Opinions No. 95-21, 95-23, and 95-37

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of LARRY SCHEFFLER, former City Councilman, Henderson, Nevada

This Opinion is in response to both first and third party requests for opinions filed with the Nevada Commission on Ethics (Commission) concerning the conduct of former Henderson City Councilman, Larry Scheffler. On April 3, 1995, Mr. Scheffler requested the Commission to issue an opinion regarding various matters that arose during his tenure as a Henderson City Councilman. (Opinion Request No. 95-21). On April 12, 1995, Mr. Ron Coury filed a third-party request relating to specific votes or transactions that Mr. Scheffler had participated in as a Henderson City Councilman (Opinion Request No.95-23). On June 5, 1995, Mr. Richard MacDonald filed a third-party request relating to certain votes and matters upon which Mr. Scheffler had acted as a Henderson City Councilman (Opinion Request No.95-37). The specific allegations or concerns of each request will be treated in detail later in this Opinion.

On August 4, 1995, a hearing on the merits of Mr. Scheffler's request was held in Las Vegas, Nevada at which time Mr. Scheffler appeared and testified on the matter and was represented by legal counsel, Mr. Richard Wright. Also on August 4, 1995, the Commission held preliminary administrative hearings to determine whether just and sufficient cause existed for the Commission to conduct full hearings on the merits of the opinion requests of Mr. Coury and Mr. MacDonald and issue opinions pursuant to the provisions of NRS 281.511(2)(c). Mr. Coury was present without counsel at the preliminary hearing of Opinion Request No.95-23; Mr. MacDonald was present at the preliminary hearing of Opinion Request No.95-37 and was represented by his attorney, Mr. Randall Jones. The Commission determined that just and sufficient cause did exist to proceed with Opinion Request Nos. 95-23 and 95-37.

On September 20, 1995, the Commission proceeded to a full hearing on the merits of Opinion Request No.95-23. Mr. Scheffler was present and represented by Mr. Wright and Mr. Bruce Judd. Also present was the opinion requester, Mr. Coury, who was accompanied by his counsel, Mr. Alan Buttell. Witnesses who were present and testified in the matter concerning Opinion Request 95-23 were Ms. Shauna Hughes, Henderson City Attorney; Mr. Kimberly Sakowski, a graphic artist employed by Suburban Graphics as its research and development manager; Mr. James Arrendale, president of the Green Valley Community Association; Mr. David Wood, Henderson City Councilman and employee of a casino development company; and Mr. Steven Forsythe, President of Forsythe-Francis Advertising.

Also on September 20, 1995, the Commission began a hearing on the merits of Opinion Request No.95-37 .The hearing was continued to and completed on February 16, 1996. Mr. MacDonald was present at the both hearings and was represented by Mr. Jones. At the hearings on Opinion Request No.95-37, only Mr. Scheffler and Mr. MacDonald testified.

Because Mr. Scheffler did not waive statutory confidentiality in the matter, all hearings on the aforementioned opinion requests were confidential pursuant to the provisions of NRS 281.511(4) and therefore, not open to the public. All three Opinion Requests were heard separately and confidentially within themselves. Subsequent to its deliberation on all three of the requests, the Commission merged the requests into one opinion based upon the common facts and overlapping issues raised in the matters. Because the Opinion Requests have raised and resolved important issues of public policy, the Commission determined to make its Opinion public pursuant to NRS 281.511(4)(t) which was in effect at the time that the first Opinion Request was received.

THE NEVADA ETHICS IN GOVERNMENT LAW

A public officer has a public duty to act in a manner which is in the public interest and consistent with the public interest served by the governmental entity or office of which one is a member. NRS ch. 281 addresses ethical prohibitions and considerations for state and local elected or appointed officials. Based upon the findings of fact arising from each of the particular issues addressed below, t11e Commission concludes that Mr. Scheffler was a public officer during his tenure as Henderson City Councilman pursuant to NRS 218.4365 and while serving in that capacity, a member of the legislative branch as defined by NRS 281.4355. As a public officer, Mr. Scheffler was held to the high ethical standards embodied in NRS 281.481 and when performing a legislative function[1], was bound by the additional guidelines set forth in NRS 281.501(2) and (3).

The provisions of the Code of Ethical Standards relevant to the issues discussed in this Opinion are NRS 281.481(1), (2), and (9) and 281.501(2) and (3). Specifically, the pertinent subsections of NRS 281.481 state as follows:

> A code of ethical standards is hereby established to govern the conduct of public officers and employees:
> 1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.
> 2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, or any business entity in which he has a significant pecuniary interest or any other person.
> . . . .
> 9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

NRS 281.501(2) and (3), which set forth the requirements that public officers must conform when determining to discuss, advocate, or vote upon a matter, read in pertinent part as follows:

> 2. In addition to the requirements of the code of ethical standards, a member of the legislative branch 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 where the resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.
> 3. 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 the full nature and extent of the gift, loan, commitment or interest***. 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. (Emphasis added.)

In *Opinion Regarding Ron Lurie* (Opinion No.90-01), the Commission explained the policy which forms the basis of the disclosure requirement:

> Without disclosure at the time of discussion and action, neither the public nor other members of the particular legislative body can weigh the relevance of the circumstances of the public officer's private interest. While abstention from voting serves the public interest by preventing the public officer from voting his or her personal or private interest, the public should be fully informed of the full nature and extent of that public officer's private interest. Only with disclosure can the public judge whether private interests either have been or should be removed from a public decision made by a city council.

In Opinion No.90-01, the Commission held that Las Vegas Mayor Ron Lurie' s **10%** partnership interest in real property purchased from the U.S. Bureau of Land Management (which Mayor Lurie acknowledged to be and was a "significant pecuniary interest") was sufficient to have materially affected the independence of judgment of a reasonable person in Mayor Lurie's situation when he considered and voted on matters in Las Vegas City Council meetings which related to the construction of both a proposed overpass and an interchange approximately one-half mile from the location of the property. Because such construction would have a positive impact on the value of the property owned by him and his co-investors by improving access to that property that would accelerate its development and increase its value, Mayor Lurie was required to disclose both the full nature and extent of his interest and abstain from voting on the matter.

The Commission further determined that Mayor Lurie was required to disclose the full nature and extent of his partnership interest and abstain from discussion and voting on an application to change the zoning of land which **abutted** the property in which he retained an interest. The Commission concluded that the nature and quality of a project developed on property adjacent to that owned by Mayor Lurie and his partners reasonably may have an effect upon the uses and value of the property owned by Lurie and other investors. That effect upon value might have been adverse or helpful depending upon the nature and quality of the abutting development approved.

Whether a disqualifying interest exists is always a factual question governed by the circumstances of each case. In view of *Lurie*, mere ownership of land in the vicinity of property which would be benefited by a proposed rezoning may be sufficient to disqualify a public officer from voting for it.

Such was the advice provided to Mr. Scheffler by the city attorney's office. Mr. Scheffler testified that when he first took office, he conferred with city attorneys representing the public works department and requested a number of legal opinions concerning both his landholdings and business interests. The advice provided by the city attorney's office, given both verbally and in writing, was that in the case where it was likely that his pecuniary interest would be significantly affected by approval or disapproval of the matter under consideration, he must disclose, and that where the facts of the matter reflected that a reasonable person in his situation could not vote with independence of judgment, abstention would be required as well. Accordingly, the criteria upon which Mr. Scheffler was advised to rely in making voting determinations was principally based upon whether the matter concerned a **change in zoning** or involved the development of **infrastructure**.

The Commission notes, however, that while the opinions provided to Mr. Scheffler with regard to the voting standard applicable to matters of infrastructure were rather straightforward, the development of water and utility lines near Mr. Scheffler's holdings not only benefited the land upon which they were to be constructed, but also property situated in the immediate vicinity. Unfortunately, the advice obtained from the city attorney's office did not specifically define those instances in which consideration by the Henderson City Council might require disclosure of a councilman' s

own real estate interests and abstention of his vote on such matters. Clearly, a zoning change related to density affects property value. Increasing density increases the commercial value of the affected property as well as that land situated adjacent thereto because demand begets demand: residential real estate developments creates a market benefit. Further, with a rate of development that is fairly dynamic, such as that occurring in Henderson during recent years, it is reasonably foreseeable that the construction of new communities and the growth and residential demand for services generated as a result will increase the monetary value of any real estate located within that radius. The more desirable pieces of land south of Lake Mead Drive are those parcels that stand to benefit from such development. The beneficial effect upon a property owner's pecuniary interest in such circumstances is simply unavoidable, whether the consequences of such developments occur today or tomorrow. The unprecedented concentration of master-planned communities in southern Green Valley will undoubtedly increase the value of nearby smaller properties.

Consequently, *when Mr. Scheffler contemplated making decisions that would have affected, accommodated, or facilitated the development of real estate located within the vicinity of parcels of property in which he had ownership or investment interests, disclosure was mandated. Abstention would also be required whenever the independence of judgment of a reasonable person in Mr. Scheffler's situation would be materially affected*. Though advice from counsel to the contrary may result in a finding that the official's conduct in reliance thereof was not willful (See, NRS 281.551(5)), where he acts in contravention of NRS ch. 281, an actionable violation nevertheless will have occurred.

Where abstention is required, disclosure is mandated as well. The criteria for abstention is not solely whether there is a pecuniary interest or there is a commitment in one's private capacity to the interests of another; such are the criteria for disclosure only. Members of the legislative branch are required to abstain from voting on matters in which they have such interests or commitments only if these would **materially affect** the independence of judgment of a **reasonable person** in those same circumstances. It is against these criteria and standards that the facts as determined in the following findings must be reviewed.

FINDINGS OF FACT

Generally Applicable Findings

The following findings of fact are an amalgam of general facts taken from the three hearings of the Opinion Requests and are intended to apply to the discussion of each.

1. Mr. Scheffler is a former member of the Henderson City Council (Council), which body consists of five members. He was appointed on May 16, 1990, to replace Councilman Carleton Lawrence. He served until June 30, 1995, at which time he lost his bid for reelection. While in public office, Mr. Scheffler voted on numerous property matters and zoning related issues.

2. Both prior to and during his membership on the Council, Mr. Scheffler acquired numerous real estate interests in the southern Green Valley area of Henderson. This region, located south of Lake Mead Drive between Eastern Avenue and Horizon Drive, is one of Henderson's prime development areas and one of the most active real estate markets in southern Nevada.

3. In 1978, Mr. Scheffler and two partners formed Las Vegas Color Graphics, a Nevada corporation, which was the first graphics and printing business in the Las Vegas area to engage in pre-press assembly. The company assembles and produces film and color proof images for various publications and advertising agencies throughout the world. Its clients include Las Vegas hotels such as the Las Vegas Hilton, Flamingo Hilton, Imperial Palace, and the Riviera. One of its largest clients is the Las Vegas Convention and Business Authority from which R&R Advertising has purchased advertising space. The payroll company which serves the employees of Las Vegas Color Graphics is known as Viking Color Graphics.

4. Mr. Scheffler testified that there was a master plan on every development north of Lake Mead Drive and for the Green Valley Ranch area. The Council had been working on the master plan for everything south of the Lake Mead Drive, other than Green Valley Ranch.

5. During the period of time that Mr. Scheffler served as councilman, it was the policy of the city of Henderson to encourage development in the area to increase its tax base.

6. Richard MacDonald is a Henderson property developer and member of the Foothills Partners. Ltd., a Nevada limited partnership. The partnership has interests in real estate situated in the southern Green Valley area in the vicinity of property owned by Mr. Scheffler and his investment partners.

7. According to the zoning designation system specified in the Henderson Municipal Code, land may not be considered for gaming use unless it is within a gaming enterprise overlay district, a district which has been approved by the city as suitable for limited gaming and nonrestricted gaming establishments. A license or permit to engage in gaming in a particular facility or to increase the extent of gaming in a facility within that district may be procured from the business license division of the city of Henderson, subject to subsequent approval by the Council. It is unlawful to engage in gaming in the absence of the appropriate license or permit. Limited gaming in commercial zones requires a special use permit. Upon approval of an application by the Council, the Henderson Municipal Code provides for a limited use gaming permit authorizing operation of up to 199 slot machines and up to nine live table games.[2]

8. Since 1984, Ron Coury and his business partner have owned a Las Vegas-based graphics corporation identified as Suburban Graphics, a screen printing company and production facility. During the past year, Suburban Graphics has evolved to perform some but not all of the same type of work done by Las Vegas Color Graphics. Though both Mr. Scheffler's and Mr. Coury's business use Macintosh computers and other personal computer systems, Mr. Scheffler's business additionally has another and significantly more sophisticated system (Cy tech System).

9. Since 1989, Mr. Coury and his business partner have owned and operated a Henderson casino and restaurant known as Thirstbusters Casino (Thirstbusters) that was purchased in 1988. Thirstbusters is located in the ward formerly represented by Mr. Scheffler in the Green Valley district. It is situated in a C-2 (commercial) zone, in the same gaming enterprise overlay district in which three undeveloped properties owned by Las Vegas Color Graphics are also located. The closest parcel is situated approximately five miles away from Thirstbusters.

10. In June 1992, Mr. Scheffler's attorney, Mr. John Marchiano, created and for a time served as an officer of LCS Investments, a corporation formed as a holding company for the real estate investments of Mr. Scheffler and his investment partners. Mr. Marchiano subsequently appeared before the Council on behalf of Mr. Scheffler and his partners concerning matters relevant to the zoning or development of their real estate interests.

11. Shortly after Mr. Scheffler assumed public office, he requested an opinion from the Henderson City Attorney, Shauna Hughes, to advise him concerning the requirements of disclosure and abstention from voting with reference to (1) real estate he owned in the Henderson area. Ms. Hughes generally responded in a series of written opinions[3] that when the Council considered any infrastructure[4] passing in front of or zoning of real property located adjacent to Mr. Scheffler's land that would result in a material benefit to Mr. Scheffler, he would be required under the Code of Ethical Standards to disclose his property interest and abstain from voting on the matter. Because Henderson has been rapidly developing in recent years, considerable infrastructure is being constructed.

12. Regarding Mr. Scheffler's color graphics business, and specifically regarding a Council agenda item relating to a

gaming corporation that had contracted with an advertising agency for production of brochures and other marketing materials which had in turn subcontracted with other businesses, including Las Vegas Color Graphics, the Henderson City Attorney's Office informed Mr. Scheffler that because he had no privity of contract with the corporation itself, but shared only a contractual relationship with the advertising agency, he was not required to disclose his private interest in Las Vegas Color Graphics and abstain from voting on the specific matter that affected that agency's client. Ms. Hughes testified that her opinion neither addressed the size of the contract or account nor the contract's relative size to Mr. Scheffler's business. Further, the opinion was not expressly limited in application to instances in which Las Vegas Color Graphics was but one of many subcontractors to an advertising contract.

13. From time to time, when Mr.: Scheffler had questions concerning a specific parcel of property or a particular action to be taken by the Council during the course of its meetings, he would ask Ms. Hughes verbally about disclosure and voting and receive a verbal response.

Findings and Conclusions Specifically Related to Opinion No. 95-23
(Third-Party Request by Mr. Coury)

Because this Opinion consolidates three Opinion Requests, and each of those Opinion Requests raised several issues, we will render findings of fact and discuss each issue within the context of the Opinion Request in which it arose. Findings of fact for each issue will be made in consecutively numbered paragraphs, followed by discussion, analysis, and conclusions of law that will be made in unnumbered paragraphs.

1. Use of Vintage-Model Chevrolet

One of the contentions made by Mr. Coury in his request for an opinion is that Mr. Scheffler violated the provisions of NRS 281.481(1) and (2) by using his public position to operate a 1955 Chevrolet owned by Falconi's Honda for a period of several months and for which such use was obtained in exchange for a favorable vote on an automobile mall project which Mr. Coury alleged had come before the Council for approval prior to the dealership' s grant of personal use of the vehicle to Mr. Scheffler. The Commission finds as follows:

14. In 1991, Mr. Scheffler voted to approve the application of Mr. Frank Ellis, one of the owners of Falconi Honda in Las Vegas, and approximately 20 other automobile dealerships for the construction of an automobile sales mall in Henderson.

15. In 1994, Mr. Scheffler left his Lexus and its keys with Mr. Ellis as collateral for his own use of a 1955 classic Chevrolet two-door hardtop from Falconi's used car inventory on West Tropicana in Las Vegas, all the while continuing to make $900.00 per month payments on his Lexus. Mr. Scheffler desired to test out the Chevrolet before making a decision to either purchase it outright (at a price of $6,000.00 to $18,000.00) or trade in his Lexus as part of a negotiation. Re continued to drive the Chevrolet, which bore license plates issued to the Falconi Honda dealership, for approximately eight months while maintaining his license and insurance on the Lexus. Mr. Ellis was out of the country for a portion of this period, and Mr. Scheffler was busy working on his political campaign for reelection. Mr. Scheffler ultimately elected not to purchase the Chevrolet and returned it to Mr. Ellis.

The Commission concludes that while it may not be the common practice of an automobile dealer to permit a person an eight -month test drive of a vehicle with dealer license plates, there is no evidence that Mr. Scheffler utilized his position on the Council to receive preferential treatment from Falconi Honda. The facts demonstrate that the favorable vote on the automobile mall project was made **three years before** Mr. Scheffler even had access to the car. The Commission therefore determines that Mr. Scheffler did not violate NRS 281.481(1) or (2).

2. Las Vegas Convention Authority Contracts

Mr. Coury asserted that Mr. Scheffler violated the provisions of NRS 281.481(1) and (2) by using his position on the Council to influence the award of Las Vegas Convention and Visitors' Authority (LVCVA) contracts to his private company, Las Vegas Color Graphics. The Commission finds as follows:

16. In 1994, R&R Advertising of Las Vegas (R&R) contracted with the LVCVA for the production of two magazines. R&R thereafter awarded a subcontract on the project to Daycor Publishing, one of several Las Vegas publishers who had submitted a bid to R&R for the work, who in turn contracted with Suburban Graphics to perform the artwork for the magazine covers.

17. In the fall of 1994, Mr. Sakowski, a graphics designer employed by Suburban Graphics, asked Mr. Bruce DeBold, the owner and operator of Daycor Publishing, whether Suburban Graphics would be permitted to bid on any other related LVCVA projects, specifically the separation work and the pre-press negative work for the content of the magazines. Mr. DeBold responded that he could not state who was causing him to be so "politically" influenced, but that all the negative work and inside work was required to go to Las Vegas Color Graphics. Thus no other LVCVA work on that project was available for bid by Suburban Graphics. Mr. Sakowski testified that Mr. DeBold informed him that he worked under the guidance of R&R and that "his hands were tied, he had no choice...it was politics, the politics involved wouldn't permit him to bring the bulk of the work to Suburban Graphics."

18. Mr. Scheffler testified that he had never served on the LVCVA Board and that his relationship to R&R Advertising was a dependent one. According to Mr. Scheffler, once R&R, as a client of the LVCVA, determined to subcontract out some of its work, it accepted any bid it desired as long as the amount did not exceed its own bid awarded to complete the entire project. It was up to R&R to select the work, price, and quality and allocation of the subcontracts it put out to bid. Mr. Scheffler had dealt directly with R&R, who had been a customer of Las Vegas Color Graphics for approximately 17 years, but he had no ability to direct R&R to select his own graphics company to perform work on any particular contract, LVCVA or otherwise.

The issue is whether Mr. Scheffler used his position as a Henderson City Councilman to obtain work for Las Vegas Color Graphics under such contracts, distinct from the work that Suburban Graphics had under those contracts, and whether he used his position to deny Suburban Graphics other or additional work under the contracts.

The testimony at the hearing established that after Daycor Publishing won an R&R contract for the right to produce magazines for the LVCVA, Mr. DeBold determined whether any of the work required him to engage subcontractors, and if so, at what price. Daycor Publishing decided to contract with Suburban Graphics to perform the artwork for the magazine covers and Las Vegas Color Graphics to achieve the graphics work on the project. Mr. Scheffler testified that he had no knowledge that anybody from R&R had directed Mr. DeBold to award a subcontract to Las Vegas Color Graphics. Based upon Mr. DeBold's expressing to Mr. Scheffler that the project was the first of its size that he had been awarded by the LVCVA and that Mr. DeBold desired to achieve the "best quality in town, " Mr. Scheffler believed that Mr. DeBold made his own decision to hire Mr. Scheffler's business to perform the majority of the graphics work on the contract. It was Mr. Scheffler's opinion that it was only for reasons of courtesy that Mr. DeBold refrained from so informing Mr. Sakowski.

Though Mr. Sakowski testified generally to the scope of the alleged competition which existed between Las Vegas Graphics and Suburban Graphics, he had no specific knowledge regarding how the decision to allocate work on the LVCVA magazines was made. Though the reasons for Mr. DeBold' s award of the bulk of the graphics work on the LVCVA contract to Las Vegas Color Graphics may have been political, Mr. Sakowski did not define what the "political influence " in the case was, and could not testify as to the manner in which Mr. Scheffler's company had come to receive work on the project. Though Mr. Sakowski reasoned that Mr. DeBold worked under the guidance of R&R Advertising, Mr. Sakowski could not explain the relationship of R&R to the control and decision to grant LVCVA work to Las Vegas Color Graphics. Moreover, Mr. Sakowski had no information that in December 1991, when Thirstbusters' application for a limited gaming license was considered by Mr. Scheffler, that Las Vegas Color

Graphics had anything to do with the LVCVA magazines.

Based upon the lack of evidence establishing a violation of NRS 281.481(1) and (2), the Commission concludes that Mr. Scheffler did not misuse his position as a member of the Council to obtain LVCVA contracts and to preclude Suburban Graphics the opportunity to bid on any phase of the project.

3. Forsythe Francis Advertising Contracts

Another issue raised by Mr. Coury's Opinion Request was whether Mr. Scheffler violated the provisions of NRS 281.481(1) and (2) by the alleged use of his membership on the Regional Transportation Commission (RTC) to direct contracts to the Forsythe Francis Advertising Agency (Forsythe Francis), which would in turn send work to Las Vegas Color Graphics, and by dissuading the president of Forsythe Francis from handling the campaign of a political opponent. The Commission finds as follows:

19. Mr. Scheffler sat on the RTC by virtue of his membership on the Council.

20. In 1992, Forsythe Francis entered into a $1 million, two-year contract with the RTC to service the CAT system (the Las Vegas transportation system).

21. Las Vegas Color Graphics had not done any subcontracting work for Forsythe Francis on projects involving the RTC. In the previous five or six years, Las Vegas Color Graphics had performed only six other jobs for Forsythe Francis. Because Forsythe Francis had an established relationship with Laser Graphics, it seldom had occasion for business relationships with any other graphics company.

22. When the RTC contract came up for renewal in the summer of 1994, Mr. Scheffler suggested to the RTC that Forsythe Francis should be required to rebid its contract so that more printers and local vendors would be provided the opportunity to compete for work on the project. Although staff recommended the contract simply be renewed based on the RTC's former satisfaction with the CAT account, Mr. Scheffler expressed concern that Forsythe Francis conducted too much work outside of the city without even taking quotes from local businessmen. Mr. Scheffler's stated goal was to save money for the RTC and to support the local economy.

23. Prior to the RTC's vote on the matter, Mr. Steven Forsythe, president of Forsythe Francis, testified that he had spoken with RTC staff to express his company's concern that because Mr. Scheffler had his own graphics company and that part of his livelihood was derived from work obtained from advertising agencies, it would probably not be proper that Mr. Scheffler vote on the matter. Mr. Forsythe had no knowledge whether the issue was, in fact, discussed with Mr. Scheffler. Though he was present, Mr. Scheffler abstained from voting at the meeting in which remaining members of the RTC voted to put the contract out to bid.

24. After a three-month sealed bidding process, the RTC awarded the major portion of the CA T account to Forsythe Francis and granted some brochure work on the contract to Carell Printing (Carell), a local vendor who was a customer of Las Vegas Color Graphics.

25. After its award, Carell approached Mr. Scheffler to handle the film for the project at Las Vegas Color Graphics. Mr. Scheffler declined to accept the work, citing a "conflict-of-interest," but recommended that Carell contact his competitor, Laser Graphics. When Laser Graphics could not complete the project due to broken or malfunctioning machinery, Carell repeated its request to Mr. Scheffler, who at this time responded that he would accept the work, but would donate the film to the RTC. Mr. Scheffler then telephoned Mr. Zev Kaplan, the attorney for the RTC, to inform him of the arrangement.

26. Forsythe Francis also performed campaign related work for state and local races. In February 1995, Mr. David

Wood, a current member of the Council who was elected to Mr. Scheffler's seat on the Council, interviewed Mr. Forsythe to determine whether he should hire the agency to run his political campaign. At that time, Mr. Wood had not yet decided in which ward to campaign for a position. Mr. Forsythe testified that he informed Mr. Wood that if he ran against Mr. Scheffler in Ward Four, Forsythe Francis would not want to handle his race because it was not its policy to work for any political candidate who was campaigning against any sitting member of a public agency with whom Forsythe Francis had an advertising contract. Mr. Forsythe explained that political campaigns are very emotional, and he was not interested in getting adversarial with anyone. Because his company was doing work for the CAT system pursuant to a contract with the RTC, he did not want to represent any political candidate who may be directly opposed to any of the eight commissioners who currently sat on the RTC. Mr. Forsythe stated that his company had declined opportunities in the past to run other political races for the same reason. It was a policy which had been consistently followed and had nothing to do with any particular personality involved. He testified that he had not stated to Mr. Wood that if he handled Mr. Wood's campaign, Forsythe Francis would lose the RTC contract. He stated that he had never had a conversation with either Mr. Scheffler or anyone on Mr. Scheffler's behalf concerning the issue, and thus, Mr. Scheffler had not attempted to influence his decision not to handle Mr. Wood ' s campaign.

27. Mr. Wood eventually decided to challenge Mr. Scheffler in Ward Four and contracted with another advertising agency to handle his political campaign.

Based upon the facts as presented, there is no evidence that Mr. Scheffler used his position as a member of the RTC to direct graphics work for the CA T system, or any other RTC project, to Las Vegas Color Graphics. To Mr. Scheffler's knowledge, Las Vegas Color Graphics had not done any work directly for the RTC, nor had it done much business with Forsythe Francis. Further, it is clear that there was no initiative or effort undertaken by Mr. Scheffler or anyone on his behalf to dissuade Forsythe Francis from handling Mr. Wood's political campaign against Mr. Scheffler. The evidence demonstrates that Forsythe Francis declined to handle Mr. Wood's campaign not for fear that Mr. Scheffler would intervene 'and cause the RTC to cancel its CAT contract, but to comply with the company's standing policy. Consequently, the Commission finds no violation of NRS 281.481(1) or (2).

4. The Del Webb Vote

Mr. Coury's Opinion Request asked the Commission to determine whether Mr. Scheffler violated the provisions of NRS 281.501(2) and (3) by voting on November 15, 1994 to approve the Del Webb Corporation's (Del Webb) plans for development of a master planned community in Henderson known as "Village I," where Del Webb was allegedly a customer or former customer of Las Vegas Color Graphics. The Commission finds as follows:

28. When Mr. Scheffler became a member of the Council in 1990, he asked for an opinion from the Henderson City Attorney's Office regarding how to proceed generally in his public capacity if a property developer had contracted with an agency, and that agency secured a graphics contract for which Mr. Scheffler's private business was selected as a subcontractor.

29. Specifically with regard to a gaming-related matter which came before the Council in which Mr. Scheffler's graphics business was but one of many subcontractors hired by an advertising agency who had contracted with certain gaming executives to prepare brochures and other marketing material, the Henderson City Attorney's Office advised Mr. Scheffler in a written opinion that no conflict of interest existed which required him to disclose his private business interest when voting on an agenda item concerning the gaming corporation because Mr. Scheffler's contractual relationship was not with the ultimate client, but with the advertising agency. Mr. Scheffler was informed that any work Las Vegas Color Graphics obtained through an advertising agency need not be disclosed in the event that agency's client appeared before the Council unless Las Vegas Color Graphics had a direct relationship or privity of contract with that client. Consequently, Ms. Hughes opined that because Mr. Scheffler's contractual relationship was with the advertising agency and not with the client and that he was only one of many subcontractors who

contributed services to the overall marketing package of the gaming property for which the work was performed, Mr. Scheffler was not required to disclose his private interest in Las Vegas Color Graphics. Ms. Hughes testified that the facts upon which her opinion was based, however, neither addressed the size of the contract or account nor the contract's relative size to Mr. Scheffler's business.

30. Del Webb retained R&R Advertising to produce publications, brochures, and advertisements related to its proposed property development project.

31. On November 15, 1994, Mr. Scheffler voted as a member of the Council to approve Del Webb's application for the development of a retirement community and amended land use designation on approximately 564 acres located northeast of Green Valley Parkway and Horizon Ridge Parkway in the MacDonald Ranch planning area. At the time of the vote, Del Webb was not, nor had it ever been, a customer of Las Vegas Color Graphics. Mr. Scheffler testified that prior to the vote on Del Webb ' s application, he did not know that R&R had an account with Del Webb nor did he have knowledge of any agency whose client was Del Webb that would be approaching Las Vegas Color Graphics for possible work.

32. After the Council's vote on November 15, 1994, Las Vegas Color Graphics engaged in work for R&R Advertising, which had been hired by Del Webb to prepare its marketing materials.

Mr. Coury asserted that because Las Vegas Color Graphics' client list included Del Webb and several other property developers who regularly appear before the Council, an inherent conflict of interest existed between Mr. Scheffler's public duty as city councilman and private business interests because he was motivated to advocate Council approval of any project for which he anticipated that his company would be selected for production of graphics materials. Mr. Coury contended that pursuant to NRS 281.501(2) and (3), Mr. Scheffler should have disclosed and abstained from voting on Del Webb's property development because Del Webb, through R&R Advertising, was doing business with Las Vegas Color Graphics.

Mr. Coury's contention, however, requires some basis in evidence that **at the time Mr. Scheffler voted in favor of the Del Webb project** he had both the foreknowledge that R&R would be chosen by Del Webb to promote its development and that Las Vegas Color Graphics would be selected by R&R to complete the graphics portion of a subcontract. Mr. Scheffler testified that until a project was voted on and approved by the Council, the developer did not have an account for which to engage an advertising agency. According to Mr. Scheffler, when one worked through an agency, one would not always even know who the ultimate client was until he received the subcontract. Mr. Scheffler testified that prior to November 1994, he had not done any graphics business for Del Webb, and, in reliance upon Ms. Hughes' opinion, he had not voted on any matter where he had a direct relationship with a person or entity who used the services provided by Las Vegas Color Graphics.

NRS 281.501(2) and (3) require specific circumstances that require disclosure and which would require abstention if such would materially affect the independence of judgment of a reasonable person. The question of whether disclosure and abstention are required depend in these general circumstances upon whether the matter: (i) was one in which Mr. Scheffler had a pecuniary interest or which would reasonably be affected by his commitment in a private capacity to the interests of his business partners (disclosure), or (ii) was one in which the independence of judgment of a reasonable person in Mr. Scheffler's situation would be materially affected by such pecuniary interest or commitments (abstention from voting). There is no evidence in the record of Opinion Request No.95-23 with respect to any such interest or commitment to the interests of others on the part of Mr. Scheffler in the matter or which would affect his ability to vote with independence of judgment. The facts as presented do not indicate that Mr. Scheffler had knowledge of or had reasonably anticipated that he would be hired by R&R to perform graphics work for Del Webb's marketing materials at the time he voted to approve Del Webb's application for its property development. Because there is no evidence of conflict as defined in the foregoing circumstances, and those circumstances by themselves do not suggest such a conflict, Mr. Scheffler did not engage in any prohibited conduct under NRS 281.501(2) or (3)

at the time of his vote on the matter.

The Commission disagrees with Ms. Hughes' advice to Mr. Scheffler that Mr. Scheffler's status as a mere subcontractor would insulate him from ethical liability .A person should not be permitted to do indirectly what he is prohibited from doing directly. Ms. Hughes testified that the facts upon which her opinion was based neither addressed the size of the contract or account nor the contract's relative size to Mr. Scheffler's business and was not expressly limited to the situation where Scheffler was one of many vendors. Conceivably these could be factors which could make a difference, but under the facts as addressed by the city attorney's office, such were not taken into consideration. The Commission nevertheless concludes that independent of the advice provided by the city attorney's office, there was no evidence to demonstrate a violation of NRS 281.501(2) or (3).

5. Issues Relating to Mr. Scheffler's Financial Disclosure Statement

The next two issues considered in this Opinion are whether (1) Mr. Scheffler's failure to file a 1992 financial disclosure statement and (2) his failure to disclose his interests in LCS Investments and Viking Color Graphics from those financial disclosure statements he did file constituted violations of NRS 281.561 and NRS 281.571(1)(t). These questions were raised by both Mr. Coury and by Mr. Scheffler in their respective opinion requests. Mr. Coury additionally alleged that Mr. Scheffler violated NRS 281.571(1)(t) by omitting five other corporations from his financial disclosure statements. The Commission finds as follows:

33. Though Mr. Scheffler believed that his 1992 financial disclosure statement had been filed, no public record exists of such a filing. Mr. Scheffler remembered having prepared the statement himself but relied upon the city clerk to file it because the clerk had performed such functions on behalf of all Councilmembers since 1990.

34. While Mr. Scheffler identified Las Vegas Color Graphics and Autumn Graphics as businesses which provided private sources of income on his statements of financial disclosure rued while in public office, he did not include seven other entities in which he was alleged to have financial interests: LCS Investments, Viking Color Graphics, Inc., Sierra Color Graphics, Inc., Wedgewood Color Graphics, Inc., Plastic Graphics Industrial, Inc., Rhino, Inc., and Gaming Graphics, Inc.

35. At the hearing, Mr. Scheffler testified that his failure to identify both LCS Investments and Viking Color Graphics on his filed statements of financial disclosure was based upon his belief that since these companies generated no income, neither constituted a "business entity" which he was required to report pursuant to NRS 281.571(1)(t). Mr. Scheffler asserted that LCS was simply a holding company for Las Vegas Color Graphics and his real estate interests that did no business and made no money. He testified that he did not include Viking Color Graphics, the payroll company for Las Vegas Color Graphics, on any of his financial disclosure statements because it was created as a separate corporate entity owned by Mr. Scheffler and Ms. Linda Fernandez in order to insulate Las Vegas Color Graphics assets from a lawsuit. Because Viking Color Graphics was organized solely to administer the payroll for Las Vegas Color Graphics and did not produce any product, invoice, or revenue, Mr. Scheffler believed that it was not an organization or enterprise operated for economic gain within the meaning of NRS 281.571(3)(a).

36. Mr. Scheffler further testified that he omitted other corporations from inclusion on his statements of financial disclosure because they had never done any business, possessed any assets, and had, for all practical purposes, "died. " As far as Mr. Scheffler was aware, however, these corporations may still exist in a technical sense because neither he nor any of his business partners had ever taken any steps to formally dissolve them. He did not know whether any of them had filed a federal tax return. Specifically in regard to each of these corporations, Mr. Scheffler testified that Sierra Color Graphics was formed as a shell corporation but had since died. It had never done any business or held any assets. Similarly, Wedgewood Color Graphics, Inc., which was formed in the 1980s to perform work originating in Phoenix where Mr. Scheffler had a partner, but it never did any work and dissolved without ever having had any assets. Likewise, Plastic Graphics Industrial, Inc., Rhino, Inc., and Gaming Graphics, Inc. never did

business and have never held any assets.

NRS 281.561 requires public officers to file statements of financial disclosure with the Commission and with the office with whom their declarations of candidacy are filed. NRS 281.561(3) provides that every public officer, whether appointed or elected, shall file a statement of financial disclosure each year of his or her term. NRS 281.571(1)(t) mandates such disclosure to include a list of each business entity with which the public officer or a member of his household is involved as a trustee, beneficiary or trust, director, officer, owner in whole or in part, limited or general partner, or holder of any class of stock or security. "Business entity" is defined as " any organization or enterprise operated for economic gain, including a proprietorship, partnership, firm, business, trust, joint venture, syndicate, corporation or association. " NRS 281.571(3)(a). A willful failure to file a statement of financial disclosure as required by the provisions of NRS 281.561 and 281.571 or regulations adopted thereunder is a misdemeanor. NRS 281.581. The Co1lllnission finds that Mr. Scheffler's failure Lo file a 1992 statement of financial disclosure was an omission based upon neglect and was thus not a willful violation of NRS 281.561 for purposes of NRS 281.581.

The Commission concludes that with the exception of LCS Investments and Viking Color Graphics, Mr. Scheffler's failure to disclose companies which he incorporated was not violative of the financial disclosure laws because such companies expired without performing any function that benefited Mr. Scheffler's. His failure to specify LCS Investments and Viking Color Graphics, however, was based on his erroneous belief that NRS 281.571(1)(t) only required him to disclose businesses which made money, and because neither of these businesses made money in the traditional sense, they were not "business entities" required to be reported within the meaning of the statute. At the hearing on this matter on August 3, 1995, the Commission noted that Mr. Scheffler's reasoning that such companies were simply "holding" companies was not dispositive of the issue. Both LCS Investments and Viking Color Graphics were development businesses which were relevant to the income resulting from Mr. Scheffler's property and business interests. Though the payroll company may have been created for purely administrative or legal reasons, it was nevertheless an enterprise operated for economic gain because it was a service company that supported Mr. Scheffler's principal business, Las Vegas Color Graphics. LCS Investments and Viking Color Graphics were and are relevant to Mr. Scheffler's commercial activities, and we find that they should have been disclosed as "business entities" pursuant to NRS 281.571(1)(t). Mr. Scheffler's failure to include LCS Investments and Viking Color Graphics on his financial disclosure forms was based upon his mistaken belief described above.

6. Mischaracterization of Real Property

Mr. Coury contended that Mr. Scheffler violated NRS 281.481(2) and (9) by using his public office to force, influence, or mislead Council staff to mischaracterize the location and size of acreage owned by Las Vegas Color Graphics for which he was seeking approval of a limited gaming use permit application from the Council in May and June 1992. Mr. Coury alleged that fraud was perpetuated by Mr. Scheffler because he failed to clarify the true location of the property at subsequent public hearings on the matter.

37. On May 6, 1992, Mr. Scheffler's partner in Las Vegas Color Graphics, Mr. Charles Harris, filed three permit applications with the City of Henderson Planning Department for the operation of limited gaming at property at 749 and 799 Green Valley Parkway and 1440 Horizon Ridge Parkway, all vacant land. The existing zoning for all three properties, which were situated in a Gaming Enterprise Overlay District, were classified RS-2-G (Single Family Residential with Gaming Enterprise Overlay) district. Mr. Harris submitted the application forms because Mr. Scheffler was too busy at that time to do so. The named applicant for the use permits was identified as Las Vegas Color Graphics.

38. In a letter to the City of Henderson dated May 6, 1992, Mr. Scheffler's attorney, Mr. John Marchiano, vouched for the accuracy of Las Vegas Color Graphics' use permit application. Mr. Marchiano stated that the application conformed with all city of Henderson ordinances and regulations, that the subject property lay within the gaming overlay district, and that the application was consistent with the policies established by the Council.

39. Neither Mr. Harris nor Mr. Scheffler physically designated or identified the project addresses of the properties specified in the permit applications; these were subsequently assigned by a technician in the Henderson City Planning Department (Planning Department). Ms. Hughes testified to the general methodology followed by city staff in assigning an address for undeveloped property. When undeveloped property that is affected is not built on a street, requests for zoning changes, limited use permits, or other permits originate through an application with the Planning Department. Based upon the legal description or other information pertaining to the general location of the land with which they are provided, the Planning Department staff determines the address of the property through computers and by reference to undesignated streets or streets which have been officially adopted by the Council. Later, when addresses become available and a street is actually put in and numbers are assigned, that information will be entered into the file. Consequently, when public notices concerning action on undeveloped property are mailed out or appear in the local newspapers, the location of the parcel in the application will be described with an accompanying map that includes locational arrows. In the instant case, the only personal knowledge Ms. Hughes had concerning the parcel's location was obtained through a conversation with the city planning technician who had assigned the particular addresses to Las Vegas Color Graphics' applications. Ms. Hughes testified that when she questioned the technician as to whether she had ever had personal contact with any permit applicants, the technician responded "no" and that the application in issue was a standard application. The technician stated to Ms. Hughes that in regard to that application, she did what she had always done, which was to fill in the address based upon her projections.

40. The address assigned to the use permit application for property located at 749 Green Valley Parkway did not exist at the time the application was filed. The land for which the application was made actually fronted on a proposed street identified on the Clark County Assessor's map as Augie Street. The map indicated that Las Vegas Color Graphics' property was set back from Green Valley Parkway by approximately 336 feet, separated by an eight acre parcel owned by someone else, which other property actually abutted the street designated on the application.

41. On June 4, 1992, the Henderson Planning Commission (Planning Commission) considered Las Vegas Color Graphics' application for a limited gaming and limited gaming liquor facility which, as depicted on the Planning Commission's discussion sheet for the meeting, was located at 749 S. Green Valley Parkway. At no time during public hearing of the matter did it appear that city staff, whom Mr. Coury claimed must have certainly discovered the alleged fraud, made any disclosure to the Planning Commission concerning the true location of the parcel that was the subject of the application. The Planning Commission recommended denial of the project by a vote of 5 to 2.

42. On the Council's agenda for its meeting of June 16, 1992 were nine items relating to Las Vegas Color Graphics' applications for zoning changes, comprehensive plan amendments, and limited use gaming permits with respect to each of three separately described parcels of property. The agenda characterized the location of these parcels at 749 S. Green Valley Parkway, 799 S. Green Valley Parkway, and 1440 Horizon Ridge Parkway. Mr. Scheffler was present at the hearing, accompanied by Mr. Marchiano.

43. On June 16, 1992, the Council approved a use permit (U-26-92) to allow Las Vegas Color Graphics' operation of a limited gaming and liquor facility consisting of 6,400 square feet on 5.48 acres in a proposed CC-G (Community Commercial with Gaming Enterprise Overlay) district at 749 S. Green Valley Parkway. The approval was subject to several conditions which included approval of a comprehensive plan amendment to the community and neighborhood shopping land use classification for the subject parcel and approval of a zoning classification amendment to the CC-G (Community Commercial with Gaming Enterprise Overlay) district or other appropriate commercial classification for the subject parcel. Mr. Scheffler abstained from voting on the application.

44 .At no time during any public hearing of the matter did either Mr. Scheffler or staff disclose that the property's location had been misidentified.

According to Mr. Coury, it would have made a great deal of difference to surrounding property owners if they had received previous public notice that the property which was the subject of Las Vegas Color Graphics' application was on Augie Street, not Green Valley Parkway. Augie Street provides residential access, whereas Green Valley Parkway is a major thoroughfare serving commercial uses of which any additional use would likely be unopposed by area residents on the basis that II Green Valley Parkway was commercial anyway. II Mr. Coury contended that if the public had been made aware that Augie Street was the actual location upon which a new casino was proposed, local residents would have been put on notice that the permit application affected a small residential street and would have mounted greater public protest. Mr. Coury argued that Mr. Scheffler's application was fraudulent on its face and constituted a gross misdemeanor pursuant to NRS 197.130 (false reports by public officers) and NRS 197.140 (public officer making false certificate). He further contended that "the act of providing a fraudulent application is compounded by the apparent collusion and conspiracy of the staff employed by the City of Henderson to accommodate the desires of one of their Councilmen."

At the hearing, Mr. Scheffler denied that either he or his business partner had done anything with respect to the manner in which city staff characterized the property on the maps which were to be the subject of the public notice. He further denied using his public office to conceal the proper location or influencing the staff' assignment of an address for the affected property. Finally, Mr. Scheffler reasoned that even had the location been correctly identified for purposes of public notice, little public protest would have occurred because whatever the address, the property was located in the middle of the desert, near no one.

The Commission concludes, however, that even assuming tile assigned address of Las Vegas Color Graphics' permit application was erroneous, and further that the public was in fact misled as a result, the issue is whether Mr. Scheffler used his public office as city councilman to engage in deceptive behavior and to force or influence city staff to engage in activity directly or indirectly which was misleading. Based upon the testimony provided by Ms. Hughes, there is no evidence that Mr. Scheffler or anyone on his behalf engaged in any activity to mislead or deceive anyone as to the location of the property. The line upon the application form designated "Project Address II was left blank pending assignment of a street and number by a Henderson Planning Department technician employed in that department whose standard practice it was to do so.

There is no evidence in the record to substantiate Mr. Coury's belief that Mr. Scheffler mislead or caused city staff to mischaracterize or "screen" the true location of the affected property and prevent adequate notice of what the Planning Commission and Council would be voting on in order to gain some form of advantage. There is also no evidence to support Mr. Coury's contention that staff's failure to advise both the Planning Commission and Council of the misleading information was influence by Mr. Scheffler. Because there is no such evidence in the record, and the circumstances by themselves do not permit such an inference to be drawn, we find no violation of NRS 281.481(2) or (9).

7. Vote Against Thirstbusters' Limited Gaming License

Another issue raised by Mr. Coury is whether Mr. Scheffler violated NRS 281.481(2) and NRS 281.501(2) and (3) by opposing and voting on Thirstbusters' request for a special use permit and limited gaming license at the Council's hearing of the matter on December 19, 1991. Mr. Coury was and is the owner of Thirstbusters, a restaurant and tavern. Mr. Coury contended that Mr. Scheffler was required to disclose the following circumstances as conflicts of interest and to recuse from voting on the matters, namely (1) Mr. Coury's graphics business, Suburban Graphics, was in direct competition with Mr. Scheffler's private business interest in Las Vegas Color Graphics, and (2) six months following Mr. Scheffler's participation in the unanimous Council vote to deny Thirstbusters' requested for increased gaming, Mr. Scheffler appeared before the Council to request use permits to conduct gaming on property at three limited gaming licenses in three different locations in Henderson, which would result in direct competition with Thirstbusters. The Commission finds as follows:

45. In 1988, Thirstbusters was licensed as a restaurant and tavern facility. It serves low-priced meals in a family restaurant atmosphere, offering a gourmet-style menu as well as a 24-hour coffee shop menu. The establishment is located on North Valle Verde Drive in the Valley Verde Shopping Center on Sunset Road and North Valle Verde Drive in the Green Valley District. It fronts on Sunset Road, a major thoroughfare and the most highly used road in the Henderson area with the exception of Boulder Highway. Thirstbusters is surrounded on three sides by other commercially zoned property, including a 7 -11 directly across the street, and on one side by industrially zoned property. The nearest residential development is known as Green Valley Highland Condominiums, located approximately 400 feet to the south.

46. Subsequent to its licensure as a restaurant and tavern facility, Thirstbusters applied for a limited gaming license and authorization to operate a casino. At a hearing on the matter before the Henderson Planning Commission, approximately 300 to 500 citizens attended to protest the proliferation of gaming in the neighborhood. Mr. Scheffler, a member of the neighborhood and not at that time a member of the Council, paid for signs which stated: "Stop the Casino." Following a 7-0 vote by the Planning Commission to deny Thirstbusters' application, the Council unanimously voted to deny operation of a casino, but subsequently granted Thirstbusters a restricted gaming license to operate 15 slot machines.

47. On December 17, 1991, Mr. Coury appeared before the Council in a new attempt to obtain a special use permit for a limited gaming license to expand its operation to include up to 199 slot machines and up to nine live table games. At the time of the hearing, Mr. Scheffler and his partners owned three undeveloped properties at Green Valley and Horizon Ridge Parkways which were within the same commercial zone and gaming overlay zone that Thirstbusters was situated (See Issue 5 above). The properties were among a whole group of lots Mr. Scheffler and his partners had purchased on speculation and for "flipping" purposes. The parcel in the closest proximity to Thirstbusters was located approximately five miles away.

48. Mr. Coury testified at the Council hearing that there would be no increase in the size of Thirstbusters' facility, no change in the basic use, and no increase in the restaurant or bar seats. He presented testimony to the Council from various witnesses -including a real estate appraiser, traffic and parking expert, policeman, marketing research representative, University of Nevada Las Vegas (UNLV) business and economic researcher, and two priests -to establish that the surrounding community was not opposed to the application and that its approval would not result in any adverse effects.

49. Mr. Coury also commissioned a survey of registered voters in Green Valle who resided within one mile of Thirstbusters. According to the survey of 312 randomly selected registered voters in Green Valley who resided in an area within one mile of Thirstbusters, 75% of the respondents in that radius did not oppose expanded gaming in an existing casino or "establishment" (the respondents were not informed that the survey pertained specifically to Thirstbusters). These findings were allegedly comparable to previous surveys of all Clark County residents by the LVCVA and UNLV taken by researchers at the Center for Business and Economic Research.

50. Several Green Valley area residents who lived adjacent to Thirstbusters testified during public comment at the Council hearing that they were opposed to the possible expansion of slot machines at Thirstbusters because they were against the proliferation of gaming in the area. They chose to live in the bedroom community of Green Valley to get away from large- scale commercial development, attempting to find respite from the gaming environment. They feared that increased gaming "in their backyards" would serve only to exacerbate traffic problems and noise as well as to depreciate their property values. The residents believed that a casino was not compatible with the neighborhood community. Mr. Scheffler explained that an overwhelming number of voters in his district had contacted him to express their disapproval of limited gaming in the area. Mr. Scheffler claimed that no one had called him in support of Thirstbusters. The other councilmen had received some calls and letters in favor, but the majority of residents were against it.

51. Toward the end of the Council meeting, Mr. Coury's attorney, Mr. Alan Buttell, stated that because a competition existed between Mr. Scheffler's and Mr. Coury, s graphic design businesses in the processing of computer files for the printing industry, Mr. Scheffler had a conflict of interest which prohibited him from voting on Thirstbusters' gaming application. Mr. Scheffler responded that he had never bid against Mr. Coury in his entire life and had been in business for 14 years. He stated to Mr. Buttell as follows: " And if you can show me one instance where I have ever bid against you, I would like you to do that for me. " Mr. Buttell stated he could not show that instance but wanted to raise the issue "just in case. " Mr. Scheffler then requested advice as to how to proceed from City Attorney Hughes.

52. After immediately conferring with and being advised by Ms. Hughes that he was not required to abstain from voting on the matter because the alleged business competition was not relevant to the issue of gaming licensure, Mr. Scheffler voted with a unanimous Council to deny Mr. Coury, s request. The motion to support the Planning Commission' s recommendation and deny the permit application was made by Councilman Williams and seconded by Councilman Harris. All five Councilmembers addressed the merits of the issue and stated their reasons for voting against Thirstbusters' request. Although each expressed their appreciation for the professional manner of Mr. Coury's presentation, they commented on the overwhelming calls and letters received opposing the issue and the general community opposition to the expansion of gaming at Thirstbusters.

53. In April 1995, Mr. Ron Zayas, a California customer of Suburban Graphics and an independent computer graphics consultant (who ran a firm that specialized in high resolution graphics and whose jobs were routinely bid through both Mr. Coury's and Mr. Scheffler's companies), wrote Mr. Coury to inform him of the following four clients that had been presented with quotes from both Las Vegas Color Graphics and Suburban Graphics: Affordable America Vacations (Affordable), Bally's Casino (Bally's), Datel Computers (Datel), and Unicorn Software (Unicorn). Mr. Zayas wrote that he based his quotes for customers on the amount of risk they wished to incur versus costs: " A customer who wanted to be on the forefront of technology was trained to produce artwork composed on a PC or Mac and designed to be output at Suburban; a less risky customer could use the bridge technology available at Las Vegas Color and pay somewhat more for the convenience. " He stated that while Affordable chose to go exclusively with Suburban Graphics, Datel and Unicorn mixed their opinions depending on the job. Bally's started out with Las Vegas Color Graphics and eventually used Mr. Zayas' consulting to switch over to Suburban Graphics. With regard to a final customer, Nevada Sports Schedule, Mr. Zayas reported that Mr. Scheffler was explicitly aware that such business was an active Suburban Graphics customer that had a potentially high-volume account.

54. Independent of the information provided him by Mr. Zayas, Mr. Sakowski, who was in charge of research and development at Suburban Graphics, testified that he had no knowledge concerning any specific job that Suburban Color Graphics and Las Vegas Color Graphics had in common or how often, or the extent to which, both companies competed on a "head to head" basis because bids were generally sealed and lists of private customers were not published. Mr. Coury testified that it was not until he had a conversation with Mr. Zayas that he was he made aware that Suburban Graphics was the only other company bidding on a given job with Las Vegas Color Graphics. Until that point in time, Mr. Coury had no knowledge that his own screen printing company was so heavily involved in the photographic and color separation industry. Mr. Scheffler testified that although he believed that Mr. Zayas had asked Las Vegas Color Graphics to do a couple of jobs, he did not remember ever working with him before November 1991.

55. In June 1992, six months following his vote to deny Thirstbusters' application for expanded gaming on its premises, Mr. Scheffler appeared before the Council to request that the zoning of three undeveloped properties owned by Las Vegas Color Graphics at Green Valley and Horizon Ridge Parkways be changed from single family residential to community commercial and to apply for a comprehensive plan amendment and operation of limited gaming and limited gaming liquor facilities at these properties. (*See*, Issue 6 above).

Mr. Coury's first argument was that Mr. Scheffler was aware that if Thirstbusters' were to generate more income

resulting from an increased number of slot machines, Mr. Coury could or would invest those profits into his own **graphics** business and be able to challenge Mr. Scheffler's company on a more direct and greater level. The Commission must determine whether the alleged competition between the graphics businesses provided a sufficient nexus to require disclosure in considering the gaming application in the first place, and secondly, whether the independence of judgment of a reasonable person in Mr. Scheffler's situation would be so materially affected by those circumstances such that he was required to abstain from voting on the matter.

Based upon the contents of the April 1995 letter written to Mr. Coury by Mr. Zayas, Mr. Coury asserts that Mr. Scheffler had knowledge during the period leading up to November 1991 that his own company was competing for business with Mr. Coury's operation, and thus, that Mr. Scheffler had lied at the December 1991 Council meeting when he stated that Las Vegas Color Graphics had never bid on the same project bid by Suburban Graphics. Mr. Coury further contended that even assuming the two companies do not know what specific jobs are in issue at the time they are approached for bids, nor the identity of another company bidding on a project, Las Vegas Color Graphics and Suburban Graphics were in a constant competitive situation because they were in the same type of business providing common services to a common customer base. In response, Mr. Scheffler testified that although both companies could probably perform the same work in 1991, he did not foresee at that time competing with Suburban Graphics directly for the same work. He stated he did not have any idea that the technology would change over the next four years. As he looked at things in 1991, he did not envision any area in business where Las Vegas Color Graphics and Suburban Graphics would become direct competitors. Further, although during the past year Suburban Graphics has evolved to perform some of the same type of work accomplished by Las Vegas Color Graphics, testimony at the Commission hearing established that Las Color Graphics and Suburban Graphics did not perform **exactly** the same kind of work. According to Mr. Coury, 95% of what Las Vegas Color Graphics does, Suburban Graphics does also, while only 20% of what Suburban Graphics does, Las Vegas Color Graphics does also. Suburban Graphics was allegedly more diversified, having a sign division as well as a silk-screening division. According to Mr. Scheffler, there are only two other graphics businesses in town with whom he competes on both a price and quality basis: Southwest Color Graphics (a competitor for approximately 10 years) and Image Works (a competitor for about two years). He testified that Las Vegas Color Graphics could not compete with Suburban Graphics on anything other than quality, because Mr. Scheffler could not even match Mr. Coury's prices, which were 10-30% below what Las Vegas Color Graphics charged.

Mr. Coury nevertheless argued that the competition he asserted to exist between Las Vegas Color Graphics and Suburban Graphics constituted a conflict of interest that should have prohibited Mr. Scheffler from voting on Thirstbusters' gaming application, because if Mr. Scheffler could succeed in preventing Mr. Coury's restaurant and bar from increasing its revenues, which would result from expanded gaming at Thirstbusters, Mr. Scheffler could limit Mr. Coury’s capability to make the financial investment in Suburban Graphics necessary to compete with Las Vegas Color Graphics. The graphics business has certain capital requirements to enable it to compete technologically. The type of equipment used is very expensive. Mr. Scheffler testified to having better equipment than Suburban Graphics which enabled him to produce better quality service. Thus, had the number of slot machines at Thirstbusters been increased, Mr. Coury would have had more capital to improve Suburban Graphics.

There was no evidence, however, that Mr. Scheffler had knowledge that Mr. Coury would invest Thirstbusters' increased profits in Suburban Graphics and that as a result, Suburban Graphics would compete technologically with Las Vegas Color Graphics. The Commission agrees with Ms. Hughes' determination that a relationship between the two graphics business (as it related to Mr. Scheffler's ability to vote with independence of judgment on Thirstbusters' gaming request) was too attenuated to have either required his disclosure or abstention. Though Mr. Coury argued that other Councilmembers had only been following Mr. Scheffler's lead when they voted to deny Thirstbusters' application, the minutes reflect that the motion to support the Planning Commission' s recommendation and deny Thirstbusters' request was made by Councilman Williams and seconded by Councilman Harris, and the vote was not taken until after each of the five Councilmembers had addressed the merits of the issue, stated his individual reasons for voting against the request, and commented upon the professional manner of Mr. Coury's presentation.

Because the foregoing circumstances do not establish or create an inference of any conflict of interest which would have affected Mr. Scheffler's ability to vote on the matter, no violation of NRS 281.501(2) or (3) resulted from his failure to disclose and abstain from voting on Thirstbusters' application. We cannot assume that Mr. Scheffler's actions on the Council were motivated or prompted by his awareness of a growth in the graphics industry that would lead to Mr. Coury's diversification into those areas and require large sums of money to purchase certain equipment in order to better compete with Las Vegas Color Graphics. It would not be reasonable to conclude within the meaning of NRS 281.481(2) that Mr. Scheffler used his public position to secure or grant any unwarranted privilege, preference, exemption or advantage for himself, Las Vegas Color Graphics, or his business partners.

Mr. Coury also contended that Mr. Scheffler's ownership of real property in Henderson for which Mr. Scheffler eventually sought zoning for limited gaming should have required disclosure and abstention by Mr. Scheffler from voting on Thirstbusters' application for expanded gaming privileges. We conclude that Mr. Scheffler's ownership of real property in the vicinity of Thirstbusters for which he anticipated procuring his own limited gaming license constituted an interest of a pecuniary nature that required disclosure of his interest in a potentially competitive property. It was only six months after Mr. Coury's appearance before the Council for Thirstbusters' application that Mr. Scheffler appeared before that same body to apply for the same use as a gaming property for which Thirstbusters had been denied.

The Commission concludes that at the time Mr. Scheffler voted to deny Thirstbusters, request to increase its number of slot machines, he intended or at least contemplated the development of his own properties in a manner which might prove competitive with Thirstbusters. It is unlikely that a reasonable person in Mr. Scheffler's situation would have considered and voted upon Thirstbusters' application without anticipating the impact Thirstbusters might have upon Mr. Scheffler's own properties. Though Mr. Coury's telephone surveys of registered voters concerning expanded gaming at his restaurant were restricted to a one-mile radius of Thirstbusters, it is not unreasonable to conclude that the approximate five-mile distance existing between one of Mr. Scheffler's parcels and Thirstbusters is within the same zone of competition for a gaming business. Those circumstances, in addition to requiring disclosure, also required Mr. Scheffler's abstention from voting as they would have materially affected the independence of judgment of a reasonable person in Mr. Scheffler's position. That the properties owned by Las Vegas Color Graphics were subsequently sold without having been developed does not alter our analysis.

Under these circumstances, NRS 281.501(2) and (3) required that Mr. Scheffler ought to have both disclosed his private property interests and commitments to the interests of his business partners relative to the matter and abstained from voting on the matter. Therefore, Mr. Scheffler violated NRS 281.501(2) and (3) by failing to disclose and abstain from participating in the Thirstbusters matter.

8. Vote Against Settlement Agreement

The next matter to be decided is whether Mr. Scheffler violated the provisions of NRS 281.501(2) and (3) by failing to disclose or abstain on the Council's vote concerning approval of a settlement agreement between Thirstbusters and the City of Henderson which granted Thirstbusters a limited gaming license for the operation of 40 slot machines. Based upon the same arguments as described in Issue 7 above, Mr. Coury requested the Commission to draw the conclusion that Mr. Scheffler improperly considered and voted against the agreement because he was motivated by desires to prevent Thirstbusters' from expanding in a financial fashion and to limit the competition for gaming which he anticipated would result between Thirstbusters and property owned by Las Vegas Color Graphics, for which latter business the Council had approved an application for a use permit to allow the operation of gaming, just one week prior to the vote on the Thirstbusters settlement agreement. The Commission finds as follows:

56. Following the Council's denial of Mr. Coury's application to obtain a limited gaming use permit for the operation of up to 199 slot machines at Thirstbusters (See Finding of Fact #52 above), Mr. Coury filed a lawsuit against the

City of Henderson petitioning for judicial review in the Clark County District Court. Settlement discussions ensued during May of 1992.

57. Mr. Coury negotiated a settlement agreement with the City of Henderson in which Mr. Coury agreed to accept a limited gaming use permit authorizing Thirstbusters operation of 25 additional machines (thereby increasing the number of machines on its premises to 40) and agreed not to request any table games. The agreement provided that neither Mr. Coury nor his business partner would ever come before the Council to require any increase as long as they owned Thirstbusters. According to the terms of the settlement, if the business were to be sold, the new owner would be required to come before the Council for approval of the transfer of the gaming license itself pursuant to section 4.32.170 of the Henderson Municipal Code. Further, should the new owner attempt to obtain additional machines, it would require a new application. The settlement agreement was prepared by Mr. Coury's attorney, Mr. But tell, and the Henderson City Attorney's Office.

58. On June 16, 1992, the Council had approved the aforementioned application of Las Vegas Color Graphics for a use permit to allow its operation of gaming and liquor facility at 749 S. Green Valley Parkway in Henderson.

59. On June 25, 1992, the Council cast a 4-1 vote to approve Mr. Coury's settlement with the City. Mr. Scheffler did not disclose his potentially competitive property interest at the time the settlement agreement was considered and cast the only vote opposing it. He did not consult with Ms. Hughes immediately prior to making such vote because he did not consider it a problem based upon their previous discussions.

As we have already concluded, the competition between Suburban Graphics and Las Vegas Color Graphics provided too attenuated a basis to require Mr. Scheffler to abstain from voting on Thirstbusters issues, including the matter of Thirstbusters' settlement agreement. (See Issue 7 above). Similarly, as we have already concluded, the potential competition between Thirstbusters' gaming and the potential for gaming on Las Vegas Color Graphics' properties **did** require Mr. Scheffler's disclosure and abstention and should have required the same for his consideration of Thirstbusters' settlement agreement for the same reasons. (See Issue 7 above). With respect to the relationship of his own parcels with the business of Thirstbusters, the Commission finds that Mr. Scheffler was required to disclose his interests and to abstain from voting on the Council' s consideration of Thirstbusters' settlement agreement with the City of Henderson. Mr. Scheffler voted on the settlement agreement with the **full knowledge** that only **one week earlier** he had applied for and been approved a use permit to allow limited gaming and limited gaming liquor operation in the same gaming overlay district in which Thirstbusters, was located.

Notwithstanding Mr. Scheffler's stated belief that the city would win Mr. Coury's lawsuit and his motivation to vote for the desires of his constituents in the neighborhood adjacent to Thirstbusters to restrict the number of slot machines at Thirstbusters to only 15, the facts reflect that a conflict of interest existed between Mr. Scheffler's private property interests (as well as those of his business partners to whom he was committed) and his public duties as city councilman which required him to disclose these interests pursuant to NRS 281.501(3) and prohibited him from voting on the agreement under NRS 281.501(2).

9. Mr. Scheffler's Relationship with John Marchiano and Shauna Hughes

The final matter brought to the Commission' s attention by Mr. Coury, as well as by Mr. Scheffler in his own request for an opinion, was whether Mr. Scheffler's relationship with Henderson City Attorney Shauna Hughes or attorney John Marchiano violated any of the provisions of NRS 281.481 or required disclosure or abstention on any related matters pursuant to NRS 281.501(2) or (3). The Commission finds as follows:

60. Mr. John Marchiano was a former City Attorney of Henderson who then moved into the private practice of law. Mr. Marchiano has appeared before the Council representing the interests of various Henderson property developers on real estate related matters.

61. Sometime between 1988 and October 1991, owners of Renata's, represented by Mr. Marchiano, applied to the Council to build a supper club in which they anticipated placement of 199 slot machines. The site was on Sunset Road, approximately 1,000 feet from Thirstbusters' location. Though the community did not consider the proliferation of gaming at Renata's any more appealing than that which had been proposed by Thirstbusters, opposition in the neighborhood was not as large. Unlike Thirstbusters, which was situated at the "mouth" of the residential community, Renata's was situated on a main corridor around the corner from Thirstbusters, occupying a space that was somewhat set back. Following an arbitration in which Renata's was authorized to commence business and operate 40 slot machines, approval of a subsequent application by the Council permitted it 75 more machines.

62. Mr. Arrendale testified that after several meetings and" negotiations" between Renata's and the Green Valley Community Association, during which time Renata's proposed to include a bowling alley within its anticipated facility, the citizens in the area acquiesced. Recognizing the benefit that a bowling alley would contribute to the community, the neighborhood was willing to engage in a trade-off as long as it had some say in the manner in which the facility would be configured. Representatives from Renata's allowed members of the community to sit in on planning meetings in which it was agreed that the gaming would be put in one area and the bowling alley in another portion of the building. Mr. Arrendale related his conversations with Renata's representatives as:

...just to build the place that has gaming, gaming, drinks and food, is not enough. You can get a restaurant, you can get a bar and you can go gamble. But, you know, if that's all you're going to offer, then we're going to fight it and that's the whole slot arcade idea and we were against that. We've said that all along. We had fought some places harder than others. There's no question about that. However, in the end, we were always given something back and it, it's made the community a little bit better place and we have not had to come back time and time again.

63. In 1989, Mr. Coury retained Mr. Marchiano to act as counsel for Thirstbusters.

64. On January 8, 1991, the Council considered the use permit request (U-32-90) of Sunset Mountain Plaza Partners (Sunset Mountain) to allow limited gaming and limited gaming liquor operation in a CC-G (Community Commercial with Gaming Enterprise Overlay) district at 4660 E. Sunset Road, generally located northwest of Sunset Road and Mountain Vista Road in Henderson.

65. The proposed tenant of the property was Mr. Russ Jacoby, Chief Executive Officer of Inn Zone Operations, who owned other Inn Zone operations throughout the Las Vegas Valley. Mr. Jacoby requested a minimum of 75 slots for placement at the Sunset Road location in which he proposed the operation of a business to be called "The Major League Bar & Grill " (Major League). Mr. Jacoby informed the Council that the proposed facility would have a full service menu equal to the Inn Zone with a 75-seat dining room as well as other seating areas where food may be served. He stated it would "not be a beer joint by any stretch of the imagination" and that because the main entrance to the building would be through the restaurant, not through the slot machine area, patrons would not be exposed to gaming unless they so desired. Mr. Jacoby stated that his business was anticipating costs in excess of $1 million.

66. According to the Council minutes of this meeting, Mr. Scheffler was concerned about the parking situation in the area and stated that "things didn't slow down much" at 6:00 p.m. when he shopped at the shopping center where the Major League would be operated. He said he thought it would be unfair to Renata's if Major League's application was approved.

67. City Attorney Hughes said there was some confusion about why an establishment like Renata's would be treated one way and the Major League another. She explained that the definition of "supper club" required a minimum capital investment in the property of $250,000 exclusive of land, building, parking, kitchen, bar, and alcohol dispensing and gaming devices. It also required that 60% of gross revenues, exclusive of gaming, be derived from service of meals during an average six-month period. Ms. Hughes informed the Council that a supper club could be

issued a limited gaming license, but a limited gaming license might be issued to businesses other than a supper club.

68. Mr. Scheffler moved to deny Major League's application and directed staff to follow up on the possible revision of the gaming ordinance in relation to the number of slots permitted for a limited gaming and limited gaming liquor operations. The Council unanimously passed Mr. Scheffler's motion.

69. In October 1991, Renata's applied for a limited gaming license to expand its number of slot machines from 75 to 199 machines. Mr. Marchiano informed the Council that the appearance was based on a soon to be implemented state law which prohibited gaming expansion beyond 15 machines unless the facility had 200 hotel rooms. Unless applications were made prior to its effective date or attempts made to become " grandfathered " in under the law, a gaming establishment having less than 200 hotel rooms would be limited to 15 slot machines. Mr. Scheffler supported Renata's application.

70. On December 17, 1991, Mr. Coury appeared before the Council in an effort to similarly expand the number of machines on Thirstbusters' premises. Immediately prior to the Council hearing on the matter, Mr. Marchiano withdrew as counsel for Mr. Coury. Mr. Scheffler joined in a unanimous decision by the Council to deny Thirstbusters' application.

71. Sometime in June 1992, Mr. Scheffler retained Mr. Marchiano as his attorney. On or about June 16, 1992, Mr. Scheffler appeared before the Council represented by Mr. Marchiano on the applications of Las Vegas Color Graphics for zoning changes, comprehensive plan amendments, and limited use gaming permits with respect to each of three separately described parcels of property. As previously discussed, one of these parcels was situated approximately five miles from Thirstbusters. (See Finding of Fact #47). Subject to various aforementioned conditions, the Council approved Las Vegas Color Graphics' application for a limited use gaming permit for property described at 749 S. Green Valley Parkway. Mr. Scheffler did not vote upon this matter.

72. In June 1992, Mr. Marchiano created, and for a time served as an officer of, LCS Investments, a corporation formed as a holding company for the real estate investments of Mr. Scheffler and his business partners. Mr. Marchiano was listed as the resident agent on the incorporation documents. He subsequently appeared before the Council on behalf of Mr. Scheffler and his investment partners concerning matters relevant to the zoning or development.

73. On June 25, 1992, Mr. Scheffler cast the sole opposing vote in the Council's approval of a settlement agreement between Thirstbusters and the City of Henderson (*See*, discussion of Question 8 above).

74. Shauna Hughes is married to attorney Edward B. Hughes. For approximately seven years, Mr. Hughes rented office space from Mr. Marchiano to conduct his own private law practice in the same building. At the present time Mr. Hughes is renting other space in a different building in a different location. Mr. Hughes and Mr. Marchiano were never partners or otherwise affiliated.

75. Prior to her appointment as Henderson City Attorney by Mr. Marchiano, Shauna Hughes served as a deputy city attorney. Prior to and since her public employment, Ms. Hughes had no professional relationship with Mr. Marchiano other than in her capacity as deputy city attorney and city attorney. Although she interacted with him quite frequently in her public capacity when he appeared before the city council representing the interests of various developers in Henderson, she had never shared any personal or business interests with Mr. Marchiano.

76. Shauna Hughes' attorney-client relationship with Mr. Scheffler was limited to the duties he engaged in as Henderson City Councilman. She offered him no advice other than in his capacity as councilman.

The final question of conflict of interest raised by Mr. Coury was whether Mr. Scheffler was influenced to vote in favor of a client of Mr. Marchiano because of Mr. Scheffler's relationship with Mr. Marchiano. Mr. Coury argued that Mr. Scheffler should have made full disclosure of the nature and extent of his relationship with Mr. Marchiano at the time he considered Thirstbusters' request to increase the number of slot machines on its premises (December 17,1991) and at the meeting in which the Council reviewed Thirstbusters' settlement agreement with the City (June 25, 1992). Mr. Coury argued that the relationship between Mr. Scheffler and Mr. Marchiano was such that Mr. Scheffler should have abstained from voting on those matters.

The Commission cannot agree with Mr. Coury's assertions. The Commission reviewed Mr. Scheffler's course of conduct on the Council when it considered the gaming license applications made by clients of Mr. Marchiano and clients not represented by Mr. Marchiano, including Thirstbusters. The record showed that both prior to and during Mr. Scheffler's membership on the Council, Renata's made various appearances before the Council to request limited gaming licenses and liquor operation at its facility. Renata's was in the same gaming overlay district and was within the five-mile radius as the Major League, Thirstbusters, and property owned by Las Vegas Color Graphics. Mr. Scheffler's voting record showed: (1) in January 1991, he voted to deny Major League's application to operate 75 machines in its facility (not represented by Marchiano); (2) in October 1991, he voted to approve the request of Renata's (represented by Mr. Marchiano) to increase the number of slot machines from 75 to 199; and (3) in December 1991, he voted to deny Thirstbusters' application for a limited gaming license to operate up to 199 slot machines and up to nine live table games (Mr. Marchiano had withdrawn as counsel just prior to the Council's hearing).

In June 1992, Mr. Marchiano began representing Mr. Scheffler, including the creation of LCS Investments, a corporation formed as a holding company for the real estate investments of Mr. Scheffler and his business partners. On June 16, 1992, one of these parcels, described as 749 S. Green Valley Parkway, was approved by the Council for a limited use gaming permit upon application of Las Vegas Color Graphics. The same type of permit had been previously granted to Renata's, but denied to both the Major League and Thirstbusters. On June 25, 1992, Mr. Scheffler cast the only vote against Thirstbusters' settlement agreement with the City which authorized its operation of 40 slot machines.

In the circumstances as described above, Mr. Scheffler did not violate the disclosure and voting provisions of NRS 281.501(2) and (3) regarding the Renata's and Major League matters because the attorney-client relationship between Mr. Scheffler and Mr. Marchiano was not created until after the dates upon which his disputed votes were cast. Mr. Scheffler also testified that while a member of the Council, he had voted **against** the applications of two large property developers who were clients of Mr. Marchiano. Taken as a whole, the record does not support the conclusion that Mr. Scheffler's relationship with Mr. Marchiano influenced Mr. Scheffler's voting behavior. Furthermore, we find that an attorney-client relationship would require disclosure and abstention in a case where the **attorney** was the public officer, but we cannot find the inverse to be true. With the record in this proceeding, we do not believe that the relationship between Mr. Scheffler and Mr. Marchiano required disclosure and abstention where the **client**, Mr. Scheffler, is the public officer and the matter before the client/public officer were not his.

The question nevertheless remains, however, whether Mr. Scheffler violated the provisions of NRS 281.481 as a result of his voting to deny Thirstbusters' application to expand the number of its slot machines, while voting to grant a similar request to a competitor of Thirstbusters. Mr. Coury argued that Mr. Scheffler's preferential treatment of Mr. Marchiano's clients was circumstantially proven because Mr. Scheffler had rejected the same limited gaming license application submitted by the Major League, also not a client of Mr. Marchiano's, just seven months earlier.

While it is true that Mr. Scheffler voted to approve a limited gaming use permit at Renata's as well as several limited gaming and non-restricted gaming locations for developer Max Cole, both of which were represented by Mr. Marchiano, it does not follow that Mr. Scheffler was according Mr. Marchiano or his clients special treatment. Rather, the testimony at the Commission hearing indicated that Renata's application had been approved because its

business was of a different style and had a different atmosphere than Thirstbusters. Based on the record before us, we cannot conclude that Mr. Scheffler intentionally favored Mr. Marchiano or his clients contrary to NRS 281.481(2).

The Commission find unmeritorious Mr. Coury's assertions that the relationship between Mr. Scheffler and Ms. Hughes had been improperly affected as a result of their connections with Mr. Marchiano. Mr. Coury suggests that a councilman, who in his public capacity was legally represented by Ms. Shauna Hughes, the husband of whom rented office space in the same building as Mr. Marchiano, would therefore be influenced to vote in support of Mr. Marchiano' s clients when they appeared before the Council. Such an inference requires some basis in evidence that Mr. Scheffler's votes as a councilman were influenced as a direct result of a Marchiano/Hughes partnership. The testimony at hearing established that not to be true: Mr. Marchiano and Mr. Hughes were never law partners nor did they have any joint ownership or shared personal or business interest of any kind.

Findings and Conclusions Specifically Related to Opinion No. 95-37 (Third-Party Request by Mr. MacDonald)

10. Development of Village I

The first contention by Richard MacDonald was that Mr. Scheffler improperly voted to approve the Del Webb Corporation's application to amend the land use policy plan and to approve a zoning classification to provide for a category or nature of use for property it owned in the MacDonald Ranch planning area which was located adjacent to acreage owned by Mr. Scheffler. The Commission finds as follows:

77. On February 1, 1994, the Council considered the application of MacDonald Properties, Ltd. for a water reservation agreement to serve approximately 1,000 acres in Village I at MacDonald Ranch, located northeast of Green Valley Parkway and Horizon Ridge Parkway. The Del Webb Corporation wanted to purchase the property for the development of a master-planned retirement community (including golf courses) on approximately 564 acres, but did not want to go forward with further negotiations or investment of money or seeking of financing unless it were assured that water services would be available. To facilitate the negotiations, Mr. MacDonald applied to the Council to obtain a water reservation, seeking assurances that if Council conditions were complied with, water would be available to service Del Webb's anticipated project.

78. The MacDonald application required the placement of a waterline that would pass two parcels of real estate owned by Mr. Scheffler (identified as Parcels ##3 and 4, which parcel number designations were made at hearing for purposes of identification of the various involved parcels) north of a development known as Foothills at MacDonald Ranch. Parcel #3, situated to the immediate east of Arroyo Grande Boulevard and north of Horizon Ridge Parkway, was purchased in March 1990 with Mr. Scheffler and his wife obtaining a 50% interest. The purchase agreement was entered into before Mr. Scheffler was asked to submit his name for appointment and months before he was appointed to membership on the Council. Parcel #4, located to the immediate east of Arroyo Grande Boulevard and south of Horizon Ridge Parkway, was also purchased by the Schefflers and other investors in March 1990, also prior to Mr. Scheffler's tenure in office, with Mr. and Mrs. Scheffler obtaining a 40% interest.

79. At the public hearing on the application, Mr. Scheffler declared, "Because the infrastructure of Village I is more than likely going to be coming right in front of some property that I own and has a real good chance of increasing my property value, I am going to have to abstain on this vote. II The matter was ultimately continued to the Council's meeting of June 7, 1994, at which time Mr. Scheffler disclosed his property interests and abstained from voting for the same stated reasons. The remaining councilmembers voted to approve development of the Village I project.

80. Mr. Scheffler testified that it was anticipated that the infrastructure would come up Stephanie Street and across Horizon Ridge Parkway.

81. On November 15, 1994, following Del Webb's purchase of the MacDonald property, the Council considered Del Webb's request to amend the land use policy plan of the city for the purpose of changing the land use designation from public and semi-public residential community and neighborhood shopping to public and semi-public and residential and to designate an special area of the master plan. The Council also considered Del Webb's application to rezone the area to increase the density of Village I. Specifically, Del Webb sought to reclassify and rezone the property from Single Family Residential (RS-2) to Single Family Residential (RS-6), Medium Density Residential (RM-8), and Public & Semi-Public (PS) Districts and to establish development and design guidelines and a Master Development Plan Overlay District.

82. In addition to Parcels ##3 and 4 situated to the northeast of Village I, Mr. Scheffler had pecuniary interests in property identified as Parcels ##5, 6, and 7, located approximately one-half mile away to the west of Green Valley Parkway. These three parcels were geographically separated from the Del Webb property to the east by a mountain ridge and wash. Parcels #5 and #6, both consisting of 5 acres, were classified as "urban reserve," meaning that the property cannot be used until it is rezoned by the Henderson Planning Commission and Council. Mr. Scheffler's requests that parcels ##5 and 6 be zoned commercial were denied by the city based on its policy to prohibit engagement of "spot zoning" unless each parcel contained at least 10 acres.

83. Parcel #5, located to the west of Green Valley Parkway and south of Horizon Ridge Parkway, was purchased by the Schefflers and other investors in February 1990. Mr. and Mrs. Scheffler obtained a 30% interest in the property prior to the time that Mr. Scheffler assumed office. Parcel #6, immediately adjacent to parcel #5 to its east, was purchased one month later with the Schefflers' acquiring a 50% interest. Parcel #7 was ten acres directly south of Parcels ##5 and 6 and was purchased in 1989, also prior to the time that Mr. Scheffler took office. The Schefflers obtained a 10% interest in Parcel #7, and this parcel was subsequently zoned commercial.

84. After conferring with the city attorney and public works director, Mr. Scheffler concluded that because Del Webb's application did not create any new infrastructure that had not been considered at the Council's February meeting in which he had previously abstained, he was neither required to disclose his property interests nor abstain from voting on Del Webb's zoning-related requests. Consequently, Mr. Scheffler voted with other members of the Council to approve Del Webb's land use policy amendment and zoning change requests without making disclosure of his interests in Parcels #3, #4, #5, #6 and #7.

We conclude that Mr. Scheffler acted properly under NRS 281.501(2) and (3) at the Council meeting of February 1, 1994, when he disclosed his reasons for abstaining on a vote to approve the application of MacDonald Properties, Ltd. for a water reservation to serve the acreage within Village I. Based upon the written opinions previously obtained from Ms. Hughes and because the proposed infrastructure would be constructed near and provide a direct benefit to Mr. Scheffler's ownership interests in Parcels #3 and #4, Mr. Scheffler announced that he would have to abstain from voting on that agenda item.

The construction of homes and golf courses by Del Webb will draw other potential buyers or investors who desire to purchase property in the area. The improvements made in Village I will make the surrounding land more marketable and valuable. As development down the Green Valley Parkway continues, it seems only a matter of time before the impact of any topographical limitations are minimized. Though the financial benefits of increased density may not materialize immediately, a reasonable person in Mr. Scheffler's circumstances could and would anticipate the benefit. As Mr. Scheffler admitted, he bought the parcels to make a profit on their sale, and his profit would certainly be boosted by the success of Village I.

Therefore, Mr. Scheffler violated NRS 281.501(2) and (3) when he failed to disclose and abstain from voting on Del Webb's application to amend the land use policy plan and to approve a change in zoning classification. Though the application did not create any new infrastructure, it was nevertheless foreseeable that the physical development of Village I resultant from the change in zoning would increase the commercial value of the parcels owned by Mr.

Scheffler in proximity thereto. There is no logical distinction between the financial benefit of infrastructure development and zoning classifications. Mr. Scheffler's votes to approve a high-density, high-quality residential community near his properties certainly improved the value and prospects of his parcels. Under NRS 281.501(2)(b) and (c), Mr. Scheffler had a private pecuniary interest -for himself, his wife, and his co-investors- in the approval of Del Webb's application because the construction and completion of Village I could reasonably be expected to increase the commercial opportunities for his own properties; therefore, he should have disclosed and abstained from voting on the issue.

11. Issues Regarding the Development of the "Foothills II

Regarding another development, Mr. MacDonald asserted that Mr. Scheffler violated the provisions of NRS 281.481(2) and NRS 281.501(2) and (3) by using his position on the Council to attempt to revoke a water service contract between the City of Henderson and Mr. MacDonald's "Foothills" project. Mr. MacDonald also asserted that Mr. Scheffler violated NRS 281.481(1), (2), and (9) as a result of letters of complaint directed by City of Henderson staff to Mrs. MacDonald following the mistaken dumping by Mr. MacDonald' s grading contractor of dirt from the Foothills upon property owned by Mr. Scheffler. The Commission finds as follows:

85. Mr. MacDonald is a general partner of the Foothills Partners, a Nevada limited partnership, and president of the MacDonald Ranch Village Ill, also known as the Foothills development project. The project pertains to a hillside community located near the corner of Foothills Village Drive and Horizon Ridge Parkway in Henderson.

86. On October 16, 1990, the Council approved the MacDonald Ranch Master Plan, the Master Plan Overlay District and Zoning for the Foothills.

87. On April 7, 1992, the Council voted to approve a performance/water reservation agreement between the City and The Foothill Partners pending Foothills' satisfactory performance of specified obligations.

88. On March 16, 1993, the Council met to consider whether to approve the Foothills water service contract with the city .The contract was being negotiated pursuant to the terms of the water reservation agreement passed by the Council on April 7, 1992. Henderson City Attorney Shauna Hughes recommended approval of the contract with two minor changes and one modification that the Council would have to consider at another time. Mr. Scheffler stated at this meeting that he would abstain from voting on the motion to approve the contract because "it would affect some property" he had" in the same area." Presumably, Mr. Scheffler was referring to Parcels ##3 and 4, situated to the north of the Foothills.

89. Claire MacDonald, Mr. MacDonald' s wife and a commercial leasing agent, filed for election to Mr. Scheffler's seat on the Henderson City Council in the city's May 1994 primary election.

90. On June 13, 1994, upon the satisfactory performance of the obligations set forth in the performance/water contract which the city agreed to at its April 7, 1992 meeting, the Foothills Partners and the City of Henderson entered into a water service contract for the Foothills. Section 5.b.i. and ii. of the contract set forth the performance provisions as follows:

> i. Developer will commence construction of off-premises infrastructure, defined as water, sewer and road infrastructure, within 60 days of the developer's execution of the agreement. Construction is deemed commenced when bonds had been posted and work on the first part of the infrastructure has begun.
>
> ii. Developer will complete all off-premise and on-premise infrastructure for any and all subdivisions within the first pressure zone (2370 zone) within twenty-three (23) months of Developer's execution of this agreement.

91. Claire MacDonald, who owns no interest in Foothills, remitted a check to the city to obtain a grading permit for the Foothills project which had been signed by Mr. MacDonald for the Foothills Partners. The Henderson City employee who accepted the check apparently entered it in the City's computer under Mrs. MacDonald's name, not Foothills', and no receipt was issued. Mrs. MacDonald was unaware of the mistake until August 1994.

92. Foothills posted its bonds, paid its fees, and began its grading in accordance with its contract. Though a grading permit for Horizon Ridge was issued on July 20, 1994, no work on the project had been done since August 1994, based on the occurrence of two events which impacted the Foothills Partners' ability to perform. First, the Foothills Partners began negotiating with the Del Webb Corporation regarding sharing costs of the sewer and roadway that Foothills had started to build (Del Webb needed the same kind of sewer outlet that was needed by the Foothills project). Mr. MacDonald contended that it was important to have Del Webb's commitment to a firm percentage of reimbursement for the Foothills infrastructure and that it would have been foolish to begin construction on the sewer, storm drain, and street until an agreement was reached with Del Webb. Although grading for the sewer line was completed, pending conclusion of the Del Webb negotiations, all further construction was halted. Second, Foothills' grading contractor mistakenly dumped between 10,000 and 15,000 cubic yards of excess soil (approximately 15,000 tons) on the lots of five other property owners rather than in a designated area in the project where the dirt was needed. Mr. Scheffler was one of the owners of property upon which some of the dirt was mistakenly dumped.

93. On August 25, 1994, and October 13, 1994, letters of complaint concerning the dumping of soil were mailed to Claire MacDonald by city staff. The second letter, which had been copied and distributed to the Mayor, City Council, City Manager, and City Attorney, directed that the stockpiles of dirt generated by the grading contractor be surveyed by a licensed surveyor and that the quantities in those stockpiles be calculated and submitted to the city to be eventually removed.

94. In 1994, the Short Term Habitat Conservation Plan (HCP) was in effect in Clark County, Nevada. As required by the Nevada Department of Wildlife, the HCP required that prior to the issuance of a grading permit, a property developer was required to conduct a tortoise survey of the area encompassed by the project in order to assure that none were present. The desert tortoise is an endangered species as identified by the Federal Endangered Species Act and is the official state reptile of the State of Nevada (NRS 235.065).

95. Five months passed in connection with the procurement of permits, rights-of-way, and actual work required to move the mistakenly stockpiled dirt to another location, and so the additional tortoise surveys were required by the Nevada Department of Wildlife.

96. On December 5, 1994, while removal of the excessive dirt was in progress, Mr. MacDonald discovered a city agenda item concerning Foothills. Mr. MacDonald was not notified of the agenda item. The matter was listed as item No.6 on the City's meeting agenda for December 6, 1994 as “Foothills Offsite Grading Permit -Discussion/Action: Foothills offsite grading permit.”

97. According to the verbatim transcript of the Council's December 6, 1994, meeting, Mr. Scheffler explained that the first letter to Mrs. MacDonald was sent by city staff as a result of complaints he had received from several residents and from "real estate people" in regard to the grading on Stephanie Street and Horizon Ridge Parkway. The letter stated that the grading that was done resulted in road service much worse than it originally was prior to the grading operation. The developers were asked to bring the streets into compliance and also into compliance with all tortoise requirements. Having received no response, city staff sent a second letter to inform Foothills that the City of Henderson's development could possibly be in jeopardy because of an improperly conducted tortoise study.

98. Further, Mr. Scheffler stated that although only six to eight acres were to be graded pursuant to a permit from the city, fifteen acres had actually been graded, no fees for the excess grading or for the additional tortoise land had yet

been paid to the city, and no work had been done since the original grading in July. He additionally pointed out that the excess grading resulted in covering up drainage and that certain ravines had been blocked and some of the drainage pipes that the City had put in were destroyed.

99. Mr. Scheffler stated at the December 6, 1994, meeting that he was concerned about the delays experienced with Foothills' completion of the water service contract. He explained that the project did not conform to the rules with which the Council required of every other developer, including the mandate that construction of roads and water and sewer lines be commenced under such contracts within 60 days. Consequently, Mr. Scheffler stated at the meeting, "I'm going to ask staff or direct staff to begin proceedings to review and determine if revocation proceedings should be initiated against this water contract, because we hold everybody else to this high standard and I would like this developer also held to this standard." The city attorney's office thereafter commenced a formal investigation to determine whether revocation proceedings were warranted.

100. In a memorandum to the Henderson Director of Public Works dated January 23,1995, Mr. Wayne Robinson, Chief of the Public Works Utility Services Division for the city, concluded that the Foothills project did not appear to be in violation of their water service contracts based upon the provisions of section 5.b.i. definition of when construction was deemed commenced--when bonds have been posted and work on the first part of the infrastructure had begun. Because the grading of Horizon Ridge was the "first part of the infrastructure, " the Division believed the applicant had fulfilled that requirement. Mr. Robinson warned that the remaining off -site projects needed to be completed, however, in order to prevent a breach of the 23-month completion term in Section 5.b.ii. of the contract.

101. In a memorandum to the Council dated May 3, 1995, Ms. Hughes stated that inasmuch as certain bonds had been posted and certain construction has been commenced as required by the terms set forth in Section 5.b.i. of the water service contract (which included sewer trenching and the laying of sewer pipe), there was no reason to commence revocation proceedings.

102. On May 16, 1995, the Council met and was advised that there was no cause for revocation of the water contract at that time. There was, however, no formal action taken to stop the investigation.

103. During the time period from December 6, 1994, to May 16, 1995, Foothills did not seek to obtain outside financing of its project because the future of its water service contract was in jeopardy. As a result, Foothills decided to go forward on the construction on an out-of-pocket basis.

A. Excavation and Erroneous Dumping of Soil

Mr. MacDonald asserted in his request for an opinion that Mr. Scheffler had illegitimate reasons for requesting city staff to investigate whether Foothills' water contract should be terminated for lack of construction and that his actions were motivated by a personal attempt to harass Mr. MacDonald for political reasons. Mr. MacDonald reasoned that if Mrs. MacDonald had not been pursuing a race for Mr. Scheffler's seat on the Council in the 1994 primary, she would not have received letters of complaint from the city which resulted in Foothills' liability for the costs associated with re-sweeping the grading area to comply with tortoise-sweeping requirements imposed by the Nevada Department of Wildlife and no actions would have been taken to revoke the Foothills' water service contract with the city.

Regarding the erroneous dumping of soil on Mr. Scheffler's property as well as that owned by others, the Commission finds no evidence in the record that when Mr. Scheffler learned of the dumping he directed city staff to notify Mrs. MacDonald. According to the testimony at the Commission's hearing, Mr. Scheffler directed city staff to address a letter to whomever was responsible for these conditions in response to complaints received from various residents in the area concerning poor road conditions which had resulted in part from excavated and stockpiled dirt generating from Foothills' grading operation. At that time, Mr. Scheffler did not know the identity of person who had done the dumping. The second letter was sent by city staff on its own initiative and in performance of its duties, as a

follow-up measure to its initial correspondence. Both letters were apparently addressed to Mrs. MacDonald personally as the result of a mistaken computer entry. Further, it is the common practice of city staff to carbon copy such letters to various city officials, and it was the obligation of the state to require tortoise surveys on any land to be moved or graded prior to commencement of a property development. Because Foothills Partners had been grading and stockpiling dirt in areas beyond the scope of its permit, it was required by law to conduct tortoise sweeps of the land which it had disrupted before it could proceed on the project.

We find that the foregoing circumstances show that Mr. Scheffler did not misuse his office in violation of NRS 281.481(1), nor did he seek to secure an unwarranted privilege in violation of NRS 281.481(2), nor did he attempt to benefit his personal or financial interests through the influence of a subordinate in violation of NRS 281.481(9) as a result of his orders to city staff to send letters of complaint, which were unfortunately misdirected to Mrs. MacDonald, concerning the erroneous grading and dumping of excavated soil in the Foothills' project.

B. Investigation Into Cause for Revocation of Water Service Contract

Mr. Scheffler testified that he raised the issue of Foothills' water service contract with at the Council's meeting of December 6, 1994 because no work on the project had been performed for months although its terms of the contract required the developer to commence construction within 60 days of execution of it execution. The city ordinances governing water rights imposed stringent requirements limiting the time during which parties to city contracts must perform. Consequently, the city required developers to put in their infrastructure within two years or the city would take the water away and give it to a party who was going to build in a timely manner.

Regarding Mr. MacDonald' s property, Mr. Scheffler requested that city staff " look into" complaints from adjacent landowners who had observed torn-up property in the area, but no visible signs of construction. Mr. Scheffler wanted to know whether Foothills was in violation of the 60-day performance condition and whether it anticipated moving forward on the project. According to its contract, construction on the project was deemed commenced when bonds had been posted and work on the infrastructure had begun. Mr. Scheffler testified that neither of these conditions appeared to have been satisfied.

Based upon the facts presented, the Commission determines that Foothills' delay was not furthered by or attributable to any act of Mr. Scheffler which may have provided the basis for commencement of revocation proceedings. Mr. Scheffler did not request the Council to consider whether the water service contract should in fact be revoked, but rather directed city staff to investigate whether revocation proceedings should be initiated in the future. For Mr. Scheffler to have “profited" from misuse of his position within the meaning of NRS 281.481(2), the city's staff must have first found cause to remove the water service contract, and then have commenced revocation proceedings, and then only if Mr. Scheffler bore some actual intent (such as Mrs. MacDonald's candidacy against him) that would be sated only by harming the Foothills and the MacDonalds. The evidence does not support such an assumption. In fact, the hearing showed that when the city attorney' s office demonstrated that Foothills was in compliance with its contract and so notified Mr. Scheffler, he informally instructed city staff to “forget about it.”

We conclude that Mr. Scheffler did not violate NRS 281.481(2) in seeking a staff investigation of Foothills' compliance with the water services contract. The evidence showed that Mr. Scheffler acted appropriately in response to complaints he had received, and when he was satisfied that Foothills was in compliance, he dropped the matter.

12. Protest Before Clark County Board of Commissioners

The final issue we address with regard to Mr. MacDonald's request is whether Mr. Scheffler violated NRS 281.481(2) when he appeared before the Clark County Board of Commissioners (Board) to protest a zoning change presented to the Board by Mr. MacDonald and his business associates.

104. On September 21, 1994, the Board considered the application of the Robert L. Gresham Testamentary Trust to construct a 95,700 square-foot shopping center that would include warehouses, restaurants, and bars on 1.2 acres of an 18-acre parcel located on the west side of Lamb Boulevard (Green Valley Parkway) and the south side of Patrick Lane, in Henderson. The request included application for a zone change from R-E (Rural Estate Residential) to M-D (Designed Manufacturing). Mr. MacDonald had a business interest in the construction of the shopping center.

105. The minutes of the Board's meeting state that prior to its vote on the matter, "[T]he Board heard statements from a representative of the City of Henderson and adjacent neighbors in opposition to the sports bar and that is inappropriate for the area; and that it will present a dangerous traffic situation. " The city "representative" who spoke in opposition to the zoning reclassification was Mr. Scheffler. He appeared on behalf of several citizens in his ward who resided in the area adjacent to the proposed construction site.

106. The Board approved the application subject to a three-year review of a previously approved use permit for purposes of reviewing traffic safety issues that might have been generated as a result of the proposed construction.

The hearing established that Mr. Scheffler decided to appear at the Board's meeting after approximately 12 to 15 of his constituents in the neighborhood contacted him to protest the proliferation of bars and shopping centers in the area and requested him to speak out against it at the Board's upcoming meeting. The residents believed the project would detract from their living environment, in which numerous bars already existed, and would generate additional traffic hazards. Thus, contrary to Mr. MacDonald's assertions, Mr. Scheffler was not present on behalf of the Council, but was there on behalf of his constituents. Under these circumstances, there is no evidence that Mr. Scheffler attempted to misuse his office within the meaning of NRS 281.481(2).

Findings and Conclusions Specifically Related to Opinion No. 95-21 (First-Party Request by Mr. Scheffler)

13. Property Acquisitions and Voting Behavior

Following news media reports, which included the allegation that Mr. Scheffler improperly purchased land while in public office and had failed to disclose and abstain on 46 matters involving property developments[5] which affected his private real estate interests, Mr. Scheffler sought the Commission's determination regarding those matters. The media's concerns were whether the growth of Henderson resulted in the enhancement of the value of property owned by Mr. Scheffler and whether his votes as a city councilman on various developments in the area inured to his personal benefit.

Because the media did not specify what particular properties and votes were the target of its concerns, Mr. Scheffler compiled a representative sampling of Council meeting minutes from September 1994 through March 1995 and identified on a Henderson area map for the Commission nine parcels of property in which he had an interest, which may have been relevant to Council agenda items considered during that time period.[6] All nine properties were located south of Lake Mead Drive. Eight were acquired prior to Mr. Scheffler's commencement of public office. Two of the properties, Parcels #3 and #7, were subsequently zoned commercial during his tenure of office and sold. Because he owned these properties at the time of his service on the council, Mr. Scheffler both disclosed his interests and abstained from voting on certain matters relating to those properties.

These specific issues must be addressed separately under NRS 281.501(2) and (3) since each requires a case-by-case analysis of its particular facts and circumstances. The purpose of this portion of this Opinion is to analyze each situation independently in order to give guidance as to how each factual situation should be addressed. In each case, our analysis must focus on whether the facts would effect the independence of judgment of a reasonable person in Mr. Scheffler's circumstances faced with the issue that was actually presented to Mr. Scheffler as a

Henderson city councilman.

A. Manley Development

107. On November 1, 1994, Mr. Scheffler **disclosed and abstained** from voting because of a possible conflict of interest, on the application of Manley Development to amend the land use and change the zoning from limited service/residential to residential on approximately 23 acres located at the northeast corner of Horizon Ridge Parkway and Stephanie Street in the Green Valley South planning area. The property is situated directly adjacent to real estate in which Mr. Scheffler has a pecuniary interest, identified as Parcels #3 and #4. Parcel #3, situated to the immediate east of Arroyo Grande Boulevard and north of Horizon Ridge Parkway, was purchased in March 1990, with Mr. Scheffler and his wife obtaining a 50% interest. The purchase agreement was entered into before Mr. Scheffler was asked to submit his name for appointment and months before he was appointed to membership on the Council. Parcel #3 was subsequently zoned commercial. Parcel #4, located to the immediate east of Arroyo Grande Boulevard and south of Horizon Ridge Parkway, was also purchased by the Schefflers and other investors in March 1990, prior to Mr. Scheffler's tenure in office, with Mr. and Mrs. Scheffler obtaining a 40% interest.

108. On January 3, 1995, a dwelling units project of Manley Development came before the Council for architectural review and determination of whether the project conformed to existing city architectural regulations governing residential property, including certain lot set-back restrictions. Mr. Scheffler disclosed to the Council that he owned commercially zoned property (Parcel #3) directly across the street from the Manley Development project. Mr. Scheffler sought Ms. Hughes' advice as to whether such interests precluded him from voting. Ms. Hughes opined that because the issue did not pertain to density limitations, zoning restrictions, or the development of infrastructure which would result in any monetary gain to or material affect upon Parcel #3, Mr. Scheffler could vote on the matter.

The Commission concludes that Councilman acted in conformity with NRS 281.501(2) and (3) when he disclosed his interests and abstained from voting on Manley Development's land use amendment and zoning change requests on November I, 1994. The Commission additionally agrees with Ms. Hughes' analysis concerning the architectural review of that developer's project on January 3, 1995, in which she concluded that Mr. Scheffler was not prohibited from voting on the matter.

B. Foothills at MacDonald Ranch

109. Mr. Scheffler's parcels #3 and #4 are situated north of the Foothills at MacDonald Ranch.

110. On January 17, 1995, the Council considered the permit application of the Foothills to store dirt excavated for later use in its property development at 500 S. Valley View in Henderson. Mr. Scheffler **disclosed** that he owned property in that area (Parcels #3 and #4) and asked Ms. Hughes whether he had a conflict of interest that prevented him from voting on the matter. Ms. Hughes reasoned that because no improvements to the immediate area would be obtained as a result, and the stockpiling of dirt would not increase the value of Mr. Scheffler's property, the independence of judgment of a public official in his position would not be materially affected. In reliance upon Ms. Hughes' advice, Mr. Scheffler **voted** to approve the stockpiling of soil.

The Commission concurs with Ms. Hughes' opinion that Mr. Scheffler was not required to abstain from voting following his disclosure of his ownership interests in Parcels #3 and #4, at the time the Council considered the permit application of the Foothills to store dirt excavated for later use in its property development, in an area of Henderson in the vicinity of Parcels #3 and #4.

C. American Nevada Corporation

111. On November 1, 1994, Mr. Scheffler **abstained** from voting on the Council's adoption of a resolution proposed

by the American Nevada Corporation to rezone property located south of Horizon Ridge Parkway from RS-2 (single family residential) to RS-6 (single family residential), RM-8 (medium density residential), RM-10 (medium density residential) and PS (public and semi-public) districts and approval of a master development plan overlay district.

112. Mr. Scheffler made **no disclosure** of his private property interests, which consists of adjacently owned property in Green Valley identified as Parcels #1 and #2. Parcel #1, located to the far east of Henderson in the Green Valley community (southeast of Arroyo Grande Boulevard and west of Gibson Road) consists of 10 acres purchased by Mr. Scheffler and other investors in August 1989, prior to the time that Mr. Scheffler took public office. Mr. Scheffler and his wife own a 50% interest in that property. The Schefflers own a 20% interest in Parcel #2, also purchased in August 1989, which is located to the immediate west of Parcel #1.

In this case, though it is clear that Mr. Scheffler properly abstained from voting on the issue, he did not properly disclose his private interests which he believed to require his abstention from voting on the matter. As we explained earlier in this opinion in our discussion of the Lurie case, the Code of Ethical Standards requires that disclosure be made **every time** one must abstain from voting on a matter. Consequently, despite his conformance with the abstention requirement of NRS 281.501(2), Mr. Scheffler's failure to disclose the nature and extent of the interests which prompted his abstention violated NRS 281.501(3).

D. Woodside Homes of Nevada. Inc.

113. On September 20, 1994, Mr. Scheffler **abstained** on a Council vote to approve the application of Woodside Homes of Nevada, Inc. to amend the land use policy plan and zoning map and to reclassify the zoning from residential with limited service overlay to residential on 42 acres located at Arroyo Grande Boulevard and Lake Mead Boulevard in the Green Valley South planning area. The property is situated approximately three-quarters of a mile from real estate in which Mr. Scheffler has investment interests (50% in Parcel #3 and 40% in Parcel #4). The record does not indicate, however, whether Mr. Mr. Scheffler disclosed the nature and extent of these interests at the time the matter was voted upon.

Because it does not appear that Mr. Scheffler disclosed the reason for abstaining on the application of Woodside Homes of Nevada, Inc., we conclude that he violated NRS 281.501(3). (See analysis of question 13(C) above).

E. Arroyo Grande Estates / Woodside Homes of Nevada. Inc.

114. On September 20, 1994, Mr. Scheffler **abstained** on a Council vote to amend the land use from residential with limited service overlay to residential on approximately 42 acres located at Arroyo Grande Boulevard and Lake Mead Boulevard in the Green Valley South planning area. Though Parcels #3 and #4, as previously described, are located adjacent to the area, Mr. Scheffler made **no disclosure** concerning the nature and extent of his interests. Mr. Scheffler's motion to continue the item concerning the applicants' request to reclassify the zoning from RS-2 (single family residential) to RS 6-MP (Single Family Residential with Master Development Plan Overlay) was carried.

Because Mr. Scheffler abstained from voting but did not disclose the basis for his abstention from voting on the amendment of Arroyo Grande Estates/Woodside Homes of Nevada, Inc., we conclude that he violated NRS 281.501(3) (See analysis of question 13(C) above).

F. Arroyo Grande Partnership

115. On September 20, 1994, Mr. Scheffler **abstained** on a Council vote to approve the application of Arroyo Grande Partnership to amend the zoning map to reclassify property located at the northeast corner of Arroyo Grande and Horizon Ridge Parkway in the Green Valley South planning area from PS (public and semi-public) and RS-2 (single family residential) to RS-6 (single family residential). Mr. Scheffler made **no disclosure** of his adjacent real

property interests (Parcels #3 and #4).

As has been previously discussed, because Mr. Scheffler abstained but did not disclose the basis of his abstention from voting on the amendment to the zoning map sought by Arroyo Grande Partnership, we conclude that he violated NRS 281.501(3) (See analysis of question 13(C) above).

G. Del Webb Corporation

Regarding this issue, the Commission refers to its findings and conclusions set forth in question #10, supra.

H. Sunridge at MacDonald Ranch

116. On November 15, 1994, Mr. Scheffler **voted** to approve an amendment of the master plan concerning a development known as Sunridge at MacDonald Ranch (Sunridge) located south of Green Valley Parkway. Mr. Scheffler owned a 10-acre parcel (Parcel #7) that was located approximately one-half mile to the south of Sunridge. Mr. Scheffler purchased Parcel #7 in 1989 prior to the time that he assumed public office. After the property was zoned commercial and until the property was sold, Mr. Scheffler held a 10% interest in Parcel #7.

117. The Council minutes do not reflect that Mr. Scheffler made any disclosure Parcel #7 when the Sunridge agenda item was discussed and voted upon.

118. At hearing, Mr. Scheffler testified that because his property was separated on the west of the development of Green Valley Parkway by a mountain ridge and wash over which there was no access and which would be serviced by different infrastructure, no benefit to his land would inure as a result of his vote on the matter.

As the Commission has previously determined in this Opinion, notwithstanding the existence of a geographic barrier which may separate one parcel of property from another, the test is whether it is likely that a person' s pecuniary interest or commitment to the interest of another may be affected as a result of the action taken, and, therefore, both disclosure and abstention are required. We are compelled to conclude that the increase of master-planned communities in southern Green Valley has increased the value of nearby properties such as Mr. Scheffler's. As Mr. Scheffler constantly reminded the Commission at the hearing, he bought his various properties to make money upon their later sale. Regarding the Sunridge agenda item, we must conclude that Mr. Scheffler's financial interest in Parcel #7 would be sufficiently affected (benefited) by the Sunridge approvals that he should have disclosed his interest and abstained from voting on the Sunridge item under NRS 281.481(2) and (3) because of the likelihood that the circumstances would have materially affected the independence of judgment of the "reasonable person" in his circumstances.

I. Westgate Properties. Ltd.

119. Acreage owned by Westgate Properties, Ltd. (Westgate) is situated on Eastern Avenue and Lake Mead Drive, approximately one-half mile from property in which Mr. Scheffler and his wife own a 25% interest (Parcel #8). Parcel #8 is located in the Green Valley to the far west of Green Valley Parkway and south of Westgate's master planned community known as "Southfork" and was acquired by the Schefflers and other investors in September 1989, prior to the time that Mr. Scheffler assumed office.

120. On February 1, 1994, the Council considered Westgate's application for a water reservation agreement. Approval of the reservation would facilitate the commencement of infrastructure to serve a residential development project. Westgate proposed to raise over $1 million to assist the City of Henderson in up-front costs to design and construct the R-19 backbone facilities which served the Sunridge project, Silver Canyon, Westgate, and American Nevada projects. In addition to its proposed construction of a two-million-gallon reservoir at the proposed R-19 site,

Westgate anticipated the design, construction, and financing of the intersection of Horizon Drive and Eastern Avenue and of a water transmission pipeline that would provide water to Westgate and other developers and property owners in that whole area.

121. Mr. Scheffler joined a unanimous vote by the Council to approve the Westgate water reservation agreement, subject to various conditions. Mr. Scheffler did **not disclose** his interest in Parcel #8. Upon completion of the conditions, Westgate could apply to convert the reservation to a water service contract.

122. Mr. Scheffler's voting on the Westgate water reservation agreement was contrary to the general advice provided to him by the Henderson City Attorney' s Office in written opinions prepared in 1990.

123. On December 20, 1994, Mr. Scheffler voted to approve Westgate Properties' final map for construction upon 45 lots on 9.73 acres at "Coronado at Southfork." Mr. Scheffler made **no disclosure** of any personal interests before his vote.

Mr. Scheffler's 25% share in property (parcel #8) adjacent to the Westgate properties constituted an affected pecuniary interest and a commitment to his co-investors who were also affected, all of which should have been disclosed and should have required his abstention from voting under NRS 281.501(2) and (3). We find that the independence of judgment a reasonable man in Mr. Scheffler's position would have been materially affected by the foreseeable benefit that would inure to his property interest as a result of the approval of the Westgate Properties' approvals. As we have discussed earlier in this opinion, Mr. Scheffler's ownership of land in the vicinity of the entire area that would be developed and serviced as a result of the approved project is sufficient to require both his disclosure and abstention. It is neither remote nor speculative to conclude that the value of Parcel #8 will inevitably be enhanced as a result of the reservoir and pipeline construction which will provide water service and a market benefit to the entire area.

J. Notre Dame Development. Inc.

124. On March 21, 1995, the Council considered Notre Dame Development Inc.'s application to amend the land use policy plan and to change the zoning classification of 24.3 acres lying south of Arroyo Grande Boulevard in the McCullough Hills planning area. McCullough Hills is situated south of Horizon Ridge Parkway and east of Stephanie Street, near property in which Mr. Scheffler had interests (Parcels ##3 and 4). Because the infrastructure servicing the project had already been approved, Ms. Hughes advised Mr. Scheffler that his abstention concerning the matter was not necessary .In accord with Ms. Hughes' advice, Mr. Scheffler voted on Notre Dame's application. The record does not reflect that Mr. Scheffler disclosed his interest to other council members at the time the matter was considered.

We conclude that Mr. Scheffler violated NRS 281.501(2) and (3) as a result of his failing to disclose his interests in Parcels #3 and #4 and failing to abstain from voting on Notre Dame's request. Contrary to Ms. Hughes' advice, we hold that a **zoning change** to increase the density of a residential development, especially in a rapidly growing area in Henderson south of Lake Mead, certainly benefits the value of adjacent land, which includes those parcels in which Mr. Scheffler had a personal interest. Because Mr. Scheffler voted in reliance on Ms. Hughes' advice, he did not commit a willful violation of the Code of Ethical Standards, however, he nevertheless violated NRS 281.501(2) and (3).

Findings and Conclusions Regarding Publication of Opinion

NRS 281.511(4)(f) provided, at the time that the three requests for opinions were filed in this matter, that each opinion by the Commission would be confidential unless " [i]t is an opinion relating to the propriety of past conduct **that the commission determines should be made public**." (Emphasis supplied). At the last hearing of this matter,

we invited argument by Mr. Scheffler's counsel as to why this Opinion should not be made public. We have considered the argument of Mr. Scheffler's counsel, but we have decided to make this opinion public for the following reasons:

(1) In the opinion issued by the Commission, this is first comprehensive examination of a public officer's consideration of property-related matters where he is himself an owner of considerable property. As this case demonstrates, a city councilman who holds significant private real estate investments walks a virtual minefield when a city council makes land use decisions. We believe that publishing this opinion will assist other public officers in navigating around the conflicts posed by one's personal interest in real property. As the Opinion reflects, many of the factual determinations made turned not just upon the proximity of Mr. Scheffler's properties to those upon which he was voting, but also upon the indirect effects upon his property, such as accelerating the rate of growth and developing infrastructure serving his property, thus creating a market for the development and a potential to sell his property. In order to abstract this Opinion, the Commission would have to remove all identifying features, including the detailed descriptions of the properties
involved, and would, thus, have made some of the most salient points of this Opinion virtually unusable as future guidance to other public officers.

(2) In addition, the Commission was also aware that during his unsuccessful bid for reelection, Mr. Scheffler publicly promised that he would make this Opinion public after the election. We see no harm in holding Mr. Scheffler to his promise. In fact, we see the publication of this important Opinion as benefiting the public that we serve.

CONCLUSION

The Commission concludes with regard to the Opinion Request of Ron Coury (Opinion Request No.95-23) the following:

(1) While performing his duties as city councilman, Mr. Scheffler did not improperly use his office to obtain access to, or the utilization of, a vintage automobile from a Las Vegas dealership in violation of NRS 281.481(1) and (2).

(2) Mr. Scheffler did not misuse his public office to influence the award of Las Vegas LVCVA contracts to his own graphics company in violation of NRS 281.481(1) and (2).

(3) Mr. Scheffler did not misuse his public office to persuade Forsythe Francis Advertising to limit its graphics business to Las Vegas Color Graphics and dissuade Forsythe Francis from handling the campaign of a political opponent in violation of NRS 281.481(1) and (2).

(4) Mr. Scheffler had no pecuniary interest in or any commitment in his private capacity to the interests of his business partners in Las Vegas Color Graphics that required disclosure under NRS 281.501(3) and abstention from voting under NRS 281.501(2) on the Del Webb Corporation's application for property development on the basis of Del Webb's advertising contract with R&R Advertising.

(5) Though Mr. Scheffler failed to comply with the law governing financial statements by his failure to include LCS Investments and Viking Color Graphics as business entities, and neglected to file any such statement for 1992, his violations were not willful.

(6) There was no evidence that Mr. Scheffler provided false and misleading information to the Planning Commission and Council in regard to the location of size of private property for which he sought gaming permits or that he persuaded city staff to concur in and perpetuate any mischaracterization of the property in violation of NRS 281.481(2) and (9).

(7) Though there is some overlap in functions between Mr. Scheffler's and Mr. Coury's graphics companies, the relationship between the two businesses is much too attenuated upon which to infer any improper motive on the part of Mr. Scheffler to suppress Thirstbusters' growth and stifle any anticipated graphics business competition when he voted without disclosure to deny Thirstbusters' application to the Council for expanded gaming and to refuse to accept Thirstbusters' settlement agreement with the city;

(8) Mr. Scheffler's ownership of land for which he had both anticipated and obtained the procurement of gaming permits in the vicinity of Thirstbusters required both disclosure and abstention pursuant to NRS 281.501(2) and (3) when the Council considered Thirstbusters' application for expanded gaming and its subsequent settlement agreement with the city.

(9) Mr. Scheffler was not required to disclose or abstain on matters in which his private attorney appeared before the Council. Mr. Scheffler did not engage in any unethical conduct arising from his relationship with Mr. John Marchiano.

The Commission concludes with regard to the Opinion Request of Richard MacDonald (Opinion Request No.95-37) the following:

(1) Mr. Scheffler violated NRS 281.501(2) and (3) by his failure to disclose his interests in property located within the vicinity of Village I and his failure to abstain from voting on Del Webb's application for the zoning of its property development in November 1994.

(2) Mr. Scheffler did not misuse his office in violation of NRS 281.481(1), seek to secure an unwarranted privilege in violation of NRS 281.481(2), or attempt to benefit his personal or financial interests through the influence of a subordinate in violation of NRS 281.481(9) as a result of his orders to City of Henderson staff to send letters of complaint, which were misdirected to Mrs. MacDonald, concerning the erroneous grading and dumping of excavated soil in the Foothills' project.

(3) Mr. Scheffler' s request to city staff to commence an investigation concerning whether Foothill' s water service contract should be terminated did not violate NRS 281.481(2).

(4) Mr. Scheffler did not violate NRS 281.481(2) when he appeared before the Clark County Board of Commissioners to protest a zoning change presented to the Board by Mr. MacDonald and his business associates.

The Commission concludes with regard to the Opinion Request of Larry Scheffler (Opinion Request No.95-21) the following:

(1) Mr. Scheffler properly disclosed the nature and extent of his pecuniary interests in Parcels #3 and #4 at the time he abstained from voting on the approval of infrastructure for acreage in Hidden Village I at MacDonald Ranch and on Manley Development's application to amend the land use and changing applicable zoning restrictions on land situated directly adjacent to Parcels #3 and #4.

(2) Mr. Scheffler properly disclosed his pecuniary interests in Parcels #3 and #4, and upon the city attorney's advice was not precluded from voting at the time the Council reviewed Manley Development's compliance with city architectural regulations and at the time of Council consideration of the Foothills' application to store excavated dirt on adjacent property.

(3) Mr. Scheffler violated NRS 281.501(3) because he should have disclosed the nature and extent of his pecuniary interests and commitments to co-investors concerning Parcels #1, #2, #3, and #4 at the time he abstained from voting on agenda items pertaining to the American Nevada Corporation, Woodside Homes of Nevada, Inc., the Arroyo Grande Estates/Woodside Homes of Nevada, Inc., and the Arroyo Grande Partnership.

(4) Mr. Scheffler violated NRS 281.501(3) by failing to disclose his interests in parcels ##3, 4, 5, 6, and 7 prior to the Council's vote on November 15, 1994, and his vote concerning the zoning of that Del Webb property on November 15, 1994 violated NRS 281.501(2).

(5) Mr. Scheffler violated NRS 281.501(2) and (3) when he failed to disclose his pecuniary interests and commitments in Parcel #7 and failed to abstain from voting on the amendment of the master plan concerning and zoning reclassification of property for use in the development of Sunridge at MacDonald Ranch.

(6) Mr. Scheffler violated NRS 281.501(2) and (3) when he failed to disclose his pecuniary interests and commitments in Parcel #8 and failed to abstain from voting on Westgate's application for approval of a water reservation agreement, the development of infrastructure, and Westgate ' s application for final map approval authorizing construction upon individual lots at Southfork,

(7) Mr. Scheffler violated NRS 281.501(2) and (3) when he failed to disclose his pecuniary interests and commitments in Parcels #3 and #4 when he voted on the application of Notre Dame Development to amend the existing land use policy plan and request for change in zoning classification.

(9) Mr. Scheffler did not knowingly violate the law governing the filing of financial disclosure statements.

(10) Mr. Scheffler did not engage in any unethical conduct arising from his relationship with Mr. John Marchiano.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The statutory provisions quoted and discussed above must be applied on a case-by-case basis with results which may vary depending on the specific facts and circumstances involved.

DATED: May 6, 1996.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R. C. WILSON, Chairman

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[1] "Legislative function " is defined as introducing or voting upon any ordinance or resolution, or voting upon: (1) the appropriation of public money; (2) the issuance of a license or permit; or (3) any proposed subdivision of land or special exception or variance from zoning regulations. NRS 281.4345.

[2] Section 4.32.010 of the City of Henderson Municipal Code defines "limited gaming" as an establishment which maintains a minimum of75, to a maximum of 199, gaming devices licensed and available for play, and which may have a maximum of nine live games. Any proposed location for limited gaming shall obtain a use permit. Section 4.32.030 of the code further provides that is unlawful for any person to deal, operate, carry on, conduct, maintain, or expose for play within the city any gambling game, slot machine, race book or sports pool; or to receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any gambling game, slot machine, race book or sports pool, without first having procured a license as therein provided.

[3] These opinions are dated July 31,1990, August 7, 1990, and August 8, 1990.

[4] Infrastructure is defined as water and sewer services as well as streetlights, curbs, and gutters.

[5] The media alleges that Mr. Scheffler voted improperly on the Council on 46 matters involving the property developments identified as Foothills at MacDonald Ranch, Westgate Homes, American Nevada, Del Webb Corporation, Woodside Homes, Arroyo Grande Partnership, Notre Dame Development and Manley Development.

[6] These agenda items related to Foothills/Sunridge at MacDonald Ranch, Westgate Homes, Del Webb Corporation, Woodside Homes, Arroyo Grande Partnership, Notre Dame Development, and Manley Development.