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May 31, 2011

OPINION NO. 2011-06

AGREEMENTS; COLLECTIVE BARGAINING; PUBLIC WORKS: The City may not require a local preference for City residents for all public works projects in excess of $100,000 since the City lacks legislative authority to do so.

Elizabeth M. Quillin, City Attorney
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Dear Ms. Quillin:

In a letter dated February 10, 2011, you requested an Attorney General Opinion as to whether the City of Henderson (City) may require a Project Labor Agreement for construction with the Southern Nevada Building Construction Trades Council for all City public works projects that are in excess of $100,000. You further asked whether such an Agreement may impose a local hiring preference for City residents.

QUESTION ONE

Are there any legal impediments that would prohibit the City from requiring a Project Labor Agreement for construction with the Southern Nevada Building Construction Trades Council for all City public works projects that are in excess of $100,000?

ANALYSIS

I. Background of Project Labor Agreements.

A Project Labor Agreement (PLA), also referred to as a Community Workforce Agreement, is a form of master agreement which serves as a pre-hire collective

bargaining agreement. *See Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382, 388 (2002), citing *U.S. Gen. Accounting Office*, Pub. No. GAO/GGD–98–82, Project Labor Agreements: The Extent of Their Use and Related Information at 1 (1998) (GAO Report). A PLA is an agreement between a construction project owner and a labor union that a contractor must sign in order to perform work on the project. *Associated Builders & Contractors, Inc. v. S. Nev. Water Auth.*, 115 Nev. 151, 979 P.2d 224 (1999). The union is designated the collective bargaining representative for all employees on the project and agrees that no labor strikes or disputes will disrupt the project. The contractor must abide by certain union conditions, such as hiring through union hiring halls and complying with union wage rules.

A PLA serves as a pre-hire agreement because it "can be negotiated before employees vote on union representation or before the contractor hires any workers" and typically "provides that only contractors and subcontractors who sign [the] pre-negotiated agreement with the union can perform project work." *Master Builders of Iowa*, 653 N.W.2d at 388. When utilized, a PLA is incorporated into every contract entered into for a project. PLAs are comprehensive in their coverage of contractor/labor issues in that they generally:

> (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the signatory unions as the sole bargaining representatives for covered workers, whether or not the workers are union members; (3) supersede all other collective bargaining agreements; (4) prohibit strikes and lockouts; (5) require hiring through union referral systems; (6) require all subcontractors to become signatory to the agreement; (7) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (8) prescribe craft wages, either in the body of the agreement or in an appendix or attachment.

Id. at 389.

PLAs have been utilized because of "the short-term nature of employment which makes post hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass. R.I., Inc.*, 507 U.S. 218, 231 (1993); 29 U.S.C. § 158(f). "PLAs have been used on public projects dating back to at least 1938." *Id.* At 388, citing GAO Report at 4.

Although they offer certain advantages, PLAs have often been disfavored as they may: (1) negate the competitive labor rate advantage of non-union contractors over union contractors; (2) lessen competition in that they do not encourage free, open and competitive bidding; (3) raise the overall cost of the project; (4) fail to advance the interests underlying competitive bidding statutes; and (5) effectively discriminate against prospective employees based on their union membership. *See New York State Chapter, Inc. v. New York State Thruway Auth.*, 666 N.E.2d 185 (1996); *George Harms Const. Co., Inc. v. New Jersey Turnpike Authority*, 644 A.2d 76 (1994).

II. Legal Arguments.

Your opinion request is broad in scope, and consequently the analysis and answer cover a wide range of law. This opinion first considers potential federal constitutional challenges; next, it considers arguments that federal statutes preempt any extant state or local authorities; and it concludes with examination of the authority actually provided by state law.

A. Constitutional Provisions.

1. Due Process.

The United States Constitution provides, "no state [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382 (2002), it was argued that the adoption of a PLA resulted in denial of due process for taxpayers who were deprived without sufficient notice or opportunity to be heard of a property right in receiving the lowest possible price for a project. The court identified a two-step inquiry to determine whether a protected liberty or property interest was involved, and then what process was due before a deprivation of that interest. *Id.* at 397–98. The court assumed *arguendo*, without deciding, that a taxpayer has a property interest in receiving the lowest possible price on a public contract. Because extensive opportunities were offered to the taxpayers to be heard before and after the adoption of the PLA, the court determined there had been no deprivation of due process rights. *Id.*

Consistent with due process principles and *Master Builders,* when adopting and implementing a PLA ordinance, notice and an opportunity to be heard are necessary. They should also be accorded prior to entry into any particular PLA.

2. Equal Protection.

The United States Constitution prohibits states from denying to "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The purpose of equal protection is to ensure that similarly situated persons are treated the same. *Master Builders*, 653 N.W.2d at 398. An issue may arise under this provision regarding whether a PLA operates to discriminate against non-union contractors.

In *Master Builders*, plaintiffs argued that the public entity's use of a PLA operated to discriminate against non-union contractors due to allegedly pro-union provisions. The court first determined that construction industry members are not a protected class under equal protection principles nor is a fundamental right involved, thus justifying examination under rational basis scrutiny. *Id.* Under that test, a public entity's action, even if it discriminates, need only be rationally related to a legitimate governmental interest.

In sum, a local government using PLAs is subject to the provisions of the Fourteenth Amendment's equal protection requirement. But under the applicable test, even if there were some disparate impact—found absent in *Master Builders*—the local government's action need only be rationally related to a legitimate governmental interest such as procuring best value for the tax payers.

3. Free Association.

It has been asserted in some cases that a PLA forces non-union contractors to affiliate with union contractors in contravention of the non-union contractors' First Amendment right to not associate with particular persons. U.S. CONST. amend. I; *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "One of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982). Recognition of this right encompasses the combination of individual workers together in order to better assert their lawful rights. *See, e.g.*, *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5–6 (1964).

The adoption of a PLA does not impinge on free association rights. *Master Builders*, 653 N.W.2d at 399. A PLA may constitute "union practices." However, a PLA does not prevent construction industry members "from freely expressing . . . their opposition to unions, nor does it coerce 'pro-union' expressions or association." *Id.*, citing *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 981 P.2d 499 (1999). Contractor members of the construction industry may be disinclined to bid or do work under the provisions of the PLA, but "the First Amendment does not oblige the government to minimize the financial repercussions of such a choice." *Id.*,

citing *Lyng v. Int'l Union, U. Auto., Aerospace, & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 368 (1988).

B. Preemption by Federal Statute.

1. Preemption under the National Labor Relations Act.

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–187, generally governs labor relations. *See Weber v. Anheuser–Busch, Inc.*, 348 U.S. 468, 480 (1955). After the NLRA's enactment, the National Labor Relations Board (NLRB) determined that pre-hire agreements were illegal because they designate an exclusive union representative for employees before an election is held. However, to address the impact this decision had on the construction industry, Congress added section 8(f) to the NLRA in 1959, which provides, in relevant part:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . or (2) such agreement requires as a condition of employment, membership in such labor organization . . . .

29 U.S.C.A. § 158(f). *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265 (1983). With this amendment, Congress authorized employers and unions engaged primarily in the building and construction industry to enter into pre-hire agreements. *Id.*

Even though allowed generally, PLAs may be preempted by federal law when used by state or local governments. However, such preemption only occurs in limited circumstances. In 1993, the United States Supreme Court specifically determined that a PLA is not preempted under the NLRA unless the governmental entity owning the project acts in a regulatory capacity in its utilization of the PLA. *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I.*, Inc., 507 U.S. 218, 227 (1993) (*Boston Harbor* case). This can occur in two types of cases: when needed to protect the authority of the NLRB, and to protect operation of the free enterprise system. *See generally Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60, 65 (2008).[1]

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[1] The two types of federal pre-emption are "Garmon pre-emption, *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), which forbids state and local regulation of activities that are "protected by § 7 (which establishes the right of employees to organize, bargain collectively, and engage in peaceful picketing and strikes) or constitute an unfair labor practice under § 8." "Machinists pre-

In the seminal *Boston Harbor case,* a public entity required that all bidders on the Boston harbor clean-up project adhere to a PLA. The contractors association argued that the NLRA preempted states from enacting or enforcing laws which attempted to regulate labor relations. However, the Court concluded that the PLA in question was not a government regulation at all. *Bldg. & Constr. Trades Council,* 507 U.S. at 232. Its determination was based upon the distinction between a public entity which acts like a regulator and one which acts like any other participant in the market, and which happens to have the economic power to exact the provisions it desires when it contracts. *Id.* at 231–32.

While it has been argued that public entities' adoption of a PLA is a regulatory action, courts have refused to search for a regulatory motive if the ultimate action of the governmental entity is proprietary, as is the case here in the "contracting for services on a specific project." *See Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631, 634 (1966); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1335–36 (D.C.Cir.1996); *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 237 (S.D.N.Y. 2000).

In accordance with *Boston Harbor*, federal labor law does not prohibit a public entity entering the construction market from using the same construction-industry exception regarding PLAs that private purchasers of construction labor use. If the state is intervening only in the labor relations of firms from which it buys services, and it is doing so in order to reduce the cost or increase the quality of those services rather than to displace the authority of the NLRA and the NLRB, there is no preemption.

2. Preemption Under the Employee Retirement Income Security Act

Employee benefit plans are regulated by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. Pursuant to 29 U.S.C. § 1144(a), ERISA provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." A state law under ERISA "includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . ." 29 U.S.C. § 1144(c)(1). Considering whether PLAs are preempted by ERISA, the issue is whether the PLAs constitute State law in the sense that they are "rules, regulations, or other . . . action having the effect of law. . . ."

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emption," *see Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976), prohibits state and municipal regulation of areas that have been left "'to be controlled by the free play of economic forces.'" *Building & Constr. Trades Council of the Metro. Dist. v. Associated Bldrs. & Contrs. of Mass./R.I.*, Inc., 507 U.S. 218, 226–229 (1993) (known as the "*Boston Harbor*" case).

Generally, negotiated contract provisions demanded for certain contracts do not implicate ERISA. *Associated Gen. Contractors v. Metro. Water Dist.,* 159 F.3d 1178, 1183 (9th Cir.1998).

> The definition of state laws excludes state action which does not have the effect of law, and ERISA therefore does not preempt state action which relates to an ERISA plan so long as the state action does not have the effect of law. This distinction indicates that where the state merely acts as any private party might act, instead of in areas where it exercises lawmaking or law enforcement authority, ERISA preemption does not come into play.

Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis, 825 F. Supp. 238, 243 (D.Minn.1993). Private parties may require that contractors on a construction project enter into a similar pre-hire agreement to protect against work stoppages. *Id.* The Court further explained:

> ERISA does not provide any express or implied indication that a state may not act as a private party would be permitted to with respect to its property. To the contrary, ERISA's definition of state law preserves this distinction by only including state action that has the effect of law.

Id.

The relevant distinction is between a public entity acting as a private party could, and an entity which acts in a more general regulatory capacity, the same market participant/regulator distinction drawn by the Supreme Court in *Boston Harbor* in the labor relations area. *See Bldg. & Constr. Trades Council,* 507 U.S. 221. ERISA itself distinguishes between state action in general and state action which has the effect of law.

The *Boston Harbor* court rejected the argument that, because a contract is legal and enforceable, it has the effect of law of a state. It cited *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n. 5 (1995) which provides that language such as "law, rule, regulation . . . connotes official government-imposed policies, not the terms of a private contract." In this case, the City's requirement is created by ordinance, but it only requires PLAs for City projects; it does not purport to establish the requirement for private construction projects. *Cf. Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 492–94, 50 P.3d 546, 548–50 (2002), overruled in part on other grounds by *Garvin v. Dist. Ct.*, 118 Nev. 749, 59 P.3d 1180 (2002) ("[t]o determine whether a municipal ordinance is legislative or administrative, . . . [ask whether] an ordinance originat[es] or

enact[s] a permanent law or lay[s] down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents") (internal quotations and citations omitted).

Thus while the ordinance might superficially appear to be regulation and thus preempted by ERISA, it is by operation not a law and not preempted. *Accord, Associated. Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1184 (1998) (public entity had "not enacted a law, issued a decision, or adopted a rule or regulation, or taken any other action which can be said to have the effect of a law of the State"). The City's ordinance is analogous to a corporation's by-law controlling the purchase of construction services. Thus consistent with the Machinists exemption found in *Boston Harbor,* the ordinance governs the public entity as a market participant and proprietor—as opposed to a regulator—and the *Boston Harbor* reasoning validating PLAs applies.

C. Invalidation by State Statute.

Even if PLAs are constitutionally permissible and are not preempted by federal law, they may be challenged under state law. The most common such challenges are based on labor statutes (right to work, freedom of association) and competitive bidding requirements for public contracts.

1. Challenge under right to work laws.

Nevada's right to work law was passed in 1953. NRS 613.230–.300.[2] The principal provision states:

> No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the state, or any subdivision thereof or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

NRS 613.250.

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[2] The Labor Management Relations (Taft–Hartley) Act, ch. 120, 61 Stat. 136 (1947), was enacted in 1947, regulating labor and limiting states' authority to do so in certain respects. However, Congress refrained from preempting state laws that protected the "right to work." *See* H.R.Rep. No. 80–510 (1947), reprinted in 1947 U.S.C.C.A.N. 1135, 1166. Subsequently, the United States Supreme Court, in companion cases, upheld three states' right-to-work laws against challenges by unions and union members that such laws "denie[d] them freedom of speech, assembly or petition, impair[ed] the obligation of their contracts, or depriv[ed] them of due process of law." *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Lincoln Fed. Labor Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949).

Right to work laws were enacted for the express purpose of guaranteeing the right to work for a given employer regardless of whether the worker belongs to a union. *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 998 P.2d 1178 (2000). "An agreement by an employer to hire only union employees has been declared by the people of this state to be an unlawful objective." *Associated Builders*, 115 Nev. at 160, 979 P.2d at 230.

Therefore, in order to be lawful pursuant to right-to-work statutes, a PLA must not mandate union membership as a condition of employment on the project, and must allow non-union members to be hired. As with the PLA considered in *Associated Builders*, however, this prohibition does not preclude exclusive reliance on a union to represent all workers on a specific project, so long as workers are not forced to join the union. *Id.,* 115 Nev. at 161.

2. Challenge under freedom of association statutes.

NRS 614.100 provides that employers must recognize representatives chosen by their employees in a labor dispute. NRS 614.090(1) declares the public policy of the state:

> It is necessary that the individual worker have full freedom of association, self-organization, and designation of representatives of the worker's own choosing to negotiate the terms and conditions of his or her employment, and that the worker shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

NRS 614.090(1).

In *Associated Builders*, the PLA provided for a union to be the sole and exclusive bargaining representative of all employees working on the project. *Id.*, 115 Nev. at 161. Nonetheless, since no employee was required to join the union or pay union dues, and thus could work on the project for a non-union contractor without joining the union, the PLA did not interfere with employees' freedom of association. *Id.,* 115 Nev. at 161.

3. Challenge under competitive bidding statutes.

Project labor agreements in connection with public contracts have been challenged in numerous jurisdictions on the basis that they are contrary to the pertinent state's competitive bidding requirements for public contracts.[3]

Nevada's law encourages competitive bidding on public contracts at all levels of government. "A public body shall not draft or cause to be drafted specifications for bids, in connection with a public work: (a) In such a manner as to limit the bidding, directly or indirectly, to any one specific concern." NRS 338.140(1)(a).

NRS 338.147(1) provides, in relevant part that, "a local government or its authorized representative shall award a contract for a public work for which the estimated cost exceeds $250,000 to the contractor who submits the best bid."

The Nevada Supreme Court has identified the purposes supporting competitive bidding requirements to be to "save public funds, and to guard against favoritism, improvidence and corruption. Such statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good." *Associated Builders*, 115 Nev. at 158, 979 P.2d at 229.

These purposes, however, do not necessarily preclude use of PLAs. In *Associated Builders*, the Southern Nevada Water Authority (SNWA) entered into a PLA for preparation and implementation of its thirty-year capital improvements plan to develop a municipal water system. The PLA was upheld against challenge even though the lowest bidder for one project was disqualified because he would not agree to abide by the PLA.

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[3] Courts have considered and upheld PLAs under their state's competitive bidding statute. *See Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 981 P.2d 499, 506–07 (Cal. 1999); *John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 961–62 (Mass. 1999); *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 378 (Minn. Ct. App. 1999); *N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth.*, 666 N.E.2d 185, 190–192 (N.Y. 1996) (upholding one of two challenged PLAs under the state law); *State ex rel. Assoc. Builders & Contractors v. Jefferson County Bd. Of Comm'rs*, 665 N.E.2d 723, 727 (Ohio Ct. App. 1995); *A. Pickett Constr., Inc. v. Luzerne County Convention Ctr. Auth.*, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999); *Assoc. Builders & Contractors of Rhode Island, Inc. v. Department of Admin.*, 787 A.2d 1179, 1189–90 (R.I. 2002).

Courts have also invalidated PLAs for violating a state's competitive bidding laws: *Tormee Constr., Inc. v. Mercer County Improvement Auth.*, 669 A.2d 1369, 1372 (1995); *George Harms Constr. Co., Inc. v. N.J. Tpk. Auth.*, 644 A.2d 76, 95 (N.J. 1994); *N.Y. State Chapter, Inc.*, 666 N.E.2d 185 (N.Y. 1996) (striking one of two challenged PLAs under the state law).

Before implementing the PLA, SNWA had adopted a list of goals and objectives for it including prohibiting labor disruptions; naming the national unions as sole and exclusive bargaining representatives of all craft employees; setting uniform work hours and overtime rates; and providing access to projects to both union and non-union contractors. *Id.,* 115 Nev. at 155, 979 P.2d at 227. Although the PLA required hiring to be supervised out of the union hall, it did not require individuals to join a union to work on projects. *Id.* In addition, the SNWA required periodic evaluation of the PLA to determine whether the anticipated benefits of using a PLA had been realized. *Id.,* 115 Nev. at 151, 979 P.2d at 224.

The Court considered whether the PLA transgressed the policies underlying competitive bidding requirements. It also observed that the PLA provided equal access to projects to both union and non-union contractors; and it discerned that employees were not required to join the representative union.

The Court concluded that the PLA maintained competition. *Id.*, 115 Nev. at 159, 979 P.2d at 229. Since labor strikes were an issue that could affect public funds, the concern was sufficient to support the PLA. The PLA maintained competition among bidders, guarded against favoritism and did not violate Nevada's competitive bidding statutes. *Id.*[4]

CONCLUSION

While PLAs are lawful in Nevada, each proposed PLA should be analyzed individually. An assessment should be performed before entering into a PLA to identify specific project requirements that support using the PLA, and whether the PLA

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[4] In *New York State Chapter Inc. v. New York State Thruway Authority*, the Court of Appeals of New York, in consolidated cases, looked to the "advancement of competitive bidding interests" to (1) uphold one project labor agreement and (2) invalidate another project labor agreement. *New York State Chapter, Inc. v. New York State Thruway Authority*, 666 N.E.2d 185 (1996). The record supporting a determination by a public benefit corporation, New York State Thruway Authority, to enter into a PLA in connection with a bridge improvement project established that a PLA was justified by the interests underlying the competitive bidding laws and, therefore, the determination is sustained. The public entity had assessed specific project needs and demonstrated that a PLA was directly tied to competitive bidding goals. The PLA did not serve to promote favoritism or cronyism as the PLA was found to apply whether the successful bidder was a union or nonunion contractor. *Id.*

In a companion case, a PLA was deemed impermissible. The Dormitory Authority of the State of New York (DASNY), a public benefit corporation, entered into a PLA in connection with a project for the modernization of the Roswell Park Cancer Institute, which is operated by the Department of Health. DASNY failed to show that its decision had as its purpose the advancement of the interests underlying the competitive bidding statutes. DASNY failed to contemporaneously project cost savings before proposing the PLA or consider any unique feature of the project to necessitate a PLA; DASNY also failed to demonstrate labor unrest threatening the project. DASNY's goals of promoting women and minority hiring through the PLA did not support its adoption of the PLA for this project consistent with the state's competitive bidding requirements.

maintains competitive bidding. Important to this latter objective, consideration should be given to whether the PLA is for the benefit of taxpayers; provides equal access to projects to both union and non-union contractors, at no disadvantage to non-union contractors; and whether employees are required to join the representative union under the PLA.

QUESTION TWO

May the City require a local preference for City residents for all public works projects in excess of $100,000? Stated another way, is a residency preference lawful?[5]

ANALYSIS

I. Delegated Authority: Dillon's Rule.

Dillon's Rule, a common law rule of statutory construction, limits the powers of local government. 2 *McQuillin Mun. Corp.* § 4:11 (3rd ed.). Under Dillon's Rule, a local government is authorized to exercise only those powers which are: (1) expressly granted; (2) necessarily or fairly implied in or incident to the powers expressly granted; or (3) essential to the accomplishment of the declared purposes of the local government. Nevada courts have applied Dillon's Rule. *See Ronnow v. City of Las Vegas*, 57 Nev. 332, 342–43, 65 P.2d 133, 136 (1937). Under existing law, a city government is authorized to exercise only those powers expressly granted by the charter or laws creating the city, and the necessary means of employing those powers. *Tucker v. Mayor of Virginia City*, 4 Nev. 20, 26 (1868).

NRS 338 provides the statutory framework for public works contracts. NRS 338.1385(5) states that: "Except as otherwise provided in subsection 6 and NRS 338.1389, a public body or its authorized representative shall award a contract to the lowest responsive and responsible bidder." An exception to this requirement exists to authorize rejection of a bid if "[t]he public interest would be served by such a rejection." NRS 338.1385(6)(d).

The government entity must adopt statutorily specified criteria for determining whether an applicant for a contract for a public work is qualified. NRS 338.1377. "The local government shall not use any criteria other than the criteria described in NRS 338.1377 in determining whether to approve or deny an application [to qualify a bidder]." NRS 338.1379(6).

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[5] A threshold question which is not opined on herein is the definitional scope of "resident."

Thus Nevada statutory authority does not expressly authorize local governments to establish local hiring preferences. Rather, local governments must adhere to specific enumerated criteria in qualifying bidders for public works projects. Neither is authority to impose a local preference necessarily or fairly implied in, or incident to, the express power given to enter into contracts. Lastly, preference is not essential to the accomplishment of the declared purposes of the local government.

Because the City has not been empowered by the Legislature to employ new or different selection criteria, the City is prohibited from imposing a local hiring preference.[6]

CONCLUSION

The City may not require a local preference for City residents for all public works projects in excess of $100,000 since the City lacks legislative authority to do so.

Sincerely,

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By: _____
ANN McDERMOTT
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AM:JM

[6] A.B. 144 became effective April 27, 2011, giving priority in bidding on state and local public works projects to Nevada businesses that employ Nevada workers. Act of April 27, 2011, ch. 20, 2011 Nev. Stat. ___.