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March 21, 2002

OPINION NO. 2002-15

AGREEMENTS; COUNTIES; WATER: Agreements entered into between Lincoln County and private corporation, creating a partnership whose purpose is the acquisition, development, and marketing of water and establishing a method of investment recovery and profit sharing, are *ultra vires*. The agreements do not serve a predominantly public purpose and the Legislature has not expressly authorized counties to engage in such an undertaking.

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Dear Mr. Bell:

You have asked this office to opine on the authority for and validity of two agreements entered into between Lincoln County, Nevada (the County), and Vidler Water Company, Inc. (Vidler). Together these agreements provide that Vidler and the County will partner to plan, acquire, develop, and purvey unappropriated waters in Lincoln County. They further provide a method for Vidler to recoup its outlay of capital and for the County to share in the profits of the enterprise after Vidler's full reimbursement.

QUESTION

Whether either or both agreements entered into between Vidler Water Company, Inc. and Lincoln County, creating a partnership whose purpose is the acquisition, development, and marketing of water in the County and establishing a method of investment recovery and profit sharing, are *ultra vires*.[1]

[1] You have separately asked whether the agreements between Vidler and the County violate the public policy of the State of Nevada. The ensuing analysis addressing your first question subsumes discussion of the second, which therefore is not separately addressed.

BACKGROUND

The first agreement between Vidler and the County, dated September 21, 1998, is styled a "Memorandum of Understanding" (MOU). It recites that "VIDLER proposes to undertake certain water resource planning which will provide substantial benefit to LINCOLN COUNTY and its residents." MOU at 1. Under the auspices of such planning, Vidler and Lincoln County agree to file joint applications for unspecified water in the County,[2] for use in conjunction with land development to be undertaken by an affiliate of Vidler, and also for export outside the County under lease. *Id.* at ¶ 1. As consideration, the County agrees to pay Vidler $25,000, an amount the parties recognize may increase if the scope of the "planning effort" is modified by the parties. *Id.* at ¶ 2. The agreement purports to bind the parties' successors in interest. *Id.* at ¶ 4.

The second agreement, dated October 20, 1999, is styled a "Water Delivery Teaming Agreement" (Agreement). It recites that "LINCOLN/VIDLER are now desirous of developing water rights, appropriations and conveyancing infrastructure . . . and providing wholesale water to adjoining water districts and/or developers who require water." Teaming Agreement at Recitals, ¶ 5. The Agreement is "anticipated to encompass future projects throughout Lincoln County relating to water marketing, water appropriation, water conveyancing, water wheeling and other water projects." Teaming Agreement at ¶ 3. It further provides that "LINCOLN/ VIDLER are agreeable to setting forth in this Agreement the framework through which water rights will be developed and water will be marketed and through which capital will be expended and recaptured and net revenues divided between the parties." *Id.* at Recitals ¶ 6. The Agreement establishes that Vidler, the "managing partner," Agreement at ¶ 3, will "obtain all capital and financing required to construct and install the water development infrastructure," *id.* at ¶ 1, and that Vidler will be repaid, with unspecified interest, for its investment from operating revenues generated by any projects which are developed. *Id.* at ¶ 2. The parties agree to a method of profit-sharing:

> Any balance of net operating revenues shall be divided equally with LINCOLN COUNTY receiving fifty percent . . . and VIDLER WATER COMPANY, INC., receiving fifty percent . . . which monies shall be paid to the parties twice each year with one payment on February 15 of each year and the other on August 15 of each year.

Id.

As with the MOU, the Agreement purports to bind the parties' successors in interest. *Id.* at ¶ 4. In addition, the Agreement provides: "as to other water resource activities within Lincoln

[2] This office is aware that numerous Lincoln/Vidler applications are pending before the State Engineer to appropriate water in Lincoln County. Furthermore, these applications are, at least in part, in competition with applications filed by the Las Vegas Valley Water District, and Lincoln County has requested the State Engineer to dismiss the applications filed by Las Vegas Valley Water District. This opinion makes no judgment regarding the relative merits of the applications or about Lincoln County's request.

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County the parties agree to disclose and obtain the consent of the other prior to proceeding forward." *Id.* at ¶ 11.

ANALYSIS

At the outset, this Office makes two preliminary observations regarding its own authority. First, it disclaims any responsibility, authority, or intent to judge the wisdom of agreements into which Lincoln County has entered. Counties are governed by and act through elected boards of county commissioners. NRS 244.010 to 244.090. Members of such boards are answerable to the county electors for lawful actions taken in such capacity.

Second, this Office concludes it has authority to provide an opinion in response to your request. The Attorney General's authority is expressly set forth in statute:

> When requested, the attorney general shall give his opinion, in writing, upon any question of law, to . . . any district attorney . . . upon any question of law relating to their respective offices, departments, agencies, boards or commissions.

NRS 228.150(1). We construe broadly the term "relating to their respective offices," and thus provide legal counsel to officials of state and local governments when such guidance will assist the officials to effectively carry out their own legal responsibilities.

Although your responsibilities as Clark County's District Attorney are tied to the area bounded by the county's legal borders, you serve as legal advisor to officials and political subdivisions whose affairs are directly affected by external events, entities, and influences. Matters affecting the conduct of county business do not simply cease at the county line. It would therefore be unreasonable to cabin the authority of this office to a strained and narrow reading of the legislative language in a way which prohibits issuance of opinions if the subject matter involves an external governmental entity.

In this instance, we have been apprised of numerous forms of actual and proposed interaction between Clark County and its subdivisions, on one hand, and by Lincoln and Vidler acting in concert, on the other. Generally speaking, officials within Clark County request legal advice from you, and you from us, about the nature of the Lincoln/Vidler relationship, before entering into governmental and business relations with it. This request is both prudent and reasonable, and is comparable to ordinary due diligence performed by private parties prior to entering into contractual relationships with one another. There is thus plainly a basis for this office to afford the counsel which you have requested, and the following analysis is provided for that purpose.[3]

[3] We note these preliminary principles: it is the legislature which decides the State's water law policies. *Pyramid Lake Paiute Tribe v. Washoe Co.*, 112 Nev. 743, 749, 918 P.2d 697 (1996). The legislature has recognized the importance of water resources to all Nevadans: "water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

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We begin with the principle that boards of county commissioners are administrative agencies of the state and are required to perform such duties as are prescribed by law under NEV. CONST. art. 4, § 26. *Ex rel Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923); *City of Las Vegas v. Mack*, 87 Nev. 105, 481 P.2d 396 (1971). Their powers are derived exclusively from legislative acts. Op. Nev. Att'y Gen. No. 97-19 (June 2, 1997), Op. Nev. Att'y Gen. No. 88 (November 12, 1963). "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State ex rel. King v. Lothrop*, 55 Nev. 405, 408, 36 P.2d 355 (1934).

We look, therefore, to state statutes to determine whether the Nevada Legislature has authorized counties to enter into agreements and engage in activities such as those herein considered. In this endeavor, it is critical to initially characterize the nature of the agreements, and the qualities of the agreements which are being evaluated. Your request asks specifically about the lawfulness of the County's agreement to obtain Vidler's consent prior to "proceeding forward" with any other water resource activities in Lincoln County. Agreement at ¶¶ 3 and 11. You also ask whether the agreements illegally bind future county commissions.

It is our opinion that the County's agreements in both these respects are contrary to law.[4] However, we recognize that these provisions may well be severable under both agreements, MOU at ¶ 9, Agreement at ¶ 10, the result being simply that the County would not be bound by these invalid covenants.

This, however, does not answer the broader question whether the agreements are *ultra vires*. This determination turns on whether the County has authority to do that which it has undertaken with Vidler. This requires us to characterize what it is that the County has undertaken.

Several significant indicators are present for purposes of characterizing the agreements. The County and Vidler have clearly formed a partnership, with Vidler as the managing partner. They have agreed to jointly apply for water rights, and to develop and market water as a commodity within and without the County. They have agreed that Vidler will act as capital partner and obtain all necessary financing; agreed that the revenues from marketing jointly-owned water will first be applied to reimbursement of Vidler's investment; and agreed that all

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[4] By agreeing not to undertake other water-related development without Vidler's consent, the County improperly gave veto authority to its partner. A county may not agree to limit its governmental functions. *See, e.g., Landau v. City of Leawood*, 519 P.2d 676, 680 (Kan. 1974) (*citing Northern Pacific Railway v. Duluth*, 208 U.S. 583 (1908), *New York & N E. R. Co. v. Bristol*, 151 U.S. 556 (1894)). *See also Byrd v. Martin, Hopkins, Lemon and Carter*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983). County commissions also may not bind future boards in the exercise of their governmental function. *Edsall v. Wheler*, 285 N.Y.S.2d 306 (Supr. Ct. N.Y. 1967) ("courts have uniformly held efforts to bind future legislative boards to be illegal and *ultra vires*), *Board of Klamath Co. Commrs.v. Select County Employees*, 939 P.2d 80 (1997) ("without question, 'an outgoing elected governing body of finite tenure which enter[s] into a contract involving a 'governmental' function cannot bind a subsequently elected body'"), *In the Matter of James A. Martin v. Hennessy*, 537 N.Y.S.2d 676 (Supr. Ct. N.Y. 1989) ("law is well settled that a municipal corporation performing a governmental function may not bind its successors"). Thus the County's agreement is invalid to the extent it purports to bind successive boards in such exercise of governmental discretion.

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net revenues will be divided equally between the County and Vidler. It is therefore indisputable that the County's agreements, read *in pari materia*, form a business relationship with a private corporation for the purpose of income generation through sale or lease of natural resources.

With this characterization in mind, we turn to the statutes to determine whether such agreements are authorized. County general and financial authorities are set forth at NRS 244.150 to 244.255. There is no provision among these statutes which, expressly or by implication, permits the County to form a partnership with a private corporation and to share in a for-profit enterprise. We therefore look elsewhere for such authority.

The Legislature has granted specific authorities permitting counties to foster economic development in the state. At NRS chapter 244A, the Legislature provides authority and means, pursuant to the County Economic Development Revenue Bond Law (Bond Law), to:

> [P]romote industry and employment and develop trade by inducing manufacturing, industrial and warehousing enterprises and organizations for research and development to locate in, remain or expand in this state to further prosperity throughout the state and to further the use of the agricultural products and the natural resources of the state.

NRS 244A.695(1). To secure this object, specific authority is given counties to "finance or acquire . . . one or more projects or parts thereof." NRS 244A.697(1). A "project" is defined to include numerous undertakings, including manufacturing, industrial and warehousing enterprises, NRS 244A.689(1)(a); health and care facilities, NRS 244A.689(1)(c); a corporation for public benefit, NRS 244A.689(1)(e); affordable housing, NRS 244A.689(1)(f); pollution abatement facilities, NRS 244A.689(3)(a); and public utilities, NRS 244A.689(5).

Arguably relevant to the County's purposes is inclusion of the following in the definition of "project":

> 3. Any land, building, structure, facility, system, fixture, improvement, appurtenance, machinery, equipment or any combination thereof or any interest therein, used by any natural person, partnership, firm, company, corporation (including a public utility), association, trust estate, political subdivision, state agency or any other legal entity, or its legal representative, agent or assigns:
>
> . . . .
>
> (b) In connection with the furnishing of water if available on reasonable demand to members of the general public.

NRS 244A.689(3)(b).

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If the County and Vidler meant to rely on these authorities for their agreements, our opinion is that their reliance was improper. As an initial matter, there is no bond issue proposed in connection with the MOU or Teaming Agreement. It is doubtful that the Legislature intended in NRS chapter 244A to confer authority apart from a bond issue. *Cf.* Op. Nev. Att'y Gen. No. 93-19 (August 10, 1993) ("[T]he term 'project' may not, in our opinion, be construed to include things other than that which is being financed with the bond proceeds"). However, it is unnecessary to conclude on this point, because other factors exist which disqualify the County's actions.

Evident in NRS 244A.689(3)(b) is a legislative intent that a qualified water project have, at least as one of its principal aims, the provision of a water system to supply the needs of citizens of the County. From the occurrence of its mention together with numerous other projects (*e.g.*, public utilities, pollution abatement projects, and health and care facilities) which provide traditional government services or benefits to citizens, it is plain that the "furnishing of water" envisioned by the Legislature is limited in scope and purpose to projects which serve the County's citizens. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (doctrine of *noscitur a sociis* provides that a word is known by the company it keeps and gathers meaning from the words around it). These provisions, in the context in which they appear, are not intended to authorize a county's partnering in a project for purveying County resources for profit, especially when the venture expressly plans export of resources from the County.

The MOU recites that it is also intended, in part, to develop "water resources necessary to meet future growth and economic development of designated areas within LINCOLN COUNTY." MOU at 1. However, pursuant to these agreements, the County and Vidler have prepared a draft water plan for Lincoln County which forecasts that water demand in the County will actually decrease in the future, from 67,516 acre-feet per year in 1995, to 65,063 acre-feet per year in 2020. *A Water Plan for Lincoln County (Draft)*, at 29, Table 4.2. Clark County is identified as the recipient of water moved through such a system. *Id.* at 38. Seen in context with the profit-sharing provisions of the Teaming Agreement, this option is self-evidently the primary objective of the partnership formed by Vidler and the County.

Even if the County's agreements fulfilled a need within the County for water, this Office is of the opinion that the arrangement still exceeds the County's authority, because the County, through its contracts, is engaging in private, for-profit enterprise. The County in this respect has stepped outside its normal role.

> It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state, funded by tax revenues, 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.

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Idaho Water Resources Board 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."). *See generally* Annotation, *Constitutionality of statute authorizing state to loan money or engage in business of a private nature*, 14 A.L.R. 1151, 1157 (1921) ("[I]t has been expressly held that the state has no power, either itself to engage in a business of a concededly private nature, or to authorize a political subdivision thereof so to engage"). *Cf.* 12 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 36.02 at 642 (3d ed. 1995) ("In the absence of express legislative sanction, [a municipal corporation] has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals").

The same defect prevents County reliance upon the General Improvement District Law. General improvement districts are authorized to acquire infrastructure for delivery of water within the districts. Section 318.144 of the Nevada Revised Statutes provides:

> The board may acquire, construct, reconstruct, improve, extend or better a works, system or facilities for the supply, storage and distribution of water for private and public purposes.

NRS 318.144(1). This authority given to general improvement districts may be exercised by a board of county commissioners. NRS 244.157(1). However, the express purpose of districts established under NRS chapter 318 is, again, to provide essential services to constituents. *See generally* NRS 318.116 (enumerating basic powers of districts). Districts "are created for the sole purpose of assisting the state in the performance of its governmental function of distributing heat, light and power among its people *without profit*." *State of Nevada v. Lincoln County*, 60 Nev. 401, 410, 111 P.2d 528 (Nev. 1941) (emphasis added). The service or product created by the district is to be "available *at cost* to the people of Nevada." *Id.*, 60 Nev. at 413 (emphasis added).

The public purpose doctrine prohibits use of public property for 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." *Idaho Water Resource Bd. v. Kramer*, 548 P.2d 35, 59 (Idaho 1979). Public purpose doctrine clearly forms the context for county activities in Nevada. It finds expression in the State Constitution, NEV. CONST. art. 8, § 10 ("No 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, rail-road corporations[,] companies or associations"). It is also manifest in case law. *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 332, 512 P.2d 1321 (1973) ("Public funds may not be spent for private purposes. . . . [I]f 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. NEV. CONST. art. 1, § 8.").

Revenue generation for the County does not fulfill the public purpose requirement, within the ordinary meaning of the term; there is "no authority which would dignify that objective,

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standing alone, as a public purpose." *City of Corbin v. Kentucky Utilities Co.*, 447 S.W.2d 356, 358 (Ky. 1969). If profit-making were sufficient to satisfy the public purpose requirement, it would justify the County's involvement in any legal business. Furthermore, even if some incidental benefit to the public resulted from the arrangement, it would not merit characterizing the arrangement as one serving a public purpose. 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." *Id.* at 359.

We acknowledge that public purpose law has evolved: "The concept is elastic and keeps pace with changing conditions." *Siegel v. City of Branson, Missouri*, 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." *Id.* Even with this acknowledgement, there appears no predominant public purpose or close relationship to the public welfare in these circumstances.

Because a venture such as the one contemplated by Vidler and the County has as its primary purpose creation of revenue for the County and its partner, it is reasonable at least to expect the Legislature to speak explicitly when and if it authorizes such action. *See Hartford Accident and Indem. Co. v. Guardian Ins. Agency*, 19 P.2d 328, 331 (Ariz. 1933) ("If it were the intention of the legislature to give counties the unlimited right to engage in every nature of private business for which their property might be used, we think that intention would have been made manifest in language very different from that in question."); *Taylor v. Dimmitt*, 78 S.W.2d 841, 843 (Mo. 1935) ("Authority for such action [entering a field of private business] should clearly appear").

We therefore stop short of concluding that the Legislature lacks power to confer such authority on counties. Instead, we only conclude the Legislature has not done so by a clear statement in this case and that the County's agreements with Vidler are not authorized under existing law and are therefore invalid.[5]

CONCLUSION

Counties, as agencies of the state derive their powers exclusively from legislative acts. We are aware of no provision of Nevada law that, either expressly or by implication, permits the County to form a partnership with a private corporation and to share in a for-profit enterprise of this nature. Nevada statutes that do authorize a County government to undertake projects intended to fulfill various public purposes do not allow engagement in profit-making enterprise.

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[5] The Legislature has expressly provided authority for certain political subdivisions to purchase and sell water. *See, e.g.*, Act of May 10, 1993, ch. 100, § 2(6), (7) and (16), 1993 Nev. Stat. 159 at 160-162 (authorizing Virgin Valley Water District to purchase and sell water rights). The absence of such authority for Lincoln County's venture therefore clearly signifies absence of legislative intent. The Legislature has also, by express language, provided authority for counties to impose a $6 per acre-foot tax on water exported for use outside the county of origin. NRS 533.438. Employing the maxim *expressio unius est exclusio alterius*, *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994), we conclude that the Legislature has provided the means by which counties may derive benefit from development of water for export, to the exclusion of other methods, including the one attempted here by Lincoln County.

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The agreements entered into between Lincoln County and Vidler have as their primary purpose development and purveying of water resources for profit. Because this purpose is not a predominantly public purpose, and the Legislature has not expressly authorized counties to engage in such an undertaking, we conclude that Lincoln County lacks authority to enter into the agreements and acted in excess of its authority when it did so.

Cordially,

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