



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request
for Opinion Concerning the Conduct of
Kimberlie Buffington, Former Member,
Lander County Planning Commission,
State of Nevada,

Request for Opinion No. **16-59C**

Subject. /

STIPULATED AGREEMENT

1. **PURPOSE**: This Stipulated Agreement resolves Third-Party Request for Opinion (“RFO”) No. 16-59C before the Nevada Commission on Ethics (“Commission”) concerning Kimberlie Buffington (“Buffington”), a former member of the Lander County Planning Commission (“Planning Commission”), State of Nevada, and serves as the final opinion in this matter.

2. **JURISDICTION**: At all material times, Buffington served as a member of the Planning Commission. As such, Buffington was a public officer, as defined in NRS 281A.160. The Ethics in Government Law (“Ethics Law”) set forth in NRS Chapter 281A gives the Commission jurisdiction over elected and appointed public officers and public employees whose conduct is alleged to have violated the provisions of NRS Chapter 281A. See NRS 281A.280. Accordingly, the Commission has jurisdiction over Buffington in this matter.

3. **PROCEDURAL HISTORY BEFORE COMMISSION:**

- a. On or about August 1, 2016, the Commission received RFO No. 16-59C from a member of the public (“Requester”), alleging that Buffington:
- 1) Failed in her commitment to avoid conflicts between her personal interests and her public duties (NRS 281A.020(1));
 - 2) Accepted favors or economic opportunities which would tend to improperly influence a reasonable person in Buffington’s position as a public officer to

- depart from the faithful and impartial discharge of her duties (NRS 281A.400(1));
- 3) Used her position to secure unwarranted privileges, preferences or advantages for herself or any business entity in which there is a significant pecuniary interest (NRS 281A.400(2));
 - 4) Represented or counseled for compensation a private person on an issue which was under consideration by the Planning Commission during Buffington's public service with the Planning Commission (NRS 281A.410(1)(b));
 - 5) Failed to disclose a conflict of interest for which disclosure was required (NRS 281A.420(1)); and
 - 6) Acted on a matter in which abstention was required (NRS 281A.420(3)).
- b. On or about December 13, 2016, staff of the Commission issued a *Notice to Subject* under NRS 281A.440(2), stating that the Commission accepted jurisdiction to investigate the allegations regarding violations of NRS 281A.020(1), NRS 281A.400(1) and (2), NRS 281A.420(1) and (3) and NRS 281A.410(1)(b). Buffington was provided an opportunity to respond to the RFO.
 - c. On or about August 23, 2016, Buffington, through her legal counsel, Anthony J. Walsh, Esq. of Walsh, Baker & Rosevear, filed an *Appeal and Objection to Jurisdiction of Nevada Commission on Ethics. A Supplemental Brief Regarding the Jurisdiction of the Nevada Commission on Ethics* was filed on or about September 21, 2016. Accordingly, the Commission issued a *Notice of Jurisdictional Appeal* on or about September 22, 2016, to both Buffington and the Requester, setting the matter to be heard at the October 3, 2016 Commission Meeting and providing an opportunity for the Requester to submit a response to Buffington's request to review the jurisdictional determination.¹
 - d. On or about October 31, 2016, the Commission issued its *Order on Jurisdiction* denying the request to overturn the Executive Director's jurisdictional determination, initiating the investigation and setting the date to respond to the

¹ NAC 281A.405 has since been amended by temporary regulations T03-16A, which became effective September 21, 2016, subsequent to Buffington requesting a review of the jurisdictional determination.

RFO. On or about December 3, 2016, Buffington, through her legal counsel, submitted a *Response* to the RFO.

- e. Buffington waived her rights to a panel determination pursuant to NRS 281A.440, and acknowledges that credible evidence establishes just and sufficient cause for the Commission to render an opinion regarding the allegations implicating NRS 281A.020(1) and NRS 281A.420(1) and (3).

4. **STIPULATED FACTS**: At all material times, the following facts were relevant to this matter:²

- a. Buffington was an appointed member of the Lander County Planning Commission (“Planning Commission”). She first served on the Planning Commission between 2010 and 2011, was re-appointed in 2012, and then resigned in January 2016. At all times relevant to this matter, Buffington was a “public officer,” as defined by NRS 281A.160.
- b. In her private capacity, Buffington is a licensed real estate agent in Nevada. She is the managing broker for Nolan Realty in Battle Mountain, Nevada.
- c. Theodore C. Herrera, Esq., is a lawyer licensed in the State of Nevada and serves as the elected District Attorney for Lander County.
- d. The Planning Commission is a political subdivision as defined in NRS 281A.145.
- e. The Planning Commission has decision-making authority over certain land use matters, including special use permits and variances.
- f. Jay Wintle lives in Lander County and has listed various parcels of undeveloped real estate with Buffington and Nolan Realty since approximately 2009.
- g. During 2015, Buffington was the listing real estate agent for two of Wintle’s parcels located at Chukkar Lane and 350 SR 305 and listed for \$376,000 and \$1,016,720, respectively.

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² Stipulated Facts do not constitute part of the “Investigative File” as that term is defined by NRS 281A.440(17). All statutory and common law protections afforded to the Investigative File shall remain and are not affected by this Stipulated Agreement.

- h. In July 2012, Wintle and Buffington jointly purchased a 39-acre parcel of undeveloped real estate located at 735 Bogey Drive in Lander County (“Bogey Drive Property”). This property was later separated into four separate parcels in 2013.
- i. On or about January 27, 2015, Wintle and Buffington executed quitclaim deeds that divided the Bogey Drive Property between them, with Wintle retaining one parcel and Buffington retaining three parcels.

April 8, 2015 Planning Commission Meeting

- j. At the April 8, 2015 meeting, agenda item 5 related to a zone change request submitted by Wintle and related to other property owned by Wintle (unrelated to the Bogey Drive Property). This item was noted on the agenda as follows:

(5) Discussion for possible action recommending to the Lander County Board Commissioners to approve/disapprove the following Zone Change request, and other matters properly related thereto.

Applicant: Jay Wintle
Location: Lots 14, 18, and 22 of Ashcroft map #183519 within the SE4 Of 14/32/44, generally located north of the W. Humboldt Rd. and west of 28th street alignments.
APN: 010 280 17, 010 280 21, 010 280 25
Type: To request a zone change from Farm and Ranch District (A-3) to One-Acre Agriculture District (A-1)

- k. The minutes reflect that Buffington made no disclosure regarding her relationship with Wintle and voted with the Planning Commission to approve the agenda item unanimously.

July 8, 2015 Planning Commission Meeting

- l. At the July 8, 2015 meeting, agenda items 1 and 2 related to parcel changes requested by Wintle regarding other property he owned (unrelated to the Bogey Drive Property). These items were noted on the agenda as follows:

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(1) Information and discussion only on a Parcel Map, and other matters properly related

Applicant: Jay Wintle
Location: Lot 18 – Ashcraft Map #183519
Generally located west of 28th Street along the Yellow Brick Road alignment, Battle Mountain
APN: 010 280 21
Type: Splitting one (1) parcel into four (4) parcels.

(2) Information and discussion only on a Parcel Map, and other matters properly related thereto.

Applicant: Jay Wintle
Location: Lot 22 – Ashcraft Map #183519
Generally located west of 28th Street along the Yellow Brick Road alignment, Battle Mountain
APN: 010 280 25
Type: Splitting one (1) parcel into four (4) parcels.

m. The minutes reflect that Buffington made no disclosure regarding her relationship with Wintle and did not participate in the discussion on these agenda items. No action was taken by the Planning Commission on either item.

September 9, 2015 Planning Commission Meeting

n. At the September 9, 2015 meeting, agenda item 6 related to a street name request submitted by Wintle regarding other property he owned (unrelated to the Bogey Drive Property). These items were noted on the agenda as follows:

(6) Discussion for possible action to approve/disapprove the following Street Name request, and other matters properly related thereto.

Applicant: Jay Wintle
Project: Parcel Maps
APN: 002-280-21 & 010-280-25
Type: To reserve a new street name: Faded Sage Drive

o. The minutes reflect that Buffington made no disclosure regarding her relationship with Wintle and made the motion to approve the name conditioned upon the parcel maps approval. The motion was voted and carried unanimously.

p. At the September 9, 2015, agenda items 7 and 8 related to parcel changes requested by Wintle regarding other property he owned (unrelated to the Bogey Drive Property). These items were noted on the agenda as follows:

(7) Discussion for possible action regarding approval/disapproval of the following Parcel Map, and other matters properly related thereto.

Applicant: Jay Wintle
Location: Lot 18 – Ashcraft Map #183519
Generally located west of 28th Street along the Yellow Brick Road alignment, Battle Mountain
APN: 010 280 21
Type: Splitting one (1) parcel into four (4) parcels.

(8) Discussion for possible action regarding approval/disapproval of the following Parcel Map, and other matters properly related thereto.

Applicant: Jay Wintle
Location: Lot 22 – Ashcraft Map #183519
Generally located west of 28th Street along the Yellow Brick Road alignment, Battle Mountain
APN: 010 280 25
Type: Splitting one (1) parcel into four (4) parcels.

- q. The minutes reflect that Buffington made no disclosure regarding her relationship with Wintle and voted with the Planning Commission to approve both agenda items unanimously.
- r. District Attorney Herrera was not present at the Planning Commission's meetings on April 8, 2015, July 8, 2015 and September 9, 2015 and did not provide any legal advice to Buffington regarding her disclosure/abstention obligations with regard to matters that were agendized for these meetings.
- s. On December 10, 2015, Buffington and Wintle entered into a listing agreement for two of the parcels that resulted from the rezoning and parcel subdivision requests presented by Wintle and approved by the Planning Commission at the April 8, 2015 and September 9, 2015 meetings.

5. **TERMS / CONCLUSIONS OF LAW:** Based on the foregoing, Buffington and the Commission agree as follows:

- a. Each of the stipulated facts enumerated in Section 4 of this Stipulated Agreement is agreed to by the parties.
- b. Buffington held a public office which constitutes a public trust to be held for the sole benefit of the people of the State of Nevada (in particular, the citizens of Lander County).
- c. Buffington had a commitment in a private capacity to the interests of Wintle because they have a substantial and continuous business relationship based on their realtor/client relationship. NRS 281A.065(5).
- d. As a public officer, Buffington had a duty to avoid conflicts of interest. See NRS 281A.020. Specifically, Buffington was required to commit to avoid actual and perceived conflicts of interest, including publicly disclosing sufficient information concerning any private relationships and pecuniary interests which would reasonably affect her decision on matters before the Planning Commission. See NRS 281A.420(1). As a public officer, Buffington was also required to abstain from voting or otherwise acting on matters in which such relationships would clearly and materially affect the independence of judgment of a reasonable person in her position. See NRS 281A.420(3).
- e. Buffington did not adequately avoid the conflict of interest between her public duties and private interests by not disclosing her relationship with Wintle during Planning Commission meetings on April 8, 2015 and September 9, 2015 before voting on agenda items that involved Wintle.
- f. Buffington now understands that she should have disclosed sufficient information regarding her relationship with Wintle, a person to whom she had a commitment in a private capacity, to inform the public of the nature and extent of the relationship. The disclosure should have occurred at every meeting and for every agenda item which the Planning Commission considered that affected Wintle's interests.
- g. The disclosure should have also included information regarding the potential effect of Buffington's action or abstention on the agenda items and the effect it may have had on her and Wintle, as the person to whom she had a commitment

- to in a private capacity. See *In re Woodbury*, Comm'n Op. No. 99-56 (1999) and *In re Derbidge*, Comm'n Op. No. 13-05C (2013).
- h. Abstention is required when a reasonable person's independence of judgment is materially affected by the public officer's significant pecuniary interest or commitment in a private capacity. NRS 281A.420 and *Woodbury*. In cases involving substantial and continuous business relationships, the interests of a business partner or client are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of a person with whom the public officer shares an important business relationship. *In re Public Officer*, Comm'n Op. No. 13-71A (2014). Thus, a public officer must abstain on all matters before the public body which materially affect the interests of his business partner or client, including interests unrelated to the business shared with the public officer. *In re Derbidge*, Comm'n Op. No. 13-05C (2013).
 - i. Although Buffington lacked any pecuniary interest in the zoning and parcel subdivision matters that Wintle brought before the Planning Commission at the meetings on April 8, 2015 and September 9, 2015, Buffington had a commitment in a private capacity to Wintle as his real estate agent. Under the circumstances presented, the nature of the realtor-client relationship necessitated abstention because the interests of Wintle were statutorily attributed to Buffington and could be materially affected by her official actions. Therefore, Buffington should have abstained from voting on the agenda items related to Wintle's property at the April 8, 2015 and September 9, 2015 Planning Commission meetings.
 - j. The provisions of NRS 281A.420 contemplate formal actions (or decisions) by public officers which affect the public trust and the Commission has not interpreted the provisions to extend to meetings at which no action is taken. See *In re Stark*, Comm'n Op. No. 10-48C (2012). While the law does not require disclosure during discussions of a matter placed on an agenda for information only, to avoid an appearance of impropriety regarding potential influence or improper use of her public position, the better course of action would have been

- for Buffington to disclose her relationship with Wintle when agenda items related to Wintle's property were discussed at the July 8, 2015 Planning Commission meeting.
- k. Buffington's actions are deemed to constitute a single course of conduct resulting in one violation of the Ethics Law, implicating the provisions of NRS 281A.020(1) and NRS 281A.420(1) and (3).
 - l. However, the allegations pertaining to NRS 281A.400(1) and (2) and NRS 281A.410(1)(b) are not supported by a preponderance of the evidence under NRS 281A.480(9) and are therefore dismissed through this Stipulated Agreement.
 - m. Based upon the consideration and application of the statutory criteria set forth in NRS 281A.475, the Commission concludes that Buffington's violation in this case should be deemed "willful" pursuant to NRS 281A.170. The Commission took into consideration the following mitigating factors:
 - 1) Buffington has not previously been the subject of any violation of the Ethics Law. This is Buffington's first violation. She has resigned from public office and does not foresee holding public office in the future.
 - 2) Buffington has been diligent to cooperate with and participate in the Commission's investigation and resolution of this matter.
 - 3) Buffington maintains that she relied upon the advice of prior District Attorneys when she decided whether to vote or abstain. This legal advice was not, however, specific to the circumstances related to this RFO and therefore does not satisfy the criteria of NRS 281A.480.
 - n. Despite these mitigating factors and although Buffington did not intend to violate the Ethics Law, her violation of NRS Chapter 281A was willful because she acted intentionally and knowingly, as those terms are defined in NRS 281A.105 and 281A.115, respectively.
 - o. For an act to be intentional, NRS 281A.105 requires that Buffington acted voluntarily or deliberately. The definition further states that proof of bad faith, ill

will, evil or malice is not required. Buffington's conduct was not accidental or inadvertent. Nevertheless, Buffington did not act in bad faith or with malicious intent to benefit her private interests.

- p. NRS 281A.115 defines "knowingly" as "import[ing] a knowledge that the facts exist which constitute the act or omission." NRS Chapter 281A does not require that Buffington had actual knowledge that her conduct violated the Ethics Law, but it does impose constructive knowledge when other facts are present that should put an ordinarily prudent person upon inquiry. See *In re Stark*, Comm'n Op. No. 10-48C (2010).
- q. For the willful violation, Buffington will pay a civil penalty of \$1,000.00, pursuant to NRS 281A.480, not later than 90 days after her receipt of the fully executed Stipulated Agreement in this matter. Buffington may pay the penalty in one lump sum payment or in monthly installment payments as negotiated with the Commission's Executive Director.
- r. Buffington and the Commission agree that the Commission's Executive Director will send a letter to the Nevada Real Estate Division that provides general information about RFOs recently issued by the Commission regarding the disclosure and abstention responsibilities of public officers who are real estate licensees.
- s. This Stipulated Agreement depends on and applies only to the specific facts, circumstances and law related to this RFO now before the Commission. Any facts or circumstances that may come to light after its entry that are in addition to or differ from those contained herein may create a different resolution of this matter.
- t. This agreement is intended to apply to and resolve only this specific proceeding before the Commission and is not intended to be applicable to or create any admission of liability for any other proceeding, including administrative, civil, or criminal regarding Buffington.

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6. WAIVER AND FINAL OPINION:

- a. Buffington knowingly and voluntarily waives her right to an Investigatory Panel proceeding and any related hearing before the full Commission on the allegations in this RFO (No. 16-59C) and of any and all rights she may be accorded with regard to this matter pursuant to NRS Chapter 281A, the regulations of the Commission (NAC Chapter 281A), the Nevada Administrative Procedures Act (NRS Chapter 233B) and any other applicable provisions of law.
- b. Buffington knowingly and voluntarily waives her right to any judicial review of this matter, as provided in NRS Chapter 281A, NRS Chapter 233B, any extraordinary writs, as provided in NRS Chapter 34, and any other applicable provisions of law.
- c. Upon approval of this Stipulated Agreement, the Stipulated Agreement will be published as the final opinion. This RFO will then be closed and no further action will be taken on the RFO, including under NRS 281A.480(7).

7. ACCEPTANCE: We, the undersigned parties, have read this Stipulated Agreement, understand each and every provision therein, and agree to be bound thereby. The parties orally agreed to be bound by the terms of this agreement during the regular meeting of the Commission on February 15, 2017.

DATED this 2 day of March, 2017. 
Kimberlie Buffington

The above Stipulated Agreement is approved by:

FOR KIMBERLIE BUFFINGTON, Subject

DATED this 7 day of March, 2017. 
Anthony J. Walsh, Esq.
Counsel for Buffington

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FOR YVONNE M. NEVAREZ-GOODSON, ESQ.
Executive Director, Commission on Ethics

DATED this 14th day of March, 2017.

Judy A. Prutzman
Judy A. Prutzman, Esq.
Associate Counsel

Approved as to form by:

FOR NEVADA COMMISSION ON ETHICS

DATED this 14th day of March, 2017.

Tracy L. Chase
Tracy L. Chase, Esq.
Commission Counsel

The above Stipulated Agreement is accepted by the Commission.³

DATED February 15, 2017.

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

By: /s/ Phillip K. O'Neill
Phillip K. O'Neill
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Lynn Stewart
Lynn Stewart
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

³ Buffington waived her right to an Investigatory Panel pursuant to NRS 281A.440. Accordingly, this Stipulated Agreement was executed prior to a Panel hearing in this matter and no Commissioner was precluded from participating in this Stipulated Agreement pursuant to NRS 281A.220.