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April 3, 2003

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The Honorable Lynn Hettrick
Minority Floor Leader - Nevada Assembly
Nevada Legislature
Capitol Complex
Carson City, Nevada 89510

Re: Assembly Bill Number 428

Dear Assemblyman Hettrick:

Please review the amendments proposed in this letter concerning AB 428. If you find them appropriate, please forward them to the Subcommittee.

Section 1

Amend Section 1, lines 23 to 26 to read as follows:

(3) With respect to the adoption or amendment of a part of the master plan, the [anticipated effect of the] adoption or amendment's consistency with the master plan. As used in this section "consistency" means the adoption or amendment's furtherance of the objectives and policies of the master plan.

(4) With respect to the adoption or amendment of a part of the master plan which operates to limit the number of housing units that may be constructed in a defined time period, findings on all of the following:

(I) Consistency with the economic plan adopted pursuant to NRS 278.160

(1)(c);

(II) Consistency with the housing plan adopted pursuant to NRS 278.160

(1)(e); and

(III) Consistency with the public services and facilities plan adopted pursuant to NRS 278.160(1)(i).

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GOVERNMENT AFFAIRS
SUBCOMMITTEE ON A.B. 428
DATE: April 4, 2003 EXHIBIT D
SUBMITTED BY: Scott Doyle

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Analysis for Section 1

The master plan is a comprehensive, long-term plan for the physical development of the city, county or region. The master plan is the "constitution" for all future development within the city, county or region and is accorded substantial deference judicially. The propriety of any local decision affecting land use and development depends on consistency with the master plan. "Consistency" is the principle which infuses the concept of comprehensive, long-term planning with the force of law.

The amendment proposed for Section 1 of A.B. 428 strengthens and is compatible with the concept of consistency which is already codified in other provisions of chapter 278. See NRS 278.170(1) (coordination of the plan with similar plans of adjoining regions); NRS 278.220(1) and (2) (adoption of those parts of the plan as "may practicably be applied" to the development of the jurisdiction and are declared to "conserve and promote the public health, safety and general welfare."); NRS 278.230(1) (statutory standards for putting the master plan into effect); NRS 278.250(2) (statutory standards for zoning regulations adopted in accordance with the master plan).

Sections 3 and 4

Amend Section 3, line 42 to read as follows:

... shall [hold] facilitate a public meeting at which the proponents of the

Amend Section 4, line 4, to read as follows:

... council shall [hold] facilitate a public meeting at which the proponents of the

Analysis for Sections 3 and 4

Use of the term "facilitate" is correct terminology given the legislative procedures authorized by Nev. Const. art. 19 §5. "Facilitate" can embrace governmental action like providing the venue for the meeting. It does not require the governing body to conduct or preside at the meeting.

It is important to ensure that the exercise of initiative or referendum by the voters not be rendered as state action prematurely or inappropriately. In a recent opinion by the United States Supreme Court governmental liability based on this theory was discussed.

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In *City of Cuyahoga Falls v. Buckeye Community Hope Found.*, No. 01-1269 (March 25, 2003), the city approved an ordinance authorizing construction of a low-income housing complex proposed by the foundation. The ordinance was the subject of a successful referendum. The referendum was challenged successfully in the state court system. The city denied issuance of building permits to the foundation during the pendency of the referendum pursuant to city charter requirements and stipulated that the referendum election results would not be certified until the state court litigation was concluded.

While the state court litigation was pending, the foundation sued the city in federal court seeking an injunction to compel issuance of the building permits, declaratory relief and damages. The foundation alleged that city officials violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as the Fair Housing Act (42 U.S.C. §3601). After the state court invalidated the referendum, the foundation's federal litigation was reduced to a claim for money damages (construction delay). The district court granted summary judgment for the city on all theories of action.

The court of appeals reversed, concluding in part, the foundation had produced sufficient evidence to go to trial on their equal protection claim. The foundation's alternate theory on this claim was that city officials acted in concert with private citizens to prevent the low-income housing complex from being built because of the race and family status of the likely residents.

The Supreme Court found this legal theory was not addressed by the lower courts and may have been disavowed by the foundation during oral argument. However, the Supreme Court went on to explain why the foundation never offered a cognizable legal claim on this basis stating:

What is more, respondents never articulated a cognizable legal claim on these grounds. Respondents fail to show that city officials exercised any power over voters' decision-making during the drive, much less the kind of "coercive power" either "overt or covert" that would render the voters' actions and statements, for all intents and purposes, state action. Nor, as noted above, do respondents show that the voters' sentiments can be attributed in any way to the state actors against which it has brought suit. Indeed, in finding a genuine issue of material fact with regard to intent, the Sixth Circuit relied almost entirely on apparently independent statements by private citizens. And in dismissing the claim against the mayor in his individual capacity, the District Court found no evidence that he orchestrated the referendum. Respondents thus fail to present an equal protection claim sufficient to survive summary judgment. [citations omitted]

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City of Cuyahoga Falls v. Buckeye Community Hope Found., Slip Op. at 6.

The moral of this story is that the Legislature should not invest local officers too heavily in the initiative and referendum process unless creation of a new form of liability for the sovereign is the goal.

Section 6

Amend section 6, line 29 to read as follows:

... NRS 278.220[.]; and

(3) If the initiative or referendum proposes to adopt or amend a part of the master plan which operates to limit the number of housing units that may be constructed in a defined time period, the findings described in subparagraph (4) of paragraph (b) of subsection 3 of NRS 278.220.

Analysis for Section 6

This makes sections 1 and 6 consistent given the amendments proposed in this letter.

Section 8

Textual amendments for section 8 need preparation and insertion at lines 3 and 27 to make municipal provisions read comparably to those for counties. This needs to be done for the same reasons as explained for Section 6.

Summary

Your willingness to take this bill to subcommittee is appreciated. County officials also appreciate the opportunity to offer comment regarding amendment. Hopefully this letter will be of assistance to the members of the Subcommittee.

Sincerely,


SCOTT W. DOYLE
DISTRICT ATTORNEY

SWD/jb

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cc: Daniel Holler, County Manager
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Mary Walker

Madelyn Shipman, Assistant District Attorney
Washoe County