



STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
ELECTED CITY PUBLIC OFFICER**

**Abstract of
Advisory Opinion No. 04-38**

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.

The hearing was closed pursuant to NRS 281.511, Subsection 5. Public Officer appeared in person and was sworn and presented testimony. The Advisory Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer requests the Commission’s advisory opinion determining whether NRS 281.501(2) requires him to abstain from voting upon and advocating the passage or failure of matters that may come before the City Council concerning undeveloped land owned by the City that is located (a) near a commercial building in which Public Officer, Investor 1 and Investor 2 each own a one-third interest; and (b) across the street from a parcel of undeveloped land that is being purchased by Investor 1.

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 City public officer.
2. In his private capacity as an investor, Public Officer owns a 1/3 interest in commercial property referred to herein as the “Investment Property.” Public Officer shares his 1/3 ownership interest in the Investment Property with two (2) other investors, Investor 1 and Investor 2, who each owns a 1/3 interest in the Investment Property. Public Officer is unsure of the investment’s legal structure.
3. The Investment Property is located in the City near an existing facility operated by the County and near undeveloped land owned by the City.
4. Public Officer acquired his interest in the Investment Property several years ago. At that time, the property was a vacant lot. Sometime later, the three investors constructed a commercial building on the property. The building was later remodeled and is presently leased.
5. The Investment Property building was leased to the present tenants prior to the time Public Officer was elected to public office.
6. Public Officer has no other relationship (business, personal, or social) with either Investor 1 or Investor 2, although Public Officer was in business with Investor 2 many years ago.
7. Investor 1 manages the Investment Property and is compensated for his services from the rent paid by the tenant. Public Officer’s interest in the Investment Property is passive; he does not personally participate in the operation of the Investment Property.
8. Public Officer receives quarterly income from the property.
9. Public Officer has been actively involved in seeking and encouraging private and non-profit entities to develop the City-owned parcel of land.

10. If the parcel of land were developed, the nearby facility operated by the County would remain.

11. Investor 1 and Investor 2 have a first refusal right with regard to the sale of Public Officer's 1/3 interest in the Investment Property. Each of them has offered to purchase Public Officer's 1/3 minority interest for a significantly discounted value. Public Officer is willing to sell his 1/3 interest for nothing less than its actual appraised value.

12. Investor 1 is attempting to acquire a parcel of land across the street from the City-owned parcel of land. Public Officer has no personal, business or financial interest in the parcel of land Investor 1 is attempting to acquire.

13. Public Officer has disclosed his business relationship with Investor 1 and Investor 2 on his financial disclosure statements and understands his disclosure obligations under NRS 281.501(4) with regard to matters that which may come before the City Council involving development of the City-owned parcel of land.

CONCLUSIONS OF LAW

1. In his capacity as elected City Public Officer, 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 approved by majority vote, the Commission renders the following Opinion:

OPINION

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 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.

Development of the parcel of land owned by the City would likely have a positive effect on the value of the parcel of land that Investor 1 intends to purchase. However, the potential benefit to Investor 1 would be no greater than the general benefit to all owners of property near the City-owned parcel of land, and there is no evidence that Public Officer would realize a personal or financial benefit from the positive effect of the value of the four-acre parcel of land potentially owned by Investor 1. Therefore, although Public Officer may have a “commitment in a private capacity to the interest of others” with regard to Investor 1 because of their investment relationship, there is no evidence that such commitment would materially affect the independence of judgment of a reasonable person in Public Officer’s situation with regard to a matter before the City Council concerning development of the City-owned parcel of land across the street from which Investor 1 may own a parcel of land.

Further, any detrimental effect on tenancy at the Investment Property as a result of development of the City-owned parcel of land is, at this point, speculative. Development of the City-owned parcel of land may also have a positive effect on the value of the Investment Property. But, that, too, is speculative at this point. In any event, any detrimental or beneficial effect will not be limited to the Investment Property. Rather, it will be a general effect on all property in that sector. Therefore, although Public Officer may have a “commitment in a private capacity to the interest of others” with regard to Investor 1 and Investor 2 because of the investment relationship, there is no evidence that such commitment would materially affect the independence of judgment of a reasonable person in Public Officer’s situation with regard to a matter before the City Council concerning development of the City-owned parcel of land because the resulting benefit or detriment that would accrue to the Investment Property in which Public Officer, Investor 1, and Investor 2 are investors would not be greater than that accruing to any other member of the general group of property owners in the general area.

In addition, there is no evidence that Public Officer will personally or financially benefit from the City’s development of the City-owned parcel of land.

Therefore, based solely upon the facts provided to the Commission by Public Officer in this advisory opinion request, NRS 281.501(2) does not require Public Officer to abstain from participating in and voting on matters that may come before the City Council related to development of the City-owned parcel of land.

Nevertheless, Public Officer, as a public officer, understands that he must comply with the disclosure provisions of NRS 281.501(4).

NRS 281.501(4) 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.

The Commission has, through its published opinions, interpreted the abstention and disclosure standards of NRS 281.501(2) and NRS 281.501(4). In particular, the Commission refers Public Officer to Opinion No. 99-56 (Woodbury), Opinion No. 03-34 (Boggs-McDonald), and Opinion No. 03-40 (Mack), relevant portions of which follow and have been provided to Public Officer:

Opinion No. 99-56 (Woodbury): 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. That determination

must be made by the public officer on a case-by-case basis. 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).

Opinion No. 03-34 (Boggs-McDonald): In making a disclosure, the public officer must disclose sufficient information concerning her commitments in a private capacity and her pecuniary interests to inform the public of the potential effect of her action as required by NRS 281.501(4); and, after making such proper disclosure, determine whether the independence of judgment of a reasonable person in her situation would be materially affected by her commitments and/or her interests, under the circumstances presented in a particular matter; and, if so, she 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). When the public officer believes that there exists a nexus between the matter on which to be voted and the public officer's pecuniary interests or private commitments to the interests of others, she must make a proper disclosure and must refrain from advocating the passage or failure of the matter, and abstain from voting on the matter. Additionally, when a public officer believes that the nexus would not materially affect the independence of judgment of a reasonable person in her situation under the circumstances, her abstention is not required. However, in addition to disclosing the pecuniary interest or private commitment to the interest of others, the public officer must also disclose the reason she believes that the independence of judgment of a reasonable person in her situation would *not* be materially affected under the circumstances and why her abstention is not required.

Opinion No. 03-40 (Mack): The disclosure and abstention provisions of NRS 281.501 are at the heart of Nevada's public policy that requires public officers, who are both public servants and private citizens, to perform their public duties in a manner that will enhance the people's faith in their integrity and impartiality [see, NRS 281.421]. When faced with a conflict between his private interests and those of the public whom he serves, NRS 281.501, therefore, requires a public officer to disclose sufficient information concerning his private interests and/or commitments to inform the public of the potential effect of his action or abstention upon those private interests and/or commitments. This gives the citizens represented by the public officer the opportunity they deserve to evaluate the nature of the conflict and the public officer's exercise of discretion in determining whether the conflict will materially affect his judgment. The public officer must then make a proper determination regarding abstention where a reasonable person's independence of judgment would be *materially* affected by those private interests and/or commitments. Public officers are the voice of and accountable to their constituents [see, Woodbury Opinion]. Therefore, when not prohibited from voting on a matter, a public officer has a duty to act on all matters that come before him.

The Commission, therefore, advises Public Officer as follows:

1. Based particularly on Public Officer's representation that his 1/3 interest in the Investment Property is strictly passive, when a matter comes before the City Council relating to the undeveloped parcel of land owned by the City, the disclosure and abstention standards of NRS 281.501(2) and NRS 281.501(4), and the Commission's interpretation of those standards as discussed in its published Opinions, require Public Officer to properly disclose the extent of his interest in the Investment Property and the extent of his business relationship with Investor 1 and Investor 2, but they do not require Public Officer, after such proper disclosure, to abstain from participating in and voting on the matter.

2. Should, however, additional and/or different facts and circumstances arise that are not a part of the record in this matter, Public Officer should consult with his legal counsel regarding his disclosure and abstention obligations and be guided by the standards provided in NRS 281.501, Subsections 2 & 4, and interpreted by the Commission in its published opinions, in

making disclosure and abstention decisions regarding matters which may come before the City Council concerning the City-owned parcel of land.

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 ___3___, 2004.

NEVADA COMMISSION ON ETHICS

By: _____/s/_____
RICK HSU, Chairman