

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1982

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The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

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**OPINION NO. 82-1 Child Support Enforcement; Financial and Credit Information of Responsible Parent; Duties of Financial Institutions and Businesses Providing Credit Reports—[NRS 425.400](#)(2)(d) requires both “financial institutions” and “entities which are in the business of providing credit reports” to supply all information on hand relative to the location, income and property of a responsible parent to those persons and public officials identified in the statute without the necessity of obtaining a search warrant, subpoena, or customer authorization, pursuant to the requirements of [NRS 239A.080](#).**

January 8, 1982

Mr. William Furlong, *Chief, Support Enforcement Program, Welfare Division, Department of Human Resources, 251 Jeanell Drive, Carson City, Nevada 89710*

Dear Mr. Furlong:

You have asked this office for an opinion on two questions relating to the 1981 amendment to [NRS 425.400](#)(2).

**STATEMENT OF FACTS**

Chapter 425 of NRS is entitled “Dependent Children” and includes the “Aid to Dependent Children Act.” A subchapter on recovery of public assistance payments made under the act from responsible parents is entitled “Recovery of Support Debts” and includes [NRS 425.400](#). (See [NRS 425.260](#) to [425.440](#).) In order to obtain needed information about responsible parents, the legislature authorized the Administrator of the Nevada State Welfare Division (hereinafter “Division”) to request and receive information regarding such persons from several sources with the adoption of [NRS 425.400](#)(2). The 1981 legislature, with the passage of Assembly Bill 158, added “financial institutions and entities which are in the business of providing credit reports” as accessible sources of information.

[NRS 425.400](#)(2), as amended, states:

2. To effectuate the purposes of this section, the administrator or a prosecuting attorney may request all information and assistance as authorized by [NRS 425.260](#) to [425.440](#), inclusive, from the following persons and entities:
  - (a) State, county and local agencies;
  - (b) Employers, public and private;
  - (c) Employee organizations and trusts of every kind;
  - (d) *Financial institutions and entities which are in the business of providing credit reports; and*

(e) *Public utilities.*

All of these persons and entities, their officers and employees shall cooperate in the location of a responsible parent who has abandoned or deserted, or is failing to support his child and shall on request supply the division and prosecuting attorney with all information on hand relative to the location, income, and property of such parent. A disclosure made in good faith pursuant to this subsection does not give rise to any action for damages for the disclosure. (Italicized subsections added by section 5, Chapter 183, Statutes of Nevada 1981, p. 354.)

You have advised our office that prior to the 1981 amendment, financial and parental location information was not accessible from financial institutions and credit reporting businesses. Unless the information needed by the Division regarding the responsible parent was available from other accessible records, such as assessor's rolls, Department of Motor Vehicles, employer's records, etc., the information was simply not available.

This situation caused the Division to propose and support the legislation that resulted in the amendment of [NRS 425.400\(2\)](#). Testimony presented before the legislative committees that considered Assembly Bill 158 (Chapter 183, Statutes of Nevada 1981) reveals that when the amendment to [NRS 425.400\(2\)](#) was being considered, the Division stressed the need for the ability to request and obtain information from financial institutions and credit reporting businesses without the necessity of court process. The legislative committees were informed this would significantly aid in improving financial assessments of responsible parents. This, in turn, would increase state collection of monies expended for child support to offset public child assistance payments. Because no other reasons for passage of the amendment to [NRS 425.400\(2\)](#) were discussed, our office will assume that the legislature enacted such amendment for the reasons and purposes stated on behalf of the Division.

### QUESTION ONE

Is the Child Support Enforcement Unit of the Nevada State Welfare Division authorized to request and receive information from financial institutions and credit reporting businesses pursuant to [NRS 425.400\(2\)\(d\)](#) without first obtaining a search warrant, subpoena, or customer authorization as required by [NRS 239.080](#)?

### ANALYSIS OF QUESTION ONE

[NRS 239A.080\(1\)](#) provides that a governmental agency shall not request or receive the financial records of any customer from a financial institution unless: "(c) The officer, employee or agent furnishes the financial institution with a customer authorization, subpoena [subpoena], or search warrant authorizing examination or disclosure of such records \* \* \*" This statute was added to NRS by section 1, Chapter 477, Statutes of Nevada 1977, p. 986, and has not been amended since then. It applies to *all* governmental agencies and has heretofore prevented the Division from obtaining information within the custody and control of financial institutions without a search warrant, subpoena, or customer authorization. This result has occurred notwithstanding the provisions of [NRS 239A.070\(3\)](#) which does not prohibit "[a] financial institution, in its discretion, from initiating contact with and thereafter communicating with and disclosing the financial records of a customer to appropriate governmental agencies concerning a suspected violation of *any* law [such as failing to support a child in violation of [NRS 201.020\(1\)](#)]." (Emphasis supplied.) Such a statute has not been construed prior to 1981 as authorizing a governmental agency, such as the Division, to initiate an inquiry for information and obtain it without compliance with the requirements of [NRS 239A.080\(1\)](#).

The 1981 amendments to [NRS 425.400](#) deal specifically with the Child Support Enforcement Section of the Welfare Division, which is the central unit serving as a registry for the receipt of information and which is also a coordinating agency, which provides cooperation with law

enforcement agencies in connection with handling inquiries concerning deserting responsible parents.

When there is a specific statute in conflict with a more general statute, the statute specifically regulating a concept or procedure will prevail over the general, particularly when the statute of specific application is of later date. See: Attorney General Opinion 167 (Nev.), dated August 24, 1974, at p. 39.

The language of [NRS 425.400\(2\)](#) is *mandatory* and *requires the cooperation* of persons and entities to whom an inquiry is directed. [NRS 425.400\(2\)\(d\)](#) was added by the 1981 legislature. If [NRS 425.400\(2\)\(d\)](#) is in irreconcilable conflict with [NRS 239A.080](#), then “the statute which was most recently enacted controls the provisions of the earlier enactment.” *Marschall v. City of Carson*, [86 Nev. 107, at 115](#), 464 P.2d 494 (1970); citing *State ex rel. Douglass Gold Mines Inc. v. District Court*, [51 Nev. 330](#), 275 P. 1 (1929); *State v. Esser*, [35 Nev. 429](#), 129 P. 557 (1913). Under this principle, the most recently enacted version of [NRS 425.400](#) would be controlling.

There is a very logical reason for this well-settled principle of law. As stated in *Ronnow v. City of Las Vegas*, [57 Nev. 332, at 366](#), 65 P.2d 133 (1937): “It will be presumed that the legislature, in enacting a statute, acted with full knowledge of statutes already existing and relating to the same subject.” (Citations omitted.) When the legislature enacts a later statute without specifically repealing the earlier statute, they must intend it as an *exception* to the earlier statute, since “[w]here express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption, or the later statute revises the whole subject-matter of the former.” *Id.* at 365.

Here, there is no repeal of [NRS 239A.080](#); instead, [NRS 425.400\(2\)\(d\)](#) is merely an exception to the former statute. No customer authorization, subpoena or search warrant authorizing examination or disclosure of such records is required when information on hand relative to the location, income and property of a responsible parent is sought by (1) the attorney general, (2) a district attorney, (3) a court having jurisdiction in a paternity, support or abandonment proceeding or action, (4) the resident parent, legal guardian, attorney or agent of a child who is not receiving aid to dependent children pursuant to Title IV of the Social Security Act (42 U.S.C. §§ 601 *et seq.*), or (5) an agency in other states engaged in the establishment of paternity or in the enforcement of support of minor children, as authorized by regulations of the Division and by provisions of the Social Security Act. See: [NRS 425.400\(3\)](#), as amended in Chapter 183, Statutes of Nevada 1981.

Because the information to be disclosed is made available to a limited class of people and may be requested only for a very specific purpose, it is apparent the legislature intended an exception to [NRS 239A.080](#) when they added “financial institutions and entities which are in the business of providing credit reports” to [NRS 425.400\(2\)](#) in 1981.

The information requested from financial institutions pursuant to [NRS 425.400\(2\)\(d\)](#) would not be subject to suppression by the responsible parent on the grounds of any privacy rights under the Fourth Amendment to the United States Constitution. In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court held that the Fourth Amendment did not protect such records due to the lack of any legitimate expectation of privacy concerning information kept in bank records.

Further, [425.400\(2\)\(d\)](#) does not violate any applicable federal statutes. The addition of “financial institutions and entities which are in the business of providing credit reports” as sources of information to aid in the location of responsible parents, and in determining their ability to pay child support, is in accord with the appropriate federal legislation [Title IV-D of the Social Security Act] which states: “A State plan for child support *must*—(8) provide that the agency administering the plan will establish a service to locate absent parents utilizing (A) *all sources of information and available records*, \* \* \*” (Emphasis added.) 42 U.S.C. § 654.

42 U.S.C. § 653 provides:

(a) The Secretary shall establish and conduct a Parent Locator Service, \* \* \* which shall be used to obtain and transmit to any authorized person (as defined in subsection (c) of this section) information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent.

\* \* \*

(c) As used in subsection (a) of this section, the term “authorized person” means—  
(1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amounts owed as child support \* \* \*

The implementing federal regulation further provides: “The *State plan shall provide* that: (a) The IV-D agency will establish a parent locator service utilizing: (1) *All sources of information and records available in the State*, and in other States as appropriate \* \* \*” (Emphasis added.) 45 CFR § 302.35.

Thus, the intent seems clear. The states are to utilize all sources of information and available records to locate absent parents and to enforce their duty of child support. One of these sources is financial institutions and another is entities which are in the business of providing credit reports.

The phrase “entities which are in the business of providing credit reports” is not defined in NRS. However, [NRS 649.365\(3\)](#) defines “credit bureau” as “any person engaged in gathering, recording and disseminating information relative to the credit-worthiness, financial responsibility, paying habits or character of persons being considered for credit extension, for prospective creditors.” Thus, the term “credit bureau,” as defined in [NRS 649.365\(3\)](#), appears to be synonymous with the phrase “entities which are in the business of providing credit reports” found in [NRS 425.400\(2\)\(d\)](#).

Nevada law does not specifically regulate credit bureaus; neither does it restrict access to the information such entities possess regarding any person. However, there is federal legislation in this area.

The federal “Fair Credit Reporting Act,” 15 U.S.C. § 1681 *et seq.*, which became effective in 1971, restricts the information available from “consumer reporting agencies” to government agencies.

Specifically, 15 U.S.C. § 1681f provides:

\* \* \* a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

“Consumer reporting agency” is defined under 15 U.S.C. § 1681a(f):

The term “consumer reporting agency” means *any person* which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and *which use any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports*. (Emphasis added.)

Thus, even local credit bureaus, which use the U.S. Mails or the telephone to prepare or furnish consumer reports, are included in the purview of the Fair Credit Reporting Act.

However, the IV-D legislation, 42 U.S.C. §§ 653 and 654, requiring the use of “all sources of information and available records,” became effective in 1975. The principle cited above, that a later statute controls over an earlier one, is also followed in the federal courts:

As a general rule of law when the purposes of two statutes appear to be in conflict with each other, and there is no statutory language which makes any cross-reference, and, as here, the legislative history is silent as to the possible conflict, it is generally assumed that the later statute constitutes an amendment of the earlier one.

Hines, Inc. v. United States, 551 F.2d 717, at 725 (6th Cir. 1977), citing United States v. Ohio Valley Company, Inc., 510 F.2d 1184, 1189 (7th Cir. 1975).

It therefore appears the later enactment of 42 U.S.C. §§ 653 and 654 would be controlling over the earlier provisions of the Fair Credit Reporting Act. Consequently, credit reporting businesses must disclose all information on hand relative to the location, income and property of a responsible parent who is failing to support his child upon request of the Division.

This very issue, involving credit reporting agencies disclosing information for use in connection with a state court civil action for increased child support, has been litigated in the federal courts. In Gardner v. Investigators, Inc., 413 F.Supp. 780 (M.D.Fla. 1976), a credit reporting service was sued for violating the Fair Credit Reporting Act by providing a report for use in connection with a state court civil action in which increased child support and medical expenses were sought to be recovered from the plaintiff. The court held that the report in question was not a “consumer report” as defined in the Fair Credit Reporting Act, since it was not to be used for any of the purposes enumerated within the act. The court said:

The report is, therefore, not a consumer report and the provisions of U.S.C. § 1681 *et sequi* are inapplicable to the defendants. For this reason, the complaint fails to state a cause of action under § 1681 *et sequi*. *Id.* at 781.

Accordingly, information from credit reporting agencies which is to be used for child support enforcement is not subject to the provisions of the Fair Credit Reporting Act, and there is no violation of the act when such information is disclosed to the proper authorities. It is noteworthy that the court so held in spite of the stated congressional purpose in the act itself regarding the consumer’s right to privacy:

§ 1681. Congressional findings and statement of purpose

(a) The Congress makes the following findings:

\* \* \*

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.

Clearly, then, the provisions of [NRS 425.400\(2\)\(d\)](#) do not violate the statutory right to privacy envisioned by the Congress in the Fair Credit Reporting Act.

### **QUESTION ONE—CONCLUSION**

It is the opinion of this office that the Child Support Enforcement Unit of the Nevada State Welfare Division is authorized to request and receive all information on hand from financial institutions and entities which are in the business of providing credit reports pursuant to the provisions of the 1981 amendment of [NRS 425.400\(2\)](#) without first obtaining a search warrant, subpoena, or customer authorization as required by [NRS 239A.080](#).

### **QUESTION TWO**

Does the language of [NRS 425.400\(2\)\(d\)](#) “Financial institutions and entities which are in the business of providing credit reports \* \* \*” mean that information may only be requested and



obtained from financial institutions which are also in the business of providing credit reports?

The term “financial institutions” is not defined in Chapter 425 of NRS. However, Chapter 239A defines this term as follows:

“Financial institution” means any banking corporation or trust company, building and loan association, savings and loan association, thrift company or credit union subject to regulation under the laws of this state.

[NRS 239A.030.](#)

Since financial institutions are normally not in the business of providing credit reports, and since the precise definition adopted by the legislature in Chapter 239A makes no mention of such functions in connection with financial institutions, it is apparent that the language of [NRS 425.400\(2\)\(d\)](#) is speaking of *two different types* of businesses which are included in the single phrase of the 1981 amendment. One of these is “financial institutions,” as defined in [NRS 239A.030](#), and the other is “credit reporting businesses,” as defined under “credit bureaus” in [NRS 649.365\(3\)](#) and under “consumer reporting agency” in the federal Fair Credit Reporting Act.

In interpreting provisions of a statute, the court must have in mind the purposes sought to be accomplished and the benefits intended to be attained. Board of School Trustees v. Bray, [60 Nev. 345](#), 109 P.2d 274 (1941). The obvious intent of [NRS 425.400](#) is to assure effective cooperation with the Division in locating parents who have failed to support their children. The information to be provided includes the location, income and property of the parent. Good faith disclosures under this statute are protected against subsequent actions for damages.

It is clear the legislature intended to increase the amount of available information in locating such parents. This is accomplished by requiring *both* “financial institutions” and “entities which are in the business of providing credit reports” to provide information. To limit the applicability of the statute to financial institutions which are *also* in the business of providing credit reports would produce an absurd result. It is doubtful if any such businesses exist and to so restrict the statute would frustrate the intent of the legislature. Legislative intent should be determined by looking at the statute itself, and the statute should be construed so as to avoid absurd results. As the Nevada Supreme Court stated so long ago in State of Nevada v. Toll-Road Co., [10 Nev. 155, at 160](#) (1875):

In arriving at the intention of the legislature we must look at the whole act, its object, scope and extent, and find out, from the act itself if possible, what the legislature meant, and the statute should be so construed as to avoid absurd results.

In construing statutes, the language used and the object to be attained must be considered, and if the language is capable of two constructions, one of which is consistent and the other inconsistent with the evident object of the legislature in passing the statute, the construction which harmonizes with the object must be adopted. State v. California Mining Co., [13 Nev. 203](#) (1878); Recanzone v. Nevada Tax Commission, [92 Nev. 302](#), 550 P.2d 401 (1976).

“[A statute] must be interpreted by the light of the reason or necessity which induced its adoption.” Carpenter v. Clark, [2 Nev. 243, at 247](#) (1866). The reason or necessity for adopting [NRS 425.400\(2\)\(d\)](#), and the evident object of the legislature in passing this amendment, is to aid in (1) the location of the responsible parent and (2) the recovery of support debts from such parent. To limit the scope of the amendment only to a financial institution which is also in the business of providing credit reports would clearly be inconsistent with the objective of the legislature, if not completely absurd. The reason the amendment was adopted was to supply needed information from both types of businesses; the fact they are both mentioned in a single

subsection does not imply that information may only be obtained from a single type of business.

### QUESTION TWO—CONCLUSION

The language of [NRS 425.400\(2\)\(d\)](#) applies to two different types of businesses which were simply included in the single phrase of the 1981 amendment for the purpose of imposing a duty on each type of business to provide the information authorized in the statute.

Sincerely,

Richard H. Bryan, *Attorney General*

By Roger D. Comstock, *Deputy Attorney General,  
Counsel to Welfare Division*

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**OPINION NO. 82-2 Time for Recording Subdivision Maps.—Under [NRS 278.360](#) the time for recording final subdivision maps can extend no longer than one year after the approval of a tentative map or the last recorded final map plus no more than one additional year's extension. Failure to record within that time period vitiates the tentative map.**

March 8, 1982

The Honorable Calvin R. X. Dunlap, *Washoe County District Attorney*, Washoe County Courthouse, S. Virginia and Court Streets, Reno, Nevada 89520

Attention: Chan G. Griswold, *Chief Civil Deputy District Attorney*

Dear Mr. Dunlap:

You have asked this office for an interpretation of [NRS 278.360](#), in particular:

### QUESTION

May a governing body grant successive one year extensions of time within which to record a final subdivision map where the subdivider has failed to record a final map for any portion of the approved tentative map?

### FACTS

[NRS 278.360](#) was amended by A.B. 141 and A.B. 283 of the 1981 Session of the Nevada Legislature. As these amendments were contradictory, the Legislative Counsel has determined that A.B. 283 was the will of the legislature, as A.B. 141 was a reviser's bill. It is that amendment which will be printed in the amendments to the NRS and which will be in effect at least until the 1983 session. Therefore, A.B. 283 will control the analysis of your question, and the amendment of [NRS 278.360](#) contained therein is as follows:

1. Unless the time is extended, the subdivider shall present to the planning commission a final map, prepared in accordance with the tentative map, for the entire area for which a tentative map has been approved, or one of a series of final maps, each covering a portion of the approved tentative map, within 1 year or within successive 1-year periods after the date of approval of the tentative map by the governing body.
2. If the subdivider fails to record a final map for any portion of the tentative map

within 1 year after the date of approval of the tentative map by the governing body, or within 1 year after the date of approval by the governing body of the most recently recorded final map, all proceedings concerning the subdivision are terminated.

3. The governing body or planning commission may grant an extension of not more than 1 year for the presentation of any final map after the 1-year period for presenting the entire final map or next successive final map has expired.

### ANALYSIS

Subdivision of land is governed by [NRS 278.320](#) *et seq.* The basic process entails the submittal of a tentative map which is a “map made for the purpose of showing the design of a proposed subdivision and the existing conditions in and around it.” [NRS 278.010](#)(14). The review of the tentative map by various agencies and subsequent approval by the governing body then is an approval of the *concept* of the proposed subdivision. The final map, when approved and recorded, concludes the process, assuring compliance with all applicable statutes and ordinances and enabling the actual development of the land so mapped.

Prior to the amendment enacted by the 1981 legislature, as you noted and as set forth in Attorney General Opinion 79-11, (Nev.), dated June 13, 1979, a subdivider had a maximum of two years after approval of the tentative map of the proposed subdivision to file a final map for the *entire* subdivision. After two years a tentative map for which no final map had been recorded would have been null and void and the subdivider required to submit another tentative map for approval.

The major change effected by the 1981 amendment is the authorization of phased development of an area through one tentative map and a series of final maps. The subdivider can preserve the vitality of an approved tentative map by filing a final map which covers only a portion of the tentative map. Section 2, Chapter 554, Statutes of Nevada 1981, p. 1182.

The basis schematic of the amendment is as follows:

1. Subsection 1 enables the phased development of a subdivision;
2. Subsection 2 contains the jurisdictional limitations on the governing body in relation to a phased development; and
3. Subsection 3 makes provision for a one-year extension in which to present and ultimately record a final map.

It is clear that the legislature intended that this phased development would take place in an orderly and continuous manner. Thus, they provided in subsection 2 of [NRS 278.360](#), as amended, “all proceedings concerning the subdivision are terminated” by the failure of a subdivider to record a final map for any portion of the tentative map within one year of the last approval of the governing body of either the tentative map or one of a series of final maps. This means that the governing body would be divested of the power to take any action concerning that subdivision if the subdivider has not recorded a map within the requisite period.

The sole exception to the time frame noted in Subsection 2 of [NRS 278.360](#), is the power of the governing body or planning commission, which oversees the proceedings concerning any particular subdivision in question, to grant “an extension of not more than one year” to present a final map or next successive final map for approval. Subsection 3 of [NRS 278.360](#). The use of the indefinite article “an” before the word “extension” in Subsection 3 is viewed by this Office to mean “one extension.” “[‘An’] implies a single entity, indicating the singular number or its noun without emphasis, and has been held to preclude a number more than one, or a series. It has been said that the word ‘an’ is seldom used to denote plurality.” 3A C.J.S. An. 444 (1973). *See e.g.*, *State ex rel. Frazer v. Martin*, 175 Kan. 160, 258 P.2d 1000 (1973); *Black’s Law Dictionary*, 4th Ed. When language is clear and unambiguous, inquiry must cease. *Virginia and T.R.R. v. County Commissioners*, [6 Nev. 68](#) (1870). Furthermore, to read “an” as enabling a series of extensions renders nugatory the words “of not more than one year” which is contrary to a fundamental precept of statutory construction that all words of a statute are to be given effect. *State v. Carson*



Valley Bank, [56 Nev. 133](#) (1935), Kaufman v. Martin, [31 Nev. 493](#) (1909).

Thus, if a subdivider were granted an extension for the presentation of each required map pursuant to Subsection 3 of [NRS 278.360](#), he would theoretically have two years between the approval of a tentative map or each of a series of final maps in which to record the final map in question. He could not have, at any time, more than two years in which to act as to a final map or one of a series of final maps, as the statute clearly specifies “an extension of not more than one year.”

The language used in Subsections 1 and 3 of [NRS 278.360](#), as amended, must be harmoniously construed with the mandatory recording requirement in Subsection 2, so that the three sections are internally consistent. Subsection 1 requires the presentation of a final map for approval within one year after the tentative map or one of a series of final maps is approved; Subsection 2 requires the recordation of the map within one year after tentative map approval or approval of the most recently recorded final map, and Subsection 3 allows for a one year extension of “the one-year period for presenting” the final map or next successive final map.

The primary rule of statutory construction is that conflicting provisions must be reconciled so as to make them harmonious and consistent and in accord with the intent of the Legislature and the desired purposes and the intended benefits. Effect must be given to every part of the statutory provisions, and there is a strong presumption that neither provision was intended to override the other. *School Trustees v. Bray*, [60 Nev. 345](#), 354, 109 P.2d 274 (1941). The intent of the legislature will prevail over the literal sense. *Western Pacific R. Co. v. State*, [69 Nev. 66](#), 241 P.2d 846 (1952).

Applying these principles to [NRS 278.360](#), as amended, it is clear that recordation of the final map, or one of a series of final maps, is the action which must occur within one year of the approval by the governing body of the tentative map or the most recently recorded final map.

The act of recording is that which preserves the vitality of the tentative map. The presentation of a final map which complies with all applicable statutes and ordinances ([NRS 278.380](#)(1)) and its approval by the governing body is the prerequisite to recordation by the clerk of the governing body ([NRS 278.318](#)(3)). Thus a subdivider must present a subdivision map intended for recordation early enough within the one year time period to allow for its recordation within the one year period allowed by [NRS 278.360](#). If the subdivider has obtained a Subsection 3 extension of time in which to present the final map in question for approval, recordation of the final map must occur within two years of tentative map approval or approval of the most recently recorded final map.

For clarity, we set forth an example of the practical impact of the requirements of [NRS 278.360](#) as amended:

- July 1, 1982: Tentative map approved by governing body; final map for a portion or all of the tentative map must be filed by July 1, 1983.
- June 30, 1983: Subdivider is granted a one-year extension to record a final map for all or a portion of the subdivision.
- June 15, 1984: Governing body approves a final map for a portion of the subdivision.  
June 15, 1985, is deadline for recordation of the next final map.
- July 1, 1984: Final map approved June 15, 1984, is recorded, thus preserving vitality of the tentative map and enabling actual development of the portion covered by that final map.
- May 30, 1985: Subdivider is granted a one-year extension to record next final map (No. 2) which now must be done by June 15, 1986.
- June 16, 1986: Subdivider has not recorded the next final map (No. 2). Another extension for this phase is not available; therefore, the tentative map has been rendered null and void. The subdivider can submit a new tentative map and start the process again.

## CONCLUSION

It is the opinion of this office that the governing body may grant a subdivider only one one-year extension of time within which to present and record a final map or one of a series of final maps covering a portion of the tentative map. This one-year extension may be granted once for each phase of the subdivision. Thus, if a developer opts to phase in a subdivision he may have a maximum of two years from the date of approval of the last recorded final map in which to record the next final map. If the subdivider has only presented for approval and not recorded, a final map for any portion of the approved tentative map at the end of the two-year time period (assuming an extension had been granted pursuant to [NRS 278.360](#), Subsection 3), all proceedings on that tentative map are terminated.

Sincerely,

Richard H. Bryan, *Attorney General*

By Linda H. Bailey, *Deputy Attorney General*

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## OPINION NO. 82-3 Publication of Legal Notices—Qualification of newspaper not lost when substantial compliance with statute.

March 23, 1982

John S. Hill, Esq., *Churchill County District Attorney*, Churchill County Law Enforcement Facility, Fallon, Nevada 89406

and

Lyman F. McConnell, Esq., *City Attorney*, City Hall, Fallon, Nevada 89406

Dear Messrs. Hill and McConnell:

By letter dated January 26, 1982, you sought the opinion of this office on three questions relating to the status of two newspapers in Churchill County under the provisions of Chapter 238 of NRS which set forth the requirements to be met by a newspaper desiring to qualify to publish legal notices and advertisements:

1. Does the failure of a newspaper, which ordinarily publishes three times a week, to publish any issues for one week disqualify that newspaper for publication of legal notices and advertisements?;
2. Does the publishing of two issues in one edition of a newspaper disqualify that newspaper from publishing legal notices if that newspaper normally publishes three issues a week?; and
3. If both newspapers are disqualified, how are legal notices and advertisements to be published in Churchill County, and what is the effect on those notices and advertisements which have already been printed?

## UNDERLYING FACTS

The two newspapers in question generally publish on a self-prescribed tri-weekly basis and appear to fall within the statutory definition of a “tri-weekly newspaper” set forth at [NRS 238.020](#)(2). You have advised us in your letter that one of the newspapers in question failed to print and publish any issues whatsoever during Christmas week, 1981 (from December 25, 1981

to January 1, 1982). At the same time, the other newspaper occasionally purports to combine two separate issues into one edition of the newspaper, with the result that it prints and publishes only two newspapers in certain weeks rather than three.

[NRS 238.030](#) imposes certain legal requirements for the publication of legal notices and advertisements by Nevada newspapers. Subsection 1 states that legal notices and advertisements shall be published only in a daily, tri-weekly, semi-weekly, semi-monthly or weekly newspaper of general circulation which is printed in whole or in part in the county in which the notice or advertisement is required to be published, which newspaper if published tri-weekly “shall have been so published in the county, continuously and uninterruptedly, during the period of a least 104 consecutive weeks next prior to the first issue thereof containing any such notice or advertisement.” (Emphasis added.) The provisions of this statute appear to govern the three questions you have submitted.

### ANALYSIS

It is not entirely clear whether uninterrupted publication for 104 continuous weeks is an initial requirement for qualification of a newspaper to carry legal notices or whether it is a continuing requirement applicable to each legal notice published thereafter. The language used in [NRS 238.030](#), “prior to the *first* issue thereof containing any such notice or advertisement,” is certainly susceptible to the interpretation that the requirement is one for initial qualification to assure a newspaper is an established one of some substantial circulation. *Cf.* In re Gillette Daily Journal, 11 P.2d 265 (Wyo. 1932) and In re Miller, 15 Cal.App. 43 (1910).

If a statute is ambiguous resort must be had to the canons of statutory interpretation, primary among which is that the intent of the legislature be honored. *E.g.*, State v. Brodigan, [37 Nev. 245](#), 141 P. 988 (1914). In Chapter 238 of NRS the legislature has sought to insure that constructive notice will be effective by requiring that a newspaper be established, published at a certain frequency (not less than semi-monthly) and at regular intervals. The practical need for regularity is obvious when one considers the evil prevented: a newspaper with a sporadic and erratic publishing schedule makes it difficult for the readership to ever be certain all issues have been read.

The facts known to this office relating to the missed issues of the two newspapers indicate that the practical policy embodied in the statute has not been violated. For the one newspaper the fact that, on two separate occasions, two issues were combined into one was clearly indicated on the masthead thus giving notice to all readers. The decision of the other newspaper not to publish the last week in the year was made some months prior and presumably sufficient and adequate notice was given to the readership. Thus, both newspapers substantially complied with the legislative policy of regular publication. The minimal frequency for publication of a “legal newspaper,” that is semi-monthly, has not been exceeded.

[NRS 238.080](#) provides that any legal notice or advertisement published in violation of the chapter is absolutely void. Having in mind the harsh result that would follow, that is, the nullity of a large number of legal notices and advertisements affecting an unknown number of people, we are reluctant to find such minor lapses in a regular publication schedule as a violation of the statute. That construction of a statute which would be the least likely to produce mischief should be adopted. O’Neil v. N.Y. & S.P. Co., [3 Nev. 141](#) (1867); Smith v. Southern Pacific, [50 Nev. 377](#), 262 P.2d 935 (1928).

We are aware of only one court which has applied a similar statute in such a technical and restrictive manner. Highland Chief, Inc. v. Wilkinson, 288 P.2d 198 (Colo. 1955) held that the failure of a daily to publish one issue disqualified it as a “legal newspaper.” However, at issue was eligibility for a contract which had already been awarded elsewhere and completely performed; furthermore, there is no indication that the readership had any advance notice that publication would be halted. We decline to apply this sister state’s reasoning to the factual situation before us.

## CONCLUSION

In view of circumstances and the substantial compliance with the legislative policy expressed in Chapter 238 or NRS, it is the opinion of this office that neither newspaper is disqualified as a legal newspaper. Although our conclusion that neither newspaper has been disqualified renders your third question moot, we would point out that [NRS 238.030\(4\)](#) provides that when there are no qualified “legal newspapers” in the county, publication of legal notices and advertisements may be made in any newspaper of general circulation which is printed and published in whole or in part in the county.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

By Linda H. Bailey, *Deputy Attorney General*

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**OPINION NO. 82-4 Aid to Certain Victims of Crime Act, Payment of Compensation Directly to Victim’s Provider of Medical Care—A hearing officer may, in the sound exercise of his discretion, order that monies awarded as compensation to a victim of crime under the Aid to Certain Victims of Crime Act (Chapter 217 of NRS) be paid directly to a provider of medical care, to the extent of a bill therefrom, for a victim’s care, within the monetary limits provided by law.**

March 24, 1982

Mr. Lester Harwell, *Hearings Officer*, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Harwell:

You have asked this office to answer a question pertaining to the payment of compensation directly to a hospital or physician which provides medical care to a victim of crime. A “victim” is defined at [NRS 217.070](#), as amended by Section 5 of Chapter 691, 1981 Statutes of Nevada, and “means a person who is physically injured or killed as a direct result of a criminal act.” Specifically, your inquiry is as follows:

## QUESTION

After an application has been received, duly processed and benefits are awarded by the hearing officer, can the medical, hospital and other bills be paid directly to the provider without the consent of the victim?

## ANALYSIS

The underlying legislative purpose of the Nevada Aid to Certain Victims of Crimes Act, Chapter 217 of NRS,<sup>1</sup> is the “policy of this state to

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<sup>1</sup>All citations to specific sections of Chapter 217 of NRS will be, where appropriate, to sections as amended by Chapter 691, 1981 Statutes of Nevada. Chapter 217 was extensively amended by this Session Law.

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provide assistance to persons who are victims of violent crimes or the dependents of victims of violent crimes.” [NRS 217.010](#). Pursuant to the victims of crimes legislation in Nevada an application for compensation may be made only by those persons expressly made eligible for compensation or by the legal guardian or representative of an entitled person. The eligible persons are: (1) the victim; (2) any person responsible for the maintenance of the victim who has suffered pecuniary loss or incurred expenses as a result of the personal injuries of the victim, and; (3) the dependents of the victim, where the victim dies as a result of the criminal act. [NRS 217.160](#). Under the act, a claim is first filed with the Nevada Board of Examiners. [NRS 217.100](#). The board refers the claim to a compensation officer, [NRS 217.110\(1\)](#), who, in turn, submits a report and recommendation to a hearing officer. [NRS 217.110\(2\)](#). The hearing officer renders the decision as to the amount, if any, of an award. [NRS 217.110\(3\)](#). To assist the compensation officer in preparing his report and recommendation, the act charges the claimant with the responsibility of following the provisions of [NRS 217.180\(2\)](#) which provide as follows:

If the [victim] has received or is likely to receive any amount on account of his injuries \* \* \* from:

- (a) The person who committed the crime which caused the injury or from anyone paying on behalf of the offender;
- (b) Insurance;
- (c) The employer of the victim; or
- (d) Any other private or public source or program of assistance, he shall report the amounts received or which he is likely to receive to the compensation officer and the hearing officer shall reduce the award of compensation by that amount. Any of those sources which is obligated to pay any amount after the award of compensation shall pay the board any amount of compensation which has been paid to the claimant and pay the remainder of the amount due to the claimant.

Further, “[i]n determining whether to make an order of compensation, the hearing officer shall consider \* \* \* the need of the victim \* \* \* for financial aid \* \* \*,” [NRS 217.180\(1\)](#), and may, in fact, “deny an award if he determines that the [victim] will not suffer serious financial hardship.” [NRS 217.220\(2\)](#).

We now turn to an analysis of the specific language employed in two particular sections of Chapter 217 of NRS; namely [NRS 217.200](#) and [NRS 217.160](#). [NRS 217.200](#), in pertinent part, provides:

1. The hearing officer may order the payment of compensation \* \* \* to a victim \* \* \* for:

- (a) Medical expenses \* \* \* actually and reasonably incurred as a result of the personal injury or death of the victim.

\* \* \*

2. An award of compensation may be made subject to such terms and conditions as the hearing officer considers necessary or advisable with respect to payment, disposition, allotment or apportionment of the award.

This provision does not say that the award of compensation must be made payable only to the victim. Instead, the provision uses broad language to vest considerable discretion in the hearing officer to allot or apportion the award and order payment and disposition of compensation under the Act as he deems advisable. The word “allot” means to apportion; distribute; to divide into



portions. Black's Law Dictionary, Revised 4th Ed., page 100. The word "apportion" has roughly the same meaning. *Id.*, page 128. The word "disposition" connotes control over the direction of payment. *Id.*, page 557. Given the plain meaning of these words, it must be concluded that the hearing officer may, in the sound exercise of his discretion, direct or order that payment be made to someone other than the victim. The award need not be disposed or apportioned only as the victim directs.

We find further support for our conclusion in the language found in [NRS 217.160](#). This provision provides in pertinent part, that the "hearing officer may order the payment of compensation to or for the benefit of the victim." (Emphasis added.) The satisfaction, in whole or in part, of a victim's medical bills is for the victim's benefit. Moreover, this provision, like [NRS 217.200](#), *supra*, does not mandate direct payment to the victim of all or any part of the award. Nor should these provisions be construed to only allow payment to someone responsible for the victim's maintenance or to a dependent of the victim. If so construed, this would have the effect of creating redundant sections in Chapter 217 because [NRS 217.160](#) subsection 2 and subsection 3 already expressly so provide.

The conclusion reached here is fully consistent with policy behind the Act. If the award is ordered to be paid directly to a provider of medical care, the victim will not suffer a "serious financial hardship," [NRS 217.220\(2\)](#), *supra*, because of medical expenses incurred as a "direct result of a criminal act." [NRS 217.070](#), *supra*. Instead, the victim will be able, because of the Act, to receive assistance in satisfying, at least in part,<sup>2</sup> his or her medical bills in much the same fashion as a person who is also injured by a criminal act, but has adequate, available, alternative resources for the payment of medical expenses and thus is denied an award. See: [NRS 217.180\(2\)](#), *supra*.

Moreover, the conclusion reached here is in line with the testimony of Clark County District Attorney Robert Miller, a chief non-legislator sponsor of A.B. 447 (Chapter 691, *supra*), before the Assembly Judiciary Committee on April 13, 1981. Assemblywoman Ham, a member of the Committee, asked Mr. Miller about the possibility of exorbitant claims for "psychological harm." Minutes of April 13, 1981 hearing, page 1354. Mr. Miller responded by saying he did not foresee abuse because there was no incentive for a victim to file large amount claims. "The only way [for a victim] to get any income is through the loss of wages which carries

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<sup>2</sup>The maximum amount of an award is \$5,000. [NRS 217.200\(3\)](#). It is entirely conceivable that the cost of medical care of a seriously wounded victim may exceed this amount.

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a \$150.00 week maximum." *Id.* "[A.B. 447, *supra*,] would not be such that anybody would jump in front of a gun so that they can get [\$5,000] because in fact all you can get is direct payment to your physician or hospital." Tape recording of testimony before the Assembly Judiciary Committee, April 13, 1981.

Given the above analysis of Chapter 217 of NRS, our answer to your question is as follows:

### CONCLUSION

A hearing officer may, in the sound exercise of his discretion, order that monies awarded as compensation to a victim of crime under the Aid To Certain Victims of Crime Act (Chapter 217 of NRS) be paid directly to a provider of medical care, to the extent of a bill therefrom, for a victim's care, within the monetary limits provided by law.

Very truly yours,

Richard H. Bryan, *Attorney General*

By Robert H. Ulrich, *Deputy Attorney General*

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**OPINION NO. 82-5 County Officers—Salary Increases—Effective Dates—The salary increases granted by Section 1 of S.B. 705 and Section 1 of A.B. 706 are effective on July 1, 1981 at midnight and 12:01 a.m. respectively. The salary increases granted by Section 2 of S.B. 705 are effective January 1, 1983. Nothing in Sections 2 or 3 of A.B. 706 alters or amends the effective date of the January 1, 1983 increases granted by Section 2 of S.B. 705.**

April 9, 1982

Thomas L. Stringfield, Esq., *Elko County District Attorney*, Elko County Courthouse, Elko, Nevada 89801

Dear Mr. Stringfield:

In your letter of February 19, 1982, you sought the official opinion of this office as to when certain pay raises for elected county officers voted by the 1981 legislature will become effective.

#### **FACTS**

The salaries for the various elected county officers including county commissioners are set forth as [NRS 245.043](#). The most recent legislative session produced two laws affecting the salaries of all elected county officers as set forth in the Nevada Revised Statutes. The first such law was S.B. 705 (Chapter 546, Statutes of Nevada 1981), while the second was A.B. 706 (Chapter 769, Statutes of Nevada 1981).

#### **ISSUE**

On what date or dates do the various sections of S.B. 705 and A.B. 706 take effect with respect to the salaries of the elected county officers including county commissioners?

#### **ANALYSIS**

Section 1 of S.B. 705 raised the salaries of all county officers approximately 15 percent except for the salaries of the various county commissioners, which were not raised at all by this particular section. Since no other effective date for this section of S.B. 705 is set forth in the statute, Section 1 became effective on July 1, 1981, in accordance with the provisions of [NRS 218.530](#) which declare that laws and resolutions of our legislature take force and effect on July 1 following passage unless another date is specifically prescribed in the law or resolution itself.

Section 2 of S.B. 705 further increased the salaries of those elected county officers whose salaries were raised by Section 1, and also raised the salaries of the county commissioners. This section will become effective on January 1, 1983, in accordance with the specific prescription found in Section 7 of S.B. 705.

Section 1 of A.B. 706 raised the salaries of the various county commissioners who, you will recall, did not receive any salary increases under the provisions of Section 1 of S.B. 705. Salary increases granted by Section 1 of A.B. 706 are, as you have noted, less than those set forth for them in Section 2 of S.B. 705. Salary increases granted to county commissioners by Section 1 of A.B. 706 are specifically made effective at 12:01 a.m. on July 1, 1981, pursuant to Section 3, subparagraph 2, of A.B. 706.

Reading these two laws together, the appropriate salary for all elected county officers including county commissioners on and after July 1, 1981, may be found by examining the provisions of Section 1 of S.B. 705 and Section 1 of A.B. 706.

It has been suggested that the legislature in A.B. 706 inadvertently accelerated to June 15, 1981, those salary increases which are found in Section 2 of S.B. 705 and which, as noted above, are to become effective January 1, 1983. In our opinion, such a suggestion is in error and constitutes a misreading of Sections 2 and 3 of A.B. 706.

Section 2 of A.B. 706 amends Section 2 of S.B. 705, but the amendment does nothing more than place into the salary table set out in [NRS 245.043](#) the July 1, 1981 salary increases for county commissioners granted by Section 1 of A.B. 706. This technical amendment was for the purpose of showing what salaries will eventually be superseded on January 1, 1983 by the new salaries granted on that date by Section 2 of S.B. 705, which salary increases under Section 7 of S.B. 705 continue to be effective only on and after January 1, 1983.

Nothing in Sections 2 or 3 of A.B. 706 purports to alter or amend the effective date of the salary increases granted by Section 2 of S.B. 705. For A.B. 706 to have changed the effective date of the salary increases granted in Section 2 of S.B. 705, the legislature in A.B. 706 would have had to specifically amend Section 7 of S.B. 705, which it did not do. Even though Section 2 of A.B. 706, amending Section 2 of S.B. 705, is effective on passage and approval (June 15, 1981), that particular date does not affect the effective date of Section 2 of S.B. 705, which continues to be governed by the express language of Section 7 of S.B. 705.

#### CONCLUSION

The salary increases granted by Section 1 of S.B. 705 and Section 1 of A.B. 706 are effective on July 1, 1981 at midnight and 12:01 a.m. respectively. For the sake of convenience, the salaries of all elected county officers for the period from July 1, 1981, until January 1, 1983 can be most easily determined from the table set forth in Section 1 of A.B. 706, which is the most recent relevant statute. The salary increases granted by Section 2 of S.B. 705 are effective January 1, 1983. Nothing in Sections 2 or 3 of A.B. 706 alters or amends the effective date of the January 1, 1983 increases granted by Section 2 of S.B. 705.

Sincerely,

Richard H. Bryan, *Attorney General*

By William E. Isaeff, *Deputy Attorney General*

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**OPINION NO. 82-6 Nevada State Board of Health's Authority to Regulate the Practice of Midwifery—Chapter 439 of NRS does not allow State Board of Health to promulgate regulations requiring licensure to practice midwifery. Statutory authority does exist to promulgate reasonable regulations consistent with law concerning the prevention of sickness and disease in newborns including those delivered by midwives.**

April 20, 1982

John Daniels Wilkes, M.D., *Chairman, State Board of Health*, c/o Sunrise Hospital, Laboratory Medicine Consultants, Ltd., P.O. Box 14157, Las Vegas, Nevada 89114

Dear Dr. Wilkes:

By letter of February 18, 1982, you have requested direction from this office concerning the

statutory authority of the Nevada State Board of Health to regulate the practice of midwifery. The specific questions posed are as follows:

### QUESTION ONE

Does the Nevada State Board of Health have authority to promulgate regulations requiring licensure to practice midwifery pursuant to [NRS 439.150\(1\)](#)?

### ANALYSIS–QUESTION ONE

[NRS 439.150\(1\)](#) provides:

The state board of health is hereby declared to be supreme in all non-administrative health matters. It has general supervision over all matters, except for administrative matters, relating to the preservation of the health and lives of citizens of the state and over the work of the state health officer and all local (district, county and city) health departments, boards of health and health officers.

On its face, this statute appears to grant almost unlimited authority to the State Board of Health over nonadministrative matters relating to the preservation of health. However, such a broad interpretation must be rejected as contrary to some generally recognized principles of administrative law.

It is clear that administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the constitution or by statute. *Andrews v. Nev. St. Bd. Cosmetology*, [86 Nev. 207](#) (1970); *California State Restaurant Ass'n. v. Whitlow*, 58 Cal.App.3d 347, 129 Cal.Rptr. 826 (1976). Any regulation promulgated by the Board which would require licensure to engage in midwifery must derive its force and effect from an enabling statute, and as such, cannot conflict with the statute nor supply omissions to a statute. *Tulley v. State Farm Mutual Automobile Insurance Co.*, 345 F.Supp. 1123 (D.C.S.D.W.Va. 1972).

A cardinal principle of administrative law is that an administrative agency has no discretion to promulgate regulations which exceed the authority conferred upon it by statute. If a regulation is challenged on these grounds, the question before a reviewing court will not be the wisdom of the agency's regulation, but rather whether the regulation alters, amends or enlarges the scope of the statute. *Stanley v. Reed*, 54 Cal.App.3d 1036, 126 Cal.Rptr. 524 (1976); *College of Psychological and Social Studies v. Board of Behavioral Science Examiners of the Department of Consumer Affairs*, 41 Cal.App.3d 367, 116 Cal.Rptr. 128 (1974). As the Court stated in the case of *State v. Marana Plantations, Inc.*, 252 P.2d 87, 89 (Sup.Ct.Ariz. 1953):

It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation of legislative power.

See also *Adams v. Industrial Commission*, 547 P.2d 1089 (C.A.Ariz. 1976); *Small v. Maine Board of Registration and Examination in Optometry*, 293 A.2d 786 (Sup.Ct.Me. 1972).

In the case of *State Ex Rel. Com'r of Ins. v. Integon Life Ins.*, 220 S.E.2d 409 (C.A.N.C. 1975) the court was asked to strike down a regulation promulgated by an insurance commissioner which set rates for credit life insurance. The court noted that although the enabling statute expressly conferred authority upon the insurance commissioner to set insurance rates for credit accident and health insurance, the statute was silent relative to the commissioner's authority to set rates for credit life insurance. The court concluded that the power to promulgate regulations is not the power to carry out the "legislative power," nor the power to promulgate regulations which have the effect of substantive law. The court's opinion reflects an apparent recognition of the statutory rule of construction—*expressio unius est exclusio alterius*—the expression of one thing is

the exclusion of another.

This office feels compelled to also recognize this principle in the analysis of your question. The Nevada legislature has conferred upon many agencies within this state, the express statutory authority to regulate by licensure certain health care professions. For example: Physicians and Assistants, [NRS 630](#); Dentistry and Dental Hygiene, [NRS 631](#); Nurses, [NRS 632](#); Osteopaths, [NRS 633](#); Chiropractors, [NRS 634](#); Traditional Oriental Medicine, [NRS 634A](#); Podiatrists, [NRS 635](#); Optometrists, [NRS 636](#); Dispensing Opticians, [NRS 637](#); Hearing Aid Specialists, [NRS 637A](#); Audiologists, Speech Pathologists, [NRS 637B](#); Veterinarians, [NRS 638](#); Pharmacists, [NRS 639](#); Physical Therapists, [NRS 640](#); Psychologists, [NRS 641](#); Funeral Directors and Embalmers, [NRS 642](#). Yet, an examination of the statutory scheme which vests the State Board of Health with its rule making authority reveals an absence of an express grant of authority to regulate by licensure the practice of midwifery. The Nevada legislature has provided statutory authority for the board to promulgate regulations requiring licensure in the areas of medical laboratories; medical laboratory directors; medical laboratory technologists in Chapter 652 of NRS; ambulance attendants; emergency medical technicians in Chapter 450(B) of NRS.

Therefore, if the Nevada Legislature had wished the practice of midwifery to be regulated by requiring licensure by the board of health, it would have so provided. [NRS 439.150](#)(1) cannot be construed to allow the board to require licensure to engage in midwifery because to do so would be creating law by regulation. The power of an administrative agency to administer a statute and to prescribe regulations to that end is not the power to make law, for no such power can be delegated by the legislative branch to the executive branch. The power to adopt regulations is limited to carrying into effect the will of the legislative branch as expressed by the statute. *Allison v. United States*, 379 F.Supp. 490 (D.C.M.D.Penn. 1974) *Knowles v. Butz*, 358 F.Supp. 228 (D.C.N.D.Cal. 1973).

Courts have consistently struck down regulations promulgated by boards of health requiring occupational licenses as being beyond the statutory authority of the agency. Three such cases might be illustrative.

In *Board of Health of the Township of Scotch Plains v. Pinto*, 271 A.2d 289 (Sup.Ct.N.J. 1970), a court held that absent an express grant of authority by statute to the local board of health, it could not require licenses nor regulate rates for collection and disposal of refuse. In *State v. Phelps*, 467 P.2d 923 (C.A.Ariz. 1970), the court determined that the State Board of Health did not have express power to require an annual license and fee for the operation of a grocery store business; therefore, the finding of a violation of the board's licensing regulation was void. The court cited the principle noted above that any excursion by an administrative body beyond the legislative grant of authority expressed in the enabling statutes will be treated as a usurpation of constitutional powers vested only in the legislative branch of government. Lastly, in *Lynch v. Tunnell*, 236 A.2d 369, 373 (Sup.Ct.Del. 1967) the court was asked to enjoin the board of health from requiring owners to obtain an occupational permit to operate a mobile home development on the theory that there was no statutory authority to adopt such regulations requiring a permit. The court held:

The powers of the Board must be found within an enabling statute. This is especially so when we come to occupational operational permits and licenses. The power to license a business or occupation will not be lightly implied; it touches upon economic freedom, one of our fundamental liberties. We do not find such licensing power for mobile home developments vested in the Board of Health by any statute, either expressly or by necessary implication. We conclude, therefore, that such power does not exist.

#### **CONCLUSION –QUESTION ONE**

[NRS 439.150](#)(1) does not vest authority with the State Board of Health to promulgate regulations requiring licensure to practice midwifery.



## QUESTION TWO

Assuming that the State Board of Health does not have authority to promulgate regulations requiring licensure to practice midwifery pursuant to [NRS 439.150](#)(1), does [NRS 439.170](#) or any other provision of Chapter 439 of NRS provide statutory authority to promulgate regulations requiring licensure to practice midwifery?

### ANALYSIS–QUESTION TWO

[NRS 439.170](#) provides:

The health division shall take such measures as may be necessary to prevent the spread of sickness and disease, and shall possess all powers necessary to fulfill the duties and exercise of authority prescribed by law and to bring actions in the courts for the enforcement of all health laws and lawful rules and regulations.

[NRS 439.200](#) provides:

1. The state board of health may by affirmative vote of a majority of its members adopt, amend and enforce reasonable regulations consistent with law;
  - (a) To define and control dangerous communicable diseases.
  - (b) To prevent and control nuisances.
  - (c) To regulate sanitation and sanitary practices in the interests of the public health.
  - (d) To provide for the sanitary protection of water and food supplies and the control of sewage disposal, but the regulations governing sewage disposal must not conflict with the provisions of the Nevada Water Pollution Control Law or regulations adopted thereunder.
  - (e) To govern and define the powers and duties of local boards of health and health officers, except with respect to the provisions of [NRS 444.440](#) to [444.620](#), inclusive, and [NRS 445.080](#) to [445.710](#), inclusive.
  - (f) To protect and promote the public health generally.
  - (g) To carry out all other purposes of this chapter.

Neither of these statutes provide any statutory authority to the State Board of Health to promulgate regulations requiring licensure to practice midwifery for the same reasons noted in the response to Question One. Nor does this office find any other provision of Chapter 439 of NRS which appears to provide such authority.

### CONCLUSION–QUESTION TWO

This office finds no express grant of authority in Chapter 439 of NRS which would permit the State Board of Health to promulgate regulations requiring licensure to practice midwifery.

## QUESTION THREE

Does the State Board of Health have statutory authority to promulgate regulations concerning the prevention of sickness and disease in newborns delivered by midwives?

### ANALYSIS–QUESTION THREE

This office is of the opinion that the State Board of Health has statutory authority pursuant to [NRS 439.170](#) and [439.200](#) to adopt reasonable regulations consistent with law concerning the prevention of sickness and disease in newborns, including those delivered by midwives. This authority may not, however, be utilized in such a manner as to impose unduly burdensome restrictions or procedures on midwives which prevent or substantially deter their ability to

engaged in this activity. This would be tantamount to a licensure scheme and, accordingly, impermissible under existing law.

### **CONCLUSION—QUESTION THREE**

Chapter 439 of NRS provides ample statutory authority to the State Board of Health to promulgate reasonable regulations consistent with law concerning the prevention of sickness and disease in newborns, including those delivered by midwives.

This office stands ready to assist you in promulgating such regulations as would be consistent with law and within the limits of your statutory authority if you desire.

Please advise when such assistance would be required.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

By Bryan M. Nelson, *Chief Deputy Attorney General,*  
*Department of Human Resources*

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**OPINION NO. 82-7 Public Records—Reports of fire safety inspections conducted in accordance with Section 13 of Chapter 659 of the Statutes of Nevada 1981 are public records.**

May 24, 1982

Mr. Thomas Huddleston, *Nevada State Fire Marshal*, Capitol Complex, Carson City, Nevada  
89710

Dear Mr. Huddleston:

### **QUESTION**

You have requested an opinion from this office as to whether reports of retrofit surveys conducted by your office in accordance with Section 13 of Chapter 659 of the Statutes of Nevada 1981 (Senate Bill 214) are public records open to inspection by the general public.

### **ANALYSIS**

Nevada's Public Records Law, [NRS 239.010](#) states in pertinent part that, "all public books and public records of state \* \* \* officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person. \* \* \*" Nevada has no statutory or case-law definition of the term public records. As one might expect, given the unique nature of Nevada's fire safety retrofit program, there are no reported decisions of courts of other states on this point. In the absence of such definition we may resort to the common law definition of the term pursuant to [NRS 1.030](#). At common law a public record was defined to be a written memorial made by a public officer required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. Fla. Atty. Gen. Op. No. 074-215 (July 24, 1974); Op. N.M. Atty. Gen. 80, 1967. Such resort to the common law definition of the term public record is consistent with the course followed by many courts in states where public records disclosure laws do not define the

term. *Cf. Privacy: Personal Data and the Law*, National Association of Attorneys General, November 1976, page 13. By this definition reports of retrofit surveys are public records because Chapter 659 of the Statutes of Nevada 1981 implies in subsection 2 of section 13 that such reports will be reduced to writing, stating that, “when the authority completes its survey of a building, it shall immediately furnish a copy of the survey to the owner or the operator of the building.”

Assuming, therefore, that each retrofit survey will result in a written report which will be a public record for purposes of [NRS 239.010](#), it is necessary to determine whether the contents of such reports are “declared by law to be confidential.” Examining first the Act which requires the surveys and the chapter of the Nevada Revised Statutes into which many sections of the Act were codified, it appears that neither Chapter 659 of the Statutes of Nevada 1981 nor Chapter 477 of the Nevada Revised Statutes contains such a declaration of confidentiality.

Because the requirements of Chapter 659 of the Statutes of Nevada 1981 apply to existing buildings rather than to just those buildings which may be constructed after enactment of the fire safety code requirements, as is more generally the case with various building codes, laws having to do with remedial repairs will be examined prior to examining laws dealing with code enforcement generally. Our Nevada Supreme Court has noted in the case of *Alamo Airways, Inc. v. Benum*, [78 Nev. 384](#) (1962) that:

It is conceded that for many years in 47 states evidence of repairs, alterations, or other precautions taken after an accident has been held inadmissible either as proof of antecedent negligence or as an admission of negligence. The reason for the virtual unanimity is that the admission of such evidence would discourage all owners, even those who had been genuinely careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their own disadvantage, and that innocent persons would suffer by such refraining from improvements.

2 Wigmore, *Evidence*, sec. 283 (3d ed., 1940). *Alamo Airways* at page 392. This rule was later codified as [NRS 48.095](#). This office has previously opined in Attorney General’s Opinion 79-5 (2-23-79) that the Attorney-Client privilege contained in our evidence code cannot form the basis for an exception from the Nevada Open Meeting Law ([NRS 241.020](#)) because of the specificity of the language in which the Open Meeting Law is cast, “except as otherwise specifically provided by statute.” The substantially broader language of the public records disclosure law, “otherwise declared by law to be confidential,” would provide a reasonable basis upon which to distinguish the public records disclosure law from the Nevada Open Meeting Law on this issue and justify the basing of exceptions to disclosure under the public records disclosure law on evidentiary privileges and exclusions. However, the basis for the remedial repairs exclusion would not be served by such an exception. Specifically, the fire safety retrofit repairs identified as necessary by the survey report are required, by Chapter 477 of NRS, to be accomplished. It therefore appears that while evidentiary privileges and exclusions may, in appropriate cases, justify nondisclosure of certain public records, the exclusion for remedial repairs should not be used as a basis for declining to disclose retrofit survey reports.

The next potential source of a declaration of confidentiality of public records such as the subject fire safety survey reports which has widely been recognized is succinctly described in the case of *Martinez v. Libous*, 378 N.Y.S.2d 917 (S.Ct. Broome County, 1975) wherein the court stated:

Petitioner’s rights \* \* \* are further limited by the common law privilege for official information. It was recently held that this privilege was not abolished by the new Freedom of Information Law. See, *Cirale v. 80 Pine Street Corporation*, 35 N.Y.2d 113, 117, 359 N.Y.S.2d 1, 4, 316 N.E.2d 301, 303. This privilege attaches to “confidential

communications between public officers, and to the public officers, in the performance of their duties, where the public interest requires that such confidential communications of the sources should not be divulged.” *People v. Keating*, 286 App.Div. 150, 153, 141 N.Y.S.2d 562, 565. The hallmark of this privilege is that it applies when the public interest would be harmed if the material were to lose its cloak of confidentiality. \* \* \*

While recognizing the existence of this common law privilege, the court finds that no case has been made out for its application under these facts. Petitioner has narrowed her request for information to include only the reports concerning her apartment and the common areas of the apartment building. Disclosure under these circumstances will not violate the right of privacy of other individuals nor should it in any manner hamper future (housing) code enforcement efforts by the Community Development Department. The court can conceive of no other threat to the public interest resulting from the limited disclosure requested here.

*Martinez* at 920.

In *Young v. Town of Huntington*, 388 N.Y.S.2d 978 (S.Ct. Suffolk County, 1976) that court also considered the application of the official information privilege, which it characterized as the common law public interest privilege, to reports of building code violations. The court found that the public interest in protecting the secrecy of an ongoing investigation in that case had not been proven by the building department and therefore rejected the privilege and ordered disclosure.

In the recent case of *Kwitny v. McGuire*, 53 N.Y.2d 968, 441 N.Y.S.2d 659 (1981) the New York Court of Appeals, the highest court in that state, affirmed that courts retain the common law power to temper access to public records, but held that on the facts before them (access to pistol license applications) it did not find an appropriate case for the exercise of that extraordinary power.

The Supreme Court of Illinois followed a somewhat different course when faced with the question of disclosure of building department code violation inspection reports. In the case of *Lopez v. Fitzgerald*, 76 Ill.2d 107, 390 N.E.2d 835 (1979) the court distinguished the New York cases of *Young, supra* and *Martinez, supra* on their facts, and cited opinions from Kansas, Maryland, Minnesota and Pennsylvania denying disclosure of investigatory records of agencies other than building departments, based upon the factual and legal circumstances presented in those cases. The court in *Lopez* determined that:

The public release of initial investigation reports indicating building code violations, without notice and a hearing, threatens the property owner’s ability and right to lease his property, and otherwise reap financial benefit from his property, thus calling for due process safeguards under both the Federal and Illinois constitutions.

To release investigative reports without notice to the owner and an opportunity to be heard would impinge upon the owner’s due process rights. To release initial and unevaluated investigation reports threatens privacy interests. Public disclosure of such reports would also tend to impair the efficiency of day-to-day activities of and investigations by the Department of Buildings. In the absence of factors supporting disclosure other than a general policy of openness in government and the plaintiffs’ interest in the condition of buildings, and in the face of strong countervailing factors, investigative reports are not open to public access.

*Lopez* at 390 N.E.2d 841.

In its supplemental opinion on denial of rehearing, the same court restated itself in the following language:

Plaintiffs’ petition (for rehearing) accurately sets forth our holding that once a notice

of violation has been sent to a building owner and he has been given an opportunity to respond at a compliance hearing, building inspection reports, on which the notice and hearing were based, may be open to public access.

*Lopez* at 390 N.E.2d 845.

However laudable the Illinois court's balancing approach may be, it does not appear that it can be applied to Nevada's fire safety retrofit survey reports because of the particular circumstances of Chapter 659 of the Statutes of Nevada 1981. Specifically, the statute before the Illinois court required compliance with the repairs, changes, alterations or other requirements ordered by the notice of building code violation within 15 days. In contrast Chapter 659 of the Statutes of Nevada 1981 provides in subsection 3 of section 13 that the owner or operator of a building found to be deficient by a fire safety retrofit survey is required to submit plans for corrections within six months after receiving a copy of the survey and to make the corrections on or before June 14, 1984 (within 36 months after the effective date of the act). In addition, subsection 4 of section 13 of the act gives the Board of Fire Safety created by the act the power to waive the above-described time limits for cause.

Since a copy of each survey report is supplied to the owner or the operator of the building surveyed pursuant to subsection 2 of section 13 of the act you are already addressing the notice aspect of the due process safeguards mandated in Illinois by the Illinois Supreme Court.

Even though a predisclosure hearing cannot be fitted into Nevada's statutory scheme, this does not inexorably lead to the conclusion reached by the majority of the Illinois Supreme Court. Indeed, in that case, four justices of the Illinois Supreme Court dissented from the conclusion that disclosure of building code violation reports could not be made absent notice and a hearing to the building owner. The dissenting opinion argued that:

Disclosure of government records is a two-edged sword. While one edge cuts through layers of bureaucracy to expose corruption, incompetence and waste, the other edge inadvertently can cut through innocent private citizens' legitimate expectations of privacy, exposing the most intimate details for their lives, or, perhaps, exposing them to public scorn due to the recorded, but unfounded, suspicions of one misguided, minor government official. Nonetheless, the importance of an informed citizenry to the assumptions which underlie our constitution and statutes demands that, even in the absence of an express statutory mandate, we undertake the admittedly difficult task of providing the maximum amount of public access to government records which is consistent both with the deference due our coordinate branches of government and with citizens' legitimate expectations of privacy.

*Lopez* at 390 N.E.2d 842.

The dissenting opinion concluded that the due process considerations which motivated the majority opinion could be satisfied without a predisclosure hearing.

Although the approaches embodied in the majority and dissenting opinions of the Illinois Supreme Court certainly are commendable, there is, at this time, an insufficient basis to conclude that a predisclosure hearing is constitutionally required. See further "Government Information and the Rights of Citizens" 73 Mich. Law Review 1975, pages 1253 through 1269; Tex. Atty. Gen. Op. No. H-90 (August 29, 1973). While you are not required to allow the owner of a building surveyed to supplement a report prior to public disclosure there is, conversely, nothing to prohibit allowing the owner to add such material as a supplement to a report. Whether or not an owner has offered such supplementary material, any report disclosed to a person other than the building owner should clearly indicate that it is an initial survey report and not a record of final agency action, that any required additions or modifications to a structure described in the report are subject to the power of the Board of Fire Safety to grant variances in accordance with [NRS](#)



[477.190](#) and [477.200](#), and that the owner of the building had not, at the time the report was written, had an opportunity to be heard concerning the contents of the report.

Although the New York and Illinois courts differed on the process due a building owner prior to disclosure of code violation reports, they were in agreement that such reports were public records subject to disclosure notwithstanding the existence of a recognized “official information” or “public interest” privilege in those states. Your inquiry does not suggest, and this office is not independently aware of, any overriding public interest that would be served by maintaining the confidentiality of fire safety survey reports. Therefore, like the remedial repairs exclusion, the public interest privilege yields, in this case, to public disclosure.

### CONCLUSION

It is the opinion of this office that a fire safety retrofit survey report prepared in accordance with Section 13 of Chapter 659 of the Statutes of Nevada 1981 is a public record open to public inspection.

Very truly yours,

Richard H. Bryan, *Attorney General*

By Richard Jost, *Deputy Attorney General*

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**OPINION NO. 82-8 Taxation–[NRS 372.284](#)–Exemption of Food From Taxation–Tax exemption for “food for human consumption” applies to food provided as part of convalescent home services unless sold on a per meal basis. Food for human consumption provided in other group residential contexts is also exempt under [NRS 372.284](#) unless it is sold on a per meal basis.**

May 25, 1982

Mr. Roy E. Nickson, *Executive Director, Nevada Department of Taxation*, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Nickson:

On behalf of the Nevada Tax Commission you have requested an opinion of this office concerning imposition of sales and use taxes upon food supplied to patients of convalescent hospitals. Additionally, you have requested analysis of the tax status of food provided in conjunction with other living arrangements. The questions posed require an interpretation of the meaning of [NRS 372.284](#) and associated statutes which exempt from Nevada’s combined sales taxes “food for human consumption.”

In order to properly analyze your inquiry, careful consideration of the statute and its intent is required. [NRS 372.284](#) states:

1. There are exempted from the taxes imposed by this chapter the gross receipts from sales and the storage, use or other consumption of food for human consumption.
2. “Food for human consumption” does not include:
  - (a) Alcoholic beverages.
  - (b) Pet foods.
  - (c) Tonics and vitamins.
  - (d) Prepared food intended for immediate consumption.

The language utilized in the exemption statute is broad. However, as you noted in your inquiry, Chapter 286, Statutes of Nevada 1979, which proposed the amendment to the referred law enacting the original sales and use tax in 1955 included the following statement of legislative intent:

It is the intent of the legislature that the exemption of food for human consumption from the sales and use tax and local school support tax, if it becomes effective, be strictly construed and be applied only to those foods and beverages commonly purchased for preparation and consumption at home. As of the effective date of this section, such foods and beverages are those eligible for purchase with food coupons issued by the Department of Agriculture and sold in food stores or departments where sales of eligible foods and beverages constitute more than half of total sales. The exemption is not intended to include sales by or from catering services or vending machines.

Statutes of Nevada 1979, p. 432.

The facts relevant to this inquiry may be briefly summarized. Patients may be admitted to convalescent hospitals on a temporary, short-term basis, or on an indefinite, long-term basis. The majority of patients are permanent residents. Convalescent hospitals generally charge an inclusive monthly fee for the services rendered, including room and board.

Food is provided to convalescent home patients as part of a comprehensive service which includes the basic necessities of life, food and shelter. The food is purchased by the convalescent home in quantity, stored, and utilized as needed. No evidence before the commission suggested that food is *sold* to patients on a per meal basis for immediate consumption or that the hospital acts as a retailer of meals. Rather, the meals are served to patients as an integral part of the resident care services rendered. 42 C.F.R. § 442.331 provides that convalescent hospitals *must*:

- (a) Serve at least three meals or their equivalent each day at regular times, with not more than 14 hours between a substantial evening meal and breakfast;
  - (b) *Procure, store, prepare, distribute, and serve* all food under sanitary conditions;
- and
- (c) Provide special eating equipment and utensils for *residents* who need them.
- (Emphasis added.)

Additionally, 42 C.F.R. § 442.311 provides a “resident’s bill of rights” for patients which insures that residents of convalescent hospitals are entitled to such rights and expectations as would inure to residents of private homes.

The plain language of the exemption statute, approved by the citizens of Nevada at a special election conducted June 5, 1979, exempts from sales and use taxes food “for human consumption.” It does not restrict the exemption to food purchased by private households only, nor does it expressly exempt only food purchased for home preparation.

The statement of legislative intent noted does attempt to restrict the *type* of food items exempted from taxation to “*those* foods and beverages commonly purchased for preparation and consumption at home.” (Emphasis supplied.) It further specifies that as of the effective date of the legislation such foods are *those* “eligible for purchase with food coupons issued by the department of agriculture.”

### QUESTION ONE

Is food provided to convalescent home patients exempt under the provisions of [NRS 372.284](#)?

### ANALYSIS

The kernel question necessary to the resolution of your inquiry is whether food provided to convalescent home patients is excluded from exemption under [NRS 372.284\(2\)\(d\)](#) as “prepared food intended for immediate consumption.” Several factors suggest that provision does not apply under these facts.

Appropriate analysis of the question is suggested by tax commission regulation 62. That regulation states in part that:

\* \* \* hospitals must collect the sales tax on tangible personalty furnished to inpatients in connection with the rendition of hospital service, *if they make a separate charge therefore*  
\* \* \* (Emphasis supplied.)

indicating that if the hospital itself purchases these items on a “sale for resale” basis from its own suppliers it must subsequently impose the tax on the ultimate consumer, the patient.

But when the regulation continues and states that:

\* \* \* when a lump-sum charge is made for the tangible personalty and the hospital or medical services, the tax is measured by *the cost to the hospitals at the time of acquisition* of the tangible personalty used or transferred to the inpatient. (Emphasis supplied.)

the regulation is stating that the hospital *itself* is the ultimate consumer and that it purchases those products from its suppliers, not on a “sale for resale” basis, but rather on a “sales” basis alone.

Thus, regulation 62 recognizes that when the hospital is utilizing the personalty in rendering its services and when the hospital or the personalty are not otherwise exempt from taxation, the hospital must pay the sales tax itself. Accordingly, an analysis of purchases in this context must consider whether the initial purchase is a “sale for resale,” whether it is a sale of taxable property, or whether it is a nontaxable sale, either because the property is not taxable or because the purchaser is exempted from the tax.

Accordingly, when a restaurant purchases food from wholesalers on a “sale for resale” basis, the ultimate consumer of the food, the purchaser of a prepared meal, pays the sales tax. A convalescent home or a hospital may also purchase in bulk from the same wholesalers. If the evidence indicates that from these purchases prepared meals are ultimately “sold” to the patients, staff or others, then these entities have purchased on a “sale for resale” basis and pay no tax on the wholesale purchase, but collect a sales tax from the consumer.

If convalescent homes or hospitals include meals as an integral part of the care and service provided, then one of the other transaction characterizations becomes pertinent. If food were subject to taxation, the hospital would pay tax on the bulk sale because it is the consumer, just as Regulation 62 provides. However, if the hospital had a charitable or other exempt tax status or the transaction were nontaxable, its purchase would be free from the tax. In this instance, the food items themselves are excluded from taxation if they are not “prepared food intended for immediate consumption.”

The public policy upon which the exemption of food for human consumption is based appears to support such a construction as well. The premise of exempting food from the sales tax is simply that the sales tax structure is more equitable if certain basic necessities of life are not subject to such taxation. Thus, a broad exemption has been provided for “food for human consumption.” The rationale for exemption is no less persuasive in those circumstances in which consumption of food occurs in an institutional residence than in a private household. The taxation of meals purchased outside the residence at the discretion of the consumer for immediate consumption pursuant to [NRS 372.284\(2\)\(d\)](#) is consistent with this analysis because such meals are not a “necessity,” but rather are discretionary purchases by a consumer. The institutional resident has no similar discretionary choice regarding the procurement and consumption of

meals.

According to this public policy analysis, as well, the plain language of the exemption statute indicates that food provided to convalescent home patients be exempt pursuant to [NRS 372.284](#) as “food for human consumption.” Our laws are to be construed to give effect to the intention of the legislature. As our Supreme Court held in an early case:

The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be invoked in aid in its interpretation, and it should always be so construed as to avoid absurd results.

Ex Parte Siebenhauer, [14 Nev. 365](#), 368 (1879).

Because the legislature avoided specifying that only food served in private homes should be exempt or otherwise restricting the exemption, the fact that certain citizens reside in other than conventional private households should not necessitate that their basic food consumption be taxed.

### **CONCLUSION TO QUESTION ONE**

Food for human consumption is exempt from the sales and use tax pursuant to [NRS 372.284](#) unless it appears that the food is sold “for immediate consumption” as that term is used in [NRS 372.284\(2\)\(d\)](#). In most circumstances, such as those involving convalescent homes, in which the service of food is an integral part of a living arrangement, no express “sale” of food occurs, and it is therefore the opinion of this office that food used in that conjunction is properly exempt.

### **QUESTION TWO**

Does the exemption apply to transient patients of convalescent homes?

### **ANALYSIS**

Because the exemption does not address the nature or characteristics of any person’s physical residence to determine exemption, there appears to be no basis for distinguishing between patients admitted on an indeterminate basis from those whose stay is apt to be of more limited duration. Additionally, the federal rules noted above do not differentiate in any respect between residents whose stay is apt to be of limited duration and permanent residents.

### **CONCLUSION TO QUESTION TWO**

Because food is procured for and provided to transient patients of convalescent homes in the same manner as for permanent residents, the analysis applied to your initial question remains appropriate if no express sale of food occurs. It is therefore the opinion of this office that food provided to transient patients of convalescent homes is exempt from the sale and use tax.

### **QUESTION THREE**

Would the exemption of [NRS 372.284](#) apply, as well, to hospital patients, residents of boarding houses, ranch or mine bunk houses, and similar establishments?

### **ANALYSIS**

Each of the above-noted establishments are similar living arrangements in some respects to the convalescent homes analyzed above. Although specific facts may suggest a different result in any particular case, the general statement that food for human consumption be exempt must be given its full weight. If no evidence is present that food provided in these various contexts is “sold” on a per meal basis for immediate consumption, the exemption appears applicable. It is therefore the opinion of this office that unless evidence exists to suggest that food is sold for immediate consumption as specified by [NRS 372.284\(2\)\(d\)](#), it is properly exempt in the

examples noted in your inquiry.

### CONCLUSION TO QUESTION THREE

For the reasons indicated by the preceding analysis, it is the opinion of this office that food provided in the examples you questioned is properly exempt from the sales and use tax if no express sale of the food occurs.

Sincerely,

Richard H. Bryan, *Attorney General*

By Timothy Hay, *Chief Deputy Attorney General*  
*Tax Division*

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**OPINION NO. 82-9 Public Lands–Wild Horses and Burros–Jurisdiction Over–The federal government has preemptive authority over wild horses and burros on the public lands of the United States which are determined by the Secretary of Interior to be wild free-roaming within the meaning of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340. The State of Nevada may exercise jurisdiction over wild horses and burros which does not conflict with federal law. Since the federal government disavows jurisdiction over wild horses or burros customarily residing exclusively on private lands and over horses or burros that appear to have been domesticated, the State regulation contemplated by the estray law may be exercised. County Commissioners may authorize capture, removal or similar interference with wild horses or burros on certain unenclosed private lands with the permission of the landowner pursuant to [NRS 569.360](#) *et seq.***

May 25, 1982

The Honorable Jack Christensen, *District Attorney of Storey County*, Storey County Court House, Virginia City, Nevada 89440

Dear Mr. Christensen:

The Storey County Board of Commissioners has requested that you obtain an opinion from this office relative to the following questions:

### QUESTIONS

What is the nature of the duties of the various governmental agencies, state and federal, with regard to the protection of “wild, unbranded horses running at large upon the public lands or ranges” within the State of Nevada? In particular, what is the nature of state agency responsibility where such horses customarily roam and graze on private lands?

### ANALYSIS

The authority of the federal government, in particular the Bureau of Land Management, relative to protection of wild horses on the public lands of the United States is well settled by the application of federal law. *See e.g.* Nevada Attorney General’s Opinion, No. 90 dated July 20, 1972. The Wild Free-Roaming Horses and Burros Act (hereinafter referred to as the Act), 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340 was enacted in 1971 to protect “all unbranded and unclaimed horses and burros on the public lands of the United States,” § 2(b) of the Act, 16

U.S.C. § 1332(b), “from capture, branding, harassment, or death.” § 1 of the Act, 16 U.S.C. § 1331. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976). “Public lands” is defined in 43 CFR § 4700-5(f) as “any lands administered by the Secretary of the Interior through the Bureau of Land Management.” Since the Wild Free-Roaming Horses and Burros Act only protects unbranded and unclaimed horses on public lands of the United States, following the capture of excess wild horses by the Bureau of Land Management officials, those branded horses and those that have other definite indicia of private ownership are turned over to the Nevada Department of Agriculture for disposition pursuant to the state’s estray law as contained in [NRS Chapter 569](#).

According to the United States Supreme Court decision in *Kleppe* at 543, “the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.” Therefore Nevada’s laws, including not only the estray law, but additionally, other provisions of [NRS Chapter 569](#), particularly, [NRS 569.360 et seq.](#), authorizing the county commissioners to permit the capture of wild, unbranded horses and burros retain their efficacy insofar as they do not conflict with federal law. In the absence of conflict, the authority of the county commissioners to regulate wild, unbranded horses, mares, colts or burros found running at large extends to any of the public lands or ranges within the State of Nevada that are under the jurisdiction of the county commission. See generally: [NRS 569.360](#) and the statutes cited therein. The authority of relevant state agencies, particularly the Nevada Department of Agriculture, where it applies, extends throughout the state.

We do not reach the question of whether the United States may regulate private activity on private lands in aid of the protection of wild free-roaming horses and burros because Congress has declined to extend the protective umbrella of the Wild Free-Roaming Horses and Burros Act to include private lands. A section of the Act, 16 U.S.C. § 1334, however, does provide that “if wild free-roaming horses and burros stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshal or agent of the Secretary [of the Interior] who shall arrange to have the animals removed. \* \* \*” The duty to remove the horses complained of has been established in a number of cases. See *e.g.*, *Roaring Springs Associates v. Andrus*, 471 F.Supp. 522 (D.Or. 1978); *United States v. Christiansen, et al.*, 504 F.Supp. 364, 367 (D.Nev. 1980). Alternatively, the private landowner may maintain such horses or burros on his land, but only in a manner that protects the animals, provided the appropriate BLM agent of the Secretary of the Interior is notified. See *United States v. Christiansen, et al.*, *supra*, at 367; *Kleppe v. New Mexico*, *supra*, at 532 n.1. Additionally, it should be noted that 16 U.S.C. § 1336 authorizes the Secretary of the Interior to enter into cooperative agreements with landowners for the furtherance of the purposes of the act.

As to wild horses that do not merely stray onto private lands from public lands, but rather use the private lands exclusively as their customary range and habitat, the Wild Free-Roaming Horses and Burros Act is not applicable; this is the position taken by the federal officials in charge of administering the act. They rely upon the definition of “wild free-roaming horses and burros” contained in 43 CFR § 4700-5(b) which means:

\* \* \* all unbranded and unclaimed horses and burros and their progeny that have used public lands on or after December 15, 1971, or that do use these lands *as all or part of their habitat* \* \* \* (Emphasis added.)

To the extent that the Act completely defines the federal authority and duty, and in view of the fact that the regulation excludes horses and burros that do not use public lands of the United States for at least part of their habitat, the officials’ position abjuring jurisdiction is unassailable. We need not consider, therefore, the question whether Congress could authorize the regulation of activities on private lands directed to the protection of wild horses because such authority is disclaimed as a part of the present federal scheme. *Cf. United States v. Christiansen, et al.*, *supra*, at 365; but compare *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, ..... U.S.



..... (March 8, 1982); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); *Camfield v. United States*, 167 U.S. 518 (1897); *United States v. Alford*, 274 U.S. 264 (1927).

There is no vacuum created by the absence of federal authority over wild horses customarily residing exclusively on private lands because where the federal authority ceases to exist the residual authority of the state and its political subdivisions fills in any resulting void. As to the nature and extent of the state's authority, a few general principles should be referenced at the outset.

The landowner takes no title to the wild animals on his lands, *McCready v. Virginia*, 94 U.S. 391 (1876); *Geer v. Connecticut*, 161 U.S. 519 (1896), nor is the ownership technically in the sovereign. *See Hughes v. Oklahoma*, 441 U.S. 322, 334-335, 341 (1979). The state does, however, have a trust obligation to manage wildlife within its borders to the extent that its regulation does not conflict with federal law. *Id.* at 335, 342.

As to the large expanses of unenclosed and uncultivated land in the State of Nevada, as in other public land states, it was customary for the inhabitants to wander, shoot, and fish at will until the owner saw fit to prohibit it. *See McKee v. Gratz*, 260 U.S. 125, 136 (1922). A license may be implied from the habits of the country. *Id.* The unrestrained wandering and grazing of domestic animals on the public lands was tolerated under similar reasoning. *See e.g. Buford v. Houtz*, 133 U.S. 321, 326-328 (1890); *Lazarus v. Phelps*, 152 U.S. 81, 84-86 (1894); *Omaechevarria v. Idaho*, 246 U.S. 343, 352 (1918).

In *Buford v. Houtz*, *supra*, at 326 the United States Supreme Court held that:

We are of the opinion that there is an implied license, growing out of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.

In *Lazarus v. Phelps*, *supra*, at 85 the United States Supreme Court in discussing the Texas "fencing out" law stated:

The object of the statute above cited is manifest. As there are, or were, in the State of Texas, as well as in the newer States of the West generally vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle straying upon the land of others.

The concept of the open range, then, arose by virtue of the conditions existing early in this state and the customs and habits of its people. It has come to include all unenclosed lands outside of cities and towns upon which animals by custom, license, lease or permit are grazed or permitted to roam. *See* [NRS 568.360](#) subsection 1; [NRS 564.025](#), subsection 1. The privatization of public lands did not change their character as open ranges. As noted by the United States Supreme Court in *Budford v. Houtz*, *supra*, at 327-328:

Of course the instances become numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain unenclosed and in no way separated from lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States, and upon the

unenclosed lands of the private individual, without let or hindrance. The owner of a piece of land, who had built a house or enclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

This office is of the opinion, therefore, based upon the nature and condition of the country, that lands theretofore public ranges did not lose their character as “ranges” or “open ranges” by becoming privately owned, where they remained open and unenclosed.

Against the foregoing historical background, the Nevada Legislature in 1913 enacted the predecessor statute to [NRS 569.360](#) which provided:

Any resident of the State of Nevada is hereby authorized, and it shall be lawful for said resident to kill any wild, unbranded horse, mare, colt or burro of the age of twelve months or over found running at large on any of the public lands or ranges within the State of Nevada; *provided*, that the person desiring to kill horses, mares, colts or burros under the provisions of this act shall first file with the board of county commissioners of the county in which he desires to kill any such horses, mares, colts or burros a written application generally describing the range or public lands upon which he intends to kill said horses, mares, colts or burros. Said application shall remain on file at least two weeks before being acted upon by said board of county commissioners, and said board of county commissioners shall have the power to grant or refuse the application, and prescribe any conditions as the circumstances may warrant, and may, at any time, revoke the permit given under said application, and under the provisions of this act without assigning any reasons therefor; *and provided further*, that before the permission granted by said board of county commissioners shall become effective, the applicant shall file with and have approved by said board of county commissioners, a bond in the sum of \$2,000 with two sureties, said bond to be conditioned that said applicant will comply with the provisions of this act and be answerable in damages to the owner or owners of any branded horses which he kills contrary to the provisions of this act. See 1913 Nev. Stats. Chap. 95, § 1, at p. 118.

According to the common understanding of the word “ranges” it is unlikely that in 1913 the Legislature intended “public lands” and “ranges” to be synonymous. As Clel Georgetta, Nevada rancher, lawyer and judge noted in his book, *Golden Fleece In Nevada*, (1972) at 72:

A man selecting a place to build a ranch in Nevada wanted more than a meadow, a sagebrush bench, and a stream of water. He wanted ‘summer range’ and ‘winter range’ for an open range livestock outfit. \* \* \* [G]enerally speaking, in Nevada the mountains are summer ranges and the valley floors, flats and deserts are winter range.

As noted, it is the valley lands, particularly where water is available, that have been transferred into private ownership.

To the extent that Attorney General’s Opinion No. 90, dated July 20, 1972 has opined that the definition of public lands in the Wild Free-Roaming Horses and Burros Act “is inclusive of the ‘public lands or ranges’ referred to in the Nevada Statutes,” it is hereby modified to preserve the above-described distinction between “public lands” and “ranges.”

A private landowner may take appropriate protective precautions against simple trespass of livestock, by the erection of legal fences which removes the land from the status of open range. See: [NRS 569.450](#). However, he may not foreclose the legitimate exercise by the state of its general authority over animals and other wildlife on his land. As noted, the landowner has no

title to the wild animals that may occasionally frequent his lands nor does he have a claim to wild or domestic animals that may stray onto his property and remain there.

The estray provisions of [NRS Chapter 569](#) afford a property owner a procedural mechanism for the removal of unwanted and/or unclaimed livestock including wild horses from his property. In similar fashion, persons other than the property owner who may claim ownership of such animals may utilize the provisions of [NRS Chapter 569](#) to establish their ownership interest when a property owner has taken up an estray by reducing it to possession on his property. See [NRS 569.040](#) *et seq.*

Until private property interests are finally determined as provided for in [NRS Chapter 569](#), all estrays are deemed the property of the Nevada Department of Agriculture. See [NRS 569.010](#), Subsection 1. Estrays necessarily include unbranded and unclaimed wild horses or burros running at large which are determined by the Secretary of the Interior not to be wild free-roaming horses within the meaning of the Wild Free-Roaming Horses and Burros Act. In this regard, it has been held that the Secretary of the Interior has the final authority, if the status of any horse or burro is contested, to decide whether it is wild and free-roaming within the meaning of the Act. See *American Horse Protection Association v. United States Department of Interior*, 551 F.2d 432, 442 (D.C.Cir. 1977); see also *Sheridan v. Andrus*, 465 F.Supp. 662, 664 (D.Colo. 1979). Similar in intent to the federal Act, under Nevada law, a landowner may lawfully permit estrays to remain on his property or hold the same without profit or use until relieved of custody by the Nevada Department of Agriculture. See [569.100](#), Subsections 1 and 2.

Under certain circumstances the county commissioners of a county may authorize the removal of wild horses and burros from private lands determined to be unenclosed open range pursuant to [NRS 569.360](#) *et seq.* Even though there is no definition of “public lands or ranges” as that term is used in Chapter 569 of NRS, this office is of the opinion that this statutory scheme should be construed to encompass unenclosed private lands that are open range. This office is of the further opinion, however, that the board of county commissioners of a county may not authorize a resident of the State of Nevada to kill, capture, remove, sell or otherwise dispose of any wild, unbranded horse, mare, or colt or burro found running at large on private lands without first securing the permission of the landowner upon which the horses are found. This conclusion is compelled by the protection afforded by the Fourteenth Amendment to the United States Constitution and Art. 1, § 1 of the Nevada Constitution. Compare *Flick v. Nevada Fish & Game Commission*, [75 Nev. 100](#), 335 P.2d 422 (1959).

With respect to the exercise by the board of county commissioners of the jurisdiction contained in [NRS 569.360](#) *et seq.*, it is appropriate to add one other caveat. Because a person cannot be positive that removal or interference with a wild horse or burro found on private property may not result in a federal complaint alleging a violation of the Wild Free-Roaming Horses and Burros Act, before such acts are authorized it is the recommendation of this office that a suitable disclaimer of jurisdiction over the subject animals be first obtained from the Secretary of Interior, or his local representative in the Bureau of Land Management.

## CONCLUSION

In summary, the federal government has preemptive authority over wild horses and burros on the public lands of the United States which are determined by the Secretary of the Interior to be wild free-roaming within the meaning of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340.

The State of Nevada, primarily through the Department of Agriculture’s administration of the estray provisions of [NRS Chapter 569](#), may exercise jurisdiction over wild horses and burros which does not conflict with federal law. Since the federal government disavows jurisdiction over wild horses or burros customarily residing exclusively on private lands and over horses or burros that appear to have been domesticated, as to those animals the state regulation contemplated by the estray law may be exercised.

A board of county commissioners may authorize capture, removal or similar interference with wild horses or burros on certain unenclosed private lands, but only with the permission of the landowner pursuant to [NRS 569.360](#) *et seq.*

If we have left unanswered any portion of your requested opinion, we would, of course, be happy to address additional points upon your request.

Very truly yours,

Richard H. Bryan, *Attorney General*

By Harry W. Swainston, *Deputy Attorney General*

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**OPINION NO. 82-10 Taxation, Taxable Value, Replacement Cost Less Depreciation, Obsolescence—Any person determining replacement cost less depreciation and obsolescence to establish the taxable value of real property improvements must consider economic obsolescence. The Assessor is not mandated to use any particular method to determine economic obsolescence.**

May 28, 1982

Mr. Roy E. Nickson, *Executive Director, Department of Taxation*, 1340 S. Curry Street, Carson City, Nevada 89701

Dear Mr. Nickson:

You have requested an opinion from this office, on behalf of the State Board of Equalization, concerning the applicability of economic obsolescence to the determination of the taxable value of improvements to real property pursuant to [NRS 361.227\(1\)](#), as amended by the 1981 Nevada Legislature. [NRS 361.227\(1\)](#) provides in pertinent part:

*Any person determining the taxable value of real property shall appraise \* \* \**

*(b) Any improvements made on the land by subtracting from the cost of replacement of the improvements all applicable depreciation and obsolescence.*

#### **QUESTION ONE**

Does the term “obsolescence” include economic, as well as functional, obsolescence?

#### **ANALYSIS**

At the outset, depreciation has been defined generally as any reduction in the value of property which includes obsolescence. *People ex rel. Union Bag and Paper Corp. v. Fitzgerald*, 2 N.Y.S.2d 290 (1937); *Attorney General v. Trustees of Boston Elevated Ry. Co.*, 67 N.E.2d 673 (Mass. 1946); *Onondago County Water District et al. v. Board of Assessors of the Town of Minetto*, 350 N.E.2d 390 (N.Y.App. 1976). When determining accrued depreciation for the purpose of appraising real property improvements, consideration must be given to three elements: physical deterioration of the structure, functional obsolescence and economic obsolescence. *Travelers Buildings Ass’n v. Providence Redevelopment Agency*, 256 A.2d 5, 9 (R.I. 1969); *Application of Putnam Theatrical Corporation*, 228 N.Y.S.2d 93 (N.Y.App.Div. 1962).

Obsolescence is the process whereby property, because of causes other than physical deterioration, loses its economic usefulness to the taxpayer. *Anaconda Co. v. Property Tax Dept.*

of New Mexico, 608 P.2d 514 (N.M.App. 1979). Economic obsolescence is the loss of value brought about by conditions extrinsic to the property, such as a change in the neighborhood or an adverse change in zoning. *Piazza v. Assessor of the Town of Porter*, 228 N.Y.S.2d 397 (N.Y.App.Div. 1962); *Rau v. Fritz*, 134 N.W.2d 773 (S.D. 1965), overruled on other grounds, 237 N.W.2d 665. Functional obsolescence is the loss of value intrinsic to an improvement due to its inability to adequately perform its intended function and includes such factors as antiquated design or mechanical inadequacy. *Travellers Building Ass'n v. Providence Redevelopment Agency*, *supra*. Economic and functional obsolescence are elements of obsolescence, which in turn, is a component of depreciation. *The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Sixth Edition, 1974, pages 237-261.

As a general rule of statutory construction, the courts may not surmise a legislative intention contrary to the plain language of a statute, nor insert or omit words to make the statute express an intention not evidenced in this original form. *Pressman v. State Tax Commission*, 102 A.2d 821, 827 (Md.App. 1954). If it can be avoided, no clause, sentence or word in a statute should be regarded as superfluous, void or insignificant. *Orr Ditch Co. v. Justice Court of Reno Township*, [64 Nev. 138](#), 178 P.2d 558 (1947).

Inclusion of the term “obsolescence” after the conjunction “and” in the above-quoted portion of [NRS 361.227\(1\)\(b\)](#) is significant given the authority noted that depreciation includes obsolescence. The fact that both words “depreciation” and “obsolescence” were utilized reflects an apparent intent of the Nevada legislature to emphasize the point that any determination of replacement cost less depreciation *must* include a consideration of obsolescence.

Professional terms used in a statute must be construed in the sense in which such terms are generally used or understood in the profession. *Brennan v. Corning Glass Works*, 417 U.S. 188 (1974); *In re Taxes, Hawaiian Pineapple Co., Ltd.*, 363 P.2d 990 (Ha. 1961). The appraisal profession defines the general term obsolescence to include functional *and* economic obsolescence. *Property Assessment Valuation*, International Association of Assessing Officers, 1977, pages 157-172. The legislature inserted no language in [NRS 361.227](#) limiting the operability of the term obsolescence to functional obsolescence only.

## CONCLUSION

In response to Question One, it is the opinion of this office that the word “obsolescence” includes economic as well as functional obsolescence.

## QUESTION TWO

Does [NRS 361.227](#) mandate that an income analysis of the subject property be utilized in the determination of economic obsolescence?

## ANALYSIS

[NRS 361.227\(1\)](#) provides that the taxable value of real property improvements is to be determined by subtracting “all applicable depreciation and obsolescence” from the replacement cost of the improvements. Subsection 5 of [NRS 361.227](#) provides that the computed taxable value of any property may not exceed its full cash value. Pursuant to [NRS 361.357](#) the owner of any property who believes that the full cash value of his property is less than its taxable value may appeal to the county board of equalization. If the board determines that the taxable value exceeds the full cash value it “shall adjust the factors applied to the property pursuant to [NRS 361.227](#), particularly the rate of depreciation, to make the taxable value of the property correspond as closely as possible to its full cash value.” [NRS 361.357\(1\)](#).

The above language suggests that the assessor should consider two values when he appraises improved property—the full cash value as well as the taxable value if the possibility exists that taxable value may exceed full cash value. Without considering the possibility that full cash value is less than taxable value, an assessor will have difficulty responding to the taxpayer’s contention



at the county and state boards of equalization that the taxable value exceeds the full cash value. Of course, as a practical matter, those instances in which full cash value is less than taxable value determined pursuant to [NRS 361.227](#) should be limited in number because in the majority of appraisals taxable value will likely be less than full cash value.

Full cash value is the amount at which property would be appraised if taken in payment of a just debt due from a solvent debtor. [NRS 361.025](#). It is well settled that three basic methods of valuation may be used to determine full cash value—the cost, income and market approaches. *Town of Barnet v. New England Power Co.*, 296 A.2d 228 (Vt. 1972); *Partlind Hotel Co. v. Michigan State Tax Commission*, 141 N.W.2d 699; *Mohave County v. Duval Corp.*, 579 P.2d 1075 (Az. 1978).

The method ultimately utilized depends on the character of the property and the availability of the data necessary to apply the various methods. *Weiss v. State*, [96 Nev. 465](#), 611 P.2d 212 (1980); *Chapin v. Dept. of Revenue*, 627 P.2d 480 (Or. 1981).

Economic obsolescence may be measured by capitalization of the net rental loss attributable to the particular condition of the property. *The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Sixth Edition, 1974, page 257. As an element of depreciation, the measure of economic obsolescence does not necessarily require a complete income analysis to determine the total full cash value of the subject property. However, any income loss attributable to adverse factors extrinsic to the subject property is an obvious reflection of economic obsolescence. [NRS 361.227](#) does not specifically mandate that any particular methodology be used in the determination of obsolescence. It *does* mandate that any person determining the taxable value of property shall subtract all “applicable obsolescence” from the replacement cost of real property improvements, and this replacement cost less depreciation and obsolescence may not exceed the full cash value of those improvements. Failure to adequately consider and subtract economic obsolescence from the replacement cost, whether determined by analyzing the income or by some other method, may thus result in a taxable value that exceeds full cash value.

Given the above case authority, the taxpayer is not precluded from using an income analysis to demonstrate that taxable value exceeds full cash value. The assessor, on the other hand, is not limited to any particular method to determine full cash value, but rather can rely upon accepted professional standards to choose the appropriate methodology. *State v. Central Pacific Railroad*, [10 Nev. 47](#) (1875); *Kargman v. Jacobs*, 325 A.2d 543 (R.I. 1974). The method for determining the *taxable* value of improvements under [NRS 361.227](#) is one of the three accepted approaches to establishing full cash value. However, by limiting taxable value to one method of valuation and yet requiring that taxable value not exceed full cash value, the legislature has left open the possibility that an income or market analysis will in fact reveal a full cash value less than taxable value, necessitating a reduction. The final determination of full cash value remains within the discretion of the state and local boards of equalization.

### CONCLUSION

It is the opinion of this office that the assessor is not mandated by [NRS 361.227](#) to use an income analysis to determine economic obsolescence for purposes of establishing the taxable value of real property improvements. He should, however, be prepared to respond to an income analysis revealing that the full cash value is less than taxable value at the hearings before the county and state boards of equalization. Furthermore, due to the mandate of [NRS 361.227\(1\)\(b\)](#) that *all* applicable obsolescence be subtracted, in those circumstances in which obsolescence is a factor, the assessor must make a determination of obsolescence if he has reason to believe that obsolescence will exceed the depreciation factor applied to the property as determined pursuant to [NRS 361.227\(5\)\(b\)](#).

Respectfully submitted,



Richard H. Bryan, *Attorney General*

By David M. Norris, *Deputy Attorney General,*  
*Tax Division*

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**OPINION NO. 82-11 Reporting of Accidents on Private Property—When enforcing [NRS 484.229\(1\)](#), the Department of Motor Vehicles cannot require the reporting of accidents which occur on private property within this state.**

June 3, 1982

Mr. Barton Jacka, *Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89711*

Dear Mr. Jacka:

**QUESTION**

In your letter of April 27, 1982, you requested an opinion regarding “the Department of Motor Vehicles’ authority to require the reporting of accidents which occur on private property within this State.” Your letter specifically referred to [NRS 484.229\(1\)](#). That statute reads in pertinent part:

1. Except as provided in subsection 2, the driver of a vehicle which is in any manner involved in an accident, resulting in bodily injury to or death of any person or total damage to any vehicle or item of property to an apparent extent of \$350 or more, shall, within 10 days after the accident, forward a written report of the accident to the department of motor vehicles. \* \* \*

**ANALYSIS**

In *Elliot v. Mallory Electric Corp.*, [93 Nev. 580](#) (1977), the Nevada Supreme Court addressed an issue similar to the one you now present. The court ruled on the applicability of [NRS 484.445](#) to private property. It was held:

[NRS 484.445](#) states: “The person driving or in charge of any motor vehicle, except a commercial vehicle loading or unloading goods[,] shall not permit it to stand unattended without first stopping the engine, locking the ignition and removing the key.” Respondents contend that this statute was intended to apply only to vehicles left on public property. Appellant contends the statute applies as well to vehicles on private property, at least on private property open to the public, such as the property in question.

On its face, the statute is unqualified and, standing alone, would appear to apply to vehicles wherever located. Chapter 484 as a whole, however, indicates a more limited intent. [NRS 484.777\(1\)](#) states: “The provisions of this chapter are applicable and uniform throughout this state on all highways to which the public has a right of access or to which persons have access as invitees or licensees.” [NRS 484.065](#) defines “highway” as “the entire width between the boundary lines of every way *maintained by a public authority* when any part of such way is open to the use of the public for purposes of vehicular traffic.” (Emphasis added.)

Appellant argues that [NRS 484.777\(1\)](#) establishes that [NRS 484.445](#) applies to a

casino driveway, since this is property to which persons have access as invitees or licensees. This argument ignores the word “highways” in that statute and the definition of “highways” in [NRS 484.065](#) as “Way[s] maintained by a public authority.” Regardless of its public character, the driveway of the Ormsby House is not maintained by a public authority and is not within the intended scope of [NRS 484.445](#).

The court went on to say:

We conclude that [NRS 484.445](#) applies only to public property and not to a private driveway in front of a casino. The language of the relevant statutes clearly indicates that such a limitation was intended.

[NRS 484.777](#)(1) has not been amended since the *Elliot* decision, *supra*. However, [NRS 484.065](#) was amended by the 1981 Nevada legislature and now reads:

“Highway” means the entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public for purposes of vehicular traffic, whether or not the public authority is maintaining the way.

The general functions of the Department of Motor Vehicles are stated in [NRS 481.027](#) which provides:

1. The department of motor vehicles shall control the manner and type of use of the public highways by the public, and the department of transportation shall control the physical aspects of the public highways.
2. The functions of the department of motor vehicles concerning highway safety must not be duplicated by any other agency, department, commission or officer of the State of Nevada.

### CONCLUSION

[NRS 484.229](#)(1) is void of language regarding its application to private land. Following the rationale in *Elliot, supra*, and the guidelines set forth in [NRS 481.027](#), the provisions of [NRS 484.777](#)(1) limits the scope of [NRS 484.229](#)(1) to “highways” as defined in [NRS 484.065](#). Therefore, the Department of Motor Vehicles cannot require the reporting of accidents which occur on private property within this state.

Sincerely,

Richard H. Bryan, *Attorney General*

By Larry B. Bernard, *Deputy Attorney General,*  
*Department of Motor Vehicles*

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**OPINION NO. 82-12 Autopsy Reports; Public Records—Strong public policy of confidentiality of medical information requires that autopsy reports not be available for public inspection.**

June 15, 1982

Mr. Bill Curran, *Clark County Counsel*, Office of the District Attorney, Clark County Courthouse, Las Vegas, Nevada 89101

Dear Mr. Curran:

### QUESTION

You have requested an opinion from this office as to whether an autopsy protocol is a public record which must be made available upon demand to any member of the public.

### BACKGROUND

The office of the County Coroner is governed by Clark County Code Chapter 2.12 enacted pursuant to the authority of [NRS 244.163](#). Under that code the County Coroner has a duty to determine the cause of death of “any person reported to him as having been killed by violence, having suddenly died under such circumstances as to afford reasonable grounds to suspect or infer that death has been caused or occasioned by the act of another by criminal means, having died under circumstances affording reasonable grounds to suspect that the death has been occasioned by unnatural, unlawful, or suspicious means, or having committed suicide.” Among the deaths which must be investigated are accidental deaths, unattended deaths, deaths due to drowning, and deaths when the decedent had not been attended by physician in the ten days before death (Clark County Code 2.12.060). If necessary to determine the cause of death an autopsy, including analysis of organs and tissues, may be undertaken. (Clark County Code 2.12.240).

An autopsy protocol consists of detailed findings of the pathologist in the course of the autopsy and contains detailed descriptions of the individual injuries found upon and within the body of the deceased, including any evidence of preexisting disease, and reports of all laboratory or technical tests performed. Thus, the autopsy protocol, sometimes referred to as the autopsy report, contains much information which is irrelevant to the final official determination of the cause of death which is entered into the “Coroner’s Register” and listed on the death certificate issued.

### ANALYSIS

The statute governing public access to public records is [NRS 239.010](#) which provides that:

1. All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person, and the same may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the same may be used to the advantage of the owner thereof or of the general public.

2. Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor.

The first question which must be addressed is whether an autopsy protocol is a “public record” for the purposes of this statute. “Public record” has not been defined in Nevada by statute or by case law. Extensive research has uncovered but one decision by a sister state upon this precise question of public inspection of an autopsy report, but that case involved interpretation of a statute entirely different than [NRS 239.010](#). *Denver Publishing Co. v. Dreyfus*, 184 Colo. 288,

520 P.2d 104 (1974). Other cases were concerned with criminal or civil discovery of autopsy reports, all of which were governed by a specific statute or ordinance, (*People v. Preston*, 13 Misc.2d 802, 176 N.Y.S.2d 542 (1958); *Whitfield v. State*, 492 S.W.2d 502 (Tex.App. 1973); *Widziewicz v. Golding*, 277 N.Y.S.2d (1966); *Walsh v. Beckman*, 215 N.Y.S.2d 398 (1968); *State v. Thompson*, 338 P.2d 319 (Wash. 1959); *Riordan v. Commercial Travelers Mutual Insurance Co.*, 525 P.2d 804 (Wash. 1974)), or with evidentiary questions, such as the admissibility of the autopsy report under public records hearsay exception (*People v. Nisonoff*, 45 N.Y.S.2d 854, 267 App.Div. 356 (1944); *People v. Hampton*, 38 A.D.2d 772, 327 N.Y.S.2d 961 (1972)) or whether the autopsy report was privileged (*Travelers Inc. Co. of Hartford, Conn. v. Bergeron*, 25 F.2d 680 (C.A. 8, 1928); *Fleska v. John Hancock Mutual Life Insurance Co. of Boston, Mass.*, 144 Misc. 508, 259 N.Y.S. 35 (1932)).

It is therefore necessary to examine the common law ([NRS 1.030](#)). The generally accepted common law definition of a “public record” is a record which is required to be kept pursuant to some law or is necessary to be kept in the discharge of a duty imposed by law. *E.g.*, *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952); *Council of Santa Monica v. Superior Court*, 21 Cal.Rptr. 896 (1962); *Nero v. Hyland*, 76 N.J. 213, 386 A.2d 846 (1978); *State v. State Board of Cosmetology*, 49 Ohio St.2d 245, 361 N.E.2d 444 (1977). By this definition an autopsy protocol is a public record as the findings of an autopsy are required by regulation to be reduced to writing and filed (Clark County Code 2.12.240 and 2.12.250).

The inquiry does not end with this determination, however, as the public’s right of inspection is not without qualification. First, if a public record is declared confidential by law access may be properly denied to the public. [NRS 239.010](#). Autopsy protocols have not been expressly declared confidential by law but confidentiality of the protocol, or detailed findings of the autopsy, does appear to be implicitly, if not explicitly, required by the county code. The coroner is directed to file the findings of the autopsy in “his records of the death of the deceased person” (Clark County Code 2.12.140) which file also includes witness’ testimony, inquest information and other investigative reports. This material is used, among other things, to determine the cause of death. The official register, labeled ‘Coroner Register,’ sets forth the fulfillment of the coroner’s statutory duties including identification of the dead person, inventory of any personal property of the deceased, disposal of the remains, notification of the next of kin and the date and cause of death. (Clark County Code 2.12.050). Thus, the apparent intent is to have a register, open to public inspection, and a file containing detailed medical information maintained away from the public eye.

The coroners of the Counties of Clark, Douglas and Washoe, all governed by substantially similar ordinances, have consistently held that the medical information in their files, including autopsy reports, to be of a confidential nature with restricted release. The construction of an ordinance by officials entrusted with its administration, while not controlling, is entitled to great weight. *Board of School Trustees v. Bray*, [60 Nev. 345](#), 357, 109 P.2d 274 (1941).

Second, the right of public inspection of public records is not absolute. Other states with public record statutes similar to Nevada’s have concluded that, in addition to any express statutory exemption, public policy may constitute a ground of denial of public inspection. *Northside Realty Associates v. Community Relations Commission*, 241 S.E.2d 189, 191 (Ga. 1978); *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236, 1243 (1977); *Papadopoulos v. State Board of Higher Education*, 494 P.2d 260, 266 (Ore. 1972); *MacEwan v. Holm*, 359 P.2d 413, 421 (Ore. 1961); *State v. Owen*, 28 Wis.2d 672, 137 N.W.2d 470, 474 (1966), modified on denial of rehearing, 28 Wis.2d 672, 139 N.W.2d 241 (1966). *Cf.* *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky.App. 1974) (expansion of common law right). The statutes are so closely analogous and the holdings so unanimous that this office considers them controlling. *McLaughlin v. L.V.H.A.*, [68 Nev. 84](#), 227 P.2d 206 (1951). Furthermore, it is a recognized principle in this state that a strong public policy may require relief in the absence of, or contrary to, an express statute, *County of Clark v. Christensen*, [86 Nev. 616](#),

618, 472 P.2d 365 (1970); Mendive v. District Court, [70 Nev. 51](#), 253 P.2d 884 (1953).

There is in this state a strong public policy that the secrets of a person's body are a very private and confidential matter upon which any intrusion in the interest of public health or adjudication is narrowly circumscribed. Cf. [NRS 441.110, 441.210](#) (reporting of venereal disease); [NRS 49.245](#) (court-ordered examination partially privileged); [NRS 49.235](#) (doctor-patient testimonial privilege). Of particular interest are [NRS 629.021](#) and [629.061](#) which restrict the inspection of health care records containing "information relating to the medical history, examination, diagnosis or treatment" to the patient or his authorized representative and [NRS 440.650](#) which restricts the release of a death certificate to a person who has a direct and tangible interest therein. While cognizant that public inspection is the rule and secrecy the exception, we can ascertain no public interest in disclosure sufficient to outweigh the public policy of confidentiality of personal medical information. The fact that a person dies in an accident, is drowned, or meets his death in any of a number of ways which may require an autopsy is no justification for enabling public knowledge of that which was closely guarded throughout his lifetime.

There may, of course, be a situation when a particular report would be available for a particular party who has sufficient interest to justify that access. This access is, as always, available through the correct procedures of law. This opinion addresses solely the question of the inspection, copying and possible dissemination of an autopsy report by any member of the public.

### CONCLUSION

An autopsy protocol is a public record, but is not open to public inspection upon demand, because disclosure would be contrary to a strong public policy; the Coroner Register is open to public inspection. Furthermore, maintaining the confidentiality of the medical information contained in the protocol accords with the intent of the governing ordinances and the administrative interpretation thereof.

Sincerely,

Richard H. Bryan, *Attorney General*

By Linda H. Bailey, *Deputy Attorney General*

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**OPINION NO. 82-13 Taxation—Sales Price and Gross Receipts—Discounts and Rebates—A retailer price concession in the form of a discount coupon or rebate is properly excluded from the measure of sales tax. The value of a reimbursable coupon or a manufacturer's rebate is properly includable in "gross receipts" for measurement of the sale tax because the retailer receives the full cash price of the tangible personal property sold.**

June 21, 1982

Mr. Roy E. Nickson, *Executive Director*, Nevada Department of Taxation, Carson City, Nevada 89710

Dear Mr. Nickson:

You have posed to this office several questions regarding the application of Nevada sales and use tax to certain transactions involving discount coupons and rebates. The answers to your various queries require careful consideration of provisions of [NRS 372.025](#) and [NRS 372.065](#). Our analysis and opinion follow.

## FACTS

Retail transactions involving discounts are common. In the mass market consumer context a manufacturer often distributes coupons which, when redeemed at a retail establishment, are accepted as partial payment of the stated face value for the goods purchased. The retailer then is reimbursed for the face amount of the coupon. In a similar fashion the retailer itself may issue coupons, commonly through newspaper advertisements, which allow “cents off” specified items. Retailers are generally not reimbursed for the face amount of such coupons because the retailer itself is the issuing agent.

In a related context it is a common practice of the automotive industry to offer rebates to purchasers of automobiles. Such rebates are commonly offered by the manufacturer directly to the consumer. In some circumstances the rebate may reflect participation by both the manufacturer and the dealer.

## QUESTION ONE

Are manufacturer’s or retailer’s coupons properly included in the measure of the sales tax?

## ANALYSIS

[NRS 372.105](#) imposes a sales tax in Nevada as follows:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

[NRS 372.025](#)(1) in relevant part, defines gross receipts as follows:

“Gross receipts” means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise. \* \* \*

While [NRS 372.025](#)(2) specifies:

The total amount of the sale or lease or rental price includes all of the following:

- (a) Any services that are a part of the sale.
- (b) All *receipts, cash, credits and property of any kind.*
- (c) *Any amount for which credit is allowed by the seller to the purchaser.* (Emphasis supplied.)

[NRS 372.025](#)(3)(f) states:

“Gross receipts” does not include any of the following:

- (a) Cash discounts allowed and taken on sales.

Similar provisions of [NRS 372.065](#) define sales price in a consistent manner as follows:

1. “Sales price” means the *total amount* for which tangible property is sold, *valued in money, whether paid in money or otherwise*, without any deduction on account of any of the following:

- (a) The cost of the property sold.
- (b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.
- (c) The cost of transportation of the property prior to its purchase.



2. The total amount for which property is sold includes all of the following:
  - (a) Any services that are a part of the sale.
  - (b) *Any amount for which credit is given to the purchaser by the seller.*
3. “Sales price” *does not include* any of the following:
  - (a) *Cash discounts allowed and taken on sales.* (Emphasis supplied.)

Initially we will consider the tax consequences of discount coupons issued by retailers, the stated value of which is not reimbursed to the retailer from an outside source.

[NRS 372.025\(3\)\(a\)](#) and [NRS 372.065\(3\)\(a\)](#) exclude from the purview of the sales tax “cash discounts allowed and taken on sales.” If a retailer issues a coupon to a customer which allows the customer to buy at a discount and the retailer absorbs the reduction in gross receipts, the coupon represents a “cash discount allowed” which is properly exempt from the measure of the tax. As the Supreme Court of Illinois stated when considering this question in *Saxon-Western Corp. v. Makin*, 396 N.E. 2d 1185, 1188 (1979):

Similarly, in the instant case, *plaintiff never receives the cash* represented by the value of its redeemed coupons, and its gross receipts are in fact reduced by its acceptance of the coupons. *Therefore, we agree with plaintiff that its coupons simply constitute an alternate way of giving its customers cash discounts;* as such, the value of the coupons may not properly be included by the Department in the amount subject to tax. (Emphasis supplied.)

See also: *Martin Oil Service Inc. v. Department of Revenue*, 334 N.E.2d 227 (Ill. 1975).

The consideration of manufacturer’s coupons in which the retailer is reimbursed for the face amount of the coupon suggests a different analysis to be appropriate. The tender of a manufacturer’s coupon by a consumer is essentially identical to tender of a full cash price. The consumer is credited with the face amount of the coupon as if it were, in fact, cash tendered; the retailer is reimbursed in cash or credit by the manufacturer for the full face amount of the coupon. Thus when accepting a manufacturer’s coupon the retailer’s “gross receipts” are not reduced because the retailer, in fact, receives “receipts, *cash, credits and property*” which equals the sales price of the item purchased within the context of [NRS 372.025\(2\)\(b\)](#) and [372.065\(2\)\(b\)](#). Although the Illinois court did not feel compelled to reach this issue, its rationale supports such a conclusion. Because the retailer ultimately receives the face value of the coupon, its gross receipts are not reduced as they are in the case of discount coupons issued by the retailer itself.

### **CONCLUSION TO QUESTION ONE**

According to the above analysis, it is the opinion of this Office that the amount of a nonreimbursable coupon issued by a retailer is properly excluded from the measure of tax as a cash discount. However, a manufacturer’s coupon which is fully reimbursable to the retailer constitutes a “credit or property” which may be included in the measure of the gross receipts subject to the tax.

### **QUESTION TWO**

Are manufacturer’s or dealer’s rebates properly included in the measure of the sales tax?

### **ANALYSIS**

You have also inquired how manufacturer’s or dealer’s rebates, or a combination thereof, affects the taxability of automobile purchases. Analysis similar to that presented above is again appropriate.

If all or part of a rebate is actually a “cash discount” offered by the retailer, [NRS 372.025\(3\)\(a\)](#) and [372.065\(a\)](#) suggest nontaxability is appropriate as in the case of a

nonreimbursable coupon. However if the rebate merely represents payment of a purchase incentive by a third party—the manufacturer—which does not affect the amount of “gross receipts” received by the retailer, it appears that sales tax is properly calculated according to the full sales price of the automobile regardless of the rebate. Such analysis was adopted by the Supreme Court of Illinois in *Keystone Chevrolet Company v. Kirk*, 372 N.E.2d 651, at 653 in which the court stated:

We find nothing in the Act or regulations, however, permitting a seller to deduct from his gross receipts an amount paid by a third party directly to the purchaser even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price. The gross receipts of the seller remain the same whether or not a rebate is paid by someone not directly involved in the retail sale. \* \* \*

While the manufacturer’s rebate is unquestionably offered as an inducement to a purchaser to buy a car, it neither changes the character of the transaction between seller and purchaser nor affects the liability of the retailer to pay a tax computed on the basis of the amount received by him.

Accordingly, it appears that manufacturer’s rebates direct to the purchaser do not affect sales tax liability. Cash discounts in the form of rebates from *dealers* to purchasers, however, may be properly excluded from taxable measure as “cash discounts allowed or taken,” just as in the case of retailer’s nonreimbursable discount coupons. The retailer’s gross receipts are reduced, in fact, and no tax appears properly attributable to the dealer’s price concession despite it being termed a “rebate.”

#### CONCLUSION TO QUESTION TWO

Dealer price concessions in the form of rebates are properly considered “cash discounts” excluded from the computation of sales price and gross receipts. Third party payments for the purpose of promoting sales, however, do not affect the transaction between the retailer and the consumer, and accordingly sales tax is properly computed upon the full sales price notwithstanding the rebate in those transactions.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

By Timothy Hay, *Chief Deputy Attorney General,*  
*Tax Division*

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**OPINION NO. 82-14 Parking Space Designated for Handicapped Persons—[NRS 484.408](#), imposing a \$25 fine for unauthorized parking in a space designated for the handicapped, does not represent an unconstitutional delegation of the legislature’s authority to define crimes and penalties.**

June 24, 1982

Major Walter T. Hines, *Deputy Chief, Nevada Highway Patrol*, 215 E. Bonanza Road, Las Vegas, Nevada 89101

Dear Major Hines:

You have asked this office for an opinion regarding the validity of [NRS 484.408](#), pertaining to parking in spaces designated for handicapped persons. Your request is made in light of the attached opinions for the Las Vegas City Attorney's Office and the Clark County District Attorney's Office, both opining that [NRS 484.408](#) represents an unconstitutional delegation by the legislature of its authority to define crimes. Specifically, your inquiry is as follows:

### QUESTION

Does [NRS 484.408](#) represent an unconstitutional delegation of the legislature's authority to define crimes and penalties?

### ANALYSIS

[NRS 484.408](#) was added to the law by Chapter 484, Statutes of Nevada 1981, p. 985, and states:

Parking in space designated for handicapped persons.

1. A person shall not park a vehicle in a space designated for the handicapped, whether on public or privately owned property, unless he is eligible to do so and the vehicle displays:

(a) Special license plates for a handicapped person; or

(b) A parking permit for a handicapped person; or

(c) An officially recognized emblem issued by this state or another jurisdiction indicating that the driver or a passenger in the vehicle is eligible.

2. A person shall not use such plate, permit or emblem for a vehicle for the purpose of parking unless he is handicapped or is the driver of a vehicle in which a handicapped person is a passenger.

3. Any person who violates any provision of this section shall be punished by a fine of \$25.

Both the Las Vegas City Attorney's Office and the Clark County District Attorney's Office have determined that [NRS 484.408](#) is unconstitutional. They base this finding on the Nevada Supreme Court decision in *Lapinski v. State of Nevada*, [84 Nev. 611](#), 446 P.2d 645 (1968).

This office believes that the *Lapinski* decision is inapplicable to the question you have asked. *Lapinski* held that the power to define crimes and penalties lies exclusively in the legislature, and that the legislature may not delegate that power without adequate guidelines. The *Lapinski* court determined that [NRS 205.272](#), as amended by Chapter 211, Statutes of Nevada 1967, p. 500, was an unconstitutional delegation for the legislative power to define a penalty because the statute allowed the district attorney the discretion to charge a car thief with a misdemeanor, a gross misdemeanor, or a felony. The court found that the legislature had clearly defined the prohibited conduct that constituted the crime, but it had failed to clearly define the concomitant punishment.

[NRS 484.408](#) represents a totally different situation from that proscribed in *Lapinski*. [NRS 484.408](#) clearly defines the act constituting the crime and the concomitant punishment: Unauthorized parking in "a space designated for the handicapped" and a \$25 fine. The conduct prohibited and the penalty provided are specific. *See Jackson v. State of Nevada*, [93 Nev. 677](#), 681, 572 P.2d 927, 930 (1977). Accordingly, this office does not agree with the opinions of the Las Vegas City Attorney's Office and the Clark County District Attorney's Office. [NRS 484.408](#) must be presumed constitutional, as must all acts of legislature:

An act of the legislature is presumed to be constitutional and should be so declared unless it appears to be clearly in contravention of constitutional principles. *County v. County Comm'rs*, [6 Nev. 30](#) (1879) [1870]. In cases of doubt, every possible presumption and intendment will be made in favor of constitutionality. Courts will interfere only in

cases of clear and unquestioned violation of fundamental rights. (Citations omitted.)

State ex rel. Tidvall v. District Court, [91 Nev. 520](#), 526-527, 539 P.2d 456, 460 (1975).

See also Princess Sea Industries, Inc. v. State of Nevada, [97 Nev. 534](#), 635 P.2d 281 (1981), cert. denied ..... U.S. ...., 50 U.S.L.W. 3831 (Case No. 81-1388); Schmidt v. State of Nevada, [94 Nev. 665](#), 584 P.2d 695 (1978).

The act of designating a handicapped parking space is not germane to an analysis of whether or not a violation of [NRS 484.408](#) has occurred. The legislature has clearly established a public policy to encourage the designation of parking spaces for handicapped persons, both on public and private property. Local governments may designate handicapped parking spaces pursuant to their authority to regulate traffic and parking and to erect traffic-control devices. See [NRS 244.357](#), [266.277](#), 269.185, 484.441, and 484.783. Private property owners may designate handicapped parking spaces pursuant to their right to control the use of their property.

### CONCLUSION

The crime and penalty defined in [NRS 484.408](#) are clear and specific within the guidelines of applicable case law. Accordingly, it is the opinion of this office that [NRS 484.408](#) does not represent an unconstitutional delegation for the legislature's authority to define crimes and penalties.

Sincerely,

Richard H. Bryan, *Attorney General*

By Jeffrey D. Patterson, *Deputy Attorney General*

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**OPINION NO. 82-15 Criminal Law: Regulation and Permitting of the Possession of Dangerous Weapons by Private Security Personnel on Private Property—Nevada statutory law prohibits the possession or carrying of certain specified dangerous or deadly weapons without a valid permit issued by the sheriff of the affected county regardless of the location or purpose involved in the possession or carrying of these particular weapons. NRS § 202.350; Nevada Attorney General's Opinion No. 127 (July 12, 1922).**

June 25, 1982

The Honorable Michael Smiley Rowe, *Douglas County District Attorney*, P.O. Box 218, Minden, Nevada 89423

Attention: Michael P. Gibbons, *Deputy District Attorney*

Dear Mr. Rowe:

In your correspondence dated February 11, 1982, your office presented two questions concerning Nevada law governing the possession of certain instruments classified as dangerous weapons. An analysis of your inquiries requires an evaluation of Section 202.350 of the Nevada Revised Statutes and a State of Nevada Attorney General Opinion rendered on July 12, 1922.

### SUMMARY OF THE PRESENTING FACTS

A private security guard was employed to supervise the premises of private property located

in Zephyr Cove, County of Douglas, State of Nevada. In the course of this employment, the security guard had occasion to carry upon his person an instrument known as a billy club and while on duty the security guard became involved in an altercation during which he allegedly struck a person with the billy club which was in his possession. As a result of this incident, a criminal prosecution was initiated by the district attorney against the security guard on the basis of a violation of Nevada law prohibiting possession of certain dangerous weapons. *See* NRS § 202.350(1)(a).

At the preliminary hearing conducted in this case, the justice court dismissed the criminal complaint on the grounds that possession of a billy club is not a public offense where this object is in the custody or control of a private security guard on private property. This decision relied upon a previous opinion published by the Attorney General of the State of Nevada. *See* Nevada Attorney General's Opinion No. 127 (July 12, 1922).

### FIRST QUESTION PRESENTED

Whether a privately employed security guard may possess and carry a type of weapon or device exclusively on private property where possession of this weapon or device is otherwise declared unlawful under the provisions of Nevada law.

### ANALYSIS OF THE FIRST QUESTION

The Constitution of the State of Nevada provides in relevant part that, “[a]ll men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness.” Nev. Const., art. 1, § 1. A constitutional guarantee such as this, however, is not absolute and a state legislature may reasonably exercise police powers to regulate the right of citizens to carry or possess certain types of weapons. This exercise of the police power is appropriate absent a specific state or federal constitutional restraint upon these powers where the regulation is reasonably related to furtherance of the state interests in public health, safety, morals or general welfare and specifically to aid the state interest in controlling crime. *See, e.g.,* *People v. Wilkes*, 334 N.E.2d 910, 912 (Ill.App.Ct. 1975); *Eaton County Deputy Sheriffs Ass’n. v. Smith*, 195 N.W.2d 12, 13 (Mich.Ct.App. 1971); *In re Application of Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980); *Hardison v. State*, [84 Nev. 125](#), 129, 437 P.2d 868 (1968); *Harris v. State*, [83 Nev. 404](#), 406, 432 P.2d 929 (1967).

Nevada law provides in relevant portion that:

1. It is unlawful for *any person* within this state to:
  - (a) Manufacture or cause to be manufactured, or import into the state, or keep, offer or expose for sale, or give, lend or *possess* any instrument or weapon of the kind commonly known as a switchblade knife, blackjack, slung shot, *billy*, sand-club, sandbag or metal knuckles; or
  - (b) *Carry concealed* upon his person:
    - (1) Any explosive substance, other than fixed ammunition;
    - (2) Any dirk, dagger or dangerous knife; or
    - (3) Any pistol, revolver or other firearm, or *other dangerous or deadly weapon*.
2. Except as provided in [NRS 202.275](#) and [212.185](#), any person who violates any of the provisions of subsection 1 is guilty:
  - (a) For the first offense, of a gross misdemeanor.
  - (b) For any subsequent offense, of a felony, and shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, and may be further punished by a fine of not more than \$5,000.

NRS § 202.350(1)-(2). [Emphasis added.]



Section 202.350(1)(a), is a legislative enactment regulating the manufacture, distribution, sale, exchange and possession of certain types of weapons because of the dangerous or deadly character of these instruments. Moreover, Section 202.350(1)(b), contains a legislative declaration that the carrying of concealed dangerous or deadly weapons is unlawful. These statutes enacted by the Nevada legislature constitute a valid exercise of the police power of the State of Nevada in furtherance of the state interest in public health, safety, morals and the general welfare, as well as to support the state objective of crime control. *Cf. Harris v. State*, [83 Nev. 404](#), 406, 432 P.2d 929 (1967) (regulation of tear gas pen is supported by state police powers).

An opinion rendered by the Office of the Attorney General dated July 12, 1922, interprets a statute similar to Section 202.350. In that opinion, this office explained that a statute, “regulating the indiscriminate carrying of weapons, in the interest of the public peace and order, \* \* \* cannot be construed as limiting” the inalienable constitutional rights of citizens to be secure in their person and property. Nevada Attorney General’s Opinion No. 127, at 77 (July 12, 1922). The 1922 attorney general’s opinion discussed a Nevada statute which provided that:

\* \* \* It shall be unlawful for any person in this state, except peace officers, or persons while employed upon or traveling upon trains, stages, or other public conveyances, to wear, carry or have concealed upon his person, in any town, city or village, any dirk-knife, pistol, sword in case, slung-shot, sand-club, metal knuckles, or other dangerous weapon, without first obtaining permission from the board of county commissioners, attested by this clerk, of the county in which such concealed weapon shall be carried. The board of county commissioners of any county in this state, may, upon an application made in writing, showing the reason of the person, or the purpose for which any concealed weapon is to be carried, grant permission under its seal, and attested by its clerk, to the person making such application, authorizing such person to carry the concealed weapon described in such permission. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than twenty dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months.

1912 Nev.Rev.Laws § 6568.

Section 6568 of the 1912 laws was repealed in 1959 when the Nevada legislature consolidated several statutes governing dangerous or deadly weapons and enacted the first version of the law now contained in Section 202.350 of the Nevada Revised Statutes. *See* 1959 [NRS Chapter 355](#), § 4. *See also* 1967 [NRS Chapter 211](#), § 112; NRS § 202.330 (1955); 1953 [NRS Chapter 322](#), § 1; 1929 Nev.Comp.Laws §§ 2300-2304; 1919 Nev.Rev.Laws Chapter 93, § 1-2. Accordingly, the *statutory interpretation* contained in the 1922 attorney general opinion is inapposite to an analysis of Section 202.350. *See* 1959 [NRS Chapter 355](#), § 4. Conversely, the 1922 opinion does adhere to a proposition of state *constitutional law* which this office reaffirms. The Constitution of the State of Nevada is unequivocal in mandating that, subject to reasonable regulations promulgated pursuant to the inherent police power of the state, the citizens have an inalienable right to be secure in their person and property. Nev.Const., art. 1, § 1.

In this regard, Section 202.350, is a legislative accommodation of the legitimate public health, safety and crime control interests of the state with the inherent right of each person to possess and protect personal property. While the Nevada statute is not a model of legislative clarity, *compare* NRS § 202.350 *with* Ill.Anno.Stat. Chapter 38, § 24-1 to 24-6 (Smith-Hurd 1977 & Supp. 1981-1982), other jurisdictions having the same or a similar statutory scheme recognize that absent an express exception contained in a possession of weapon statute, neither the location of the possession or carrying of the weapon nor the particular intent of the possessing or carrying person is material to enforcement of the statute. *See, e.g., Beck v. State*, 414 N.E.2d 970, 972 (Ind.App.Ct. 1981); *Pierce v. State*, 275 P. 393, 394-395 (Okla.Crim.Ct.App. 1929).



*See generally* Annot., 73 ALR 839 (1921). *See also* Annot., 57 ARL3d 938 (1974).

Similarly, Section 202.350, does not contain any legislative exceptions based upon the distinction between a private premise or a public location, and the Nevada statute does not provide an exception for possession or carrying of a weapon when an individual is engaged in some specific activity. *Cf.* *Facion v. State*, 290 So.2d 75, 76 (Fla.Ct.App. 1974) (home or place of business); *State v. Mason*, 571 S.W.2d 246, 247-248 (Mo. 1978) (continuous journey); *State v. Dobbins*, 176 S.E.2d 353, 354 (N.C.Ct.App. 1970) (own premises); *Commonwealth v. Goosby*, 380 A.2d 802, 806 (Pa.Super.Ct. 1977) (private versus public property); *Coleman v. State*, 500 S.W.2d 472, 473-474 (Tex.Ct.Crim.App. 1973) (own property); *Johnson v. State*, 571 S.W.2d 170, 172-173 (Tex.Ct.Crim.App. 1978) (travelling). The Nevada statute does contain four (4) exceptions from the general prohibition against the possession or carrying of the specified weapons. Unless a private security guard is able to establish facts which demonstrate that his or her possession or carrying of an unlawful weapon is authorized under one of the statutory exceptions, then such possession or carrying of the particular instrument or device is unlawful.

### **CONCLUSION TO THE FIRST QUESTION**

Section 202.350 provides that certain dangerous or deadly weapons may not be possessed or carried by any person, including private security guards, unless that person is expressly exempt from the provisions of the statute. This legislative enactment is a valid exercise of the police power of the State of Nevada in furtherance of the legitimate state interests in public health, safety and crime control. As such, this statute is a reasonable regulation which does not offend the mandate of the Constitution of the State of Nevada that the citizen has an inalienable right to protect his person and property.

### **SECOND QUESTION PRESENTED**

Whether a privately employed security guard may be authorized to carry a type of weapon or device, the possession of which is otherwise declared unlawful by statute, where the sheriff of the appropriate county issues permits upon an application of each such person.

### **ANALYSIS OF THE SECOND QUESTION**

Although Section 202.350, contains a valid legislative regulation of certain dangerous and deadly weapons, the statute also provides for exemption from the statute in certain situations. In this regard, the statute provides in pertinent part:

3. *The provisions of subsection 1 do not apply to:*

(a) Sheriffs, constables, marshals, peace officers, special police officers, policemen, whether active or honorably retired, other duly appointed police officers or *persons having permission from the sheriff of the county as provided in subsection 4.*

(b) Any person summoned by any peace officer to assist in making arrests or preserving the peace while the person so summoned is actually engaged in assisting such officer.

(c) Members of the Armed Forces of the United States when on duty.

4. *The sheriff of any county may, upon written application by a resident of that county showing the reason or the purpose for which the concealed weapon is to be carried, grant permission to the applicant, authorizing a person to carry, in this state, the concealed weapon described in the permit. No permit may be granted to any person to carry a switchblade knife.*

5. For purposes of this section, "switchblade knife" means a spring-blade knife, snap-blade knife, or any other knife having the appearance of a pocket knife, any blade of which is 2 or more inches long and which can be released automatically by a flick of a

button, pressure on the handle, or other mechanical device, or is released by any type of mechanism.

NRS § 202.350(3)-(5). [Emphasis added.]

The exempting portion of the statute permits certain classifications of persons to possess or carry a type of weapon which is otherwise declared unlawful under the provisions of Section 202.350(1). Specifically, the following individuals are excepted from the statute: (1) particular types of law enforcement officers; (2) members of the active duty armed forces; (3) persons enlisted by a peace officer to assist in law enforcement activities, and; (4) persons having a permit from the sheriff of the affected county authorizing possession of the particular weapon involved. *See* NRS § 202.350(3)(a)-(c). Unless a private security guard independently qualifies under one of these exceptions, the status of an individual as a private security guard is not within the express exemptions of the statute. *See* NRS § 169.125 (peace officer defined).

Consequently, the principal method for a private security guard to lawfully possess or carry a weapon specified under Section 202.350(1), is for that security guard to obtain a permit pursuant to the statute. The language of the permitting provisions of Section 202.350, is primarily concerned with authorizing the possession or carrying of a concealed weapon. A concealed weapon, however, may be any dangerous or deadly weapon capable of being concealed, *see* NRS § 202.350(1)(b)(3), and the statute further mandates that none of the provisions, except those concerning a switchblade knife, are applicable to individuals having a permit under the statutes. NRS § 202.350(3)(a) and (4). In light of the fact that only a regulation reasonably related to furtherance of the state interest in public health, safety and controlling criminal activity can accommodate the constitutional mandate of a citizen's right to protect person and property, the permitting section of this statute must be construed to encompass any dangerous or deadly weapon delineated in Section 202.350(1) regardless of whether the person possessing or carrying the particular weapon concealed the weapon.

#### **CONCLUSION TO THE SECOND QUESTION PRESENTED**

A private security guard employed to protect private property does not, merely by reason of his status as a private security guard, have an absolute right under the Nevada Constitution to possess or carry a billy club or other weapon specified in Section 202.350. This individual, however, has a qualified right to possess, *see* NRS § 202.350(1)(a), or even carry concealed, *see id.* § 202.350(1)(b), one of the delineated weapons where the security guard qualifies within one of the exceptions contained in the statute. *See* NRS § 202.350(3)(a)-(c). The primary method by which the private security guard may be authorized to possess or carry one of the dangerous or deadly weapons described in Section 202.350(1), is by application for a permit from the sheriff of the affected county. NRS § 202.350(3)(a) and (4).

Under this permitting portion of the statute, the Nevada legislature has attempted to accommodate the legitimate regulatory concerns of the state as well as the prominence of personal property rights as recognized in the Nevada Constitution. Although other legislative schemes may have been available to the State of Nevada which would be more effective in regulating dangerous and deadly weapons, this statutory system does not patently offend the constitutional privileges accorded the citizenry of this state.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

By Dan R. Reaser, *Deputy Attorney General,*  
*Criminal Division*

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**OPINION NO. 82-16 Local Government Financing; Short-Term Financing; Voter Approval of General Obligations—Short-term financing approved by the executive director of the Department of Taxation or by the interim legislative committee on local governmental finance pursuant to [NRS 354.430](#) does not require voter approval pursuant to [NRS 350.020](#).**

July 12, 1982

Mr. Roy E. Nickson, *Executive Director, Department of Taxation, Capitol Complex, Carson City, Nevada 89710*

Dear Roy:

You have requested an opinion regarding the proper interpretation of [NRS 354.430](#) when read in conjunction with [NRS 350.020](#). In essence your inquiry is whether short-term financing approved by either the executive director of the department of taxation pursuant to [NRS 354.430](#)(1) or approved by the interim legislative committee on local governmental finance pursuant to [NRS 354.430](#)(3) is subject to approval by the electorate which, as specified in [NRS 350.020](#)(1), is a general prerequisite to a local government issuing or incurring general obligations. Our analysis follows:

**ANALYSIS**

[NRS 354.430](#) through [NRS 354.460](#) provide a specific statutory scheme which enables local governments to enter into short-term financing under certain controlled circumstances. A number of prerequisites must be fulfilled before the contemplated financing may occur. In brief, this procedure entails the following steps.

First, the governing body of the local government must, by a resolution unanimously adopted, specify that the public interest requires short-term financing and state the facts upon which that conclusion is based pursuant to [NRS 354.618](#). Next a copy of the resolution must be forwarded to the executive director of the department of taxation for approval or disapproval based upon the ability of the local government to repay the obligation except when the resolution proposes a special tax exempt from the limitation on taxes ad valorem pursuant to [NRS 354.430](#)(1). If such a special tax is proposed the executive director must recommend to the interim legislative committee on local governmental finance whether the resolution should be approved according to [NRS 354.430](#)(3). If this approval process is successfully completed [NRS 354.440](#)(1) provides, in part, that the local government then “*may issue*, as evidence thereof, negotiable notes or short-time negotiable bonds.” (Emphasis supplied.)

At this point, [NRS 350.020](#) must be considered, which states that a proposal to incur general obligations must be submitted to the electors of a municipality for approval prior to issuing debt instruments.

As a preliminary observation, a local government engaging in short-term financing may choose not to implement that financing through general obligations, and special obligations are expressly excluded from the required approval of the electorate under [NRS 350.020](#)(3). Due to the nature of short-term finance requirements, however, in ordinary circumstances it is likely that general obligations will be utilized to accomplish the financing.

If short-term financing is effected through general obligations, a determination must be made whether the restrictive and specific approval process for short-term financing supplants the requirement of approval by the electorate as specified in [NRS 350.020](#). It is the rule of statutory construction in Nevada that when general and specific statutes each address the same subject, specific provisions will prevail over the general provisions. *Sierra Life Insurance Co. v. Rottman*,

[95 Nev. 654](#) (1979). This rule of statutory construction is particularly applicable if the specific statute is enacted after the general one, which appears to be the case under the instant facts. Although each has been significantly amended, the genesis of [NRS 350.020](#) can be traced to a 1937 legislative enactment, while [NRS 354.440](#) can be first attributed to a 1953 enactment. Because no specific reference is included in the provisions of [NRS 354.440](#) to indicate that approval of the electorate for short-term financing need be sought, and because the prerequisites for approving short-term financing described above are highly specific and restrictive (requiring initially a *unanimous* vote upon the resolution by members of the governing body) it is permissible to conclude that the later enactment was intended to be an exception to the earlier rule. *See*: *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), 65 P.2d 133 (1937); *Nevada Tax Commission v. Boulin*, 38 Nevada 39, 144 P. 798 (1914).

An additional aid to statutory construction is the interpretation placed upon those statutes by the administrative officers and agencies charged with enforcing their provisions. Such interpretations have great weight in determining the proper operation of a statute. *See*: C. Sands, *Sutherland Statutory Construction* § 49.05 (1973). In the instant case, the administrative interpretation of [NRS 354.430](#) by the department of taxation during the years since its enactment has consistently resulted in the approval of short-term financing resolutions of local governing bodies without requiring a vote of the electorate pursuant to the general requirements of [NRS 350.020](#).

Public policy supports such a construction as well. The genesis of the short-term financing powers of local government was to permit local governments sufficient flexibility to meet unexpected or emergency needs of their citizens. In that context the time constraints needed for approval of financing at an election could seriously impair the ability of a local government to deal with emergency circumstances. Accordingly, [NRS 354.430](#) mandates that the executive director of the department of taxation shall “*as soon as is practicable \* \* \** approve or disapprove the resolution in writing. \* \* \*” (Emphasis supplied.) To impose the additional requirements of [NRS 350.020](#) upon the other necessary approvals for short-term financing would result in short-term financing being a more cumbersome and lengthy procedure than ordinary general obligation financing of local governments, a result seemingly contradictory to the needs underlying short-term financing procedures and policy and which would appear, as well, to contravene the likely intent of the legislature when enacting [NRS 354.430](#).

### CONCLUSION

It is the opinion of this office that local governments may utilize the provisions of [NRS 354.430 et seq.](#) for short-term financing without the additional approval requirements specified in [NRS 350.020](#).

Sincerely,

Richard H. Bryan, *Attorney General*

By Timothy Hay, *Chief Deputy Attorney General,*  
*Tax Division*

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**OPINION NO. 82-17 Preliminary Inquiries in the Parole/Probation Revocation Process—Due Process requires an informal preliminary determination of probable cause to hold a parolee or probationer for final revocation and a more formal revocation hearing to insure that revocation of parole/probation is based on verified facts. Under certain circumstances, a preliminary inquiry into certain matters prior to a formal revocation hearing is not necessary in order to consider such matters at the revocation hearing.**

August 26, 1982

Mr. Robert Calderone, *Chief, Department of Parole and Probation*, 1100 E. William Street,  
Carson City, Nevada 89710

Dear Mr. Calderone:

You have asked this office for an opinion on six questions respecting the due process rights available in parole/probation revocation proceedings in light of the recent codification in Nevada of the safeguards mandated by *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Your questions deal primarily with due process guarantees at the first stage of the revocation process—that is, the preliminary inquiry. Where appropriate, reference will be made to the second stage of the process, *i.e.* the revocation hearing, for purposes of explanation and clarification of responses.

### UNDERLYING FACTS

The United States Supreme Court addressed the issue of due process in parole revocation in *Morrissey v. Brewer*, 408 U.S. 471 (1972). The question presented to the court in that case asked in effect whether the nature of the interest of a parolee in his continued liberty is one within the contemplation of the liberty or property language of the Fourteenth Amendment. The court noted that, “[g]iven the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual in imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole[.] \* \* \* [however] \* \* \* the State has no interest in revoking parole without some informal procedural guarantees.” *Id.* at 483. The court stated further that although parole revocation does not call for the “full panoply of rights due a defendant” in a criminal proceeding, *Id.* at 480, because a parolee’s liberty involves significant due process values, termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. *Id.* at 484.

The parole revocation process is to be conducted in two phases. The first phase consists of a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. He may present relevant information and (absent security considerations) question adverse informants at his request. The hearing officer shall digest the evidence and information presented and “determine whether there is probable cause to hold the parolee for final decision of the parole board on revocation.” *Id.* at 485-487.

The second phase of the revocation process is the revocation hearing, which must be conducted reasonably soon after the parolee is taken into custody. “This hearing \* \* \* must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.” *Id.* at 488. Minimum due process requirements at the revocation hearing consist of:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and



(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* at 489.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the United States Supreme Court held that due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as *Morrissey* dictates in the case of a parolee. Further, the court held that the body conducting the hearings should decide in each individual case whether due process requires that an indigent probationer or parolee be represented by counsel.

The due process requirements mandated by *Morrissey* and *Gagnon* were codified by the Nevada Legislature and are delineated in [NRS 213.1511](#)-213.1517 and [NRS 176.216](#)-176.218.

Those statutes specifically provide in pertinent part:

[NRS 213.1511](#):

1. Before a parolee may be returned to the custody of the Nevada state prison for violation of a condition of his parole, an inquiry shall be conducted to determine whether there is probable cause to believe that he has committed acts that would constitute such a violation.

\* \* \*

3. Except in a case where the parolee is a fugitive, the inquiry shall be held at or reasonably near the place of the alleged violation or the arrest and as promptly as convenient after the arrest.

[NRS 213.1513](#):

1. The board of detaining authority shall give the arrested parolee advance notice of:

- (a) The place and time of the inquiry.
- (b) The purpose of the inquiry.
- (c) What parole violations have been alleged.

2. The inquiring officer shall allow the parolee to:

- (a) Appear and speak on his own behalf.
- (b) Obtain counsel.
- (c) Present any relevant letters or other documents and any person who can give relevant information.

(d) Confront and question any person who has given adverse information on which a revocation of his parole may be based, unless in the opinion of the inquiring officer the person would be subjected to a risk of harm by disclosure of his identity.

[NRS 213.1515](#):

1. Upon completion of the inquiry, the inquiring officer shall:

- (a) Make a written summary \* \* \*.
- (b) Determine whether there is probable cause to hold the parolee for a board hearing on parole revocation.

2. If the inquiring officer determines that there is probable cause, his determination is sufficient to warrant the parolee's continued detention and return to the Nevada state prison pending the board's hearing.

[NRS 213.1517](#):

1. Where the inquiring officer has determined that there is probable cause for a

hearing by the board, the chief parole and probation officer may, after consideration of the case and pending the next meeting of the board:

- (a) Release the arrested parolee again upon parole; or
- (b) Suspend his parole and return him to confinement.

\* \* \*

3. Any conviction for violating a federal, state or local law, except a minor traffic offense, which is committed while the prisoner is on parole constitutes probable cause for the purposes of subsection 1 and the hearing required therein need not be held.

[NRS 176.216:](#)

1. Before a probationer may be returned to the court for violation of a condition of his probation, an inquiry must be conducted to determine whether there is probable cause to believe that he has committed any act that would constitute such a violation.

\* \* \*

3. Except in a case where the probationer is a fugitive or is under supervision in another state, the inquiry must be held at or reasonably near the place of the alleged violation or the arrest \* \* \*.

4. Any conviction for violating a federal, state or local law, except a minor traffic offense, which is committed while the probationer is on probation constitutes probable cause for the purpose of this section and an inquiry need not be held.

[NRS 176.217:](#)

1. The board or detaining authority shall give the arrested probationer advance notice of:

- (a) The place and time of the inquiry.
- (b) The purpose of the inquiry.
- (c) What violations of probation have been alleged.

2. The inquiring officer shall allow the probationer to:

- (a) Appear and speak on his own behalf.
- (b) Obtain counsel.
- (c) Present any relevant letters or other documents and any person who can give relevant information.

(d) Confront and question any person who has given adverse information on which a revocation of his probation may be based, unless in the opinion of the inquiring officer the person would be subjected to a risk of harm by disclosure of his identity.

[NRS 176.218:](#)

1. Upon completion of the inquiry, the inquiring officer shall:

- (a) Make a written summary \* \* \*
- (b) Determine whether there is probable cause to hold the probationer for a court hearing on revocation.

2. If the inquiring officer determines that there is probable cause, his determination is sufficient to warrant the continued detention of the probationer pending the court's hearing.

**QUESTION ONE**

If a parolee/probationer is not arrested or detained on a parole/probation violation charge but rather is “summoned” to appear before the board/court for a revocation hearing, is a preliminary inquiry required?

### ANALYSIS

The principal policy underlying the procedural protections mandated by *Morrissey* and *Gagnon* is to assure informed, intelligent and just revocation decisions. The requirement of a two-stage procedure for parole and probation revocation (*i.e.*: a preliminary hearing to establish probable cause and a final hearing on the merits) is premised on the holding that: “the conditional freedom of a parolee is a liberty interest protected by the due process clause of the 14th Amendment which may not be terminated absent appropriate due process safeguards.” *Moody v. Daggett*, 429 U.S. 78, 85-86 (1976).

In *Morrissey* the court stated that the first stage of the revocation proceedings occurs “when the parolee is arrested and detained,” at which time due process requires that “some *minimal inquiry* be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after *arrest* while information is fresh and sources are available.” *Morrissey* at 485 (emphasis added). The second stage of the revocation process, the final revocation hearing, must also be conducted “within a reasonable time after the parolee is taken into *custody*.” *Id.* at 488 (emphasis added). In holding that the revocation hearing must be conducted within a reasonable time after the parolee is taken into custody, the court “established execution of the warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation.” *Moody, supra* at 87. In both *Morrissey* and *Gagnon* the respondents were held in custody until the revocation hearing. The apparent reason for requiring a preliminary inquiry was that the arrest and detention of the respondents pending final revocation proceedings amounted to an infringement of their liberty interests and the conditional liberty of a probationer or parolee cannot constitutionally be infringed without probable cause. Accordingly, where a parolee/probationer is not held in custody to await the final revocation hearing, there has been no loss of liberty, *Moody, supra* at 87, and the reason for requiring a preliminary hearing is eliminated. *United States v. Sciuto*, 531 F.2d 842 (7th Cir. 1976); *United States v. Tucker*, 524 F.2d 77 (5th Cir. 1975), *cert. denied* 424 U.S. 966 (1975); *United States v. Strada*, 503 F.2d 1081 (8th Cir. 1974); *Curtis v. State*, 370 N.E.2d 385 (Ind.Ct.App. 1978); *State v. Malbrough*, 615 P.2d 165 (Kan.Ct.App. 1980); *Howie v. Commonwealth*, 283 S.E.2d 197 (Va. 1981).

Statutory law in Nevada appears to support this conclusion. [NRS 213.1511](#) and [NRS 176.216](#) require that a probable cause inquiry be conducted before a parolee/probationer is returned to the custody of the Nevada State Prison or the court for revocation of his parole/probation. However, when addressing the revocation process, [NRS 213.151](#), [NRS 213.1511](#), [NRS 213.1513](#), [NRS 213.1515](#), [NRS 213.1517](#), [NRS 176.215](#), [NRS 176.216](#), [NRS 176.217](#) and [NRS 176.218](#) all make reference to the “arrested” parolee/probationer or his “continued detention.” Furthermore, [NRS 213.1515](#) and [NRS 176.218](#) state that the inquiring officer shall determine “whether there is probable cause to *hold* the parolee/probationer for a \* \* \* hearing on \* \* \* revocation.” (Emphasis added.) The clear implication is that the preliminary inquiry is mandated when a warrant or detainer has been lodged against the alleged violator. The resulting loss of liberty occasioned by the hold requires that a preliminary inquiry be conducted to justify the detention pending a final revocation hearing. However, where the parolee/probationer has not been detained in custody, the need for a preliminary inquiry is eliminated.

### CONCLUSION—QUESTION ONE

A preliminary inquiry is not required if a parolee/probationer is not arrested or detained on a parole/probation violation. Due process requires that an informal preliminary inquiry be conducted to determine whether probable cause exists to justify the loss of liberty occasioned by

arrest or detention of an alleged parole/probation violator pending final revocation proceedings. Where no liberty is lost, a preliminary inquiry as to probable cause to “hold” is not required.

### **QUESTION TWO**

Since a parolee/probationer is not entitled to a preliminary inquiry if he has been convicted of a new criminal offense, is it necessary once a subsequent conviction has been established to hold a preliminary inquiry hearing on attendant technical violations such as residence, employment or cooperation, in order for them to be considered at the final revocation hearing?

### **ANALYSIS OF QUESTION TWO**

The United States Supreme Court held in *Morrissey v. Brewer*, *supra*, that the purpose of the preliminary inquiry is “to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.” *Id.* at 485. In *Moody v. Daggett*, *supra*, the court noted that where the revocation is based upon a subsequent conviction, the preliminary inquiry is unnecessary because the conviction forms the basis for probable cause. The *Moody* rationale was codified by the Nevada legislature in [NRS 213.1517\(3\)](#) and [NRS 176.216\(4\)](#) which specifically provide that a conviction for violation of a law which is committed while a parolee/probationer is on parole/probation constitutes probable cause and a preliminary inquiry need not be held. Once probable cause to believe that a violation has occurred has been sufficiently established, this determination is sufficient to warrant continued detention of the violator pending final revocation proceedings. *Morrissey v. Brewer*, *supra*, *Moody v. Daggett*, *supra*, *Terry v. Rucker*, 649 F.2d 563 (9th Cir. 1981), *State v. McFarlin*, 610 P.2d 1054 (Ariz.Ct.App. 1980).

Because a subsequent conviction will justify continued detention pending final revocation, it is not necessary to hold a preliminary inquiry to establish probable cause to detain on attendant technical violations. It is necessary, however, that any and all violations upon which revocation may be based by properly noticed prior to the final revocation hearing. *Cross v. State*, 369 So.2d 685 (Fla.Dist.Ct.App. 1979). Accordingly, in *Champion v. Commonwealth, Board of Probation and Parole*, 399 A.2d 447 (Pa.Comm. Ct. 1979), the court held that where notice by the board alleged only “technical” parole violations, the defendant could not be revoked on the basis of “new criminal convictions” in spite of the fact that the parolee was aware of such convictions. Furthermore, if the only thing established at the final revocation hearing is that the defendant was convicted of a new criminal offense, reversal of that conviction would require reversal of the revocation based thereon as well. *Oksoktaruk v. State*, 619 P.2d 480 (Alaska 1980), *Judd v. State*, 402 So.2d 1279 (Fla.Dist.Ct.App. 1981), *People v. Tebedo*, 309 N.W.2d 250 (Mich.Ct.App. 1981). Subsequent reversal of a criminal conviction on which a revocation is based will not require reversal of the revocation, however, if testimony or the defendant’s admissions at the revocation hearing are sufficient to establish by a preponderance of the evidence that the defendant committed the offense. *People v. Tebedo*, *supra*.

The parolee/probationer has a due process right to receive notice of the charges on which his parole/probation may be revoked, and the state has an interest in charging any and all violations that allegedly occurred. Where a subsequent criminal conviction forms the basis of probable cause to hold for final revocation, a preliminary inquiry need not be held, even though additional technical violations may be alleged. Proper notice of the technical violations prior to the final hearing is sufficient to warrant their consideration for purposes of revocation.

### **CONCLUSION—QUESTION TWO**

Where technical violations are charged in addition to the criminal conviction, it is not necessary to hold a preliminary inquiry on the technical violations in order for them to be considered at the final revocation hearing as long as they are properly noticed. The criminal conviction establishes the probable cause necessary to justify detention pending final revocation

proceedings.

### QUESTION THREE

If the purpose of the preliminary inquiry hearing is to establish probable cause to *detain* the individual pending the formal revocation hearing, it is necessary at the preliminary inquiry hearing to review each and every charge against the offender, or can the hearing be halted at any point where the hearing officer determines probable cause to have been established on any one violation? If he can halt the hearing, can the remaining rule violations still be charged at the formal revocation hearing?

### ANALYSIS OF QUESTION THREE

The United States Supreme Court in *Morrissey v. Brewer*, *supra*, explained that the purpose of a preliminary inquiry is “to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.” *Id.* at 485. (Emphasis added.) Such a determination would be sufficient to warrant the parolee’s continued detention pending final revocation proceedings. Once probable cause is found on any one violation, detention on that one violation is justified. Although it is not necessary to hold a preliminary inquiry on all charges to be considered at a final revocation hearing, a violator may only be *detained* on those charges upon which there was a finding of probable cause.

This conclusion is supported by the case of *In re Winn*, 532 P.2d 144 (Cal. 1975), in which a parolee, charged with four counts of parole violation, was returned to prison without a preliminary inquiry on any of the counts. Following a revocation hearing at which he pled not guilty to all counts, he was found guilty of counts 1 and 4 (involving new convictions of crime) and of count 2 (a charge the subject of a criminal proceeding which had been dismissed). The court held that the petitioner was properly detained for a final revocation hearing on either count 1 or 4, because his guilt of the conduct charged in those counts had been determined adversely to him in independent judicial proceedings. Having determined that the detention was proper, the court concluded that the need for a preliminary inquiry on count 2 was eliminated. In explaining its holding, the court declared that:

Neither *Morrissey* nor \* \* \* requires the holding of prerevocation hearings on *all* charges to be considered at a final revocation hearing, and no impropriety occurs where there is either a prerevocation determination that there is probable cause to believe that at least one violation has occurred, or it appears as here that the parolee was, without prejudice, properly held for a formal revocation hearing as to at least one violation.

*Id.* at 146, 147. The court went on to note additionally in a footnote that the petitioner could not “complain of the detention in the absence of a prerevocation hearing because he suffered no prejudice thereby since he was properly held as to at least one of the charged violations.” *Id.* at 147, n. 2.

### CONCLUSION—QUESTION THREE

Once a determination is made that probable cause exists to believe that a parolee/probationer has committed acts that would constitute a violation of parole/probation, the purpose of the preliminary inquiry mandated by *Morrissey*, that is, to justify continued detention, has been satisfied. A preliminary inquiry as to additional violations is not required in order for those violations to be considered at the final revocation hearing, although detention pending that hearing may only be based on those charges upon which probable cause has been found. Consideration of additional charges at the final hearing is clearly proper as long as the parolee/probationer is put in timely notice that those charges may form the basis of revocation.



#### **QUESTION FOUR**

If a hearing officer reviews multiple charges against the offender and finds probable cause on some and not on others, can the charges for which no probable cause was found be adjudicated at the formal revocation hearing?

#### **ANALYSIS OF QUESTION FOUR**

Because the purpose of the preliminary inquiry is to determine whether probable cause exists to believe a violation of parole/probation has occurred and on such basis to *hold* for final revocation proceedings, a finding of probable cause on the basis of a criminal conviction or any one technical violation satisfies the dictates of *Morrissey* and Nevada statutory law respecting the preliminary stage of the revocation process thereby justifying detention. The lack of a probable cause finding as to each violation charged does not foreclose consideration of those charges at the final hearing, although as explained in the Analysis to Question Three above, detention pending the final hearing may not be based on charges not supported by a probable cause finding.

It is important to keep in mind that parole/probation revocation does not call for the full panoply of rights due a defendant in a criminal proceeding. *Morrissey, supra*, at 480. The principal policy underlying the procedural protections of *Morrissey* and *Gagnon* is to assure informed, intelligent and just revocation decisions and as long as *revocation* is not based on violations that have not been charged or have not been proven by a preponderance of the evidence at the formal revocation hearing, that policy has not been thwarted. *See Barron v. State*, 369 So.2d 669 (Fla. Dist. Ct. App. 1979).

#### **CONCLUSION—QUESTION FOUR**

It is not necessary that probable cause be established at the preliminary inquiry on each and every violation charged as long as it is established on at least one violation to justify any loss of liberty pending final revocation proceedings. Charges for which no probable cause was found at the preliminary inquiry may be adjudicated at the final revocation hearing even though detention pending that final hearing may not be based on those charges.

#### **QUESTION FIVE**

Do [NRS 176.217](#) and [NRS 213.1513](#) prohibit the use of all hearsay testimony at preliminary inquiries and revocation hearings? Both of those sections refer to a right of confrontation and cross-examination of witnesses who offer adverse information. Does the right of confrontation exist only with respect to those witnesses who have personally appeared at the hearing to give adverse information?

#### **ANALYSIS OF QUESTION FIVE**

Because revocation proceedings are summary and informal and not subject to the rules of evidence applicable in criminal trials, hearsay evidence is properly admissible. *See Reeves v. State*, 366 So.2d 1229 (Fla. Dist. Ct. App. 1979), *People v. Morgan*, 271 N.W.2d 233 (Mich. Ct. App. 1978). In considering a parole/probation revocation, the parole board/court is permitted to consider all relevant evidence, even if such evidence would be excluded in a court of law. *In Re Carroll*, 145 Cal. Rptr. 334 (App. Ct. 1978). While hearsay evidence is not categorically barred from revocation proceedings, due process requires, at a minimum, that a revocation be based upon “verified facts” so that “the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” *Morrissey, supra*, at 484.

The standard of proof required in revocation proceedings is met by evidence which reasonably satisfies the parole board/court that a violation has occurred. *Jenkins v. State*, 368 So.2d 329 (Ala. Crim. App. 1979), *State v. Turcotte*, 400 A.2d 957 (R.I. 1979). The reliability of the evidence presented is “determined by balancing the strength of the [parolee’s/] probationer’s

interest in confronting and cross-examining the primary sources of the information being used against him against the very practical difficulty of securing the live testimony of actual witnesses to his alleged violation or to his character while on [parole/]probation.” *Anaya v. State*, [96 Nev. 119](#), 123, 606 P.2d 156, 158 (1980).

At both the preliminary inquiry and final revocation hearing, a parolee/probationer is allowed to “[c]onfront and question any person who has given adverse information on which a revocation \* \* \* may be based, unless in the opinion of the inquiring officer the person would be subjected to a risk of harm by disclosure of his identity.” [NRS 176.217\(2\)\(d\)](#), [NRS 213.1513\(2\)\(d\)](#). If evidence is presented to establish a substantive violation, a parolee/probationer has an interest in questioning the source of that information and testing its reliability. Thus, *revocation* cannot be based solely on an arrest or probation report where the parolee/probationer is not permitted the opportunity to confront and cross-examine the author of the report and/or the party who has provided adverse information in the report.

Accordingly, the court held in *Hornback v. Warden*, [97 Nev. 98](#), 625 P.2d 83, 97 Nevada Advance Opinion 35 (1981), that the right of a parolee to confront and question his accusers was violated where no effort was made to procure attendance of the arresting officer at the revocation hearing. Although the arrest report was admitted in evidence and the parole officer testified that he spoke with the arresting officer, neither the parole board, the parolee, nor the court had any means of testing the accuracy or reliability of the facts recited in the report itself or the parole officer’s recollection of them.

The Nevada Supreme Court explained in *Anaya*, that the purpose for which the evidence is offered and the form of the evidence is “important in striking the due process balance.” In that case, the court held that the probationer’s due process right to confront and question his accusers was violated by the district court in admitting multiple hearsay testimony of his probation officer for the purpose of establishing a substantive violation of terms of his probation. At the probation revocation hearing, the probation officer testified as to the arrest report, but the report was not entered into evidence, the arresting officers did not testify, nor did the record contain any explanation for their absence. The court concluded that under these circumstances the state’s interest in admitting the multiple hearsay testimony rather than more reliable evidence was outweighed by the substantial liberty interest of the probationer.

More recently in *Hyler v. State*, 98 Nev. ...., 639 P.2d 560, 98 Nevada Advance Opinion 16 (1982), the court held that the use of a probation violation report as a basis for finding probable cause and subsequent revocation of probation, violated the probationer’s confrontation rights. The report was used without the probationer’s knowledge and the probation officer who authored the report did not testify at the preliminary inquiry.

The right of confrontation guaranteed by *Morrissey* and *Gagnon* and codified in [NRS 176.217\(2\)\(d\)](#) and [NRS 213.1513\(2\)\(d\)](#) is an absolute right. However, the right in and of itself does not foreclose the use of hearsay evidence. In fact, the flexibility and informality of the revocation process provides for the use of the conventional substitutes for live testimony, including affidavits, depositions and documentary evidence where appropriate. *Anaya*, 96 Nev. at 124, 606 P.2d at 159. *Morrissey*, *supra* at 489, *Gagnon*, *supra* at 783. The parolee/probationer has a due process right to confront any person who has given adverse information on which a revocation of his parole/probation may be based, whether that information is provided through live testimony or one of the substitutes therefor. However, “due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.” *Gagnon*, *supra* at 788.

The Nevada Supreme Court noted in *Anaya*, *supra*, that the practicality of obtaining primary evidence is one of the factors the board/court must consider in striking the due process balance on the propriety of admitting secondary evidence. *Id.*, 96 Nev. at 125, n. 2, 606 P.2d at 159, n. 2. The court went on to explain that:

Problems posed by the necessity of securing direct testimony from distant areas may be alleviated by the holding of the preliminary inquiry as closely as possible in time and place to the alleged violation. When the [parolee's/] probationer's right to cross examine those providing adverse information is scrupulously observed at this inquiry and an appropriate record is made, [there should be] little difficulty in using that record at the formal revocation hearing, when securing the live testimony of witnesses to the violation would be burdensome.

*Id.*

### **CONCLUSION—QUESTION FIVE**

[NRS 176.217](#) and [NRS 213.1513](#) do not prohibit the use of hearsay testimony at preliminary inquiries and revocation hearings. The admissibility of evidence at revocation proceedings is governed by a due process balancing standard, and hearsay evidence is clearly admissible as long as it is reliable.

Revocation based solely on hearsay, however, may seriously conflict with a parolee/probationer's due process right to confrontation of adverse witnesses. This right of confrontation exists as to any person who has given adverse information on which a revocation of parole/probation may be based, whether through live testimony or one of the substitutes therefor, unless the person would be subjected to a risk of harm by disclosure of his identity. Because of the impracticality of obtaining live testimony in particular cases, affidavits, depositions and documentary evidence may be appropriate substitutes in certain circumstances.

### **QUESTION SIX**

In the event a person is unduly denied a preliminary inquiry or he is denied some form of due process in the inquiry, which does not come to light until the final revocation hearing, and the latter is conducted in a pristine fashion, what is the remedy?

### **ANALYSIS OF QUESTION SIX**

Most courts that have dealt with errors in the revocation process focus on whether any prejudice has resulted. "Unless prejudice can be shown which affects the integrity of the final revocation hearing, [revocation] will not be reversed." *State v. Dawson*, 282 S.E.2d 284 (W.Va. 1981).

Generally, the failure to hold a preliminary inquiry or the failure to hold a timely preliminary inquiry, does not require reversal absent a showing of prejudice. *See e.g.* *Collins v. Turner*, 599 F.2d 657 (5th Cir. 1979), *People v. Knowles*, 362 N.E.2d 1087 (Ill.App.Ct. 1977); *Wilson v. State*, 403 N.E.2d 1104 (Ind.Ct.App. 1980); *People v. Blakely*, 233 N.W.2d 523 (Mich.Ct.App. 1975); *Ewing v. Wyrick*, 535 S.W.2d 442 (Mo. 1976); *Richardson v. New York State Board of Parole*, 341 N.Y.S.2d 825 (App.Div. 1973), *aff'd* 33 N.Y.2d 33, 347 N.Y.S.2d 179. The court explained in *Howie v. Commonwealth*, 283 S.E.2d 197, 200 (Va. 1981) that since the purpose of the preliminary inquiry is to determine if there is probable cause to detain a parolee or probationer, once a final revocation hearing is held, the need for a preliminary inquiry is obviated and its denial no longer has any relation to the parolee's/probationer's incarceration.

The lack of procedural safeguards during the first phase of the revocation process is also rendered moot by a full and fair final revocation hearing. An analogous situation to that presented by the two-stage revocation process in this regard exists with respect to the criminal process. In *Mayer v. Moeykens*, 494 F.2d 855 (2d Cir.) *cert. denied*, 417 U.S. 926 (1974), the defendant alleged in a petition for post-conviction relief that the "failure to afford him a probable cause hearing prior to his incarceration amounted to a deprivation of due process of law that must be redressed by the reversal of his conviction." *Id.*, 494 F.2d at 359. Noting that the defendant's incarceration was the result of his conviction rather than deficiencies at the preliminary stages of

detention, the court held that it could not “remedy, retrospectively, a possible denial of a ‘fundamental’ right which has no bearing on \* \* \* present incarceration.” *Id.* Analogously, an offender’s status after the final revocation hearing is a result of the finding of violations by the board/court, not the result of errors that may have occurred during the preliminary stages of the revocation process. *See Collins v. Turner, supra.* In order to obtain appropriate relief from an alleged deprivation of rights in the revocation process, the parolee/probationer must seek relief at the time the deprivation of rights is actually occurring. A final revocation hearing, adequate in all respects, guarantees the protections of *Morrissey* and *Gagnon*.

### CONCLUSION–QUESTION SIX

The denial of a preliminary inquiry or the denial of some form of due process at the preliminary inquiry is not grounds for reversal of revocation absent a showing of prejudice. A full and fair final revocation hearing will remedy any deficiencies that may have occurred in the preliminary stages of the revocation process.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

By Janet Beronio, *Deputy Attorney General,*  
*Criminal Division*

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**OPINION NO. 82-18 Labor Commissioner: Public Works–The State Labor Commissioner has jurisdiction over any public works project sponsored by a public body in this State, whether federally funded or not, under the provisions of Chapter 338 of the NRS.**

October 26, 1982

Mr. Edmond McGoldrick, *Nevada State Labor Commissioner,* Office of the Labor  
Commissioner, Capitol Complex, Carson City, Nevada 89710

Dear Mr. McGoldrick:

You have requested from this office an opinion regarding the provisions of [NRS Chapter 338](#) and how they apply to public works projects in this state which are federally funded.

### FACTS

There has been an increasing problem regarding public bodies who sponsor public works projects and believe that the State Labor Commissioner does not have jurisdiction over projects which are federally funded. As a result, the public bodies have not demanded that the contractors pay the state prevailing wage rate as specified in [NRS 338.020](#). In situations where contractors have not paid the prevailing wage rate, employees have filed claims with the State Labor Commissioner, in some cases even upon the recommendation of federal officials to whom they have complained. Since the public bodies sponsoring these projects often do not notify the State Labor Commissioner of the project pursuant to [NRS 338.013](#), the Labor Commissioner has only received notice through employees’ complaints.

### QUESTION

Do the provisions of [NRS 338.010](#) et seq. apply to public works projects within the State of Nevada which are federally funded, but which are awarded, or in any other way participated in,

by a public body within the State?

### ANALYSIS

Under the provisions of [NRS 338.010](#) the definition of “public work” reads as follows:

3. “Public Work” means any project for the new construction, repair or reconstruction of public buildings, public highways, public roads, public streets and alleys, public utilities paid for in whole or in part by public funds, publicly owned water mains and sewers, public parks and playgrounds, and all other publicly owned works and property whose cost as a whole exceeds \$4,000.

The definition of “public body” under the same statute is as follows:

2. “Public Body” means the state, county, city, town, village, school district or any public agency of this State or its political subdivisions sponsoring or financing a public work.

Based on the statutory definition of “public body,” a public agency of this state or any of its political subdivisions need only sponsor, not necessarily finance, a public works project to fall within the purview of [NRS Chapter 338](#). Once a public body sponsors a public works project, subject to Chapter 338, the State Labor Commissioner has jurisdiction over the project. [NRS 338.015](#). The term “sponsor” is defined in Webster’s Dictionary as “one who assumes responsibility for some other person or thing.” The meaning is broad and would encompass a public body which solicits bids, awards contracts, and pays for a project. For example, if the public body participates in a project, which is totally federally funded, by hiring the contractors to do the work, then it is deemed to sponsor the project and is subject to the public works laws of Nevada that are not inconsistent with any federal laws with which it must comply.

The State Department of Transportation often has highway projects which are substantially federally funded. These public works projects must comply with the prevailing wage rates of the Davis-Bacon Act. 40 U.S.C.A. § 7276a *et seq.* The department, however, also complies with Chapter 338 of the NRS to the extent it is compatible with the federal law. For example, the department takes the position that federal and state law governing their projects must be read in *pari materia*. When the state prevailing wage rates are higher than the federal rates, which is often the case, then the contract specifies that the contractor must pay the higher of the two rates. Officials of The Federal Highway Administration and the Wage and Hour Division of the Department of Labor are in agreement with this position, *e.g.* when the state rates are higher, the higher rates should be enforced.

There is nothing within the Davis-Bacon Act itself, nor in the case law, which states that the Federal Act preempts state laws applicable to public works projects sponsored by public entities in the state. 40 U.S.C.A. § 7276a *et seq.* However, the various federal agencies which enforce the Davis-Bacon Act’s prevailing wage rates on federal public works projects can only enforce the law to the limit of the federal rates. If, in fact, state rates are higher than the federal rates, the state would have to enforce any portion of the rates that are over and above the federal rate.

There are some differences between the federal and state laws which must be considered. For example, the Secretary of Labor may recognize “trainees” or “helpers” on public works projects, a category of worker which is not valid for purposes of the state statutes. *See generally* Attorney General’s Opinion (Nev.) 80-18, May 29, 1980. Therefore, the Labor Commissioner would have to defer to the federal law in cases where there may be a conflict. However, state law may supplement federal law in this area, such as in the case where the state wage rate is higher for a particular category of worker.

As a practical matter, the State Labor Commissioner’s Office may work out a joint



enforcement effort with what ever federal agency is overseeing a particular public works project to avoid confusion and duplication of effort. In addition, the State Labor Commissioner should give notice to the various public bodies who have not in the past adhered to Chapter 338 that they are in fact subject to this law.

### **CONCLUSION**

In view of the fact that the provisions of [NRS Chapter 338](#) clearly apply to any public works project sponsored by a public body of the State of Nevada, whether federally funded or not, and that the federal agencies have not prohibited the higher prevailing state wage rates from being enforced, the provisions of [NRS 338.010](#) *et seq.*, which among other things define the duties, responsibilities and jurisdiction of the State Labor Commissioner, apply to any such public works projects.

Sincerely,

Richard H. Bryan, *Attorney General*

By Pamela M. Bugge, *Deputy Attorney General*

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