



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the Request for
Advisory Opinion Concerning the
Conduct of PUBLIC OFFICER,
Member, City Council,
State of Nevada,**

Abstract Advisory Opinion No. 08-06A

Public Officer.

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OPINION

Pursuant NRS 281A.440.1, this is a request for an advisory opinion by Public Officer, a City Council member. This matter came before a quorum¹ of the Nevada Commission on Ethics (Commission) for a hearing on June 30, 2008. Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission on whether, pursuant to NRS 281A.420, he must disclose and abstain from voting on a development project when it comes before the City Council. As a professional in private practice, Public Officer has a client (Client). Client and a business associate (Associate), the developer of the development project coming before City Council, have an ongoing business relationship.

After fully considering the request for advisory opinion and analyzing all of the facts and circumstances and testimony presented, the Commission deliberated and orally advised Public Officer of its decision in the matter. The Commission now renders this written Opinion.

FINDINGS OF FACT

1. In his public capacity, Public Officer is a member of the City Council.
2. In his private capacity, Public Officer is a licensed professional in private practice.
3. Public Officer does work for Client on a variety of matters.
4. Client was the original developer and principal owner of a residential community (Community).
5. Approximately 20 years ago, Client sold more than 100 acres of Community to Associate and Associate developed this land.
6. Until recently, Client and Associate have not been involved in any business transactions since the original land sale. Client sold the golf course on Community to Associate and carried back an unsecured note. Associate is currently making payments on the note to Client.
7. Although Client sold the golf course to Associate, Client manages the golf course. Associate pays Client a monthly fixed-fee for his services pursuant to a fixed-fee management agreement (this agreement was not reviewed by the Commission).
8. Public Officer did not provide professional services on the transactions between Client and Associate involving the unsecured note and the fixed-fee management agreement.
9. Associate is currently developing a high-end residential project at Community.
10. As a promotion, the first 10 buyers of the residences will receive a membership to the Community golf course.
11. The Community golf course will likely benefit from the residential project at Community.
12. Prior to the residential project coming before the City Council for action, Public Officer consulted with the City Attorney regarding his voting on the residential project matter.

13. Because Public Officer represents Client and Client has an ongoing business relationship with Associate, relating to the Community golf course management agreement and the unsecured note, the City Attorney advised Public Officer to disclose his relationship with Client and abstain from voting on the residential project.

14. The City Attorney and Public Officer agreed that it would be appropriate for Public Officer to seek an opinion from the Commission as the residential or a substitute project at Community will come before the City Council in the near future.

CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a public officer, as defined by NRS 281A.160.
2. The Commission has jurisdiction to render an advisory opinion in this matter, pursuant to NRS 281A.440.1 and NRS 281A.460.
3. When matters concerning the residential or its substitute project come before the City Council, pursuant to NRS 281A.420.4, Public Officer must disclose his commitment in a private capacity to Client as it relates to Associate. The disclosure must contain sufficient information to allow the public to determine what his commitment is and the potential effect of the action or abstention upon Client as it relates to Associate.
4. When matters concerning the residential or its substitute project come before the City Council, pursuant to NRS 281A.420.2 and as interpreted by the Commission's *Woodbury* opinion, Public Officer must make a determination on a case-by-case basis whether he would need to abstain. The test is whether the independence of judgment of a reasonable person in Public Officer's position would be materially affected by his relationship with Client as it relates to Associate. If so, then he must abstain from voting on the matter.

5. Pursuant to NRS 281A.420, Public Officer may provide factual information to the City Council without advocating for or against approval of the residential project.

DISCUSSION

The issue is whether, pursuant to NRS 281A.420, specifically, subsections 2, 4 and 8,² Public Officer must disclose and abstain from acting on the residential project when Client has a business relationship with Associate, the developer of the residential project.

Public Officer provided all the facts considered in this matter. Facts and circumstances that differ from those provided by Public Officer and used by the Commission in this advisory opinion may result in an opinion different from this opinion.

A principal purpose of the Ethics in Government Law (Ethics law) is to enhance the people's faith in the integrity and impartiality of public officers.³ Further, the Ethics law requires public officers to commit themselves to avoid conflicts between their private interests and those of the general public whom they serve. Accordingly, adequate statutory guidelines are established to show the appropriate separation between the roles of persons who are both public servants and private citizens.

The Commission advised Public Officer that when matters concerning the residential or its substitute project come before the City Council, he must disclose his private interests and determine whether abstention is necessary in accordance with subsections 2, 4, and 8 of NRS 281A.420 and as the Commission interpreted these provisions in its seminal *Woodbury* opinion. *In Re Woodbury*, Nev. Comm'n on Ethics Op. 99-56 (1999).

In *Woodbury*, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits: first, disclosure is required whenever a public officer's actions would "***reasonably*** be

affected by his private commitment”; and second, before abstention is also required, a reasonable person’s independence of judgment “must be *materially* affected” by that private commitment.

Accordingly, whenever the residential or its substitute project come before the City Council, Public Officer must disclose sufficient information concerning his commitment to allow the public to determine what his commitment is and the potential effect of his action or abstention upon Client. Further, Public Officer must make a determination on a case-by-case basis whether the independence of judgment of a reasonable person in his position would be materially affected by his relationship to Client as it relates to Associate before he is required to abstain.

When abstaining, if the public officer is sitting at the dais and otherwise participating as a member of a city council, there is an aura of the city council around him. The Commission advises that if the public officer makes a determination to abstain, the public officer would be wise to remove himself from the dais and sit in the audience and approach the podium only to provide factual information. In such a position, the public sees the public officer in a completely different perspective. The Commission has long recognized that once an individual becomes a public officer, nothing in the Ethics law prohibits the individual from participating in the ordinary processes of government as any other citizen would.⁴

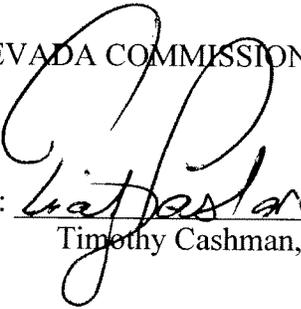
Public Officer may participate in a matter when he has a conflict of interest by providing factual information, as any other citizen would, yet without advocating for or against approval of the matter. Still, the Commission cautioned Public Officer that the line between participating by providing factual information and advocating is a thin line. The Commission advised Public Officer to review the Commission’s prior opinions, *In Re Woodbury* and *In Re Kubichek* for guidance on disclosure, abstention and participation.

CONCLUSION

Therefore, by a unanimous vote the Commission concluded that whenever matters involving the residential or its substitute project come before the City Council, Public Officer must disclose his commitment in a private capacity to Client as it relates to Associate. Additionally, Public Officer must make a determination on a case-by-case basis whether or not he would need to abstain. Public Officer's determinations regarding disclosure and abstention must be based on the requirements set forth in NRS 281A.420 and as interpreted by the Commission in its *Woodbury* and *Kubichek* opinions.

DATED: 8-20-08.

NEVADA COMMISSION ON ETHICS

By: 

Timothy Cashman, Vice Chair

¹ The quorum consisted of Vice Chair Cashman and Commissioners Capurro, Keele, Kosinski and Moran.

² These provisions of the Ethics law state in part:

NRS 281A.420.2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, 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 which the independence of judgment of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

➔ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

NRS 281A.420.4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest,

↳ without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294A.286 in a timely manner.

NRS 281A.420.8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

³See NRS 281A.020.

⁴ See *In Re Kubichek*, Nev. Comm’n on Ethics Op. 97-07 (1997).