



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request
for Opinion Concerning the Conduct of
Theodore "Ted" Fuller, Member, Washoe
County Debt Management Commission, and
Chairman, Incline Village General Improvement
District Board of Trustees, State of Nevada,

Request for Opinion No. 11-94C

Public Officer. /

OPINION

I. STATEMENT OF THE CASE

Pursuant to NRS 281A.440(2)(b), a Third-Party Request for Opinion ("RFO") was filed with the Nevada Commission on Ethics ("Commission"), alleging that Theodore "Ted" Fuller ("Fuller") violated the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS") by failing to disclose his membership on the Incline Village General Improvement District ("IVGID") Board of Trustees ("IVGID Board") and failing to abstain from voting on a matter before the Washoe County Debt Management Commission ("DMC") concerning IVGID. Pursuant to NRS 281A.440, the Commission staff conducted an investigation of the allegations, and an Investigatory Panel¹ of two commissioners determined that just and sufficient cause existed for the Commission to hold a hearing and render an opinion regarding the allegations.

The matter then came before a quorum of the Commission for a public hearing on September 20, 2012.² Fuller attended the hearing and provided sworn testimony. He was represented during the Commission proceedings by attorney Paul Lipparelli, Esq., Assistant District Attorney for Washoe County.

¹ Commissioners Magdalena Groover and James Shaw served on the Investigatory Panel. Pursuant to NRS 281A.220(4), they did not thereafter participate in any proceedings of the Commission relating to the matter.

² The quorum consisted of Chairman Erik Beyer and Commissioners John Carpenter, Timothy Cory and Gregory Gale.

At the conclusion of the hearing, and after fully considering the facts and circumstances disclosed by the evidence, including witness testimony and documents, the Commission deliberated on the record and orally announced its decision that Fuller was not required to disclose or abstain on the matter before the DMC. Accordingly, the Commission dismissed the allegation. The Commission now renders this written Opinion setting forth its formal findings of fact and conclusions of law.

II. PROCEDURAL HISTORY

Fuller serves as an elected member of the IVGID Board and simultaneously serves as an appointed member of the DMC representing the interests of the general improvement districts within Washoe County, Nevada. Fuller was appointed to serve on the DMC by a joint vote of all general improvement districts in the County, including IVGID. On November 8, 2011, a private citizen filed an RFO with the Commission alleging that Fuller violated various provisions of the Ethics Law by participating and voting on a matter before the DMC concerning IVGID on November 4, 2011 without disclosing his commitment to IVGID as a Trustee.

The RFO specifically alleged that Fuller, as a compensated IVGID Trustee, had a commitment in a private capacity to the interests of IVGID that would reasonably affect the IVGID matter under consideration by the DMC and would materially affect his vote, or that of a reasonable person in his position, on the IVGID matter before the DMC. Accordingly, the RFO alleged that Fuller was required to disclose the conflict and abstain from voting pursuant to NRS 281A.420(1) and (3)³. In particular, the Requester suggested that the IVGID Trustees are effectively “employed” by IVGID within the meaning of NRS 281A.420(8)(a)(3) because they receive an annual

³ NRS 281A.420(1) provides, relevant part:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

→ without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure to the chair and other members of the body....

NRS 281A.420(3) provides:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

compensation and other benefits, and if they aren't otherwise "employed," they are substantially similar to employees under NRS 281A.420(8)(a)(5)⁴.

Pursuant to NRS 281A.440(3) and (4), the Commission's Executive Director conducted a thorough investigation of the RFO and presented a recommendation regarding just and sufficient cause to an Investigatory Panel. Consistent with the Executive Director's recommendation, the Panel found sufficient credible evidence⁵ for the Commission to hold a hearing and render an opinion regarding whether Fuller violated NRS 281A.420(1) and (3) by failing to disclose and abstain on the DMC's November 4, 2011 meeting agenda regarding the IVGID proposal. The Panel found that Fuller's role as a compensated member of IVGID created just and sufficient cause regarding whether Fuller had a commitment in a private capacity to the interests of IVGID under NRS 281A.420(8) and whether such a commitment would have required his disclosure and abstention on the DMC vote on November 4, 2011 involving IVGID.

Further consistent with the Executive Director's recommendation, the Panel dismissed the allegation that Fuller violated NRS 281A.020. The Panel concluded that there was insufficient credible evidence that Fuller failed to separate his personal interests from his public duties to the DMC, finding instead that Fuller served on the DMC "because of, not in spite of," his position on the IVGID Board and the evidence did not reveal a conflict between his dual roles on the IVGID Board and DMC. See Panel Determination.

III. FINDINGS OF FACT

1. In his public capacity, Fuller serves as an elected member of the IVGID Board, presently serving as its Chair. Fuller is completing his second term as a member of the IVGID Board. Fuller served on the IVGID Board from 2001 to 2004 and was again elected in 2008. His current term will expire at the end of 2012.
2. IVGID is a general improvement district established by Washoe County under NRS Chapter 318. It "provide[s] water, sewer, trash and recreation services for the communities of Incline Village and Crystal Bay, Nevada [and] . . . is governed

⁴ NRS 281A.420(8)(a) provides, in relevant part:

8. As used in this section:

(a) "Commitment in a private capacity to the interests of others" means a commitment to a person:

- (1) Who is a member of the public officer's or employee's household;
- (2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (3) Who employs the public officer or employee or a member of the public officer's or employee's household;
- (4) With whom the public officer or employee has a substantial and continuing business relationship; or
- (5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

⁵ NAC 281A.435 defines "credible evidence" as "the minimal level of any reliable and competent form of proof provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion."

by an elected Board of Trustees which, acting on behalf of the electorate, sets policy and determines strategies for accomplishing its charter. Within the limits of the statutes, IVGID is empowered to determine what facilities and services it should offer that will preserve or enhance the general health, safety and welfare of the community. It may set rates, tolls and fees to be charged for the provision of those facilities and services, and it may borrow or raise funds to acquire, construct and/or provide those facilities and services to the community. Finally, IVGID has the power to levy and collect taxes necessary to sustain its operations.”
<http://ivgid.org/about>.

3. Pursuant to NRS 318.085, IVGID Trustees may be compensated for their service. All IVGID Trustees, including Fuller, receive \$9,000 per year, paid bi-weekly. The amount of compensation is not dependent on attendance at IVGID Board meetings or any actions taken as a Trustee.
4. IVGID Trustees receive similar benefits granted to IVGID employees, such as access to and discounts for the recreational facilities governed by IVGID, including the recreation center, beaches, ski resort, golf course and various restaurants. Trustees do not receive health insurance or sick leave benefits.
5. The IVGID Board is an elected governing body and is not supervised by any person or entity.
6. IVGID is under a federal mandate to make improvements to the Incline Village Water Purification System by 2014. To comply with the federal mandate, IVGID had to finance the project.
7. Before a general improvement district in Nevada may incur certain debt, including general obligation revenue bonds, it must obtain approval from its county debt commission. NRS 350.0145. The general improvement district’s governing body may adopt, by a vote of two-thirds of the members, a resolution of intent to issue bonds without an election. NRS 350.020(3). The debt may be incurred without an election unless a petition containing the required number of signatures is timely presented. NRS 350.020(3).
8. The IVGID Board and its staff examined several ways to finance the required water purification system improvements. On or about August 10, 2011, based upon an objective financial presentation, the IVGID Board unanimously adopted Resolution 1802 which directed the secretary of the IVGID Board to submit a proposal to the DMC for the issuance of \$3,000,000 in revenue bonds (“IVGID Proposal”). These revenue bonds would be repaid from IVGID’s revenues, rather than via any tax increases or assessments. The financial report indicated that IVGID had significant bonding capacity at low interest rates and sufficient revenues to repay the debt.

9. IVGID was not presented with a petition bearing the required number of signatures to hold an election concerning the issuance of the bonds pursuant to Resolution 1802.
10. Pursuant to NRS Chapter 350, each county in the State has a debt management commission. The DMC consists of seven members including one representative each from the county, the school district and the city in which the county seat is located; one representative each from the other incorporated cities jointly and the general improvement districts jointly; and two additional representatives from the public at large. NRS 350.0115.
11. Pursuant to NRS 350.0155(4), “[e]ach representative [on the DMC] of the general improvement districts must be chosen by their governing bodies jointly, each governing body having one vote.”
12. The general improvement districts in Washoe County, including IVGID, voted jointly to appoint Fuller to serve as their representative member of the DMC. Fuller receives no remuneration for his service on the DMC.
13. Fuller is currently serving his second term as a member of the DMC. He served on the DMC during his initial term with the IVGID Board.
14. During his tenure with the DMC, Fuller has regularly participated and voted on matters involving general improvement districts, including IVGID.
15. On or about November 4, 2011, the DMC considered the IVGID Proposal. Based on the financial report, the DMC unanimously approved the IVGID Proposal. Fuller participated and voted to approve the IVGID Proposal without disclosing his membership on the IVGID Board.
16. Prior to the November 4, 2011 DMC meeting, Fuller requested and received legal advice from the Washoe County District Attorney’s Office concerning his obligation to abstain from voting on the IVGID Proposal as a member of the DMC. He was advised that he did not have an obligation to abstain. Fuller did not request advice concerning his disclosure obligations.
17. Fuller did not seek a first-party advisory opinion from the Commission regarding disclosure and abstention prior to the November 4, 2011 DMC meeting.

IV. DISCUSSION OF ISSUES AND COMMISSION DECISION

A. ISSUES

The Commission is generally presented with an issue of first impression regarding whether a public officer has a commitment in a private capacity to the interests of the public body he serves to require disclosure and/or abstention. The Ethics Law

requires public officers to disclose any pecuniary interests in or the acceptance of any gifts or loans regarding a public matter under consideration. NRS 281A.420(1)(a) and (b). Disclosures are also required for a public officer's "commitments in a private capacity to the interests of others" which would reasonably affect the public matter. NRS 281A.420(1)(c). The Legislature has defined "commitments in a private capacity to the interests of others" to include certain relationships that are deemed to create private interests in matters that affect those with whom the public officer shares the relationship. See NRS 281A.420(8). For example, a sibling's interests in a nonprofit company are deemed by law to create private interests in the nonprofit company for the public officer. However, the relationship and interests alone are not sufficient to require disclosure. Rather, the relationship and/or interest must reasonably affect the public matter under consideration to trigger disclosure obligations. Furthermore, abstention is required only when the public officer's independence of judgment regarding the vote, or that of a reasonable person in his situation, would be materially affected by such a relationship or interest. NRS 281A.420(3).

Nevada has several public bodies that are comprised of representative members ("Representative Public Bodies") of other elected or appointed public bodies or agencies ("Appointing Public Bodies"). For example, many regional public bodies are governed by representative members of the governing bodies of the political subdivisions within the region, including the counties, municipalities and special districts. By statute or other appointment qualifications, service on Representative Public Bodies is dependent upon membership on an Appointing Public Body. In the matter before the Commission, Fuller serves as a representative member of the DMC, qualified and appointed solely because of his service on the IVGID Board.

Serving in a dual capacity as a member of a Representative Public Body and the Appointing Public Body may create inherent conflicts between the public officer's ability to independently represent the best interests of the public served by the Representative Public Body versus that of the Appointing Public Body, particularly if those interests are competing for time, resources or other priorities. The very nature of Representative Public Bodies contemplates regular consideration of issues affecting the various Appointing Public Bodies, either directly or indirectly.

If a public officer is deemed to have a commitment in a private capacity to the interests of the Appointing Public Body, the public officer may have a conflict of interest requiring disclosure and/or abstention on matters before the Representative Public Body. An abstention denies the public of its representative voice on the matter; the very purpose of the appointment. Such a result would be contrary to the purpose and goals of Representative Public Bodies. Accordingly, the Commission is not prepared to issue a blanket statement that such a public officer has an automatic conflict of interest, or a commitment in a private capacity to the interests of the respective public bodies as defined by the Ethics Law. To the contrary, the Commission likewise does not suggest that certain facts in such dual representative circumstances could not create conflicts requiring disclosure and/or abstention.

Based on the facts and circumstances presented herein, the Commission need not reach a conclusion regarding the broad question of whether Fuller has a commitment in a private capacity to the interests of IVGID as defined by NRS 281A.420(8). Instead, the Commission finds that regardless of any defined relationship or commitment to IVGID, as an “employee” or “substantially similar relationship,” Fuller’s membership on the IVGID Board would not have reasonably affected the IVGID Proposal before the DMC and his relationship to IVGID as a Trustee would not have materially affected his vote on the IVGID Proposal, or that of a reasonable person in his situation. Therefore, the Commission finds that Fuller did not have a duty to disclose his interests in IVGID or abstain from voting under the provisions of NRS 281A.420. Nevertheless, the Commission encourages and advises public officers to disclose any separate interests and/or relationships that may be affected by a public matter to avoid conflicts of interest and perceived conflicts of interest to enhance the public trust.

B. DECISION

By statute, the DMC is comprised of representative members of the various political subdivisions within the county, with a duty to “review[] and approv[e] debt issuance by the local entities, as well as overs[ee] . . . the entities’ indebtedness and debt management plans.” See http://www.washoecounty.us/clerks/dmc_minutes.php. Fuller represents the interests of the County’s general improvement districts, including IVGID. The DMC regularly considers matters affecting the various political subdivisions within the County for which there is generally a representative member including, without limitation, debt obligations incurred by the County and the various improvement districts, municipalities and school districts.

If the representative members of the DMC are required to disclose and abstain from voting on every proposal considered by the DMC that involves their represented entity, it would take away the entity’s representative voice in the matter. The very structure and purpose of Representative Public Bodies prioritizes the representative membership over inherent conflicts. The DMC statutes do not contemplate disclosure and/or abstention by the representative members regarding issues that affect the represented entity.

Fuller serves on the DMC only by virtue of his membership on the IVGID Board. As statutorily designed, Fuller’s role on the DMC is to vote on matters which may affect debt obligations of IVGID. If Fuller is required to disclose and/or abstain on the IVGID Proposal because he is also an IVGID Trustee, IVGID will be left without its representative voice on the matter. Without specific facts or circumstances to suggest a personal interest in the IVGID Proposal, the Commission does not find disclosure or abstention mandatory.

As a DMC member, Fuller acted in a representative capacity when he approved the IVGID Proposal. He had no financial or personal stake in the IVGID Proposal or the outcome of the vote. His compensation and/or benefits as an IVGID Trustee could

not have been affected by his vote on this matter and the IVGID Proposal did not affect Fuller's personal or financial interests any more or less than any other resident of the community to have improved water purification. Furthermore, Fuller receives no remuneration for his service on the DMC.

Fuller's commitment to and/or interests in IVGID with regard to the IVGID Proposal were public in nature as opposed to personal. The matter had been unanimously approved by the IVGID Board as the best approach to financing a federally mandated project for the District. Fuller testified that IVGID had significant levels of available bond funding at remarkably low interest rates given the current economic market and IVGID's revenue base. Further, by issuing revenue bonds, the IVGID Board would not be required to increase assessments against the local property owners. The IVGID Board considered independent expert reports from financial advisors regarding the viability of the revenue bonds for this purpose and the projected revenues to repay the debt. Based on these factors, the IVGID Board unanimously approved the IVGID Proposal and sought approval from the DMC.

The statutes authorizing a general improvement district to acquire such debt against the district have built-in checks and balances, including the public's ability to petition for an election regarding the issuance of the debt within a certain time frame. No such petition was filed, suggesting that the IVGID Proposal was supported by the members of the public. Furthermore, had the IVGID Proposal included increased assessments against property owners, or if the DMC declined the IVGID Proposal requiring IVGID to consider increased assessments to finance the project, Fuller may have had a financial interest in the matter. However, such financial interests would not have been any greater or less than those affecting all property owners alike.

Given the public interests served by the IVGID Proposal and lack of personal benefit to Fuller, Fuller's membership on the IVGID Board would not have reasonably affected the IVGID Proposal before the DMC. Likewise, the objective circumstances presented to the DMC were two-fold: IVGID was under a federal mandate to fund the water purification project; and the objective financial advice offered to the IVGID Board determined that revenue bonds were the best manner in which to fund the project. IVGID is in a unique circumstance in the State wherein its bonding capacity is favorable and its revenues are sufficient to repay the debt in a timely manner. The same information was presented to the DMC and there was no evidence that the issuance of these revenue bonds would otherwise cause concern for the overall debt of the County or any other political subdivisions. Accordingly, the independence of judgment of a reasonable person in Fuller's position would not have been materially affected by the IVGID Proposal under these specific circumstances. Therefore, Fuller would not have been required to abstain from voting on the matter.

Based on the unique facts presented in this case, the Commission need not, and does not, determine whether Fuller had a commitment in a private capacity to the interests of IVGID within the meaning of NRS 281A.420(8). In so holding, the Commission does not rule out a contrary finding under different facts and

circumstances. The Legislature appears to have contemplated the circumstances presented herein for every county debt management commission in the State to consist of representative members of the respective county agencies and/or political subdivisions requiring action by the debt management commissions. Had the Legislature intended representative appointments to the DMC to impose disqualifying conflicts requiring disclosure and abstention under such circumstances, it could have expressly so provided. Nevertheless, the Legislature's silence does not preclude a finding by this Commission that different facts and circumstances could create an appropriate disclosure and/or abstention obligation under the Ethics Law.

Although disclosure was not required in this instance, the Commission nevertheless encourages disclosure in these types of circumstances for various reasons. As we stated in *In re Weber*, Comm'n Opinion No. 09-47C (2012):

In keeping with the public trust, a public officer's disclosure is paramount to transparency and openness in government. The public policy favoring disclosure promotes accountability and scrutiny of the conduct of government officials. . . . Such disclosures dispel any question concerning conflicts of interest and may very well ward off complaints against the public officer based on failure to disclose.

If Fuller could have articulated his role as an IVGID Trustee and whether or not his personal interests or relationship with IVGID would be affected by the IVGID Proposal, it may have clarified for the public that his relationship with IVGID and his DMC vote were not reasonably and/or materially affected by the IVGID Proposal.

V. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Fuller was a "public officer" as defined by NRS 281A.160. The Commission has jurisdiction over public officers pursuant to NRS 281A.280.
2. Pursuant to NRS 281A.440(2)(b) and NRS 281A.460, the Commission has jurisdiction to render an opinion in this matter.
3. Based on the specific facts and circumstances presented in this matter, Fuller was not required to disclose his membership on the IVGID Board or abstain from voting on the IVGID Proposal before the DMC. The Commission does not determine whether Fuller had a "commitment in a private capacity to the interests of [IVGID]" as defined by NRS 281A.420(8). Regardless of whether Fuller could be deemed to have a commitment in a private capacity to the interests of IVGID, his membership on the IVGID Board would not have reasonably affected the IVGID Proposal before the DMC, and his vote on the matter, or that of a reasonable person in his situation, would not have been materially affected by his role as an IVGID Trustee.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The Following Commissioners Participated in this Opinion:

Dated this 12th day of December, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ Gregory Gale
Gregory Gale
Commissioner