



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**, Public
Agency, State of Nevada,

Request for Opinion No. **15-77A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer") a member of the governing body of a public agency in the State of Nevada ("Public Agency"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1), regarding the propriety of Public Officer's past, present and 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. Public Officer appeared in person and provided sworn testimony. Public Officer was represented by the Public Agency's counsel.

Public Officer sought an opinion from the Commission regarding relief from the strict application of the contracting provisions set forth in NRS 281A.430, which may be implicated by a sale of real property owned by Public Officer's business entity to the Public Agency for necessary public improvements.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and advised Public Officer of its decision that, as an elected public officer, Public Officer is subject to the contracting prohibitions of NRS 281A.430; however, a waiver based upon good cause is provided to Public Officer to permit the sale of the real property to the Public Agency provided there is compliance with the provisions of this opinion and applicable law.

The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law. Public Officer has elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this Abstract of the Opinion.

Although Findings of Fact were included in the written opinion served on Public Officer, for confidentiality reasons, this abstract provides a summary of issues rather than detailing the specific Findings of Fact and removes other identifying information.

¹ The following Commissioners participated in this Opinion: Chair Lau, Vice-Chair Weaver and Commissioners Groover, Shaw and Stewart.

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Officer. For the purposes of the conclusions offered in this abstract of the Opinion, the Commission's findings of fact accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those issued by the Commission.

II. QUESTIONS PRESENTED

Public Officer questions whether Public Officer may be relieved from the strict application of NRS 281A.430 in Public Officer's role as a member of the governing body of the Public Agency regarding a contract for the sale of land owned by Public Officer's business entity to the Public Agency for purposes of installation of public improvements to the property.

III. FINDINGS OF FACT – (Removed to protect confidentiality)

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

The Ethics Law generally prohibits a public officer or employee from entering into contracts with a governmental entity regarding which he or she has a significant pecuniary interest, unless the contracting process is governed by open, competitive bidding, and the public officer or employee has not participated in the contracting process. NRS 281A.430. However, NRS 281A.430(6) permits the Commission to grant relief from the strict application of the provisions of NRS 281A.430 under certain circumstances.

In this matter, the Public Agency proposes to enter into a contract to purchase the property from a private business owned by Public Officer and Public Officer's family. Such a contract has potential to place Public Officer in the position of violating NRS 281A.430, unless the Commission grants relief from strict application of the statute. Public Officer provided various public interests to support the sale of the property to the Public Agency by Public Officer's business seeking relief from the contracting prohibitions of NRS 281A.430. Public Officer confirms Public Officer will honor the applicable disclosure and abstention obligations under the Ethics Law with respect to the sale and related matters, if permitted to do so.

Based on the facts presented, the Commission confirms the existence of the conflict of interest and Public Officer's obligation to disclose and abstain pursuant to NRS 281A.420. Further, the Commission considers the applicability and relief of the contracting prohibitions of NRS 281A.430 to the proposed contract to purchase the property from Public Officer's business.

B. RELEVANT STATUTES

1) Duty to Avoid Conflicts/Public Trust

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.

2) Using Position in Government to Negotiate or Seek Contracts

NRS 281A.400(3) and (10) provide:

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any business entity in which the public officer or employee has a significant pecuniary interest.

...

10. A public officer or employee shall not seek other employment or contracts through the use of the public officer's or employee's official position.

3) Disclosure and Abstention

NRS 281A.420(1), (3) and (4) provide, in relevant 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 significant pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,

↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient 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 significant pecuniary interest, or upon the person 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 significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person 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 another person, accruing to the other person, is not greater than that accruing to any other member of any 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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(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, significant pecuniary interest or commitment in a private capacity to the interests of another person 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, significant pecuniary interest or commitment in a private capacity to the interests of another person.

4) Prohibited Contracts

NRS 281A.430, in pertinent part, provides:

1. Except as otherwise provided in this section and NRS 218A.970 and 332.800, a public officer or employee shall not bid on or enter into a contract between an agency and any business entity in which the public officer or employee has a significant pecuniary interest.

2. A member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such board, commission or body may, in the ordinary course of his or her business, bid on or enter into a contract with an agency, except the board, commission or body on which he or she is a member, if the member has not taken part in developing the contract plans or specifications and the member will not be personally involved in opening, considering or accepting offers.

...

4. Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

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

...

6. The Commission may relieve a public officer or employee from the strict application of the provisions of this section if:

(a) The public officer or employee requests an opinion from the Commission pursuant to subsection 1 of NRS 281A.440; and

(b) The Commission determines that such relief is not contrary to:

(1) The best interests of the public;

(2) The continued ethical integrity of each agency affected by the matter; and

(3) The provisions of this chapter.

V. DECISION

A. INTRODUCTION

Nevada's Ethics Law mandates that public officers and employees hold public office for the public benefit and avoid conflicts of interest. NRS 281A.020. The Standards of Conduct applicable to public officers established by the Ethics Law assist public officers to navigate the boundaries of prohibited conduct where conflicts of interest are presented between public duties and personal interests. In particular, the Ethics Law prohibits public officers from entering into certain contracts between government agencies and entities in which they (or certain persons to whom they have private commitments) have significant pecuniary interests. This prohibition seeks to protect the public against potential abuses of power wherein the public officer serves in a position that has the power or authority to influence a contract, and to ensure that public officers avoid any appearances of impropriety and/or suggestion that the public officer has a competitive advantage in contracting with the government because of the public officer's position in government.

Public Officer is a member of the governing body for the Public Agency, the government entity that seeks to contract with Public Officer's private business to purchase real property for public improvements. Public Officer has a significant pecuniary interest in Public Officer's business entity. NRS 281A.139. Public Officer also has a commitment in a private capacity to the interests of Public Officer's family, which commitment derives from Public Officer's relationship by blood within the third degree of consanguinity, as well as Public Officer's substantial and continuing business relationship with the family. NRS 281A.065. Therefore, the contracting prohibitions set forth in NRS 281A.430 of the Ethics Law are applicable to Public Officer's circumstances. However, the Legislature has provided authority to the Commission to grant relief from the prohibitions set forth in NRS

281A.430 under certain circumstances wherein the contracting provisions are open, competitive and transparent, and the opportunities for the public officer's or employee's participation in the contract are removed. Such a contract must also be in the best interests of the public being served by the government contract.

In this matter, the Public Agency has a significant need to make public improvements for the public's best interest. Facts were provided to substantiate why the purchase is in the best interest of the public and the Public Agency's need for this specific property. These facts established that there were no other suitable properties available to complete the needed public improvements, except for the real property belonging to Public Officer's business.

Nevada law authorizes the Public Agency to purchase or lease real property from private persons for needed public improvements, which law establishes inherent requirements for fair market value appraisals of such property to ensure that public expenses are responsibly incurred and private persons are reasonably compensated. Given the overall circumstances presented in this matter, the Commission concludes that relief should be granted from the strict prohibitions of NRS 281A.430 because the sale is in the best interests of the public served by the Public Agency provided there is compliance with applicable law and based upon the assurances from Public Officer to properly disclose Public Officer's interests and abstain from appraiser selection and in any manner from participating or negotiating the contract and any associated decisions by the Public Agency in furtherance of the transaction to purchase the property from Public Officer's private business.

B. GOVERNMENT CONTRACT PROHIBITIONS/RELIEF

1) General Prohibition - (NRS 281A.430(1))

NRS 281A.430 generally prohibits a public officer or employee from engaging in government contracts in which the public officer or employee has a significant pecuniary interest. Here, the Public Agency seeks to enter into a contract with Public Officer's business to purchase property for public improvement purposes. The Legislature has permitted the Commission to grant relief from the strict application of this prohibition where such relief is in the best interests of the public and not contrary to the ethical integrity of the Public Agency or the provisions of the Ethics Law. In doing so, the Commission pays special attention to the public trust and interest to be served by such a contract if relief is to be granted.

Pursuant to NRS 281A.430(4), the Commission has previously permitted public officers and employees to contract with government agencies in limited circumstances where the contracting process was open and transparent and the public officer or employee did not have a role in developing the contract specifications or considering the offers. See *In re Public Employees*, Comm'n Opinion Nos. 99-34 and 99-35 (2000); *In re Harris*, Comm'n Opinion No. 02-08 (2002); *In re Public Employee*, Comm'n Opinion No. 12-13A (2012); and *In re Blackburn*, Comm'n Opinion No. 09-90A (2009). The Commission has further granted relief from the strict application of NRS 281A.430(1) and permitted a public employee to enter into a contract with the government agency to purchase government-owned property under unique circumstances in which the property had been presented for auction twice and listed for sale for more than one year with no offers. See *In re Public Employee*, Comm'n Opinion No. 13-78A (2013)(property associated with that Opinion was purchased at fair market value and the employee did not participate in any government actions or decisions regarding the sale of the property). In Comm'n Opinion No. 13-78A, the sale of public property was determined to be in the

best interests of citizens where it promoted economic development in the community and surrounding businesses. *Id* at p. 7.

In this matter, the potential contract to purchase Public Officer's business entity's property does not fall within an exception to the contracting prohibitions set forth in NRS 281A.430(4) given the sale is not subject to open competitive bidding, it is not a sole source purchase of a good or service, and there will not be any other open process because available property for the public improvements is limited to that owned by Public Officer's business entity. But, Public Officer has provided detailed facts to support granting relief from the contracting provisions due to the Public Agency's need to construct the public improvements, why the purchase is in the best interest of the public and why the purchase should be for this specific property, including facts establishing that there are no other suitable properties available to complete the needed improvements. Accordingly, though Public Officer is subject to the contracting prohibitions set forth in NRS 281A.430, this case is suitable for consideration of relief from the strict application, assuming all assurances and legal requirements have been met to protect the public trust.²

2) Relief from Strict Prohibition – (NRS 281A.430(6))

NRS 281A.430(6) provides the Commission authority to grant a waiver from the strict prohibition of government contracting by public officers for good cause. In doing so, the Commission analyzes whether Public Officer satisfies the relief requirements stated in NRS 281A.430(6)(b) which require that relief would not be contrary to:

- (1) The best interests of the public;
- (2) The continued ethical integrity of each agency affected by the matter;
- and
- (3) The provisions of this chapter.

The record provided by Public Officer demonstrates that there is a significant pecuniary interest to Public Officer if the Public Agency purchases the real property. Under applicable law, the Public Agency is authorized to purchase real property for public improvements and such a purchase requires an independent appraisal at fair market value. This means that the Public Agency is required to purchase the property at fair market value, which is the value that Public Officer, in his private capacity as a business owner, might otherwise expect to receive in the private marketplace. However, the Public Agency has exhausted its options to purchase other property, and there are no other properties suitable and available on which to construct the needed public improvements.

Public Officer also pledges that Public Officer will neither participate as an agent of government nor otherwise use Public Officer's position as a member of the governing body of the Public Agency to secure the contract for Public Officer's business, which includes assurances of appropriate disclosures and abstentions under the Ethics Law regarding all decisions of the Public Agency affecting the property.

² Public Officer should consult with official legal counsel for the Public Agency or request a First-Party Advisory Opinion if there are questions associated with the applicability of the Ethics Law, including NRS 281A.430, to the Public Agency's consideration of prior matters regarding the real property provided that Public Officer had a private interest in the property and contemporaneously held office as a member of the governing body of the Public Agency at the time the matter was heard.

The specific circumstances presented convince the Commission that the contract to purchase the real property from Public Officer's business is necessary to construct the Public Agency's needed improvements, which are in the best interests of the public. The Ethics Law recognizes that public officers and employees may encounter limited circumstances in which it may be appropriate and sometimes necessary to contract with a governmental entity. Viewing the facts under the framework of NRS 281A.430(6)(b), Public Officer is permitted to sell Public Officer's business's property without violating NRS 281A.430. The sale of the property to the Public Agency under these limited circumstances is in the public's best interest and would not diminish the ethical integrity of the Public Agency.

However, if Public Officer does sell the property to the Public Agency, Public Officer must maintain the ethical integrity of Public Officer's public position by properly disclosing related private interests and abstaining from selection of the appraiser and, in any manner, participating in or negotiating the Public Agency's consideration and/or approval of the purchase or any associated matter. Proper disclosures and abstentions will also ensure that Public Officer does not violate other provisions of the Ethics Law implicating improper use of government positions to secure unwarranted benefits, contracts or business opportunities. See NRS 281A.400.

C. DISCLOSURE AND ABSTENTION

The Ethics Law requires disclosures and abstentions by public officers and employees who have a significant pecuniary interest in a matter before or affecting the public body or entity. NRS 281A.420. A public officer/employee has an obligation to preserve the public trust and commit himself to avoid conflicts between public officer/employee's private interests and public duties. Where these conflicts arise in the context and consideration of public matters, the public officer/employee may, under certain circumstances, honor his/her obligations through appropriate disclosures and abstentions.

In this matter, Public Officer is an owner of a private business and has a significant pecuniary interest in a potential sales contract with the Public Agency. Public Officer also has a commitment in a private capacity to the interests of Public Officer's family. As identified above, Public Officer must, and intends to, fully disclose these private interests to the public as required by NRS 281A.420 and interpretive opinions. Public Officer's disclosure must be made each time a matter is considered and should include the full scope and nature of Public Officer's interests in Public Officer's business entity and the extent to which such a contract or associated matters will affect those interests. (NRS 281A.420(1)). The Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests. Silence based upon a prior disclosure at a prior meeting fails to inform the public of the nature and extent of the conflict at the meeting where no actual disclosure occurred. (See *In re Buck*, Comm'n Opinion No. 11-63C (2011)(holding that incorporation by reference of a prior disclosure even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)).

The Commission's published opinions interpreting these requirements include but are not limited to: *In re Woodbury*, Comm'n Opinion No. 99-56 (1999), *In re Public Officer*, Comm'n Opinion 13-86A (2014), *In re Public Officer*, Comm'n Opinion No. 13-78A (2014), *In re Public Officer*, Comm'n Opinion No. 13-72A (2014), citing *In re Weber*, Comm'n Opinion No. 09-47C (2009).

Given the material effect of this proposed contract on Public Officer's private interests, Public Officer is advised to abstain from participating in any activities with respect to the consideration and approval of the real property sales contract by the Public Agency, including any associated agreements and related matters such as the selection of an appraiser. Public Officer has already acknowledged these requirements and agrees to abide by this advice.

D. OTHER STATE LAW CONTRACTING PROHIBITIONS

The Commission does not interpret statutory prohibitions or limitations on government contracting by public officers set forth in other provisions of Nevada law unless there is an associated implication under the Ethics Law; however, full compliance with these laws is recommended.

VI. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was an elected "public officer" as defined by NRS 281A.160, serving as a member of the governing body of the Public Agency.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. As a public officer, Public Officer is subject to the contracting prohibitions set forth in NRS 281A.430 because the potential contract to purchase Public Officer's property does not fall within an exception to the contracting prohibitions set forth in NRS 281A.430(4) given the sale is not subject to open competitive bidding, is not a sole source purchase of a good or service, and/or any other open process, as available property is limited to that owned by Public Officer's business entity.
4. Pursuant to NRS 281A.430(6), good cause has been established in this case to grant a waiver from the strict prohibition of government contracting because: (1) the sale of the real property would not be contrary to the provisions of the Ethics Law nor would it diminish the ethical integrity of the Public Agency; (2) the purchase is critical to allow completion of the public improvements; and (3) the purchase of the property is controlled and restricted under applicable law.
5. A waiver is granted for the sale of the property to the Public Agency under these limited circumstances provided there is compliance with the requirements of applicable law, including conducting an independent appraisal of the real property, and that Public Officer maintains the ethical integrity of Public Officer's public position by properly disclosing Public Officer's private interests and abstaining from the selection of the appraiser and, in any manner, participating in or negotiating the Public Agency's consideration and/or approval of the purchase and all associated matters. Proper disclosures and abstentions will ensure that Public Officer does not violate other provisions of the Ethics Law regarding the improper use of government positions to secure unwarranted benefits, contracts or business opportunities. See NRS 281A.400.

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

The Following Commissioners Participated in this Opinion:

Dated this 12th day of July, 2016.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ James M. Shaw
James M. Shaw
Commissioner

By: /s/ Keith A. Weaver
John C. Carpenter
Vice-Chair

By: /s/ Dan H. Stewart
Dan H. Stewart
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner