



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, City Council,
State of Nevada,

Request for Opinion No. 12-15A

Public Employee. /

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 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"). A quorum¹ of the Commission heard this matter on April 19, 2012. 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 she must disclose her pecuniary interests and commitments in a private capacity to the nonprofit entity she serves, and its members, before voting on a public matter affecting that entity or its members.

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

II. QUESTION PRESENTED

As a member of the City Council, Public Officer questions whether her volunteer service as a member of the Board of Directors of a nonprofit entity establishes a private commitment to the interests of the entity and its other members/officers which required disclosure and/or

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners John Carpenter, Timothy Cory, Gregory Gale, James Shaw and Keith Weaver.

abstention regarding a matter before the City Council.

III. DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, the conflicts of interest provisions of the Ethics 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 (8).

Public Officer is also required to disclose all pecuniary interests and any commitments to the interests of certain persons (or entities) which reasonably affect matters under consideration, and abstain from voting or otherwise acting on such matters in which those pecuniary interests and 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 owns a private business in the City and serves as a volunteer member of the Board of Directors of "Nonprofit Company," a nonprofit organization focused on the economic development and improvement of the City. The City Council is considering a

public/private partnership ("Partnership") with "Private Entity" which promotes similar goals. Based on the facts and circumstances presented, Public Officer has a pecuniary interest in the Partnership (the matter before the City Council) as a local business owner whose business will benefit from the development and improvement of the City. Public Officer also has a commitment in a private capacity to the interests of Nonprofit Company and its members. Public Officer should have disclosed these interests before voting and should properly disclose in the future. However, she would not have been required to abstain from participating and voting based on the nature of these interests and relationships.

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.

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 integrity in public service. As a member of the City Council, Public Officer holds a public office and must therefore commit herself to avoid both actual and perceived conflicts between her private interests and those of the public she serves. Whether there would be such conflicts between her public duties and her private interests must be considered in light of the provisions set forth in NRS Chapter 281A and as interpreted by applicable Commission precedent in similar circumstances. As a member of the City Council, Public Officer has public responsibilities to the interests of the City that she must separate from her private business interests and private interests in the goals of Nonprofit Company and its members.

Under the facts and circumstances provided herein, Nonprofit Company and the proposed Partnership share the common goal of promoting economic development for the City. To the extent Nonprofit Company promotes those goals in the City it raises funds and revenues for various community projects and businesses for the benefit of the public. Public Officer's commitment to Nonprofit Company and its members along with her pecuniary interests in her separate private business create private interests in the Partnership which implicate potential conflicts with her public duties. Such conflicts may be properly resolved with appropriate disclosures.

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.

NRS 281A.420(8) establishes certain relationships that implicate conflicts of interest. In this instance, the Commission again holds that volunteer service on the board of directors of a nonprofit organization constitutes a commitment in a private capacity to the interests of that organization. *See also In re Public Officer*, Comm'n Opinion No. 12-04A (2012). Accordingly, Public Officer has a commitment in a private capacity to the interests of Nonprofit Company.

In this case, the Commission is also asked to determine whether Public Officer has a commitment in a private capacity to a fellow member (“Member X”) of the nonprofit board she serves. Here, Member X serves on Nonprofit Company’s board and is interested in the matter before the City – the Partnership – both in his service to Nonprofit Company and his role as an officer and trustee of Private Entity (the entity considering the public/private Partnership). The Commission finds that Public Officer’s service on the nonprofit board with Member X creates a separate commitment to Member X within the meaning of NRS 281A.420(8)(a)(5) as a substantially similar relationship to a substantial and continuing business relationship. This relationship implicates separate disclosure and abstention considerations and the use of her public position to secure unwarranted benefits for her fellow board member.

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.

Here, the Commission is concerned about Public Officer’s conduct as it relates to her public responsibilities as a member of the City Council involving the Partnership. Public Officer must not use her public position to secure unwarranted privileges, preferences or advantages for her private business, Nonprofit Company or Member X.

The Commission finds no evidence to suggest that Public Officer used her position as a member of the City Council to secure unwarranted benefits for her private business, Nonprofit Company and/or Member X (on behalf of Private Entity). While there appears to be some opposition to the Partnership, Public Officer has a history of supporting local development. No evidence supported even a suggestion that Member X sought, or Public Officer provided, a vote in favor of the Partnership for any unwarranted or special benefit or preference to Nonprofit Company and/or Member X.

The statute does not prohibit a public officer from acting in a manner consistent with his personal interests. Rather, the intent of this

statute prohibits a public officer from acting in a manner which creates unwarranted privileges, preferences or advantages for a personal interest. Without facts to suggest an improper activity by Public Officer, the Ethics Law protects the public through appropriate disclosure and abstention provisions when a public officer has a private interest in a public matter regarding which she has some authority or influence. While her vote does not violate the provisions of NRS 281A.400(2), the Commission nevertheless analyzes the vote under the disclosure and abstention requirements of NRS 281A.420.

The Commission further acknowledges that its position regarding commitments to nonprofit entities has been developing in recent opinions and therefore Public Officer is advised to properly acknowledge her commitments to guide her future conduct as a public officer.

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 City Council member, Public Officer considers and votes upon matters of interest to her local private business and to Nonprofit Company, including the Partnership. To ensure that her public actions preserve the public trust and maintain the independence of her private interests (her private business and Nonprofit Company and its members) from public matters, Public Officer is advised to disclose her interests in her private business and commitments in a private capacity to the interests of Nonprofit Company and Member X on any matters which involve the Partnership. The disclosure should include sufficient information regarding these private interests to inform the public of the nature and extent of her private interests and how her public action or inaction regarding the Partnership will affect those private interests, if at all.

In the present case, the Commission notes the difference between the Public Officer's *commitment* to Member X (relationship created by serving on the same nonprofit board) and the *interests* of Member X in the matter under consideration by the City Council (goals of Nonprofit Entity and Officer/Trustee status for Private Entity in the Partnership). A commitment (relationship) alone does not trigger disclosure requirements. The matter under consideration must be "reasonably affected" by the commitment. If Member X's interests were unrelated to the matter before the City Council, the commitment may not reasonably affect the matter.

Here, Member X interests in matter before the City Council (the Partnership) are twofold: his affiliation with Nonprofit Company as a Board member and its shared goals with the Partnership to pursue economic development for the City, and his role as an officer and trustee of Private Entity (the entity partnering with the City). In this instance, Public Officer's commitment to Member X must be disclosed because Member X's interests are directly related to the Partnership under consideration by the City Council and Public Officer's vote or action regarding the matter is reasonably affected by Member X's interests.

The Commission may reach different conclusions regarding the disclosure requirements if Member X's interests in the matter before the City Council were unrelated or unaffected by his interests in

Nonprofit Company and/or Private Entity. For example, if the matter before the City Council which affected Member X's interests involved an issue unrelated to Nonprofit Company's or Private Entity's goals, such as whether to add a sidewalk to the street on which Member X resides, the effect of Public Officer's commitment to Member X would be much less tangible. Public Officer may have a relationship with Member X that triggers a private commitment, but the sidewalk issue may not be reasonably affected by that relationship such that disclosure may not be required.

Nevertheless, the Commission prefers that public officers err on the side of disclosure to avoid any actual or apparent conflicts and promote transparency in public actions. The nature and extent of such a commitment to an unrelated interest before the public officer surely affects an abstention analysis.

Public Officer also owns a private business which may create a pecuniary interest in the Partnership. As she has done in the past, Public Officer must disclose her interests in her business before any potential action as a member of the City Council that affect her private property/business rights. However, the Partnership is intended to affect all business owners in the area and Public Officer's disclosure should specify how the matter affects her interests differently from that of other business 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 commitments to and interests in Nonprofit Company and her commitments to Member X 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 City. In fact, Nonprofit Company is a nonprofit organization which raises revenues and promotes the common goal of economic development in the

City. Its main goals are shared by the City, despite expressed opposition to the Partnership by certain members of the public. Accordingly, the commitments to Nonprofit Company and Member X and their impact on the matter before the City Council would not clearly and materially affect the independence of judgment of a reasonable person in Public Officer's position to warrant abstention. Public Officer has a responsibility as a public officer to represent her constituents and vote on matters of public importance unless a clear conflict outweighs that duty. In this case, the balance tips in favor of voting with appropriate disclosures.

IV. CONCLUSIONS OF LAW

1. Public Officer is 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. Public Officer has a pecuniary interest (ownership of business) in the matter (Partnership – economic development for local businesses) before the City Council which must be disclosed pursuant to NRS 281A.420(1). However, Public Officer is not required to abstain from voting pursuant to NRS 281A.420(3) on such matters unless her business will be affected by the Partnership any more or less than any other local business.
4. As a member of its Board of Directors, Public Officer has a commitment in a private capacity to the interests of Nonprofit Company and its members which reasonably affect the matter before the City Council. Accordingly, pursuant to NRS 281A.420(1), Public Officer must disclose sufficient information concerning the nature and extent of her interests/commitments and how or whether those interests may be affected by any matter before the City Council, including the Partnership.
5. Applying NRS 281A.420(3) and (4), Public Officer is not required to abstain from acting on matters involving Nonprofit Company and/or Member X's interests before the City Council. Her commitments in a private capacity to the interests of Nonprofit Entity and Member X do 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 such commitments.

Dated this 4th day of October, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman