



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for  
Advisory Opinion Concerning the Conduct of  
**Roger Tobler**, Mayor, City of Boulder City,  
State of Nevada,

**Request for Opinion No. 11-51A**

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Public Officer. /

#### OPINION

##### I. STATEMENT OF THE CASE

Public officer, Roger Tobler ("Tobler"), requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his past and anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS").<sup>1</sup> A quorum<sup>2</sup> of the Commission heard this matter on August 12, 2011. The Commission held a second hearing on October 19, 2011, to reconsider the matter. Tobler appeared in person at both hearings and provided sworn testimony. David

Olsen, City Attorney for Boulder City, represented Tobler at the second hearing.

At the conclusion of the hearing on August 12, 2011, and after full consideration of the facts, circumstances and testimony presented, the Commission orally advised Tobler of its decision that no conflict of interest exists under the Ethics Law between Tobler's personal interests and his official duties. The Commission, at the hearing on reconsideration on October 19, 2011, amended its initial decision and reaffirmed that there is no conflict of interest that would prohibit Tobler's acts under the Ethics Law. The Commission now renders this written Opinion.<sup>3</sup>

<sup>1</sup>Tobler waived confidentiality with respect to this request for opinion.

<sup>2</sup> The following Commissioners participated in the initial hearing: Chairman Erik Beyer, and Commissioners Gregory J. Gale, CPA, Magdalena M. Groover, George M. Keele, Esq., and Keith A. Weaver, Esq.

<sup>3</sup> The following Commissioners participated in the hearing on reconsideration and this written opinion: Chairman Erik Beyer, and Commissioners Tim Cory, Esq., Gregory J. Gale, CPA, Magdalena M. Groover, Paul H. Lamboley, Esq., John W. Marvel, and Keith A. Weaver, Esq.

The facts in this matter were provided in written and oral testimony by Tobler. The Commission's findings of fact set forth below accept as true those facts presented by Tobler for the purposes of the advice offered in this Opinion. Facts and circumstances that differ from those presented to, and relied upon by, the Commission may result in different findings and conclusions than those expressed in this Opinion.

## II. QUESTION PRESENTED

Tobler serves as the Mayor of Boulder City, Nevada. Tobler questions whether his continued acceptance of purchases by Boulder City government agencies at his hardware store violates any provisions of NRS 281A.

## III. FINDINGS OF FACT

1. Tobler was first elected to public office in Boulder City in 2003. He served one term as a City Councilman, and has served as the Mayor of Boulder City since 2007.
2. In his private capacity, Tobler has a significant pecuniary interest in a family-owned store, True Value Home Hardware & Variety ("Home Hardware"), located in Boulder City.
3. Hardware items are also available in Boulder City from the locally-owned Ace Hardware Shopper Stopper ("Shopper Stopper"), as well as at two

national chain stores located close by in Henderson.

4. Based on an unwritten, informal policy, Boulder City employees for many years, including before Tobler held City office, have purchased materials from both Boulder City hardware stores on a fairly equal basis. A similar informal policy existed in the City for government agencies to spread its purchases among all competing small businesses.
5. The amount of the City's purchases from Home Hardware has declined during the years that Tobler has served in public office. Tobler estimates that he now receives 30% of the City's purchases compared to Shopper Stopper's 70%.
6. Boulder City uses a bid process for large purchases, but does not solicit bids for incidental, routine purchases of hardware merchandise. As Mayor of Boulder City, Tobler does not direct the City's purchasing practices.
7. Home Hardware's sales to Boulder City for the year preceding the August 12, 2011 hearing were generally less than \$1,000 monthly, and amounted to 1% or less of Home Hardware's total annual sales of \$1.25 to \$1.3 million.
8. Hardware purchases are made by City employees on an as-needed basis and not pursuant to any contract between Home

Hardware and Boulder City. Home Hardware bills Boulder City for the purchases charged on the City's account. City staff pays the account monthly and the City Council then approves the payments as part of a monthly consent agenda for "claims paid."

9. During his tenure as Mayor, Tobler has considered and voted concerning payment of the "claims paid" items, including invoices from Home Hardware.
10. Tobler has twice sought the advice of the City Attorney for Boulder City with regard to whether his business may continue to accept purchases from Boulder City government agencies while he holds public office, and the City Attorney has advised him that such purchases are proper.

#### **IV. DISCUSSION OF RELEVANT STATUTES AND ISSUES**

##### **A. Issues**

As a public officer, the Ethics Law applies to Tobler's conduct. Specifically, the Ethics Law states that a public office is a public trust to be held for the sole benefit of the people and requires avoidance of conflicts of interest. Accordingly, the Ethics Law prohibits Tobler from accepting any economic opportunity which would tend to improperly influence him, and from using his position in government to secure unwarranted privileges or

advantages for his hardware business. See NRS 281A.400(1) and (2). The Ethics Law may also restrict Tobler's ability to conduct business with the City. See NRS 281A.530.

#### **B. Relevant Statutes**

##### **1) 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 or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

Tobler currently serves as the Mayor of the City of Boulder City and must commit himself to avoid conflicts between his private interests and those of the public he serves. Any conflict between his public duties as Mayor and his commitments to his private business interests must be considered in light of the applicable provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

## 2) Acceptance of economic opportunity

### NRS 281A.400(1) provides:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

Under this statute, a public officer is prohibited from accepting an economic opportunity if it would tend to improperly influence a reasonable person to depart from the faithful and impartial discharge of the public officer's public duties.

Boulder City employees have purchased items from Tobler's hardware store on an as-needed basis for many years. The City's hardware purchases took place before Tobler assumed public office, and have continued since he was elected first as City Councilman and then as Mayor. Such purchases were for small items and, pursuant to a long-standing City policy, were split fairly evenly between Tobler's store, Home Hardware, and Tobler's local competitor, Shopper Stopper. Tobler testified that the City's recent purchases from Home Hardware are generally less than \$1,000 monthly and comprise 1% or less of the hardware store's total annual sales. Home Hardware has executed no contract with the City for any type of

purchase – large or small – and Tobler, as Mayor, does not direct the City's purchasing practices.

Under these circumstances, a reasonable person in Tobler's position would not tend to be improperly influenced by the City's purchases. Therefore, Tobler's hardware store may continue to accept small, incidental purchases that City employees make without violating NRS 281A.400(1).

## 3) Securing unwarranted privileges

### NRS 281A.400(2) provides:

2. 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.

NRS 281A.400(2) prohibits a public officer from using his position to secure unwarranted preferences or advantages for any business entity

in which the public officer has a significant pecuniary interest. It is undisputed that Tobler has a significant pecuniary interest in Home Hardware. Thus, this statute would prohibit Tobler from using his position as Mayor to secure an unwarranted preference or advantage for Home Hardware.

Boulder City's purchasing practices with Home Hardware pre-date Tobler's public service and, as Mayor, Tobler does not control the City's purchases. Rather, the City employees decide which business to patronize – whether it is Home Hardware or Shopper Stopper or one of the chain stores in Henderson. Tobler also testified that the City's purchases from Home Hardware have in fact decreased over the years he has been a public officer.

Based on the evidence presented to the Commission, Home Hardware has not received any unwarranted preferences or advantages from Boulder City, and Tobler has not used his position to secure or grant any preferences or advantages for the business.

#### **4) Sole source**

##### **NRS 281A.530 provides:**

The purchase of goods or services by a local government upon a two-thirds vote of its governing body from a member of the governing body who is the sole source of supply within the area served by the governing body is not unlawful or unethical if the public notice of the meeting

specifically mentioned that such a purchase would be discussed.

At the initial hearing on August 12, 2011, the Commission determined that NRS 281A.530 is inapplicable to Tobler's circumstances. In preparing the written opinion, however, the Commission's further evaluation of the Ethics Law prompted it to hold a second hearing on October 19, 2011, to reconsider its advice.

On reconsideration, the Commission reaffirmed its prior decision that NRS 281A.530 is inapplicable to Tobler.<sup>4</sup> The Commission agreed with the Boulder City Attorney that the statute applies only to situations in which a member of a governing body is the sole source of supply within the area served by the governing body. Here, Tobler's business, Home Hardware, is not the sole source of hardware goods in Boulder City. Shopper Stopper is another supplier located within Boulder City. There are also nearby stores outside of Boulder City's jurisdiction that sell hardware, as well. Thus, we reaffirm our conclusion that, although Tobler is a member of Boulder City's governing body, NRS 281A.530 is inapplicable to his situation because Tobler's business is not a sole-source provider of hardware merchandise to Boulder City.

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<sup>4</sup> Chairman Erik Beyer and Vice-Chairman Paul H. Lambole, Esq., disagree that NRS 281A.530 is inapplicable to Tobler's situation. See Dissenting Opinion.

## 5) Disclosure/Abstention

### **NRS 281A.420(1) and (3), in relevant part, provide:**

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.

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.

The evidence before the Commission showed that Boulder City's purchases appear monthly on the City Council's consent agenda and that the City Council, as well as the Mayor, take action to approve the prior month's expenditures. Tobler testified that the City's purchases from Home Hardware are included as part of the consent agenda item and that he has taken action with respect to the consent agenda.

The Commission cautioned Tobler that if the Boulder City Council considers a consent agenda item that includes a payment to Home Hardware, then the Ethics Law requires him to disclose and consider whether he should abstain from voting on the matter. Pursuant to NRS 281A.420, Tobler, as a public officer, is required to disclose sufficient information concerning his pecuniary interest in any payments to Home Hardware in order to inform the public of the potential effect of his action or abstention as Mayor upon his pecuniary interest. Such disclosure must be made in public at the time the matter is considered.

## 6) Other NRS Provisions

Tobler was expressly advised that this opinion relates only to the Ethics Law set forth in NRS Chapter 281A. He was further cautioned that the City's purchasing practices are governed by other state laws and was advised to consult NRS Chapters 332, 268, and possibly 281, to ensure that Boulder City's purchases from his hardware store would not violate these purchasing laws.

## V. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Tobler 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(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Tobler's Home Hardware's acceptance of small, incidental purchases from Boulder City government agencies does not violate NRS 281A.400(1) or (2) because Tobler did not use his public position to require the purchases and the value would not improperly influence a reasonable person in Tobler's position to depart from his public duties.
4. NRS 281A.530 is inapplicable to Tobler's situation because Tobler's hardware store is not a

sole-source provider of hardware merchandise to Boulder City.

Dated this 16<sup>th</sup> day of April, 2012.

NEVADA COMMISSION ON  
ETHICS

For the Majority:

By: /s/ Gregory Gale  
Gregory Gale, C.P.A.  
Commissioner

Vice-Chairman Lamboley dissenting,  
and Chairman Beyer joining in the  
dissent:

I cannot join my colleagues' conclusion that Mayor Tobler's private business may sell supplies to the City of Boulder City, and subsequently, that he may disclose and vote on the City's payment of the bills to his business.

The majority accepts the contention of the Mayor in adopting the view that NRS 281A.530 does not apply to the facts of this case because the Mayor's business is not the sole source of supply. In my view, that is clearly erroneous.

A review of NRS Chapter 281A, and related non-NRS 281A statutes, as well as legislative history, establishes that Nevada has a definite, broad public policy rule that *prohibits* sales by a supplier in which a public officer or public employee is an owner or has an interest *unless*

there is an exception that excuses the application of the rule. See relevant portions of NRS 281.230 and NRS 332.800.<sup>5</sup> In the absence

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<sup>5</sup> **NRS 281.230. Unlawful commissions, personal profit and compensation of public officers and employees; penalties; payment of commission, profit or compensation to public employer.**

1. Except as otherwise provided in this section and NRS 218A.970, 281A.530 and 332.800, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada; ....

4. A public officer or employee, other than an officer or employee described in subsection 2 or 3, may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, the public officer or employee has not taken part in developing the contract plans or specifications and the public officer or employee will not be personally involved in opening, considering or accepting offers. If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose his or her interest in the contract and shall not vote on or advocate the approval of the contract.

5. A person who violates any of the provisions of this section shall be punished as provided in NRS 197.230 and:

(a) Where the commission, personal profit or compensation is \$650 or more, for a category D felony as provided in NRS 193.130.

(b) Where the commission, personal profit or compensation is less than \$650, for a misdemeanor.

6. A person who violates the provisions of this section shall pay any commission, personal profit or compensation resulting from the contract or transaction to the employing state, county, municipality, township, district or quasi-municipal corporation as restitution.

of an exception, there can be stiff penalties for violating the rule.

It cannot be seriously contended the Legislature did not intend to include the policy of prohibition in the Ethics in Government Law, NRS Chapter 281A. The non-281A statutes include specific exception references to provisions of NRS Chapter 281A. In addition to NRS 281A.530, NRS Chapter 281A specifically includes a statement of the general rule of prohibition in NRS 281A.430.<sup>6</sup>

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**NRS 332.800 Interest of member of governing body or evaluator in contract prohibited; exception; penalty.**

1. Except as otherwise provided in NRS 281.230, 281A.430 and 281A.530, a member of the governing body may not be interested, directly or indirectly, in any contract entered into by the governing body, but the governing body may purchase supplies, not to exceed \$1,500 in the aggregate in any 1 calendar month from a member of such governing body, when not to do so would be of great inconvenience due to a lack of any other local source.

....

3. A member of a governing body who furnishes supplies in the manner permitted by subsection 1 may not vote on the allowance of the claim for such supplies.

4. A violation of this section is a misdemeanor and, in the case of a member of a governing body, cause for removal from office.

<sup>6</sup> **NRS 281A.430 Contracts in which public officer or employee has interest prohibited; exceptions.**

1. Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest. . . .

4. A public officer or employee, other than a public officer or employee described in subsection 2 or 3, may bid on or enter into a contract with a governmental agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding



NRS 281A.530 is consistent in its charge to implement the rule on prohibition by language that anticipates application of the rule *unless there is an exception, i.e., the supplier is the sole source of supply*. Admittedly, the Mayor's business is not the sole source of supply. The majority's view, however, simply allows the absence of the required exception to swallow the rule.

The Commission's role is to interpret and apply provisions of NRS Chapter 281A, not those of non-NRS 281A statutes. The Commission, however, is responsible to implement NRS Chapter 281A in harmony with broader Legislative policy set out in other statutes to avoid allowing conduct under ethics laws that is otherwise precluded elsewhere.

In this case, the majority decision not to apply NRS 281A.530 is contrary to the plain language of the

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are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

(The Mayor's evidence is that sales of \$1000 per month, or \$12,000 per year, amount to only 1% of total annual sales. If the Mayor views such sales as insignificant, the question is why then engage in the same and vote to approve while a public office holder. Moreover, that is not the basis for the majority's decision not to apply NRS 281A.530.)

statute, and in my view, clearly inconsistent with overall policy rule contained in other statutes prohibiting public officers to sell to their own governing body and voting to approve payment of the same.

Accordingly, I dissent.<sup>7</sup>

By: /s/ Paul H. Lamboley  
Paul H. Lamboley, Esq.  
Vice Chair

Joined by: /s/ Erik Beyer  
Erik Beyer  
Chair

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<sup>7</sup> Also without doubt, the Legislature views a public office as a public trust that should be held for the sole benefit of the public and requires the holder to avoid conflicts between the private interests of the holder and those of the general public. NRS 281A.020(1)(a) and (b). The Mayor's conduct is not consistent with such responsibilities.