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

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

Docket No. 51920
District Court No. 07-OC-012451B

RESPONDENT'S ANSWERING BRIEF

COMES NOW, Respondent THE NEVADA COMMISSION ON ETHICS OF THE STATE OF NEVADA, by and through its attorney of record, Adriana G. Fralick, Esq., and files its Answering Brief.

Respectfully submitted this 25th day of August, 2008

THE NEVADA STATE COMMISSION ON ETHICS

ADRIANA G. FRALICK, ESQ. (9392)
General Counsel
3476 Executive Pointe Way, Ste. 10
Carson City, NV 89706
(775) 687-5469
(775) 687-1279 fax
Attorney for Respondent

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I. STATEMENT OF THE CASE

When enacting the Ethics in Government Law (NRS 281A), the Legislature, speaking for the people of the State of Nevada declared that "[a] public office is a public trust and shall be held for the sole benefit of the people." NRS 281A.020(1)(a). In order to uphold this trust, "[a] public officer must commit himself to avoid conflicts between his private interests and those of the general public whom he serves." Id. The Legislature found that "[t]o 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." Id. at (2)(b). To this end, the disclosure and abstention provisions of the Ethics in Government Law require a public officer to disclose conflicts of interest where the independence of judgment of a reasonable person in the public officer's situation would reasonably be affected by his private commitments and to abstain where a reasonable person's independence of judgment would be materially affected by those commitments. NRS 281A.420.

Councilman Carrigan (Carrigan) however, allowed his private commitments to collide with his public duties when he voted on the Lazy 8 matter, a project wherein his campaign manager, political advisor, confidant and close personal friend came before the Sparks City Council (City Council) for a vote, thereby Carrigan failed to uphold the public trust. Carrigan claims the statutory guidelines set up by the Legislature to show the appropriate separation between public officers' private and public interests are unconstitutional. However, as Judge Maddox in the First Judicial District Court concluded in his May 28, 2008 Order and as the Commission, in this brief will show:

> "Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment." (JA0413, lines 11-14.) And "Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments." (Id.)

The District Court's decision in this matter should be affirmed.

II. STATEMENT OF FACTS

The Commission accepts Carrigan's statement of facts contained in his Opening Brief. (OB p. 2, lines 18-24; p. 3-4; p. 5, lines 1-21.) However, the Commission offers key facts omitted through the brief statement of facts that follows. Additionally, the Commission points out that the various lawsuits by the Nugget and Red Hawk Land Company (Red Hawk) against the City of Sparks and its council members mentioned in Carrigan's Opening Brief have no bearing on the matter before the Court that is the basis of this appeal. (OB p. 3, lines 6-12; p. 4, lines 1-10; p. 5, lines 1-21.)

On August 29, 2007, after fully considering the evidence and testimony presented on a ethics complaint filed against Carrigan, the Commission concluded that Carrigan committed a non-willful[1] violation of NRS 281A.420(2). Subsection 2 of NRS 281A.420 provides that "where the independence of judgment of a reasonable person in [the public officer's] situation would be materially affected" by a private commitment or relationship, the public officer must abstain from voting on that matter that is before him. Subsection 8 of NRS 281A.420 lists four specific and concrete commitments or relationships where the independence of judgment of a reasonable person in the public officer's situation would be materially affected:

> As used in this section, "commitment in a private capacity to the interest 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.)

The Commission found that the sum total of Carrigan and Carlos Vasquez's (Vasquez) relationship falls squarely within paragraph (e) of NRS 281A.420(8), "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection"

[1] NRS 281A.170 defines "willful" to mean that the public officer knew or reasonably should have known that his conduct violated the Ethics in Government Law.

including a close personal friendship, akin to a relationship to a family member, and a "substantial and continuing business relationship." (JA0286.)

Carrigan and Vasquez share a relationship that has been ongoing since 1991. (JA0075.) Vasquez has been a close personal friend, confidant and political advisor to Carrigan throughout the years. (JA0083, lines 3-23; 0086-87.) Carrigan would confide in Vasquez regarding political matters that he would not normally discuss with members of his own family such as siblings. (JA0136, lines 2-16.) Additionally, on August 23, 2006, the date Carrigan voted on the Lazy 8, he was a candidate for reelection and Vasquez was Carrigan's campaign manager. (JA0151, lines 17-25.) During this particular campaign, the predominant campaign issue was the Lazy 8 project. (JA0183, lines 5-13.) As Carrigan's campaign manager, Vasquez sought campaign contributions on Carrigan's behalf, including soliciting contributions from principals in the Lazy 8 project or individuals interested in the success of the project. (JA0170, lines 8-25; 0171, lines 1-2.) Vasquez served as campaign manager for many candidates over the years. (JA0207, lines 6-15.) Although Vasquez was compensated for his services for some of these candidates, he was not compensated by Carrigan for serving as his campaign manager. (Id.) However, Carrigan paid Vasquez's various companies for providing printing, advertising and public relations services during Carrigan's three successful campaigns. (JA0198-99; 0200, lines 1-11.) These services were provided at cost, and Vasquez and his companies did not make a profit from these services. (Id.)

On May 28, 2008 the First Judicial District Court of the State of Nevada entered an order and judgment denying Carrigan's petition for judicial review and affirmed the final decision of the Commission.

III. ARGUMENT

A. Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally vague because a public officer of ordinary intelligence can understand what conduct is prohibited and because the subsections do not encourage arbitrary and discriminatory enforcement by the Commission.

Subsections 2 and 8 of NRS 281A.420 are not vague. A statute is vague if it (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. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 497-99 (1982); Comm'n on Ethics v. Ballard, 120 Nev. 862, 868 (2004).

Carrigan claims that subsection 2 and through its reliance on subsection 8 of NRS 281A.420 and specifically, paragraphs (d) and (e) of subsection 8 are unconstitutionally vague due to their use of the phrases "substantially similar," "substantial and continuing" and "business relationship." Carrigan's position is that without guidance from Nevada's Legislature, Nevada's Courts, or the Commission, these phrases do not have well-settled or commonly understood definitions. (OB p.7, lines14-20; p. 8, lines 1-18.) The District Court correctly ruled against Carrigan's position.

1. Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally vague because a public officer of ordinary intelligence would understand what conduct is prohibited by their readily interpretable terms, by consulting a dictionary or by requesting an advisory opinion.

Subsections 2 and 8 of NRS 281A.420 are not vague. Subsection 2 of NRS 281A.420 provides that when a matter comes for a vote before the public body in which a public officer serves and the public officer has a conflict of interest as listed in NRS 281A.420(8), then the public officer must abstain from voting. It would be impossible to list in the statute every possible situation where a conflict of interest could exist. Instead, in line with this Court,[2] the Legislature, when enacting subsections 2 and 8 of NRS 281A.420 provided boundaries so that people of ordinary intelligence need not guess as to the conduct the provisions proscribe.[3] In fact, a statute will be upheld if its terms "may

[2] "Although, mathematical precision is not possible in drafting statutory language, the law must, at a minimum, delineate the boundaries of unlawful conduct." City of Las Vegas v. Eighth Judicial District Court, 118 Nev. 859; 59 P.3d 47 (citing Coates v. City of Cincinnati, 402 U.S. 611, 614, 29 L.Ed. 2d 214, 91 S. Ct. 1686 (1971).

[3] Unlike the former financial disclosure provision found to be unconstitutional (Dunphy v. Sheehan, 92 Nev. 259, 263, 549 P.2d 332, 335 (1976)) NRS 281A.420(2) and (8) delineate boundaries of unlawful conduct.

be made reasonably certain by reference to other definable sources." County of Nevada v. Ronald L. Macmillen, 11 Cal. 3d 662; 522 P.2d 1345 (quoting People v. Victor, 2 Cal.2d 280, 300).

Subsections 2 and 8 of NRS 281A.420 have many qualifying terms readily interpretable by a person of ordinary intelligence exercising common sense. Subsection 2 of NRS 281A.420 has at least four qualifiers which provide that a public officer may not act on a matter with respect to which the [1] independence of judgment of [2] a reasonable person [3] in his situation would be [4]materially affected by one of the interests listed under NRS 281A.420(8). Similarly, NRS 281A.420(8) lists four certain and concrete circumstances of where the "independence of judgment" of a "reasonable person" in the public officer's "situation" would be "materially affected." A public officer must abstain from voting on a matter where he has a commitment to a person: [1] who is a member of his household; [2] who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; [3] who employs him or a member of his household; [4] with whom he has a substantial and continuing business relationship. Therefore, a public officer of ordinary intelligence exercising common sense would understand that he must abstain from voting on a matter where the independence of judgment of a reasonable person in his situation would be materially affected by a relationship that is "substantially similar" to a relationship with someone who is a member of his household or who is closely related to him or who employs him or a member of his household or with whom he has a substantial and continuing business relationship.

A statute is also not vague where a question can be resolved by consulting a dictionary or similar supplement.[4] A basic principle of statutory interpretation is that words in a statute should be given their plain meaning unless this violates the spirit of the law. State, Dep't of Ins. v. Humana Health Ins., 112 Nev. 356, 360 914 P.2d 627, 630 (1996); Rodgers v. Rodgers, 110 Nev. 1370, 1373, 887 P.2d 269 (1994); Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260 (1993). Accordingly, the definition of "substantial" includes: Having solid worth or value, of real significance; solid; weighty; important,

[4] "Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty that some statutes may compel or forbid. ...All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Sheriff v. Martin, 99 Nev. At 340, 662 P.2d at 637 (quoting Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243 (1975).

worthwhile. New Shorter Oxford English Dictionary, 3124 (ed. 1993). "Similar" means: Having a resemblance or likeness; of the same nature or kind. Id. at 2865. The definition of "continue" includes: Remain in existence or in its present condition; last, endure. Id. at 495. Finally, "Business" means: The state of being busily engaged; activity; application, industry; diligent labour. The object of serious effort; an aim. Id. at 305.

In the instant case, Vasquez had served as Carrigan's campaign manager for three consecutive campaigns including at the time Vasquez came before the City Council for a vote on the Lazy 8. (JA0198-99; 00200, lines 1-11; 0151, lines 17-25.) Additionally, Carrigan and Vasquez had a close personal friendship that had been ongoing since 1991. (JA0075.) By applying the plain meaning of the words found in NRS 281A.420(8)(d) and (e) Carrigan would have had notice that the substance, not the name,[5] of his relationship with Vasquez was such that required Carrigan abstain from voting on the Lazy 8 matter.

Finally, a statute will not typically be found to be vague where a person subject to the statute can seek an advisory opinion to "remove any doubt there may be as to the meaning of the law." McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (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).

Carrigan's argument that, requesting an advisory opinion from the Commission is not a viable solution considering the logistics associated with City Council meetings and the inability of Council members to identify potential conflicts prior to three days before a scheduled City Council meeting fails in light of the record in this case. (OB p. 21, lines 19-28; p. 22.) Furthermore, Carrigan's assertion that the Commission's process in rendering advisory opinions is too long and onerous also fails. (Id. at 22.)

The District Court found that "Carrigan failed to seek an advisory opinion from the Commission even though he had ample time and opportunity to do so." (JA0894, lines 20-24.) Vasquez became Carrigan's campaign manager long before he voted on the Lazy 8 matter—six months or more before

[5] Carrigan argues that his relationship with Vasquez amounts to political volunteerism on the part of Vasquez and not a substantial and continuing business relationship or any other similar relationship included in NRS 281A.420(8). (OB p. 9, lines 22-25.)

his vote. (JA0109, lines 10-12; 0110, lines 11-15.) Carrigan was aware that Vasquez was hired to represent Red Hawk on the Lazy 8 matter. (Id.) In fact, prior to Carrigan's vote in question, Vasquez met numerous times with Carrigan and other Council members to discuss the Lazy 8. (JA0194.) Surely, Carrigan knew this matter would, in the future, come before him for a vote. Therefore, in Carrigan's case, he could have requested an advisory opinion from the Commission if he had any questions about what conduct the statutes prohibit.

Carrigan's argument that the Commission's process in rendering advisory opinions is too lengthy and onerous is without merit. As an example of a typical request for an advisory opinion, the Commission points to a recent opinion requested by Carrigan's fellow Council member, Sparks City Councilman John Mayer. Councilman Mayer requested an advisory opinion from the Commission on November 9, 2007 and on December 12, 2007 (the next scheduled Commission meeting) the Commission rendered its opinion. See, In Re Mayer, Nev. Comm'n on Ethics (CEO) Op. 07-47A, http://ethics.nv.gov/opinions.htm. Unless the public officer waives the time limit, the Commission is statutorily required to issue an advisory opinion within 45 days after receiving the request. NRS 281A.440(1). Therefore, most advisory opinions are heard at the next meeting of the Commission following receipt of a request.

Even if there would not have been sufficient time, which there was, to seek an advisory opinion from the Commission, Carrigan could have telephoned the Commission's office where a representative would have referred Carrigan to the Commission's seminal Woodbury[6] opinion which provides guidance to public officers on disclosure and abstention. Instead, the Sparks City Attorney, relying on a pre-Woodbury Attorney General opinion (AGO 98-27),[7] advised Carrigan to disclose his interest to Vasquez and vote on the Lazy 8 matter. (See Addendum 1 attached hereto.) Accordingly, the District Court agreed with the Commission that:

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[6] In Re Woodbury, CEO 99-56 (1999).

[7] AGO 98-27 was issued prior to the 1999 statutory changes enacting NRS 281A.420(8).

> 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. (JA0385, lines 14-18.)

A reasonable public officer exercising common sense would understand the conduct prohibited by subsections 2 and 8 of NRS 281A.420 by reviewing the very language of the provisions or by requesting an advisory opinion from the Commission.

2. Subsections 2 and 8 of NRS 281A.420 do not authorize or encourage arbitrary enforcement.

Subsections 2 and 8 of NRS 281A.420 do not authorize or encourage arbitrary enforcement. The Commission does not have unfettered discretion when determining what conduct violates the statutes. In fact, the circumstances where a public officer is materially affected by a relationship are exhaustively enumerated in NRS 281A.420(8). The question then becomes whether Carrigan was put on notice that, if his close friend, confidant and campaign manager came before the Council on a matter for action, would Carrigan have to abstain from acting on the matter? The answer is yes.

Carrigan and Vasquez's relationship was "substantially similar" (NRS 281A.420(8)(e)) to a "substantial and continuing business relationship" (NRS 281A.420(8)(d)) or a family relationship within the third degree of consanguinity or affinity (NRS 281A.420(8)(b)). (JA0286.) Granted, reasonable men may differ in their interpretation of these terms. The Commissioners presiding over this matter differed as to whether Carrigan and Vasquez's relationship was more akin to a family relationship or a business relationship. (JA0249, lines 6-9, 23-25; 0250, lines 1-2; 0253, lines 10-12.)

However, it was unanimous that the sum total of their relationship amounted to a disqualifying conflict of interest under NRS 281A.420(8). (JA0265-66.)

What is more, Carrigan and Vasquez's relationship is exactly the type of relationship that the legislature intended to encompass when adopting paragraph (e) of NRS 281A.420(8). During the 1999 legislative session, Scott Scherer, General Counsel to Governor Guinn testified as follows:

> [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.
>
> Legislative Minutes re: Hearing on SB 478 before the Senate Committee on Government Affairs, 70th Leg., at 42 (Nev. April 7, 1999).

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

> [T]he way that would fit in...if this was one <u>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</u> in cases involving that particular person.
>
> Legislative Minutes re: Hearing on SB 478 before the Senate Committee on Government Affairs, 70th Leg., at 42 (Nev. March 30, 1999). (Emphasis added.)

Given a reasonable and practical construction in accordance with the Legislature's intent, taken as a whole, the statutes are sufficiently definite in their terms to give adequate warning to public officers that voting on matters affecting family or business associates is prohibited. These laws do not authorize or encourage arbitrary enforcement and should not be void for vagueness.

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B. Subsections 2 and 8 of NRS 281A.420 are not overbroad and do not encroach upon public officers' political speech and association rights.

Carrigan's argument that, through its reliance on NRS 281A.420(8), NRS 281A.420(2) is unconstitutionally overbroad because it effectively kills political speech and associational freedoms is unpersuasive. (OB p. 16, lines 16-19.) Carrigan reasons that, political contributions, volunteerism and citizen involvement will "dissipate" in Nevada due to the vagueness of NRS 281A.420(8). (OB p.10, lines 8-14.) He contends that political contributions that led to the election of a candidate will render that candidate ineffective. (Id.) Carrigan interprets the Commission's decision in his case to mean that all public officers in Nevada that have received campaign contributions must abstain from voting on matters where their contributors have an interest. The Commission vehemently rejects this interpretation.

A public officer's acceptance of campaign contributions, from a contributor that comes before him on a matter for action, in and of itself, does not demand the public officer's abstention from voting on the matter. In fact, subsection 4 of NRS 281A.420 states in relevant part:

> This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120...in a timely manner. NRS 281A.420(4).

Pursuant to NRS 281A.420(4), a public officer doesn't even have to disclose campaign contributions received from an interested person before him on a matter for action and since his disclosure is not required in these instances, his abstention from voting is also not required.

The Commission did not base its determination in Carrigan's case merely on Vasquez's campaign contributions to Carrigan. Instead, the Commission found, by a preponderance of the evidence, that a reasonable person in 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. (JA0290.) It is for this very reason that case law cited by Carrigan does not support his argument.

In his Opening Brief, Carrigan cites to Woodland Hills v. City Council, 609 P.2d 1029 (Cal. 1980). There, the California Supreme Court held that city council members of the City of Los Angeles who had received campaign contributions from developers and their principals were not disqualified from considering and voting on a proposed subdivision where the contributors were interested. Id. at 1032. In Woodland Hills, the court looked to the Political Reform Act of 1974 which does not prevent a city council member from acting on a matter involving a campaign contributor. Id. at 1032-1033. The court found that "absent a showing of bribery or conflict of interest," a council member does not have to disqualify himself from voting on matters where the developers have given campaign contributions to the member. Id. (Emphasis added.)

In Carrigan's case, the Commission based its decision on the Ethics in Government Law and found that Carrigan was required to abstain from voting on the Lazy 8 matter NOT because of contributions received from Vasquez, but because Carrigan had a private commitment to Vasquez that amounted to a conflict of interest under NRS 281A.420(8). On August 23, 2006, the date Carrigan voted on the Lazy 8, Vasquez was Carrigan's campaign manager and Vasquez represented the Lazy 8 before the City Council. (JA0151, lines 17-25.) This alone, would cause the independent judgment of a reasonable person in Carrigan's position, at the very least, to be materially affected. Vasquez was also Carrigan's good friend and confidant. (JA0083, lines 3-23; 0086-87.) For three successful consecutive campaigns, Vasquez provided his campaign management services to Carrigan for free. (JA0207, lines 6-15.) Further, Carrigan's various businesses provided campaign services to Carrigan at cost. (JA0198-99; 0200, lines 1-11.) These facts do not go to the issue of volunteerism. Instead, these facts illustrate how a reasonable person in Carrigan's situation would be beholden to Vasquez and thus, a real disqualifying conflict of interest existed.

Carrigan also cites to other cases involving campaign contributions that do not require the public official's disqualification. In Re Boggs-McDonald, CEO 01-12; In Re Wood, CEO 95-51; Snohomish County Improvement Alliance v. Snohomish County, 808 P.2d 781 (Wa. 1991); O'Brien v. State of Bar of Nevada, 114 Nev. 71, 952 P.2d 952 (Nev. 1998); Cherradi v. Andrews, 669 So.2d 326,

(Fla.App 4th Dis. 1996); J-IV Investments v. David Lynn Mach, Inc., 784 S.W.2d 106 (Tex.App.Dallas 1990); Las Vegas Downtown Redevelopment Agency v. Dist. Ct., 116 Nev. 640, 644, 5 P.3d 1059 (2000) (quoting In re Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988). (OB p. 18.) However, the cases cited can be distinguished by one simple fact: Absent the campaign contribution, those public officials did not have an ongoing relationship with the contributor interested in the matter before the official for his action, as Carrigan had with Vasquez. Therefore, Carrigan's argument in this regard must be rejected.

C. Subsections 2 and 8 of NRS 281A.420 do not offend the First Amendment because the provisions are intended to prohibit only unprotected speech.

Carrigan argues that subsections 2 and 8 of NRS 281A.420 are vague and that because they are vague the provisions chill protected political speech in violation of the First Amendment. (OB p. 13, lines 15-19.)

Carrigan urges this Court to review this case under strict scrutiny. (OB p. 13, lines 27-28; p. 14, lines 12-28.) However, the First Judicial District Court correctly applied the Pickering[8] balancing test as the proper standard of review in this case. (JA0391, lines 14-15.) Under the Pickering balancing test, the District Court weighed Carrigan's interest in exercising his First Amendment rights against the State of Nevada's interest in promoting efficiency and integrity in the discharge of his public duties. (JA0392, lines 23-24; 0393, lines 1-14.) The District Court found that the state's interests outweighed any interest Carrigan, who had a disqualifying conflict of interest, had in voting on the Lazy 8 matter and therefore, subsections 2 and 8 of NRS 281A.420 are facially constitutional and as applied to Carrigan under Pickering. (JA0393, lines 1-14.)

Even if this Court applied strict scrutiny, subsections 2 and 8 of NRS 281A.420 are constitutional because: (1) Nevada has a compelling state interest in promoting ethical government and guarding the public from biased decisionmakers; and (2) the statutory provisions requiring disqualified

[8] Pickering v. Board of Education, 391 U.S. 563 (1968).

public officers to abstain from voting constitutes the least restrictive means available to further the state's compelling interest. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000); (JA0390.)

First, Nevada's compelling state interest as stated in the Ethics in Government Law and specifically, the law on disclosure and abstention is to enhance the people's faith in the integrity and impartiality of public officers. NRS 281A.020.

Second, the Ethics in Government Law uses the narrowest restriction on speech consistent with furthering its interest. The law on disclosure and abstention does not censor a conflicted public officer but instead, allows such a public officer to participate. Public officers can provide information on matters before their public body just as any other member of the public can provide information, pursuant to NRS 281A.420(2) and the Commission's Kubichek Opinion:

> A legally conflicted official may otherwise participate in a matter as a citizen applicant and provider of factual information...Nothing in NRS 281.501 [now NRS 281A.420] or elsewhere in the Nevada Ethics in Government Law would compel the conclusion that once Ms. Kubichek became a county commissioner she became barred for the remainder of her term from participating in the ordinary processes of Humboldt County government as any citizen would, and such a conclusion would severely restrict the pool of potential candidates for any office. In Re Kubichek, CEO 97-07 (6-11-1998).

The law merely requires that a public officer disclose his private interests and abstain from acting on matters where a reasonable person in his situation would be materially affected by his private interest. NRS 281A.420(2). Circumstances where a reasonable person's independent judgment would be materially affected are enumerated in NRS 281A.420(8).

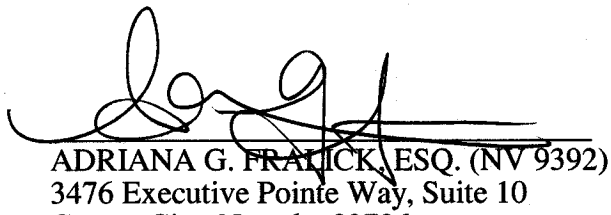
Therefore, the abstention provisions are narrowly tailored to allow a public officer to vote where his judgment would not be materially affected. Further, on matters where he would be materially affected, the law permits a public officer to participate so long as he discloses his private interests and abstains from voting. The statutes at issue are narrowly tailored to further the purpose of the Ethics in Government Law and therefore, do not offend the First Amendment.

IV. CONCLUSION

A principal purpose of the Ethics in Government Law is to enhance the people's faith in the integrity and impartiality of public officers. NRS 281A.020(2)(b). Accordingly, the disclosure and abstention laws hold 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. Subsections 2 and 8 of NRS 281A.420 are not vague. Reasonable public officers of ordinary intelligence exercising common sense would understand what conduct the law prohibits. Further, these subsections are not overbroad and do not encroach on public officers' First Amendment rights.

The District Court ruled that subsections 2 and 8 of NRS 281A.420 are constitutional and enforceable. For the reasons argued in this brief, the District Court's ruling should be affirmed and the Commission's opinion upheld.

Dated this 25th day of February, 2008.

By: 

ADRIANA G. FRALICK, ESQ. (NV 9392)
3476 Executive Pointe Way, Suite 10
Carson City, Nevada 89706
(775) 687-5469

Attorney for Appellant, THE NEVADA STATE COMMISSION ON ETHICS

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 25th day of August, 2008.

By: _____

ADRIANA G. FRALICK, ESQ. (NV 9392)
3476 Executive Pointe Way, Suite 10
Carson City, Nevada 89706
(775) 687-5469

Attorney for Respondent, THE NEVADA STATE COMMISSION ON ETHICS

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics, and that on this 25th day of August, 2008, I served a copy of the foregoing RESPONDENT'S ANSWERING BRIEF thereto by mailing, via U.S. mail a true copy of each to the following:

CHESTER H. ADAMS
DOUGLAS R. THORNLEY
Assistant City Attorney
431 Prater Way
Sparks, NV 89431

BRENDA J. ERDOES
KEVIN C. POWERS
Senior Principal Deputy Legislative Counsel
Legislative Council Bureau
401 S. Carson Street
Carson City, NV 89701

An Employee of the Nevada Commission on Ethics

ADDENDUM 1

Enclosure 1

MEMORANDUM

TO: **Geno Martini, Sparks City Mayor**
Shaun Carey, Sparks City Manager
Sparks City Council Members:
John Mayer **Phil Salerno**
Judy Moss **Michael Carrigan**
Ronald Schmitt

FROM: **David Creekman, Senior Assistant City Attorney**
Doug Thornley, Legal Intern

DATE: **August 17, 2006**

SUBJECT: **Bias or predisposition as grounds for disqualification of elected official**

We have looked into the question of whether predisposition or demonstrable bias are grounds for the recusal of an elected official when that elected official is charged with responsibility for later deciding, in an official capacity, an issue relating to the subject matter where bias is alleged to exist. Because we are unaware of any facts establishing the existence of financial or personal gain or loss[1], it is our legal conclusion that previously-revealed positions which may indicate a predisposition on a matter before the City Council do not require the recusal of an elected member of the City Council.

"Elected officials are presumed to act objectively," and at least a minimal showing of bias must be made to warrant a remand. *See, Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill. App. 3d 541, 548, 555 N.E.2d 1178, 1182, 144 Ill. Dec. 659 (1990)(appeal of a decision of the Illinois Pollution Control Board upholding a previous decision of the Village of Fairview Village Board in which the appellants questioned whether the procedures employed by the Village Board were fundamentally fair due to preexisting bias on the part of members of the Village Board). In *Breakzone Billiards v. City of Torrance*, 81 Cal. App.4th 1205 (2000), the city's planning commission granted an applicant's request for a liquor license. On appeal, the Court held that the plaintiff was not denied a fair hearing by the fact that four members of the city council had received

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[1] Other than the possibility of simple personal connections and friendships which formed the basis for an Opinion of the Nevada Attorney General, 98-27, issued on September 26, 1998, on this subject. That opinion concluded that abstention is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others.

campaign contributions from a donor who might have benefitted from the denial of the plaintiff's request. The Court further held that the fact that a city council member who also sat on the planning commission brought the appeal to the city council in his capacity as a member of the planning commission, and then participated in the city council hearing, did not result in an unfair hearing. *Id.* at 1224.

An elected official's positions on certain matters are often the basis of that official's election in the first place. To disqualify these officials from voicing their opinions and fulfilling their duties accordingly would be contrary to the basic principles of a democratic and free society. *See, Wollen v. Borough of Fort Lee*, 27 N.J. 408, 142 A.2d 881 (1958).[2] In this regard, attention should also be directed to *Saks & Co. v. City of Beverly Hills*, 107 Cal. App. 2d 260, 237 P.2d 32 (2d Dist. 1951)(*disapproved of by City of Fairfield v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952) and *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543, 537 P.2d 375 (1975)), in which the court held that where three of five members of the city council were disqualified to vote on a resolution and ordinance revoking temporary zoning variances either because they were biased and prejudiced and had determined in advance of the hearings and presentation of the evidence to vote for the revocation, based upon their campaign promises, or had not heard the evidence presented to the council. The resolution and ordinance in question resulted from granting numerous variances, including a parking lot variance at issue in the case, which inspired the voters to adopt an initiative revoking all variances. When enforcement of the initiative was enjoined, three of its proponents campaigned for the city council on a platform of revocation of the variances. In *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543, 537 P.2d 375 (1975), California's Supreme Court disapproved of the *Saks* holding on the grounds that the Court of Appeals decision in *Saks* effectively thwarted representative government by depriving the voters of the power to elect councilmen whose views on important issues of civic policy corresponded to those of the electorate. The Court stated that campaign statements by candidates for elected municipal office do not disqualify a candidate from voting on matters that come before them after his election, thus permitting the conclusion that *Saks* was erroneously decided and must be disapproved.

Although facts substantiating financial or personal gain or loss are not now at issue and did

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[2]In the *Wollen* case, the issue at stake involved the validity of an ordinance purporting to amend and supplement the zoning ordinance of the Borough of Fort Lee. The amendment would reduce the land area of a zoning district previously restricted to one-family residence use and a minimum lot area of 10,000 square feet, and constitute in its place a new multi-story apartment district open to apartment houses not in excess of six stories in a portion of the zoning district and not in excess of 14 stories and elsewhere in the zoning district. As part of the appeal, arguments were raised that three members of the Borough's council "had, while they were candidates for election to the Borough Council ... publicly announced that if elected they would vote in favor or rezoning ... for multi-family dwellings," and that they were thereby disqualified from participating in the enactment of the ordinance. The Court rejected this argument, stating that it needed to do so because to decide otherwise "...would frustrate freedom of expression for the enlightenment of the electorate that is of the very essence of our democratic society...."

not prompt this Opinion, if such facts were at issue we advise that Nevada's Ethics in Government Law, NRS chapter 281, would be implicated. In particular, we note that statute's stated dual purpose is to prevent a public officer from seeking or accepting any gift, service, favor, employment engagement, emolument or economic opportunity which would tend to improperly influence the public officer and to prevent a public officer from using his position to secure or grant unwarranted privileges, preferences, exemptions or advantages to 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. NRS 281.481. A commitment in a private capacity includes a commitment to a person who is a member of his household, who is related to him by blood, adoption or marriage within a certain degree of consanguinity or affinity, who employs him or a member of his household or with whom he has a substantial business relationship. NRS 281.501(8).

The Nevada Ethics in Government Law further provides that if a financial or personal detriment or benefit which accrues to a public official is not greater than that accruing to any other member of the general business, profession, occupation or group, the public official may vote upon the matter. NRS 281.501(1). The statute goes on to require that the disclosure of sufficient information concerning the financial or personal detriment or benefit at the time the matter is decided upon. NRS 281.501(4).

For the foregoing reasons, it is our Opinion that prior statements of position on an issue of public importance by either a candidate or by an elected official do not require disqualification of that individual at the time the individual is charged with deciding upon the issue. 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. Although, once again, we are unaware of the existence of any such facts[3] with respect to any member of the City Council on any issue the City Council is expected to soon consider, 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. This disclosure should be articulated on the record. However, if no facts exist demonstrating personal or financial gain or loss, disclosure is unnecessary. If you have additional questions, comments or concerns regarding this matter, please feel free to contact this office.

Cc: *Chester H. Adams*
City Attorney

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[3] *See footnote 1.*

AGO 98-27 ETHICS IN GOVERNMENT; PUBLIC OFFICIALS DISCLOSURE AND ABSTENTION: Abstention required when independence of judgment of reasonable person is materially affected by tangible interest of another.

Carson City, September 25, 1998
The Honorable Bradford R. Jerbic, Las Vegas City Attorney, 400 East Stewart, Las Vegas, Nevada 89101

Dear Mr. Jerbic:

You have presented your analysis and requested an opinion from this office in an attempt to provide some clarification to public officials who are members of boards and commissions as to when they would need to consider disclosing and abstaining from voting based upon ethical considerations.

QUESTION

When does a member of a board or commission need to disclose a possible conflict of interest and abstain from voting because of an acquaintance or friendship with a person interested in, but not a party to the outcome of an item before the governing body?

ANALYSIS

The requirements regarding disclosure and abstention in Nevada must be determined by analysis of Nevada's ethics in government laws as well as other relevant statutes, legislative history, opinions issued by the Commission on Ethics (Ethics Commission), and any applicable case precedent. As you know, these issues involve largely uncharted waters in our state due to the lack of relevant case precedent available here or nationally to provide guidance. In the first instance, questions concerning ethical requirements should always be addressed to one's counsel.

In more difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission since that is the body vested by the Legislature with jurisdiction and responsibility to enforce the laws. The job of interpreting and enforcing the statutes is sometimes difficult in light of the often complex factual scenarios, which are presented to the Ethics Commission. As you have indicated the variety and breadth of questions has contributed to some growing confusion as to the applicability of the relevant statutes.

It is apparent from the increasing number of questions concerning theses statutes that the Nevada Legislature will in all likelihood be asked to consider reviewing and refining the current laws so public officials will better understand and be able to comply with the rules. As you know, this office does not have authority to resolve these matters and can only address your question in an advisory capacity in the hope of assisting you and other lawyers who represent public bodies. Appeals from Ethics Commission rulings go to the district court in accordance with NRS 233B.130. The ultimate rulings and interpretations on these questions must come from the Ethics Commission, the courts and the Legislature.

In your request, you put forth the scenario of a personal friendship between a public officer and a person interested in, but not a party to the outcome of a matter upon which the public officer will be voting. The friendship is a long standing one (the friend being a well-liked customer of the public officer in his private capacity), although the friends had not engaged in any social activities. The friend voiced his opposition to the matter to the public officer. The public officer consulted

with counsel and disclos.. the friendship on the record before .ting on the matter. It is your conclusion that in such circumstances the public official's obligation was to disclose the matter, but that abstention was not required. This was the advice given by your office and followed by the public official. A question has now been raised as to whether the public officer should have abstained as well.

NRS 281.501(2) provides that a member of the legislative branch must abstain from a vote where he has a commitment in a private capacity to the interests of others "with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by" that private interest of others. This is the legal standard that governs whether a public officer must abstain from voting on a matter. "Member of the legislative branch" is defined under NRS 281.4355 to include legislators and members of boards of county commissioners, city councils or other political subdivisions. The requirement for disclosure set forth in NRS 281.501(3), prohibits public officers and employees from acting upon a matter unless they have disclosed the full nature and extent of any private interest which would reasonably affect their judgment. Also, 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 member of his household, any business entity in which he has a significant pecuniary interest, or any other person." The language in these statutes is not clear and the terms are not specifically defined in NRS chapter 281 or in case precedent. In the absence of specific standards or definitions, the confusion you describe regarding the applicability of these statutes is understandable.

The Ethics Commission has articulated, in its recently issued opinion concerning the Clark County airport concessions at Terminal D, four considerations which it will use in its future analysis of the nature and impact of a public official's personal relationships. Nevada Commission on Ethics Opinion (NCOE) Nos. 97-54, 97-59, 97-66, 97-53, and 97-52, (Terminal D Opinion). You have indicated that these criteria do not give sufficient guidance to either public officials or their lawyers who on a regular basis must make decisions about whether to make disclosures and when to abstain from voting on matters. As noted above, there is very little legal precedent to assist in providing guidance.

Our representative form of government is based upon our elected officials being typical of the constituents who elected them. Frequent contact between elected officials and their constituents is necessary for elected officials to truly represent their communities and is almost a daily occurrence in Nevada's smaller communities. If elected officials do not communicate with their constituents, some of whom may be acquaintances and personal friends, the elected officials will not be as well informed. We do not believe that the ethics in government law was intended to prevent government officials from seeking or receiving input from constituents who may also include acquaintances and friends. Rather, the law tries to strike a balance wherein public officials must disclose certain outside interests and in some cases abstain from voting where their independence of judgment is materially affected. The law places particular emphasis on the need for public officials to disclose conflicts or potential conflicts on the record, with abstention being required only in limited circumstances where the independence of judgment of a reasonable person would in fact be materially affected.

As stated above, the terms "materially affected by" or "commitment in a private capacity to the interests of others," are not specifically defined by the Legislature or the Ethics Commission in the Terminal D opinion. Although the four personal relationship criteria are helpful in the analysis, they do not precisely fix the point at which a "personal relationship" will be considered to *materially affect* the independence of judgment of a public official.

The criteria provide no guidance regarding the specific meaning of the term "interests of others." Does that term apply only to persons who are in fact impacted either directly or indirectly by the matter being voted upon by the public official? Or does this term mean simply that the other person has an opinion on the subject matter? Although NRS 281.501(2) contains some limiting language, these are questions which are not clearly answered and which have created a climate of some doubt and uncertainty.

Although the evaluation of ethical concerns is sometimes difficult and necessarily qualitative, public officials, who consult with counsel to determine their obligations, should be able to carry out their public duties without concern that they may still be found to have acted inappropriately after the fact. As you know good faith reliance on advice of counsel after full disclosure of relevant facts can constitute a defense in criminal matters. *See, e.g.,In the Matter of Vandelinde,* 366 S.E.2d 631, 637 (W.Va. App. 1988)(Defense of good faith reliance on advice of counsel can be established where there has been complete disclosure of facts and the advice given is not patently erroneous); *Bursten v. United States,* 395 F.2d 976 (5th Cir. 1968)(To assert the reliance defense, the defendant must establish good faith reliance on an expert coupled with full disclosure to the expert). A similar defense has been recognized in at least one published ethics decision involving an attorney. *See Committee on Legal Ethics of W. Va. State Bar v. Coleman,* 377 S.E.2d 485, 490, 500 (W.Va. App. 1988) (Good faith reliance on statutory interpretation was a defense to excessive fee allegation). Thus, the good faith reliance of a public official upon advice of counsel which has been rendered in a sincere attempt to help the public official comply with ethics provisions, we believe should be a defense in appropriate cases.

Nevada's ethics in government law recognizes consultation with counsel as a defense to the element of willfulness in ethics cases. NRS 281.551(6) provides:

> An action taken by a public officer or employee or former public officer or employee relating to NRS 281.481, 281.491, 281.501 or 281.505 is not a willful violation of a provision of those sections if the public officer or employee:
> (a) Relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the employer of the public employee;
> (b) Was unable, through no fault of his own, to obtain an opinion from the commission before the action was taken; and
> (c) Took action that was not contrary to a prior opinion issued by the commission to the public officer or employee.

This defense could be expanded to constitute a complete defense in appropriate cases as discussed above. Public officials who sincerely attempt to comply with the law by consulting with counsel, and completely disclose relevant facts to their counsel, and who receive and follow advice consistent with the ethics in government law should not be found in violation, even if there is some subsequent disagreement regarding the advice given. In such cases it may be more appropriate to give the public official instruction or direction for the future. A public officer's duty is defined in NRS 281.421, which 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 to avoid conflicts between his private interests and those of the general public whom he serves.
> 2. The legislature finds that:

(a) The increasing complexity of state and local governm more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
(b) 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 creates an obligation on the part of the public officers to avoid conflicts between their private and public interests. To assist in assuring this, the Legislature, in NRS 281.501 as amended in 1997, set forth requirements as to when a commitment in a private capacity to the interests of others would require disclosure and even abstention. NRS 281.501, provides:

1. Except as otherwise provided in subsection 2 or 3, a member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.
2. In addition to the requirements of the code of ethical standards, a member of the legislative branch 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.
3. 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 the full nature and extent of the gift, loan, commitment, or 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 that 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.
4. If a member of the legislative branch declares to the legislative body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.
5. If a member of the legislative branch is voting on a matter which affects public employees, he shall make a full public disclosure of any personal pecuniary interest that he may have in the matter.

6. After a member of the legislative branch makes a disclosure pursuant to subsection 3, he may file with the director of the legislative counsel bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the legislative counsel bureau.

As long as the independence of judgment of a reasonable person would not be *materially affected* by a commitment in a private capacity to the interests of others, it appears a member of the legislative branch may vote. To determine whether the independence of judgment is materially affected by a commitment, the statute sets forth a presumption that the independence of judgment of a reasonable person would *not* be materially affected by 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* is not greater than that accruing to any other member of the general business, profession, occupation or group. Under this statute, public officials are presumed *not to be materially affected* by a private commitment, unless there is some tangible extra benefit or detriment derived by either party (the official or the private person). Thus, before a public official may be required to abstain, we believe there must be some evidence of a benefit or detriment, which is greater than that experienced by similarly situated persons. Even if a greater benefit or detriment exists, the statute still may not require abstention unless the independence of judgment of a reasonable person in that situation would be materially affected by this tangible interest.

At the time of the creation of NRS 281.501 in 1977, the Legislature defined a conflict of interest to be when a legislator received some monetary benefit outside his salary for performing his official duty. The Legislature indicated that it did not want to prevent input from constituents. A legislative body is made stronger as a result of the input that it receives from a variety of people. Overly restricting the voting ability of legislative bodies would defeat the purpose of having such lay legislative groups. One legislator stated, "[I] do not believe that a legislator should be precluded from . . . voting on legislation merely because it is something that may be desirable to a client. Ethics should deal with the problems where a legislator is financially rewarded because of introducing a measure that a client wanted." *Hearing on A.B. 450 Before the Senate Government Affairs and Assembly Elections Committee, 1977 Legislative Session*, 3 (March 28, 1977).

The statute was amended in 1991 to prohibit voting where a conflict of interest actually exists. The original law made abstention optional and in 1991 language was added to make abstention mandatory where a conflict of interest is found. However, in 1991 the Legislature also apparently sought to limit when abstention is actually required by adding a presumption that an official's independence of judgment is *not* materially affected where a pecuniary benefit or detriment exists if the benefit or detriment is the same as that experienced by others similarly situated.

The then Chairman of the Ethics Commission offered the following advice:
Obviously, it is a question of degree and the particular circumstances. One should not have to abstain from voting simply for being personally representative of or in the same circumstances as one's constituents. That may be a reason why one is elected in the first place. That is in the very nature of a "Citizen Legislature."

However, where the circumstances change to such a degree that independence of judgment *is* in fact so materially affected or impaired, one should be required to abstain from voting even though the benefit or detriment accruing to him or her is the same.

Hearing on A.B. 190 Before the Senate Committee on Government Affairs, 1991 Legislative Session, Exhibit 1 (May 8, 1991).

In 1997, NRS 281.501(2) of the statute was further amended to expand the presumption against the existence of a conflict to include the situation where an official may have a commitment in a private capacity to the interests of others. In other words, there is a presumption against finding a conflict where a public official has a commitment to the private interests of others, if the resulting benefit or detriment is the same as others similarly situated.

Language broadening the abstention requirement could have been added, but the Legislature instead chose to narrow the abstention requirement. Expansion of abstention requirements can only be achieved through legislative action. Under the current statutory language of NRS 281.501 discussed above, if on an objective level it appears that a reasonable person would not be able to separate himself from the tangible interest of another, such that his independence of judgment is materially affected, then he should abstain.

As discussed above, the Ethics Commission's evaluation of the impact of personal relationships on the independent judgment of public officials is most recently found in the Terminal D Opinion. In seeking to qualitatively adjudge such relationships, the Ethics Commission interpreted NRS 281.501 to require a look at the substance of the relationship itself, rather than the label on it. In doing this, the Ethics Commission came up with four factors to analyze a personal relationships for conflict of interest purposes. These factors are: 1) the length of a relationship, 2) the context of the relationship, 3) the substance of the relationship, and 4) the frequency of the relationship. Recognizing these personal relationships are difficult to adjudge, the Ethics Commission stated, "By legislative design, the determination of whether a given relationship would materially affect the independence of judgment of a reasonable person will always be a case-by-case examination." Terminal D Opinion, at 13.

Summarizing the Terminal D Opinion, significant personal relationships that required disclosure and abstention, were found under the following circumstances:

(1) where one is considered a "best friend" in which the friendship is forged in the context of common political and philosophical beliefs that both parties felt strongly enough about to become politically active on behalf of;
(2) a "long-term very close friend with the spouse of the public officer" where the public officer knows little information about this person or the other applicants, yet votes for the friend of his spouse's matter in front of the public body;
(3) a "long-term business relationship where reliance and trust have been such large factors that many facets of their lives intersect in their relationship," and finally
(4) where there were "substantial efforts to support the public officer's candidacy as evidenced by raising large amounts of money for the public officer combined with events such as the official's daughter participating in the friend's wedding" that the relationship has become a political alliance in which both were dedicated to common causes, one of which was the furtherance of the public officer's political aspirations which in turn made the public officer beholden to her friend.

In each of these situations, the "friend" was directly interested in and significantly benefited from the matter being voted upon by the public official. The Ethics Commission found that the public officials had violated NRS 281.501(2) and (3), and NRS 281.481(2). This is quite different from the situation that you have outlined where the "friend" is not before the public body, but has privately expressed a strong opinion to the public official.

Although the close and long-term friendships at issue in the Terminal D matter required disclosure and abstention, under the analysis in the opinion it would be reasonable to conclude that abstention would only be required where the other party to the friendship is actually before the public body or benefits from the particular vote. It does not follow that the comments of a friend who is not personally impacted by the vote would require disclosure *and* abstention. We agree with your suggestion that the legislative process could be entirely undermined if a member of a public body is required to abstain from a vote because he has an acquaintance or friendship with someone interested in a matter, but not actually affected (receiving a benefit or detriment greater than others) by the vote on the particular matter. If the Legislature intended otherwise, it would have expressed that intent in the language of NRS 281.501, which has been amended four times since its enactment. We can derive from the current NRS 281.501, the 1991 and 1997 amendments, and from the opinions of the Ethics Commission, that the law does not place a blanket prohibition on voting where an acquaintance or friendship exists. Only in circumstances, 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, is abstention required. In such circumstances, the public official's independence of judgment would be materially affected.

According to other Ethics Commission opinions, a public officer was not required to abstain from a vote on a contract amendment and renewal matter which involved a friendship and business relationship with the person who came before the board because the matter before the board did not involve actually choosing the candidate to be awarded the contract. NCOE Opinions 94-27, 94-30. In addition, an arms-length business relationship with one before the public body, such as a private business loan in the amount of $200,000, does require disclosure but not abstention unless the relationship materially affects the independence of judgment of the public officer. NCOE Opinion 94-05. Finally, when a public officer considers a matter that is only tenuously related to a previous matter which required disclosure and abstention, the public officer may vote (the public body was deciding whether or not to seek review of a court decision). *Board of Commissioners of the City of Las Vegas, Nevada v Dayton Development Company,* 91 Nev. 71, 530 P.2d 1187 (1975).

Under Nevada's law, public officers have a responsibility to consider whether their private interests conflict with a public matter. Thus, whenever a public officer has reasonable notice a friend (or other private interest) may be involved in a matter on which they will be voting, the disclosure and/or abstention requirements must be taken into consideration. However, in this regard, the Ethics Commission has stated in the Terminal D Opinion:

> In the future, deliberate ignorance of readily knowable facts will not be condoned by this Commission. We insist each public official vigilantly search for reasonably ascertainable potential conflicts of interest. The solution for a public official who knows that her best friend may end up appearing before her, or who is overwhelmed with the volume of her workload, is to task her staff with assisting her to root out potential ethical concerns.

Terminal D Opinion at 16. Thus, if a public officer *knows* his friend has a matter coming before the public body, the official clearly has an obligation to consider the relevant circumstances, disclose and abstain if the official's independence of judgment would be materially affected by the

friendship. Public officials should always consult with counsel on these matters, and as noted in the Terminal D opinion, should never deliberately try to remain ignorant of potential conflicts.

However, we are concerned that this portion of the Terminal D opinion seems to suggest that staff should be tasked with conducting research if the public official is too busy to review agendas for potential conflicts. This language, as well as the reference to "conflict software" implies that all public bodies should have staff available to conduct research into all possible conflicts, and that public funds should be expended to obtain conflict software and any necessary hardware. Public bodies may not have budgeted for such software and hardware. This suggestion also raises some concern about the propriety of using public resources to research the private interests of officials and others.

CONCLUSION

The Legislature should revisit these very complex and difficult issues to consider clearer guidance to all public officials. Although ultimately judicial interpretation of the relevant statutes may provide more definitive guidance on these matters. We recognize that the Ethics Commission's job of interpreting and enforcing the statutes is difficult in light of the often complex factual scenarios which are presented, and that through its decisions and regulation drafting authority, the Commission continuously seeks to clarify the responsibilities of public officials under Nevada's ethics in government laws.

The ethics in government law is intended to prevent public officials from acting out of self-interest or from using their office to give unfair advantage to others. As the former chair of the Ethics Commission stated, "where the circumstances change to such a degree that independence of judgment *is in fact so materially affected or impaired*, one should be required to abstain from voting . . . ." (emphasis added). Under NRS 281.501, and in light of the interpretation of this statute as articulated to the Legislature by the former chair of the Ethics Commission, abstention is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others. Public officials should always disclose any relevant private interests on the record and with the advice of counsel explore whether such an interest would require abstention. If it is determined that the independence of judgment would not be materially affected and/or that the friend or acquaintance has no tangible interest in the particular matter, the basis for such conclusions should be carefully articulated on the record.

In light of the variety and breadth of questions that have been recently raised, we believe all public entities and their counsel would be well advised to carefully review and reconsider the procedures used to evaluate contracts or other matters requiring a public vote. Consultation with ethics experts such as the Josephson Institute in Los Angeles or others may also be helpful. Bidding and bid protest procedures from similarly situated public entities, as well as national or state organizations which provide training in this regard, should be considered as well. *See MCM Construction, Inc. v. City & County of San Francisco, et al*, 66 Cal. App. 4th 359 (Cal. App. 1998) (Detailed discussion of airport bid and bid protest procedures). Although our comments can only be treated as advisory, they will hopefully assist you and other lawyers in advising clients.

FRANKIE SUE DEL PAPA
Attorney General

ADDENDUM 2

ADRIANA G. FRALICK, #9392
General Counsel
NEVADA COMMISSION ON ETHICS
3476 Executive Pointe Way, Ste.10
Carson City, Nevada 89706
(775) 687-5469
Attorney for Respondent

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF 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.

Case No.: 07-OC-012451B
Dept. No. 2

RESPONDENT'S ANSWERING BRIEF

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues in this case are whether: (1) the Commission's final decision concerning Carrigan's conduct is supported by substantial evidence in the record; (2) the Commission properly determined the presumption in NRS 281.501.2 is inapplicable; and (3) NRS 281.501.2 and NRS 281.501.8 are constitutional.

II. STATEMENT OF THE CASE

This matter is a petition for judicial review of the Nevada Commission on Ethics Opinion Nos. 06-61, 06-62, 06-66 and 06-68 (Opinion) that applies to Petitioner Michael Carrigan (Carrigan). The Opinion was a decision on complaints filed by members of the public concerning the conduct of Carrigan. ROA000075-107.

On August 29, 2007, the Commission held a hearing regarding the complaints filed against Carrigan. ROA000016. The Commission considered whether Carrigan violated NRS 281.481.2, NRS 281.501.2 and 281.501.4[1] of the Ethics in Government Law, when he voted on a matter that involved a commercial project known as the "Lazy 8" at the August 23, 2006 Sparks City Council (Council) meeting. ROA000001-2. After fully considering the evidence and testimony presented, the Commission concluded that Carrigan did not violate NRS 281.481.2 or NRS 281.501.4. However, the Commission found that Carrigan committed a non-willful[2] violation of NRS 281.501.2 for failure to abstain from voting on the Lazy 8 matter. ROA000004-5.

The Commission based its decision on the following findings:

1. Carrigan and Carlos Vasquez (Vasquez) have been friends since 1991. ROA000002; ROA000020, p. 19, line 16.

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[1] Since the time of the hearing, NRS 281.481.2 and NRS 281.501.2 and .4 have been re-codified and are now found in NRS Chapter 281A. With the exception to NRS 281.481.2 and NRS 281.501.2, .4 and .8, this brief cites to the re-codified statutes.

[2] NRS 281A.170 defines "willful" to mean that the public officer knew or reasonably should have known that his conduct violated the Ethics in Government Law (NRS Chapter 281A).

2. Vasquez has been a close personal friend, confidant and political advisor to Carrigan throughout the years. ROA000003; ROA000022, p. 27, lines 6-8; ROA000023, p. 30, lines 20-23.
3. Vasquez owns various companies that provide public relations services for candidates running for public office and he also manages campaigns. ROA000002; ROA000053, p.151, lines 6-14.
4. Vasquez was Carrigan's campaign manager and Vasquez's companies provided public relations and advertising services to Carrigan in his successful 1999, 2003, and 2006 campaigns. ROA000003; ROA000046, p. 124, lines 21-25; p. 125-127.
5. Vasquez was instrumental in getting Carrigan elected. ROA000008; ROA000031, p. 63, line 7.
6. Vasquez is a lobbyist for Wingfield Nevada whose Red Hawk Land Company sought the Council's approval for the Lazy 8 project at the August 23, 2006 Council meeting. ROA000002; ROA000187-190.
7. At the August 23, 2006 Council meeting, Carrigan disclosed his relationship to Vasquez, made the motion for passage of the Lazy 8 matter and voted. Carrigan's motion failed by a three-to-two vote. ROA000003; ROA000176; ROA000208-209.
8. Based on the evidence in the record, the Commission concluded that Carrigan should have abstained from voting because of his commitment in a private capacity to Vasquez. His failure to do so was a violation, although not willful, of NRS 281.501.2. ROA000068, p. 209, lines 1-5.
9. The vote by six members of the Commission in favor of finding that Carrigan violated NRS 281.501.2 was unanimous. ROA00013; ROA000068, p. 210, lines 3-6.

III. ARGUMENT

A. STANDARD OF REVIEW

The standard of review of a petition for judicial review is found in NRS 233B.135.2 and .3. Judicial review does not entitle this Court to reconsider the evidence or "substitute its judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135.

"Although the district court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." *Knapp v. Dep't of Prisons*, 111 Nev. 423, 892 P.2d 577 (1995), quoting *SIIS v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992).

More importantly, the Nevada Supreme Court in *Nevada Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 866 P.2d 297 (1994) acknowledged the deference that must be accorded to the Ethics Commission's interpretation of the Ethics in Government Law:

> [T]he Commission's power to construe the Nevada Ethics in Government Law is explicit in the statute rather than implicit. NRS 281.511(1). **Accordingly, although this court may conduct a *de novo* review of the Commission's construction of the Nevada Ethics in Government Law, the district court was obligated to give deference to the construction afforded by the Commission.** *We conclude that the district court erred in failing to do so.*
>
> *JMA/Lucchesi*, 110 Nev. 6-8, 866 P.2d 300.
> [Emphasis added.]

The Commission thoroughly investigated the facts surrounding Carrigan and Vasquez's relationship and Carrigan's conduct at the August 23, 2006 Council meeting. Further, the Commission's Opinion is a well-reasoned interpretation of NRS 281.501.

Accordingly, the Commission's Opinion is entitled to the great deference by this Court and this Court should not substitute its judgment for that of the Commission's.

B. THE COURT SHOULD AFFIRM THE FINDING THAT CARRIGAN VIOLATED NRS 281.501.2 BASED ON THE COMMISSION'S REASONABLE INTERPRETATION AND APPLICATION OF THE STATUTE

1. The Record Contains Substantial Evidence To Support The Commission's Opinion

Substantial evidence exists to support the Commission's conclusion that Carrigan violated NRS 281.501.2 when he failed to abstain from voting on the Lazy 8 matter. The Commission's interpretation of NRS 281.501 was neither arbitrary, capricious, nor an abuse of discretion.

"Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) (citing *State Employment Sec. Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

The purpose of the Nevada Ethics in Government Law is to "instill confidence in the general public that public officers are not out to line their own pockets, or use government to further their own interests."[3] Accordingly, when creating the Ethics in Government 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).

To this end, the disclosure and abstention laws hold 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 forcing them to make that judgment after evaluating their private commitments and the effects of their decision on those private commitments. NRS 281.501. *See also, In Re Woodbury*, CEO 99-56 (12-22-1999).

NRS 281.501.2 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:
>
> ...
>
> **(c) His commitment in a private capacity to the interests of others.** [Emphasis added.]

"Commitment in a private capacity to the interests of others" was undefined in the Ethics in Government Law until 1999. The definition now reads in part:

> [A] commitment to a person:
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> ...
>
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
>
> ...
>
> (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.** NRS 281.501.8 [Emphasis added.]

After the 1999 amendments to the law, the Commission interpreted those changes in its seminal *Woodbury* Opinion. CEO 99-56. There, 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: 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. *Id.* at 2.

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[3] Assemblyman Joe Dini, Legislative Minutes on AB 450, Joint Hearing Senate Government Affairs and Assembly Elections Committees (Nev. March 28, 1977).

In the instant case, prior to voting on the Lazy 8 matter, Carrigan sought advice from the Sparks City Attorney, his legal counsel. ROA000112-114. Neither Carrigan nor his legal counsel consulted the Commission or the *Woodbury* Opinion for guidance prior to the Lazy 8 vote. In advising Carrigan, legal counsel relied on a 1998 Attorney General Opinion (AGO 98-27).[4] ROA000112. AGO 98-27 was issued prior to the 1999 statutory changes on personal relationships. Nevertheless, the guidance it gives concerning abstention is still valid.

AGO 98-27 focuses on disclosure and abstention because of an official's acquaintance or friendship with a person interested in, but not a party to the outcome of an item before the governing body. AGO 98-27 at 1; ROA000115. This AGO opinion states that "[t]he requirements regarding disclosure and abstention in Nevada must be determined by analysis of Nevada's ethics in government laws as well as other relevant statutes, legislative history, opinions issued by the Commission on Ethics...and any applicable case precedent." ROA000115.

Further, AGO 98-27 advises, "[i]n more difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission." *Id.* Most notably, this opinion states that "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, is abstention required. In such circumstances, the public official's independence of judgment would be materially affected." ROA000121. [Emphasis added.]

In the instant case, the Commission found that Carrigan was beholden to Vasquez who had an interest in the Lazy 8. Substantial evidence in the record demonstrates how a

[4] The City Attorney's legal opinion was substantially based on out-of-state case law instead of opinions

reasonable person in Carrigan's position would be materially affected by Carrigan and Vasquez's relationship.

Their relationship was not a mere friendship, but a close friendship akin to family. In addition to being close long-time friends, Carrigan admitted that Vasquez was Carrigan's confidant. ROA000023, p. 30, lines 20-23. Carrigan would consult Vasquez on matters where he would not his own family. ROA000035, p. 80, lines 11-16. Also, Vasquez was instrumental in getting Carrigan elected three times to the Council, with the third campaign being "brutal, just brutal." ROA000047, p. 127 at 5. Further, Vasquez was Carrigan's volunteer campaign manager for all three campaigns. ROA000022, p. 26, lines 22-25; pp. 27-30. Finally, Vasquez received over $46,000 from Carrigan in 2006—the year Carrigan voted on the Lazy 8—for costs associated with his campaign.[5] ROA000163; ROA000051, pp. 141-142.

Carrigan's argument that he and Vasquez did not have a relationship that is "substantially similar" to a relationship enumerated in NRS 281.501.8 defies common sense in light of his own testimony. In fact, even under Carrigan's own definition of a "business relationship," the evidence reflects that such a relationship existed. Carrigan's definition of "business relationship" is where money is made or if money changes hands **one way or another**." ROA000040, p. 98, lines 9-15. [Emphasis added.] Clearly, money changed hands within Vasquez's various businesses in connection with his services as campaign manager to Carrigan.

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interpreting the Nevada Ethics in Government Law. ROA000112.

[5] Campaign contributions are not subject to a verbal disclosure so long as they are disclosed on timely-filed financial disclosure statements. NRS 281.501.4.

This is exactly the type of relationship that the legislature intended to encompass when adopting the definition of "commitment in a private capacity to the interest of others." During the 1999 legislative session, Scott Scherer, General Counsel to Governor Guinn testified as follows:

> [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.
>
> Legislative Minutes re: Hearing on SB 478 before the Senate Committee on Government Affairs, 70th Leg., at 42 (Nev. April 7, 1999).

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

Substantial evidence exists in the record to support the Commission's conclusion that (a) Carrigan and Vasquez's relationship was substantially similar to those found in NRS 281.501.8; (b) a reasonable person's independence of judgment would have been materially affected by that relationship; and (c) pursuant to NRS 281.501.2, Carrigan should have abstained from voting on the Lazy 8 matter. Therefore, the Commission's Opinion should stand.

2. The Presumption Found In NRS 281.501.2 Does Not Apply To Carrigan

Carrigan argues that the Commission ignored the presumption contained in NRS 281.501.2 which 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 interest 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.** [Emphasis added.]

Carrigan claims the presumption was not rebutted by any evidence or testimony received by the Commission. Petitioner Opening Brief (POB), p.7, lines 17-19. Therefore, he argues that "the ultimate finding of the Nevada Commission on Ethics is affected by error of law." *Id.* This is a glaring fallacy in Carrigan's argument. The Commission fully considered the presumption and concluded that it simply did not apply to Carrigan based on facts.

Carrigan's brief contains quotes taken out of context from Commissioner Hsu's (Hsu) comments during the discussion about the presumption. POB, p. 7, lines 8-9. The isolated sentence quoted by Carrigan would lead this Court to believe that the Commission completely ignored the presumption. However, the transcript clearly reflects the contrary:

> 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 have 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...**I just don't see how...the entire group of lobbyists is being**

affected by the passage or failure of this vote. ROA000066, p. 201, lines 20-25; p. 205, lines 1-15. [Emphasis added.]

...

COMMISSIONER JENKINS: [W]e 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? ROA000067, p. 206, lines 23-25; p. 207, lines 1-4.

VICE CHAIRMAN HUTCHISON: [S]o we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez...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...**that paragraph does not necessarily save the day.** ROA000067, p. 207, lines 12-14, 19-25; p.208, line 1. [Emphasis added.]

COMMISSIONER JENKINS: **[I] can't find any support for that paragraph.** ROA000067, p. 208, line 13. [Emphasis added.]

Carrigan conspicuously fails to identify the "general business, profession, occupation or group" in which he or Vasquez supposedly falls in to trigger the presumption. The dialogue above clearly shows that any benefit to Vasquez (the person to whom Carrigan had a commitment in a private capacity) was not the same as other members in Vasquez's general business, profession or occupation. Vasquez was the only lobbyist or advocate for the Lazy 8 project identified before the Commission. No evidence was offered that all other lobbyists or advocates appearing before the Council would receive the same benefit as Vasquez from a Carrigan vote. Thus, the Commission clearly rejected the notion that the presumption found in NRS 281.501.2 would apply to Vasquez based on evidence.

Moreover, any suggestion by Carrigan that the resulting benefit to him personally (as opposed to Vasquez) is no greater than to persons similarly situated must also be rejected. If the "group" is defined as all citizens in his ward, Carrigan cannot argue that every such citizen

had Vasquez for a close friend, confidant and campaign manager. Further, every such citizen did not clearly stand to benefit from Carrigan's vote. There may have been citizens in his ward who opposed the Lazy 8. The presumption was considered by the Commission and rejected as not applicable. Therefore, Carrigan's arguments regarding the presumption in NRS 281.501.2 must be summarily rejected.

3. The Commission's Notice Contained In Its Opinions Are Proper And The Commission Did Not Ignore Prior Opinions

Prior Opinions:

The Commission did not apply the law arbitrarily without regard to precedent. In fact, an analysis of the opinions upon which Carrigan so heavily relies actually reveals that the Commission's analysis in his case is consistent with such opinions. Contrary to Carrigan's representation in his Opening Brief, the facts in the following prior opinions cited by Carrigan are inapposite.

First, in *In re Wright*, CEO 02-21 (12-9-2002), the Commission concluded that a board member did not need to abstain because he knew two of the witnesses and in the past, contracted with the complaining party on a matter before his board. *Id.* The key fact in that case is that Wright had absolutely no personal or pecuniary relationship with the subject of the complaint pending before Wright's board. *Id.* at 2. By contrast, Carrigan not only had a substantial and continuing personal and business relationship with Vasquez, but their relationship was so close that it was akin to family. ROA000021, lines 3-5; ROA000023, p. 30, lines 20-23; ROA000035, p. 80, lines 11-16; ROA000022, p. 26, lines 22-25; pp. 27-30; ROA000051, pp. 141-144.

Next, in *In re Glenn*, CEO 01-15 (1-1-2002), the Commission also found that a hospital board of trustees member did not have to abstain on a vote to increase the rent on a building owned by the hospital. *Id.* at 1. There, although Glenn owned three professional office suites in the vicinity of the office building owned by the hospital, Glenn had no personal relationship to the rent increase matter other than a public one. Again, the glaring distinction in this case is Carrigan's close personal and business relationship with Vasquez that would have materially affected the independence of judgment of a reasonable person in Carrigan's situation.

Finally, Carrigan also points to *In re Boggs-McDonald*, CEO 01-12 (8-08-2001) to support his argument that he was not required to abstain based on the campaign contributions received by Vasquez. POB, p.9, lines 3-8. In that case, a Las Vegas councilwoman received an in-kind campaign contribution of a trip to Chicago from a local casino. *Id.* at 1. The Commission concluded that the facts and circumstances surrounding Boggs-McDonald did not require her abstention on a matter before her concerning the casino. *Id.* at 3. However, the Commission, opined:

> NRS 281.501...clearly does not prohibit a public officer from disclosing any campaign contributions that may appear **significant enough in relationship to the public officer's total campaign budget to raise the question of the contribution's effect on the public officer's independence of judgment or that of a reasonable person in the public officer's position.** Such cases may implicate...the abstention standards of NRS 281.501...and the guidance thereon provided in...the "Woodbury Opinion." *Id.* at 2 (referencing Commission Opinion No. 99-56). [Emphasis added.]

The facts and circumstances in Carrigan are markedly different than those in *Boggs-McDonald*. For instance, Carrigan's total campaign contributions in 2006 were $49,400. ROA000306, ROA000317 and ROA000327. In that year alone, Carrigan

reported paying over $46,500 to Vasquez for expenses related to advertising. ROA000312 and ROA000322. The labor associated with these advertising costs were supplied to Carrigan in part, on a volunteer basis. ROA000051, pp. 143-144. Also, in the three-month period from August to November, 2006, Carrigan reported in-kind campaign contributions from Vasquez for consulting services in the amount of $9,000. ROA000333. The logical conclusion is that the connection between Carrigan's significant contributions and payments to Vasquez would materially affect a reasonable person's independence of judgment.

The Commission arrived at its conclusion concerning Carrigan by fully considering the reliable, probative and substantial evidence and by applying the analysis consistent with prior opinions. The Commission's decision is neither arbitrary, capricious, nor an abuse of discretion. Therefore, the Carrigan Opinion must be upheld.

Notice in Opinions:

Carrigan's argument that the Commission's notice contained in its opinions allows the Commission to apply the law arbitrarily without regard to precedent is utterly unpersuasive.

The notice found at the end of the opinions issued by the Commission does not serve a malicious purpose as Carrigan would lead this Court to believe. These types of notices are common and similar notices are found in opinions by other ethics agencies around the country. See, http://www.arkansasethics.com/; http://www.ethics.state.ok.us/; http://www.denvergov.org/Default.aspx?alias=www.denvergov.org/Board_of_Ethics; http://ethics.lacity.org/; http://www.gspc.state.or.us/.

Such notices serve to advise the public that facts and circumstances that differ from a specific opinion may result in a different conclusion. This is not a controversial idea. Legal analysis is comprised of the application of specific facts to a body of law. This is precisely what the Commission does[6] and did in the Carrigan matter. The Commission applied Carrigan's facts and circumstances to NRS 281.501. The disclosure and abstention provisions were interpreted by the Commission in its *Woodbury* Opinion and applied to Carrigan. Therefore, the Commission's notice contained in its opinions does not serve an improper purpose.

C. THE COMMISSION'S DECISION DOES NOT ABRIDGE CARRIGAN'S RIGHT TO DUE PROCESS AND FREE SPEECH

1. Due Process

Due process is concerned with "the right to a fair hearing before a tribunal with the power to decide the case."[7] Carrigan attempts to argue that Commissioners Flangas (Flangas) and Hsu are biased based on certain relationships outlined by Carrigan in his Opening Brief. POB, p. 3, lines 13-28; p. 4, lines 1-17. The truth of the matter is that the relationships claimed by Carrigan are so far-removed or non-existent that they have no bearing whatsoever on the matter that was before the Commission. Commissioners Flangas and Hsu acted properly and their actions do not abridge Carrigan's procedural due process.

First and foremost, Nevada Commission on Ethics Commissioners are public officers subject to the Ethics in Government Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters where a reasonable person's independence of judgment

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[6] NRS 281A.440.1 provides: "The Commission shall render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances."

[7] Black's Law Dictionary 516 (7th ed. 1999).

would be materially affected by a commitment in a private capacity or his pecuniary interests. NRS 281.501.4.

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 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...

The Commentary to Cannon 3E(1) states that "[w]hether a judge's impartiality might be reasonably questioned, and the opinion of the judge as to his or her ability to be impartial, is determined pursuant to *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997)." In that case, the Nevada Supreme Court opined:

> We also conclude that Justice Young is not disqualified from hearing this appeal on the ground that his son-in-law is a partner in the Lionel Sawyer & Collins firm, which represents The Freemont Street Experience, an amicus curiae to this appeal...The Freemont Street Experience **is not a party to this litigation, and** Justice Young's daughter **has no direct economic interest in the subject matter in controversy** or any other "more than de minimis" interest that could be substantially affected...the attorney at issue must be actually involved in the representation of the amicus curiae, and not just affiliated with the law firm that is providing the representation." *Id.* at 637-638. [Emphasis added.]

Based on these standards, there is no evidence in the record that Commissioners Hsu and Flangas should have been disqualified due to some alleged bias.

Commissioner Hsu:

Carrigan argues that Hsu was biased due to the apparent representation of The Nugget by his law firm, Maupin Cox & LeGoy (Maupin Cox). Carrigan makes this argument based on a posting of representative clients on the firm's website which is not part of the administrative record. POB p. 27, line 28 and p.28. Carrigan's arguments of due process violations based on Hsu's participation fail for a multitude of reasons.

First, there is no evidence that Hsu himself ever represented The Nugget (which he has not), or that he knew of his firm's representation of The Nugget at the time of Carrigan's hearing.[8]

Second, The Nugget was not a party to the matter heard by the Commission. There is no evidence in the record to suggest that a decision on whether Carrigan properly disclosed and abstained would somehow defeat the approval of the Lazy 8 which The Nugget purportedly opposes.[9] Along these same lines, the individuals who filed the ethics complaints against Carrigan whom Carrigan claims are associated with The Nugget are not parties in the matter before the Commission and were not even allowed to testify.[10] NRS 281A.450.

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[8] After the Sparks City Attorney raised this issue, Hsu investigated his firm's representation of The Nugget as well as the competing proponent of the Lazy 8, The Peppermill, and disclosed his firm's relationship previously unknown to him in a subsequent proceeding involving Sparks City Councilman, John Mayer. A copy of this disclosure is available to the Court should it find a need to review extraneous matters outside of the administrative record.

[9] The lawsuits (mentioned in POB, p. 1-2) filed by The Nugget contend that the Commission's Opinion should invalidate Carrigan's vote and therefore invalidate the actions taken by the Council on the Lazy 8.

[10] Carrigan argues that The Nugget instigated the ethics complaints filed against him for political reasons, but that was never established as fact in the record. During the hearing, Vice Chairman Hutchison exercised his discretion in deciding not to hear testimony from witnesses who were supposedly affiliated with The Nugget because the "motive for filing a complaint really is irrelevant." ROA000052, p. 147, lines 7-8.

Third, even if the website printout were part of the record to be considered by the Court (which it should not), the list of representative clients of the Maupin Cox law firm also includes The Peppermill, who apparently is a partner with Harvey Whittemore on the Lazy 8. ROA000049, p. 133, lines 21-23. Thus, the misguided suggestion that Hsu was somehow biased in favor of The Nugget's interest is counterbalanced by an equally misguided suggestion that he would be biased in favor of the Lazy 8.

Fourth, Carrigan's suggestion of Hsu's alleged bias against him is contradicted by the record. Hsu did vote in favor of a finding in violation of NRS 281.501.2, which was unanimous. ROA000068, p. 210, lines 4-6. However, he also forcefully argued against finding a violation of NRS 281.501.4, and a divided majority agreed. ROA000061, p. 184, lines 14-25; ROA000062, pp. 185-186.

Finally, and most importantly, the record is clear that Hsu made a very detailed disclosure based on his own personal involvement in a 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. Hsu made it clear that he would defer to any motion by Carrigan to disqualify him if Carrigan had any objection. Carrigan's counsel expressly waived any objections. ROA000017, p. 5, lines 23-25 and p. 6, lines 4-8.

Carrigan fails to prove that Hsu was biased against him. Hsu's participation did not violate Carrigan's due process rights.

Commissioner Flangas:

Carrigan argues that Flangas' familial relationship with Alex Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, required his disqualification. Further, Carrigan alleges a supposed collusion based on purported similarity in words spoken

by Flangas and written words in legal pleadings (which are not part of the record) filed by Alex Flangas' law firm.

NRS 281.501.4 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. NRS 281.501.2.

Flangas is not even related to Alex or Amanda Flangas within the third degree of consanguinity or affinity. During the hearing, Carrigan's counsel requested that Flangas disclose his relationship to Alex Flangas. Flangas stated that he was raised by his first cousin once removed (his father's first cousin), the grandfather to Alex Flangas. ROA000055, p.158. In essence, Alex Flangas is Flangas' second cousin once removed. Therefore, no disclosure or abstention by Flangas was warranted based on the relationship.

To add the proverbial "icing on the cake," Flangas stated that he had "no idea where Alex Flangas' law activities are, who he works for and who he is connected with and whatever connection he might have with this case." ROA000055, p.158, lines 13-17. Carrigan conveniently fails to mention that after hearing this detailed disclosure, he waived any objection to Flangas' continued participation in the hearing. ROA000055, p.158, lines 18-22.

Carrigan alludes to some collusion between Flangas and Alex and Amanda Flangas for the benefit of The Nugget, based on documents that are not even part of the record. POB, p. 24, lines 24-28, p. 25-26. Even if this Court were to accept the submission of this extraneous documentation, Carrigan's attempt to assassinate the character of Flangas must be rejected. Carrigan's allegation of supposed collusion based on purported similarity in

words spoken by Flangas and written words in legal pleadings filed by Alex Flangas' law firm (Hale Lane) is simply ludicrous. POB, p. 24, lines 18-28; p. 25, lines 1-24. Flangas used words like "illegal," "secret meeting," and "bullying, tyrannical mega-lawsuit threat." ROA000058, p. 170, lines 2-10.

Carrigan claims that the Commission "received absolutely no evidence concerning either the merits of the Red Hawk lawsuit or the prudence of the City's decision to settle the matter." POB, pg. 25, lines 21-22. It should be noted that in the record (which was received and reviewed by every Commissioner in advance of the August 29, 2007 Commission meeting) exists Carrigan's own exhibit—the Stipulation, Judgment and Order on the lawsuit by Red Hawk against the City of Sparks. ROA000519. Additionally, the record contains numerous newspaper articles conveying information concerning the Red Hawk lawsuit and the meetings conducted by the Council to settle the lawsuit. Interestingly, the articles use the same or similar words to those used by both Flangas and Hale Lane:

- "Illegal meeting," "secret meeting": ROA000343; ROA000356; ROA000358; ROA 000360; ROA000362; ROA000364; ROA000365; ROA000366; ROA000368; ROA000370.
- "$100 million lawsuit," "major lawsuit," "appalling amount of money," "settle lawsuit": ROA000345; ROA000349; ROA000350; ROA000351; ROA000352; ROA000353; ROA000355; ROA000356; ROA000358; ROA000360; ROA000366; ROA000368; ROA000370.
- "Hamstring," "intimidation/threat of a lawsuit," "scare," "hands were tied": ROA000344; ROA000351; ROA000353; ROA000356; ROA000358; ROA000367.

Under Carrigan's ridiculous conspiracy theory based on word usage, Flangas, Alex Flangas and the local newspaper were all conspiring against him in order to defeat the Lazy 8. Such a theory is wholly unsupported by the record.

The woeful failure by Carrigan to establish a due process violation based on Flangas' participation must be summarily rejected, especially in light of Carrigan's express waiver of any objections. Therefore, Carrigan's procedural due process arguments are wholly without merit.

2. Free Speech

Carrigan argues that the Commission's finding that he failed to abstain from voting encroaches on his First Amendment rights. POB, p. 12, lines 20-24. Carrigan contends that his voting on the Council, constitutes "pure speech" entitled to the highest degree of protection. *Id.* However, the authority Carrigan relies on does not support his contention.

In *Kucinich v. Forbes*, 432 F. Supp. 1101 (1977), Gary Kucinich, then Councilman on the Cleveland City Council was suspended under city council rules from the city council for allegedly inferring that the council chair had accepted money for the passage of a matter before the council. *Id.* at 1106. The Court found that Gary Kucinich "was punished for allegedly slandering [the chair]. In other words the plaintiff was punished for the idea content of his speech, not the failure to yield the floor when ordered, nor for any other action. Thus the Court finds the plaintiff was punished for the exercise of "pure speech.""[11] *Id.* at 1112.

Here, the Commission did not find Carrigan in violation of the Ethics in Government Law merely because of the idea content of his speech in favor of the Lazy 8. The Commission found that Carrigan failed to abstain from voting on the Lazy 8 based on his

[11] The Court went on to state: [B]y refusing to yield the floor or by interrupting debate, even if done vocally, Kucinich's conduct would no longer have been pure speech but would have been speech plus, as the physical action element of the expression becomes more than just an unobtrusive means to communicate an idea or opinion. *Id.* at 1114.

conflict of interest. ROA000012. Therefore, Carrigan's conduct was not merely "pure speech" but "speech plus."

"When the physical action element of the expression become more than just an unobtrusive means to communicate an idea, then the conduct is called *speech plus* and is entitled to a lower degree of protection than *pure speech*." *Kucinich*, 432 F. Supp. 1101, 1111 (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 Ct. 1673, 20 L. Ed. 2d 672 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555-556, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. at 633 (1976)).

In order to restrict speech plus the state must show that: (1) a substantial interest of society will be affected by the speech plus conduct; (2) the individual's interest in allowing the speech plus conduct is insufficient in comparison with the detrimental effect the conduct will have on society; (3) the government has used the narrowest restriction on pure speech consistent with the furtherance of the governmental interest involved. *Kucinich*, 432 F. Supp. 1101, 1111-1112.

Applying the above balancing test, the Commission's decision does not abridge Carrigan's Constitutional right to free speech.

Substantial interest of society:

The purpose of the Ethics in Government Law and specifically, the law on disclosure and abstention is to enhance the people's faith in the integrity and impartiality of public officers. *See* NRS 281A.020. Further, the law requires public officers to commit themselves to avoid conflicts between their private interests and those of the general public whom they serve. *Id.* Adequate guidelines are therefore established to show the appropriate separation between the roles of persons who are both public servants and private citizens. *Id. See also*

NRS 281.501.2, NRS 281.501.4 and *Woodbury,* CEO 99-56. This interest to have an honest and impartial government is a substantial public interest, one that would have been affected by Carrigan's vote on the Lazy 8 matter.

Carrigan's interest:

Carrigan's interest in voting on the Lazy 8 matter is insignificant in comparison with the detrimental effect his conduct would have on the public. As a public officer, Carrigan has a duty to uphold the public's trust by avoiding conflicts of interests between his private interests and his public duties. True, Carrigan had a public investment in the Lazy 8 as he had worked to get the project approved. ROA000029, p. 55, lines 5-7. However, the fact of the matter is that he was legally conflicted and should have abstained due to his relationship with Vasquez. Still, Carrigan was not prohibited from being heard. Instead, Carrigan had the right to participate just as any other citizen. In *In Re Kubichek*, CEO 97-07 (6-11-1998) the Commission opined:

> A legally conflicted official may otherwise participate in a matter as a citizen applicant and provider of factual information...Nothing in NRS 281.501 or elsewhere in the Nevada Ethics in Government Law would compel the conclusion that once Ms. Kubichek became a county commissioner she became barred for the remainder of her term from participating in the ordinary processes of Humboldt County government as any citizen would, and such a conclusion would severely restrict the pool of potential candidates for any office. *Id. See also*, NRS 281.501.2.

Balancing the public's interest to have an honest and impartial government with Carrigan's interests to vote on the Lazy 8, his interests are insignificant in comparison.

Narrow restriction on speech:

The Ethics in Government Law uses the narrowest restriction on speech consistent with furthering its interest. As shown above, the law on disclosure and abstention does not

censor a conflicted public officer but instead, allows a public officer to participate. Further, abstention is only necessary where a reasonable person's independence of judgment would be *materially* affected.

The Ethics in Government Law delineates where a reasonable person's independence of judgment is *materially* affected. This is where one has 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. NRS 281.501.8. Therefore, the law on disclosure and abstention is narrowly tailored to allow a public officer to vote where his judgment would not be materially affected. Further, on matters where he would be materially affected, the law permits a public officer to participate so long as he discloses his private interests and abstains from voting.

Therefore, the Commission's decision does not abridge Carrigan's constitutional right to free speech. The Carrigan Opinion should be upheld.

D. NRS 281.501.2 AND NRS 281.501.8 ARE NEITHER VAGUE NOR OVERBROAD

1. Vagueness

Carrigan claims that NRS 281.501.2 and through its reliance on NRS 281.501.8 are unconstitutionally vague due to the use of the phrases "substantially similar," "business relationship," and "substantial and continuing." Carrigan's position is that these phrases do

not have statutory, well-settled or commonly understood definitions and therefore, (1) do not give fair notice of prohibited conduct, and, (2) they invite arbitrary and discriminatory enforcement. POB, p. 17, lines 15-20.

In response, the Commission's argument, in line with the Nevada Supreme Court,[12] is that it would be impossible to list in the statute every possible situation where an abuse could exist. Instead, the Legislature provided boundaries so that people of common intelligence need not guess as to the conduct the statute proscribes.[13] In fact, a statute will be upheld if its terms "may be made reasonably certain by reference to other definable sources." *County of Nevada v. Ronald L. Macmillen*, 11 Cal. 3d 662; 522 P.2d 1345, 114 Cal. Rptr. 345 (quoting *People v. Victor*, 62 Cal.2d 280, 300 (1965)).

The question then becomes whether Carrigan was put on notice that, if his close friend, confidant and campaign manager came before the Council on a matter for action, would Carrigan have to abstain from acting on the matter? The answer is yes.

Carrigan and Vasquez's relationship was "substantially similar" (NRS 281.501.8(e)) to a "substantial and continuing business relationship" (NRS 281.501.8(d)) or a family relationship within the third degree of consanguinity or affinity (NRS 281.501.8(b)). Granted, reasonable men may differ in their interpretation of these terms. However, given a

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[12] "Although, mathematical precision is not possible in drafting statutory language, the law must, at a minimum, delineate the boundaries of unlawful conduct." *City of Las Vegas v. Eighth Judicial District Court, 118 Nev. 859; 59 P.3d 47 (citing Coates v. City of Cincinnati, 402 U.S. 611, 614, 29 L.Ed. 2d 214, 91 S. Ct. 1686 (1971).*

[13] NRS 281.501.2 prohibits a public officer from voting on a matter where he would be affected by his "commitment in a private capacity to the interest of others" which is defined in NRS 281.501.8 as a person:

...

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

...

(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.]

reasonable and practical construction in accordance with the Legislature's intent, taken as a whole, the statutes are sufficiently definite in their terms to give adequate warning to public officers that voting on matters affecting family or business associates is prohibited.

In *Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9, 866 P.2d 297, 300 (1994) The Court recognized that:

> The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. This intent will prevail over the literal sense of the words. The meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and policy may be involved as an interpretive aid (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)).

The legislature clarified its intent in NRS 281A.020: "A public office is a public trust and shall be held for the benefit of the people... adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens."

NRS 281.501.2 and NRS 281.501.8 do not authorize or encourage arbitrary enforcement. The Commission does not have unfettered discretion when determining what conduct violates the statutes. In fact, the circumstances where a public officer is materially affected by a relationship are exhaustively enumerated in NRS 281.501.8. Carrigan knew of his business and family-like relationship with Vasquez when he voted. These terms are defined in the statute and are not vague. These laws should not be void for vagueness.

2. Overbreadth

Carrigan's argument that NRS 281.501.2 and NRS 281.501.8 are unconstitutionally overbroad because they effectively kill political speech and associational freedoms is unpersuasive. As previously argued in this brief, the Ethics in Government Law and specifically NRS 281.501 do not prohibit public officers from having their voice heard. In fact,

public officers, like Carrigan, can provide information on matters before their public body just as any other member of the public can provide information, pursuant to NRS 281.501.2 and the *Kubichek* Opinion (CEO 97-07).

The law merely requires that a public officer disclose his private interests and abstain from acting on matters where a reasonable person in his position would be materially affected by his private interest. NRS 281.501.2 and NRS 281.501.4. Circumstances where a reasonable person's independent judgment would surely be affected are enumerated in NRS 281.501.8. The statutes at issue are narrowly tailored to further the purpose of the Ethics in Government Law and define where abstention is required. Therefore, Carrigan's argument that the statutes are overbroad must be rejected.

IV. CONCLUSION

The District Court must accord deference to the Commission's interpretation of the Ethics in Government Law. If substantial evidence exists that a public officer has violated the public trust by failing to abstain from voting on a matter where the independence of judgment of a reasonable person in his position would be materially affected, the Commission is legislatively authorized to act.

Substantial evidence exists to support the Commission's conclusion that Carrigan's relationship to Vasquez was substantially similar to those relationships of business and family as described in NRS 281.501.8. Therefore, Carrigan should have abstained from voting on the Lazy 8 matter when Vasquez was its representative because of their close relationship. Carrigan failed to abstain in violation of NRS 281.501.2. For reasons stated above,

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Carrigan's arguments, and each of them, which are not all based on the record, are wholly without merit. The Court should affirm the decision of the Commission in its entirety.

Dated this 25th day of February, 2008.

By: _____

ADRIANA G. FRALICK, ESQ. (NV 9392)
3476 Executive Pointe Way, Suite 10
Carson City, Nevada 89706
(775) 687-5469

Attorney for Respondent, THE NEVADA STATE COMMISSION ON ETHICS

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 25th day of February, 2008.

By: _____

ADRIANA G. FRALICK, ESQ. (NV 9392)
3476 Executive Pointe Way, Suite 10
Carson City, Nevada 89706
(775) 687-5469

Attorney for Respondent, THE NEVADA STATE COMMISSION ON ETHICS

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics, and that on this 28th day of February, 2008, I served a copy of the foregoing APPELLANT'S REPLY BRIEF thereto by mailing a true copy of each to the following:

CHESTER H. ADAMS
DOUGLAS R. THORNLEY
Assistant City Attorney
431 Prater Way
Sparks, NV 89431

An Employee of the Nevada Commission on Ethics