

1 Case No. 10197

2 Dept. No. 1

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**MARY ANN GRAY
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7 **IN THE SIXTH JUDICIAL DISTRICT COURT**
8 **COUNTY OF LANDER, STATE OF NEVADA**

9 **MICHAEL MARKING and**
10 **ELIZABETH FLEMING,**

11 Plaintiffs,

**DEFENDANT'S OPPOSITION TO PLAINTIFFS'
12 MOTION FOR ORDER VOIDING MEETINGS
13 AND FOR PRELIMINARY INJUNCTION**

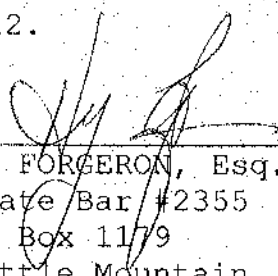
14 -vs-

15 **AUSTIN ROPING CLUB.**

16 Defendant.

17
18 COMES NOW, Defendant above-named, by and through it's
19 attorney HY FORGERON, Esq., and opposes Plaintiffs' Motion For
20 Order Voiding Meetings And For Preliminary Injunction, all as is
21 more fully set forth in the Points and Authorities annexed hereto.

22 Dated this 25th day of April, 2012.

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HY FORGERON, Esq.
State Bar #2355
PO Box 1179
Battle Mountain, NV 89820
775-635-8100
Fax: 775-635-3118
Attorney for Defendant

1 I.

2 **POINTS AND AUTHORITIES**

3 **A. Procedural Background**

4 Defendant is a nonprofit cooperative corporation without
5 stock organized under Title 7, Chapter 81 of the Nevada Revised
6 Statutes. Defendant's formal corporate name is denominated in
7 its Articles Of Incorporation as "The Austin Roping Club,
8 Incorporated" and shall hereinafter be referred to as Defendant or
9 as "the Club".

10 On or about February 22, 2012, the Club's resident agent,
11 Joseph P. Ramos, was served with a copy of the Complaint filed by
12 the Plaintiffs herein on February 7, 2012.

13 Defendant, by and through its attorney Hy Forgeron, Esq.,
14 filed its Motion For More Definite Statement on March 13, 2012.

15 On April 9, 2012, Plaintiffs filed their Motion For Order
16 Voiding Meetings And For Preliminary Injunction, which is the
17 subject of this Opposition.

18 **B. Argument**

19 **1. Plaintiffs have no standing to object to the manner in**
20 **which Defendant conducts its meetings.**

21 Defendant is a nonprofit cooperative corporation without
22 stock. Its participants are referred to as "members" rather than
23 as the traditional "stockholders" or "shareholders". Plaintiffs
24 are not members of the corporation. As such, they have no
25 standing to object to the manner in which the Defendant conducts
26 its meetings.

1 While it deals with an objection to a lawsuit by a third
2 party, the following case is illustrative. In Farmers Union Oil
3 Co. v. Maixner, 376 N.W.2d 43 (N.D. 1985), one Maixner, a third
4 party, sought to object to the institution of a lawsuit by one
5 Kaufman, who was chairman of the board of Farmers Union. In
6 disallowing the objection, the Court stated:

7 "Maixner has questioned the authority of Kaufman to initiate
8 a lawsuit on behalf of Farmers Union. Whether or not Kaufman had
9 actual authority to initiate a lawsuit is unimportant as Maixner
10 cannot object to Kaufman's alleged lack of authority. As a general
11 rule, if a corporation does not object to an officer's lack of
12 authority, a third person may not object. Village of Brown Deer v.
13 City of Milwaukee, 16 Wis.2d 206, 114 N.W.2d 493, 497 (1962).

14 Farmers Union did not object to any lack of authority on the part
15 of Kaufman; therefore, Maixner may not do so." (376 N.W.2d at 46)

16 See also, Jenkins v. Neighborhood Legal Services Ass'n, 523
17 F.Supp. 376, (Pa. 1981), aff'd, 688 F.2d 821 (3rd Cir. 1982).

18 **2. Assuming, arguendo, that Plaintiffs have standing and**
19 **that the meetings complained of were improperly noticed, their**
20 **objection fails under the doctrine of ratification as expressed by**
21 **statute.**

22 NRS 82.281 provides, in pertinent part, as follows:

23 **NRS 82.281 Actions at meetings not regularly called: Consent, ratification**
24 **and approval.**

25 1. Whenever all persons entitled to vote at any meeting, whether of directors,
26 trustees, delegates or members, consent by:

1 ... (c) Taking part in the deliberations at the meeting without objection,
2 the actions taken at the meeting are as valid as if they had been taken at a meeting
3 which was regularly called after notice was given. . . .

4 3. **The Nevada Open Meeting Law does not apply to Defendant.**

5 The Nevada Open Meeting Law, (hereinafter referred to as
6 "OML") as set forth in NRS Chapter 241, only applies to meetings
7 of public bodies. A public body is any administrative, advisory,
8 executive, or legislative body of the state or local government
9 which expends or disburses or is supported in whole or in part by
10 tax revenue, or which advises or makes recommendations to any
11 entity which expends or disburses or is supported in whole or in
12 part by tax revenue, including any board, commission, committee,
13 subcommittee, or other subsidiary.

14 Defendant is a private, not-for-profit corporation, and is
15 not an administrative, advisory, executive, or legislative body of
16 the state or of Lander County. Neither does it advise or make
17 recommendations to the state or to Lander County.

18 The Nevada Attorney General is charged with investigating and
19 prosecuting violations of the OML (NRS 241.039). The Attorney
20 General has adopted and publicized the Nevada Open Meeting Law
21 Manual (hereinafter "Manual") to assist in these functions.

22 Section 3.09 of the Manual provides as follows:

23 **§ 3.09 Private, nonprofit organizations**

24 Where a government body or agency itself establishes such a civic
25 organization, even though it is composed of private citizens, it may well constitute a
26 "public body" under the law. *Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). In

1 Nevada, this would be true if the civic organization is intended to perform any
2 administrative, advisory, executive or legislative function of state or local
3 government and it expends or disburses or is supported in whole or in part by tax
4 revenue, or if it is intended to advise or make recommendations to any other Nevada
5 governmental entity which expends or disburses or is supported in whole or in part
6 by tax revenue. See e.g., *Seghers v. Community Advancement, Inc.*, 357 So. 2d 626
7 (La. Ct. App. 1978); *Raton Public Service Co. v. Hobbes*, 417 P.2d 32 (N.M. 1966).

8 The mere receipt of a grant of public money **does not** by itself transform a
9 private, nonprofit civic organization into a "public body" for purposes of the Open
10 Meeting Law, nor does the membership of a few government officials on the
11 organization's board of directors, per se, make the organization a "public body." See
12 OMLO 2004-03 (February 10, 2004) and OMLO 2004-20 (May 18, 2004). A
13 private, non-profit corporation is a public body if it is formed by a public body, acts
14 in an administrative, advisory and executive capacity in performing local
15 governmental functions **and** is supported in part by tax revenue from the public
16 body. See AG File No. 00-030 (April 12, 2001).(emphasis added).

17 The Attorney General has issued an opinion in a similar case
18 to this one. KPVM Television had been excluded from a meeting of
19 Valley Electric Association, Inc. KPVM objected on the basis that
20 Valley was a public body, subject to the OML. In the Attorney
21 General's formal opinion (OMLO 2001-08), it was ruled that Valley
22 was not a public body. The opinion states, in part:

23 "In this instance, Valley Electric's Articles of Incorporation provide that it is a
24 not-for-profit corporation and does not offer stock to the public. The Articles of
25 Incorporation further indicate Valley Electric is an association organized for the
26 purpose of promoting and supporting electrical utility services to the citizens of

1 Pahrump, Nevada. We have not been informed that any state or local authority
2 created Valley Electric or that the Board of Directors is controlled by state or local
3 officials. Furthermore, we have not been informed that Valley Electric is supported
4 in whole or in part by public funding. Merely because Valley Electric provides utility
5 service to the public does not alone make it subject to the Open Meeting Laws.
6 Accordingly, Valley Electric is not a "public body" and, thus, is not subject to the
7 Open Meeting Laws, Chapter 241 of the Nevada Revised Statutes. Therefore, Valley
8 Electric may exclude KPVM-TV, Channel 41 and any other media organization from
9 attending and/or video or audio taping Association meetings.

10 Based on the foregoing reasons, the Nevada Attorney General's Office
11 concludes that Valley Electric is not a "public body" as defined pursuant to NRS
12 241.105(3) and, thus, is not required to comply with the Open Meeting Laws,
13 Chapter 241 of the Nevada Revised Statutes."

14 Like Valley, Defendant is a not-for-profit corporation and
15 does not offer stock to the public. The Articles of Incorporation
16 further indicate Defendant is an association organized for the
17 purpose of promoting and advancing the sport of roping and other
18 sports involving horses. No state or local authority created
19 Defendant and neither the officers nor the Board of Directors are
20 controlled by state or local officials. Defendant is simply not,
21 nor has it ever been, a public body within the meaning of the OML.

22 **4. A representative of the Nevada Attorney General's Office**
23 **has indicated that Defendant is not a public body subject to the**
24 **OML.**

25 On April 10, 2012, the undersigned attorney spoke with George
26 Taylor, Deputy Attorney General, who works with the OML in the

1 Attorney General's Office in Carson City. According to Mr.
2 Taylor, not-for-profit corporations such as Defendant are not
3 public bodies subject to the OML. He further stated that neither
4 leasing county property nor accepting grant money would define
5 Defendant as a public body under the OML.

6 5. Since Defendant is not a "public body", this Court is
7 without jurisdiction to enforce the penalty provisions of the OML
8 as against a private, not-for-profit corporation.

9 NRS 241.037 provides, in pertinent part, as follows:

10 **NRS 241.037 Action by Attorney General or person denied right**
11 **conferred by chapter; limitation on actions.**

12 1. The Attorney General may sue in any court of competent jurisdiction to
13 have an action taken by a public body declared void or for an injunction against
14 any public body or person to require compliance with or prevent violations of the
15 provisions of this chapter. . . .

16 2. Any person denied a right conferred by this chapter may sue in the district
17 court of the district in which the public body ordinarily holds its meetings or in
18 which the plaintiff resides. A suit may seek to have an action taken by the public
19 body declared void . . . (emphasis added).

20 Since Defendant is not a public body subject to the OML, NRS
21 Chapter 241 does not confer jurisdiction on this Court to hear and
22 determine alleged violations thereof by Defendant.

23 6. Since no rights were conferred on Plaintiffs by NRS
24 Chapter 241, this Court is without jurisdiction to enforce the
25 penalty provisions of the OML as against a private, not-for-profit
26 corporation.

1 Article IV, Section 4 of the Defendant's By-Laws, in effect
2 at all times relevant to Plaintiffs' claims, through and until
3 April 24, 2012, read: "We must and will comply with the Nevada
4 open meeting law." Since Defendant is not a public body subject
5 to the OML, the only claim by Plaintiffs must be found in the By-
6 Law language quoted above. Even assuming, *arguendo*, that said
7 language does somehow confer a right of some kind on Plaintiffs,
8 their remedy is not within the OML.

9 Subsection 2 of NRS 241.037 as quoted above makes it clear
10 that, for a person to institute an action for an OML violation,
11 the right alleged to have been violated must have been "conferred
12 by this chapter." (emphasis added). Since Plaintiffs' "right", if
13 any, was conferred by Defendant's By-Laws, and not by NRS Chapter
14 241, no jurisdiction has been conferred on this Court by the OML
15 to hear and determine alleged violations thereof by Defendant.

16 **7. An injunction enforcing the OML and By-Laws will not lie**
17 **at this time.**

18 As set forth above, Defendant is not subject to the OML and
19 therefore an injunction based on NRS Chapter 241 is not an
20 available remedy.

21 In addition, Article IV, Section 4 of the Defendant's By-
22 Laws, quoted in Section B(6) above as reading "We must and will
23 comply with the Nevada open meeting law.", no longer exists. At a
24 meeting of the Defendant on April 24, 2012, a Motion was duly
25 made, seconded, and passed by a majority of those members then
26 present. Said Motion struck Article IV, Section 4 from the By-

1 Laws. Copies of the Agenda Notice, Motion and Memorandum are
2 attached hereto and made a part hereof by reference as Defendant's
3 Exhibits "A", "B" and "C" respectively.

4 II.

5 **CONCLUSION**

6 It is therefore respectfully submitted that, Plaintiffs
7 having no standing to object, their Motion should be denied. If
8 the Court believes Plaintiffs should be heard, their Motion still
9 fails as Defendant is not a public body subject to the OML.
10 Finally, no injunction can issue to enforce any "right" under
11 Article IV, Section 4 of the By-Laws as said Section has been
12 revoked.

13 WHEREFORE, Defendant requests relief from this honorable
14 Court as follows:

- 15 1. That Plaintiffs Motion For Order Voiding Meetings And
16 For Preliminary Injunction be denied;
- 17 2. For an award of attorney's fees and costs associated
18 with the preparation and presentation of this Opposition;
- 19 3. For such other and further relief as to the Court may
20 seem just and proper in the premises.

21 Dated this 25th day of April, 2012.

22
23 
24 _____
25 HY FORGERON, Esq.
26 Attorney For Defendant

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
) ss.
COUNTY OF LANDER)

COMES NOW, HY FORGERON, who, being first duly sworn, on oath,
deposes and says:

1. Affiant is a member in good standing of the State Bar of Nevada, State Bar #2355.

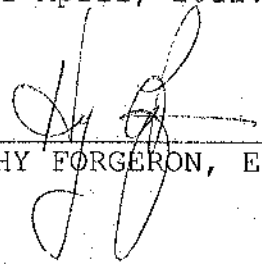
2. Affiant is the attorney of record for the Defendant herein.

3. The factual allegations made in the foregoing Opposition are true of Affiant's own personal knowledge.

4. That this Opposition is made in good faith and not merely for the purposes of delay.

5. Pursuant to NRS 52.045, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 25th day of April, 2012.



HY FORGERON, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2012, I deposited in the United States Post Office at Battle Mountain,

1 Nevada 89820 a copy of the foregoing, in a sealed envelope,
2 postage fully prepaid, addressed to:

3 Michael Marking
4 Elizabeth Fleming
5 General Delivery
6 Austin, NV 89310

Marcia Meyer
Marcia Meyer, Assistant to
Hy Forgeron

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DEFENDANT'S EXHIBIT

“A”

AUSTIN ROPING CLUB
AGENDA
SPECIAL MEETING APRIL 24, 2012
AUSTIN FIRE HALL

6:30 P.M. – CALL TO ORDER

PLEDGE OF ALLEGIANCE

*Discussion and possible action regarding approval of Agenda Notice.

*Discussion and possible action regarding approval of minutes of meeting of March 6, 2012.

PUBLIC COMMENT – For Non-Agendized Items Only. Persons are invited to submit comments in writing and/or attend and make comments on any item at the Board meeting. All public comments may be limited to five (5) minutes per person, at the discretion of the Board. Reasonable restrictions may be placed on public comment based on time, place and manner, but public comment based on viewpoint may not be restricted.

Public comment is encouraged on all Agenda items.

(1) AMENDMENT OF EXISTING BY-LAWS

Discussion and possible action to amend the existing Austin Roping Club By-Laws by removing therefrom Article IV, Section 4, which states: “4. We must and will comply with the Nevada open meeting law.”

Public Comment

ADJOURN

* Denotes discussion and possible action item with information provided at the meeting.

NOTE: TIMES ARE APPROXIMATE

This is a tentative schedule for the meeting. The Board reserves the right to take items out of order to accomplish business in the most efficient manner. The Board may combine two or more agenda items for consideration. The Board may remove an item from the agenda or delay discussion relating to an item at anytime.

DEFENDANT'S EXHIBIT

“B”

MOTION

It is hereby moved that the By-Laws of the Austin Roping Club be amended by striking therefrom Article IV, Section 4 which currently reads, "4. We must and will comply with the Nevada open meeting law."

Proposed on the 24th day of April, 2012, by

Jenny Ashby

Seconded by Ros Buspo

Adopted by the majority vote of the members present in general session.

Ruben Gallegos
Ruben Gallegos, President

Attest: Sissie Gallegos
Sissie Gallegos, Secretary

DEFENDANT'S EXHIBIT

“C”

MEMORANDUM

TO: Hy Forgeron, Esq.
Attorney at Law

FROM: Sissy Gallegos, Secretary
Austin Roping Club

DATE: April 24, 2012

SUBJECT: Amendment to By-Laws

Please be advised that, at a special meeting of the Austin Roping Club held at the Austin Fire Hall on April 24, 2012, the following action was taken:

Under Agenda Item Number 1, it was moved and seconded that the By-Laws of the Austin Roping Club be amended by striking therefrom Article IV, Section 4 which read "4. We must and will comply with the Nevada open meeting law."

The Motion was thereupon submitted to the members present for a vote pursuant to Article VI, Section 5 of the By-Laws.

A majority of the members then and there present voting in the affirmative, the Motion was approved and duly signed by the President.