

M E M O R A N D U M

TO: Board of Trustees

THROUGH: Indra S. Winquest
Interim General Manager

FROM: Thomas P. Beko, Esq.
Litigation Counsel

SUBJECT: Case No. CV18-01564 Mark E. Smith v. IVGID

- (1) Receive, review and discuss status report from litigation counsel, Thomas P. Beko, Esq., regarding defense of lawsuit initiated by Mark E. Smith under Case No. CV18-01564 against the Incline Village General Improvement District ("IVGID"), IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.
- (2) Review, discuss and possibly approve legal fees and costs to cover fees that were not budgeted as of the last update (estimated to be not to exceed \$13,000.00 over current authorization).
- (3) Authorize litigation counsel, Thomas P. Beko, Esq., to pursue a motion to remove IVGID Board Chair Kendra Wong and District Legal Counsel Jason Guinasso from this lawsuit (estimated budget \$10,000.00).

DATE: December 3, 2019

I. RECOMMENDATION

That the Board of Trustees makes a motion to:

Review, discuss and possibly approve legal fees and costs to cover fees that were not budgeted as of the last update (estimated to be not to exceed \$13,000.00 over current authorization); and

Authorize litigation counsel, Thomas P. Beko, Esq., to pursue a motion to remove IVGID Board Chair Kendra Wong and District Legal Counsel Jason Guinasso from this lawsuit (estimated budget \$10,000.00).

II. EXECUTIVE SUMMARY

Following our last update provided to this Board on June 12, 2019, my firm has incurred fees of not to exceed \$13,000 above the fees authorized by the IVGID Board of Trustees. This was due to a plaintiff filing. As a result of this action, a reply was mandated and my firm undertook that effort on behalf of the District. When I came before this Board in June of 2019, I didn't anticipate this action by the Plaintiff.

Also, the District has an indemnification policy and in order to clear Board Chair Wong and District Legal Counsel Guinasso from this lawsuit, my firm needs to prepare and submit a motion to remove them from this lawsuit which was recommended by the latest court action.

III. STATUS REPORT

The status of this litigation is the court has yet to issue a final ruling. However, the court has issued a ruling that was favorable to the District.

Further, Interim District General Manager Winqest, through my firm, has reached out to the Plaintiff, through his counsel, to attempt to meet on at least two different occasions. The Plaintiff did come back on the latest attempt and stated that he was willing to meet however there was a condition which we are trying to get further explanation upon.

I have attached, as background, the June 12, 2019 memorandum which was included in that Board packet so as not to have to recite all that information that was submitted at that time.

IV. ALTERNATIVES

Do not approve either or both of these recommendations.

V. BUSINESS IMPACT

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.

Reference Memorandum

MEMORANDUM

TO: Board of Trustees

THROUGH: Steven J. Pinkerton
General Manager

FROM: Tom Beko
Litigation Counsel

SUBJECT: Case No. CV18-01564 Mark E. Smith v. IVGID

- (1) Receive, review and discuss status report from litigation counsel, Tom Beko, Esq., regarding defense of lawsuit initiated by Mark E. Smith under Case No. CV18-01564 against the Incline Village General Improvement District ("IVGID"), IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.
- (2) Review, discuss and possibly approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over current authority of the General Manager).
- (3) Authorize litigation counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).

DATE: June 12, 2019

I. RECOMMENDATION

That the Board of Trustees makes a motion to:

Review, discuss and possibly approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over the current authority of the General Manager); and

Authorize Litigation Counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).

II. EXECUTIVE SUMMARY

Mr. Smith made a records request asking for all communications between District Legal Counsel Jason Guinasso and District Clerk Susan Herron and General

Manager Steve Pinkerton for a twenty-two (22) month period beginning January 1, 2016 and ending October 19, 2017.

This records request required an extraordinary amount of time and effort to prepare a response to because it required District Legal Counsel to identify over 13,000 potentially responsive documents, print and Bates stamp these documents, and then individual review each document to determine whether the documents were privileged and confidential. All but 304 of the 13,000 + documents were privileged and confidential.

Therefore, IVGID provided the 304 requested documents at \$1.00 per page. The rest of the documents were not produced because they were attorney-client privileged communication. Mr. Smith was informed of this decision in writing and was provided the appropriate legal authority.

Mr. Smith disagreed with this decision and filed a lawsuit on July 30, 2018, naming IVGID Board Chair Kendra Wong, and District Legal Counsel as Defendants. In his Complaint, his primary claims were:

He should not have to pay anything for the documents.

He should be able to receive the documents in electronic form.

He should be provided a log regarding all communication between legal counsel and staff.

As a consequence of this legal action taken by Mr. Smith, IVGID was forced to retain outside litigation counsel to defend the District, the District Board Chair, and District Legal Counsel. After six months of litigation which required responses to discovery requests, depositions, and preparation and responses to motions, the District Court decided that no trial would be necessary and denied IVGID's Motion for Summary Judgment, but entered an order granting summary judgment in favor of Mr. Smith.

However, in the decision, the Court made a number of findings which were actually favorable to IVGID's position. First, the Court found that Mr. Smith was not entitled to electronic (native) versions of the 304 documents originally produced in hard copy. This was the primary dispute that existed between Mr. Smith and IVGID and likely spawned this entire lawsuit.

With regard for the charge assessed by IVGID for the copies produced, (\$1.00 per page) the Court ruled that Mr. Smith must tender payment to IVGID at the rate of \$.50 per page for these documents. This portion of the order fully vindicates the District's demand that Mr. Smith pay for the records he sought rather than receive them electronically.

Thus, despite the Court denying IVGID's motion for summary judgment, the Court actually supported IVGID's actions vis-à-vis the documents requested which IVGID has always admitted were not privileged, and were otherwise available to Mr. Smith if he only tendered the requested payment. Rather than make the reasonable payment of \$299.00 for the documents he requested, Mr. Smith instead chose to file a lawsuit costing himself and the District tens of thousands of dollars so that he could ultimately pay \$149.50 for the documents he requested.

Moreover, with regard to whether IVGID was legally obligated to provide Mr. Smith with a Privilege Log under the Nevada Public Records Act pre-litigation when it withheld documents based upon the attorney-client privilege, the Court did not rule that IVGID had any such obligation pre-litigation. However, post-litigation the Court exercised its authority to order IVGID to produce a privilege log.

In summary, for the most part, the Court's ruling was a win for IVGID in that:

- 1) it affirmed IVGID's right to require payment for documents despite the fact that they are readily available in electronic form;
- 2) IVGID need not produce the document in digital form; and
- 3) pre-litigation, IVGID was not required to prepare and serve a privilege log.

Stated another way, the 304 documents produced in hard copy were produced in accordance with the law and must be paid for by Mr. Smith (Smith had argued he did not have to pay anything). Further, the attorney-client privilege was asserted correctly pre-litigation under the NPRA (no pre-litigation privilege log required).

Although the Court specifically ruled that IVGID was required *post-litigation* to produce a privilege log, the Court never specifically held that *pre-litigation* IVGID had any such obligation. However, because the Court seemingly entered an order finding in favor of Mr. Smith (which impliedly would have found that IVGID had a pre-litigation obligation to produce such a log), IVGID has asked the Court to clarify the ruling on this issue. That motion remains pending today and represents the need for additional litigation in the underlying matter.

I have opined that the Court's ruling on the post-litigation privilege log is also contrary to existing Nevada law in that the Court found that IVGID could not assert a "blanket" privilege over the withheld records and instead IVGID was required to provide a more detailed explanation of the withheld documents. The law clearly supported the manner in which IVGID asserted the privilege (albeit in a "blanket" form) because the privilege clearly and unmistakably applied to every document withheld. Under such circumstances, the "blanket" assertion of the privilege was

fully justified under existing law. If left intact, this aspect of the Court's ruling would again impose an enormous financial burden upon IVGID in that when future public records requests are received, IVGID would not be permitted to generally assert a privilege against production without providing what amounts to a privilege log individually describing each record withheld. Thus, I believe this aspect of the Court's ruling should be challenged in order to obtain appellate review and clarification of this key issue.

III. STATUS REPORT

This agenda item arises out of ongoing defense of a lawsuit filed by IVGID resident Mark E. Smith against IVGID, IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.

A. BACKGROUND

On October 19, 2017, Mr. Smith submitted a request to IVGID's Public Records Officer, Susan Herron to "access, inspect and copy" the following records:

All communications by any form including email between Jason Guinasso (the District's attorney) on the one hand, and both yourself and Steve Pinkerton on the other, for the period of January 1, 2016 to the date of this request, excluding any privileged communications but including a list of all excluded communications including the nature of each, as required by law.

Due to the nature of the request for communications between IVGID General Counsel and its General Manager, Mr. Pinkerton, and its Executive Assistant and District Clerk, Ms. Herron, IVGID's initial response on October 19, 2017, was that no public documents would be provided due to the privileged and confidential nature of attorney-client communications.

Later Mr. Smith clarified his request and explained that he was seeking documents outside the attorney-client privilege such as those that included Mr. Guinasso and Ms. Herron and a member of the public. Mr. Smith and Mr. Guinasso also met on October 31, 2017 to further discuss the request.

After receiving clarification from Mr. Smith about his request, IVGID began working on the request and sent an email to Mr. Smith on November 7, 2017. In that email, Mr. Guinasso confirmed Mr. Smith's request and the clarification that Mr. Smith expected that documents responsive to the request would include communications wherein a member of the public was included in the communication. Mr. Guinasso further informed Mr. Smith that, since the communications at issue covered nearly a two-year span, it would necessarily

take significant time and resources to locate, review, and produce the requested documents. Mr. Guinasso advised that he anticipated that it would take approximately 60 days to complete the request and that he anticipated providing the records on or before January 8, 2018.

On January 9, 2018, Mr. Guinasso provided an update to Mr. Smith and advised that, due to the volume of emails that have to be reviewed in response to Mr. Smith's request, an additional two weeks would be needed.

On February 2, 2018, Mr. Guinasso sent a letter to Mr. Smith to provide an update on the records request. Mr. Guinasso explained that the request required significant manpower to process it and that the request was still in process. Mr. Guinasso provided additional information as to the steps taken to date to satisfy the request including: (1) use of Staff and IT departments to search and obtain emails from the IVGID email server and General Counsel's email server; and (2) review of identified emails by IVGID General Counsel to ensure documents protected by the attorney-client privilege or work product doctrine were not inadvertently disclosed. *Id.* Mr. Guinasso further advised Mr. Smith that there are at least 1,000 additional emails that require review by General Counsel and that it was estimated to take until the end of February 2018, to complete that review.

Following a thorough and exhaustive review of the communications at issue, Mr. Guinasso provided a final response to Mr. Smith on April 27, 2018. Mr. Guinasso informed Mr. Smith of the applicability of the attorney-client privilege found at NRS 49.095 and the application of that privilege to the majority of the identified communications. Mr. Smith was also informed that the search and review of these documents took 120 hours of General Counsel time in order to determine the application of the attorney-client privilege, plus significant additional time of the IT department spent retrieving the communications. Mr. Guinasso stated that although it could be argued that Mr. Smith be responsible for paying for 13,000 pages of printed privileged communications, no such charge would be assessed.

To be clear, there was never any charge assessed to Mr. Smith for the entirety of the 13,000 pages of documents.

However, Mr. Guinasso did explain that copies of the records that were retrieved, reviewed, and determined to be non-privileged would be provided as a cost of \$1.00 per page after the first five pages. The non-privileged documents totaled 304 pages, and Mr. Smith was advised that the cost would be \$299 as provided by IVGID's Policy and Procedure 137. Mr. Smith was advised that upon receipt of his payment of \$299, the non-privileged records would be

provided to him. If the time of staff and General Counsel, as well as the technological resources used to complete the request were monetized, the \$299 fee would amount to a fraction of the cost incurred by IVGID in responding to Mr. Smith's request.

Mr. Smith objected to Mr. Guinasso's April 27, 2018 letter on the basis that he did not feel that the potentially privileged documents needed to be printed and that he should not be charged \$299 because he preferred to inspect the electronic files. Mr. Smith argued that Policy and Procedure 137 stated that documents available in a digital form will be provided at no charge, and he objected to the charge.

Thereafter, on July 30, 2018, Mr. Smith filed a lawsuit against IVGID, Kendra Wong, in her capacity as Chairwoman, and Mr. Guinasso, "individually and as counsel" and allegedly as, "de facto records officer for IVGID." The Complaint requested "Declaratory and Injunctive Relief to Compel Disclosure of Public Records."

The Nevada Public Agency Insurance Pool declined to provide coverage for the lawsuit because there is no coverage for lawsuits seeking declaratory and injunctive relief under the Nevada Public Records Act.

General Manager Pinkerton approved the defense against the litigation under the authority given to him under IVGID Board Resolution No. 495 Policy and Procedure 098), NRS Chapter 41, and Policy 3.1.0 (f) &(g) (the expenditure of public funds for contracted legal fees and costs, as well as the value of the law suit, was less than \$50,000, which was within the authority delegated to the General Manager).

The General Manager selected Litigation Counsel to defend against the lawsuit because of his history with IVGID defending against the lawsuit of Mr. Aaron Katz.

The Court set a trial date for April 8, 2019.

B. DISCOVERY AND MOTIONS FILED DURING LITIGATION

Mr. Smith engaged in aggressive discovery, including the submission of interrogatories, requests for production of documents, and requests for admissions. Mr. Smith also deposed General Manager Steve Pinkerton, District Clerk Susan Herron, Trustee Phil Horan, and Kendra Wong. Notably, Mr. Smith did not depose Mr. Guinasso who, quite frankly, was the only individual who possessed information relative to the issues in dispute in the matter.

After the foregoing discovery was completed, IVGID Legal Counsel filed a Motion for Summary Judgement.

Mr. Smith opposed this motion.

Mr. Smith file a motion for in camera inspection of all the records sought in the case. IVGID opposed this motion.

On or about April 5, 2019, the District Court provided notice to the parties that it was going to deny IVGID's motion for Summary Judgement and grant summary judgment on its own terms.

C. DISTRICT COURT ORDER

On May 10, 2019, the Court ordered that "summary judgment is granted in favor of Mark Smith and against Defendant Incline Village General Improvement District pursuant to Rule 56(f)..." Following that, the Court ordered that "summary judgment is not granted at this time against Jason Guinasso..." and that "summary judgment is not entered against Kendra Wong..." The Court noted that Chair Wong and Mr. Guinasso are not dismissed from the action but can seek dismissal by way of a separate motion. Therefore, the order was entered against IVGID only and not as to Ms. Wong and Mr. Guinasso.

The Court denied IVGID's motion, but entered an order granting summary judgment in favor of Mr. Smith. However, in the decision, the Court made a number of findings which were actually favorable to IVGID's position. First, the Court found that Mr. Smith was not entitled to electronic (native) versions of the 304 documents originally produced in hard copy. Due to security reasons, IVGID rejected Mr. Smith's demand for this information as it was concerned that allowing any person access to the native form of an email could result in alterations of the original email, or it could allow the recipient of the email to take subsequent actions (such as forwarding the email to others) in a manner in which it would appear to the recipient of the email that it had actually be sent by a representative of IVGID. This was the primary dispute that existed between Mr. Smith and IVGID and likely spawned this entire lawsuit.

With regard for the charge assessed by IVGID for the copies produced, (\$1.00 per page) the Court ruled that Mr. Smith must tender payment to IVGID at the rate of \$.50 per page for these documents. This portion of the order fully vindicates Mr. Guinasso's demand that Mr. Smith pay for the records he sought rather than receive them electronically. This would be true despite IVGID

resolution which purports to require IVGID to produce electronic copies of records when available.

Thus, despite the Court denying IVGID's motion for summary judgment, the Court actually supported IVGID's actions vis-à-vis the documents requested which IVGID has always admitted were not privileged, and were otherwise available to Mr. Smith if he only tendered the requested payment. Rather than make that payment, Mr. Smith instead chose to institute the current action.

A second key issue which was raised in the litigation related to the question of whether IVGID was legally obligated to provide Mr. Smith with a Privilege Log when it withheld documents based upon the attorney-client privilege. In order to respond to Mr. Smith's public records request, IVGID's staff was forced to individually review more than 13,000 pages of email communications. This task fell primarily upon Mr. Guinasso as the decision as to whether the document fell within the attorney-client privilege entailed a legal determination.

Because he believed that this public records request was instituted for the specific purpose of providing a platform upon which to commence litigation against IVGID, Mr. Guinasso undertook the exhaustive task of preparing a privilege log as it was believed that if litigation was actually commenced, the Court might require IVGID to then prepare such a log. As noted herein, the process of reviewing and cataloging the requested communications took over 120 hours.

While the Privilege Log was prepared, it was not produced to Mr. Smith pre-litigation as Mr. Guinasso was concerned that it would set an unwanted precedent which might spawn other disgruntled individuals to make incredibly burdensome records requests solely as a means by which to disrupt IVGID's operations.

As Mr. Guinasso suspected, **post-litigation** (meaning after a lawsuit is filed), the Court did order IVGID to produce a privilege log of the remaining records which were withheld. Notably, the Court did not rule that IVGID had any such obligation **pre-litigation** which, as set forth above, was one of the key issues which spawned this litigation and effectively forced IVGID to vigorously defend against the claims asserted. When the Court ordered IVGID to produce the privilege log, the Court required the log to include only the date of the communication, the author and recipient of the communication, whether a third party is party to the communication, and "a one word identifier for the property or outside entity involved."

When Mr. Guinasso originally prepared his privilege log, it contained all the information required by the Court, save and except the “one word identifier.” As a result, IVGID’s retained counsel were required to go back through the remaining 13,497 pages of withheld documents to add this additional identifier. That process is in the final stages of completion and the revised log is expected to be delivered to Mr. Smith’s counsel in the next few days. At the present time, it remains unknown whether Mr. Smith will take further action to ask the Court to find that any of the withheld documents do not fall within the asserted privilege. This appears to be all that remains with regard to the underlying litigation.

As detailed above, one of the primary reasons why IVGID has taken a firm position in this case is because of a concern that an adverse ruling might set a precedent for future matters which could impose an enormous financial burden upon IVGID. In entering its ruling, the Court did make it clear that the ruling was limited to the unique facts of this matter and as such should not be considered a precedent for blanket access to documents maintained by IVGID. However, despite this explicit holding, IVGID remains concerned that the Court’s actual rulings will have an adverse future impact upon IVGID’s operations.

In summary, for the most part, this ruling is a win for IVGID in that: 1) it affirmed IVGID’s right to require payment for documents despite the fact that they are readily available in electronic form, 2) IVGID need not produce the document in digital form, and 3) pre-litigation, IVGID was not required to prepare and serve a privilege log. Stated another way, the 304 documents produced in hard copy were produced in accordance with the law and must be paid for by Mr. Smith (Smith had argued he did not have to pay anything). Further, the attorney-client privilege was asserted correctly pre-litigation under the NPRA. (no pre-litigation privilege log required).

This case also involved a procedural issue never before presented in any Nevada Court due to the fact that the Court’s ruling was only allowed due to a 2019 amendment to Nevada’s Rules of Civil Procedure. Under this recent amendment, a district court is allowed to grant summary judgment to a non-moving party (in this case, Mr. Smith) despite the fact that he never sought a pretrial ruling in his favor. While IVGID always maintained that this case raised only issues of law which must be decided only by the Court, it was a bit surprising that the Court took the opportunity to issue a ruling which, on its face, appeared to favor Mr. Smith in that it denied IVGID’s motion for summary judgment and found in favor of Mr. Smith.

As noted above, although the Court specifically ruled that IVGID was required *post-litigation* to produce a privilege log, the Court never specifically held that *pre-litigation* IVGID had any such obligation. However, because the Court seemingly entered an order finding in favor of Mr. Smith (which impliedly would have found that IVGID had a pre-litigation obligation to produce such a log), IVGID has asked the Court to clarify her ruling on this issue. That motion remains pending today and represents the need for additional litigation in the underlying matter.

IVGID's retained counsel has opined that the Court's ruling on the post-litigation privilege log is also contrary to existing Nevada law in the Court found that IVGID could not assert a "blanket" privilege over the withheld records and instead IVGID was required to provide a more detailed explanation of the withheld documents. IVGID's counsel believes that the law clearly supported the manner in which IVGID asserted the privilege (albeit in a "blanket" form) because the privilege clearly and unmistakably applied to every document withheld. Under such circumstances, the "blanket" assertion of the privilege was fully justified under existing law.

If left intact, this aspect of the Court's ruling would again impose an enormous financial burden upon IVGID in that when future public records requests are received, IVGID would not be permitted to generally assert a privilege against production without providing what amounts to a privilege log individually describing each record withheld. Thus, IVGID's counsel believes this aspect of the Court's ruling should be challenged in order to obtain appellate review and clarification of this key issue.

D. POST-JUDGEMENT LITIGATION

Mr. Smith paid the \$149.50 for the 304 documents that had been produced in hard copy to him in response to his original request for public records. IVGID provided Mr. Smith with a post-litigation privilege log.

Several post-judgment motions have been filed by Mr. Smith and IVGID, including the following recently filings:

- Plaintiff's Memorandum of Costs: (whereby the plaintiff seeks his litigation costs, not including attorney's fees)
- IVGID's Motion to Retrax Costs: (IVGID's challenge to the request for costs)
- IVGID's Motion to Amend or For Additional Findings: (seeking the clarifications detailed above)
- IVGID's Motion for Leave to File Motion for Reconsideration (also seeking clarification of the Court's ruling)

Plaintiff's Opposition to Motion to Retax Costs
Plaintiff's Motion for Attorney's Fees & Costs
IVGID's Reply in Support of Motion to Retax Costs

All of the forgoing motions are tied one way or another to the apparent inconsistency between the Court's *sua sponte* order granting summary judgment to Mr. Smith, while at the same time, issuing an order which effectively denied him much of the relief he sought. The plaintiff's motion for attorney's fees and costs are dependent upon the Court finding that he was the prevailing party in this case. And, while the general nature of the Court's rulings appear to favor Mr. Smith, when one reviews the actual Court rulings, the decisions mostly favor IVGID. Thus, it is upon this basis that IVGID will oppose these motions.

E. MERITS OF POTENTIAL APPEAL:

As set forth above, IVGID has two pending motions which seek clarification of the Court's ruling. There exists a possibility that the Court will revise its decision to make it clear that IVGID was not required, *pre-litigation* to serve Mr. Smith with a privilege log. If the Court does not, or if the Court enters a ruling which provides that pre-litigation IVGID had such an obligation, I believe that ruling would be entirely inconsistent with Nevada law and because of the enormous future burden that would place on IVGID thus a recommendation that such a ruling be appealed.

Additionally, regardless of the pending motions, it appears that the Court's ruling which would require IVGID to provide a detailed description of the privilege for each withheld document is contrary to existing law. If the Court's ruling continues unaltered, Litigation Counsel believes this issue should be appealed. However, such an appeal would be very simple, straightforward and inexpensive to pursue.

IV. LEGAL FEES AND COSTS

To date, I have accrued \$45,608.62 for legal fees and costs for the period of August 2018 to present. These costs included all the preparation for trial which was vacated (by the Court's ruling on IVGID's motion) just days before the trial was set to commence

Litigation Counsel estimates that \$15,000.00 will be needed to complete post-judgment litigation. This cost could be substantially less depending upon the two motions identified above, but could also increase if Ms. Smith seeks to further

challenge IVGID's assertion of the attorney-client privilege to any withheld document.

Mr. Smith has asked the Court for an award of attorney fees and costs of in the amount of \$23,065.00. This motion has not yet been opposed by IVGID and while there certainly exists a possibility that the Court might award Mr. Smith some of his fees and costs (for the matters upon which he did prevail, namely reducing the cost per page by \$.05), Litigation Counsel believes he will not be awarded the entirety of his claimed fees and costs.

I estimate that an Appeal of the District Court order, should it become necessary, will be \$15,000.00.

V. ALTERNATIVES

Do not approve continued defense of litigation beyond the General Manager's current authority.

Do not authorize litigation counsel to pursue an Appeal of the District Court's final disposition of the case.

VI. BUSINESS IMPACT

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.

Reference Minutes

year, the Board can adjust it. Any Trustee is welcome to sit down with him and go over the cash flows as there are a lot of different factors but that he thinks for now, we are comfortable that this is our goal and then go in that priority order.

G.6. Review, discuss, and possibly provide input on a legislative wrap-up for the 2019 State of Nevada Legislative Session following a verbal presentation on legislative matters provided by Tri-Strategies representative(s)

Paul Klein and Victor Salcido of Tri-Strategies gave an overview of the submitted materials.

Trustee Dent asked about the press release that was sent out and what the cost was to do that work. Mr. Klein said that yes, he did assist in producing that and that it was incorporated as a matter of government affairs.

Chairwoman Wong asked about the next steps and since most are becoming law, are we just waiting for them to get codified into law as she doesn't recall anything immediately but that some do affect us.

Mr. Salcido said that every one of these bills will have a different effective date and that some will be July 1, some will be October 1 and then others will be January 1, 2020 and that we can do a bill by bill inquiry. As to the ones that have an immediate effect on the District, there is nothing that the District would be out of compliance on but that some may have an effect on future actions. Our responsibility is to make sure Staff is aware of the new perimeters.

Chairwoman Wong thanked Mr. Klein and Mr. Salcido for their service and guidance through the legislative process and session.

G.7. Case No. CV18-01564: Mark E. Smith v. IVGID

- (1) **Receive, review and discuss status report from litigation counsel, Tom Beko, Esq., regarding defense of lawsuit initiated by Mark E. Smith under Case No. CV18-01564 against the Incline Village General Improvement District ("IVGID"), IVGID Board Chair Kendra Wong, and District Legal Counsel Jason Guinasso.**

- (2) **Review, discuss and possibly approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over current authority of the General Manager).**
- (3) **Authorize litigation counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).**

Tom Beko, along with Charity Felts, gave an overview of the case details.

Trustee Horan asked if we have provided the privilege log. Mr. Beko said that three hundred and five pages of documents have been provided, a check has been remitted, and these were immediately produced. Trustee Horan asked how did we get to fifty cents versus one dollar per page. Mr. Beko said that entities can do a reasonable charge that factors in everything that goes with it and that he has looked across the board of other public entities and courts and the District is well within what others charge. The court looked at it and said the costs weren't provided upfront. We couldn't do that until Counsel reviewed them, page by page, so after review there were three hundred and five pages that came from that. That was the court's analysis, the dollar was a reasonable charge, but they went back and balanced it to fifty cents per page. There is a complex analysis of the procedure of what the charge is and that couldn't be done until the review was done. Counsel wisely recognized that the privilege log should be done ahead and he did so which was pretty efficient by doing it upfront. This also showed upfront that this had the possibility of being litigated. Depositions were about other matters that were under dispute. We challenged that and opposing counsel never asked to depose Mr. Guinasso which shows that the discovery process was motivated by something other than the facts of the case. It is so important that we admitted the facts of the case and there were at least five pages that could have been provided free of charge but he didn't want those which raised the question about this not being a legitimate records request and that it resulted in what Mr. Guinasso thought it would.

Trustee Callicrate said, regarding the whole attorney/client privilege, the Board of Trustees confers with District General Counsel to decide what is privileged and what isn't except in personnel issues. This wasn't the case as the Board never had a chance to look at any of these e-mails so the decision was made exclusive of the Board of Trustees as well as entering into this entire litigious situation. Also, who hired Mr. Beko because that never came to the Board of Trustees rather it was an oh by the way, we have been served with a lawsuit and we are moving forward. That is not how it works

because it has to be on the Board of Trustees agenda and there needs to be money put behind it. It wasn't an agenda item and the District has expended multiple thousands of dollars for which Mr. Smith now wants repaid for whatever he has spent. Now, the Board of Trustees is being asked for more money and we are involved in a situation that isn't in accordance with the statute. This doesn't have Board of Trustees approval because it wasn't done in an upfront, ethical manner. As to the 13,000 e-mails, he, as the client, hasn't seen them. The cost per page is window dressing. We didn't give out the original e-mails, we didn't provide copies. Anything that is digital is to be provided at no expense. The conjecture is that it was fishing, we don't know that and it is callous to say that. Be careful on how you paint the citizen because the citizen has the right to have the records. We have been admonished by the Attorney General on destruction of public records so he is adamantly against this. IVGID needs to learn its lesson on the destruction of records. He is outraged that it wasn't vetted and this is completely wrong. The District is going to get taken to the cleaners however he will defer to his colleagues. Trustee Callicrate said he would like to know when Mr. Beko was hired and by whom with what authority. Mr. Beko said he will look at his records as he doesn't have that information with him. Trustee Callicrate said it is critically important to learn that information because it was never agenda item so there is no dollar amount against it. This should have been done like all the other GIDs and other entities. Are we so special that we don't have to abide by the rules? This becomes so irritating that we don't have to abide with those rules from the Attorney General against the District. He doesn't agree with it, that it is just tough apples because it is the Board of Trustees that have the final say. This is a very serious situation that we have gotten ourselves into once again and he had no idea about this until about a month or so back. This is side stepping the Board of Trustees approval. He is just giving Mr. Beko the background because the attorney works for the client and that relationship has gotten skewed. Mr. Beko said he was hired to defend the litigation that was brought against the District and other parties. The authority has been granted to the District General Manager who hired him to do a job and that is what he did; he will leave it to the Board of Trustees about the decision to retention him to provide services.

District General Manager Pinkerton said in his General Manager's Status Report, dated September 19, 2018 and included in the Board of Trustees packet for the September 26, 2018 meeting the following was provided:

Pending Litigation

At our last meeting, District Legal Counsel disclosed that IVGID was served with a summons and complaint initiated by Mark Smith requesting "Declaratory and Injunctive Relief and to Compel Disclosure of Public Records."

The matter was referred to the POOL/PACT for coverage of legal costs to defend the District. Since the POOL/PACT coverage does not include defense of Declaratory Relief, the District was denied coverage.

Normally, District Legal Counsel would provide the District's defense. Since District Legal Counsel was named in the action, we obtained outside legal counsel.

Thomas Beko of Erickson, Thorpe & Swainston successfully defended the District in a similar public records action in conjunction with the Katz lawsuit. Mr. Beko has been retained for this action as well.

District General Manager Pinkerton said it was also mentioned at the meeting as well. Trustee Callicrate said that counsel was retained exclusive of the Board of Trustees ability and demand by the Board and that this Board of Trustees are the ones to instigate this and that should have been through an agendized item with a monetary number. However, once again, that step was again sidestepped. Let's pull back, agendize this item, let the public in on it, and then move forward. That entire process wasn't accomplished. What you read isn't how it works as there is a legal process to follow. This District didn't follow the rules and now we are open to exciting items in court. So here we are again, having a FlashVote 2.0, and spending another twenty-five thousand dollars over the forty thousand already spent on someone who is trying to get public records. He doesn't understand why there is a disconnect on getting public records and said we don't learn from our mistakes. We need to break this mold as we should be abiding by the rules. He is not going to support this action because for seventy-five thousand dollars, we could hire one or two people to work at the Recreation Center. This is money ill spent and it is going down a rat hole faster than we can churn it out.

Trustee Horan said that Trustee Callicrate's were far ranging and asked that we get back to the case at hand. Trustee Horan said that he disagrees with Trustee Callicrate's analysis that we engaged against the law as the District General Manager does have the authority. Attorney/client privilege is between the attorney and Staff. Mr. Beko said that the attorney and Staff do have the legal right and obligation to assert that right and the suggestion to come back to the Board of Trustees and ask this Board of Trustees if they wanted to assert that privilege is against the law. The suggestion that this Board of Trustees would waive that privilege, he can't fathom that, as there would never be a defense because the other side would know every bit of your strategy. Trustee Horan said that it was a very simple decision that was made and there was no decision for the Board of Trustees to make. Trustee Horan said that he also objects to the comment made about destruction of e-mails and records; he objects to that comment. Trustee Callicrate said that it is on the record. Trustee Horan said he doesn't believe that is what happened. Trustee Callicrate said that it was it said in our Board packet and that is was due to the lack of a retention schedule and the destruction of public records is not conducive to the law. We got this notice in one of our Board packets that this is the standing policy for deletion of e-mails. Chairwoman Wong said that we are not going to rehash this as it is not relevant to this matter. Trustee Callicrate said it is relevant as it is about 13,000 e-mails. Steve Dolan, a member of the public, shouted that you can't do this as he is a Board member.

At 10:18 p.m., Chairwoman Wong called for a break; the Board reconvened at 10:31 p.m.

Chairwoman Wong said that while Trustees can speak on any topic, as the Chair, she can cut them off and that the argument that was occurring was not appropriate.

Trustee Callicrate apologized for getting a little excited and said that he is very, very concerned with the Attorney General's ruling that said that the General Manager cannot instigate litigation and that we have a real issue. He is bringing this issue before his colleagues because it is a large part of this issue and that he is speaking up for the entire Board of Trustees and the District that we need to have a closer accounting of what the laws are as he is dead set against spending any more money and that he wants to stop it where it is. From this point forward, if someone is requesting public records, they should be provided. In the last four and a half to five years, we have had litigation that we haven't seen before. We have to do a far stronger

job that we are following protocols that have been in place. Chairwoman Wong said that she is asking our District General Counsel and our District General Manager to evaluate our policies regarding litigation and public records. Trustee Callicrate said that is fine with him and that he welcomes that.

Trustee Horan said we were talking about expenses and potential impact to the District which is an important consideration and it is part of our responsibility to look out for the District going forward as there is an impact of costs if we are required to do this on an ongoing basis and that he appreciates that concern and thus would we have to do privilege logs for everything.

Mr. Beko said that at his normal hourly rate, it would have cost close to fifty thousand dollars to do that pre-litigation privilege log. Regarding the suggestion that the District should have provided the e-mails in PDF format, the request was very specific that PDF format was not acceptable and that one of the primary reasons we were not going to provide them was because it was going to violate this request. The pre-litigation obligation entailed that much time or more and the breadth of the request was that it was from a disgruntled citizen to just cause harassment. Let's say the request wasn't limited to two years but was five or ten years, it could cost hundreds of thousands of dollars and that would pale in comparison to the costs of additional Staff members. It is not about 305 pages, nor is it about 13,000 pages of e-mails, it is about the future of the District and providing the privilege log because it was not part of the lawsuit of these documents being in their native form/electronic original files. It is about the consequences of the potential rulings. If there is a question about the best interest of the District, the suggestion is absurd. Think about the next request as that three sentence letter will cost you hundreds of thousands of dollars.

Trustee Morris said it is not about three hundred dollars or thirteen thousand pages, because as a Trustee of the Board, we want to look to the District General Counsel and ask about attorney/client privilege, and he is extremely comfortable with the review and it is a mark to the main and the litigious society that we have that he had this foresight. To him, it is about the future and knowing what happens to this community. If this stands, we do get bombarded with requests and that will drown us instead of allowing us to do good things for this community. It is very important to us, as a Board, that we don't accidentally trap ourselves into a deluge in the future and that just gives him pause. He doesn't want to send raw data files out to anyone for

them to do whatever they want as Mr. Beko has answered that question about those costs down the road. Regarding a tactical question, the privilege log, has that been given to Mr. Smith. Mr. Beko said yes, it was provided to Mr. Smith and to the court as well. There are other pending motions that could end this litigation upon which we could get a decision any day and that all of this might go away. Trustee Morris asked what are the different alternatives and best case scenario as well as other scenarios to be considered. Mr. Beko said now that the privilege log has been received, it could be challenged with the court doing a document by document review which the judge has indicated she will do. There could be a continuing ruling about the prevailing party. If the court issues an order on attorney costs of x dollars, the Board of Trustees might find that it is fair and not challenge that anymore. We are all hanging out there until we get those rulings – it could be no fees, could have limited success with x fees. There is a big gambit of things that we have to wait and see and then we will bring it forward so you can decide. Trustee Morris said that the key point is before or after litigation on privilege and why that matters. Mr. Beko said that it matters because if there is an obligation pre-litigation, for any documents withheld, then we will have to create a privilege log. If the court says no, only after litigation, then he thinks that the Nevada Supreme Court has already ruled and made it crystal clear. There are not very many cases but there is always potential for future cases. The privilege log is only necessary because you have different reasons of why individual documents are not public records. Different reasons for different records. In those cases, it makes good sense. In the cited case, it didn't fall within that as there was no reason to give that detail but we all feel these are in that same category. In the cited case, the court didn't cite that but it did cite to Federal cases which got a whole group of documents for non-production and then gave a single reason for an objection which applies in total. It is his belief that the Nevada Supreme Court will say that is what they envisioned as this is exactly the type of case thus they will state it. Other than saying it 13,400 times, the same language would have been stated each time, and there is no reason to do that. Trustee Morris said he appreciates that information and reason. If we don't get this properly resolved, the costs will be very significant. Mr. Beko said that the sky is the limit especially when they know that when they send it over.

Trustee Dent asked if the invoices associated with the costs can be provided. District General Manager Pinkerton said that they are under review and will be provided shortly. Trustee Dent asked the District General Manager what was his thought process or thresholds as the costs were coming in. District General Manager Pinkerton said that it was unfortunate

that the Plaintiff decided to go to this level of litigation. Trustee Dent asked if a settlement was offered. District General Manager Pinkerton said that we followed all the normal efforts. Mr. Beko added that once the litigation process started, they started doing discovery and we had discussions about the privilege log which would have taken away a huge incentive if they were willing to agree. As to coming to some resolution without them being in the native format, he was told they would consider it but that they never got back to him on it. A suggestion was made for PDF's and PDF's were not adequate. Options were presented to them. The long term ramifications are not about these records but that it puts such a financial burden on the District. We made the effort and got no response which raises the question of motivation. We did approach them to try and find a way to resolve this to get them the information they wanted and they have always been concerned about producing the privilege log which we didn't have to produce because it was already done. If we would have produced the privilege logs there would have been concerns about future cases and we got no commitment on this. In fact, the courts in its orders made it very clear and very early on that they were concerned about the long term consequences and Mr. Beko read from an order by the courts that talked about this being unique and not being a precedent. What he thinks the court was trying to do was to say this case was unusual and that the issue was only after it was filed and that it was one of the original claims in the action and that the way the court granted summary judgment was that the non-moving parties have been proven, claimed, and established and one ruling has to be challenged because the financial consequences are huge. Trustee Dent said his concern is dealing with the August 2017 meeting where the Board of Trustees was notified that there was a public records request and the response was that we don't keep records for long than thirty days. There were discussions by the Board, State Archives was involved and that this has been going on for a really long time. In the Summer or Fall of 2017, he proposed an agenda item to have a third party attorney dive into those things and let us know what we should do; the Board pulled that item so we saved thirty thousand dollars to know where we are at. We are spending public dollars on this when we could be hiring at the Recreation Center or at Golf, and we are wasting money on another stupid lawsuit. There is no authority for this and the Attorney General has stated that there is no authorization for authority. There is no contract and no authority. The Board of Trustees should have been approached much sooner. Trustee Dent concluded by stating that he was feed up with all of this and ready for this to come to an end as he is tired of hearing about all of this.

District General Counsel Guinasso said the Board has Policy 495.

Members of the public interrupted by shouting from the back of the room.

Chairwoman Wong said that this is the time for the Board to get feedback and to please leave us to do their business and that she has given District General Counsel Guinasso the opportunity to speak and he is going to do so.

District General Counsel Guinasso said that Policy 495 has an obligation to indemnify officers and Trustees for issues that arise during the time they are doing their duties. This policy has been in place for over forty years. He had a duty, by Board policy and when defending a lawsuit, to do so, he followed that policy. Please be mindful of your Board policy and also State law that requires indemnification because of the consequences of not doing so could also result in exposure to the District.

Trustee Callicrate said that the Board of Trustees wouldn't rise to the occasion for the Board of Trustees or Senior officers and that we have all discussed this. If the District General Manager had come to the Board of Trustees and said that this is going on, that would have alleviated a lot of this discussion. Because it wasn't agendaized and brought forth to the public and because we didn't follow our statute, it should be agendaized for another meeting and there has to be a motion. Are any of the Board of Trustees members precluded from voting as he wants to bring that up before there is a vote. Trustee Callicrate said he would like to know if there are any conflicts of interests or if anyone is precluded from voting if they are named or attorneys retained. Chairwoman Wong said that she did consult with Mr. Beko and District General Counsel and we are upholding our policy therefore there is no conflict of interest. Mr. Beko said it is an obligation set by statute and that it will be provided if requested and that there is no discretion thus it must be provided. Trustee Callicrate said in our policies, it doesn't cover legal counsel rather it is just Board of Trustees, General Manager, and Senior officers so we are not paying for our District General Counsels costs. Mr. Beko said he could take a look at that but that the costs would be identical to the source of what the claims are. Trustee Callicrate said that they are all named in the lawsuit – Guinasso, Wong and Pinkerton – so are we paying for the defense of those individuals which opens another item and that is that this is a contract attorney that doesn't fall under this as this is the General Manager and the Board and it didn't go through the proper

motions. We have to abide by the law as we took an oath to uphold the laws and regulations.

Trustee Horan said that he didn't understand the question. Mr. Beko said he is not sure what Trustee Callicrate is talking about as this is in Chapter 41 and he has never been asked to answer any questions. The request came to him to provide the defense and he didn't look behind the question and not provide any legal advice.

Trustee Callicrate said it is premature in this situation to move forward because it was improperly entered in to.

Trustee Horan said he still isn't quite getting what Trustee Callicrate is saying as IVGID is the primary defendant.

Mr. Beko said he would have done nothing differently if Mr. Guinasso was named or not named. Our defenses would not have been done differently because it is really with IVGID.

Trustee Horan said that he was trying to understand where Trustee Callicrate was going. Trustee Callicrate said that Chairwoman Wong is included and needs to recuse herself from the rest of the Board.

Chairwoman Wong said that both Mr. Beko and Mr. Guinasso have given her advice and it relies with her to make the recusal decision.

Trustee Callicrate said wow.

Trustee Morris said as far as he is concerned about if this matter did come to the Board, when the District General Manager read from his submitted written report which told us the case was here and that it was referred to Mr. Beko, it surprised him that there was a question that it occurred when there was an opportunity to put it on the next meeting agenda.

Trustee Callicrate said that he objected.

Trustee Morris said as far as he recalls there was notification to the Board of Trustees and that it was accepted by default if not by other means. He is comfortable as to how we got here. This matter is critical to the future of our District and the best option is the clarification from the courts. Whilst there is

no guarantee, we have to be ready for that and go to the next steps and it is imperative that we do that.

Trustee Horan said he had a question on the motion – regarding the second item, this Board doesn't need to make that decision tonight. Mr. Beko said until you have the court's ruling, you don't need to decide that. Trustee Morris said so all that is needed right now is ten thousand dollars. Mr. Beko said exactly. Trustee Callicrate said that the majority of the Board is going to vote for this and he will not be supporting it at all so go ahead and make your motion so we can vote.

Chairwoman Wong said before a motion is made, we have had a request for public comment; is anyone on the Board opposed to taking public comment; no Board member objected.

John Eppolitio said that this is beyond words as most people have no idea what goes on. To put this item at the end when everyone is exhausted well it wouldn't be that way if it had been first. He only spent one weekend in law school but there seems to be a conflict of interest with being a defendant. To try and silence another Board member who makes sense isn't right as it isn't showing respect to the other two Board members as Tim and Matt were elected just like you were. The attorney called the Sheriff on another community member. Even if Chairwoman Wong can vote, she shouldn't be running this meeting; he objects.

Frank Wright said are we having fun yet. Here is what we have – a lawsuit filed without approval, paying the attorney with no bills, and he is guessing that there hasn't been a bill for the past year and a half. Now asking for more money and you run the show and you just go ahead. Trustee Callicrate asked if there was a conflict of interest; Chairwoman Wong you have a huge conflict of interest and it would be incredibly stupid of you to vote. Trustee Morris are either one of these people your attorneys in your bankruptcy suit. Hmmm, no one can answer that questions. Well, he knows they are so how much are you paying them or is it pro bono work. Mr. Wright said that he will be excited if Trustee Morris votes. What this Board should be doing is looking at getting rid of that guy as he has cost us a lot of money. What is going on this lawsuit – why not give it up as there is stuff in there. This guy has raped this District for hundreds of thousands of dollars and everyone is looking at you and asking what is going on. You better stop this meeting.

Linda Newman asked about defending the in defensive and stated that she understands that Mr. Beko is defending. This is all about public records as we have a serious problem. The Attorney General's ruling said that there is no authority without the Board taking an action in a public meeting. Trustee Horan and others seem to have forgotten about NPRI and their filing with the Public Integrity Unit. We have an attorney who is acting as attorney and as client. Thirty thousand e-mails have been determined as privileged and confidential and it is up to the Board to make that determination yet this Board hasn't seen them. Why haven't you seen them as that could have saved us money. Why withhold them and who is asserting that privilege.

Sara Schmitz said because we had a vocal citizen, we took our Sheriff off a life threatening situation. Let's handle it in an adult way as we have limited Sheriff resources; shame on you for taking them from a life threatening situation.

Hearing no further public comments, Chairwoman Wong brought the matter back to the Board and asked if there was a motion.

Trustee Morris made a motion to:

Approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over the current authority of the General Manager); and

Authorize Litigation Counsel, Thomas P. Beko, Esq., to pursue an appeal of the final disposition of the District Court (estimated budget \$15,000.00).

There was no second to the motion so the motion failed.

District General Counsel Guinasso suggested that the Board of Trustees might want to get some information on the timeline as he is unsure on the time frame of the appeal.

Mr. Beko said after the final judgment, there would be thirty days, which he would guess would be sufficient time to have a special meeting and stated that he will notify the District quickly. There can then be a determination if you need to expend additional funds.

Trustee Morris made a motion to approve legal fees and costs to continue defense of lawsuit (estimated budget \$10,000.00 over the current authority of the General Manager). Trustee Horan seconded the motion. Chairwoman Wong asked for comments.

Trustee Horan said that it is disrespectful of how we got here tonight and that it is important that we protect the District and that is why he is going to support this motion.

Trustee Dent asked, regarding the 13,000 e-mails, who is the client ascertaining privilege? Mr. Beko said IVGID. Trustee Dent asked who is the client, Mr. Beko said that District General Counsel Guinasso asserted the privilege and he did so and acting on behalf of the client. Trustee Dent said he only received twenty or thirty emails during that time period.

Trustee Callicrate said that this is bizarre theater and that IVGID is a public agency who should be providing public records to the public. We ejected people tonight and yet we are supposedly the most transparent Board ever. This is shocking and annoying and he is on the verge of voting no confidence. We had the Registrar of Voters come in and give us our oaths maybe we should do that again. This has blossomed over the past four years. The community will watch the Livestream and there is an election next year. He hopes that folks really take this to heart as tyranny has run and this has to stop. It is creating division in our community and costing hundreds of thousands of dollars. He will be voting no loudly and clearly.

Hearing no further comments from the Board, Chairwoman Wong called the question – Trustees Dent and Callicrate voted no and Trustees Horan, Morris, and Wong voted yes; the motion passed.

At approximately 11:20 p.m. Trustee Callicrate disconnected from the meeting.

H. **DISTRICT STAFF UPDATE (for possible action) - (moved up to after Item D. on the agenda)**

H.1. General Manager Steve Pinkerton

I. **APPROVAL OF MINUTES (for possible action)**

I.1. Regular Meeting of May 22, 2019