



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion
Concerning the Conduct of **ANDREW BORASKY**,
Member, Board of County Commissioners,
Nye County, State of Nevada,
Subject.

Request for Opinion No. 10-12C

STIPULATED AGREEMENT

1. **PURPOSE:** This stipulated agreement is intended to resolve Request for Opinion No. 10-12C before the Nevada Commission on Ethics ("Commission") concerning Andrew Borasky and render an opinion as agreed.

2. **JURISDICTION:** At all material times, Borasky served as an elected member of the Board of County Commissioners for Nye County, Nevada, making him a public officer pursuant to NRS 281A.160. Nevada Revised Statute ("NRS") 281A.280 gives the Commission jurisdiction over elected and appointed public officers. Therefore, Borasky is a public officer subject to the jurisdiction of the Commission.

3. **PROCEDURAL STATUS AND HISTORY:**

The following events are relevant to the matter:

- a. Borasky was elected to the Nye County Commission in November 2006 and assumed office in January 2007.
- b. At all times relevant to this matter, in his private capacity, Borasky owned a small business, A. Borasky Excavating, serving primarily as a subcontractor to perform construction site work, including excavation and grading of land. Borasky operated the business for approximately ten years and dissolved the company before becoming a County Commissioner.
- c. On March 15, 2010, the Commission received a third-party request for opinion (RFO) regarding Borasky filed by Richard Johnson, the Nye County Building Safety and Compliance Manager and Nye County Flood Plain Manager who oversaw the County's flood zones and enforced elevation requirements. The RFO alleged that Borasky violated the Ethics in Government Law set forth in NRS 281A by using his position as a County Commissioner to secure unwarranted privileges or preferences for himself and attempting to influence his subordinate, Mr. Johnson, to use County time and property to inspect two privately-developed local properties (which Borasky had excavated in his private capacity) and design flood abatement openings in an effort to secure proper elevation certificates on behalf of Borasky's former client, Nationwide Homes.

- d. The Commission provided Borasky with proper notice of the allegations and an opportunity to file a written response. Borasky is fully advised of the allegations asserted in the RFO.
- e. On April 22, 2010, Borasky through his retained legal counsel, Lillian Donahue, Esq., filed a written response to the RFO.
- f. On September 1, 2010, Borasky replaced his legal counsel with Keith L. Loomis, Esq., for the remainder of the Commission's proceedings.
- g. The Commission's staff investigated the allegations and provided reports and recommendations to the Commission's investigatory panel.
- h. Pursuant to NRS 281A.440, on May 13, 2010, a two-member panel of the Commission reviewed the RFO, Borasky's written response, the staff reports and recommendations and other evidence. The Panel determined that just and sufficient cause existed for the Commission to conduct a public hearing and render an opinion whether Borasky used his position in government to secure unwarranted privileges or preferences and attempted to influence his subordinate, Mr. Johnson, to use County time and property to inspect two privately-developed local properties (which Borasky excavated in his private capacity) in an effort to secure proper elevation certificates on behalf of Borasky's former client, Nationwide Homes, in violation of NRS 281A.400, subsections (2) (7) and (9).
- i. In lieu of participating in a hearing regarding these alleged violations of NRS 281A, Borasky now enters into this stipulation acknowledging his duty to commit to avoid conflicts between his private interests and those of the public he serves. Accordingly,

Borasky agrees that an appearance of impropriety and a conflict of interest arose from using his position as a County Commissioner to secure unwarranted privileges from County employees using government time and property. *See* NRS 281A.020.

4. **RELEVANT STATUTES:** The following excerpts from Nevada Revised Statutes are relevant to the allegations giving rise to this stipulated agreement:

a. **NRS 281A.400(2)** – Use of Official Position to Secure Unwarranted Privileges:

A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

b. **NRS 281A.400(7)** – Using Government Time:

Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

- If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

c. NRS 281A.400(9) – Attempt to Influence Subordinate:

A public officer or employee shall not attempt to benefit the public officer's or employee's personal or financial interest through the influence of a subordinate.

d. NRS 281A.170 - Willfulness

“Willful violation” means a violation where the public officer or employee:

1. Acted intentionally and knowingly; or
2. Was in a situation where this chapter imposed a duty to act and the public officer or employee intentionally and knowingly failed to act in the manner required by this chapter.

5. **FINDINGS/STIPULATIONS OF FACT:**

a. Borasky's Public Interests:

(1) Borasky was elected to the Nye County Board of Commissioners in November 2006 and assumed office in January 2007.

(2) Borasky holds a public office which constitutes a public trust held for the sole benefit of the people of Nye County, Nevada.

b. Borasky's Private Interests/Conduct:

At all times relevant to this matter:

- (1) Borasky owned a private company known as "A. Borasky Excavating" which was dissolved before he became a County Commissioner.
- (2) In early 2006, Borasky's company served as a subcontractor for Nationwide Homes in Pahrump, Nevada to excavate two separate properties in preparation for the construction of two manufactured homes with detached garages. The properties were located in a County-designated flood zone area, which required the pads to be elevated to two feet above the required flood zone. After completing the pads for the properties, Nationwide constructed the homes and garages in late 2006.
- (3) Nationwide had difficulty securing buyers for the properties, which remained vacant until approximately September 2008. In an effort to sell the properties, the Federal Department of Housing and Urban Development ("HUD") became involved in assisting a private bank with loans for the properties. The bank sought financial support from HUD which required proof of the necessary elevations in the flood zones, via elevation certificates, to obtain the necessary flood insurance through the Federal Emergency Management Agency ("FEMA"). Nationwide hired a surveying company, Citiwize, to inspect the properties and prepare the elevation certificates to qualify for the loans. However, the private bank denied the loans claiming the buildings were not properly elevated and/or the elevation certificates were not properly completed.

- (4) The private bank contacted Nationwide's President, Michael Colbert, regarding the denial of the loans for the improper elevations and/or certificates, and Colbert contacted the Nye County Building Safety and Compliance Manager and Flood Plain Manager, Richard Johnson, to inspect the properties and determine what was wrong with the elevations and/or elevation certificates. Colbert also notified Johnson that Borasky had developed the pads in 2006.
- (5) After the contact from Colbert, Johnson received a similar request from Borasky to inspect the properties and determine whether any problems existed with the elevations and/or elevation certificates provided to the private bank and HUD.
- (6) Johnson inspected the properties, reviewed the elevation certificates and determined that the detached garages of the two properties were below the proper elevation for the flood zone. Johnson conveyed the problem with the elevations to Colbert and explained that the elevation certificates were not signed by the County and contained incorrect elevation calculations that referenced the houses but not the garages.
- (7) Johnson told Colbert that it would be Nationwide's responsibility and expense, and not the County's, to contract with an engineer (or other qualified person) to determine how to best fix the elevation deficiency. The least expensive and most appropriate alternative authorized by the Nye County Code (Section 15.12.160 of Title 15 governing Flood Damage Prevention), and consistent with FEMA regulations, is the construction of flood openings. While Johnson reported that Nationwide would be required to hire someone to provide these services because

it was not a County function or expense, Johnson nevertheless was qualified to design flood openings and calculate the necessary dimensions based upon his training from FEMA such that he could ultimately approve any revised flood openings upon completion.

- (8) The County's signature and approval of an elevation certificate, which is otherwise optional, is required for FEMA to provide the required flood insurance for properties in flood zones. Johnson was designated as the Nye County Flood Plain Manager after having been trained by FEMA to conduct the necessary inspections of properties in flood zones for elevation requirements and certify that the properties satisfied the FEMA requirements.
- (9) After Johnson reported the problems with the Citiwize elevation certificates to Colbert, Johnson received new elevation certificates on October 2, 2008, prepared by a different land surveyor, Triangle Surveying. Johnson signed the certificates noting that the detached garages were required to be "flood proofed." Johnson emailed the information and FEMA paperwork to Colbert to correct the elevation deficiencies of the garages.
- (10) Borasky again contacted Johnson requesting that he immediately re-inspect the properties and design and calculate the necessary flood openings to correct the elevation deficiencies. After the flood openings were constructed by Nationwide consistent with Johnson's calculations and Nye County and FEMA requirements, Johnson signed the elevation certificates on October 24, 2010 noting that the flood openings had been completed and inspected, thereby satisfying the elevation

deficiencies. The flood openings consisted of 4 by 6 square inch openings on two sides of the garages. A third-party, Dream Homes, constructed the flood openings at no cost to Nationwide.

(11) In response to Johnson's concerns that he used county time and property to perform the inspection and design and calculate the flood openings at the direction of a County Commissioner, Johnson filed a complaint with Nye County. Accordingly, Nye County conducted an independent investigation concluding that Borasky's request was inappropriate and may constitute a violation of NRS 281A.400.

(12) After the RFO was filed, Borasky contacted Triangle Surveying to conduct another inspection of the elevations of the detached garages. In April 2010, Triangle Surveying asserted in a new elevation certificate that the garage elevations had always satisfied the elevation requirements and flood openings were never required. That certificate was not signed by the County.

6. **TERMS:** Based on the foregoing, Borasky and the Commission agree as follows:

- a. Each of the facts enumerated in section 5 is deemed to be true and correct.
- b. Borasky acknowledges Johnson may have felt influenced to change or set-aside his County schedule and agree to inspect the garages and design flood openings for Borasky's private interests. Johnson rearranged his schedule to accommodate this inspection and work for Borasky, a County Commissioner, thereby using his work

- hours (governmental time) and County property to provide information for Borasky's private interests.
- c. Borasky acknowledges that Johnson was his subordinate and further acknowledges Johnson rightfully felt that Borasky was seeking an unwarranted privilege, preference or advantage through the use of his position as a County Commissioner.
 - d. The parties agree, consistent with the Commission's prior opinions, that "regardless of whether the employee was five to seven management levels subordinate to the [County Commission], an employee may very well feel undue pressure to follow instructions given by an elected official regardless of the number of management levels between the employee and the elected governing body on which the official serves." *See In re Boggs-McDonald*, NCOE Opinion 04-77.
 - e. Borasky's acts of seeking assistance from a subordinate to secure an inspection of the properties and calculation and design of the flood openings (through the use of government time and property) for his private interests, constitutes a single course of conduct which amounts to a single violation of the Ethics in Government Law (implicating NRS 281A.400 (2), (7) and (9)).
 - f. Borasky's violation of NRS 281A.400 was willful under NRS 281A.170. Borasky knowingly and intentionally sought assistance from a subordinate to obtain designs and calculations for flood openings on properties Borasky had formerly developed that should otherwise have been undertaken by a private party.
 - g. Borasky agrees to pay a total civil penalty (fine) of \$1,000.00 pursuant to NRS 281A.480 on or before December 31, 2011, in one lump sum payment or in monthly

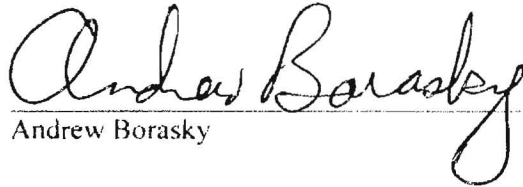
- installment payments as negotiated with the Commission's Executive Director.
- h. On or before December 31, 2011, Borasky agrees to attend and complete an Ethics in Government Law training presentation provided by the Commission's Executive Director, or her designee, as set forth in NRS 281A.240(1)(e).
 - i. The Commission will **NOT** seek to remove Borasky from office, as permitted under NRS 281A.480(4)(c)(1), upon the finding of the willful violation set forth above.
 - j. This agreement applies only to the specific facts, circumstances and law related to this RFO. Any facts or circumstances that are in addition to or differ from those contained in this agreement may create an entirely different resolution of this matter.

7. **WAIVER:**

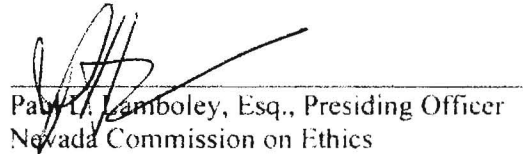
- a. Borasky retained legal counsel in this matter and knowingly waived a full hearing before the Commission on the allegations against him and of any and all rights he may be accorded pursuant to NRS Chapter 281A, the regulations of the Commission (NAC Chapter 281A), the Nevada Administrative Procedure Act (NRS Chapter 233B), and the laws of the State of Nevada.
- b. Borasky knowingly and voluntarily waived his right to any judicial review of this matter as provided in NRS 281A, 233B or any other provision of Nevada law.

8. **ACCEPTANCE:** We, the undersigned parties, have read this agreement, understand each and every provision therein, and agree to be bound thereby. The parties orally agreed to be bound by the terms of this agreement during a regular meeting of the Commission on December 9, 2010.


DATED this 23rd day of December, 2010.

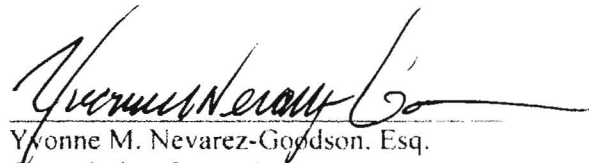

Andrew Borasky

DATED this 9th day of January, 2010.


Paul J. Lamboley, Esq., Presiding Officer
Nevada Commission on Ethics

The above Stipulated Agreement is approved:


Keith L. Loomis, Esq.
Attorney for Andrew Borasky


Yvonne M. Nevarez-Goodson, Esq.
Commission Counsel
Nevada Commission on Ethics

RECEIVED

JAN 14 2011

COMMISSION
ON ETHICS