



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **Dwight Dortch**, Member, City Council
City of Reno, State of Nevada,

Request for Opinion No. **13-54A**
CONFIDENTIAL

Public Officer. /

CONFIDENTIAL OPINION

I. STATEMENT OF THE CASE

Reno City Council Member Dwight Dortch (“Dortch”) requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”). A quorum¹ of the Commission heard this matter on July 17, 2013. Dortch appeared in person and provided sworn testimony.

Dortch sought an opinion from the Commission regarding his disclosure and abstention obligations concerning a matter expected to appear before the City Council affecting the interests of his homeowner’s association.

After fully considering Dortch’s request and analyzing the facts, circumstances and testimony presented by Dortch, the Commission deliberated and orally advised Dortch of its decision that he must disclose his relationship with and the interests of his homeowner’s association before voting on related measures before the Reno City Council, but he need not abstain from voting. The Commission now renders this final written Opinion stating its findings of fact and conclusions of law.

Dortch elected to retain confidentiality with respect to the Commission’s proceedings. Therefore, the Commission will publish an abstract of this Opinion.

The facts in this matter were obtained from documentary and testimonial evidence provided by Dortch. For the purposes of the conclusions offered in this Opinion, the Commission’s findings of fact set forth below accept as true those facts Dortch presented. Facts and circumstances that differ from those presented to and relied upon by the

¹ The following Commissioners participated in this opinion: Chairman Paul Lamboley, Vice-Chairman Gregory Gale and Commissioners John Carpenter, Timothy Cory, Magdalena Groover, Cheryl Lau, James Shaw and Keith Weaver.

Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Dortch questions whether his membership in a homeowner's association establishes a commitment in a private capacity to the interests of the homeowner's association or creates a significant pecuniary interest in matters under consideration by the City Council which affect the homeowner's association and therefore require his disclosure and/or abstention.

III. FINDINGS OF FACT

1. In his public capacity, Dortch has served as the Councilman representing Ward 4 of the City Council since 2002, and he also serves as the City Council's member-representative on the Reno Redevelopment Agency ("RDA"). As Councilman, Dortch's duties generally include formulation, administration and enforcement of policies, codes and ordinances, approval of City agreements and budgets, and implementation of administrative, economic development, public safety, recreational and cultural matters.
2. Dortch owns property subject to the University Ridge Homeowner's Association ("URHOA") in Reno, Nevada. As a property/home owner, Dortch automatically serves as a member of the URHOA. Membership in a homeowner's association ("HOA") is not voluntary; it is an obligation running with the land to the current property owner.
3. Dortch does not serve on the URHOA Board of Directors.
4. Dortch pays approximately \$30 in monthly dues to the URHOA. The URHOA maintains common areas of the association and enforces the CC&Rs. The URHOA engages legal representation for matters affecting the legal rights of the homeowners and may assess special fees against its members to pay such expenses.
5. NRS 116.3115 permits an HOA to assess its members for any judgments against the HOA, in proportion to the liabilities for common expenses. The URHOA issues uniform (or equal) assessments of its members. The statute does not establish individual authority for an aggrieved applicant of a Special Use Permit or other administrative action to sue any individual member of an HOA, including Dortch.²

² **NRS 116.3115 Assessments for common expenses; funding of adequate reserves; collection of interest on past due assessments; calculation of assessments for particular types of common expenses; notice of meetings regarding assessments for capital improvements.**

1. Until the association makes an assessment for common expenses, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association in accordance with the requirements set forth in NRS 116.31151. Unless the declaration imposes more stringent standards, the budget must include a budget for the daily operation of the association and a budget for the reserves required by paragraph (b) of subsection 2.

6. An applicant's recourse against the denial of a Special Use Permit or other administrative action by the City is judicial review of the City Council's final decision. To the contrary, if an application for a Special Use Permit or other administrative action is granted and the HOA is aggrieved by the decision, the HOA may seek judicial review of the City's decision. The adverse parties to the application may otherwise participate in the judicial review litigation. In any judicial proceeding, there is a potential for attorney's fees, costs or other judgments against any party.
7. In January/February 2013, C4 Equity LLC, a private entity, submitted an application to the Reno Planning Commission for a Special Use Permit to allow the operation of a truck terminal and outdoor processing center on a parcel of land which is located adjacent to properties within the URHOA. This application is hereafter referred to as "Gaslight Lane #1."

2. Except for assessments under subsections 4 to 7, inclusive, or as otherwise provided in this chapter:

(a) All common expenses, including the reserves, must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to subsections 1 and 2 of NRS 116.2107.

(b) The association shall establish adequate reserves, funded on a reasonable basis, for the repair, replacement and restoration of the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore. The reserves may be used only for those purposes, including, without limitation, repairing, replacing and restoring roofs, roads and sidewalks, and must not be used for daily maintenance. The association may comply with the provisions of this paragraph through a funding plan that is designed to allocate the costs for the repair, replacement and restoration of the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore over a period of years if the funding plan is designed in an actuarially sound manner which will ensure that sufficient money is available when the repair, replacement and restoration of the major components of the common elements or any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore are necessary. Notwithstanding any provision of the governing documents to the contrary, to establish adequate reserves pursuant to this paragraph, including, without limitation, to establish or carry out a funding plan, the executive board may, without seeking or obtaining the approval of the units' owners, impose any necessary and reasonable assessments against the units in the common-interest community. Any such assessments imposed by the executive board must be based on the study of the reserves of the association conducted pursuant to NRS 116.31152.

3. Any assessment for common expenses or installment thereof that is 60 days or more past due bears interest at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date the assessment becomes past due, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the balance is satisfied.

4. Except as otherwise provided in the governing documents:

(a) Any common expense associated with the maintenance, repair, restoration or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(b) Any common expense benefiting fewer than all of the units or their owners may be assessed exclusively against the units or units' owners benefited; and

(c) The costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

5. Assessments to pay a judgment against the association may be made only against the units in the common-interest community at the time the judgment was entered, in proportion to their liabilities for common expenses.

6. If damage to a unit or other part of the common-interest community, or if any other common expense is caused by the willful misconduct or gross negligence of any unit's owner, tenant or invitee of a unit's owner or tenant, the association may assess that expense exclusively against his or her unit, even if the association maintains insurance with respect to that damage or common expense, unless the damage or other common expense is caused by a vehicle and is committed by a person who is delivering goods to, or performing services for, the unit's owner, tenant or invitee of the unit's owner or tenant.

7. The association of a common-interest community created before January 1, 1992, is not required to make an assessment against a vacant lot located within the community that is owned by the declarant.

8. If liabilities for common expenses are reallocated, assessments for common expenses and any installment thereof not yet due must be recalculated in accordance with the reallocated liabilities.

9. The association shall provide written notice to each unit's owner of a meeting at which an assessment for a capital improvement is to be considered or action is to be taken on such an assessment at least 21 calendar days before the date of the meeting.

8. The Planning Commission makes decisions concerning applications for Special Use Permits which are appealable to the City Council.
9. Gaslight Lane #1 requested the Special Use Permit to allow the operation of a truck terminal, outdoor processing center for various materials, including vegetative materials, asphalt and concrete crushing and grade cuts, and other related land uses. The truck terminal and processing center were intended to be operational from Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. The anticipated land use would have included traffic from the project trucks and public sales of processed materials.
10. URHOA and certain members of the public were opposed to Gaslight Lane #1, alleging nuisance complaints and declining property values. The Planning Commission considered the application during its February 6, 2013 meeting and recommended approval of the application. Several private citizens (individual homeowners) and the URHOA appealed the Planning Commission decision to the City Council. The URHOA was represented by legal counsel, retained at costs to be paid by the homeowners either through existing dues or special assessments. Only certain homeowners whose properties were directly adjacent to the proposed land use were directly affected and prompted the URHOA to represent their interests.
11. The City Council considered the appeal of Gaslight Lane # 1 at its March 13, 2013 meeting. The City Council agendas are posted within the week prior to each meeting. After reviewing the agenda and learning that the URHOA was an appellant in the matter, Dortch sought legal advice from the Reno City Attorney's Office regarding his disclosure and abstention obligations as a member of the URHOA. Based upon the limited information available at the time, the City Attorney's Office advised Dortch to disclose his membership in the HOA and abstain from voting on the appeal. The City Attorney's Office based its abstention advice upon a concern that NRS 116.3115 authorized an HOA Board to assess the property owners for any judgments against the HOA. Since the URHOA was an appellant in the matter, it was subject to potential judgments and therefore created significant pecuniary interests for Dortch in the matter.
12. During its March 13, 2013 meeting, the City Council reversed the Planning Commission's decision, with Dortch disclosing and abstaining and the remaining six members of the City Council voting to deny Gaslight Lane #1. The applicant did not seek judicial review of the City Council's final decision.
13. Due to the short notice between the receipt of the agenda and the meeting, Dortch received conservative, last minute advice from the City Attorney's Office. Upon reconsideration, Dortch and the City Attorney acknowledge his responsibility to disclose his membership in the URHOA, but question whether abstention was necessary considering the similar impact on all members of the URHOA. Dortch anticipates a similar issue appearing before the City Council in the immediate future.

14. In May 2013, C4 Equity LLC submitted a new application to the Reno Planning Commission for a Special Use Permit to divide the same parcel of land which is located adjacent to residential properties within URHOA. This application is hereafter referred to as "Gaslight Lane #2."
15. The developer of Gaslight Lane #2 requested a Special Use Permit³ to divide a parcel of land into four separate parcels. The property is presently zoned as "Industrial." A division of a parcel is deemed to be development according to the Reno Municipal Code. Any development of land adjacent to residentially zoned property, such as the properties within the URHOA, was originally deemed to require a Special Use Permit. After the parcel is divided, each new parcel may have different Code requirements for development because not all parcels will remain adjacent to the residentially zoned property.
16. The URHOA opposes the development application by Gaslight Lane #2 to divide the parcel of land adjacent to its properties.
17. Dortch's property is not within the geographically-defined area which requires notice of the proposed development (division) of the parcel. Accordingly, Dortch does not believe that parceling of the adjacent industrially-zoned property would affect the value of his property. Dortch does not claim to have, nor does he intend to pursue, any individual rights against the developer-applicant as a citizen living near the requested development. Dortch believes that he is similarly situated as any other member of the public and members of his homeowners association with regard to any potential appeal before the City Council.
18. Dortch anticipates that *any* decision by City staff and the Planning Commission will be appealed to the City Council by the aggrieved party and ultimately subject to judicial review. Accordingly, Dortch understands that URHOA will have attorneys' fees in either event, to bring the appeal or otherwise defend against the appeal.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES; COMMISSION DECISION

A. ISSUES

Dortch must commit himself to avoid actual and perceived conflicts of interest by disclosing sufficient information concerning any private relationships and interests which would reasonably affect matters before the City Council. NRS 281A.420(1). He is also required to abstain from voting or otherwise acting on matters in which such relationships and related interests would clearly and materially affect the independence of judgment of

³ Although the developer originally submitted an application for a Special Use Permit ("SUP"), the City later determined that the SUP would not be required. Rather, the City determined that the Developer could submit an application for a parcel map adjustment and the City staff could make an administrative decision regarding the application which would be appealable to the City Planning Commission and then to the City Council. Regardless of the procedure, the City Council is ultimately expected to consider the matter on appeal.

a reasonable person in his position. NRS 281A.420(3). The Ethics law presumes that certain relationships and/or interests do not require abstention where the matter does not impact the public officer or employee any more or less than others who are similarly situated. NRS 281A.420(4).

Dortch owns property which is subject to a homeowner's association ("HOA"). A private developer has submitted an application to the City seeking to divide a parcel of land into four separate parcels. The land is located adjacent to properties within Dortch's HOA and is presently zoned for industrial use. Any development of land adjacent to residentially zoned property, such as the properties within the HOA, requires City action (staff or Planning Commission), which may be appealed to the City Council and subject to judicial review. If Dortch's HOA becomes an interested party in the matter expected to be appealed to the City Council, Dortch requests advice concerning his disclosure and abstention obligations.

Dortch's membership in the HOA constitutes a commitment in a private capacity to the interests of the HOA and establishes a significant pecuniary interest in the matter before the City Council based on the nature of the HOA's legal representation. Dortch pays monthly dues and other assessments for his HOA to maintain common areas, enforce CC&Rs and otherwise represent the legal interests of the HOA and homeowners in various development matters. As a member of the HOA, Dortch may also be liable for any potential judgments levied against the HOA. NRS 116.3115.

Based on his membership and pecuniary interests in the HOA, and the interests of the HOA in matters before the City Council, Dortch is advised to disclose the nature of his membership and all pecuniary interests in the HOA before voting on such City matters. However, based on the nature of the interests, he need not abstain from participating and voting because the interests in and commitments to the HOA would not materially affect the objectivity of a reasonable person in his situation.

B. RELEVANT STATUTES

1. Public Policy

NRS 281A.020(1) provides:

1. It is hereby declared to be the public policy of this State that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

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2. “Commitment in a Private Capacity” Defined

NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption, marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subsections 1 to 5, inclusive.

3. Disclosure/Abstention

NRS 281A.420(1), (3) and (4) provide:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a significant pecuniary interest; or

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

↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer’s or employee’s significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which

makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of

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

C. COMMISSION DECISION

The Ethics Law seeks sufficient separation between private interests and public duties to promote the public trust. NRS 281A.020. The Legislature has deemed certain pecuniary interests and relationships to establish the types of conflicts which require disclosure and abstention, such as relationships with entities with which a public officer or employee shares significant business and similar relationships. NRS 281A.420(1)(3) and (4). In the present case, Dortch's membership in the URHOA constitutes a commitment in a private capacity to the interests of the URHOA and establishes a significant pecuniary interest in the HOA which may conflict with the public interests of the City in its consideration of the Gaslight Lane #2.

In its interpretation of commitments and/or relationships which are substantially similar to business relationships, the Commission has held that volunteer service on the board of directors, or other fiduciary responsibility, of nonprofit and other private entities constitutes a commitment in a private capacity to the interests of that entity within the meaning of NRS 281A.420(8)(e) (now NRS 284.065(6)). See *In re Public Officers*, Comm'n Opinion Nos. 12-15A (2012) and 12-46A (2012). The Commission in this case extends its view of commitments to include the membership in an HOA where the HOA is an interested party in a matter before the public body.

The Commission likewise concludes that Dortch has significant pecuniary interests in the activities and interests of the URHOA before the City Council. He pays dues to URHOA to support and promote the value of his property. Likewise, URHOA's activities and interests have the potential to cost Dortch significant money in assessments for attorney's fees if any judgments are levied against it during its pursuit of litigation. URHOA's interests in Gaslight Lane #2 are directly related to matters over which Dortch has significant influence as a Council member.

Dortch testified that he doesn't believe his personal property values will be impacted by the proposed development set forth in Gaslight Lane #2 and he doesn't anticipate or expect to assert any personal rights against the proposed development. However, the URHOA does oppose the project and anticipates asserting rights against the developer, which has a very tangible and significant effect on Dortch's interests, both pecuniary and personal. Although his membership in the URHOA is not voluntary and runs with the land, he maintains his ownership rights in the property and its related association to the URHOA.

There are various rights and responsibilities associated with membership in an HOA that necessarily implicate pecuniary interests and commitments in a private capacity. Because the URHOA is interested in and adverse to the Gaslight Lane #2, Dortch should disclose the full nature and extent of his membership and interests in the URHOA pursuant to the provisions of NRS 281A.420(1). See *In re Woodbury*, Comm'n

Opinion No. 99-56 (1999). The extent of these interests include the potential impact on his property that may be separate and apart from the properties directly adjacent to the proposed development. His interests may also include the benefits he receives from the URHOA, as well as the extent of any potential assessments/liability for the HOA's participation in the litigation. Without disclosing these interests, Dortch's vote on the matter may be perceived to be wrought with conflict as supporting the efforts of his HOA to enhance his property value or otherwise protect him from potential assessments for HOA liabilities.

Dortch testified that the URHOA would participate in the litigation regardless of the City's determination of the Gaslight Lane #2 application. If the application is approved, URHOA will appeal the decision and if the application is denied, URHOA will participate in the litigation to support the City's determination. In either event, the URHOA will incur attorney's fees that will otherwise be assessed against the homeowners. Therefore, Dortch asserts that his pecuniary interests will not be affected any more or less than any other member of the HOA which is affected by the matter. Accordingly, Dortch is presumed to have independent judgment in matters affecting the Gaslight Lane #2 and abstention is not required. See NRS 281A.420(3).

The Ethics Law presumes the independence of judgment of a public officer where the official matter will not affect his private interests any more or less than any other person affected by the matter. Likewise, the potential for liability is speculative and dependent upon various factors that may take place after the City's action. On this basis, Dortch's pecuniary interests and commitments do not clearly and materially affect the independence of judgment of a reasonable person in his situation and he need not abstain from participating or voting on the matter. The Commission is mindful of the public policy which encourages public officers to represent their constituents' voice on governmental affairs and abstain from voting only in clear cases in which their private interests materially affect their public duties.

V. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Dortch was a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Pursuant to NRS 281A.020 and 281A.420(1), Dortch is advised to disclose sufficient information concerning the nature and extent of his pecuniary interests in and commitments to URHOA and how or whether his relationship and interests, and those of URHOA, affect the City Council's consideration of the Gaslight Lane #2.
4. Applying NRS 281A.420(3) and (4), Dortch is not required to abstain from participating or acting on matters affecting URHOA based on its involvement in the Gaslight Lane #2.

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

The Following Commissioners Participated in this Opinion:

Dated this 1st day of July, 2014.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul H. Lamboley
Paul H. Lamboley
Chairman

By: /s/ Gregory J. Gale
Gregory J. Gale
Vice-Chairman

By: /s/ John C. Carpenter
John C. Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Cheryl A. Lau
Cheryl A. Lau
Commissioner

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

By: /s/ Keith A. Weaver
Keith A. Weaver
Commissioner