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 5 Chuck Weinberger and Robert C. Wolf

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 8 UNITED STATES DISTRICT COURT  
 9 FOR THE DISTRICT OF NEVADA

10 STEVEN E. KROLL, Case No. 3:08-CV-0166-ECR-RAM  
 11 Plaintiff

12 vs.

13 INCLINE VILLAGE GENERAL  
 14 IMPROVEMENT DISTRICT, aka IVGID, a  
 governmental subdivision of the State of  
 15 Nevada; JOHN A. BOHN; GENE  
 16 BROCKMAN; BEA EPSTEIN, CHUCK  
 WEINBERGER and ROBERT C. WOLF,  
 17 individually and as Trustees of IVGID; DOES  
 1 through 25, inclusive, each in their  
 individual and official capacities,  
 18 Defendants.

**DEFENDANTS' OPPOSITION TO  
 PLAINTIFF'S MOTION TO COMPEL  
 DISCOVERY AND FOR SANCTIONS**

19  
 20 COME NOW Defendants, Incline Village General Improvement District, John A. Bohn,  
 Gene Brockman, Bea Epstein, Chuck Weinberger and Robert C. Wolf, and hereby submit their  
 21 opposition to Plaintiff's Motion to Compel Discovery and for Sanctions. Said opposition is  
 22 made and based upon the memorandum of points and authorities filed herewith and all papers  
 23 and pleadings on file herein.

24  
 25 **I**  
 26 **INTRODUCTION**

27 Plaintiff STEVEN KROLL filed his complaint in this Court on March 4, 2008, against  
 28 the Incline Village General Improvement District and five individual Trustees of the Board of  
 IVGID, including John Bohn, Gene Brockman, Bea Epstein and Chuck Weinberger. The action

1 was subsequently removed to this Court on April 2, 2008.

2 Plaintiff's complaint is brought under 42 U.S.C. §1983 and requests declaratory,  
3 injunctive and monetary relief from the Court on the grounds that IVGID Ordinance No. 7, §62  
4 violates the First and Fourteenth Amendment rights of Plaintiff under the United States  
5 Constitution. Plaintiff's complaint also purports to state a claim for relief for the taking of  
6 property without just compensation in violation of the Fifth Amendment of the United States  
7 Constitution.

8 As this Court is undoubtedly aware, the ordinance about which Plaintiff complains is  
9 based upon a restrictive covenant contained in the deed by which IVGID obtained certain  
10 properties at Lake Tahoe from Village Development Company in 1968. These two parcels of  
11 property abutting Lake Tahoe are currently known as Burnt Cedar Beach, Incline Beach, Ski  
12 Beach, and Hermit Beach. Plaintiff claims in this case that the ordinance in question violates his  
13 rights of free speech and free expression as guaranteed by the First Amendment of the United  
14 States Constitution by prohibiting him from accessing the properties referred to above. The  
15 restrictive covenant contained in the deed limits the use of these beach properties to those  
16 property owners whose parcels are located within the boundaries of IVGID as constituted in  
17 1968. Plaintiff owns a parcel of property located in the former Crystal Bay General Improvement  
18 District. Said parcel is not within the IVGID boundaries as constituted in 1968.

19 On April 30, 2008, IVGID adopted Policy and Procedure No. 136 entitled, "Policy  
20 Concerning Access to District Property and the Use of District Facilities for Expression."<sup>1</sup> As can  
21 be seen from a review of same, the new policy recognizes the importance of public expression,  
22 speech and assembly and provides for access to property owned by IVGID to all wishing to use  
23 them for First Amendment activities. The policy designates areas within IVGID-owned  
24 properties where First Amendment activities may be conducted. Thus, by virtue of the newly  
25 adopted policy, Plaintiff may access the beach properties to conduct First Amendment activities.

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28 <sup>1</sup>A complete copy of Policy No. 136 was lodged with the Court as Docket No. 22.

1 II

2 RELEVANT FACTS

3 After Policy No. 136 was passed, Plaintiff filed what he described as an “emergency  
 4 motion” in which he asks this Court to enjoin IVGID from putting into effect the new policy  
 5 which allows access to the beach properties to all individuals wishing to use them for First  
 6 Amendment activities. Plaintiff did so, despite the fact that this entire lawsuit is about Plaintiff’s  
 7 alleged inability to access the beach properties for First Amendment activities. In opposing  
 8 Plaintiff’s motion, Defendants provided the Court with the affidavit of Ramona Cruz, IVGID’s  
 9 Director of Finance, which demonstrates that costs associated with the purchase and  
 10 improvement of the beach properties have been borne solely by the owners of parcels of real  
 11 property within IVGID boundaries as of 1968 and that none of the expenses have been borne by  
 12 property owners in what was formerly known as the Crystal Bay General Improvement District.  
 13 In reaching this conclusion, Ms. Cruz reviewed certain documents.

14 On or about May 27, 2008, Plaintiff served the Defendants with his First Set of  
 15 Interrogatories. In same, Plaintiff requested that the Defendants identify all documents reviewed  
 16 by Ms. Cruz in reaching the conclusion set forth above. Defendants responded to Plaintiff’s  
 17 interrogatories on July 14, 2008. In so doing, Defendants provided Plaintiff with detailed  
 18 information responsive to the interrogatories, a copy of which is set forth as Exhibit “B” to  
 19 Plaintiff’s motion to compel. It is Defendants’ position that their responses comport with the  
 20 requirements of FRCP 33 and that Plaintiff’s motion to compel any further responses should be  
 21 denied.

22 With that said, the undersigned has had several conversations with Plaintiff in which  
 23 counsel for the Defendants indicated that he would endeavor to have copies of all documents  
 24 referenced in Defendants’ interrogatory responses made and produced for Plaintiff’s review.  
 25 Despite the detailed nature of Defendants’ responses and the Defendants’ willingness to move  
 26 forward with the production of the documents referenced therein, Plaintiff has filed the instant  
 27 motion seeking Court intervention in this issue. His actions in doing so are inappropriate and  
 28 premature.

1 With respect to the deposition of Bea Epstein, on or about June 24, 2008, Plaintiff served  
2 Defendants with a notice to take the deposition of a representative of IVGID pursuant to FRCP  
3 30(b)(6). Plaintiff's deposition notice specifically requested that IVGID produce a representative  
4 for deposition with knowledge of the following subjects: "the genesis, history, implementation  
5 and interpretation" of Policy No. 136. In response to this notice, Defendants designated IVGID  
6 Chairman of the Board Bea Epstein as the appropriate witness. Ms. Epstein has been the  
7 Chairman of the Board since 2007 and has been a member of the Board since 2004. IVGID had  
8 been developing Policy No. 136 for approximately one year prior to its adoption in April of 2008  
9 and Ms. Epstein has been the Chairman of the Board for that entire period.

10 Ms. Epstein's deposition was taken on July 16, 2008. It commenced at 9:00 a.m. and  
11 ended at 11:30 a.m. During the deposition, Ms. Epstein gave a detailed account of the history of  
12 Policy No. 136, from the initial discussions of the policy IVGID had with its legal counsel,  
13 through its adoption in April of this year. Ms. Epstein fully described the genesis of the policy  
14 and testified that the policy was developed by the Board with the significant involvement of its  
15 legal counsel. See, Exhibit "A," deposition of Bea Epstein, pp. 11-14.

16 During the deposition, Plaintiff repeatedly asked Ms. Epstein to testify as to the legal  
17 scope of the First Amendment in terms of Policy No. 136. For example, Plaintiff asked Ms.  
18 Epstein during her deposition to, "[t]ell me what your idea of the First Amendment is?" Id. at  
19 17. Questions of this nature were objected to by Defendants' attorney, as the same is an  
20 inappropriate attempt to ask Ms. Epstein to provide a legal conclusion and analysis of the First  
21 Amendment. In addition, Plaintiff repeatedly asked Ms. Epstein questions of the following  
22 nature:

23 "This is a policy respecting freedom of speech and expression. I want to know  
24 what the district had in mind when they passed such legislation."

25 Id. at 23. Defendants objected to questions which required Ms. Epstein to provide testimony  
26 concerning the mental processes utilized by she and the other Board members in connection with  
27 adopting Policy No. 136. Such questions are clearly barred by the *mental process privilege* and  
28 the *deliberative process privilege* and are wholly improper and objectionable.

1 As shall be discussed infra, Plaintiff is not entitled to elicit such testimony from an FRCP  
2 30(b)(6) witness and a non-lawyer designed to testify about the adoption and implementation of  
3 Policy No. 136. The interpretation of Policy No. 136 in terms of the First Amendment is  
4 specifically a legal issue to be decided by this Court. In fact, Plaintiff has asked this Court to  
5 declare Policy No. 136 unconstitutional in his Emergency Motion to Enjoin IVGID's Policy No.  
6 136 (Docket No. 11).

7 In addition, questions relating to the interpretation of Policy No. 136 and what is  
8 permissible thereunder from a First Amendment perspective, are not subjects which would be  
9 decided upon by Ms. Epstein alone. Rather, such issues would be put before the IVGID Board as  
10 a whole and they would likely be made only after IVGID received information and guidance  
11 from its legal counsel. It was not appropriate for Plaintiff to attempt to elicit testimony from one  
12 Board member about the legal interpretation of Policy No. 136. Ms. Epstein gave exhaustive  
13 testimony about the genesis, adoption and implementation of Policy No. 136. Ms. Epstein  
14 cannot be required, in the confines of a deposition, to provide legal analysis relating to the First  
15 Amendment. This is a Board function which is undertaken only after careful consultation with  
16 the Board's counsel. Under the mental processes privilege and deliberative process privilege  
17 discussed herein, one government official, whether designated as a 30(b)(6) witness or otherwise,  
18 cannot be compelled to testify as to the mental deliberations of a government entity which pertain  
19 to the enactment of legislation.

20 As for Plaintiff's apparent criticism in his motion that Ms. Epstein was not aware of the  
21 "2001 Bluth litigation" involving the District and/or the fact that she did not discuss her proposed  
22 deposition testimony with "management personnel" in preparation for same, Plaintiff's FRCP  
23 30(b)(6) deposition notice was very specific in terms of the subject matter for same. Specifically,  
24 Plaintiff sought the deposition of an individual knowledgeable about Policy No. 136. As that  
25 policy was adopted in April of 2008 and, as the policy had been under development for one year  
26 prior, questions concerning litigation that may have been instigated in 2001 was not relevant to  
27 the deposition, although Ms. Epstein answered the questions to the best of her ability. Nor is the  
28 fact that Ms. Epstein did not consult with other "management personnel" prior to her deposition

1 relevant to anything given that Ms. Epstein has been the Chairman of the Board since 2007.

2 II

3 LEGAL ANALYSIS

4 I. Defendants’ Answers to Plaintiff’s First Set of Interrogatories Comport with FRCP  
5 33.

6 Under FRCP 26(1)(b), parties may obtain discovery regarding any matter, not privileged,  
7 which is relevant to the subject matter of the pending action and FRCP 33 requires a party to  
8 answer interrogatories with whatever information is available to it. In his First Set of  
9 Interrogatories, Plaintiff demanded that IVGID identify all documents reviewed by Ramona Cruz  
10 in reaching the conclusions set forth in her affidavit filed with IVGID’s motion to dismiss  
11 referenced herein.

12 Contrary to the assertions in Plaintiff’s motion, Defendants provided Plaintiff with a  
13 detailed list of the information requested. See, Plaintiff’s Motion to Compel, Exhibit “B.” This  
14 list of documents included references to a 10-1-99 Official Statement for Bond Issues and  
15 specific documents related thereto, District financial system JD Edwards records and specific  
16 documents related thereto, budget documents and specific documents related thereto, FTE  
17 Allocation worksheets, Annual Audit Reports and recreation fee per parcel allocation excel  
18 worksheets. Id. Defendants responded to Plaintiff’s interrogatories in a detailed manner and in  
19 total compliance with FRCP 33. At no time has Plaintiff served Defendants with a request for  
20 production of these documents. Rather, Plaintiff relied upon FRCP 33 as a means to obtain this  
21 information and Defendants have fully complied with their obligations under the Rules.

22 Based upon the foregoing, Plaintiff’s motion to compel additional interrogatory  
23 responses, and his motion for sanctions based upon the alleged violation of FRCP 33, should be  
24 denied.

25 II. Plaintiff’s Motion to Compel the Continuation of the Deposition of Bea Epstein  
26 should be Denied.

27 As was discussed above, the deposition of Bea Epstein was taken in accordance with  
28 FRCP 30(b)(6) which provides as follows:

1 “In its notice or subpoena, a party may name as the deponent a public or private  
2 corporation, a partnership, an association, a governmental agency, or other entity  
3 and must describe with reasonable particularity the matters for examination. The  
4 named organization must then designate one or more officers, directors, or  
5 managing agents, or designate other persons who consent to testify on its behalf;  
6 and it may set out the matters which each person designated will testify. A  
7 subpoena must advise a nonparty organization of its duty to make this designation.  
8 *The person designated must testify about information known or reasonably*  
9 *available to the organization.* This paragraph (6) does not preclude a deposition  
10 by any other procedure allowed by these rules.

11 See, FRCP 30(b)(6)(*emphasis added*).

12 By the specific language of FRCP 30(6)(6), a witness designated to testify on behalf of a  
13 corporate defendant or government agency is required to give testimony about “information  
14 known or reasonably available to the organization.”

15 The Federal Rules of Evidence do not cease to operate in a deposition taken pursuant to  
16 FRCP 30(b)(6). Thus, opinion testimony by a lay witness is improper and inadmissible. See,  
17 FRE 701. That evidentiary rule provides as follows:

18 “If the witness is not testifying as an expert, the witness’ testimony in the form of  
19 opinions or inferences is limited to those opinions or inferences which are (a)  
20 rationally based on the perception of the witness, (b) helpful to a clear  
21 understanding of the witness’ testimony or the determination of a fact in issue,  
22 and (c) not based on scientific, technical, or other specialized knowledge within  
23 the scope of Rule 702.”

24 Upon receipt of Plaintiff’s deposition notice, Defendants designated Bea Epstein to testify  
25 as to the subject matter identified by Plaintiff; namely, the genesis, history, implementation and  
26 interpretation of Policy No. 136. Plaintiff’s deposition did not request that the District produce a  
27 witness to testify about the First Amendment and Ms. Epstein is clearly not an expert in legal  
28 matters. Ms. Epstein has been the Chairman of the IVGID Board since 2007 and it is undisputed  
that Policy No. 136 was adopted in April of 2008, and had been in development for a period of  
one year. Thus, Ms. Epstein provided detailed testimony in her deposition as to the genesis of  
the policy, the reasons for its adoption and the manner in which IVGID is implementing the  
policy.

Contrary to the arguments set forth in Plaintiff’s motion, Ms. Epstein should not be  
required to give testimony about the First Amendment implications of Policy No. 136 or about  
the mental deliberations used by the Board in making the decision to adopt Policy No. 136. Ms.

1 Epstein testified that the policy was adopted to assure the public's access to certain District  
2 properties for the purpose of exercising their First Amendment rights. See, Exhibit "A,"  
3 deposition of Bea Epstein, p. 22. She also made clear during her deposition that Policy No. 136  
4 was developed by the District's counsel and was adopted by the District only after careful  
5 deliberation and consultation with its counsel. Id. at pp. 14, 22. Ms. Epstein also testified to her  
6 educational background and that she holds master's degrees in education and administration. Id.  
7 at 33.

8 Ms. Epstein is not a lawyer. She does not have any scientific, technical or other  
9 specialized knowledge which would permit her to provide answers in a deposition as to "her  
10 idea" of what the First Amendment means or as to how Policy No. 136 should be analyzed in  
11 terms of the First Amendment. A lay witness such as Ms. Epstein, even one called to provide  
12 testimony on behalf of a government agency, should not be compelled to give opinion testimony  
13 concerning the very complicated legal morass that surrounds the First Amendment.

14 Rather, whether Policy No. 136 meets constitutional standards is a decision that may  
15 ultimately be made by this Court and which is the subject of Plaintiff's "emergency motion."  
16 See, Docket No. 11. Ms. Epstein testified to all of the facts within her knowledge as to the  
17 history behind Policy No. 136 and its adoption by IVGID. It is not for Ms. Epstein, or the Board  
18 of Trustees, to make legal conclusions about this policy and such questioning in a deposition is  
19 inappropriate.

20 In addition, Plaintiff's FRCP 30(6)(6) deposition notice did not specify that Plaintiff  
21 sought testimony from any individual concerning the First Amendment. Ms. Epstein provided  
22 detailed testimony as to all of the subjects listed in Plaintiff's notice, other than questions relating  
23 to the legal ramifications of Policy No. 136 from a First Amendment standpoint and questions  
24 relating to the mental thought process of the Board underlying the adoption of Policy No. 136.  
25 Questions relating to what the Board contemplated prior to and at the time of the adoption of  
26 Policy No. 136 are improper as violative of the mental process privilege, the deliberative process  
27 privilege and the legislative privilege.

28 The underlying purpose of the deliberative process privilege is to protect the consultative



1 functions of government by maintaining the confidentiality of advisory opinions,  
2 recommendations, and deliberations comprising part of the process by which government  
3 decisions and policies are formulated. See, National Wildlife Federation v. U.S. Forest Service,  
4 861 F.2d 1114, 1117 (9<sup>th</sup> Cir. 1988). “By maintaining the confidentiality of the give-and-take  
5 that occurs among agency members in the formulation of policy, the deliberative process  
6 privilege . . . encourages frank and open discussions of ideas, and, hence, improves decision-  
7 making process.” Id. This privilege is similar to what has been described as the “legislative  
8 privilege” which also pertains to the subjective intent of government officials in making  
9 decisions related to their official duties.

10 In City of Las Vegas v. Foley, 747 F.2d 1294 (9<sup>th</sup> Cir. 1984), the Ninth Circuit Court of  
11 Appeals discussed the issue of a plaintiff’s efforts to depose city officials to determine their  
12 motives for enacting a zoning ordinance. That case involved a First Amendment challenge to a  
13 Las Vegas zoning ordinance which restricted the location of sexually oriented businesses. Id. at  
14 1296. After the parties completed discovery, the plaintiff sought to re-open arguing that it should  
15 be permitted to depose city officials to discuss their motivations for enacting the ordinance. Id.  
16 The district court agreed with the plaintiff and refused to grant a protective order to prevent the  
17 depositions at issue. Id. The City then filed an application for a writ of mandamus asking that  
18 the Ninth Circuit order the district court to grant its protective order on the grounds that the  
19 testimony sought by the plaintiff was subject to a privilege. Id. The Ninth Circuit agreed.

20 In so holding, the Court held that, to permit the city officials to be deposed concerning the  
21 motives underlying their adoption of the legislation in question would disregard the long-  
22 standing rejection by the United States Supreme Court of the use of legislative motives as  
23 evidence. Id. at 1295. In holding that the city officials could not be required to give testimony  
24 concerning their mental processes and subjective opinions of the legislation at issue, the Court  
25 noted that the relevant governmental interest in First Amendment cases must be determined by  
26 “objective indicators as taken from the face of the statute, the effect of the statute, comparison to  
27 prior law, facts surrounding enactment of the statute, the stated purpose, and the record of  
28 proceedings.” Id. at 1297. The Court further stated as follows:

1 “The Court prevents inquiry into the motives of legislators because it recognizes  
2 that such inquiries are a hazardous task. Individual legislators may vote for a  
3 particular statute for a variety of reasons. *United States v. O’Brien*, 391 U.S. at  
4 384; *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469-70, 67 L.  
5 *Ed. 2d 437*, 101 S. Ct. 1200 (1981). ‘The diverse character of such motives, and  
6 the impossibility of penetrating into the hearts of men and ascertaining the truth,  
7 precludes all such inquiries as impracticable and futile.’”

8 Id. at 1297-98; *citing Soon Hing v. Crowley*, 113 U.S. 703, 710-11, 28 L. Ed. 1145, 5 S. Ct. 730  
9 (1885).

10 The Ninth Circuit thus held that allowing discovery of legislative motives would not only  
11 create a major departure from precedent rejecting the use of such evidence, but would be  
12 inconsistent with the basic analysis under the First Amendment, as well, which does not turn on  
13 the motives of the legislators, but upon the effect of the regulation. Id. at 1298.

14 In the instant matter, Plaintiff is foreclosed from asking Ms. Epstein to provide him with  
15 “what the District had in mind” when the Board enacted Policy No. 136. See, Plaintiff’s Motion,  
16 p. 6. The mental deliberations of the individual Board members is privileged and, as was stated  
17 during the deposition of Ms. Epstein, are inappropriate subject matter for testimony. Ms. Epstein  
18 responded to all other inquires made by Plaintiff concerning the history, genesis and  
19 implementation of Policy No. 136. Neither Ms. Epstein’s understanding of the First Amendment  
20 nor the mental deliberations or motivation of the Board and its members are proper inquires for  
21 deposition and, as such, Plaintiff’s motion to compel additional testimony should be denied.

22 **III. Plaintiff’s Motion for Sanctions Should be Denied.**

23 As has been clearly demonstrated herein, Defendants have not engaged in any  
24 inappropriate discovery abuses nor violated FRCP 30(b)(6) or FRCP 33. As such, Defendants  
25 respectfully submit that Plaintiff’s motion for sanctions be denied.

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III

CONCLUSION

Based upon all of the foregoing, Defendants respectfully request that this Court deny Plaintiff's motion to compel discovery and motion for sanctions.

DATED this 8<sup>th</sup> day of September, 2008.

THORNDAL, ARMSTRONG,  
DELK, BALKENBUSH & EISINGER

By   
STEPHEN C. BALKENBUSH, ESQ.  
6590 S. McCarran Blvd, Suite B  
Reno, NV 89509  
Attorneys for Defendants

**CERTIFICATE OF MAILING**

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this day I deposited for mailing at Reno, Nevada a true and correct copy of the following attached document, **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS** addressed to:

**Steven E. Kroll, Esq.  
Post Office Box 8  
Crystal Bay, NV 89402**

DATED this 8<sup>th</sup> day of September, 2008.



\_\_\_\_\_  
An employe of Thorndal, Armstrong,  
Delk, Balkenbush & Eisinger

EXHIBIT “A”



1 MR. BALKENBUSH: DePaoli.

2 MR. KROLL: Excellent.

3 BY MR. KROLL:

4 Q Is he an employee of IVGID?

5 A No.

6 Q He's an associate of Mr. Brooke?

7 A No. He's a with a different firm.

8 Q Is he employed by IVGID?

9 A We have a contract with him, yeah.

10 Q And when was that contract entered into?

11 A Probably somewhere in either March or April of  
12 '07.

13 Q You called this a legal counsel session?

14 A Uh-huh.

15 Q What did you mean by that?

16 A Well, as clients we asked to meet with or  
17 confer with our legal counsel to be sure that, as we were  
18 putting forth Policy 136, as it came to be known, would be  
19 an appropriate legal document. And so for them to give us  
20 advice, and for us to approve what had been designed or  
21 prepared by legal counsel.

22 Q Had you read Policy 136 before this discussion  
23 occurred?

24 A No.

25 Q When did you first read it?

1 A When it was presented with the attached memo.

2 Q On April 22nd?

3 A Uh-huh.

4 Q So you read that whole thing, then the next  
5 day you had this meeting?

6 A Right.

7 Q Who was at this meeting besides --

8 A The board members. Just the board members and  
9 counsel.

10 Q Susan Herron was not there?

11 A To the best of my recollection, no.

12 Q How long did that meeting last?

13 A Possibly an hour or more.

14 Q And there was discussion?

15 A Yes, there was.

16 Q Amongst all of the participants that you have  
17 named?

18 A Yes.

19 Q What was the trigger for developing Policy  
20 136?

21 A Back in February of '07, Trustee Wineberger  
22 and I had a meeting with Frank Wright and Mark Alexander.  
23 And the purpose of the meeting was to listen to Frank and  
24 Mark and their concerns about the beach access issue, and  
25 to walk away with the possibility of doing something in a



1 positive nature to try to ameliorate the situation that  
2 was existing with the beach access issue.

3           During that conversation Frank said, "You do  
4 realize that you are preventing us from exercising our  
5 First Amendment rights?" And I had not at that time  
6 thought about that.

7           So at the end of that meeting I gave that some  
8 thought. I mentioned it to -- I e-mailed or mentioned it  
9 to Scott Brooke, our attorney, and said we need to do  
10 something. Because if, in fact, he is correct, then we  
11 need to straighten out that situation.

12           As you know, we then formed -- a few months  
13 later we formed a committee to try and come to a  
14 resolution of the beach access issue.

15           In the interim, Scott was doing some research  
16 in terms of First Amendments, how public institutions  
17 provide for that freedom of speech accessibility. And we  
18 worked for several months on both, working on this First  
19 Amendment thing, answering some of Frank's civil rights  
20 questions that he had put forth, and looking at -- as you  
21 served on that committee as well -- on trying to find this  
22 resolution to this beach access situation.

23           Frank had said, "You know, if we can resolve  
24 this, all this will go away." From which I inferred that  
25 the implication of there being litigation would disappear,

1 and we could go on about our business of living life the  
2 way we always have.

3 Well, unfortunately, as you know, Steven, the  
4 attempt failed, and we find ourselves now in litigation.

5 However, we did recognize that there was that  
6 possibility that the First Amendment was being not adhered  
7 to. And so we asked counsel to prepare a document that  
8 would allow people who did not have access to certain  
9 venues to be able to use those venues, to exercise First  
10 Amendment rights. And to do so in such a way so that it  
11 did not interfere or obstruct the normal operation of a  
12 given venue. The venues being the ski areas, the beaches,  
13 the golf course, the chateau, or any of the other venues  
14 that IVGID is responsible for.

15 That design for Policy 136, a three-page  
16 document, the request was keep it simple, make it easy for  
17 people to understand, don't have it be super restrictive.  
18 And, in essence, that's what they put forth in 136.

19 Q "They" are the lawyers?

20 A The lawyers, correct.

21 Q Who authorized the lawyers to do this?

22 A The board.

23 Q When did that happen?

24 A That was in consultation at one of our legal  
25 sessions with counsel.

1 venues, it was less evident, because the general public  
2 can access the golf area. The general public can access  
3 the chateau. You pay a rate, and that's part of the rec  
4 fee. For some they pay less, for others without the rec  
5 fee, they pay more, visitors, et cetera.

6 And so the only venue where there was a  
7 prohibition because of the beach access restriction was  
8 just the beaches.

9 So it was a way to provide for all of the  
10 venues to have a place where people could come gather,  
11 have a rally if they choose to, campaign if they choose  
12 to, do whatever in terms of exercising their First  
13 Amendment rights. And it would apply across the board to  
14 all of our venues, not just the beaches.

15 Q What is your interpretation of what these  
16 First Amendment rights are that you were providing space  
17 for people to express?

18 A I'm not sure I understand your question.

19 Q Tell me what your idea of the First Amendment  
20 is?

21 MR. BALKENBUSH: Well, I would object to that  
22 question.

23 MR. KROLL: I'll withdraw that question.

24 MR. BALKENBUSH: Okay.

25 BY MR. KROLL:

1 Q Was the wording of Policy 136 discussed?

2 A The wording of the document, yes.

3 Q And you -- by "you" I mean the board, the  
4 district -- understood what Policy 136 was saying; is that  
5 correct?

6 A Correct.

7 Q And did the board members approve of that  
8 language at this April 23rd meeting?

9 A Yeah. We may have made a couple of  
10 recommendations in terms of simplification of language.

11 Q Do you remember what those were?

12 A No, I don't.

13 Q Will you tell me, please, what Policy 136  
14 specifically does?

15 A It allows for members of the community to be  
16 able to go to specific areas, designated areas, and allows  
17 them to implement or use their First Amendment rights.

18 Q That's what I want --

19 A Constitutional rights.

20 Q So what I want to know are: What are those  
21 rights that are being allowed to be implemented? What did  
22 you guys have in mind?

23 MR. BALKENBUSH: Again, that calls for  
24 speculation on behalf of this witness. The policy speaks  
25 for itself. And again, she can't testify as to what other

1 board members' thoughts are on this issue. She is  
2 incapable of doing that.

3 MR. KROLL: This is a policy respecting  
4 freedom of speech and expression, and free expression. I  
5 want to know what the district had in mind when they  
6 passed such legislation.

7 MR. BALKENBUSH: She's answered that to the  
8 best of her ability.

9 MR. KROLL: Well, we don't want best of  
10 ability here. We want to have the answer of the district,  
11 obviously.

12 MR. BALKENBUSH: Let me just tell you this.  
13 With respect to if you are asking her to interpret this  
14 ordinance, that isn't going to happen, because she can't.  
15 That's a function of the board. She is one member of the  
16 board.

17 If you have a question concerning what a  
18 provision of -- not of the ordinance, I meant policy --  
19 Policy 136 means, or if you think there is an issue that  
20 you have that you're concerned about, then you can submit  
21 that to the board, and the board would provide you an  
22 answer. But that would be a collective answer of the  
23 board.

24 But you can't take one board member when it's  
25 a board policy and expect her to interpret that and