

STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR OPINION
CONCERNING THE CONDUCT OF
MICHAEL CARRIGAN, Councilman,
City of Sparks.**

**Opinion Nos. 06-61, 06-62, 06-66
and 06-68**

This matter came before a quorum¹ of the Nevada Commission on Ethics (hereinafter the "Commission") for a hearing on August 29, 2007, pursuant to Requests for Opinion filed with the Commission and a determination made on May 23, 2007, by a Commission panel finding just and sufficient cause for the Commission to hold a hearing on the matter and render an opinion on whether Councilman Carrigan's conduct violated the provisions of NRS 281.481(2), NRS 281.501(2), and/or NRS 281.501(4).

The issues before the Commission in this matter are limited to the following:

1. Did Councilman Carrigan use his official position in government to secure or grant unwarranted² privileges, preferences, exemptions or advantages for himself or any person to whom he has a commitment in a private capacity to the interests of that person in violation of

¹ The quorum consisted of Vice Chairman Hutchison and Commissioners Capurro, Cashman, Flangas, Hsu and Jenkins. Commissioner Keele and Chairman Kosinski served as the panel in this matter. Pursuant to NRS 281.462(4), panel members are prohibited from participating in any further proceedings of the Commission relating to the matter.

² As used in NRS 281.481(2), "unwarranted" means without justification or adequate reason.

NRS 281.481(2) by acting on the Red Hawk Land Company's ("Red Hawk") proposed Lazy 8 development project ("Lazy 8") at the August 23, 2006 Sparks City Council ("Council") meeting?

2. At the August 23, 2006 Council meeting, when the Council was considering approval of the Lazy 8, did Councilman Carrigan fail to sufficiently disclose his relationship with Carlos Vasquez, a consultant and spokesperson for Red Hawk, in violation of NRS 281.501(4)?

3. At the August 23, 2006 Council meeting, did Councilman Carrigan fail to abstain from voting on the Lazy 8 matter in violation of NRS 281.501(2)?

Notice of the hearing was properly posted and served. Councilman Carrigan was present with his counsel, David Creekman, Esq., Senior Assistant City Attorney and Doug Thornley, Esq., Assistant City Attorney and provided sworn testimony. Carlos Vasquez appeared as a witness and provided sworn testimony.

FINDINGS OF FACT

The Commission, after hearing testimony and considering the evidence presented, makes the following Findings of Fact:

1. Michael Carrigan is a Sparks City Council member representing Ward 4.
2. Carlos Vasquez is a consultant for Red Hawk.
3. Carlos Vasquez owns various companies that provide public relations services for candidates running for public office and he also manages campaigns for candidates for public office.
4. Councilman Carrigan and Carlos Vasquez have been friends since 1991.
5. The friendship between Councilman Carrigan and Carlos Vasquez is close, substantial and continuing.

6. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 1999.

7. Councilman Carrigan was elected to the Sparks City Council in 1999.

8. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2003.

9. Councilman Carrigan was reelected to the Sparks City Council in 2003.

10. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2006.

11. Councilman Carrigan was reelected to the Sparks City Council in 2006.

12. Carlos Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three of his political campaigns.

13. Councilman Carrigan moved the Council to tentatively approve the amendment to Red Hawk's planned development handbook and voted "yes" on the Lazy 8 agenda item at the August 23, 2006 Council meeting; his motion failed.

14. Prior to voting "yes," Councilman Carrigan disclosed to the Council and the public that Carlos Vasquez was his personal friend and campaign manager.

15. A majority of Councilman Carrigan's constituency favored the Lazy 8.

16. The second motion by the Council on the Lazy 8 matter on August 23, 2006 passed by a 3 to 2 vote. The motion called for denial of approval of the amendment to Red Hawk's planned development handbook. Councilman Carrigan was one of the two negative votes.

17. Prior to his August 23, 2006 vote, Councilman Carrigan requested a legal opinion from the Sparks City Attorney regarding whether a conflict existed prohibiting him from acting on the Lazy 8 matter.

18. The Sparks City Attorney advised Councilman Carrigan that unless he stood to reap either financial or personal gain or loss as a result of his official action and because the City Attorney was unaware of any facts establishing the existence of such a gain or loss, nothing prohibited Councilman Carrigan from acting on the Lazy 8 matter at the August 23, 2006 council meeting.

19. Councilman Carrigan relied on his legal counsel's advice and he testified before the Commission that if counsel had told him to abstain on the Lazy 8 matter, he would have done so.

20. Prior to casting his votes on the Lazy 8 matter on August 23, 2006, Councilman Carrigan was aware that he could have asked the Commission for an advisory opinion, but instead he relied on his counsel's advice.

21. Should any finding of fact be better construed as a conclusion of law, it may be so deemed.

CONCLUSIONS OF LAW

1. At all relevant times, Councilman Carrigan was an elected Sparks City Councilman, and as such was a public officer as defined in NRS 281.4365.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465 and NRS 281.511, subsection 2, paragraph (b).

3. Councilman Carrigan has a commitment in a private capacity to the interest of Carlos Vasquez within the definition of NRS 281.501, subsection 8.

4. Councilman Carrigan did not violate NRS 281.481, subsection 2, and did not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Carlos Vasquez.

5. Councilman Carrigan did not violate NRS 281.501, subsection 4, and he sufficiently disclosed his relationship with Carlos Vasquez to the Council and to the public.

6. Councilman Carrigan violated NRS 281.501, subsection 2, by not abstaining from voting on the Lazy 8 matter at the August 23, 2006 Council meeting.

7. Councilman Carrigan's violation of NRS 281.501, subsection 2, was not willful under the definition of "willful" in NRS 281.4375.

8. Should any conclusion of law be better construed as a finding of fact, it may be so deemed.

WHEREFORE, based upon a preponderance of the evidence in this matter in support of the foregoing findings of fact and conclusions of law, the Commission renders the following Opinion:

OPINION

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "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 281.421. Therefore, charged with interpreting and enforcing the Ethics in Government Law, the Commission must hold public officers accountable when they fail to place the public interest and public trust ahead of their private interests.

In determining whether Councilman Carrigan violated any of the provisions of the Ethics in Government Law at issue, the Commission must ascertain whether Councilman Carrigan had a “commitment in a private capacity to the interest of” Mr. Vasquez.

NRS 281.501(8) provides:

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.

In 1999, the Nevada State Legislature excluded mere friendships from its definition of “commitment in a private capacity to the interests of others.” However, the definition contemplated close relationships which rise to such a level of commitment to another person’s interests that the independence of judgment of a reasonable person in the public officer’s position would be affected. Independence of judgment means a judgment that is unaffected by that commitment or relationship. It is important to note that the test under the statute is not the independence of judgment of the public officer making the assessment whether his independence of judgment is affected. Rather, the test calls for the independence of judgment of a “reasonable person.”

The legislature enumerated the commitments and relationships where the independence of judgment of a reasonable person in a given situation is sure to be affected. *See* NRS 281.501(8)(a)-(d). Additionally, the legislature contemplated commitments and relationships that, while they may not fall squarely within those enumerated in NRS 281.501(8)(a)-(d), are substantially similar to those enumerated categories because the independence of judgment may

be equally affected by the commitment or relationship. The legislature enacted NRS 281.501(8)(e) to include such cases. The commitment and relationship shared by Councilman Carrigan and Mr. Vasquez are illustrative of those contemplated by NRS 281.501(8)(e).

In a 1999 meeting of the Senate Committee on Government Affairs, Senator Dina Titus questioned Scott Scherer, Legal Counsel to Governor Guinn, regarding NRS 281.501(8)(e), as follows:

“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 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 responded:

“...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.*” [Emphasis added.]

Legislative Minutes re: Hearing on SB 478
before the Senate Committee on
Government Affairs, 70th Leg., at 42 (Nev.,
March 30, 1999).

Councilman Carrigan admits that Mr. Vasquez, who is his campaign manager and political advisor, was instrumental in the success of all three of Councilman Carrigan’s elections. Mr. Vasquez was Councilman Carrigan’s campaign manager at the time of the August 23, 2006 Council meeting when the Lazy 8 matter was heard.

Councilman Carrigan argues that his relationship with Mr. Vasquez is not a business relationship. Under Councilman Carrigan’s view, a “business relationship” is where money

changes hands or a situation where money is made. The Commission rejects such a narrow interpretation of “business relationship.”

Councilman Carrigan and Mr. Vasquez both testified that Mr. Vasquez worked in a volunteer capacity on all three of Councilman Carrigan’s campaigns for Sparks City Council and that Mr. Vasquez never profited from any of Councilman Carrigan’s campaigns. Mr. Vasquez testified that everything he and his companies did for Councilman Carrigan was at cost and that any related funds were a “pass-through,” that is, Mr. Vasquez’ companies would do work on the campaigns, or farm out the work, and then be reimbursed for costs from Councilman Carrigan’s campaign fund. Notwithstanding this at-cost or pass-through arrangement, Mr. Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three political campaigns. Councilman Carrigan believes that Mr. Vasquez was instrumental in getting Councilman Carrigan elected in all three of his elections.

Mr. Vasquez has been a close personal friend, confidant and political advisor to Councilman Carrigan throughout the years. Councilman Carrigan confides in Mr. Vasquez on matters where he would not confide in his own sibling. Therefore, The sum total of their commitment and relationship equates to a “substantially similar” relationship to those enumerated under NRS 281.501(8)(a)-(d), including a close personal friendship, akin to a relationship to a family member, and a “substantial and continuing business relationship.” The independence of judgment of a reasonable person in Councilman Carrigan’s position would be affected by the commitment and relationship Councilman Carrigan shares with Mr. Vasquez.

Therefore, during the August 23, 2006 Council meeting when the Lazy 8 matter was heard, Councilman Carrigan had a “commitment in a private capacity to the interest of” Mr. Vasquez.

1. NRS 281.481(2).

NRS 281.481(2) provides:

A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.

(b) "Unwarranted" means without justification or adequate reason.

The Commission finds that a preponderance of the evidence does not exist to conclude that Councilman Carrigan used his position as Sparks City Councilman to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or for Mr. Vasquez, a person to whose interests he has a commitment in a private capacity. Councilman Carrigan testified that a majority of constituents in his Ward favored the project. No evidence or testimony was presented in this matter to conclude otherwise. Therefore, the Commission finds that Councilman Carrigan did not violate NRS 281.481(2).³

2. NRS 281.501(4).

NRS 281.501(4) provides:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6,

³ Commissioners Capurro, Cashman, Hsu, Hutchison and Jenkins voted to approve the motion, while Commissioner Flangas voted nay.

such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

In the *Woodbury* opinion, 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 serves: first, disclosure is required whenever a public officer's actions would “*reasonably* be affected by his private commitment”; and second, before abstention is also required, a reasonable person's independence of judgment “must be *materially* affected” by that private commitment. *In re Woodbury*, CEO 99-56.

The facts presented at the hearing established that prior to the August 23, 2006 Council meeting, Councilman Carrigan requested a legal opinion from the Sparks City Attorney as to whether or not he had a conflict that prohibited him from acting on the Lazy 8 matter. The Sparks City Attorney advised Councilman Carrigan through a legal memorandum that stated in part: “The only type of bias which may lead to disqualification of a public official must be grounded in facts demonstrating that the public official stands to reap either financial or personal gain or loss as a result of official action...if you anticipate that certain positions you may have previously taken or personal relationships in which you are involved may give rise to allegations of bias against you, you should simply err on the side of caution and disclose sufficient information concerning the positions or relationships before you consider and vote on the issue.” The Sparks City Attorney also prepared a disclosure for Councilman Carrigan to make before voting. Relying on this advice, Councilman Carrigan disclosed the following: “...I have to disclose for the record something...I'd like to disclose that Carlos Vasquez, a consultant for Red

Hawk...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. Therefore, according to NRS 281.501, I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue..."

Councilman Carrigan's actions on August 23, 2006 would reasonably have been affected by his private relationship and commitment to Mr. Vasquez and therefore, a disclosure by Councilman Carrigan of sufficient information concerning this commitment to inform the public of the potential effect of the action or abstention upon Mr. Vasquez or Councilman Carrigan's interest was necessary. Based on Councilman Carrigan's disclosure, the Commission finds that Councilman Carrigan did not violate NRS 281.501(4).⁴

3. NRS 281.501(2).

NRS 281.501(2) provides:

Except as otherwise provided in subsection 3, in 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.

⁴ Commissioners Capurro, Cashman, Hsu and Jenkins voted for the motion, while Commissioners Flangas and Hutchison voted Nay.

In *Woodbury* the Commission opined:

...[T]he public (and an elected official's constituents) have an interest in matters which come before such officers and employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and employees should have the opportunity to perform the duties for which they were elected or appointed, *except where private commitments would materially affect one's independence of judgment*. Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore, is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a *reasonable person's* independence of judgment would be *materially* affected by those private commitments. *In re Woodbury*, CEO 99-56. [Emphasis added.]

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.

Therefore, the Commission unanimously finds that Councilman Carrigan violated NRS 281.501(2) by not abstaining from voting on the Lazy 8 matter on August 23, 2006. However, because the Commission also finds that Councilman Carrigan's violation was not willful, as he reasonably relied on his counsel's advice, and because he did not consider his relationship with Mr. Vasquez a relationship that falls under the statute, it imposes no civil penalty.

CONCLUSION

Based on the foregoing, the Commission finds that Councilman Carrigan's actions did not violate NRS 281.481(2) or NRS 281.501(4). The Commission finds one violation by Councilman Carrigan of NRS 281.501(2). However, because the Commission finds that Councilman Carrigan's violation is not willful, it imposes no civil penalty.

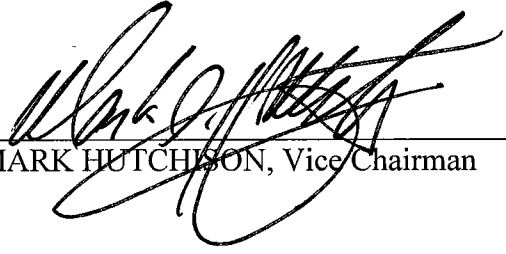
NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DESCRIBED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION.

DATED: October 8, 2007.

NEVADA COMMISSION ON ETHICS

By: _____

MARK HUTCHISON, Vice Chairman

A handwritten signature in black ink, appearing to read 'Mark Hutchison', is written over a horizontal line. The signature is stylized with large, sweeping loops.