

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of
JAY BINGHAM, Clark County Commissioner

This Opinion is in response to a third-party request for an opinion filed with the Nevada Commission on Ethics (Commission) by Joan E. Stuart and Bryant Robison concerning the conduct of Clark County Commissioner Jay Bingham. Hearings were held on March 21 and April 25, 1997 at which numerous witnesses testified and presented evidence. Mr. Bingham was represented by Kirk Harrison of Harrison, Kemp & Jones, and Mrs. Stuart was represented by Ronald Colquitt of Colquitt & Knudson. Immediately after the April 25, 1997 hearing, the Commission publicly deliberated the matter and reached a decision. The Commission now issues the Findings of Fact and Opinion which follows.

FINDINGS OF FACT

1. At all times pertinent to this matter Mr. Bingham was a Clark County Commissioner.

2. On January 16, 1996, Barr Limited Liability Company (Barr) purchased 213.88 acres of land in Clark County located approximately six miles up a dirt road from Highway 168 near Moapa, Nevada. Mr. Bingham owns 20% of Barr. Some portion of the dirt road (between one-half to one mile) runs across the Barr property. About three miles further on the dirt road beyond the Barr property was the Stuart Ranch owned by Mr. and Mrs. Stuart until Mr. Stuart's death on July 9, 1996, at which time Mrs. Stuart became the sole owner of the property. Beyond the Stuart Ranch the dirt road continues until it reaches Caliente, Nevada. Because the parties consistently referred to the dirt road as the "Meadow Valley Road," we will also use this designation.

3. Barr operates a sand and gravel operation on its property. The Stuarts have leased a portion of their property to two successive lessees, first Rivers End and then Meadow Valley Rock and Sand (MVRS), both of whom operated sand and gravel operations on the leased property. The evidence showed that the portion of the Meadow Valley Road between Highway 168 and the Barr property was a well-maintained gravel road used by double and triple trailer rigs that picked up sand and gravel at both Barr's and MVRS's operations. The evidence also showed that the portion of the Meadow Valley Road between the Barr property and the Stuart property was not as well maintained, requiring (according to one truck driver who used the road) that the trucks drive as slow as fifteen miles per hour over parts of the road so as not to damage the trucks.

4. On November 22, 1995, a hearing was held before the Clark County Commission on the Stuarts' application for a use permit to allow the operation of a sand and gravel pit on their property that would be operated by MVRS. Although Barr had not yet purchased the Barr property, Mr. Bingham abstained from participating in the Stuarts' application because Barr was in negotiations to purchase the Barr property at the time.^[1] The Clark County Commission granted the Stuarts a permit to operate the sand and gravel operation on their property, but the approval was conditional, requiring that the Stuarts resolve several permitting problems with other agencies. Thus, the Clark County Commission required the Stuarts to cease and desist operations until the permits had been received and then to appear again before the Clark County Commission six months after the permits were received and operations were resumed.

5. On August 9, 1996, Mrs. Stuart appeared before the Moapa Town Board to seek approval of an extension of the use permit. The Moapa Town Board voted unanimously to deny Mrs. Stuart's request. Mr. Bingham was not present at this meeting, and no evidence was presented to show that Mr. Bingham had anything to do with the determination

by the Moapa Town Board.

6. On August 20, 1996, Mrs. Stuart appeared before the Clark County Planning Commission regarding the extension of the use permit granted by the Clark County Commission on November 22, 1995. Mrs. Stuart and Mr. Robison appeared in support of Mrs. Stuart's application. Eddie Riggs, manager and co-owner of Barr, first appeared for Barr in opposition to Mrs. Stuart's application. About halfway through the hearing, Mr. Bingham also spoke in opposition to Mrs. Stuart's application.

7. The transcript of the August 20, 1996 hearing showed that several issues were raised in opposition to Mrs. Stuart's application: (1) the dust from the Stuart operation, (2) the speed of trucks driving to and from the Stuart operation, (3) the lawfulness of the access of the trucks to and from the Stuart operation because such access necessarily crossed Barr's private property. Mr. Bingham's comments specifically addressed the third issue. Mr. Bingham testified about his concerns that the Stuarts' use of the road as it crossed the Barr property exceeded the historic use of the road and exposed Barr to liability for any personal injury or property damages that might occur on Barr's property. Mr. Bingham asserted his belief, based upon advice from his private legal counsel, that where the road crossed the Barr property, it did so according to an easement that allowed a limited public use for vehicles no larger than pickup trucks and four-wheel-drive vehicles across Barr's private property.

8. The Planning Commission denied the extension of Mrs. Stuart's application by a three-to-two vote. Planning Commissioner Charley Johnson, Mr. Bingham's appointee to the Planning Commission, disclosed his relationship with Mr. Bingham and abstained from voting on the matter.

9. On August 23, 1996, Mr. Bingham had a conversation with Donna Bombara, co-owner with her husband, Mike, of DDJ Trucking. DDJ Trucking hauled sand from MVRs as the exclusive truckers for Sierra Read-Mix, a concrete producer. DDJ Trucking also hauled sand from Barr's operation to supply DDJ's own concrete producing operation. Both Mrs. Bombara and Mr. Bingham testified that during this conversation on August 23, 1996, Mr. Bingham discussed with Mrs. Bombara that Mrs. Stuart's use permit had not been extended. Mrs. Bombara told Mr. Bingham that she welcomed the news because the road between Barr's property and MVRs was bad and was damaging DDJ Trucking's trucks. Both Mr. and Mrs. Bombara testified that the road between Barr's property and MVRs was a bad road that required them to drive their trucks as slow as 15 miles per hour in some places to avoid damaging their trucks.

10. Pursuant to the regular processes of Clark County, Mrs. Stuart appealed the Planning Commission's ruling to the Clark County Commission. The hearing of Mrs. Stuart's appeal was twice continued (on September 18 and October 18, 1996) by the Clark County Commission. Mr. Bingham abstained from voting on the motions to continue the matter.

11. On November 16, 1996, Mrs. Stuart's appeal was heard before the Clark County Commission. Just after the matter was called, Mr. Bingham made the following statement:

Let me just put on the record, that I'm a minority interest in a, in a, as somebody that's going to protest this item. So, I'll be abstaining on this item.

After making this statement, the transcript of the November 6, 1996 hearing of Mrs. Stuart's appeal shows that Mr. Bingham took no further part in the discussion or deliberation of the matter.

12. At hearing, Mrs. Stuart and Mr. Robison alleged that during the November 16, 1996 hearing of Mrs. Stuart's appeal, Mr. Bingham left the dais after making the statement quoted above and then went to the stage-right wing of the dais. The allegation was that while in this wing area, Mr. Bingham spoke with Erin Kenny, another Clark County Commissioner, and that when Mrs. Kenny returned to her seat, she began a new and surprising line of questioning,

the implication being that Mr. Bingham "planted" these supposedly difficult questions in his conversation with Mrs. Kenny. We find that the conversation may not have even occurred, but that even if it had, Mr. Bingham did not discuss Mrs. Stuart's appeal with Mrs. Kenny.

13. The Clark County Commission voted to sustain the Planning Commission's denial of the extension of Mrs. Stuart's use permit, with one abstention (Mr. Bingham's).

14. At the Ethics Commission's hearing, the Commission was informed that Mrs. Stuart subsequently appealed the Clark County Commission's action to district court where the district court affirmed the action of the Clark County Commission. The Commission was further informed that Mrs. Stuart appealed the district court's ruling to the Nevada Supreme Court where the matter presently remains unresolved.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter because Mr. Bingham is a public officer as defined in NRS 281.4365 in his capacity as a Clark County Commissioner. Mrs. Stuart and Mr. Robison alleged three violations: (1) that on August 23, 1996, Mr. Bingham threatened Mrs. Bombara and DDJ Trucking, thus violating NRS 281.481(2); (2) that Mr. Bingham made misrepresentations in his testimony before the Planning Commission on August 20, 1996, violating NRS 281.481(2); and (3) that Mr. Bingham attempted to influence the outcome of Mrs. Stuart's appeal before the Clark County Commission by speaking with Mrs. Kenny, violating NRS 281.481(2) and 281.501(2). The Commission noted an additional issue of its own cognizance regarding whether Mr. Bingham's disclosure before his abstention at the November 6, 1996 meeting of the Clark County Commission was legally sufficient under NRS 281.501(3). Finally, Mr. Bingham raised the issue of whether Mrs. Stuart and Mr. Robison should be sanctioned pursuant to NRS 281.551(2). We will discuss each of these issues *seriatim*.

1. The Alleged Threat by Mr. Bingham Against Mrs. Bombara and DDJ Trucking

Mrs. Stuart and Mr. Robison alleged that on August 23, 1996 (three days after the Planning Commission denied Mrs. Stuart's application for an extension of her use permit), Mr. Bingham threatened Mrs. Bombara and DDJ Trucking with some potential adverse impact upon their Clark County permits if they continued to haul from MVRs. The Commission received extensive evidence from all parties regarding the August 23, 1996 conversation. Based upon the weight of the evidence, we find that Mr. Bingham did **not** threaten Mrs. Bombara and DDJ Trucking, either explicitly or implicitly. Mr. and Mrs. Bombara's sworn testimony, in combination with Mr. Bingham's sworn testimony, were more persuasive and weighty than the triple hearsay offered by Mrs. Stuart through the testimony of Mr. Leonard.^[2] When Mrs. Bombara was specifically asked whether she felt that Mr. Bingham had threatened her in any way, she unequivocally replied that she did not feel threatened. In fact, both Mr. and Mrs. Bombara expressed their relief that the denial of the extension of Mrs. Stuart's use permit would result in their not having to drive their trucks across the road between the Barr property and MVRs.

There was nothing improper in Mr. Bingham disclosing to Mrs. Bombara the results of the August 20, 1996 Planning Commission meeting during the course of a conversation with her as one of Barr's customers. The Planning Commission's action was a matter of public record and would likely have been of interest to Mrs. Bombara since DDJ Trucking was the exclusive trucker for one of MVRs's customers. We cannot find that the sharing of such information is tantamount to a threat. Based on the evidence, we cannot conclude that Mr. Bingham used "his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself...[or] any business entity in which he has a significant pecuniary interest," and thus, Mr. Bingham did not violate NRS 281.481(2).

2. The Alleged Misrepresentations Made by Mr. Bingham to the Planning Commission

Mrs. Stuart and Mr. Robison alleged that when Mr. Bingham testified before the Planning Commission he misrepresented the legal status of the road as it passed over the Barr property because Mr. Bingham represented that the road was private where it ran across Barr's private property. If all the testimony, evidence, and argument on this issue proved anything, it proved that there was no definitive answer to the legal status of the road across the Barr property, whether the forum for the controversy was the Planning Commission, the Clark County Commission, or this Commission. The record also demonstrated that for some reason, all the parties seemed content to try this issue, time and again, before fora, including this Commission, that were powerless to resolve the controversy.

The issue before this Commission was whether Mr. Bingham intentionally misrepresented the legal status of the road when he testified before the Planning Commission on August 20, 1996, **not** whether the road was, in fact, a private or a public road and **not** whether the use of the road made by MVRS was lawful or proper. In particular, Mrs. Stuart and Mr. Robison claim that the following statement made by Mr. Bingham was a misrepresentation: "We've researched it, the district attorney's office has researched it and they have concluded with our attorney that it is a private road."

The evidence showed that Barr retained Kirk Harrison of Harrison, Kemp & Jones to research and render an opinion as to the legal status of the road where it crossed Barr's private property. Mr. Harrison obtained the opinion of a title company, and based upon the research performed by the title company and his own legal research, Mr. Harrison opined that the road was an easement across Barr's property and that the use of the easement could be limited to its historic use, namely for vehicles no larger than pickup trucks and four-wheel-drive vehicles. Thus, Mr. Bingham's representation before the Planning Commission that the road was "private" as it crossed Barr's land was based upon Mr. Harrison's legal opinion. Similarly, Mr. Bingham testified before this Commission that he had discussed the legal status of the road with a deputy district attorney before the Planning Commission meeting, and that deputy had represented his belief that the road was an easement across private property. Taken in context, Mr. Bingham's representations before the Planning Commission were true and correct to the extent of his knowledge.

Mrs. Stuart and Mr. Robison insinuated that Mr. Bingham's belief in the legal status of the road was not a good faith belief because Mr. Harrison's legal opinion was result-oriented and was paid for by Barr. We must disagree. A reasonable and prudent business such as Barr has every right to determine the legality of its title and its consequent liability exposure. Having obtained the opinion, Barr could reasonably rely upon it, including making public representations of the opinion. It is not surprising that Mrs. Stuart and Mr. Robison disagree with the legal opinion received by Barr; such is the stuff of the legal system. For our purposes, it is enough that Barr sought a legal opinion from an attorney of its choice and that Mr. Bingham correctly represented the substance of that opinion to the Planning Commission. Until one of the two parties to the dispute puts it before a court with the jurisdiction to resolve the dispute, the parties will be left with the opinions of their respective attorneys, and for our purposes one such opinion is as good as another since we are not the proper forum to resolve this legal dispute. There is no evidence before us that Mr. Harrison's opinion was "bought and paid-for" in any nefarious manner, rendering it false, and making Mr. Bingham's public statements based on it thus knowingly false and therefore a willful misrepresentation.

The Clark County Commissioners serve part-time, so every Commissioner may (and most do) have outside business interests or employment. It must be that a Commissioner should be able to represent his private business before the various public agencies that regulate the business as long as he himself does not participate in the approvals of his own business and does not lord his position over those other agencies who will be affecting his business.

In this case, Mr. Bingham's appointee to the Planning Commission, Mr. Johnson, disclosed his relationship with Mr. Bingham and abstained from participating in the discussion and vote upon Mrs. Stuart's application. It is surely true that had Mr. Bingham not spoken at the Planning Commission, Mrs. Stuart and Mr. Robison would have one less thing to complain about regarding Mr. Bingham, but we find nothing improper in the way Mr. Bingham acquitted himself before the Planning Commission or in the things Mr. Bingham said to the Planning Commission. From the

record before us, it appears that Mr. Bingham attempted to carefully advocate his private interest while being in the tricky position of being a public official seeking public approval for his private interests. Thus, 'we cannot find that Mr. Bingham violated NRS 281.481(2).

3. The Alleged Improper Participation in the Clark County Commission's Hearing of Mrs. Stuart's Appeal

Mrs. Stuart and Mr. Robison alleged that even though Mr. Bingham abstained from voting in the matter of Mrs. Stuart's appeal to the Clark County Commission, he nonetheless attempted to influence the outcome of the hearing by speaking with another Commissioner during the discussion of the matter.

NRS 281.501(2) provides that if a public officer must abstain from participating in a matter, then he shall not "advocate the passage or failure of, but may otherwise participate in the consideration of" the matter. Since Mr. Bingham was prohibited by NRS 281.501(2) from advocating for the failure of Mrs. Stuart's application, if he had done so against the prohibition by "planting" difficult questions through another Commissioner, he would have violated NRS 281.501(2) and also would have violated NRS 281.481(2) because his conduct would have constituted the seeking an "unwarranted advantage" for himself and Barr.

The evidence regarding this allegation was insubstantial for several reasons. First, both Mr. Bingham and Mrs. Kenny testified that neither had a specific recollection of any conversation occurring at the November 6, 1996 meeting, but both specifically testified that even if they had spoken, Mr. Bingham did not discuss with Mrs. Kenny anything regarding Mrs. Stuart's appeal. Second, the transcript does not bear out Mrs. Stuart's and Mr. Robison's allegations that Mrs. Kenny's line of questioning was new and surprising. Instead, it appeared that the road and the use of the road was as much at issue before the Clark County Commission as it was before the Planning Commission, and Mrs. Kenny's questions appear focused upon the same issues that were already being discussed by the Commission.

Third, the physical layout of the County Commission chambers appears to belie the allegations because the wing area in which the conversation between Mr. Bingham and Mrs. Kenny allegedly occurred has a door, so it is unlikely that any member of the audience could have seen much more than Mr. Bingham and Mrs. Kenny entering and exiting the door. Fourth, the testimony of Mrs. Stuart's and Mr. Robison's witnesses was confusing and inconsistent, and none of their witnesses knew what was said between Mr. Bingham and Mrs. Kenny during the alleged conversation. In fact, what little harmonious evidence was presented on the observation of the alleged conversation showed that the witnesses only saw Mr. Bingham and Mrs. Kenny enter the door in the wing area. What they discussed, if anything, seems based on the mere speculations and suspicions of the witnesses. In the face of this admitted lack of evidence, Mrs. Stuart and Mr. Robison ask this Commission to assume that the conversation between Mr. Bingham and Mrs. Kenny must have been about Mrs. Stuart's appeal because they felt that the tenor of the Commission's questioning changed upon Mrs. Kenny's return. We cannot leap to the conclusion at which Mrs. Stuart and Mr. Robison arrived because the weak and contradictory evidence cannot sustain either the leap or the conclusion.

From the record made before the Clark County Commission on November 6, 1996 and the record made before this Commission, we cannot conclude that Mr. Bingham advocated for the failure of Mrs. Stuart's appeal in violation of NRS 281.501(2) or NRS 281.481(2).

4. Mr. Bingham's Disclosure on November 6, 1996

In order to rule upon the preceding question, the Commission necessarily reviewed the text of Mr. Bingham's disclosure to his fellow Commissioners on November 6, 1996. As one of this Commission's members observed, Mr. Bingham's disclosure was notable because it was made at all, since many public officers are unaware or unsure of

their obligation to disclose their reasons for abstaining from participation in a matter. Because this Commission is aware of the unfortunate and unintentional ignorance of the disclosure requirements in NRS 281.501(3) harbored by many of Nevada's public officers, this Commission has taken up the issue of Mr. Bingham's disclosure on its own cognizance for the positive edification of Mr. Bingham and all others who will find themselves in his situation in the future.

NRS 281.501(3) provides that a public officer shall not abstain from voting upon a matter "without disclosing the full nature and extent of the gift, loan, commitment or interest." Regarding Mrs. Stuart's appeal before the Clark County Commission, Mr. Bingham correctly understood his obligation under NRS 281.501(2) to abstain from participating in the matter because of his personal and business interests, and Mr. Bingham also attempted to satisfy his obligation under NRS 281.501(3) to disclose why he felt he had to abstain. Unfortunately, his disclosure as recorded in the transcript of the November 6, 1996 meeting was only, "Let me just put on the record, that I'm a minority interest in a, in a, as somebody that's going to protest this item."

This disclosure is deficient because it does not provide the "full nature, and extent" of Mr. Bingham's interest. The intent of the disclosure requirement in NRS 281.501(3) is to assure that the public attending a public meeting is fully informed as to why its elected officers cannot participate in a given matter. In other words, there should be no mystery as to why an elected officer is failing to participate in a matter before him. While it appears that Mr. Bingham was on the right track, his execution was incomplete. To be sufficient, Mr. Bingham's disclosure should have mentioned his percentage ownership (20%) in a specific company (Barr) and that that company's interest was adverse to Mrs. Stuart because there was a legal controversy regarding the use of a road that crossed Barr's property and because Barr was a direct business competitor with Mrs. Stuart. Thus, a full and sufficient disclosure should have read something like:

I must disclose that I am a 20% owner in Barr LLC, a sand and gravel business that is in direct competition with Mrs. Stuart. There is a legal dispute between Mrs. Stuart and Barr regarding the ownership and use of a dirt road that crosses Barr's property that provides the only access to Mrs. Stuart's property. Because of these interests, I must abstain from participating in this matter.

As can be seen, the difference between our suggested disclosure and Mr. Bingham's actual disclosure is a matter of details and specific information, precisely those items that are required to be/ disclosed to meet the purposes underlying the disclosure requirement. To the extent that Mr. Bingham recognized that he should disclose and abstain regarding Mrs. Stuart's appeal, Mr. Bingham should be commended; to the extent that his disclosure was lacking in the legally requisite detail, we must conclude that technically he violated NRS 281.501(3). However, because of the technical nature of the violation, we do not impose any further sanctions.

5. Whether Sanctions Are Appropriate Against Mrs. Stuart and Mr. Robison

Mr. Bingham has asked this Commission to impose sanctions against Mrs. Stuart and Mr. Robison (and Jesse Jones) pursuant to NRS 281.551(2), which provides:

In addition to any other penalty provided by law, the commission may impose a civil penalty not to exceed \$5,000 on any person who knowingly or maliciously submits to the commission any false accusation or false information, or submits to the commission any false accusation or false information in bad faith or who, by fraud or artifice, prevents the discovery of a violation of this chapter.

The threshold finding for the imposition of a sanction under NRS 281.551(2) is a "false accusation or false information." In this matter, we cannot find that either Mrs. Stuart or Mr. Robison submitted any knowingly false

statements or information. The record made abundantly clear that each side had marshaled support for his or her positions. While the positions and testimony were often contradictory, we cannot find that either side made any patently false statements. Within the confines of their arguments, we can understand why Mrs. Stuart and Mr. Robison reached the conclusions and beliefs that they reached, even if we disagree with them.

This Commission is circumspect regarding a request for sanctions. We are aware that a public officer such as Mr. Bingham may incur significant expense and public opprobrium defending himself against allegations that ultimately prove to be insubstantial, but the Legislature has set a high standard for the imposition of sanctions against requesters. NRS 281.551(2) cannot be invoked every time allegations are unsubstantiated, but must be reserved only for those most egregious cases of abuse where the party has knowingly made false allegations with bad faith, requiring us to find that the party has acted with a malicious intent. This high standard has not been met in this matter.

Finally, there was one other allegation made which warrants further commentary by this Commission. At the end of the hearing, Mr. Bingham made an allegation that Mr. Robison had called him in the interim between the two hearings and had told Mr. Bingham that he and Mrs. Stuart would withdraw their request for an opinion if Mr. Bingham would assure that Barr would not oppose Mrs. Stuart's new application for a use permit. If this allegation had been found to be proven, it would warrant the imposition of severe sanctions. This Commission is not, and will not allow itself to become, a lever to gain undue advantage over a party merely because that party happens to be a public officer or employee. Any efforts by individuals to use the Commission for private, extortionate or other inappropriate purposes, in bad faith and with knowingly false allegations will be met with serious punishment. We are not imposing a penalty in this matter because this allegation was merely made, but not proven. However, we take this opportunity to provide fair warning to any person(s) contemplating such misuse.

CONCLUSION

Based upon the record, the Commission concludes that Mr. Bingham did not violate NRS 281.481(2) or NRS 281.501(2) in the way he conducted himself before the Planning Commission or the Clark County Commission regarding Mrs. Stuart's application for a use permit. The Commission also concludes that Mr. Bingham's disclosure before the Clark County Commission was deficient, thus constituting a technical violation of NRS 281.501(3). Finally, the Commission concludes that it will not impose a penalty against Mrs. Stuart and Mr. Robison even though the Commission found their allegations to be unsubstantiated.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of the Nevada Revised Statutes 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: June 9, 1997.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman

[1] The transcript of the Clark County Commission's hearing on November 22, 1995 shows that Mr. Bingham made the following disclosure and abstention statement: "-put on the record. Brian, I don't know if you were here at the beginning of the meeting, but I have to abstain on this item because own some land probably about five miles farther

down the basic same operation that we're getting ready to drop permits on and I just want to put that and also put on the record that I haven't (unintelligible)."

[2] Mr. Leonard testified that he had been told by Mr. Bombara that Mrs. Bombara had told Mr. Bombara that Mr. Bingham had made a veiled threat against the Bombaras' county permits in the August 23, 1996 conversation between Mrs. Bombara and Mr. Bingham.