



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Lori Bagwell**, Member,
Carson City Board of Supervisors,
State of Nevada,

Request for Advisory Opinion
No.17-47A
CONFIDENTIAL

Public Officer. /

CONFIDENTIAL OPINION

I. STATEMENT OF THE CASE

Lori Bagwell (“Bagwell”), a member of the Carson City Board of Supervisors (“Board of Supervisors”), requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1), regarding the propriety of her anticipated future conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”).¹ A quorum of the Commission heard this matter on November 15, 2017.² Bagwell appeared in person to provide sworn testimony and was represented by Adriana Fralick, Chief Deputy District Attorney, Carson City, Nevada.

Bagwell sought an opinion from the Commission regarding her disclosure and abstention obligations as a member of the Board of Supervisors on an upcoming Request for Proposal to award a new lease to manage Carson City’s two municipal golf courses known as Eagle Valley East and Eagle Valley West (collectively “Eagle Valley Golf Courses”), given her prior appointment to serve as the City’s representative on the board of directors for the Carson City Municipal Golf Corporation (“CCMGC”), a 501(c)(3) nonprofit entity.

After fully considering Bagwell’s request and analyzing the facts, circumstances and testimony presented by Bagwell, the Commission deliberated and orally advised Bagwell of its decision that the evidence does not establish a current relationship governed by NRS 281A.065, including a commitment in a private capacity to the interests of CCMGC that would require abstention. Nonetheless, the Commission instructs Bagwell to provide a public disclosure on any matters affecting the operations of CCMGC, given

¹ All citations to the Ethics Law include amendments enacted pursuant to Senate Bill 84 adopted in the 79th Legislative Session (2017), which are in the process of being codified.

² The following Commissioners participated in this opinion: Chair Cheryl Lau, Vice-Chair Keith A. Weaver and Commissioners Brian Duffrin, Barbara Gruenewald, Philip K. O’Neill, Lynn Stewart and Amanda Yen. Commissioner O’Neill disclosed that he has known Supervisor Bagwell for approximately 30 years characterizing the relationship as both professional and a friendship. They know one another by virtue of their public and community service in Carson City, which recently included separate volunteerism for the Salvation Army. Commissioner O’Neill’s volunteerism for the Salvation Army is intermittent and not similar to a substantial and continuing business relationship as defined in NRS 281A.065. Given the nature of the relationship and their individual volunteerism to the Salvation Army has no connection to the matter to be considered, the independence of judgment of a reasonable person in Commissioner O’Neill’s situation would not be materially affected in participating on an advisory matter before the Commission. Commission Counsel confirmed that she had been consulted and advised that disclosure is appropriate but abstention was not required under the Ethics Law or Canons of Judicial Conduct. Supervisor Bagwell confirmed that she had no objection to Commissioner O’Neill’s participation on this matter.

her recent departure from its Board of Directors and knowledge she acquired only by reason of such service.

The Commission now renders this final written opinion stating its formal findings of fact and conclusions of law.³ The facts in this matter were obtained from documentary and testimonial evidence provided by Bagwell. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below accept as true those facts Bagwell presented. Facts and circumstances that differ from those presented to and relied upon by the Commission in this opinion may result in different findings and conclusions than those expressed in this opinion.

II. QUESTIONS PRESENTED

Bagwell requests an opinion from the Commission regarding whether the Ethics Law requires her to disclose her prior association with the CCMGC and/or abstain on matters concerning this nonprofit entity when the Request for Proposal to lease the Eagle Valley Golf Courses comes before the Carson City Board of Supervisors because a prior employee of the CCMGC has submitted a response to the Request for Proposal.

III. FINDINGS OF FACT

1. In her public capacity, Bagwell was elected as a member of the Carson City Board of Supervisors in November 2014. As a Supervisor, Bagwell's duties include the consideration and approval of awards of Requests for Proposal to lease City property and facilities, including the Eagle Valley Golf Courses which are owned by Carson City and related matters.
2. CCMGC is a 501(c)(3) nonprofit entity that has leased and managed the operations of the Eagle Valley Golf Courses since 1997 pursuant to a lease agreement with Carson City that has been renewed and amended several times. The current Amended and Restated Golf Course Lease Agreement was entered into in 2013 and is due to expire on December 31, 2017.
3. The Board of Directors of CCMGC is comprised of eight directors, one being an appointee of the Board of Supervisors pursuant to Section 1.8 of the lease agreement between CCMGC and the City. The Board of Supervisors appointed Bagwell as a director of CCMGC in 2015 and she resigned from this position in July of 2017. Each director has equal voting rights to approve CCMGC matters. In addition, the Board of Director's executive officers have authority to meet separately from the full board to take action on certain matters including personnel decisions.
4. Since Bagwell resigned as a CCMGC Director in July 2017, she no longer has any current or continuing relationship with CCMGC or other substantially similar relationship as these terms are defined in NRS 281A.065.
5. Bagwell had no connection with CCMGC in her private capacity and served as a Director by virtue of her public appointment. Bagwell has not and does not volunteer or otherwise participate in fundraising events for CCMGC or donate funds to the organization. Accordingly, Bagwell does not believe she has a commitment in a private capacity as that term is defined by NRS 281A.065.

³ The individual comments made by any Commissioner during the hearing are not binding on the Commission's final opinion.

6. Supervisor Bagwell was not and is not aware of any anticipated future litigation, default or dispute between the City and CCMGC. However, given the alignment of interests, Carson City previously agreed to represent/defend CCMGC's interests in a lawsuit initiated by another golf course that named both Carson City and the CCMGC.
7. Carson City has instituted a Request for Proposal process for the new lease for operating and managing the Eagle Valley Golf Courses. The proposals received from qualified applicants will be first reviewed by an evaluation committee, which does not include any member of the Board of Supervisors. It is anticipated that the committee's recommendation will be presented to the Board of Supervisors for approval at its December 7, 2017 public meeting.
8. Responses to the Request for Proposal have been received by the City and CCMGC did not submit a response. However, a former employee of CCMGC has submitted a response to the Request for Proposal. Staff will provide the Board of Supervisors with a recommendation regarding which response is recommended for approval. However, it is not known at the time of this consideration whether the former employee's response will be selected. Also, it is not known whether the information acquired by Bagwell through her services as a CCMGC Director would implicate the Request for Proposal. If the prior employee is selected, it could place Bagwell in the position to discuss her knowledge regarding the operations of the Eagle Valley Golf Courses by CCMGC and its prior employee's competence in performing assigned duties in his previous position with CCMGC when the Request for Proposal is considered. Some of this information may be proprietary or confidential.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, Bagwell must commit herself to avoid actual and perceived conflicts of interest between her public duties and private endeavors (NRS 281A.020) and ensure that she will not use her position in government to gain unwarranted privileges, preferences, exemptions or advantages for herself, any business entity in which she has a significant pecuniary interest, or any person to whom she has a commitment in a private capacity to the interests of that person (NRS 281A.400(2)).

In addition, the Ethics in Government Law imposes certain disclosure and abstention obligations on public officers, including disclosures of certain private interests which would reasonably affect public decisions. NRS 281A.420(1). Specifically, Bagwell must disclose (NRS 281A.420(1)) whether she has a commitment in a private capacity pursuant to the defined relationships listed in NRS 281A.065 in a matter before or affecting Carson City; and Bagwell must abstain from those matters regarding which the independence of judgment of a reasonable person in her situation would be materially affected. NRS 281A.420(3).

B. RELEVANT STATUTES

1. Public Policy

NRS 281A.020(1) provides:

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

2. Use of Government Position

NRS 281A.400(2) provides:

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest [;] or any person to whom the public officer or employee has a commitment in a private capacity. ~~[to the interests of that person]~~ As used in this subsection, "unwarranted" means without justification or adequate reason.

3. Disclosure

NRS 281A.420(1) provides:

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 significant pecuniary interest; [or]

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person [;] ; or

(d) Which would reasonably be related to the nature of any representation or counseling that the public officer or employee provided to a private person for compensation before another agency within the immediately preceding year, provided such representation or counseling is permitted by NRS 281A.410,

↳ without disclosing information concerning the gift or loan, **the** significant pecuniary interest [or] , **the** commitment in a private capacity to the interests of the **other** person **or the nature of the representation or counseling of the private person** that is sufficient 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 significant pecuniary interest, [or] upon the person to whom the public officer or employee has a commitment in a private capacity [.] **or upon the private person who was represented or counseled by the public officer or employee.** Such a 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 in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public

officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

4. Abstention

NRS 281A.420(3) and (4) provide:

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 which 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 significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the **duty of the public officer to make a proper disclosure** ~~[of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.]~~ **at the time the matter is considered and in the manner required by subsection 1.**

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer ~~[has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person]~~ **makes a proper disclosure at the time the matter is considered and** in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

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5. "Commitment in a private capacity" Defined.

NRS 281A.065

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

V. COMMISSION DECISION

A. INTRODUCTION

Nevada's Ethics Law mandates that public officers hold public office for the sole benefit of the public and avoid conflicts between public duties and private interests, both actual and perceived. NRS 281A.020. Bagwell does not believe a conflict exists between her duties as a Carson City Supervisor and her prior service as a CCMGC Director. Bagwell seeks Commission guidance regarding her disclosure and abstention responsibilities under NRS 281A.420 in participating on matters associated with the Request for Proposal relating to selection of the next operator and lessee for the Eagle Valley Golf Courses, given her prior recent role as a CCMGC Director.

B. COMMITMENT IN A PRIVATE CAPACITY; DISCLOSURE AND ABSTENTION REQUIREMENTS

As an elected Carson City Supervisor, Bagwell is a public officer and has public duties that she must separate from her private interests and relationships to preserve the public trust. NRS 281A.020. The duties of disclosure and abstention are rooted in preserving the public's trust in its public officers and employees. The Commission has confirmed that:

A public officer/employee has an obligation to preserve the public trust and commit himself/herself to avoid conflicts between Public Employee's private interests and public duties. Where these conflicts arise in the context and consideration of public matters, the public officer/employee may, under certain circumstances, honor his/her obligations through appropriate disclosures and abstentions.

(Emphasis added). *In re Public Employee*, Comm'n Op. No. 13-78A (2014).

NRS 281A.065 establishes certain private relationships that implicate conflicts of interest, including a person who employs the public officer/employee under NRS 281A.065(4), a person (and entity) with whom the public officer shares business relationships under NRS 281A.065(5), or a person with whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to the commitment, interest or relationship described in NRS 281A.065 subsections (1) to (5). See NRS 281A.065(6).

The Commission has previously determined that a public officer's private commitment as a volunteer serving on the board of directors of a nonprofit entity establishes a relationship that is substantially similar to a substantial and continuing business relationship. See *In re Lambert*, Comm'n Op. No. 14-15C (2015) (A public officer's role as a director of a nonprofit entity establishes a relationship substantially similar to a substantial and continuing business relationship given legal fiduciary obligations to the corporation, which is a commitment to the interest of others); See also *In re Public Officer*, Comm'n Op. No. 12-46A (2013); *In re Public Officer*, Comm'n Op. No. 12-15A (2012); *In re Public Employee*, Comm'n Op. No. 10-66A (2012); *In re Public Officer*, Comm'n Op. No. 11-84A (2012) and *In re McCoy*, Comm'n Op. No. 09-58A (2012). The Commission has also concluded that people who volunteer their time and efforts to a nonprofit organization are interested in and committed to the goals of the organization, serve as a fiduciary to the organization, and have a commitment in a private capacity to the interests of the organization and its members. See *In re Mills*, Comm'n Op. No. 14-78A (2015) (long-term volunteer relationship with the Search and Rescue Team, a nonprofit comprised of citizen volunteers who conduct search and rescue for a county).

Whether or not a public officer has a commitment in a *private* capacity when serving a nonprofit is determined on the factual circumstances presented. The issue presented in this opinion is whether a public officer who was appointed by the public body she serves pursuant to a contractual provision to serve as a Director of a nonprofit organization that is affiliated with the public entity constitutes public service, a commitment in a private capacity, or alternatively a hybrid of public and private service and obligations. Certainly, many circumstances can establish a private commitment, including, without limitation, membership, volunteerism, donations, in-kind contributions, or other forms of support for the nonprofit organization. Here, the facts presented establish Bagwell's prior relationship with CCMGC to be a hybrid of public and private duties.

NRS 281A.065 references certain forms of relationships which establish a platform for the disclosure and abstention requirements of NRS 281A.420. When the relationship has for the most part ended, the Commission will ascertain whether there are any continuing duties that accrued as a result of the relationship that are regulated by the Ethics Law. In *In re Public Officer*, Comm'n Op. No. 11-65A (2012), the Commission reviewed a business relationship spanning 25 years and a friendship that had existed for

decades. Even though the business relationship had ended, the Commission viewed the circumstances in light of the public policy favoring disclosure to promote openness and transparency in government and concluded disclosure was appropriate. *Id.* at pgs. 5-6. In another opinion, the public officer had a reasonable expectation of continued or future work for a client that directly affected the public officer's private interests. The expectations arising from the past course of dealings created a foreseeable future course of dealings and supported disclosure and abstention under the Ethics Law. See *In re Milton*, Comm'n Op. No. 97-21 (1998).

Further, in *In re Mirchandani*, Comm'n Op. No. 16-64C (2015), the Commission determined that under certain circumstances, a public officer/employee's service to nonprofit entities, if performed in his/her official capacity, is subject to the code of ethics established in NRS 281A.400 of the Ethics Laws. In applying the Commission's interpretive opinions including *Mirchandani*, the Commission reviews each fact pattern before it to determine whether or not the service to the nonprofit was public or private in nature. The Commission's determinations are fact specific and not necessarily persuasive in guiding varied fact patterns.

Although Bagwell's service as a CCMGC Director had several attributes of public service, her service for CCMGC was not restricted by the contractual terms or the parties' performance of the lease agreement to be purely a public position. Contrarily, CCMGC provided Bagwell with confidential or proprietary information relating to private personnel matters and provided her the same authority as any other of its private directors. Although the circumstances presented favor characterization of the service as public based upon her contractual appointment as a Supervisor pursuant to the lease agreement, the related performance did not maintain the service as singularly public. Therefore, the Commission deems it appropriate to characterize the relationship as a hybrid.

Even though a hybrid situation existed and Bagwell had a prior commitment in a private capacity to CCMGC, that relationship has concluded and the record does not support a finding that Bagwell has a current commitment in a *private* capacity to CCMGC as defined in NRS 281A.065. Nevertheless, in order to protect the public trust and achieve compliance with Nevada's public policy creating an affirmative duty to avoid conflicts, implicated by reason of Bagwell's acknowledgment that she might possess proprietary or confidential information relating to the Request for Proposal,⁴ the Commission advises Bagwell to properly disclose her prior relationship with CCMGC and the effect that the relationship may have on the matter (Request for Proposal) when considered by the Board of Supervisors. See NRS 281A.020; See also *In re Public Officer*, Comm'n Op. No. 13-71A (2014) (disclosure on matters associated with a pecuniary interest or a commitment in private capacity to the interests of others is integral in avoiding both an actual and a perceived conflict); *In re Collins*, Comm'n Op. No. 11-78A (2012) (the Ethics Law requires the avoidance of conflicts and the appearance of impropriety, even under circumstances where actual impropriety is not evident).

⁴ Whether CCMGC's proprietary or confidential information would have any relevance to the Request for Proposal is not known, especially since the information is confidential and CCMGC did not submit a response to the Request for Proposal.

Disclosure protects the integrity of public service especially since the hybrid situation with CCMGC recently concluded and given the potential relevance of the confidential or proprietary information provided to Bagwell by CCMGC. Opinions instructing on the parameters of proper disclosure include: *In re Woodbury*, Comm'n Op. No. 99-56 (1999), *In re Public Officer*, Comm'n Op. 13-86A (2014), *In re Public Officer*, Comm'n Op. No. 13-78A (2014), *In re Public Officer*, Comm'n Op. No. 13-72A (2014), citing *In re Weber*, Comm'n Op. No. 09-47C (2009), and *In re Buck*, Comm'n Op. No. 11-63C (2011). Further, unless there is other information learned in the future, the record before the Commission does not demonstrate a clear case that Bagwell's consideration or vote on the Request for Proposal would be materially affected by her prior commitment to the private interests of CCMGC as to invoke the abstention requirements of NRS 281A.420(3). Therefore, the Commission advises Bagwell to complete a proper disclosure if the Request for Proposal implicates the private interests of CCMGC. However, abstention is not required under the circumstances presented.

C. ANCILLARY LEGAL ISSUES

The Commission refers Bagwell to her official or private attorney for legal advice associated with the potential for a continuing fiduciary duty to CCMGC. Even though Bagwell's service as a Director for CCMGC is not determined to be a current commitment in a private capacity for purposes of application of the abstention requirements of the Ethics Law, the Commission is recognizing that even public service on a nonprofit board under certain circumstances may include a separate private fiduciary duty (commitment in a private capacity) to the interests of that nonprofit entity, which duties may fall outside of the jurisdiction of the Ethics Law. Public agencies should consider the potential for both public and private commitments to arise and associated implications under the Ethics Law by virtue of a public appointment to a private nonprofit entity when the terms of such service are not explicit (or expressly limited to public service) in the applicable agreement or other arrangement.

This opinion applies to the circumstances as presented. If these circumstances change or should a question arise in the future as to the implication under the Ethics Law associated with the transition of operations relating to the Eagle Valley Golf Courses, winding down of the contractual relationship existing between the two entities or enforcement of the lease agreement, Bagwell is advised to seek legal advice from the Board of Supervisor's official legal counsel or return to the Commission for an advisory opinion if the matter implicates the Ethics Law.

VI. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Bagwell was a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Based upon the record before the Commission, Bagwell's prior commitment to CCMGC has concluded. Accordingly Bagwell does not have a "current" commitment

in a *private* capacity to CCMGC as defined in NRS 281A.065. Nevertheless, given Nevada's public policy, the opinions issued by the Commission favoring disclosure and Bagwell's acknowledgment that she might possess proprietary or confidential information about CCMGC, the Commission advises Bagwell to properly disclose her prior relationship with CCMGC and the effect the relationship may have on the matter considered by the Board of Supervisors should the Request for Proposal or a related matter implicating the interests of CCMGC be presented to the Board of Supervisors.

4. The Commission concludes that the record before it does not present a clear case in which a reasonable person in Bagwell's situation would be materially affected by her prior relationship with CCMGC. Accordingly, Bagwell is not required to abstain pursuant to NRS 281A.420(3) based upon this prior relationship on matters that affect the Eagle Valley Golf Courses.
5. Notwithstanding these conclusions of law applying the Ethics Law, Bagwell is advised to consider potential implications under other laws given the nature of her former relationship with CCMGC and any proprietary or confidential information she may possess that could be implicated by her public duties.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law 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 5th day of December, 2017.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ Philip K. O'Neill
Philip K. O'Neill
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Lynn Stewart
Lynn Stewart
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner