

1 **CHESTER H. ADAMS, #3009**
2 Sparks City Attorney
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5 431 Prater Way
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8 **Attorneys for Petitioner**

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ALAN GLOVER
CLERK
BY *[Signature]* DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CARSON CITY

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

Case No. 07-OC-012451B

Petitioner,

Dept. No. 2

FILED

vs.

11 **THE COMMISSION ON ETHICS OF THE**
12 **STATE OF NEVADA,**

No. 51920

JUN 25 2008

Respondent. /

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]* DEPUTY CLERK

NOTICE OF APPEAL

15 Notice is hereby given that Petitioner Michael A. Carrigan, Fourth Ward City Council
16 Member of the City of Sparks, hereby appeals to the Supreme Court of Nevada from the *Order and*
17 *Judgment Denying the Petitioner's Petition for Judicial Review and Affirming the Final Decision*
18 *of the Nevada Commission on Ethics* entered in this action on May 28, 2008.

19 Respectfully submitted this 23rd day of June 2008.

20 **CHESTER H. ADAMS**
21 Sparks City Attorney

22 By:

23 *[Signature]*
24 **DOUGLAS R. THORNLEY**
25 Assistant City Attorney
26 P.O. Box 837
Sparks, NV 89432
(775) 353-2324
Attorneys for Petitioner

RECEIVED

28 JUN 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

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REC'D & FILED

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ALAN GLOVER
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BY *[Signature]* DEPUTY

6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF CARSON CITY**

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

Case No. 07-OC-012451B

10 vs. Petitioner,

Dept. No. 2

11 **THE COMMISSION ON ETHICS OF THE**
12 **STATE OF NEVADA,**

13 _____ Respondent. /

14 **CASE APPEAL STATEMENT**

15 **1. Name of appellant filing this case appeal statement:**

16 Michael A. Carrigan, the Sparks City Councilman elected to represent the City's Fourth Ward.

17 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

18 The Honorable William A. Maddox, Department 2, First Judicial District Court of the State of
19 Nevada.

20 **3. Identify all parties to the proceedings in the district court:**

21 Petitioner/Appellant: Michael A. Carrigan, the Sparks City Councilman elected to represent
22 the City's Fourth Ward;

23 Respondent: The Nevada Commission on Ethics;

24 Amicus Curiae: The Nevada Legislature.

25 **4. Identify all parties involved in this appeal:**

26 Petitioner/Appellant: Michael A. Carrigan, the Sparks City Councilman elected to represent
27 the City's Fourth Ward;

28 Respondent: The Nevada Commission on Ethics.

1 **5. Set forth the name, law firm, address, and telephone number of all counsel on appeal**
2 **and identify the party or parties whom they represent:**

3 Counsel for Petitioner/Appellant Michael A. Carrigan, the Sparks City Councilman elected to
4 represent the City's Fourth Ward, are:

5 **Chester H. Adams, Esq.**
 Sparks City Attorney
6 **Douglas R. Thornley, Esq.**
 Assistant City Attorney
7 431 Prater Way
 P.O. Box 857
8 Sparks, NV 89432
 Telephone No.: 775-353-2324
9 Fax No.: 775-353-1688

10 Counsel for Respondent Nevada Commission on Ethics is:

11 **Adriana Frallick**
 General Counsel
12 Nevada Commission on Ethics
 3476 Executive Pointe Way, Suite 10
13 Carson City, NV 89706
 Telephone No.: 775-687-5469
14 Fax No.: 775-687-1279

15 **6. Indicate whether appellant was represented by appointed or retained counsel in the**
16 **district court:**

17 Petitioner/Appellant Michael A. Carrigan, the Sparks City Councilman elected to represent the
18 City's Fourth Ward, was represented by retained counsel in the District Court.

19 **7. Indicate whether appellant is represented by appointed or retained counsel on appeal:**

20 Petitioner/Appellant Michael A. Carrigan, the Sparks City Councilman elected to represent the
21 City's Fourth Ward, is represented by retained counsel in this appeal.

22 **8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date**
23 **of entry of the district court order granting such leave:**

24 Petitioner/Appellant was not granted leave to proceed in forma pauperis.

25 ///

26 ///

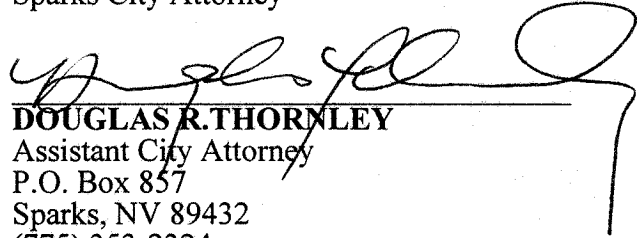
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1 9. **Indicate the date the proceedings commenced in the district court:**
2 Petitioner/Appellant filed his Petition for Judicial Review on October 9, 2007.
3 Respectfully submitted this 23rd day of June 2008.
4

5 **CHESTER H. ADAMS**
6 Sparks City Attorney

7 By:

8 
9 **DOUGLAS R. THORNLEY**
10 Assistant City Attorney
11 P.O. Box 857
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Judge: MADDOX, JUDGE WILLIAM
A'

Case No. 07 OC 01245 1B

Ticket No.
CTN:

CARRIGAN, MICHAEL A

By:

NEVADA COMMISSION ON
ETHICS

DRSPND

-vs-

By: FRALICK, ADRIANA G

3476 EXECUTIVE POINTE WAY
SUITE 10
CARSON CITY, NV 89706Dob: Sex:
Lic: Sid:Plate#: Make:
Year: Accident:
Type:
Venue:
Location:

CARRIGAN, MICHAEL A

PLNTPET

Bond: Set:
Type: Posted:

Charges:

Ct.

Offense Dt: Cvr:
Arrest Dt:
Comments:

Sentencing:

No.	Filed	Action	Operator	Fine/Cost	Due
1	06/24/08	CERTIFICATE OF SERVICE BY MAIL	JHIGGINS	0.00	0.00
2	06/24/08	CASE APPEAL STATEMENT	JHIGGINS	0.00	0.00
3	06/24/08	NOTICE OF APPEAL	JHIGGINS	24.00	0.00
4	06/20/08	ORDER DENYING PEITION FOR WRIT OF MANDAMUS PROHIBITION	CCOOPER	0.00	0.00
5	05/30/08	NOTICE OF ENTRY OF ORDER	CFRANZ	0.00	0.00
6	05/29/08	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	CFRANZ	0.00	0.00
7	05/28/08	ORDER OF JUDGMENT DENYING THE PETITIONER'S PETITION FOR JUDICIAL REVIEW AND AFFIRMING THE FINAL DECISION OF THE NEVADA COMMISSION ON ETHICS	CFRANZ	0.00	0.00
8	05/27/08	TRANSCRIPT OF PROCEEDINGS - PETITION FOR JUDICIAL REVIEW - 5/12/08	CFRANZ	0.00	0.00
9	04/16/08	TRIAL DATE MEMO	JULIEH	0.00	0.00
10	04/01/08	NOTICE OF INTENT TO APPEAR TELEPHONICALLY	JHIGGINS	0.00	0.00
11	03/27/08	CERTIFICATE OF SERVICE	CCOOPER	0.00	0.00
12	03/27/08	ORDER	CCOOPER	0.00	0.00
13	03/26/08	REQUEST FOR HEARING	CCOOPER	0.00	0.00
14	03/26/08	PETITIONER'S REPLY BRIEF	CCOOPER	0.00	0.00
15	03/21/08	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	CCOOPER	0.00	0.00
16	03/21/08	ORDER DENYING MOTION TO STRIKE	CCOOPER	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
17	03/21/08	ORDER GRANTING THE MOTION OF THE NEVADA LEGISLATURE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND FOR PERMISSION TO PARTICIPATE AS AMICUS CURIAE IN ANY ORAL ARGUMENT OR HEARING	CCOOPER	0.00	0.00
18	03/18/08	NOTICE AND REQUEST TO THE CLERK TO SUBMIT THE FOLLOWING MOTION TO THE COURT FOR DECISION: MOTION OF THE NEVADA LEGISLATURE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND FOR PERMISSION TO PARTICIPATE AS AMICUS CURIAE IN ANY ORAL ARGUMENT OR HEARING	JHIGGINS	0.00	0.00
19	03/18/08	NEVADA LEGISLATURE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND FOR PERMISSION TO PARTICIPATE AS AMICUS CURIAE IN ANY ORAL ARGUMENT OR HEARING	JHIGGINS	0.00	0.00
20	03/11/08	OPPOSITION TO THE NEVADA LEGISLATURE'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND FOR PERMISSION TO PARTICIPATE AS AMICUS CURIAE IN ANY ORAL ARGUMENT OR HEARING	JHIGGINS	0.00	0.00
21	03/07/08	REPLY TO PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE	CFRANZ	0.00	0.00
22	03/06/08	ATTORNEY'S CERTIFICATE OF COMPLIANCE FOR THE NEVADA LEGISLATURE'S AMICUS CURIAE BRIEF	JULIEH	0.00	0.00
23	03/04/08	OPPOSITION TO RESPONDENT'S MO/STRIKE	DRODARTE	0.00	0.00
24	02/28/08	NOTICE OF ERRATA	DRODARTE	0.00	0.00
25	02/28/08	PETITIONER'S CORRECTED OPENING BRIEF IN PETITION FOR JUDICIAL REVIEW	DRODARTE	0.00	0.00
26	02/25/08	AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA	JHIGGINS	0.00	0.00
27	02/25/08	MOTION OF THE NEVADA LEGISLATURE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND FOR PERMISSION TO PARTICIPATE AS AMICUS CURIAE IN ANY ORAL ARGUMENT OR HEARING	JHIGGINS	0.00	0.00
28	02/25/08	MOTION TO STRIKE PETITIONER'S OPENING BRIEF OR IN THE ALTERNATIVE, MOTION TO STRIKE EXHIBITS TO OPENING BRIEF AND ARGUMENTS IN OPENING BRIEF RELYING ON THE EXHIBITS	JHIGGINS	0.00	0.00
29	02/25/08	RESPONDENT'S ANSWERING BRIEF	JHIGGINS	0.00	0.00
30	02/08/08	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	CCOOPER	0.00	0.00
31	02/08/08	ORDER TO EXTEND TIME TO FEBRUARY 25, 2008 TO FILE RESPONDENT'S ANSWERING BRIEF	CCOOPER	0.00	0.00
32	02/07/08	STIPULATION TO EXTEND TIME TO FEBRUARY 25, 2008 TO FILE RESPONDENT'S ANSWERING BRIEF	CCOOPER	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
33	01/07/08	PETITIONER'S OPENING BRIEF IN PETITION FOR JUDICIAL REVIEW	JULIEH	0.00	0.00
34	12/11/07	NOTICE OF ENTRY OF ORDER	JHIGGINS	0.00	0.00
35	12/07/07	REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR STAY OF ENFORCEMENT OF FINAL DECISION	CCOOPER	0.00	0.00
36	12/07/07	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	JULIEH	0.00	0.00
37	12/07/07	CERTIFICATE OF SERVICE	JULIEH	0.00	0.00
38	12/07/07	ORDER DENYING MOTION FOR STAY OF ENFORCEMENT OF FINAL DECISION	JULIEH	0.00	0.00
39	11/29/07	OPPOSITION TO MOTION FOR STAY OF ENFORCEMENT OF FINAL DECISION AND REPLY TO REQUEST FOR SUBMISSION	CCOOPER	0.00	0.00
40	11/29/07	RECORD OF THE PROCEEDING UNDER REVIEW	CCOOPER	0.00	0.00
41	11/29/07	ADMINISTRATIVE RECORD ON APPEAL CERTIFICATION OF OFFICIAL RECORDS OF THE NEVADA STATE COMMISSION ON ETHICS VOLUME III	CCOOPER	0.00	0.00
42	11/29/07	ADMINISTRATIVE RECORD ON APPEAL CERTIFICATION OF OFFICIAL RECORDS OF THE NEVADA STATE COMMISSION ON ETHICS VOLUME II	CCOOPER	0.00	0.00
43	11/29/07	ADMINISTRATIVE RECORD ON APPEAL CERTIFICATION OF OFFICIAL RECORDS OF THE NEVADA STATE COMMISSION ON ETHICS VOLUME I	CCOOPER	0.00	0.00
44	11/27/07	REQUEST FOR SUBMISSION	DRODARTE	0.00	0.00
45	11/15/07	NOTICE OF INTENT TO PARTICIPATE IN PETITINO FOR JUDICIAL REVIEW	DRODARTE	0.00	0.00
46	10/09/07	MOTION FOR STAY OF ENFORCEMENT OF FINAL DECISION	CCOOPER	0.00	0.00
47	10/09/07	PETITION FOR JUDICIAL REVIEW	CCOOPER	146.00	0.00
Total:				170.00	0.00
Totals By: COST				170.00	0.00
INFORMATION				0.00	0.00
*** End of Report ***					

1 Case No.: 07-OC-012451B

2 Dept. No.: II

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2008 MAY 28 PM 4: 36

ALAN GLOVER
CLERK
BY *[Signature]*
DUTY

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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR CARSON CITY**

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

10 Petitioner,

11 vs.

12 THE COMMISSION ON ETHICS OF THE
13 STATE OF NEVADA,

14 Respondent.
15

**ORDER AND JUDGMENT DENYING
THE PETITIONER'S PETITION FOR
JUDICIAL REVIEW AND AFFIRMING
THE FINAL DECISION OF THE
NEVADA COMMISSION ON ETHICS**

16 **PROCEDURAL HISTORY**

17 On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council,
18 filed a Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS 233B.130-
19 233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON
20 ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the
21 Commission found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics
22 Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red
23 Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the
24 Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict

1 of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor,
2 confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red
3 Hawk and was urging the City Council to approve the Lazy 8 project.¹

4 In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on
5 January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on
6 February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File
7 an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or
8 Hearing on this matter. The Legislature conditionally filed its Amicus Curiae Brief along with its
9 Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that
10 subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict
11 protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of
12 the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion
13 and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any
14 oral argument or hearing on this matter.

15 On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing
16 on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12,
17 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

18 On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the
19 courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H.
20 ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who
21 appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada

22
23 ¹ At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In
24 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a
new chapter to be numbered as NRS Chapter 281A. See Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events
in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision
and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as
presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 281A.

1 Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior
2 Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the
3 Legislature as Amicus Curiae.

4 Having considered the pleadings, briefs, documents, exhibits and administrative record on file in
5 this case and having received oral argument from the parties and Amicus Curiae, the Court enters the
6 following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order
7 and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

8 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

9 1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

10 2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged
11 with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada
12 Revised Statutes as NRS Chapter 281A.

13 3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to
14 grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned
15 development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)² All
16 five members of the City Council were present at the meeting and actively participated in the discussion
17 regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

18 4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term
19 on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.)
20 Vasquez started serving as campaign manager in January or February 2006, and he served in that
21 capacity until Councilman Carrigan was reelected at the November 2006 general election. Id. In prior
22 elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both
23

24 ² Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

1 1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City
2 Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal
3 friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

4 5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999.
5 (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign
6 manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid
7 compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid
8 for providing printing, advertising and public relations services for Councilman Carrigan's three
9 campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his
10 companies did not make any profit from these services. Id.

11 6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his
12 terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political
13 advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact, Councilman Carrigan would confide in
14 Vasquez regarding political matters that he would not normally discuss with members of his own family
15 such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of
16 political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything.
17 When you are running a campaign you have to take a look at all the factors that could affect that
18 candidate and that community." (ROA000046.)

19 7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue
20 was the Lazy 8 project, and the public and the media focused most of their attention on that project.
21 (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the
22 benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his
23 many community and business contacts, and he sent fund-raising letters to approximately 700 potential
24 donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were

1 otherwise directly interested in the success of the Lazy 8 project. Id.

2 8. Vasquez's primary occupation is to act as a paid public relations political advocate and
3 strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and
4 public relations services, and one of his specialties is providing such services to developers who are
5 seeking approval from local governments for their planned developments. (ROA000041-53.)

6 9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting,
7 lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to
8 oversee public relations regarding the project, and he was actively and openly involved in efforts to
9 manage information in the media and to influence and improve the public's opinion regarding the
10 project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City
11 Council's approval of the project. Id.

12 10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote
13 a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that
14 Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id.
15 For example, Vasquez met numerous times with Councilman Carrigan and other council members to
16 discuss the project. Id. At those meetings, Vasquez sought support for the project through discussions
17 and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the
18 concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed
19 information directly to Red Hawk, which then changed the specifications of the project to obtain the
20 support of Councilman Carrigan and other council members. Id.

21 11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan
22 made the following disclosure, as found in the transcripts of the meeting:

23 Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that
24 Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also
my campaign manager. I'd also like to disclose that as a public official, I do not stand to
reap either financial or personal gain or loss as a result of any official action I take tonight.

1 [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this
2 disclosure of information is sufficient and that I will be participating in the discussion and
voting on this issue. Thank you.

3 (ROA000507.)

4 12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and
5 representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk
6 and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

7 13. After receiving additional testimony at the meeting from supporters and opponents of the
8 Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.)
9 Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206-
10 209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer,
11 Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the
12 Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and
13 Moss) and two opposed (Carrigan and Schmitt). Id.

14 14. In September 2006, four members of the public filed separate but similar ethics complaints
15 against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's
16 participation in the City Council meeting violated the Ethics Law because, at the time of the meeting,
17 Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was
18 acting as a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the
19 Lazy 8 project. Id.

20 15. On August 29, 2007, the Commission held a hearing and received testimony and evidence
21 concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its
22 final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted
23 upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman
24 Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman

1 Carrigan. (ROA000012-13.)

2 16. Subsection 2 of NRS 281A.420 provides in relevant part:

3 [I]n addition to the requirements of the code of ethical standards, a public officer shall not
4 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:

5 (a) His acceptance of a gift or loan;

6 (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
7 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
8 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,
9 occupation or group. The presumption set forth in this subsection does not affect the
applicability of the requirements set forth in subsection 4 relating to the disclosure of the
10 pecuniary interest or commitment in a private capacity to the interests of others.

11 17. In its final decision, the Commission determined that when Councilman Carrigan voted upon
12 the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the
13 independence of judgment of a reasonable person in his situation would be materially affected
14 by...[h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c).
15 (ROA000011-13.)

16 18. In reaching its conclusion, the Commission relied upon the statutory definition of
17 "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS
18 281A.420:

19 8. As used in this section, "commitment in a private capacity to the interests of others"
means a commitment to a person:

20 (a) Who is a member of his household;

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

22 (c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

23 (e) Any other commitment or relationship that is substantially similar to a commitment
or relationship described in this subsection.

24 (Emphasis added.) (ROA000006-8.)

1 19. The Commission found that Councilman Carrigan's relationship with Vasquez came within
2 the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or
3 relationship that is substantially similar to a commitment or relationship described in this subsection."
4 (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment
5 and relationship equates to a 'substantially similar' relationship to those enumerated under NRS
6 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin
7 to a relationship to a family member, and a 'substantial and continuing business relationship.'"
8 (ROA000008.)

9 20. Because the Commission found that the independence of judgment of a reasonable person in
10 Councilman Carrigan's situation would be materially affected by his commitment in a private capacity
11 to the interests of his campaign manager, political advisor, confidant and close personal friend, the
12 Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to
13 abstain from voting. Specifically, the Commission stated:

14 Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to
15 make a determination regarding abstention. Abstention is required where a reasonable
16 person's independence of judgment would be materially affected by his private
17 commitment.

18 A reasonable person in Councilman Carrigan's position would not be able to remain
19 objective on matters brought before the Council by his close personal friend, confidant and
20 campaign manager, who was instrumental in getting Councilman Carrigan elected three
21 times. Indeed, under such circumstances, a reasonable person would undoubtedly have such
22 strong loyalties to this close friend, confidant and campaign manager as to materially affect
23 the reasonable person's independence of judgment.

24 (ROA000012.)

21 **Petitioner's Claims**

22 21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging
23 the Commission's final decision.

24 22. First, Councilman Carrigan contends that the Commission's final decision should be

1 reversed under the Administrative Procedure Act because the final decision is in violation of
2 constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that
3 subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict
4 protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of
5 the First and Fourteenth Amendments.

6 23. Second, Councilman Carrigan contends that the Commission's final decision should be
7 reversed under the Administrative Procedure Act because the final decision is affected by error of law.
8 NRS 233B.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly
9 interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in
10 that subsection without receiving any evidence that rebutted the presumption.

11 24. Third, Councilman Carrigan contends that the Commission's final decision should be
12 reversed under the Administrative Procedure Act because the final decision is not supported by reliable,
13 probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

14 25. Fourth, Councilman Carrigan contends that the Commission's final decision should be
15 reversed under the Administrative Procedure Act because the final decision is arbitrary and capricious
16 and characterized by abuse of discretion. NRS 233B.135(3)(f).

17 26. Finally, Councilman Carrigan contends that the Commission's final decision should be
18 reversed under the Administrative Procedure Act because the final decision violates his constitutional
19 rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically,
20 Councilman Carrigan contends that his constitutional rights to due process were violated because
21 Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an
22 appearance or implied probability of bias and which disqualified them from participating in the
23 Commission's hearing regarding the ethics complaints against Councilman Carrigan.

24 27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do

1 not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final
2 decision of the Commission pursuant to NRS 233B.135(3).

3 **Standard of Review**

4 28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to
5 show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of
6 Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must
7 prove that substantial rights have been prejudiced by the final decision of the Commission because the
8 final decision is:

- 9 (a) In violation of constitutional or statutory provisions;
- 10 (b) In excess of the statutory authority of the agency;
- 11 (c) Made upon unlawful procedure;
- 12 (d) Affected by other error of law;
- 13 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the
 whole record; or
- 14 (f) Arbitrary or capricious or characterized by abuse of discretion.

15 NRS 233B.135(3).

16 29. In reviewing the final decision of the Commission, the standard of deference accorded to the
17 Commission's determinations turns largely on whether the determinations are more appropriately
18 characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121
19 Nev. 523, 527 (2005).

20 30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at
21 527-28. Under that deferential standard, the Court may not look beyond the administrative record or
22 substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact.
23 NRS 233B.135(3); Weaver, 121 Nev. at 498. Thus, the Court must uphold the Commission's findings
24 of fact if they are supported by substantial evidence in the record, regardless of whether the Court would
have reached the same view of the facts as the Commission. Wright v. State, Dep't of Motor Vehicles,
121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence

1 which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence
2 need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

3 31. In addition to giving deference to the Commission's findings of fact, the Court must give
4 deference to the Commission's conclusions of law when they are closely tied to the Commission's view
5 of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure
6 questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered
7 to undertake an independent de novo review, and the Court is not required to defer to the Commission's
8 legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v.
9 Nev. Cement Co., 117 Nev. 960, 964 (2001).

10 32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the
11 statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n
12 on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the Commission is clothed with the
13 power to interpret the ethics statutes as a necessary precedent to its administrative action and "great
14 deference should be given to that interpretation if it is within the language of the statute." Nev. Tax
15 Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co.,
16 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's
17 interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the
18 language of the statutes and is consistent with legislative intent. JMA/Lucchesi, 110 Nev. at 5-7; City of
19 Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

20 **Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected**
21 **speech in violation of the First Amendment.**

22 33. Councilman Carrigan contends that legislative voting is protected speech under the First
23 Amendment and that he had a constitutional right as an elected public officer to engage in such
24 protected speech when he voted on the Lazy 8 project. Because the Commission concluded that

1 subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8
2 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and
3 as applied to him because they impermissibly restrict his protected speech in violation of the First
4 Amendment. In response, the Legislature raises several arguments in opposition to Councilman
5 Carrigan's constitutional challenge to the validity of the statutory provisions.

6 34. First, the Legislature contends that the First Amendment was not applicable under the
7 circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the
8 Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative
9 proceeding, but was an administrative proceeding at which the City Council and its members were
10 required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman
11 Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing
12 political, professional and personal relationship with Vasquez which created an appearance or implied
13 probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due
14 Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First
15 Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS
16 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

17 35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are
18 subject to review under the First Amendment in this case, the balancing test established by the United
19 States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of
20 review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS
21 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital
22 interest in ethical government outweighs any interest Councilman Carrigan has to vote upon a matter in
23 which he has a disqualifying conflict of interest.

24 36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review

1 under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and
2 as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical
3 government and guarding the public from biased decisionmakers; and (2) the statutory provisions
4 requiring disqualified public officers to abstain from voting constitute the least restrictive means
5 available to further the state's compelling interest.

6 37. Although the Legislature makes a cogent argument that the First Amendment was not
7 applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case.
8 Instead, even assuming that the First Amendment was applicable under the circumstances, the Court
9 finds that under the Pickering balancing test, any interference with protected speech is warranted
10 because of the state's strong interest in either having ethical government or the appearance of ethical
11 government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on
12 their face and as applied to Councilman Carrigan.

13 38. Although public officers and employees do not surrender their First Amendment rights as a
14 result of their public service, it is well established that the free speech and associational rights of public
15 officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413
16 U.S. 548, 567 (1973). Because the free speech and associational rights of public officers and employees
17 are not absolute, states may enact reasonable regulations limiting the political activities of public
18 officers and employees without violating the First Amendment. Clements v. Fashing, 457 U.S. 957,
19 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

20 39. Several cases from the First Circuit have found that "[v]oting by members of municipal
21 boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the
22 status of public officials' votes as constitutionally protected speech [is] established beyond peradventure
23 of doubt." Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir.
24 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit

1 recognizes that voting by public officers is constitutionally protected speech, the First Circuit also
2 recognizes that “[t]his protection is far from absolute,” and that when a public officer claims his First
3 Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review
4 to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 74-
5 76; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

6 We have extended First Amendment protection to votes on “controversial public issues”
7 cast by “a member of a public agency or board.” Miller v. Town of Hull, 878 F.2d 523, 532
8 (1st Cir. 1989) (“There can be no more definite expression of opinion than by voting on a
9 controversial public issue.”); see also Stella v. Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995).
10 This protection is far from absolute, however. In their capacity as public officials voting on
11 matters of public concern, plaintiffs retain First Amendment protection “so long as [their]
12 speech does not unduly impede the government’s interest . . . in the efficient performance of
the public service it delivers through” its appointed officials. O’Connor, 994 F.2d at 912
(citing cases). Accordingly, to determine the scope of First Amendment free speech
protections applicable to public officials, we have employed a three-part test extracted
largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v.
Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

13 Mullin, 284 F.3d at 37.

14 40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper
15 standard of review for this case. Under the Pickering balancing test, the Court must weigh the interests
16 of public officers and employees in exercising their First Amendment rights against the state’s vital
17 interest in “promot[ing] efficiency and integrity in the discharge of official duties.” Connick v. Myers,
18 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson,
19 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the
20 potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may
21 impose significant restraints on the speech that “would be plainly unconstitutional if applied to the
22 public at large.” United States v. Nat’l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v.
23 Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion). Thus, under the Pickering balancing test, the
24 state is given greater latitude to restrict the speech of public officers and employees to promote

1 operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in
2 the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004);
3 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006).

4 41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting
5 upon a matter when he has a “commitment in a private capacity to the interests of others.” The purpose
6 of the statutory provisions is to prevent a public officer from voting upon a matter when private interests
7 create an actual conflict of interest or the appearance of a conflict of interest. Under such circumstances,
8 a reasonable person would have a legitimate fear that the public officer’s commitment to the private
9 interests of others could potentially disrupt or undermine the public officer’s efficiency, effectiveness
10 and integrity in the discharge of his official duties. Thus, on their face, the statutory provisions serve the
11 vital state interest of securing the efficient, effective and ethical performance of governmental functions.
12 See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) (“The elimination and prevention of conflict of
13 interest is a proper state purpose.”).

14 42. Because the statutory provisions serve such a vital state interest, the balancing of interests
15 under the Pickering test tilts heavily in favor of the state because the state’s interests are at their zenith.
16 In contrast, a public officer’s interest in voting upon a matter in which he has a disqualifying conflict of
17 interest is entitled to little or no protection under the First Amendment. Indeed, allowing a public officer
18 to vote under such circumstances would seriously erode the public’s confidence in ethical government.
19 Therefore, because the state’s interest in securing the efficient, effective and ethical performance of
20 governmental functions outweighs any interest that a public officer may have in voting upon a matter in
21 which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS
22 281A.420 are facially constitutional under the Pickering balancing test.

23 43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied
24 to Councilman Carrigan. Given Vasquez’s role as Councilman Carrigan’s campaign manager, political

1 advisor, confidant and close personal friend, the record contains substantial evidence that Councilman
2 Carrigan and Vasquez had a substantial and continuing political, professional and personal relationship
3 when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to
4 create an actual conflict of interest or the appearance of a conflict of interest, and a reasonable person
5 would have had a legitimate fear that the relationship could potentially disrupt or undermine
6 Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties.
7 Under such circumstances, Councilman Carrigan had a disqualifying conflict of interest. Because the
8 First Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the
9 Commission acted constitutionally when it found that Councilman Carrigan was prohibited from voting
10 upon the Lazy 8 project.

11 44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of
12 NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore,
13 subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of
14 the First Amendment.

15 **Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in**
16 **violation of the First and Fourteenth Amendments.**

17 45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v.
18 Lawson, 461 U.S. 352, 358 n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute
19 prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates
20 v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is unconstitutionally vague on its face if the statute:
21 (1) fails to provide people of ordinary intelligence with a reasonable opportunity to understand what
22 conduct it prohibits; or (2) authorizes or encourages arbitrary and discriminatory enforcement by the
23 officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868
24 (2004).

1 46. In determining whether a statute is unconstitutionally overbroad or vague, the United States
2 Supreme Court considers whether there are any procedures in place allowing persons with doubts about
3 the meaning of the statute to obtain clarification from the agency charged with its enforcement. U.S.
4 Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma,
5 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion);
6 Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme
7 Court typically will not find the statute to be unconstitutionally overbroad or vague if such persons "are
8 able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the
9 meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting
10 Letter Carriers, 413 U.S. at 580); Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct.
11 App. 1982).

12 47. Under the Ethics Law, a public officer may request an advisory opinion from the
13 Commission regarding "the propriety of his own past, present or future conduct" and receive guidance
14 from the Commission on whether to withdraw or abstain from participating in a matter. NRS
15 281A.440(1) & 281A.460. Each request so made by a public officer and each advisory opinion rendered
16 by the Commission in response to such a request, and any motion, determination, evidence or hearing
17 record relating to such a request, are confidential unless the public officer who requested the advisory
18 opinion permits the disclosure of the confidential information or acts in contravention of the advisory
19 opinion. NRS 281A.440(5).

20 48. In this case, Councilman Carrigan failed to seek an advisory opinion from the Commission
21 even though he had ample time and opportunity to do so. The record shows that Vasquez became
22 Councilman Carrigan's campaign manager 6 months or more before the City Council meeting.
23 (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's
24 simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-

1 43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during
2 this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory
3 opinion and obtain clarification of the statute from the Commission when he had ample opportunity to
4 do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or
5 vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was
6 unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics
7 commission regarding the propriety of his conduct).

8 49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's
9 intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague
10 in violation of the First and Fourteenth Amendments.

11 50. The United States Supreme Court has recognized that the overbreadth and vagueness
12 doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick,
13 413 U.S. at 613. In addition, a statute should not be invalidated on its face "when a limiting
14 construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not
15 be invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First
16 Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis."
17 Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

18 51. Under the overbreadth doctrine, a statute is not overbroad merely because the statute, if
19 construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal
20 amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as
21 overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in
22 relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth
23 challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth.
24 Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual

fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City of Las Vegas v. Dist. Ct., 122 Nev. ---, 146 P.3d 240, 247 (2006).

52. When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it regulates political activity in an even-handed and neutral manner and is not attempting to suppress any particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to vote "yes" or "no" on the matter. Thus, because the statute "is not a censorial statute, directed at particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected speech. The purpose of the statute is to prevent public officers from voting upon matters when private interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest, and this traditional common-law rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E. 146, 149 (Ga. 1888); Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v. Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-established" tradition under the common law of prohibiting certain conduct, this creates a "strong

1 presumption” that the prohibition is constitutional under the First Amendment. Republican Party of
2 Minn. v. White, 536 U.S. 765, 785 (2002). Thus, because public officers do not have a First
3 Amendment right to vote upon matters in which they have disqualifying conflicts of interest, subsections
4 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

5 54. Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in
6 abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of
7 protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained
8 by the Nevada Supreme Court, “[e]ven if a law at its margins proscribes protected expression, an
9 overbreadth challenge will fail if the ‘remainder of the statute . . . covers a whole range of easily
10 identifiable and constitutionally proscribable . . . conduct.’” City of Las Vegas, 146 P.3d at 247
11 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

12 55. In this case, Councilman Carrigan’s conduct falls squarely within the intended scope of the
13 statute and was not protected by the First Amendment. When the Legislature enacted the definition of
14 “commitment in a private capacity to the interests of others” in Senate Bill No. 478 (70th Sess. 1999), it
15 clearly had in mind situations where a public officer’s substantial and continuing relationship with his
16 campaign manager would require abstention. In the legislative hearings on S.B. 478, Senator Dina Titus
17 and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

18 Senator Titus questioned:

19 I just have a question of how this would fit with either the existing language or the new
20 language. One of the cases that had a lot of notoriety involved a commissioner and someone
21 who had worked on her campaign. Sometimes people who do campaigns then become
22 lobbyists. If you could not vote on any bill that was lobbied by someone who had
23 previously worked on your campaign, how would all of that fit in here. It is not really a
24 business relationship or a personal relationship, but I don’t [do not] know what it is.

22 Mr. Scherer stated:

23 The way that would fit in . . . the new language that the Governor is suggesting is that it
24 would not necessarily be included because it would not be a continuing business
relationship. So the relationship would have to be substantial and continuing. Now, if this
was one where the same person ran your campaign time, after time, after time, and you had
a substantial and continuing relationship, yes, you probably ought to disclose and abstain in

1 cases involving that particular person.

2 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999)
3 (emphasis added).

4 56. In light of this legislative history, it would be detrimental to society to invalidate the statute
5 on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute
6 and was not protected by the First Amendment. The statute also should not be invalidated on its face
7 because the statute's impact on the First Amendment is so speculative or slight that the First
8 Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by
9 petitioners whose conduct does not fall so squarely within the confines of the statute.

10 57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because:
11 (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the
12 extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore
13 is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended
14 scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that
15 subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First
16 Amendment.

17 58. Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical
18 precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never
19 expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110
20 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable
21 breadth, rather than meticulous specificity. Id. As explained by the United States Supreme Court:

22 [T]here are limitations in the English language with respect to being both specific and
23 manageably brief, and it seems to us that although the prohibitions may not satisfy those
24 intent on finding fault at any cost, they are set out in terms that the ordinary person
 exercising ordinary common sense can sufficiently understand and comply with, without
 sacrifice to the public interest.

1 Letter Carriers, 413 U.S. at 578-79.

2 59. When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for
3 vagueness if it imposes only civil sanctions, instead of criminal penalties, since the United States
4 Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties
5 because the consequences of imprecision are qualitatively less severe.” Hoffman Estates, 455 U.S. at
6 498-99; Groener, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was
7 subject to less exacting scrutiny for vagueness).

8 60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics
9 Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its
10 provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in
11 criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

12 61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the
13 provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which
14 could result in severe consequences for a public officer, including referring the matter to the Attorney
15 General or the appropriate District Attorney for a determination of whether a crime has been committed
16 and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court
17 finds that because none of the actions which the Commission is authorized to take under NRS 281A.480
18 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law*, it
19 would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

20 62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable
21 from office by impeachment only has committed a willful violation of the Ethics Law, the Commission
22 is required to file a report with the appropriate person responsible for commencing impeachment
23 proceedings. It is well established, however, that impeachment proceedings are not criminal
24 proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev.

1 Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States
2 §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) (“The primary purpose
3 of an impeachment is to protect the state, not to punish the offender.”).

4 63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is
5 removable from office pursuant to NRS 283.440 has committed one or more willful violations of the
6 Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence
7 removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer.
8 It is well established, however, that removal proceedings conducted pursuant to NRS 283.440 are civil
9 proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction.
10 Adler v. Sheriff, 92 Nev. 436, 439 (1976) (“The laws for removal of public officers are not criminal
11 statutes nor are the proceedings criminal proceedings.”).

12 64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the
13 Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in
14 accordance with the applicable provisions governing his employment. It is well established, however,
15 that disciplinary proceedings conducted against public employees are administrative proceedings, not
16 criminal proceedings. Navarro v. State ex rel. Dep’t of Human Res., 98 Nev. 562, 563-65 (1982); State,
17 Dep’t of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

18 65. Finally, NRS 281A.480(7) provides:

19 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions
20 of the Nevada Revised Statutes which define crimes or prescribe punishments with respect
21 to the conduct of public officers or employees. If the Commission finds that a public officer
22 or employee has committed a willful violation of this chapter which it believes may also
constitute a criminal offense, the Commission shall refer the matter to the Attorney General
or the district attorney, as appropriate, for a determination of whether a crime has been
committed that warrants prosecution.

23 66. Even though the Commission is required to refer certain matters to the Attorney General or
24 the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a

1 state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics
2 Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions.
3 Rather, such a criminal prosecution could occur only under the criminal laws of this state.

4 67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its
5 provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law
6 was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its
7 view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all.
8 (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a
9 violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less
10 exacting scrutiny for vagueness.

11 68. Furthermore, when the government restricts the speech of its public officers and employees,
12 it may use broad and general language even if such language would create "a standard almost certainly
13 too vague when applied to the public at large." Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality
14 opinion). For example, a federal statute allowed the government to remove a federal employee "for such
15 cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974)
16 (plurality opinion). An employee who was discharged for making public statements critical of his
17 supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The United States
18 Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of
19 the infinite variety of factual situations in which public statements by Government employees might
20 reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required,
21 the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized
22 "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater
23 specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail
24 all that conduct which will result in retaliation. The most conscientious of codes that define prohibited

1 conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or
2 'conduct unbecoming.'" Id. at 161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

3 69. In a case challenging the constitutionality of the rule of judicial conduct which requires
4 judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district
5 court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d
6 672, 708-10 (E.D. Ky. 2004). The court found that while the rule is stated in broad and general terms,
7 the rule also contains four specific instances which require recusal: (1) personal bias or prejudice
8 concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic
9 interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the
10 controversy. The court held that the rule did not prohibit a substantial amount of protected speech in
11 relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws
12 based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality
13 of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not
14 vague because it provided enough guidance for a judge to determine, "in most instances," the
15 circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at
16 710; see also Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family
17 Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

18 70. In a similar vein, the Nevada Supreme Court has held that broad and general terms, like
19 "unprofessional conduct," are not vague when used to define the ethical standards governing various
20 professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v.
21 Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of
22 Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the court:

23 [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt
24 to specify in a statute or regulation all of the acts which come within the meaning of the
term. The fact that it is impossible to catalogue all of the types of professional misconduct
is the very reason for setting up the statutory standard in broad terms and delegating to the

1 board the function of evaluating the conduct in each case.

2 Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

3 71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship
4 that is substantially similar to a commitment or relationship described in this subsection" is designed to
5 capture the infinite variety of factual situations in which private commitments and relationships will
6 cause a public officer to have a disqualifying conflict of interest. Considering that it would have been
7 infeasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying
8 conflict of interest in the language of the statute, it was appropriate for the Legislature to enact such a
9 reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in
10 each case.

11 72. Furthermore, because the language of the catch-all provision is expressly tied to the four
12 types of private commitments and relationships already enumerated in the statute, the Legislature has
13 given the Commission and public officers four very specific and concrete examples to guide and
14 properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by
15 the Commission.

16 73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and
17 public officers regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer,
18 Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

19 [The new language in NRS 281A.420] would be, 'any substantially similar commitment or
20 relationship.' Because I can tell you what the Governor was trying to get at was actually
21 trying to make the language better by defining 'commitment in a private capacity to the
22 interests of other.' That, I think, is even more vague than the language we have in here,
23 which sets forth some categories. We also, though, on the other hand, did not want to
24 specifically limit it to just these categories. But what we were trying to get at relationships
that are so close that they are like family. That they are substantially similar to a business
partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then
we said, 'any substantially similar commitment or relationship.' That would express the
view that we are trying to get at which is, it has got to be a relationship that is so close, it is
like family, it is like a member of your household, it is like a business partner.

1 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

2 74. On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose
3 and scope of the catch-all provision:

4 Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal
5 relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any
6 commitment or relationships that is substantially similar to any one of the relationships set
7 forth in this paragraph." The intent of change, he stated, is to capture a relationship, not
8 listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers
9 them family. He commented with this change the ethics commission would still have some
10 discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed
11 out, it has to actually be shown that the relationship is substantially similar to one of the four
12 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" . . . 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. He declared this language to be an improvement on
existing law and an appropriate balance between trying to provide guidance and trying to
allow the ethics commission discretion.

13 Chairman O'Connell concurred stating, "I do not think that that language could leave any
14 doubt in anybody's mind about the relationship. In my looking at it, I think you did a
15 terrific job with that, because it certainly does tell you exactly what kind of relationship you
16 would have with the person and it would make it much easier to determine that before
17 voting."

18 Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a
19 private capacity to the interests of others." He stressed the importance of attempting to give
20 guidance without completely taking away the ethics commission's discretion.

21 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

22 75. In the face of this legislative history, it is reasonable to expect a public officer of ordinary
23 intelligence to understand the types of private commitments and relationships that are "substantially
24 similar" to those he has with: (1) a member of his household; (2) a person who is related to him by
blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who
employs him or a member of his household; or (4) a person with whom he has a substantial and
continuing business relationship. Through the exercise of ordinary common sense, a reasonable public

1 officer could readily deduce that the four types of private commitments and relationships that are
2 explicitly described in the statute all involve close, substantial and continuing relationships. It follows
3 by simple logic that the catch-all provision extends to "substantially similar" private commitments and
4 relationships which also constitute close, substantial and continuing relationships akin to those
5 commitments and relationships that are explicitly described in the statute. Because it is not
6 unreasonable to expect a public officer to know when he has a close, substantial and continuing
7 relationship with another person, most public officers should have little difficulty in conforming their
8 conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of
9 further guidance, they can request advisory opinions from the Commission pursuant to NRS
10 281A.440(1) and 281A.460.

11 76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because:
12 (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the
13 statute from the Commission when he had ample opportunity to do so; (2) the statute contains
14 sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can
15 adequately understand the type of conduct that is prohibited by the statute; and (3) the statute contains
16 four very specific and concrete examples of prohibited conduct to guide and properly channel
17 interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.
18 Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally
19 vague in violation of the First and Fourteenth Amendments.

20 **The Commission did not commit an error of law in finding that the presumption in**
21 **subsection 2 of NRS 281A.420 does not apply in this case.**

22 77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS
23 281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission.
24 The Court disagrees.

1 78. The presumption contained in subsection 2 of NRS 281A.420 states:

2 It must be presumed that the independence of judgment of a reasonable person would not be
3 materially affected by his pecuniary interest or his commitment in a private capacity to the
4 interests of others where the resulting benefit or detriment accruing to him or to the other
5 persons whose interests to which the member is committed in a private capacity is not
6 greater than that accruing to any other member of the general business, profession,
7 occupation or group.

8 79. As illustrated by the following discussion on the record at the hearing, the Commission fully
9 considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on
10 the facts:

11 COMMISSIONER HSU: . . . I think people put too much emphasis on this language
12 when I see people argue it when the resulting benefit or detriment accruing to him would not
13 be greater than any accruing to any other member in a general business. There is only one
14 lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard.
15 It's not like the entire business profession of lobbyists are being affected uniformly. That's
16 kind of what that language is there for.

17 So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who
18 is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the
19 professional benefit by having this approved, and of course, the vote was that it got denied,
20 the vote, but I just don't see how that language applies because it is not a broad application.

21 Again, . . . I just don't see how every—how the entire group of lobbyists is being affected
22 by the passage or failure of this vote. Thanks.

23 * * *

24 COMMISSIONER JENKINS: . . . We 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?

VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . .
[We're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about
his commitment in a private capacity to the interests of others. So we're not talking about
his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.

So I think that Commissioner Hsu's reasoning does, I think, apply . . . 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.

1 So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph
2 does not necessarily save the day.

3 COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're
4 right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

5 80. Therefore, the Court holds that the Commission did not commit an error of law in finding
6 that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

7 **The Commission's decision was supported by reliable, probative and substantial**
8 **evidence on the whole record and was not arbitrary or capricious or characterized by**
9 **an abuse of discretion.**

10 81. After review of the record, the Court finds that substantial evidence exists to support the
11 Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he
12 voted on the Lazy 8 project.

13 82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as
14 adequate to support a conclusion. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005).

15 83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature
16 declared:

17 To enhance the people's faith in the integrity and impartiality of public officers and
18 employees, adequate guidelines are required to show the appropriate separation between the
19 roles of persons who are both public servants and private citizens.

20 NRS 281A.020(2)(b).

21 84. Accordingly, the disclosure and abstention law holds public officers accountable to the
22 public for complete disclosures of private commitments and for the proper exercise of their judgment to
23 abstain or not to abstain, by requiring them to make that judgment after evaluating their private
24 commitments and the effects of their decision on those private commitments. NRS 281A.420; see also
In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

1 [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter
2 with respect to which the independence of judgment of a reasonable person in his
3 situation would be materially affected by . . . [h]is commitment in a private capacity to
the interests of others.

4 86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of
5 NRS 281A.420 as:

- 6 [A] commitment to a person:
- 7 (a) Who is a member of his household;
 - 8 (b) Who is related to him by blood, adoption or marriage within the third degree of
consanguinity or affinity;
 - 9 (c) Who employs him or a member of his household;
 - 10 (d) With whom he has a substantial and continuing business relationship; or
 - 11 (e) Any other commitment or relationship that is substantially similar to a commitment
or relationship described in this subsection.

12 87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type
13 that the Legislature intended to encompass when adopting the definition of "commitment in a private
14 capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is
15 evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the
1999 legislative session.

16 [I]t has to actually be shown that the relationship is substantially similar to one of the four
17 other relationships listed, including a member of one's family, member of one's household,
18 an employment relationship, or a business relationship. The commission, he restated, would
19 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.

20 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 33 (Nev. Apr. 7, 1999).

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

23 The way that would fit in . . . if this was one where the same person ran your campaign time,
24 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.

1 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999).

2 89. The Court agrees with the Commission that the sum total of the relationship shared by
3 Councilman Carrigan and Vasquez equates to a relationship such as those enumerated under NRS
4 281A.420(8)(a)-(d), including a close, personal friendship akin to family and a "substantial and
5 continuing business relationship."

6 90. First, in addition to being a close personal friend, Councilman Carrigan would confide in
7 Vasquez on matters where he would not his own family such as siblings. (ROA000035.)

8 91. Second, as Councilman Carrigan's volunteer campaign manager, Vasquez was instrumental
9 in getting him elected three times to the Council. (ROA000022, 47.)

10 92. Third, companies owned by Vasquez were paid by Councilman Carrigan's campaign for
11 providing printing, advertising and public relations services. These services were provided at cost, and
12 Vasquez and his companies did not make any profit from these services. (ROA000051.)

13 93. Finally, as campaign manager, Vasquez actively solicited campaign contributions for the
14 benefit of Councilman Carrigan. As part of that solicitation, Vasquez relied on his many community
15 and business contacts and he sent fund-raising letters to approximately 700 potential donors, including
16 persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly
17 interested in the success of the Lazy 8 project. (ROA000044.)

18 94. The Commission found that "[a] reasonable person in Councilman Carrigan's
19 position . . . would undoubtedly have such strong loyalties to this close friend, confidant and campaign
20 manager as to materially affect the reasonable person's independence of judgment." (ROA00012).

21 95. In Woodbury, the Commission set out the steps that a public officer must take whenever a
22 matter that may affect his independence of judgment comes before the public body in which he sits.
23 Nev. Comm'n on Ethics Op. No. 99-56, at 2. Before abstention is required, a reasonable person's
24 independence of judgment "must be *materially* affected" by that private commitment. Id.

1 96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice
2 from the Sparks City Attorney, his legal counsel. (ROA000112-114.) Neither Councilman Carrigan nor
3 his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on
4 the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General
5 Opinion (AGO 98-27). (ROA000112.)

6 97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking
7 an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that
8 abstention is required:

9 where it appears from objective evidence that as a result of the acquaintance or friendship, a
10 reasonable person in the public officer's situation would have no choice but to be beholden
11 to someone who has an actual interest in the matter . . . In such circumstances, the public
12 official's independence of judgment would be materially affected.

12 (ROA000121.)

13 98. The Court finds that substantial evidence exists to support the Commission's conclusion that
14 at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the
15 interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman
16 Carrigan's situation would have been materially affected by that commitment. Therefore, Councilman
17 Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of
18 NRS 281A.420.

19 99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy
20 8 project was a violation of subsection 2 of NRS 281A.420.

21 100. Therefore, the Court holds that the Commission's final decision was supported by reliable,
22 probative and substantial evidence on the whole record and was not arbitrary or capricious or
23 characterized by an abuse of discretion.

1 **Councilman Carrigan's constitutional rights to due process were not violated by the**
2 **participation of Commissioners Hsu and Flangas in the Commission's hearing.**

3 101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject
4 to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters
5 where a reasonable person's independence of judgment would be materially affected by a commitment
6 in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

7 102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada
8 Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification.
9 NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

10 (1) A judge shall disqualify himself or herself in a proceeding in which the judge's
11 impartiality might reasonably be questioned, including but not limited to instances where:

12 (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;

13 * * *

14 (d) the judge or the judge's spouse, or a person within the third degree of relationship
15 to either of them, or the spouse of such a person:

16 * * *

17 (ii) is acting as a lawyer in the proceeding;

18 (iii) is known by the judge to have a more than de minimis interest that could be
19 substantially affected by the proceeding;

20 * * *

21 103. Based on these standards, and the fact that Councilman Carrigan waived any objections to
22 the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due
23 process were not violated.

24 **Commissioner Hsu**

104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent
representation of The Nugget³ by his law firm, Maupin Cox & LeGoy. However, there is no evidence
that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's

³ The Nugget is an opponent of the Lazy 8 project.

1 representation of The Nugget at the time of Councilman Carrigan's hearing. Additionally, The Nugget
2 was not a party to the matter heard by the Commission.

3 105. Further, although Commissioner Hsu did vote in favor of a finding in violation of
4 subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of
5 subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

6 106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement
7 in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal
8 knowledge of his law partner's subsequent representation of Vasquez's business interests.
9 (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any
10 motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection.
11 Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

12 **Commissioner Flangas**

13 107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex
14 Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The
15 Nugget, required his disqualification.

16 108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably
17 be affected by his commitment to a person who is related to him by blood, adoption or marriage "within
18 the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable
19 person's independence of judgment would be materially affected by such a relationship.

20 109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex
21 Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once
22 removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex
23 Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to
24 Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was

1 required based on his familial relationship to Alex and Amanda Flangas because that relationship is not
2 within the third degree of consanguinity or affinity.

3 110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel
4 waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

5 111. Therefore, the Court finds that Councilman Carrigan has not established a due process
6 violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in
7 light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that
8 Councilman Carrigan's constitutional rights to due process were not violated by the participation of
9 Commissioners Hsu and Flangas in the Commission's hearing.

10 **ORDER AND JUDGMENT**

11 112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do
12 not unconstitutionally restrict protected speech in violation of the First Amendment; (2) subsections 2
13 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and
14 Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the
15 presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's
16 decision was supported by reliable, probative and substantial evidence on the whole record and was not
17 arbitrary or capricious or characterized by an abuse of discretion; and (5) Councilman Carrigan's
18 constitutional rights to due process were not violated by the participation of Commissioners Hsu and
19 Flangas in the Commission's hearing.

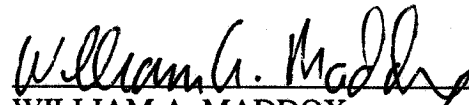
20 113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision
21 of the Commission pursuant to NRS 233B.135(3).

22 114. All parties shall bear their own costs and attorney's fees.

23 115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required
24 to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order

1 and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such
2 notice of entry with the Clerk of Court.

3
4 DATED: This 28th day of May, 2008.

5
6 
7 WILLIAM A. MADDOX
DISTRICT COURT JUDGE

8 Submitted by:

9 ADRIANA G. FRALICK, General Counsel

Nevada Bar No. 9392

10 Nevada Commission on Ethics

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11 Carson City, NV 89706

Telephone: (775) 687-5469

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14 BRENDA J. ERDOES, Legislative Counsel

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15 KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel

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Attorneys for Amicus Curiae Legislature of the State of Nevada



1 and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such
2 notice of entry with the Clerk of Court.

3
4 DATED: This 28th day of May, 2008.

5
6 
7 WILLIAM A. MADDOX
8 DISTRICT COURT JUDGE

9 Submitted by:

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REC'D & FILED

2008 MAY 30 PM 4:50

ALAN CLOVER

CLERK

6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF CARSON CITY**

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

10 Petitioner,

11 vs.

12 **THE COMMISSION ON ETHICS OF THE**
13 **STATE OF NEVADA**

14 Respondent.


Case No.: 07-OC-012451B
Department No.: II

16 **NOTICE OF ENTRY OF ORDER**

17
18 **PLEASE TAKE NOTICE** that on the 28th day of May, 2008, an Order and Judgment
19 was entered in the above-entitled action, a copy of which is attached hereto.

20
21 DATED this 30th day of May, 2008.

22 Submitted by:

23
24 
25 Adriana G. Fralick, Esq. (NV Bar No. 9392)
26 3476 Executive Pointe Way, Ste. 10
27 Carson City, Nevada 89706
28 Telephone: (775) 687-5469
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Attorney for Respondent

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I certify that I am an employee of the Nevada Commission on Ethics and that on this 30th day of May, 2008, I placed a true and correct copy of the foregoing Notice of Entry of Order in an envelope at Carson City, Nevada and caused same to be delivered via Reno Carson Messenger, next business day delivery, to the following:

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

BRENDA J. ERDOES, Legislative Counsel
KEVIN C. POWERS, Senior Principal Deputy Legislative Council
Legislative Counsel Bureau
401 S. Carson Street
Carson City, Nevada 89701
Attorneys for Amicus Curiae Legislature of the State of Nevada

An Employee of the Nevada Commission on Ethics

Case No.: 07-OC-012451B

Dept. No.: II

REC'D & FILED

2008 MAY 28 PM 4:36

ALAN GLENN
BY J. HIGGINS CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR 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.

**ORDER AND JUDGMENT DENYING
THE PETITIONER'S PETITION FOR
JUDICIAL REVIEW AND AFFIRMING
THE FINAL DECISION OF THE
NEVADA COMMISSION ON ETHICS**

PROCEDURAL HISTORY

On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council, filed a Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS 233B.130-233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the Commission found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict

1 of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor,
2 confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red
3 Hawk and was urging the City Council to approve the Lazy 8 project.¹

4 In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on
5 January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on
6 February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File
7 an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or
8 Hearing on this matter. The Legislature conditionally filed its Amicus Curiae Brief along with its
9 Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that
10 subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict
11 protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of
12 the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion
13 and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any
14 oral argument or hearing on this matter.

15 On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing
16 on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12,
17 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

18 On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the
19 courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H.
20 ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who
21 appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada
22

23 ¹ At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In
24 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a
new chapter to be numbered as NRS Chapter 281A. See Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events
in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision
and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as
presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 281A.

1 Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior
2 Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the
3 Legislature as Amicus Curiae.

4 Having considered the pleadings, briefs, documents, exhibits and administrative record on file in
5 this case and having received oral argument from the parties and Amicus Curiae, the Court enters the
6 following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order
7 and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

8 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

9 1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

10 2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged
11 with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada
12 Revised Statutes as NRS Chapter 281A.

13 3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to
14 grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned
15 development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)² All
16 five members of the City Council were present at the meeting and actively participated in the discussion
17 regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

18 4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term
19 on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.)
20 Vasquez started serving as campaign manager in January or February 2006, and he served in that
21 capacity until Councilman Carrigan was reelected at the November 2006 general election. *Id.* In prior
22 elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both
23

24 ² Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

1 1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City
2 Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal
3 friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

4 5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999.
5 (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign
6 manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid
7 compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid
8 for providing printing, advertising and public relations services for Councilman Carrigan's three
9 campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his
10 companies did not make any profit from these services. Id.

11 6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his
12 terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political
13 advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact, Councilman Carrigan would confide in
14 Vasquez regarding political matters that he would not normally discuss with members of his own family
15 such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of
16 political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything.
17 When you are running a campaign you have to take a look at all the factors that could affect that
18 candidate and that community." (ROA000046.)

19 7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue
20 was the Lazy 8 project, and the public and the media focused most of their attention on that project.
21 (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the
22 benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his
23 many community and business contacts, and he sent fund-raising letters to approximately 700 potential
24 donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were

1 otherwise directly interested in the success of the Lazy 8 project. Id.

2 8. Vasquez's primary occupation is to act as a paid public relations political advocate and
3 strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and
4 public relations services, and one of his specialties is providing such services to developers who are
5 seeking approval from local governments for their planned developments. (ROA000041-53.)

6 9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting,
7 lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to
8 oversee public relations regarding the project, and he was actively and openly involved in efforts to
9 manage information in the media and to influence and improve the public's opinion regarding the
10 project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City
11 Council's approval of the project. Id.

12 10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote
13 a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that
14 Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id.
15 For example, Vasquez met numerous times with Councilman Carrigan and other council members to
16 discuss the project. Id. At those meetings, Vasquez sought support for the project through discussions
17 and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the
18 concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed
19 information directly to Red Hawk, which then changed the specifications of the project to obtain the
20 support of Councilman Carrigan and other council members. Id.

21 11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan
22 made the following disclosure, as found in the transcripts of the meeting:

23 Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that
24 Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also
my campaign manager. I'd also like to disclose that as a public official, I do not stand to
reap either financial or personal gain or loss as a result of any official action I take tonight.

1 [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this
2 disclosure of information is sufficient and that I will be participating in the discussion and
voting on this issue. Thank you.

3 (ROA000507.)

4 12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and
5 representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk
6 and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

7 13. After receiving additional testimony at the meeting from supporters and opponents of the
8 Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.)
9 Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206-
10 209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer,
11 Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the
12 Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and
13 Moss) and two opposed (Carrigan and Schmitt). Id.

14 14. In September 2006, four members of the public filed separate but similar ethics complaints
15 against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's
16 participation in the City Council meeting violated the Ethics Law because, at the time of the meeting,
17 Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was
18 acting as a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the
19 Lazy 8 project. Id.

20 15. On August 29, 2007, the Commission held a hearing and received testimony and evidence
21 concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its
22 final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted
23 upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman
24 Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman

1 Carrigan. (ROA000012-13.)

2 16. Subsection 2 of NRS 281A.420 provides in relevant part:

3 [I]n addition to the requirements of the code of ethical standards, a public officer shall not
4 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:

5 (a) His acceptance of a gift or loan;

6 (b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

➔ It must be presumed that the independence of judgment of a reasonable person would not
be materially affected by his pecuniary interest or his commitment in a private capacity to
the interests of others where the resulting benefit or detriment accruing to him or to the other
persons whose interests to which the member is committed in a private capacity is not
greater than that accruing to any other member of the general business, profession,
occupation or group. The presumption set forth in this subsection does not affect the
applicability of the requirements set forth in subsection 4 relating to the disclosure of the
pecuniary interest or commitment in a private capacity to the interests of others.

11 17. In its final decision, the Commission determined that when Councilman Carrigan voted upon
12 the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the
13 independence of judgment of a reasonable person in his situation would be materially affected
14 by...[h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c).
15 (ROA000011-13.)

16 18. In reaching its conclusion, the Commission relied upon the statutory definition of
17 "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS
18 281A.420:

19 8. As used in this section, "commitment in a private capacity to the interests of others"
means a commitment to a person:

20 (a) Who is a member of his household;

21 (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;

22 (d) With whom he has a substantial and continuing business relationship; or

23 (e) Any other commitment or relationship that is substantially similar to a commitment
or relationship described in this subsection.

24 (Emphasis added.) (ROA000006-8.)

1 19. The Commission found that Councilman Carrigan's relationship with Vasquez came within
2 the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or
3 relationship that is substantially similar to a commitment or relationship described in this subsection."
4 (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment
5 and relationship equates to a 'substantially similar' relationship to those enumerated under NRS
6 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin
7 to a relationship to a family member, and a 'substantial and continuing business relationship.'"
8 (ROA000008.)

9 20. Because the Commission found that the independence of judgment of a reasonable person in
10 Councilman Carrigan's situation would be materially affected by his commitment in a private capacity
11 to the interests of his campaign manager, political advisor, confidant and close personal friend, the
12 Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to
13 abstain from voting. Specifically, the Commission stated:

14 Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to
15 make a determination regarding abstention. Abstention is required where a reasonable
16 person's independence of judgment would be materially affected by his private
17 commitment.

18 A reasonable person in Councilman Carrigan's position would not be able to remain
19 objective on matters brought before the Council by his close personal friend, confidant and
20 campaign manager, who was instrumental in getting Councilman Carrigan elected three
21 times. Indeed, under such circumstances, a reasonable person would undoubtedly have such
22 strong loyalties to this close friend, confidant and campaign manager as to materially affect
23 the reasonable person's independence of judgment.

24 (ROA000012.)

21 **Petitioner's Claims**

22 21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging
23 the Commission's final decision.

24 22. First, Councilman Carrigan contends that the Commission's final decision should be

1 reversed under the Administrative Procedure Act because the final decision is in violation of
2 constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that
3 subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict
4 protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of
5 the First and Fourteenth Amendments.

6 23. Second, Councilman Carrigan contends that the Commission's final decision should be
7 reversed under the Administrative Procedure Act because the final decision is affected by error of law.
8 NRS 233B.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly
9 interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in
10 that subsection without receiving any evidence that rebutted the presumption.

11 24. Third, Councilman Carrigan contends that the Commission's final decision should be
12 reversed under the Administrative Procedure Act because the final decision is not supported by reliable,
13 probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

14 25. Fourth, Councilman Carrigan contends that the Commission's final decision should be
15 reversed under the Administrative Procedure Act because the final decision is arbitrary and capricious
16 and characterized by abuse of discretion. NRS 233B.135(3)(f).

17 26. Finally, Councilman Carrigan contends that the Commission's final decision should be
18 reversed under the Administrative Procedure Act because the final decision violates his constitutional
19 rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically,
20 Councilman Carrigan contends that his constitutional rights to due process were violated because
21 Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an
22 appearance or implied probability of bias and which disqualified them from participating in the
23 Commission's hearing regarding the ethics complaints against Councilman Carrigan.

24 27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do

1 not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final
2 decision of the Commission pursuant to NRS 233B.135(3).

3 **Standard of Review**

4 28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to
5 show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of
6 Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must
7 prove that substantial rights have been prejudiced by the final decision of the Commission because the
8 final decision is:

- 9 (a) In violation of constitutional or statutory provisions;
- 10 (b) In excess of the statutory authority of the agency;
- 11 (c) Made upon unlawful procedure;
- 12 (d) Affected by other error of law;
- 13 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the
14 whole record; or
- 15 (f) Arbitrary or capricious or characterized by abuse of discretion.

16 NRS 233B.135(3).

17 29. In reviewing the final decision of the Commission, the standard of deference accorded to the
18 Commission's determinations turns largely on whether the determinations are more appropriately
19 characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121
20 Nev. 523, 527 (2005).

21 30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at
22 527-28. Under that deferential standard, the Court may not look beyond the administrative record or
23 substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact.
24 NRS 233B.135(3); Weaver, 121 Nev. at 498. Thus, the Court must uphold the Commission's findings
of fact if they are supported by substantial evidence in the record, regardless of whether the Court would
have reached the same view of the facts as the Commission. Wright v. State, Dep't of Motor Vehicles,
121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence

1 which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence
2 need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

3 31. In addition to giving deference to the Commission's findings of fact, the Court must give
4 deference to the Commission's conclusions of law when they are closely tied to the Commission's view
5 of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure
6 questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered
7 to undertake an independent de novo review, and the Court is not required to defer to the Commission's
8 legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v.
9 Nev. Cement Co., 117 Nev. 960, 964 (2001).

10 32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the
11 statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n
12 on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the Commission is clothed with the
13 power to interpret the ethics statutes as a necessary precedent to its administrative action and "great
14 deference should be given to that interpretation if it is within the language of the statute." Nev. Tax
15 Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co.,
16 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's
17 interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the
18 language of the statutes and is consistent with legislative intent. JMA/Lucchesi, 110 Nev. at 5-7; City of
19 Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

20 **Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected**
21 **speech in violation of the First Amendment.**

22 33. Councilman Carrigan contends that legislative voting is protected speech under the First
23 Amendment and that he had a constitutional right as an elected public officer to engage in such
24 protected speech when he voted on the Lazy 8 project. Because the Commission concluded that

1 subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8
2 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and
3 as applied to him because they impermissibly restrict his protected speech in violation of the First
4 Amendment. In response, the Legislature raises several arguments in opposition to Councilman
5 Carrigan's constitutional challenge to the validity of the statutory provisions.

6 34. First, the Legislature contends that the First Amendment was not applicable under the
7 circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the
8 Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative
9 proceeding, but was an administrative proceeding at which the City Council and its members were
10 required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman
11 Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing
12 political, professional and personal relationship with Vasquez which created an appearance or implied
13 probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due
14 Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First
15 Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS
16 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

17 35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are
18 subject to review under the First Amendment in this case, the balancing test established by the United
19 States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of
20 review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS
21 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital
22 interest in ethical government outweighs any interest Councilman Carrigan has to vote upon a matter in
23 which he has a disqualifying conflict of interest.

24 36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review

1 under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and
2 as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical
3 government and guarding the public from biased decisionmakers; and (2) the statutory provisions
4 requiring disqualified public officers to abstain from voting constitute the least restrictive means
5 available to further the state's compelling interest.

6 37. Although the Legislature makes a cogent argument that the First Amendment was not
7 applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case.
8 Instead, even assuming that the First Amendment was applicable under the circumstances, the Court
9 finds that under the Pickering balancing test, any interference with protected speech is warranted
10 because of the state's strong interest in either having ethical government or the appearance of ethical
11 government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on
12 their face and as applied to Councilman Carrigan.

13 38. Although public officers and employees do not surrender their First Amendment rights as a
14 result of their public service, it is well established that the free speech and associational rights of public
15 officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413
16 U.S. 548, 567 (1973). Because the free speech and associational rights of public officers and employees
17 are not absolute, states may enact reasonable regulations limiting the political activities of public
18 officers and employees without violating the First Amendment. Clements v. Fashing, 457 U.S. 957,
19 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

20 39. Several cases from the First Circuit have found that "[v]oting by members of municipal
21 boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the
22 status of public officials' votes as constitutionally protected speech [is] established beyond peradventure
23 of doubt." Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir.
24 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit

1 recognizes that voting by public officers is constitutionally protected speech, the First Circuit also
2 recognizes that “[t]his protection is far from absolute,” and that when a public officer claims his First
3 Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review
4 to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 74-
5 76; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

6 We have extended First Amendment protection to votes on “controversial public issues”
7 cast by “a member of a public agency or board.” Miller v. Town of Hull, 878 F.2d 523, 532
8 (1st Cir. 1989) (“There can be no more definite expression of opinion than by voting on a
9 controversial public issue.”); see also Stella v. Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995).
10 This protection is far from absolute, however. In their capacity as public officials voting on
11 matters of public concern, plaintiffs retain First Amendment protection “so long as [their]
12 speech does not unduly impede the government’s interest . . . in the efficient performance of
13 the public service it delivers through” its appointed officials. O’Connor, 994 F.2d at 912
14 (citing cases). Accordingly, to determine the scope of First Amendment free speech
15 protections applicable to public officials, we have employed a three-part test extracted
16 largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v.
17 Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

18 Mullin, 284 F.3d at 37.

19 40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper
20 standard of review for this case. Under the Pickering balancing test, the Court must weigh the interests
21 of public officers and employees in exercising their First Amendment rights against the state’s vital
22 interest in “promot[ing] efficiency and integrity in the discharge of official duties.” Connick v. Myers,
23 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson,
24 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the
potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may
impose significant restraints on the speech that “would be plainly unconstitutional if applied to the
public at large.” United States v. Nat’l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v.
Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion). Thus, under the Pickering balancing test, the
state is given greater latitude to restrict the speech of public officers and employees to promote

1 operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in
2 the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004);
3 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006).

4 41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting
5 upon a matter when he has a “commitment in a private capacity to the interests of others.” The purpose
6 of the statutory provisions is to prevent a public officer from voting upon a matter when private interests
7 create an actual conflict of interest or the appearance of a conflict of interest. Under such circumstances,
8 a reasonable person would have a legitimate fear that the public officer’s commitment to the private
9 interests of others could potentially disrupt or undermine the public officer’s efficiency, effectiveness
10 and integrity in the discharge of his official duties. Thus, on their face, the statutory provisions serve the
11 vital state interest of securing the efficient, effective and ethical performance of governmental functions.
12 See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) (“The elimination and prevention of conflict of
13 interest is a proper state purpose.”).

14 42. Because the statutory provisions serve such a vital state interest, the balancing of interests
15 under the Pickering test tilts heavily in favor of the state because the state’s interests are at their zenith.
16 In contrast, a public officer’s interest in voting upon a matter in which he has a disqualifying conflict of
17 interest is entitled to little or no protection under the First Amendment. Indeed, allowing a public officer
18 to vote under such circumstances would seriously erode the public’s confidence in ethical government.
19 Therefore, because the state’s interest in securing the efficient, effective and ethical performance of
20 governmental functions outweighs any interest that a public officer may have in voting upon a matter in
21 which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS
22 281A.420 are facially constitutional under the Pickering balancing test.

23 43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied
24 to Councilman Carrigan. Given Vasquez’s role as Councilman Carrigan’s campaign manager, political

1 advisor, confidant and close personal friend, the record contains substantial evidence that Councilman
2 Carrigan and Vasquez had a substantial and continuing political, professional and personal relationship
3 when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to
4 create an actual conflict of interest or the appearance of a conflict of interest, and a reasonable person
5 would have had a legitimate fear that the relationship could potentially disrupt or undermine
6 Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties.
7 Under such circumstances, Councilman Carrigan had a disqualifying conflict of interest. Because the
8 First Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the
9 Commission acted constitutionally when it found that Councilman Carrigan was prohibited from voting
10 upon the Lazy 8 project.

11 44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of
12 NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore,
13 subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of
14 the First Amendment.

15 **Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in**
16 **violation of the First and Fourteenth Amendments.**

17 45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v.
18 Lawson, 461 U.S. 352, 358 n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute
19 prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates
20 v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is unconstitutionally vague on its face if the statute:
21 (1) fails to provide people of ordinary intelligence with a reasonable opportunity to understand what
22 conduct it prohibits; or (2) authorizes or encourages arbitrary and discriminatory enforcement by the
23 officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868
24 (2004).

1 46. In determining whether a statute is unconstitutionally overbroad or vague, the United States
2 Supreme Court considers whether there are any procedures in place allowing persons with doubts about
3 the meaning of the statute to obtain clarification from the agency charged with its enforcement. U.S.
4 Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma,
5 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion);
6 Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme
7 Court typically will not find the statute to be unconstitutionally overbroad or vague if such persons "are
8 able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the
9 meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting
10 Letter Carriers, 413 U.S. at 580); Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct.
11 App. 1982).

12 47. Under the Ethics Law, a public officer may request an advisory opinion from the
13 Commission regarding "the propriety of his own past, present or future conduct" and receive guidance
14 from the Commission on whether to withdraw or abstain from participating in a matter. NRS
15 281A.440(1) & 281A.460. Each request so made by a public officer and each advisory opinion rendered
16 by the Commission in response to such a request, and any motion, determination, evidence or hearing
17 record relating to such a request, are confidential unless the public officer who requested the advisory
18 opinion permits the disclosure of the confidential information or acts in contravention of the advisory
19 opinion. NRS 281A.440(5).

20 48. In this case, Councilman Carrigan failed to seek an advisory opinion from the Commission
21 even though he had ample time and opportunity to do so. The record shows that Vasquez became
22 Councilman Carrigan's campaign manager 6 months or more before the City Council meeting.
23 (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's
24 simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-

1 43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during
2 this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory
3 opinion and obtain clarification of the statute from the Commission when he had ample opportunity to
4 do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or
5 vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was
6 unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics
7 commission regarding the propriety of his conduct).

8 49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's
9 intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague
10 in violation of the First and Fourteenth Amendments.

11 50. The United States Supreme Court has recognized that the overbreadth and vagueness
12 doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick,
13 413 U.S. at 613. In addition, a statute should not be invalidated on its face "when a limiting
14 construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not
15 be invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First
16 Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis."
17 Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

18 51. Under the overbreadth doctrine, a statute is not overbroad merely because the statute, if
19 construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal
20 amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as
21 overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in
22 relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth
23 challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth.
24 Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual

1 fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y.
2 State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed
3 consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld
4 even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City
5 of Las Vegas v. Dist. Ct., 122 Nev. ---, 146 P.3d 240, 247 (2006).

6 52. When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it
7 regulates political activity in an even-handed and neutral manner and is not attempting to suppress any
8 particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420
9 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers
10 from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to
11 vote "yes" or "no" on the matter. Thus, because the statute "is not a censorial statute, directed at
12 particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

13 53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the
14 scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected
15 speech. The purpose of the statute is to prevent public officers from voting upon matters when private
16 interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a
17 universal and long-established rule under the common law that members of public bodies are prohibited
18 from voting upon matters in which they have disqualifying conflicts of interest, and this traditional
19 common-law rule "is founded on principles of natural justice and sound public policy." Bd. of
20 Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E. 146, 149 (Ga. 1888);
21 Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W.
22 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v.
23 Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-
24 established" tradition under the common law of prohibiting certain conduct, this creates a "strong

1 presumption" that the prohibition is constitutional under the First Amendment. Republican Party of
2 Minn. v. White, 536 U.S. 765, 785 (2002). Thus, because public officers do not have a First
3 Amendment right to vote upon matters in which they have disqualifying conflicts of interest, subsections
4 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

5 54. Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in
6 abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of
7 protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained
8 by the Nevada Supreme Court, "[e]ven if a law at its margins proscribes protected expression, an
9 overbreadth challenge will fail if the 'remainder of the statute . . . covers a whole range of easily
10 identifiable and constitutionally proscribable . . . conduct.'" City of Las Vegas, 146 P.3d at 247
11 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

12 55. In this case, Councilman Carrigan's conduct falls squarely within the intended scope of the
13 statute and was not protected by the First Amendment. When the Legislature enacted the definition of
14 "commitment in a private capacity to the interests of others" in Senate Bill No. 478 (70th Sess. 1999), it
15 clearly had in mind situations where a public officer's substantial and continuing relationship with his
16 campaign manager would require abstention. In the legislative hearings on S.B. 478, Senator Dina Titus
17 and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

18 Senator Titus questioned:

19 I just have a question of how this would fit with either the existing language or the new
20 language. One of the cases that had a lot of notoriety involved a commissioner and someone
21 who had worked on her campaign. Sometimes people who do campaigns then become
22 lobbyists. If you could not vote on any bill that was lobbied by someone who had
23 previously worked on your campaign, how would all of that fit in here. It is not really a
24 business relationship or a personal relationship, but I don't [do not] know what it is.

22 Mr. Scherer stated:

23 The way that would fit in . . . the new language that the Governor is suggesting is that it
24 would not necessarily be included because it would not be a continuing business
relationship. So the relationship would have to be substantial and continuing. Now, if this
was one where the same person ran your campaign time, after time, after time, and you had
a substantial and continuing relationship, yes, you probably ought to disclose and abstain in

1 cases involving that particular person.

2 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999)
3 (emphasis added).

4 56. In light of this legislative history, it would be detrimental to society to invalidate the statute
5 on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute
6 and was not protected by the First Amendment. The statute also should not be invalidated on its face
7 because the statute's impact on the First Amendment is so speculative or slight that the First
8 Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by
9 petitioners whose conduct does not fall so squarely within the confines of the statute.

10 57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because:
11 (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the
12 extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore
13 is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended
14 scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that
15 subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First
16 Amendment.

17 58. Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical
18 precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never
19 expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110
20 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable
21 breadth, rather than meticulous specificity. Id. As explained by the United States Supreme Court:

22 [T]here are limitations in the English language with respect to being both specific and
23 manageably brief, and it seems to us that although the prohibitions may not satisfy those
24 intent on finding fault at any cost, they are set out in terms that the ordinary person
exercising ordinary common sense can sufficiently understand and comply with, without
sacrifice to the public interest.

1 Letter Carriers, 413 U.S. at 578-79.

2 59. When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for
3 vagueness if it imposes only civil sanctions, instead of criminal penalties, since the United States
4 Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties
5 because the consequences of imprecision are qualitatively less severe." Hoffman Estates, 455 U.S. at
6 498-99; Groener, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was
7 subject to less exacting scrutiny for vagueness).

8 60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics
9 Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its
10 provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in
11 criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

12 61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the
13 provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which
14 could result in severe consequences for a public officer, including referring the matter to the Attorney
15 General or the appropriate District Attorney for a determination of whether a crime has been committed
16 and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court
17 finds that because none of the actions which the Commission is authorized to take under NRS 281A.480
18 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law*, it
19 would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

20 62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable
21 from office by impeachment only has committed a willful violation of the Ethics Law, the Commission
22 is required to file a report with the appropriate person responsible for commencing impeachment
23 proceedings. It is well established, however, that impeachment proceedings are not criminal
24 proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev.

1 Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States
2 §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose
3 of an impeachment is to protect the state, not to punish the offender.").

4 63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is
5 removable from office pursuant to NRS 283.440 has committed one or more willful violations of the
6 Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence
7 removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer.
8 It is well established, however, that removal proceedings conducted pursuant to NRS 283.440 are civil
9 proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction.
10 Adler v. Sheriff, 92 Nev. 436, 439 (1976) ("The laws for removal of public officers are not criminal
11 statutes nor are the proceedings criminal proceedings.").

12 64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the
13 Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in
14 accordance with the applicable provisions governing his employment. It is well established, however,
15 that disciplinary proceedings conducted against public employees are administrative proceedings, not
16 criminal proceedings. Navarro v. State ex rel. Dep't of Human Res., 98 Nev. 562, 563-65 (1982); State,
17 Dep't of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

18 65. Finally, NRS 281A.480(7) provides:

19 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions
20 of the Nevada Revised Statutes which define crimes or prescribe punishments with respect
21 to the conduct of public officers or employees. If the Commission finds that a public officer
22 or employee has committed a willful violation of this chapter which it believes may also
constitute a criminal offense, the Commission shall refer the matter to the Attorney General
or the district attorney, as appropriate, for a determination of whether a crime has been
committed that warrants prosecution.

23 66. Even though the Commission is required to refer certain matters to the Attorney General or
24 the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a

1 state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics
2 Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions.
3 Rather, such a criminal prosecution could occur only under the criminal laws of this state.

4 67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its
5 provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law
6 was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its
7 view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all.
8 (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a
9 violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less
10 exacting scrutiny for vagueness.

11 68. Furthermore, when the government restricts the speech of its public officers and employees,
12 it may use broad and general language even if such language would create "a standard almost certainly
13 too vague when applied to the public at large." Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality
14 opinion). For example, a federal statute allowed the government to remove a federal employee "for such
15 cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974)
16 (plurality opinion). An employee who was discharged for making public statements critical of his
17 supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The United States
18 Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of
19 the infinite variety of factual situations in which public statements by Government employees might
20 reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required,
21 the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized
22 "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater
23 specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail
24 all that conduct which will result in retaliation. The most conscientious of codes that define prohibited

1 conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or
2 'conduct unbecoming.'" Id. at 161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

3 69. In a case challenging the constitutionality of the rule of judicial conduct which requires
4 judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district
5 court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d
6 672, 708-10 (E.D. Ky. 2004). The court found that while the rule is stated in broad and general terms,
7 the rule also contains four specific instances which require recusal: (1) personal bias or prejudice
8 concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic
9 interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the
10 controversy. The court held that the rule did not prohibit a substantial amount of protected speech in
11 relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws
12 based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality
13 of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not
14 vague because it provided enough guidance for a judge to determine, "in most instances," the
15 circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at
16 710; see also Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family
17 Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

18 70. In a similar vein, the Nevada Supreme Court has held that broad and general terms, like
19 "unprofessional conduct," are not vague when used to define the ethical standards governing various
20 professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v.
21 Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of
22 Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the court:

23 [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt
24 to specify in a statute or regulation all of the acts which come within the meaning of the
term. The fact that it is impossible to catalogue all of the types of professional misconduct
is the very reason for setting up the statutory standard in broad terms and delegating to the

1 board the function of evaluating the conduct in each case.

2 Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

3 71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship
4 that is substantially similar to a commitment or relationship described in this subsection" is designed to
5 capture the infinite variety of factual situations in which private commitments and relationships will
6 cause a public officer to have a disqualifying conflict of interest. Considering that it would have been
7 infeasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying
8 conflict of interest in the language of the statute, it was appropriate for the Legislature to enact such a
9 reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in
10 each case.

11 72. Furthermore, because the language of the catch-all provision is expressly tied to the four
12 types of private commitments and relationships already enumerated in the statute, the Legislature has
13 given the Commission and public officers four very specific and concrete examples to guide and
14 properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by
15 the Commission.

16 73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and
17 public officers regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer,
18 Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

19 [The new language in NRS 281A.420] would be, 'any substantially similar commitment or
20 relationship.' Because I can tell you what the Governor was trying to get at was actually
21 trying to make the language better by defining 'commitment in a private capacity to the
22 interests of other.' That, I think, is even more vague than the language we have in here,
23 which sets forth some categories. We also, though, on the other hand, did not want to
24 specifically limit it to just these categories. But what we were trying to get at relationships
that are so close that they are like family. That they are substantially similar to a business
partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then
we said, 'any substantially similar commitment or relationship.' That would express the
view that we are trying to get at which is, it has got to be a relationship that is so close, it is
like family, it is like a member of your household, it is like a business partner.

1 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

2 74. On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose
3 and scope of the catch-all provision:

4 Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal
5 relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any
6 commitment or relationships that is substantially similar to any one of the relationships set
7 forth in this paragraph." The intent of change, he stated, is to capture a relationship, not
8 listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers
9 them family. He commented with this change the ethics commission would still have some
10 discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed
11 out, it has to actually be shown that the relationship is substantially similar to one of the four
12 other relationships listed, including a member of one's family, member of one's household,
13 an employment relationship, or a business relationship. The commission, he restated, would
14 have to show the relationship is "as close as" or "substantially similar" . . . He reiterated this
15 would give the ethics commission some discretion for those egregious cases that may slip
16 through the cracks otherwise, while still giving some guidance to public officials who need
17 to know what their obligations are. He declared this language to be an improvement on
18 existing law and an appropriate balance between trying to provide guidance and trying to
19 allow the ethics commission discretion.

20 Chairman O'Connell concurred stating, "I do not think that that language could leave any
21 doubt in anybody's mind about the relationship. In my looking at it, I think you did a
22 terrific job with that, because it certainly does tell you exactly what kind of relationship you
23 would have with the person and it would make it much easier to determine that before
24 voting."

Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a
private capacity to the interests of others." He stressed the importance of attempting to give
guidance without completely taking away the ethics commission's discretion.

18 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

19 75. In the face of this legislative history, it is reasonable to expect a public officer of ordinary
20 intelligence to understand the types of private commitments and relationships that are "substantially
21 similar" to those he has with: (1) a member of his household; (2) a person who is related to him by
22 blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who
23 employs him or a member of his household; or (4) a person with whom he has a substantial and
24 continuing business relationship. Through the exercise of ordinary common sense, a reasonable public

1 officer could readily deduce that the four types of private commitments and relationships that are
2 explicitly described in the statute all involve close, substantial and continuing relationships. It follows
3 by simple logic that the catch-all provision extends to "substantially similar" private commitments and
4 relationships which also constitute close, substantial and continuing relationships akin to those
5 commitments and relationships that are explicitly described in the statute. Because it is not
6 unreasonable to expect a public officer to know when he has a close, substantial and continuing
7 relationship with another person, most public officers should have little difficulty in conforming their
8 conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of
9 further guidance, they can request advisory opinions from the Commission pursuant to NRS
10 281A.440(1) and 281A.460.

11 76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because:
12 (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the
13 statute from the Commission when he had ample opportunity to do so; (2) the statute contains
14 sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can
15 adequately understand the type of conduct that is prohibited by the statute; and (3) the statute contains
16 four very specific and concrete examples of prohibited conduct to guide and properly channel
17 interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.
18 Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally
19 vague in violation of the First and Fourteenth Amendments.

20 **The Commission did not commit an error of law in finding that the presumption in**
21 **subsection 2 of NRS 281A.420 does not apply in this case.**

22 77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS
23 281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission.
24 The Court disagrees.

1 78. The presumption contained in subsection 2 of NRS 281A.420 states:

2 It must be presumed that the independence of judgment of a reasonable person would not be
3 materially affected by his pecuniary interest or his commitment in a private capacity to the
4 interests of others where the resulting benefit or detriment accruing to him or to the other
5 persons whose interests to which the member is committed in a private capacity is not
6 greater than that accruing to any other member of the general business, profession,
7 occupation or group.

8 79. As illustrated by the following discussion on the record at the hearing, the Commission fully
9 considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on
10 the facts:

11 COMMISSIONER HSU: . . . I think people put too much emphasis on this language
12 when I see people argue it when the resulting benefit or detriment accruing to him would not
13 be greater than any accruing to any other member in a general business. There is only one
14 lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard.
15 It's not like the entire business profession of lobbyists are being affected uniformly. That's
16 kind of what that language is there for.

17 So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who
18 is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the
19 professional benefit by having this approved, and of course, the vote was that it got denied,
20 the vote, but I just don't see how that language applies because it is not a broad application.

21 Again, . . . I just don't see how every—how the entire group of lobbyists is being affected
22 by the passage or failure of this vote. Thanks.

23 * * *

24 COMMISSIONER JENKINS: . . . We 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?

VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . .
[W]e're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about
his commitment in a private capacity to the interests of others. So we're not talking about
his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.

So I think that Commissioner Hsu's reasoning does, I think, apply . . . 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.

1 So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph
2 does not necessarily save the day.

3 COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're
4 right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

5 80. Therefore, the Court holds that the Commission did not commit an error of law in finding
6 that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

7 **The Commission's decision was supported by reliable, probative and substantial**
8 **evidence on the whole record and was not arbitrary or capricious or characterized by**
9 **an abuse of discretion.**

10 81. After review of the record, the Court finds that substantial evidence exists to support the
11 Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he
12 voted on the Lazy 8 project.

13 82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as
14 adequate to support a conclusion. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005).

15 83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature
16 declared:

17 To enhance the people's faith in the integrity and impartiality of public officers and
18 employees, adequate guidelines are required to show the appropriate separation between the
19 roles of persons who are both public servants and private citizens.

20 NRS 281A.020(2)(b).

21 84. Accordingly, the disclosure and abstention law holds public officers accountable to the
22 public for complete disclosures of private commitments and for the proper exercise of their judgment to
23 abstain or not to abstain, by requiring them to make that judgment after evaluating their private
24 commitments and the effects of their decision on those private commitments. NRS 281A.420; see also
In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

1 [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter
2 with respect to which the independence of judgment of a reasonable person in his
3 situation would be materially affected by . . . [h]is commitment in a private capacity to
the interests of others.

4 86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of
5 NRS 281A.420 as:

- 6 [A] commitment to a person:
- 7 (a) Who is a member of his household;
 - 8 (b) Who is related to him by blood, adoption or marriage within the third degree of
consanguinity or affinity;
 - 9 (c) Who employs him or a member of his household;
 - 10 (d) With whom he has a substantial and continuing business relationship; or
 - 11 (e) Any other commitment or relationship that is substantially similar to a commitment
or relationship described in this subsection.

12 87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type
13 that the Legislature intended to encompass when adopting the definition of "commitment in a private
14 capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is
15 evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the
1999 legislative session.

16 [I]t has to actually be shown that the relationship is substantially similar to one of the four
17 other relationships listed, including a member of one's family, member of one's household,
18 an employment relationship, or a business relationship. The commission, he restated, would
19 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.

20 Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 33 (Nev. Apr. 7, 1999).

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

23 The way that would fit in . . . if this was one where the same person ran your campaign time,
24 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.

1 96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice
2 from the Sparks City Attorney, his legal counsel. (ROA000112-114.) Neither Councilman Carrigan nor
3 his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on
4 the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General
5 Opinion (AGO 98-27). (ROA000112.)

6 97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking
7 an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that
8 abstention is required:

9 where it appears from objective evidence that as a result of the acquaintance or friendship, a
10 reasonable person in the public officer's situation would have no choice but to be beholden
11 to someone who has an actual interest in the matter . . . In such circumstances, the public
12 official's independence of judgment would be materially affected.

12 (ROA000121.)

13 98. The Court finds that substantial evidence exists to support the Commission's conclusion that
14 at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the
15 interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman
16 Carrigan's situation would have been materially affected by that commitment. Therefore, Councilman
17 Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of
18 NRS 281A.420.

19 99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy
20 8 project was a violation of subsection 2 of NRS 281A.420.

21 100. Therefore, the Court holds that the Commission's final decision was supported by reliable,
22 probative and substantial evidence on the whole record and was not arbitrary or capricious or
23 characterized by an abuse of discretion.

1 **Councilman Carrigan's constitutional rights to due process were not violated by the**
2 **participation of Commissioners Hsu and Flangas in the Commission's hearing.**

3 101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject
4 to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters
5 where a reasonable person's independence of judgment would be materially affected by a commitment
6 in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

7 102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada
8 Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification.
9 NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

10 (1) A judge shall disqualify himself or herself in a proceeding in which the judge's
11 impartiality might reasonably be questioned, including but not limited to instances where:

12 (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer,
13 or personal knowledge of disputed evidentiary facts concerning the proceeding;

14 * * *

15 (d) the judge or the judge's spouse, or a person within the third degree of relationship
16 to either of them, or the spouse of such a person:

17 * * *

18 (ii) is acting as a lawyer in the proceeding;

19 (iii) is known by the judge to have a more than de minimis interest that could be
20 substantially affected by the proceeding;

21 * * *

22 103. Based on these standards, and the fact that Councilman Carrigan waived any objections to
23 the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due
24 process were not violated.

Commissioner Hsu

25 104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent
26 representation of The Nugget³ by his law firm, Maupin Cox & LeGoy. However, there is no evidence
27 that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's

³ The Nugget is an opponent of the Lazy 8 project.

1 representation of The Nugget at the time of Councilman Carrigan's hearing. Additionally, The Nugget
2 was not a party to the matter heard by the Commission.

3 105. Further, although Commissioner Hsu did vote in favor of a finding in violation of
4 subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of
5 subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

6 106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement
7 in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal
8 knowledge of his law partner's subsequent representation of Vasquez's business interests.
9 (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any
10 motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection.
11 Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

12 **Commissioner Flangas**

13 107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex
14 Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The
15 Nugget, required his disqualification.

16 108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably
17 be affected by his commitment to a person who is related to him by blood, adoption or marriage "within
18 the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable
19 person's independence of judgment would be materially affected by such a relationship.

20 109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex
21 Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once
22 removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex
23 Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to
24 Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was

1 required based on his familial relationship to Alex and Amanda Flangas because that relationship is not
2 within the third degree of consanguinity or affinity.

3 110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel
4 waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

5 111. Therefore, the Court finds that Councilman Carrigan has not established a due process
6 violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in
7 light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that
8 Councilman Carrigan's constitutional rights to due process were not violated by the participation of
9 Commissioners Hsu and Flangas in the Commission's hearing.

10 **ORDER AND JUDGMENT**

11 112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do
12 not unconstitutionally restrict protected speech in violation of the First Amendment; (2) subsections 2
13 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and
14 Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the
15 presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's
16 decision was supported by reliable, probative and substantial evidence on the whole record and was not
17 arbitrary or capricious or characterized by an abuse of discretion; and (5) Councilman Carrigan's
18 constitutional rights to due process were not violated by the participation of Commissioners Hsu and
19 Flangas in the Commission's hearing.

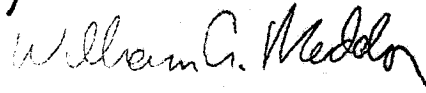
20 113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision
21 of the Commission pursuant to NRS 233B.135(3).

22 114. All parties shall bear their own costs and attorney's fees.

23 115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required
24 to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order

1 and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such
2 notice of entry with the Clerk of Court.

3
4 DATED: This 28th day of May, 2008.

5 

6
7 WILLIAM A. MADDOX
DISTRICT COURT JUDGE

8 Submitted by:

9 ADRIANA G. FRALICK, General Counsel

Nevada Bar No. 9392

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Attorneys for Amicus Curiae Legislature of the State of Nevada

DISTRICT COURT MINUTES

CASE NO. 07OC01245 TITLE: MICHAEL A. CARRIGAN VS THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA

5/12/08 - DEPT. II - JUDGE MADDOX - J. Harkleroad, Clerk - J. Adams, Reporter

PETITION FOR JUDICIAL REVIEW

Present: Petitioner with counsel, Douglas R. Thornley and Chester H. Adams; Adriana G. Fralick, counsel for Respondent; Kevin C. Powers, counsel for Nevada Legislative Counsel Bureau as Amicus Curiae.

Counsel argued the Petition. Statements were made by Court.

COURT ORDERED: It will uphold the Nevada Commission's on Ethics decision. Fralick or Powers to prepare Decision. Counsel to submit Order to Mr. Thornly by the May 19th, Mr. Thornly has until May 26th to object to anything in the Order. If there are no objections the Court will sign the Order that is submitted to the Court.

1 Case No. 07 OC 01245 1B

2 Dept. No. 2

REC'D & FILED

08 JUN 24 P2:40

ALAN HIGGINS
CLERK

BY

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR CARSON CITY

8
9 MICHAEL A. CARRIGAN, Fourth
10 Ward City Council Member, of
11 the City of Sparks,
Petitioner,

CERTIFICATE OF SERVICE
BY MAIL

11 vs.

12 THE COMMISSION ON ETHICS OF
13 THE STATE OF NEVADA,
Respondent.

14 _____/
15 I hereby certify that I am employed by the Office of the
16 Carson City District Court Clerk, Carson City, Nevada, and that on the
17 24th day of June, 2008, I deposited in the United States mail, with
18 postage prepaid, two certified copies of the following documents
19 addressed to TRACIE LINDEMAN, Clerk of the Supreme Court, 201 South
20 Carson Street, Capitol Complex, Carson City, NV, 89710, pursuant to
21 NRAP 3(e): Notice of Appeal filed June 24, 2008; Case Appeal
22 Statement filed June 24, 2008; Full Case History (District Court
23 docket entries) generated June 24, 2008; Order and Judgment Denying
24 the Petitioner's Petition for Judicial Review and Affirming the Final
25 Decision of the Nevada Commission on Ethics filed May 28, 2008; Notice

26 -----

27 -----

28 -----

1 of Entry of Order filed May 30, 2008; Minutes of District Court
2 proceedings; and this Certificate of Service by Mail filed June 24,
3 2008. Any Certification Order directing entry of judgment pursuant
4 to NRCP 54(b) and List of Exhibits have not been transmitted because
5 the District Court file does not contain those particular documents.
6
7
8
9

J. HIGGINS

CERTIFIED COPY

The document to which this certificate is attached
is a full, true and correct copy of the original on
file and of record in my office.

Date June 24 2008

Alan Glover, City Clerk and Clerk of the First
Judicial District Court of the State of Nevada, in
and for Carson City.

By J. Higgins Deputy

Per NRS 239 Sec.6 the SSN may be redacted,
but in no way affects the legality of the document.

**SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

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.

Supreme Court No. 51920
District Court Case No. 07OC0124!

RECEIPT FOR DOCUMENTS

TO: Sparks City Attorney and Chester H. Adams, City Attorney and Douglas
R. Thornley, Asst. City Attorney
Nevada Commission on Ethics and Adriana G. Fralick
Alan Glover, Carson City Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

06/25/08 Filing Fee Waived: State/County/Municipality.

06/25/08 Filed Certified Copy of Notice of Appeal.
Notice of exemption from settlement conference program mailed to all counsel.
(Docketing statement mailed to counsel for appellant.)

DATE: June 25, 2008

Tracie Lindeman, Clerk of Court

By: _____

Deputy Clerk

