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100 North Carson Street
Carson City, Nevada 89701

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OPINION NO. 2022-03

PREVAILING WAGE; REDEVELOPMENT AGENCIES; COMPENSATION: NRS 279.500 should be construed to promote its goal of fairly compensating the workers who build taxpayer-supported projects. Where a developer receives the benefit of more than $100,000.00 in taxpayer-funded financial incentives, it will generally have to bear the burden of paying its employees the regional prevailing wage. Nevada courts will likely be critical of attempts to structure around that fundamental tradeoff.

Bryan Pack, City Attorney
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Dear City Attorney Pack,

Pursuant to NRS 228.150, you have requested an opinion on several issues related to Nevada's prevailing-wage statute, NRS 338.020 to 338.090, and the Community Redevelopment Law, NRS chapter 279. Taken together, those statutes generally require a developer to pay the prevailing wage for work on a project if the developer has received more than $100,000 in financial incentives from a redevelopment agency for that project.

You write that the City of Mesquite Redevelopment Agency (the "Agency") has "regularly made grants of no more than $99,999" with the understanding that separate grants below $100,000.01 do not trigger the prevailing-wage statute. You ask three questions related to that practice in the context of an unnamed project in the City of Mesquite (the "City"). This opinion will address all three questions.

FIRST QUESTION

Under NRS 279.500, if a municipality sells real property to a developer for less than fair-market value, is the developer subject to the prevailing-wage statute?

SHORT ANSWER

NRS 279.500 does not make Nevada's prevailing-wage statute applicable to a municipal transaction unless the transaction involved a redevelopment agency, or the municipality was exercising the powers granted by NRS chapter 279. Selling municipal real property for less than fair-market value pursuant to NRS 268.063 does not involve a redevelopment agency or require exercising NRS chapter 279 powers, so it does not trigger NRS 279.500.

ANALYSIS

Answering this question requires analyzing NRS chapters 268 and 279. "The construction of a statute should give effect to the Legislature's intent." *Richardson Constr., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 64 (2007). If the statute's text is unambiguous, that ends the inquiry. *Id.* If not, the statute must be examined "in the context of the entire statutory scheme, reason, and public policy to effect a construction that reflects the Legislature's intent." *Id.*

When a public body contracts for public work, the contractor must pay employees no less than the regional prevailing wage. NRS 338.020(1)(a).[1] NRS 279.500 extends the prevailing-wage requirements to developers under certain conditions, even if the developer has not contracted with a public body or is not performing public work.

Relevant here, NRS 279.500 applies when an "agency" provides "property for development at less than the fair market value of the property. NRS 279.500(2)(a). The statute defines "agency" as "a redevelopment agency created pursuant to [NRS chapter 279] or a legislative body which has elected to exercise the powers granted to an agency pursuant to [NRS chapter 279]." NRS 279.386. Under that definition, if a municipality is not acting in concert with a redevelopment agency or exercising the powers granted to a redevelopment agency, there is no "agency" action and NRS 279.500 does not apply. *See* NRS 279.386.

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[1] NRS 338.080 exempts some types of work from the prevailing-wage requirements.

In your March 9, 2022 letter, you write that the City sold municipal property for less than fair-market value for purposes of economic development. That sale, standing alone, did not appear to trigger NRS 279.500. That is because nothing in your letter indicates that the City was acting in concert with the Agency or relying on powers granted by NRS chapter 279 to effect the sale.

Instead, your letter suggests that the City was permissibly exercising its NRS 268.063 powers. That provision authorizes a "governing body" like the City to sell real property for less than fair-market value "for the purposes of redevelopment or economic development." NRS 268.063(1). It does not require the involvement of a redevelopment agency. *See id.* And your letter states that the reason for the sale was to facilitate the construction of workforce housing, which is an appropriate economic-development purpose under NRS 268.063. NRS 268.063(4)(a)(4).

SECOND QUESTION

Can the Agency deem the construction of one building on one parcel and two buildings on the second parcel as separate NRS 279.500 projects?

SHORT ANSWER

No. The development at issue here is a single project proposed by a single developer. If the Agency provides financial incentives totaling more than $100,000 to the developer for that single project, NRS 279.500 requires the developer to comply with the prevailing-wage statute.

ANALYSIS

NRS 279.500 requires that the "developer" and any contractor or subcontractor who works on "the project" comply with the prevailing-wage statute if a redevelopment agency provides to the developer financial incentives worth more than $100,000. NRS 279.500(2)(c). The statute defines "developer" as "a person or entity that proposes to construct a redevelopment project which will receive financial assistance from [a redevelopment] agency." NRS 279.3925. NRS chapter 279 does not define "project"; "redevelopment project" is defined as "any undertaking of [a redevelopment] agency pursuant to [NRS chapter 279]." NRS 279.412.

Two conclusions follow from that statutory language. First, the measuring unit for calculating the total financial incentives provided is "the project." NRS 279.500(2) (flush text). If an agency provides financial incentives to

multiple projects that equal more than $100,000 on aggregate, the projects will not be subject to the prevailing-wage statute (assuming that no single project has received more than $100,000 in incentives). Second, the scope of "the project" is initially determined by the developer's proposal. *See* NRS 279.3925.

Your letter's description of the development at issue shows why it is a single "project" for NRS 279.500 purposes. While it appears that two separate parcels comprise the "property," the City sold the entire property to a single developer for a single purpose (workforce housing). The developer is executing a plan in which the buildings on both parcels will share a parking lot and access to a public street that abuts only one of the parcels. Those facts indicate that the developer proposed the entire development as one project. If the Agency awards grants totaling more than $100,000 for this project, the developer and all contractors and subcontractors will be subject to the prevailing-wage statute. NRS 279.500(2)(c).

THIRD QUESTION

What factors could a redevelopment agency or developer cite to justify dividing one NRS 279.500 project into multiple projects?

SHORT ANSWER

A single project proposed by a developer cannot later be divided into multiple projects. Whether a set of potentially related developments constitute a single NRS 279.500 "project" must be decided on a case-by-case basis by evaluating whether the developments have a complete integrated object or unified, central purpose.

ANALYSIS

A single project proposed by a developer cannot later be divided into multiple projects. NRS 279.3925 provides that the scope of a project is initially determined by the developer's proposal. Manipulating the project *post hoc* to evade NRS 279.500 would violate the statute's text and (as explained more below) the Nevada Legislature's intent. Consequently, a developer or redevelopment agency cannot divide a project to evade NRS 279.500.

NRS 279.500's legislative history shows that a developer or redevelopment agency's characterization of multiple units as separate projects does not control. Rather, NRS 279.500's intent to ensure that workers receive the prevailing wage on publicly funded redevelopment projects is prioritized. Nev. Op.

Atty. Gen. 2001-3, 2001 WL 1660144, at *4. Assembly Committee on Labor and Management Chair Christina Giunchigliani explained that the purpose was to require those working on taxpayer-supported projects to "be paid a decent wage." Minutes of the Legislature, 66th Sess., Assemb. Comm. on Lab. & Mgmt., at 10 (Nev. May 28, 1991). That purpose would be defeated if a developer could receive the benefit of taxpayer funds while escaping the burden of the prevailing-wage requirements by simply labeling separate units as separate projects.[2]

NRS 338.080, part of the prevailing wage statute, confirms that the Legislature intended to prevent parties from evading NRS 279.500 by dividing a single project into multiple parts. While NRS 338.080 exempts public works "whose estimated cost is less than $100,000" from the prevailing-wage requirements, it also provides that a "unit of the project must not be separated from the total project, even if that unit is to be completed at a later time, in order to lower the estimated cost of the project below $100,000." NRS 338.080(3).[3]

NRS 338.080's bar on dividing a project should be imputed to NRS 279.500 as well. The prevailing-wage statute and NRS 279.500 are interpreted *in pari materia* because they have the same purpose: to ensure that employees working on taxpayer-supported projects are paid a decent wage. *See State v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 294 (2000). Laws interpreted *in pari materia* must be construed "as if they were one law." *United States v. Stewart*, 311 U.S. 60, 64 (1940). NRS 338.080's purpose and effect – preventing division of a project – applies equally to work governed by NRS 279.500.

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[2] A different question could arise if a developer separately proposes related works or asserts upfront that different units within a single proposal are separate NRS 279.500 projects. For example, the developer responsible for the workforce-housing development at issue in your letter could have originally proposed building on one parcel as one project and then separately proposed building on the other parcel as a second project. As discussed below, determining whether separately proposed units are in fact a single NRS 279.500 project requires assessing whether the units are part of a complete integrated object or have a unified, central purpose.

[3] NRS 338.080's language is similar to NRS 279.500's, but it addresses a different situation. NRS 338.080 applies when a governing body contracts for public work. NRS 279.500 applies when (among other times) a redevelopment agency provides financial incentives to a developer for the developer's private project.

The statute and legislative history are silent on the question of how to distinguish improper attempts to divide a single project, on the one hand, from truly separate projects that should not be aggregated, on the other. No Nevada Supreme Court case resolves that question either. We therefore look to out-of-State judicial decisions for guidance.

California courts have repeatedly considered whether that state's prevailing-wage law covers privately funded activities that are related to publicly funded work.[4] Those cases hold that the prevailing-wage law will extend to privately funded activities if they are part of, together with the publicly funded work, a "complete integrated object." *Cinema W., LLC v. Baker*, 220 Cal. Rptr. 3d 415, 428-29, 432 (Ct. App. 2017).

In *Cinema West* a private company built a movie theater, and a city built an accompanying parking lot. 220 Cal. Rptr. 3d at 418-21. Even though the company arguably did not receive any direct financial assistance from the city, the *Cinema West* court held that it was still subject to the prevailing-wage law because the parking lot and the movie theater were part of a complete integrated object – the theater complex. *Id.* at 431-33. It pointed out that the city had granted the company a parking easement for use of the lot and that the lot was necessary for the theater to comply with the local parking-minimum ordinance. *Id.* at 431-32.

The Kentucky Court of Appeals set out a similar mode of analysis in *City of Henderson Util. Comm'n v. Donta*, No. 2013-ca-1082, 2016 WL 3574651 (Ky. Ct. App. June 24, 2016) (unpublished). The *Donta* court concluded that an operation that had "numerous components" was a "single project" under the prevailing-wage law because "it had a unified, central purpose. *Id.* at *1, 7.

HYPOTHETICAL SCENARIOS

Your letter suggests four hypothetical scenarios. None of these scenarios provides appropriate grounds for finding that the units proposed are separate NRS 279.500 projects, however.

First, your letter proposes having a different legal entity own each unit. We take it from your letter that each of those entities would themselves be

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[4] *City of Long Beach v. Dep't of Indus. Relations*, 102 P.3d 904 (Cal. 2004); *Cinema W., LLC v. Baker*, 220 Cal. Rptr. 3d 415 (Ct. App. 2017); *Oxbow Carbon & Mins., LLC v. Dep't of Indus. Relations*, 122 Cal. Rptr. 3d 879 (Ct. App. 2011).

owned by the same ownership group. Allowing the same ownership group to benefit from a redevelopment agency's financial incentives while evading the prevailing-wage law in this way would "unduly exalt[ ] form over substance. *See City & Borough of Sitka v. Constr. Local 942*, 644 P.2d 227, 232 (Alaska 1982) (rejecting a municipality's attempt to formally divide a project into two bids to evade the prevailing-wage law). The better course is to view the overall ownership group as the "developer" for NRS 279.500 purposes, no matter how that ownership group formally organizes the entities that will own and manage project. That would advance the Legislature's goal of ensuring that employees on taxpayer-supported projects are paid the prevailing wage. *See id.* at 232-33.

Second, your letter suggests that a developer could delay building certain units. NRS 338.080(3), which must be construed together with NRS 279.500, expressly rejects that kind of maneuvering. The order or timing of a development's units is irrelevant if all units have the same unified, central purpose. *See Donta*, 2016 WL 3574651, at *7.

Third, your letter notes that a municipality could obtain separate bids for different units. That is precisely the kind of elevating form over substance that the Alaska Supreme Court wisely rejected in *Sitka*. 644 P.2d at 232-33. What matters is whether the units have the same unified, central purpose, not the bidding process.

Fourth, your letter considers using different subcontractors on different units. NRS 279.500 applies equally to "any subcontractor who performs any portion of the project." NRS 279.500(2) (flush text). There is no reason why the division of labor among subcontractors would affect the determination of whether the developer has received more than $100,000 in financial incentives for the project.

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CONCLUSION

NRS 279.500 should be construed to promote its goal of fairly compensating the workers who build taxpayer-supported projects. As discussed above, there are circumstances under which a municipality may sell real property for less than fair-market value to a developer without obligating the developer to satisfy the prevailing-wage requirements. But where a developer receives the benefit of more than $100,000 in taxpayer-funded financial incentives, it will generally have to bear the burden of paying its employees the regional prevailing wage. Nevada courts will likely be critical of attempts to structure around that fundamental tradeoff.

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