

Opinion No. 00-41

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF

MICHAEL J. McDONALD, Las Vegas City Councilman

This matter came before six members^[1] of the Nevada Commission on Ethics (hereinafter "Commission") for hearing on Thursday, February 15, 2001, pursuant to a Request for Opinion submitted in proper form to the Commission by Robert Rose on August 28, 2000, and a written panel determination entered November 13, 2000, finding just and sufficient cause for the Commission to render an opinion in this matter on two issues:

1. Whether Councilman McDonald's conduct relating to the Ranger Building property before the Las Vegas City Council violated the provisions of NRS 281.481, Subsection 2; and
2. Whether Councilman McDonald's conduct relating to the Las Vegas Sportspark before the Las Vegas City Council violated the provisions of NRS 281.230, Subsection 1; NRS 281.481, Subsections 1, 2, 3, 5, 9, and 10; and NRS 281.501, Subsections 2 and 3.

The matter was originally set for hearing on December 7, 2000. However, on November 17, 2000, Councilman McDonald, by and through his counsel, Richard A. Wright, Esq., filed a Request for Continuance and Waiver of Statutory Time Requirement, and the hearing was continued to February 15, 2001. Notice of the hearing was properly posted and served. Councilman McDonald was present with his counsel, Richard A. Wright, Esq. The following persons were sworn as witnesses and testified before the Commission at the hearing: Lawrence Brown (Las Vegas City Councilman), Liberto Cirincione (real estate salesperson), James DiFiori (City of Las Vegas, Business License Division), Eric Dornak (ward liaison to Councilman Brown), Linda Fernandez (part-owner of Sportspark), Oscar Goodman (Mayor of Las Vegas), Councilman Michael McDonald, Dean Patti (attorney), Doug Rankin (ward liaison to Councilman McDonald), Larry Scheffler (owner of Las Vegas Color Graphics and part-owner of Sportspark), Don Schlesinger (part-owner of Sportspark), and Virginia Valentine (Las Vegas City Manager).

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

FINDINGS OF FACT

1. In his public capacity, Michael McDonald is an elected member of the Las Vegas City Council. He has served as a Las Vegas City Councilman since 1995. Councilman McDonald is also a member of the Las Vegas Visitors and Convention Authority and was Chairman thereof at all times pertinent to this matter. In his private capacities, Mr. McDonald owns a corporate marketing company and is employed as Vice President of Corporate Development for Las Vegas Color Graphics, where he is paid a salary of \$52,000/year.
2. Las Vegas Color Graphics is owned by Larry Scheffler. Mr. Scheffler hired Michael McDonald as Vice President of Corporate Development for Las Vegas Color Graphics in January or February, 2000. Mr. Scheffler is also a part-owner of Las Vegas Sportspark.
3. Jim DiFiori is, and at all times pertinent to the circumstances herein was, Business Services Manager for the Finance and Business Services Department of the City of Las Vegas. In that capacity, Mr. DiFiori supervises the department's business license division.
4. The business license division processes applications for business licenses. Unless a business license application indicates something unusual, such applications are processed routinely by the division and do not come to the attention of Mr. DiFiori.
5. In or about March, 2000, Annette Patterson of the Well-Being Institute of The Universal Church of Life

Enhancement submitted to the business license division a business license application. The application was processed by the business license division without coming to the attention of Mr. DiFiori.

6. Prior to March, 2000, Ranger Building Corporation requested from the City of Las Vegas a special use permit to allow a tavern to be located in the Ranger Building.

7. Requests for special use permits must be approved by the city council.

8. The Las Vegas City Code requires a distance of at least 1,500 feet between a tavern and a church.

9. Virginia Valentine is, and at all times pertinent to the circumstances herein was, City Manager for the City of Las Vegas. In that capacity, Ms. Valentine implements and administers policy established by the mayor and city council.

10. On or about March 22 or 23, 2000, Councilman McDonald called the city surveyors to his office and requested that they measure distances between the Ranger Building property and any other property with uses which might affect the special use proposed for the Ranger Building.

11. City surveyors determined that buildings with conflicting uses, previously overlooked, were within 1500 feet of the Ranger Building.

12. On or about March 22 or 23, 2000, after learning that Councilman McDonald had requested the city surveyors to survey and measure distances between the Ranger Building property and any other property with uses which might affect the special use proposed for the Ranger Building, City Manager Valentine confronted Councilman McDonald regarding his failure to follow the proper chain of command for assigning work to the city surveyors.

13. When the Ranger Building special use permit first came before the city council, Councilman McDonald disclosed a conflict of interest and abstained from participating in and/or voting on the matter. At the meeting of the city council where the Ranger Building special use permit was approved, Councilman McDonald left the meeting at approximately 1:30 p.m. The matter did not come before the city council, and the city council did not vote on the special use permit, until approximately 3:30 p.m. Councilman McDonald was not present when the vote was taken.

14. Las Vegas Sportspark is a public-private venture between the City of Las Vegas and Sportspark, owned by Linda Fernandez (58%), Don Schlesinger (36%), and Larry Scheffler (6%).

15. Sportspark is located on property owned by and leased from the City of Las Vegas. The City of Las Vegas acquired the property at no cost from the Bureau of Land Management. Use of the property is restricted to recreational purposes. Sportspark is located in Councilwoman Boggs- McDonald's city council ward.

16. The management and operation of Sportspark is controlled by a written agreement between the City of Las Vegas and the owners of Sportspark.

17. Mr. Scheffler is President of and manages Las Vegas Color Graphics. Formerly, Mr. Scheffler and Ms. Fernandez were co-owners of Las Vegas Color Graphics. They were partners for approximately 22 years. Mr. Scheffler and Ms. Fernandez sold Las Vegas Color Graphics to Print Source in March or April, 1997. Ms. Fernandez received a small stock interest in Print Source under the terms of the sale, which stock interest was purchased by another company in or about May, 2000, when it acquired all of Print Source's interest in Las Vegas Color Graphics. At the time Ms. Fernandez owned the Print Source stock, it was not publicly traded and had little, if any, value.

18. At the time Mr. Scheffler hired Councilman McDonald as Vice President of Corporate Development for Las Vegas Color Graphics in January or February 2000, Ms. Fernandez had no ownership interest in, or management or operational responsibilities for, Print Source or Las Vegas Color Graphics. Councilman McDonald had no financial interest in Print Source, Las Vegas Color Graphics, or Las Vegas Sportspark, except for his employment with Las Vegas Color Graphics.

19. Mr. Schlesinger is an attorney and former Clark County Commissioner.

20. The initial capitalization for Sportspark consisted of a \$1.5 million cash investment by Ms. Fernandez, a \$100,000 cash investment by Mr. Scheffler, and a loan from CIT in the amount of approximately \$5.3-5.5 million. The CIT note is personally guaranteed by Ms. Fernandez, Mr. Scheffler, and Mr. Schlesinger (the "debtors").
21. At all material times, Schlesinger managed the day-to-day operations of Sportspark, for which he receives a salary. He made no initial cash investment in the project but has contributed his time and effort.
22. Ms. Fernandez and Mr. Schlesinger originated the Sportspark project concept. They, together with Bob Campbell, were to be the original capital investors in the project and personal guarantors of the CIT note. Bob Campbell decided not to participate prior to making any investment in the project or guaranteeing the CIT note. Thereafter, Larry Scheffler was brought in as a third investor in the project and guarantor of the CIT note.
23. Ms. Fernandez first met Councilman McDonald at the Las Vegas City Council meeting where she originally brought the Sportspark concept before the city council. Thereafter, Ms. Fernandez saw and conversed with Councilman McDonald occasionally at Las Vegas Color Graphics when she went to pick up jobs. On occasion she would mention to him that she was still having problems with Sportspark.
24. The CIT loan (which was funded in August, 1997) is amortized over 20 years, and the monthly loan payments are \$48,000.
25. In addition to the CIT loan, Sportspark's liabilities include a personal loan from Ms. Fernandez in the amount of \$100,000, a \$100,000 bank line of credit, and approximately \$200,000 in mechanic's lien claims against the project.
26. With regard to Sportspark, Ms. Fernandez and Mr. Scheffler are each personally at risk to the extent of their initial investment, the full amount of the CIT loan, and the full amount of the company's other liabilities. Mr. Schlesinger is personally at risk to the extent of the full amount of the CIT loan and the company's other liabilities; however, the evidence reflects that he does not have unprotected personal assets sufficient to satisfy the CIT loan and the company's other liabilities.
27. As of the date of the hearing, payments on the CIT loan were two months in arrears. In the event the debtors default on the CIT loan, CIT has the right to foreclose on the project. In the event CIT forecloses on the project, neither Ms. Fernandez nor Mr. Scheffler would recover their initial investments in Sportspark.
28. Sportspark has never made a profit and, in early 2000, was in default on interest payments on the CIT loan. In March or April, 2000, CIT served a demand letter on Sportspark.
29. At about that same time, Mr. Schlesinger, with the concurrence of Ms. Fernandez, was attempting to negotiate with CIT to restructure Sportspark's debt.
30. In late April, 2000, Mr. Schlesinger went to see Mr. Scheffler to apprise him, for the first time, of Sportspark's financial situation. Mr. Schlesinger recommended to Mr. Scheffler that he and Ms. Fernandez contribute additional capital to Sportspark to cure the default on the CIT note. Until that meeting, Mr. Scheffler had never received reports or other information from Mr. Schlesinger and/or Ms. Fernandez concerning Sportspark's financial and operational issues and had no knowledge of Sportspark's critical financial condition.
31. During the early part of 2000, Mr. Schlesinger and/or Ms. Fernandez were attempting to negotiate with Pristine Properties, Don Herman, and possibly a third entity for the sale/purchase of Sportspark.
32. After his meeting with Mr. Schlesinger, Mr. Scheffler was demonstrably displeased about the matter and proceeded to gather more information on the Sportspark issue, frequently verbalizing his anger, concerns, and desire to sell his ownership interest in the project in telephone conversations and outbursts of frustration while present at Las Vegas Color Graphics. Councilman McDonald, an employee of Las Vegas Color Graphics, was often present and overheard Mr. Scheffler's conversations and angry outbursts regarding Sportspark.
33. In the process of discussing the Sportspark matter with Ms. Fernandez and Mr. Schlesinger and attempting to gather more information on the issue, it occurred to Mr. Scheffler that he, Ms. Fernandez, and Mr. Schlesinger

should bring this matter to the attention of the City of Las Vegas. Mr. Scheffler shared that thought with his employee, Councilman McDonald, and asked him who at the City of Las Vegas Mr. Scheffler should see to set up a meeting. Councilman McDonald referred Mr. Scheffler to City of Las Vegas staff, specifically City Manager Virginia Valentine.

34. Councilman McDonald's city office is located next to Councilman Brown's city office. Sometime in May, 2000, in casual conversation, Councilman McDonald mentioned to Councilman Brown that the City of Las Vegas may have an opportunity to take control of Sportspark. At that time, Councilman Brown did not know that Mr. Scheffler, Councilman McDonald's employer, was an owner of Sportspark, and Councilman McDonald did not disclose that information to Councilman Brown. Over an approximately six-week period between May and July, 2000, Councilman McDonald approached Councilman Brown at least a half dozen times regarding the City's possible opportunity to acquire Sportspark.

35. Sometime after his late April, 2000 meeting with Mr. Scheffler and before June 2, 2000, Mr. Schlesinger again met with Mr. Scheffler. Ms. Fernandez was also present at this meeting. Mr. Schlesinger again suggested that Ms. Fernandez and Mr. Scheffler contribute additional capital to the business to cure the CIT default and provide working capital. Mr. Scheffler and/or Ms. Fernandez suggested they consider what options they might have to sell their ownership interests in Sportspark. Mr. Scheffler and Ms. Fernandez were interested in options which would allow them to recover their initial capital investments. Mr. Scheffler suggested that the City of Las Vegas was a logical candidate for them to approach regarding such a purchase. Mr. Schlesinger was adamantly opposed to approaching the City of Las Vegas regarding the possibility of the City purchasing Sportspark. Ultimately, the three agreed to draft a document outlining the terms and circumstances under which they would agree to sell Sportspark.

36. At Mr. Scheffler's recommendation, Dean Patti, Esq., drafted the document outlining the terms to which the parties agreed with regard to selling Sportspark. The agreement included a proposed sale price range of \$7,888,000 to \$8,700,000 (which represented the proceeds necessary to satisfy all debts of the business, return to Ms. Fernandez and Mr. Scheffler their original investments, and provide a commission to real estate agent Bert Cirincione) and listed the City of Las Vegas as a buyer candidate. Ms. Fernandez and Mr. Scheffler signed the document on June 2, 2000, and provided it to Mr. Schlesinger for his signature. Mr. Schlesinger refused to sign the document.

37. At the time of the meeting where they discussed the terms under which they would agree to sell Sportspark, neither Ms. Fernandez, Mr. Scheffler, nor Mr. Schlesinger had discussed the matter with any representative of the City of Las Vegas or Mr. Cirincione, the real estate agent identified in the written agreement.

38. Bert Cirincione is a licensed real estate agent employed by Millennia Real Estate Services. He has been a licensed real estate agent in Clark County since 1987. Prior to being in real estate, Mr. Cirincione was involved in the graphics business, where he had associations with Mr. Scheffler. Mr. Cirincione and Mr. Scheffler enjoy a business relationship. Mr. Cirincione and Ms. Fernandez invested in real estate together during the 1980s; however, since about 1990 Mr. Cirincione has had very little business dealings with Ms. Fernandez.

39. The agreement provided that Mr. Cirincione was to receive a real estate commission in an amount equal to the remainder of the proceeds of the sale of Sportspark after all debts were paid and after Ms. Fernandez and Mr. Scheffler were each paid an amount equal to or greater than their initial cash investment.

40. After Ms. Fernandez and Mr. Scheffler delivered the agreement to Mr. Schlesinger, and before they heard back from him, John Horton presented an offer on behalf of Pristine Properties to purchase Sportspark from Ms. Fernandez, Mr. Scheffler, and Mr. Schlesinger. However, subsequent negotiations between Pristine Properties and the owners of Sportspark ultimately failed, and the deal fell through.

41. Thereafter, Don Herman expressed an interest in purchasing from Ms. Fernandez, Mr. Scheffler, and Mr. Schlesinger the ownership interest in Sportspark. Ms. Fernandez attempted to negotiate a deal with Don Herman. However, those negotiations also ultimately failed.

42. When the matter involving the possible sale of Sportspark to Pristine Properties came before the Las Vegas City Council on its July, 2000 agenda, Councilman McDonald abstained because of his employment relationship with Mr. Scheffler.

43. Councilman Brown believed the opportunity for the City to get involved with Sportspark was appealing, but he wanted information about Sportspark's financial status. Sometime near the end of July, 2000, Mr. Scheffler asked Councilman McDonald if he would set up a meeting between Mr. Scheffler and Councilman Brown. Councilman McDonald arranged for Councilman Brown to meet with Mr. Scheffler at Las Vegas Color Graphics regarding Sportspark's financial status. However, Mr. Scheffler failed to appear at the time set for the meeting, and Councilman Brown left to catch a flight. Councilman McDonald arranged another meeting between Mr. Scheffler and Councilman Brown, and Councilman Brown requested that the meeting be held at the City Manager's office, with staff present.
44. Mr. Scheffler subsequently met with City Manager Virginia Valentine and other Las Vegas City personnel, including Las Vegas City Councilman Larry Brown, Las Vegas City Attorney Brad Jerbic, and/or other City of Las Vegas officials, and provided information about Sportspark, including information about who owed what to whom, CIT's position, and copies of the original loan documents and amendments. Councilman Brown insisted that Councilman McDonald not attend the meeting, and Councilman McDonald did not attend the meeting.
45. Councilman McDonald discussed the Sportspark issue with Mayor Oscar Goodman, City Manager Virginia Valentine, and/or Councilman Brown on several occasions.
46. Councilman McDonald telephoned Mayor Goodman, City Manager Valentine, and Councilman Brown on more than one occasion when they were out of state on other business. Councilman McDonald told these City officials that Ms. Fernandez and Mr. Scheffler were "good people", and he believed the Sportspark acquisition was a good opportunity for the City to "make it right for them" by proceeding with a "friendly foreclosure" and buying out their interests in Sportspark. Councilman McDonald urged that the matter be placed on a city council agenda. Mr. Scheffler had advised Councilman McDonald, and Councilman McDonald advised Mayor Goodman, City Manager Valentine, and Councilman Brown, that Sportspark was facing imminent foreclosure by CIT and that if the City wanted Sportspark, it would have to act soon.
47. Councilman McDonald telephoned City Manager Valentine at home on a Sunday regarding the City buying Sportspark, providing the following figures to buy out the interests of Ms. Fernandez, Mr. Scheffler and Mr. Schlesinger: \$1.6 million for Ms. Fernandez, \$200,000 for Mr. Scheffler, \$50,000 for Mr. Schlesinger, and the amount of the CIT note (approximately \$5.3-5.5 million). The figures were provided to Councilman McDonald by Mr. Scheffler.
48. When Councilman McDonald first approached Mayor Goodman, the Mayor did not know that one of the owners of Sportspark, Mr. Scheffler, was Councilman McDonald's employer, and Councilman McDonald did not disclose that information to Mayor Goodman during their conversations about Sportspark.
49. At a Las Vegas Convention and Visitors Authority meeting, Councilman McDonald, then the Chairman of the Authority, advised Mayor Goodman that (i) there was approximately \$2.6 million through the LVCVA, which might be available to contribute to the City's purchase of Sportspark; and (ii) County Commissioner Lance Malone had advised Councilman McDonald of a County park fund, from which approximately \$1 million might be contributed to the purchase of Sportspark. Councilman McDonald urged Mayor Goodman to use this approximately \$3.6 million fund for the City's purchase of Sportspark.
50. Mayor Goodman, Councilman Brown, and City Manager Valentine all cautioned Councilman McDonald at various times not to get involved in Sportspark because of the conflict, since Mr. Scheffler, an investor in Sportspark, was also Councilman McDonald's employer.
51. City of Las Vegas staff and councilpersons are obligated to make decisions and act upon matters such as Sportspark according to what is in the best interest of the City of Las Vegas.
52. The City of Las Vegas' interest was in having Sportspark perform under the terms of the management and operation agreement.

CONCLUSIONS OF LAW

1. Michael McDonald is a public officer as defined by NRS 281.005 and NRS 281.4365.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465, Subsection 1(a); and NRS 281.511, Subsection 2(b).

WHEREFORE, on motion duly made, seconded, and unanimously approved, the Commission renders the following Opinion:

OPINION

A. Ranger Building Special Use Permit

Based on the testimony and evidence, Councilman McDonald is a "hands-on" representative who approaches his public duties with enthusiasm and zealously. However, in this instance, after recusing himself from the City Council's consideration of the Ranger Building matter, he directly intervened in issues related thereto which came to his attention, rather than referring those issues to the City Manager as City protocol would have indicated, and he failed to follow the chain of command in requesting work from City staff. Nevertheless, the Commission finds that although Councilman McDonald's actions reflected poor judgment and a violation of City protocol, his conduct did not amount to a violation of NRS 281.481(2).

NRS 281.481(2) provides:

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, any business entity in which he has a significant pecuniary interest, or any other person. As used in this subsection, "unwarranted" means without justification or adequate reason.

Therefore, in order to find a violation of NRS 281.481(2) by Councilman McDonald, a preponderance of the evidence must show that he used his City Council position to secure or grant unwarranted benefits for himself, any business entity in which he has a significant pecuniary interest, or "any other person." Although Councilman McDonald exercised poor judgment and did not follow City protocol, and he may have used his City Council position to get staff to perform work relating to the Ranger Building matter, the evidence did not show any benefit to Councilman McDonald, or that he had any pecuniary or business relationship with any person for whom he sought to secure or grant unwarranted privileges, preferences, exemptions or advantages.

Councilman McDonald, through his liaison, approached City staff in the City business license division and made inquiries related to certain distance separation provisions of the City Code and issues of possible code violations relating to the Ranger Building matter. The testimony showed that such inquiries by city councilpersons or their liaisons are neither unusual nor improper in the context of planning, zoning, and other issues which come before the City. The Commission is not prepared to say that out-of-protocol contacts with staff by elected representatives, in and of themselves, constitute ethical violations. Any such conclusion would unduly restrict elected representatives in carrying out their official responsibilities.

There was no evidence or testimony that in making such inquiries, Councilman McDonald or his liaison attempted to influence staff in the City business license division to depart from the faithful performance of their duties. There was no evidence or testimony that Councilman McDonald or his liaison requested any special treatment, favorable or unfavorable, by the City business license division relating to the church, the institute, or Ranger Building. Further, there was no evidence or testimony that Councilman McDonald or his staff were in any way involved in the decision to locate the church or the institute within the distance restrictions relating to the Ranger Building. Finally, although Councilman McDonald requested city surveyors to undertake surveys of certain properties in this matter without going through the "chain of command" established by City Manager Valentine, there was no evidence of any attempt to have the surveyors do anything other than conduct an accurate, professional survey in accord with their City responsibilities.

Had there been any such evidence, Councilman McDonald's conduct may very well have constituted ethical violations. However, the observance or violation of protocol is a matter for the internal processes of the municipality

and does not constitute an ethical violation, unless other evidence of statutory breaches is present. The Commission finds, therefore, that Councilman McDonald did not violate the provisions of NRS 281.481(2), based on the evidence presented of his conduct in the Ranger Building special use permit matter.

B. Sportspark

Councilman McDonald's hands-on approach, however, is more troubling in the Sportspark matter, because of his employment relationship with Sportspark investor Scheffler. The evidence shows that this pecuniary interest affected Councilman McDonald and resulted in conduct which violates NRS Chapter 281.

One of the purposes of Nevada's Code of Ethics is to encourage public officers and employees to place their ethical obligations at the forefront of their thought processes, particularly where personal pecuniary interests are present which may tempt an official to place personal concerns ahead of the public interest which the official is sworn to serve. Councilman McDonald's conduct did not meet that standard, and he may have been "saved" from more severe ethical problems by the conscientious and diligent protection of the City's interests by Mayor Goodman, Councilman Brown, and City Manager Valentine, through their refusals to allow Councilman McDonald to play an even greater advocacy role for his employer on the Sportspark matter.

Initially, Councilman McDonald did not disclose his employment relationship with Mr. Scheffler to Councilman Brown, Mayor Goodman, or City Manager Valentine. However, his testimony reflected his understanding that the Code of Ethics would prohibit him from voting on any ultimate transaction where the City might be involved with Sportspark. By the time Sportspark came before the Las Vegas City Council in July, 2000, Mayor Goodman, Councilman Brown, and City Manager Valentine had learned of his employment relationship with Mr. Scheffler, and Councilman McDonald publicly disclosed that relationship and his abstention from any vote. Before any matter was acted upon by the City Council, Councilman McDonald was clearly aware that, as a public officer, he had a conflict of interest in matters concerning Sportspark and that the conflict of interest implicated a disclosure and abstention requirement at City Council meetings. In addition, once Mayor Goodman, Councilman Brown, and City Manager Valentine became aware of Councilman McDonald's conflict, they were able to evaluate his input in light of that conflict and make decisions on Sportspark based on the City's interest and not on any hidden motive or interest of the Sportspark investors advocated by Councilman McDonald. In this sense, then, the objective of the Code of Ethics was achieved when Councilman McDonald recognized that his employment would require his abstention on any City Council votes relating to Sportspark; his conflict was recognized by the appropriate City officials before any City Council action was taken; and those City officials were able to filter his improper advocacy and ultimately reject any Sportspark purchase, based on the best interests of the City. Councilman McDonald's awareness, disclosure, and abstention, however, did not satisfy his obligations under the ethical standards to which public officers are held.

The analysis of Councilman McDonald's improper conduct begins with NRS 281.501(2), which allows a public officer to "otherwise participate" in a matter, even where a conflict prohibits that officer from voting upon or advocating its passage or failure. This Commission has considered the bounds of "participation" and the line between permissible participation and impermissible advocacy in one previous opinion.^[2] In the Kubichek Opinion, the Commission held that a public officer could speak and provide facts at a public meeting on a matter where the public officer had a disqualifying conflict, commenting that the line between a statement of fact and a statement of advocacy "will often be razor thin." As the Commission stated in the Kubichek Opinion:

Because the consequences of crossing the line will always rest upon the elected official proffering the statement, the best general rule we can give is that an elected official who has already disclosed and abstained from a matter because of a disabling conflict of interest should always consider whether what [he] has to say really needs to be said, and if [he] thinks so, then [he] must be very careful with what [he] says and how [he] says it. Prudential forethought, common sense, and concern for appearances of impropriety will be the best prophylaxis. We interpret NRS 281.501(2) not to be a strict prohibition, but a stiff caution. In other words, a member of the legislative branch may speak about a matter in which [he] is interested, but [he] had better know why, what, and how **before** [he] does so... Thus, we interpret NRS 281.501(2) to allow an otherwise legally conflicted elected official to "otherwise participate" in a matter by participating as a citizen applicant before the elected official's body and by participating as a provider of factual

information.

Under the Kubichek Opinion, then, Councilman McDonald could provide factual information (such as the Sportspark ownership structure, the terms of the CIT loan, and the pending default and foreclosure thereunder, all of which he learned through his disqualifying employment conflict) to his colleagues and City Manager Valentine. Had Councilman McDonald simply performed such a role as a provider of facts between Sportspark owners and City officials, the Kubichek Opinion would have provided support that his conduct was not in violation of NRS 281.501(2). However, the evidence clearly established that Councilman McDonald's role went far beyond a mere provider of facts and crossed the line into "statements of advocacy", which are prohibited by the Kubichek Opinion and NRS 281.501(2).

The evidence showed that new "facts" were available to Councilman McDonald at each of the several stages of the Sportspark matter, but his transmittal of those facts came with strong statements and implications of advocacy that the City should rescue the Sportspark investors by making them whole with City money. His transmittal of facts came with arguments why the City should save the private investors, without advancing arguments why the City's expenditure of public funds was justified by benefits to the City, as opposed to benefits to the private investors. Throughout the period from April through August, 2000, Councilman McDonald became aware of pertinent facts through information provided by Mr. Scheffler, and he conveyed that information in advocating on Mr. Scheffler's behalf. For example, he learned from Mr. Scheffler of the financial difficulties of the Sportspark investors, the tentative "agreement" among the three investors to seek a sale, and the private purchasers who attempted to negotiate a sale. He acted on these facts in his role as a Councilman at the July City Council meeting where an audit was ordered, with his telephone calls to Councilman Brown and City Manager Valentine in Baltimore, with his Sunday telephone call to City Manager Valentine to convey precise numbers for the City to acquire Sportspark, and at the August City Council meeting where accusations against Councilman McDonald were made by Mr. Schlesinger. Each of these events involved facts of interest to the City, and transmitting those facts gave Mayor Goodman, Councilman Brown, and City Manager Valentine relevant information which could assist the City in evaluating its options on Sportspark. Councilman McDonald's conduct, however, went beyond merely providing information. It went beyond participation. It urged the City, through its elected and appointed officials, to act to benefit the Sportspark investors. It was advocacy, prohibited by NRS 281.501(2).

Councilman McDonald's discussions with Councilman Brown on numerous occasions also crossed the line. During the early discussions, Councilman Brown was unaware of Councilman McDonald's employment relationship with Mr. Scheffler, and Councilman McDonald failed to disclose that information to Councilman Brown. Even after Councilman Brown became aware of the relationship, Councilman McDonald continued to lobby him to support the City's acquisition of Sportspark at a price in public dollars which benefited Mr. Scheffler, Ms. Fernandez and Mr. Schlesinger. Councilman McDonald's comments to Councilman Brown went beyond providing information. His involvement and efforts went beyond participation. He was not just providing information about the availability of Sportspark or commenting that Sportspark would be a positive acquisition for the City of Las Vegas. He was urging Councilman Brown to support the City's acquisition of Sportspark by the City of Las Vegas at his employer's price. He was advocating.

Councilman McDonald's communications with Mayor Goodman regarding Sportspark also crossed the line between merely providing factual information and advocating a certain position. Mayor Goodman was unaware of Councilman McDonald's pecuniary interest with Mr. Scheffler until after he had been lobbied by Councilman McDonald to support the Sportspark acquisition. Councilman McDonald's advocacy to City Manager Valentine and Councilman Brown was passed on to Mayor Goodman, again crossing the line between merely transmitting facts to non-conflicted decision makers and improperly advocating for a particular result despite a disqualifying conflict. Councilman McDonald's advocacy to City Manager Valentine carried with it additional pressure, since the city council has power to hire, fire, and determine working conditions and employment benefits for the city manager. City Manager Valentine, to her credit, properly carried out her responsibilities by evaluating the City's best interest as to Sportspark, looking into the alternatives, and ultimately rejecting the entreaties of one of her "bosses" to assist the Sportspark investors at the City's expense.

Councilman McDonald rationalized his conduct as being informative and consistent, with his public duty to explore a park opportunity which might be in the best interests of the City of Las Vegas. However, in his private capacity, Councilman McDonald also had a strong sense of loyalty and a great personal incentive to please his employer, Mr. Scheffler. In matters involving Sportspark, Councilman McDonald's private interests conflicted with his public duty,

and his advocacy on behalf of his employer violated that public duty. Merely reciting a possible public benefit which could arise from impermissible advocacy will not insulate a public officer from a violation of NRS 281.501(2). The prohibition against advocacy is absolute and must be respected under all circumstances, even where a public official believes in good faith that the public interest will be served by actions which, by the way, also happen to convey a personal benefit on that official.

In NRS 281.421, the Legislature has declared that it is "the public policy of this state that (a) a public office is a public trust and shall be held for the sole benefit of the people; and (b) a public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves." NRS Chapter 281, therefore, provides guidelines "to show the appropriate separation between the roles of persons who are both public servants and private citizens" so as to "enhance the people's faith in the integrity and impartiality of public officers and employees." NRS 281.421(2).

As the Commission discussed in its Opinion in another matter^[3] (which the Commission has often since quoted), the intent of Nevada's ethics laws is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests; to preserve and enhance impartiality of public officers and faith in the integrity of government; to ensure equality of treatment toward those dealing with government; to provide assurance that decisions on public matters will not be influenced by private considerations; and to prevent the use of public office for private gain. Conflicts of interest are situations which require a public officer to serve two masters - his private interest and his public duty. They create at least the potential for a public officer to conduct himself contrary to what may be for the sole benefit of the people he serves.

In relevant part, NRS 281.501(2) provides:

In addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

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

The definition of "commitment in a private capacity to the interests of others" in NRS 281.501 includes, among others, a person who employs the public officer. See, NRS 281.501(8). The independence of judgment of a reasonable person in Councilman McDonald's situation would be materially affected by his pecuniary interest in his employment by Mr. Scheffler, an investor in Sportspark, and by a commitment in a private capacity to his employer's interests, which interests he would reasonably be interested in protecting so as to preserve his own employment. And Mr. Scheffler had a very significant interest in the issues surrounding Sportspark. As discussed herein, although there is no evidence that Councilman McDonald voted on any matter regarding Sportspark, there is clearly a preponderance of the evidence that he advocated and lobbied other members of the Las Vegas City Council and the City Manager to take action on the Sportspark matter that would benefit Councilman McDonald's employer, Mr. Scheffler, at the City's expense.

NRS 281.481(2) prohibits a public officer from using his position in government to "secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person." As used in NRS 281.481(2), "unwarranted" means "without justification or adequate reason."

There is no evidence that Councilman McDonald was promised additional compensation by Mr. Scheffler for assisting him in the Sportspark transaction with the City or that Councilman McDonald acted with the intent to profit personally. Further, there was no evidence that Councilman McDonald's continued employment by Mr. Scheffler was explicitly dependent upon his assisting Mr. Scheffler in the Sportspark transaction with the City.

However, Councilman McDonald put himself in a very difficult position as to Sportspark. In his public capacity as a Las Vegas City Councilman, his duty is to act for the sole benefit of the people he was elected to serve. In his private capacity, his loyalty to his employer motivated him to assist Mr. Scheffler in attempting to overcome a difficult financial situation by using access to staff and other members of the City Council (which an ordinary member of the

public would not have) and lobbying them to take action which would benefit Mr. Scheffler and, therefore, himself as Mr. Scheffler's employee. There was absolutely no evidence that the action Councilman McDonald was advocating with regard to Sportspark (i.e., the City of Las Vegas purchasing the CIT note and the investors' interests at a cost of several million dollars) was a good economic deal for the City of Las Vegas and in the public's interest. On the contrary, there was evidence that the action Councilman McDonald advocated served primarily the pecuniary interests of the Sportspark investors, and it was the impression of those being lobbied that his primary concern was to make sure the Sportspark investors (including Mr. Scheffler) were "made whole." By his conduct relating to the Sportspark issue, Councilman McDonald used his position as a Las Vegas City Councilman to secure or grant an unwarranted privilege, preference, or advantage for himself by attempting to benefit and please his employer (and thereby curry favor for himself so that his primary source of outside income would be protected), contrary to his duty to avoid conflicts and serve the public trust.

Therefore, based upon a preponderance of the evidence in this matter, the Commission unanimously determined that Councilman McDonald's conduct related to the Sportspark matter violated NRS 281.501(2) and NRS 281.481(2). The Commission also determined that Councilman McDonald's conduct in the Sportspark matter did not violate any provision of NRS 281.230; NRS 281.481(1), (3), (5), (9), and (10); or NRS 281.501(3).

Having found violations of NRS 281.481(2) and NRS 281.501(2), the Commission must determine whether Councilman McDonald's actions constitute "willful violations" as defined in NRS 281.4375 and, if so, whether penalties should be imposed under NRS 281.551.

A violation of NRS Chapter 281 is "willful" if the public officer "knew or reasonably should have known" that his conduct violated NRS Chapter 281. NRS 281.4375. Because the legislature clearly contemplated that willful acts or conduct can be found to violate NRS Chapter 281 and yet not constitute a "willful violation," something more than a simple willful or voluntary act is required. Therefore, conduct can be "willful" in the dictionary sense, yet not result in a "willful violation" as defined in NRS 281.4375 and as contemplated by the legislature to warrant imposition of penalties under NRS 281.551. The analysis necessarily must proceed on a case-by-case basis, dependent on the particular facts and evidence in the record. Although previous Commission decisions have found "willful violations", one particular opinion provides some guidance on making the distinction between a willful act (which does not result in sanctions) and a willful violation (which can lead to sanctions). In Opinion 96-49, *In re: Bowles*, the Commission evaluated the conduct of a county treasurer who used public money for personal purposes. The Commission had no difficulty in finding that "...a reasonable person ... would have known that public money cannot and should not be used for personal purposes under any circumstances... [Public officer] deliberately and intentionally used public money as his own, and in so doing, he willfully violated NRS 281.481(2) and (7)." Opinion 96-49 at p. 10.

Our inquiry here, then, is whether a reasonable person in Councilman McDonald's position knew or should have known that his transmission of facts on Sportspark, when conveyed with impermissible statements of advocacy, violated NRS 281.481(2) and NRS 281.501(2). On one hand, Councilman McDonald is charged with knowledge of the Code of Ethics, including the distinction between permissible participation and impermissible advocacy, and his conduct clearly crossed the line into impermissible advocacy. On the other hand, the Kubichek Opinion is the closest previous Commission pronouncement on this distinction, and its holding supports a defense that once disqualifying conflicts are disclosed, a public official can convey facts without violating the Code of Ethics. And here, there is no evidence that Councilman McDonald advocated the use of public money for his own personal purposes, which was the situation in Opinion 96-49 where willful violations were found.

The Commission may find that a public officer or public employee's conduct is a willful violation if he is found to have acted voluntarily and with the specific intent and purpose either to (i) disobey or disregard what NRS Chapter 281 requires or (ii) do something which NRS Chapter 281 forbids. The Commission may also find that a public officer or public employee willfully violated a provision of NRS Chapter 281, if it determines that he knew or reasonably should have known what NRS Chapter 281 forbids and/or requires and he is found to have acted voluntarily and with intention, knowledge, and purpose, without justifiable excuse, in violation of the provisions of NRS Chapter 281. A violation of the provisions of NRS Chapter 281 is not "willful" if it occurs as the result of carelessness, thoughtlessness, heedlessness, or inadvertence.

Additional guidance is found in NRS 281.551(6), which defines certain specific circumstances under which action taken by a public officer in violation of certain provisions of NRS Chapter 281 cannot constitute a "willful" violation. These "safe harbor" provisions include the public officer's good faith reliance on advice of legal counsel or the

Commission's manual; a public officer's inability through no fault of his own to obtain an opinion from the Commission before the action was taken; and taking action that was not contrary to a prior published opinion of the Commission. Based upon the facts of this matter, Councilman McDonald did not meet any of the "safe harbor" provisions of NRS 281.551(6), so his conduct must be evaluated without the benefit he would otherwise have, had he availed himself of those protections.

The Commission, after hearing all of the testimony and reviewing all of the evidence in this matter, deadlocked on a 3-3 vote on a motion to find that Councilman McDonald's conduct in violation of NRS 281.481(2) and/or NRS 281.501(2) constituted "willful violations." The Commission realizes that such a deadlock does not provide a "bright line" test to guide public officials as to what conduct will be deemed "willful violations" of NRS Chapter 281. However, the difficulty which the Commission had in reaching a majority vote reflects that each case involves an intensive, fact-specific inquiry, and that public officials whose conduct violates NRS Chapter 281 will always be exposed to uncertainty as to whether that conduct will also be found to constitute a "willful violation" resulting in the imposition of sanctions. The simplistic lesson is to avoid conduct which violates NRS Chapter 281 and avail oneself of the "safe harbor" protections of NRS 281.551(6) whenever any issue even remotely implicates NRS Chapter 281. Nevada's Code of Ethics places the burden and the risk on public officers and employees to conform their conduct to the highest standards of public service, avoiding even the appearance of placing personal benefit above the public interest. Councilman McDonald could have avoided the decision of this Commission that he has committed ethical violations, the uncertainty as to whether his conduct constituted "willful violations", and the threat of sanctions and damage to his political future, through the simple expedient of seeking advice of legal counsel or an advisory opinion from this Commission, before transmitting facts and advocating for particular City actions on Sportspark. His failure to obtain such "safe harbor" protections places responsibility for any negative consequences from this Opinion at his feet. Therefore, although the 3-3 Commission vote on whether Councilman McDonald's conduct constituted "willful violations" prevented the Commission from considering the penalty provisions of NRS 281.551, Councilman McDonald has clearly been put on notice that his conduct as a Councilman must comport first with his duty to act solely for the public interest. He will be acting at his peril on any issues which implicate his personal interests in any manner whatsoever, particularly where he does not use the "safe harbor" provisions available to him.

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: July 13, 2001.

NEVADA COMMISSION ON ETHICS

By: PETER C. BERNHARD, Chairman

[\[1\]](#) Commission Vice Chairman Todd Russell and Commission member Bill Flangas did not participate in this hearing pursuant to NRS 281.462, Subsection 4.

[\[2\]](#) See, Commission Opinion No. 97-07, In the Matter of the Request for Opinion Concerning the Conduct of Janet Kubichek, Humboldt County Commissioner, dated June 11, 1998 (the "Kubichek Opinion").

[\[3\]](#) See, Abstract of Opinion No. 99-57, in the Matter of the Request for an Advisory Opinion of Public Officer, dated May 19, 2000, at page 6.