



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY DUNCAN
Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

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OPINION NO. 2015-06

NYE COUNTY; SALES AND USE TAX;
COMMISSIONERS; PUBLIC SAFETY;

The Nye County Sales and Use Tax Act of 2007 (Act) does not prohibit a governing body within the County from using the proceeds of the tax to restore the funding for items of police and fire protection to the amounts funded before October 1, 2007. The governing bodies must determine compliance with section 17(2)(b) and must compare proposed expenditures with the previous year's expenditures; they may reallocate the proceeds of the tax to different uses from year to year; and the proceeds may be pooled and expended on a pro rata basis. The Board may not unilaterally approve expenditures for services provided by the Sheriff.

Angela A. Bello
Nye County District Attorney
Post Office Box 39
Pahrump, Nevada 89041

Dear Ms. Bello:

By letter dated April 6, 2015, you requested an opinion from the Office of the Attorney General regarding the use of proceeds generated by the Nye County Sales and Use Tax Act of 2007 (Act). See Act of June 18, 2007, ch. 545, §§ 1-23, 2007 Nev.

Stat. 3423-29 (A.B. 461). Subsequently, on May 22, 2015, you submitted revised questions to be answered by the opinion.

BACKGROUND

In 2007, the Nevada Legislature passed the Act to address a perceived need for additional spending on public safety in Nye County (County). 2007 Nev. Stat. 3423-24. Section 4 of the Act declared that the County was growing, the danger from fire and crime was increasing, and the number of public safety personnel and facilities had not kept pace with the growth. *Id.* To address these concerns, Section 14(1) of the Act authorized the Board of County Commissioners of the County (Board) to enact an ordinance imposing a sales and use tax to generate additional revenue for public safety. 2007 Nev. Stat. 3427. The Act became effective on October 1, 2007. 2007 Nev. Stat. 3429. The Act's grant of authority to the Board expires by limitation on October 1, 2027. *Id.* Accordingly, the Act gave the Board a period of twenty years in which to adopt an ordinance imposing the tax.

The Board adopted an ordinance imposing the tax, but not until 2013, at which point the funding for various items of police and fire protection had fallen below the level at which the funding existed for those items prior to October 1, 2007. Sections 17 and 17.5 of the Act contain language which implies that the proceeds of the tax must be used to supplement the funding for public safety in reference to the amounts as they existed before October 1, 2007. 2007 Nev. Stat. 3426-27. You have asked, among other things, whether the proceeds of the tax may be used to completely or partially restore the funding for various items of public safety to the amounts at which the funding for those items existed before October 1, 2007.

QUESTION 1

As a preliminary matter, you have asked about the reporting requirement in Section 17.5 of the Act. This provision requires the County to submit expenditure reports to the Director of the Legislative Counsel Bureau (LCB). Section 17.5(3) of the Act states that the reports must include "[a] detailed analysis of the manner in which each expenditure . . . [d]oes not replace or supplant funding which existed before October 1, 2007, for the purposes set forth in subsection 1 of section 14 of [the Act]." 2007 Nev. Stat. 3427. Stated differently, Section 17(3) requires the reports to identify the manner in which the proceeds of the tax have been used to maintain or supplement the level of funding at which it existed before October 1, 2007.

When read in isolation, the reporting requirement in Section 17.5(3) suggests that the County is prohibited from using the proceeds of the tax to replace or supplant a previous level of funding for items of police and fire protection. However, Section 17.5(3) is only a reporting requirement and does not actually purport to limit or restrict

the use of the proceeds of the tax. Section 17(2)(b) is the only provision of the Act that arguably limits or restricts the use of the proceeds of the tax.

Section 17(2)(b) ties proposed expenditures to “existing funding” for police and fire protection, not previous levels of funding for police and fire protection. 2007 Nev. Stat. 3426. Section 17(2)(b) states that a “governing body *must* approve the expenditure of the proceeds *if* it determines that . . . [t]he *proposed use* will not replace or supplant *existing funding* for [police and fire protection].” 2007 Nev. Stat. 3426 (emphasis added). Given the significance of Section 17(2)(b), it is appropriate to restate your question as follows:

Does Section 17(2)(b) of the Act, when read in conjunction with 17.5(3), prohibit the governing bodies within the County from using the proceeds of the tax to restore the funding for various items of police and fire protection to the amounts at which those items were funded prior to October 1, 2007?

SUMMARY CONCLUSION TO QUESTION 1

Section 17(2)(b) of the Act does not prohibit a governing body within the County from using the proceeds of the tax to restore the funding for items of police and fire protection to the amounts at which those items were funded before October 1, 2007. However, the governing body’s aggregate expenditure for qualifying items of police and fire protection must supplement existing funding for those items in the first year after the adoption of the County’s ordinance, and must thereafter remain constant or increase on an annual basis.¹

ANALYSIS

Section 17(2)(b) of the Act is a directive to governing bodies to approve expenditures that maintain or supplement existing levels of funding for police and fire protection. Section 17(2)(b) does not prohibit expenditures that restore some previous level of funding, so long as the funding for all qualifying expenditures supplements the existing funding for qualifying items of police and fire protection in the first year after the adoption of the County’s ordinance. Thereafter, the funding for qualifying items of police and fire protection must remain constant or increase on an annual basis. This condition on annual spending derives from the directive to governing bodies to approve expenditures that “will not replace or supplant *existing funding*.” 2007 Nev. Stat. 3426 (emphasis added). Although Section 17.5(3) of the Act establishes a benchmark of October 1, 2007, for reporting a comparison of expenditures to the LCB, that benchmark

¹ To the extent that this opinion conflicts with the analysis in Op. Nev. Atty. Gen. No. 04 (April 15, 2011), this opinion governs. As used in this opinion, “existing funding” refers not to an absolute amount of funding, but to the level of funding for qualifying items of police and fire protection relative to the funding for all governmental obligations and expenses.

is not a substantive restriction or limitation upon the authority of a governing body to approve expenditures for the purposes outlined in Section 14(1) of the Act.

When the language of a statute is plain on its face, one should not look beyond the text of the statute to ascribe meaning to the statute. *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, __Nev.__, 249 P.3d 501, 505 (2011). Furthermore, “[i]t is a fundamental rule of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000) (citations and internal quotations omitted). Here, Sections 17(2)(b) and 17.5 of the Act serve two completely different purposes and should not be jointly construed to impose an unspecified limitation upon spending.

In fact, neither Section 17(2)(b) nor Section 17(3) prohibits expenditures. As noted above, Section 17(2)(b) of the Act affirmatively directs governing bodies within the County to approve specified expenditures based upon existing levels of funding. More specifically, it directs governing bodies to approve expenditures which maintain or supplement existing levels of funding for items falling within the statement of general purposes outlined in Section 14(1) of the Act. Section 14(1), in turn, authorizes the Board to “enact an ordinance imposing a local sales and use tax to: (a) Recruit, employ and equip additional firefighters, deputy sheriffs to the Sheriff and other public safety personnel; (b) Improve and equip existing public safety facilities; and (c) Construct and equip new public safety facilities.” 2007 Nev. Stat. 3425.

Section 14(1) of the Act sets forth restrictions on the use of tax proceeds only insofar as expenditures must be made for one or more of the three stated purposes. With respect to each jurisdiction over which a governing body has authority, Section 17(1) of the Act further requires that expenditures be allocated in equal shares between police and fire protection. Aside from this allocation requirement, the Act does not require that expenditures be equally allocated between or prioritized in reference to the three general categories mentioned in Section 14 of the Act. In short, a governing body may approve expenditures for any of the three general purposes enumerated in Section 14 of the Act, subject only to the requirement that expenditures be (1) allocated evenly between police and fire protection, and (2) approved for the purpose of supplementing or maintaining existing levels of funding for qualifying items of police and fire protection.

Indeed, the requirement of Section 17(2)(b) to maintain or supplement existing funding is not a limitation upon the authority of a governing body to spend the proceeds of the tax to partially or completely restore a previous level of funding for items of public safety. The clear purpose of the directive is to insure that the governing body does not redirect existing public safety funds to support governmental functions or operations not mentioned in Section 14(1) of the Act. If this were to occur, the governing body would presumably fill the resulting void in the public safety budget with the proceeds of the tax. Section 17 of the Act addresses this very scenario.

Section 17 of the Act does not, however, prohibit spending to restore the levels of funding for items of public safety to the levels at which they were funded before October 1, 2007. Sections 17(1) and 17(2) read in their entirety as follows:

1. The proceeds received from any sales and use tax imposed pursuant to this act must be expended in each of the areas to which those proceeds are allocated for expenditure pursuant to section 14 of this act in such a manner *that half of those proceeds are expended for the support of the services provided by local fire departments in that area and the remaining half of those proceeds are expended for the support of the services provided by the Sheriff in that area.*

2. No expenditure of those proceeds may be made unless the expenditure has been approved by the governing body of the area to which those proceeds have been allocated for expenditure. The governing body *must approve the expenditure of the proceeds if it determines that:*

(a) The proposed use of the money conforms to all provisions of this act; and

(b) The proposed use will not replace or supplant *existing funding* for the purposes set forth in subsection 1 of section 14 of this act for the support of the services provided by local fire departments and the Sheriff in that area.

2007 Nev. Stat. 3426 (emphasis added).

In summary, the above provisions set forth the process by which a governing body must approve prospective expenditures relative to the existing level of funding for public safety. Furthermore, according to Section 17(3) of the Act, the existing level of funding is that which exists in the fiscal year immediately preceding the fiscal year for which the governing body intends to approve a new cycle of expenditures. Section 17(3) reads as follows:

In determining whether a proposed use meets the requirement set forth in [Section 17(2)(b) of the Act], the governing body shall determine whether the amount approved for expenditure for the fiscal year for the purposes set forth in subsection 1 of section 14 of this act for the support of the services of local fire departments and the Sheriff in that area, not including any money received or expended pursuant to this act, is equal to or greater than the amount approved for expenditure *in the immediately*

preceding fiscal year for the purposes set forth in subsection 1 of section 14 of this act for the support of the services of local fire departments and the Sheriff in that area.

2007 Nev. Stat. 3426 (emphasis added).

As to the reporting requirements in Section 17.5 of the Act, these provisions require only that the Board report the manner in which the Board has prioritized expenditures relative to the funding for public safety as it existed before October 1, 2007. Section 17.5 does not contain a prohibition on spending and should not be construed to modify the plain language of Section 17(2)(b) of the Act. On its face, Section 17.5 simply requires each governing body within the County to provide the LCB with accurate and detailed information about how the governing body has prioritized and allocated expenditures in accordance with Sections 14 and 17 of the Act.

As a practical matter, the reporting requirement of Section 17.5 allows the LCB to evaluate how fluctuations in revenue since September 30, 2007, have impacted expenditures on an annual basis. While the reporting requirement of Section 17.5 may provide the LCB with guidance in making future decisions about tax matters within the County, it does not impose restrictions on the use of sales and use tax proceeds. As noted above, the Act requires only that expenditures be allocated equally between police and fire protection in accordance with Section 17(1) of the Act, and approved in the manner described in Sections 17(2) and (3) of the Act.

QUESTION 2

As discussed above, Section 17(2)(b) of the Act requires that each governing body within the County approve expenditures that will supplement or maintain the existing funding for any use to which the proceeds of the tax will be expended in the current year. You have asked whether the governing body must perform an item-by-item analysis in determining whether expenditures comply with the provisions of Section 17(2)(b) of the Act.

SUMMARY CONCLUSION TO QUESTION 2

In determining whether proposed expenditures for the current year will conform to the requirements of Section 17(2)(b) of the Act, the governing body must compare proposed expenditures in the aggregate with the previous year's expenditures in the aggregate.

ANALYSIS

The Act authorizes governing bodies within the County to spend the proceeds of the tax for any or all of the purposes outlined in Section 14(1) of the Act. As discussed

above, Section 17(2)(b) requires the governing bodies to approve expenditures which maintain or supplement the existing funding for the stated purposes. Section 17(2)(b) insures that governing bodies will not redirect existing funds for police and fire protection to governmental purposes or functions not described in Section 14(1) of the Act.

In other words, once the tax is imposed and first applied to maintain or supplement the existing level of funding for any or all of the purposes outlined in Section 14(1) of the Act, the governing bodies must thereafter ensure that expenditures in future years conform to the same criteria. In determining whether expenditures meet these criteria, the governing bodies must compare expenditures in the aggregate. In short, Section 17 of the Act does not direct the governing bodies of the County to perform an item-by-item analysis of expense items. So long as spending in the aggregate is made for the purposes outlined in Section 14(1) of the Act, the governing bodies may reallocate the proceeds of the tax to different uses from year to year.

Regarding the approval of expenditures, Section 17(3) of the Act directs the governing body to make a comparison between “the *amount* approved for expenditure for the fiscal year *for the purposes* set forth in [Section 14(1) of the Act]” and “the *amount* approved for expenditure in the immediately preceding fiscal year *for the purposes* set forth in [Section 14(1) of the Act].” 2007 Nev. Stat. 3426 (emphasis added). As illustrated by the preceding text, the word “amount” as expressed in the singular is modified by the term “purposes” as expressed in the plural. The structure of the sentence indicates that the required comparison is between the aggregate expenditure for the preceding year and the proposed aggregate expenditure for the current year.

As a practical matter, this affords the governing body the discretion to reallocate specific expenditures within the general framework provided by Section 14(1) of the Act. In other words, the governing body will be in compliance with Section 17(2) so long as it uses the proceeds of the tax to maintain or supplement, on an annual basis, the aggregate funding that it expends for the various purposes described in Section 14(1) of the Act.

QUESTION 3

You have asked whether a new position initially funded with the proceeds of the tax must continue to be funded in future years with the proceeds of the tax.

SUMMARY CONCLUSION TO QUESTION 3

As discussed above in response to your second question, the governing bodies may reallocate the proceeds of the tax to different uses from year to year, provided that

they maintain or supplement the aggregate level of funding for the purposes described in Section 14(1) of the Act.

QUESTION 4

If a proposed expenditure of the proceeds of the tax imposed pursuant to the Act would benefit multiple areas within the county, may the proceeds available to each benefitted area be pooled and expended on a pro-rata basis by population?

SUMMARY CONCLUSION TO QUESTION 4

The proceeds available to each area may be pooled and expended on a pro rata basis, as long as the requirements of Section 14(3) are met and each governing body agrees and approves the expenditure relative to its area. Section 14(3) of the Act states that the proceeds of the tax must be allocated “for expenditure . . . [i]n the areas . . . on a pro rata basis in each of those areas . . . or . . . [i]n any other manner that the Board and the governing body of each of those areas agree to be appropriate.” 2007 Nev. Stat. 3425.

QUESTION 5

May the Board unilaterally approve expenditures related to the provision of services by the Sheriff of the County in separate individual areas when the statute requires approval by the governing bodies of the areas?

SUMMARY CONCLUSION TO QUESTION 5

The Board may not unilaterally approve expenditures related to services provided by the Sheriff because the statute requires approval of area expenditures by the governing bodies of each of the areas.

ANALYSIS

Section 14(3) of the Act requires that tax proceeds be “[a]llocated for expenditure” in the listed “areas.” 2007 Nev. Stat. 3425. In addition, Section 17(2) of the Act states, “[n]o expenditure of those proceeds may be made unless the expenditure has been approved by the governing body of the *area* to which those proceeds have been allocated for expenditure.” 2007 Nev. Stat. 3426 (emphasis added).

Question 5 suggests that the Board may act as the governing body for purposes of approving all Sheriff-related expenditures throughout the county. This is problematic because some of the areas in the county have their own governing bodies. Section 14(3)(a)(1) defines “area” by reference to enumerated towns and cities, as well as “any

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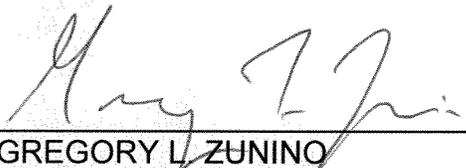
other town or city created in Nye County.” 2007 Nev. Stat. 3425. Therefore, references to the “governing body of the area” mean the governing body of a specific town or city. The term “governing body” has also been defined elsewhere to mean “that body which has ultimate power to determine its policies and control its activities.” BLACK’S LAW DICTIONARY, 695 (6th Ed. 1990). When an area is controlled by a governing body, the Board may not act on the governing body’s behalf. To the contrary, the governing body must approve expenditures allocated for use within the area controlled by the governing body.

Although county sheriffs have county-wide responsibilities pursuant to NRS 248.090, Section 17(2) of the Act requires that a proposed expenditure be approved by the governing body of the area to which the proceeds have been allocated. 2007 Nev. Stat. 3426. This affords the governing body of each area the right to determine how to spend the proceeds of the tax relative to services provided by the Nye County Sheriff within that area.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



GREGORY L. ZUNINO
Bureau Chief
Bureau of Business and State Services
(775) 684-1237

GLZ/jlc