



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **Public Officer**, Member,
Local Government Planning Commission,
State of Nevada,

Request for Opinion No. 11-54A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public Officer requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his 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"). A quorum¹ of the Commission heard this matter on August 1, 2011. Public Officer appeared at the hearing and provided sworn testimony.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission deliberated and orally advised Public Officer of its decision that the Ethics Law requires him to disclose his personal business relationships prior to acting on an amendment to a local law, but that he need not abstain from voting on the matter.²

Public Officer elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

¹ The following Commissioners participated in this opinion: Vice-Chairman Paul H. Lamboley, Esq., and Commissioners Gregory J. Gale, CPA, George M. Keele, Esq., John W. Marvel, and James M. Shaw.

² Vice-Chairman Lamboley agrees with the Commission's decision, except that he would conclude that the Commission did not have enough information before it to make a determination regarding abstention.

II. QUESTION PRESENTED

Public Officer asks the Commission to advise him regarding his disclosure and abstention obligations as a member of the Planning Commission on a matter that may impact his private business interests.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer is a member of a Planning Commission. The Planning Commission will consider an amendment to the local government's billboard law at an upcoming workshop, where no action will be taken, and a regular meeting where the Planning Commission will vote on a recommendation to the elected governing body. The proposed text amendment affects all billboards in the jurisdiction and will potentially impact those who advertise on billboards. In a private capacity, Public Officer is a salesman who works as an independent contractor with "ABC", a firm which advertises on six billboards leased from Billboard Owner, a proponent of the proposed amendments. Because Public Officer and ABC both benefit from the increased sales generated from these billboards, it is likely that a change to the current billboard law will affect their respective business interests. Public Officer asks the Commission whether he may participate in the Planning

Commission's consideration of the billboard law in light of his relationship with ABC and ABC's relationship with Billboard Owner.

The Ethics Law provides that public officers must adequately disclose private interests, and where appropriate, abstain from acting on a matter. The Commission thus considers Public Officer's obligation to disclose his personal interests in the billboard law and whether such interests merit his abstention.

B. RELEVANT STATUTES

1) Public Office

The Commission first addresses whether Public Officer, an appointed member of the Planning Commission, holds public office for purposes of the Ethics Law. NRS 281A.160(3)(b) excludes from the definition of "public office" an office held by "[a]ny member of a board, commission or other body whose function is advisory." A member of a commission or other body which serves a public entity in an advisory capacity is not a "public officer" under the Ethics Law. See *Matter of Haldeman*, RFO No. 00-46. However, the body's function must be solely advisory for the exclusion to apply. See *Hantges v. City of Henderson*, 121 Nev. 319, 325 (2005); *In re Public Officer*, RFO 11-18A (2012) and Attorney General Opinion No. 1986-6.

Here, the Planning Commission functions in an advisory capacity to the governing body with respect to proposed amendments to certain

local laws. It has no authority to amend the local laws, but rather makes recommendations to the governing body concerning the adoption of certain textual changes such as those proposed for billboards. The Planning Commission, however, also has decision-making authority over certain administrative actions which are final unless appealed to the governing body. Because it makes decisions on substantive matters on its own authority, the Planning Commission's functions are not purely advisory to the governing body. In this situation, the Commission concludes that NRS 281A.160(3)(c) is inapplicable and that the Planning Commission is a "public office" for purposes of the Ethics Law. Public Officer, as a member of the Planning Commission, therefore holds public office and is subject to the Ethics Law applicable to public officers for all actions taken by the Planning Commission.

2) Disclosure and Abstention

NRS 281A.420 provides in pertinent part:

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 persons to whom the public officer or employee has a commitment in a private capacity. Such a 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 in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

* * *

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 which 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 others.

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 persons, is not greater than 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 others.

* * *

As a public officer, the disclosure, participation and abstention standards of the Ethics Law apply to Public Officer. When a matter comes before Public Officer as a member of the Planning Commission, NRS 281A.420(1) requires Public Officer to carefully consider the private interests and commitments that may affect his decision in the matter and disclose sufficient information concerning those private interests and

commitments to inform the public of the potential effect of his action. After making a proper disclosure, Public Officer must determine under NRS 281A.420(3) whether the independence of judgment of a reasonable person in his situation would, under the circumstances presented in the particular matter, be materially affected by those private interests and commitments and, if so, Public Officer must refrain from advocating the passage or failure of the matter and abstain from voting upon the matter.

Based on the facts presented, the Commission concludes that NRS 281A.420(1) obligates Public Officer to disclose his private interests when the Planning Commission considers changes to the billboard laws. Public Officer candidly admitted that he potentially profits from ABC's relationship with Billboard Owner because ABC's billboard advertisements directly affect his earnings from sales commissions. The billboards drive more business to ABC, which generates more sales and thus more commissions for Public Officer. Likewise, Public Officer's substantial and continuing business relationship with ABC as a salesman, and ABC's retention of a share of Public Officer's commission, establish Public Officer's commitment in a private capacity to the interests of ABC under NRS 281A.420(8).

In accordance with NRS 281A.420(1)(b) and (c), Public Officer must disclose his pecuniary interest resulting from billboard advertising, his commitment to ABC

and also ABC's relationship with Billboard Owner. The Commission advises Public Officer that he can satisfy the requirements of NRS 281A.420(1) if he discloses that he is employed under an independent contractor agreement with ABC, that ABC contracts with Billboard Owner for space on six billboards within the jurisdiction, and that Public Officer and ABC benefit as a result of the contract between ABC and Billboard Owner due to potentially increased earnings resulting from ABC's billboard advertisements.

Although Public Officer is obligated under NRS 281A.420(1) to disclose his personal interests, his abstention from the billboard law matter is not required unless the independence of judgment of a reasonable person in his situation would be materially affected by his pecuniary interest or his commitment to ABC. Based on Public Officer's particular circumstances, the Commission concludes that Public Officer's abstention is not required under NRS 281A.420(3).

On the record before us, it appears that any amendment to the billboard law will have the same impact on all of those who advertise on billboards, and will not provide Public Officer additional benefits due to his relationship with ABC or ABC's relationship with Billboard Owner. Because neither Public Officer nor ABC will accrue a greater benefit or detriment than that accruing to any other individual or group affected by the billboard law, we conclude, in accordance with NRS 281A.420(4), that the independence of judgment

of a reasonable person in Public Officer's situation would not be materially affected by Public Officer's pecuniary interest or commitment to ABC.³ Accordingly, Public Officer may participate in the Planning Commission's consideration of changes to the billboard law at the workshop and vote or otherwise act at the regular Planning Commission meeting on changes to the billboard law.

3) Public Policy

NRS 281A.020 provides in relevant part:

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.

The Ethics Law promotes the appropriate separation between public duties and private interests. As a public officer, Public Officer has specific public responsibilities that

³Vice-Chairman Lamboley voted against this determination finding instead that Public Officer was unable to provide sufficient evidence regarding any actual or potential benefits or detriments to other businesses which advertise on billboards or may be affected by the billboard law to determine whether Public Officer and/or ABC accrue a greater benefit or detriment than that accruing to other businesses. Accordingly, Vice-Chairman Lamboley believed the Commission's decision regarding abstention required speculation concerning the effect of the billboard law on other businesses and could not properly determine whether the independence of judgment of a reasonable person in Public Officer's position would be materially affected.

he must separate from his private interests in order to preserve the public trust. It is clear to the Commission that Public Officer understands his obligations under NRS 281A.020 and NRS 281A.400 and has adhered to them. We commend Public Officer for his commitment to his ethical obligations as a public officer and for seeking advice as soon as he learned of a potential conflict between his public duties and private business interests. He consulted the government's counsel and requested advice from this Commission before taking action on the billboard law, thereby avoiding issues that may later arise concerning his conduct. The Commission further finds that his anticipated conduct does not implicate any of the provisions set forth in NRS 281A.400.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a "public officer," as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. With respect to the text amendment to the billboard law, NRS 281A.420(1) requires Public Officer to disclose his pecuniary interest, his commitment to ABC, and ABC's business relationship with Billboard Owner in sufficient detail to inform the public of the

potential effect of his actions on the billboard law. He must make a disclosure at any workshops, even though no formal action will occur, and at the Planning Commission's regular meetings.

4. Public Officer is not required to abstain under NRS 281A.420(3) and (4) because the billboard ordinance amendment will have no greater benefit or detriment on Public Officer or ABC than that accruing to others who advertise on billboards.
5. There are no facts before the Commission that would establish that Public Officer has violated or will violate any provision of NRS 281A.400 or NRS 281A.020 with respect to this matter.

Dated this 15th day of August, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul H. Lamboley
Paul H. Lamboley
Vice Chairman