



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the Request for
Advisory Opinion by CAL EILRICH,
Member, Fernley City Council,
State of Nevada,
Public Officer.**

Advisory Opinion No. 08-09A

OPINION

This matter came before a quorum¹ of the Nevada Commission on Ethics (Commission) for a hearing on May 7, 2008 on the request for an advisory opinion by Fernley City Council Member Cal Eilrich (Eilrich), pursuant NRS 281A.440.1. Eilrich appeared by telephone and provided sworn testimony. Eilrich was represented by Fernley City Attorney Jeff McGowan, Esq., who appeared in person at the hearing in Carson City.

Eilrich sought an opinion from the Commission specifically on the following questions:

1. May Eilrich, acting in his private capacity, enter into a development agreement with the Fernley City Council (City Council) on behalf of the City of Fernley (City) extending the time for filing the final map of Eilrich's private land development?
2. If so, to what extent may Eilrich participate as an applicant for a development agreement with the City Council?

After fully considering the request for advisory opinion and analyzing all of the facts and circumstances and testimony presented, the Commission deliberated and orally advised Eilrich of its decision in the matter. The Commission now renders this written Opinion.

FINDINGS OF FACT

1. In his public capacity, Eilrich is a member of the City Council. On March 19, 2008, he was appointed to fill the City Council's vacant seat for the City's Ward 5.
2. In his private capacity, Eilrich owns real estate through a private business entity.
3. Eilrich has two parcels of real property that he plans to develop (projects). One project is a housing development and the other is a commercial development.
4. Prior to taking office, Eilrich's tentative maps relating to both projects were approved by the City Council.
5. NRS 278.360 requires a subdivider to file a final map, or a successive map in a series of maps, with the governing body within two years after the approval of the tentative map, unless a longer time is provided in a development agreement entered into between the subdivider and the governing body. The governing body may thereafter grant the subdivider an extension of not more than one year.
6. Under NRS 278.0201, a governing body may enter into a separate agreement with a subdivider concerning the development of the subdivider's land. The agreement may fix the period within which construction must commence and provide for an additional extension of that deadline.
7. The City Council has adopted an ordinance to allow for such development agreements, as authorized pursuant to NRS 278.0201.

8. In September 2008, Eilrich will request a one-year extension of the time for filing the final map on his housing development. The City Council will vote on this matter.
9. After the one-year extension expires in September 2009 on Eilrich's housing project, he plans to request that the City Council enter into a development agreement with his private business which would extend the deadline to file a final project map for an additional two years, as allowed under NRS 278.0201 and the City ordinance.
10. The development agreement, which would be required for extending the deadline to file a final map on Eilrich's or any similar project, is a routine ministerial City Council procedure.
11. Due to the downturn in the real estate market, the City Council has recently approved several development agreements allowing for developers to extend construction deadlines.
12. The development agreement Eilrich seeks from City Council does not involve the purchasing of goods or services by the City or the payment of money by the City to Eilrich.

CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Eilrich was a public officer, as defined by NRS 281A.160.
2. The Commission has jurisdiction to render an advisory opinion in this matter, pursuant to NRS 281A.440.1 and NRS 281A.460.
3. By entering into the proposed development agreement with the City Council to extend the time in which Eilrich is required to file a final map in his two pending projects, Eilrich would not violate NRS 281A.430.
4. When matters concerning Eilrich's two pending projects come before the City Council, Eilrich, pursuant to NRS 281A.420, must disclose and abstain from acting on those matters.

5. Pursuant to NRS 281A.420, Eilrich may provide factual information to the City Council without advocating for or against approval of his two pending projects.

DISCUSSION

The issues are: (1) Whether Eilrich, in his private capacity and as principal in his development business, may enter into a development agreement with the City Council to extend the time for filing the final map in his two pending land developments; and (2) to what extent may Eilrich participate as an applicant for a development agreement with the City Council.

A principal purpose of the Ethics in Government Law (Ethics law) is to enhance the people's faith in the integrity and impartiality of public officers.² Further, the Ethics law requires public officers to commit themselves to avoid conflicts between their private interests and those of the general public whom they serve. Accordingly, adequate statutory guidelines are established to show the appropriate separation between the roles of persons who are both public servants and private citizens.³

All the facts provided to the Commission in this matter were provided by Eilrich. Facts and circumstances that differ from those provided by Eilrich and used by the Commission in this advisory opinion may result in an opinion contrary to this opinion.

1. The Development Agreement

The Ethics law contains prohibitions against public officers or public employees bidding on or entering into certain types of contracts with the government. The facts in this request for advisory opinion implicate the provisions of NRS 281A.430.

NRS 281A.430 provides in relevant part:

1. Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any private business in which he has a significant pecuniary interest.

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

...

4. A public officer or employee, other than an officer or employee described in subsection 2 or 3, may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers. If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose his interest in the contract and shall not vote on or advocate the approval of the contract.

Under NRS 281A.430.1 Eilrich is generally prohibited from entering into a contract between the City Council and himself or his private business. However, the development agreement that Eilrich seeks approval from the City Council is an administrative and ministerial procedure and not the type of contract contemplated by NRS 281A.430. Eilrich is not providing any goods or services to the City Council in exchange for money. Instead, by entering into the development agreement, Eilrich seeks solely to extend his deadline for filing the final map on his two pending projects.

A majority⁴ of the Commission concluded that Eilrich would not violate NRS 281A.430.1 by entering into a development agreement with the City Council that would only extend his deadline for filing the final map on his two pending projects. This exception to the strict prohibitions under NRS 281A.430 is limited to the development agreement extending the deadline for filing the final map on Eilrich's two pending projects.

2. Eilrich's Participation

Eilrich requests an opinion on the extent to which he may participate as an applicant for a development agreement with the City Council. The Commission has long recognized that once an individual becomes a public officer, nothing in the Ethics law prohibits the individual from participating in the ordinary processes of government as any other citizen would.⁵

Eilrich may participate by providing factual information, as any other citizen would, yet without advocating for or against approval of the matter. Still, the Commission cautions Eilrich that the line between participating by providing factual information and advocating is a thin line. The Commission advises Eilrich to review the Commission's prior opinions, *In Re Woodbury* and *In Re Kubichek*,⁶ for guidance on disclosure, abstention and participation.

Therefore, a majority⁷ of the Commission concluded that whenever Eilrich's two pending projects come before the City Council, he must disclose his private interest, pursuant to NRS 281A.420.4.⁸ Additionally, Eilrich must abstain from acting on the matter, pursuant to NRS 281A.420.2.⁹

CONCLUSION

Eilrich may enter into a development agreement with the City Council to extend the deadline for filing the final map on his two pending projects. Additionally, whenever these two pending projects come before the City Council, Eilrich may provide factual information to the City Council, so long as he discloses his private interests and abstains from acting on the matter.

DATED: 6/4/08

NEVADA COMMISSION ON ETHICS

By: 
Timothy Cashman, Vice Chair

¹ The quorum consisted of Vice Chair Cashman and Commissioners Hsu, Keele, Kosinski and Lamboley.

² See NRS 281A.020.

³ See also NRS 281A.420.2, NRS 281A.420.4 and *In Re Woodbury*, Nev. Comm'n on Ethics Op. 99-56 (1999).

⁴ The vote was 3 to 2 with Commissioners Cashman and Kosinski voting No.

⁵ See *In Re Kubichek*, Nev. Comm'n on Ethics Op. 97-07 (1997).

⁶ Nev. Comm'n on Ethics Op. 97-07 (1997).

⁷ Commissioner Lamboley voted No.

⁸ NRS 281A.420.4 and .8 provide:

4. 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, 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 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294A.286 in a timely manner.

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.

⁹ NRS 281A.420.2 provides:

2. 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.