BEFORE THE NEVADA GOVERNOR'S OFFICE OF ENERGY DIRECTOR

COMMENT/REPLY INFORMATION FORM

Rulemaking to adopt, amend, or repeal)
regulations pertaining to Chapter 701A)
of the Nevada Administrative Code related)
to modifications and additions to NAC 701A)
which will facilitate compliance as well as)
approved uses for money in the Account)
_____)

Please complete the following information and submit this form along with your comments[1]:

Date of Filing: October 18, 2017

Method of Filing: via Email [X] U.S. Postal Mail [ ] Fax [ ]

Name of Person Commenting: Dagny Stapleton

Name of Organization (if applicable): Nevada Association of Counties

Address: 304 S. Minnesota St. Carson City, NV 89701

Phone Number: (775) 883-7863

Fax Number: (775) 887-2057

Email address: dstapleton@nvnaco.org

Do you wish to be placed on the email service list for this matter to receive any further notices? (Mark One)

Yes [X] No [ ]

Note: Submitted comments are part of the public record for the rulemaking and may be posted on the web.

[1] Please refrain from making any changes to this form. Thank you.

Nevada Association of Counties

304 S. Minnesota Street
Carson City, NV 89703
775-883-7863
www.nvnaco.org

October 18, 2017

Angela Dykema, Director
Laura Wickam, Management Analyst
Governor's Office of Energy
755 North Roop Street, Suite 202
Carson City, Nevada 89701
E-mail: adykema@energy.nv.gov
E-mail: lwickham@energy.nv.gov

Submitted via e-mail to adykema@energy.nv.gov and lwickham@energy.nv.gov.

Comment on Rulemaking Before the Nevada Governor's Office of Energy Director

LCB File No. R022-17 - To adopt, amend, or repeal regulations pertaining to Chapter 701A of the Nevada Administrative Code related to modifications and additions to NAC 701A which will facilitate compliance as well as approved uses for money in the Account.

The Nevada Association of Counties is opposed to Section 2 of the proposed regulation. NACO believes that the language in Section 2 of LCB File No. RO22-17 would override the authority granted to counties by NRS 701A.365.2, and contradict and expand the intent of AB239 from the 2015 Legislative Session.

During the 2015 Legislative Session, AB 239 changed NRS 701A.365.2 and added Section (b). Prior to the enactment of AB 239, counties had the authority to decide whether to approve or deny renewable energy tax abatements. This authority was important to counties because the preponderance of the taxes abated are local property, sales and use taxes. During the 2015 Legislative Session there was interest in limiting county authority to approve renewable energy tax abatements and, as a result, a compromise was struck between counties and other stakeholders to retain county authority to approve or deny abatements, but to limit that authority to certain circumstances. AB 239 created NRS 701A.356.2(b), which says that counties can deny a renewable energy application *only* when a two-pronged test is met regarding the cost and benefit of the renewable energy project to the county.

The language proposed in Section 2 of LCB File No. RO22-17 would have the effect of removing the authority of counties to deny renewable energy tax abatements. This proposal contradicts the legislative intent of AB 239, overrides the statutory language in NRS 701A.356.2(b) and broadens the authority of the Nevada Governor's Office of Energy (GOE) in a manner not contemplated by the Legislature.

NRS 701A.365.2 (AB 239)

The section of statute that includes the criteria by which a county can deny an application for an abatement is NRS 701A.365.2:

> 2. The Director shall not approve an application for a partial abatement of the taxes imposed pursuant to chapter 361 of NRS submitted pursuant to NRS 701A.360 by a facility for the generation of process heat from solar renewable energy or a wholesale facility for the generation of electricity from renewable energy unless the application is approved or deemed approved pursuant to this subsection. The board of county commissioners of a county must provide notice to the Director that the board intends to consider an application and, if such notice is given, must approve or deny the application not later than 30 days after the board receives a copy of the application. The board of county commissioners:
>
> (a) Shall, in considering an application pursuant to this subsection, make a recommendation to the Director regarding the application;
>
> (b) May, in considering an application pursuant to this subsection, deny an application only if the board of county commissioners determines, based on relevant information, that:
>
> (1) The projected cost of the services that the local government is required to provide to the facility will exceed the amount of tax revenue that the local government is projected to receive as a result of the abatement; or
>
> (2) The projected financial benefits that will result to the county from the employment by the facility of the residents of this State and from capital investments by the facility in the county will not exceed the projected loss of tax revenue that will result from the abatement.

NRS 701A.365.2 clearly provides an exception for counties to deny a partial abatement application for a renewable energy project if the county finds that the cost of the project to the county, in either services or taxes abated, exceeds the benefit the project will bring. If the county denies an application based on these criteria, then the Director *shall not approve* the partial abatement of taxes. NRS 701A grants no additional authority to the Director to review the county's determination.

The Proposed Regulation

The proposed regulation however, grants the Director additional authority. The regulation would require that a board of county commissioners provide "information sufficient to support a determination made by the board of county commissioners pursuant to subparagraph (1) or (2) of paragraph (b) of subsection 2 of NRS 701A.365." There is no statutory provision that allows the GOE to review or otherwise determine that the board of county commissioners used "sufficient information" to make its decision. In fact, the statute expressly limits the

Director's ability to review those criteria, as it states that the Director "shall not approve" the application if the board of county commissioners does not approve, or denies, an application. There is no other process outlined or additional authority given to the Director in this circumstance.

If approved, the proposed regulation would create a loophole by which the Director would have the ability to override the county's denial simply by stating there is not "sufficient information," even where a board of county commissioners follows clear guidelines to meet the requirements of NRS 701A.365.2(b)(1) and (2). NACO has expressed our concerns regarding the proposed regulation to Director Dykema, as well as on the record during the June 22, 2017 workshop. NACO is not opposed to providing information to the Director regarding the nature of a board of county commissioners' decision. County deliberations take place during public meetings, therefore the information is already made publicly available to the GOE. However, any use of the information to attempt to review or certify that the information upon which the county based its denial is "sufficient" is not within the Director's authority.

Applied Analysis Worksheet and Additional Information

In an effort to ensure that counties are able to provide the "relevant information" that any denial should be based on under NRS 701A.365.2, NACO contracted with Applied Analysis to create a worksheet that is available for all counties to use to accurately calculate the economic costs and benefits of any renewable energy project. Applied Analysis consulted with the Governor's Office of Economic Development during the development of that worksheet.

NACO is aware of only one instance since the 2015 legislation was passed where a county denied a geothermal tax abatement application. During the June 22, 2017 workshop held by the GOE, Director Dykema discussed a Mineral County tax abatement denial where the county had supposedly provided "inaccurate information" in their denial. It was this example that was used to justify the need for the proposed regulation. Mineral County disagrees with this accusation. Mineral County used the Applied Analysis worksheet, and, in good faith, did provide its calculation to the GOE regarding their denial even though the county was not required to do so. Even though Mineral County had denied the tax abatement, the GOE approved the application based on the GOE's interpretation that the information provided by the county was inaccurate. Mineral County did not receive information from the Department of Taxation or the GOE showing how the information submitted or the calculation was inaccurate and still maintains that the denial should have stood. In fact, Mineral County's projections regarding the application in question have since played out to be true: the projected financial benefits by the facility in Mineral County did not exceed the loss of tax revenue that resulted from the abatement. This means that today Mineral County is receiving a reduction in essential tax revenue that is greater than the economic benefit that the project in question provides to the county.

Liability Concerns

During the June 22, 2017 workshop, Director Dykema expressed concerns regarding the liability of the GOE if a county's decision is indeed based on inaccurate information. We think that these concerns should be alleviated by the fact that it is the county that would be liable, not the GOE, if any county denial decision was faulty. The reason for this is that the GOE's decision is not discretionary; it is contingent only on the board of county commissioners' determination as is clearly stated in NRS 701A.365.2.[1]

Because the decision is non-discretionary, a court need only ask whether the board of county commissioners denied the application and whether the GOE also denied the application as compelled by NRS 701A.365.2(2). Because it is the county's decision that is discretionary, it is the county that would be subject to legal action and review by a court.[2] If anything, the GOE's proposed regulation, if enacted, would expose the GOE to liability and judicial review where none currently exists.

Proposed Solution

We would propose a solution, where, in the instance of a county denial, the Director would simply memorialize the board of county commissioners' decision and state that the Director must deny the application accordingly, citing to NRS 701A.365.2. The current regulations need not be rewritten; however, for the GOE to exercise this solution:

Sec. 2. NAC 701A.575 is hereby amended to read as follows:

701A.575 1. The Director will issue a final decision denying an application for a partial abatement of property taxes imposed pursuant to chapter 360 of NRS ~~[unless]~~ ***if*** the Director receives ~~[written notice of approval of the application]~~ ***a denial*** from the board of county commissioners of ***any*** county in which the facility is located ~~[or the application is deemed approved]~~ ***pursuant to subparagraph (1) or (2) of paragraph (b) of subsection 2 of NRS 701A.365.***

Conclusion

The criteria written into AB 239 and subsequently codified into NRS 701A are important tools to ensure that local tax dollars are used wisely and effectively when it comes to granting tax abatements for renewable energy projects. The proposed regulation removes the important process outlined in NRS 701A.365 and therefore contradicts legislative intent and exceeds the authority granted to the GOE under the plain language of the statute. We urge you to reconsider going forward with this portion of the proposed regulation.

[1] The GOE is not empowered to disregard a non-discretionary mandate of the legislature or to take action where there is no constitutional or statutory authority. State Emps. Ass'n v. Daines, 108 Nev. 15, 17, 824 P.2d 276, 277 (1992). The GOE does not have the authority to review the county's decision or compel the county to produce documents and is similarly ill-equipped to apply judicial evidentiary standards to those findings.

[2] The court will review the County's decision under the "arbitrary and capricious" standard, and the County would be compelled to produce for judicial review any information relevant to the county's determination. Rio All Suite Hotel & Casino v. Phillips, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). The arbitrary and capricious standard of review means that reviewing courts will uphold administrative decisions as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence. Sherman v. Gifford, No. PC-2006-3245, 2009 R.I. Super. LEXIS 105, at *1 (R.I. Super. Ct. Aug. 21, 2009).