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April 25, 2002

Dear:

You have asked this office several questions relating to the proposed railroad grade separation project which would lower, below grade, a portion of the Union Pacific railroad tracks that run through the downtown area of the City of Reno. The project is officially designated as the Reno Transportation Rail Access Corridor (ReTRAC), but it is more commonly known as the train trench.

First, you have asked a group of questions relating to the validity of a municipal initiative petition that, if enacted by the voters, would prohibit the City of Reno from constructing a train trench within the existing railroad right-of-way through the central portion of the City of Reno. Specifically, you have asked:

1. Whether the initiative petition is fatally defective in form because it does not contain a title and an enacting clause that conform to the requirements of section 2.090 of the Reno City Charter.
2. Whether the initiative petition is fatally defective in form because it does not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition is to enact a city ordinance or to amend the city charter.
3. Whether the initiative petition is invalid on its face because the prohibition contained in the initiative petition is beyond the power of the municipal voters to enact by initiative.
4. Whether the initiative petition, if enacted by the voters, would be preempted by state law.

ASSEMBLY ELECTIONS, PROCEDURES, & ETHICS  
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SUBMITTED BY: Vivian Freeman

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In addition, you have asked a question relating to certain taxes that were authorized by the Nevada Legislature in 1997 when it enacted Assembly Bill No. 291 (A.B. 291). See chapter 506, Statutes of Nevada 1997, at p. 2394, as amended by Senate Bill No. 494 (S.B. 494), chapter 439, Statutes of Nevada 1997, at p. 1551, and Senate Bill No. 255 (S.B. 255), chapter 28, Statutes of Nevada 1999, at p. 63. Specifically, you have asked whether a governing body of a city or county may use certain proceeds from the taxes authorized by A.B. 291 for a purpose other than a railroad grade separation project.

### **BACKGROUND**

For many years, officials at the state and local level have discussed proposals to address the public safety and economic development issues associated with the Union Pacific railroad tracks that run through downtown Reno. See Karadanis v. Bond, 116 Nev. Adv. Op. 16, 993 P.2d 721, 723 (2000). In 1996, the Union Pacific Railroad Company merged with the Southern Pacific Railroad Company, and the potential for increased train traffic through downtown Reno increased significantly. Id. To address the public safety and economic development issues associated with this increased train traffic, officials developed plans for a railroad grade separation project that would lower the Union Pacific railroad tracks through downtown Reno by construction of a below-grade, open trainway trench along a 2.1 mile portion of the Union Pacific right-of-way. Id. The plans called for several sources of funding to finance the railroad grade separation project. Id. at 723-24.

During the 1997 legislative session, the Nevada Legislature authorized two sources of funding for the railroad grade separation project by enacting A.B. 291.<sup>1</sup> In section 24 of A.B. 291, the Nevada Legislature authorized the Board of County Commissioners for Washoe County (board of county commissioners) to impose a tax of not more than one-eighth of 1 percent on retail sales in the county (county sales tax). Section 24 of A.B. 291 further provided that the proceeds from the county sales tax “must be used by the board of county commissioners for the cost of the acquisition, establishment, construction or expansion of one or more railroad grade separation projects.” On December 8, 1998, the board of county commissioners enacted the county sales tax by ordinance. The validity of the ordinance was challenged in court. Karadanis, 993 P.2d at 723-24. On appeal, the Nevada Supreme Court held that the ordinance was valid. Id.

In section 21 of A.B. 291, the Nevada Legislature authorized the governing bodies of certain cities to impose, within a taxing district created pursuant to NRS 268.781, a tax of not more than 1 percent on the rental of transient lodging (city room tax). Section 21 of A.B. 291 further provided that the proceeds from the city room tax “must be used to fund the acquisition, establishment, construction or expansion of one or more railroad grade separation projects.”

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<sup>1</sup> As noted previously, A.B. 291 was amended by S.B. 494 during the 1997 legislative session and by S.B. 255 during the 1999 legislative session. For the purposes of this opinion, we will consider all references to A.B. 291 to include all amendments made to the bill in 1997 and 1999.

Section 21 of A.B. 291 has been codified in NRS 268.7845. That statute provides in relevant part:

1. In a county whose population is 100,000 or more but less than 400,000, the governing body of an incorporated city within the county that has created a district pursuant to NRS 268.781 may by ordinance impose within that district a tax at the rate of not more than 1 percent of the gross receipts from the rental of transient lodging throughout the district.

\* \* \*

4. The proceeds of the tax and any applicable penalty or interest must be used to fund the acquisition, establishment, construction or expansion of one or more railroad grade separation projects, including the payment and prepayment of principal and interest on notes, bonds or other obligations issued to fund such projects.

On October 27, 1998, the Reno City Council (city council) exercised the authority granted to it by NRS 268.7845, and the city council enacted the city room tax by passing Ordinance No. 4921. Thereafter, on December 8, 1998, the city council passed Ordinance No. 4939, which authorized the issuance of special obligation bonds payable solely from the proceeds of the city room tax and the county sales tax. The special obligation bonds are to be used to finance the railroad grade separation project. The city council enacted the ordinance, in part, under the authority of the City Bond Law, which is codified in NRS 268.672 to 268.740, inclusive.

The City Bond Law authorizes the city council to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. See NRS 268.730. In Ordinance No. 4939, the city council defined the railroad grade separation project as a project that includes overpass projects, sidewalk projects, street projects, transportation projects and underpass projects as defined in the City Bond Law. The city council also expressly authorized the railroad grade separation project in accordance with the City Bond Law.

The special obligation bonds that are to be issued by the city pursuant to NRS 268.7845, Ordinance No. 4939 and the City Bond Law do not constitute the only source of funding that the city council has authorized to finance the railroad grade separation project. On November 10, 1998, the city council enacted Ordinance No. 4932, which created a special assessment district pursuant to the Consolidated Local Improvements Law.

As codified in chapter 271 of NRS, the Consolidated Local Improvements Law authorizes the city council to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. See NRS 271.265. In addition, the Consolidated Local Improvements Law authorizes the city council to create special assessment districts consisting of property that will be specially benefited by public improvement projects, and the law authorizes the city council to levy assessments against

such property to defray the costs of the projects. See NRS 271.040 and 271.270. In Ordinance No. 4932, the city council created a special assessment district in downtown Reno to levy assessments against property that will be specially benefited by the overpass projects, street projects and transportation projects that will be part of the overall railroad grade separation project.

On January 23, 2002, five registered voters of the City of Reno formed a petitioners' committee pursuant to NRS 295.195 to 295.220, inclusive, to circulate the train trench initiative petition. The train trench initiative petition provides:

The people of the City of Reno, of the State of Nevada, do enact as follows:

The City of Reno shall not construct a depressed trainway ("train trench") within the existing railroad right of way through the central portion of the City of Reno.

On April 11, 2002, the petitioners' committee submitted the initiative petition to the city clerk for verification of the signatures on the petition. See Petition Could Put Reno Train Trench Vote on November Ballot, Reno Gazette-Journal, Apr. 11, 2002. On April 19, 2002, the city clerk certified that the initiative petition had a sufficient number of valid signatures under state law. See Anjeanette Damon, Anti-Trench Petition Signatures Verified, Reno Gazette-Journal, Apr. 19, 2002.

## **DISCUSSION**

### **I. Validity of the Train Trench Initiative Petition**

You have asked four specific questions concerning the validity of the train trench initiative petition. We will discuss your first and second questions together because they are directed at the form of the petition. Similarly, we will discuss your third and fourth questions together because they are directed at the substance of the petition.

#### **A. Questions relating to the Form of the Train Trench Initiative Petition**

You have asked whether the train trench initiative petition is invalid on its face because it does not contain a title and an enacting clause that conform to the requirements of section 2.090 of the Reno City Charter. You have also asked whether the initiative petition is invalid on its face because it does not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition is to enact a city ordinance or to amend the city charter.

The powers of initiative and referendum are reserved to the people in article 19 of the Nevada Constitution. Sections 1, 2 and 3 of article 19 set forth the requirements for exercising the powers of initiative and referendum for statewide measures. With regard to the

form of statewide measures, section 3 of article 19 specifically provides that a statewide initiative petition "shall include the full text of the measure proposed." That section also provides that "[t]he enacting clause of statutes or amendments proposed by initiative petition shall be: 'The People of the State of Nevada do enact as follows:[.]'" If a statewide initiative petition does not contain the enacting clause required by the constitution, the initiative petition is void and unenforceable, even if the initiative petition is approved by a vote of the electorate. Caine v. Robbins, 61 Nev. 416, 420 (1942).

Section 4 of article 19 reserves the power of initiative and referendum to the registered voters of each county and each municipality.<sup>2</sup> Unlike the provisions of section 3 of article 19, which set forth specific requirements for the form of statewide initiative petitions, the provisions of section 4 of article 19 do not set forth any requirements for the form of local initiative petitions. In the absence of any express constitutional requirements concerning the form of local initiative petitions, section 5 of article 19 empowers the Legislature to establish the requirements by statute. See Nev. Const. art. 19, § 5 ("The provisions of this article are self-executing but the legislature may provide by law for procedures to facilitate the operation thereof."); see also Rea v. City of Reno, 76 Nev. 483, 484-85 (1960); State ex rel. Dotta v. Brodigan, 37 Nev. 37, 42 (1914).

The Legislature, by statute, has established requirements concerning the form of municipal initiative petitions that propose to enact an ordinance. Specifically, subsection 5 of NRS 295.205 provides that such an initiative petition must contain "the full text of the ordinance proposed." This same requirement also applies to municipal initiative petitions that propose to amend the city charter. See NRS 268.010. We have not found any statutory provision in the NRS that expressly requires a municipal initiative petition to contain a title or an enacting clause. As a general rule, an initiative or referendum petition must conform only to those statutory requirements that are clearly expressed in the language of the statute. See Tod v. City of Billings, 430 P.2d 620, 621-22 (Mont. 1967). Additional requirements as to form or procedure generally will not be implied. Id.

Even though the NRS does not contain any provision that requires a municipal initiative petition to contain a title or an enacting clause, section 2.090 of the Reno City Charter (section 2.090) contains certain requirements concerning the form of a city ordinance. In particular, section 2.090 provides that each ordinance must contain a title and an enacting clause in a particular form:

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<sup>2</sup> Section 4 of article 19 provides:

The initiative and referendum powers provided for in this article are further reserved to the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality. In counties and municipalities initiative petitions may be instituted by a number of registered voters equal to 15 percent or more of the voters who voted at the last preceding general county or municipal election. Referendum petitions may be instituted by 10 percent or more of such voters.

1. No ordinance may be passed except by bill and by a majority vote of the city council. The style of all ordinances shall be as follows: "The City Council of the City of Reno do ordain:".

2. No ordinance shall contain more than one subject, which shall be briefly indicated in the title. Where the subject of the ordinance is not so expressed in the title, the ordinance is void as to the matter not expressed in the title.

3. Any ordinance which amends an existing ordinance shall set out in full the ordinance or sections thereof to be amended, and shall indicate matter to be omitted by enclosing it in brackets and shall indicate new matter by underscoring or by italics.

Based on the language and sentence structure used in section 2.090, there are two reasonable constructions that could be given to the charter provision. The provision could be read expansively so that it applies to all ordinances, whether or not such ordinances are proposed by a municipal initiative petition or by the city council. Alternatively, the provision could be read more narrowly so that it applies only to those ordinances that are proposed by the city council. When a provision is susceptible to two or more reasonable constructions, the provision is ambiguous and it should be construed "in line with what reason and public policy would indicate the legislature intended." State v. Lovett, 110 Nev. 473, 477 (1994) (quoting State v. Vezeris, 102 Nev. 232, 236 (1986)).

The Legislature enacted the Reno City Charter by special act. See chapter 662, Statutes of Nevada 1971, at p. 1962. The provisions of a city charter are generally construed according to the same rules of construction that apply to statutes. See City & Borough of Sitka v. International Bhd. of Elec. Workers, Local Union 1547, 653 P.2d 332, 335-36 (Alaska 1982); Rollo v. City of Tempe, 586 P.2d 1285, 1286 (Ariz. 1978).

The Nevada Supreme Court has typically demanded strict adherence to form and procedural requirements for initiative petitions when such requirements are expressly provided for in the state constitution. See Cirac v. Lander County, 95 Nev. 723, 728-30 (1979). However, when such requirements are prescribed by statute, the court has held that those statutes should be liberally construed. Id. Thus, the right to petition the government should not be taken away "due to a doubtful statutory construction." Id. at 730.

Because section 2.090 is susceptible to two or more reasonable constructions, we believe that a court would construe section 2.090 in a manner that is least restrictive of the power of initiative. Such a construction would be consistent with the rule that "[p]rocedural requirements which govern [c]ouncil action . . . generally do not apply to initiatives, any more than the provisions of the initiative law govern the enactment of ordinances in council." Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 479 (Cal. 1976).

Furthermore, the requirements in section 2.090 are part of Article II of the Reno City Charter. That article is entitled "Legislative Department," and it provides in section 2.010 that "[t]he legislative power of the city is vested in a city council consisting of six councilmen and a mayor." Given the context and structure of Article II and the fact that it is generally concerned with the exercise of legislative power by the city council, not by the city electorate, it is unlikely that the Legislature intended for the requirements in section 2.090 concerning titles and enacting clauses to apply to municipal initiative petitions.

Thus, we believe a court would find that neither the NRS nor the Reno City Charter contains a clearly expressed requirement that a municipal initiative petition must contain a title or an enacting clause that conforms to the requirements of section 2.090. In the absence of such a clearly expressed requirement, it is the opinion of this office that the train trench initiative petition is not fatally defective in form for failing to have a title and an enacting clause that conform to the requirements of section 2.090.

Even though we believe that the NRS and the Reno City Charter do not require the train trench initiative petition to contain a title or an enacting clause, it is possible that a court could find that the initiative petition is defective in form because it does not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition is to enact a city ordinance or to amend the city charter.

In Stumpf v. Lau, 108 Nev. 826, 832-33 (1992), the Nevada Supreme Court held that a statewide initiative petition was defective in form because it did not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition was to enact a state statute or to amend the state constitution. The court reasoned that:

The Nevada Constitution is the fundamental law of our state, and if it is to be amended by an initiative, "potential signers are to be made specifically aware of the solemnity of their act in signing that they may do so with full appreciation of the fact that they are participating in an effort to change the fundamental law, *i.e.*, the constitution of their state." State ex rel. Scott v. Kirkpatrick, 484 S.W.2d 161, 164 (Mo.1972). . . . Without language specifying whether the initiative is intended to create a law, amend a law or amend the constitution, the Secretary of State has no guidance as to how the ballot proposition is to be drafted. This failure to specify the nature and purpose of the initiative is not merely an obscurity of language; it is a fatal omission that effectively prevents the signers from knowing what they are signing.

Id. at 832.

Unlike the initiative petition in Stumpf, the train trench initiative petition is not a statewide initiative petition that implicates the fundamental law of the state, *i.e.*, the state constitution. However, the train trench initiative petition is a municipal initiative petition that



implicates the fundamental law of the city, *i.e.*, the city charter. By analogy, it is possible that a court could conclude that the train trench initiative petition suffers from the same fatal defect that plagued the initiative petition in Stumpf.

The general rule is that “[w]hen a charter is adopted, that instrument becomes the fundamental law of the municipality in the same manner that the constitution is the fundamental law of the state.” Central Power & Light Co. v. City of San Juan, 962 S.W.2d 602, 612 (Tex. App. 1998). Thus, a city charter is “the equivalent of a local constitution.” Creighton v. City of Santa Monica, 207 Cal. Rptr. 78, 82 (Cal. Ct. App. 1984).

The train trench initiative petition does not contain any provision indicating whether the initiative petition is intended to enact an ordinance or amend the Reno City Charter. As a result, potential signers of the train trench initiative petition would not be properly informed of the nature and effect of the proposed measure, and they would not have a full appreciation of the fact that they may be participating in an effort to change the fundamental law of the city, *i.e.*, the city charter. See Stumpf, 108 Nev. at 832-33. A court could find that such a failure to inform potential signers is deceptive and misleading. Id.

Moreover, a court could find that the train trench initiative petition is particularly deceptive and misleading because the substantive goal of the initiative petition, prohibiting the city from constructing the train trench within the existing railroad right-of-way, could be accomplished at the local level, if at all, only through an amendment to the city charter and not by enactment of a mere ordinance. It is a basic rule of municipal law that “an ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution.” Lucchesi v. City of San Jose, 163 Cal. Rptr. 700, 703 (Cal. Ct. App. 1980). As a result, an ordinance which is in conflict with the city charter is void and unenforceable. See State ex rel. Davies v. White, 36 Nev. 334, 336 (1913). If the charter invests the city council with the police power to take certain actions, the people of the municipality may not, through the enactment of a mere ordinance, divest the city council of the police power which it possesses under the authority of the charter. Davies, 36 Nev. at 336; see also Campen v. Greiner, 93 Cal. Rptr. 525, 528-29 (Cal. Ct. App. 1971); Alexander v. Mitchell, 260 P.2d 261, 264 (Cal. Dist. Ct. App. 1953). Rather, to divest the city council of that police power, the people of the municipality must amend the city charter. See City & County of San Francisco v. Patterson, 248 Cal. Rptr. 290, 295 (Cal. Ct. App. 1988) (“[A]ny restrictions on the power of the [city council] must be explicitly provided by the charter or accomplished by charter amendment.”). However, even if the people of the municipality amend the charter to limit the police power of the city council, such an amendment would be effective only if the amendment was not in conflict with paramount state law. See City of Reno v. Reno Police Protective Ass’n, 98 Nev. 472, 475 (1982).

As will be discussed in more detail below, we believe that, if enacted by the voters, the train trench initiative would be in conflict with state law. However, for the purposes of this

portion of the opinion, we will set aside issues of state preemption, and we will focus on the police power granted to the city council by the Reno City Charter.

Section 2.140 of the Reno City Charter provides the city council with the power to “[a]cquire, control, improve and dispose of any real or personal property for the use of the city, its residents and visitors.” That section also provides the city council with the power to “[e]nact and enforce any police, fire, traffic, health, sanitary or other measure which does not conflict with the general laws of the State of Nevada.” With limited exceptions not relevant here, section 6.010 of the Reno City Charter provides the city council with the power to authorize public improvement projects, including overpass projects, street projects and underpass projects. Section 7A.130 of the Reno City Charter provides the city council with the power to designate tax increment areas for the payment of bonds or other securities issued to defray the cost of any project that the city council may authorize pursuant to the City Bond Law, including overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. See NRS 268.730. Finally, section 7A.210 of the Reno City Charter provides the city council with the power to enter into contracts and other cooperative agreements concerning any project authorized by the City Bond Law, including overpass projects, street projects, transportation projects and underpass projects. See NRS 268.730.

From the foregoing canvass of the Reno City Charter, it is clear that the city council possesses considerable police power under the charter to undertake and participate in various public improvement projects, like constructing the train trench within the existing railroad right-of-way. Because the train trench initiative petition would limit or restrict the power of the city council to undertake or participate in such a public improvement project, the initiative petition is clearly an attempt to limit or restrict the police power that is expressly granted to the city council by the charter. Such limits or restrictions on the police power of the city council can be imposed only by charter amendment; they cannot be imposed by ordinance. See Patterson, 248 Cal. Rptr. at 294-96; Campen, 93 Cal. Rptr. at 528-29; Alexander, 260 P.2d at 264.

Thus, the substantive goal of the train trench initiative petition, prohibiting the city from constructing the train trench within the existing railroad right-of-way, could be accomplished at the local level, if at all, only through an amendment to the city charter. However, the train trench initiative petition does not contain any provision indicating that it is intended to amend the city charter. Without such information, a court would be left with two alternatives in interpreting the initiative petition.

First, the court could interpret the train trench initiative petition as proposing to enact an ordinance. If the court were to adopt that interpretation, the initiative petition would be void and unenforceable because it proposes to enact an ordinance that is in conflict with the city charter.

Alternatively, the court could interpret the train trench initiative petition as proposing an amendment to the city charter. If the court were to adopt that interpretation, the court would have to decide whether it should follow the reasoning of the Nevada Supreme Court in Stumpf. If the court were to follow the reasoning in Stumpf, the train trench initiative petition would be inherently deceptive and misleading, and therefore fatally defective in form, because it fails to clearly indicate that the purpose of the initiative petition is to amend the city charter. However, the court could find that the reasoning in Stumpf is limited in its application to statewide initiative petitions. In that case, the train trench initiative petition, which is a municipal initiative petition, would not be fatally defective in form even though it fails to clearly indicate that the purpose of the initiative petition is to amend the city charter. Unfortunately, we cannot predict with any certainty whether a court would or would not apply the reasoning in Stumpf to the train trench initiative petition.

In sum, it is the opinion of this office that the train trench initiative petition is not fatally defective in form for failing to have a title and an enacting clause that conform to the requirements of section 2.090 of the Reno City Charter. However, based on the reasoning of the Nevada Supreme Court in Stumpf, we believe a court could find that the initiative petition is fatally defective in form because it does not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition is to enact a city ordinance or to amend the city charter. Unfortunately, because the decision in Stumpf involved a statewide initiative petition, not a municipal initiative petition, we cannot predict with any certainty whether a court would or would not apply the reasoning in Stumpf to the train trench initiative petition.

#### **B. Questions relating to the Substance of the Train Trench Initiative Petition**

You have asked whether the train trench initiative petition is invalid on its face because the prohibition contained in the initiative petition is beyond the power of the municipal voters to enact by initiative. You have also asked whether the initiative petition, if enacted by the voters, would be preempted by state law. Your questions implicate several closely related yet analytically distinct doctrines concerning the power of municipal initiative and the preeminence of state law.

The voters of each city possess a broad power of initiative. See Forman v. Eagle Thrifty Drugs & Mkts, Inc., 89 Nev. 533, 537 (1973). That broad power, however, is not unlimited. Id. Rather, based on a long line of precedent from other jurisdictions, the Nevada Supreme Court has recognized two limitations on the power of initiative at the municipal level. Id. First, the voters of a city cannot use the power of initiative in matters that are primarily administrative in nature. Id. Second, the voters of a city cannot use the power of initiative in matters of statewide concern if the Legislature has delegated local authority over those matters exclusively to the city council. Id. at 538-39.

These two limitations on the power of initiative at the municipal level derive from the fact that the constitution reserves the power of initiative "as to all local, special and municipal legislation." Nev. Const. art. 19, § 4. The phrase "local, special and municipal legislation" carries with it two inherent limitations on the power of initiative. First, the power of initiative extends only to acts that constitute "legislation." Forman, 89 Nev. at 537. Acts that are primarily administrative in nature do not constitute legislation. Thus, such acts are beyond the power of initiative. Id. Second, the power of initiative extends only to matters of a "local, special and municipal" nature. In matters of statewide concern, state law predominates. Forman, 89 Nev. at 538-39. Thus, when the Legislature delegates local authority over a matter of statewide concern exclusively to the city council, that exclusive delegation removes the matter from the power of local initiative, even if the acts of the city council constitute legislation. Id.

Finally, even if a matter is within the power of municipal voters to enact by way of an initiative petition, the initiative petition, like any other measure enacted at the municipal level, remains subject to the preemptive force of paramount state law. Thus, if the voters of a city enact an initiative petition that conflicts with state law, that initiative petition will be preempted by state law and it will be rendered unenforceable. See Crowley v. Duffrin, 109 Nev. 597, 605 (1993); Lamb v. Mirin, 90 Nev. 329, 332-33 (1974).

With these basic principles in mind, we will first discuss whether the train trench initiative petition violates the two limitations imposed on the power of initiative at the municipal level, thereby rendering the initiative petition invalid on its face. Then, we will discuss whether the train trench initiative petition is preempted by state law, thereby rendering the initiative petition unenforceable.

#### **(1) Administrative Acts**

In the area of initiative and referendum, the distinction between legislative acts and administrative acts is often vague and difficult to apply. See Forman, 89 Nev. at 537. As explained by one court:

An examination of the cases and legal authorities will disclose that the determination of whether a municipality has acted in its legislative or administrative capacity is indeed difficult and by no means consistent. Each case must be determined on its particular facts and even then there is no unanimity of opinion. Action based on one set of facts will be considered legislative in one jurisdiction while the same or similar action may be considered administrative in a different jurisdiction.

Rauh v. City of Hutchinson, 575 P.2d 517, 523 (Kan. 1978). Succinctly put, "these cases are often irreconcilable." Wennerstrom v. City of Mesa, 821 P.2d 146, 150 (Ariz. 1991).

Given the wide disparity in court holdings, the most that can be said of the case law is that each case ultimately turned on the facts before the court. We have not found any one case whose facts are so similar that the case can be deemed controlling.

Despite the wide disparity in holdings, courts generally have followed a consistent set of guidelines in determining whether an initiative or referendum petition effected a legislative act or an administrative act. In particular, courts have considered four main guidelines:

1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.
4. No one act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures which are quite clearly and fully legislative and not principally executive or administrative.

Town of Whitehall v. Preece, 956 P.2d 743, 749 (Mont. 1998); accord Johnson v. City of Alamogordo, 910 P.2d 308, 312 (N.M. 1996); City of Wichita v. Kansas Taxpayers Network, Inc., 874 P.2d 667, 671-72 (Kan. 1994).

In addition, courts have recognized that the city council often acts as an administrative arm of the state when it carries out policies established by the state legislature. As explained by the California Supreme Court:

Acts of a local governing body which, in a purely local context, would otherwise be legislative and subject to referendum may, however, become administrative "in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state."

Yost v. Thomas, 685 P.2d 1152, 1157 (Cal. 1984) (quoting Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 480 n.14 (Cal. 1976)).

For example, in Simpson v. Hite, 222 P.2d 225 (Cal. 1950), the California Legislature enacted legislation that required the county board of supervisors to provide "suitable quarters" for the county's superior and municipal courts. Id. at 226-27. The state law gave the board considerable discretion to determine what types of facilities would constitute suitable quarters. Id. Acting under the authority of the state law, the Los Angeles County Board of Supervisors selected a site for the construction of new court buildings. Id. In response, several voters circulated an initiative petition that, in effect, would have prohibited the board from constructing any court buildings on the site that the board had selected. Id. The California Supreme Court found that, by enacting the state law, the state legislature had "acted to establish the basic policy and has vested the responsibility for carrying out that policy in [the] board of supervisors." Id. at 228. The court also found that, when the board selected the site for the court buildings and took other steps in furtherance of construction, the board was carrying out the policy set by the state legislature and the board was therefore performing acts that were predominantly administrative in character. Id. at 228-30. Thus, the court concluded that the initiative petition was invalid on its face because it dealt with administrative matters that, under state law, had been committed solely to the board of supervisors. Id. at 226.

In light of the foregoing guidelines and principles, we must consider two issues. First, we must consider whether the railroad grade separation project in downtown Reno constitutes a matter of statewide concern. Second, we must consider whether the provisions of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law establish such a pervasive framework of state policy and regulation that, when acting with regard to the railroad grade separation project in downtown Reno, the city council is acting in a predominantly administrative manner as an administrative arm of the state.

As a general rule, courts will consider a matter to be one of statewide concern if the matter has any significant effects that extend beyond the boundaries of the municipality. See Committee of Seven Thousand v. Superior Ct., 754 P.2d 708, 716-17 (Cal. 1988). For example, in Committee of Seven Thousand, the California Legislature passed legislation which applied only to Orange County and the cities therein and which authorized the county and such cities to finance major highway projects that would be constructed entirely within Orange County. Id. at 710. The California Supreme Court acknowledged that street work has long been regarded as a matter of local concern. Id. at 716. However, the court recognized that construction of major highways has effects beyond the boundaries of any one city. Id. at 716-17. Thus, the court concluded that such important transportation projects "are of the kind likely to require coordination on a regional basis and to have substantial impacts on persons living outside the boundaries of the city and so are matters of statewide concern." Id. at 717. In reaching this conclusion, the court noted that the concept of statewide matters "includes matters the impact of which is primarily regional rather than truly statewide." Id. at 716.

Courts have long held that "the subject of railroad grade crossings is a matter of statewide concern," Union City v. Southern Pac. Co., 67 Cal. Rptr. 816, 817 (Cal. Ct. App. 1968), and that "[t]he safety of railroad crossings is a matter of statewide concern that should not be left to the individual regulations of various municipalities." Northwestern Bell Tel. Co. v. Chicago & N. W. Transp. Co., 245 N.W.2d 639, 642 (S.D. 1976). Thus, when a municipality acts to construct and apportion the costs for a railroad grade separation project, that project is a matter of statewide concern. See Denver & Rio Grande W. R.R. v. City and County of Denver, 673 P.2d 354, 359 (Colo. 1983).

The railroad grade separation project in downtown Reno is intended to improve public safety and to enhance economic development. It is reasonable to conclude that the effects of the project will extend far beyond the boundaries of the city. Indeed, to finance this important transportation project, the city council and the board of county commissioners must coordinate their efforts on a regional basis and must also coordinate their efforts with a major interstate railroad company whose railroad operations extend well beyond the boundaries of the city, the county and even the state. Under such circumstances, we believe that a court would find that the railroad grade separation project in downtown Reno is a matter of statewide concern.

Having determined that a court would find that the railroad grade separation project in downtown Reno is a matter of statewide concern, we must now examine the provisions of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law to determine whether those provisions establish such a pervasive framework of state policy and regulation that, when acting with regard to the railroad grade separation project in downtown Reno, the city council is acting in a predominantly administrative manner as an administrative arm of the state.

The provisions of NRS 268.7845 authorized the Reno City Council to impose a room tax within a taxing district created by NRS 268.781. Once the city council imposed the room tax, the city council had a statutory duty to use the proceeds from the room tax "to fund the acquisition, establishment, construction or expansion of one or more railroad grade separation projects." NRS 268.7845(4). Thus, by enacting NRS 268.7845, the Legislature established a basic state policy to finance one or more railroad grade separation projects, and the Legislature vested in the city council the responsibility to carry out the state policy. Accordingly, we believe that when the city council takes actions to carry out the state policy codified in NRS 268.7845, the city council is acting in a predominantly administrative capacity and is thereby acting as an administrative arm of the state.

This conclusion is supported by a number of decisions in which courts have held that, when legislation gives a local governing body the authority to finance one or more public improvement projects, the determinations made by that local body concerning the location and details of those projects are to be considered administrative acts in furtherance of the policy set forth in the financing legislation. See Wennerstrom v. City of Mesa, 821 P.2d 146

(Ariz. 1991) (holding that the city council was acting in an administrative capacity when it approved street improvement projects pursuant to previously enacted bond financing legislation); City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987) (holding that the city council was acting in an administrative capacity when it approved public improvement projects pursuant to previously enacted legislation authorizing a city sales and use tax); Rauh v. City of Hutchinson, 575 P.2d 517 (Kan. 1978) (holding that the city commission was acting in an administrative capacity when it approved projects pursuant to previously enacted legislation authorizing the issuance of industrial revenue bonds).

Furthermore, the city room tax authorized by NRS 268.7845 may be imposed only in a taxing district created by NRS 268.781. The provisions of NRS 268.781 limit such taxing districts to areas of the city which have been included in a redevelopment area established pursuant to the Community Redevelopment Law. See chapter 279 of NRS. The Community Redevelopment Law provides for comprehensive state regulation of redevelopment in cities and counties. Several courts have held that when a local governing body is carrying out policies that further the state's community redevelopment law, the local governing body is not acting in a legislative capacity but is acting in an administrative capacity as an administrative arm of the state. See Redevelopment Agency v. City of Berkeley, 143 Cal. Rptr. 633, 638 (Cal. Ct. App. 1978); Gibbs v. City of Napa, 130 Cal. Rptr. 382, 385 (Cal. Ct. App. 1976); Walker v. City of Salinas, 128 Cal. Rptr. 832, 836 (Cal. Ct. App. 1976); Andrews v. City of San Bernardino, 346 P.2d 457, 459 (Cal. Dist. Ct. App. 1959). Because the train trench is designed to promote redevelopment within the downtown redevelopment area and because the train trench is being financed in part with money from a taxing district created within the downtown redevelopment area, we believe that any decisions of the city council concerning the train trench must be considered to be predominantly administrative acts that are designed to further the comprehensive state policy embodied in the Community Redevelopment Law.

The City Bond Law authorizes the city council to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. See NRS 268.730. The railroad grade separation project in downtown Reno will involve one or more of these projects; therefore, the city council has the power to undertake the railroad grade separation project pursuant to the City Bond Law. From a reading of the City Bond Law, we believe that the comprehensive nature of the law creates a pervasive system of state policy and regulation concerning public improvement projects that makes the city council an administrative arm of the state when it undertakes projects pursuant to the City Bond Law. Thus, with regard to the City Bond Law, we believe that the state legislature has set the basic policy concerning public improvement projects and that the city council acts in a predominantly administrative manner when it carries out that policy.

Finally, the Consolidated Local Improvements Law authorizes the city council to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. See NRS 271.265. The railroad grade separation project in downtown Reno will involve one or more of these projects; therefore, the city council has the power to



undertake the railroad grade separation project pursuant to the Consolidated Local Improvements Law. From a reading of the Consolidated Local Improvements Law, we believe that the comprehensive nature of the law creates a pervasive system of state policy and regulation concerning public improvement projects that makes the city council an administrative arm of the state when it undertakes projects pursuant to the Consolidated Local Improvements Law. Indeed, the Legislature has declared in the Consolidated Local Improvements Law that "the acquisition, improvement, equipment, maintenance and operation of any project herein authorized is in the public interest, is conducive to the public welfare, and constitutes a part of the established and permanent policy of the State of Nevada." NRS 271.020(2). Thus, with regard to the Consolidated Local Improvements Law, we believe that the state legislature has set the basic policy concerning public improvement projects and that the city council acts in a predominantly administrative manner when it carries out that policy.

In sum, we believe a court would find that the railroad grade separation project in downtown Reno is a matter of statewide concern. We also believe a court would find that the provisions of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law establish such a pervasive framework of state policy and regulation that, when acting with regard to the railroad grade separation project in downtown Reno, the city council is acting in a predominantly administrative manner as an administrative arm of the state. Therefore, it is the opinion of this office that the train trench initiative petition is invalid on its face because it involves predominantly administrative matters of statewide concern that are beyond the power of the municipal voters to enact by initiative.

## **(2) Exclusive Delegation**

In matters of statewide concern, the state legislature may delegate local authority over those matters exclusively to the city council. See Forman v. Eagle Thrifty Drugs & Mkts, Inc., 89 Nev. 533, 537 (1973). When the state legislature makes such an exclusive delegation of authority, that exclusive delegation will preclude city voters from exercising the power of initiative or referendum concerning those matters, even if those matters are legislative in nature. See Committee of Seven Thousand v. Superior Ct., 754 P.2d 708, 720-21 (Cal. 1988); State ex rel. Guthrie v. City of Richland, 494 P.2d 990, 991 (Wash. 1972); Priorities First v. City of Spokane, 968 P.2d 431, 433 (Wash. Ct. App. 1998).

In determining whether the state legislature has made an exclusive delegation of local authority to the city council, courts generally examine three factors. See DeVita v. County of Napa, 889 P.2d 1019, 1027 (Cal. 1995). First, the court determines whether the matter can be fairly characterized as a matter of statewide concern. See Committee of Seven Thousand, 754 P.2d at 716-17. Second, the court examines the statutory language to determine whether the state legislature has used language that suggests an exclusive delegation of authority. Id. at 713-16. In this regard, statutory language that uses generic terms, such as "governing body" or "legislative body," supports a weaker inference of exclusive delegation, while statutory

language that uses more specific terms, such as "city council" or "board of supervisors," supports a stronger inference of exclusive delegation. Id. at 713. However, none of these terms, standing alone, will support a conclusive inference as to legislative intent. Id. at 713-16. As a result, the final inquiry in the three-part test is an examination of any other indicia of legislative intent. Id. at 718-19.

As discussed previously, we believe that a court would find that the railroad grade separation project in downtown Reno is a matter of statewide concern. Thus, the remaining issues concern whether the provisions of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law demonstrate that the Legislature intended to delegate local authority over the railroad grade separation project in downtown Reno exclusively to the city council, thereby precluding the power of initiative on the matter.

The provisions of NRS 268.7845 authorize the "governing body of an incorporated city" to impose the city room tax. While the Legislature's use of the generic term "governing body" supports a weaker inference of exclusive delegation, we believe that there is other indicia of legislative intent which supports a conclusion that NRS 268.7845 constitutes an exclusive delegation of local authority to the city council.

The Nevada Supreme Court has held that an examination of the legislative history of a statute is useful in determining legislative intent. See Del Papa v. Board of Regents, 114 Nev. 388, 394 (1998). The legislative history of a statute may consist of exhibits and testimony provided to legislative committees in either house, arguments and statements made by legislators during debate in either house and any legislative action or inaction that occurs in either house on bills and amendments. Id. at 394-97.

The legislative history of section 21 of A.B. 291 (NRS 268.7845) involves legislation enacted over two sessions. See Karadanis v. Bond, 116 Nev. Adv. Op. 16, 993 P.2d 721 (2000). Several proponents and opponents of the railroad grade separation project in downtown Reno testified before legislative committees during the 1997 and 1999 legislative sessions. From a reading of that testimony, it is clear that those legislators who were in support of A.B. 291 believed that the city council had been given final authority over the railroad grade separation project in downtown Reno, and that the city council had exercised that authority by deciding to construct the train trench within the existing railroad right-of-way. See Minutes of the Senate Committee on Taxation, June 12, 1997; Minutes of the Senate Committee on Government Affairs, Mar. 3, 1999; Minutes of the Assembly Committee on Government Affairs, Mar. 15, 1999. Those legislators also believed that it was imperative to enact a regional funding mechanism to assist the city in financing the railroad grade separation project, so that the project could proceed to construction as soon as possible. Id. Because those legislators believed that there was an urgent need to construct the project as soon as possible, it is reasonable to infer that the Legislature intended to delegate local authority over the project exclusively to the city council to avoid the disruption and delay that would arise from the process of initiative and referendum.

Furthermore, in at least one case, the California Supreme Court concluded that the state legislature intended to make an exclusive delegation of authority based on the fact that the purpose of the state legislation was to promote a regional project and to facilitate intergovernmental cooperation. See Committee of Seven Thousand v. Superior Ct., 754 P.2d 708 (Cal. 1988) (finding exclusive delegation where highway projects required regional planning and intergovernmental cooperation). The purpose of A.B. 291 is to promote an important regional project by establishing a regional funding mechanism to finance the railroad grade separation project in downtown Reno. By its very nature, the regional funding mechanism requires significant regional planning and intergovernmental cooperation. Indeed, on December 8, 1998, the city council and the board of county commissioners entered into an interlocal agreement regarding the collection and use of the taxes authorized by A.B. 291. Thus, in providing for a city room tax and a county sales tax in A.B. 291, the Legislature clearly recognized that a regional funding mechanism, involving significant regional planning and intergovernmental cooperation, was absolutely necessary to finance the railroad grade separation project in downtown Reno. From these facts, it is reasonable to infer that the Legislature intended to delegate local authority over the railroad grade separation project exclusively to the city council to ensure that the process of initiative and referendum would not delay an important regional project or impede intergovernmental cooperation.

Finally, in determining legislative intent, the Nevada Supreme Court often looks to analogous statutes. See State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins., 114 Nev. 535, 541-42 (1998). Thus, if one statute contains a specific requirement and a second, analogous statute does not contain the same requirement, the court will presume that the Legislature intended to exclude the requirement from the second statute. See Estate of Delmue v. Allstate Ins. Co., 113 Nev. 414, 418 (1997). The provisions of section 21 of A.B. 291 (NRS 268.7845) do not contain any requirement mandating that the actions of the city council concerning the room tax and the railroad grade separation project must be submitted to the voters for approval. In other instances, where the Legislature has authorized a local body to impose a tax for a public improvement project, the Legislature has also expressly required the local body to submit the tax ordinance to the local voters for approval. See, e.g., chapter 14, Statutes of Nevada 1997, at p. 29 (authorizing the imposition, upon the approval of the voters, of a sales and use tax for constructing and equipping a hospital in Elko County). The absence of such a requirement in A.B. 291 is evidence that the Legislature intended to exclude the actions of the city council concerning the room tax and the railroad grade separation project from the process of initiative and referendum.

Thus, given the legislative history of section 21 of A.B. 291 (NRS 268.7845), the fact that the statute is intended to promote a regional project and to facilitate intergovernmental cooperation, and the fact that the statute does not contain any express requirement mandating voter approval as found in analogous statutes, it is reasonable to conclude that the Legislature intended to delegate local authority over the railroad grade separation project exclusively to the city council, thereby precluding the power of initiative on the matter.

The City Bond Law authorizes the "governing body of a municipality" to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. NRS 268.730. Again, the Legislature's use of the generic term "governing body" supports a weaker inference of exclusive delegation. Nevertheless, the provisions of the City Bond Law create a comprehensive state scheme for carrying out public improvement projects. In analogous situations, where the power of initiative and referendum would interfere with comprehensive state schemes, courts have held that the state legislature intended to delegate local authority exclusively to the local governing body to ensure that the purposes and objectives of the state legislation would be achieved without undue interference or delay from the process of initiative and referendum. See Simpson v. Hite, 222 P.2d 225, 230 (Cal. 1950); Snohomish County v. Anderson, 868 P.2d 116, 120 (Wash. 1994). Because the City Bond Law establishes a comprehensive state scheme for public improvement projects and because the power of initiative and referendum would interfere with that comprehensive state scheme, it is reasonable to conclude that the Legislature intended to delegate local authority over such projects exclusively to the city council to ensure that the purposes and objectives of the state legislation would be achieved without undue interference or delay from the process of initiative and referendum.

The Consolidated Local Improvements Law authorizes the "governing body of a county, city or town" to undertake overpass projects, sidewalk projects, street projects, transportation projects and underpass projects. NRS 271.265. Again, the Legislature's use of the generic term "governing body" supports a weaker inference of exclusive delegation. However, the Consolidated Local Improvements Law also provides that the governing body may undertake such projects "without any election." NRS 271.265. This is a clear and express indication that the Legislature intended to delegate local authority over such projects exclusively to the city council without subjecting the actions of city council to the process of initiative and referendum. Furthermore, like the City Bond Law, the Consolidated Local Improvements Law creates a comprehensive state scheme for carrying out public improvement projects. Thus, based on the express provisions in the Consolidated Local Improvements Law and based on the fact that the law establishes a comprehensive state scheme for public improvement projects, it is reasonable to conclude that the Legislature intended to delegate local authority over such projects exclusively to the city council to ensure that the purposes and objectives of the state legislation would be achieved without undue interference or delay from the process of initiative and referendum.

In sum, from a reading of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law and from an examination of legislative history and other relevant indicia of legislative intent, we believe a court would find that the Legislature intended to delegate local authority over the railroad grade separation project exclusively to the city council, thereby precluding the power of initiative on the matter. Therefore, it is the opinion of this office that the train trench initiative petition is invalid on its face because it involves matters of statewide concern which have been delegated exclusively to the city council and which are beyond the power of the municipal voters to enact by initiative.

### **(3) Preemption by State Law**

The state legislature may preempt local regulation over any matter that is not purely or strictly of local concern. See Lamb v. Mirin, 90 Nev. 329, 332-33 (1974). As explained by the Nevada Supreme Court:

Whenever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject, through legislation, ceases. In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, the Court may look to the whole purpose and scope of the legislative scheme.

Id. at 332. Thus, if the state legislature has decided to occupy an entire field, all local regulation within that field is preempted by state law. Id. at 332-33; Douglas County Contractors Ass'n v. Douglas County, 112 Nev. 1452, 1463-65 (1996).

Even if the state legislature does not intend to occupy an entire field, local regulation over a matter still will be preempted by state law if the local regulation is in direct conflict with state law or if the local regulation frustrates the purposes and objectives of state law. See Crowley v. Duffrin, 109 Nev. 597, 604-05 (1993). A local regulation will be in direct conflict with state law if: (1) the local regulation allows an activity which state law prohibits; or (2) the local regulation prohibits an activity which state law allows. See Lamb, 90 Nev. at 333 ("That which is allowed by the general laws of a state cannot be prohibited by local ordinance, without an express grant on the part of the legislature."). A local regulation will frustrate the purposes and objectives of state law if the local regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the state legislature when it enacted the law. Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1122 & n.26 (Alaska 1978) (citing Ray v. Atlantic Richfield Co., 98 S. Ct. 988 (1978)).

The provisions of NRS 268.7845 allow the city council to use the proceeds from the room tax "to fund the acquisition, establishment, construction or expansion of one or more railroad grade separation projects." Indeed, the provisions of NRS 268.7845 require the city council to use the tax proceeds for such purposes. Thus, state law allows the city council to use the tax proceeds to fund the construction of the train trench within the existing railroad right-of-way. The train trench initiative petition would prohibit the city council from constructing the train trench within the existing railroad right-of-way. The result is that the train trench initiative petition would prohibit an activity which state law allows; therefore, the initiative petition would be in direct conflict with NRS 268.7845.

Furthermore, even assuming that the train trench initiative petition would not be in direct conflict with state law, we believe that the initiative petition would stand as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the state legislature when it enacted A.B. 291. As discussed previously, the legislative history of A.B. 291 indicates that the Legislature intended to provide a regional funding mechanism for the railroad grade separation project in downtown Reno so that the project could proceed to construction as soon as possible. By prohibiting the city council from constructing the train trench within the existing railroad right-of-way, the initiative petition would not only interfere with or delay the railroad grade separation project as currently planned, but it could delay indefinitely any workable and financially sound solution to the serious problems caused by the at-grade location of the Union Pacific railroad tracks in downtown Reno. Under such circumstances, we believe that the train trench initiative petition would frustrate the purposes and objectives of A.B. 291.

The City Bond Law creates a comprehensive state scheme for carrying out public improvement projects. As discussed previously, the City Bond Law allows the city council to undertake railroad grade separation projects, including the project to construct the train trench within the existing railroad right-of-way. The train trench initiative petition would prohibit the city council from constructing the train trench within the existing railroad right-of-way. The result is that the train trench initiative petition would prohibit an activity which state law allows; therefore, the initiative petition would be in direct conflict with the City Bond Law.

Furthermore, we believe that the initiative petition would stand as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the state legislature when it enacted the City Bond Law. In subsection 1 of NRS 268.740, the Legislature expressly provided that:

No other act or law with regard to the authorization or issuance of bonds that requires an approval, or in any way impedes or restricts the carrying out of the acts herein authorized to be done, shall be construed as applying to any proceedings taken hereunder or acts done pursuant hereto, except as herein otherwise provided.

While this provision does not expressly preempt all acts or laws at the municipal level, it is evidence of the underlying policy of the City Bond Law to facilitate the financing and construction of important public improvement projects without undue interference. Because the train trench initiative petition prohibits the construction of an important public improvement project, we believe that the initiative petition would frustrate the purposes and objectives of the City Bond Law.

The Consolidated Local Improvements Law creates a comprehensive state scheme for carrying out public improvement projects. As discussed previously, the Consolidated Local Improvements Law allows the city council to undertake railroad grade separation projects, including the project to construct the train trench within the existing railroad right-of-way. The train trench initiative petition would prohibit the city council from constructing the train trench within the existing railroad right-of-way. The result is that the train trench initiative petition would prohibit an activity which state law allows; therefore, the initiative petition would be in direct conflict with the Consolidated Local Improvements Law.

Furthermore, we believe that the initiative petition would stand as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the state legislature when it enacted the Consolidated Local Improvements Law. In subsection 2 of NRS 271.020, the Legislature expressly provided that "the acquisition, improvement, equipment, maintenance and operation of any project herein authorized is in the public interest, is conducive to the public welfare, and constitutes a part of the established and permanent policy of the State of Nevada." Thus, the underlying policy of the Consolidated Local Improvements Law is to facilitate the financing and construction of important public improvement projects. Because the train trench initiative petition prohibits the construction of an important public improvement project, we believe that the initiative petition would frustrate the purposes and objectives of the Consolidated Local Improvements Law.

In sum, if the voters were to enact the train trench initiative petition, we believe a court would find that the initiative petition is in direct conflict with NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law because the initiative petition would prohibit an activity which state law allows. In addition, we believe a court would find that the initiative petition frustrates the purposes and objectives of A.B. 291, the City Bond Law and the Consolidated Local Improvements Law because the initiative petition would prohibit construction of an important public improvement project. Therefore, it is the opinion of this office that, if the voters were to enact the train trench initiative petition, the initiative petition would be preempted by state law.

## **II. Use of the Proceeds from the City Room Tax and the County Sales Tax**

You have asked whether the city council or the board of county commissioners may use the proceeds from the city room tax or the county sales tax authorized by A.B. 291 for a purpose other than a railroad grade separation project. As discussed previously, section 21 of A.B. 291 (NRS 268.7845) provides that the proceeds from the city room tax "must be used to fund the acquisition, establishment, construction or expansion of one or more railroad grade separation projects." Likewise, section 24 of A.B. 291 provides that the proceeds from the county sales tax "must be used by the board of county commissioners for the cost of the acquisition, establishment, construction or expansion of one or more railroad grade separation projects."

The cardinal rule of statutory construction is that "words in a statute should be given their plain meaning unless this violates the spirit of the act." McKay v. Board of Supervisors, 102 Nev. 644, 648 (1986). Furthermore, when the Legislature uses the word "must" in a statute, it is presumed that the Legislature intended to impose a mandatory duty or requirement. See NRS 0.025. Finally, it is well settled that when the proceeds from a tax have been designated for a specific purpose, those proceeds may not be diverted for any other purpose. See McNichols v. City & County of Denver, 209 P.2d 910, 912 (Colo. 1949); Thompson v. Pierce County, 193 P. 706, 707 (Wash. 1920). Thus, if state law directs a local governing body to use tax proceeds for a specific purpose, the local governing body does not have any inherent or implied power to use the tax proceeds for any other purpose. See City of Miami v. Gates, 393 So. 2d 586, 587-88 (Fla. Dist. Ct. App. 1981); Miller v. City of Milwaukee, 196 N.W. 235, 236-37 (Wis. 1923).

Based on the plain language in section 21 and section 24 of A.B. 291, we believe that the Legislature intended to impose a mandatory duty and requirement on the city council and the board of county commissioners to use the proceeds from the city room tax and the county sales tax exclusively for "one or more railroad grade separation projects." Because the Legislature has directed that such tax proceeds must be used exclusively for a specific purpose, it is the opinion of this office that neither the city council nor the board of county commissioners may use the proceeds for any other purpose.

We note, however, that the plain language of section 21 and section 24 of A.B. 291 allows the city council and the board of county commissioners to use the tax proceeds for "one or more railroad grade separation projects." The phrase "one or more railroad grade separation projects" is broad and general in its meaning. Thus, the planned railroad grade separation project involving the construction of a train trench through downtown Reno is not the only conceivable railroad grade separation project that could be undertaken by the city or the county. Rather, there could be any number of alternative or additional railroad grade separation projects that could come within the plain meaning of the phrase "one or more railroad grade separation projects." Consequently, while the plain language of section 21 and section 24 of A.B. 291 requires the city council and the board of county commissioners to use the tax proceeds exclusively for "one or more railroad grade separation projects," the plain language of the statutes does not require the city council or the board of county commissioners to use the tax proceeds for any one particular type of railroad grade separation project.

### CONCLUSION

We believe a court would find that neither the NRS nor the Reno City Charter contains a clearly expressed requirement that a municipal initiative petition must contain a title or an enacting clause that conforms to the requirements of section 2.090 of the Reno City Charter. In the absence of such a clearly expressed requirement, it is the opinion of this office that the



train trench initiative petition is not fatally defective in form for failing to have a title and an enacting clause that conform to the requirements of section 2.090 of the Reno City Charter.

Based on the reasoning of the Nevada Supreme Court in Stumpf v. Lau, 108 Nev. 826, 832-33 (1992), we believe a court could find that the initiative petition is fatally defective in form because it does not clearly indicate to potential signers of the initiative petition whether the purpose of the initiative petition is to enact a city ordinance or to amend the city charter. Unfortunately, because the decision in Stumpf involved a statewide initiative petition, not a municipal initiative petition, we cannot predict with any certainty whether a court would or would not apply the reasoning in Stumpf to the train trench initiative petition.

We believe a court would find that the railroad grade separation project in downtown Reno is a matter of statewide concern. We also believe a court would find that the provisions of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law establish such a pervasive framework of state policy and regulation that, when acting with regard to the railroad grade separation project in downtown Reno, the city council is acting in a predominantly administrative manner as an administrative arm of the state. Therefore, it is the opinion of this office that the train trench initiative petition is invalid on its face because it involves predominantly administrative matters of statewide concern that are beyond the power of the municipal voters to enact by initiative.

From a reading of NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law and from an examination of legislative history and other relevant indicia of legislative intent, we believe a court would find that the Legislature intended to delegate local authority over the railroad grade separation project exclusively to the city council, thereby precluding the power of initiative on the matter. Therefore, it is the opinion of this office that the train trench initiative petition is invalid on its face because it involves matters of statewide concern which have been delegated exclusively to the city council and which are beyond the power of the municipal voters to enact by initiative.

If the voters were to enact the train trench initiative petition, we believe a court would find that the initiative petition is in direct conflict with NRS 268.7845, the City Bond Law and the Consolidated Local Improvements Law because the initiative petition would prohibit an activity which state law allows. In addition, we believe a court would find that the initiative petition frustrates the purposes and objectives of A.B. 291, the City Bond Law and the Consolidated Local Improvements Law because the initiative petition would prohibit construction of an important public improvement project. Therefore, it is the opinion of this office that, if the voters were to enact the train trench initiative petition, the initiative petition would be preempted by state law.

Based on the plain language in section 21 and section 24 of A.B. 291, we believe that the Legislature intended to impose a mandatory duty and requirement on the city council and the board of county commissioners to use the proceeds from the city room tax and the county

sales tax exclusively for "one or more railroad grade separation projects." Because the Legislature has directed that such tax proceeds must be used exclusively for a specific purpose, it is the opinion of this office that neither the city council nor the board of county commissioners may use the proceeds for any other purpose.

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

Very truly yours,

Brenda J. Erdoes  
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By   
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