No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari
to the Supreme Court of Nevada

AMICUS CURIAE BRIEF OF THE NEVADA LEGISLATURE

Supporting Petitioner
Nevada Commission on Ethics
and Supporting Reversal

KEVIN C. POWERS, ***Counsel of Record***
Senior Principal Deputy Legislative Counsel
kpowers@lcb.state.nv.us
BRENDA J. ERDOES
Legislative Counsel of the State of Nevada
NEVADA LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830; Fax: (775) 684-6761
Attorneys for Amicus Curiae Nevada Legislature

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

United States Supreme Court Rules

Nevada Constitution

Nevada Revised Statutes (NRS)

Statutes of Nevada

Nevada Legislative History

Nevada Supreme Court Rules

Sparks City Charter

Sparks Municipal Code

Other Authorities

INTEREST OF AMICUS CURIAE

Under Nevada Revised Statutes (NRS) 218F.720, the Nevada Legislature is authorized to appear in any action to protect its official interests, including actions challenging the validity of Nevada's statutes. Leg. App. 1a. In the district court, the Legislature defended the constitutionality of Nevada's recusal statute—NRS 281A.420—by filing an *amicus curiae* brief and presenting oral argument at the hearing. Pet. App. 41a-42a. The Legislature also filed an *amicus curiae* brief with the Nevada Supreme Court. Pet. App. 6a. In this Court, the parties consented to the filing of *amicus curiae* briefs.[1]

Because the Legislature enacted Nevada's recusal statute to promote ethical conduct and prevent the appearance of impropriety, corruption and bias by its public officers, the Legislature has a vital interest in defending the statute and upholding Nevada's important public policy of requiring its officials to abstain from voting when they have ethical conflicts that undermine "the people's faith in the integrity and impartiality of public officers." NRS 281A.020.

As an *amicus curiae* in the state courts, the Legislature made several arguments in response to Carrigan's First-Amendment challenges. Pet. App. 56a-58a. As an *amicus curiae* in this Court, the Legislature focuses on its threshold argument: the First Amendment does not protect conduct which the Due Process Clause forbids.

---

[1] Per Rule 37.6, the Legislature states that counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no other person made such a monetary contribution.

Specifically, when Carrigan voted on Red Hawk's application, he was acting in an administrative capacity, not in a legislative capacity, and his extreme ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. Under such circumstances, Carrigan's voting was not protected by the First Amendment. It was forbidden by the Due Process Clause.

Because this argument addresses the pivotal issue of whether Carrigan's voting was protected by the First Amendment, the Legislature believes its argument "may be of considerable help to the Court." Rule 37.1. This argument is properly before the Court because it falls within the questions presented for review under Rules 14.1(a) and 24.1(a), and it was briefed and presented to and considered by the state courts. Pet. App. 18a, 57a-58a.

In addition to the arguments made herein, the Legislature joins and concurs in the arguments made by the Nevada Commission on Ethics (Commission) in its brief on the merits.

SUMMARY OF ARGUMENT

This case falls at the intersection of the First and Fourteenth Amendments. Because the First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, the First Amendment does not protect conduct which the Due Process Clause forbids.

A fair hearing in a fair tribunal is a basic requirement of due process. To ensure fairness at administrative hearings, the Due Process Clause forbids the participation of decisionmakers whose

extreme ethical conflicts create an objective and constitutionally intolerable risk of prejudgment or actual bias.

The Nevada Supreme Court held that Carrigan's act of voting on the Lazy 8 was protected by the First Amendment because he was voting in a "legislative" proceeding. Pet. App. 11a. Carrigan, however, was voting in an administrative proceeding where an impartial and disinterested tribunal was a basic requirement of due process and where Carrigan's extreme ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. Under such circumstances, Nevada's recusal statute did not violate Carrigan's First-Amendment rights because his act of voting was not protected by the First Amendment. It was forbidden by the Due Process Clause.

The Lazy 8 hearing was not a legislative proceeding because the council was not enacting a land-use policy of general applicability. Instead, the council was conducting an administrative land-use proceeding where it was applying existing land-use policies to make a specific and individualized decision regarding Red Hawk's application. Consequently, the council members needed to be neutral decisionmakers who were free of ethical conflicts that created a serious, objective risk of prejudgment or actual bias. Carrigan was not such a neutral decisionmaker at the Lazy 8 hearing.

Carlos Vasquez, the principal lobbyist for Red Hawk who appeared, testified and lobbied at the Lazy 8 hearing, was at the same time serving as Carrigan's campaign manager during Carrigan's

then-ongoing and contentious reelection bid. The predominant issue during Carrigan's campaign was the suitability of the controversial Lazy 8 project. During this period, Vasquez actively solicited campaign contributions for Carrigan, including soliciting contributions from persons who were principals either in Red Hawk or one of its affiliates or who were otherwise directly interested in the success of the Lazy 8. Vasquez also contributed significant amounts of time, effort and at-cost services to Carrigan's campaign.

During Carrigan's two prior successful elections to the council, Vasquez served as Carrigan's campaign manager, and he made significant contributions of time, effort and at-cost services to those campaigns. Outside the context of Carrigan's campaigns, Vasquez had a substantial and continuing political, professional and personal relationship with Carrigan as his political advisor, confidant and close personal friend for more than a decade.

Given Vasquez's close-knit and long-standing relationship with Carrigan at the time of the Lazy 8 hearing, his prominent and public role as Carrigan's campaign manager and fundraiser during Carrigan's then-ongoing reelection campaign, and his extensive, extraordinary and indispensable contributions to the success of Carrigan's reelection, Vasquez would have appeared to an objective observer to be favorably positioned to exert significant and disproportionate influence over Carrigan as a decisionmaker at the hearing. Thus, a reasonable person would have had an objective and legitimate fear that Carrigan was predisposed to favor Vasquez and his client Red Hawk—a fear that was realized when Carrigan made

the initial motion to approve Red Hawk's project. Taken together, these exceptional and unusual circumstances combined to create an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. As a result, Carrigan was disqualified by the Due Process Clause from voting on Red Hawk's application, even if he did not harbor any actual bias.

Thus, the Nevada Supreme Court erred when it concluded that Carrigan's act of voting was protected by the First Amendment because Carrigan was constitutionally prohibited from voting on Red Hawk's application by the Due Process Clause. The Nevada Supreme Court also erred when it concluded that the catchall provision in Nevada's recusal statute is facially overbroad in violation of the First Amendment. Because Carrigan's conduct fell squarely within the intended scope of the recusal statute and was constitutionally prohibited, Carrigan had to meet the heavy burden of showing that the statute forbids a substantial amount of protected activity in situations outside of his own prohibited conduct. Carrigan failed to meet his burden.

Like common-law and judicial recusal rules, Nevada's recusal statute promotes ethical conduct and prevents the appearance of impropriety, corruption and bias by its public officers. The statute does not prohibit a substantial amount of protected activity in relation to its many legitimate applications. Even though the catchall provision is stated in general terms, its scope is limited by the specific relationships expressly described in the statute, and a reasonable public officer can easily deduce the statute's potential reach. To the extent

public officers need further guidance, they can request advisory opinions from the Commission and thereby remove any doubt as to the meaning of the law. If the Court were to invalidate Nevada's recusal statute as facially overbroad, the state would lose an invaluable tool in safeguarding the people's faith in the integrity and impartiality of public officers.

ARGUMENT

A. Nevada's recusal statute did not infringe on Carrigan's First-Amendment rights because his act of voting on Red Hawk's application was not protected by the First Amendment. It was forbidden by the Due Process Clause.

The First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996). It follows, therefore, that the First Amendment does not protect conduct which the Due Process Clause forbids.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). To ensure fairness in administrative proceedings, the Due Process Clause forbids the participation of decisionmakers whose extreme ethical conflicts create an objective and constitutionally intolerable risk of prejudgment or actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S.Ct. 2252, 2263-65 (2009); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973).

In the Nevada Supreme Court, Carrigan did not contest the Commission's or the district court's factual and legal findings that his ethical conflicts

disqualified him from voting under Nevada's recusal statute. Pet. App. 33a. If this was an ordinary case, Carrigan's statutory ethical violations would not have required further scrutiny under the Due Process Clause. *Caperton*, 129 S.Ct. at 2267 ("Because the codes of [ethical] conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.").

However, when this case is viewed appropriately through our nation's deep-rooted notions of fair play and impartial justice, this cannot be considered an ordinary case. Even the most objective observer would have been shocked when Carrigan's long-time campaign manager, fundraiser, political adviser and close personal friend—who was publicly and aggressively working to secure Carrigan's reelection at that very moment—appeared at the Lazy 8 hearing as a paid lobbyist for Red Hawk to publicly and aggressively lobby Carrigan and his fellow council members to approve Red Hawk's project. In this type of extraordinary situation, where an impartial and disinterested tribunal was essential to the appearance of fairness and justice, the Due Process Clause prohibited Carrigan from voting because his extreme ethical conflicts "created a constitutionally intolerable probability of actual bias." *Caperton*, 129 S.Ct. at 2262.

1. Carrigan was acting in an administrative capacity, not in a legislative capacity, when he voted on Red Hawk's application.

In Nevada, cities serve as "the agency by and through which the state exercises its sovereignty in a given locality." *State ex rel. City of Reno v. Reno Traction Co.*, 41 Nev. 405, 413, 171 P. 375, 377 (1918). They do not have the constitutional power of home rule. *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, 140 (1876). Thus, each of Nevada's cities "is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication. Its officers or agents, who administer its affairs, are created by the legislature, and chosen or appointed in the mode prescribed by the law of its creation." *Id.* Because Nevada's municipal officers are always subject to the Legislature's sovereign control, they are "mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature." *City of Reno v. Stoddard*, 40 Nev. 537, 542, 167 P. 317, 318 (1917).

The Nevada Constitution allows the Legislature to create cities through special acts, Nev. Const. art. 8, § 1; *Rosenstock*, 11 Nev. at 142-45; *Western Realty v. City of Reno*, 63 Nev. 330, 350-51, 172 P.2d 158, 168 (1946), and through general laws for municipal incorporation. Nev. Const. art. 8, § 8; NRS chs. 265-267; *State ex rel. Williams v. District Court*, 30 Nev. 225, 227-28, 94 P. 70, 71 (1908). In this case, the Legislature created the City of Sparks through a special act establishing its city charter. 1975 Nev.

Stat., ch. 470, at 724, as amended. Under that city charter, the Sparks City Council, consisting of five elected members, serves as the city's governing body. Sparks City Charter §§ 1.060, 2.010; Leg. App. 20a-21a.

Like other city councils, the Sparks City Council performs both legislative and administrative functions. See *Nevadans for Prot. of Prop. Rights v. Heller*, 122 Nev. 894, 914, 141 P.3d 1235, 1248 (2006) ("Unlike the Legislature, which performs strictly legislative functions, a local government body performs administrative functions as well."); *City of Mobile v. Bolden*, 446 U.S. 55, 59 (1980) (noting that the city's "three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality."). The mixture of these functions in the same city council does not transgress Nevada's separation-of-powers doctrine because that doctrine requires divided functions only in the three departments of state government. It does not require such separation in local governments. See Nev. Const. art. 3, § 1; *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (1893); *State ex rel. Mason v. Board of County Comm'rs*, 7 Nev. 392, 396-97 (1872).

Under this Court's jurisprudence, local governing bodies perform legislative functions when they enact laws, rules or policies of general applicability. *Bogan v. Scott-Harris*, 523 U.S. 44, 54-56 (1998). Ordinarily, such legislative functions will not trigger the procedural protections of the Due Process Clause because the local bodies are establishing standards that govern the population generally and they are not making individualized decisions regarding "[a] relatively small number of persons . . . who [are]

exceptionally affected, in each case upon individual grounds." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915).

In the legislative arena, the inherent checks and balances of the legislative process provide their own procedural safeguards, and the people can protect their rights against legislative abuses "by their power, immediate or remote, over those who make the rule." *Id.* at 445. Thus, when local bodies legislate, their "legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985).

By contrast, local governing bodies perform administrative functions when they apply existing laws, rules or policies to make individualized decisions affecting the property rights of particular persons or groups. *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908).[2] Because individual rights are at stake, local governing bodies must perform their administrative functions in a manner that comports with procedural due process. *Id.* This includes providing notice and a fair hearing before "an impartial and disinterested tribunal." *Marshall*, 446 U.S. at 242.

---

[2] Because administrative functions require decisionmakers to adjudicate the merits of each case upon individual grounds, such functions are also called adjudicative or quasi-judicial. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973) (explaining "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.").

Like other local proceedings, land-use proceedings are either legislative or administrative depending on the nature of the decision. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673-74 (1976). When local governing bodies promulgate citywide zoning plans or rezone particular areas under those plans, they are enacting laws, rules or policies of general applicability, and they are usually making legislative decisions. *Id.*; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

However, when local governing bodies apply existing land-use laws, rules or policies to make individualized decisions about specific property, they are usually making administrative decisions. See *Eastlake*, 426 U.S. at 674 n.9. In *Eastlake*, Justice Stevens commented on "the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels." *Id.* at 683 (Stevens, J., dissenting). He further noted the widely-held view that "[w]hen the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency." *Id.* at 685 n.7 (quoting R. Babcock, The Zoning Game 158 (1966)).

In line with this view, many courts have recognized that land-use matters which require local governing bodies to make individualized decisions about specific property are typically administrative decisions, not legislative decisions. See, *e.g.*, *Cutting v. Muzzey*, 724 F.2d 259, 261-62 (CA1 1984); *Acierno*

v. Cloutier, 40 F.3d 597, 610-15 (CA3 1994); *Scott v. Greenville County*, 716 F.2d 1409, 1422-23 (CA4 1983); *Bryan v. City of Madison*, 213 F.3d 267, 273-74 (CA5 2000); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895-97 (CA6 1991); *LC&S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 602-05 (CA7 2001); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611 n.5 (CA8 1980); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219-24 (CA9 2003); *Sable v. Myers*, 563 F.3d 1120, 1123-27 (CA10 2009); *75 Acres, LLC v. Miami-Dade County*, 338 F.3d 1288, 1293-95 (CA11 2003); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392-93 (CA11 1993); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485-86 (CA11 1991).

Because local governing bodies are sitting as administrative tribunals in these land-use proceedings, courts have found that the proceedings must comport with procedural due process. See, *e.g.*, *Wedgewood L.P. I v. Township of Liberty*, 610 F.3d 340, 354-55 (CA6 2010); *Nasierowski Bros.*, 949 F.2d at 895-97; *Harris v. County of Riverside*, 904 F.2d 497, 501-02 (CA9 1990). And since the appearance of fairness and justice is an essential component of procedural due process, courts have determined that the members of such governing bodies must be unbiased decisionmakers "[b]ecause it is a hallmark of procedural due process that 'a biased decisionmaker is constitutionally unacceptable.'" *Nasierowski Bros.*, 949 F.2d at 896 n.8 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Thus, when confronted with an unconstitutionally high probability of prejudgment or bias by decisionmakers in administrative land-use proceedings, courts have

held that disqualification is constitutionally required. See, *e.g.*, *Marcia T. Turner, LLC v. City of Twin Falls*, 159 P.3d 840, 846 (Idaho 2007); *Eacret v. Bonner County*, 86 P.3d 494, 498-501 (Idaho 2004); *City of Hobart v. Behavioral Inst.*, 785 N.E.2d 238, 253-54 (Ind. Ct. App. 2003); *McPherson Landfill v. Board of County Comm'rs*, 49 P.3d 522, 531-33 (Kan. 2002); *Tri-County Concerned Citizens v. Board of County Comm'rs*, 95 P.3d 1012, 1018 (Kan. Ct. App. 2004); *Thornbury Twp. v. W.D.D., Inc.*, 546 A.2d 744, 746-47 (Pa. Commw. Ct. 1988); *Champlin's Realty v. Tikoian*, 989 A.2d 427, 443-44 (R.I. 2010); *Armstrong v. Turner County Bd. of Adjustment*, 772 N.W.2d 643, 650-52 (S.D. 2009).

In prior cases, the Nevada Supreme Court has followed the weight of authority and distinguished between legislative and administrative land-use decisions. For example, in *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006), the court determined that a local governing body's decision to waive zoning and development standards so a developer could build a nonconforming structure on a specific parcel was an administrative decision reviewable by the courts "to determine, based on the administrative record, whether substantial evidence supports the administrative decision." See also *Bing Constr. Co. v. County of Douglas*, 107 Nev. 262, 265-66, 810 P.2d 768, 769-70 (1991) (holding that a local governing body's decision to revoke a special use permit required compliance with procedural due process).

By contrast, in *City of Reno v. Citizens for Cold Springs*, 126 Nev. ___, 236 P.3d 10, 12-15 (2010), the court determined that a local governing body's

decision to enact ordinances amending its master plan for a rural valley and changing the zoning for a large undeveloped area of 6,800 acres was a legislative decision. The court explained that "[t]he enactment of zoning ordinances and amendments by local municipal entities constitutes sound legislative action." 236 P.3d at 15.

In this case, the Nevada Supreme Court did not thoroughly analyze whether Carrigan was voting in a legislative or administrative proceeding. Instead, it concluded that all elected officials have a First-Amendment right to vote on public issues based on its "recognition of voting as a core *legislative* function," and on "other jurisdictions' holdings that voting in a *legislative* setting is protected speech." Pet. App. 11a (emphasis added). The record, however, establishes that Carrigan was not performing a legislative function or voting in a legislative setting.

When federal constitutional rights are at issue, the Court's determination of whether an act is legislative or administrative is a question of federal law. *Bogan*, 523 U.S. at 55-56. While the Court's determination may be informed by how the act is characterized under local law, the Court is not bound by local labels. *Id.* Instead, the Court looks to the substance of the act to determine whether it "bore all the hallmarks of traditional legislation." *Id.* at 55.

Furthermore, the simple fact that a legislator performs an official act does not, *ipso facto*, mean the act is legislative. *Doe v. McMillan*, 412 U.S. 306, 313 (1973); *United States v. Brewster*, 408 U.S. 501, 512-13 (1972); *United States v. Johnson*, 383 U.S. 169, 172 (1966). As the Court observed regarding federal

legislators: "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

The Court also does not inquire into the motives or intent of the officials performing the act. *Bogan*, 523 U.S. at 54-56. Rather, the Court asks whether the act, "stripped of all considerations of intent and motive," was legislative in substance. *Id.* at 55. Thus, the Court's determination turns on the substantive nature of the act and whether it involved a legislative function. *Id.*

In this case, the council's decision on Red Hawk's application was not legislative in substance, nor did it exhibit any of the hallmarks of traditional legislation or otherwise involve a legislative function. From an examination of the Lazy 8 hearing minutes, it is clear the council was not legislating in a traditional sense because it did not enact or amend an ordinance.[3] The council also was not performing a legislative function because it did not create laws, rules or policies of general applicability or make decisions with prospective implications reaching beyond the particular facts of Red Hawk's application. Cf. *Bogan*, 523 U.S. at 55-56.

Red Hawk applied for *tentative* approval of a *single* project. J.A. 15-19. If the council had granted tentative approval, its action would have been

---

[3] To enact or amend an ordinance, the council had to follow the legislative process mandated by its charter, including proposing a bill. Sparks City Charter §§ 2.070-2.080; Leg. App. 21a-23a. At the hearing, the council did not propose a bill or otherwise follow the required procedures for enacting or amending an ordinance. J.A. 20-81.

extremely narrow in scope and duration and would have temporarily changed the individual property rights of a single applicant. Such narrow and temporary action does not resemble the type of general and permanent laws, rules and policies that are ordinarily associated with traditional legislation. See *Bi-Metallic*, 239 U.S. at 445. Rather, it resembles the type of specific and individualized actions that mandated procedural due process in *Londoner*, 210 U.S. at 385-86.

Consequently, the council was not performing a legislative function. It was performing an administrative function because it was applying existing land-use laws, rules and policies to make a specific and individualized decision about the suitability of the Lazy 8 and its consistency with the city's master plan.

This conclusion is buttressed by the fact that under Nevada's Planned Unit Development Law (PUD Law), the council's denial of Red Hawk's application was "a final administrative decision" for purposes of judicial review. NRS 278A.590(1); Sparks Municipal Code § 20.18.090; Leg. App. 18a-19a, 29a.

Red Hawk's application proposed modifications to two PUDs—Tierra Del Sol and Wingfield Springs—located within the Northern Sparks Sphere of Influence (NSSOI) master plan. J.A. 35. When Red Hawk filed its application, it held rights to build a hotel-casino at Wingfield, and it wanted to modify both PUDs by transferring its hotel-casino rights to Tierra Del Sol in order to build the Lazy 8 there. J.A. 20-41. The city's staff explained that a master plan amendment was unnecessary because the project "doesn't change the integrity of the NSSOI plan; it

simply moves the use to, what staff believes, is a more appropriate location." J.A. 26.

Because Red Hawk's application requested PUD modifications, it was governed by Nevada's PUD Law and the city's supplemental PUD ordinance. NRS 278A.430; Leg. App. 7a-19a, 24a-29a; J.A. 27, 80.[4] The PUD Law and ordinance contain detailed administrative procedures for seeking tentative and final approval of PUDs and modifications thereto. NRS 278A.430-278A.590; Sparks Municipal Code §§ 20.18.060-20.18.090; Leg. App. 7a-19a, 24a-29a. Those procedures include providing notice and an adversarial hearing, making detailed findings of fact, establishing specific conditions, requirements, and timelines for development, and mailing a copy of the council's decision directly to the developer. *Id.* If the developer is aggrieved by the decision, the PUD Law and ordinance provide that:

> Any decision of the city . . . granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is *a final administrative decision* and is subject to judicial review in properly presented cases.

NRS 278A.590(1) (emphasis added); Sparks Municipal Code § 20.18.090; Leg. App. 18a-19a, 29a.

The individualized procedures in the PUD Law and ordinance are very common procedures for modern administrative proceedings. They are quite foreign, however, to the traditional legislative process. See *Bi-Metallic*, 239 U.S. at 445. And

---

[4] The city's PUD ordinance, Sparks Municipal Code ch. 20.18, was enacted under the authority of NRS 278A.080.

considering that the PUD Law and ordinance expressly make the denial of tentative approval "a final administrative decision" for purposes of judicial review, there is considerable support for the conclusion that the council was performing an administrative function, not a legislative function.

Further, in interpreting Nevada's PUD Law, the Nevada Supreme Court has explained that:

> A "prime objective" of NRS Chapter 278A is to promote "flexibility of development." NRS 278A.110(3). A developer can maintain flexibility until it receives final approval for and records provisions of the plan. At that point, the features of a PUD enforceable under NRS 278A.400 are established.

Glenbrook Homeowners Ass'n v. Glenbrook Co., 111 Nev. 909, 915, 901 P.2d 132, 137 (1995).

Because the features of a PUD remain flexible and changeable until final approval, the developer can explore "nonbinding proposals and ideas" during the tentative approval process. *Id.* Tentative approval, therefore, does not create "enforceable commitments on the part of a developer." *Id.* Tentative approval also does not authorize the developer to proceed with development. NRS 278A.520(2); Sparks Municipal Code § 20.18.060(G) ("Tentative approval does not qualify a plat or the planned unit development for recording or authorize development or the issuance of any building permit."); Leg. App. 12a, 27a.

Nonbinding flexibility during the tentative approval process is certainly important to administering the complex and constantly evolving land-use plans of each specific PUD. However,

considering that tentative approval does not create binding laws, rules or policies of a general and permanent nature, tentative approval does not exhibit any of "the hallmarks of traditional legislation." *Bogan*, 523 U.S. at 55.

Finally, in her dissent, Justice Pickering noted that the Nevada Supreme Court in an unpublished order in a different case "held that the Lazy 8 vote represented a land-use decision reviewable, if at all, by a petition for judicial review under NRS 278.3195(4)." Pet. App. 18a; but see Nev. Sup. Ct. Rule 123 ("An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority"). Under NRS 278.3195, which is part of Nevada's general land-use law, an aggrieved person may seek review of "administrative decisions regarding the use of land." NRS 278.3195(1); Leg. App. 4a; *Kay*, 122 Nev. at 1104-06, 146 P.3d at 804-05. Although it is not important for this case, it is likely that the council's decision was reviewable under both NRS 278A.590 and NRS 278.3195, with the PUD-specific provisions of NRS Chapter 278A taking precedence over the general land-use provisions of NRS Chapter 278. What is important for this case is that the council's decision was reviewable under either statute because it was an *administrative* decision.

In sum, the council's decision regarding Red Hawk's application was not legislative in substance, it did not resemble traditional legislation, and it did not involve the performance of a legislative function. It was an administrative decision, and council members needed to be impartial and disinterested decisionmakers free from ethical conflicts that

created a serious, objective risk of prejudgment or actual bias. Regrettably, Carrigan was not such a decisionmaker at the Lazy 8 hearing.

2. The Due Process Clause disqualified Carrigan from voting because his ethical conflicts created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk.

To guarantee that a person will not be unfairly deprived of life, liberty or property in an unjust or biased proceeding, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall*, 446 U.S. at 242. Although the requirement of neutrality has its origins in judicial proceedings, the Court has extended it to administrative proceedings where the requirement "applies to administrative agencies which adjudicate as well as to courts." *Withrow*, 421 U.S. at 46; *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). Accordingly, when the Court evaluates whether the Due Process Clause disqualifies an administrative decisionmaker, the Court utilizes the same standards of constitutional disqualification that apply to judges. *Withrow*, 421 U.S. at 46-47; *Gibson*, 411 U.S. at 579 ("most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.") (quoting K. Davis, *Administrative Law Text* § 12.04, p. 250 (1972)).

All cases alleging disqualification start with the presumption that the decisionmaker is unbiased.

Schweiker, 456 U.S. at 195. "This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id.* The burden of establishing disqualification rests on the party making the assertion. *Id.* at 196. In the case of constitutional disqualification, this is a heavy burden because it is generally only "an extraordinary situation where the Constitution requires recusal," and only the "extreme cases are more likely to cross constitutional limits." *Caperton*, 129 S.Ct. at 2265. In ordinary cases, "[b]ecause the codes of [ethical] conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Id.* at 2267.

Constitutional disqualification "preserves both the appearance and reality of fairness." *Marshall*, 446 U.S. at 242. Not only must decisionmakers be free from actual bias, they must be free from "a constitutionally intolerable *probability* of actual bias." *Caperton*, 129 S.Ct. at 2262 (emphasis added). The reason for such disqualification is that "our system of law has always endeavored to prevent even the probability of unfairness." *Withrow*, 421 U.S. at 47 (quoting *Murchison*, 349 U.S. at 136). Simply put, "justice must satisfy the appearance of justice." *Marshall*, 446 U.S. at 243 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

When applying the constitutional disqualification standards, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*,

129 S.Ct. at 2262. Under this test, the potential for bias must be gauged by the reasonable perceptions of an objective observer, and the inquiry must involve "a realistic appraisal of psychological tendencies and human weakness." *Withrow*, 421 U.S. at 47. The decisionmaker is disqualified if all the surrounding circumstances, when viewed objectively, "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Caperton*, 129 S.Ct. at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

Thus, a decisionmaker does not have to harbor actual bias at a hearing to be constitutionally disqualified. *Id.* at 2263. If, at the time of the hearing, there were "extreme facts that created an unconstitutional probability of bias," *id.* at 2265, the decisionmaker is disqualified because his participation "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47.

In *Caperton*, the Court addressed for the first time the issue of constitutional disqualification in the context of judicial elections. In that case, Don Blankenship was the chairman, chief executive officer and president of several affiliated West Virginia coal companies that a jury found liable for $50 million in damages for fraudulent and tortious conduct against other mining and coal companies. After the jury's verdict but before any appeal to the West Virginia Supreme Court, Blankenship worked aggressively and successfully to have Brent Benjamin elected to the state supreme court. As described by this Court:

> Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

129 S.Ct. at 2264 (citations omitted).

When the case against Blankenship's companies came before the West Virginia Supreme Court, Justice Benjamin refused repeated recusal motions based on the potential for bias created by Blankenship's extraordinary involvement in the campaign. In a 3-to-2 decision in which Justice Benjamin was in the majority, the state supreme court reversed the $50 million verdict.

This Court held that Justice Benjamin was constitutionally disqualified from hearing the case because Blankenship's extraordinary involvement in Justice Benjamin's campaign created an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Blankenship and his companies. The Court explained that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* at 2263. The Court found that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case." *Id.* at 2264.

Additionally, the Court found that "[t]he temporal relationship between the campaign contributions, the

justice's election, and the pendency of the case [was] also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 2264-65. The Court observed that a legitimate fear of bias can arise when a person "chooses the judge in his own cause," regardless of whether the judge has agreed to decide the case in a particular way. *Id.* at 2265. The Court determined that the timing of Blankenship's campaign contributions in relation to the pending case was sufficient to raise a serious, objective risk of actual bias, stating that "[a]lthough there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome." *Id.*

Based on the totality of the circumstances, the Court held that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* The Court cautioned that most campaign involvement will not present "a potential for bias comparable to the circumstances in this case." *Id.* The Court announced the type of campaign involvement that will require constitutional disqualification as follows:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case *by raising funds or directing the judge's election campaign when the case was pending or imminent.*

Id. at 2263-64 (emphasis added).

The Court's decision in *Caperton* anticipated that there will be circumstances—similar to those in the instant case—when a judge is constitutionally disqualified from hearing a case because a party or attorney appearing before the judge is presently serving as the judge's campaign manager or fundraiser or is playing another substantial role in the judge's election efforts during an ongoing campaign. Indeed, several courts have already found that judges are disqualified under such circumstances. See, *e.g.*, *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 n.5 (Fla. 1990); *Neiman-Marcus Group v. Grey*, 829 So.2d 967, 968-69 (Fla. Ct. App. 2002); *Dell v. Dell*, 829 So.2d 969, 970 (Fla. Ct. App. 2002); *Caleffe v. Vitale*, 488 So.2d 627, 628-29 (Fla. Ct. App. 1986).

Several courts have also found that a judge is disqualified when a party or attorney appearing before the judge is actively soliciting campaign contributions on behalf of the judge or is publicly acting as the judge's campaign spokesman during an ongoing campaign. See, *e.g.*, *Pierce v. Pierce*, 39 P.3d 791, 796-800 (Okla. 2001); *Barber v. Mackenzie*, 562 So.2d 755, 757-58 (Fla. Ct. App. 1990); *Aetna Cas. & Sur. v. Berry*, 669 So.2d 56, 74-75, 79 (Miss. 1996), *overruled in part on other grounds by Owens v. Miss. Farm Bureau Cas. Ins.*, 910 So.2d 1065 (Miss. 2005).

For example, in *Caleffe v. Vitale*, the court held that a trial judge was disqualified from presiding over a divorce proceeding because "the wife's attorney is actually running the judge's ongoing reelection campaign. Common sense tells us that this alone would give rise to a reasonable fear on the petitioner's part that a conflict of interest may exist."

488 So.2d at 629. Consequently, the court held that the "specific and substantial political relationship" between the judge and the wife's attorney created an appearance of bias that required disqualification. *Id.*

Similarly, in *Barber v. Mackenzie*, the court held that a trial judge was disqualified from presiding over a divorce proceeding because the wife's two attorneys were members of the judge's campaign committee which was "actively conducting direct mail solicitation requesting contributions and endorsements." 562 So.2d at 757. In explaining the need for disqualification, the court stated:

> The Committee was formed at least one year prior to the election, and plainly contemplates a course of activity on behalf of the judge during the year leading up to the election. There is a substantial and continuing relationship between the Committee and the trial judge, in a matter of great and immediate importance to the judge. . . . [D]isqualification is called for here, where there is a continuing affiliation in a joint project lasting a considerable period of time. It is the nature of the relationship which compels the result. We conclude that a reasonable litigant in the position of movant would fear that the trial court will be aware of the membership and activities of her own contemporaneously active campaign committee, and will entertain a bias in favor of the side represented by her Committee members.

Id. at 757-58.

The instant case falls squarely into the disqualifying scenario envisioned by the Court in *Caperton*. Carlos Vasquez, a person with a personal

stake in the council's decision on the Lazy 8 because of his position as Red Hawk's lobbyist, had a significant and disproportionate influence in Carrigan's election to the council by raising campaign funds for Carrigan and directing Carrigan's election campaign while the hearing on Red Hawk's application was pending and imminent.

Vasquez became Carrigan's campaign manager and fundraiser approximately six months before the Lazy 8 hearing. Pet. App. 44a; J.A. 172. The predominant issue during Carrigan's campaign was the suitability of the controversial Lazy 8 project. Pet. App. 45a; J.A. 173-74. During this period, Vasquez actively solicited campaign contributions for Carrigan, including soliciting contributions from persons who were principals either in Red Hawk or one of its affiliates or who were otherwise directly interested in the success of the Lazy 8. Pet. App. 45a. Vasquez also contributed significant amounts of time, effort and at-cost services to Carrigan's campaign. Pet. App. 44a; J.A. 163-76, 207-09, 230-31, 240-42.

During the same period that Vasquez was serving as Carrigan's campaign manager and fundraiser, Vasquez was also actively involved in Red Hawk's efforts to gain the council's approval for the Lazy 8, including managing public relations for Red Hawk, engaging in discussions and negotiations with Carrigan and other council members, and testifying at the Lazy 8 hearing as a paid lobbyist and advocate for Red Hawk and publicly urging the council to approve the Lazy 8. Pet. App. 45a-46a; J.A. 39-45, 192, 206-07, 216-21, 233.

Further, during Carrigan's two prior successful elections to the council, Vasquez served as Carrigan's campaign manager, and he made significant contributions of time, effort and at-cost services to those campaigns. *Id.* Outside the context of Carrigan's campaigns, Vasquez had a substantial and continuing political, professional and personal relationship with Carrigan as his political advisor, confidant and close personal friend for more than a decade. Pet. App. 44a-45a; J.A. 161-63, 168-71, 177, 200-01, 215, 230-31.

Given Vasquez's close-knit and long-standing relationship with Carrigan at the time of the Lazy 8 hearing, his prominent and public role as Carrigan's campaign manager and fundraiser during Carrigan's then-ongoing reelection campaign, and his extensive, extraordinary and indispensable contributions to the success of Carrigan's reelection, Vasquez would have appeared to an objective observer to be favorably positioned to exert significant and disproportionate influence over Carrigan as a decisionmaker at the hearing. Thus, a reasonable person would have had an objective and legitimate fear that Carrigan was predisposed to favor Vasquez and his client Red Hawk—a fear that was realized when Carrigan made the initial motion to approve Red Hawk's project. Pet. App. 47a; J.A. 75-80. Taken together, these exceptional and unusual circumstances combined to create an objective and constitutionally intolerable risk of prejudgment or actual bias in favor of Red Hawk. As a result, Carrigan was disqualified by the Due Process Clause from voting on Red Hawk's application, even if he did not harbor any actual bias.

Consequently, Nevada's recusal statute did not infringe on Carrigan's First-Amendment rights because his act of voting on Red Hawk's application was not protected by the First Amendment. It was forbidden by the Due Process Clause.

B. The catchall provision in Nevada's recusal statute is not facially overbroad in violation of the First Amendment.

Under Nevada's recusal statute, a public officer may have to abstain from voting on a matter if he has a "commitment in a private capacity to the interests of others." NRS 281A.420. This term is defined to mean that the public officer has a commitment to: (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. *Id.* In addition to these four enumerated categories, the statute contains a catchall provision which provides that such commitments also include "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." *Id.*

The Nevada Supreme Court held that the catchall provision is facially overbroad in violation of the First Amendment because "[t]his catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." Pet. App. 17a. The Nevada Supreme Court's holding should be reversed because the court did not properly apply the overbreadth doctrine.

A statute does not violate the overbreadth doctrine when its impact on First-Amendment rights is so speculative or slight that "[t]he First Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis." *Clements v. Fashing*, 457 U.S. 957, 971-72 n.6 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). A statute does not suffer from overbreadth merely because the statute has some speculative or unrealized potential to prohibit a marginal amount of protected speech. *Broadrick*, 413 U.S. at 615-17. To find a constitutional violation, "the overbreadth of [the] statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615 (emphasis added).

Therefore, to prevail in an overbreadth challenge, it is not enough for the challenger to show that there is a possibility of some overbreadth. Instead, the challenger "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 *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected activity, the statute will be upheld even though it "may deter protected speech to some unknown extent." *Broadrick*, 413 U.S. at 615.

With regard to Carrigan's act of voting on Red Hawk's application, Nevada's recusal statute clearly reached only unprotected activity given that Carrigan's extreme ethical conflicts created a constitutionally intolerable risk of actual bias and disqualified him from voting on Red Hawk's

application under the Due Process Clause. Since Carrigan's conduct fell squarely within the intended scope of the recusal statute and was constitutionally prohibited, Carrigan had to meet the heavy burden of showing that the statute forbids a substantial amount of protected activity "in other situations not before the Court." *Broadrick*, 413 U.S. at 610. Carrigan failed to meet his burden.

This Court has indicated that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). When the catchall provision in Nevada's recusal statute is construed consistently with its intended purpose, it reaches only unprotected activity.

The catchall provision captures "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." NRS 281A.420. By its express terms, the catchall provision cannot be read in isolation. It must be read in conjunction with the provisions preceding it, and its scope must be limited by the specific commitments and relationships described in the subsection. Thus, the meaning of the catchall provision is "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294.

The meaning of the catchall provision is also narrowed by the term "substantially similar." As commonly defined and used in the catchall provision,

"substantial" means "being largely but not wholly that which is specified." *Webster's Ninth New Collegiate Dictionary* 1176 (1990). "Similar" means "having characteristics in common," being "strictly comparable," or being "alike in substance or essentials." *Id.* at 1098. Synonyms for the term include "analogous" and "parallel." *Id.*

When all parts of the catchall provision are read together, a reasonable public officer can readily understand the types of relationships that are "substantially 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. Because the four enumerated categories all describe close, significant and continuing relationships, it follows that the catchall provision covers "substantially similar" close, significant and continuing relationships that, in large part, are strictly comparable, alike in substance or essentials, analogous or parallel to the expressly listed relationships.

Reasonable public officers have the acumen to know when they have a close, significant and continuing relationship with another person. To the extent they are in need of further guidance, they can request advisory opinions from the Commission. NRS 281A.440(1), 281A.460. The Court typically will not find a statute to be overbroad if persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" *McConnell v. FEC*, 540 U.S. 93, 170 n.64

(2003) (citation omitted) (quoting *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973)).

Furthermore, the legislative history of the catchall provision provides additional guidance regarding its meaning. The sponsors of the legislation explained that they:

> did not want to specifically limit it to just these categories. But what we were trying to get at [were] relationships that are so close that they are like family. That they are substantially similar to a business partner. . . . [I]t 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.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999); Pet. App. 78a.

As an example of the catchall's application, the sponsors stated that if "the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person." *Id.*; Pet. App. 69a. The sponsors also believed the catchall:

> 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. [They] 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.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999); Pet. App. 79a-80a.

When Nevada's recusal statute is construed in line with its obvious meaning and intended scope, the statute is not significantly broader than the common-law rules of disqualification that courts have been applying for centuries. See 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2010); 83 Am. Jur. 2d *Zoning and Planning* §§ 731-34 (2003); Marjorie A. Shields, Annotation, *Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision*, 4 A.L.R.6th 263 (2005).

It is also notable that at least one lower federal court has held that the judicial recusal rule requiring judges to recuse themselves when their "impartiality might reasonably be questioned" is not unconstitutionally overbroad. *Family Trust Found. v. Wolnitzek*, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). Although the judicial recusal rule is stated in broad and general terms, the rule also contains four specific instances which require recusal. In *Family Trust Foundation*, the court held that the judicial recusal rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." *Id.* at 709-10; see also

Republican Party of Minn. v. White ("White II"), 416 F.3d 738, 755 (CA8 2005) (en banc), *cert. denied*, 546 U.S. 1157 (2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

Like common-law and judicial recusal rules, Nevada's recusal statute promotes ethical conduct and prevents the appearance of impropriety, corruption and bias by its public officers. The statute does not prohibit a substantial amount of protected activity in relation to its many legitimate applications. Even though the catchall provision is stated in general terms, its scope is limited by the specific relationships expressly described in the statute, and a reasonable public officer can easily deduce the statute's potential reach. To the extent public officers need further guidance, they can request advisory opinions from the Commission and thereby remove any doubt as to the meaning of the law. If the Court were to invalidate Nevada's recusal statute as facially overbroad, the state would lose an invaluable tool in safeguarding "the people's faith in the integrity and impartiality of public officers." NRS 281A.020.

CONCLUSION

The decision of the Nevada Supreme Court should be reversed.

Respectfully submitted,

KEVIN C. POWERS, ***Counsel of Record***
Senior Principal Deputy Legislative Counsel
kpowers@lcb.state.nv.us
BRENDA J. ERDOES
Legislative Counsel of the State of Nevada
NEVADA LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830; Fax: (775) 684-6761
Attorneys for Amicus Curiae Nevada Legislature

Dated: March 1, 2011.

LEGISLATURE'S APPENDIX

NEVADA REVISED STATUTES (NRS)

NRS 218F.720 Authority to provide legal representation in actions and proceedings; exemption from fees, costs and expenses; standards and procedures for exercising unconditional right and standing to intervene; payment of costs and expenses of representation.

1. When deemed necessary or advisable to protect the official interests of the Legislature, one or more Houses of the Legislature or one or more agencies, members, officers or employees of the Legislature, the Legislative Counsel Bureau or the Legislative Department of State Government, the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held, may direct the Legislative Counsel and his or her staff to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court, agency or officer of the United States, this State or any other jurisdiction, or any political subdivision thereof. In any such action or proceeding, the Legislature, the Houses of the Legislature and the agencies, members, officers and employees of the Legislature, the Legislative Counsel Bureau and the Legislative Department of State Government may not be assessed or held liable for:

(a) Any filing or other court fees; or

(b) The attorney's fees or other fees, costs or expenses of any other parties.

2. If a party to any action or proceeding before any court, agency or officer:

(a) Alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or laws of the United States or the Constitution or laws of this State; or

(b) Challenges, contests or raises as an issue, either in law or in equity, in whole or in part, or facially or as applied, the meaning, intent, purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution, initiative, referendum or other legislative or constitutional measure, including, without limitation, on grounds that the law, resolution, initiative, referendum or other legislative or constitutional measure is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by federal law or is otherwise inapplicable, invalid, unenforceable or unconstitutional,

➥ the Legislature may elect to intervene in the action or proceeding by filing a motion or request to intervene in the form required by the rules, laws or regulations applicable to the action or proceeding. The motion or request to intervene must be accompanied by an appropriate pleading, brief or dispositive motion setting forth the Legislature's arguments, claims, objections or defenses, in law or fact, or by a motion or request to file such a pleading, brief or dispositive motion at a later time.

3. Notwithstanding any other law to the contrary, upon the filing of a motion or request to intervene pursuant to subsection 2, the Legislature has an unconditional right and standing to intervene in the action or proceeding and to present its

arguments, claims, objections or defenses, in law or fact, whether or not the Legislature's interests are adequately represented by existing parties and whether or not the State or any agency, officer or employee of the State is an existing party. If the Legislature intervenes in the action or proceeding, the Legislature has all the rights of a party.

4. The provisions of this section do not make the Legislature a necessary or indispensable party to any action or proceeding unless the Legislature intervenes in the action or proceeding, and no party to any action or proceeding may name the Legislature as a party or move to join the Legislature as a party based on the provisions of this section.

5. The Legislative Commission may authorize payment of the expenses and costs incurred pursuant to this section from the Legislative Fund.

6. As used in this section:

(a) "Action or proceeding" means any action, suit, matter, cause, hearing, appeal or proceeding.

(b) "Agency" means any agency, office, department, division, board, commission, authority, committee, subcommittee or other similar body or entity, including, without limitation, any body or entity created by an interstate, cooperative, joint or interlocal agreement or compact.

(Added to NRS by 1965, 1461; A 1971, 1546; 1995, 1108; 1999, 2203; 2007, 3305; 2009, 1565)—(Substituted in revision for NRS 218.697)

NRS 278.3195 Governing body to adopt ordinance allowing appeal to governing body concerning certain decisions regarding use of land; required contents of ordinance; appeal of decision of governing body to district court.

1. Except as otherwise provided in NRS 278.310, each governing body shall adopt an ordinance providing that any person who is aggrieved by a decision of:

(a) The planning commission, if the governing body has created a planning commission pursuant to NRS 278.030;

(b) The board of adjustment, if the governing body has created a board of adjustment pursuant to NRS 278.270;

(c) A hearing examiner, if the governing body has appointed a hearing examiner pursuant to NRS 278.262; or

(d) Any other person appointed or employed by the governing body who is authorized to make administrative decisions regarding the use of land,

➥ may appeal the decision to the governing body. In a county whose population is 400,000 or more, a person shall be deemed to be aggrieved under an ordinance adopted pursuant to this subsection if the person appeared, either in person, through an authorized representative or in writing, before a person or entity described in paragraphs (a) to (d), inclusive, on the matter which is the subject of the decision.

2. Except as otherwise provided in NRS 278.310, an ordinance adopted pursuant to subsection 1 must set forth, without limitation:

(a) The period within which an appeal must be filed with the governing body.

(b) The procedures pursuant to which the governing body will hear the appeal.

(c) That the governing body may affirm, modify or reverse a decision.

(d) The period within which the governing body must render its decision except that:

(1) In a county whose population is 400,000 or more, that period must not exceed 45 days.

(2) In a county whose population is less than 400,000, that period must not exceed 60 days.

(e) That the decision of the governing body is a final decision for the purpose of judicial review.

(f) That, in reviewing a decision, the governing body will be guided by the statement of purpose underlying the regulation of the improvement of land expressed in NRS 278.020.

(g) That the governing body may charge the appellant a fee for the filing of an appeal.

3. In addition to the requirements set forth in subsection 2, in a county whose population is 400,000 or more, an ordinance adopted pursuant to subsection 1 must:

(a) Set forth procedures for the consolidation of appeals; and

(b) Prohibit the governing body from granting to an aggrieved person more than two continuances on the same matter, unless the governing body determines, upon good cause shown, that the granting of additional continuances is warranted.

4. Any person who:

(a) Has appealed a decision to the governing body in accordance with an ordinance adopted pursuant to subsection 1; and

(b) Is aggrieved by the decision of the governing body,

➥ may appeal that decision to the district court of the proper county by filing a petition for judicial review within 25 days after the date of filing of notice of the decision with the clerk or secretary of the governing body, as set forth in NRS 278.0235.

5. As used in this section, "person" includes the Armed Forces of the United States or an official component or representative thereof.

(Added to NRS by 2001, 2803; A 2003, 1734; 2007, 354)

NRS CHAPTER 278A
PLANNED DEVELOPMENT
GENERAL PROVISIONS

NRS 278A.010 Short title. This chapter may be cited as the Planned Unit Development Law.

(Added to NRS by 1973, 565)—(Substituted in revision for NRS 280A.010)

* * *

NRS 278A.080 Exercise of powers by city or county. The powers granted under the provisions of this chapter may be exercised by any city or county which enacts an ordinance conforming to the provisions of this chapter.

(Added to NRS by 1973, 566; A 1977, 1518)—(Substituted in revision for NRS 280A.080)

* * *

PROCEDURES FOR AUTHORIZATION OF PLANNED DEVELOPMENT

GENERAL PROVISIONS

NRS 278A.430 Applicability and purposes of NRS 278A.440 to 278A.590, inclusive. In order to provide an expeditious method for processing a plan for a planned unit development under the terms of an ordinance enacted pursuant to the powers granted under this chapter, and to avoid the delay and uncertainty which would arise if it were necessary to secure approval by a multiplicity of local procedures of a plat or subdivision or resubdivision, as well as approval of a change in the zoning regulations otherwise applicable to the property, it is hereby declared to be in the public interest that all procedures with respect to the approval or disapproval of a planned unit development and its continuing administration must be consistent with the provisions set out in NRS 278A.440 to 278A.590, inclusive.

(Added to NRS by 1973, 571; A 1981, 137)

PROCEEDINGS FOR TENTATIVE APPROVAL

NRS 278A.440 Application to be filed by landowner. An application for tentative approval of the plan for a planned unit development must be filed by or on behalf of the landowner.

(Added to NRS by 1973, 571; A 1981, 137)

NRS 278A.450 Application: Form; filing fees; place of filing; tentative map.

1. The ordinance enacted pursuant to this chapter must designate the form of the application

for tentative approval, the fee for filing the application and the official of the city or county with whom the application is to be filed.

2. The application for tentative approval may include a tentative map. If a tentative map is included, tentative approval may not be granted pursuant to NRS 278A.490 until the tentative map has been submitted for review and comment by the agencies specified in NRS 278.335.

(Added to NRS by 1973, 571; A 1981, 1317; 1987, 664)

NRS 278A.460 Planning, zoning and subdivisions determined by city or county. All planning, zoning and subdivision matters relating to the platting, use and development of the planned unit development and subsequent modifications of the regulations relating thereto to the extent modification is vested in the city or county, must be determined and established by the city or county.

(Added to NRS by 1973, 572; A 1981, 138)

NRS 278A.470 Application: Contents. The ordinance may require such information in the application as is reasonably necessary to disclose to the city or county:

1. The location and size of the site and the nature of the landowner's interest in the land proposed to be developed.

2. The density of land use to be allocated to parts of the site to be developed.

3. The location and size of any common open space and the form of organization proposed to own and maintain any common open space.

4. The use and the approximate height, bulk and location of buildings and other structures.

5. The ratio of residential to nonresidential use.

6. The feasibility of proposals for disposition of sanitary waste and storm water.

7. The substance of covenants, grants or easements or other restrictions proposed to be imposed upon the use of the land, buildings and structures, including proposed easements or grants for public utilities.

8. The provisions for parking of vehicles and the location and width of proposed streets and public ways.

9. The required modifications in the municipal land use regulations otherwise applicable to the subject property.

10. In the case of plans which call for development over a period of years, a schedule showing the proposed times within which applications for final approval of all sections of the planned unit development are intended to be filed.

(Added to NRS by 1973, 572; A 1977, 1523; 1981, 138)

NRS 278A.480 Public hearing: Notice; time limited for concluding hearing; extension of time.

1. After the filing of an application pursuant to NRS 278A.440 to 278A.470, inclusive, a public hearing on the application shall be held by the city or county, public notice of which shall be given in the manner prescribed by law for hearings on amendments to a zoning ordinance.

2. The city or county may continue the hearing from time to time and may refer the matter to the planning staff for a further report, but the public hearing or hearings shall be concluded within 60 days after the date of the first public hearing unless the landowner consents in writing to an extension of the time within which the hearings shall be concluded.

(Added to NRS by 1973, 572; A 1977, 1524)—(Substituted in revision for NRS 280A.460)

NRS 278A.490 Grant, denial or conditioning of tentative approval by minute order; specifications for final approval. The city or county shall, following the conclusion of the public hearing provided for in NRS 278A.480, by minute action:

1. Grant tentative approval of the plan as submitted;

2. Grant tentative approval subject to specified conditions not included in the plan as submitted; or

3. Deny tentative approval to the plan.

➥ If tentative approval is granted, with regard to the plan as submitted or with regard to the plan with conditions, the city or county shall, as part of its action, specify the drawings, specifications and form of performance bond that shall accompany an application for final approval.

(Added to NRS by 1973, 572; A 1977, 1524)—(Substituted in revision for NRS 280A.470)

NRS 278A.500 Minute order: Findings of fact required. The grant or denial of tentative approval by minute action must set forth the reasons for the

grant, with or without conditions, or for the denial, and the minutes must set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings on the following:

1. In what respects the plan is or is not consistent with the statement of objectives of a planned unit development.

2. The extent to which the plan departs from zoning and subdivision regulations otherwise applicable to the property, including but not limited to density, bulk and use, and the reasons why these departures are or are not deemed to be in the public interest.

3. The ratio of residential to nonresidential use in the planned unit development.

4. The purpose, location and amount of the common open space in the planned unit development, the reliability of the proposals for maintenance and conservation of the common open space, and the adequacy or inadequacy of the amount and purpose of the common open space as related to the proposed density and type of residential development.

5. The physical design of the plan and the manner in which the design does or does not make adequate provision for public services, provide adequate control over vehicular traffic, and further the amenities of light and air, recreation and visual enjoyment.

6. The relationship, beneficial or adverse, of the proposed planned unit development to the neighborhood in which it is proposed to be established.

7. In the case of a plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public, residents and owners of the planned unit development in the integrity of the plan.

(Added to NRS by 1973, 573; A 1981, 138)

NRS 278A.510 Minute order: Specification of time for filing application for final approval. Unless the time is specified in an agreement entered into pursuant to NRS 278.0201, if a plan is granted tentative approval, with or without conditions, the city or county shall set forth, in the minute action, the time within which an application for final approval of the plan must be filed or, in the case of a plan which provides for development over a period of years, the periods within which application for final approval of each part thereof must be filed.

(Added to NRS by 1973, 573; A 1985, 2116; 1987, 1305)

NRS 278A.520 Mailing of minute order to landowner; status of plan after tentative approval; revocation of tentative approval.

1. A copy of the minutes must be mailed to the landowner.

2. Tentative approval of a plan does not qualify a plat of the planned unit development for recording or authorize development or the issuance of any building permits. A plan which has been given tentative approval as submitted, or which has been given tentative approval with conditions which have been accepted by the landowner, may not be modified, revoked or otherwise impaired by action of

the city or county pending an application for final approval, without the consent of the landowner. Impairment by action of the city or county is not stayed if an application for final approval has not been filed, or in the case of development over a period of years applications for approval of the several parts have not been filed, within the time specified in the minutes granting tentative approval.

3. The tentative approval must be revoked and the portion of the area included in the plan for which final approval has not been given is subject to local ordinances if:

(a) The landowner elects to abandon the plan or any part thereof, and so notifies the city or county in writing; or

(b) The landowner fails to file application for the final approval within the required time.

(Added to NRS by 1973, 574; A 1977, 1525; 1981, 139)

PROCEEDINGS FOR FINAL APPROVAL

NRS 278A.530 Application for final approval; public hearing not required if substantial compliance with plan tentatively approved.

1. An application for final approval may be for all the land included in a plan or to the extent set forth in the tentative approval for a section thereof. The application must be made to the city or county within the time specified by the minutes granting tentative approval.

2. The application must include such maps, drawings, specifications, covenants, easements, conditions and form of performance bond as were set

forth in the minutes at the time of the tentative approval and a final map if required by the provisions of NRS 278.010 to 278.630, inclusive.

3. A public hearing on an application for final approval of the plan, or any part thereof, is not required if the plan, or any part thereof, submitted for final approval is in substantial compliance with the plan which has been given tentative approval.

(Added to NRS by 1973, 574; A 1981, 1317; 1989, 934)

NRS 278A.540 What constitutes substantial compliance with plan tentatively approved. The plan submitted for final approval is in substantial compliance with the plan previously given tentative approval if any modification by the landowner of the plan as tentatively approved does not:

1. Vary the proposed gross residential density or intensity of use;

2. Vary the proposed ratio of residential to nonresidential use;

3. Involve a reduction of the area set aside for common open space or the substantial relocation of such area;

4. Substantially increase the floor area proposed for nonresidential use; or

5. Substantially increase the total ground areas covered by buildings or involve a substantial change in the height of buildings.

➥ A public hearing need not be held to consider modifications in the location and design of streets or

facilities for water and for disposal of storm water and sanitary sewage.

(Added to NRS by 1973, 574; A 1977, 1525; 1981, 139)

NRS 278A.550 Plan not in substantial compliance: Alternative procedures; public hearing; final action.

1. If the plan, as submitted for final approval, is not in substantial compliance with the plan as given tentative approval, the city or county shall, within 30 days of the date of the filing of the application for final approval, notify the landowner in writing, setting forth the particular ways in which the plan is not in substantial compliance.

2. The landowner may:

(a) Treat such notification as a denial of final approval;

(b) Refile his or her plan in a form which is in substantial compliance with the plan as tentatively approved; or

(c) File a written request with the city or county that it hold a public hearing on his or her application for final approval.

➥ If the landowner elects the alternatives set out in paragraph (b) or (c) above, the landowner may refile his or her plan or file a request for a public hearing, as the case may be, on or before the last day of the time within which the landowner was authorized by the minutes granting tentative approval to file for final approval, or 30 days from the date he or she receives notice of such refusal, whichever is the later.

3. Any such public hearing shall be held within 30 days after request for the hearing is made by the landowner, and notice thereof shall be given and hearings shall be conducted in the manner prescribed in NRS 278A.480.

4. Within 20 days after the conclusion of the hearing, the city or county shall, by minute action, either grant final approval to the plan or deny final approval to the plan. The grant or denial of final approval of the plan shall, in cases arising under this section, contain the matters required with respect to an application for tentative approval by NRS 278A.500.

(Added to NRS by 1973, 575)—(Substituted in revision for NRS 280A.540)

NRS 278A.560 Action brought upon failure of city or county to grant or deny final approval. If the city or county fails to act either by grant or denial of final approval of the plan within the time prescribed, the landowner may, after 30 days' written notice to the city or county, file a complaint in the district court in and for the appropriate county.

(Added to NRS by 1973, 576)—(Substituted in revision for NRS 280A.550)

NRS 278A.570 Certification and recordation of plan; effect of recordation; modification of approved plan; fees of county recorder.

1. A plan which has been given final approval by the city or county, must be certified without delay by the city or county and filed of record in the office of the appropriate county recorder before any

development occurs in accordance with that plan. A county recorder shall not file for record any final plan unless it includes:

(a) A final map of the entire final plan or an identifiable phase of the final plan if required by the provisions of NRS 278.010 to 278.630, inclusive;

(b) The certifications required pursuant to NRS 116.2109; and

(c) The same certificates of approval as are required under NRS 278.377 or evidence that:

(1) The approvals were requested more than 30 days before the date on which the request for filing is made; and

(2) The agency has not refused its approval.

2. Except as otherwise provided in this subsection, after the plan is recorded, the zoning and subdivision regulations otherwise applicable to the land included in the plan cease to apply. If the development is completed in identifiable phases, then each phase can be recorded. The zoning and subdivision regulations cease to apply after the recordation of each phase to the extent necessary to allow development of that phase.

3. Pending completion of the planned unit development, or of the part that has been finally approved, no modification of the provisions of the plan, or any part finally approved, may be made, nor may it be impaired by any act of the city or county except with the consent of the landowner.

4. For the recording or filing of any final map, plat or plan, the county recorder shall collect a fee of $50 for the first sheet of the map, plat or plan plus

$10 for each additional sheet. The fee must be deposited in the general fund of the county where it is collected.

(Added to NRS by 1973, 576; A 1975, 1425; 1977, 1525; 1981, 1318; 1989, 934; 1991, 48, 586; 2001, 3220)

NRS 278A.580 Rezoning and resubdivision required for further development upon abandonment of or failure to carry out approved plan. No further development may take place on the property included in the plan until the property is resubdivided and is reclassified by an enactment of an amendment to the zoning ordinance if:

1. The plan, or a section thereof, is given approval and, thereafter, the landowner abandons the plan or the section thereof as finally approved and gives written notification thereof to the city or county; or

2. The landowner fails to carry out the planned unit development within the specified period of time after the final approval has been granted.

(Added to NRS by 1973, 576; A 1977, 1526; 1981, 140)

JUDICIAL REVIEW

NRS 278A.590 Decisions subject to review; limitation on time for commencement of action or proceeding.

1. Any decision of the city or county under this chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is a final

administrative decision and is subject to judicial review in properly presented cases.

2. No action or proceeding may be commenced for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any city, county or other governing body authorized by this chapter unless the action or proceeding is commenced within 25 days after the date of filing of notice of the final action, decision or order with the clerk or secretary of the governing body.

(Added to NRS by 1973, 576; A 1991, 49)

SPARKS CITY CHARTER

http://www.leg.state.nv.us/Division/Legal/LawLibrary/CityCharters/CtySCC.html

* * *

Sec. 1.060 Elective officers: Qualifications; salaries.

1. The elective officers of the City consist of:

(a) A Mayor.

(b) Five members of the Council.

(c) A City Attorney.

(d) Municipal Judges, the number to be determined pursuant to section 4.010.

2. All elective officers of the City must be:

(a) Bona fide residents of the City for at least 30 days immediately preceding the last day for filing a declaration of candidacy for such an office.

(b) Residents of the City during their term of office, and, in the case of a member of the Council, a resident of the ward the member represents.

(c) Registered voters within the City.

3. No person may be elected or appointed as a member of the Council who was not an actual bona fide resident of the ward to be represented by him for a period of at least 30 days immediately preceding the last day for filing a declaration of candidacy for the office, or, in the case of appointment, 30 days immediately preceding the day the office became vacant.

4. The City Attorney must be a licensed member of the State Bar of Nevada.

5. Each elective officer is entitled to receive a salary in an amount fixed by the City Council. At any time before January 1 of the year in which a general election is held, the City Council shall enact an ordinance fixing the initial salary for each elective office for the term beginning on the first Monday following that election. This ordinance may not be amended to increase or decrease the salary for the office of Mayor, City Councilman or City Attorney during the term. If the City Council fails to enact such an ordinance before January 1 of the election year, the succeeding elective officers are entitled to receive the same salaries as their respective predecessors.

(Ch. 470, Stats. 1975 p. 725; A—Ch. 98, Stats. 1977 p. 211; Ch. 380, Stats. 1977 p. 711; Ch. 412, Stats. 1983 p. 1028; Ch. 450, Stats. 1985 p. 1308; Ch. 24, Stats. 1987 p. 59; Ch. 253, Stats. 1989 p. 546; Ch. 129, Stats. 1993 p. 228; Ch. 41, Stats. 2001 p. 394)

* * *

Sec. 2.010 City Council. The legislative power of the City is vested in a City Council consisting of five Councilmen.

(Ch. 470, Stats. 1975 p. 728)

* * *

Sec. 2.070 Ordinances: Passage by bill; amendments; subject matter; title requirements.

1. An ordinance must not be passed except by bill and by a majority vote of the whole City Council. The style of all ordinances must be as follows: "The City Council of the City of Sparks does ordain:".

2. A bill must not contain more than one subject, which must be briefly indicated in the title. Where the subject of the ordinance is not expressed in the title, the bill is void as to the matter not expressed in the title.

3. Any bill which amends an existing ordinance must:

(a) Set out in full the ordinance or sections thereof to be amended;

(b) Indicate any matter to be omitted by lining or striking through it; and

(c) Indicate any new matter by highlighting.

(Ch. 470, Stats. 1975 p. 730; A—Ch. 129, Stats. 1993 p. 230)

Sec. 2.080 Ordinances: Enactment procedure; emergency ordinances.

1. When first proposed, all bills must be read to the City Council by title, after which an adequate number of copies of the proposed bill must be filed with the City Clerk for public inspection. Except as otherwise provided in subsection 3, notice of the filing must be published once in a newspaper qualified to publish legal notices, and published at least 10 days before the adoption of the ordinance.

2. At the next regular meeting or adjourned meeting of the City Council following the proposal of a bill, the title of the bill must be read as first introduced. Thereupon the bill must be finally voted upon or action thereon postponed. The proposed ordinance and any amendments thereto must be read in full when it is adopted only if so requested by a member of the Council.

3. In cases of emergency or where the bill is of a kind specified in section 7.030, by not less than four-fifths of all the members of the City Council, excluding from any such computation any vacancy on the Council, final action may be taken immediately or at a special meeting called for that purpose, and no notice of the filing of the copies of the proposed bill with the City Clerk need be published.

4. All ordinances must be signed by the Mayor, attested by the City Clerk and published by title, together with the names of the members of the Council voting for or against passage, in a newspaper qualified to publish legal notices, and published for at least one publication, before the ordinance becomes effective. The City Council may, by majority vote, order the publication of the ordinance in full in lieu of publication by title only.

5. The City Clerk shall maintain a record of all ordinances together with the affidavits of publication by the publisher.

(Ch. 470, Stats. 1975 p. 730; A—Ch. 380, Stats. 1977 p. 716; Ch. 160, Stats. 1983 p. 373; Ch. 450, Stats. 1985 p. 1314)

SPARKS MUNICIPAL CODE

http://cityofsparks.us/governing/muni_code/

CHAPTER 20.18
PLANNED DEVELOPMENT REVIEW

* * *

Section 20.18.060 Procedure of tentative approval.

A. Staff review. The City staff will formally review the application, and development plan. Staff will evaluate the proposal and submit its recommendation for approval or denial to the Sparks Planning Commission.

B. Public hearing. A public hearing on the application shall be held by the Sparks Planning Commission. No application in tentative approval will be scheduled for consideration before the Planning Commission or City Council if the application contains errata sheets or is missing any of the contents required by 20.18.050 Application contents. Public notice of the hearing shall be given in the manner prescribed by in section 20.07, Administration. The hearing may be continued from time to time or the Planning Commission may refer the matter to the Planning Department for a further report, but the public hearing or hearings shall be concluded within 60 days after the date of the first public hearing unless the landowner consents in writing to an extension of the time within which the hearings shall be concluded.

C. Recommendation to grant, deny, or condition tentative approval. Following the conclusion of the public hearing, the Planning Commission shall recommend:

1. Granting tentative approval of the plan as submitted;

2. Granting tentative approval of the plan subject to specified conditions not included in the plan as submitted; or

3. Denying tentative approval of the plan.

If granting tentative approval is recommended, the Planning Commission shall, as part of its action, specify the drawings, specifications and any special financial assurances that shall accompany an application for final approval.

D. Findings of fact required. The recommendation must set forth the reasons for granting, with or without conditions, or for denying, and the minutes must set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings on the following:

1. In what respects the plan is or is not consistent with the statement of objectives of a planned unit development.

2. The extent to which the plan departs from zoning and subdivision regulations, otherwise applicable to the property, including but not limited to density, bulk and use, and the reasons why these departures are or are not deemed to be in the public interest.

3. The ratio of residential to nonresidential use in the planned unit development.

4. The purpose, location and amount of the common open space in the planned unit development, the reliability of the proposals for maintenance and conservation of the common open space, and the adequacy or inadequacy of the amount and purpose

of the common open space as related to the proposed density and type of residential development.

5. The physical design of the plan and the manner in which the design does or does not make adequate provision for public services and utilities, provide adequate control over vehicular traffic, and further the amenities of light, air, recreation and visual enjoyment.

6. The relationship, beneficial or adverse, of the proposed planned unit development to the neighborhood in which it is, proposed to be established.

7. In the case of a plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public, residents and owners of the planned unit development in the integrity of the plan.

E. Specification of time for filing application for final approval. Unless the time is specified in an agreement entered into pursuant to NRS 278.0201, if a plan is recommended for tentative approval, an application for final approval of the plan, or any portion of the plan, must be filed within one year from the date of City Council tentative approval. In no event shall the first application for final approval be filed later than one year from the date of City Council tentative approval unless an alternative time frame is identified in the phasing of the project (item 20.18.040 J, above).

F. The Planning Commission shall file a written report of its recommendation with the City Clerk who shall place it on the agenda of the City Council. The City Council shall:

1. Grant tentative approval of the plan as submitted;

2. Grant tentative approval of the plan subject to specified conditions not included in the plan as submitted; or

3. Deny tentative approval of the plan.

In its grant or denial of tentative approval, the City Council must conduct a hearing and provide findings of fact as delineated in SMC 20.18.060(D).

G. The effect of tentative approval is to provide the applicant with a clear indication of requirements needed for final approval of the development plan including a schedule for submittal of application for final approval. Tentative approval does not qualify a plat or the planned unit development for recording or authorize development or the issuance of any building permit.

(Ord. 2281, Amended, 06/13/2005; Ord. 2129, Add, 02/11/2002)

Section 20.18.070 Final approval application.

An application for final approval is a necessary precursor to the issuance of a permit under SMC chapter 15 for construction activity. An application for final approval must be accompanied by a final development plan, design regulations and a fee in the amount established by resolution of City Council.

(Ord. 2129, Add, 02/11/2002)

Section 20.18.080 Procedure for final approval.

A. Application for final review by the Sparks Planning Commission and ultimate final approval by the Sparks City Council must be made to the Administrator within the time specified by the minutes granting tentative approval.

B. A public hearing on an application for final approval of the plan, or any part thereof, is not required if the plan, or any part thereof, submitted for final approval is in substantial compliance with the plan which has been given tentative approval. No application in final approval will be scheduled for consideration before the Planning Commission or City Council if the application contains errata sheets or is missing any of the contents required by 20.18.050 Application contents. The plan submitted for final approval is in substantial compliance with the plan previously given tentative approval if any modification by the landowner of the plan as tentatively approved does not:

1. Vary the proposed gross residential density or intensity of use;

2. Vary the proposed ratio of residential to nonresidential use;

3. Involve a reduction of the area set aside for common open space or the substantial relocation of such area;

4. Substantially increase the floor area proposed for nonresidential use; or

5. Substantially increase the total ground areas covered by buildings or involve a substantial change in the height of buildings.

A public hearing need not be held to consider modifications in the location and design of streets or facilities for water and for disposal of storm water and sanitary sewage.

C. All requirements and regulations pertaining to the application for final approval, substantial compliance with tentatively approved plan, alternative proceedings for final action on plans not in substantial compliance, recourse to courts for

failure of city to grant or deny final approval, certification and filing of approved plan upon abandonment or failure to carry out approved plan shall be provided in NRS 278A.530 to 278A.580, inclusive.

(Ord. 2281, Amended, 06/13/2005; Ord. 2129, Add, 02/11/2002)

Section 20.18.090 Judicial review. Any decision of the city under this chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is a final administrative decision and is subject to judicial review in properly presented cases.

(Ord. 2129, Add, 02/11/2002)