



STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
PUBLIC OFFICER, Trustee, General Improvement District**

**Abstract of Confidential
Advisory Opinion No. 05-09**

This matter came before the Nevada Commission on Ethics (hereinafter the “Commission”) for hearing on the request for advisory opinion filed pursuant to NRS 281.511(a) by Public Officer, an elected member of the Board of Trustees of a General Improvement District (hereinafter “GID”).

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5. Public Officer appeared in person, was sworn in 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 the public officer’s county clerical employment creates an impermissible conflict of interest with public officer’s duties as an elected member of the GID board of trustees. Public Officer also requests that the Commission provide general guidance with regard to public officer’s conduct as an elected member of the GID’s board of trustees in light of public officer’s status as a county employee.

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. Public Officer is an elected member of the GID Board of Trustees.
2. Public Officer is employed by County as a full time clerk.
3. The ordinance filed pursuant to NRS 318.010 established the GID and granted it all powers provided in NRS Chapter 318, including the power to:
 - levy taxes and issue bonds
 - use the district's revenue to meet its obligations
 - acquire, construct, improve, extend, better, operate, maintain and repair
 - a sanitary sewer system
 - curbs, gutters and sidewalks
 - a water supply, storage, and distribution system for private and public purposes
 - a lighting system for public streets, ways, and places
 - sites and equipment for the collection and disposal of garbage and refuse
4. The Board of Trustees is the governing body of GID.
5. GID and County are at odds on a controversial issue.
6. Public Officer is opposed to GID's position on the issue. Public Officer's campaign to be elected as a trustee of GID was based on his/her opposition to GID's position.
7. Other than to answer a few questions from one County Commissioner, Public Officer has not discussed the controversial subject with the members of the county board of commissioners; nor has public officer, in the role of a county clerical employee, offered guidance on the subject to the county manager or any member of the board of commissioners.
8. In his/her clerical position with County, Public Officer reports to and is under the direct supervision of a county division official. The county division official reports to a county

director, who, in turn, reports to the county manager. The county manager reports to the county commission.

9. Public Officer has no supervisory authority as a county employee and has specific duties.

10. Public Officer decided to be a candidate for the elected position of a Trustee of the GID in part based on Public Officer's knowledge of how the county works and where in the county to go for information and assistance. Public Officer believed that his/her knowledge would be beneficial to the GID.

CONCLUSIONS OF LAW

1. In the capacity as an elected member of the Board of Trustees of GID, Public Officer is a "public officer" pursuant to 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,¹ the Commission renders the following advisory pinion:

OPINION

The Commission is authorized to render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances upon request from a public officer or public employee who is seeking guidance on questions which directly relate to the propriety of his own past, present or future conduct as a public officer or employee. NRS 281.511, Subsection 1.

The Commission's opinion may include guidance to the public officer or employee on questions whether: (a) a conflict exists between his personal interest and his official duty; (b) his

¹ The vote was 5-1.

official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter; (c) the conflict would materially affect the independence of the judgment of a reasonable person in his situation; (d) he possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision; (e) it would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter. NRS 281.521, Subsection 1.

The statutes authorizing the Commission to render advisory opinions to public officers and public employees contemplate specific questions on specific facts and circumstances which may present a specific conflict between and public officer's or employee's private interests and public duties. The Commission lacks authority to render an opinion based upon speculation.

Since Public Officer's request for opinion presents general rather than specific facts and circumstances for the Commission to consider in interpreting and applying the ethical standards of NRS 281.481 and the disclosure, abstention, and participation requirements of NRS 281.501 to Public Officer's past, present or future conduct as a public officer and/or public employee, the Commission makes the following observations and provides to Public Officer the following general guidance with regard to Nevada's Ethics in Government law.

As an elected member of the Board of Trustees of the GID, Public Officer is a "public officer" pursuant to NRS 281.4365.²

² Pursuant to NRS 281.4365, "public officer" means a person elected or appointed to a position which is established by the Constitution of the State of Nevada, a statute of this state or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty." As used in NRS 281.4365, "the exercise of a public power, trust or duty" means: (a) Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy; (b) The expenditure of public money; and (c) The enforcement of laws and rules of the State, a county or a city." A member of the board of trustees for a general improvement district is a public officer pursuant to NRS 281.4365 unless the member's official duties do not include the formulation of a budget for the district or the authorization of the expenditure of the

As a county employee, Public Officer is a "public employee" pursuant to NRS 281.436.³

In both capacities (public officer; public employee), Public Officer is subject to the Code of Ethical Standards (NRS 281.481; NRS 281.505).

In the capacity of public officer, Public Officer is subject to the disclosure, abstention, and participation provisions of NRS 281.501.

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "to enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the role of persons who are both public servants and private citizens." NRS 281.421.

The Commission is charged with the responsibility of evaluating matters before it in light of public perception and commitment to the public trust, cautioning public officers and public employees of conduct that may undermine the public trust and holding public officers accountable when they fail to place public interest and public trust ahead of their private and/or pecuniary interests.

In performing their public duties, public officers should be mindful of the Nevada Legislature's public policy declarations of NRS 281.421 and conduct themselves to avoid conflicts between their private interests and those of the general public whom they serve. Public officers should also be mindful of the provisions of NRS 281.501 requiring them to adequately

district's money. See, NRS 281.4365(2)(c). Because members of the GID in County formulate a budget for the GID and authorize the expenditure of the GID's money, they are "public officers" pursuant to NRS 281.4365.

³ Pursuant to NRS 281.436, "'public employee' means any person who performs public duties under the direction and control of a public officer for compensation paid by the State, a county or an incorporated city."

disclose private interests and commitments when considering matters before them and, as appropriate, refrain from advocating the passage or failure of matters and abstain from voting when their independence of judgment is materially affected by their personal interest.

NRS 281.501(1) provides:

Except as otherwise provided in subsection 2 or 3, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

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(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 6,⁴ 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.

The Commission interpreted the disclosure, participation and abstention standards of NRS 281.501 in its Opinion No. 99-56, *In The Matter of the Opinion Request of Bruce L. Woodbury* (hereinafter the “*Woodbury Opinion*”), and regularly refers public officers to Opinion No. 99-56 for guidance. The Commission cautions Public Officer that when a matter comes before Public Officer in Public Officer’s capacity as an elected member of the Board of Trustees of GID, Public Officer must carefully consider the private interests and commitments that may affect Public Officer’s decision in the matter and disclose sufficient information concerning those private interests and/or commitments to inform the public and the constituents of the potential effect of Public Officer’s action [as required by NRS 281.501(4)] and, after making such proper disclosure, Public Officer must then determine whether the independence of judgment of a reasonable person in the situation would, under the circumstances presented in the particular matter, be materially affected by those private interests and/or commitments, and, if so, Public Officer must also refrain from advocating the passage or failure of the matter and

⁴ The provisions of NRS 281.501, subsection 6, apply to members of the legislature.

abstain from voting upon the matter [as required by NRS 281.501(2)].⁵ Public Officer's decision regarding abstention will, of course, necessarily vary depending on the particular issue before the GID Board of Trustees and how Public Officer's vote would be affected by, and could affect the basis of, Public Officer's private interests and/or commitments.

Specifically in that regard, Public Officer must carefully consider disclosure and abstention obligations when matters come before Public Officer as a member of the GID Board of Trustees that involve or concern Public Officer's employer, the County, or in which County has an interest. Most, if not all, such matters will require Public Officer to properly disclose the employment relationship with County; however, not all such matters will necessarily require Public Officer to abstain from participating and/or voting. Rather, in making the decision regarding abstention, Public Officer, on a case-by-case basis, should be guided by the NRS 281.501 disclosure and abstention standards and principles as discussed herein and as interpreted by the Commission in the *Woodbury Opinion*.

Abstaining from voting on a matter requires a public officer's careful consideration. As the Commission stated in the *Woodbury Opinion*:

Abstention in all such cases would be a safe harbor for public officers and employees. However, the public ... (and an elected official's constituents) have 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

⁵ The provisions of NRS 281.501 do not require a public officer who is refraining from participating in the discussion of, and abstaining from voting on, a particular matter to leave the room while the public body considers and votes on the matter.

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.

Nevada Commission on Ethics, Opinion No. 99-56, at page 8.

Should specific conflict of interest issues arise while Public Officer serves in the capacity as a member of the GID Board of Trustees and/or the public employee capacity as a county employee, Public Officer may, pursuant to NRS 281.511(1) and NRS 281.521, request the Commission to render an opinion regarding Public Officer's past, present or future conduct as a public officer in the context of the specific facts and circumstances of the issue.

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: April 29, 2005.

NEVADA COMMISSION ON ETHICS

By: /s/
RICK HSU, Chairman