



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request
for Opinion Concerning the Conduct of
Chris Johnson, Mayor, City of Elko,
State of Nevada

Request for Opinion No. 11-42C

Public Officer. /

OPINION

I. STATEMENT OF THE CASE

On June 7, 2011, a private citizen filed a Third-Party Request for Opinion ("RFO") with the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(2)(b) alleging that Chris Johnson ("Johnson"), Mayor of Elko, Nevada, violated various provisions of the Ethics in Government Law ("Ethics Law") set forth in NRS Chapter 281A by failing to disclose and abstain on a matter before the Elko City Council ("City Council").

Pursuant to NRS 281A.440, the Commission conducted an investigation and an investigatory panel of two commissioners¹ determined that just and sufficient cause existed for the Commission to hold a hearing and render an opinion regarding certain of the allegations.

¹ Commissioners Timothy Cory and Gregory Gale served on the Investigatory Panel. Pursuant to NRS 281A.220(4), they took no part in the hearing or opinion in this matter.

The matter then came before a quorum² of the Commission during a public hearing on April 19, 2012. Johnson attended the hearing and provided sworn testimony. He was represented during the Commission proceedings by attorney Thomas P. Beko, Esq., of the law firm of Erickson, Thorpe & Swainston, Ltd.

At the conclusion of the hearing on April 19, 2012, the Commission deliberated in open session, and after fully considering the facts disclosed by the evidence, including stipulated facts, witness testimony and documents, the Commission deliberated on the record and orally announced its decision that a preponderance of the substantive and probative evidence did not support the allegations before the Commission. Accordingly, the Commission dismissed

² The quorum consisted of Vice-Chairman Paul Lambole (Presiding Officer), and Commissioners Erik Beyer (Chairman), Magdalena Groover, James Shaw and Keith Weaver. Commissioner Carpenter disclosed a conflict and abstained from participating or voting.

the allegations.³ The Commission now renders this written Opinion setting forth its formal findings of fact and conclusions of law in this case.

II. PROCEDURAL HISTORY

On February 8, 2011, and April 12, 2011, in his role as member of the City Council, Johnson twice considered a conditional use permit for the development of an apartment project ("Apartment Project") in Elko, Nevada without disclosing his pecuniary interests and private commitments regarding businesses (storage unit facilities and a plumbing business) and vacant property owned by Johnson and/or his family members which were located approximately one mile from the proposed Apartment Project. On February 8, 2011, Johnson also failed to abstain from voting on the matter. However, on April 12, 2011, the City Council did not formally act on the matter. Based on his private interests and conduct during these meetings, an RFO was filed with the Commission alleging that Johnson violated NRS 281A.420(1) and (3) by failing to disclose his business and property interests (and those of his family members) and voting to approve the development of the Apartment Project.

The RFO also alleged that because Johnson's plumbing company had an existing business relationship with an entity financing the Apartment Project, he voted to approve the Apartment Project (used his official position) to seek or accept economic opportunities

³ Commissioner Lamboley voted against dismissal of the disclosure allegations on the grounds there is sufficient credible evidence to satisfy disclosure requirements for Johnson as a public officer given the nature, extent and location of the property interests at issue in this case.

which detracted from his public duties (NRS 281A.020 and 281A.400(1)) and to seek unwarranted preferences (NRS 281A.400(2)) and other employment or contract opportunities (NRS 281A.400(10)) to benefit his private interests.

After a thorough investigation, the Commission's Executive Director presented the allegations, a report concerning the investigation and a recommendation relating to just and sufficient cause to an Investigatory Panel pursuant to NRS 281A.440(4). The Panel determined that there was just and sufficient cause to forward only two of the allegations to the Commission to render an opinion pursuant to NRS 281A.440(5).

Consistent with the Executive Director's recommendation, the Panel found sufficient credible evidence⁴ for the Commission to hold a hearing and render an opinion regarding whether Johnson violated the Ethics Law by failing to disclose his pecuniary interests and commitments to his family members' interests before considering the Apartment Project during the February 8, 2011 and April 12, 2011 City Council meetings, and by failing to abstain from voting on the Apartment Project during the February 8, 2011 meeting. The investigation revealed that the City Council considered an agenda item during its April 12, 2011 meeting regarding the conditional use

⁴ NAC 281A.435 defines "credible evidence" as "the minimal level of any reliable and competent form of proof provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion."

permit for the Apartment Project, but took no formal action.

The Panel noted that the focus of the RFO and investigation had been limited to whether Johnson's storage and plumbing businesses would benefit by increased rents and services as a result of the Apartment Project. However, the Panel suggested that the Commission might also consider whether Johnson's business and pecuniary interests, and those of his family members, would be affected by an increase in value of the property, not simply whether rents or business revenues would increase.

Further consistent with the Executive Director's recommendation, the Panel dismissed the allegations that Johnson used his official position to seek or accept economic or employment opportunities or any unwarranted benefits for his private interests. Based on the evidence gathered during the investigation, the Panel concluded that Johnson neither knew, nor had any reasonable opportunity to know that an entity with which he conducted private business was financing all or a portion of the Apartment Project. Accordingly, no sufficient credible evidence existed that Johnson used his position in any way to benefit his private interests.

Johnson does not dispute his and/or his family members' private business interests in two storage unit facilities, a plumbing company and vacant property located within the vicinity of the Apartment Project. Therefore, the Commission determines in this Opinion only whether the proximity of such businesses and undeveloped property interests create pecuniary interests in and commitments affected by the

Apartment Project requiring disclosure and abstention. The Commission also determines whether there is evidence of a benefit or detriment to Johnson's interests simply as a result of its proximity to the Apartment Project.

III. FINDINGS OF FACT

A. Stipulated Facts

At the beginning of the hearing in this matter Johnson and the Commission entered the following stipulated facts into the record:

1. Johnson was elected to the office of Mayor of Elko, Nevada on or about June 7, 2011. Immediately preceding his term as Mayor, Johnson served for eight (8) consecutive years as a member of the Elko City Council.
2. Johnson and/or members of his family own two separate storage facilities and a plumbing and heating business in Elko, Nevada. Johnson's parents, Charles H. Chester (step father) and Lois Ann Chester (mother), Trustees of the Chester Family Trust, own Cha Chet, a 74-unit storage facility built in the early 1990s located at 2950 Mountain City Highway in Elko, Nevada. Johnson and his wife, Lorrie Johnson, own Cha Chet II, a 30-unit storage facility located at 2952 Mountain City Highway, Elko, Nevada, adjacent to Cha Chet.
3. Both storage facilities have continuously operated at capacity and have waiting lists for unit rentals. Johnson built Cha Chet II to accommodate the overflow demand

for units of Cha Chet. Cha Chet II's units have been rented at capacity since its establishment. Johnson has no ownership interest in Cha Chet.

4. Approximately 95% of Cha Chet and Cha Chet II customers are not apartment dwellers, but rather are homeowners and businesses (approximately 61% and 34%, respectively).
5. Johnson and his wife, together with Johnson's parents, own Charles H. Chester Plumbing and Heating ("Chester Plumbing"), also located at 2950 Mountain City Highway (on the same parcel as Cha Chet).
6. The Chester Family Trust owns approximately 40.4 acres of undeveloped land, comprised of three (3) adjacent parcels ("Chester Parcels") located approximately two (2) miles from Cha Chet, Cha Chet II and Chester Plumbing on the Mountain City Highway in Elko, Nevada.
7. These parcels were purchased by Johnson's step father, Charles Chester, in the late 1970's or early 1980's. The property is zoned as residential/agricultural. Following the purchase, Mr. Chester used the property solely for agricultural purposes (i.e., raising cattle).
8. Due to his advanced age (currently 86 years of age), Mr. Chester decided to sell the property. After the property was offered for sale, there was very little interest in the property. Moreover, there has been no increase whatsoever in the level

of interest since the approval of the Apartment Project. Johnson does not believe that the Apartment Project increased the value of this property. Moreover, those nearby property owners who opposed the Apartment Project opined that it would actually reduce the value of their respective properties.

9. On or about January 4, 2011, Ormaza Construction ("Ormaza"), a local developer, presented an application for a conditional use permit to the Elko City Planning Commission ("Planning Commission") to develop an apartment complex known as the Rabbit Brush Apartments ("Apartment Project") on property located at 3700 Sundance Drive in Elko, Nevada. Apartments were an approved use of this property with a conditional use permit. This property is located between the Chester Parcels and the Cha Chet and Cha Chet II storage facilities.
10. The Planning Commission granted a conditional use permit for the Apartment Project on January 4, 2011. A private citizen appealed the Planning Commission's determination to the City Council. The City Council considered the Planning Commission's determination at its February 8, 2011 meeting.
11. At the February 8, 2011 meeting, the City Council modified the conditional use permit approved by the Planning Commission to require additional driveway access and two (2) parking spaces per unit.

12. As a member of the City Council, Johnson participated in the February 8, 2011 meeting by asking questions, providing comments and voting on the matter. Johnson made no disclosures respecting his pecuniary interests or commitments in a private capacity to the interests of his family members in Cha Chet, Cha Chet II, Chester Plumbing or the Chester Parcels.

13. A national profile⁵ indicates that apartment/condo dwellers comprise 21% of the total residential storage rental market, while 71% is made up of single family residents and the remaining 8% is made up of other types of units (such as mobile homes). Accordingly, Cha Chet and Cha Chet II customers who are apartment dwellers make up considerably less than the national average composition of residential storage facility customers.

14. The 15 storage facilities in the Elko area provide 1,851 total storage units. Of the total storage units, Cha Chet's 76 units comprise 4.1% and Cha Chet II's 30 units comprise 1.6%. Together, Cha Chet and Cha Chet II comprise 5.7% of the total number of units in the area; however, as both Cha Chet and Cha Chet II have and continue to operate at capacity and maintain waiting lists, neither Johnson's interests nor those of his family members are likely to change based upon the development the Apartment Project located near the storage facilities.

15. According to the waiting lists for Cha Chet and Cha Chet II, some potential customers have been waiting for a unit at Cha Chet since October 2009 and Cha Chet II has had a waiting list since its completion in November 2011. These waiting lists are still in effect. Based upon these facts, customer turnover for Cha Chet and Cha Chet II is slow.

16. No evidence exists to prove that the value of Chester Plumbing's business or the Chester Parcels will increase or decrease as a result of their proximity to the Apartment Project.

B. Factual Findings

In addition to the above-enumerated stipulated facts, the Commission also makes the following findings of fact based on testimonial and documentary evidence presented during the hearing:

1. At the April 12, 2011 meeting, the City Council considered an agenda item concerning the conditional use permit of the Apartment Project but took no formal action on the item.
2. As a member of the City Council, Johnson participated in the April 12, 2011 meeting and made no disclosures respecting his pecuniary interests or commitments in a private capacity to the interests of his family members in Cha Chet, Cha Chet II, Chester Plumbing or the Chester Parcels. With no formal action taken on the time, Johnson did not vote on the matter.

⁵George H. Leon, Ph.D., *2007 Self Storage Demand Study 18* (Self Storage Association, National Analysts Worldwide) (2007).

IV. STATEMENT OF ISSUES

The allegations in this RFO focus on the time during which Johnson served as a member of the City Council, prior to his present service as the Mayor of Elko. The issues in this matter arise from Johnson's failures to disclose his personal interests and commitments and abstain from voting during the February 8, 2011 and April 12, 2011 City Council meetings concerning a conditional use permit for the development of the Apartment Project. NRS 281A.420(1) prohibits a public officer from acting on a matter in which the public officer has a pecuniary interest or commitment in a private capacity to the interests of certain family members without first disclosing the nature and extent of the interests. NRS 281A.420(3) further prohibits a public officer from acting on a matter in which his pecuniary interests or commitments to the interests of others would materially affect the independence of judgment of a reasonable person in his situation.

The Commission finds and concludes, based on a failure to satisfy a preponderance of substantial, probative evidence in this case, that the physical proximity of the proposed Apartment Project to Johnson's private businesses, Cha Chet (storage facility) and Chester Plumbing, did not create a pecuniary interest in the development of the Apartment Project. Furthermore, his commitments to his spouse and parents regarding their respective interests in Cha Chet and Cha Chet II (the storage facilities), Chester Plumbing and the Chester Parcels did not reasonably affect his actions or materially affect the independence of judgment of a

reasonable person in his situation regarding the approval of the Apartment Project. Accordingly, Johnson did not violate NRS 281A.420(1) or (3) by failing to disclose or abstain from voting on the Apartment Project before the City Council on February 8, 2011 and/or April 12, 2012.

V. DISCUSSION OF RELEVANT STATUTES AND ISSUES

A. Public Policy

NRS 281A.020(1) provides:

1. It is hereby declared 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.
 - (b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.

Nevada's Ethics Law mandates that public officers hold public office for the public benefit and avoid conflicts of interests. The Ethics Law is concerned with situations involving public officers that create appearances of impropriety and conflicts of interest, as well as actual impropriety and conflicts to promote the integrity in public service. To ensure the public trust and transparency of private interests related to public matters, the Ethics Law demands appropriate disclosures of readily ascertainable conflicts of interest and abstentions in clear cases in which a reasonable public officer could not act independently. At the time of his alleged conduct, Johnson served as a publicly elected member of the Elko City Council and was therefore required to

avoid any conflicts of interest between his private interests and those of the general public whom he served by making proper disclosures and abstaining when appropriate.

B. Disclosure

NRS 281A.420(1), in relevant part, provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,
- without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure to the chair and other members of the body

NRS 281A.420(1)(b) prohibits a public officer from voting or otherwise acting on a matter in which the public officer has a pecuniary interest or which would be reasonably affected by his

commitments to the interests of his family members without first disclosing sufficient information regarding the interest or commitment. Although Johnson had a pecuniary interest in Cha Chet and Chester Plumbing and a commitment to his family members' interests in Cha Chet, Cha Chet II, Chester Plumbing and the Chester Parcels, Johnson was not required to disclose those interests and commitments. The property and business interests and commitment to the interests of family members did not create a pecuniary interest in the Apartment Project or a commitment which would reasonably affect his decisions regarding the Apartment Project. *See In re Weber*, Comm'n Opinion No. 09-47C (2012) (Planning Commissioner owning property located in a local planning area held not to have pecuniary interest in the matter before the body concerning amendments to the overall Area Plan because no evidence was presented of any individual benefit or detriment to his property and the amendments equally affected all property owners in the planning area). Furthermore, the effect on Johnson's property from the development of the Apartment Project is no greater than that accruing to others similarly situated within the area. *Id.*

In several previous decisions the Commission has addressed the duty to disclose and/or abstain on matters that may affect property interests located in close proximity to a development project under consideration by a public officer. The mere ownership of businesses or property in an area within close physical proximity to such a development project is not sufficient to implicate the NRS 281A.420 disclosure requirements. *Id.*

Rather, a “more direct, beneficial nexus” between Johnson’s property and business interests and the City Council’s action on the Apartment Project must be established by evidence. *Id.*

While a direct, beneficial nexus is required, the Commission determined in one case that a local city councilman was required to disclose his property interests in each of several proposed development projects and abstain from voting because the projects materially affected his private property which was adjacent to the proposed developments. *In re Scheffler*, Comm’n Opinion Nos. 95-21, 95-23 and 95-37 (1995). However, in that case, the Commission declined to issue a “mechanical proximity” rule or analysis and instead held that such analysis required a case-by-case analysis of the particular facts and circumstances. *Id.*

Regarding Mr. Scheffler specifically, the Commission held that a proposed public project located directly adjacent to his property (or within one half of a mile to a mile distance) which involved a land use and/or zoning decision required disclosure and abstention. Furthermore, based on Scheffler’s public consideration of an agreement to facilitate infrastructure to a development project located adjacent to his private property, the Commission’s determined that:

“ownership of land in the vicinity of the entire area that would be developed and serviced as a result of the approved project [was] sufficient to require both . . . disclosure and abstention. It [was] neither remote nor speculative to conclude that the value of [Scheffler’s parcel would] inevitably be enhanced as a result of

the [infrastructure] which [would] provide [utility] service and a market benefit to the entire area.

Id.

The Commission articulated the test as “whether it is likely that a person’s pecuniary interest or commitment to the interest of another may be affected as a result of the action taken[.]” *Id.* However, the Commission found no disclosure or abstention required where there were no improvements to the immediate area or no increases in value to the property. *Id.*

The Commission revisited its *Scheffler* decision concerning “proximity” in *In re Woodbury*, Comm’n Opinion No. 96-14 (1996). Mr. Woodbury, member of the Clark County Commission, owned improved real property in the vicinity of a proposed street widening and curb and gutter improvement project under consideration by the County. *Id.* The Commission distinguished its position in *Scheffler*, holding instead that “[w]hile the proximity of his properties to those upon which he voted was an important factor, . . . it was also important to examine the **effect** of the votes as an additional factor. *Id.* In *Scheffler*, the Commission noted that the benefits to Scheffler from his votes were “either directly evident or were reasonably foreseeable.” *See Scheffler.* In *Woodbury*, however, the Commission noted that there was “no substantial evidence . . . presented to show that [his property or its tenants] would appreciably benefit from the widening of [the nearby road.]” *See Woodbury.* Accordingly, the Commission found “no direct benefit [or] . . . any indirect or reasonably foreseeable benefit”

resulting to Woodbury or his tenants occupying his property. *Id.*

Like *Woodbury* and *Weber*, no evidence, let alone substantial evidence, was offered in this matter to conclude that Johnson's business and property interests would be affected by the Apartment Project. Rather, the Commission was presented with unsubstantiated assumptions about the nature and extent of possible future increased rental and service revenue and speculation about how such development could potentially impact the overall value of Johnson's (and his family members') businesses and property. Furthermore, no evidence was presented to the Commission that Johnson's property would receive any demonstrable, direct beneficial impact (or reasonably foreseeable impact) as a result of the proposed Apartment Project, including any benefit or detriment beyond that which may be attributable to other businesses or property owners similarly situated.

If fact, contrary evidence was presented to the Commission in this case establishing that the storage units had been rented at full capacity and maintained continuing and existing waiting lists since their establishment. Further, the evidence revealed that Cha Chet and Cha Chet II accounted for only 5 percent of all storage units available in Elko and apartment dwellers comprised only 5 percent of their customers. The storage units neither needed nor expected additional renters with the construction of additional apartment units.

With regard to Chester Plumbing, Johnson testified that the plumbing

business was one of several local plumbing businesses and did not provide any special services or expertise beyond other local businesses that would entice the new Apartment Project to use Chester Plumbing for its services. The City of Elko is not so substantial in its geographic size or population that the closer proximity of Chester Plumbing to the Apartment Project would result in increased business or revenues. Such a determination is speculative at best.

Finally, the facts revealed that the Chester Properties had been listed for sale without any significant interest from any buyers, and the interest in purchasing the properties did not increase or decrease after the approval of the Apartment Project. Moreover, similarly situated business and property owners opposed the Apartment Project and feared a decline in the value of their respective properties. Without any affirmative evidence that the Chester Properties would benefit, any finding to the contrary is again speculative and does not satisfy the Commission's burden of proof.

Based on the lack of evidence, the Commission concludes that the effect on Johnson's interests and commitments resulting from the Apartment Project vote is no greater or less than others similarly situated in the area. Accordingly, Johnson was not required to disclose his ownership of businesses or property in the proximity of the Apartment Project during the February 8, 2011 and April 12, 2011 City Council meetings. Therefore, we find no violation of NRS 281A.420, and therefore dismiss these allegations against Johnson.

As we stated in *Weber*, the Commission nevertheless strongly encourages disclosure in such circumstances. *Id.* In that case, the Commission stated:

In keeping with the public trust, a public officer's disclosure is paramount to transparency and openness in government. The public policy favoring disclosure promotes accountability and scrutiny of the conduct of government officials. The requisite disclosure must be made at the time a matter is considered by a public body – not when the vote happens – but when the agenda item is called. . . . Consideration of a matter encompasses much more than a final action. It includes questions and comments raised by the public officer and the public; the questioning and advocacy relating to the matter by the public body itself; and also the preparation and making of the motions on which the public body ultimately votes. Such disclosures dispel any question concerning conflicts of interest and may very well ward off complaints against the public officer based on failure to disclose.

Id.

The Commission now turns to the issue of whether Johnson was required to abstain from voting to approve the Apartment Project.

C. Abstention

NRS 281A.420(3) and (4) provide:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, 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 the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of other's.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of others, accruing to the other person, is not greater that that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of other.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to

the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

Based on the lack of evidence requiring disclosure, the Commission likewise finds that Johnson had no obligation to abstain from voting on the Apartment Project pursuant to NRS 281A.420(3).

VI. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Johnson was a "public officer," as defined by NRS 281A.160. The Commission has jurisdiction over public officers pursuant to NRS 281A.280.
2. Pursuant to NRS 281A.440(2)(b) and NRS 281A.460, the Commission has jurisdiction to render an opinion in this matter.
3. As a member of the Elko City Council, Johnson did not violate the provisions of NRS 281A.420(1) of (3) by failing to disclose his pecuniary interests and private commitments regarding the storage and plumbing businesses and family property during the February 8, 2011 and April 12, 2011 City Council meetings

or abstain from voting during the February 8, 2011 meeting because no evidence was presented to satisfy the Commission's burden of proof that the proximity of the Apartment Project created any effect on those businesses or properties.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 12th day of December, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley
Paul Lamboley
Vice Chair, Presiding Officer