



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**, Trustee, Board of
Trustees, General Improvement District,
Political Subdivision,
State of Nevada,

Request for Opinion No. 12-04A

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 her 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 February 15, 2012. Public Officer appeared at the hearing and provided sworn testimony.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and reached and orally advised Public Officer of its decision that she has a commitment in a private capacity to the interests of a nonprofit entity for which she serves as a volunteer member of its Board of Directors that requires disclosure but not abstention and she must appropriately separate her public and private interests.

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: Chairman Erik Beyer and Commissioners Tim Cory, Gregory Gale, Magdalena Groover, Paul Lamboley and James Shaw.

II. QUESTION PRESENTED

In her role as a Trustee of a General Improvement District (“GID”), which provides public health, safety and welfare services to Political Subdivision, Public Officer questions whether she has a conflict of interest by serving as a volunteer Director of a nonprofit organization which provides similar services to Political Subdivision through grants obtained from various sources.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, the conflicts of interest provisions of the Ethics in Government Law apply to Public Officer’s conduct. Specifically, NRS 281A prohibits Public Officer from using her position in government to secure unwarranted privileges, preferences, exemptions or advantages for herself or any person to whom she has a commitment in a private capacity, including a nonprofit organization for which she serves as a volunteer member of its Board of Directors. See NRS 281A.400(2) and 281A.420(8).

Public Officer is also required to disclose matters to the public which are reasonably affected by her commitments to the interests of certain persons (including entities) and abstain from voting or otherwise acting on matters in which such commitments would clearly and materially affect the independence

of judgment of a reasonable person in her position. See NRS 281A.420(1) and (3).

Public Officer serves as a volunteer member of the Board of Directors of “Nonprofit Entity” focused on the same goals as the GID for which she serves in a public capacity – public health, safety and welfare services to Political Subdivision. Based on the facts and circumstances presented, the nature of the relationship between the two entities is such that the common goals promote the public trust and any concern about conflicts may be properly resolved with appropriate disclosures.

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.

The Ethics Law promotes the appropriate separation between public duties and private interests. As a Trustee of the GID, Public Officer has public responsibilities to the interests of the public served by the GID that she must separate from

her private interests in the goals of Nonprofit Entity.

However, under the facts and circumstances provided herein, both entities share the common goal of providing public health, safety and welfare services to Political Subdivision. To the extent Nonprofit Entity promotes those goals, it provides grant monies and services to Political Subdivision for the benefit of the public. Public Officer does not personally benefit from this private relationship other than having her interests in serving and protecting the community and any personal interest she has in serving as a volunteer member of Nonprofit Entity.

One of Public Officer's duties for GID includes approving requests for services to be performed by GID employees which are funded with grants administered and provided by Nonprofit Entity. If the roles were reversed and Public Officer's public responsibilities included approving expenditures of public money, the considerations may be different. Nonetheless, we commend Public Officer for recognizing her ethical obligations and for seeking the advice of this Commission to avoid ethical pitfalls where they may exist between the two entities.

2) "Commitment in a private capacity" defined

NRS 281A.420(8) provides:

8. As used in this section:
 - (a) "Commitment in a private capacity to the interests of

others" means a commitment to a person:

(1) Who is a member of the public officer's or employee's household;

(2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;

(3) Who employs the public officer or employee or a member of the public officer's or employee's household;

(4) With whom the public officer or employee has a substantial and continuing business relationship; or

(5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

Under NRS 281A.420(8), the Legislature deemed certain relationships to establish the type of private commitments that implicate certain conflicts of interest. In this instance, the Commission is asked to determine whether volunteer service on the Board of Directors of a nonprofit organization constitutes a commitment in a private capacity to the interests of that organization. Public Officer volunteers to serve on this Board and does not have a pecuniary interest in the organization. The relationship between Nonprofit Entity and Public Officer does not constitute an employment relationship or substantial business relationship. However, her role with Nonprofit Entity as a Director certainly creates a relationship that is substantially similar to a substantial and continuing business relationship. See also *In re*

Public Employee, Comm'n Opinion No. 10-66A (2012), *In re Public Officer*, Comm'n Opinion No. 11-84A (2012) and *In re Public Officer*, Comm'n Opinion No. 12-15A (2012).

Even as a volunteer, Public Officer has a fiduciary duty to the organization and she is responsible for seeking and awarding grants worth millions of dollars for public health, safety and welfare services to be provided to Political Subdivision. Furthermore, Public Officer would not volunteer her time and efforts to Nonprofit Entity if she was not interested and committed to its goals. Accordingly, in her private capacity, Public Officer has a commitment to the interests of Nonprofit Entity.

3) Use of Government Position to Secure Unwarranted Preferences

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 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.

In the context of this request for opinion, the Commission is concerned about Public Officer's conduct as it relates to her public responsibilities as a Trustee of the GID and not her private responsibilities to Nonprofit Entity. Public Officer must not use her position as a Trustee of the GID to secure unwarranted privileges, preferences or advantages for herself or Nonprofit Entity.

No evidence in this record suggests that Public Officer is using her position as a Trustee to secure unwarranted benefits for Nonprofit Entity or for herself. Rather, it is Nonprofit Entity that submits the purchase/service orders for the GID to provide certain services within the grant funding available from Nonprofit Entity. In her public role, Public Officer is merely accepting the private funds on behalf of the public to provide certain services. Even if such actions could be construed as the use of her position to secure benefits for the public, such benefits are not unwarranted. Rather, such benefits are within the best interests of the public and promote the goals of both entities.

Although the Commission does not have jurisdiction regarding Public Officer's conduct as it relates to her duties to a private nonprofit organization, the Commission nonetheless advises Public Officer

to be careful in her private capacity to Nonprofit Entity so as not to violate a fiduciary responsibility to be fair and impartial in distributing grant funds among the various GIDs and/or local property owners – and not “line the pockets” of the GID or properties located within the area. Public Officer assured the Commission that all grants include a specified purpose and geographic location for the funds such that she would not be in a position to unfairly distribute funds in a beneficial manner to GID or specific property owners. Public Officer is also not involved in the processes for acquiring grants; Nonprofit Entity has project coordinators who propose and apply for various grants.

Public Officer is also a homeowner in Political Subdivision. Public Officer must be careful not to use her position as a GID Trustee to create unwarranted benefits for herself (or her property). Again, no evidence was presented to suggest that any decisions made by the GID Board affect any one individual property owner more or less than another property owner. Moreover, any available grant that may affect her property is determined by the grant itself, not by Public Officer’s approval to utilize the grant.

However, Public Officer is advised that to the extent any of her decisions have the potential to affect her private property rights any more or less than any other private property owner, she may be using her position to secure unwarranted benefits for herself. In such a

circumstance, Public Officer is advised to disclose her conflict and abstain from participating or voting in any matters affecting her property interests. Based on her testimony, Public Officer has already engaged in this practice.

4) 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.

In her role as a GID Trustee, Public Officer considers and votes upon matters involving Nonprofit Entity. These matters typically involve purchase/service orders which will ultimately result in invoices back to Nonprofit Entity for payment. She is effectively accepting “free” (or at least non-public) money to provide services that benefit the public and those served by GID. At the very least, this money provides services to GID that would otherwise cost the public additional money (through taxes or assessments) or would not be provided due to a lack of available funding.

A larger concern would be if the roles were reversed and Public Officer was making decisions to expend public money or resources to an entity in which she had a private interest. The Commission notes, however, that GID is ultimately responsible for the costs of its services under a purchase order until it is reimbursed by Nonprofit Entity, which may not happen.² In such an instance, the GID Board is effectively approving public expenditures, or subjecting the public to potential expenditures. Nonetheless, in her role as a GID Trustee, Public Officer is advised to disclose her commitment in a private capacity to the interests of Nonprofit Entity on any matters which involve

² Nonprofit Entity is presently experiencing a legal challenge from GID because Nonprofit Entity did not properly administer a grant expected to pay for services provided by the GID under a purchase/service order and the granting entity is withholding funds. Unless and until those matters are solved, the GID is responsible for the expenses incurred in performing the work under that purchase/service order from Nonprofit Entity.

Nonprofit Entity. The disclosure should include sufficient information to inform the public of the nature and extent of her private commitment to Nonprofit Entity and its interests in the matter, and how her action or inaction will affect those private interests, if at all. Her private interest in Nonprofit Entity includes her service as a Director and her responsibilities in that capacity. Accordingly, Public Officer should disclose how her decisions as a Trustee regarding matters involving projects with grant funds will affect Nonprofit Entity and her role as a Director. It appears that Nonprofit Entity will benefit by having its goals accomplished which will encourage future grants.

Public Officer also owns property served by the GID. Public Officer must disclose her interests in her property before any potential action as a Trustee that may reasonably affect her private property rights. However, such actions likely affect all property owners and Public Officer’s disclosure should specify how the matter affects her interests differently from that of other property owners, if at all.

5) Abstention

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

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 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 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.

Public Officer's interests in Nonprofit Entity do not create a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by her public duties to the GID. In fact, Nonprofit Entity is a nonprofit organization which obtains grants for the common goal of providing services to Political Subdivision. Its main interests and goals are shared by GID. Without more information concerning a specific grant for a specific purpose, the Commission generally advises Public Officer that she need not abstain from voting on matters involving Nonprofit Entity. However, Public Officer is further advised to return to the Commission for specific advice concerning actual or apparent conflicts involving any

particular matter which may trigger abstention requirements.

NRS 318.050 provides that a member of a board of trustees shall not be “disqualified to perform any duty imposed by this chapter by reason of ownership of property within any proposed district.” Accordingly, the Legislature has deemed property ownership not to create a disqualifying conflict of interest. The provisions of NRS 281A.420(4)(a) presume that the independence of judgment of a reasonable person is not materially affected if the resulting benefits or detriments to the public officer are not more or less than those accruing to any other member of the group affected by the matter. Without evidence that Public Officer’s property would benefit or detriment more or less by a matter before GID, Public Officer is not required to abstain from voting or participating.

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. Pursuant to NRS 281A.420(8)(a)(5), Public Officer, as a member of its Board of Directors, has a commitment in a private capacity to the interests of Nonprofit Entity, as a nonprofit

entity with which she shares a substantially similar relationship to a substantial and continuing business relationship.

4. Although the goals and interests of the GID and Nonprofit Entity are the same, Public Officer has a public responsibility to the GID and a private responsibility to Nonprofit Entity. Accordingly, pursuant to NRS 281A.420(1), Public Officer must disclose sufficient information concerning the nature and extent of her commitments and interests in Nonprofit Entity and how or whether any matter before the GID involving Nonprofit Entity may be affected by those commitments and interests.
5. Applying NRS 281A.420(3) and (4), Public Officer would not be required to abstain from participating or acting on matters involving Nonprofit Entity before the GID. Due to the common goals shared and lack of personal benefit, this relationship does not establish a clear case in which the independence of judgment of a reasonable person in Public Officer’s situation would be materially affected by her commitment in a private capacity to the interests of Nonprofit Entity.

Dated this 4th day of October, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman