

MEMORANDUM

TO: Audit Committee

FROM: Josh Nelson
Interim General Counsel

REVIEWED BY: Indra S. Winquest
General Manager

SUBJECT: Legal Opinion for Community Correspondence
Regarding Dillon's Rule

DATE: November 19, 2020

Enclosed please find a re-formatted version of the legal opinion presented to the Audit Committee at its September 30th meeting. As requested, this opinion has been placed on my firm's letterhead. Please note that the memorandum includes some minor clean-up edits. Most notably and due to comments from a member of the community, the memorandum includes a citation to NRS 268.001. This has been added to clarify that this section does not modify my opinion.



Memorandum

To: Audit Committee, Incline Village General Improvement District
From: Josh Nelson, Best Best & Krieger LLP
Date: November 10, 2020
Re: Legal Opinion for Community Correspondence Regarding Dillon's Rule

I. OVERVIEW

This memorandum provides a follow up to the presentations provided to the Audit Committee at its June 30, 2020 and September 1, 2020 meetings regarding Dillon's Rule and its application to IVGID. Specifically, this memorandum summarizes the issues discussed during the presentations and provides follow up regarding some of the specific subject areas that members of the public had questioned (*i.e.*, employee benefits and non-profit/community partnerships) in prior correspondence.

As explained below, NRS 318 provides authority to IVGID in three ways: (1) express substantive powers, (2) administrative powers, and (3) necessary and incidental powers. These powers clearly include the ability to provide recreational facilities and related services and programming. They also include the ability to provide various employee expense reimbursement and retention/recognition programs. Lastly, these powers include the ability to provide non-profit/community partnerships and support in furtherance of recreation or other express power.

II. GENERAL RULE

A. Overview of Local Authority

As a number of community members have noted, IVGID and other local governments may only act as permitted by statute. (See *State v. Swift*, 11 Nev. 128, 140 (1876) ["Hence, a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication."]; see generally *State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 773 (2001).) This is commonly known as "Dillon's Rule."¹ (See NRS 268.001

¹ This memorandum uses this term given its use in the community. However, Dillon's Rule may be more accurately applied to general purpose local governments like counties or cities. Special districts like IVGID are inherently limited to providing those services and otherwise acting as permitted by statute. (See NRS 318.116.) However, NRS 266.001 clarifies that Dillon's Rule applies to "other local governments," which would include GIDs.



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[defining Dillon’s Rule].) While the Legislature has provided greater “home rule” authority to cities and counties, it has not done so for general improvement districts.

The courts have provided guidelines to help determine if a local government has the authority to act and where it may lack the ability to do so. For example, general principles of statutory interpretation apply. As such, “[i]t is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.” (*McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, (1986). [citations omitted].) “Where the language of a statute is plain and unambiguous ... there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” (*Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503 (1990), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000) [internal citations omitted].) Lastly, “where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended.” (*State, Dep’t of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 477 [internal citations omitted].)

In addition, authorized powers must be interpreted consistently with other state law. If local action is expressly preempted by the state, the local government cannot act. (See *Lamb v. Mirin*, 90 Nev. 329 (1974).) Similarly, if the Legislature regulates an area, local action may not be permitted, even if it is not directly in conflict. (See *Falcke v. Douglas County*, 116 Nev. 583 (2000) [Legislature’s adoption of supermajority voting requirements in some areas prohibits locally adopted supermajority voting requirements in other areas].) The express authority to provide some types of services indicates an intent not to allow the agency to provide other types of services that are not listed. (2013 Nev. Op. Atty. Gen. No. 07, *6)

Despite this, general grants of authority are interpreted broadly. In *Flores v. Las Vegas-Clark County Library District* (2018) 134 Nev. 827, 833, the Nevada Supreme Court held that the general authority for a library district to “[d]o all acts necessary for the orderly and efficient management and control of the library, see NRS 379.025(2)(f), and [e]stablish[ing] bylaws and regulations for the management of the library, see NRS 379.025(1)(h).” included the ability to ban firearms at libraries. This was true even though the Legislature expressly preempted towns, cities, and counties from regulating firearms. As library districts were not included within the express ban on local regulation, their general authority to operate libraries included the ability to ban firearms. Importantly, the Supreme Court recognized that other local governments had similar authority, including GIDs.

B. Powers Granted to IVGID in NRS 318



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IVGID's powers are generally set forth in NRS 318. (See generally Leg. Counsel Bureau, Background Paper 83-4, General Improvement Districts.) NRS 318 identifies three different types of powers that GIDs possess: (1) express substantive powers, (2) administrative powers, and (3) necessary and incidental powers.

For the first, NRS 318.116 identifies a number of services that GIDs may provide. Not all GIDs may provide all services identified in this section. Rather, GIDs must be authorized to provide each type of service. Under these rules, IVGID has been authorized to provide water, sewer, solid waste, and recreational services. Importantly, while NRS 318.116 generally refers to "furnishing" facilities, other portions of NRS 318 clarify that this includes operating these facilities and providing related services. (NRS 318.100(2) ["The district may also furnish services pertaining to any such basic power which the district may exercise."]; NRS 318.145 [operation of facilities].)

For the second, NRS 318 identifies administrative powers that GIDs may utilize when conducting business. For the third, NRS 318.210 recognizes that NRS 318 cannot exhaustively state all things that a GID may need to do and it grants GIDs all necessary and implied powers required to exercise their express powers. Specifically, it states that GIDs "...shall have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted in [NRS 318]. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this chapter." Similarly, NRS 318.205 empowers GIDs to adopt bylaws "[f]or carrying on the business, objects and affairs of the board and of the district [and] [r]egulating the use or right of use of any project or improvement." In this regard, it is important to note other portions of NRS 318 which evidence a legislative intent to grant broad powers to GIDs. (NRS 318.015(1) ["For the accomplishment of these purposes the provisions of this chapter shall be broadly construed."]; 318.040 ["This chapter being necessary to secure the public health, safety, convenience and welfare, it shall be liberally construed to effect its purposes."].)

Based on the above, any question regarding whether IVGID has the ability to do something requires first asking which express power it falls under (either substantive or administrative). If the action does not fit squarely within an express power, one must ask whether it is "close enough" to an express power to fall under IVGID's incidental powers. As an example, IVGID could not operate a police department as NRS 318 does not authorize GIDs to operate public safety departments. In addition, this is so far removed from any express power in NRS 318 to qualify as an incidental power. (See 2013 Nev. Op. Atty. Gen. No. 07, *6.) By contrast, suppose the question was whether IVGID could install a security camera at its water facilities to deter vandalism. In this case, while "installing a security camera" is not specifically identified in NRS 318, it is part of the



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water system and would be permissible (either as part of the express authority to provide water service or incidental to this express power). (NRS 318.144, 318.205, 318.210; *Las Vegas-Clark County Library District*, 134 Nev. at 833.)

III. EMPLOYEE BENEFITS AND COMMUNITY PARTNERSHIPS

When this matter was referred to our office for consideration, a list of eight specific questions were included. These questions identified a number of different situations for evaluation. These situations generally split into two categories: (1) employee benefit-related expenditures and (2) community/non-profit partnerships.

Applying the discussion above to these categories, one must first determine if they fall within an express power and if not, determine if they are permitted through IVGID's incidental powers. For employee benefit-related expenditures, IVGID's administrative powers grant broad authority to hire and compensate employees and contractors. (NRS 318.180, 185.) The power to compensate necessarily includes the ability to reimburse an employee for business expenses or operate an employee recognition program. Even if one argued that this was not within the express powers in NRS 318.180 and 318.185, it would be an incidental power or otherwise part of the general grant of authority to compensate employees. (See *Las Vegas-Clark County Library District*, 134 Nev. at 833.) Of course, all employee recognition and retention programs should be reasonable (as determined by the Board and General Manager) to ensure they serve a public purpose and are not substitutes for basic salary and other traditional compensation.

For community/non-profit partnerships, the NRS does not include an express power to make general *in kind* or monetary donations to non-profits or community groups.² In this respect, it is important to distinguish IVGID from cities and counties. These entities do have express authority to make these donations. (See NRS 244.1505, 268.028.³) Based on this, IVGID must look to its other powers for this authority.

Importantly, not all monetary or *in kind* support provided to local non-profits and community groups qualifies as a "donation." For example, IVGID contracts with the Diamond Peak Ski Education Foundation to provide ski team and ski race programs. This contract includes having IVGID provide ski passes and tickets to coaches and participants. These passes and tickets are not "donations" but consideration provided to the Foundation in exchange for it providing recreational services. Functionally, this would be the same as

² One exception to this general rule is NRS 332.185. This authorizes all local governments to donate unneeded personal property to other local agencies or non-profits.

³ This legislative authority is cited in the Attorney General Opinion included in the community correspondence. (See 2005 Nev. Op. Atty. Gen. No. 01 *overruled* by 2005 Nev. Op. Atty. Gen. No. 07.)



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hiring a contractor to provide a recreational program. (See NRS 318.143, 318.100.) Similarly, IVGID may lease office space to a non-profit at below market rent. This is likely permitted under NRS 318.160 which grants broad authority to lease property. Lastly, IVGID provides qualifying non-profits with venue space at no cost or reduced rates under Policy and Procedure Resolution No. 132/Resolution No. 1701. While this is permissible even if considered a “donation” as explained below, it also likely falls under the Board’s ability to charge fees and rates for the use of IVGID facilities. (NRS 318.197.)

That being said, any actual donations are most likely permitted under IVGID’s implied or incidental powers provided that they are in furtherance of some express IVGID power.⁴ To that end, the Board of Trustees has adopted policies to this effect. In addition to Policy and Procedure Resolution No. 132/Resolution No. 1701, the Board adopted Policy and Procedure Resolution No. 110/Resolution No. 1493 which authorizes IVGID staff, with advance notice to the Board of Trustees, to make reasonable (*i.e.*, generally less than \$1,000) monetary expenditures to support community groups provided that the support is “...related to a purpose authorized by NRS Chapter 318, and delegated to IVGID thereunder.” Importantly, this must in furtherance of some express power. General grants of funds are most likely impermissible absent express statutory authority. (See 2000 Nev. Op. Atty. Gen. No. 10.)

⁴ While not directly related to Dillon’s Rule, donations are permitted by the Nevada Constitution and general laws. (Nev. Const., art. 8, §§ 9-10; see also 2013 Nev. Op. Atty. Gen. No. 07.)



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Issue	Authorization	Discussion
Providing stale recreational merchandise to local charities.	NRS 318.143, 318.160, 318.205, 318.210	<p>-Based on our investigations, this has occasionally occurred when recreational staff has donated stale, unsold recreational merchandise to non-profits for fundraisers.</p> <p>-This would most likely be authorized as incidental to operating recreational programs as this stale merchandise has nominal market value. However, if viewed as a “donation,” this would fall under the Board’s authority to dispose of unused, unsold IVGID property.</p> <p>-However, there is not an explicit Board policy on this, and the Board of Trustees may wish to provide guidance.</p>
Providing below market rate rent to non-profit tenants.	NRS 318.160, 318.205, 318.210	<p>-This is permissible under IVGID’s power to lease property.</p> <p>-Even if considered a “donation,” it would be authorized as incidental to this express power.</p> <p>-Moreover, the lease at issue was approved by Board action.</p>
Providing venue cards to employees.	NRS 318.180, 318.185, 318.210	<p>-This is permissible and a common way to show appreciation for employees.</p> <p>-It is set forth in Personnel Policies 6.10, and this benefit is expressly “subject to change by the Board of Trustees and may be revoked if the privilege is abused by an employee and/or their qualified dependents.”</p>
Sending employees on business trips and reimbursing business expenses, providing per	NRS 318.180, 318.185, 318.210	<p>-Employees commonly receive reimbursements for expenses associated with business travel. Reimbursements may be based on actual expenses or a per diem. IVGID’s current policy complies with the requirements. (See Personnel Policies 7.) This policy requires receipts for actual reimbursement and an expense report for all travel cases. Employees must receive prior authorization for overnight travel from their supervisor.</p>



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diem reimbursement.		
Employee celebration expenses, including the use of purchase cards.	NRS 318.180, 318.185, 318.210	<p>-Similar to rewards, this is a common way to show appreciation for employees. Celebration expenses should be reasonable cost (<i>i.e.</i>, pizza parties).</p> <p>-IVGID has adopted a policy regarding the use of procurement cards. (See Personnel Policies 8.) This policy does not expressly discuss employee celebration expenses. However, “[a]ll purchases made with a District Procurement Card must be for the use and benefit of the District. No personal purchases are allowed.” In addition, the Board of Trustees assigns funds each year for this purpose. The Board of Trustees could adopt a specific policy if it wished.</p>
Employee birthday parties and related gift certificates.	NRS 318.180, 318.185, 318.210	<p>-Similar to rewards, this is a common way to show appreciation for employees. Celebration expenses should be reasonable (<i>i.e.</i>, a nominal gift card for coffee).</p> <p>-In discussions with staff, the bulk of employee celebrations are funded by participating employees. Any IVGID funds are drawn from the funds assigned by the Board for employee recognition. Similar to the above, the Board of Trustees could adopt a specific policy if it wished.</p>
Contractor meals while meeting with staff	NRS 318.180, 318.185, 318.210	<p>-This is not explicitly covered by the existing employee reimbursement policy and has been traditionally authorized under the purchasing policy.</p> <p>-It would be permissible under Dillon’s Rule as compensation to a contractor or reimbursement to an employee of necessary business expenses. However, the Board of Trustees may wish to clarify this in an explicit policy. Note that there is a comment about this in the Board of Trustees’ handbook for business lunches.</p>



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Employee rewards through IVGID "bucks"	NRS 318.180, 318.185, 318.210	-This is permissible and a common way to show appreciation for employees. -This is part of IVGID's P.E.R.K. program for seasonal employee recognition and retention. This program has been brought to the Board of Trustees in the past, including in February 2007.
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