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Case No.: CV- 1408108  
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LINDA M. ...  
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**IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF WHITE PINE**

\*\*\*\*\*

Management Board of the White Pine Historical  
Railroad Foundation, Inc., et al.,

Plaintiffs,

vs.

Board of Trustees for the White Pine Historical  
Railroad Foundation, Inc., et al.,

Defendants.

**MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION AND  
ORDER SHORTENING TIME**

**ORIGINAL**

The Management Board (the “Management Board”) of the White Pine Historical Railroad Foundation, Inc. (the “Foundation”); Roger Bowers, in his official capacity as a member of the Management Board (“Member Bowers”); Randy Larson, in his official capacity as a member of the Management Board (“Member Larson”); Carl Marsh, in his official capacity as a member of the Management Board (“Member Marsh”); John C. Gianoli, in his individual capacity (“Member Gianoli”), and Stephen D. Leith, in his individual capacity (“Member Leith”), by and through their undersigned counsel, GIANOLI HUSBANDS PLLC – ATTORNEYS & COUNSELORS AT LAW, by Angela M. Gianoli, Esq. and Scott H. Husbands, Esq. and GOICOECHEA, DIGRAZIA, COYLE & STANTON, LTD., by Robert B. Goicoechea, Esq. submit this

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Motion for Temporary Restraining Order and Preliminary Injunction and Order Shortening Time in the above-entitled matter. This Motion is made and based upon all of the papers, pleadings and records on file herein, the Points & Authorities and Affidavits attached hereto, the Plaintiffs' Verified Complaint filed contemporaneously herewith, and any oral argument or documentary evidence to be adduced at the time of the hearing herein.

DATED THIS 26<sup>th</sup> day of August, 2014.

GIANOLI HUSBANDS PLLC



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**NOTICE OF MOTION**

**TO: Board of Trustees for the White Pine Historical Railroad Foundation, Inc.; the City of Ely; the Ely City Council; Dale Derbidge; Sam Hanson; Randy Lee; Bruce Setterstrom; Martin Westland; and, Mayor Melody VanCamp**

**PLEASE TAKE NOTICE** that Plaintiffs respectfully move this Court for an Order granting the foregoing Motion for Temporary Restraining Order and Preliminary Injunction and Order Shortening Time. Plaintiffs respectfully request a hearing be set in this matter at the Court’s first opportunity but in any event no later than 2.00 p.m. on Thursday, August 28, 2014.

DATED this 26<sup>th</sup> day of August, 2014.

GIANOLI HUSBANDS PLLC

  
\_\_\_\_\_  
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Co-Counsel for Plaintiffs

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**POINTS & AUTHORITIES**

**A. Statement of Facts**

For the sake of brevity, Plaintiffs incorporate by reference the factual allegations in Plaintiffs’ Verified Complaint filed contemporaneously with this Motion.

**B. Argument and Analysis**

1. Nevada Standard for Injunctive Relief

Nevada Rule of Civil Procedure 65 governs the ability of a party to obtain injunctive relief. Generally, a temporary restraining order is an order granted on an emergency basis until such time as the court can conduct a hearing on a preliminary injunction. Pursuant to NRCP 65, a preliminary injunction may only issue upon notice and an opportunity to be heard by the party sought to be enjoined.

A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the nonmoving party’s conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an adequate remedy. *See Nevada Revised Statute 33.010; Boulder Oaks Cmty Ass’n v. B&J Anders Enters., LLC*, 125 Nev. Adv. Op. 33, 215 P.3d 27, 31 (2009). A preliminary injunction is designed to protect the applicant from irreparable injury and to preserve the status quo pending final judgment. *Ottenheimer v. Real Estate Div.*, 91 NEv. 338, 342, 535 P.2d 1284, 1285 (1975). A preliminary injunction may also be proper to restore the status quo if the act causing the injury has already been completed. *See Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Mem’l Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 124 (1982.)

1 Public officers do not enjoy immunity from injunctive relief and can be enjoined from  
2 acts that exceed their authority or are unlawful. *See generally City Council of Reno v. Reno*  
3 *Newspapers, Inc.*, 105 Nev. 886, 890, 784 P.2d 974, 977 (1989).

4 Courts examining an application for a temporary restraining order or preliminary  
5 injunction review the threat of irreparable harm and the moving party’s likelihood of success on  
6 the merits. *See, e.g., Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335,  
7 337 (1986). The court may also consider the balance of hardships and the public interest. *Univ.*  
8 *& Cmty College Sys. of Nevada v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721 (2004).

9  
10 2. The Removal of Members Gianoli and Leith Should Be Enjoined Because the Action  
11 Authorizing Their Removal Violated Nevada’s Open Meeting Law

12 NRS 241.020(2)(d)(1) requires that an agenda contain a “clear and complete  
13 statement of the topics scheduled to be considered during the meeting.” NRS 241.020(2)(c)  
14 requires that the notice or agenda for a meeting must contain “the name and contact information  
15 for the person designated by the public from whom a member of the public may request the  
16 supporting material for the meeting . . . and a list of the locations where the supporting material  
17 is available to the public.”

18 Nevada’s Open Meeting Law also has strict requirements for public comment during  
19 open meetings.

20 (3) Periods devoted to comments by the general public, if any, and discussion  
21 of those comments. Comments by the general public must be taken:

22 (I) At the beginning of the meeting before any items on which  
23 action may be taken are heard by the public body and again before the  
24 adjournment of the meeting; or

25 (II) After each item on the agenda on which action may be taken is  
discussed by the public body, but before the public body takes action on the  
item.

The provisions of this subparagraph do not prohibit a public body from taking  
comments by the general public in addition to what is required pursuant to sub-

1 subparagraph (I) or (II). Regardless of whether a public body takes comments  
2 from the general public pursuant to sub-subparagraph (I) or (II), the public body  
3 must allow the general public to comment on any matter that is not specifically  
4 included on the agenda as an action item at some time before adjournment of  
5 the meeting. No action may be taken upon a matter raised during a period  
devoted to comments by the general public until the matter itself has been  
specifically included on an agenda as an item upon which action may be taken  
pursuant to subparagraph (2).

6 NRS 241.020(2)(d)(3) (noting required provisions and agenda items in agendas for open  
7 meetings).

8 In addition to these requirements, NRS 241.033 requires that personal notice be given,  
9 by personal service or certified mail, to any individual whose character, alleged misconduct,  
10 professional competence, or physical or mental health are to be considered. In addition to  
11 providing this notice, the public body must receive proof of service prior to the meeting or action  
12 item going forward. Additionally, NRS 241.033(2)(c) requires that the written notice include a  
13 list of the general topics concerning the person that will be considered by the public body during  
14 the personnel session.  
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17 NRS 241.037 provides that any person denied a right under the Open Meeting Law  
18 may sue in the District Court to require compliance with, or to prevent violations of that law.  
19 That statute also provides that an injunction requested by the Attorney General may be issued  
20 without proof of actual damage or other irreparable harm. The same standard generally applies  
21 to any private party actions for the reason that Open Meeting Laws are enacted for the benefit of  
22 the public, and any violation of such laws irreparably harms the public. *See, e.g., In the Matter*  
23 *of STOP BHOD*, 861 N.Y.S.2d 367 (2009). In private actions under the Open Meeting Law,  
24 damages are not available and violations of the Open Meeting Law are only remediable by  
25

1 injunctive or declaratory relief; i.e. damages cannot provide an adequate remedy at law. *See*  
2 *generally Stockmeir v. Nev. Dept. of Corrections*, 124 Nev. 313, 183 P.3d 133 (2008).

3 Here, Trustee Setterstrom’s action item read as follows: “Trustee Setterstrom –  
4 Discussion/For Possible Action – Removal from office of up to two (2) White Pine Historical  
5 Railroad Foundation Management Board Members for reasonable cause.” This poorly worded  
6 action item, and action taken as a result at the August 7, 2014 meeting, violates the Open Meeting  
7 Law provisions cited above.  
8

9 First, the action item’s description fails to provide a clear and complete statement. The  
10 agenda item does not identify the members that were subject to removal nor does it identify the  
11 basis for reasonable cause as required by the bylaws. This unclear and incomplete statement  
12 failed to put the Management Board members and the public on notice as is required by the Open  
13 Meeting Law. Because of this failure, the action removing Members Gianoli and Leith should  
14 be declared void and Defendants should be enjoined from removing any additional members  
15 using the same unclear and incomplete description.  
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18 Second, the agenda which included this agenda item failed to provide the name and  
19 contact information for the person designated by the public body from whom a member of the  
20 public may request the supporting material for the meeting. Likewise, the agenda failed to  
21 provide a list of the locations where the supporting material is available to the public. Because  
22 of this failure, the action removing Members Gianoli and Leith should be declared void and  
23 Defendants should be enjoined from removing any additional members using an agenda item on  
24 an agenda that suffers from the same deficiency.  
25

1 Third, the Board of Trustees did not allow for, nor did the agenda allow for, any public  
2 comment at the start of its meeting nor was any allowance for public comment made during the  
3 discussion items or at the closing of the Board of Trustees meeting. Because of this failure, the  
4 action removing Members Gianoli and Leith should be declared void and Defendants should be  
5 enjoined from removing any additional members using the same deficient open meeting  
6 procedures.

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8 Lastly, as required by NRS 241.033, Members Gianoli and Leith did not receive any  
9 notice that their character, alleged misconduct, professional competence, or physical or mental  
10 health were to be considered. Additionally, as required by NRS 241.033, no written notice  
11 including a list of the general topics to be discussed was provided. Because of this failure, the  
12 action removing Members Gianoli and Leith should be declared void and Defendants should be  
13 enjoined from removing any additional members using the same deficient open meeting  
14 procedures.

15  
16 In addition to declaring the removal of Members Gianoli and Leith void and enjoining  
17 the Defendants from removing Members Gianoli and Leith, Plaintiffs seek an injunction  
18 preventing any removal of additional Management Board members using the same deficient  
19 open meeting procedures. The August 28, 2014 agenda suffers from these same flaws.

20  
21 The Board of Trustee’s action taken on June 26, 2014 to commission a forensic audit  
22 suffers from many of the same open meeting issues as the action taken to remove the  
23 Management Board Members. At the June 26, 2014 meeting of the Board of Trustees, Trustee  
24 Hanson placed an item on the agenda that read, “Trustee Hanson – Discussion/For Possible  
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1 Action – Consideration to Authorize a Forensic Audit of the White Pine Historical Railroad  
2 Foundation.” The agenda item did not explain why the Board of Trustees was contemplating a  
3 forensic audit, which firms might be used to do such work or how much such an audit might cost  
4 the citizens of Ely. Trustee Hanson moved to commission the audit up to \$10,000 and to appoint  
5 himself and Trustee Westland to identify the specific areas of concern. Trustee Lee seconded  
6 the motion and the motion carried unanimously. During the discussion, the Trustees were  
7 reviewing an e-mail that had never been provided to the public.  
8

9 The June 26, 2014 action violates Nevada’s Open Meeting Law because the agenda  
10 item’s description is not clear and concise. There is no reference at all as to the potential cost or  
11 the subject areas to inquire into which is of great concern and consequence to the citizens of Ely.  
12 At a bare minimum, the agenda item should have indicated that the citizens would be paying  
13 \$10,000 to conduct the audit so that interested and concerned citizens could attend the meeting  
14 and speak their voice. Additionally, the June 26, 2014 action violates Nevada’s Open Meeting  
15 Law to the extent that the Trustees relied on information that was not provided to the public.  
16 Accordingly, Plaintiffs seek an order from the Court declaring this action void and an injunction  
17 preventing the forensic audit from going forward as the action commissioning the audit was not  
18 the proper under Nevada’s Open Meeting Law.  
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21 3. The Removal of Members Gianoli and Leith Should Be Enjoined Because the Action  
22 Authorizing Their Removal Violated the Foundation’s Bylaws  
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24 As alleged in the Verified Complaint filed concurrently with this Motion, the  
25 Foundation’s bylaws limit removal of Management Board members by the Board of Trustees to

1 removal for reasonable cause. Reasonable cause is defined to mean misfeasance, malfeasance, or  
2 commission of a felony. The Foundation’s bylaws do not specifically define misfeasance or  
3 malfeasance thereby attributing the common definition to those terms. Black’s Law Dictionary  
4 defines misfeasance as “a lawful act performed in a wrongful manner, or, more broadly, a  
5 transgression or trespass.” The same source defines malfeasance as “a wrongful or unlawful act  
6 or wrongdoing or misconduct by a public official.” Misfeasance in public office is defined by  
7 that same source as “the tort of excessive, malicious or negligent exercise of statutory powers by  
8 a public official.”  
9

10  
11 Although Trustee Setterstrom’s action item uses the word reasonable cause, the  
12 words misfeasance or malfeasance were not used once during the August 7, 2014 meeting.  
13 Indeed, the only issue raised by Trustee Setterstrom and other Trustees was that those Trustees  
14 did not feel they were given complete or adequate answers to questions or requests for  
15 information. No Trustee made any attempt to relate this issue to misfeasance or malfeasance  
16 because there is no relationship between that issue and the meaning of misfeasance or  
17 malfeasance. Likewise, there was no evidence whatsoever that Members Gianoli or Leith  
18 committed a felony.

19  
20 Regarding the questions or requests that the Trustees claim have gone unanswered,  
21 the Foundation has responded to or has provided as much information as it has within its  
22 control and discretion in an effort to work cooperatively with the Trustees. Moreover, several  
23 of the questions or requests raised by the Trustees fall outside of the scope of the Management  
24 Board’s duties and responsibilities.  
25

1           Thus, the named Defendants acted improperly in removing Former Members Gianoli  
2 and Leith because the named Defendants did not demonstrate the existence of reasonable cause  
3 for the removal. For this reason, Plaintiffs enjoy a reasonable probability of success on the  
4 merits of their challenge to the removal.

5           Based on the affidavit(s) attached hereto, the Foundation will suffer irreparable harm  
6 if the Board of Trustees' removal is allowed to proceed. First, the Foundation's success is  
7 largely dependent on donations. The negativity surrounding the Board of Trustee's removal  
8 has called into question the continued viability of the Foundation which will impact fundraising.  
9 Second, employees have questioned whether or not they now have job security meaning that  
10 some employees may seek work elsewhere as a result of the removal. Third, there is the  
11 potential for loss of the currently applied for TIGER Grant.

12           For this reason, Plaintiffs seek an order enjoining the removal of Members Gianoli  
13 and Leith and restoring them to their positions on the Management Board. Likewise, Plaintiffs  
14 seek an order enjoining any future removal of other Management Board members absent the  
15 required proof of reasonable cause.

16  
17           4. The Removal of Members Gianoli and Leith Should Be Enjoined Because the Action  
18           Authorizing Their Removal Violated Member Gianoli's and Leith's Constitutional  
19           Due Process

20           Persons are entitled to notice and an opportunity to be heard before being deprived of  
21 their property by the government. U.S. Const. Amend. 14; Nevada Const. Art. 1, § 8, subd. 5; *see*  
22 *also Levingston v. Washoe Co.*, 112 Nev. 479, 484, 916 P.2d 163, 166 (1996).

23           Here, Members Gianoli and Leith were not provided any notice that they were the  
24 Management Board members who be subject to removal. Likewise, they were not afforded an  
25

1 opportunity to be heard. In particular, the Board of Trustees ignored the request by Member Leith  
2 to consult with his personal attorney after Member Leith advised the Board of Trustees that he  
3 had received no notice of his removal. On this basis, Members Gianoli and Leith have a  
4 reasonable probability of success on the merits of their due process claim.

5 Additionally, the injury to Members Gianoli and Leith is irreparable if an injunction is  
6 not issued. Members Gianoli and Leith have been removed from the Management Board and the  
7 City of Ely is already seeking candidates to replace them. This will make it difficult, if not  
8 impossible, to reinstate them should they ultimately prevail on their claims at a trial in this matter.  
9 Because the act of reinstatement is in reality the only cure to the improper removal, money  
10 damages are not an adequate remedy. Therefore, Members Gianoli and Leith seek an injunction  
11 preventing the Board of Trustees from removing them from the Management Board and  
12 reinstating them to their former positions on the Management Board.

13  
14 5. An Order Shortening the Time Is Appropriate Given the Emergency Nature of the  
15 Motion and Related Circumstances

16 The Ely City Council and Board of Trustees is set to meet at 4.00 p.m. on August 28,  
17 2014. As part of the agenda for that meeting, the Board of Trustees is seeking to remove the  
18 remaining three Management Board members as well as confirm the appointment of two  
19 replacement Management Board members. These actions will take place well before any  
20 opposition or reply would be due under the normal rules of this judicial district. Likewise, the  
21 harm contemplated by this motion will also have occurred well before any such opposition or  
22 reply. For this reason, Plaintiffs seek an order shortening the time for Defendants to submit their  
23 opposition to Wednesday, August 27, 2014 at 5.00 p.m. so that a hearing in this matter can be had  
24 on Thursday August 28, 2014 before the City Council and Board of Trustees meeting. This  
25


1 proposal to shorten time is in the best interests of all parties as it will allow for at least some  
2 judicial resolution of issues from the August 7, 2014 meetings that are almost guaranteed to occur  
3 against at the August 28, 2014 meetings.

4 **C. Conclusion**

5 The named Defendants have, by and through their actions, violated various provisions  
6 of Nevada’s Open Meeting law, the Foundation’s governing documents and well-settled  
7 provisions of the United States and Nevada Constitution. Plaintiffs seek the injunctive relief  
8 specified herein to prevent immediate and irreparable injury to the Foundation that is incapable  
9 of being redressed by compensatory damages. Indeed, given the gravity of the harm that will  
10 befall the Plaintiffs if the requested injunctive relief is not granted, injunctive relief is the only  
11 means of redress available to the Plaintiffs at this point.

12 DATED this 26<sup>th</sup> day of August, 2014.

13  
14 GIANOLI HUSBANDS PLLC

15   
16 Scott H. Husbands, Nevada Bar 11398  
17 1050 Aultman Street  
18 Ely, Nevada 89301  
19 Ph: 775.289.3050 | Fax: 775.549.9815  
20 Attorney for Plaintiff

21 **AFFIRMATION**

22 The undersigned does hereby affirm that the preceding document:

23  Does not contain the social security number of any person.

24 DATED this 26<sup>th</sup> day of August, 2014.

25   
SCOTT H. HUSBANDS, ESQ.  
Attorney for Plaintiff

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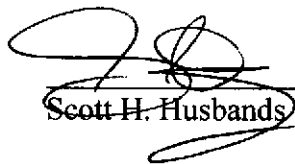
**CERTIFICATE OF SERVICE**

I hereby certify that on the date below written, I caused to be served on the below named individual(s), attorney(s), or entity(ies), a true and correct copy of the above and foregoing Motion dated August 26, 2014 as follows:

- By Placing same to be deposited for mailing in the United States mail, in a sealed envelope upon which first class postage was prepaid in Ely, Nevada; and/or,
- Via facsimile; and/or,
- Via electronic mail; and/or,
- To be hand-delivered.

Richard W. Sears  
333 Murry Street  
Ely, Nevada 89301

Date: August 26, 2014

  
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Scott H. Husbands

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**AFFIDAVIT OF ROGER BOWERS**

STATE OF NEVADA            )  
  )ss.  
WHITE PINE COUNTY        )

After being first duly sworn, Affiant makes this Affidavit on personal knowledge and swears the facts are true. If stated on information and belief, as to those matters, Affiant believes them to be true.

1. I am a current member of the Management Board of the White Pine Historical Railroad Foundation, Inc. (the “Foundation). Recently, I ascended into the role of Vice Chairman of the Management Board after Members Gianoli and Leith were improperly removed.
2. The improper removal of Members Gianoli and Leith, if left unaddressed or unenjoined, will result in serious irreparable injury to the Foundation.
3. First, the Foundation’s success depends in large part on donations and effective fundraising. The removal of Members Gianoli and Leith has generated a great deal of negative publicity for the Foundation which has hampered the Foundation’s ability to raise funds and generate much needed donations.
4. Second, upon information and belief, several employees have indicated that they no longer feel they have job security because of the removal. I fear we may lose these employees who undoubtedly provide key services needed for the day to day affairs of the Foundation.

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5. Third, the negative publicity associated with the improper removal has the potential for loss of the currently applied for TIGER grant. This grant is critically important to the Foundation.



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Roger Bowers  
Roger Bowers

STATE OF NEVADA            )  
  ) ss.  
COUNTY OF WHITE PINE    )

On August 26, 2014 Roger Bowers personally appeared before me, a Notary Public, personally known to me or proved to me to be the persons whose name is subscribed to the above instrument who acknowledged that he executed the instrument.



[Signature]  
NOTARY PUBLIC