

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF
THE STATE OF NEVADA,

Appellant,

vs.

IRA HANSEN, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 32; AND JIM
WHEELER, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 39,

Respondents.

Supreme Court Case No. 69100

Appeal from First Judicial District
Court, Carson City, Nevada,
Case No. 15 OC 00076 1B

EXHIBITS TO

**RESPONDENTS' MOTION TO DISMISS APPEAL
FOR LACK OF APPELLATE JURISDICTION, ETC.**

BRENDA J. ERDOES, Legislative Counsel (Nevada Bar No. 3644)
KEVIN C. POWERS, Chief Litigation Counsel (Nevada Bar No. 6781)
EILEEN G. O'GRADY, Chief Deputy Legislative Counsel (Nevada Bar No. 5443)
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
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Attorneys for Respondents

INDEX OF EXHIBITS

Exhibit	Description
A	Letter from Brenda J. Erdoes, Legislative Counsel, to Assemblyman Jim Wheeler (Jan. 7, 2014).
B	Excerpts from Certified Record of Proceedings: In the Matter of Assemblyman Ira Hansen, Request for Opinion Number 14-21C and In the Matter of Assemblyman Jim Wheeler, Request for Opinion Number 14-22C.
C	Stipulation and Order.
D	Notice of Entry of Order Denying Motion to Dismiss and Granting Petition for Judicial Review.
E	Complaint to Have Declared Void Action Taken By Commission on Ethics in Violation of Open Meeting Law.
F	Plaintiffs' Proof of Service of Summons and Complaint.

Respondents' Motion to Dismiss Appeal, Etc.

Exhibit A

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600



LEGISLATIVE COMMISSION (775) 684-6800
STEVEN A. HORSFORD, *Senator, Chairman*
Rick Combs, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
DEBBIE SMITH, *Assemblywoman, Chair*
Mike Chapman, *Acting Fiscal Analyst*
Mark Kimpotic, *Fiscal Analyst*

RICK COMBS, *Director*
(775) 684-6800

BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830
PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
DONALD O. WILLIAMS, *Research Director* (775) 684-6825

January 7, 2014

Assemblyman Jim Wheeler
Post Office Box 2135
Minden, NV 89423

Dear Assemblyman Wheeler:

You have asked whether the prohibition against placing or setting a steel trap within 200 feet of a public road or highway applies to box traps and snare traps. Title 45 of NRS includes the various state laws concerning wildlife. Chapter 503 of NRS, which is included within that title, establishes the state laws relating to hunting, fishing, trapping and various other protective measures. The term "trap" is defined in NRS 501.089 for purposes of Title 45 to mean "a device that is designed, built or made to close upon or hold fast any portion of an animal." NRS 503.580 addresses placing or setting traps within a certain distance of a public road or highway. Specifically, NRS 503.580 provides:

1. For the purposes of this section, "public road or highway" means:
 - (a) A highway designated as a United States highway.
 - (b) A highway designated as a state highway pursuant to the provisions of NRS 408.285.
 - (c) A main or general county road as defined by NRS 403.170.
2. It is unlawful for any person, company or corporation to place or set any steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap, within 200 feet of any public road or highway within this State.
3. This section does not prevent the placing or setting of any steel trap inside, along or near a fence which may be situated less than 200 feet from any public road or highway upon privately owned lands.

NRS 503.585 makes violation of NRS 503.580 a misdemeanor.

In interpreting the provisions of NRS 503.580, we are guided by several well-established rules of statutory construction. First, as a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full

NCOE 00007

and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995). "Under long established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." Randono v. CUNA Mut. Ins. Group, 106 Nev. 371, 374 (1990), citing State v. California Mining Co., 13 Nev. 203, 217 (1878). Moreover, "[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." Imperial Palace, Inc. v. State ex rel. Dep't of Taxation, 108 Nev. 1060, 1067 (1992), citing City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891 (1989). Subsection 2 of NRS 503.580 clearly indicates that the prohibition applies to any "steel trap . . . larger than a No. 1 Newhouse trap." Therefore, applying the plain meaning rule to NRS 503.580, the prohibition clearly must be read to apply only to placing or setting a steel trap that is larger than a No. 1 Newhouse trap within 200 feet from any public road or highway and only if the trap is used for the purpose of trapping mammals.

Along with an analysis based on the plain meaning rule, we generally look at legislative intent because the Nevada Supreme Court has held that when the plain meaning of the statutory language is supported by the legislative history of the statute, a court will be reluctant to interpret the statutory language in a manner that is contrary to its plain meaning and the legislative history of the statute. *See, e.g., Gaines v. State*, 116 Nev. 359, 366-67 (2000). However, in this case such an analysis was not possible. The provisions of NRS 503.580 were originally enacted in Assembly Bill No. 19 (1931). Chapter 155, Statutes of Nevada 1931, p. 249. The relevant provisions of Assembly Bill No. 19 (1931) read as follows:

[I]t shall be unlawful for any person or persons, company or corporation to place or set any steel trap, used for the purpose of trapping animals, larger than a No. 1 Newhouse trap within two hundred feet of any public road or highway within this state; *provided*, that for the purposes of this act a public road or highway shall mean only such roads or highways as have been designated as such by law or by the county commissioners of the county in which they are situated; *and provided further*, that this act shall not be construed so as to prevent the placing or setting any steel trap inside, along or near a fence which may be situated less than 200 feet from any public road or highway upon privately owned lands.

Although amended several times since their original enactment, the provisions of NRS 503.580 have remained substantively unchanged. The only change to the phrase "to place or set any steel trap, used for the purpose of trapping animals, larger than a No. 1 Newhouse trap" through the years was to swap the term "mammal" for the term

“animal.” After reviewing all available legislative histories concerning the provisions of Assembly Bill No. 19, we were unable to find a record of any discussions that occurred concerning the scope or applicability of those provisions.

In addition to the plain meaning rule, there is another well-established principle of statutory construction that should be considered in the interpretation of NRS 503.580. The Nevada Supreme Court has long held that the Legislature is not presumed to intend that which the Legislature could have easily included within a statute, but chose not to include within the statute. *See, e.g., Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 680 (1992) (Young, J., concurring) (explaining that the Legislature could have easily provided a definition of occupational disease had it chosen to do so); *Joseph F. Sanson Inv. Co. v. 268 Ltd.*, 106 Nev. 429, 432-33 (1990) (quoting *In re 268 Ltd.*, 75 B.R. 37 (Bankr. D. Nev. 1987)) (explaining that the Legislature could have easily worded a statute so as to make attorney's fees in addition to, instead of included within, the expenses of a trust); *State v. University Club*, 35 Nev. 475, 484-5 (1913) (“As the question is one entirely subject to legislative control, the legislature can, if it so desires, amend the law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the business of selling liquors.”); *State ex rel. Norcross v. Eggers*, 35 Nev. 250, 258 (1912) (“If the legislature had intended that the \$25,000 appropriated by section 7 should include salaries, instead of using language negating such intent, it would have used language manifesting such intent, as it did in the case of the act in relation to banks and banking and creating the office of state bank examiner and fixing his salary, which act was passed at the same session of the legislature.”) Had the Legislature intended to restrict the placing or setting of any trap within 200 feet of a public road or highway, the Legislature could have easily done so. For example, various other provisions of chapter 503 of NRS refer to a “trap” or “traps” without specifying the type or size of the trap. *See* NRS 503.450, 503.452 and 503.454. In these sections, it is clear that the traps to which the section refers are all traps rather than only those steel traps that are larger than a No. 1 Newhouse trap as is provided in NRS 503.580.

The courts in this State have also long held that, where possible, a statute should be read so as to give meaning to all of its parts. *Nevada Tax Comm'n v. Bernhard*, 100 Nev. 348, 351, 683 P.2d 21 (1984); *Nevada State Personnel Div. v. Haskins*, 90 Nev. 425, 427, 529 P.2d 795 (1974). The term “trap” is defined for the purpose of NRS 503.580 to mean “a device that is designed, built or made to close upon or hold fast any portion of an animal.” NRS 501.189. This definition is very broad and could include any snare or other device that closes upon or holds fast any portion of an animal. Despite this broad definition, however, the provisions of subsection 2 of NRS 503.580 are expressly limited to the placing or setting of a “steel trap” which is “larger than a No. 1 Newhouse trap.” To read the provisions of subsection 2 of NRS 503.580 in a manner which gives meaning to all of its parts, those provisions must be read to allow the placing or setting of all traps other than steel traps larger than a No. 1 Newhouse trap within 200 feet of any highway or public road.

In determining the meaning of “steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap” as that phrase is used in subsection 2 of NRS 530.580, it is important to consider an additional rule of statutory construction. When the provisions of a statute are interpreted, the Nevada Supreme Court has consistently held that the interpretation of the statute should be consistent with what reason and public policy would indicate the Legislature intended in enacting those provisions, and that the interpretation should avoid absurd results. Theis v. State, 117 Nev. 744, 751, 30 P.3d 1140 (2001); English v. State, 116 Nev. 828, 832, 9 P.3d 60 (2000). Based on these authorities, the provisions of subsection 2 of NRS 503.580 must be interpreted in a manner which is consistent with what reason and public policy would indicate the Legislature intended in enacting those provisions and which avoids an absurd result. It is important to note that the prohibition set forth in NRS 503.580 applies only to a “steel trap” that is “larger than a No. 1 Newhouse trap.” Thus, it is clear that the prohibition set forth in NRS 503.580 does not apply to traps made of any material other than steel. Additionally, for the prohibition to apply, the trap must be larger than a No. 1 Newhouse trap. To avoid an absurd result as is required by the case law, the types of traps to which the prohibition applies must necessarily be directly comparable in size to a No. 1 Newhouse trap. The term “No. 1 Newhouse trap” is not defined for the purposes of NRS but the Nevada Attorney General has opined that a No. 1 Newhouse trap is a “jaw-foot trap used for trapping muskrats and mink.” Attorney General Opinion No. 1971-57. Therefore, it is clear that the only type of trap to which the prohibition set forth in NRS 503.580 applies is a “jaw-foot” type of trap. Because a snare trap and a box trap are not “jaw-foot” types of traps, it is equally clear that these traps are not subject to reasonable comparison for the purpose of establishing a violation of subsection 2 of NRS 503.580. Accordingly, interpreting the prohibition set forth in subsection 2 of NRS 503.580 to apply to any type of trap used to trap mammals other than a jaw-foot trap would be inconsistent with what reason and public policy would indicate the Legislature intended in enacting those provisions and would lead to an absurd result.

This interpretation is consistent with another very important line of cases. It has long been held that a criminal statute is one which imposes a penalty for transgressing the provisions of the statute. Ex Parte Davis, 33 Nev. 309, 315, 110 P. 1131 (1910); State v. Wheeler, 23 Nev. 143, 152, 44 P. 430 (1896). As such, a criminal statute must be strictly construed in a defendant’s favor and may not be enlarged by implication or intendment beyond the fair meaning of the language used. Anderson v. State, 95 Nev. 625, 629-30, 600 P.2d 241 (1979); Ex Parte Sweeney, 18 Nev. 74, 75, 1 P. 379 (1883). As noted above, the provisions of subsection 2 of NRS 503.580 make it unlawful for any person to place or set any steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap, within 200 feet of a public road or highway within this State. Pursuant to NRS 501.385, any person who performs an act or attempts to perform an act made unlawful or prohibited by a provision of title 45 of NRS is guilty of a misdemeanor. Based upon the holdings in Anderson and Ex Parte Sweeney, any question or ambiguity

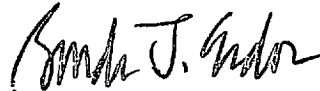
concerning the applicability of the provisions of subsection 2 of NRS 503.580 must be resolved in a defendant's favor and the application of those provisions must not be given an enlarged or implied meaning beyond the fair meaning of the language used in those provisions.

As a final note, the Nevada Supreme has held that an administrative agency which is charged with the duty of administering a legislative act is impliedly clothed with the authority to construe any relevant laws and to set any necessary precedent for administrative action. Any construction placed on a statute by that agency is entitled to deference. State Industrial Ins. Sys. v. Snyder, 109 Nev. 1223, 1228, 865 P.2d 1168 (1993) (citing Truckee Meadows v. Int'l Firefighters, 109 Nev. 367, 849 P.2d 259 (1993) and Jones v. Rosner, 102 Nev. 115, 719 P.2d 805 (1986)). Pursuant to NRS 501.105, the Board of Wildlife Commissioners is required to establish policies and adopt regulations necessary to preserve, protect, manage and restore wildlife and its habitat. Pursuant to NRS 501.331, the Department of Wildlife is required to administer the wildlife laws of this State. As such, any interpretation of the provisions of subsection 2 of NRS 503.580 by the Commission or the Department in carrying out their duties is entitled to deference. However, based upon research and information provided to our office by the Department, the Commission and the Department have not issued a written policy interpreting those provisions. Rather, the Department, in enforcing those provisions, has relied upon those provisions as written without resorting to any construction or interpretation prepared by the Commission or Department.

Based on the foregoing principles of statutory construction, it is the opinion of this office that the prohibition contained in subsection 2 of NRS 503.580 against placing or setting a steel trap within 200 feet of a public road or highway does not apply to box traps or snare traps.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,



Brenda J. Erdoes
Legislative Counsel

J. Randall Stephenson
Principal Deputy Legislative Counsel

Respondents' Motion to Dismiss Appeal, Etc.

Exhibit B

1 Tracy L. Chase, Esq.
2 Nevada Bar No. 2752
3 704 W. Nye Lane, Suite 204
4 Carson City, Nevada 89703
5 (775) 687-5469
6 Attorney for Respondent

REC'D & FILED

2015 MAY 14 PM 3:27

SUSAN MERRIWETHER
V. Alegria CLERK

BY _____ DEPUTY

7 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR CARSON CITY

9 IRA HANSEN, in his official capacity as Nevada)
10 State Assemblyman for Assembly District No. 32;)
11 And JIM WHEELER, in his official capacity as)
12 Nevada State Assemblyman for Assembly District)
13 No. 39,)

14 Petitioners,)

15 vs.)

16 THE COMMISSION ON ETHICS OF THE)
17 STATE OF NEVADA,)

18 Respondent.)

Case No. 15OC000761B

Dept. No. II

19 Certified Record of Proceedings

20 In the Matter of Assemblyman Ira Hansen, Request for Opinion Number 14-21C

21 and

22 In the Matter of Assemblyman Jim Wheeler, Request for Opinion Number 14-22C

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Ira Hansen and Jim Wheeler v. Nevada Commission on Ethics
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CERTIFIED RECORD

**Ira Hansen and Jim Wheeler v. Nevada Commission on Ethics
Case No. 15OC000761B**

On this 14th day of May, 2015, I, Darci L. Hayden, Senior Legal Researcher for the Commission on Ethics of the State of Nevada, certify pursuant to NRS 52.265 that the Bates-numbered documents, NCOE 00001-00144, are true, exact, complete and unaltered photocopies of the record of proceedings and the transcript of evidence which resulted in the final decision of the agency in Third-Party Requests for Opinion Nos. 14-21C and 14-22C.


Darci L. Hayden

MAR 05 2014

NRS 281A.440(2)

COMMISSION
ON ETHICS

- NCOE 00001

<input type="checkbox"/>	NRS 281A.400(4)	Accepting any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.
<input checked="" type="checkbox"/>	NRS 281A.400(5)	Acquiring, through his public duties or relationships, any information which by law or practice is not at the time available to people generally, and using the information to further the pecuniary interests of himself or any other person or business entity.
<input type="checkbox"/>	NRS 281A.400(6)	Suppressing any governmental report or other document because it might tend to affect unfavorably his pecuniary interests.
<input checked="" type="checkbox"/>	NRS 281A.400(7)	Using governmental time, property, equipment or other facility to benefit his personal or financial interest. (Some exceptions apply).
<input checked="" type="checkbox"/>	NRS 281A.400(8)	A State Legislator using governmental time, property, equipment or other facility for a nongovernmental purpose or for the private benefit of himself or any other person, or requiring or authorizing a legislative employee, while on duty, to perform personal services or assist in a private activity. (Some exceptions apply).
<input checked="" type="checkbox"/>	NRS 281A.400(9)	Attempting to benefit his personal or financial interest through the influence of a subordinate.
<input type="checkbox"/>	NRS 281A.400(10)	Seeking other employment or contracts through the use of his official position.
<input type="checkbox"/>	NRS 281A.410	Failing to file a disclosure of representation and counseling of a private person before public agency.
<input checked="" type="checkbox"/>	NRS 281A.420(1)	Failing to sufficiently disclose a conflict of interest.
<input type="checkbox"/>	NRS 281A.420(3)	Failing to abstain from acting on a matter in which abstention is required.
<input type="checkbox"/>	NRS 281A.430/530	Engaging in government contracts in which public officer or employee has a significant pecuniary interest.
<input type="checkbox"/>	NRS 281A.500	Failing to timely file an ethical acknowledgment.
<input type="checkbox"/>	NRS 281A.510	Accepting or receiving an improper honorarium.
<input type="checkbox"/>	NRS 281A.520	Requesting or otherwise causing a governmental entity to incur an expense or make an expenditure to support or oppose a ballot question or candidate during the relevant timeframe.
<input type="checkbox"/>	NRS 281A.550	Failing to honor the applicable "cooling off" period after leaving public service.

5. Identify all persons who have knowledge of the facts and circumstances you have described, as well as the nature of the testimony the person will provide. Check here ☐ if additional pages are attached.

NAME and TITLE: (Person #1)	Ira Hansen, Nevada Assemblyman		
ADDRESS:	68 Amigo Court	CITY, STATE, ZIP	Soarks, NV 89441-6213
TELEPHONE:	Work: 775-684-8851	Other: (Home, cell) 775-221-2502	E-MAIL: Ira.Hansen@asm.state.nv.us
NATURE OF TESTIMONY:	Party to the events		

NAME and TITLE: (Person #2)	Jim Wheeler, Nevada Assemblyman		
ADDRESS:	P.O. Box 2135	CITY, STATE, ZIP	Minden, NV 89423-2135
TELEPHONE:	Work: 775-684-8843	Other: (Home, cell) 775-546-3471	E-MAIL: Jim.Wheeler@asm.state.nv.us
NATURE OF TESTIMONY:	Party to the events		

6. YOU MUST SUBMIT EVIDENCE TO SUPPORT YOUR ALLEGATIONS PURSUANT TO NRS 281A.440(2)(b)(2).

Attach all documents or items you believe provide credible evidence to support your allegations. NAC 281A.435(3) defines credible evidence as any reliable and competent form of proof provided by witnesses, records, documents, exhibits, minutes, agendas, videotapes, photographs, concrete objects, or other similar items that would reasonably support the allegations made. A newspaper article or other media report will not support your allegations if it is offered by itself.

State the total number of additional pages attached (including evidence) 10

7. REQUESTER'S INFORMATION:

YOUR NAME:	Fred Voltz		
YOUR ADDRESS:	1805 N. Carson St., #231	CITY, STATE, ZIP:	Carson City, NV 89701-1216
YOUR TELEPHONE:	Day: 775-297-3651	Evening: --	E-MAIL: zebedee_177@yahoo.com

By my signature below, I affirm that the facts set forth in this document and all of its attachments are true and correct to the best of my knowledge and belief. I am willing to provide sworn testimony if necessary regarding these allegations.

I acknowledge that, pursuant to NRS 281A.440(8) and NAC 281A.255(3), this Request for Opinion, the materials submitted in support of the allegations, and the Commission's Investigation are confidential until the Commission's Investigatory Panel renders its determination, unless the Subject of the allegations authorizes their release.

Fred Voltz
Signature:

3/5/2014

Date:

Fred Voltz

Print Name:

You must submit an original and two copies of this form bearing your signature, and three copies of the attachments to:

Executive Director
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, Nevada 89703



Forms submitted by facsimile will not be considered as properly filed with the Commission.

NAC 281A.255(3)

TELEPHONE REQUESTS FOR OPINION ARE NOT ACCEPTED.

RECEIVED
3/5/2014

Third-Party Request for Opinion
Page 3 of 3

NCOE 00003

Supplement to Third-Party Request for Opinion—Nevada Commission on Ethics—

Ira Hansen and Jim Wheeler

2. Background

In November 2013, Nevada State Assemblyman Ira Hansen was cited by the Nevada Department of Wildlife on four counts of illegally setting animal traps near Buffalo Canyon Road in Churchill County, Nevada. The trial date concerning these four charges has been tentatively set for May 27, 2014, 1:30 p.m., in Churchill County/New River Justice Court.

Sometime in November or December 2013 after the citations were issued, Assemblyman Hansen collaborated with Nevada State Assemblyman Jim Wheeler. Assemblyman Wheeler subsequently requested a legal opinion from the Nevada Legislative Counsel Bureau (LCB) about NRS 503.585, which concerns the placement of steel traps within 200 feet of a public road or highway. Assemblyman Wheeler asked for an LCB interpretation as to whether this statute applied to box traps and snare traps. This was the precise issue Assemblyman Hansen needed a legal interpretation of in preparing his legal defense against the four charges of illegal animal trap setting.

Attached to this Third-Party Request for Opinion is a copy of the January 7, 2014 legal opinion letter to Assemblyman Wheeler co-authored by LCB's Brenda J. Erdoes, Legislative Counsel and J. Randall Stephenson, Principal Deputy Legislative Counsel, further documenting the chronology of events.

If any non-legislator Nevadan allegedly violated a state statute in his or her private life, he/she would not have access to the LCB's attorneys and staff to build a defense or interpret statutes. Non-legislator defendants would have to hire private legal counsel to perform any necessary legal work. If they were indigent, which Assemblyman Hansen is not, the court would have appointed a public defender.

Assemblyman Hansen publicly stated (January 29, 2014 *Reno Gazette Journal* article attached) he will use this publicly-funded opinion Assemblyman Hansen asked Assemblyman Wheeler to request of LCB in preparing a defense case against alleged statutory violations Assemblyman Hansen committed as a private citizen, not as an elected official.

Seven Unanswered Ethical Questions

Why didn't Assemblyman Hansen directly request this LCB opinion for his upcoming trial if he had no concerns with the possible appearance or fact of impropriety?

2. (continued)

Is it ethical for a Nevada elected official to directly request, or indirectly request through another elected official, the use of taxpayer-funded resources (the LCB) for personal benefit in his/her private life?

Why was Assemblyman Wheeler complicit with Assemblyman Hansen in violating NRS 281A.020(1), 281A.400(1), 281A.400(2), 281A.400(5), 281A.400(7), 281A.400 (8)(a) and (8)(b), 281A.400(9), and 281A.420(1)?

Why didn't Assemblyman Hansen personally hire private legal counsel to investigate the provisions of NRS 503.580?

Does LCB legal assistance provided to Assemblyman Hansen for his alleged private life statutory violations give his defense an inappropriate advantage when the case goes to trial vs. the public's case against Assemblyman Hansen presented by the Churchill County District Attorney?

How can the LCB be shielded from behind-the-scenes pressure to help individual legislators or other state employees with personal legal problems?

Shouldn't Assemblymen Hansen and Wheeler have filed a First-Party Request for Opinion with the Nevada Commission on Ethics before asking an entity employed by the Legislature (the LCB) to perform legal research of a private nature?

Potential Remedies

Assemblymen Hansen and Wheeler expressly agreed to uphold the provisions of NRS 281 when they executed the Nevada Commission on Ethics' Nevada Acknowledgment of Ethical Standards for Public Officials upon entering elected office in 2011 and 2013, respectively.

The Nevada Commission on Ethics may or may not have the unilateral authority to impose formal sanctions and/or penalties if it is found either assemblyman violated their oaths of office, partially contained in NRS 281.

One alternative: A Nevada Commission on Ethics' recommendation to another entity (the full Legislature, the Interim Finance Committee of the Legislature, the Assembly Speaker, the Legislative Commission, the Nevada Attorney General, or?) could call for personal reimbursement by Assemblyman Hansen of any LCB staff time spent (including base salary, fringe benefits and administrative overhead) researching and issuing the January 7, 2014 legal opinion to Assemblyman Wheeler on behalf of Assemblyman Hansen for his legal defense as a private citizen.

The suggested legal fee reimbursement would be in addition to any monetary fines that might be levied against either elected official.

5. Additional Persons with Knowledge of Facts and Circumstances

Brenda J. Erdoes, Legislative Counsel, Legislative Counsel Bureau

401 S. Carson Street; Carson City, NV 89701-4747

(775) 684-6600

J. Randall Stephenson, Principal Deputy, Legislative Counsel, Legislative Counsel Bureau

401 S. Carson Street; Carson City, NV 89701-4747

(775) 684-6600

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU



January 7, 2004

Assemblyman Jim Wheeler
Post Office Box 2135
Minden, NV 89423

Dear Assemblyman Wheeler:

You have asked whether the prohibition against placing or setting a steel trap within 200 feet of a public road or highway applies to box traps and snare traps. Title 45 of NRS includes the various state laws concerning wildlife. Chapter 503 of NRS, which is included within that title, establishes the state laws relating to hunting, fishing, trapping and various other protective measures. The term "trap" is defined in NRS 501.089 for purposes of Title 45 to mean "a device that is designed, built or made to close upon or hold fast any portion of an animal." NRS 503.580 addresses placing or setting traps within a certain distance of a public road or highway. Specifically, NRS 503.580 provides:

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 - (a) A highway designated as a United States highway.
 - (b) A highway designated as a state highway pursuant to the provisions of NRS 408.285.
 - (c) A main or general county road as defined by NRS 403.170.
2. It is unlawful for any person, company or corporation to place or set any steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap, within 200 feet of any public road or highway within this State.
3. This section does not prevent the placing or setting of any steel trap inside, along or near a fence which may be situated less than 200 feet from any public road or highway upon privately owned lands.

NRS 503.585 makes violation of NRS 503.580 a misdemeanor.

In interpreting the provisions of NRS 503.580, we are guided by several well-established rules of statutory construction. First, as a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full

and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995). "Under long established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." Randono v. CUNA Mut. Ins. Group, 106 Nev. 371, 374 (1990), citing State v. California Mining Co., 13 Nev. 203, 217 (1878). Moreover, "[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." Imperial Palace, Inc. v. State ex rel. Dep't of Taxation, 108 Nev. 1060, 1067 (1992), citing City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891 (1989). Subsection 2 of NRS 503.580 clearly indicates that the prohibition applies to any "steel trap . . . larger than a No. 1 Newhouse trap." Therefore, applying the plain meaning rule to NRS 503.580, the prohibition clearly must be read to apply only to placing or setting a steel trap that is larger than a No. 1 Newhouse trap within 200 feet from any public road or highway and only if the trap is used for the purpose of trapping mammals.

Along with an analysis based on the plain meaning rule, we generally look at legislative intent because the Nevada Supreme Court has held that when the plain meaning of the statutory language is supported by the legislative history of the statute, a court will be reluctant to interpret the statutory language in a manner that is contrary to its plain meaning and the legislative history of the statute. *See, e.g., Gaines v. State*, 116 Nev. 359, 366-67 (2000). However, in this case such an analysis was not possible. The provisions of NRS 503.580 were originally enacted in Assembly Bill No. 19 (1931), Chapter 155, Statutes of Nevada 1931, p. 249. The relevant provisions of Assembly Bill No. 19 (1931) read as follows:

[I]t shall be unlawful for any person or persons, company or corporation to place or set any steel trap, used for the purpose of trapping animals, larger than a No. 1 Newhouse trap within two hundred feet of any public road or highway within this state; *provided*, that for the purposes of this act a public road or highway shall mean only such roads or highways as have been designated as such by law or by the county commissioners of the county in which they are situated; *and provided further*, that this act shall not be construed so as to prevent the placing or setting any steel trap inside, along or near a fence which may be situated less than 200 feet from any public road or highway upon privately owned lands.

Although amended several times since their original enactment, the provisions of NRS 503.580 have remained substantively unchanged. The only change to the phrase "to place or set any steel trap, used for the purpose of trapping animals, larger than a No. 1 Newhouse trap" through the years was to swap the term "mammal" for the term

"animal." After reviewing all available legislative histories concerning the provisions of Assembly Bill No. 19, we were unable to find a record of any discussions that occurred concerning the scope or applicability of those provisions.

In addition to the plain meaning rule, there is another well-established principle of statutory construction that should be considered in the interpretation of NRS 503.580. The Nevada Supreme Court has long held that the Legislature is not presumed to intend that which the Legislature could have easily included within a statute, but chose not to include within the statute. *See, e.g., Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 680 (1992) (Young, J., concurring) (explaining that the Legislature could have easily provided a definition of occupational disease had it chosen to do so); Joseph F. Sanson Inv. Co. v. 268 Ltd., 106 Nev. 429, 432-33 (1990) (quoting In re 268 Ltd., 75 B.R. 37 (Bankr. D. Nev. 1987)) (explaining that the Legislature could have easily worded a statute so as to make attorney's fees in addition to, instead of included within, the expenses of a trust); State v. University Club, 35 Nev. 475, 484-5 (1913) ("As the question is one entirely subject to legislative control, the legislature can, if it so desires, amend the law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the business of selling liquors."); State ex rel. Norcross v. Eggers, 35 Nev. 250, 258 (1912) ("If the legislature had intended that the \$25,000 appropriated by section 7 should include salaries, instead of using language negating such intent, it would have used language manifesting such intent, as it did in the case of the act in relation to banks and banking and creating the office of state bank examiner and fixing his salary, which act was passed at the same session of the legislature.") Had the Legislature intended to restrict the placing or setting of any trap within 200 feet of a public road or highway, the Legislature could have easily done so. For example, various other provisions of chapter 503 of NRS refer to a "trap" or "traps" without specifying the type or size of the trap. *See* NRS 503.450, 503.452 and 503.454. In these sections, it is clear that the traps to which the section refers are all traps rather than only those steel traps that are larger than a No. 1 Newhouse trap as is provided in NRS 503.580.

The courts in this State have also long held that, where possible, a statute should be read so as to give meaning to all of its parts. Nevada Tax Comm'n v. Bernhard, 100 Nev. 348, 351, 683 P.2d 21 (1984); Nevada State Personnel Div. v. Haskins, 90 Nev. 425, 427, 529 P.2d 795 (1974). The term "trap" is defined for the purpose of NRS 503.580 to mean "a device that is designed, built or made to close upon or hold fast any portion of an animal." NRS 501.189. This definition is very broad and could include any snare or other device that closes upon or holds fast any portion of an animal. Despite this broad definition, however, the provisions of subsection 2 of NRS 503.580 are expressly limited to the placing or setting of a "steel trap" which is "larger than a No. 1 Newhouse trap." To read the provisions of subsection 2 of NRS 503.580 in a manner which gives meaning to all of its parts, those provisions must be read to allow the placing or setting of all traps other than steel traps larger than a No. 1 Newhouse trap within 200 feet of any highway or public road.

In determining the meaning of "steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap" as that phrase is used in subsection 2 of NRS 503.580, it is important to consider an additional rule of statutory construction. When the provisions of a statute are interpreted, the Nevada Supreme Court has consistently held that the interpretation of the statute should be consistent with what reason and public policy would indicate the Legislature intended in enacting those provisions, and that the interpretation should avoid absurd results. Theis v. State, 117 Nev. 744, 751, 30 P.3d 1140 (2001); English v. State, 116 Nev. 828, 833, 9 P.3d 60 (2000). Based on these authorities, the provisions of subsection 2 of NRS 503.580 must be interpreted in a manner which is consistent with what reason and public policy would indicate the Legislature intended in enacting those provisions and which avoids an absurd result. It is important to note that the prohibition set forth in NRS 503.580 applies only to a "steel trap" that is "larger than a No. 1 Newhouse trap." Thus, it is clear that the prohibition set forth in NRS 503.580 does not apply to traps made of any material other than steel. Additionally, for the prohibition to apply, the trap must be larger than a No. 1 Newhouse trap. To avoid an absurd result as is required by the case law, the types of traps to which the prohibition applies must necessarily be directly comparable in size to a No. 1 Newhouse trap. The term "No. 1 Newhouse trap" is not defined for the purposes of NRS but the Nevada Attorney General has opined that a No. 1 Newhouse trap is a "jaw-foot trap used for trapping muskrats and mink." Attorney General Opinion No. 1971-57. Therefore it is clear that the only type of trap to which the prohibition set forth in NRS 503.580 applies is a jaw-foot type of trap. Because a snare trap and a box trap are not "jaw-foot" types of traps, it is equally clear that these traps are not subject to reasonable comparison for the purpose of establishing a violation of subsection 2 of NRS 503.580. Accordingly, interpreting the prohibition set forth in subsection 2 of NRS 503.580 to apply to any type of trap used to trap mammals other than a jaw-foot trap would be inconsistent with what reason and public policy would indicate the Legislature intended in enacting those provisions and would lead to an absurd result.

This interpretation is consistent with another very important line of cases. It has long been held that a criminal statute is one which imposes a penalty for transgressing the provisions of the statute. Ex Parte Davis, 35 Nev. 309, 315, 110 P. 1131 (1910); State v. Wheeler, 23 Nev. 143, 152, 44 P. 430 (1896). As such, a criminal statute must be strictly construed in a defendant's favor and may not be enlarged by implication or intendment beyond the fair meaning of the language used. Anderson v. State, 95 Nev. 625, 629-30, 660 P.2d 241 (1979); Ex Parte Sweeney, 18 Nev. 74, 75, 1 P. 379 (1883). As noted above, the provisions of subsection 2 of NRS 503.580 make it unlawful for any person to place or set any steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap, within 200 feet of a public road or highway within this State. Pursuant to NRS 501.385, any person who performs an act or attempts to perform an act made unlawful or prohibited by a provision of title 45 of NRS is guilty of a misdemeanor. Based upon the holdings in Anderson and Ex Parte Sweeney, any question or ambiguity

Assemblyman Wheeler
January 7, 2014
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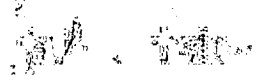
concerning the applicability of the provisions of subsection 2 of NRS 503.580 must be resolved in a defendant's favor and the application of those provisions must not be given an enlarged or implied meaning beyond the fair meaning of the language used in those provisions.

As a final note, the Nevada Supreme has held that an administrative agency which is charged with the duty of administering a legislative act is impliedly clothed with the authority to construe any relevant laws and to set any necessary precedent for administrative action. Any construction placed on a statute by that agency is entitled to deference. State Industrial Ins. Sys. v. Sawyer, 109 Nev. 1223, 1228, 865 P.2d 1168 (1993) (citing Truckee Meadows v. Int'l Firefighters, 109 Nev. 367, 849 P.2d 259 (1993); and Jones v. Rosner, 102 Nev. 115, 719 P.2d 895 (1986)). Pursuant to NRS 501.105, the Board of Wildlife Commissioners is required to establish policies and adopt regulations necessary to preserve, protect, manage and restore wildlife and its habitat. Pursuant to NRS 501.331, the Department of Wildlife is required to administer the wildlife laws of this State. As such, any interpretation of the provisions of subsection 2 of NRS 503.580 by the Commission or the Department in carrying out their duties is entitled to deference. However, based upon research and information provided to our office by the Department, the Commission and the Department have not issued a written policy interpreting those provisions. Rather, the Department, in enforcing those provisions, has relied upon those provisions as written without resorting to any construction or interpretation prepared by the Commission or Department.

Based on the foregoing principles of statutory construction, it is the opinion of this office that the prohibition contained in subsection 2 of NRS 503.580 against placing or setting a steel trap within 200 feet of a public road or highway does not apply to box traps or snare traps.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,


Brenda J. Hedges
Legislative Counsel

J. Randall Stephenson
Principal Deputy Legislative Counsel

NCOE 00011

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Assemblyman Ira Hansen charged with 4 counts of illegally setting traps; calls charges 'a vendetta' by Dept. of Wildlife

7:22 pm, Jan 29, 2014 | Written by Ray Hagar

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Assemblyman Ira Hansen, R-Sparks, has been charged with four misdemeanor counts of unlawfully setting traps near the Buffalo Canyon Road in Churchill County, according to documents filed with the Churchill County District Attorney's office by the Nevada Department of Wildlife.

Hansen, who has trapped in Nevada for more than 30 years, called the charges a "vendetta" against him by NDOW officials. Hansen said he has been a "watchdog" on the agency and has testified against the department's budget increases at the Legislature.

"I did not break any law," Hansen said. "I am in complete compliance with the law. They are doing this to stir the pot, make me look bad because that takes the heat off of them for the felonies, in my opinion, they have committed."

Hansen said NDOW has withheld public documents and data from him and denied access to other public information. Hansen said he had filed a complaint with the Nevada Attorney General over the issue.

"That is what this is about," Hansen said. "I did not break any law. I did not do anything that was unsafe. I've been doing this (trapping) for over 35 years and I have been a lobbyist on these issues (before he was elected to the Assembly in 2010). I know the law and they have totally tried to make something out of the law that is not there."

NDOW law-enforcement spokesman Edwin Lyngar denied any vendetta against Hansen by NDOW.

"The vendetta is utter nonsense," Lyngar said. "The officer who investigated this, a field officer who was on routine patrol, found these snares. Any other person who owned the snares would be treated in exactly the same way."

"Our field officer did his professional job, as he has been trained to do and followed the law as we have enforced it in Nevada for many years," Lyngar said. "Any allegation that there has been any difference treatment is nonsense on its face."

Hansen was most-likely trapping bobcats, Lyngar said.

"He was trapping too close to a roadway," Lyngar said. In Nevada you have to be at least 200 feet from a roadway. This serves an important purpose. You don't want to trip right along a roadway where people or dogs go, particularly with snares, which can be very harmful to people's dogs."

The latest incident is the seventh time Hansen has been cited for trapping or non-trapping violations since 1980, said NDOW spokesman Chris Healy.

Charges ranged from hunting a protected species to transporting wildlife without a permit. He was convicted in 1992 for having no registration numbers on his traps. He was found not guilty of failing to visit traps within a 96 hour time frame in 2004.

Hansen set four snare traps too close to a roadway in early November, according to court documents. He has been summoned to appear in New River Justice Court on March 3 to answer the charges.

NCOE 00012

Each count carries a fine up to \$500, said Lyngar.

"One of our game wardens encountered the traps," Lyngar said. "One of our game wardens then wrote a report then forwarded to the district attorney in Churchill County. The district attorney issued a summons of a criminal complaint. We forwarded the complaint to the district attorney and left it at their discretion."

A key issue is the type of traps Hansen used. Hansen used snares, according to NDOW.

Snares are not covered by the law that bars setting steel traps within 200 feet of a public road or highway, Hansen said.

"I have been involved a long time with those issues and I know the law as well," Hansen said.

Hansen said the Legislative Counsel Bureau has issued an opinion that backs his claim that he has not broken the law.

"I will give you a prediction right now: This will either be dismissed outright or I will be found not guilty because when you see what the LCB says and when you read the law, you will see that I was in compliance," Hansen said. "This is nothing more than a vendetta."

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STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party
Request for Opinion Concerning the
Conduct of Public Officer **IRA HANSEN**,
Assemblyman, State of Nevada,
Subject.

Request for Opinion No. 14-21C

In the Matter of the Third-Party
Request for Opinion Concerning the
Conduct of Public Officer **JIM WHEELER**,
Assemblyman, State of Nevada,
Subject.

Request for Opinion No. 14-22C

ORDER ON REVIEW OF JURISDICTIONAL DETERMINATION

BACKGROUND:

On March 5, 2014, the Nevada Commission on Ethics ("Commission") received Third-Party Requests for Opinions ("RFOs") from a member of the public pursuant to NRS 281A.440(2)(b) concerning the conduct of Nevada State Assemblyman Ira Hansen and Nevada State Assemblyman Jim Wheeler ("Subjects"), alleging violations of certain provisions of the Nevada Ethics in Government Law ("Ethics Law") set forth in NRS Chapter 281A. Subjects are public officers under the Ethics Law, as defined in NRS 281A.160. Pursuant to NAC 281A.405, the Commission's Executive Director and Commission Counsel determined that the Commission has jurisdiction under NRS 281A.280(1)(a) to initiate investigations concerning these RFOs, now procedurally consolidated under NAC 281A.260 as related requests sharing common facts and issues.

On March 24, 2014, the Commission's Executive Director, pursuant to NRS 281A.440 and NAC 281A.410, issued Notices of the RFOs to the Subjects and provided them with the requisite opportunity to respond to the allegations.

Subjects are presently represented in this matter by Brenda J. Erdoes, Esq., Legislative Counsel, Kevin C. Powers, Esq., Chief Litigation Counsel, and Eileen G. O'Grady, Esq., Chief Deputy Legislative Counsel, of the Nevada Legislative Counsel Bureau ("LCB").

Pursuant to the provisions of NAC 281A.265 and 281A.405, on July 18, 2014, the Commission entered into a Stipulation with the Subjects' counsel to authorize the submission of a jurisdictional motion with the requisite opportunity to respond by the Commission's Executive Director and Associate Counsel. The Commission also issued

an Order staying all further pre-panel and panel proceedings and a Notice of Hearing and Scheduling Order to hear oral argument on September 17, 2014.

On August 4, 2014, Subjects' counsel submitted a motion requesting the Commission's review of the jurisdictional determination in this matter and a dismissal of the RFOs ("Motion"). The Commission's Executive Director/Associate Counsel submitted an opposition to the Motion on September 8, 2014 ("Opposition"), and the Subjects' counsel submitted a reply to the opposition on October 6, 2014 ("Reply").

Following various scheduling conflicts, on November 19, 2014 the Commission heard oral argument on the Motion and took the matter under submission.¹

PROCEDURAL AND LEGAL STANDARDS:

Under NRS 281A.290(1), the Commission has adopted procedural regulations which will be liberally construed pursuant to NAC 281A.250(2) to determine all matters before the Commission in a just, speedy and economical manner. For good cause shown pursuant to NAC 281A.250(3), the Commission may deviate from its procedural regulations if the deviation will not materially affect the interests of a party who is the subject of the RFO.

NRS 281A.440(8) states that all information, communications, records, documents and other material in the possession of the Commission or its staff that is related to a request for opinion regarding a public officer . . . are confidential and not public records pursuant to chapter 239 of NRS until . . . [t]he investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter . . . or . . . [t]he public officer . . . authorizes the Commission in writing to make its information . . . publicly available, whichever occurs first." Further, NRS 281A.440(15) exempts from the requirements of the Open Meeting Law (NRS Chapter 241) any hearings by the Commission to receive information and/or deliberate on information related to a request for opinion concerning the conduct of a public officer.

The Subjects' Motion is based on the Subjects' interpretation of doctrines of separation of powers and legislative privileges and immunity that promote legislative autonomy under Art. 4, Sec. 6 of the Nevada Constitution; an interpretation set out in the provisions of NRS 41.071 and made applicable to Commission proceedings under NRS 281A.020(2)(d).

NRS 281A.020(2)(d) states:

The provisions of this chapter [281A] do not, under any circumstances, allow the Commission to exercise jurisdiction or authority over or inquire into, intrude upon or interfere with the functions of a State Legislator that are protected by legislative privilege and immunity pursuant to the Constitution of the State of Nevada or NRS 41.071.

¹ Commissioners Groover and Weaver did not participate in oral argument, but having reviewed that transcript and all pleadings, did participate in this decision. Commissioner Carpenter has recused himself from any participation in these RFOs.

NRS 41.071 provides:

1. The Legislature hereby finds and declares that:

(a) The Framers of the Nevada Constitution created a system of checks and balances so that the constitutional powers separately vested in the Legislative, Executive and Judicial Departments of State Government may be exercised without intrusion from the other Departments.

(b) As part of the system of checks and balances, the constitutional doctrines of separation of powers and legislative privilege and immunity facilitate the autonomy of the Legislative Department by curtailing intrusions by the Executive or Judicial Department into the sphere of legitimate legislative activities.

(c) The constitutional doctrines of separation of powers and legislative privilege and immunity protect State Legislators from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity.

(d) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must not be hindered or obstructed by executive or judicial oversight that realistically threatens to control their conduct as Legislators.

(e) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must be free to represent the interests of their constituents with assurance that they will not later be called to task for that representation by the other branches of government.

(f) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, State Legislators must not be questioned or sanctioned by the other branches of government for their actions in carrying out their core or essential legislative functions.

(g) Under the constitutional doctrines of separation of powers and legislative privilege and immunity, the only governmental entity that may question or sanction a State Legislator for any actions taken within the sphere of legitimate legislative activity is the Legislator's own House pursuant to Section 6 of Article 4 of the Nevada Constitution.

(h) Therefore, the purpose and effect of this section is to implement the constitutional doctrines of separation of powers and legislative privilege and immunity by codifying in statutory form the constitutional right of State Legislators to be protected from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity.

2. For any speech or debate in either House, a State Legislator shall not be questioned in any other place.

3. In interpreting and applying the provisions of this section, the interpretation and application given to the constitutional doctrines of separation of powers and legislative privilege and immunity under the Speech or Debate Clause of Section 6 of Article I of the Constitution of the United States must be considered to be persuasive authority.

4. The rights, privileges and immunities recognized by this section are in addition to any other rights, privileges and immunities recognized by law.

5. As used in this section, "State Legislator" or "Legislator" means a member of the Senate or Assembly of the State of Nevada.

Abrogation of common-law privileges and immunities is not a consideration in this case. NRS 281A.185(2)(a).

Proceedings on this Motion were conducted consistent with Commission rules in NAC Chapter 281A and applicable provisions of NRS 233B, as well as consideration of judicial rules of civil procedure and evidence in NRCP and NRE, as appropriate.

The motion practice on subject-matter jurisdiction issues is generally set out in the provisions of NAC 281A.405. Requested review by the Commission may include an oral argument or an evidentiary-style hearing. In this case, review was limited to oral arguments of counsel, in which both fact and law issues were urged and argued.

As in Commission hearings on Third-Party RFOs, oral arguments may follow similarly relaxed, liberal procedural allowances.

NAC 281A.465 provides:

1. In conducting any hearing concerning a third-party request for an opinion, the rules of evidence of the courts of this State will be followed generally but may be relaxed at the discretion of the Commission.
2. The Chair or presiding officer may exclude immaterial, incompetent, cumulative or irrelevant evidence or order that the presentation of such evidence be discontinued.
3. A subject may object to the introduction of evidence if the subject:
 - (a) Objects to such evidence promptly; and
 - (b) Briefly states the grounds of the objection at the time the objection is made.
4. If an objection is made to the admissibility of evidence, the Chair or presiding officer may:
 - (a) Note the objection and admit the evidence;
 - (b) Sustain the objection and refuse to admit the evidence; or
 - (c) Receive the evidence subject to any subsequent ruling of the Commission.

Under provisions of NAC 281A.405, when RFO jurisdiction is initially found, the Requester is not generally deemed a party to the proceedings if the Subject seeks Commission review. The Executive Director assumes the responsibility to respond to the Subject's jurisdictional motion.

The Subjects' Motion effectively precludes the Executive Director from investigating the allegations made in the RFOs against the Subjects as would normally be conducted under NRS 281A.440 and NAC 281A.045 and 281A.405, and there has been no jurisdiction-related discovery requested by any party prior to the oral argument. Moreover, under NRS 281A.440(8), proceedings at this stage on Subjects' motion are, and must be maintained as, confidential. Consequently, the combined result is that the evidentiary record is limited to the facts as alleged in RFOs, the Supplemental Statements, the motion-related pleadings, and the respective exhibits thereto.

DISCUSSION:

Subjects' Motion requests dismissal relief on jurisdictional grounds as a matter of law. In doing so, Subjects broadly would define the scope of conduct "within the legitimate sphere of legislative activity" as the jurisdictional exemption issue, but limit the factual inquiry to their stated conduct as an evidentiary issue. The Motion appears a facial challenge to the RFOs, but is argued as substantive based on a mix of fact and law.

The Subjects contend their concerted action in requesting an opinion from the LCB on a question of law was a "legislative act" within the "legitimate sphere of legislative activity", which under recognized concepts of "checks and balances" and "legislative privileges and immunity" is conduct beyond the subject-matter jurisdiction of the Commission to review based on the RFOs submitted. Subjects assert any evidence of motive or intent is not material or admissible to determine what is a "legislative act."

The RFOs and Opposition submit that the Subjects' request for an opinion from LCB was not such a "legislative act" but rather an act to further the Subjects private, personal interests and use for purposes of Subject Hansen's pending criminal charges. Consequently, the conduct is within the Commission's jurisdiction to investigate. Support for the RFOs and Opposition included contemporary newspaper articles containing quotes attributed to Subjects and other material witnesses that provide context for the conduct of Subjects, LCB's denial of an initial request for legal opinion, and support for the RFOs' allegations of private, personal use.

In their pleadings and oral arguments, counsel for the Subjects and the Opposition made representations of fact. The presentations did not include affidavits. The RFOs, Supplemental Statements, and Opposition included contemporary newspaper articles describing the circumstances of Subjects' conduct and statement quotes from Subjects and other material sources. The Subjects' Motion included their own stated facts.

Subjects objected to consideration of any evidentiary facts reported in newspaper articles and the quotes attributed to Subjects and other material witnesses for two reasons: first, on the ground it is hearsay within hearsay; and second, the facts relate to motive or intent which are not relevant. Subjects acknowledge hearsay exceptions.

The Commission notes the Subjects' objection that the facts alleged in the RFOs relating to the private, personal interests of the Subjects may be hearsay. So too are the facts offered by the Subjects in pleadings and oral argument. However, rules of evidence may be relaxed at the discretion of the Commission, and the Commission may admit evidence over objection.

The Commission finds and concludes that the facts presented in the RFOs, Supplemental Statements and briefing materials, which include newspaper articles contemporaneous with events that contain quotes attributed to Subjects and other material sources, satisfy concerns over what might otherwise be within the hearsay rule, being exceptions to the rule as admissions/declarations against Subjects' interests. See

NRS 51.035(3) and NRS 51.315 to 51.345, inclusive, and NRS 233B.123. Moreover, the credibility of the objected-to quotes or any other evidentiary facts offered by the Requester or Subjects has yet to be critically evaluated by investigation.²

Accordingly, the Commission further concludes there is sufficient necessity for the evidence, combined with circumstantial guarantee of trustworthiness and assurance of journalistic accuracy, to admit the evidence for the limited purposes of disposition of this motion at this preliminary stage, and overrules the objection. The evidentiary antidotes of denial or other critical examination are available during investigation.

In the absence of any investigation, facts relevant or material to the issue of "legislative" conduct to satisfy legislative privilege or immunity cannot be determined at this preliminary stage. The Subjects seek to limit the evidentiary record to their stated conduct, i.e. the sole act of requesting an LCB legal opinion on a question of law, as a basis to deny subject-matter jurisdiction and investigation. Facts necessary for determination of the nature of the act may not and should not be so limited, even if motive and intent are not relevant.

Finally, the Commission notes that in these consolidated cases each Subject's individual conduct at issue differs, but Subjects' motion apparently treats and argues the conduct as being singular, in concert or in common, if not similar, for purposes of legislative privilege and immunity.

Based on the foregoing information, representations, and arguments, for good cause, the Commission hereby finds and concludes that it has jurisdiction to initiate an investigation of the RFOs' allegations to determine whether as a matter of fact and law for purposes of NRS 281A.020(2)(d), the Subjects' respective conduct relating to the requested LCB legal opinion are "actions performed within the sphere of legitimate legislative activity" (NRS 41.071(1)(c)) and/or "represent[ing] the interests of their constituents" (NRS 41.071(1)(e)).

In seeking dismissal for lack of subject-matter jurisdiction, Subjects argue that "it is clear from the face of the RFOs that the Assemblymen were acting within the sphere of legitimate legislative activity and performing functions of a State Legislator that are protected by legislative privilege and immunity when they exercised the statutory right to request a legal opinion from the Legislative Counsel on a question of law." Motion, pgs. 10-11. To the contrary, the Commission's Executive Director/Associate Counsel argue that the RFOs call into question the legitimacy of the respective conduct as "legislative acts" falling within the "legitimate sphere of legislative activity" based on the assertions that the Subjects' requested legal opinion are acts not related to any legislative function but rather are for purposes related to their personal, private interests. At this preliminary stage of proceedings, the Commission finds the latter argument a more persuasive

² Although not urged, provisions of NAC 281A.400(3) and (6) preclude newspaper articles or reports from being considered if that is the only support for RFO allegations. The news articles are not the only supporting evidence. The RFOs and Supplemental Statements provide facts and issues of pending charges; the LCB opinion letter exhibit relates to similar facts and issues.

reason to undertake an investigation as reasonable and necessary to determine the "legislative act" issue and render an opinion. NRS 281A.290(3).³

Given the status of the RFOs as pending without any investigative facts, and relying solely upon the factual material presented in the RFOs, Supplemental Statements, and the respective motions, the Commission determines that it has jurisdiction under provisions of NRS 281A.020(2)(d) and NRS 281A.440(2)(b) at this juncture to investigate the legitimacy of the Subjects' conduct claimed to be legislative acts within the sphere of legitimate legislative activity for purposes of legislative privilege and immunity.

At issue is whether a Commission investigation under the Ethics in Government Law, NRS Chapter 281A, operates to hinder or obstruct, as a realistic threat to control, the conduct of Subjects as legislators acting within the legitimate sphere of legislative activity. In the context of a system of "checks and balances" among the branches of Nevada government, in which the Commission acting as an independent agency and a creature jointly established for and composed of Legislative and Executive branch appointees under NRS Chapter 281A, at this juncture, the Commission believes the answer is no.

The ethical principles, basic and common to the public service at issue, are public trust and faith. The initial presentations of facts in the RFOs and Supplemental Statements are sufficient to invoke the jurisdiction of the Commission for purposes of investigation by the Executive Director. As defined in NAC 281A.045, the Commission's exercise of jurisdiction to investigate the RFOs' allegations does not intrude upon or interfere with the functions of the Subjects as State Legislators. Accordingly, the Subjects' motion to dismiss for want of subject-matter jurisdiction will be denied.⁴

ORDER:

Based on the foregoing, it is ordered that:

- 1) The Subjects' Motion to Dismiss be, and hereby is, denied; and
- 2) The Commission's Executive Director shall undertake an investigation for referral to an Investigatory Panel pursuant to NRS 281A.440(3) to determine whether the Subjects conduct properly falls within the scope of legitimate legislative activity and/or conduct related to the representation of the interests of their constituents that is privileged and immune from review under application of NRS 281.020(2)(d) and NRS 41.071; and

³Subjects and Opposition provide opinions of the US Supreme Court, and other Federal Courts, which address the concept of legislative privilege and immunity in a variety of circumstances. The Commission notes that application of the concept, while historic, is not static or without regard to the factual context of the cases or the differences of judicial opinion. The Commission will consider Federal authorities as persuasive. NRS 41.071(3).

⁴At hearing, Subjects raised an additional issue of public relief available under Assembly Standing Rule 23 for ethics complaints post-sine die, which the Commission will not consider for purposes of this motion.

- 3) Pursuant to the provisions of NRS 1.310, the investigation by the Commission's Executive Director, or any further Commission proceedings on these RFOs, shall be deferred and continued, and not undertaken until after the 2015 Session of the Nevada Legislature, in regular or special session, has adjourned sine die.

DATED: March 3, 2015

/s/ Yvonne M. Nevarez-Goodson, Esq.
Yvonne M. Nevarez-Goodson, Esq.
Executive Director

On Behalf of:

COMMISSIONERS PARTICIPATING AND APPROVING ORDER:

Chairman Paul H. Lamboley
Vice-Chairman Gregory J. Gale
Commissioner Timothy Cory
Commissioner Magdalena Groover
Commissioner Cheryl A. Lau
Commissioner James M. Shaw
Commissioner Keith A. Weaver

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the **ORDER ON DETERMINATION OF JURISDICTION** in Requests for Opinion Nos. 14-21C and 14-22C, via email, addressed to the parties as follows:

Jill C. Davis, Esq.
Associate Counsel
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, Nevada 89703

Email: jilldavis@ethics.nv.gov

Brenda J. Erdoes, Esq.
Legislative Counsel
Kevin C. Powers, Esq.
Chief Litigation Counsel
Eileen G. O'Grady, Esq.
Chief Deputy Legislative Counsel
Nevada Legislative Counsel Bureau
Legal Division
401 S. Carson Street
Carson City, Nevada 89701

Email: erdoes@lcb.state.nv.us

Email: kpowers@lcb.state.nv.us

Email: ogrady@lcb.state.nv.us

DATED: March 3, 2015

/s/ Yvonne M. Nevarez-Goodson, Esq.
An employee, Nevada Commission on Ethics


Respondents' Motion to Dismiss Appeal, Etc.

Exhibit C

REC'D & FILED

APR 30 PM 2: 56

SUSAN HERRIWETHER
CLERK

BY  DEPUTY

BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us; ogrady@lcb.state.nv.us
Attorneys for Petitioners

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
for Assembly District No. 39,

Petitioners,

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

Respondent.

Case No. 15 OC 00076 1B
Dept. No. II

STIPULATION AND ORDER

On April 2, 2015, the Petitioners, Ira Hansen, in his official capacity as Nevada State Assemblyman for Assembly District No. 32, and Jim Wheeler, in his official capacity as Nevada State Assemblyman for Assembly District No. 39 (the Assemblymen), filed a Petition for Judicial Review pursuant to the Nevada Administrative Procedure Act (NRS Chapter 233B or APA) and the Nevada Ethics in Government Law (NRS Chapter 281A or Ethics Law) asking the Court to set aside the order issued on March 3, 2015, by the Respondent, the Commission on Ethics of the State of Nevada

1 (Commission), denying the Assemblymen's motion to dismiss for lack of subject matter jurisdiction in
2 pending matters designated as Request for Opinion No. 14-21C and Request for Opinion No. 14-22C
3 (collectively the RFOs).

4 In the alternative, the Assemblymen also filed a Petition and Application for a Writ of Certiorari,
5 Review or Prohibition pursuant to Article 6, Section 6 of the Nevada Constitution and NRS Chapter 34
6 asking the Court to arrest the Commission's investigations and proceedings against the Assemblymen
7 under the RFOs based on their allegations that the investigations and proceedings are in excess of the
8 authority and jurisdiction of the Commission under the Constitution and laws of this state.

9 In conjunction with their Petition and Application, the Assemblymen also filed an Emergency
10 Motion for a Preliminary Injunction and a Stay asking the Court to enjoin the Commission from
11 conducting any further investigations or proceedings under the RFOs pending judicial review pursuant
12 to NRCP 65, NRS 33.010 and NRS 233B.140.

13 On April 3, 2015, the Court held a status hearing, which was recorded on JAVS, with counsel for
14 the parties participating by telephone conference. The Assemblymen were represented by Brenda J.
15 Erdoes, Legislative Counsel, Kevin C. Powers, Chief Litigation Counsel, and Eileen G. O'Grady, Chief
16 Deputy Legislative Counsel, with the Legal Division of the Legislative Counsel Bureau (LCB), and the
17 Respondent was represented by Tracy L. Chase, Commission Counsel, with the Commission on Ethics.

18 Following the status hearing, counsel for the parties met and conferred in good faith and hereby
19 agree and stipulate, contingent upon approval by the Court, as follows:

20 1. Unless as otherwise ordered by the Court, the parties agree and stipulate to a stay of any and
21 all administrative investigations and proceedings by the Commission and its staff in Request for Opinion
22 No. 14-21C and Request for Opinion No. 14-22C while this matter is pending before or otherwise within
23 the jurisdiction of this Court and, if any party seeks review by or relief from any state appellate court,
24 while this matter is pending before or otherwise within the jurisdiction of the Nevada Court of Appeals

1 or the Nevada Supreme Court.

2 2. The parties agree and stipulate to vacate the hearing before this Court set for May 14, 2015, at
3 10:00 a.m., for oral arguments on the Emergency Motion for a Preliminary Injunction and a Stay, and
4 the parties agree and stipulate that the Emergency Motion for a Preliminary Injunction and a Stay is
5 rendered moot by the stay agreed to and stipulated by the parties herein. Accordingly, the Assemblymen
6 withdraw the Emergency Motion for a Preliminary Injunction and a Stay from consideration by the
7 Court upon the Court's approval of this stipulation.

8 3. Pursuant to NRS 281A.440(8), the Assemblymen authorize the Commission by this written
9 stipulation to make its information, communications, records, documents or other materials which are
10 related to the RFOs publicly available, and the Assemblymen waive the confidentiality of the RFOs
11 pursuant to NRS 281A.440(8).

12 4. Pursuant to NRCP 5(b)(2)(D), the parties consent to service by electronic mail. The parties
13 may use portable document format (pdf) or Microsoft Word as the format for attachments to service by
14 electronic mail, except that if service by electronic mail is not confirmed or fails due to the size of the
15 attachments, the parties shall take additional steps to reduce the size of the attachments to perfect service
16 or shall perfect service by another means authorized by NRCP 5. Service by electronic mail must be
17 made upon the following persons at the following electronic-mail addresses:

18 Brenda J. Erdoes, Legislative Counsel

E-mail: erdoes@lcb.state.nv.us

19 Kevin C. Powers, Chief Litigation Counsel

E-mail: kpowers@lcb.state.nv.us

20 Eileen G. O'Grady, Chief Deputy Legis. Counsel

E-mail: ogrady@lcb.state.nv.us

21 *Attorneys for Petitioners*

Tracy L. Chase, Commission Counsel

E-mail: tchase@ethics.nv.gov

Attorneys for Respondent

22 //

23 //

24 //

1 5. Not later than April 30, 2015, the Commission shall file and serve its statement of intent to
2 participate in the Petition for Judicial Review. NRS 233B.130(3).

3 6. Not later than May 15, 2015, the Commission shall transmit to this Court the entire record,
4 including a transcript, unless the record is shortened by a stipulation of the parties under
5 NRS 233B.131(1), and shall file and serve upon the parties a written notice of transmittal, which must
6 include a statement to the effect: "The record of the proceeding was filed with the Court on (insert date
7 the record was filed)." NRS 233B.133(1).

8 7. Not later than June 30, 2015, the Commission shall file and serve its answer or other
9 responsive pleading to the Petition and Application for a Writ of Certiorari, Review or Prohibition.

10 8. Not later than July 13, 2015, the Assemblymen shall file and serve their opening brief
11 (memorandum of points and authorities) in the form provided for appellate briefs in NRAP 28.
12 NRS 233B.133(1).

13 9. Not later than August 14, 2015, the Commission shall file and serve its answering brief
14 (memorandum of points and authorities) in the form provided for appellate briefs in NRAP 28.
15 NRS 233B.133(2).

16 10. Not later than September 4, 2015, the Assemblymen shall file and serve their reply brief
17 (memorandum of points and authorities) in the form provided for appellate briefs in NRAP 28.
18 NRS 233B.133(3).

19 //

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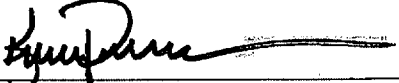
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11. A hearing before the Court for oral argument on the Petition for Judicial Review and the
Petition and Application for a Writ of Certiorari, Review or Prohibition is set for September 29, 2015, at
1:30 p.m.

IT IS SO STIPULATED.

DATED: This 22nd day of April, 2015.

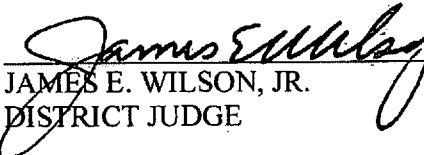
DATED: This 22nd day of April, 2015.

By: 
KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL
DIVISION
401 S. Carson Street
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
kpowers@lcb.state.nv.us
Attorney for Petitioners

By: 
TRACY L. CHASE
Commission Counsel
Nevada Bar No. 2752
COMMISSION ON ETHICS
704 W. Nye Lane, Suite 204
Carson City, NV 89703
Tel: (775) 687-5469; Fax: (775) 687-1279
tchase@ethics.nv.gov
Attorney for Respondent

IT IS SO ORDERED.

DATE: April 29, 2015


JAMES E. WILSON, JR.
DISTRICT JUDGE

Respondents' Motion to Dismiss Appeal, Etc.

Exhibit D

1 BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
2 KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
3 EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
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6 E-mail: kpowers@lcb.state.nv.us; ograde@lcb.state.nv.us
Attorneys for Petitioners

REC'D & FILED
2015 OCT 26 AM 9:17
SUSAN MERRIWETHER
CLERK
BY V. Alegria
DEPUTY

8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
11 District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
12 for Assembly District No. 39,

Case No. 15 OC 00076 1B
Dept. No. II

13 Petitioners,

14 vs.

15 THE COMMISSION ON ETHICS OF THE
16 STATE OF NEVADA,

17 Respondent.

18 **NOTICE OF ENTRY OF ORDER DENYING MOTION TO DISMISS**
19 **AND GRANTING PETITION FOR JUDICIAL REVIEW**

20 **PLEASE TAKE NOTICE** that on the 1st day of October, 2015, the Court in the above-
21 titled action entered an Order Denying Motion to Dismiss and Granting Petition for Judicial Review. A
22 copy of the Order is attached hereto as Exhibit 1.

23 \\\

24 \\\

1 DATED: This 26th day of October, 2015.

2 Respectfully submitted,

3 **BRENDA J. ERDOES**
4 Legislative Counsel

5 By: 

6 **KEVIN C. POWERS**, Chief Litigation Counsel
Nevada Bar No. 6781
7 **EILEEN G. O'GRADY**, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
8 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
9 Tel: (775) 684-6830; Fax: (775) 684-6761
10 *Attorneys for the Petitioners*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
13 and that on the 26th day of October, 2015, pursuant to NRCP 5(b) and the parties' stipulation and
14 consent to service by electronic mail, I served a true and correct copy of Notice of Entry of Order
15 Denying Motion to Dismiss and Granting Petition for Judicial Review, by electronic mail, addressed to
16 the following:

17 Tracy L. Chase, Esq.
Commission Counsel
18 NEVADA COMMISSION ON ETHICS
704 W. Nye Lane, Suite 204
19 Carson City, NV 89703
E-mail: tchase@ethics.nv.gov
20 *Attorney for Respondent*

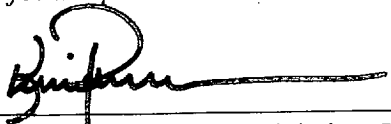
21 
22 An Employee of the Legislative Counsel Bureau
23
24

Exhibit 1

Exhibit 1

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SUSAN MERRIWETHER
CLERK

~~G. WINDER~~
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

IRA HANSEN, in his official capacity as
Nevada State Assemblyman for
Assembly District No. 32; and JIM
WHEELER, in his official capacity as
Nevada State Assemblyman for
Assembly District No. 39,

Petitioners,

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA

Respondent.

CASE NO. 15 OC 00076 1B

DEPT. 2

ORDER DENYING MOTION TO
DISMISS AND GRANTING
PETITION FOR JUDICIAL
REVIEW

PROCEDURAL BACKGROUND

An individual filed two Third-Party Request for Opinion (RFO) forms with the Commission on Ethics of the State of Nevada (the Commission) seeking review of certain actions of Assemblymen Ira Hansen (Hansen) and Jim Wheeler (Wheeler) (collectively, Petitioners). The Commission's executive director and its counsel completed a jurisdictional determination for each RFO and concluded the Commission had jurisdiction to investigate.

The parties entered into a Stipulation and Order Concerning Review of Jurisdictional Determination, which provided Petitioners with an opportunity for the Commission to consider a Pre-Panel Motion to Dismiss along with the related record. The Commission held a hearing on the Pre-Panel Motion to Dismiss and then

1 entered an Order on Review of Jurisdictional Determination. The order denied
2 Petitioners' Motion to Dismiss and ordered the Commission's executive director to
3 undertake an investigation to determine whether Petitioners' conduct properly falls
4 within the scope of legitimate legislative activity and/or conduct related to the
5 representation of the interests of their constituents that is privileged and immune
6 from review under NRS 281A.020(2)(d) and NRS 41.071.

7 Petitioners filed a Petition for judicial review, or in the alternative, a petition
8 for writ relief. Petitioners requested the court set aside the Commission's Order on
9 Review of Jurisdictional Determination. The Commission filed a motion to dismiss
10 the petition for judicial review and the petition for writ relief.

11 The Legislature passed AB496 which, among other things, broadly describes
12 acts that are covered by legislative privilege and immunity. The Commission in its
13 Reply in Support of Motion to Dismiss argued AB496 is unconstitutionally vague and
14 over broad, and violates the separation of powers doctrine.

15 16 **FACTS**

17 The record contains evidence of the following facts which are stated in
18 chronological order.

19 Hansen had a dispute with a Nevada Department of Wildlife officer regarding
20 whether Hansen illegally placed snare traps too near a roadway. Hansen contacted
21 Legislative Counsel and requested a legal opinion regarding the snare trap statute,
22 NRS 503.580. Legislative Counsel told Hansen it could look like a potential conflict
23 of interest if he requested the opinion so he should ask a colleague to request the
24 opinion.

25 Hansen asked Wheeler to request the opinion. Wheeler requested Legislative
26 Counsel for an opinion as to whether the prohibition against placing or setting a steel
27 trap within 200 feet of a public road or highway applies to box traps and snare traps.

1 Hansen was charged under NRS 503.580 with four misdemeanor counts for
2 unlawfully setting traps. Legislative Counsel issued an opinion in response to
3 Wheeler's request. The Legislative Counsel's opinion contains a statutory
4 construction analysis of NRS 503.580 and concluded NRS 503.580 does not apply to
5 snare traps. Hansen told a reporter, among other things, "I will be found not guilty
6 because when you see what the LCB says and when you read the law, you will see that
7 I was in compliance."

8 Petitioners requested BDRs regarding trapping. Wheeler requested BDR31
9 which was introduced as AB335. AB335 proposed an amendment to NRS 503.580.
10 The Legislature did not pass AB335.

11 12 ISSUES

13 Does this court have jurisdiction to conduct a judicial review under the
14 Administrative Procedures Act (APA)?

15 If the court has jurisdiction under the APA, did the Commission commit
16 prejudicial error as a matter of law by denying Petitioners' motion to dismiss for lack
17 of subject matter jurisdiction?

18 If the court does not have jurisdiction under the APA, is writ relief
19 appropriate?

20 21 ANALYSIS

22 The Commission argued the petition for judicial review should be dismissed
23 because: 1) judicial review is not available to Petitioners under NRS Chapter 233B
24 because a) the Commission's Order on Review of Jurisdictional Determination is not
25 a final order and Petitioners have not exhausted their administrative remedies; and
26 2) Petitioners have an adequate remedy at law.

27 Petitioners argued they are entitled to immediate judicial review. Petitioners'
28 argument is, first, they are entitled to legislative privilege and immunity because

1 their acts at issue were within the sphere of legitimate legislative activity. Legislative
2 privilege and immunity protect legislators from the burden of defending themselves
3 as well as from the consequences of litigation results.¹ Second, if judicial review is not
4 granted now, Petitioners will lose the legislative privilege and immunity protection
5 from having to defend themselves in the Commission's administrative investigation
6 and proceedings. Third, review of a final Commission decision, one made after
7 further investigation, will not provide an adequate remedy because Petitioners will
8 have to defend themselves in the Commission's investigation and will therefore be
9 deprived of the protection of not having to defend themselves. Fourth, Petitioners
10 cite NRS 233B.130(1) which states: "Any preliminary, procedural or intermediate act
11 or ruling by an agency in a contested case is reviewable if review of the final decision
12 of the agency would not provide an adequate remedy." And fifth, because review of a
13 final decision of the Commission would not provide an adequate remedy at law they
14 are entitled to judicial review now.

15 To resolve the issue of whether Petitioners are entitled to judicial review, the
16 court must resolve the issue of whether Petitioners' acts are protected by legislative
17 privilege and immunity. Petitioners are protected by legislative privilege and
18 immunity if their questioned acts fall "within the sphere of legitimate legislative
19 activity." On the issue of whether Petitioners' questioned acts fall within the sphere
20 of legitimate legislative activity, the court also considered the parties' briefs filed in
21 support of and opposing the Petition for Judicial Review.

22 The Commission took the position that Petitioners' request to Legislative
23 Counsel for the opinion was to serve Petitioners' private, personal interests.
24 Specifically, the Commission argued Petitioners requested the opinion so Hansen
25 could use it as a defense in his criminal case. The Commission argued Petitioners'
26 acts did not fall within the sphere of legitimate legislative activity.

27
28
¹*Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S. Ct. 1425, 18 L. Ed. 2d 577
(1967) (Internal citation and quotation marks omitted.)

1 Petitioners countered with several arguments, including an argument based
2 upon NRS 41.071 as amended by AB496 during the 2015 Legislature. The NRS 41.071
3 argument is dispositive on the “sphere of legitimate legislative activity” issue.

4 AB496, section 3, paragraph 5 provides legislative privilege and immunity to
5 legislators for (a) “Any actions, in any form, taken or performed with regard to any
6 legislative measure or other matter within the jurisdiction of the Legislature ...;” ©
7 Any actions, in any form, taken or performed with regard to requesting, seeking or
8 obtaining any form of aid, assistance, counsel or services from any officer or
9 employee of the Legislature concerning any legislative matter or other matter within
10 the jurisdiction of the Legislature” Both subsections include a non-exhaustive list
11 of examples of acts that fall “within the sphere of legitimate legislative activity.” The
12 Legislature declared in AB496 that the amendments to NRS 41.071 were a legislative
13 pronouncement of already existing law intended to clarify rather than change
14 existing law and apply to pending administrative or judicial proceedings. The
15 Legislature also made the amendment effective upon passage and approval.

16 The Commission argued AB496 is unconstitutionally vague and over broad,
17 and violates the separation of powers doctrine. The Commission cited no persuasive
18 authority to support these arguments. The Commission did not show that AB496 is
19 unconstitutionally vague or over broad as applied to Petitioners’ case. Neither did the
20 Commission show that AB496 impedes the authority of the judiciary to interpret and
21 apply legal precedent.

22 23 **CONCLUSIONS OF LAW**

24 Hansen through Wheeler requested Legislative Counsel provide an opinion
25 interpreting a state trapping law. The Legislature has jurisdiction over trapping laws.
26 Therefore, under AB496, as a matter of law, Petitioners’ actions are within the sphere
27 of legitimate legislative activity and protected by legislative privilege and immunity.

28 The Commission failed to show that AB496 is unconstitutionally vague or
over broad, or violates the separation of powers doctrine.

1 Because Petitioners acts fall within the sphere of legitimate legislative activity
2 as defined in AB496, they are entitled to legislative privilege and immunity. If
3 judicial review is not granted now, Petitioners will lose the legislative privilege and
4 immunity protection from having to defend themselves in the Commission's
5 administrative investigation and proceedings. Review of a final Commission
6 decision, one made after further investigation, will not provide an adequate remedy
7 because Petitioners will have to defend themselves in the Commission's investigation
8 and will therefore be deprived of the protection of not having to defend themselves.
9 Therefore, under NRS 233B.130(1) this court has jurisdiction to conduct a judicial
10 review and the Commission's Motion to Dismiss must be denied. For the same
11 reasons, Petitioners' petition for judicial review must be granted.

12 The court does not conclude that substantial rights of Petitioners were
13 prejudiced by the Commission under any of the grounds stated in NRS 233B.135(3).
14 The Commission's personnel performed their duties under NRS 281A.240(1)©, NRS
15 281A.280(1), NRS 281A.440(3) and (4), and NAC 281A.405(1). They investigated the
16 facts and circumstances related to the RFOs to determine whether there was just and
17 sufficient cause for the Commission to render an opinion in the matter, and made a
18 recommendation that the Commission did have jurisdiction to investigate and take
19 appropriate action. The Commission held a pre-panel hearing under NAC
20 281A.405(4). The Commission did not render a final decision. The issue of whether
21 Petitioners' acts were within the sphere of legitimate legislative activity was unclear
22 during the time the matter was before the Commission. After Petitioners filed their
23 petition for judicial review, the Legislature made clear, through AB496, that
24 Petitioners' acts were within the sphere of legitimate
25 legislative activity. At that point, the matter was before this court and out of the
26 Commission's hands. The Commission discharged its duties responsibly and
27 reasonably.

28 Because Petitioners' acts were within the sphere of legitimate legislative
activity, the Nevada Assembly has sole jurisdiction to question and sanction

1 Petitioners regarding those acts. Therefore, the Commission must terminate its
2 proceedings in this matter.

3 Because Petitioners' petition for judicial review is granted, the other issues
4 raised by the parties in their pleadings and papers are moot and therefore denied.

5
6 **ORDER**

7 **IT IS ORDERED:**

8 The Commission's Motion to Dismiss is denied.

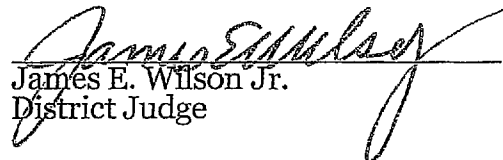
9 Petitioners' Petition for Judicial Review Pursuant to Nevada Administrative
10 Procedure Act and Nevada Ethics in Government Law is granted.

11 Petitioners' Petition and Application for Writ of Certiorari, Review or
12 Prohibition Pursuant to Article 6, Section 6 of Nevada Constitution and NRS Chapter
13 34 is denied.

14 The Commission terminate its proceedings in this matter.

15 Other requests for relief are moot and therefore denied.

16
17 October 1, 2015

18 
19 James E. Wilson Jr.
20 District Judge
21
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28

Respondents' Motion to Dismiss Appeal, Etc.

Exhibit E

REC'D & FILED

2015 DEC -1 PM 4:42

SUSAN M. HARRIS

C. GRIBBLE

BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us; ogrady@lcb.state.nv.us
Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
for Assembly District No. 39,

Plaintiffs,

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

Defendant.

Case No. 150C00261 LB

Dept. No. I

COMPLAINT TO HAVE DECLARED VOID ACTION TAKEN BY
COMMISSION ON ETHICS IN VIOLATION OF OPEN MEETING LAW

1 **I. General allegations.**

2 1. The Plaintiffs, Ira Hansen, in his official capacity as Nevada State Assemblyman for
3 Assembly District No. 32, and Jim Wheeler, in his official capacity as Nevada State Assemblyman for
4 Assembly District No. 39 (the Assemblymen), by and through their counsel the Legal Division of the
5 Legislative Counsel Bureau (LCB), hereby file this complaint pursuant to NRS 241.037(2) to have
6 declared void action taken by the Commission on Ethics (Commission) in violation of the Open Meeting
7 Law (OML) codified in NRS Chapter 241.¹

8 2. In addition to being the Plaintiffs in this action, the Assemblymen are also the Petitioners in
9 the district court case of Hansen v. Commission on Ethics, First Judicial District Court, Carson City,
10 Nevada, Case No. 15 OC 00076 1B, and they are also the Respondents in the Commission's appeal from
11 the district court's order in that case, which is docketed as Commission on Ethics v. Hansen, Nevada
12 Supreme Court Case No. 69100.

13 3. On October 1, 2015, in the district court case of Hansen v. Commission on Ethics, the First
14 Judicial District Court entered an order denying the Commission's motion to dismiss and granting the
15 Assemblymen's petition for judicial review.

16 4. On October 26, 2015, in the district court case of Hansen v. Commission on Ethics, the
17 Assemblymen served the Commission with written notice of entry of the district court's order. The
18 written notice was served on the Commission by electronic mail pursuant to the parties' written
19 stipulation and consent to service by electronic mail filed in that case on April 30, 2015.

20 5. On October 29, 2015, in the district court case of Hansen v. Commission on Ethics, the
21 Commission filed a notice of appeal.

22 6. The Commission is a public body subject to the OML. NRS 241.015(4); OMLO 2002-17
23 (Apr. 18, 2002).

24 ¹ All OML citations are to the law as amended in 2015 by SB70, 2015 Nev.Stat., ch.226, §§2-7, at
1054-62, and SB158, 2015 Nev.Stat., ch.84, §2, at 329-32.

1 7. Before filing the notice of appeal in the district court case of Hansen v. Commission on
2 Ethics, the Commission did not make its decision or take “action” to appeal the district court’s order in
3 an open and public meeting that complied with the OML.

4 8. In October 2015 and November 2015, the Commission did not hold any open and public
5 meetings that complied with the OML.

6 9. The OML provides that “[t]he action of any public body taken in violation of any provision of
7 this chapter is void.” NRS 241.036; McKay v. Bd. of Sup’rs (McKay I), 102 Nev. 644, 651 (1986)
8 (holding that a public body’s action in violation of the OML is void).

9 10. In enacting the OML, the Legislature declared as the public policy of this State that “all
10 public bodies exist to aid in the conduct of the people’s business. It is the intent of the law that their
11 actions be taken openly and that their deliberations be conducted openly.” NRS 241.010(1).

12 11. A public body must make a decision or take “action” only in an open and public meeting that
13 complies with the OML, unless there is a specific statutory exception that exempts the public body from
14 the OML. NRS 241.020(1); McKay v. Bd. of Cnty. Comm’rs (McKay II), 103 Nev. 490, 492-93 (1987)
15 (“the wording of the open meeting law requiring exceptions to be expressly enacted and ‘specifically
16 provided’ forecloses the court from reading in or implying exceptions.”).

17 12. The OML provides that “[t]he exceptions provided to this chapter . . . must not be used to
18 circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting,
19 upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.”
20 NRS 241.016(4).

21 13. The OML provides that “[a] meeting that is closed pursuant to a specific statute may only be
22 closed to the extent specified in the statute allowing the meeting to be closed. All other portions of the
23 meeting must be open and public, and the public body must comply with all other provisions of this
24 chapter to the extent not specifically precluded by the specific statute.” NRS 241.020(1).

1 14. To carry out the objectives of the OML, the Nevada Supreme Court has stated that “meetings
2 of public bodies should be open ‘whenever possible’ to comply with the spirit of the Open Meeting Law.
3 Since generally all meetings must be open, this court strictly construes all exceptions to the Open
4 Meeting Law in favor of openness.” Chanos v. Nev. Tax Comm’n, 124 Nev. 232, 239 (2008) (quoting
5 McKay I, 102 Nev. at 651).

6 15. To carry out the objectives of the OML, the Nevada Supreme Court has stated that
7 “exceptions to the Open Meeting Law extend only to the portions of a proceeding specifically,
8 explicitly, and definitely excepted by statute.” Chanos, 124 Nev. at 239.

9 16. The OML draws a clear distinction between a public body’s “deliberations” and its “action.”
10 NRS 241.010(1), 241.015(1)-(3), 241.016(4) & 241.020(1); Chanos, 124 Nev. at 238 (explaining that
11 under the OML, “a meeting, by definition, can consist of “action” or “deliberation.”).

12 17. Under the OML, a public body “deliberates” when its members collectively “examine, weigh
13 and reflect upon the reasons for or against the action. [This] includes, without limitation, the collective
14 discussion or exchange of facts *preliminary to the ultimate decision*.” NRS 241.015(2) (defining
15 “deliberate” (emphasis added)); Dewey v. Redev. Agency, 119 Nev. 87, 97-98 (2003).

16 18. Under the OML, a public body takes “action” when it makes the ultimate decision.
17 NRS 241.015(1) (defining “action”).

18 19. In 2001, the Legislature amended the OML to add the attorney-client litigation exception.
19 AB225, 2001 Nev.Stat., ch.378, §2, at 1836 (currently codified in NRS 241.015(3)(b)(2)).

20 20. The attorney-client litigation exception allows public bodies to “receive information” and
21 “deliberate toward a decision” regarding potential or existing litigation in private conferences with their
22 attorneys.² NRS 241.015(3)(b)(2).

23
24 ² For ease of discussion, the term “conference” is used as a convenient shorthand for “a gathering or
series of gatherings of members of a public body . . . at which a quorum is actually or collectively
present, whether in person or by means of electronic communication.” NRS 241.015(3)(b).

1 21. Based on the plain language and legislative history of the attorney-client litigation exception,
2 it does not allow public bodies to make a decision or take “action” regarding potential or existing
3 litigation in private conferences with their attorneys. Legis. History AB225, 71st Leg., at 1771-75, 1810-
4 16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001) (discussing the intent and purpose of the
5 attorney-client litigation exception).³

6 22. In the absence of a specific statutory exception from the OML, public bodies are not allowed
7 to make a decision or take “action” regarding potential or existing litigation in private conferences with
8 their attorneys, but they must make a decision or take “action” regarding such litigation only in open and
9 public meetings that comply with the OML. NRS 241.010(1), 241.015(1)-(3), 241.016(4) & 241.020(1);
10 McKay II, 103 Nev. at 491-96.

11 23. For the past 15 years, the Office of the Attorney General (OAG) has advised public bodies,
12 in both its Open Meeting Law Manual (OMLM) and its Open Meeting Law Opinions (OMLOs), that
13 even though public bodies may deliberate in private conferences with their attorneys regarding potential
14 or existing litigation, public bodies are not allowed to take action regarding such litigation in private
15 conferences with their attorneys but must take action regarding such litigation only in open and public
16 meetings that comply with the OML. See OMLM §§4.05 & 5.11 (9th ed. 2001, 10th ed. 2005 & 11th ed.
17 2012); OMLO 2005-04 (Mar. 7, 2005).

18 24. In interpreting provisions in Arizona’s open meeting law that are similar to Nevada’s OML,
19 the Arizona Court of Appeals has held that if a public body fails to take action to appeal a lower court
20 order in an open and public meeting that complies with the open meeting law before filing a notice of
21 appeal, the public body violates the open meeting law, and its notice of appeal is null and void and has
22 no legal effect. Johnson v. Tempe Elementary Sch. Dist., 20 P.3d 1148, 1151 (Ariz.Ct.App.2000),
23

24 ³ A copy of Legis. History AB225, 71st Leg. (Nev. LCB Resch. Libr. 2001), is available at:
<http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225,2001.pdf>.

1 *review denied* (Ariz. Oct. 3, 2001); City of Tombstone v. Beatty's Guest Ranch & Orchard, No. 2 CA-
2 CV 2013-0018, 2013 WL 6243854 (Ariz.Ct.App. Nov. 27, 2013), *review denied* (Ariz. Apr. 22, 2014).

3 25. The Arizona Court of Appeals has determined that a public body's notice of appeal is null
4 and void and has no legal effect because "once the [body] finished privately discussing the merits of
5 appealing, the open meeting statutes required that board members meet in public for the final decision to
6 appeal." Johnson, 20 P.3d at 1151.

7 26. The Commission violated the OML and denied each Assemblyman and the legal
8 representatives of each Assemblyman rights conferred by the OML when the Commission filed a notice
9 of appeal in the district court case of Hansen v. Commission on Ethics without first making its decision
10 or taking action to appeal the district court's order in an open and public meeting that complied with the
11 OML. NRS 241.010(1), 241.015(1)-(3), 241.016(4), 241.020(1) & 241.036; McKay I, 102 Nev. at 651;
12 McKay II, 103 Nev. at 491-96; Johnson, 20 P.3d at 1148-51.

13 27. The notice of appeal filed by the Commission in the district court case of Hansen v.
14 Commission on Ethics is void as a matter of law under NRS 241.036 and has no legal effect because the
15 Commission violated the OML and denied each Assemblyman and the legal representatives of each
16 Assemblyman rights conferred by the OML when the Commission filed a notice of appeal in the district
17 court case of Hansen v. Commission on Ethics without first making its decision or taking action to
18 appeal the district court's order in an open and public meeting that complied with the OML.
19 NRS 241.010(1), 241.015(1)-(3), 241.016(4), 241.020(1) & 241.036; McKay I, 102 Nev. at 651;
20 McKay II, 103 Nev. at 491-96; Johnson, 20 P.3d at 1148-51.

21 **II. Jurisdiction, venue and standing.**

22 28. Pursuant to NRCP 10(c), the Assemblymen adopt by reference and incorporate herein all of
23 the allegations and statements set forth in all of the preceding paragraphs as though they were fully set
24 forth and realleged or restated herein.

1 29. The OML provides that “[a]ny person denied a right conferred by this chapter may sue in the
2 district court of the district in which the public body ordinarily holds its meetings or in which the
3 plaintiff resides. A suit may seek to have an action taken by the public body declared void, to require
4 compliance with or prevent violations of this chapter or to determine the applicability of this chapter to
5 discussions or decisions of the public body.” NRS 241.037(2).

6 30. By giving “any person” denied a right under the OML a private cause of action to remedy a
7 violation of the OML’s provisions, the Legislature intended to “provide a broad right to sue.”
8 Stockmeier v. State Dep’t of Corr. (Stockmeier I), 122 Nev. 385, 394 (2006), *overruled in part on other*
9 *grounds by State Bd. of Parole Comm’rs v. Morrow*, 127 Nev. Adv. Op. 21, 255 P.3d 224 (2011).

10 31. Under the OML’s private cause of action in NRS 241.037(2), a person may bring an action
11 against a public body for declaratory and injunctive relief to have declared void any action taken by the
12 public body in violation of the OML. Stockmeier v. State Dep’t of Corr. (Stockmeier III), 124 Nev. 313,
13 317-19 (2008).

14 32. The First Judicial District Court, Carson City, Nevada, has subject-matter jurisdiction over
15 this action under NRS 241.037(2) because the Commission violated the OML and denied each
16 Assemblyman and the legal representatives of each Assemblyman rights conferred by the OML when
17 the Commission filed a notice of appeal in the district court case of Hansen v. Commission on Ethics
18 without first making its decision or taking action to appeal the district court’s order in an open and
19 public meeting that complied with the OML.

20 33. The First Judicial District Court, Carson City, Nevada, is the proper venue for this action
21 under NRS 241.037(2) because the Commission is a public body that ordinarily holds its meetings in
22 Carson City, Nevada, which is part of the First Judicial District under NRS 3.010.

23 34. The Assemblymen have standing to bring this action under NRS 241.037(2) because the
24 Commission violated the OML and denied each Assemblyman and the legal representatives of each

1 Assemblyman rights conferred by the OML when the Commission filed a notice of appeal in the district
2 court case of Hansen v. Commission on Ethics without first making its decision or taking action to
3 appeal the district court's order in an open and public meeting that complied with the OML.

4 35. The rights conferred by the OML which the Commission denied each Assemblyman and the
5 legal representatives of each Assemblyman when the Commission violated the OML include, without
6 limitation, the right to proper public notice and a proper agenda for an open and public meeting, the right
7 to be provided with any supporting material for an open and public meeting, the right to attend an open
8 and public meeting, the right to make comments at an open and public meeting, the right to inspect the
9 written minutes and the audio recording or transcript of an open and public meeting, and the right to
10 record an open and public meeting by means of sound or video reproduction. NRS 241.020 & 241.035.

11 **III. Time for bringing action.**

12 36. Pursuant to NRCP 10(c), the Assemblymen adopt by reference and incorporate herein all of
13 the allegations and statements set forth in all of the preceding paragraphs as though they were fully set
14 forth and realleged or restated herein.

15 37. The OML provides that "[a]ny such suit brought to have an action declared void must be
16 commenced within 60 days after the action objected to was taken." NRS 241.037(3).

17 38. The action objected to was taken by the Commission on October 29, 2015, because on that
18 date the Commission violated the OML and denied each Assemblyman and the legal representatives of
19 each Assemblyman rights conferred by the OML when the Commission filed a notice of appeal in the
20 district court case of Hansen v. Commission on Ethics without first making its decision or taking action
21 to appeal the district court's order in an open and public meeting that complied with the OML.

22 39. The Assemblymen commenced this action pursuant to NRCP 3 by filing a complaint under
23 NRS 241.037(2) in the First Judicial District Court, Carson City, Nevada, within 60 days after the action
24 objected to was taken by the Commission on October 29, 2015.

1 **IV. Attorney's fees and court costs.**

2 40. Pursuant to NRCP 10(c), the Assemblymen adopt by reference and incorporate herein all of
3 the allegations and statements set forth in all of the preceding paragraphs as though they were fully set
4 forth and realleged or restated herein.

5 41. The OML provides that "[t]he court may order payment of reasonable attorney's fees and
6 court costs to a successful plaintiff in a suit brought under this subsection." NRS 241.037(2).

7 42. The Assemblymen are entitled to payment by the Commission of reasonable attorney's fees
8 and court costs under NRS 241.037(2) because the Commission violated the OML and denied each
9 Assemblyman and the legal representatives of each Assemblyman rights conferred by the OML when
10 the Commission filed a notice of appeal in the district court case of Hansen v. Commission on Ethics
11 without first making its decision or taking action to appeal the district court's order in an open and
12 public meeting that complied with the OML.

13 **V. Claims for relief.**

14 43. Pursuant to NRCP 10(c), the Assemblymen adopt by reference and incorporate herein all of
15 the allegations and statements set forth in all of the preceding paragraphs as though they were fully set
16 forth and realleged or restated herein.

17 44. The Assemblymen respectfully request that the Court enter an order under NRS 241.037(2)
18 declaring that the Commission violated the OML and denied each Assemblyman and the legal
19 representatives of each Assemblyman rights conferred by the OML when the Commission filed a notice
20 of appeal in the district court case of Hansen v. Commission on Ethics without first making its decision
21 or taking action to appeal the district court's order in an open and public meeting that complied with the
22 OML.

23 45. The Assemblymen respectfully request that the Court enter an order under NRS 241.037(2)
24 declaring that the notice of appeal filed by the Commission on October 29, 2015, in the district court

1 case of Hansen v. Commission on Ethics is void as a matter of law under NRS 241.036 and has no legal
2 effect because the Commission violated the OML and denied each Assemblyman and the legal
3 representatives of each Assemblyman rights conferred by the OML when the Commission filed a notice
4 of appeal in the district court case of Hansen v. Commission on Ethics without first making its decision
5 or taking action to appeal the district court's order in an open and public meeting that complied with the
6 OML.

7 46. The Assemblymen respectfully request that the Court enter an order under NRS 241.037(2)
8 enjoining the Commission from taking any further action in the district court case of Hansen v.
9 Commission on Ethics or in the Commission's appeal from the district court's order in that case, which
10 is docketed as Commission on Ethics v. Hansen, Nevada Supreme Court Case No. 69100, that is based
11 in whole or in part on the notice of appeal filed by the Commission on October 29, 2015, because the
12 notice of appeal is void as a matter of law under NRS 241.036 and has no legal effect because the
13 Commission violated the OML and denied each Assemblyman and the legal representatives of each
14 Assemblyman rights conferred by the OML when the Commission filed a notice of appeal in the district
15 court case of Hansen v. Commission on Ethics without first making its decision or taking action to
16 appeal the district court's order in an open and public meeting that complied with the OML.

17 47. The Assemblymen respectfully request that the Court enter an order under NRS 241.037(2)
18 requiring the payment of reasonable attorney's fees and court costs by the Commission because the
19 Commission violated the OML and denied each Assemblyman and the legal representatives of each
20 Assemblyman rights conferred by the OML when the Commission filed a notice of appeal in the district
21 court case of Hansen v. Commission on Ethics without first making its decision or taking action to
22 appeal the district court's order in an open and public meeting that complied with the OML.

23 48. The Assemblymen respectfully request that the Court enter an order granting such other
24 relief as the Court may deem just and proper.

1 The undersigned hereby affirm that this document does not contain "personal information about
2 any person" as defined in NRS 239B.030 and 603A.040.

3 DATED: This 1st day of December, 2015.

4 Respectfully submitted,

5 **BRENDA J. ERDOES**
6 Legislative Counsel

7 By: 

KEVIN C. POWERS, Chief Litigation Counsel
8 Nevada Bar No. 6781

EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
9 Nevada Bar No. 5443

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

10 401 S. Carson Street

Carson City, Nevada 89701

11 Tel: (775) 684-6830; Fax: (775) 684-6761

12 *Attorneys for the Plaintiffs*

Respondents' Motion to Dismiss Appeal, Etc.

Exhibit F

REC'D & FILED
2015 DEC -2 PM 4:11
SUSAN HERRIWETHER
CLERK
BY C. Cooper DEPUTY

BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
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Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
for Assembly District No. 39,

Plaintiffs,

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

Defendant.

Case No. 15 OC 00261 1B
Dept. No. I

PLAINTIFFS' PROOF OF SERVICE OF
SUMMONS AND COMPLAINT

The Plaintiffs, Ira Hansen, in his official capacity as Nevada State Assemblyman for Assembly District No. 32, and Jim Wheeler, in his official capacity as Nevada State Assemblyman for Assembly District No. 39 (the Assemblymen), by and through their counsel the Legal Division of the Legislative Counsel Bureau (LCB), hereby file, pursuant to NRCP 4(g), Proof of Service of Summons and Complaint on Defendant Commission on Ethics and on the Attorney General. The Affidavit of Service

1 of Summons and Complaint on the Commission on Ethics is attached as Exhibit 1, and the Affidavit of
2 Service of Summons and Complaint on the Attorney General is attached as Exhibit 2.

3 The undersigned hereby affirm that this document does not contain "personal information about
4 any person" as defined in NRS 239B.030 and 603A.040.

5 DATED: This 2nd day of December, 2015.

6 Respectfully submitted,

7 **BRENDA J. ERDOES**
8 Legislative Counsel

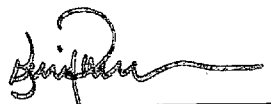
9 By: 

KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
Attorneys for the Plaintiffs

14
15 **CERTIFICATE OF SERVICE**

16 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
17 and that on the 2nd day of December, 2015, pursuant to NRCP 5(b), I served a true and correct copy
18 of the foregoing document, by depositing the same in the United States Mail, postage prepaid, addressed
19 to the following:

20 Tracy L. Chase, Esq.
Commission Counsel
21 NEVADA COMMISSION ON ETHICS
704 W. Nye Lane, Suite 204
22 Carson City, NV 89703
Attorney for Respondent

23 
24 _____
An Employee of the Legislative Counsel Bureau

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Proof of Service

Exhibit 1

Exhibit 1

1 BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
2 KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
3 EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
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6 E-mail: kpowers@lcb.state.nv.us; ogrady@lcb.state.nv.us
Attorneys for Plaintiffs

7
8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 IRA HANSEN, in his official capacity as Nevada
11 State Assemblyman for Assembly
District No. 32; and JIM WHEELER, in his
12 official capacity as Nevada State Assemblyman
for Assembly District No. 39,

13 Plaintiffs,

14 vs.

15 THE COMMISSION ON ETHICS OF THE
16 STATE OF NEVADA,

17 Defendant.

Case No. 15 OC 00261 1B
Dept. No. I

18 **AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT ON**
19 **COMMISSION ON ETHICS OF THE STATE OF NEVADA**
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Proof of Service

Exhibit 2

Exhibit 2

1 BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
2 KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
3 EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
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6 E-mail: kpowers@lcb.state.nv.us; ogradv@lcb.state.nv.us
Attorneys for Plaintiffs

7
8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
11 District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
12 for Assembly District No. 39,

13 Plaintiffs,

14 vs.

15 THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

16 Defendant.
17

Case No. 15 OC 00261 1B
Dept. No. I

18 **AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT ON**
19 **ATTORNEY GENERAL OF THE STATE OF NEVADA**
20
21
22
23
24

AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT

STATE OF NEVADA)
) ss:
COUNTY OF CARSON)

Pursuant to NRCP 4, NRS 12.105 and any other applicable rules and laws of the State of Nevada, the
affiant (print name) ROBERT MCDONALD (print title) Legislative Police Sgt.
declares under penalty of perjury that:

1. I am over 18 years of age and not a party to or interested in the above-titled action.
2. I am a legislative police officer of the State of Nevada and have the powers of a peace officer under NRS 289.210 and, as a peace officer, I am not required to be licensed to serve process under NRS Chapter 648 (see NRS 648.014 & 648.018) or another provision of law. My business address and telephone number are: 401 S. Carson St., Carson City, NV 89701, 775-684-6812.

3. I received a copy of the summons attached to a copy of the complaint in the above-titled action against the defendant, the Commission on Ethics of the State of Nevada, on the 2 day of December, 2015, and I personally served the same upon the Attorney General, 100 N. Carson St., Carson City, NV 89701, on the 2 day of December, 2015, at the approximate time of 2:50 PM, at the above address in the city of Carson City, County of Carson, State of Nevada, by personally delivering a copy of the summons attached to a copy of the complaint to (check one):

- ☐ Adam Paul Laxalt, Esq., Attorney General.
☒ A clerk, secretary or other agent at the above address of the Attorney General:
(Print name) Lulu Gonzalez
(Print title) AAI

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on the 2 day of December, 2015.

(Signature) Robert McDonald, Sgt.

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF
THE STATE OF NEVADA,

Appellant,

vs.

IRA HANSEN, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 32; AND JIM
WHEELER, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 39,

Respondents.

Electronically Filed
Dec 21 2015 08:28 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No. 69100

Appeal from First Judicial District
Court, Carson City, Nevada,
Case No. 15 OC 00076 1B

**RESPONDENTS' MOTION TO DISMISS APPEAL
FOR LACK OF APPELLATE JURISDICTION**

OR, IN THE ALTERNATIVE,

**MOTION TO STAY APPEAL AND REMAND TO DISTRICT COURT
FOR RESOLUTION OF RESPONDENTS' COMPLAINT TO VOID
NOTICE OF APPEAL FILED BY COMMISSION ON ETHICS AS
ACTION TAKEN IN VIOLATION OF OPEN MEETING LAW**

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MOTION

Pursuant to NRAP 27(a), Respondents Ira Hansen, in his official capacity as Nevada State Assemblyman for Assembly District No. 32, and Jim Wheeler, in his official capacity as Nevada State Assemblyman for Assembly District No. 39 (the Assemblymen), by and through their counsel the Legal Division of the Legislative Counsel Bureau (LCB), hereby file this motion to: (1) dismiss the appeal for lack of appellate jurisdiction; or (2) in the alternative, stay the appeal and remand to the district court for resolution of the Assemblymen's pending complaint filed in the district court under NRS 241.037(2) to void the notice of appeal filed by Appellant Commission on Ethics (Commission) as action taken by the Commission in violation of the Open Meeting Law (OML) codified in NRS Chapter 241.¹

STATEMENT OF THE ISSUES FOR THE MOTION

1. Did the Commission violate the OML when it filed a notice of appeal without first making its decision or taking "action" to appeal the district court's order in an open and public meeting that complied with the OML?

2. If the Commission violated the OML, is the Commission's notice of appeal void as a matter of law under the absolute voiding rule in NRS 241.036 and is it therefore invalid and without any legal force or effect?

¹ All OML citations are to the law as amended in 2015 by SB70, 2015 Nev.Stat., ch.226, §§2-7, at 1054-62, and SB158, 2015 Nev.Stat., ch.84, §2, at 329-32.

3. If the Commission's notice of appeal is void as a matter of law and therefore invalid and without any legal force or effect, should the Court dismiss the Commission's appeal for lack of appellate jurisdiction because the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period and thereby lost the right to appeal in this case?

4. If the Court decides not to consider the OML issue in the first instance on appeal, should the Court stay the appeal and remand to the district court for resolution of the Assemblymen's pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission's notice of appeal as action taken by the Commission in violation of the OML?

STATEMENT OF THE CASE

On January 7, 2014, pursuant to the express authority in NRS 218F.710 which authorizes a legislator to request a legal opinion from the LCB on "any question of law, including existing law," the LCB provided Assemblyman Wheeler with a written legal opinion that he requested regarding the statutory construction of existing law in NRS 503.580. (*Ex. A at 00007-00011.*)² The statute regulates the trapping of mammals and states "[i]t is unlawful for any person, company or

² Because the copy of the LCB opinion in the administrative record is a low-quality photocopy that is not clearly legible, a higher-quality photocopy is included in *Exhibit A*. It is marked with bates-stamp numbers to correspond with the copy in the administrative record (00007-00011).

corporation to place or set any steel trap, used for the purpose of trapping mammals, larger than a No. 1 Newhouse trap, within 200 feet of any public road or highway within this State.” NRS 503.580(2).

In the LCB opinion, Assemblyman Wheeler’s question of law is expressed as follows: “You have asked whether the prohibition against placing or setting a steel trap within 200 feet of a public road or highway applies to box traps and snare traps.” (*Ex. A at 00007.*) To answer this question of law, the LCB opinion applies “several well-established rules of statutory construction” and opines that the prohibition applies only to a “jaw-foot” type steel trap and “does not apply to box traps or snare traps.” (*Ex. A at 00007-11.*) The LCB opinion cites and follows a 1971 Nevada Attorney General opinion, AGO 1971-57 (Dec. 22, 1971), which opines that as used in NRS 503.580, “[a] No. 1 Newhouse Trap is a jaw-foot trap used for trapping muskrats and mink.” (*Ex. A at 00010.*) The LCB opinion concludes that “[b]ased on the foregoing principles of statutory construction, it is the opinion of this office that the prohibition contained in subsection 2 of NRS 503.580 against placing or setting a steel trap within 200 feet of a public road or highway does not apply to box traps or snare traps.” (*Ex. A at 00011.*)

The LCB opinion was limited exclusively to this broad and general question of statutory construction, and it did not apply its statutory construction to the personal facts or circumstances of any party. Therefore, the LCB opinion adhered

to the statutory requirements of NRS 218F.710 because it answered a pure question of law. See Comm’n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 4 (1994) (“The construction of a statute is a question of law.”); Sheriff v. Encoe, 110 Nev. 1317, 1319 (1994) (explaining that “[t]he proper construction of a statute is a legal question rather than a factual question.”); State Dep’t Tax’n v. McKesson Corp., 111 Nev. 810, 812 (1995) (explaining that courts undertake independent review of the administrative construction of a statute because “it is the statutory interpretation of [the law] that is at issue rather than any type of factual review.”).

On March 5, 2014, Fred Voltz filed an ethics complaint against each Assemblyman, which the Commission designated as Requests for Opinions Nos. 14-21C and 14-22C (collectively the RFOs). (*Ex. B.*)³ The RFOs allege that Assemblyman Hansen “collaborated” with Assemblyman Wheeler in order to use their legislative positions to request the LCB opinion for a private or nongovernmental purpose in violation of the Ethics Law in NRS Chapter 281A.⁴ (*Ex. B at 00001-6.*) Before the LCB opinion was provided to Assemblyman

³ Each RFO is nearly identical. To avoid duplicative exhibits for purposes of this motion, *Exhibit B* includes only the RFO against Assemblyman Hansen.

⁴ With regard to the RFOs, all Ethics Law citations are to the law in effect when the RFOs were filed in 2014. However, before the Commission filed its notice of appeal on October 29, 2015, the Ethics Law was amended by AB60, 2015 Nev.Stat., ch.198, at 916-26. Thus, with regard to the Commission’s notice of appeal, all Ethics Law citations are to the law as amended by AB60.

Wheeler on January 7, 2014, Assemblyman Hansen had a disagreement in November 2013 with an employee of the Department of Wildlife concerning the interpretation of NRS 503.580, and he later was issued citations on December 31, 2013, for alleged violations of NRS 503.580 for placing or setting snare traps within 200 feet of a public road or highway. The RFOs allege that because the LCB opinion addresses “the precise issue Assemblyman Hansen needed a legal interpretation of in preparing his legal defense against the four charges of illegal animal trap setting,” the LCB opinion was requested for a private or nongovernmental purpose. (*Ex. B at 00004.*)

Pursuant to a stipulation and order approved by the Commission, the Assemblymen filed a motion to dismiss the RFOs on grounds that the Commission lacks subject matter jurisdiction over the RFOs because: (1) all allegations against the Assemblymen involve actions taken within the sphere of legitimate legislative activity; (2) those legislative actions are protected by NRS 281A.020(2)(d) and NRS 41.071 and the constitutional doctrines of separation of powers and legislative privilege and immunity; and (3) the Nevada Assembly is the only governmental entity that may question or penalize the Assemblymen regarding those legislative actions.

On March 3, 2015, the Commission issued an order denying the motion to dismiss. (*Ex. B at 00134-142.*) Despite the Assemblymen’s objections that any

investigation into the motive, intent or purpose of the Assemblymen in requesting the LCB opinion is precluded by legislative privilege and immunity, the Commission indicated in its order that it may inquire into “the legitimacy of the respective conduct as ‘legislative acts’ falling within the ‘legitimate sphere of legislative activity’ based on assertions that the [Assemblymen’s] requested legal opinion are acts not related to any legislative function but rather are for purposes related to their personal, private interests.” (*Ex. B at 00139.*)

On April 2, 2015, the Assemblymen filed: (1) a judicial-review petition under the Ethics Law and Administrative Procedure Act (APA) in NRS Chapter 233B; and (2) in the alternative, a writ petition under Article 6, Section 6 of the Nevada Constitution and NRS Chapter 34. On April 30, 2015, the district court approved a stipulation and order in which the parties agreed to stay all administrative investigations and proceedings in the RFOs pending judicial review before the district court and any state appellate court. (*Ex. C at 2-3.*) The parties also agreed to a stipulated schedule for briefing the judicial-review petition and responding to the writ petition, and the parties consented to service by electronic mail. (*Ex. C at 3-4.*) Finally, the Assemblymen waived the confidentiality of the RFOs under NRS 281A.440(8). (*Ex. C at 3.*)

On June 30, 2015, the Commission filed a motion to dismiss both the judicial-review petition and the writ petition. In September 2015, the parties completed

their briefing for the Commission’s motion to dismiss and the Assemblymen’s judicial-review petition. On October 1, 2015, the district court entered an order that: (1) denied the Commission’s motion to dismiss the judicial-review petition and the writ petition; (2) denied the Assemblymen’s writ petition; and (3) granted the Assemblymen’s judicial-review petition under the Ethics Law and APA and ordered the Commission to terminate its ethics proceedings against the Assemblymen.⁵ (*Ex. D at 7.*)

In its order, the district court concluded that, as a matter of law under NRS 41.071 as amended by AB496, 2015 Nev.Stat., ch.511, §3, at 3193-95, the Assemblymen’s actions were “within the sphere of legitimate legislative activity and protected by legislative privilege and immunity.” (*Ex. D at 5.*) The district court also concluded that the Commission failed to show that AB496 is unconstitutional. (*Ex. D at 5.*) Because the Assemblymen’s actions were within the sphere of legitimate legislative activity and protected by legislative privilege and immunity, the district court held that “the Nevada Assembly has sole jurisdiction to

⁵ Although the district court did not state that it denied the Assemblymen’s writ petition as moot, that is the legal effect of the district court’s order. By granting the Assemblymen’s judicial-review petition on its merits and ordering the relief requested in the judicial-review petition, it was not necessary for the district court to rule on the merits of the Assemblymen’s alternative writ petition. Therefore, once the district court granted the Assemblymen’s judicial-review petition, their alternative writ petition became moot.

question and sanction [the Assemblymen] regarding those acts. Therefore, the Commission must terminate its proceedings in this matter.” (*Ex. D at 6-7.*)

On October 26, 2015, the Assemblymen served the Commission with written notice of entry of the district court’s order by electronic mail pursuant to the parties’ written stipulation and consent to service by electronic mail. (*Ex. D at 1-2.*) On October 29, 2015, the Commission filed a notice of appeal. However, before filing the notice of appeal, the Commission did not make its decision or take “action” to appeal the district court’s order in an open and public meeting that complied with the OML. In fact, in October and November 2015, the Commission did not hold any open and public meetings that complied with the OML.

SUMMARY OF THE ARGUMENT

The Commission is a public body subject to the OML. Unless there is a specific statutory exception that expressly exempts a public body from the OML, the public body may make a decision or take “action” regarding a matter only in an open and public meeting that complies with the OML. Before filing its notice of appeal, the Commission did not make its decision or take action to appeal the district court’s order in an open and public meeting that complied with the OML. Furthermore, there is no specific statutory exception that expressly exempted the Commission from the OML and allowed it to make its decision or take action to appeal the district court’s order without first complying with the OML.

In 2001, the Legislature amended the OML to allow public bodies to “receive information” and “deliberate toward a decision” regarding litigation in private conferences with their attorneys. However, based on the plain language and legislative history of the attorney-client litigation exception, public bodies are not allowed to make a decision or take “action” regarding litigation in private conferences with their attorneys, but they must make a decision or take “action” regarding such litigation only in open and public meetings that comply with the OML. For the past 15 years since the Legislature enacted the exception, the Office of the Attorney General (OAG) has advised public bodies, in both its Open Meeting Law Manual (OMLM) and its Open Meeting Law Opinions (OMLOs), that even though public bodies may deliberate regarding litigation in private conferences with their attorneys, public bodies cannot take action regarding litigation unless such action is taken in open and public meetings that comply with the OML. Therefore, the Commission violated the OML by filing its notice of appeal without first making its decision or taking action to appeal the district court’s order in an open and public meeting that complied with the OML.

Because the Commission violated the OML, its notice of appeal is void as a matter of law under the absolute voiding rule in NRS 241.036. There are no exceptions to the absolute voiding rule in NRS 241.036, and the OML does not allow a public body to take any subsequent action to cure its violation or reverse

the effects of the absolute voiding rule in NRS 241.036. Consequently, because the Commission's notice of appeal is void as a matter of law, it is invalid and does not have any legal force or effect.

This result is supported by caselaw from other jurisdictions. The Arizona Court of Appeals has held that a public body's notice of appeal is "null and void" under Arizona's open meeting law when the public body does not first make its decision or take action to appeal in an open and public meeting. Johnson v. Tempe Elementary Sch. Dist., 20 P.3d 1148, 1151 (Ariz.Ct.App.2000), *review denied* (Ariz. Oct. 3, 2001); City of Tombstone v. Beatty's Guest Ranch & Orchard, No. 2 CA-CV 2013-0018, 2013 WL 6243854 (Ariz.Ct.App. Nov. 27, 2013), *review denied* (Ariz. Apr. 22, 2014).

Accordingly, because the Commission's notice of appeal is invalid and does not have any legal force or effect, the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period. Having failed to file a valid notice of appeal during the jurisdictional appeal period, the Commission lost the right to pursue an appeal in this case, and its appeal must be dismissed for lack of appellate jurisdiction.

Finally, because the issue of whether the Commission violated the OML is a pure question of law and because the absolute voiding rule in NRS 241.036 is self-executing, the Court has the power and discretion to apply the OML to this case

and dismiss the Commission's appeal for lack of appellate jurisdiction without remanding the case for any further proceedings in the district court. However, if the Court decides not to consider the OML issue in the first instance on appeal, the Court should stay the appeal and remand to the district court for resolution of the Assemblymen's pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission's notice of appeal as action taken by the Commission in violation of the OML.

ARGUMENT

I. Legal standards governing the OML.

In enacting the OML, the Legislature declared as the public policy of this State that "all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010(1). To carry out the OML's objectives, the Court has held that "meetings of public bodies should be open 'whenever possible' to comply with the spirit of the Open Meeting Law. Since generally all meetings must be open, this court strictly construes all exceptions to the Open Meeting Law in favor of openness." Chanos v. Nev. Tax Comm'n, 124 Nev. 232, 239 (2008) (quoting McKay v. Bd. of Sup'rs (McKay I), 102 Nev. 644, 651 (1986)). Consequently, "exceptions to the Open Meeting Law extend only to the portions of a proceeding specifically, explicitly, and definitely excepted by statute." Id.

The Legislature has codified these legal standards in the OML. Specifically, the OML provides that “[t]he exceptions provided to this chapter . . . must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.” NRS 241.016(4). The OML also provides that:

A meeting that is closed pursuant to a specific statute may only be closed to the extent specified in the statute allowing the meeting to be closed. All other portions of the meeting must be open and public, and the public body must comply with all other provisions of this chapter to the extent not specifically precluded by the specific statute.

NRS 241.020(1).

Thus, unless there is a specific statutory exception that expressly exempts the public body from the OML, the public body may make a decision or take “action” regarding a matter only in an open and public meeting that complies with the OML. NRS 241.020(1); McKay v. Bd. of Cnty. Comm’rs (McKay II), 103 Nev. 490, 492-93 (1987) (“the wording of the open meeting law requiring exceptions to be expressly enacted and ‘specifically provided’ forecloses the court from reading in or implying exceptions.”).

Furthermore, the OML draws a clear distinction between a public body’s “deliberations” and its “action.” NRS 241.010(1), 241.015(1)-(3), 241.016(4) & 241.020(1); Chanos, 124 Nev. at 238 (explaining that under the OML, “a meeting,

by definition, can consist of “action” or “deliberation.”). A public body “deliberates” when its members collectively “examine, weigh and reflect upon the reasons for or against the action. [This] includes, without limitation, the collective discussion or exchange of facts *preliminary to the ultimate decision.*” NRS 241.015(2) (defining “deliberate” (emphasis added)); Dewey v. Redev. Agency, 119 Nev. 87, 97-98 (2003). By contrast, a public body takes “action” when it makes the ultimate decision. NRS 241.015(1) (defining “action”). Consequently, a public body’s deliberations do not include its ultimate decision to take action.

Finally, because of the OAG’s enforcement role under the OML, the Court has found that: (1) the OAG’s reasonable interpretation of the OML is entitled to deference; and (2) when the Legislature has had ample time to amend the law in response to the OAG’s interpretation but fails to do so, such acquiescence indicates the OAG’s interpretation is consistent with legislative intent. Del Papa v. Bd. of Regents, 114 Nev. 388, 396 (1998). Therefore, when interpreting the OML, the OAG’s manual and opinions provide persuasive guidance regarding the OML’s requirements. Id. (agreeing with a reasonable interpretation in the OAG’s manual where the Legislature evidenced acquiescence because it “had sixteen years to override the Attorney General’s interpretation of [the OML] via amendment,” but failed to do so).

II. Because the Commission did not make its decision or take action to appeal the district court's order in an open and public meeting that complied with the OML, the Commission's notice of appeal is void as a matter of law.

The Commission is a public body subject to the OML. NRS 241.015(4); OMLO 2002-17 (Apr. 18, 2002). As such, unless a specific statute expressly exempted the Commission from the OML, the Commission was allowed to make a decision or take action to appeal the district court's order only in an open and public meeting that complied with the OML. NRS 241.020(1); McKay II, 103 Nev. at 491-93; Johnson, 20 P.3d at 1151 (“[O]nce the Board finished privately discussing the merits of appealing, the open meeting statutes required that board members meet in public for the final decision to appeal.”). In Nevada, there is no specific statute which expressly exempts the Commission from the OML and allows it to make a decision or take action to appeal a district court's order without first complying with the OML.

Under the Ethics Law, all information in the possession of the Commission or its staff that is related to any RFO is confidential until the investigatory panel determines whether there is just and sufficient cause to render an opinion in the matter or until the subject of the RFO authorizes the Commission in writing to make its information publicly available, whichever occurs first. NRS 281A.440(8) as amended by AB60, 2015 Nev.Stat., ch.198, §3, at 920. There is no provision in this statute which expressly exempts the Commission from the OML and allows it

to make a decision or take action to appeal a district court's order in a private conference. Furthermore, in the stipulation and order approved by the district court on April 30, 2015, the Assemblymen waived the confidentiality of the RFOs under NRS 281A.440(8) and therefore authorized the Commission in writing to make its information publicly available. (*Ex. C at 3.*) Accordingly, NRS 281A.440(8) did not expressly exempt the Commission from the OML.

The Ethics Law also contains a limited exception from the OML, but that exception does not apply here. The limited exception in NRS 281A.440(16) exempts “[a] meeting or hearing that the Commission . . . holds to receive *information or evidence* concerning the propriety of the conduct of a public officer or employee *pursuant to this section* and the *deliberations* of the Commission . . . on such information or evidence.” NRS 281A.440(16) as amended by AB60, 2015 Nev.Stat., ch.198, §3, at 921 (emphasis added). The Commission did not make its decision or take action to appeal the district court's order in a meeting or hearing held by the Commission under NRS 281A.440.

First, to legally hold such a meeting or hearing, the Commission must comply with NRS 281A.440(11), which provides that:

11. Whenever the Commission holds a hearing *pursuant to this section*, the Commission shall:

- (a) Notify the person about whom the opinion was requested of the place and time of the Commission's hearing on the matter;
- (b) Allow the person to be represented by counsel; and

(c) Allow the person to hear the evidence presented to the Commission and to respond and present evidence on the person's own behalf.

↳ The Commission's hearing may be held no sooner than 10 days after the notice is given unless the person agrees to a shorter time.

NRS 281A.440(11) as amended by AB60, 2015 Nev.Stat., ch.198, §3, at 921 (emphasis added). It is clear from the plain language of this statute that a meeting or hearing contemplated by NRS 281A.440(16) is an adjudicatory proceeding at which the merits of an RFO are adjudicated by the Commission after notice and an opportunity for the subject to be heard. A meeting or hearing contemplated by NRS 281A.440(16) does not include any meeting or hearing at which the Commission makes a decision or takes action to appeal a district court's order.

Furthermore, even assuming that NRS 281A.440(16) had any application, its plain language expressly exempts only the Commission's receipt of "information or evidence" and its "deliberations" on such information or evidence. It does not expressly exempt the Commission's ultimate decision to take action, which must occur only in an open and public meeting that complies with the OML. Accordingly, NRS 281A.440(16) did not expressly exempt the Commission from the OML.

Finally, the OML contains a limited attorney-client litigation exception that allows public bodies to "receive information" and "deliberate toward a decision" regarding potential or existing litigation in private conferences with their

attorneys.⁶ NRS 241.015(3)(b)(2). However, based on the plain language and legislative history of the attorney-client litigation exception, it does not allow public bodies to make a decision or take “action” regarding potential or existing litigation in private conferences with their attorneys. Legis. History AB225, 71st Leg., at 1771-75, 1810-16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001) (discussing the intent and purpose of the attorney-client litigation exception).⁷

Before 2001, the OML did not include a “statutory exception specifically providing public bodies with the privilege to meet in private just because they have their attorneys present; hence, such meetings [were] prohibited.” McKay II, 103 Nev. at 491. As a result, the OML prohibited public bodies from gathering in private with their attorneys to deliberate or take action regarding litigation. Id. at 495-96. However, the OML did not prohibit “an attorney for a public body from conveying sensitive information to the members of a public body by confidential memorandum,” nor did it “prevent the attorney from discussing sensitive

⁶ For ease of discussion, the term “conference” is used as a convenient shorthand for “a gathering or series of gatherings of members of a public body . . . at which a quorum is actually or collectively present, whether in person or by means of electronic communication.” NRS 241.015(3)(b).

⁷ A copy of Legis. History AB225, 71st Leg. (Nev. LCB Resch. Libr. 2001), is available at:
<http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225,2001.pdf>.

information in private with members of the body, singly or in groups less than a quorum.” Id. But when a quorum of the body met to deliberate or take action regarding litigation, the OML required the body to hold open meetings. Id.

Against this backdrop, the Legislature enacted the limited attorney-client litigation exception during the 2001 legislative session. AB225, 2001 Nev.Stat., ch.378, §2, at 1836. When the Assembly Committee on Government Affairs first considered the exception in AB225, the committee adopted an amendment proposed by the Nevada Press Association that was intended to ensure continued public access to the deliberations of public bodies with their attorneys. Legis. History AB225, at 1771-75, 1810-16. The amendment defined a “meeting” under the OML to **include**:

a series of gatherings between individual members of the public body and an attorney employed or retained by the public body regarding potential or existing litigation . . . if the gatherings were held with the intent to deliberate toward a decision or take action regarding the litigation.

AB225, First Reprint, 71st Leg., §2 (Nev. 2001) (emphasis added).

As explained by its proponents, AB225, First Reprint, was intended to require both action and deliberations regarding litigation to be conducted in open meetings, which meant that “[a]n attorney could meet with the public body as long as discussions did not lead to action or deliberation. Any guidance or deliberation needed to be done in an open meeting.” Legis. History AB225, at 1771 (testimony

of Kent Lauer, Executive Director, Nevada Press Association); id. at 2064 (“the bill does allow an attorney to advise members in private, but they cannot privately deliberate or take action on that advice.”).

When AB225, First Reprint, was heard by the Senate Committee on Government Affairs, the attorney-client provision was met with considerable opposition, and the Nevada Press Association agreed to another amendment allowing public bodies to discuss or deliberate litigation in private with their attorneys but maintaining the requirement for public bodies to take action regarding litigation only in open and public meetings that comply with the OML. Legis. History AB225, at 2064-70, 2442-43, 2475-79. As a result, the final version of AB225 enacted the limited attorney-client litigation exception which provides that a “meeting” under the OML **does not include** a gathering of the public body:

To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

AB225, 2001 Nev.Stat., ch.378, §2, at 1836 (emphasis added).

Thus, based on the plain language and legislative history of the attorney-client litigation exception, it expressly allows public bodies to confer with their attorneys in private to “receive information” and “deliberate toward a decision” regarding litigation, but it does not allow public bodies to make a decision or take “action”

regarding that litigation in private. Instead, such action must be taken only in open and public meetings that comply with the OML. NRS 241.010(1), 241.015(1)-(3), 241.016(4) & 241.020(1); McKay II, 103 Nev. at 491-96.

This conclusion is reinforced by the OAG's manual and opinions which provide persuasive guidance regarding the OML's requirements. Since 2001, the OAG has advised public bodies that the law requires them to take action regarding litigation only in open and public meetings that comply with the OML. See OMLM §§4.05 & 5.11 (9th ed. 2001, 10th ed. 2005 & 11th ed. 2012) (stating that under the attorney-client litigation exception, "a public body may deliberate . . . in an attorney-client conference," but the exception "does not permit a public body to take action in an attorney-client [private] meeting."); OMLO 2005-04 (Mar. 7, 2005) ("The facts here indicate that the Board deliberated over strategy decisions with [its attorney] Ms. Nichols, but did not reach or make any decision regarding the existing litigation. Thus the Board conducted itself within the legal requirements of Nevada's Open Meeting Law.").

In conducting their public business, all public bodies "are presumed to know the law and to apply it in making their decisions." Miller v. Warden, 112 Nev. 930, 937 (1996) (quoting Jones v. State, 107 Nev. 632, 636 (1991)). This presumption also applies to the members and staff of public bodies because "[e]very one is presumed to know the law, and this presumption is not even rebuttable." Smith v.

State, 38 Nev. 477, 481 (1915). Consequently, it must be conclusively presumed that the Commission and its members and staff have known, for the past 15 years, that the Commission cannot take action regarding litigation in private conferences with its attorneys but must take such action only in open and public meetings that comply with the OML.

Despite this long-standing knowledge for the past 15 years, the Commission nevertheless filed a notice of appeal without first making its decision or taking action to appeal the district court's order in an open and public meeting that complied with the OML. Because the Commission violated the OML, its notice of appeal is void as a matter of law under the absolute voiding rule in NRS 241.036, and its notice of appeal does not have any legal force or effect. See Johnson, 20 P.3d at 1149-51 (holding under Arizona's open meeting law that a public body's "private decision to appeal violated the state's open meeting law and that its notice of appeal is null and void.").

Nevada's OML contains an absolute voiding rule in NRS 241.036, which states that "[t]he action of any public body taken in violation of any provision of this chapter is *void*." NRS 241.036 (emphasis added). The OML does not contain any exceptions to the absolute voiding rule in NRS 241.036. Therefore, in all cases and without exception, "[a]ctions taken in violation of the Open Meeting Law are void." Chanos, 124 Nev. at 244; McKay I, 102 Nev. at 651.

For example, in Chanos, the OAG brought an enforcement action under the OML to void the Tax Commission's actions in granting tax refunds to Southern California Edison in a series of taxpayer appeal hearings closed to the public. The Tax Commission argued that the former provisions of one of its governing statutes, NRS 360.247, created a complete exception to the OML and authorized it to close the entire taxpayer appeal to the public. The Court found that the Tax Commission's "overbroad interpretation of the statutory exception would eviscerate the Open Meeting Law's mandate that public bodies deliberate and vote in public meetings." Chanos, 124 Nev. at 234. The Court concluded, therefore, that the Tax Commission's actions in granting the tax refunds to Edison in closed hearings were void as a matter of law under the absolute voiding rule in NRS 241.036. Id. at 244. The Court explained that:

NRS 360.247 allowed the Tax Commission to close its session to hold a hearing at which it took confidential evidence from the parties; however, the Open Meeting Law required the Tax Commission to receive nonconfidential evidence, deliberate the collective discussion of relevant facts, and vote on Edison's appeal in open session. Therefore, to the extent that the Tax Commission took nonconfidential evidence, deliberated, and voted regarding Edison's appeal in closed session, it violated the Open Meeting Law. *Under NRS 241.036, actions taken in violation of the Open Meeting Law are void. . . .*

When considering Edison's appeal, the Tax Commission deliberated entirely in closed session and voted in closed session. Therefore, its action granting Edison's refund was taken in violation of the Open Meeting Law. *Actions taken in violation of the Open Meeting Law are void. Therefore, because the Tax Commission's grant of Edison's tax refund is void, we reverse the district court's judgment.*

Id. at 244-45 (emphasis added and footnotes omitted).⁸

Thus, based on the plain language of the absolute voiding rule in NRS 241.036 and based on the Court's decisions applying that rule, it is well established that, in all cases and without exception, any action taken by a public body in violation of the OML is void as a matter of law. It is also well established that, when an action is void as a matter of law, the action "is void ab initio, meaning it is of no force and effect." Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1304 (2006) (citing Black's Law Dictionary 5 (8thed.2004) (defining "ab initio" as "from the beginning")). Because such an action is void ab initio and has no force and effect, "it does not legally exist." Id. Furthermore, it is well established that void actions "cannot be cured by amendment" because "they are void and do not legally exist." Otak Nev., LLC v. Dist. Ct., 127 Nev. Adv. Op. 53, 260 P.3d 408, 412 (2011) (quoting Fierle v. Perez, 125 Nev. 728, 740 (2009), *overruled in part on other grounds by Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364 (2013)). Therefore, when the actions of a public body violate the

⁸ See also McKay I, 102 Nev. at 651 (applying the absolute voiding rule in NRS 241.036 and holding that "the action of the Board terminating the city manager in closed session on August 13, 1985, violated the open meeting requirement of NRS 241.020 and is not within any of the exceptions to this requirement contained in NRS 241.030, and *is therefore void.*" (emphasis added)).

OML, the public body cannot take any subsequent action that would cure the violation or reverse the effects of the absolute voiding rule in NRS 241.036.

The OML contains only one limited procedure which allows a public body to take corrective action “within 30 days after the alleged violation.” NRS 241.0365(1). However, even if the public body takes corrective action in a timely manner pursuant to that procedure, the corrective action does not cure the violation or reverse the effects of the absolute voiding rule in NRS 241.036. Instead, the only legal effect of the corrective action is that “the Attorney General may decide not to commence prosecution of the alleged violation if the Attorney General determines foregoing prosecution would be in the best interests of the public.” NRS 241.0365(1). Thus, the OML does not allow the public body to take corrective action to cure the violation or reverse the effects of the absolute voiding rule in NRS 241.036.

Moreover, the OML also expressly provides that “[a]ny action taken by a public body to correct an alleged violation of this chapter by the public body *is effective prospectively*.” NRS 241.0365(5) (emphasis added). When an action is effective prospectively, it does not change “the legal consequences of acts completed before its effective date.” Miller v. Burk, 124 Nev. 579, 592 n.44 (2008) (quoting Miller v. Florida, 482 U.S. 423, 430 (1987)). Therefore, under the plain language of the OML, any action taken by a public body to correct a violation of

the OML is effectively prospectively, and it does not change the legal consequences of the violation or reverse the effects of the absolute voiding rule in NRS 241.036.

Accordingly, because the Commission filed a notice of appeal without first making its decision or taking action to appeal the district court's order in an open and public meeting that complied with the OML, the Commission violated the OML. As a legal consequence of the violation, the Commission's notice of appeal is void as a matter of law, and the Commission cannot take any corrective action to cure the violation or reverse the effects of the absolute voiding rule in NRS 241.036. Under such circumstances, the Commission's notice of appeal does not have any legal force or effect.

This conclusion is supported by caselaw from other jurisdictions. The Arizona Court of Appeals has held that a public body's notice of appeal is "null and void" under Arizona's open meeting law when the public body does not first make its decision or take action to appeal in an open and public meeting. Johnson, 20 P.3d at 1149-51. In Johnson, the plaintiff sought judicial review of a public board's decision to terminate his employment, and the trial court ruled in the plaintiff's favor and ordered the board to reinstate the plaintiff with back pay and also awarded him attorneys' fees and costs. After the trial court entered its judgment, the board met in executive session with its attorney concerning the status of the

litigation, and the board decided to appeal the trial court's judgment at this private meeting. Thereafter, the board filed a notice of appeal.

On appeal, the plaintiff argued that "a legal action decided by a public body in violation of open meeting statutes is null and void." Id. at 1149. The board countered that under Arizona's attorney-client exception, "it complied with Arizona's open meeting statute because [the exception] allows a public body, meeting in an executive session, to instruct its attorneys to file an appeal." Id. at 1150. The Arizona Court of Appeals rejected the board's argument and held that the board's notice of appeal was "null and void," explaining that:

[W]e cannot extend the "legal advice" and "pending litigation" exceptions to include a final decision to appeal. [The open meeting law] limits executive sessions to "discussion or consultation," in contrast to the "collective decision" or "commitment" that comprises "legal action." While [the law] permits board members privately to discuss or consult with their attorneys concerning legal advice or pending litigation, [it] prohibits holding such executive sessions for taking any legal action involving a final vote or decision. A decision to appeal transcends "discussion or consultation" and entails a "commitment" of public funds. Therefore, once the Board finished privately discussing the merits of appealing, the open meeting statutes required that board members meet in public for the final decision to appeal.

The Board argues that announcing its decision to appeal in an open meeting might deter settlement and reinstatement. Aside from such speculation, the law recognizes no such exception. Under the statute, any discussions concerning strategy and the merits of the case could be conducted in executive session, but the final vote or decision to appeal needed to be public.

We conclude that the Board violated the open meeting law when, in executive session, it decided to appeal the superior court's judgment.

When a public body takes legal action that violates the open meeting law without timely ratification, that legal action is “null and void.” A.R.S. §38–431.05(A). Actions taken in violation of the open meeting law “cease to exist or have any effect.” Van Alstyne v. Hous. Auth., 985 P.2d 97, 101 (Colo.Ct.App.1999). Here, the legal action violating the open meeting law was the very decision to file this appeal. Accordingly, this resulting appeal is null and void. See Berry v. Bd. of Governors of Reg. Dentists, 611 P.2d 628, 632 (Okla.1980) (reversing granting of injunction because board failed to vote to seek injunctive relief in a public meeting).

Id. at 1151 (citations and footnotes omitted).

Recently in 2013, the Arizona Court of Appeals confronted the same issue again, and it reached the same conclusion as in Johnson that a public body’s decision to appeal without holding an open and public meeting violated the state’s open meeting law and that its notice of appeal was therefore null and void. City of Tombstone v. Beatty’s Guest Ranch & Orchard, No. 2 CA-CV 2013-0018, 2013 WL 6243854 (Ariz.Ct.App. Nov. 27, 2013), *review denied* (Ariz. Apr. 22, 2014). In Tombstone, the city attempted to distinguish its case from Johnson by arguing that the city council did not actually vote or take other final action during its executive session to authorize the appeal. Instead, the city contended that the city code gave the city attorney authority to pursue the appeal without first obtaining the city council’s approval.

The court rejected the city’s arguments. First, the court held that because the open meeting law mandated that any final decision to take legal action must be made in a public meeting, the city council’s failure to approve the final decision to

appeal in a public meeting rendered the appeal null and void, regardless of whether the city council actually voted or took other final action during its executive session to authorize the appeal. Second, the court held that the city code did not give the city attorney any authority to unilaterally take legal action binding the city without a public vote and that the city code could not give the city attorney such authority because it would conflict with the provisions of the open meeting law. Therefore, the court concluded that because the “decision to prosecute this appeal without a public vote constituted legal action in violation of the open meeting law . . . ‘the resulting appeal is null and void’ and this court lacks jurisdiction.” Tombstone, 2013 WL 6243854 at *4 (quoting Johnson, 20 P.3d at 1151).

Like the public bodies in Johnson and Tombstone, the Commission violated the OML when it filed a notice of appeal without first making its decision or taking action to appeal the district court’s order in an open and public meeting that complied with the OML. Johnson, 20 P.3d at 1151; Tombstone, 2013 WL 6243854 at *4. Furthermore, like Arizona’s open meeting law, Nevada’s OML expressly provides that any action taken in violation of the OML is “void.” NRS 241.036; McKay I, 102 Nev. at 651; Johnson, 20 P.3d at 1151; Tombstone, 2013 WL 6243854 at *4. Accordingly, because the Commission violated the OML, the notice of appeal filed on October 29, 2015, is void as a matter of law under the

absolute voiding rule in NRS 241.036, and the notice of appeal does not have any legal force or effect.

III. Because the Commission’s notice of appeal is void as a matter of law and does not have any legal force or effect and because the time to file a valid notice of appeal has expired, the Commission’s appeal must be dismissed for lack of appellate jurisdiction.

In Nevada, “[t]he proper and timely filing of a notice of appeal is jurisdictional. This court cannot treat an improperly-filed notice of appeal as vesting jurisdiction in this court.” Guerin v. Guerin, 116 Nev. 210, 214 (2000) (citation omitted). If an appellant does not have the proper legal authority to file a notice of appeal, the appellant cannot legally file a valid notice of appeal that vests jurisdiction in Nevada’s appellate courts. Id. at 213-14.

Because the Commission did not have the proper legal authority to file its notice of appeal due to its violation of the OML, the Commission did not legally file a valid notice of appeal that vests jurisdiction over this case in Nevada’s appellate courts. See Johnson, 20 P.3d at 1151; Tombstone, 2013 WL 6243854 at *4. Furthermore, because the Commission’s time to file a valid notice of appeal has expired, the Commission no longer has the right to pursue an appeal in this case. Therefore, this case must be dismissed for lack of appellate jurisdiction.

When the Commission filed its notice of appeal, it was attempting to appeal under the Administrative Procedure Act (APA), which provides that:

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction pursuant to *the rules fixed by the Supreme Court* pursuant to Section 4 of Article 6 of the Nevada Constitution. *The appeal shall be taken as in other civil cases.*

NRS 233B.150 (emphasis added). Accordingly, because APA appeals are governed by the Court's rules and because such appeals must be taken as in other civil cases, the Commission was required to file a proper and timely notice of appeal under the Nevada Rules of Appellate Procedure (NRAP).

Under NRAP, the filing of a proper and timely notice of appeal "is mandatory and jurisdictional," Rogers v. Thatcher, 70 Nev. 98, 100 (1953), which means that such "[j]urisdictional rules go to the very power of this court to act." Rust v. Clark Cnty. Sch. Dist., 103 Nev. 686, 688 (1987). Because the filing of an improper or untimely notice of appeal does not "invoke this court's jurisdiction to entertain [the] appeal," such a defective appeal must be dismissed and cannot be considered on its merits. Healy v. Volkswagenwerk, 103 Nev. 329, 331 (1987). Thus, "[w]hile this court has often expressed its adherence to hearing appeals on the merits rather than dismissing the same on technical grounds, it cannot do so in absence of compliance with the jurisdictional requirement for filing [a] notice of appeal within the time limited by the rules." Culinary Workers v. Haugen, 76 Nev. 424, 429 (1960). Accordingly, it is well established that "[t]his court lacks jurisdiction to

consider an appeal that is filed beyond the time allowed under NRAP 4(a).” Winston Products Co. v. DeBoer, 122 Nev. 517, 519 (2006).

Under NRAP 4(a)(1), the period for the Commission to file a proper and timely notice of appeal expired “30 days after the date that written notice of entry of the judgment or order appealed from [was] served.” See In re Duong, 118 Nev. 920, 922 (2002). Pursuant to the parties’ stipulation and consent to service by electronic mail, the Assemblymen served the Commission by e-mail with written notice of entry of the district court’s order on October 26, 2015, and their electronic service of the notice was complete upon transmission of the e-mail on that date. NRAP 25(c)(3); NEFCR 9(f). Therefore, the period for the Commission to file a proper and timely notice of appeal expired on November 25, 2015, which was 30 days after the date of electronic service of written notice of entry of the district court’s order. NRAP 26(a) (prescribing rules for computing time).⁹

⁹ When service is by regular mail, NRAP 26(c) adds 3 days to the appeal period. Lytle v. Rosemere Estates Prop. Owners, 129 Nev.Adv.Op. 98, 314 P.3d 946, 948 (2013). However, it is unclear whether NRAP 26(c) adds 3 days to the appeal period when service is by electronic means. Cf. Winston Products, 122 Nev. at 520 (noting that under NRCP 6(e), “[t]hree additional days are added to [the] filing deadline when service was made by mail or *electronic means*.” (emphasis added)). In this case, if 3 days are added to the Commission’s appeal period, the period expired on November 28, 2015, which was a Saturday, so the appeal period expired on the next judicial day: Monday, November 30, 2015. NRAP 26(a)(3).

Because the notice of appeal filed by the Commission on October 29, 2015, is void as a matter of law under the absolute voiding rule in NRS 241.036 and does not have any legal force or effect, the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period. Consequently, having failed to file a valid notice of appeal during the jurisdictional appeal period, the Commission lost the right to pursue an appeal in this case, and its appeal must be dismissed for lack of appellate jurisdiction. Accordingly, the Assemblymen respectfully ask the Court to dismiss the Commission's appeal for lack of appellate jurisdiction.

IV. If the Court decides not to consider the OML issue in the first instance on appeal, the Court should stay the appeal and remand to the district court for resolution of the Assemblymen's pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission's notice of appeal as action taken by the Commission in violation of the OML.

As a preliminary matter, the Assemblymen respectfully urge the Court to consider the OML issue in the first instance on appeal because the issue of whether the Commission violated the OML is a pure question of law which involves an issue of statutory construction and which the Court may decide de novo without any deference to the district court. See Sandoval v. Bd. of Regents, 119 Nev. 148, 153-54 (2003); Dewey, 119 Nev. at 93-94. If the Court determines that the Commission violated the OML, the Court can apply the absolute voiding rule in NRS 241.036, which lays down a clear rule of law and is self-executing as applied

to all public bodies. See Wilson v. Koontz, 76 Nev. 33, 39 (1960) (explaining that a “provision is said to be self-executing if it enacts a sufficient rule by means of which the right given may be enjoyed and protected. The language used, as well as the object to be accomplished, is to be looked into in ascertaining the intention of the provision.”) Wren v. Dixon, 40 Nev. 170, 195 (1916) (“prohibitory provisions . . . are usually self-executing to the extent that anything done in violation of them is void.”).

Therefore, because the issue of whether the Commission violated the OML is a pure question of law and because the absolute voiding rule in NRS 241.036 is self-executing, the Court has the power and discretion to apply the OML to this case and dismiss the Commission’s appeal for lack of appellate jurisdiction without remanding the case for any further proceedings in the district court. However, if the Court decides not to consider the OML issue in the first instance on appeal, the Court should stay the appeal and remand to the district court for resolution of the Assemblymen’s pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission’s notice of appeal as action taken by the Commission in violation of the OML.

On December 1, 2015, the Assemblymen filed an OML complaint in the district court under NRS 241.037(2) to void the Commission’s notice of appeal as action taken by the Commission in violation of the OML. (*Ex. E.*) On December 2,

2015, the Assemblymen served the Commission with the summons and the OML complaint. (*Ex. F.*) Because the district court’s resolution of the OML complaint could render this appeal moot, the Court has the power and discretion to stay the appeal and remand to the district court for resolution of the OML complaint.

As a general rule, “the timely filing of a notice of appeal divests the district court of jurisdiction to act in matters pending before this court, such that the district court only retains jurisdiction to consider collateral matters.” Gold Ridge Partners v. Sierra Pac. Power, 128 Nev.Adv.Op. 47, 285 P.3d 1059, 1063 (2012). To be considered collateral matters within the limited jurisdiction retained by the district court, the matters generally must be “matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal’s merits.” Foster v. Dingwall, 126 Nev. 49, 52 (2010) (quoting Mack–Manley v. Manley, 122 Nev. 849, 855 (2006)).

The district court also retains limited jurisdiction to address matters during the pendency of an appeal when a specific statute requires the district court to consider the matters even while the appeal is pending. Gold Ridge, 285 P.3d at 1063-64. This is particularly true when the district court’s consideration of the matter “is likely to render any issues in the appeal moot, [for] it would be illogical to require the plaintiff to wait until the conclusion of the appeal to have the district court adjudicate such a [matter].” Id. at 1064.

Finally, the Court has broad discretion to “consider the request for a remand and determine whether it should be granted or denied.” Foster, 126 Nev. at 53; Mack–Manley, 122 Nev. at 856 (noting the Court’s broad discretion to grant a motion seeking remand to the district court). The Court also has broad discretion to issue all writs and orders “necessary or proper to the complete exercise of [its] jurisdiction.” Nev. Const. art.6, §4(1).

As discussed previously, if the district court determines that the Commission violated the OML when it filed a notice of appeal without first making its decision or taking action to appeal in an open and public meeting that complied with the OML, the Commission’s notice of appeal is void as a matter of law and does not have any legal force or effect. That means the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period and no longer has the right to pursue an appeal in this case. Under such circumstances, the district court’s decision would render this appeal moot. Therefore, in the interests of judicial economy and efficiency, if the Court decides not to consider the OML issue in the first instance on appeal, the Court should stay the appeal and remand to the district court for resolution of the Assemblymen’s pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission’s notice of appeal as action taken by the Commission in violation of the OML.

CONCLUSION

The Assemblymen respectfully ask the Court to: (1) dismiss the appeal for lack of appellate jurisdiction; or (2) in the alternative, stay the appeal and remand to the district court for resolution of the Assemblymen's pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission's notice of appeal as action taken by the Commission in violation of the OML.

DATED: This **7th** day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 7th day of December, 2015, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of (1) Respondents' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, Etc., and (2) Exhibits to Respondents' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, Etc., by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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