Case No.: 07-OC-012451B

Dept. No.: II

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BY J. HIGGINS

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MICHAEL A. CARRIGAN, Fourth Ward City Council Member of the City of Sparks,

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

ORDER AND JUDGMENT DENYING THE PETITIONER'S PETITION FOR JUDICIAL REVIEW AND AFFIRMING THE FINAL DECISION OF THE NEVADA COMMISSION ON ETHICS

JUN 03 2008

PROCEDURAL HISTORY

On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council, filed a *Petition for Judicial Review* pursuant to the Administrative Procedure Act (NRS 233B.130-233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the Commission found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict

of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor, confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project.[1]

In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or Hearing on this matter. The Legislature conditionally filed its Amicus Curiae Brief along with its Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any oral argument or hearing on this matter.

On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12, 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H. ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada

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[1] At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a new chapter to be numbered as NRS Chapter 281A. See Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 281A.

Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the Legislature as Amicus Curiae.

Having considered the pleadings, briefs, documents, exhibits and administrative record on file in this case and having received oral argument from the parties and Amicus Curiae, the Court enters the following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada Revised Statutes as NRS Chapter 281A.

3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)[2] All five members of the City Council were present at the meeting and actively participated in the discussion regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.) Vasquez started serving as campaign manager in January or February 2006, and he served in that capacity until Councilman Carrigan was reelected at the November 2006 general election. Id. In prior elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both

[2] Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999. (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid for providing printing, advertising and public relations services for Councilman Carrigan's three campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his companies did not make any profit from these services. Id.

6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact, Councilman Carrigan would confide in Vasquez regarding political matters that he would not normally discuss with members of his own family such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything. When you are running a campaign you have to take a look at all the factors that could affect that candidate and that community." (ROA000046.)

7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project. (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his many community and business contacts, and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were

otherwise directly interested in the success of the Lazy 8 project. Id.

8. Vasquez's primary occupation is to act as a paid public relations political advocate and strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and public relations services, and one of his specialties is providing such services to developers who are seeking approval from local governments for their planned developments. (ROA000041-53.)

9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting, lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to oversee public relations regarding the project, and he was actively and openly involved in efforts to manage information in the media and to influence and improve the public's opinion regarding the project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City Council's approval of the project. Id.

10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id. For example, Vasquez met numerous times with Councilman Carrigan and other council members to discuss the project. Id. At those meetings, Vasquez sought support for the project through discussions and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed information directly to Red Hawk, which then changed the specifications of the project to obtain the support of Councilman Carrigan and other council members. Id.

11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan made the following disclosure, as found in the transcripts of the meeting:

> Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight.

> [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue. Thank you.

(ROA000507.)

12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

13. After receiving additional testimony at the meeting from supporters and opponents of the Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.) Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206-209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer, Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and Moss) and two opposed (Carrigan and Schmitt). Id.

14. In September 2006, four members of the public filed separate but similar ethics complaints against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's participation in the City Council meeting violated the Ethics Law because, at the time of the meeting, Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was *acting as a paid consultant and lobbyist for Red Hawk* and was urging the City Council to approve the Lazy 8 project. Id.

15. On August 29, 2007, the Commission held a hearing and received testimony and evidence concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman

Carrigan. (ROA000012-13.)

16. Subsection 2 of NRS 281A.420 provides in relevant part:

> [I]n addition to the requirements of the code of ethical standards, 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 his situation would be materially affected by:
> (a) His acceptance of a gift or loan;
> (b) His pecuniary interest; or
> (c) His commitment in a private capacity to the interests of others.
> ➥ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

17. In its final decision, the Commission determined that when Councilman Carrigan voted upon the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c). (ROA000011-13.)

18. In reaching its conclusion, the Commission relied upon the statutory definition of "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS 281A.420:

> 8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(Emphasis added.) (ROA000006-8.)

19. The Commission found that Councilman Carrigan's relationship with Vasquez came within the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated under NRS 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" (ROA000008.)

20. Because the Commission found that the independence of judgment of a reasonable person in Councilman Carrigan's situation would be materially affected by his commitment in a private capacity to the interests of his campaign manager, political advisor, confidant and close personal friend, the Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to abstain from voting. Specifically, the Commission stated:

> Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reasonable person's independence of judgment would be materially affected by his private commitment.
>
> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

(ROA000012.)

Petitioner's Claims

21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging the Commission's final decision.

22. First, Councilman Carrigan contends that the Commission's final decision should be

reversed under the Administrative Procedure Act because the final decision is in violation of constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments.

23. Second, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is affected by error of law. NRS 233B.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in that subsection without receiving any evidence that rebutted the presumption.

24. Third, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is not supported by reliable, probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

25. Fourth, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is arbitrary and capricious and characterized by abuse of discretion. NRS 233B.135(3)(f).

26. Finally, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision violates his constitutional rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically, Councilman Carrigan contends that his constitutional rights to due process were violated because Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an appearance or implied probability of bias and which disqualified them from participating in the Commission's hearing regarding the ethics complaints against Councilman Carrigan.

27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do

not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

Standard of Review

28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must prove that substantial rights have been prejudiced by the final decision of the Commission because the final decision is:

> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

29. In reviewing the final decision of the Commission, the standard of deference accorded to the Commission's determinations turns largely on whether the determinations are more appropriately characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121 Nev. 523, 527 (2005).

30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at 527-28. Under that deferential standard, the Court may not look beyond the administrative record or substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact. NRS 233B.135(3); Weaver, 121 Nev. at 498. Thus, the Court must uphold the Commission's findings of fact if they are supported by substantial evidence in the record, regardless of whether the Court would have reached the same view of the facts as the Commission. Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence

which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

31. In addition to giving deference to the Commission's findings of fact, the Court must give deference to the Commission's conclusions of law when they are closely tied to the Commission's view of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered to undertake an independent de novo review, and the Court is not required to defer to the Commission's legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v. Nev. Cement Co., 117 Nev. 960, 964 (2001).

32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the Commission is clothed with the power to interpret the ethics statutes as a necessary precedent to its administrative action and "great deference should be given to that interpretation if it is within the language of the statute." Nev. Tax Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co., 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the language of the statutes and is consistent with legislative intent. JMA/Lucchesi, 110 Nev. at 5-7; City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

33. Councilman Carrigan contends that legislative voting is protected speech under the First Amendment and that he had a constitutional right as an elected public officer to engage in such protected speech when he voted on the Lazy 8 project. Because the Commission concluded that

subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and as applied to him because they impermissibly restrict his protected speech in violation of the First Amendment. In response, the Legislature raises several arguments in opposition to Councilman Carrigan's constitutional challenge to the validity of the statutory provisions.

34. First, the Legislature contends that the First Amendment was not applicable under the circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative proceeding, but was an administrative proceeding at which the City Council and its members were required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing political, professional and personal relationship with Vasquez which created an appearance or implied probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are subject to review under the First Amendment in this case, the balancing test established by the United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital interest in ethical government outweighs any interest Councilman Carrigan has to vote upon a matter in which he has a disqualifying conflict of interest.

36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review

under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical government and guarding the public from biased decisionmakers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitute the least restrictive means available to further the state's compelling interest.

37. Although the Legislature makes a cogent argument that the First Amendment was not applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case. Instead, even assuming that the First Amendment was applicable under the circumstances, the Court finds that under the Pickering balancing test, any interference with protected speech is warranted because of the state's strong interest in either having ethical government or the appearance of ethical government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan.

38. Although public officers and employees do not surrender their First Amendment rights as a result of their public service, it is well established that the free speech and associational rights of public officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). Because the free speech and associational rights of public officers and employees are not absolute, states may enact reasonable regulations limiting the political activities of public officers and employees without violating the First Amendment. Clements v. Fashing, 457 U.S. 957, 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

39. Several cases from the First Circuit have found that "[v]oting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir. 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit

recognizes that voting by public officers is constitutionally protected speech, the First Circuit also recognizes that "[t]his protection is far from absolute," and that when a public officer claims his First Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 74-76; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

> We have extended First Amendment protection to votes on "controversial public issues" cast by "a member of a public agency or board." Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue."); see also Stella v. Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995). This protection is far from absolute, however. In their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment protection "so long as [their] speech does not unduly impede the government's interest . . . in the efficient performance of the public service it delivers through" its appointed officials. O'Connor, 994 F.2d at 912 (citing cases). Accordingly, to determine the scope of First Amendment free speech protections applicable to public officials, we have employed a three-part test extracted largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

Mullin, 284 F.3d at 37.

40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper standard of review for this case. Under the Pickering balancing test, the Court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in "promot[ing] efficiency and integrity in the discharge of official duties." Connick v. Myers, 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson, 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may impose significant restraints on the speech that "would be plainly unconstitutional if applied to the public at large." United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v. Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion). Thus, under the Pickering balancing test, the state is given greater latitude to restrict the speech of public officers and employees to promote

operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004); Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006).

41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting upon a matter when he has a "commitment in a private capacity to the interests of others." The purpose of the statutory provisions is to prevent a public officer from voting upon a matter when private interests create an actual conflict of interest or the appearance of a conflict of interest. Under such circumstances, a reasonable person would have a legitimate fear that the public officer's commitment to the private interests of others could potentially disrupt or undermine the public officer's efficiency, effectiveness and integrity in the discharge of his official duties. Thus, on their face, the statutory provisions serve the vital state interest of securing the efficient, effective and ethical performance of governmental functions. See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) ("The elimination and prevention of conflict of interest is a proper state purpose.").

42. Because the statutory provisions serve such a vital state interest, the balancing of interests under the Pickering test tilts heavily in favor of the state because the state's interests are at their zenith. In contrast, a public officer's interest in voting upon a matter in which he has a disqualifying conflict of interest is entitled to little or no protection under the First Amendment. Indeed, allowing a public officer to vote under such circumstances would seriously erode the public's confidence in ethical government. Therefore, because the state's interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS 281A.420 are facially constitutional under the Pickering balancing test.

43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied to Councilman Carrigan. Given Vasquez's role as Councilman Carrigan's campaign manager, political

advisor, confidant and close personal friend, the record contains substantial evidence that Councilman Carrigan and Vasquez had a substantial and continuing political, professional and personal relationship when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to create an actual conflict of interest or the appearance of a conflict of interest, and a reasonable person would have had a legitimate fear that the relationship could potentially disrupt or undermine Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties. Under such circumstances, Councilman Carrigan had a disqualifying conflict of interest. Because the First Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the Commission acted constitutionally when it found that Councilman Carrigan was prohibited from voting upon the Lazy 8 project.

44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore, subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is unconstitutionally vague on its face if the statute: (1) fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or encourages arbitrary and discriminatory enforcement by the officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868 (2004).

46. In determining whether a statute is unconstitutionally overbroad or vague, the United States Supreme Court considers whether there are any procedures in place allowing persons with doubts about the meaning of the statute to obtain clarification from the agency charged with its enforcement. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion); Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme Court typically will not find the statute to be unconstitutionally overbroad or vague if such persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting Letter Carriers, 413 U.S. at 580); Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct. App. 1982).

47. Under the Ethics Law, a public officer may request an advisory opinion from the Commission regarding "the propriety of his own past, present or future conduct" and receive guidance from the Commission on whether to withdraw or abstain from participating in a matter. NRS 281A.440(1) & 281A.460. Each request so made by a public officer and each advisory opinion rendered by the Commission in response to such a request, and any motion, determination, evidence or hearing record relating to such a request, are confidential unless the public officer who requested the advisory opinion permits the disclosure of the confidential information or acts in contravention of the advisory opinion. NRS 281A.440(5).

48. In this case, Councilman Carrigan failed to seek an advisory opinion from the Commission even though he had ample time and opportunity to do so. The record shows that Vasquez became Councilman Carrigan's campaign manager 6 months or more before the City Council meeting. (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-

43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory opinion and obtain clarification of the statute from the Commission when he had ample opportunity to do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics commission regarding the propriety of his conduct).

49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

50. The United States Supreme Court has recognized that the overbreadth and vagueness doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. In addition, a statute should not be invalidated on its face "when a limiting construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not be invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis." Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

51. *Under the overbreadth doctrine*, a statute is not overbroad merely because the statute, if construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth. Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual

fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City of Las Vegas v. Dist. Ct., 122 Nev. ---, 146 P.3d 240, 247 (2006).

52. When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it regulates political activity in an even-handed and neutral manner and is not attempting to suppress any particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to vote "yes" or "no" on the matter. Thus, because the statute "is not a censorial statute, directed at particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected speech. The purpose of the statute is to prevent public officers from voting upon matters when private interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest, and this traditional common-law rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E. 146, 149 (Ga. 1888); Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v. Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-established" tradition under the common law of prohibiting certain conduct, this creates a "strong

presumption" that the prohibition is constitutional under the First Amendment. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002). Thus, because public officers do not have a First Amendment right to vote upon matters in which they have disqualifying conflicts of interest, subsections 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

54. Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained by the Nevada Supreme Court, "[e]ven if a law at its margins proscribes protected expression, an overbreadth challenge will fail if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" City of Las Vegas, 146 P.3d at 247 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

55. In this case, Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. When the Legislature enacted the definition of "commitment in a private capacity to the interests of others" in Senate Bill No. 478 (70th Sess. 1999), it clearly had in mind situations where a public officer's substantial and continuing relationship with his campaign manager would require abstention. In the legislative hearings on S.B. 478, Senator Dina Titus and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

> *Senator Titus questioned:*
> I just have a question of how this would fit with either the existing language or the new language. One of the cases that had a lot of notoriety involved a commissioner and someone who had worked on her campaign. Sometimes people who do campaigns then become lobbyists. If you could not vote on any bill that was lobbied by someone who had previously worked on your campaign, how would all of that fit in here. It is not really a business relationship or a personal relationship, but I don't [do not] know what it is.
>
> Mr. Scherer stated:
> The way that would fit in . . . the new language that the Governor is suggesting is that it would not necessarily be included because it would not be a continuing business relationship. So the relationship would have to be substantial and continuing. Now, if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in

cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999) (emphasis added).

56. In light of this legislative history, it would be detrimental to society to invalidate the statute on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. The statute also should not be invalidated on its face because the statute's impact on the First Amendment is so speculative or slight that the First Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by petitioners whose conduct does not fall so squarely within the confines of the statute.

57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because: (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First Amendment.

58. Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable breadth, rather than meticulous specificity. Id. As explained by the United States Supreme Court:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Letter Carriers, 413 U.S. at 578-79.

59. When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for vagueness if it imposes only civil sanctions, instead of criminal penalties, since the United States Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Hoffman Estates, 455 U.S. at 498-99; Groener, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was subject to less exacting scrutiny for vagueness).

60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which could result in severe consequences for a public officer, including referring the matter to the Attorney General or the appropriate District Attorney for a determination of whether a crime has been committed and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court finds that because none of the actions which the Commission is authorized to take under NRS 281A.480 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law*, it would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable from office by impeachment only has committed a willful violation of the Ethics Law, the Commission is required to file a report with the appropriate person responsible for commencing impeachment proceedings. It is well established, however, that impeachment proceedings are not criminal proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev.

Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose of an impeachment is to protect the state, not to punish the offender.").

63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is removable from office pursuant to NRS 283.440 has committed one or more willful violations of the Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer. It is well established, however, that removal proceedings conducted pursuant to NRS 283.440 are civil proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction. Adler v. Sheriff, 92 Nev. 436, 439 (1976) ("The laws for removal of public officers are not criminal statutes nor are the proceedings criminal proceedings.").

64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in accordance with the applicable provisions governing his employment. It is well established, however, that disciplinary proceedings conducted against public employees are administrative proceedings, not criminal proceedings. Navarro v. State ex rel. Dep't of Human Res., 98 Nev. 562, 563-65 (1982); State, Dep't of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

65. *Finally, NRS 281A.480(7) provides:*

> 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions of the Nevada Revised Statutes which define crimes or prescribe punishments with respect to the conduct of public officers or employees. If the Commission finds that a public officer or employee has committed a willful violation of this chapter which it believes may also constitute a criminal offense, the Commission shall refer the matter to the Attorney General or the district attorney, as appropriate, for a determination of whether a crime has been committed that warrants prosecution.

66. Even though the Commission is required to refer certain matters to the Attorney General or the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a

state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions. Rather, such a criminal prosecution could occur only under the criminal laws of this state.

67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all. (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less exacting scrutiny for vagueness.

68. Furthermore, when the government restricts the speech of its public officers and employees, it may use broad and general language even if such language would create "a standard almost certainly too vague when applied to the public at large." Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion). For example, a federal statute allowed the government to remove a federal employee "for such cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974) (plurality opinion). An employee who was discharged for making public statements critical of his supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The United States Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited

conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'" Id. at 161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

69. In a case challenging the constitutionality of the rule of judicial conduct which requires judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). The court found that while the rule is stated in broad and general terms, the rule also contains four specific instances which require recusal: (1) personal bias or prejudice concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the controversy. The court held that the rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not vague because it provided enough guidance for a judge to determine, "in most instances," the circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at 710; see also Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

70. *In a similar vein, the Nevada Supreme Court has held that broad and general terms, like* "unprofessional conduct," are not vague when used to define the ethical standards governing various professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v. Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the court:

> [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt to specify in a statute or regulation all of the acts which come within the meaning of the term. The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the

board the function of evaluating the conduct in each case.

Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" is designed to capture the infinite variety of factual situations in which private commitments and relationships will cause a public officer to have a disqualifying conflict of interest. Considering that it would have been infeasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying conflict of interest in the language of the statute, it was appropriate for the Legislature to enact such a reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in each case.

72. Furthermore, because the language of the catch-all provision is expressly tied to the four types of private commitments and relationships already enumerated in the statute, the Legislature has given the Commission and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and public officers regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer, Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

> [The new language in NRS 281A.420] would be, 'any substantially similar commitment or relationship.' Because I can tell you what the Governor was trying to get at was actually trying to make the language better by defining 'commitment in a private capacity to the interests of other.' That, I think, is even more vague than the language we have in here, which sets forth some categories. We also, though, on the other hand, did not want to specifically limit it to just these categories. But what we were trying to get at relationships that are so close that they are like family. That they are substantially similar to a business partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then we said, 'any substantially similar commitment or relationship.' That would express the view that we are trying to get at which is, it has got to be a relationship that is so close, it is like family, it is like a member of your household, it is like a business partner.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

74. On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose and scope of the catch-all provision:

> Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any commitment or relationships that is substantially similar to any one of the relationships set forth in this paragraph." The intent of change, he stated, is to capture a relationship, not listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers them family. He commented with this change the ethics commission would still have some discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed out, it has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" . . . He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are. He declared this language to be an improvement on existing law and an appropriate balance between trying to provide guidance and trying to allow the ethics commission discretion.
>
> Chairman O'Connell concurred stating, "I do not think that that language could leave any doubt in anybody's mind about the relationship. In my looking at it, I think you did a terrific job with that, because it certainly does tell you exactly what kind of relationship you would have with the person and it would make it much easier to determine that before voting."
>
> Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a private capacity to the interests of others." He stressed the importance of attempting to give guidance without completely taking away the ethics commission's discretion.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

75. In the face of this legislative history, it is reasonable to expect a public officer of ordinary intelligence to understand the types of private commitments and relationships that are "substantially similar" to those he has with: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. Through the exercise of ordinary common sense, a reasonable public

officer could readily deduce that the four types of private commitments and relationships that are explicitly described in the statute all involve close, substantial and continuing relationships. It follows by simple logic that the catch-all provision extends to "substantially similar" private commitments and relationships which also constitute close, substantial and continuing relationships akin to those commitments and relationships that are explicitly described in the statute. Because it is not unreasonable to expect a public officer to know when he has a close, substantial and continuing relationship with another person, most public officers should have little difficulty in conforming their conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of further guidance, they can request advisory opinions from the Commission pursuant to NRS 281A.440(1) and 281A.460.

76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because: (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the statute from the Commission when he had ample opportunity to do so; (2) the statute contains sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can adequately understand the type of conduct that is prohibited by the statute; and (3) the statute contains four very specific and concrete examples of prohibited conduct to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission. *Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally vague in violation of the First and Fourteenth Amendments.*

The Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case.

77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS 281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission. The Court disagrees.

78. The presumption contained in subsection 2 of NRS 281A.420 states:

> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

79. As illustrated by the following discussion on the record at the hearing, the Commission fully considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on the facts:

> COMMISSIONER HSU: . . . I think people put too much emphasis on this language when I see people argue it when the resulting benefit or detriment accruing to him would not be greater than any accruing to any other member in a general business. There is only one lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard. It's not like the entire business profession of lobbyists are being affected uniformly. That's kind of what that language is there for.
>
> So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the professional benefit by having this approved, and of course, the vote was that it got denied, the vote, but I just don't see how that language applies because it is not a broad application.
>
> Again, . . . I just don't see how every—how the entire group of lobbyists is being affected by the passage or failure of this vote. Thanks.
>
> * * *
>
> COMMISSIONER JENKINS: . . . We might consider that Councilman Carrigan is a resident of his ward and the decision to participate in the vote and his bringing the motion and voting for it would not bring him or the project—well, him any greater benefit than any other resident of his ward. But you know, Vasquez just really throws a wrench in the whole thing, doesn't he?
>
> VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . . [W]e're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about his commitement in a private capacity to the interests of others. So we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.
>
> So I think that Commissioner Hsu's reasoning does, I think, apply . . . Mr. Vasquez was in a different position than the general business, profession, occupation or group in terms of the Lazy 8 and the passage of the matter that was before the Council on August 23rd.

So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph does not necessarily save the day.

COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

80. Therefore, the Court holds that the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

The Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

81. After review of the record, the Court finds that substantial evidence exists to support the Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project.

82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005).

83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature declared:

> To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

NRS 281A.020(2)(b).

84. Accordingly, the disclosure and abstention law holds public officers accountable to the public for complete disclosures of private commitments and for the proper exercise of their judgment to abstain or not to abstain, by requiring them to make that judgment after evaluating their private commitments and the effects of their decision on those private commitments. NRS 281A.420; see also In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

> [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.

86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of NRS 281A.420 as:

> [A] commitment to a person:
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type that the Legislature intended to encompass when adopting the definition of "commitment in a private capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the 1999 legislative session.

> [I]t has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" to one listed in section 15, subsection 7 of the bill. He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 33 (Nev. Apr. 7, 1999).

88. In response to Senator Titus' question as to how campaign managers fit into the statute, Mr. Scherer responded:

> The way that would fit in . . . if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999).

89. The Court agrees with the Commission that the sum total of the relationship shared by Councilman Carrigan and Vasquez equates to a relationship such as those enumerated under NRS 281A.420(8)(a)-(d), including a close, personal friendship akin to family and a "substantial and continuing business relationship."

90. First, in addition to being a close personal friend, Councilman Carrigan would confide in Vasquez on matters where he would not his own family such as siblings. (ROA000035.)

91. Second, as Councilman Carrigan's volunteer campaign manager, Vasquez was instrumental in getting him elected three times to the Council. (ROA000022, 47.)

92. Third, companies owned by Vasquez were paid by Councilman Carrigan's campaign for providing printing, advertising and public relations services. These services were provided at cost, and Vasquez and his companies did not make any profit from these services. (ROA000051.)

93. Finally, as campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. As part of that solicitation, Vasquez relied on his many community and business contacts and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. (ROA000044.)

94. The Commission found that "[a] reasonable person in Councilman Carrigan's position . . . would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment." (ROA00012).

95. In Woodbury, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits. Nev. Comm'n on Ethics Op. No. 99-56, at 2. Before abstention is required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. Id.

96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice from the Sparks City Attorney, his legal counsel. (ROA000112-114.) Neither Councilman Carrigan nor his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General Opinion (AGO 98-27). (ROA000112.)

97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that abstention is required:

> where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter . . . In such circumstances, the public official's independence of judgment would be materially affected.

(ROA000121.)

98. The Court finds that substantial evidence exists to support the Commission's conclusion that at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman Carrigan's situation would have been materially affected by that commitment. Therefore, Councilman Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of NRS 281A.420.

99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy 8 project was a violation of subsection 2 of NRS 281A.420.

100. Therefore, the Court holds that the Commission's final decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters where a reasonable person's independence of judgment would be materially affected by a commitment in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification. NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> * * *
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> * * *
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
> * * *

103. Based on these standards, and the fact that Councilman Carrigan waived any objections to the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due process were not violated.

Commissioner Hsu

104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent representation of The Nugget[3] by his law firm, Maupin Cox & LeGoy. However, there is no evidence that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's

[3] The Nugget is an opponent of the Lazy 8 project.

representation of The Nugget at the time of Councilman Carrigan's hearing. Additionally, The Nugget was not a party to the matter heard by the Commission.

105. Further, although Commissioner Hsu did vote in favor of a finding in violation of subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal knowledge of his law partner's subsequent representation of Vasquez's business interests. (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection. Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

Commissioner Flangas

107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The Nugget, required his disqualification.

108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably be affected by his commitment to a person who is related to him by blood, adoption or marriage "within the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable person's independence of judgment would be materially affected by such a relationship.

109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was

required based on his familial relationship to Alex and Amanda Flangas because that relationship is not within the third degree of consanguinity or affinity.

110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

111. Therefore, the Court finds that Councilman Carrigan has not established a due process violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

ORDER AND JUDGMENT

112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment; (2) subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion; and (5) Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

114. All parties shall bear their own costs and attorney's fees.

115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order

and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such notice of entry with the Clerk of Court.

DATED: This 28th day of May, 2008.

William G. Maddox

WILLIAM A. MADDOX
DISTRICT COURT JUDGE

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