

Advisory Opinion No. 02-21

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Advisory Opinion of JOHN S. WRIGHT, Member and President, State of Nevada Commission of Appraisers of Real Estate

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on November 7, 2002, on the confidential request for advisory opinion filed by John S. Wright, Member and President, State of Nevada Commission of Appraisers of Real Estate, pursuant to NRS 281.511, Subsection 1.

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5. Mr. Wright appeared in person and was sworn and presented testimony. Following the hearing, Mr. Wright waived confidentiality of the Commission's written opinion.

Based upon the facts provided herein, Mr. Wright requests the Commission's advisory opinion determining whether certain of his professional relationships and/or activities create a conflict of interest with his public duty as a member and President of the Nevada Commission of Appraisers of Real Estate which disqualifies him from participating in deciding a matter pending before the Nevada Commission of Appraisers of Real Estate limited to the question of whether an appraisal of commercial property for eminent domain prepared by a certain licensed appraiser of real estate meets professional guidelines.

The Commission, after hearing testimony and considering the evidence presented herein, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In his public capacity, Mr. Wright is a member and President of the Nevada Commission of Appraisers of Real Estate. Mr. Wright was appointed to the Nevada Commission of Appraisers of Real Estate by the Governor in 2001. He was elected President of the Commission in 2002 by a vote of the members of the Commission. The President of the Commission is elected annually.
2. In his private capacity, Mr. Wright is a licensed general appraiser of real estate with experience in the appraisal of commercial properties and appraisal of properties subject to eminent domain.
3. The Nevada Commission of Appraisers of Real Estate is composed of five members. Three members are certified general appraisers (qualified to appraise any type of property); two members are residential appraisers. Three of the five members (including one of the certified general appraisers) have residential practices. Mr. Wright and only one other member have experience in the appraisal of commercial property.
4. The Real Estate Division of the State of Nevada Department of Business and Industry has brought a complaint before the Nevada Commission of Appraisers of Real Estate against James Himes, a certified general appraiser licensed in Nevada, based upon a complaint filed with the Real Estate Division by an unknown third party. The Nevada Commission of Appraisers of Real Estate is scheduled to hear the matter on December 10, 2002.
5. Ms. Laura Wightman FitzSimmons, attorney for Mr. Himes, alleges that Mr. Wright (a) has close professional relationships with two witnesses who will testify in the Himes matter; (b) has done work for the Nevada Department of Transportation (NDOT) (the entity she alleges originated the complaint) since the complaint was filed, as has his former firm, Wright, Warren & Schiffmacher; and (c) was appointed President of the Nevada Commission of

Appraisers of Real Estate by the Governor while the complaint against Hines was pending; and, therefore, has asked Mr. Wright to disqualify himself from participating in hearing the complaint against Mr. Himes.

6. Mr. Wright is not acquainted with Mr. Himes, the licensee who is the subject of the complaint pending before the Nevada Commission of Appraisers of Real Estate. However, he is acquainted on a professional basis with two appraisers (Mr. Wren and Mr. Johnson) who will appear as witnesses before the Nevada Commission of Appraisers of Real Estate in the matter. Mr. Wright knows Mr. Wren professionally, and has no personal or pecuniary relationship with him. Mr. Wright was an employee of Mr. Johnson between 1984 and 1994 at the firm Johnson-Wright & Associates. The "Wright" in the firm name was Mr. Wright's father, who retired prior to Mr. Wright leaving the firm. After Mr. Wright's father's retirement, the name of the firm was changed to Johnson-Perkins & Associates. Mr. Wright's father is listed on the firm's letterhead in an honorary capacity as appraiser emeritus; however, he has no ownership or pecuniary interest in Johnson-Perkins. Mr. Wright's father is not presently a licensed real estate appraiser. He is in his mid-70's and has not practiced for approximately eight years. A stroke he suffered a year ago and Parkinson's disease have rendered him incapacitated. Mr. Wright has no personal relationship with Mr. Johnson, nor does he have any professional relationship with or interest in Johnson-Perkins & Associates.

7. Mr. Wright was a member of the limited liability company called Wright, Warren & Schiffmacher. The company was dissolved effective November 1, 2002. The company was formed by Mr. Wright and two other appraisers for the purpose of sharing professional confidences and common expenses, but not profits. Each appraiser member received payment for only the work he performed.

8. The complaint against Mr. Himes pending before the Nevada Commission of Appraisers of Real Estate concerns an appraisal prepared by Mr. Himes for a Nevada Department of Transportation (NDOT) property acquisition by eminent domain. The property appraised by Mr. Himes was located at the southern end of the U.S. 395 by-pass around Carson City. Federal funds will be used to acquire the property.

9. Prior to leaving Mr. Johnson's employ in 1994, Mr. Wright participated in appraising properties on the northern portion of the U.S. 395 by-pass around Carson City.

10. Mr. Wright did not appraise the same properties appraised by Mr. Himes for the U.S. 395 by-pass around Carson City.

11. Mr. Himes has been retained by Ms. FitzSimmons to appraise the Lompa Ranch for a pending condemnation. Mr. Wright previously appraised the Lompa Ranch for NDOT; however, for purposes of the actual condemnation, another appraiser was retained to complete the appraisal and Mr. Wright does not expect to be involved in the condemnation proceedings, nor does he expect to be called as a witness.

12. In the past year, Mr. Wright has prepared two appraisals for NDOT,^[1] but he currently has no contracts with NDOT. Since January 1, 1999, the income Mr. Wright has received for appraisal work performed for NDOT amounts to less than 4.5 percent of his total income.

13. The Uniform Standards of Professional Appraisal Practice generally employed by the Nevada Commission of Appraisers of Real Estate are superseded by the jurisdictional exceptions of the Uniform Standards for Federal Land Acquisition in appraisals of commercial property for eminent domain acquisitions involving federal funds. Mr. Wright may be the only member of the Nevada Commission of Appraisers of Real Estate with experience in appraising commercial property subject to eminent domain standards.

CONCLUSIONS OF LAW

1. Mr. Wright 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 281.511, Subsection 1, and NRS 281.521.

WHEREFORE, on motion duly made, seconded, and approved by majority vote, the Commission renders the following Opinion:

OPINION

NRS 281.501 sets the disclosure and abstention standards for public officers. The Commission has previously interpreted those standards in [Opinion No. 99-56](#), *In the Matter of Bruce L. Woodbury, Clark County Commissioner*. A public officer such as Mr. Wright has a duty to disclose the effects of his private commitments on the decision-making process in which he is involved. NRS 281.501(3). See also, NCOE Opinion No. 99-56. In addition, where informing the public of the potential effect of one's private commitment to the interests of others is not sufficient to protect the public from decisions which may be based on that private commitment (rather than on the public interest), abstention is also required. NRS 281.501(2). See also, NCOE [Opinion No. 99-56](#).

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.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the members is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 3 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

NRS 281.501(3) provides:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6,

such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body... This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

Although a public officer must always disclose appropriate information pursuant to NRS 281.501(3), his decision on whether to abstain in a particular matter involves a case-by-case evaluation of relevant factors. The burden of making a proper determination regarding abstention is on the public officer.

Abstention in all such cases would be a safe harbor for public officers and employees. However, the public (and an elected official's constituents) has an interest in matters which come before such officers and employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and employees should have the opportunity to perform the duties for which they were elected or appointed, except where private commitments would materially affect one's independence of judgment. Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore, is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a reasonable person's independence of judgment would be materially affected by those private commitments.

NCOE [Opinion No. 99-56](#), *In the Matter of Bruce L. Woodbury, Clark County Commissioner*.

Therefore, a public officer, in matters before him in which his private interests may be implicated, must (a) disclose sufficient information concerning his private interests to inform the public of the potential effect of his action as required by NRS 281.501(3); and (b) after making such proper disclosure, determine whether the independence of judgment of a reasonable person in his situation would be materially affected by his private interests and/or commitments, under the circumstances presented in a particular matter; and, if so, the public officer must also refrain from advocating the passage or failure of the matter and abstain from voting upon the matter, all in accord with NRS 281.501(2). See, NCOE [Opinion No. 99-56](#).

The facts and circumstances presented by Mr. Wright herein implicate no conflict of interest that would materially affect his independence of judgment or that of a reasonable person in his position requiring him, pursuant to NRS 281.501, to abstain from participating in hearing the complaint against Mr. Himes pending before the Nevada Commission of Appraisers of Real Estate. However, Mr. Wright is cautioned to comply with the disclosure requirements of NRS 281.501(3) at the time the complaint against Mr. Himes comes before the Nevada Commission of Appraisers of Real Estate for hearing.

Finally, for his guidance as a member of the Nevada Commission of Appraisers of Real Estate, the Commission refers Mr. Wright to NCOE [Opinion No. 99-56](#), which provides a thorough analysis of the Commission's interpretation of the disclosure and abstention standards of NRS 281.501(2) and (3) and a public officer's obligations with regard thereto; and reminds Mr. Wright that the Nevada Legislature has declared it to be the public policy of this state that (a) a public office is a public trust and shall be held for the sole benefit of the people, and (b) a public officer must commit himself to avoid conflicts between his private interests and those of the general public whom he serves. (NRS 281.421).

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: December 9, 2002.

NEVADA COMMISSION ON ETHICS

By: WILLIAM FLANGAS, Vice Chairman

[1] One on the NDOT maintenance station in Elko; one on property in Sparks.