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December 14, 2015

Assemblyman Ira Hansen
68 Amigo Court
Sparks, NV 89441-6213

Dear Assemblyman Hansen:

Introduction

You have asked whether the City of Sparks may adopt a certain ordinance without complying with the requirements of NRS 237.030 to 237.150, inclusive, based upon the City's unilateral determination that the ordinance will have no economic impact on businesses. For the reasons explained below, it is the opinion of this office that the City may not do so.

Section 15.05.115 of the Sparks Municipal Code currently requires any electrician or plumber working in the City to obtain annually from the City a "certificate of qualification." The certificate is obtained by paying a nominal fee and providing the issuing official with "substantiating evidence of [the applicant's] qualification." To our understanding, this requirement has not been enforced by the City for many years, and the City now proposes to repeal the requirement through the adoption of Bill No. 2699 ("the Bill"). The first reading of the Bill occurred on November 23, 2015, and the Bill is scheduled for second reading and potential adoption today.

As we explain, the provisions of NRS 237.030 to 237.150, inclusive, establish a process whereby the adoption of certain "rules" by the governing body of a local government must be preceded by notice to businesses, an assessment of the economic impact of the proposed rules and the preparation of a "business impact statement." In this case, it appears that the City made a threshold determination that there were no businesses likely to be affected by the Bill and, accordingly, the City is apparently prepared to adopt the Bill without otherwise complying with the requirements of NRS 237.030 to 237.150, inclusive. Because the Bill is a "rule" within the meaning of NRS 237.060 and does not fall within any exception to the requirements of NRS 237.030 to

237.150, inclusive, it is our opinion that the City must comply with those requirements before the Sparks City Council determines whether to adopt the Bill.

Analysis

For the purposes of NRS 237.030 to 237.150, inclusive, the term “rule” is defined by NRS 237.060. Subsection 1 of that section provides:

“Rule” means:

(a) An ordinance by the adoption of which the governing body of a local government exercises legislative powers; and

(b) An action taken by the governing body of a local government that imposes, increases or changes the basis for the calculation of a fee that is paid in whole or in substantial part by businesses.

Thus, a “rule” is any ordinance described in paragraph (a) or any action described in paragraph (b), above. Subsection 2 of NRS 237.060 sets forth certain ordinances and actions that are not “rules,” but none of those exceptions applies here. NRS 237.070 and 237.110 also exempt a local government from compliance with the provisions of NRS 237.030 to 237.150, inclusive, where the local government is not authorized to consider a “less stringent alternative” or where “emergency action is necessary to protect public health and safety.” Again, neither exception is applicable here. In short, the Bill provides for the adoption of an ordinance by the City Council in the exercise of its legislative powers. (In addition, to the extent it repeals the existing fee requirement, it arguably “changes the basis for the calculation of a fee” paid wholly or substantially by businesses.) We believe that the Bill is a “rule” for the purposes of NRS 237.030 to 237.150, inclusive.

Upon its enactment in 1999, NRS 237.080 required the governing body of a local government, before adopting a proposed rule, to determine whether the rule was likely to impose a direct and significant burden upon a business or directly restrict the formation, operation or expansion of a business. If the governing body determined that such an effect was likely, the governing body was required to consult with affected businesses, consider methods to reduce the impact of the proposed rule and prepare a business impact statement.

These provisions were revised in 2005 by Senate Bill No. 488 (“S.B. 488”). Testimony presented in support of the bill indicated that local governments were frequently determining the question of impact unilaterally, without input from affected businesses. Minutes of the Assembly Committee on Government Affairs, May 9, 2005, at p. 32 (testimony of Carole Vilardo). Accordingly, S.B. 488 amended NRS 237.080 to require explicitly that the governing body or a person designated by it “notify trade associations or owners and officers of businesses which are likely to be affected by the

proposed rule that they may submit data or arguments” concerning the impact of the rule. Section 1 of chapter 383, Statutes of Nevada 2005, at p. 1478. (Emphasis added).

The language of NRS 237.080 was amended most recently in 2013. In its present form, NRS 237.080 provides:

1. Before a governing body of a local government adopts a proposed rule, the governing body or its designee must make a concerted effort to determine whether the proposed rule will impose a direct and significant economic burden upon a business or directly restrict the formation, operation or expansion of a business. The governing body of a local government or its designee must notify trade associations or owners and officers of businesses which are likely to be affected by the proposed rule that they may submit data or arguments to the governing body or its designee as to whether the proposed rule will:

(a) Impose a direct and significant economic burden upon a business; or

(b) Directly restrict the formation, operation or expansion of a business.

Notification provided pursuant to this subsection must include the date by which the data or arguments must be received by the governing body or its designee, which must be at least 15 working days after the notification is sent.

2. After the period for submitting data or arguments specified in the notification provided pursuant to subsection 1 has expired, the governing body or its designee shall determine whether the proposed rule is likely to:

(a) Impose a direct and significant economic burden upon a business; or

(b) Directly restrict the formation, operation or expansion of a business.

If no data or arguments were submitted pursuant to subsection 1, the governing body or its designee shall make its determination based on any information available to the governing body or its designee.

3. If the governing body or its designee determines pursuant to subsection 2 that a proposed rule is likely to impose a direct and significant economic burden upon a business or directly restrict the formation, operation or expansion of a business, the governing body or its designee shall consider methods to reduce the impact of the proposed rule on businesses, including, without limitation:

(a) Simplifying the proposed rule;

(b) Establishing different standards of compliance for a business;

and

(c) Modifying a fee or fine set forth in the rule so that a business is authorized to pay a lower fee or fine.

4. After making a determination pursuant to subsection 2, the governing body or its designee shall prepare a business impact statement.

(Emphasis added).

NRS 237.090 sets forth the information that must be included in the business impact statement and requires that the statement be considered by the governing body “at its regular meeting next preceding any regular meeting held to adopt the proposed rule.” If the governing body ultimately adopts the rule, any “business that is aggrieved” by the rule may file a petition within 30 days thereafter, alleging: (1) that a business impact statement has not been prepared as required; or (2) that the statement is inaccurate, incomplete or otherwise deficient. If the governing body agrees, it may amend the rule. NRS 237.100. Finally, NRS 237.150 authorizes the Nevada Tax Commission, at the request of the Committee on Local Government Finance, to adopt regulations interpreting the provisions of NRS 237.030 to 237.150, inclusive, “that are recommended by the Committee”

NRS 237.080 generally requires, then, that the governing body or its designee “make a concerted effort to determine” whether the proposed rule will impose an economic burden upon or restrict the formation, operation or expansion of a business. But this language is not a directive or authority for the governing body or a member of its staff to make a unilateral determination about whether compliance with the remainder of the statute is required. Rather, the “concerted effort” is made through the process of notice (NRS 237.080(1)), the submission of data and arguments by the relevant trade associations or businesses (id.), the determination thereafter by the governing body or its designee relating to the apparent impact of the rule (NRS 237.080(2)), the consideration of methods to reduce that impact (NRS 237.080(3)), the preparation of a business impact statement (NRS 237.080(4), 237.090), and the governing body’s consideration of the statement at a public meeting before any action is taken to adopt the rule (NRS 237.090). Where, as here, a proposed ordinance or other action is a “rule” within the meaning of NRS 237.060 and the exceptions of NRS 237.070 and 237.110 are not applicable, the only threshold determination to be made by the governing body or its designee is to decide which trade associations or businesses are likely to be affected by the proposed rule so that they may be notified of the proposal and given an opportunity to submit data or arguments. That is the plain reading of the statute and it is consistent with the underlying legislative purpose. McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986) (“words in a statute should be given their plain meaning unless this violates the spirit of the act.”).

It only remains to consider the effect of certain written “guidelines” that have been issued on this subject by the Department of Taxation. *See* Department of Taxation, Division of Local Government Services, Business Impact Statements: Guidelines and

References (“Guidelines”), available at http://tax.nv.gov/LocalGovt/PolicyPub/Archive/Files/Local_Government_Finance_Documents/ (last visited Dec. 8, 2015). The Guidelines identify various types of ordinances and other governmental actions that are thought to be or not to be “rules” for the purposes of NRS 237.030 to 237.150, inclusive. Guidelines, Exhibits A and B.¹ If the staff of a local government concludes that a “rule” is involved and determines on its own and without public input that the proposed rule will not impose a significant economic burden on a business or restrict the formation, operation or expansion of a business, the Guidelines suggest that staff should recommend the adoption of a motion to that effect by the governing body, whereupon the governing body may proceed to adopt the rule in accordance with the body’s customary process -- i.e., without complying with the notice and other requirements of NRS 237.030 to 237.150, inclusive. *See* Guidelines, “Procedures -- Determination as to Business Impact.” If a rule is otherwise subject to adoption in a single meeting, the Guidelines advise that “the above-described motion should be considered as a separate motion or as part of the motion adopting the rule.” Id.

Initially, we question whether the Guidelines have any legal force or effect. As noted above, NRS 237.150 authorizes the Nevada Tax Commission to adopt regulations to interpret the provisions of NRS 237.030 to 237.150, inclusive, making them subject to the process set forth in chapter 233B of NRS for review and approval by the Legislative Commission. For the purposes of chapter 233B, a “regulation” is defined, in part, to mean “[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy” NRS 233B.038(1)(a). The promulgation of the Guidelines is not only contrary to NRS 237.150 but appears to be an example of the kind of “ad hoc” rulemaking that has repeatedly been invalidated by the Nevada Supreme Court. *See, e.g., Coury v. Whittlesea-Bell*, 102 Nev. 302, 305 (1986) (administrative action establishing a standard of general applicability which effectuates policy is a regulation and must be adopted as such); *see also Public Service Comm’n v. Southwest Gas*, 99 Nev. 268, 273 (1983).

In any case, to the extent that the Guidelines suggest that the provisions of NRS 237.030 to 237.150, inclusive, may be bypassed through the unilateral process of staff determination and the adoption of a motion by the governing body as described above, we believe that the Guidelines are simply inconsistent with the plain language and purpose of those statutes. We therefore decline to give the Guidelines any weight in this analysis. *Cf. State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 295-96 (2000) (regulation that conflicts with statute is invalid).

¹ The Guidelines are not paginated, making it impractical for us to provide specific page references to them.

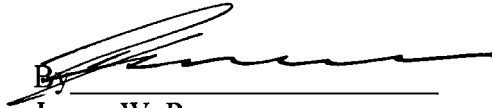
Conclusion

Accordingly, it is our opinion that before taking any further action to adopt the ordinance at issue here, the City of Sparks must complete the process required by NRS 237.030 to 237.150, inclusive. We express no opinion as to whether the proposed ordinance will in fact "impose a direct and significant economic burden upon a business or directly restrict the formation, operation or expansion of a business." NRS 237.080. That determination must be made by the City, in accordance with the statutory process.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Brenda J. Erdoes
Legislative Counsel

A handwritten signature in black ink, appearing to read "James W. Penrose", is written over a horizontal line.

James W. Penrose
Senior Principal Deputy Legislative Counsel

JWP:dtm

Encl.

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