



STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
PUBLIC OFFICER, Member, County Commission**

**Abstract of
Advisory Opinion No. 04-36**

This matter came before the Nevada Commission on Ethics (hereinafter the “Commission”) for hearing on the confidential request for advisory opinion filed pursuant to NRS 281.511, Subsection 1, by Public Officer, Member, County Commission.

The hearing was closed pursuant to NRS 281.511, Subsection 5. Public Officer appeared in person with counsel and was sworn and presented testimony. Advisory Opinion No. 04-36 is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer requests the Commission’s opinion advising him to what extent, if any, his private capacity as a member of the board of trustees of a private Nevada nonprofit corporation (hereinafter “Private Corporation”) would amount to a conflict of interest that would materially affect the independence of judgment of a reasonable person in his situation as a member of the County Commission, requiring him to abstain pursuant to NRS 281.501(2) on matters before the County Commission relating to and/or affecting Private Corporation.

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, Public Officer is an elected member of the County Commission.

2. Several years ago, pursuant to statute, Public Officer was appointed to fill a vacancy on the board of trustees of a county-owned facility. Public Officer was subsequently unanimously elected as a trustee. He served in that capacity until he resigned when he became an elected member of the County Commission.

3. After being elected to the County Commission, Public Officer was assigned the position of liaison on the County Commission to the County-owned facility's board of trustees, a voting member as then provided in the Nevada Revised Statutes.

4. Some time later, the County-owned facility changed from being a public facility with a six-member board of trustees to a private, not-for-profit 501(c)(3) corporation with a twelve-member board of trustees. The private corporation board of trustees meets monthly. A membership board consisting of members of the community meets at least annually to approve selection of the trustees and the general direction of the corporation.

5. When the facility changed from a public facility to a private, not-for profit 501(c)(3) corporation, Public Officer remained as a voting member of the now private corporation's board of trustees and continues to serve in that capacity. Public Officer also serves as chairman of the corporation's finance committee and corporate treasurer.

6. As compensation for his service as a member of the private corporation's board of trustees, Public Officer receives a nominal stipend. Public Officer has no other financial or pecuniary interest in the private, nonprofit corporation, nor does he, as treasurer, handle any corporate money, sign any corporate checks, or prepare any corporate budgets.

7. Several years ago, the county, the public facility, and a local special interest facility (a nonprofit corporation) entered into an agreement (hereinafter “The Agreement”) to attempt to lease or purchase for development a parcel of land then owned by a public agency (hereinafter “Parcel of Land”). Under the terms of The Agreement, the north half of the Parcel of Land was to be developed by the special interest facility; the south half of the Parcel of Land was to be developed by the then public facility for a specific purpose.

8. Recently, a matter came before the County Commission proposing development of the entire Parcel of Land by the special interest facility and a private developer. The materials presented to the County Commission for consideration of the matter made no mention of The Agreement.

9. During the County Commission’s consideration of the matter, Public Officer, after disclosing his position as a member of the private corporation’s board of trustees and the stipend he receives for that service, informed the members of the County Commission of The Agreement and the master plan for the Parcel of Land developed by the County, the then public facility, and the special interest facility.

10. At that time, the local district attorney raised the issue of whether The Agreement, which was entered into when the now private corporation was a public facility, was still effective since the facility was now a private corporation.

11. The County Commission thereafter assigned the facility’s interest, as a public facility, in The Agreement to the private corporation, and then voted to allow development of the Parcel of Land consistent with The Agreement.

12. As a member of the private corporation’s board of trustees, Public Officer acts in a fiduciary capacity for the private corporation.

13. As an elected member of the County Commission, Public Officer acts in a fiduciary capacity for the citizens of the county.

CONCLUSIONS OF LAW

1. In his capacity as an elected member of the County Commission, Public Officer is a “public officer” pursuant to NRS 281.4365.

2. The Commission has jurisdiction to render an advisory opinion in this matter pursuant to NRS 281.511, Subsection 1, and NRS 281.521.

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

OPINION

NRS 281.501(2), which addresses when public officers are required to abstain from voting on matters, 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 member 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(4), which addresses a public officer's duty to disclose conflicts of interests, 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. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. 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.

For purposes of NRS 281.501(2) and NRS 281.501(4), NRS 281.501(8) defines “commitment in a private capacity to the interests of others” as a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

To what extent Public Officer's fiduciary responsibility as a member of the Board of Trustees of the private Nevada nonprofit corporation, chairman of the corporation's finance committee, and corporate treasurer, amount to a conflict of interest that would materially affect the independence of judgment of a reasonable person in his situation as a member of the County

Commission, requiring him to abstain pursuant to NRS 281.501(2) on matters before the County Commission relating to and/or affecting the private corporation, can be answered only on a case-by-case basis as specific matters come before the County Commission. Where informing the public of the potential effect of his commitment and fiduciary responsibility to the private corporation's interests is not sufficient to protect the public from his decisions which may be based on that commitment (rather than on the public interest), abstention in the matter is required. But, that determination must be made by the public officer, in consultation with his legal counsel, after making a proper disclosure and carefully considering the matter.

In Opinion No. 99-56, the Commission reasoned:

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 that 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. A public officer must (1) disclose sufficient information concerning his commitments in a private capacity to inform the public of the potential effect of his action as required by NRS 381.501(3); and (2) after making such proper disclosure, determine whether the independence of judgment of a reasonable person in his situation would be materially affected by his commitments in a private capacity to the interests of others, 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).

Even when required to abstain on a matter pursuant to NRS 281.501(2), a public officer may still “otherwise participate” in the matter on issues about which he might possess unique and valuable knowledge, information, and experience. Therefore, when Public Officer is possessed of information that is important to be communicated to the County Commission when it is considering a matter concerning the private corporation, NRS 281.501(2) allows him to communicate that information to the board even if he is prohibited from advocating the passage or failure of, and voting on, the matter. However, The Commission cautions Public Officer that the line between permissible communication of information and prohibited advocacy of a matter “is razor thin [and] the consequences of crossing the line will always rest upon the elected official proffering the statement.” See, Commission Opinion No. 97-07.

The Commission, therefore, advises Public Officer, that when a matter relating to, affecting, or involving the private corporation comes before the County Commission:

1. He must make a proper disclosure about his commitment to the private corporation pursuant to NRS 281.501(4) and the Commission’s interpretation of the statute in its prior published opinions.¹
2. After making such proper disclosure, he must determine whether the independence of judgment of a reasonable person in his situation would be materially affected by his commitment to the private corporation.
3. If the independence of judgment of a reasonable person in his situation would be materially affected by his commitment to the private corporation, he shall not vote upon or advocate the passage or failure of, but may otherwise participate in the

¹ Especially, Opinion No. 99-56, Opinion No. 03-34, and Opinion No. 03-40 (all regarding disclosure and abstention pursuant to NRS 281.501).

consideration of, the matter in accordance with NRS 281.501(2) and the Commission's interpretation of the statute in its prior published opinions.²

NOTE: THIS MATTER IS A CONFIDENTIAL FIRST-PARTY ADVISORY OPINION REQUEST. FOR PURPOSES OF A FIRST-PARTY ADVISORY OPINION REQUESTED PURSUANT TO NRS 281.511(1), ALL FACTS IN THE MATTER ARE PROVIDED BY THE PUBLIC OFFICER REQUESTING THE ADVISORY OPINION, AND THE COMMISSION MAKES NO INDEPENDENT INVESTIGATION AS TO THE TRUTH OF THOSE FACTS. THE RECORD HEREIN, THEREFORE, CONSISTS SOLELY OF FACTS PROVIDED ON THE RECORD BY THE PUBLIC OFFICER, AND THIS OPINION IS BASED SOLELY UPON THOSE FACTS. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE PROVIDED BY THE PUBLIC OFFICER IN THIS ADVISORY 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, 2004.

NEVADA COMMISSION ON ETHICS

By: _____/s/_____
RICK HSU, Chairman

² Especially, the opinions referred to in fn 1 and Opinion No. 97-07 (regarding advocating and participation).