.

OMA requires all meetings ". . . of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegate authority of any board . . ." be held open to the public. NMSA 1978, Section 10-15-1(B). "Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance . . . shall be held only after reasonable notice to the public." NMSA 1978, Section 10-15-1(D). "Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting . . ." NMSA 1978, Section 10-15-1(F).

Conclusion

Based upon the information provided, the OGD determines that there was no apparent OMA violation, as there appeared to be no action taken on the Zimmerman application at the December 13 Commission meeting. If you have any specific questions about the

Morgan Spencer
September 10, 2019
Page 3

matters addressed in this letter or about the Open Meetings Act in general, you may contact me directly or call the Office of the Attorney General Open Government Division at 505-490-4060. For more information about OMA generally, you also may refer to the Office of the Attorney Open Meetings Act Compliance Guide, available on our website at www.nmag.gov.

Thank you for bringing this matter to the attention of the OGD.

Sincerely,



Lori Chavez
Assistant Attorney General
Open Government Division

cc: Charles Rennick, City Attorney

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OFFICE OF THE ATTORNEY GENERAL



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ATTORNEY GENERAL

Electronic Complaint Submission

Submission Detail

ECS Reference Number	NMOAG-ECS-20181213-9bd3
Final Submit Date	12/13/2018 2:26:36 PM

Disclosure of your complaint: This complaint is a public record, thus available under provisions of the NM Inspection of Public Records Act.

Disclosure to other entities: This complaint, its content, and other information may be disclosed to other law enforcement and regulatory agencies.

I understand this complaint and any submitted documents are public record and may be shared with other law enforcement and regulatory agencies.

DECLARATION: By submitting this form, I attest that the information in this complaint is true and accurate to the best of my knowledge. I further understand that by submitting this form I may be called to testify as a witness in this matter.

I understand declaration statement.

The New Mexico Office of the Attorney General cannot give legal advice regarding this complaint and will not act as your personal attorney. If you have questions regarding your rights please contact a private attorney.

Submission of this complaint is not confirmation that an investigation will be initiated.

Complaint Detail

Complaint Type Open Meetings (OMA) Complaint

Retained Attorney

Parties

Complainant

Mrs Morgan Spencer

Person

Address

[REDACTED]

Contact information

[REDACTED]

Complaint against

City of Elephant Butte

Public Body (Government Entity)

Address

103 Water St
Elephant Butte, New Mexico 87935

Contact information

mayor@cityofelephantbutte.com
(575) 744-4892
www.cityofelephantbutte.com

Complaint Specifics

Specific date(s) of OMA violation(s) December 13, 2018

Agenda Public body took action on items that were not listed on the agenda

Transaction

Documents



agenda dec 13 pz mtg.jpg

Agenda for Dec 13 2018

Comments

The Planning and Zoning Commission of the City of Elephant Butte, took action, discussed and “swore in under oath” on an item that was not on the Agenda for the meeting. This matter was not of an emergency. On Dec. 13, 2018, during the City Managers Report, the meeting stopped until the Court Clerk joined the meeting and swore each of the planning and zoning commissioners and city employees in. Documents were then given to the commissioners by the City Manager. The chairman of the commission asked for a vote from each member. The vote was to show that they didn’t receive these documents during a September meeting in the past. The attached Agenda does not show there was action (voting) going on for a topic during the City Managers report. There was no notice of a public hearing, so I am not sure the intent behind them being sworn in. Unfortunately, this is my second complaint for a violation of the open meetings act and request the City obtain additional training on the OMA.

*** END OF COMPLAINT ***



CITY OF ELEPHANT BUTTE PLANNING & ZONING COMMISSION
NOTICE OF REGULAR MEETING
OPEN TO THE PUBLIC
Thursday, December 13th, 2018
PLANNING & ZONING AGENDA-9:00 am

1. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

2. ROLL CALL

- Chairman Nathan La Font
- Vice Chairperson Cathy Vickers
- Commissioner Sheridan Fuss
- Commissioner Charles Looney
- Commissioner Rick Harrison
- Alternate Commissioner Patsy Barnett

3. DECLARATION OF CONFLICT OF INTEREST & STATEMENT OF OPEN MEETINGS ACT

**The Open Meetings Act is in effect and there is a three-minute limit per speaker on all non-agenda items.*

4. APPROVAL OF AGENDA

5. APPROVAL OF MINUTES

- Approval of Regular Meeting Minutes, Tuesday, October 9th, 2018

6. PUBLIC INPUT-

7. COMMISSIONERS COMMENTS-

8. MANAGERS REPORT

9. LAND USE MANAGER REPORT-

10. CODE ENFORCEMENT REPORT -

11. ZONING PERMIT UPDATE—

12. PUBLIC HEARING ACTION ITEMS-(none)

13. NEW BUSINESS

- Comprehensive Sign Review- Church at the Butte
- Condition Requirements for Zoning Permit and Home Occupations in Residential zoning districts Review/Discussion/ Possible Action
- Home Occupations in the City of Elephant Butte

14. OLD BUSINESS

- **Ordinance Revisions**
 - o New Ordinance 178- Revision to Ordinance 119 Discussion/ Possible Action
 - o New Ordinance 179- Revisions to 134-Animal Control/Permitting Review/Discussion/ Possible Action
 - o New Ordinance 180- Revisions to Chapter 155- Zoning— Discussion/ Possible Action
 - o Chapter 92- Fireworks and Fire Prevention Review/ Discussion/ Possible Action

15. ADJOURNMENT



Salazar, Patricia <psalazar@nmag.gov>

Eleohant Butte City Manager Complaint and Elephant Butte Planning and Zoning Open Meeting violation

Kim Skinner <kimskinner01@windstream.net>

Tue, Jan 29, 2019 at 9:54 AM

To: psalazar@nmag.gov

Patricia,

Below is the official complaint written by City Councilor Travis Atwell that supports Morgan Spencer's written complaint regarding the Open Meetings violation at the City of Elephant Butte Planning and Zoning on December 13, 2018.

Also, below is the meeting agenda notice that I was emailed on October 22 for the City of Elephant Butte Special Session City Council meeting that was held on October 23, and 2018.

During the October 23, City Council meeting a quorum (4 members) of the City of Elephant Butte Planning and Zoning Commission members attended the meeting. During this meeting, 3 members of the City of Elephant Butte Planning and Zoning Commission, Cathy Vickers, Nathan Lafont and Chuck Looney spoke to the Elephant Butte City Council for 1 hour and 50 minutes. The P & Z Commission members were trying to force us to change our unanimous approval of the home business application of Anita Zimmerman during our City Council meeting held on October 17, 2018. The October City Council meeting was NOT noticed as a joint meeting of the City Council and the Planning and Zoning Commission!

Please request a digital voice copy all of the meetings in question and personally listen to these meetings.! The violations did happen and other illegal activities are still ongoing.

Respectfully Submitted,

Kim Skinner
Mayor Pro Tem
City of Elephant Butte
575-740-1777

From: travis.atwell@cityofelephantbutte.com
Date: December 13, 2018 at 12:29:02 PM MST
To: euni1021@aol.com
Cc: Kim Skinner <kim.skinner@cityofelephantbutte.com>
Subject: City Manager Complaint

Mayor i am officially filing a complaint on Mr. Duvall. In recent meetings he has disrespected the council and citizens of our city. While the council is discussing business he is having side conversations with others, rolling his eyes and and making facial expressions to our comments.

In a recent meeting he made comments to a citizen while they were commenting during public comment and this citizen had to ask him to not make comments as they were addressing the council. These actions are unprofessional and disrespectful.

He is creating a hostile work environment between some of the councilors and city staff by undermining us when he doesn't get his way. I have received calls from citizens on his bully tactics and disrespect when a citizen

brings a concern to him. Our citizens deserve to be treated with respect and not talked down to. I will note that he treated me this way when i asked about SDR charging the kids golf team.

Today at the P&Z meeting he once again brought up Anita Zimmerman and had the commissioners sworn in and take a vote on a NONE agenda item. These types of actions are going to get our city sued as they are illegal and unethical. He also made a comment to P&Z about the upcoming workshop is with them now since some councilors have issues/fits about it.

I have cc'd Mayor Pro Tem Skinner on this since you are currently on vacation and she is the acting Mayor.

Councillor Atwell

From: deputyclerk@cityofelephantbutte.com
Date: October 22, 2018 at 11:38:23 AM MDT
To: mayor@cityofelephantbutte.com, kim.skinner@cityofelephantbutte.com, edna.trager@cityofelephantbutte.com, travis.atwell@cityofelephantbutte.com, citymanager@cityofelephantbutte.com
Subject: **Special City Council Meeting Agenda Oct. 23, 2018 at 2pm**

Thank you,

Jessica

From: Cathy Vickers <homesteaderscathy@gmail.com>
Date: October 25, 2018 at 10:30:41 AM MDT
To: Charles Looney <chuckpam2010@hotmail.com>, "Chuck & Pam Looney" <pam1chuck@valornet.com>, Nathan LaFont <nathanlafont@gmail.com>, Rick Harrison <rickharrison0001@gmail.com>, Sheridan Fuss <swslfuss@yahoo.com>, "Kim W. Skinner" <ckauto@valornet.com>, Kim Skinner <kim.skinner@cityofelephantbutte.com>, Gerald LaFont <gerald.lafont@cityofelephantbutte.com>, Edna Trager <ednatrager@gmail.com>, Edna Trager <edna.trager@cityofelephantbutte.com>, travis.atwell@cityofelephantbutte.com, Alan Briley <citymanager@cityofelephantbutte.com>, Eunice Kent <EUNi1021@aol.com>, Toby Boone <fire@cityofelephantbutte.com>
Subject: **Combined Meeting**

Good morning all,
Happy INTERNET RESTORED DAY!!!! Yesterday was impossible to work without phone and internet!

I wanted to THANK EVERYONE AGAIN for taking the time to meet. It is ALWAYS good to have interaction between the two commissions.

I have re-read the minutes for both meetings and absolutely understand how a couple of points were lost in translation. Our presentation was made in hopes that a "reversal" of the decision made to allow the operation of a beauty salon in a residential zone would be issued.

However, a few points never made it into the minutes thus, I feel, further explanation needs to be provided. Due to the turnover in the offices of City Manger and Code Enforcement, the Planning and Zoning Commission has had to rely on the Zoning Ordinance and we have been forced to unofficially and unintentionally transform into "land use", "enforcement agency" members! We do a lot of research on our own, each member brings something to the "collective table". The minutes and comments from the public focused on the word "product", the P & Z determined that providing a hair cut, perm, color, etc constituted a Sale of a SERVICE - a condition not allowed for a home based business. Five or Six scheduled appointments on a near daily basis, whether they be 15 minutes apart or not constitutes traffic - a condition not allowed for a home based business. The denial letter included our concern that a storage shed would have to be brought up to code - since the public is being served, we now have to adhere to the regulations for construction of a new commercial building which is strictly prohibited in the R-1A Zoning ordinance. We also took into consideration the Administrative Code and Licensure for Cosmetologists. There are several restrictions and mandates a Municipality has to comply with - an example is OSHA - our reference guide was Title 16 Chapter 34 Part 7. After careful consideration of the above mentioned points, it was our opinion, that a Cosmetologist by definition, is a retail business, therefore we feel our decision was legal and just.

Please do not respond to this statement, I do not want any communication and will not violate the Open Meetings Act.

With sincere appreciation for everyone's dedication to the City of Elephant Butte,

Cathy

Vice Chair - P & Z Commission

Cathy Vickers

Owner/Broker

Homesteaders Realty

PO Box 450


507 Highway 195

Elephant Butte, NM 87935

575-744-5283 Office

575-740-0003 Cell



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