

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; AND SOUTHERN NEVADA
BUILDING & CONSTRUCTION
TRADES COUNCIL,

Appellants,

vs.

CITIZEN OUTREACH, INC., A
FOREIGN NON-PROFIT
CORPORATION D/B/A NEVADA
BUSINESS COALITION; AND
ASSOCIATED BUILDERS AND
CONTRACTORS NEVADA CHAPTER,
A NEVADA DOMESTIC NON-PROFIT
COOPERATIVE CORP.,

Respondents.

No. 59166

FILED

NOV 28 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order granting a preliminary injunction in a public works contract dispute. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Respondents Citizen Outreach, Inc., d.b.a. Nevada Business Coalition, and Associated Builders and Contractors Nevada Chapter (ABCNC) filed a complaint in district court for injunctive relief to prevent appellant Clark County from utilizing a project labor agreement (PLA) for a public works project involving extensive renovations to the Clark County Detention Center North Tower. The district court originally declined to

grant a preliminary injunction, noting that in Associated Builders v. Southern Nevada Water Authority, 115 Nev. 151, 979 P.2d 224 (1999), this court approved a PLA containing similar language as the PLA at issue.

On appeal, this court concluded that the district court abused its discretion when it simply compared the terms of the PLA to the terms of the PLA at issue in Associated Builders, rather than considering whether the factual circumstances of this project, together with the PLA's terms, were consistent with the policies underlying the public works bidding statutes. Citizen Outreach, Inc. v. Clark Co., Docket No. 58365 (Order Vacating Order and Remanding, July 1, 2011). Accordingly, we vacated the district court's order and remanded the matter to the district court for reconsideration under the correct legal standard set forth in Associated Builders.

On remand, the district court granted respondents' request for a preliminary injunction, preventing Clark County from utilizing a PLA for Phase I of the project. Clark County and appellant Southern Nevada Building and Construction Trades Council (SNBCTC) now appeal, contending that the district court applied an incorrect standard of review and improperly admitted new evidence on remand, and that the district court erred in enjoining the utilization of a PLA based upon purported unfairness to non-union contractors when, according to Associated Builders, public works bidding statutes are not intended to protect bidders, but rather, taxpayers.

Since the completion of briefing in this matter, the Clark County Board of Commissioners (the Board) unanimously authorized a contract for the construction of Phase I of the project. Phase I of the project does not contain a PLA; however, the Board has made clear that it expects a PLA to be utilized on Phase II.¹ Phase I of the project is currently in progress, with a projected completion date of May 2013.

Therefore, in the instant appeal, Citizen Outreach and ABCNC filed a motion to dismiss, arguing that the appeal was rendered moot when the Board approved and executed a contract for Phase I of the project without the inclusion of a PLA. See Personhood Nevada v. Bristol, 126 Nev. ___, ___, 245 P.3d 572, 574 (2010) (stating that “even though a case may present a live controversy at its beginning, subsequent events may render the case moot”). However, appellants argue that this appeal is not moot because construction work on Phase I of the project is not complete.² Alternatively, they argue that even if this appeal is moot, this court should consider it because it presents issues that are almost certain

¹The Phase I contract does not contain a provision to enforce a PLA due to the district court’s preliminary injunction. We note the parties’ failure to pursue a stay in district court pending the resolution of this appeal.

²However, we note that, at oral argument, counsel for Clark County argued “if you are to decide this case today favorably to appellants then we would simply look to whatever decision you rendered and give legal advice to our clients accordingly. So I don’t believe it would be advisory at all . . . I think that it would assist the County in knowing whether it can go forward on the Phase II using the same or similar project labor agreement.”

to arise again and will likely evade future review, or because the issues raised are of substantial public importance.

This court has a duty to “decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.” NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). “Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.” Id. at 58, 624 P.2d at 11.

At this point, the controversy that existed at the beginning of this litigation, regarding whether Clark County could utilize a PLA in Phase I of the jail construction project, is no longer at issue, because the county entered into a contract for Phase I without the PLA in its terms. As such, this court is unable to grant effective relief with respect to the district court injunction at issue and this appeal has been rendered moot. See Personhood Nevada, 126 Nev. at ___, 245 P.3d at 574. In addition, appellant has not convinced this court that an exception to the mootness doctrine applies here. While Clark County’s assertion that it intends to use a PLA in the contract for Phase II of the project creates a reasonable expectation that respondents will raise the same challenge in the future, it is not clear that the challenged action is too short in its duration to be fully litigated prior to its natural expiration.³ Id. at ___, 245 P.3d at 574

³Indeed, the United States Supreme Court has held that “[t]he capable-of-repetition doctrine applies only in exceptional situations . . . where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that

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(discussing the capable-of-repetition-yet-evading-review exception to the mootness doctrine); Matter of Guardianship of L.S. & H.S., 120 Nev. 157, 161, 87 P.3d 521, 524 (2004).

Here, the short duration of the challenged action was compounded by the county's urgent need to renovate its jail, not because of the natural expiration of the PLA itself. Moreover, we conclude that the issue raised on appeal does not rise to the level of substantial public importance so as to merit the court's consideration despite having been rendered moot. State of Nevada v. Glusman, 98 Nev. 412, 418, 651 P.2d 639, 643 (1982) (recognizing this court's discretion to consider a moot appeal that raises an issue of substantial public importance which was likely to recur). We further note that because we dismiss this appeal as moot by no fault of the appellant, the district court's order will have no preclusive effect in any future litigation. See Personhood Nevada, 126 Nev. at ___, 245 P.3d at 576.

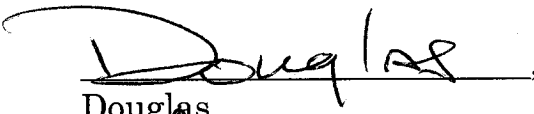
Because this court can afford no relief from the district court's order, this appeal is moot.⁴ For the reasons discussed above, we also decline to apply any exception to the mootness doctrine. Accordingly, we

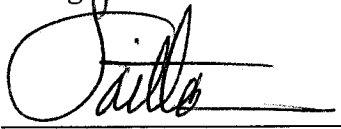
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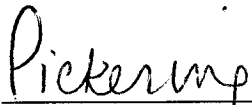
the same complaining party [will] be subject to the same action again." Spencer v. Kemna, 523 U.S. 1, 17 (1998) (internal citations omitted). The Spencer court found that a petitioner could not satisfy this test where he could not show "that the time between parole revocation and expiration of sentence is always so short as to evade review." Id. at 18 (emphasis added).

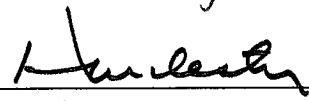
⁴Despite the opinion of the dissenting justices, we reemphasize that this court has a duty to "decide actual controversies by a judgment which
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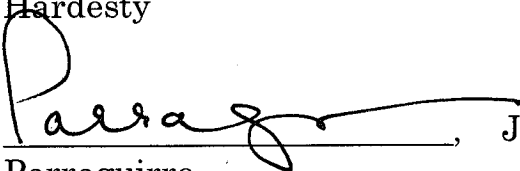
ORDER this appeal DISMISSED.

 J.
Douglas

 J.
Saitta

 J.
Pickering

 J.
Hardesty

 J.
Parraguirre

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can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." See NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

We further note that ample guidance has been provided as to propriety and review of PLA provisions. See Citizen Outreach, Inc. v. Clark Co., Docket No. 58365 (Order Vacating Order and Remanding, July 1, 2011).

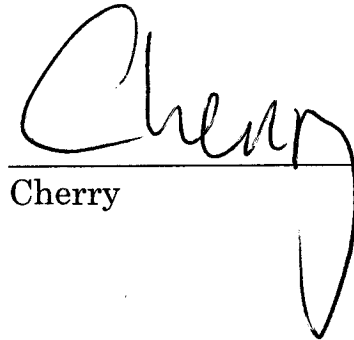
cc: Hon. Jerry A. Wiese, District Judge
Clark County District Attorney/Civil Division
McCracken, Stemerman & Holsberry
Parker, Nelson & Associates
Sean L. Stewart
Sherman, Dunn, Cohen, Leifer & Yellig
Michael E. Langton
Charles K. Hauser
Eighth District Court Clerk


CHERRY, C.J., with whom, GIBBONS, J., agrees, dissenting:

Phase I of the Clark County Detention Center North Tower is not complete. Construction was slated to begin in June 2012, and is not expected to be finished until May 2013. Consequently, this appeal is not moot because the construction authorized under the contract is not remotely close to completion—it still presents a live controversy, as appellant may still have an effective remedy. See Kona Old Hawaiian Trails Group v. Lyman, 734 P.2d 161, 165 (Haw. 1987) (concluding that an appeal from the granting of a building permit retained vitality because all of the construction authorized under the permit was not yet complete); see also Bayou Liberty Ass'n v. U.S. Army Corps, 217 F.3d 393, 397 (5th Cir. 2000); Wilson & Wilson v. City Council of Redwood, 120 Cal. Rptr. 3d 665, 679 (Ct. App. 2011); Grande and Son, Inc. v. School Housing Committee, 135 N.E.2d 6, 10-11 (Mass. 1956).

Phase II of the Clark County Detention Center North Tower is on the horizon. It is more than likely that Clark County will apply similar project labor agreements and respondents will raise identical challenges in future public works projects. As a result, this court should have reached the merits of this appeal because it involves a matter that is capable of repetition and most certainly will evade further review. Personhood Nevada v. Bristol, 126 Nev. ___, ___, 245 P.3d 572, 574 (2010); see Johnson v. Rancho Santiago Community College Dist., 623 F.3d 1011, 1019-20 (9th Cir. 2010) (recognizing that a three-year public works contract term is generally too short for full judicial review of a challenge to the contract's labor agreement, and finding that the matter evades review). Moreover, this appeal raises significant questions of public importance surrounding project labor agreements in the public sector. Bd. of Cty. Comm'rs. v.

White, 102 Nev. 587, 589, 729 P.2d 1347, 1349 (1986); cf. Big D Const. v. Court of Appeals, 789 P.2d 1061, 1064 (Ariz. 1990) (exercising discretion to consider a moot case involving a public works bidding statute because of the statute's significant public impact and cost).¹


Cherry, C.J.

I concur:

Gibbons, J.

¹This court's unpublished panel order, see Citizen Outreach, Inc. v. Clark Co., Docket No. 58365 (Order Vacating Order and Remanding, July 1, 2011), cannot be regarded as precedent concerning project labor agreements and shall not be cited as legal authority. SCR 123.