

TAXTOPICS

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TASC AND PISTOL: THE CONSEQUENCES

Nevadans are fortunate that they have the right to amend both statutes and the Constitution by the initiative process. And it would be hoped that when that right is exercised, it would be exercised with great care and as a last resort. Unfortunately over the last five election cycles that process, particularly with respect to amending the Constitution, has been used with more frequency and in a manner that treats the Constitution as a statute rather than the blueprint for governing it should be.

Constitutions should establish the framework by which a state functions to serve its citizens. This framework of policy is then fleshed out by legislators with the laws they enact. However, the initiative petitions that have been circulated in Nevada to amend the Constitution read nothing like policy statements. What is more, they have been sold to voters not on the basis of solid information and analysis, but rather with sound bites that make them sound like motherhood and apple pie.

This issue of Tax Topics focuses on two of the initiatives that have obtained sufficient signatures to be on the November Ballot. They are the Tax and Spending Control (TASC) initiative, and the People's Initiative to Stop the Taking of Our Land (PISTOL). Both TASC and PISTOL are fraught with unintended consequences which will be the subject of litigation or require changes to the Constitution — a process that takes five years.

TASC is being sold on the basis that it would limit government growth and tax increases, unless approved by the voters, and that surplus government revenue would be refunded. PISTOL is being sold as the answer to the Kelo decision handed down by the U.S. Supreme Court.

Tax and Spending Control

There is very little doubt that TASC was a direct response to legislative actions taken during the 2003 session when legislators passed a record tax increase in response to a perceived shortfall of funding. There is also no doubt, however, that in too many sections of the initiative the procedures are subject to multiple interpretations or don't work at all.

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POSITION ANNOUNCED

Fred Gibson, Chairman of NTA said that because of additional problems that were identified with TASC, the Association's Board of Directors was re-surveyed in July and voted overwhelmingly to oppose TASC. He noted that the Board had been originally surveyed in January on the TASC initiative and at that time could not reach a consensus position.

Gibson said the language of the initiative was such that it would not stand the test of time. He reiterated statements he has previously made, saying "the Constitution is a policy document and as such the initiative process to amend the Constitution should be used judiciously."

(Ed. Note: The Board had previously voted to oppose PISTOL.)

Eminent Domain

There is no question that the U. S. Supreme Court decision in the Kelo case had a chilling impact on property owners and raised concerns about the practices surrounding the use of eminent domain by government. During the 2005 regular legislative session (*BEFORE* the Kelo decision was issued), the Legislature addressed a number of issues involving the use of eminent

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Tax and Spending Control Continued

Some of the more obvious problems are discussed in this Issue.

- Bond proceeds from multi year debt must receive voter approval to be outside the cap, even if no tax increase is required.

If bonds are sold without voter approval, which is the current practice when no tax increase is required, the formula dictates that the revenues from the sale would have to be counted in determining any surplus.

Can there be any question that this will increase the number of ballot questions to go before the voters? No. Will it increase the cost of elections? Yes.

- Highway trust funds ① and federal revenues are excluded from the expenditure cap and are not included in determining a revenue surplus.

The Department of Transportation, however, receives revenue from other sources that are not excluded from the expenditure cap. These other sources would also be included in determining a revenue surplus. Either the authors of TASC forgot to exclude the funds and the Department, or they didn't care about the absurd results that would occur.

For instance, because the Department issues bonds that are paid from both exempt and nonexempt revenue sources, it appears that *ALL* bonds will have to be approved by the voters even though these bonds do not require a tax increase. Additionally, delays in starting projects will occur because of election time frames. This in turn will lead to increased costs, as construction inflation has been exceeding increases in the CPI.

Also, the State's ability to receive federally matching highway funds will be reduced, as all non-federal revenue (grants, transfers and appropriations from local governments) is subject to the expenditure cap and surplus revenue calculation.

- Voters will have to approve "indirect debt." Indirect debt includes leases and lease purchases.

TASC proponents have said that is not true. They have said "Commercially reasonable leases of tangible property . . . does not constitute indirect debt." How can they make a statement like this, when a commercial lease is in fact an indirect debt? There is no exemption provided for commercial leases, unless the leases are written for one year or contain an opt-out clause.

If the lessee were to exercise the fiscal funding-out clause, there would be financial and possibly legal ramifications. Certificates of participation (which are essentially lease-purchase agreements) are rated credits. Exercising the funding-out clause would undoubtedly result in a dimmer view of the lessor's (or the issuer's) credit quality. Consequently, the ability of government to secure similar lease-purchase terms in the future would be jeopardized.

In fact, proponents cite a Colorado Attorney General's opinion to make their point about what constitutes public long-term debt. It can only be presumed they thought that by citing this opinion, they would cure this particular problem with TASC. Obviously, a Colorado AG's opinion has absolutely no weight in Nevada. Further, an opinion is just that, an opinion. It can be expected that this is another provision that will result in litigation. It is further interesting that TASC's proponents willingly use Colorado as an example when they deem it to be in their interest; otherwise, they seek to distance TASC from the problems experienced in Colorado by TABOR, upon which TASC is modeled.

- TASC says "... government-owned business that lacks authority to tax and receives less than 10 percent of its annual revenue in the form of grants, transfers or appropriations . . ." is exempt from the cap.

Enterprise funds are most frequently used by local governments, so that the service provided is paid for by the persons using the service. The most common enterprise funds are airports, hospitals, and building departments. However, the definition of an enterprise fund creates some absurd results as shown with the example of University Medical Center (UMC).

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Tax and Spending Control Continued

UMC is identified as an enterprise fund in the Clark County Budget. It receives more than 10 percent of its revenue in the form of transfers from the state indigent fund. According to the TASC definition, UMC cannot be considered an enterprise fund.

UMC will now be subject to the expenditure cap, which is based on population and CPI. That formula does not come anywhere close to reflecting the increased costs in providing medical care. It is unlikely that UMC could continue maintaining its current level of service under the expenditure cap.

Proponents will probably argue there are sufficient private hospitals to pick up the slack. That might be true in Las Vegas but, whether at the same cost is unknown. Unfortunately that will not be the case with some of the public hospitals located in rural counties ②.

- Local governments are subject to the expenditure cap if the city or county is chartered by the state.

While there is no provision in Nevada law for charter counties, statutes do specifically distinguish between charter cities and general law cities. ③

Proponents have said the cap applies to all cities and counties and to say otherwise would be an absurd result. The fact that TASC proponents do not like the absurd results that TASC engenders does not make those results any less absurd. In this case the absurd result is that only the 11 charter cities will be subject to the local government expenditure cap. Assuredly a legal challenge will be filed by proponents to have counties and general law cities included in the expenditure cap.

Other issues and questions raised by the language of the initiative are:

- Does an unincorporated town budget, normally shown in a county budget, have its own spending limit and surplus revenue calculation?

Instead of providing a reasoned response to this question proponents have said: “As in many other circumstances when a town has not incorporated, or has disincorporated, there are costs, or trade-offs, that ensue - - - for both the town and the county. In the normal processes of local government decision-making, *those issues get resolved.*” (Emphasis added.)

It would appear that proponents are perfectly satisfied with having these problems settled in Court, rather than having written a document that works.

- The Nevada Legislature has created “Special and Local Acts”^⑤. Some of these “Acts” contain the power to tax.

Are entities created by these Acts considered local governments? Is this another issue which will have to be litigated?

- Colorado’s TABOR provides that school district growth is based on “the percentage change in its student enrollment.”

There are school districts in Nevada that have had a student enrollment growth greater than the general population growth. Why didn’t the authors of TASC use the provision in Colorado’s TABOR for calculating school expenditures?

Colorado’s TABOR specifically excludes among other revenues “. . . .collections for another government . . .”

In Nevada the Department of Taxation is the collection agency for sales tax revenue and cigarette and alcoholic beverage taxes. These taxes are then distributed to the various local governments. Additionally, local governments collect the real property transfer tax and remit the State portion of the tax to the State.

Unfortunately, there is no comparable exclusion for one government collecting revenue for another government in the TASC language. That will lead to the same revenue being counted twice. Again, one more problem with the language of the initiative.

Eminent Domain continued

domain in SB 326 and AB 143. Anyone who was involved in or followed the progress of the legislation is aware that the issue of eminent domain is very complex.

As with TASC, PISTOL presents a series of problems that will create unintended consequences.

- PISTOL says “Unpublished eminent domain judicial opinions or orders shall be null and void.”

District Court opinions and jury verdicts are not published in the sense that Supreme Court decisions are published. This raises the question of whether, under PISTOL, any opinion of a lower Court would be considered published. Could this language potentially be used, in fact, to say that the District Courts have no power to issue a decision in the first place since their decisions are not published?

- “Just compensation” in an eminent domain case is defined as placing “. . . the property owner back in the same position monetarily” as if the property had not been taken, including, “. . . all reasonable costs and expenses actually incurred.”

This will increase the cost of takings because it eliminates the caps and sharing mechanisms provided by current law (NRS 37.190). These increased costs can be substantial. At the present time, attorneys typically take these cases on a contingency basis; the percentage is based upon the difference between the amount the government originally offered and what the property owner, with the attorney’s assistance, finally receives.

- “Fair market value” is “. . . the highest price the property would bring on the open market.”

Currently, fair market value is considered to be the most probable price that property on the open market would be sold for. Under PISTOL, however, it appears the highest price would allow outliers to be used to inflate the price,

causing government to pay that higher price — a cost ultimately borne by the taxpayer.

According to a memo from the Federal Highway Administration, the change of definition for fair market value would be in violation of Federal Regulations ④ and negatively impact our ability to access federal highway funds.

- The language of the initiative allows only judges elected to their current term of office to hear eminent domain cases. Currently senior (retired) judges and a pro tem judge or judge who is appointed by the Governor to fill a vacant judicial position can also hear eminent domain cases.

It is unrealistic to believe that this would not increase the workload of currently seated judges, increase the length of time cases will take to come before the court, and delay the time before decisions are issued.

- In all eminent domain actions, a property owner will have the right to preempt one judge at the district court level and one justice at each appellate court level.

This provision is a substantial change from current law which allows the removal of a judge at the district court level for payment of a one-time fee. It also extends the removal process to Supreme Court judges who are now only removed for bias or conflict of interest by motion and supporting affidavits. (Supreme Court Rule 35.)

- In addition to eminent domain, the initiative also contains language regarding regulatory takings because of government actions.

This provision applies to *ANY* government action. *NOT* just eminent domain. For example, limiting access to property for road construction might be considered by a business as having a detrimental effect. As the initiative is written, however, even if other means of access is available, a lawsuit could still be filed.

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Eminent Domain continued

● Property “. . . shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government.”

This provision creates a very small window for the government to do a major project. It is common for major projects, which require obtaining multiple parcels of land, to take longer than five years to acquire, design, and go through environmental hearings before construction ever starts.

This provision could effectively stop major road and highway projects. The legislation passed during the 2005 session recognized this problem and created a 15-year window. (There are many current examples of projects that could not meet the five-year time frame imposed by the initiative.)

● The initiative removes any consequences for filing a frivolous legal action, by providing that “A property owner shall not be liable to the government for attorney fees or costs in any eminent domain action.”

Eliminating an award of attorneys’ fees to the government invites litigants to advance frivolous claims in eminent domain proceedings, claims which are defended at the expense of taxpayers. Without a provision to address “frivolous claims,” this section creates an incentive to contest an action every time a government uses eminent domain, regardless of merit.

NOTES

① Highway Trust Fund revenue is constitutionally identified as “. . . any license or registration fee and other charge with respect to the operation of any motor vehicle upon any public highway . . . excise tax on gasoline or other motor vehicle fuel . . .” (Article 9, section 5, Nevada Constitution.)

② Public Hospitals: Battle Mountain General Hospital (Lander County), Boulder City Hospital, Grover C. Dils Medical Center (Lincoln County), Humboldt General Hospital, Mount Grant Hospital (Mineral County), Pershing General Hospital, South Lyon Medical Center and William Bee Ririe Hospital (White Pine County).

③ General Law Cities: Ely, Fallon, Fernley, Lovelock, Mesquite, West Wendover, Winnemucca.

④ Federal Regulation 23 CFR 710.403(d) governs the disposal of real property interest obtained with Title 23 U.S. C funding (Highway funds). This memo was submitted during the hearing on SB 326 of the 2005 regular legislative session. SB 326 was one of two eminent domain bills passed during that session.

⑤ Some of the better known Special and Local Acts are: Reno-Tahoe Airport Authority Act, Airport Authority Acts for Battle Mountain and Carson City, Carson City Tax on Transient Lodging Act, Douglas County Lodgers Tax Law Act, Elko Convention and Visitors Authority Act, Las Vegas Valley Water District Act.

IN CONCLUSION

NTA has always supported and continues to support government spending that is prudent and taxation which is subject to limits. Further, NTA believes that the Legislature must continue the efforts begun in the 2005 session to limit the use of eminent domain. However, both TASC and PISTOL are fundamentally and fatally flawed instruments to achieve those results. As they are written they do not belong in Nevada’s Constitution, where their errors will be the subject of litigation for years.

BE AN INFORMED VOTER. Take the time to read these initiatives and understand their full impact before you cast your ballot. Visit the Secretary of State’s website at: www.sos.state.nv.us. Click onto “Elections” and then onto “Initiatives and Referendums.”

THE SAD PASSING OF COMMON SENSE

Today we mourn the passing of a beloved old friend, Common Sense, who has been with us for many years. No one knows for sure how old he was since his birth records were long ago lost in bureaucratic red tape.

He will be remembered as having cultivated such valuable lessons as knowing when to come in out of the rain, why the early bird gets the worm, life isn't always fair, and maybe it was my fault.

Common Sense lived by simple, sound financial policies (don't spend more than you earn) and reliable parenting strategies (adults, not children, are in charge).

His health began to deteriorate rapidly when well intentioned but overbearing regulations were set in place.

Reports of a six-year-old boy charged with sexual harassment for kissing a classmate; teens suspended from school for using mouthwash after lunch; and a teacher fired for reprimanding an unruly student, only worsened his condition.

Common Sense lost ground when parents attacked teachers for doing the job they failed to do in disciplining their unruly children. It declined even further when schools were required to get parental consent to administer Panadol, sun lotion or a sticky plaster to a student; but, could not inform the parents when a student became pregnant and wanted to have an abortion.

Common Sense lost the will to live as the Ten Commandments became contraband; churches became businesses; and criminals received better treatment than their victims.

Common Sense took a beating when you couldn't defend yourself from a burglar in your own home and the burglar can sue you for assault.

Common Sense finally gave up the will to live, after a woman failed to realize that a steaming cup of coffee was hot. She spilled a little in her lap, and was promptly awarded a huge settlement.

Common Sense was preceded in death by his parents, Truth and Trust; his wife, Discretion; his daughter, Responsibility; and his son, Reason. He is survived by three stepbrothers; I Know My Rights, Someone Else is to Blame, and I'm A Victim.

Not many attended his funeral because so few realized he was gone.

Author Unknown
Reprinted from AGC Nevada Chapter Bulletin, December 2005

Condolences to the Families of . . .

Former Senator **Lawrence Jacobsen**, died on July 26 at the age of 85. He served for 40 years in the Legislature and “Jake”, as he liked to be known, is being remembered as a true gentleman by all who knew him. He was first elected to the Assembly in 1962 and then in 1978 to the Senate. He retired in 1992.

Former Senator **Carl Dodge** who served 22 years in the Legislature died on July 28 at the age of 92. One of the longest serving Senate members he was known for having authored a number of landmark pieces of legislation among which was the Dodge Act which established collective bargaining for local government employees.

State Controller **Kathy Augustine**, who was campaigning for the office of State Treasurer unexpectedly died on July 11 of an apparent heart attack. Augustine was 50 years old. She had previously served in both the Nevada Assembly and Senate.

Strange Political Stories

And if you thought you’ve heard it all, you haven’t. According to various media stories Brinkley a golden retriever is a write-in candidate for Governor of Alaska. No party affiliation was given.

Does Anyone Have the Answers?

??? Why is reciprocity for teachers prohibited, when there is a shortage of teachers?

??? Why is reciprocity for nurses prohibited, when there is a shortage of nurses?

??? Why does the minimum wage initiative petition have a provision that would allow unions to negotiate a wage lower than the minimum wage?

??? Why would any candidate for office propose using one-time surplus funds to establish an ongoing program for all day kindergarten?

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* NTA e-brief and time sensitive notices are sent via email. If you give your email address please be sure that Nevada Taxpayers Association appears in your address book, so the Association emails are not blocked.

Thank-you for taking the time to respond to this request.

TAX FACTS CORRECTION

PAGE 51 - LOCAL TRANSIENT LODGING TAX

The correct rate for the Douglas County Lodgers Tax Law is 8 %

The correct cite for the City of Sparks Special Tourism Projects is Chapter 189 Statutes of Nevada 2003, page 962.

This issue of **TAX TOPICS** explains the consequences of the Tax And Spending Control Initiative - TASC and the Eminent Domain Initiative - PISTOL. Become an informed voter, understand their ramifications by reading these initiatives.

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