

1 ELLSWORTH, MOODY & BENNION
2 KEEN L. ELLSWORTH, ESQ.
3 Nevada State Bar #4981
4 ANDREW D. SMITH, ESQ.
5 Nevada State Bar #8890
6 7881 W. Charleston Blvd., Ste. 210
7 Las Vegas, Nevada 89117
8 (702) 658-6100
9 *Attorneys for Plaintiff*
10 *Tom Collins*

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 * * * * *

14 TOM COLLINS, individually and as County
15 Commissioner of Clark County, Nevada,

CASE: 2:09-cv-01931-HDM-LRL

16 Plaintiff,

17 vs.

18 FISHER SAND & GRAVEL CO., a North Dakota
19 corporation; LAS VEGAS PAVING
20 CORPORATION, a Nevada corporation; and
21 CLARK COUNTY NEVADA, a political
22 subdivision of the State of Nevada,

23 Defendants.

24 **PLAINTIFF'S MOTION FOR EX PARTE TEMPORARY RESTRAINING
25 ORDER**

26 **ON AN ORDER SHORTENING TIME**

27 COMES NOW the Plaintiff, TOM COLLINS, individually and as County
28 Commissioner of Clark County, Nevada, by and through his counsel of record, and
hereby moves for an ex parte temporary restraining order. This motion is based upon
FRCP 65, Local Rule 6-2, Local Rule 7-5, the Points and Authorities attached hereto,
and upon such additional information and argument as this Court permits.

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POINTS AND AUTHORITIES

I. Brief Summary of the Case

Tom Collins is an elected County Commissioner of Clark County, Nevada.

Defendants Fisher Sand & Gravel and Las Vegas Paving Corp. submitted competing bids for a county road improvement project, known as Bid 601309-08 (“the Bid”). Fisher Sand & Gravel’s bid was approximately 4% lower than Las Vegas Paving’s bid, but both were well below Clark County’s maximum estimated project cost.

On April 21, 2009, and again on July 21, 2009, majorities of the Clark County Commission voted to award the Bid project to Las Vegas Paving Corp. Seven days later, Fisher Sand & Gravel filed suit in Clark County District Court, naming Clark County and Las Vegas Paving Corp. as defendants. Fisher Sand & Gravel’s suit sought, *inter alia*, an opportunity to rebut allegations that it was not a responsible bidder, and for a re-vote on the Bid after it had made such rebuttal. Fisher Sand & Gravel also sought a judicial order awarding *it* the Bid, instead of Las Vegas Paving. Fisher Sand & Gravel filed a motion for a writ of mandamus, a temporary restraining order, and a preliminary injunction seeking the same relief.

The case was immediately removed to the U.S. District Court for the District of Nevada. It is before the U.S. District Court as Case No. 2:09-cv-01372-RCJ-GWF.

The U.S. District Court held an evidentiary hearing on Fisher Sand & Gravel’s motion on August 24 and August 25, 2009. At some point before and/or during the evidentiary hearing, counsel for the parties met off-record and apparently settled some of the issues raised in Fisher Sand & Gravel’s motion. (*See Exhibit 1, Excerpts from Transcript of court proceedings.*) Fisher Sand & Gravel’s counsel submitted an order memorializing this purported agreement. That order, dated September 17, is attached hereto as Exhibit 2. It states that:

- 1) The Clark County Commission’s vote of July 21, 2009, is vacated;



- 1 2) The Bid is remanded to Clark County for reconsideration and rehearing;
- 2 3) Clark County shall follow due process and open meetings laws, and shall:
- 3 a) Give notice of all specific allegations against the bidders that the
- 4 Commission might consider in deciding how to award the Bid;
- 5 b) Conduct a fair and impartial hearing; and
- 6 c) Allow each bidder against whom allegations of non-responsibility are
- 7 raised an opportunity to present evidence in rebuttal of those
- 8 allegations;
- 9 4) “Commissioners Steve Sisolak and Tom Collins, *by willing agreement*, shall
- 10 abstain from participation” in the re-hearing and re-vote on the Bid (*emphasis*
- 11 *added*); and
- 12 5) Judge Gonzales’ orders and writ of mandamus at the state district court
- 13 level shall remain in effect.

14 Tom Collins filed this complaint to seek relief, *inter alia*, from paragraph 4.

15 It is Commissioner Collins’ duty and right to participate in the re-hearing and

16 re-vote on the Bid. He was not asked to give testimony at the evidentiary hearing.

17 Neither the state nor U.S. district court made any finding that Commissioner Collins

18 was improperly biased in any of his prior votes on this Bid. (*See Exhibit 1, page 22:10-*

19 *11.*) And finally, the statement that Collins will abstain “by willing agreement” is

20 simply false. Commissioner Collins never agreed to that. He was never asked to agree

21 to that. (*See Exhibit 3, Affidavit of Tom Collins.*) It appears that Fisher Sand & Gravel,

22 Las Vegas Paving, and Clark County’s attorneys agreed to keep Commissioner Collins

23 out of the re-hearing and re-vote without ever bothering to consult him on the issue.

24 Commissioner Collins filed suit in this case to set aside and/or void the order

25 of September 17th. He sued to protect his right to vote on the Bid. Commissioner

26 Collins has already filed a motion to consolidate this case with Case No. 2:09-cv-

27 01372-RCJ-GWF.

28



1 **II. The Clark County Commission Will Schedule Its Vote on the Bid for**
2 **October 20, 2009**

3 Tom Collins filed his complaint in this case on October 5, 2009. Collins just
4 recently learned that the re-hearing and re-vote on the Bid will very probably be held
5 on October 20, 2009. If the Clark County Commission holds the hearing and vote on
6 that date, Tom Collins will lose the opportunity to participate in the debate and vote.
7 His rights and duties as a County Commissioner will have been permanently
8 compromised, and it may affect the outcome of the Commission's decision.

9 Commissioner Collins seeks an *ex parte* temporary restraining order and, after
10 notice and a hearing, a preliminary injunction preventing the Clark County
11 Commission from holding the hearing and vote on Bid No. 601309-08, until
12 Commissioner Collins' right to participate and vote on the matter has been properly
13 adjudicated.

14 **III. An Emergency *Ex Parte* Temporary Restraining Order Is Necessary**

15 Fed. R. Civ. P. 65(b)(1) states:

16 "The court may issue a temporary restraining order without written or oral
17 notice to the adverse party only if:

18 "(A) specific facts in an affidavit or verified complaint clearly show that
19 immediate and irreparable injury, loss, or damage will result to the movant
20 before the adverse party can be heard in opposition; and

21 "(B) the movant's attorney certifies in writing any efforts made to give notice
22 and the reasons why it should not be required."

23 Tom Collins' second affidavit, attached hereto as Exhibit 4, states that he has
24 asked the Commission to delay its vote on Bid 601309-08 until his right to participate
25 can be restored. However, Mr Collins also states that despite his request, it appears
26 that the Bid will be placed on the agenda of the October 20, 2009 meeting for vote.

27 As a member of the Clark County Commission, Mr. Collins is privy to agendas
28



1 and scheduling information. His testimony on this matter is certainly credible.

2 Commissioner Collins and his constituents will suffer permanent and
3 irreparable harm if the vote takes place on October 20. Mr Collins states, “If this vote
4 is taken before my matter can be heard, it will be unfair to the citizens that I represent
5 because they will not have a vote or say in the matter.” (See Exhibit 4.)

6 This vote is important to Commissioner Collins’ constituents. The road work at
7 the heart of this Bid will directly abut Commission District B, which Commissioner
8 Collins represents. (See Exhibit 5, Election Certificate, and Exhibit 6, District B Map.)
9 Highway 215 is the artery that connects District B with the northwest valley and US-
10 95. It is important that Commissioner Collins hear the evidence and vote for the best
11 bid. This will affect the daily lives (and commutes) of his district’s residents.

12 An emergency and *ex parte* temporary restraining order is appropriate and
13 necessary in this matter.

14 There is an emergency. This motion will be filed on October 14. Commissioner
15 Collins just learned that the vote will most likely be held on October 20, just *six days*
16 from now. There is not time to hear this matter in the ordinary course.

17 Ex parte proceedings are appropriate because no other parties have appeared
18 in this case yet. Defendants Las Vegas Paving and Clark County were served with the
19 summons, complaint, and motion to consolidate on October 8, 2009. Their answers
20 are not due until after October 20. Neither Las Vegas Paving nor Clark County has yet
21 answered or otherwise appeared. Fisher Sand & Gravel has not yet been served; local
22 counsel refused service last week so Collins is in the process of serving its resident
23 agent in Carson City. (See Exhibit 7, Affidavit of Andrew D. Smith, Esq.)

24 **IV. Tom Collins Is Entitled to a Preliminary Injunction**

25 This argument will be presented in a separate motion, but it is relevant here
26 because the merits of Collins’ argument for a preliminary injunction support his
27 request for a temporary restraining order.

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1 “A plaintiff seeking a preliminary injunction must establish the following: (1) a
2 likelihood of success on the merits, (2) a likelihood of irreparable injury to the
3 plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the
4 plaintiff, and (4) advancement of the public interest.” Witherow v. Cortez-Masto, WL
5 3156717 (D.Nev. 2009).

6 **A. Likelihood of Success on the Merits**

7 **1. Declaratory Relief**

8 In his complaint, Commissioner Collins plead causes of action for declaratory
9 and injunctive relief. He sought the following relief: A declaration that the agreement
10 reached between Fisher Sand and Gravel, Las Vegas Paving, and Clark County on or
11 about August 25, 2009 is void as to Tom Collins; that Tom Collins is entitled to
12 declaratory judgment stating that the order granting Fisher Sand & Gravel’s petition
13 for writ of mandamus in Case No. 2:09-cv-1372-RCJ-GWF is void as to Tom Collins
14 and his right to vote;, and that Collins may participate in the re-hearing and new vote
15 on the Bid. (*See* Complaint paragraphs 42 - 45.)

16 **a. This Court has power to grant declaratory relief**

17 NRS 30.030 states, “Courts of record within their respective jurisdictions shall
18 have the power to declare rights, status and other legal relations whether or not
19 further relief is or could be claimed. . . . The declaration may be either affirmative or
20 negative in form and effect; and such declarations shall have the force and effect of a
21 final judgment or decree.”

22 This court has power to grant declaratory relief, by virtue of Nevada’s adoption
23 of the Uniform Declaratory Judgment Act.

24 **b. Collins is entitled to declaratory relief because Clark**
25 **County’s attorneys lacked authority to compromise his vote**

26 The basis for this relief is that Clark County’s attorneys lacked authority to
27 enter into any agreement whereby Tom Collins would abstain from voting on the Bid.

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1 They lacked authority to stipulate as to that, and they lacked authority to waive any
2 defenses that Tom Collins might have raised. **Commissioner Collins never**
3 **agreed to give up his vote.**

4 Fisher Sand & Gravel prepared an order stating that Collins would, “by willing
5 agreement,” abstain from participating in the re-vote and re-hearing on the Bid.
6 Clark County’s attorneys waived their opposition to this. This constituted a *de facto*
7 settlement and/or compromise of Tom Collins’ rights and defenses.

8 Based on the record kept, it appears that there was some sort of agreement
9 between Fisher Sand & Gravel, Las Vegas Paving, and Clark County to present a
10 motion to the Court and waive opposition to it. But Collins was never asked, and
11 never agreed, to waive his defenses to Fisher Sand & Gravel’s charges of bias.

12 Clark County’s attorneys lacked authority to waive their defenses to Fisher
13 Sand & Gravel’s motion, thereby abandoning Collins’ right to vote. Pursuant to NRS
14 244.165, power to prosecute and defend suits to which Clark County is a party is
15 vested in the Clark County Commission.

16 The right to settle or compromise claims is also vested in the Clark County
17 Commission. “Since NRS 244.165 allows the board of county commissioners to
18 control the prosecution or defense of the all suits to which the county is a party, such
19 right to sue or be sued necessarily carries with it the right to compromise and settle
20 disputed claims.” Clark County v. Lewis, 88 Nev. 354, 356-57, 498 P.2d 363, 365
21 (1972).

22 The county’s attorneys, whether the district attorney or private counsel, do not
23 have independent authority to settle or compromise claims. The Nevada Supreme
24 Court specifically addressed the district attorney’s authority to settle a claim by or
25 against the county in State of Nevada vs. The California Mining Co, 15 Nev. 234, 1880
26 WL 2478 (1880). The court explained, “it remains true that an attorney at law cannot
27 compromise his client’s cause of action without being especially authorized to do so.
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1 It is further admitted, that the district attorneys of the several counties have no
2 greater authority (under the statute) in the conduct of tax suits than in ordinarily
3 conferred by a general retainer in a controversy between private parties. It follows
4 from these admitted propositions that, *under the law*, a district attorney has no
5 authority to compromise a tax suit.” *Id.* at 7, *emphasis original*.

6 That holding specifically mentions tax suits, but it is equally true and
7 applicable to all other types of suits to which Clark County is a party. It applies to
8 Case No. 2:09-cv-01372. Any decision to prevent Tom Collins from voting constitutes
9 a compromise or settlement of a disputed claim; power to make that concession lies
10 with the Commission and with Tom Collins individually. The county’s counsel assume
11 that power for himself or herself.

12 Commissioner Collins was never asked for permission to make this concession.
13 There is no evidence on record suggesting that the Clark County Commission
14 authorized it. In fact, the sequence of events suggests that the Commission could not
15 have authorized it. Without actual authority to make that compromise, the
16 compromise and waiver of defenses made by the County’s counsel is void. *Id.* at 8.

17 **c. Nevada’s open meetings law also voids the order, and**
18 **therefore entitles Collins to declaratory relief he is seeking.**

19 The Commission’s decision to settle and compromise such an important issue
20 falls within the definition of an “action” in NRS 241.015, Nevada’s open meetings law.
21 Subsection (1)(d) defines “action” as, “an affirmative vote taken by a majority of all
22 the members of the public body.” If the Commission took action and voted on the
23 compromise, it should have done that in public. Any secret decision to compromise
24 Commissioner Collins’ vote is void pursuant to NRS 241.036.

25 Furthermore, if, as Fisher Sand & Gravel alleged, Collins’ prior votes were
26 influenced by an improper bias, then the Commission’s decision of whether to waive
27 Collins’ voting rights would necessarily require some discussion of the “character,
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1 misconduct or competence” of an elected member of public body. This simply did not
2 happen. The secret decision to compromise Commissioner Collins’ vote is void
3 pursuant to NRS 241.036.

4 Collins is entitled to the declaratory relief he seeks.

5 **B. Irreparable Injury**

6 Irreparable injury was argued above. Commissioner Collins will suffer an
7 irreparable injury if the County Commission votes on the Bid on October 20. If the
8 debate and vote are heard then, Collins will not be allowed to participate. He will lose
9 the opportunity to represent his district in a very important matter.

10 When commissioner Collins took his oath of office, he swore to “faithfully
11 perform all the duties of the office of County Commissioner – District B.” (See Exhibit
12 8, Oath of Office.)

13 As a County Commissioner, Tom Collins shares in the Commission’s duty to
14 “expend money for any purpose which will provide a substantial benefit to the
15 inhabitants of the county.” NRS 244.1505(1). He also shares in the Commission’s duty
16 to “lay out, control and manage public roads, turnpikes, ferries and bridges within the
17 county...” NRS 244.155.

18 Commissioner Collins has taken an oath to perform his statutory duties. If he
19 is wrongfully prevented from performing those duties, he is prevented from fulfilling
20 his oath and duty. This could potentially influence the Commission’s decision on a
21 major public roads project. That constitutes an irreparable injury.

22 **C. Balance of Hardships Favors Delaying the Vote**

23 At this point, the “status quo” is that the Commission has not voted (for the
24 third time) on this contract. There is relatively little inconvenience to the County if
25 the vote is delayed until these important legal issues are resolved.

26 On the other hand, if the Commission does vote on this Bid on October 20 and
27 Collins subsequently prevails in his claims, that could void the Commission’s action

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1 and force a *fourth* vote on this public roads project. It could potentially void a signed
2 contract with the winning bidder. A premature vote could create substantial hardship
3 and confusion in the future.

4 **D. Advancement of the Public Interest**

5 The citizens of Clark County are best served when their elected officials are
6 informed and cast good-faith votes on important actions. Tom Collins is an elected
7 County Commissioner, and the County Commission is about to make an important
8 decision by selecting a bid to improve and upgrade one of the County’s busiest and
9 most important highways.

10 Commissioner Collins has done his homework; he has reviewed the bids and
11 reviewed the “due diligence” research on the companies submitting them. If the
12 bidders have a right to present additional information, then Collins is willing to listen.
13 But he adamantly denies the allegation that he cast his prior votes under the influence
14 of any improper bias. His vote in the third ballot will not be subject to any improper
15 or unlawful bias. Commissioner Collins has a right to vote on this Bid, and the
16 citizens of Clark County – and particularly of District B – deserve to have their elected
17 representative participate in the vote.

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1 **V. Conclusion**

2 Based on foregoing, and upon any other information and argument this court
3 may choose to hear, Commissioner Tom Collins seeks and is entitled to:

4 1) An *ex parte* temporary restraining order preventing the Clark County
5 Commission from holding hearings and a vote on Bid No. 601309-08, until Collins'
6 right to participate and vote (based on his claims in this case) has been fully
7 adjudicated; and

8 3) Such other relief as is necessary to fully effectuate the purposes of the
9 temporary restraining order.

10 DATED this 14th day of October, 2009.

11 ELLSWORTH, MOODY & BENNION

12
13 By: /s/ Andrew D. Smith
14 Andrew D. Smith, Esq.
15 Nevada Bar No. 8890
16 7881 W. Charleston Blvd., Suite 210
17 Las Vegas, NV 89117
18 Tel: (702) 658-6100
19 *Attorneys for Plaintiff Tom Collins*

20 **ORDER**

21 IT IS SO ORDERED.

22 UNITED STATES DISTRICT JUDGE

23 Dated: _____.

24 # # #

