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September 23, 2013

OPINION NO. 2013-07

BONDS; ELKO COUNTY; IMPROVEMENT DISTRICTS. Elko County cannot create a Special Improvement District (SID) under NRS chapter 271 and issue bonds for the creation of infrastructure improvements that are owned and operated by for-profit companies.

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Dear Mr. Torvinen:

You have asked this office for an opinion regarding the ability of Elko County to issue local government bonds for improvements under NRS Chapter 271 where the improved property is owned and operated by a for-profit corporation.

QUESTION ONE

Can Elko County create a Special Improvement District (SID) under NRS Chapter 271 and issue bonds for the creation of infrastructure improvements, including the creation and operation of a sewer system and a natural gas pipeline, both owned and operated by for-profit companies?

## ANALYSIS

Elko County is home to approximately 50,000 Nevadans, approximately 18,000 of whom live in the Elko suburbs of Spring Creek, Lamoille, and South Fork. In conjunction with development of the land in that area, a developer has asked Elko County to create a SID and issue development bonds, under NRS Chapter 271, in an approximate amount of \$7.5 million in order to assist the financing of a residential development in Spring Creek, Lamoille, and South Fork. The bonds would assist in financing the infrastructure development required for additional phases of development of private property into residences for the expanding population in Elko County. The parcel of property to be developed is wholly owned by the developer, who would sell the subdivided parcels to the property owners. As part of the sales, parcel owners would pay to connect into the infrastructure services financed by the bonds. These payments would be applied to payment of the bonds' financing obligations.

The proposed infrastructure improvements include, but are not limited to, a roundabout on a state highway at the entrance of the residential development; partial pavement of various streets within the SID; construction of gravel roads with the intention to pave at a later date; construction of curbs, gutters, and sidewalks within the residential development; construction of a sewer treatment facility; construction of approximately one mile of sewer main line; and construction of six miles of natural gas pipeline.

Once constructed, operation of the sewer treatment facility would be conducted by a private for-profit water company, regulated by the Public Utilities Commission of Nevada (PUC). Similarly, once constructed, the natural gas pipeline would be turned over to the natural gas purveyor in Elko, which is a private, for-profit company, regulated by the Nevada PUC.

Several legal authorities are relevant to the analysis at the outset. A county in Nevada is a "creature of the legislature," whose power is exclusively derived from the Legislature. *Pershing County v. Sixth Jud. Dist. Ct.*, 43 Nev. 78, 84, 181 P. 960, 961 (1919). "Under traditional legal principles, the scope and extent of a county's authority to act is contained within, and limited by, it's [sic] enabling statutes." Op. Nev. Att'y Gen. No. 95-03 (March 13, 1995); see also Op. Nev. Att'y Gen. No. 2000-10 (March 8, 2000). "In short, [a county] can exercise only those powers that are expressly granted to it by law, or by such implication as are reasonably necessary to carry out the express powers." Op. Nev. Att'y Gen. No. 95-03 (March 13, 1995), citing Op. Nev. Att'y Gen. No. 874 (February 21, 1950).

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The Consolidated Local Improvements Law, codified at NRS Chapter 271, provides municipalities the authority to fund acquisition, improvement, maintenance, and operation of a project that is in the public interest. NRS 271.020(2). "Municipalities" are defined as "any county, unincorporated town or city in the State." NRS 271.145(1). Elko County is thus a municipality for purposes of Chapter 271. Further, a project is defined as "any structure, facility, undertaking or system which a municipality is herein authorized to acquire, improve, equip, maintain or operate." NRS 271.175.

Generally under the Consolidated Local Improvements Law, municipalities, such as Elko County, are authorized to engage in projects as set forth in NRS 271.265. This power is expanded by the collateral powers expressed in NRS 271.270. However, the exercise of powers under Chapter 271 must be in conformity with the constitutional requirements for distribution of public funds and the expressed legislative intent that the action be in the public interest.

The Legislature has the power to appropriate money as it sees fit, except as limited by Nevada's Constitution including, Article 8, § 9. *State ex rel. Ash v. Parkinson*, 5 Nev. 15, 27 (1869).

Pursuant to the express language of the Nevada Constitution, the State is prohibited from donating money to companies, associations, or corporations. Specifically, "[T]he State shall not donate or loan money, or its credit, subscribe to or be interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." NEV. CONST. art. 8 § 9. This prohibition, however, does not apply to spending by cities, counties, municipal corporations, or other governmental entities. *Gibson v. Mason*, 5 Nev. 283, 301 (1869). Limits on political subdivisions are contained in Article 8, §10 which states: "[n]o county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation or association whatever; or loan its credit in aid of any such company, corporation or association, except railroad corporations, companies or associations." NEV. CONST. art. 8, § 10. The omission from Article 8, § 9, of a prohibition against donations such as that contained in Article 8, § 9, leads to the conclusion that it was not intended to prohibit such donations by political subdivisions. *Gibson*, 5 Nev. at 301 (1869); Op. Nev. Att'y Gen. No. 1995-15 (August 11, 1995).

However, the counties' discretionary authority to grant sums of money is still subject to constitutional restraints. See *State of Nevada ex. rel. Brennan v. Bowman*, 89 Nev. 330, 332, 512 P.2d 1321, 1322 (1973) ("Public funds may not be spent for private purposes . . . if the County were to levy a tax to retire the bonds and if the purpose of the bond issue was private rather than public in nature, the law would be

struck down." (internal citations omitted). The constitutional restraint in this instance is the public purpose doctrine, requiring that expenditure of public funds be made in the furtherance of a public purpose.

As a general proposition, "[t]he issue of public bonds that must be paid for by public funds raised by the process of taxation must be for a public purpose." 64 Am. Jur. 2d Public Securities and Obligations § 88 (2013). This rule is constitutionally based:

It has been recognized in several cases that state power to issue state bonds to be paid by raising money through taxation is subject to the limitation upon state power created through the Due Process Clause of the 14<sup>th</sup> Amendment to the Federal Constitution, for it is settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes.

Even as to revenue bonds, a municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function that is not in a legal sense public in nature.

*Id.* See also *Potter v. Judge*, 444 N.E.2d 821, 823 (Ill. App. 1983) ("The 'public purpose' analysis rests, in part, upon the long-settled principle that the imposition of taxes for non-public purposes contravenes due process of law.") (citing *Green v. Frazier*, 253 U.S. 233 (1920)). *Brown v. Longiotti*, 420 So.2d 71, 72 (Ala. 1982) ("[t]he limitation that public money and credit can only be used for 'public purposes' is a matter of due process and implicit in the [state's] Constitution" and overall, "the premise that all appropriations or expenditures of public money . . . must be for public purpose as opposed to a private purpose" is widely held.) Citing 15 McQuillin, Mun. Cor. § 39.19 (3d Ed.).

The court will determine what are constitutionally permissible public purposes, but the question in the first instance is for the legislature to determine and its opinion must be given great weight by the court. *Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424, 433-34 (Wis. 1996).

For a project to be properly within the Consolidated Local Improvements Law, it must conform to the public purpose doctrine. In the circumstances here, there is no predominant public purpose or close relationship to the public welfare.

It is axiomatic in Nevada law that a political subdivision cannot engage in a for-profit enterprise. Public funds may not be spent for private purposes. *State ex rel. Brennan*, 89 Nev. at 332, 512 P.2d at 1322. Where public funds are spent, there is close scrutiny to ensure there is a public benefit generated by the expenditure. See *Clark County v. Lewis*, 88 Nev. 354, 357, 498 P.2d 363, 365 (1972). These principles are similarly present when evaluating the requirements for development bonding under NRS Chapter 271. NRS 271.335(11) requires that the advantages resulting from the creation of a SID be to the municipality and the public:

It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state . . . must have primarily a public rather than a private purpose. A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002) (quoting *Idaho Water Res. Bd. v. Kramer*, 548 P.2d 35, 59 (Idaho 1976). Compare *Everett v. County of Clinton*, 282 S.W.2d 30, 39 (Mo. 1955) (upholding county operation of rock quarry, where "[T]he record . . . satisfactorily refutes the theory that the county was engaging in a commercial enterprise. It was not a business venture for profit.")).

Development of private property for the pecuniary benefit of developers and non-governmental utility operators does not fulfill the public purpose requirement. Review of the public purpose requirement demonstrates that there is "no authority which would dignify that objective, standing alone, as a public purpose." Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002) (citing *City of Corbin v. Kentucky Util. Co.*, 447 S.W.2d 356, 358 (Ky. 1969)). The determination of public purpose is based upon the activity as a whole, and must demonstrate "a predominance of a public purpose [or a] close relationship to the public welfare . . ." *City of Corbin*, 447 S.W.2d at 359.

While public purpose law and its interpretation have evolved, they do not appear to have moved to a point where a county may provide project funding to private entities for development of residential real estate for the primary benefit of the developer and the third party utility service operators. For the funding of a SID under NRS Chapter 271 to be permissible, it must have a predominantly "public purpose" or maintain such a close relationship to the public welfare to consist of a permissible use of county bonding authority. Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002); *Siegel v. City of Branson*, 952 S.W.2d 294, 297 (Mo. App. 1997) ("No hard and fast rules exist for determining whether specific uses and purposes are public or private . . . [t]he concept is elastic and

keeps pace with changing conditions.”) No such connection exists here, and therefore the public purpose is not served by the issuance of the development bonds.

As part of your opinion request, you indicated your belief that the competitive bidding process for contracts for public work set forth in NRS Chapter 338 is applicable to a project undertaken to create a SID and issue public financing based on the facts set forth above. We agree. Pursuant to the requirements for the creation of a SID the anticipated improvements must be carried out either through: (i) municipally owned or leased equipment and officers; or (ii) by an independent contractor operating under an approved contract with the SID. NRS Chapter 338 sets out the applicable requirements for approval of a contract between a SID and an independent contractor. It is our understanding that the County will not provide municipally owned or leased equipment, and the developer is not associated with the County; therefore, the competitive bidding requirements of NRS Chapter 338 are applicable, requiring that the project be competitively bid.

Additionally, the express statutory language of NRS 271.335 provides that any project undertaken pursuant to NRS Chapter 271 must be subject to the competitive bid process of NRS Chapter 338. NRS 271.335(3); *see also Carson-Tahoe Hospital v. Bldg. & Constr. Trades Council of N. Nevada*, 122 Nev. 218, 128 P.3d 1065 (2006).

In *Carson-Tahoe Hospital*, the court considered whether NRS 244A.763(5) required workers to be paid prevailing wages for a private project funded through public economic development bonds. *Id.* at 219, 128 P.3d at 1066. The court held that the requirements of the prevailing wage laws apply only to those projects mandated to pay prevailing wages. Special Improvement Districts created under NRS Chapter 271 are expressly required to pay prevailing wages pursuant to NRS Chapter 338, unless limited statutory exceptions apply. While *Carson-Tahoe Hospital* dealt with the narrow issue of prevailing wages, the applicability of the legislative scheme set forth in Chapter 338, and therefore the applicability of Chapter 338 as a whole was expressly affirmed by the court. Additional statutory requirements, such as competitive bidding, are similarly required where private project funding is to be made through economic development bonds. After review of the facts as presented and the statutory exceptions, the exceptions are inapplicable in this instance. If a SID were created to implement the request of the developer as set forth above, it would be subject to the requirements of NRS Chapter 338, including the competitive bidding process.

#### CONCLUSION TO QUESTION ONE

Counties, as subdivisions of the State, derive their powers exclusively from legislative delegation. There is no provision of Nevada law that, either expressly or

by implication, permits the formation of a SID and distribution of municipal funds for the enhancement of private property, where the property remains in the hands of private for-profit entities, and is operated by private for-profit entities. While Nevada law authorizes municipal governments to undertake projects intended to fulfill various public purposes, there is no indication that the intended SID satisfies the requirements of NRS Chapter 271 specifically or the policy of the State of Nevada generally. The creation of a SID and the funding of a project with municipal funds pursuant to NRS Chapter 271 for the purpose of providing financing for the construction of infrastructure improvements relating to private for-profit development of a residential community, followed by operation of such infrastructure by for-profit entities for the benefit of those entities, is contrary to the public purpose doctrine. Therefore, while not violating the constitutional prohibitions against extension of municipal funds, the creation of such a SID would violate Nevada law, as well as the stated policy for creation of such districts, and is therefore impermissible.

#### QUESTION TWO

Can Elko County create a SID under NRS Chapter 271 and issue bonds to finance the creation of a natural gas pipeline owned and operated by a for-profit company?

#### ANALYSIS

There is no express authorization within NRS Chapter 271 for the creation of a SID or the extension of municipal funds for the purpose of installing a natural gas pipeline. Elko County lacks such authority under Nevada law.

NRS 271.265 sets forth projects for which bonding under NRS Chapter 271 are available. There is no provision for creation of natural gas pipelines within NRS 271.265. The specificity with which the Legislature defined and authorized the general powers of counties, cities, and towns should be construed consistently with the legal maxim "expressio unius est exclusio alterius," which means "the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). See also *Ronnow v. City of Las Vegas*, 57 Nev. 332, 342, 65 P.2d 133, 136 (1937) (strict construction applied to legislative grant of powers to municipality); *Clark Co. Sports Ent., Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (Legislature would have provided language of inclusion if it intended it); *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1060, 944 P.2d 835, 842 (1997) (court is reluctant to imply a right not granted by the Legislature in NRS 533.040 because of the maxim "expressio unius est exclusio alterius").

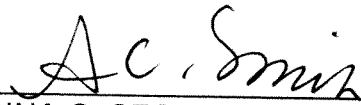
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CONCLUSION TO QUESTION TWO

Without the specific determination by the Legislature that a natural gas pipeline project is within the powers conveyed by Chapter 271, Elko County cannot issue bonds to provide financing under the Consolidated Local Improvements law.

Sincerely,

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