

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF A PUBLIC OFFICER

This matter came before five of the eight members^[1] of the Nevada Commission on Ethics (hereinafter "Commission") on Friday, August 11, 2000, for hearing on the advisory opinion request filed with the Commission on July 28, 2000, by Public Officer pursuant to Subsection 1 of NRS 281.511. The hearing was properly noticed, and notice of the hearing was properly served. The hearing was closed pursuant to NRS 281.511, Subsection 5.

Public Officer seeks an Advisory Opinion from the Commission regarding the definition of "public officer" under NRS 281.4365 as it relates to members of a Steering Committee (hereinafter the "Committee"), of which Public Officer is a member. Specifically, the issue presented to the Commission is whether each member of the Committee, solely because of membership on the Committee, could be construed as a "public officer" under NRS 281.4365 when acting in the capacity as a member of the Committee.

Public Officer appeared in person, was sworn in as a witness and presented testimony. Also present were Attorney A and Attorney B, co-counsel for the Committee.

The Commission, after full consideration of the testimony of witnesses, and the evidence received into the record, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Public Officer is an elected member of a city council and a redevelopment agency.
2. Public Officer is also one of nine members of the Committee. He is one of the three redevelopment agency members of the Committee appointed by the agency's chairman.
3. The Committee was created pursuant to a special act of the Nevada Legislature to assist the redevelopment agency in its endeavor to redevelop the city's downtown gaming and tourism enterprises through a public/private partnership. The statute creating the Committee charges it with the specific duty to develop a master plan which identifies: (a) proposed capital improvement projects that the Committee determines to be advisable to promote tourism in the county, and (b) the method or methods pursuant to which those proposed capital improvement projects will be financed.
4. The capital improvement projects identified by the Committee must be approved by a two-thirds vote of the members of the Committee and must be located in a specified district.
5. The Committee's membership is defined by statute and represents both private and public perspectives. Currently, the membership of the Committee consists of four (4) members who are private citizens and represent major downtown properties and five (5) members who serve as public officers in other capacities for the city and county. The Committee's membership is composed so as to have input from both city public officials and private major downtown properties in deciding what to build in downtown and how to finance it. The project will ultimately be financed by both public and private money.
6. The public financing portion of the proposed projects will be provided from a lodging tax imposed by statute. The tax must be collected by the county and paid to the local convention and visitor's authority, which must use the funds as provided in the statute. A specific portion of those funds must be used to acquire, establish, construct, expand and equip the capital improvement projects identified by the Committee and to pay the principal and interest on

notes, bonds or other obligations issued by the redevelopment agency to fund the acquisition, establishment, construction or expansion of those projects. Until the capital improvement projects are identified, the funds must be used to support another specific enterprise.

7. The private financing portion of the proposed projects will be provided by the private major downtown properties represented on the Committee.

8. Committee members serve without compensation.[\[2\]](#)

9. The Committee does not formulate public policy. The Committee has no power to levy or collect taxes or assessments. The Committee does not enforce any laws, rules or regulations. The Committee's duration is limited to the time required to accomplish its purpose defined by statute.

CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281.005 and NRS 281.4365 by virtue of his position as an elected city councilperson.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.511, Subsection 1.

WHEREFORE, on motion duly made, seconded, and approved by majority vote,[\[3\]](#) the Commission renders the following Opinion:

OPINION

Except as limited for purposes of NRS 281.411 to 281.581, inclusive, NRS 281.005 establishes three criteria for defining "public officer" for purposes of NRS Chapter 281. First, a person must be elected or appointed to a position established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state. Second, the person's position must involve the continuous exercise of a public power, trust or duty. Third, this exercise of a power, trust or duty must be part of the regular and permanent administration of government.

NRS 281.4365 defines "the exercise of a public power, trust or duty" to include: (a) actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy; (b) the expenditure of public money; and (c) the enforcement of laws and rules of the state, a county or a city. Pursuant to NRS 281.4365, "public officer" does not include, *inter alia*, "any member of a board, commission or other body whose function is advisory." NRS 281.4365, Subsection 2(c).

The Committee membership is established by a statute of this state, and the members are appointed. Therefore, they meet the first criteria of "public officer" under NRS 281.005 and NRS 281.4365.

The second element of the definition of "public officer" in NRS 281.005 and NRS 281.4365, "the continuous exercise of a public power, trust or duty," customarily requires a position created by law with duties that involve an exercise of a portion of the *sovereign* power of government, the performance of which involves the public and which is continuous in nature.[\[4\]](#) This definition has been accepted in Nevada[\[5\]](#) and does not conflict with the definition of "public officer" in NRS 281.005 or NRS 281.4365.[\[6\]](#)

With regard to the statutory phrase "public power, trust or duty," the Nevada Attorney General has opined:

"Thus, when NRS 281.005 speaks of powers, trust and duty, it contemplates the exercise of a sovereign power of government. The term 'sovereign power' has been defined as:

That power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish the legitimate

ends and purposes of government. (citing Black's Law Dictionary.)
It contemplates duties performed in the execution or administration of the law...Therefore, any person holding a position which does not permit the execution or administration of the law would not be exercising a public power, trust or duty, i.e., sovereign functions. In this connection, therefore, a member of a purely advisory board or commission would not be subject to the provisions of Chapter [281]....Therefore, a position on an advisory board or commission, with *solely* advisory duties and with no power to implement recommendations or carry out the administration of the law, would not constitute a public office and its members would not be public officers." A.G.O. 193 (9/3/75).

Members of the Committee do not possess the power to implement their recommendations regarding the proposed capital improvements project and financing therefor, or to "carry out the administration of the law" related thereto. They do not formulate public policy or enforce the laws and rules of the state, county, or city. There is some question, however, about the extent to which they could be considered to be expending public money. Notwithstanding that factor, however, the members of the Committee do not meet the second element of the definition of "public officer" pursuant to NRS 281.005. Further, the Committee appears to function in an advisory capacity to the local redevelopment agency and the local convention and visitor's authority, which is authorized by law to implement the Committee's recommendations. A "member of a board, commission or other body whose function is advisory" is excluded from the definition of "public officer" pursuant to NRS 281.4365, Subsection 2(c).

The third element of the definition of "public officer" in NRS 281.005 requires that the exercise of a public power, trust or duty be part of the regular and permanent administration of government. Whether the person in question is a full-time officer or only a part-time officer exercising his duties periodically while having other permanent, private employment makes no difference. However, "the duty exercised must not be for a single transaction, or occasional, transitory or incidental."^[7] Because the Committee exists, pursuant to statute, for a special "single transaction," i.e., to identify for the local redevelopment agency proposed capital improvements project and the financing therefor, it does not appear to be "part of the regular and permanent administration of government" and, therefore, its members do not meet the third element of the definition of "public officer."

The analysis regarding the definition of "public officer" in A.G.O. 193 (9/3/75) was relied on in several subsequent Attorney General Opinions on the subject, and continues to be relevant. When revisiting the definition of "public officer" in a 1996 opinion, the Attorney General's office relied on A.G.O. 193 (9/3/75) and stated, "Neither passage of time nor the slight differences between NRS 281.005 and NRS 281.4365 require us to alter our analysis in A.G.O. 193." See, A.G.O. 96-15 (5/28/96).

Whether a person is a "public officer" pursuant to NRS 281.005 and NRS 281.4365 for purposes of NRS Chapter 281 must be analyzed on a case-by-case basis.

In light of all of the specific facts and circumstances of this particular case, the Commission finds that the members of the Committee, solely because of membership on that Committee, are not "public officers" pursuant to NRS 281.005 or NRS 281.4365 when acting in the capacity as a member of the Committee.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: October 19, 2000.

NEVADA COMMISSION ON ETHICS

By: /s/ Rick Hsu, Member

By: /s/ William Flangas, Member

By: /s/ R. Hal Smith, Member

DISSENTING OPINIONS

(Chairman Bernhard): Based on the record presented to the Commission, I cannot support the majority's conclusion that none of the members of the Committee are "public officers" under NRS 281.4365. None of the private citizen members of the Committee appeared before the Commission, nor did they join in Public Officer's opinion request. Therefore, I would limit the Commission's decision only to the question of whether Public Officer is a public officer when acting for the Committee. Based on Public Officer's testimony, Public Officer concedes that he is bound by the provisions of Nevada's Ethics in Government Law even when acting for the Committee. Since Public Officer was the only person requesting an opinion from the Commission, I believe that the Commission's inquiry should have ended there.

In addition, since the Committee has at least some role in deciding how public money will be expended, even though final authorization of such expenditures may lie with another body, I believe that further evidence is required to explain the Committee's role in deciding how public money will be spent. Upon presentation of such evidence, it may be that the private citizen members of the Committee would not be deemed "public officers" within the contemplation of NRS 281.4365, but I am not able to reach that conclusion based on the record, which was presented to us. Therefore, I dissent from the Commission's determination that the Committee members are not "public officers" and therefore not bound by the provisions of Nevada's Ethics in Government law.

By: /s/ PETER C. BERNHARD

(Commissioner Kosinski): I concur in the dissenting opinion of Chairman Bernhard. Further, I do not believe that the definition of "public officer" provided in NRS 281.005 applies to the provisions of NRS 281.411-281.581.

By: /s/ JIM KOSINSKI

[1] Chairman Peter Bernhard and Commission Members Hal Smith, Rick Hsu, Jim Kosinski, and William Flangas conducted the Commission hearing. Commissioners Russell and Hatcher were absent; Commissioner Avansino recused himself.

[2] However, while engaged in the business of the Committee, members may receive the per diem allowance and travel expenses provided for state officers and employees generally, as the budget of the redevelopment agency allows.

[3] Commissioners Hsu, Flangas and Smith voted "aye;" Chairman Bernhard and Commissioner Kosinski voted "no." Chairman Bernhard noted for the record that his "no" vote was not because he believes the members of the Committee who represent private downtown properties are "public officers," but because he did not believe that he had enough information at the time of the vote to make that judgment.

[4] See, A.G.O. 193 (9/3/75); 53 A.L.R. 595.

[5] *State ex rel. Kendall v. Cole*, 38 Nev. 215, 148 P. 551 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953).

[6] "...the statutory definition of a public officer is in harmony with case law previously decided and contemplates that the individual in question is vested with some portion of the sovereign functions of government." See, *State ex rel.*

Kendall v. Cole, 38 Nev, 215, 219, 148 P. 551 (1915); *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953). (*Mullen v. Clark County*, 89 Nev. 308, 311, 511 P.2d 1036 (1973).)

[\[7\]](#) A.G.O. 193, (9/3/75); *State ex rel. Kendall v. Cole*, supra.