

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1986

OPINION NO. 86-1 CRIMINAL LAW: Twelve-hour mandatory delay in admission to bail following arrest for domestic battery does not violate right to bail or due process clauses of Nevada Constitution.

CARSON CITY, January 15, 1986

NOEL WATERS, ESQ., *District Attorney*, 208 N. Carson Street, Carson City, Nevada 89701

DEAR MR. WATERS:

You have requested an opinion from this office concerning the constitutionality of section 178.484 of the Nevada Revised Statutes, as amended by chapter 659, section 3 of the 1985 Nevada Statutes. That amendment establishes a twelve hour delay in admission to bail following an arrest for domestic battery. You have asked whether the amendment violates the right to bail and due process clauses of the Nevada Constitution.

QUESTION ONE

Is the right to bail clause found in article 1, section 7 of the Nevada Constitution violated by the imposition of a mandatory twelve hour period during which an arrestee in a domestic battery case cannot be admitted to bail?

ANALYSIS

Section 178.484 states that a person arrested for a crime other than first degree murder must be admitted to bail, and a person arrested for first degree murder may be admitted to bail unless the court determines that proof of the offense is evident or the presumption great. The final subsection of the statute, the amendment added by the 1985 legislature, provides:

3. A person arrested for a battery upon his spouse, former spouse, a person to whom he is related by blood, a person with whom he is or was actually residing or with whom he has a child in common, his minor child or a minor child of that person must not be admitted to bail sooner than 12 hours after his arrest.

In essence, subsection 3 establishes a twelve hour "cooling off" period which every arrestee in a domestic battery case must spend in jail before release. The purpose behind the cooling off period, found in the amendment's legislative history, is the protection of victims of domestic batteries from further violence. In committee hearings, testimony was offered regarding the proven deterrent value of post arrest detention in domestic violence cases. Citing studies conducted in Minnesota, one of the bill's proponents testified that the incidence of repeated violence in domestic abuse cases is less where the offender spends some time in jail cooling off following arrest. *Assembly Bill 229: Hearings Before the Assembly Committee on Judiciary*, 63d Session of the Nevada Legislature (1985) (statement of Assemblyman John DuBois);

Assembly Bill 229: Hearings Before the Senate Committee on Judiciary, 63d Session of the Nevada Legislature (1985) (statement of Assemblyman John DuBois).

Section 178.484 is the legislative implementation of article 1, section 7 of the Nevada Constitution, which states: “[a]ll persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.” When the constitution was adopted in 1864, only capital offenses were designated as non-bailable. In 1980, section 7 was amended to include “murders punishable by life imprisonment without possibility of parole” as well. This amendment is irrelevant to our analysis here, and both classes of offenses are treated as capital offenses for purposes of this opinion.

Nevada case law construing article 1, section 7 establishes that all offenses are bailable as a matter of right. In non-capital cases, the right to bail is absolute and, in capital cases, bail is limited where proof of the crime is evident or the presumption great—a standard considerably more stringent than that used in the determination of probable cause for an arrest. *See In re Knast*, [96 Nev. 597](#), 614 P.2d 2 (1980); *Howard v. State*, [83 Nev. 48](#), 422 P.2d 538 (1967); *Ex parte Wheeler*, [81 Nev. 495](#), 406 P.2d 713 (1965); *State v. Teeter*, [65 Nev. 584](#), 200 P.2d 657 (1948). The legislature cannot limit the right to bail when implementing the provisions of article 1, section 7 by the inclusion of a non-capital offense as non-bailable. *St. Pierre v. Sheriff*, [90 Nev. 282](#), 286, 524 P.2d 1278, 1280 (1974).

We initially note the strong presumption favoring the constitutionality of a legislative enactment. *City of Reno v. County of Washoe*, [94 Nev. 327](#), 333-34, 580 P.2d 460, 464 (1978); *City of Las Vegas v. Ackerman*, [85 Nev. 493](#), 499, 457 P.2d 525, 530 (1969). If reasonably possible, a statute will be construed so as to avoid conflict with the constitution. *See Anaya v. State*, [96 Nev. 119](#), 123, 606 P.2d 156, 158 (1980). We believe that the 1985 amendment to section 178.484 is capable of such a construction, since it imposes only a short delay in admission to bail rather than an outright denial and, therefore, conclude that the right to bail clause of the Nevada Constitution is not violated by its enactment.

Various Nevada statutes allow temporary detainment for up to two days of intoxicated or mentally ill persons thought to pose a threat to themselves or others. *See NRS 433A.150-.160; NRS 458.270*. While these statutes are admittedly civil in nature, the fact that they allow for preventive detention of individuals who present a danger to the public safety supports the validity of such detention in the present context. If protection of the public safety is sufficient reason to hold an individual under a civil commitment statute for forty-eight hours, the protection of the particular victims of a crime from additional violence is a sufficient reason to delay admission to bail for a short time. This conclusion is further supported by section 171.178 of the Nevada Revised Statutes, which mandates that an arrested person be brought before a magistrate “without unnecessary delay” following arrest. While the statute does not define unnecessary delay in terms of a specific number of hours, it contains a seventy-two hour “trigger” mandating an inquiry into the reasons behind the delay. Recognizing that seventy-two hours does not necessarily equate with unnecessary delay, we nevertheless believe that the period of detention authorized by section 171.178 easily encompasses the twelve hour delay authorized by 178.484(3).

We are aware that states with constitutional bail provisions that are substantially similar to Nevada’s have struck down statutes denying bail to offenders solely on the basis of public safety.

See Martin v. State, 517 P.2d 1389 (Alaska 1974); *In re Underwood*, 508 P.2d 721 (Cal. 1973); *Petition of Humphrey*, 601 P.2d 103 (Okla. 1979); *Commonwealth v. Mecier*, 388 A.2d 435 (Vt. 1978); *State v. Pray*, 346 A.2d 227 (Vt. 1975). The statutes in these cases differ from section 178.484(3) in that they allowed for a total denial of bail. If the statute in question here provided for the total denial of bail in domestic battery cases, rather than a twelve hour delay, we would not hesitate to follow the reasoning and rule of these cases.

Even though we feel the question is close, in light of the minimal infringement presented here and the strong presumption favoring constitutionality, we do not feel compelled to conclude that section 178.484(3) violates the right to bail clause of the Nevada Constitution.

QUESTION TWO

Does the twelve hour post arrest detention required of all individuals accused of domestic battery constitute a deprivation of liberty without due process of law, in violation of article 1, section 8 of the Nevada Constitution?

ANALYSIS

Article 1, section 8 of the Nevada Constitution states in relevant part that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law. . . .” As any due process inquiry under Nevada law must satisfy federal constitutional standards as well, it is to federal case law that we look for the answer.

The guarantees of due process are triggered by a governmental deprivation of a constitutionally protected interest. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976). The pretrial liberty interest implicated in the twelve hour delay in admission to bail imposed by section 178.484(3) is such a constitutionally protected interest, *see Gerstein V. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863 (1975), so as to bring due process considerations into play.

The concept of due process requires notice and an opportunity to be heard prior to deprivation of the protected interest. *Mathews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. at 902. This rule is not absolute, however, as “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). Determining the protection mandated by a specific situation involves the weighing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335, 96 S.Ct. at 903 (citations omitted).

The private interest at stake here is the accused’s pretrial liberty. While the significance of this interest cannot be doubted, it is important to recognize that the infringement imposed on the accused’s liberty by section 178.484(3) is a temporary one, strictly limited in time.

The second factor to be weighted into the balance is the risk of erroneous deprivation using existing procedures. Chapter 659, section 1 of the 1985 Statutes of Nevada, codified as section 171.137, requires that a peace officer make an arrest when he has probable cause to believe that the person arrested has committed a battery upon a domestic associate within the preceding four hours, unless mitigating circumstances exist. In every domestic battery case, whether or not an arrest is made, a written report is required. Where no arrest is made, the report must include the mitigating circumstances that prevented it. Thus, under the procedural safeguards provided, the decision to arrest is made only where the officer reasonably believes that a domestic battery has occurred within the preceding four hours, that the person arrested is the perpetrator of the battery, and that no circumstances exist which would mitigate the crime. A written report of every domestic battery case is required, detailing either the circumstances of the arrest or the factors which were sufficient to mitigate the offense and prevent an arrest.

Once the decision to arrest has been made, the accused comes within the proscription of section 178.484(3), based on the legislative finding that individuals arrested for domestic battery pose a greater danger to their victims if not required to spend some time in jail cooling off following arrest. In this context, we note that the United States Supreme Court has sanctioned outright seizure of property interests in certain limited situations.

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes v. Shevin, 407 U.S. 67, 91, 92 S.Ct. 1983, 2000 (1961). In some cases, these same considerations may be applicable to deprivations of other kinds of interests. *Id.* at 91, n.23, 92 S.Ct. at 1999-2000, n. 23.

The final factor to be considered when analyzing the amount of due process required by a given situation is the government interest involved. The state interest promoted by section 178.484(3) is the safety and welfare of its citizens, specifically domestic abuse victims. The validity of this interest is indisputable. “The legitimate and compelling state interest in protecting the community from crime cannot be doubted.” *Schall v. Martin*, ___ U.S. ___, 104 S.Ct. 2403, 2410 (1984).

Upon balancing these factors as required by *Mathews v. Eldridge*, *supra*, and being ever mindful of the flexible nature of due process, we conclude that the government interest in protecting abuse victims and the procedural safeguards afforded are sufficient to outweigh the private liberty interest affected by section 178.484(3). A compelling government interest can justify serious restrictions on a person’s liberty, *see Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043 (1983); *Youngberg v. Romero*, 457 U.S. 307, 102 S.Ct. 2452 (1972), and therefore can certainly be said to justify the temporary and limited restriction at issue here. As to the procedural safeguards provided, we believe they are sufficiently fair and reliable to protect against wrongful deprivation. Additionally, the considerations which can justify seizure of property without a prior hearing are all present in this situation: the deprivation is necessary to secure an important interest in the safety of domestic abuse victims; there is a need for prompt action based on the legislative determination that jail time following arrest to cool off significantly deters further domestic violence; and the deprivation is caused by a government official who has determined under the applicable statutory standards that the action taken is necessary and justified in each particular case. By analogy, we conclude that, although the question again is close, these considerations are sufficient to uphold the very limited deprivation of liberty under section 178.484(3) without a prior opportunity to be heard.

Decisions by state courts reviewing due process challenges to ex parte protection orders in domestic abuse cases lend support to this conclusion. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982); *Marquette v. Marquette*, 686 P.2d 990 (Okla.Ct.App. 1984); *Boyle v. Boyle*, 12 Pa.D.&C.3d 767 (1979). These cases hold that the state interest in protecting domestic abuse victims sufficiently outweighs the private liberty and property interests involved in custody of one’s children and access to one’s home to justify an ex parte deprivation without a prior hearing.

CONCLUSION

Section 178.484(3) of the Nevada Revised Statutes, which imposes a twelve hour “cooling off” period before an individual arrested for domestic battery can be admitted to bail, does not violate the right to bail clause of the Nevada Constitution since it merely delays admission to bail

for a brief period of time. Nor does it violate article 1, section 8 of the Nevada Constitution by depriving an individual of liberty without due process of law.

Sincerely,

BRIAN MCKAY, *Attorney General*
By MELANIE FOSTER, *Deputy Attorney General*,
Criminal Division

OPINION NO. 86-2 ELECTIONS: FILING FEES FOR GENERAL IMPROVEMENT DISTRICT OFFICES. Candidates for trustee of a general improvement district are candidates for district office. *See* NRS ' 293.193 (1985).

CARSON CITY, January 22, 1986

THE HONORABLE WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Complex, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

You have requested reconsideration of Nevada Attorney General Opinion No. 200 (February 24, 1976), Question One, regarding the filing fee for declaring candidacy for the office of trustee of a general improvement district.

In that opinion this office concluded, in part, that “candidates for the position of general improvement district trustee do not have to pay a filing fee when filing their declarations of candidacy, regardless of whether the trustees receive compensation for their services or not.” This conclusion was based, in part, upon the statement that “under [NRS 318.050](#), the boundaries of a general improvement district must be no larger than the boundaries of the county which it serves.” This statement is in error; therefore, we hereby reverse the conclusion of Question One of Nevada Attorney General Opinion No. 200 (February 24, 1976).

QUESTION

What, if any, filing fee should accompany a declaration of candidacy for the office of trustee of a general improvement district?

ANALYSIS

[NRS 293.193](#)(1) provides for the following candidates filing fees:

Fees as listed in this section for filing declarations of candidacy or acceptances of candidacy shall be paid to the filing officer by cash, cashier’s check or certified check.

United States Senator	\$250
Representative in Congress	150
Governor	150
Justice of the supreme court	150
Any state office, other than governor or justice of the supreme court	100
Any district office	75
Any county office other than a trustee of a	

school district	40
State senator	30
Assemblyman	15
Trustee of a county school district	15
Justice of the peace, constable or other town or township office	10

The legislature has declared a general improvement district to be a body corporate and politic and a quasi-municipal corporation. [NRS 318.015\(1\)](#). It is not, therefore, part of a county, town or township, which are political subdivisions in their own right. The question arises, is a general improvement district a “district office” pursuant to [NRS 293.193\(1\)](#).

Chapter 293 of the Nevada Revised Statutes does not define “district.” Consulting Black’s Law Dictionary, 4th ed., “district” is defined as “[o]ne of the portions into which an entire state or country, county, municipality or other political subdivision or geographical territory is divided, for judicial, political or administrative purposes” and cites *State ex rel. Schur v. Payne*, [57 Nev. 286](#), 63 P.2d 921 (1937).

State ex rel. Schur v. Payne, supra, dealt with the issue of a candidate’s eligibility for the office of justice of the peace of Nelson Township. Although the candidate had been a resident and elector of Clark County for seven years, he did not reside in Nelson Township at the time of tendering his declaration and acceptance of candidacy. The Nevada Supreme Court was called upon to construe the use of the word “district” in section one of article 2 of the state constitution.

The court held that “the framers of the constitution did not intend the word ‘district’ as used in said constitutional provision, to mean ‘township,’ or to be construed as including ‘township’ within its meaning. . . .” *Id.* at 297. In dicta, the court in *Payne* stated that “[t]he order in which the words ‘state,’ ‘district,’ and ‘county’ are placed, while by no means conclusive, is some indication that ‘district’ was not intended to include any subdivision of less extent than a county.”

Id. at 299. However, the court made it clear that it was not deciding “whether the word ‘district’ . . . may in a particular case mean a subdivision or district of less extent than a county.” *Id.* at 300.

General improvement districts may be of greater or lesser extent than a county as far as geographical territory included within the district. [NRS 318.050](#). We feel that the emphasis placed on the geographical extent of the general improvement district is responsible for the erroneous conclusion of Question One of Nevada Attorney General Opinion No. 200 (February 24, 1976). Instead, we should follow traditional rules of statutory construction in interpreting the meaning of a statute. If a statute is clear on its face, we cannot go beyond the language of the statute in determining the legislature’s intent. *Robert E. v. Justice Court*, [99 Nev. 443](#), 664 P.2d 957 (1983).

Looking at the plain language of [NRS 293.193\(1\)](#), the term “district” is used expressly in prescribing a \$75 filing fee for a candidate seeking “[a]ny district office.” Again, the legislature expressly used the term “district” in the name “general improvement district.” Since 1876, the Nevada Supreme Court has held that where the language of a statute is “clear, plain, simple, unambiguous, . . . the legislature must be understood to mean just what it has plainly and explicitly expressed. . . .” *Oddfellows Bank vs. Quillen*, [11 Nev. 109](#) (1876).

Case law cited in *State ex rel. v. Payne*, supra, also supports constructing “district” as including general improvement district. The Nevada Supreme Court in *Payne*, supra, cited *State v. O’Brien*, 90 P. 514, 518 (Mont. 1907), which held that the office of commissioner of a park district was a district office. The court in *Payne* also cited *Olive v. State*, 7 N.W. 444, 446 (Neb. 1880) for the following proposition:

In its ordinary meaning the word ‘district’ is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes, and may refer either to a congressional,

judicial, senatorial, representative, school, or road district, depending always upon the connection in which it is used.

This proposition supports the conclusion that a general improvement district should be included within the definition of a “district” since general improvement districts are subdivisions into which a state is divided for the purpose of serving a public use that will “promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and the State of Nevada.” [NRS 318.015](#)(1).

CONCLUSION

Candidates for trustee of a general improvement district are candidates for a district office. [NRS 293.193](#) requires that candidates for any district office pay a filing fee of \$75.00, unless the holder of a particular district office receives no compensation.

Sincerely,

BRIAN MCKAY, *Attorney General*
By JENNIFER STERN, *Deputy Attorney General*

OPINION NO. 86-3 TAXATION—VETERANS’ EXEMPTION: That portion of [NRS 361.090](#)(1)(a) which grants a tax exemption to veterans who were residents of Nevada for more than 3 years before December 31, 1963, is unconstitutional. The remainder of the statute is still constitutional.

CARSON CITY, January 24, 1986

THOMAS F. RILEY, ESQUIRE, *Chief Deputy District Attorney*, Washoe County District Attorney’s Office, Post Office Box 11130, Reno, Nevada 89520

DEAR MR. RILEY:

You have requested the opinion of the attorney general regarding the effect of the recent United States Supreme Court decision in *Hooper v. Bernalillo County Assessor*, 472 U.S. _____, 105 S.Ct. 2862 (1985) on the veterans’ property tax exemption found in [NRS 361.090](#). It is your opinion that *Hooper v. Bernalillo*, supra, renders unconstitutional that portion of [NRS 361.090](#)(1)(a) which grants a preferential tax exemption to veterans who were Nevada residents for a period of more than three years prior to December 31, 1963. It is further your opinion that the provision is severable from the remainder of the statute, under other NRS provisions and rulings of the Nevada Supreme Court, and should, therefore, be interpreted as though the unconstitutional portion were excised from the statute.

QUESTIONS PRESENTED

(1) Is that portion of [NRS 361.090](#)(1)(a) which grants a partial property tax exemption to qualifying veterans who were residents of Nevada for a period of more than three years before December 31, 1963, constitutionally invalid under the equal protection clause of the fourteenth amendment to the U.S. Constitution as recently interpreted in *Hooper v. Bernalillo* because it denies a similar benefit to otherwise qualifying veterans who were not residents of Nevada during that period but who later acquired residency?

(2) If so, is that unconstitutional portion of the statute severable from the other conditions precedent to obtaining an exemption under [NRS 361.090](#) such that those conditions remain valid?

APPLICABLE STATUTES

[NRS 361.090](#), the veterans' exemptions statute, provides, in pertinent part:

1. The property, to the extent of \$1,000 assessed valuation, of any actual bona fide resident of the State of Nevada who:

(a) Was such a resident for a period of more than three years before December 31, 1963, or who was such a resident at the time of his or her entry into the Armed Forces of the United States, who has served a minimum of ninety days on active duty, who was assigned to active duty at some time between April 21, 1898, and June 15, 1903, or between April 6, 1917, and November 11, 1918, or between December 7, 1941, and December 31, 1946, or between June 26, 1950, and January 31, 1955; or

(b) Was such a resident at the time of his or her entry into the Armed Forces of the United States, who has served a minimum of ninety continuous days on active duty none of which was for training purposes, who was assigned to active duty at some time between January 1, 1961, and May 7, 1975, and who received upon severance from service, an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or who, having so served, is still serving in the Armed Forces of the United States, is exempt from taxation.

2. For the purpose of this section the first \$1,000 assessed valuation of property in which such person has any interest shall be deemed the property of that person.

3. The exemption may be allowed only to a claimant who files an affidavit annually, on or before August 1 of the year preceding the year for which the tax is levied, for the purpose of being exempt on the secured tax roll, but the affidavit may be filed at any time by a person claiming exemption from taxation on personal property.

...
[NRS 361.040](#) provides:

"Resident" means a person who has established a residence in the State of Nevada, and has actually resided in this state for at least 6 months.

ANALYSIS

In *Hooper v. Bernalillo County Assessor*, supra, the Supreme Court of the United States held that a New Mexico statute which granted a tax exemption only to those veterans who had been residents in that state before May 8, 1976, violated the fourteenth amendment equal protection rights of those veterans who had established residency in the state after that date.

[NRS 361.090](#)(1)(a) grants a property tax exemption only to veterans who were Nevada residents for more than three years prior to December 31, 1963, or to veterans who were residents at the time of their entry into the Armed Forces and who served on active duty during certain designated periods of armed conflict. In other words, a veteran in Nevada will only be allowed to claim the property tax exemption if he fulfills one of these two residency requirements. The *Hooper* decision appears to invalidate the first of these requirements, i.e., that which affords preferential treatment to "established" veterans as opposed to newcomers. In so doing, the court stated:

The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after [a specific date]. (citations omitted). . . . *Zobel* made clear that the Constitution will not tolerate a state benefit program that "creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide

residents, based on how long they have been in the State.” 457 U.S., at 59. Neither the Equal Protection Clause, nor this Court’s precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit.

Hooper v. Bernalillo County Assessor, supra, at 2869.

The court considered two justifications asserted for the distinction made by the veterans’ tax exemption statute, i.e., that the exemption encourages veterans to settle in the state and that it serves as an expression of the state’s appreciation to its own citizens for honorable military service. With regard to the former, the Court has held that the distinction the statute made between veterans who established residence before certain dates and those veterans who arrived in the state thereafter bore no rational relationship to encouraging veterans to move to the state. Citing *Zobel v. Williams*, 457 U.S. 55 (1982), the court stated, “[t]he separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay.” *Hooper v. Bernalillo County Assessor*, supra, at 2867. The court also found that the second purpose of the statute, i.e., rewarding veterans who resided in the state before a certain date for their military service, was not rationally served by a statute which was not written to require any connection between the veteran’s prior residence and military service.

A review of the legislative history of Nevada’s statute reveals that no specific purposes were delineated by the legislature when passing the veterans’ tax exemption. The Nevada Supreme Court held long ago that when ascertaining the purposes or intention of the legislature in enacting a statute courts must first resort to the words of the statute and then to the mischiefs the statute was intended to suppress or the benefits to be attained. *Maynard v. Johnson*, [2 Nev. 25](#), reversing [2 Nev. 16](#) on rehearing (1866), cited, *State ex rel. Jones v. Mack*, [23 Nev. 359, at 367](#), 47 P. 763 (1897), *State ex rel. Bartlett v. Brodigan*, [37 Nev. 245, at 255](#), 141 P. 988 (1914), *Porch v. Patterson*, [39 Nev. 251, at 262](#), 156 P. 439 (1916). [NRS 361.090\(1\)\(a\)](#), in the same manner as New Mexico’s statute, grants a preferential exemption to veterans who were residents of Nevada for a period of more than three years before December 31, 1963. From the language of the statute, it is a simple matter to infer that the legislature intended, as it has been asserted did New Mexico’s legislature, to encourage veterans to settle in Nevada and to express the state’s appreciation to its own citizens for honorable military service. As in *Hooper*, the Supreme Court would likely find these justifications to be ill-served by Nevada’s veterans’ tax exemption statute. Accordingly, Nevada’s veterans’ tax exemption statute would probably be held to violate the guarantees of the equal protection clause of the fourteenth amendment as interpreted by the United States Supreme Court in *Hooper v. Bernalillo County Assessor*.

The question next is, if the invalid provision of the statute were excised from it, would the remaining portions of the statute still be valid. In other words, once the requirement that a veteran be a resident of Nevada for more than three years before December 31, 1963, was severed from the statute, would the legislature have intended the exemption be granted only to those veterans who were residents at the time of their entry into military service and who have fulfilled the remaining conditions precedent established by the statute. The answer to this question is found in the Nevada Revised Statutes and case law regarding the severability of statutes.

[NRS 0.020\(1\)](#) provides, in pertinent part:

If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end to provisions of NRS are declared to be severable.

Further, our Supreme Court has long held that if a law is constitutional in part and unconstitutional in part, the unobjectionable portion may stand, unless the whole object and effect of the law is destroyed. *State v. Eastabrook*, [3 Nev. 173](#) (1867), cited, *Evans v. Job*, [8 Nev. 322, at 342](#) (1873), *Turner v. Fish*, [19 Nev. 295, at 296](#), 9 P. 884 (1886), *State ex rel. Dunn v. Board of Commissioners*, [21 Nev. 235, at 240](#), 29 P. 974 (1892), *State ex rel. Keith v. Westerfield*, [23 Nev. 468, at 474](#), 49 Pac. 119 (1897), *State ex rel. Abelman v. Douglass*, [46 Nev. 121, at 125](#), 208 Pac. 422 (1922); see also *State ex rel. Rostenstock v. Swift*, [11 Nev. 128](#) (1876) (unconstitutional portion of statute does not affect valid portions unless they are “inseparably connected” in a manner that it can be presumed the legislature would not have passed one portion without the other). Similar holdings are found in more recent cases. See *Spears v. Spears*, [95 Nev. 416](#), 596 P.2d 210 (1979); *Desert Chrysler Plymouth, Inc. v. Chrysler Corp.*, [95 Nev. 640](#), 600 P.2d 1189 (1979); *Morris v. Board of Regents*, [97 Nev. 112](#), 625 P.2d 562 (1981).

The unconstitutional portion of [NRS 361.090](#) is separated from the balance of the statute (including the other residency requirement) by the conjunction “or,” indicating the legislative intent that the unconstitutional portion is not inseparably connected to the remainder of the statute. (“Or” is defined in Webster’s New Twentieth Century Dictionary 1257 (2nd ed. 1983) as a coordinating conjunction introducing an alternative, specifically, introducing the second of two choices.) Accordingly, the requirement that a veteran be a resident of Nevada for more than three years before the given date could be judicially excised from the statute as being unconstitutional, leaving eligible only those veterans who meet the “time of entry into service” residency requirement.

The possibility exists that the second residency requirement will also soon be held unconstitutional. Although not directly ruling on the issue in *Hooper*, Chief Justice Burger, speaking for the majority, inferred that a statute which conditions eligibility for the exemption upon residence at the time of entry into the service may also be unconstitutional. The U.S. Court of Appeals for the Second Circuit has already ruled that such a statute could not pass muster under the equal protection clause in light of the Supreme Court’s holding in *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309 (1982). The Second Circuit ruling in *Soto-Lopez v. New York City Civil Service Commission*, 775 Fed.2d 266 (2nd Cir. 1985) has been appealed to the U.S. Supreme Court and was argued on January 15, 1986. A decision is expected in the spring.

It should be noted that the *Hooper* decision did not affect the validity of statutory requirements that a person serve on active duty in the Armed Forces for a minimum time between specific dates. Accordingly, the dates and times specified in [NRS 361.090](#) remain valid to condition qualifying for the exemption. Additionally, that statute’s requirement for an honorable discharge or certificate of satisfactory service remains a valid condition precedent to obtaining the exemption. It should further be noted that the disabled veterans’ exemption, [NRS 361.091](#), does not contain a residency requirement and is unaffected by the *Hooper* decision.

CONCLUSION

The provision of [NRS 361.090\(1\)\(a\)](#) which grants a preferential tax exemption to veterans who were Nevada residents for a period of more than three years before December 31, 1963, is unconstitutional in light of the United States Supreme Court’s recent decision in *Hooper v. Bernalillo County Assessor*, supra. That provision is not inseparably connected to other parts of the statute and is therefore severable from the remainder of the statute under [NRS 0.020](#) and rulings of the Nevada Supreme Court. [NRS 361.090](#) should be interpreted and applied as though the unconstitutional portion were excised from the statute. All other conditions for obtaining the remaining veterans’ tax exemption, as well as the exemption itself, remain valid.

Very truly yours,

BRIAN MCKAY, *Attorney General*
By ILLYSSA I. FOGEL, *Deputy Attorney General*

The tax is imposed “at the rate of fifty-five cents for each \$500.00 of *value*. . . .” emphasis added. “Value” is defined as the full consideration paid or to be paid “excluding the amount of any liens *assumed*.” (emphasis added). Thus, the legislature has unequivocally specified that in order to be deducted from the consideration used in computing “value,” a lien must be assumed.

While it is true that the tax is imposed only “when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon [whether assumed or unassumed] at the time of sale, exceeds \$100.00,” this does not contradict the legislature’s specification that only assumed liens are deducted from consideration when “value” is computed. Nor, does the legislature’s proposed form for real property transfer tax, contained in [NRS 375.050\(1\)](#), contradict its clearly stated intent that only assumed liens are deductible. That form would be clearer if the language next to box two read as follows: “Computed on full value less liens and encumbrances *assumed and* remaining thereon at time of transfer.” However, the legislature required only that the information be reported in “substantially” the form suggested in [NRS 375.050\(1\)](#). The form should be interpreted in light of the legislature’s previously stated intent that only assumed liens are deductible. Thus, where the only liens on transferred property are unassumed, tax should be paid on the full value of the property conveyed, and the first box should be checked.

This analysis is consistent with [NAC 375.150](#), which provides, in part, as follows:

Examples of methods of determining value or tax base.

The following examples are given to illustrate methods of determining value or the tax base on which to compute the tax:

...

5. For a full consideration of \$50,000.00, A conveys to B land on which there is an encumbrance of \$10,000.00 at the time of sale. At time of sale, A signs a contract agreeing to pay off the encumbrance at a later date. The deed of conveyance from A to B is subject to stamp tax on \$50,000.00.

CONCLUSION

In applying [NRS ch. 375](#) real property transfer tax, a transferee is *not* entitled to a credit on the purchase price for the amount of an existing mortgage not being assumed by the purchaser.

Sincerely yours,

BRIAN, MCKAY, *Attorney General*

By MICHAEL J. DOUGHERTY, *Deputy Attorney General*

OPINION NO. 86-5 MUNICIPAL CORPORATIONS: A housing authority is a Apolitical subdivision” within meaning of sovereign immunity waiver statutes. [NRS 41.0305-41.039](#).

CARSON CITY, February 10, 1986

RULON A. EARL, ESQ., Earl & Earl, 302 East Carson, Suite 802, Las Vegas, Nevada 89101

DEAR MR. EARL:

You have sought our advice in your capacity as the attorney for the Housing Authority of the City of Las Vegas.

QUESTION

Is a housing authority a “political subdivision” within the meaning of Nevada Revised Statutes sections 41.0305 to 41.039, inclusive?

ANALYSIS

You have informed us that the Housing Authority of the City of Las Vegas was created by resolution dated June 6, 1947, passed by the governing body of the City of Las Vegas. The resolution of necessity was passed in accord with the Housing Authorities Law of 1947. See [NRS 315.140](#) to [315.780](#), inclusive. Housing authorities created in accord with the provisions of this law are declared to be public corporations and municipal corporations. See [NRS 315.170](#), [315.320](#) and 315.420. See also *McLaughlin v. Housing Authority*, [68 Nev. 84](#), 92.93, 227 P.2d 206 (1951).

Nevada Revised Statutes sections 41.0305 to 41.039, inclusive, provide for the qualified waiver of sovereign immunity on the part of the State of Nevada and its political subdivisions. The term “political subdivision” is defined in Nevada Revised Statutes section 41.0305. That section provides:

As used in [NRS 41.031](#) to [41.039](#), inclusive, the term ‘political subdivision’ includes a fire district, irrigation district, school district and other special district which performs a governmental function, even though it does not exercise general governmental powers.

Your concern is whether the definition just quoted is sufficiently broad to include a housing authority such as your client.

Traditionally Nevada courts have distinguished between a public quasi-corporation such as a county and a municipal corporation such as an incorporated city. A quasi-corporation has been defined as an involuntary political or civil division of the state and the term “political subdivision” has traditionally been used in conjunction with these public quasi-corporations as opposed to municipal corporations. See *Schweiss v. First Jud. Dist. Court*, [23 Nev. 226](#), 231, 45 P. 289 (1896). However, other court decisions construing Nevada Revised Statutes sections 41.0305 to 41.039, inclusive, indicate to us that the term “political subdivision,” as used in that portion of chapter 41 of the Nevada Revised Statutes, is not to be understood in the restrictive sense set out *Schweiss v. First Jud. Dist. Court*, supra.

Since the enactment of the provisions contained in Nevada Revised Statutes sections 41.0305 to 41.039, inclusive, our state supreme court has always treated these statutory provisions as being applicable to municipal corporations. See *Harrigan v. City of Reno*, [86 Nev. 680](#), 475 P.2d 94 (1970); *LaFever v. City of Sparks*, [88 Nev. 282](#), 496 P.2d 750 (1972); *Williams v. City of North Las Vegas*, [91 Nev. 622](#), 541 P.2d 652 (1975); *Crucil v. Carson City*, [95 Nev. 583](#), 600 P.2d 216 (1979) and *Foley v. City of Reno*, [100 Nev. 307](#), 680 P.2d 975 (1984). It should be noted that both the facts giving rise to the cause of action against the City of Reno and the decision in *Foley v. City of Reno*, supra, come well after the enactment of Nevada Revised Statutes section 41.0305.

The Housing Authority of the City of Las Vegas has been statutorily and judicially characterized as being a municipal corporation created for municipal purposes and exercising essential governmental functions. See [NRS 315.320\(2\)](#). See also *McLaughlin v. Housing Authority*, supra, at 92. There is nothing in our decisional law that would indicate a willingness on the part of our state supreme court to refuse to apply the provisions of Nevada Revised Statutes sections 41.0305 to 41.039, inclusive, to one type of municipal corporation, such as your client, while deciding that the same provisions are applicable to other municipal corporations, such as the cities of Reno, Sparks, North Las Vegas and Carson City. Such an incomplete application of the waiver of immunity statutes would be inconsistent with the purpose for these laws which “was to compensate victims of government negligence in circumstances like those in

which victims of private negligence would be compensated. (Citation omitted.)” *Harrington v. City of Reno*, supra, at 680.

CONCLUSION

Based on the decisions of our state supreme court which apply without question the provisions of Nevada Revised Statutes sections 41.0305 to 41.039, inclusive, to other municipal corporations, we are convinced that the same provisions also apply to housing authorities in our counties, cities and towns.

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Deputy Attorney General*

OPINION NO. 86-6 PUBLIC OFFICERS; NEVADA ETHICS IN GOVERNMENT LAW—Trustees of a county library formed pursuant to chapter 379 of the Nevada Revised Statutes are public officers within the meaning of the Nevada Ethics in Government Law and therefore required to file statements of financial disclosure with the secretary of state.

CARSON CITY, May 12, 1986

THE HONORABLE STEVEN G. MCGUIRE, *White Pine County District Attorney*, P.O. Box 240, Ely, Nevada 89301

DEAR MR. MCGUIRE:

By letter dated April 10, 1986, you have sought our opinion involving the interpretation of financial disclosure requirements contained in the Nevada Ethics in Government Law.

QUESTION

Are the trustees of a county library formed pursuant to chapter 379 of the Nevada Revised Statutes required to file a statement of financial disclosure pursuant to the provisions contained in the Nevada Ethics in Government Law?

ANALYSIS

[NRS 281.561](#) requires that every candidate for public office and every public officer file with the secretary of state for review by the Commission on Ethics a statement of financial disclosure within the time limitations provided in subsections 1-4, inclusive. The term “public officer” used in [NRS 281.561](#) is defined in [NRS 281.4365](#). That section provides:

“Public officer” means a person elected or appointed to a position which is established by the constitution of the State of Nevada, a statute of this state or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty, except:

1. Any justice, judge or other officer of the court system;
2. A commissioner of deeds; and
3. Any member of a board, commission or other body whose function is advisory.

Measuring these legal requirements against the characteristics of a county library trustee leads us to the conclusion that county library trustees are “public officers” within the meaning of the definition contained in [NRS 281.4365](#).

The position of county library trustee is an appointive position created pursuant to enabling legislation contained in [NRS 379.020](#). The duties to be performed by the trustees of a county library are set forth in [NRS 379.025](#). We note that [NRS 379.025](#)(1)(d) provides that the trustees of a county library serve in an advisory capacity to the board of county commissioners with respect to the formulation of the budget necessary for the operation and management of the library. However, our review of the remaining duties contained in [NRS 379.025](#) indicates to us that, with respect to all other aspects of county library management, the board of trustees has specific responsibilities which the trustees must discharge with respect to the operation of the county library. Therefore, the trustees of the county library do not act in a purely advisory role; they carry out public powers, trusts or duties with respect to the actual management of the county library. Consequently, none of the exclusions contained in subsections 1-3, inclusive, of [NRS 281.4365](#) apply to the office of county library trustee. The only conclusion that can be reached is that county library trustees are public officers within the meaning of [NRS 281.4365](#) and, therefore, required to file statements of financial disclosure in accord with [NRS 281.561](#) and [281.571](#).

CONCLUSION

County library trustees are public officers within the meaning of [NRS 281.4365](#) and, therefore, required to file statements of financial disclosure with the secretary of state in accord with [NRS 281.561](#) and [281.571](#). This conclusion is consistent with the reasoning contained in Nevada Attorney General Opinion No. 193 (Sept. 3, 1975).

Sincerely,

BRIAN MCKAY, *Attorney General*

By SCOTT W. DOYLE, *Deputy Attorney General*

OPINION NO. 86-7 PUBLIC RECORDS: Customer complaints of State Contractors' Board are records open for public inspection under [NRS 239.010](#). Application of balancing test favors public disclosure.

CARSON CITY, May 12, 1986

MR. ROBERT B. WELD, *Executive Officer*, State Contractors' Board, 1800 Industrial Road, Las Vegas, Nevada 89158

DEAR MR. WELD:

This letter is in response to your inquiry regarding the State Contractors' Board's obligations under this state's public records law ([NRS chapter 239](#)) and [NRS 624.110](#).

QUESTION

Must the State Contractors' Board allow public inspection of consumer complaints filed with the board?

ANALYSIS

[NRS 624.110](#) classifies certain records of the State Contractors' Board as either public or confidential. Section 1 of [NRS 624.110](#) lists certain records which are deemed to be public records and which must be open to public inspection, including:

1. applications for licenses;
2. licenses issued;
3. licenses renewed; and
4. all revocations, cancellations and suspensions of licenses.

Section 2 of [NRS 624.110](#) identifies certain records of the board which are to remain confidential. Included therein are:

1. credit reports;
2. references;
3. investigative memoranda; and
4. financial information or data pertaining to the licensee's net worth.

Because the public record status of consumer complaints filed with the board is not specifically addressed by [NRS 624.110](#) as being either public or confidential, you have questioned whether such complaints should nonetheless be deemed public records under [NRS 239.010](#).

Nevada's Public Records Law provides that:

All public books and records of . . . [governmental entities and officers], 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. . . .

Failure to comply with this law subjects the party refusing the information to a misdemeanor prosecution. [NRS 239.010\(2\)](#).

Although [NRS 239.010](#) requires all "public records" to be open to public inspection, it does not define the term "public records." It is important to distinguish the difference between a statute which requires "all records" of an agency not otherwise declared to be confidential to be open to the public and one which requires only "all *public* records" of an agency not otherwise declared confidential to be open. Our inquiry must therefore give meaning and effect to the legislative use of the qualifying term "public." Such a task is rendered more difficult in light of the fact that Nevada is one of only three states in the nation that has not clearly defined the term "public records," either legislatively or judicially. *See Comment, Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except. . . ."* 45 Fordham L.R. 1105 (1977). Due to such a lack of statutory or judicial definition of the term "public record" as used in Nevada, it is necessary to examine the common law.

Courts have generally agreed that the mere fact that a document is maintained by a public agency does not automatically categorize it as a public record. It is the nature and purpose of the document, not the location where it is kept, which determines its status. *Coldwell v. Board of Public Works*, 202 P. 879 (Cal. 1921); *Steiner v. McMillan*, 195 P. 836 (Mont. 1921); *Tagliabue v. North Bergen Township*, 86 A.2d 773 (N.J. 1952); *People ex rel. Stenstrom v. Hartnell*, 226 N.Y.S. 338 (Sup.Ct. 1927), *aff'd* 164 N.E. 602 (N.Y. 1928); *State ex rel. Romsa v. Grace*, 5 P.2d 301 (Wyo. 1931).

A number of different analyses have been developed by various jurisdictions in determining whether a document constitutes a public record subject to public inspection in the absence of a clear statutory definition. The more liberal view, as espoused by the Oregon Supreme Court, balances the public's interest in evaluating the performance of government officials against the government's interest in not having the public disrupt the process of government. In holding in

favor of public access to the records in dispute, the court placed upon the governing agency the burden of justifying its decision to prevent public access to a particular record:

In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interest of the public in having the business of government carried on efficiently and without undue interference.

....
In balancing the interest referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. *MacEwan v. Holm*, 359 P.2d 413, 421-22 (Ore. 1961).

The recent trend of decisions has employed a balancing approach similar to that used by the *MacEwan* court. Instead of attempting to create rigid categories for determining whether a particular writing is a public record, courts have tended to use a flexible balancing test which weighs the competing policy considerations. In *Church of Scientology v. City of Phoenix Police Department*, 594 P.2d 1034 (Ariz.App. 1979), the court, in evaluating a request for access to 20-year-old police investigative reports, held that the proper way to view requests for information was not to determine whether a record was held by a public agency and was therefore a public record, but, instead, to determine if release of the record would have an important and harmful effect on the duties of the official or agency involved. A similar test was employed by the court in *Northside Realty Associates v. Community Relations Commission*, 241 S.E.2d 189 (Ga. 1978):

[T]he court must weigh the benefits accruing to the government from nondisclosure against the harm which may result to the public if such records are not made available for inspection by the appellants.
Id. at 191.

Some courts, an apparent minority, have rejected the liberal construction reflected by the various balancing tests in favor of limiting the definition of "public records" to specific types of documents. One line of cases has held that public records include only those records which are "required or authorized" to be kept by law. *Town Crier, Inc. v. Chief of Police*, 282 N.E.2d 379 (Mass. 1972); *Steiner v. McMillan*, supra; *Steel v. Johnson*, 115 P.2d 145 (Wash. 1941). Another restrictive approach advocates limiting the definition of public records to those documents which reflect an official decision or action:

If the record is one that is not kept pursuant to law or as part of a duty to be discharged by the officer, and is not required to be filed or recorded, it is not subject to public inspection. In this category are intra-departmental communications which are merely for the information of various state or federal officers in dealing with one another.
. . . Only documents which present ultimate actions should be accessible to the public. Those which are merely part of the preliminary steps by which the conclusion was reached should become public only in the discretion of the particular agency.
48 Nw.U.L. Rev. 527, 530 (1953-54).

In accord with this view are *Amos v. Gunn*, 94 So. 615 (Fla. 1922); *Robison v. Fishback*, 93 N.E. 666 (Ind. 1911); *Backley Newspapers Corp. v. Hunter*, 34 S.E.2d 468 (W.Va. 1945).

Also illustrative of this approach is *Kottschade v. Lundberg*, 160 N.W.2d 135 (Minn. 1968), where an association of homeowners brought suit in an attempt to gain access to field cards which were used by the county assessor to record his observations and opinions with respect to each piece of property assessed by him. The court drew a distinction between records relating to the process by which an assessment is reached and records relating to the ultimate assessment itself. It refused to extend the definition of public records to include documentation of the thought processes used by a public official in reaching a decision.

Several other courts have adopted this same analysis with the proviso that the public's right of inspection is merely suspended until some official action of approval or disapproval is taken on the matter. *Houston v. Rutledge*, 229 S.E.2d 624 (Ga. 1976); *Linder v. Eckard*, 152 N.W.2d 833 (Iowa 1967); *Sanchez v. Board of Regents of Eastern N. Mex. Univ.*, 486 P.2d 608 (N.M. 1971); *Sorley v. Clerk, Mayor and Board of Trustees*, 292 N.Y.S.2d 575 App.Div. (1968). Additionally, some courts have held that where information is received in confidence, the public interest may justify refusal of access to it. An example is *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978), where the court held that a prospective gubernatorial appointee did not have a right of access to information gathered during a standard pre-appointment investigation of his character. Employing a balancing test, the court found that the public interest in maintaining the confidentiality of the report outweighed the plaintiff's interest in disclosure. It reasoned that maintaining the confidentiality of the report would further several important public interests: First, such confidentiality would assure protection from physical harm or intimidation to persons interviewed about prospective appointees; second, a promise of confidentiality would also encourage candid communications between citizens and interviewing officers, thereby enhancing the effectiveness of the investigative process; and finally, the court recognized that a qualified executive privilege, intended to preserve the confidentiality of communications relating to an executive-level decision, would protect the sensitive process leading to decisions of this nature. Cf. [NRS 49.285](#).

As can be seen from this survey of existing law, the courts of the various states have not reached a consensus regarding the issue of what type of document is a "public record." However, in keeping with the spirit and intent of Nevada's Public Record Law, we are of the opinion that Nevada's statute should be construed in favor of inspection whenever there is insufficient justification to maintain the document as confidential. *Sosa v. Lincoln Hospital of the City of New York*, 74 N.Y.Supp.2d 184, (S.Ct. 1947) *aff'd*, 77 N.Y.Supp.2d 138, 273 App. Div. 852 (1948); *Mulford v. Davey*, [64 Nev. 506](#), 186 P.2d 360 (1947); *Nicklo v. Peter Pan Play School*, [97 Nev. 77](#), 624 P.2d 22 (1981). Such a construction is not absolute and does not require that every document in the custody of a public agency be deemed a "public record." Relevant considerations on a case-by-case basis should include a balancing of (1) the document's content and function; (2) the interest and justification of either the agency or the public in general in maintaining the confidentiality of the document; and (3) the extent of the interest or need of the public in reviewing the document.

Performance of the balancing test analysis described in the preceding paragraph is a task that needs to be undertaken only in those instances when the legislature has not specified a particular record to be "public" or "confidential." The flexible nature of this test indicates to us that this analysis should be done by legal counsel in full consultation with the agency. The agency staff should not attempt this balancing of potentially competing interests in the absence of advice from its official legal advisor. While this approach to public records determinations lacks a certain degree of definiteness, we feel that this disadvantage is more than offset by the more precise evaluation of the public's right to know versus the agency's need to maintain confidentiality.

In applying this balancing test to the particular issue of written consumer complaints sent to the State Contractors' Board regarding work done by licensed Nevada contractors, it is our opinion that, absent an express confidentiality statute, the interest of the public in gaining access to such complaints outweighs any interest the board may assert in maintaining such documents as confidential. Such documents are sent to the board with the expectation that the board, pursuant

to its statutory responsibility, will investigate the complaints and either determine that no wrongdoing occurred or that the complaint is justified. If the complaint is justified, appropriate action, including possible discipline of the licensee, is expected of the board by the public. Thus, the content and function of such complaints is to invoke the board's statutory jurisdiction. Absent an express statutory declaration as to the confidentiality of the record in question, the public interest in both protecting itself from unscrupulous contractors and in monitoring the performance of the board outweighs both the personal preference of the licensee to maintain such complaints as confidential and the preference of the board to not have its operation overly scrutinized.

We realize much of the concern regarding Nevada's Public Records Law stems from a fear of civil liability based on the disclosure of potentially defamatory material. On the one hand, a public officer or employee must allow access to the records or face prosecution under the misdemeanor provision of [NRS 239.010\(2\)](#). On the other hand, the same employee in complying with the law may subject himself to a civil action for the publication of defamatory material, the contents over which the employee has no control. Nevada law contains the defense of "privileged communications," shielding public officers and others from suit for libel or slander for statements made in good faith in connection with the performance of their judicial, legislative or executive functions. See *Bull v. McCuskey*, [97 Nev. 706](#), 615 P.2d 957 (1980); *Reynolds v. Arnetz*, 119 F.Supp. 82 (D. Nev. 1954); *Pierson v. Robert Griffin Investigations, Inc.*, [92 Nev. 605](#), 555 P.2d 843 (1976). If a communication or publication is privileged, it is outside the rules imposing liability for defamation.

Nevada has no reported decisions involving a defamation action resulting from a public records publication, but other jurisdictions have cases on point. In the Minnesota case of *Johnson v. Dirkswager*, 315 N.W.2d 215 (1982), the commissioner of public welfare was sued for releasing the contents of a letter of termination. Minnesota's Data Privacy Act was similar to Nevada's Public Records law in that all government data was public unless expressly classified nonpublic. The commissioner claimed that the material was "public" and that as such he was absolutely privileged to release such information. The Supreme Court of Minnesota adopted the "absolute privilege" of the Restatement (Second) of Torts § 592A. In ruling for the commissioner the court stated:

So here, where the defamatory statement appears in the context of the mandate of the Data Privacy Act, further support is afforded for an absolute privilege, since "one who is required by law to publish defamatory matter is absolutely privileged to publish it."

Restatement (Second) of Torts § 592A (1977).

Ibid at 222-223.

Although our supreme court has not yet decided a case in reliance on the Restatement (Second) of Torts position, it appears to us to be sound legal policy likely to be adopted and followed in Nevada. Additionally, existing Nevada case law relating to "privileged communications" also shields public officers and employees acting in good faith from defamation suits. Additional protection may be available if unproven complaints are clearly disclosed "*for informational purposes only*" and not as statements of fact.

CONCLUSION

Construing [NRS 624.110](#) in conjunction with [NRS chapter 239](#) results in a statutory construction that mandates that all records are public unless by law determined to be "confidential." Thus, the State Contractors' Board must make all such records accessible to the public and make the "non-confidential" records available for copying, including any actual complaints against contractors. The legislature in balancing the public's right to know with the

individual's right to privacy has generally struck the balance in favor of the public and open government.

Public records may contain material upon which a defamation action could be based, but the defense of privileged communication, currently a part of Nevada law, and the Restatement (Second) of Torts § 592A defense, if adopted, should provide protection from defamation actions.

Sincerely,

BRIAN MCKAY, *Attorney General*
By WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

OPINION NO. 86-8 CONSTITUTIONAL LAW—CRIMINAL LAW: When prosecuting a violation of [NRS 205.273](#), the state is not required to prove that the defendant was not, at the time of the offense, an officer of the law engaged in the performance of his duty. The defendant must establish this defense by a preponderance of the evidence. [NRS 205.273](#) (1979).

CARSON CITY, June 13, 1986

JOHN S. MCGIMSEY, *Deputy District Attorney*, Elko County Courthouse, Elko, Nevada 89801

DEAR MR. MCGIMSEY:

You have requested the opinion of this office with regard to the following:

QUESTION

Whether, in criminal prosecutions resulting from violation of Nevada Revised Statutes (NRS) Section 205.273, the state is required affirmatively to prove that, at the time of the alleged crime, the defendant was not a police officer engaged in the performance of his duties.

ANALYSIS

The due process clause of the Fourteenth Amendment to the United States Constitution requires that, in a criminal case, the prosecution establish all necessary elements of the offense by proof beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 2068, 1071 (1970); *Carl v. State*, [100 Nev. 164](#), 165, 678, P.2d 669 (1984). The state may not shift the burden of proof of any of the elements to the defendant. *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979); *Mullaney v. Wilburn*, 421 U.S. 684, 95 S.Ct. 1881 (1975).

However, it is only the elements of the offense which the state must prove beyond a reasonable doubt. The state is not required to “prove beyond a reasonable doubt every fact the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment.” *Patterson v. New York*, 432 U.S. 197, 207, 97 S.Ct. 2319, 2325 (1977). Thus, the state may require that the defendant “prove by a preponderance of the evidence a defense that does not negate any element of the crime charged.” *Kelso v. State*, [95 Nev. 37](#), 41, 588 P.2d 1035, 1038 (1979), citing *Patterson v. New York*.

In many cases, the elements of the offense may be readily apparent from the language of the criminal statute. Uncertainty may arise, however, if a particular statute contains exceptions or exemptions from its prohibitions. It must then be determined whether such negatives constitute elements of the offense which must necessarily be pleaded and proved by the prosecution. If not, the defendant may be required to plead and prove their existence in the nature of an affirmative defense.

It has long been recognized in Nevada that the prosecution is only required to negate an exception to a statute “when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged.” *State v. Ah Chew*, [16 Nev. 50](#), 54 (1881); *State v. Robey*, [8 Nev. 312](#) (1873). Accordingly, where statutory exceptions do not describe or define an offense, but merely afford an excuse, “they are to be relied on in the defense.” *State v. Ah Chew*, 16 Nev. at 54.

[NRS 205.273](#) provides as follows:

Any person who, with intent to procure or pass title to a motor vehicle which he knows or has reason to believe has been stolen, receives or transfers possession of the vehicle from or to another, or who has in his possession any motor vehicle which he knows or has reason to believe has been stolen, *and who is not an officer of the law engaged at the time in the performance of his duty as such officer* shall be punished by imprisonment in the state prison for not less than 1 year, nor more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment. (Emphasis added.)

In this statute, the phrase “and who is not an officer of the law engaged at the time in the performance of his duty as such officer” is not a part of the definition of the offense. Rather, it exempts one class of individuals from criminal liability for the prohibited act. An exception such as this cannot be said to define the offense simply because it is placed in close proximity to the actual definition. “It is the nature of the exception, and not its locality, that determines that question. . . .” *Id.* The act prohibited by [NRS 205.273](#) is the knowing receipt or transfer of a motor vehicle which has been stolen. Lack of membership in the class of individuals defined as “officer of the law engaged in the performance of their duties” is not an element of the offense, and it is up to the defense to plead this exception. See *Ex Parte Davis*, [33 Nev. 309](#) (1910); *State v. Harvey*, [62 Nev. 287](#) (1944). These principles, which have long been established in Nevada, are also recognized in many other courts. See *U.S. v. McKelvey*, 260 U.S. 353 (1922); *U.S. v. Henry*, 615 F.2d 1223 (9th Cir. 1980); *U.S. v. Laroche*, 723 F.2d, 1541 (11th Cir. 1984); *In Re Andre R.*, 204 Cal.Rptr. 723 (App.Ct. 1984); *State v. Roybal*, 667 P.2d 462 (N.M. 1983).

A correlative consideration in determining that the state is not required to prove the lack of peace officer status under [NRS 205.273](#) is the rule of necessity and convenience. This rule states that “the burden of proving an exonerating fact may be imposed on a defendant if its existence is ‘peculiarly’ within the defendant’s personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient.” *In Re Andre R.*, 204 Cal.Rptr. at 726. The burden thus imposed must be neither unduly harsh nor unfair. *Id.* It is clear that the phrase “officer of the law” could encompass individuals working for a vast number of law enforcement agencies. Cf. [NRS 169.125](#) (1985) (“peace officer” defined). Whether a particular defendant was so employed at the time of the incident resulting in criminal prosecution would be peculiarly within that defendant’s knowledge. Requiring the prosecution to prove that the defendant was not an officer of the law engaged in the performance of his duty would be both difficult and unduly burdensome.

CONCLUSION

In a prosecution for a violation of [NRS 205.273](#), the state is not required to prove that the defendant was not, at the time of the offense, an officer of the law engaged in the performance of his duty. Such a defense must be raised affirmatively by the defendant.

Very truly yours,

BRIAN MCKAY, *Attorney General*
By BROOKE A. NIELSEN, *Chief Deputy Attorney General*,

OPINION NO. 86-9 MINES AND MINERALS—MINING CLAIMS: Analysis of legislative scheme related to recordation of accurate county maps of mining claims indicates legislature enacted separate conformation procedures for patented mining claims and other mining claims. Section 517.215 of Nevada Revised Statutes does not apply to patented mining claims. [NRS 517.213](#) and [517.215](#) (1985).

CARSON CITY, June 16, 1986

HONORABLE STEVEN G. MCGUIRE, *White Pine District Attorney*, White Pine County Courthouse,
Post Office Box 240, Ely, Nevada 89301

DEAR DISTRICT ATTORNEY MCGUIRE:

The purpose of this letter is to respond to your correspondence requesting an opinion of the attorney general. In your letter you specifically inquired concerning the applicability of section 517.215 of the Nevada Revised Statutes to patented mining claims. Since receipt of your opinion request letter on April 28, 1986, the attorney general has received letters from private law firms on May 5, 1986, May 19, 1986, and May 23, 1986, communicating the legal position of the respective private mining interests which are involved in the controversy which precipitated your opinion request.

QUESTION PRESENTED

Whether the provisions for the correction of inaccurate location of mining claims upon county maps through an administrative hearing process delineated in section 517.215 of the Nevada Revised Statutes applies to both patented and unpatented mining claims.

ANALYSIS

In 1985, the sixty-third session of the Nevada Legislature added certain new provisions to title 46 of the Nevada Revised Statutes governing mines and minerals. Among these statutory enactments were the following new provisions:

Comparison of record of survey to county map of other claims; proposal to change map; notice; hearing.

1. When a record of survey filed with the county recorder by a registered land surveyor shows the location of a *mining claim*, the county recorder shall compare that record of survey to the county map of mining claims and ascertain whether the location of the claim is accurate according to the record of survey.

2. If the county map inaccurately shows the location of the claim, the county recorder shall propose a change to the county map and mail a notice to all persons whose claims would be affected by the proposed change.

3. The notice must include:

(a) A description of the proposed change; and

(b) A statement advising the owner of the claim that the proposed change will be made unless he makes a written request to the county recorder for a hearing within 30 days.

4. If a request for a hearing is not received by the county recorder within 30 days after he mailed the notice, the county recorder shall make the proposed change to the county map.

5. Upon receipt of a request for a hearing the county recorder shall request the board of county commissioners to hold a hearing on the proposed change.

6. Upon receipt of such a request the board of county commissioners shall, after notifying the county recorder and the owner of the mining claim at least 30 days in advance, hold a hearing and determine whether the proposed change is to be made.

[NRS 517.215](#) (1985), *added by* 1985 Nev. Stat. ch. 489, § 2.8 (emphasis added).

The 1985 legislature also enacted a statute which provides:

Inclusion of patented mining claims on county map; conformation of discrepancy between county map and record of survey showing location of patented claim.

1. The county recorder shall include all *patented mining claims* in the county on the county map of mining claims in a manner which clearly distinguishes the patent claims from the unpatented claims.

2. When a record of survey filed with the county by a registered surveyor shows the location of a *patented mining claim*, the county recorder shall conform the county map to the record of survey if there is any discrepancy between the two maps concerning the location of the claim.

[NRS 517.213](#) (1985), *added by* 1985 Nev. Stat. ch. 489 § 2.9 (emphasis added).

By the terms of these statutes, section 517.215 applies to “a mining claim” and this particular statutory provision does not contain any specific reference to patented or unpatented mining claims. In contrast, section 517.213 refers to and is applicable to “patented” claims exclusively. Both of these statutes address the duties of the county recorder relative to the location of mining claims upon the county map of mining claims. See [NRS 517.213](#) and [517.215](#) (1985).

Where the meaning of statutory language is uncertain or ambiguous, reference to intrinsic interpretation aids in order to construe the law is appropriate. See, e.g., *Porter v. Sheriff*, [87 Nev. 274](#), 275, 485 P.2d 676 (1971). See generally 2A N.J. Singer, *Sutherland Statutory Construction* § 47.01-47.38 (4th ed. 1984). When a particular word or term utilized in a statute does not have a generally accepted technical, legal or commercial interpretation, the common meaning of that term should be recognized as controlling. See, e.g., *Orr Ditch & Water Co. v. Justice Court*, [64 Nev. 138](#), 149-150, 178 P.2d 558 (1947); *Comstock Mill & Mining Co. v. Allen*, [21 Nev. 325](#), 331 (1892). See generally 2A N.J. Singer, *Sutherland Statutory Construction* § 47.27-47.31 (4th ed. 1984). Moreover, interpretative consideration must be accorded the textual context of a particular word or term employed in a statute. See, e.g., *Western Pac. R. R. v. State*, [69 Nev. 66](#), 68-69, 241 P.2d 846 (1952). See generally 2A N.J. Singer, *Sutherland Statutory Construction* § 47.01 (4th ed. 1984).

Both the phrase “mining claim” and “patented mining claim” have generally accepted legal interpretations. The phrase “mining claim” has been judicially defined as a possessory interest in mineral lands upon the public domain in which a miner does not have title, but rather a vested and exclusive right of possession for the purpose of extracting precious metals. See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336 (1963); *Forbes v. Gracey*, 94 U.S. 762, 766-767 (1877); *Mt. Diablo Mill, Co. v. Callison*, 17 F. Cas. 918, 924 (Cir. Ct. D. Nev. 1879) (No. 9,886). By comparison, the term “patented” when applied to a mining claim denotes that a miner has obtained fee title from the federal government to a mining claim upon the public lands. See, e.g., *Freese v. United States*, 639 F.2d 754, 755-757 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 827 (1981); *United States v. Springer*, 491 F.2d 239, 242-243 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); *Roberts v. Morton*, 389 F.Supp. 87, 90 (D. Colo. 1975), *aff'd* 549 F.2d 158 (10th Cir. 1976), *cert. denied*, 434 U.S. 834 (1977).

When the Nevada Legislature used these terms in chapter 489 of the 1985 session laws, the legislature was presumed to have knowledge of the preexisting legal meanings of the phrases “mining claim” and “patented mining claim.” See e.g., *Reid v. Woofter*, [88 Nev. 378](#), 381, 498 P.2d 361 (1972). Moreover, the objective of the legislature can be discerned by considering the titles of the statutes. See, e.g., *A Minor v. Clark County Juvenile Ct. Services*, [87 Nev. 544](#), 548, 490 P.2d 1248 (1971). In construing statutory language, care also must be taken to consider the entire legislative scheme, see, e.g., *Nevada Tax Comm’n v. Bernhard*, [100 Nev. 348](#), 351, 683 P.2d 21 (1984), and to consider related statutory provisions *in pari materia*. See, e.g., *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982).

Applying these rules of statutory interpretation to the provisions of sections 517.213 and 517.215, results in the following conclusions. Section 517.213 clearly and unequivocally applies only to patented mining claims and the conformation of county maps of mining claims to correctly reflect the location of such patented claims as established by survey. See [NRS 517.213](#) (1985).

Both section 517.213 and 517.215 must be considered *in para materia* because these statutes are components of a common legislative scheme to provide for accurate county maps of mining claims. The titles of the respective statutes indicate that section 517.213 governs patented claims exclusively. Likewise, the title to section 517.215 demonstrates that this statute applies to county maps of “other claims.” [NRS 517.215](#) (1985). These “other claims” are identified by the legislature through the use of the phrase “mining claim” *Id.* § 517.215(1) and (6) (1985). The legal meaning of this phrase is a possessory claim to mineral public land without a fee title interest demonstrated by a patent from the federal government.

CONCLUSION

An analysis of sections 517.213 and 517.215 of the Nevada Revised Statutes in light of settled rules of statutory construction demonstrates that these statutes apply to different classes of mining claims. Section 517.213 applies to patented mining claims exclusively. By contrast, section 517.215 governs all other mining claims, that is claims in which a miner has a possessory interest in mineral lands upon the public domain for the purpose of extracting minerals without title to the land. Both statutes are components in a rational legislative scheme directed to promote accurate county maps of mineral claims through a uniform statewide procedure.

Sincerely,

BRIAN MCKAY, *Attorney General*

By DAN R. REASER, *Deputy Attorney General*

OPINION NO. 86-10 SCHOOL DISTRICTS AND DISTRICT EMPLOYEES: Money disbursed to school districts pursuant to 1985 Nev. Stat. ch. 642 must be used to provide school district employees with a percentage increase in salary and may not be used to provide those employees with a single lump sum payment.

CARSON CITY, June 17, 1986

MICHAEL ALASTUEY, *Associate Superintendent*, Department of Education, 400 West King Street, Carson City, Nevada 89710

DEAR MR. ALASTUEY:

You have asked this office for an opinion concerning Assembly Bill 540 of the 1985 legislative session, the “salary trigger bill.”

QUESTION

May a school district provide to school district employees a one time payment of money disbursed to the district pursuant to 1985 Nev. Stat. ch. 642 sec. 8, the “salary trigger bill?”

ANALYSIS

In 1985 the Nevada legislature passed Assembly Bill 540, popularly known as the “salary trigger bill.” The bill was enrolled as 1985 Nev. Stat. ch. 642 (“Act”). The Act essentially provides for a salary increase of approximately 11 percent for state employees during fiscal year 1985. See for example section 1.1 of the Act. The Act further provides for another salary increase of 3 percent for state employees effective July 1, 1986, and that increase is linked to movement of the Consumer Price Index during a specified period. See for example sections 1.2 and 1.3 of the Act. Finally, section 7 of the Act requires the state board of examiners to estimate what the unappropriated balance of the state general fund will be on July 1, 1986. Depending on the amount which the board projects pursuant to section 7, certain additional amounts of money are “triggered” for payment to state employees and, pursuant to section 8.1(a)(4) or section 8.1(b)(4), to the state distributive school fund for disbursement to employees of school districts.

The board has made the required projection and the pertinent “trigger” provision has been determined to be section 8.1(b)(4) of the Act, which provides in pertinent part:

Sec. 8 1. In addition to *other increases* provided for the fiscal year 1986-1987, the following amounts are hereby contingently appropriated from the respective funds to provide *salary increases* for the respective groups of employees, for the fiscal year 1986-1987, according to the projections by the state board of examiners made pursuant to section 7 of this act.

...

(b) If the projected balance is at least \$60,000,000:

...

(4) From the state general fund to the distributive school fund . . . \$7,404,872.

...

(Emphasis added).

An interpretation of the Act must be made in a manner consistent with legislative intent. *Robert E. v. Justice Court*, [99 Nev. 443](#), 664 P.2d 957 (1983). The primary source from which to determine legislative intent is the language of the statute itself. Where that language is plain the intention of the legislature must be derived from the statute and recourse to aids to interpretation which are extrinsic to the statute is not proper. *City of Las Vegas v. Macchiaverna*, [99 Nev. 245](#), 661 P.2d 879 (1983). All parts of the Act must be harmonized to give effect to the legislative intent. *Acklin v. McCarthy*, [96 Nev. 520](#), 612 P.2d 219 (1980). In applying these principles to the Act we call attention to the language emphasized in the above excerpt from section 8.1 of the Act. It is clear that the legislature intended that the amounts appropriated are to be used for “salary increases” for the subject employees. Salary is commonly defined as:

[F]ixed compensation paid regularly for services. . . .

Webster’s Collegiate Dictionary 759 (7th ed. 1971). Further, section 8.1 refers to “other increases” provided in the Act. As noted earlier, those increases are always percentage increases in the salaries paid to state employees.

For the above reasons we do not believe that the legislature intended the money appropriated pursuant to section 8.1 of the Act to be disbursed to school district employees in any manner other than as a percentage increase in their salaries, resulting in an appropriate adjustment in their salary schedules. We are further persuaded that this interpretation is correct when we note that in

the same legislative session that the Act was passed the legislature adopted the “incentive pay bill,” 1985 Nev. Stat. ch. 566. In that enactment the legislature clearly provided for a single, lump sum payment to state and school district employees and specifically distinguished that payment from the salary of an employee for various purposes. 1985 Nev. Stat. ch. 566, sec. 6 and sec. 7. By using the term “salary increase” instead of the term “single payment,” as used in the incentive pay bill, the legislature made clear its intent that salaries of school district employees must be adjusted upward on a percentage basis. Finally, we have been advised by the director of fiscal analysis division of the legislative counsel bureau that the two “trigger” amounts found in sections 8.1(a)(4) and 8.1(b)(4) were calculated as the amounts necessary to give school district employees a 1 percent or 2 percent salary increase, respectively. That fact provides further evidence that our conclusion is correct.

CONCLUSION

The money disbursed to school districts pursuant to 1985 Nev. Stat. ch. 642 must be used to provide school employees with a percentage increase in salary and may not be used to provide those employees with a single lump sum payment.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By JAMES T. SPENCER, *Deputy Attorney General*
Civil Division

OPINION NO. 86-11 FUND FOR HOSPITAL CARE TO INDIGENT PERSONS: What constitutes a “Public Street or Highway” for purposes of determining a county’s eligibility for reimbursement from the fund.

CARSON CITY, July 9, 1986

MARY FINNELL, *Risk Manager*, Capitol Complex, Carson City, Nevada 89710

DEAR MS. FINNELL:

You have asked this office for an opinion concerning a county’s eligibility for reimbursement from the fund for hospital care to indigent persons.

QUESTION

What constitutes a public street or highway for purposes of determining a county’s eligibility for reimbursement from the fund for hospital care to indigent persons?

ANALYSIS

During the 1983 legislative session the Nevada legislature considered and passed Assembly Bill 218 (“Act”), whose summary stated: “Provides for reimbursement of certain costs of hospital care for certain indigents injured in motor vehicle accidents.” The legislative history of the Act indicates that the Act was introduced at the urging of the Nevada Association of Counties (“NACO”). The bill was explained to the legislature by the Executive Director of NACO as: “[A]n insurance mechanism, if you will, to insure against certain catastrophic costs in the area of automotive accidents . . . [involving] people that are medically indigent.” Minutes of Assembly Committee on Government Affairs, March 3, 1983, page 1. The operative provisions of the Act have been added to chapter 428 of NRS, sections .115 to .255, inclusive.

The Act provides for the creation of the fund for hospital care to indigent persons (“fund”), which is supported by an ad valorem tax levied by the counties. [NRS 428.175](#) and [NRS 428.185](#). A hospital which provides to an indigent services exceeding \$1,000 in value may apply to the fund’s board of trustees for reimbursement of costs of hospital care over that \$1,000 amount. [NRS 428.235](#). A county must reimburse the fund for money paid by the fund to a hospital which has provided such services and has charged any amount between \$1,000 and \$4,000. [NRS 428.255](#). In summary, the hospital is liable for the first \$1,000 of charges not paid by the indigent, the county is liable to the fund for the next \$3,000 of those unpaid charges and the fund is liable to the hospital for all amounts over \$1,000. The “insurance” mechanism clearly functions to limit the liability of a county to only \$3,000 while spreading the risk of major medical costs among the counties on a statewide basis.

Money in the fund can only be used to reimburse a hospital for unpaid charges for hospital services which result from “injury in a motor vehicle accident,” which is defined in [NRS 428.165](#) as:

“Injury in motor vehicle accident” means any personal injury accidentally caused in, by or as the proximate result of the movement of a motor vehicle on a *public street or highway*, whether the injured person was the operator of the vehicle or another vehicle, a passenger in the vehicle or another vehicle, a pedestrian, or had some other relationship to the movement of a vehicle. (Emphasis added.)

You have asked us to construe the terms emphasized above.

We begin by noting that neither “public street” nor “public highway” is defined in chapter 428 of NRS. In seeking guidance from other chapters of NRS we find no uniformity in the definition of “highway.” Definitions of the term are narrow for some purpose. See [NRS 403.410\(1\)](#) and [NRS 408.070](#). For other purposes the term is broadly defined. See [NRS 484.065](#) and also [NRS 706.081](#), which provides:

“Highway” means every street, road or thoroughfare of any kind used by the public.

Likewise, the term “street” has been defined narrowly for some purposes, see [NRS 484.189](#), and broadly for other purposes. See [NRS 278.010\(13\)](#) and also [NRS 483.170](#), which provides:

“Street means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

In construing the term “public streets and highways,” we must attempt to discover the legislature’s intent in using that language. *Robert E. v. Justice Court*, [99 Nev. 443](#), 664 P.2d 957 (1983). Although the primary source which may be used to determine that intent is the language of the statute itself, *City of Las Vegas v. Machiaverna*, [99 Nev. 256](#), 661 P.2d 879 (1983), “Where the meaning of a particular provision is doubtful, the courts will give consideration to the effect or consequences of proposed constructions.” *Nevada Tax Comm’n v. Bernhard*, [100 Nev. 348](#), 351, 683 P.2d 21 (1984). Also, in construing an unclear statutory provision we must consider the legislature’s goals and overall objectives. *SIIS v. Jesch*, 101 Nev. Adv. Op. 139 at 4, 709 P.2d 172 (1985). Further, “Statutory interpretation should not yield an unreasonable result if a more reasonable result is available (citations omitted).” *Id.*, *Nevada Tax Comm’n v. Bernhard*, supra, at 351. Finally, a remedial statute, such as the Act, should be liberally construed to achieve the legislature’s goal. *Welfare Div. v. Washoe Co. Welfare Dep’t*, [88 Nev. 635](#), 503 P.2d 457 (1972).

In applying these principles to the instant case, we note that the overall purpose of the Act is to prevent a serious depletion of the treasury of one county due to hospital costs which may stem from treatment of an indigent who is harmed in an automobile accident. It could conceivably require only one such accident to cause major financial harm to a county. As was said by the chairman of the Humboldt County Commission during testimony on the Act:

[A] county could be bankrupt with one busload of people traveling through. . . .

Minutes of the Assembly Committee on Government Affairs, March 3, 1983, page 15. For that reason, we believe the term “public streets and highways” was intended by the legislature to be broadly construed. A narrow construction, perhaps one that excludes “avenue,” “lane,” or “road” because of the absence of those particular kinds of vehicular ways in the subject provision, could result in the very kind of fiscal calamity for a county that the Act was designed to prevent, thereby defeating the very purpose of the Act and producing an unreasonable result in light of the broad, remedial purposes of the Act.

With the above analysis in mind, and giving great weight to the prefatory term “public,” we conclude that the term “public street or highway” should be construed as “any street, road, highway or way which is publicly maintained and is open to the public for vehicular traffic use.”

Such a broad construction excludes only privately owned property and ways and publicly owned property to which the public is denied access.

CONCLUSION

The term “public street or highway” as used in [NRS 428.165](#) to determine a county’s eligibility for reimbursement from the fund for hospital care to indigent persons should be construed broadly as meaning “any street, road, highway or way which is publicly maintained and is open to the public for vehicular traffic use.” The term excludes privately owned property and ways and publicly owned property and ways to which the public is denied access.

Very truly yours,

BRIAN MCKAY, *Attorney General*

By JAMES T. SPENCER, *Deputy Attorney General*

OPINION NO. 86-12 MUNICIPAL CORPORATIONS—CITIES AND TOWNS: Cities and towns may operate water utilities outside their boundaries without regard to the certificated area of privately owned water utilities.

CARSON CITY, July 10, 1986

ARCHIE E. BLAKE, *Office of the City Attorney*, Yerington, 38 South Main Street, Yerington, Nevada 89447

DEAR MR. BLAKE:

You have recently requested an opinion of this office regarding the City of Yerington’s proposal to extend its water system to serve an industrial area outside the city’s boundaries. Part of the area sought to be served lies within the service area of a privately owned water company (“Company”) regulated by the Nevada Public Service Commission (“Commission”). Several issues have arisen concerning the city’s power to serve this area and the necessity for paying compensation to the Company for such an extension. Specifically, you have posed the following:

QUESTIONS PRESENTED

1. Does the city have the power to extend its water system to serve customers located outside its boundaries and within the certificated area of a privately owned, regulated water company?
2. If the answer to question number one is yes, must the city compensate the water company for competing with it in the area in which the privately owned utility is authorized to serve?

ANALYSIS QUESTION ONE

As a municipal corporation organized and formed pursuant to 1971 Nev. Stat. ch. 465, the City of Yerington is authorized to construct and operate a municipal water system for the benefit of its residents. 1971 Nev. Stat. ch. 465, Sec. 2.280. A review of Title 21, Cities and Towns, [NRS Chapters 265](#) through 274, inclusive, further reveals a legislative intent to grant incorporated cities broad powers with respect to the provision of public utilities to residents of this state both within and without their boundaries.

[NRS 271.265](#), provides in pertinent part:

1. The governing body of a . . . city . . . , upon behalf of the municipality and in its name, without any election, may from time to time acquire, improve, equip, operate and maintain, *within or without the municipality, or both within and without the municipality*:

(m) *A water project* (emphasis added).

[NRS 271.250](#) defines “water project” as:

[f]acilities appertaining to a municipal water system for the collection, transportation, treatment, purification and distribution of water, including without limitation springs, wells, other raw water sources, basin cribs, dams, reservoirs, towers, other storage facilities, pumping plants and stations, filter plant, purification system, water treatment facilities, powerplant, waterworks plant, valves, standpipes, connections, hydrants, conduits, flumes, sluices, canals, ditches, water transmission and distribution mains, pipes, lines laterals, and service pipes, engines, boilers, pumps, meters, apparatus, tools, equipment, fixtures, structures, buildings, and all appurtenances and incidentals necessary, useful or desirable for the acquisition, transportation, treatment, purification and distribution of potable water or untreated water for domestic, commercial and industrial use and irrigation (or any combination thereof), including real and other property therefor.

With respect to the powers conferred upon cities by the provisions of Chapter 271, Local Improvements, the legislature has declared:

1. That providing for municipalities to which this chapter appertains the purposes, powers, duties, rights, disabilities, privileges, liabilities and immunities herein provided will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the State of Nevada.
2. That the acquisition, improvement, equipment, maintenance and operation of any project herein authorized is in the public interest, is conducive to the public welfare, and constitutes a part of the established and permanent policy of the State of Nevada.
3. That the necessity for this chapter is a result of the large population growth and intense residential, commercial and industrial development in the incorporated and unincorporated areas of portions of the state and of the ensuing need for extensive local improvements therein.
4. That the legislature recognizes the duty of municipalities as instruments of state government to meet adequately the needs for such facilities within their boundaries in cooperation with the state, counties and districts within the state.

5. That for the accomplishment of these purposes, the provisions of this chapter shall be broadly construed, and the rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

6. That the notices herein provided are reasonably calculated to inform each interested person of his legally protected rights.

7. That the rights and privileges herein granted and the duties, disabilities and liabilities herein provided comply in all respects with any requirement or limitation imposed by any constitutional provision.

[NRS 271.020](#). Additional authority is found in [NRS 268.728](#) and [268.730](#), containing provisions nearly identical to those of [NRS 271.265](#) and [271.250](#). Further, [NRS 350.370](#) provides broad authority for the financing of such projects both within and without the boundaries of a municipality. Consistent with the legislature's sweeping declaration of policy, we believe that the statutes cited above provide ample authority for the City of Yerington to extend its municipal water system to serve an industrial area located outside its boundaries.

Further, we do not believe that this authority is limited by the fact that part of the area sought to be served lies within the service area of a privately owned water company. Privately owned utilities must obtain a certificate of public convenience and necessity prior to operating and are subject to regulation of their service and rates by the Nevada Public Service Commission. [NRS 704.020](#), [704.210](#), [704.330](#). A municipal corporation operating its own water system, however, is exempt from the requirement of obtaining a certificate of public convenience and necessity and is not subject to the jurisdiction of the Public Service Commission. [NRS 704.340](#); *See*, Attorney General Opinion No. 99 (12-12-1963). We find nothing in the municipality enabling statutes or those pertaining to the regulation of public utilities that limits the power of municipalities to operate a water system within the certificated area of a regulated water utility.

[NRS 703.337](#)(1) states that: "No certificate of public convenience and necessity issued in accordance with the terms of [NRS 704.010](#) to [704.751](#), inclusive, or 706.011 to 791, inclusive, is either a franchise or irrevocable." The rights granted under a certificate of public convenience and necessity are therefore subject to the continuing jurisdiction of the Commission and are non-exclusive as against unregulated utilities. In *L.V. Valley Water v. Michelas*, [77 Nev. 171](#), 360 P.2d 1041 (1961), the court held that a water district not subject to the jurisdiction of the Public Service Commission was authorized to provide service within the service area of a regulated utility, even though the privately owned utility was actually serving the area in question. The industrial area sought to be served by the City of Yerington, while within the service area of the privately owned utility, is not currently being served by that company. Although the case discussed the statutory authority of a water district, not a municipal utility, it remains persuasive authority for the proposition that, absent specific statutory limitations, municipal water utilities may operate where authorized without regard to the certificated area of privately owned utilities.

See also, *City of Tucson v. Polar Water Co.*, 265 P.2d 773 (Ariz. 1954); *Town of Loxley v. Rosinton Water, Sewer, Ltd.*, 370 So.2d 705 (Ala. 1979). We conclude that the City of Yerington may construct and operate a municipal water system within the certificated area of a regulated privately owned water utility.

ANALYSIS QUESTION TWO

In *Michelas*, *supra* at 178, the court held that the water district's competition with a privately owned regulated utility did not constitute a "taking" of a property right requiring the payment of just compensation under the Nevada or United States Constitutions. The court noted that, inasmuch as the regulated utility's certificate to operate was non-exclusive as against the unregulated water district, it could not have had a reasonable expectation that it would be free from competition from such an entity. *Id.* at 178. Quoting from *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 26 S.Ct. 224, 228, 50 L.Ed. 353 (1906), the court stated:

And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes of which they were established. But such considerations cannot control the determination of the legal rights of parties.

Id. at 180. Since the City of Yerington's proposal anticipates, at most, the potential for future competition with the privately owned water utility, the reasoning of *Michelas* would appear to apply with even greater force to the present situation.

In *Union Rural Elect. Ass'n v. Town of Frederick*, 670 P.2d 4 (Colo. 1983), the court held that, since the Colorado Constitution limits the jurisdiction of its public utilities commission over municipal utilities, the town's annexing of adjacent territory and furnishing electricity in an area which was part of a rural electric utility's certificated area was proper and did not constitute a taking of the utility's property without due process of law:

Although an electric utility may be subject to a municipality's power of eminent domain, competition by a municipality with a certificated public utility for new customers does not under these circumstances constitute a taking of property which requires compensation.

Id. at 8. It should be noted that, under Colorado law, the public utilities commission may regulate the rates of municipally owned utilities outside the city boundaries; however, no corresponding jurisdiction exists in the Nevada Public Service Commission.

In *Sende Vista Water Co., v. City of Phoenix*, 617 P.2d 1158 (Ariz.App. 1980), the court held that the city was not entitled to provide utility service in the certificated area of another regulated utility without first acquiring the property interest of the holder of the certificate for the area to be served. Critical to the court's conclusion, however, were the existence of statutes which specifically limited the power of municipal corporations to compete with existing utilities. *Id.* at 1161.

As previously noted, the authority of a privately owned utility to operate within its certificated area is subject to the continuing jurisdiction of the Nevada Public Service Commission. While the Commission has discretion to eliminate existing territorial disputes between regulated public utilities, [NRS 704.330\(b\)](#), the legislature has not provided the Commission with jurisdiction over municipally owned water systems, nor does such a limitation on the service provided by municipal utilities exist elsewhere in Nevada Revised Statutes. We conclude, therefore, that a privately owned, regulated utility has no right under Nevada law to be free from competition from a municipally owned water utility such as would require the payment of compensation in the situation presented.

In light of our conclusion in this matter, it is unnecessary to discuss the city's proposal to annex the industrial area in question; however, it may be noted that annexation would only strengthen our conclusion regarding the city's power to serve the area. Further, annexation would ensure that those customers within the industrial area have a voice in the political process which ultimately determines the terms and conditions of the service provided them. *Cf., City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926) (Colorado Public Utilities Commission may regulate rates charged by municipal utilities to nonresident customers because the nonresident customers have not voice as voters or taxpayers in the shaping of the affairs of the municipality engaged in the business.); *County of Inyo v. Public Util. Com'n*, 604 P.2d 566 (Calif. 1980) (Legislature has not exercised existing constitutional authority to grant Public Utilities Commission jurisdiction over municipally owned water companies supplying outside customers.)

CONCLUSION

The City of Yerington has the authority to construct and maintain a municipal water system both within and without its boundaries. The City need not compensate a privately owned water utility for competing with it in an area in which the privately owned utility is authorized to serve, since Nevada law provides the regulated utility no right to be free from competition from a municipal water utility.

Very truly yours,

BRIAN MCKAY, *Attorney General*
By DOUGLAS E. WALTHER, *Deputy Attorney General*

OPINION NO. 86-13 TAXATION—VETERANS’ EXEMPTION: That portion of [NRS 361.090](#)(1)(a) and (b) which grants tax exemption to veterans who were residents of Nevada at time of entry into Armed Forces is unconstitutional. Remainder of statute is constitutional.

CARSON CITY, July 25, 1986

THOMAS F. RILEY, ESQ., *Chief Deputy District Attorney*, Washoe County District Attorney’s Office, Post Office Box 11130, Reno, Nevada 89520

DEAR MR. RILEY:

You have again requested the opinion of this office regarding the effect of a recent United States Supreme Court decision on the veterans’ property tax exemption found in [NRS 361.090](#). As you will recall, we recently rendered an opinion, Nevada Attorney General Opinion No. 86-3 (January 24, 1986), which concluded that the provisions of [NRS 361.090](#)(1)(a) which grant a preferential tax exemption to veterans who were Nevada residents for a period of more than three years before December 31, 1963, were unconstitutional in light of the United States Supreme Court’s recent decision in *Hooper v. Bernalillo County Assessor*, 472 U.S. ____, 105 S.Ct. 2862 (1985). We further opined that the unconstitutional provision was not inseparably connected to the other parts of the statute and was, therefore, severable from the remainder of the statute under [NRS 0.020](#) and rulings of the Nevada Supreme Court. We further stated that [NRS 361.090](#) should be interpreted and applied as though the unconstitutional portion were excised from the statute and that the remaining conditions for obtaining the veterans’ tax exemption, as well as the exemption itself, continued to be valid.

Your question now pertains to the impact of the United States Supreme Court’s recent decision in *Attorney General of New York v. Soto-Lopez*, Case No. 84-1803, 54 U.S. L. W. 4661 (June 17, 1986) on the veterans’ property tax exemption found in [NRS 361.090](#)(1)(a) and (b). It is your opinion that *Soto-Lopez* renders unconstitutional those portions of the statute which grant a preferential tax exemption to qualifying veterans who were residents of Nevada at the time of their entry into the Armed Forces of the United States. It is further your opinion that the provisions are severable from the remainder of the statute, including that portion recently declared unconstitutional, under other NRS provisions and rulings of the Nevada Supreme Court, and should, therefore, be interpreted as though the unconstitutional portions were excised from the statute.

QUESTIONS PRESENTED

1. Are those provisions of [NRS 361.090](#) which grant a partial property tax exemption to qualifying veterans who were residents of Nevada at the time of their entry into the Armed Forces constitutionally invalid under the equal protection clause of the fourteenth amendment to

the U.S. Constitution or the constitutional right to travel as recently interpreted in *Attorney General of New York v. Soto-Lopez*, supra?

2. If so, are the unconstitutional portions of the statute severable from the other conditions precedent to obtaining an exemption under [NRS 361.090](#) such that those conditions remain valid?

3. If the portions of [NRS 361.090](#) which grant an exemption to qualifying veterans who are residents of Nevada at the time of entry into the Armed Forces are unconstitutional, and if the unconstitutional portions of that statute are severable from the other provisions of [NRS 361.090](#), and taking into consideration the residency requirement declared unconstitutional by Attorney General Opinion 86-3, which conditions precedent to obtaining a veterans' exemption under that statute remain constitutionally valid?

APPLICABLE STATUTES

[NRS 361.090](#), provides in pertinent part:

1. The property, to the extent of \$1,000 assessed valuation, of any actual bona fide resident of the State of Nevada who:

(a) Was such a resident for a period of more than three years before December 31, 1963, or who *was such a resident at the time of his or her entry into the Armed Forces of the United States*, who has served a minimum of ninety days on active duty, who was assigned active duty at some time between April 21, 1898, and June 15, 1903, or between April 6, 1917, and November 11, 1918, or between December 7, 1941, and December 31, 1946, or between June 25, 1950, and January 31, 1955; or

(b) *Was such a resident at the time of his or her entry into the Armed Forces of the United States*, who has served a minimum of ninety continuous days on active duty none of which was for training purposes, who was assigned to active duty at some time between January 1, 1961, and May 7, 1975, and who received, upon severance from service, an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States or who, having so served, is still serving in the Armed Forces of the United States, is exempt from taxation.

2. For the purpose of this section, the first \$1,000 assessed valuation of property in which such person has any interest shall be deemed the property of that person.

3. The exemption may be allowed only to a claimant who files an affidavit annually, on or before August 1 of the year preceding the year for which the tax is levied, for the purpose of being exempt on the secured tax roll, but the affidavit may be filed at any time by a person claiming exemption from taxation on personal property.

4. The affidavit must be filed with the county assessor to the effect that the affiant is an actual bona fide resident of the State of Nevada who meets all the other requirements of subsection 1 and that the exemption is claimed in no other county within this state.

...
(Emphasis added.)

[NRS 361.040](#) provides:

“Resident” means a person who has established a residence in the State of Nevada, and has actually resided in the State for at least six months.

ANALYSIS

Nevada's veterans' property tax exemption statute, [NRS 361.090](#), formerly granted a property tax exemption only to veterans who were Nevada residents for more than three years prior to

December 31, 1963, or to veterans who were residents at the time of their entry into the Armed Forces and who served on active duty during certain designated periods of armed conflict. Thus, a veteran from Nevada was only allowed to claim the property tax exemption if he fulfilled one of those two residency requirements. However, the United States Supreme Court's opinion in *Hooper v. Bernalillo County Assessor*, 472 U.S. _____, 105 S.Ct. 2862 (1985) was found by this office to have invalidated the first of the prior residency requirements, that is, that which affords preferential treatment to veterans who were residents of Nevada for a period of more than three years before December 31, 1963. In *Hooper* the court held that a New Mexico statute which granted a tax exemption only to those veterans who had been residents in that state before May 8, 1976, violated the fourteenth amendment equal protection rights of those veterans who had established residency in the state after that date.

Now, serious questions as to the constitutionality of the second residency requirement, the "time of entry" requirement found in [NRS 361.090](#), have been raised by the United States Supreme Court's recent decision in *Attorney General or New York v. Soto-Lopez*, Case No. 84-1803, 54 U.S. L. W. 4661 (June 17, 1986). In *Soto-Lopez*, the Supreme Court held that provisions of New York's constitution and statutes which limited the award of a civil service employment preference to resident veterans who lived in New York at the time they entered the Armed Forces effectively penalized otherwise qualified resident veterans who did not meet the prior residence requirement. The court further held that the state had not met its heavy burden of proving that it selected a means of pursuing a compelling state interest which did not impinge unnecessarily on constitutionally protected interests and concluded that New York's veterans' preference violated the appellee's constitutionally protected rights to migrate and to equal protection of the law.

Although the *Soto-Lopez* decision did not deal directly with the unconstitutionality of a state veterans' tax exemption, it appears that the type of preference granted to veterans by virtue of their prior residence was of little consequence to the Supreme Court, especially in light of the court's heavy reliance on the veterans' tax exemption case of *Hooper v. Bernalillo County Assessor*, supra. Indeed, the language of *Soto-Lopez* is quite broad and appears to encompass a wide spectrum of discriminations against veterans who migrate from one state to another. For example, the court stated:

Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments. See, e.g. *Hooper*, supra; *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 551 (1983); *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, n. 25 (1979). Nonetheless, this policy, even if deemed compelling, does not support a distinction between resident veterans based on their residence when they joined the military. Members of the Armed Forces served the Nation as a whole. While a service person's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel. . . .

...
Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." *Hooper*, supra, at _____. See also, *Vlandis v. Kline*, 412 U.S. 441, 449 to 450, and n. 6 (1973); *Shapiro*, 394 U.S. at 632-633; *Passenger cases*, 7 How., at 492 (Taney, C. J. dissenting).

54 U.S. L. W. at 4665.

The court considered four interests offered by New York in justification of its fixed point residence requirement: (1) the encouragement of New York residents to join the Armed

Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a uniquely valuable class of public servants who possess useful experience acquired through their military service. The court found that all four justifications failed to withstand heightened scrutiny on a common ground, that is, that each of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans. Citing *Dunn v. Blumstein*, 405 U.S. 330 (1972), the court stated that "if there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." 54 U.S. L. W. at 4664. The court further stated that "[b]ecause New York could accomplish its purpose without penalizing the right to migrate by awarding special credits to all qualified veterans, the State (was) not free to promote its interests through a preference system that incorporate(d) a prior residence requirement." 54 U.S. L. W. at 4664-4665.

A review of the legislative history of [NRS 361.090](#) reveals that no specific purposes were delineated by the legislature when passing the veterans' tax exemption. The Nevada Supreme Court long ago held that when ascertaining the purposes or intention of the legislature in enacting a statute, courts must first resort to the words of the statute and then to the mischiefs the statute was intended to suppress or the benefits to be attained. *Maynard v. Johnson*, [2 Nev. 25](#), reversing [2 Nev. 16](#) on rehearing (1866), cited, *State ex rel. Jones v. Mack*, [23 Nev. 359, at 367](#), 47 P. 763 (1897), *State ex rel. Bartlett v. Brodigan*, [37 Nev. 245, at 255](#), 141 P. 988 (1914), *Porch v. Patterson*, [39 Nev. 251, at 262](#), 156 P. 439 (1916). Nevada's statute, in the same manner as New York's statute, grants preferential treatment to veterans who had established prior residence within the state. From the language of our statute, it is a simple matter to infer that the legislature intended to implement benefits to veterans for reasons similar to those asserted in justification of New York's prior residence requirement. As in *Soto-Lopez*, the Supreme Court would likely find that each of the inferred justifications could be promoted fully by granting the exemption to all otherwise qualified veterans. Accordingly, the prior residence requirement in Nevada's veterans' tax exemption statute would probably be held to unnecessarily impinge on the constitutionally protected rights to migrate and to equal protection of the law. It is, therefore, the opinion of this office that the provisions of [NRS 361.090](#) which grant a partial property tax exemption to otherwise qualifying veterans who were residents of Nevada at the time of their entry into the Armed Forces of the United States are constitutionally invalid.

If the invalid provisions of the statute were excised from it, would the remaining portions of the statute still be valid? Preliminarily, however, it must be remembered that Nevada's veterans' tax exemption statute originally contained two prior residency provisions, one of which must have been met in order to qualify for the exemption. The first of those, that a veteran be a resident of Nevada for more than three years before December 31, 1963, was found unconstitutional in light of the United States Supreme Court's recent decision in *Hooper v. Bernalillo County Assessor*, *supra*. That decision left eligible only those veterans who meet the "time of entry into service" residency requirement which is under consideration now. Should this requirement be found severable, the class of veterans eligible for the exemption would be broadened to include any veteran who is a current Nevada resident and who meets the remaining conditions precedent, as more fully discussed *infra*.

The answer to the severability question is found in the Nevada Revised Statutes and in case law discussing the issue. [NRS 0.020](#)(1) provides, in pertinent part:

If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable.

Further, our Supreme Court has long held that if a law is constitutional in part and unconstitutional in part, the unobjectionable portion may stand, unless the whole object and effect of the law is destroyed. *State v. Eastabrook*, [3 Nev. 173](#) (1867), cited, *Evans v. Job*, [8 Nev. 322 at 342 \(1873\)](#), *Turner v. Fish*, [19 Nev. 295 at 296, 9 P. 884](#) (1886), *State ex rel. Dunn v. Board of Commissioners*, [21 Nev. 235 at 240, 29 P. 974](#) (1892). *State ex rel. Keith v. Westerfield*, [23 Nev. 468, at 474, 49 P. 119](#) (1897), *State ex rel. Abelman v. Douglass*, [46 Nev. 121 at 125, 208 P. 422](#) (1922); see also *State ex rel. Rostenstock v. Swift*, [11 Nev. 128](#) (1876) (unconstitutional portion of statute does not affect valid portions unless they are “inseparably connected” in a manner that it can be presumed the legislature would not have passed one portion without the other). Similar holdings are found in more recent cases. See *Spears v. Spears*, [95 Nev. 416](#), 596, P.2d 210 (1979); *Desert Chrysler Plymouth, Inc. v. Chrysler Corp.*, [95 Nev. 640](#), 600 P.2d 1189 (1979); *Morris v. Board of Regents*, [97 Nev. 112](#), 625 P.2d 562 (1981).

The unconstitutional portions of [NRS 361.090](#) are separated from the balance of the statute by commas indicating the legislative intent that those portions are not inseparably connected to the remainder of the statute. Further, removing both prior residency requirements from the statute does not destroy the overall objective and effect of the law and leaves the remaining conditions precedent to obtaining the exemption easily discernible, as will be more fully discussed *infra*. Accordingly, the requirement that a veteran be a resident of Nevada at the time of his or her entry into the Armed Forces of the United States could be excised from the statute as being unconstitutional.

The question remains which conditions precedent to obtaining a veterans’ exemption under this statute remain constitutionally valid once the prior residency requirements in the statute are found unconstitutional and are excised from it. The answer to this question can be found through a careful reading of the statute. So that the county assessors may more easily ascertain the valid prerequisites to obtaining the exemption, they are set forth as follows:

1. That the claimant be an actual bona fide resident of the State of Nevada as defined in [NRS 361.040](#);
2. That the claimant served a minimum of 90 days on active duty and was assigned to active duty at sometime between the dates set forth in paragraph (a) of subsection (1), or that the claimant served a minimum of 90 continuous days on active duty, none of which was for training purposes, within the dates set forth in paragraph (b) of subsection (1);
3. That the claimant received upon discharge an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or that the claimant, having so served, is still serving in the Armed Forces of the United States;
4. That the claimant timely filed the affidavit with the county assessor as required in subsections (3) and (4) for real property (except as provided in subsection (5) for persons currently in the service), or has filed the affidavit at any time for exemption from taxation on personal property;
5. That the exemption is claimed in no other county within this State as provided in subsection (4); and
6. That the person submits the proof as required by subsection (6).

CONCLUSION

The provisions of [NRS 361.090](#)(1)(a) and (b) which grant a preferential tax exemption to veterans who are residents of Nevada at the time of their entry into the Armed Forces of the United States are unconstitutional in light of the United States Supreme Court’s recent decision in *Attorney General of N.Y. v. Soto-Lopez*, supra. Those provisions are not inseparably connected to other parts of the statute and are, therefore, severable from the remainder of the statute under

[NRS 0.020](#) and rulings of the Nevada Supreme Court. [NRS 361.090](#) should be interpreted and applied as though the unconstitutional portions were excised from the statute. All remaining conditions for obtaining the veterans' tax exemption, as well as the exemption itself, remain valid.

Any honorably discharged or separated veteran of the United States Armed Forces who has served ninety days or more of active duty, or, having so served, is still serving such duty, during dates set forth in the law and is an actual bona fide resident of Nevada may apply for the statutory property tax exemption.

Sincerely,

BRIAN MCKAY, *Attorney General*
By ILLYSSA I. FOGEL, *Deputy Attorney General*

OPINION NO. 86-14 MUNICIPAL CORPORATIONS: Sale of certificates of participation in lease payments of city for leased convention facilities does not violate Nev. [Const. art. 8, ' 10](#). Building leased by city remains subject to ad valorem taxes.

CARSON CITY, July 21, 1986

MR. ROBERT L. VAN WAGONER, Office of the City Attorney, P.O. Box 1900, Reno, Nevada 89505

DEAR MR. VAN WAGONER:

Recently you sought the opinion of this office on three questions relating to a proposed financing scheme for the construction and operation of a trade show and convention hall facility in which the City of Reno would be a participant. As part of our review of these matters, you have provided to us and we have examined copies of four proposed documents known as the trust indenture, the air rights sub-sublease, the management services agreement and the lease purchase agreement.

BACKGROUND

As we understand the proposal, the promoters have leased space over the Southern Pacific Railroad tracks in downtown Reno for the purpose of constructing a building, the first two floors of which will consist of retail sales space. The third and fourth floors of the building would contain the trade show and convention hall areas. The city believes the construction and operation of such facilities near the city's center will be highly beneficial to the economic development of the area, attracting residents and tourists alike to these and other nearby retail and recreational facilities and offering new employment opportunities as well. The city wants to lease the trade show and convention hall portions of the building for a term of 25 years, at which time ownership of the facilities and certain rights under an air rights sublease will pass to the city if all the lease purchase terms have been complied with. Under the terms of the lease, the city's obligation to pay rent and to continue as a lessee of the facilities may be terminated without penalty or liability of any kind to the city at the end of each current fiscal year by the city merely failing to designate money in its budget for the ensuing fiscal year for that year's rental payments otherwise required under the lease.

Construction money for the trade show and convention hall facilities will be acquired by the sale to interested persons of certificates of participation in the rental payments to be made by the

city of Reno under the lease purchase agreement. Management of the completed facility initially will be performed by a private management firm retained by the city for this specific purpose.

Due to your need for a quick response from us on some of the questions raised in your letter, we are at this time supplying our opinion only on the issues of the city's general authority to participate in the proposed financing scheme and the taxability of the property if the city does participate.

QUESTION NO. 1

May the City of Reno legally participate in the proposed financing scheme for the construction and operation of the trade show and convention hall facilities hereinbefore described?

ANALYSIS

Your question calls for an analysis of the possible application to the proposal of Art. 8, § 10 of the Nevada constitution and various sections of the Reno City Code and the Nevada Revised Statutes.

Art. 8, § 10 of the Nevada constitution provides in pertinent part that “[n]o city shall become a stockholder in any joint stock company, corporation or association whatever, or loan its credit in aid of any such company, corporation or association, except railroad corporations, companies or associations.” Although the Southern Pacific Transportation Company, a railroad, is indirectly involved in this proposal as the lessor under a ground lease, its presence is not such as would automatically invoke the exception language found in Art. 8, § 10 of the state constitution. We must, therefore, determine whether the proposal and the role of the city in it constitutes the loaning of the city's credit to a private company or whether the city will become a stockholder in a private company if it goes ahead with the project as presently structured.

From the early case of *Gibson v. Mason*, [5 Nev. 283](#) (1869), we learn that the phrase “loan its credit” in our state constitution means assuming the obligation to pay with public money the debts of private companies and associations. Other courts have more recently characterized similar constitutional debt restrictions as prohibiting government entities from acting as sureties or guarantors of the collateral obligations of private parties. See *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977); *Allen v. County of Tooele*, 445 P.2d 994 (Utah 1968). Nothing in the documents we have examined appears to us to commit the City of Reno to assume and discharge a debt owed by another. The city's only obligation appears to be to make certain rental payments during any current fiscal year that it occupies the trade show and convention hall facilities. The complete nonliability of the city with respect to payments of any kind for other than the current fiscal year or for satisfaction of amounts still due and owing on the certificates of participation is repeated throughout the documentation and on the face of the certificates themselves.

Although these multi-paged documents evidence a highly detailed and complex business deal, as far as the City of Reno is concerned its part in the arrangement is merely that of a lessee of certain real and personal property (i.e., the third and fourth floors of the building and the air rights). There is no doubt in our mind that the city may acquire both real and personal property by leasing the same. Reno City Code § 2.140(1) empowers the city to acquire, control, improve and dispose of real and personal property for use by the city, its residents and visitors. The power to “acquire” property implies the power to lease property, enter into contracts for construction or for purchase, or to lease with the option to purchase. 10 McQuillan, *Municipal Corporations* § 28.10 (3rd ed. rev.). And, Reno City Code § 2.020 clearly implies the power to lease property when it authorizes the city council to “vote on any lease, contract or other agreement which extends beyond their terms of office.”

We are aware that [NRS 350.800](#)(1) says that a “debt” is created whenever a municipality acquires real or personal property and another person acquires or retains a security interest in that property, but in view of the nonappropriation clauses scattered throughout the documents we have examined, we believe the debt exemption language in [NRS 350.800](#)(1)(a) would be

applicable to this situation. Nor, do we believe, would the proposed leases count towards the city's debt limit set out in Reno City Code § 7.010.

A word of caution is appropriate here. We are somewhat concerned by some language in *State ex rel. Nevada Building Authority v. Hancock*, 86 Nev. 310, 468 P.2d 333 (1970) referring to the "current revenue" doctrine and the creation of state debt under Nev. [Const. Art. 9, § 3](#). Our supreme court held, under the facts of that case, that successive biennial appropriations for rent constituted a legislative pledge to make future appropriations and thus created "debt" subject to, and in excess of, the state's one percent constitutional debt limit. In passing, the court observed it was inconceivable the state would default on the future rent payments since its "good faith" would not allow it. The applicability of this case to the proposed financing scheme is not entirely clear. The facts are arguably different; it would have been very difficult for the state, as a practical matter, to abandon such buildings. And, four of the five members of the current court played no part in the *Hancock* decision. Cf. *Lagiss v. County of Contra Costa*, 35 Cal.Rptr. 450 (Cal.App. 1963).

Assuming *arguendo* the city in the proposed transaction is to some extent lending its credit in aid of a private company which stands to gain financially, the fact that the city is also pursuing a public purpose probably prevents the financing scheme from running afoul of Nev. [Const. Art. 8, § 10](#). We entertain no doubt whatsoever that in Nevada acquiring and operating convention, auditorium or assembly halls by public entities is a public purpose. See [NRS 244A.597](#); 10 McQuillan, *Municipal Corporations* § 28.14 (3rd ed. rev.) and cases cited therein.

The other prohibition in Nev. [Const. Art. 8, § 10](#) relates to a city becoming a stockholder in any private company. The trade show and convention hall proposal nowhere contemplates the city will actually acquire "stock" as we generally understand that term, but it has been suggested that the various parts of the proposal, taken as a whole, might constitute some form of joint venture which would be the equivalent of becoming a stockholder in a private company. In the absence of any cases directly on point, it is difficult to speak with much certainty on this aspect of your question.

However, we do know that in Nevada a joint venture has been defined by our courts as a contractual relationship in the nature of an informal partnership wherein two or more persons conduct some business enterprise, agreeing to share jointly, or in proportion to the capital contributed, in profits and losses. See *Bruttomesso v. Las Vegas Metropolitan Police Department*, 95 Nev. 151, 154, 591 P.2d 254, 256 (1979); *Swenson v. McDaniel*, 119 F.Supp. 152 (D.Nev. 1953). Although both the air rights sub-lease and the management services agreement contain terms which relate the amount of rental or fee payments to the revenues the city receives from the operation of the trade show and convention hall facilities, neither document in our view provides for a "sharing of the profits." One merely describes the method by which the city's rent as sub-sublessee is calculated, and the method (a percentage of gross sales) is one commonly found in commercial leases of property which the lessee intends to use for revenue production. The other provides for a fixed fee as an additional financial incentive to the management team to do a good job in promoting use of the facilities, which is certainly to the advantage of the city. We realize liability for the payment of these basic and incentive management fees is waived if the net income of the trade show and convention hall facilities is not sufficient to pay them, but it is not clear to us this constitutes "sharing in the losses" within the meaning of a joint venture.

Again, assuming *arguendo* the documents and the proposal do constitute a joint venture, there is no law we have discovered which equates that with stock ownership for the purposes of a constitutional provision like Nev. [Const. Art. 8, § 10](#). The limited obligations of the city as lessee, as discussed above, argue against a construction that the proposal is a joint venture or the equivalent of a stock ownership interest.

CONCLUSION

Subject to the cautions and limitations noted herein, we believe the City of Reno may generally participate in the proposed financing scheme for the construction, leasing and operation of a trade show and convention hall facility in downtown Reno. This opinion covers only the general proposal, and we offer no opinion as to specific, individual terms in the various documents which should, we believe, be thoroughly reviewed by the legal and other advisors to the city before the documents are approved and executed.

QUESTION NO. 2

Will the land and improvements pertaining to the project enjoy an ad valorem tax exemption because of the involvement of the city in the financing scheme?

ANALYSIS

[NRS 361.045](#) declares that “[e]xcept as otherwise provided by law, all property of every kind and nature whatever within this state shall be subject to taxation.” See also Nev. [Const. Art. 8, § 2](#). Absent a specific exemption law, every piece of real and personal property in Nevada is subject to ad valorem taxation. Our examination of the property tax statutes has failed to reveal any exemption for property which is leased by a private lessor to a municipal corporation like the City of Reno.

Property owned by and belonging to municipal corporations may be exempted from taxation, and [NRS 361.060](#) does, in fact, generally exempt such lands and other property. However, the key to the ad valorem tax exemption is ownership of (i.e., legal title to) the real or personal property in question. From the documents we have examined relating to the proposed trade show and convention hall facilities, it appears clear to us that the City of Reno is not intended to, and in fact will not, have legal title to the trade show and convention hall portion of the building unless it completes all its obligations under the lease purchase agreement for the entire term of said agreement or, alternatively, the city exercises its option to buy the facilities before the end of the lease term. Otherwise, during the lease term, title to the property will at all times be in the lessor/trustee, a private banking entity.

State and local governments frequently rent office or other space from private landlords. The mere fact that a governmental entity is a tenant in a building does not by itself change or alter the tax status of the property, which remains fully subject to taxation under [NRS ch. 361](#).

After the project is constructed and occupied by the city, if the city places its *own personal* property in the facilities for use in conjunction therewith, such personal property of the city would not be subject to ad valorem taxes under [NRS 361.060](#).

CONCLUSION

The presence of the City of Reno as a lessee of the proposed trade show and convention hall facilities would not create an exemption from ad valorem taxation for any portion of those facilities not actually owned by the city.

We will endeavor to provide you with our response to your competitive bidding question within the next two weeks. We trust that the above opinion will assist you in completing your legal review of this proposed transaction on behalf of your client, the City of Reno.

Sincerely,

BRIAN MCKAY, *Attorney General*

By WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

OPINION NO. 86-15 MUNICIPAL CORPORATIONS: Management service agreement for city-leased convention hall must be put out for competitive bids. Professional services exception not applicable. [NRS 332.045](#) and [332.115](#).

CARSON CITY, August 1, 1986

MR. ROBERT L. VAN WAGONER, Office of the City Attorney, P.O. Box 1900, Reno, Nevada 89505

DEAR MR. VAN WAGONER:

In our letter to you dated July 21, 1986, we indicated that we would respond at a later date to your inquiry about the applicability of chapter 332 of NRS to the construction and management of the proposed trade show and convention center facilities in downtown Reno. That is the purpose of this letter.

QUESTION

Is the proposed management service agreement for the management and operation of the trade show and convention center facilities to be known as Reno Expo subject to the competitive bidding requirements of chapter 332 of NRS?

ANALYSIS

It is our understanding that the construction of the proposed trade show and convention center facilities will no longer be a responsibility of the City of Reno under the lease purchase agreement and related documents. Therefore, we are limiting your question and our analysis to the proposed management service agreement for the actual operation of the facilities.

As you know, [NRS 332.045](#), as part of the Local Government Purchasing Act, requires that all Nevada cities awarding contracts where the amount exceeds \$10,000 do so only after public advertisement, unless otherwise specifically provided by law. [NRS 332.115](#) exempts certain contracts from the competitive bidding requirement because they are deemed, as a matter of law, not to be adapted to award by such a procedure. Included among the exempt contracts are those for "professional services." [NRS 332.115\(1\)\(b\)](#).

Is the proposed management service agreement a contract for professional services exempt from the requirements for competitive bidding? Although a number of cases have been decided by various courts involving the issue of whether contracts for personal or professional services are subject to a statutory competitive bidding requirement (*see* 15 A.L.R.3rd 733), only a few such cases have examined management service contracts, and they are not unanimous in their holdings. However, for the reasons hereinafter set forth, we believe our Nevada courts would, more likely than not, find this particular contract subject to the competitive bidding requirements of chapter 332 of NRS.

We begin by acknowledging the strong public policy underlying the competitive bidding statutes. These laws are for the benefit of the taxpayers and are to be construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition. *Terminal Construction Corp. v. Atlantic City Sewerage Authority*, 341 A.2d 327 (N.J. 1975). In this same vein, it is axiomatic that exceptions to competitive bidding requirements should be strictly construed so as not to dilute this strong public policy or permit a public body to avoid pertinent legislative enactments. *Autotote Ltd. v. New Jersey Sports and Exposition Authority*, 427 A.2d 55 (N.J. 1981).

A contract for management and operation of a city-owned amusement park was found to be subject to the competitive bidding laws in *Glatstein v. City of Miami*, 399 So.2d 1005 (Fla.App. 1981). What the city required to be done and what the management firm agreed to do was found not to constitute "professional services." Likewise, in *Council of City of New Orleans v. Morial*,

390 So.2d 1361 (La.App. 1980), a contract for administrative services in connection with a city-operated self-insured health care plan was found subject to the competitive bidding statutes. The court noted the vast majority of the services to be provided under the contract were of a clerical nature, with only a small portion requiring any extensive training and experience in fields of science and learning.

In an earlier Louisiana case, the court noted the question as to whether competitive bidding is feasible and contemplated by the statutes must be determined from an examination of the terms of the contract required of the successful bidder:

Generally, the public body is allowed to exercise discretion in contracting for services which require use of creative and individual talents or unique artistic skills, or which require counselling and advice based on training and experience in fields of science and learning, or which otherwise require such extraordinary skill and learning that other factors far outweigh monetary considerations in determining the acceptability of the bidder.

Transportation Display, Inc. v. City of New Orleans, 346 So.2d 259 (La.App. 1977) (contract to sell advertising space in municipal airport did not involve skills that would exclude it from competitive bidding law).

Our examination of the terms of the proposed management service agreement for Reno Expo discloses that the manager/operator of the trade show and convention center facilities is expected to operate the facilities efficiently and at the lowest reasonable cost, to arrange for their use by concessionaires, licensees, tenants and other users, to maintain all utilities and operating supplies, to do necessary repairs and renovations, to keep all required licenses and permits in effect, to collect and distribute money in payment of all required licenses and permits in effect, to collect and distribute money in payment of all expenses of the facilities of any nature whatsoever, and to maintain adequate insurance coverages. Although some advertising and promotion is mentioned, such duties appear to form a very small part of the manager's overall responsibilities. Quite frankly, none of these services sound like they will require professional skill, i.e., education, experience, ability and personality characteristics not possessed by persons generally. *Stoor v. City of Seattle*, 267 P.2d 992 (Wash. 1954).

This agreement appears to us to be markedly different from the one discussed in the case of *Hurd v. Erie County*, 310 N.Y.S.2d 953 (Sup.Ct.App.Div. 1970). In *Hurd*, a proposed contract for the management of a domed sports stadium was found to call for specialized management and promotional skills which brought it within an exception to the competitive bidding statutes of New York. Critical to the court's conclusion seems to have been the fact that the manager of this new domed stadium had previously managed the well-known Houston Astrodome, at that time the only one of its kind in the nation, and therefor possessed "unique talents and abilities" in this regard. Also, the contract called for "expert top management with at least five years experience in stadium management and operation." We find no similar facts or requirements in the instant agreement. Nor do the duties of the Reno Expo manager appear to require skills or labor that are predominantly mental or intellectual, as opposed to physical or manual. See *Witherspoon v. Sides Construction Company*, 362 N.W.2d 35 (Neb. 1985); *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102 (Tex. 1942).

CONCLUSION

Our review of the proposed management service agreement itself and pertinent case law has not convinced us that in this instance any deviation is mandated from the strong public policy expressed by our legislature in favor of competitive bidding for local government contracts. On balance, we believe the public good is best advanced with respect to the management of the proposed trade show and convention center facilities through compliance with the competitive bidding requirements of ch. 332 of NRS. We are of the opinion that the professional services exemption does not reach this agreement.

We trust that this opinion, together with our opinion of July 21, 1986, will assist you in completing your legal review of this proposed transaction by the City of Reno.

Sincerely,

BRIAN MCKAY, *Attorney General*
By WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

OPINION NO. 86-16 MOTOR VEHICLES—JURISDICTION FOR MISDEMEANOR TRAFFIC OFFENSES: When traffic violation occurs within municipal boundaries violation may be prosecuted in either municipal court or justice’s court having jurisdiction of offense. Nevada Attorney’s General Opinion No. 105 (11/20/72) is modified.

CARSON CITY, August 19, 1986

MR. WAYNE R. TEGLIA, *Director*, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711-0900

DEAR MR. TEGLIA:

You have requested this office review a prior opinion and determine whether we would still give the same advice following the recent decision in *Sheriff v. Wu*.

QUESTION

Is Nevada Attorney General Opinion No. 105 (November 20, 1972) still valid in light of the Nevada Supreme Court’s decision in *Sheriff v. Wu*, [101 Nev. 687](#), 708, P.2d 305 (1985)?

ANALYSIS

In Nevada Attorney General Opinion No. 105 (November 20, 1972) we addressed the question which court has jurisdiction when a traffic violation occurs within the boundaries of a municipality. At issue was [NRS 484.803\(1\)](#):

Whenever any person is taken before a magistrate or is given a written traffic citation containing a notice to appear before a magistrate as provided for in [NRS 484.799](#), the magistrate shall be a justice of the peace or police judge who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the alleged violation occurred, except that when the offense is alleged to have been committed within an incorporated municipality wherein there is an established court having jurisdiction of the offense, the person shall be taken without unnecessary delay before that court.

We concluded that this statute requires taking the alleged offender before the justice of the peace unless a municipal court judge also has jurisdiction over such offenses as the result of a city traffic ordinance. In that event, we thought the municipal judge had exclusive jurisdiction under the statute with respect to that particular traffic violation.

In *Sheriff v. Wu*, supra, the Nevada Supreme Court acknowledged that [NRS 484.803\(1\)](#) could be grammatically read in the manner suggested by Wu, which was the same as our 1972 opinion. However, the court noted that to do so would be contrary to Art. 6, § 9 of the Nevada constitution, which does not permit fixing municipal court jurisdiction so that it is in “conflict with that of the several courts of record.” Wu’s reading of the statute and our 1972 opinion

would deprive the justice's court, a court of record, of jurisdiction over traffic violations committed within the jurisdictional area of that court. Our high court specifically held [NRS 484.803](#)(1) to mean:

When a traffic violation occurs within municipal boundaries a violator may be prosecuted in either a municipal court or justice's court having jurisdiction of the offense. In either event, the violator must be taken without unnecessary delay before that court in which the charge is brought.

When our 1972 opinion was written, justice courts were not then courts of record, becoming such only on and after July 1, 1979. Although not in error when written, subsequent legal events have lessened the validity of the opinion. For the reasons stated above, Nevada Attorney General Opinion No. 105 (November 20, 1972) is hereby modified.

CONCLUSION

Nevada Attorney General Opinion No. 105 (November 20, 1972) is modified and, in keeping with the decision of the Nevada Supreme Court in *Sheriff v. Wu*, supra, it is the opinion of this office that [NRS 484.803](#)(1) means that when a traffic violation occurs within municipal boundaries a violator may be prosecuted in *either* a municipal court or justice's court having jurisdiction of the offense. In either event, the violator must be taken without unnecessary delay before that court in which the charge is brought.

Sincerely,

BRIAN MCKAY, *Attorney General*

By WILLIAM E. ISAEFF, *Chief Deputy Attorney General*

OPINION NO. 86-17 JAILS AND PRISONERS: INTERCEPTION OF WIRE COMMUNICATIONS AND CONVERSATIONS—Monitoring by jail personnel of prisoner telephone conversations, prisoner/visitor conversations and prisoner conversations does not violate state law.

CARSON CITY, September, 1986

THE HONORABLE MILLS LANE, *Washoe County District Attorney*, Washoe County Courthouse,
P.O. Box 11130, Reno, Nevada 89520
Attention: EDWIN T. BASL, *Assistant District Attorney*

DEAR MR. LANE:

You have requested the opinion of this office with regard to whether county jail officials may monitor a prisoner's conversations. This monitoring is performed on a regular basis by law enforcement personnel, pursuant to established jail procedures with posted notice that monitoring is conducted, for the purpose of maintaining jail security, safety, order and discipline. The policy involves the monitoring of prisoner telephone conversations with persons outside the jail, prisoner-visitor conversations via a visiting room telephone intercom and prisoner conversations by use of a jail-wide intercom system.

At the outset it is important to note that the questions presented are purely matters of state statutory construction. It is well established that, as a matter of federal constitutional law, the monitoring or recording of prisoner conversations by jail personnel for the purpose of maintaining jail security and safety does not violate the fourth amendment. *United States v.*

Hearst, 563 F.2d 1331, 1344-1346 (9th Cir. 1977) *cert. denied*, 435 U.S. 1000 (1978), *citing Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218 (1962). *Accord United States v. Paul*, 614, F.2d 115, 116 (6th Cir. 1980), *cert. denied* 446 U.S. 941 (1980); *People v. Hill*, 528 P.2d 1 (Cal. 1974); *People v. Blehm*, 623 P.2d 411, 415 (Colo.App. 1981); *People v. Myles*, 379 N.E.2d 897, 900 (Ill.App. 1978).

QUESTION ONE

Whether monitoring by jail personnel of prisoner telephone conversations or prisoner/visitor conversations conducted over a visiting room telephone intercom violates state law?

ANALYSIS

Pursuant to Nevada law it is unlawful for any person to intercept or attempt to intercept any wire communication unless conducted pursuant to a few limited exceptions. See [NRS 200.610-200.690](#) (1985).¹ A “wire communication” is defined as:

¹The primary exception to the prohibition on intercepting wire communications is found at [NRS 179.410-179.515](#), which permits interception pursuant to a court order based on probable cause. These statutes allow investigative or law enforcement officers to intercept wire or oral communications only after an application is made by the attorney general or county district attorney to a state supreme court justice or district judge who then approves the application by issuing an appropriate order. [NRS 179.460](#) (1985).

[T]he transmission of writing, signs, signals, pictures and sounds of all kinds by wire, cable, or other similar connection between the points of origin and reception of such transmission, including all facilities and services incidental to such transmission, which facilities and services include, among other things, the receipt, forwarding and delivering of communications.

[NRS 200.610](#)(2) (1985). Ordinary telephone conversations and prisoner/visitor conversations over a visiting room telephone intercom clearly fall within this very broad definition of “wire communication.” In both instances sound (voices) are transmitted by wire (telephone/intercom line) between a point of origin to a point of reception.

Although not defined in Chapter 200, the term “intercept” is defined as “the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment.” [NRS 179.430](#) (1985). The term “electronic, mechanical, or other device” is defined as:

[A]ny device or apparatus which can be used to intercept a wire or oral communication other than:

1. Any telephone or telegraph instrument, equipment or facility or any component thereof:

(a) Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by subscriber or user in the ordinary course of its business; or

(b) Being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

[NRS 179.425](#) (1985).

Interpreting statutory language similar to Nevada's,² several courts have concluded that correctional officers are "investigative or law enforcement officers" and monitoring prisoner telephone calls for the purpose of maintaining jail security and safety is within the ordinary

²Federal law defines the term "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(5). Federal law defines the term "electronic, mechanical or other device" as: [A]ny device or apparatus which can be used to intercept a wire or oral communication other than . . .

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;
18 U.S.C. § 2510(5).

course of their duties. Therefore, pursuant to the statutory definition, the telephone equipment used to monitor the conversations does not fit within the definition of "electronic, mechanical, or other device." Accordingly, the use of such equipment does not constitute an "interception" and no court order is required. See *United States v. Paul*, 614 F.2d at 117 (monitoring of prisoner calls for security reasons pursuant to prison rules with posted notice to inmates was permissible under exception to Title III of Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510(a), permitting interception of communication over equipment used by an investigative or law enforcement officer in the ordinary course of his duties); *Jandak v. Village of Brookfield*, 520 F.Supp. 815, 825 (N.D.Ill. 1981) (judicially unauthorized monitoring of police officer's telephone call by police chief was in the ordinary course of police chief's duties as a law enforcement officer and exempted from requirement of court order by 18 U.S.C. § 2510(5)(a)(ii); *Crooker v. U. S. Dept. of Justice*, 497 F.Supp. 500, 503 (D.Conn. 1980) (routine and random monitoring of prisoner telephone calls for security purposes pursuant to published regulations with reasonable notice was within the ordinary course of prison officials' duties and therefore permissible under 18 USC § 2510(5)(a)(ii) without a court order).

CONCLUSION

Sheriff deputies are clearly "investigative or law enforcement officers" and monitoring prisoner telephone conversations for the purpose of maintaining jail security is within the ordinary course of their duties. Therefore, where notice of the monitoring is posted, alternative methods for privileged communications are provided and the monitoring is conducted over telephone equipment pursuant to an established procedure for the purpose of maintaining jail security and safety, a court order is not required. Within these limitations, the monitoring of prisoner telephone conversations or prisoner/visitor conversations conducted over a visiting room telephone intercom does not violate state law.

QUESTION TWO

Whether monitoring of prisoner conversations by jail personnel using a jail intercom system violates state law?

ANALYSIS

The surreptitious monitoring of private conversations by a listening device is prohibited by [NRS 200.650](#) (1985) which provides:

Except as otherwise provided in [NRS 179.410](#) to [179.515](#), inclusive, no person shall intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by such other persons, or disclose the existence, contents, substance, purport, effect or meaning of any such conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

Prisoner conversations, however, are not considered private because courts have continually refused to recognize a reasonable expectation of privacy in ordinary jail conversations. See *United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir. 1985) (person who expects privacy under the circumstances of prison visiting is, if not actually foolish, exceptionally naive); *People v. Clark*, 466 N.E.2d 361, 364 (Ill.App. 1984) (in jail or prison setting, official surveillance has traditionally been the order of the day, and, therefore, there is no reasonable expectation of privacy in ordinary jailhouse conversations). In addition, any expectation of privacy is further eroded where notice of monitoring is clearly posted, or the monitoring equipment is in plain view. See *United States v. Paul*, 614 F.2d at 117 (posted telephone rules provided inmates with reasonable notice that conversations were monitored); *People v. Blehm*, 623 P.2d at 413 (visitors' and prisoners' entrances to jail posted with notice that facility is equipped with audio and visual security systems); *People v. Clark*, 466 N.E.2d at 365 (inmate had no reasonable expectation of privacy in jail conversation where jail intercom system clearly visible).

CONCLUSION

Due to the absence of a reasonable expectation of privacy, ordinary prisoner jail conversations are not considered private. Where notice of monitoring is clearly posted or the monitoring equipment readily visible, the monitoring cannot be characterized as surreptitious. Accordingly, monitoring of prisoner conversations by jail personnel with the use of an intercom system is not prohibited by state law.

Sincerely,

BRIAN MCKAY, *Attorney General*
By JAMES J. RANKL, *Deputy Attorney General,*
Criminal Division

**OPINION NO. 86-18 STREETS AND ALLEYS; POWERS OF MUNICIPALITIES;
PLANNING AND ZONING: Municipality may not require compensation from
abutting property owner for total abandonment of adjoining street acquired by
dedication for public purpose. [NRS 278.480](#) (1985).**

CARSON CITY, September 25, 1986

HONORABLE ROBERT L. VAN WAGONER, *Reno City Attorney*, City Hall, Post Office Box 1900,
Reno, Nevada 89505

DEAR CITY ATTORNEY VAN WAGONER:

This letter is in response to your request for an opinion of the attorney general relative to the propriety of a municipality obtaining compensation from an abutting landowner upon the abandonment of an alley originally acquired by dedication. Resolution of this question requires an analysis of the interaction of sections 268.050 and 278.480 of the Nevada Revised Statutes. Your opinion request letter contains three questions which will be examined separately. Before evaluating these legal issues, we will first review the facts contained in your opinion request letter.

SUMMARY OF FACTS

On June 7, 1899, the city of Reno, Nevada, received by dedication a north-south alley connecting West Fifth Street and West Sixth Street and located between West Street and Sierra Street in downtown. The city of Reno paid no consideration for the subject alley. Subsequently, a commercial business became the successor in interest and abutting property owner to both the parcels adjacent to the east and west of the subject alley.

On May 8, 1984, the commercial business petitioned the city of Reno for an order of abandonment relative to this alleyway in conjunction with an expansion project for this commercial business operation. This abandonment petition was approved on July 9, 1984, by the City Council of Reno after notice and hearing.

At a September 24, 1984, council meeting, the order of abandonment was approved contingent upon payment by the commercial business of the sum of two hundred and fifty-six thousand two hundred dollars (\$256,200.00) for title to the abandoned alley, which sum reflected the property value of the alley recommended in an appraisal conducted by the city. Additionally, the city required payment of an outstanding special assessment already owed by the commercial business.

The commercial business paid the sum of \$256,200 under protest, because the subject alley was needed for the ongoing expansion construction.

During a subsequent city council meeting on October 22, 1984, the commercial business requested reconsideration of the compensation requirement. This reconsideration request was denied. Thereafter, on June 9, 1986, legal counsel for the commercial business made a demand upon the city of Reno for the return of the monies paid to the city in order to secure title to the abandonment of the subject alley. Your opinion request followed receipt of this demand letter on July 10, 1986.

QUESTION ONE

Whether section 278.480 of the Nevada Revised Statutes authorizes a municipality to require compensation from an abutting property owner for the abandonment of an adjoining alley constructed upon land originally obtained by dedication for a public purpose.

ANALYSIS

Nevada statute provides in relevant part that:

[I]f, upon public hearing, the governing body is satisfied that the *public will not be materially injured by the proposed vacation, it shall order the street or easement vacated.* The governing body may make the order conditional, and the order shall become effective only upon fulfillment of the conditions prescribed.

If a utility has an easement over the property, the governing body shall provide in its order for the continuation of that easement.

The order must be recorded in the office of the county recorder, if all the conditions of the order have been fulfilled, and *upon the recordation title to the street or easement reverts to the abutting property owners in the approximate proportion that the property was dedicated by the abutting property owners or their predecessors in interest. In the event of a partial vacation of a street where the vacated portion is separated from the property from which it was acquired by the unvacated portion of it, the governing body may sell the vacated portion upon*

such terms and conditions as it deems desirable and in the best interests of the city. If the governing body so sells the vacated portion, it shall afford the right of first refusal to each abutting property owner as to that part of the vacated portion which abuts his property, but no action may be taken by the governing body to force the owner to purchase that portion and that portion may not be sold to any person other than the owner if the sale would result in a complete loss of access to a street from the abutting property.

If the street was acquired by dedication from the abutting property owners or their predecessors in interest, no payment is required for title to the proportionate part of the street reverted to each abutting property owner. If the street was not acquired by dedication, the governing body may make its order conditional upon payment by the abutting property owners for their proportionate part of the street of such consideration as the governing body determines to be reasonable. If the governing body determines that the vacation has a public benefit, it may apply the benefit as an offset against any determination of reasonable consideration which did not take into account the public benefit.

[NRS 278.480\(4\)-\(7\)](#) (1985) (emphasis added). The provisions of section 278.480 apply to “alleys, . . . public easements and rights of way, and other ways,” all of which are statutorily defined as a “street.” [NRS 278.010\(13\)](#) (1985).

In this instance, the city of Reno is considering the total abandonment, as compared to a partial abandonment, *see* [NRS 278.480\(6\)](#) (1985), of an alley apparently acquired through subdivision map dedication from a grantor who was the abutting parcel owner and predecessor in interest of the present owner. Assuming these facts are correct as represented in your opinion request letter, *see* text at 1-2, *supra*, a successor in interest to the abutting property owner who made original dedication is not required to pay value for title to the proportionate part of the street or alley reverted to each abutting property owner. [NRS 278.480\(7\)](#) (1985).

This conclusion is based upon an examination of section 278.480 which discloses only two circumstances under which a local government *may* require payment from an abutting property owner for a vacated street or alley. First, where the vacation of the property is partial and the vacated portion is physically separated from the abutting property by the unvacated portion. [NRS 278.480\(6\)](#) (1985). Second, where the street or alley being vacated was not originally acquired by dedication. [NRS 278.480\(7\)](#) (1985). Neither of these circumstances is present in the alley vacation which is the subject of your opinion request, because the alley abandonment involves a total vacation of the property which was originally acquired by dedication.

When the language of a statute, such as that contained in section 278.480, is plain and unambiguous, the intention of the law must be deduced from the statutory language. *See, e.g., City of Las Vegas v. Macchiaverna*, [99 Nev. 256](#), 258, 661 P.2d 879 (1983). Section 278.480 is plain and unambiguous in the requirement that an abutting property owner is not required to pay value for title to a vacated alley under the circumstances presented by this opinion request.

Accordingly, the only issue which is properly before a municipal governing body under the attendant facts is whether the public would be materially injured by the proposed vacation of the alley. *See* [NRS 278.480\(4\)](#) (1985); *L & T Corp. v. City of Henderson*, [98 Nev. 501](#), 503, 654 P.2d 1015 (1982); *Lied v. County of Clark*, [94 Nev. 275](#), 279, 579 P.2d 171 (1978). The vacation of a street or alley at the instigation of and which will benefit a private property owner does not render governmental action of vacating the property in valid or improper *per se*. Public welfare may be served by placing street lands in private ownership. *See, e.g., L & T Corp. v. City of Henderson*, [98 Nev. 501](#), 503-504, 654 P.2d 1015 (1982). *See also Teacher Building Company v. City of Las Vegas*, [68 Nev. 307](#), 232 P.2d 119 (1951).

CONCLUSION

Section 278.480(7) of the Nevada Revised Statutes expressly provides that no payment is required in order to acquire title of a totally abandoned street or alley by an abutting property owner where the proportionate part of the street reverted to each abutting property owner was acquired by dedication from that property owner or his predecessor in interest. The commercial business involved in these circumstances is a successor in interest to the grantor who originally dedicated the subject alley by parcel map in 1899, and is likewise the abutting property owner to both sides of the totally vacated alley. Absent some evidence, which is not included in the information available to the attorney general, that the public will be materially injured by the alley abandonment, the subject street vacation reverts title to the alley to the abutting property owner without the necessity of compensation to the municipality.

QUESTION TWO

Whether the provisions of section 268.050 of the Nevada Revised Statutes authorize a municipality to require compensation from an abutting property owner for the total vacation of an alley constructed upon land originally obtained by dedication, notwithstanding the prohibition of such a requirement contained in section 278.480 of the Nevada Revised Statutes.

ANALYSIS

State statute prescribes the following powers of a municipality concerning the reconveyance, sale or exchange of land dedicated for public purposes, namely:

The governing body may sell land which has been donated, dedicated, acquired in accordance with chapter 37 of NRS, or purchased under the threat of an eminent domain proceeding, for a public purpose described in subsection 1, or may exchange that land for other land of equal value, if:

(a) *The person from whom the land was received or acquired or his successor in interest refuses to accept the reconveyance or states in writing that he is unable to accept the reconveyance; or*

(b) *The land has been combined with other land owned by the city and improved in such a manner as would reasonably preclude the division of the land, together with the land with which it has been combined, into separate parcels.*

[NRS 268.050](#)(5) (1985) (emphasis added). This statute delineates as public purposes which are governed by section 268.050, “a public park, public square, public landing, agricultural fairground, aviation field, automobile parking ground or facility for the accommodation of the traveling public, or land held in trust for the public for any other public use or uses.” [NRS 268.050](#)(1) (1985). Nowhere in the plain and unambiguous language of section 268.050 is the sale of a vacated road or alley obtained dedication authorized.

In addition, there are other bases upon which the attorney general concludes that section 268.050 has no application to the abandonment of a street or alley. Where a general and a specific statute relating to the same subject matter are in conflict and cannot be read together, the specific statute controls the general statute. *See, e.g., Laird v. State of Nevada Public Employees Retirement Sys.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982). Sections 268.050 and 278.480 of the Nevada Revised Statutes both relate to the relinquishment to a private party of a municipality’s title in property originally obtained by dedication. Only section 278.480, however, specifically addresses the process for vacation or abandonment of a street or alley which is the subject matter of the present opinion request. Accordingly, the provisions of section 278.480, the specific statute, would control the general property disposal provisions of section 268.050.

Moreover, the intent of a statute may be conclusively discerned when a statute is amended by subsequent legislation which clarifies any doubt concerning the meaning of the law. *See, e.g., Estate of Hughes v. First Nat’l Bank of Nevada*, [95 Nev. 146](#), 149-150, 590 P.2d 1164 (1979). In 1981, the Nevada Legislature amended section 278.480 to expressly provide that no payment is required for title to the proportionate part of a street reverted to an abutting property owner where

the street was acquired by dedication. Prior to this amendment, an abutting property owner was required by law to pay reasonable consideration for such title. *See* 1981 Nev. Stats. ch. 321, § 7.

Finally, prior to 1905, when the Nevada Legislature enacted controlling statutory provisions, the dedication of a street vested a mere easement in the municipality with a reversionary interest in favor of the grantor abutting land owner or his successor in interest. A municipality may not, therefore, dispose of fee simple title to a street in which the city owns only a mere easement. *See Shearer v. City of Reno*, [36 Nev. 443](#), 449 (1913); Nevada Attorney General Opinion No. 520 (June 20, 1968). *See also Peterson v. City of Reno*, [84 Nev. 60](#), 436 P.2d 417 (1968) This alley which is the subject of the present opinion request was constructed upon land dedicated for that purpose on June 7, 1899. Consequently, the municipality may not properly require payment of consideration for the title to property in which the abutting landowners have a preexisting reversionary interest.

CONCLUSION

Section 268.050 of the Nevada Revised Statutes does not provide authority for a municipal government to ignore the prohibition contained in section 278.480 which prescribed that no payment is required of an abutting property owner in order to obtain title to the proportionate part of totally vacated adjacent alley originally dedicated to a public purpose. This conclusion is based upon the fact that public property sale authority for dedicated lands under section 268.050 expressly does not extend to streets and alleys. Moreover, the application of legal principles related to statutory interpretation demonstrates that the Nevada Legislature did not intend that a municipality obtain compensation for abandoned streets or easements secured by dedication.

QUESTION THREE

Whether a municipality may require compensation from an abutting property owner for the total vacation of an alley constructed upon land originally obtained by dedication by promulgating a municipal policy or ordinance notwithstanding the prohibition of such a requirement contained in section 278.480 of the Nevada Revised Statutes.

ANALYSIS

As discussed above, section 278.480 of the Nevada Revised Statutes expressly provides that “no payment is required” in order for an abutting property owner to obtain title to the proportionate part of a totally vacated street or alley which was originally obtained by the municipality through dedication. *See* [NRS 278.480\(7\)](#) (1985); text at 2-4, *supra*. Moreover, section 278.480 is a legislative scheme governing the subject of municipal government procedures for the vacation or abandonment of streets and alleys. This statutory scheme is detailed and specific in scope. Whenever the Nevada Legislature adopts such a scheme for the regulation of a particular subject, local government control over the same subject through legislation ceases. *See, e.g., Lamb v. Mirin*, [90 Nev. 329](#), 332, 526 P.2d 80 (1974). Under these circumstances, the attorney general concludes that local governments may not adopt policies nor promulgate ordinances which conflict with the unequivocal legislative objective of prohibiting municipalities from requiring compensation from abutting landowners for title to abandoned streets under these circumstances. A local government may not enforce regulations which are in conflict with the clear mandate of the legislature. *Id.* at 333. In this regard, the legislative scheme demonstrates that a local government does have discretion to require compensation when the street or easement is not originally acquired by dedication, [NRS 278.480\(7\)](#) (1985), and when the abandonment is partial and the unabandoned parcel separates the abutting landowners parcel from the vacated parcel. [NRS 278.480\(6\)](#) (1985). Additionally, the local government has the ultimate responsibility of determining whether the street or alley vacation will materially injure the public. [NRS 278.480\(4\)](#) (1985).

CONCLUSION

Section 278.480 contains a legislative scheme related to the subject of municipal government procedures for the abandonment of streets and alleys. The scope of this statutory scheme is detailed and specific which demonstrates a legislative objective to prohibit municipalities from promulgating or enforcing procedures inconsistent with those delineated by state statute.

Our analysis of the legal issues discussed above convinces the attorney general that the July 10, 1986, opinion of your office correctly advised your client that Nevada law did not authorize the act of the city in requiring compensation for the total abandonment of an alley to an abutting property owner where the alley was obtained by dedication. We trust that this opinion will assist your office in representing the legal interests of the city of Reno.

Sincerely,

BRIAN MCKAY, *Attorney General*

By Dan R. Reaser, *Chief Deputy Attorney General,*
Transportation Division

OPINION NO. 86-19 ELECTIONS; VOTING: [NRS 293.463](#) should be interpreted and applied in a liberal manner in order to achieve its purpose of ensuring that employees have the opportunity to vote. An employee who meets the statute's qualifications, including the impracticability of the employee voting before or after the workday, is entitled to a specified amount of time away from the workplace in which to vote.

CARSON CITY, October 21, 1986

WILLIAM D. SWACKHAMER, *Secretary of State*, Capitol Building, Carson City, Nevada 89710

DEAR MR. SWACKHAMER:

As in the past election years, we have again recently received numerous inquires concerning the interpretation and application of [NRS 293.463](#). In order to provide appropriate guidance on these issues, we are taking this opportunity to provide your office with this opinion.

QUESTION

What is the proper interpretation and application of [NRS 293.463](#)?

ANALYSIS

[NRS 293.463](#) was adopted in 1960 and has never been amended. 1960 Nev. Stat. ch. 157 § 171. The statute states:

1. Any registered voter may absent himself from his place of employment at a time to be designated by the employer for a sufficient time to vote, if it is impracticable for him to vote before or after his hours of employment. A sufficient time to vote shall be determined as follows:
 - (a) If the distance between the place of such voter's employment and the polling place where such person votes is 2 miles or less, 1 hour.
 - (b) If the distance is more than 2 miles but not more than 10 miles, 2 hours.
 - (c) If the distance is more than 10 miles, 3 hours.
2. Such voter may not, because of such absence, be discharged, disciplined or penalized, nor shall any deduction be made from his usual salary or wages by reason of such absence.
3. Application for leave of absence to vote shall be made to the employer or person authorized to grant such leave prior to the day of the election.

4. Any employer or person authorized to grant the leave of absence provided for in subsection 1, who denies any registered voter any right granted under this section, or who otherwise violates the provisions of this section, is guilty of a misdemeanor.

The six qualifying provisions contained in [NRS 293.463](#)(1) and (3) are clearly spelled out. First, only registered voters are affected by the statute. Second, a registered voter must be in a position where “it is impracticable for him to vote before or after his hours of employment.” That is, if the voter cannot complete the act of voting in the time before the workday begins or after the workday ends, it is impracticable for the voter to vote. Third, if it is impracticable for the registered voter to vote, the voter may be absent from the place of employment. Fourth, the voter may be absent from the place of employment for a “sufficient time to vote.” A sufficient time to vote is categorically stated. It is determined by the distance between the place of employment and the polling place. If the distance is (a) two miles or less, the voter is entitled to be absent from the place of employment for one hour, (b) between two and ten miles, the voter is entitled to be absent for two hours, or (c) more than ten miles, the voter is entitled to be absent for three hours. Fifth, the employer may designate the appropriate period of sufficient time during which the voter may be absent from the place of employment. Finally, the voter must request the leave of absence “prior to the day of the election.”

These qualifying provisions are plain, unambiguous, and not subject to construction. *National Tow & Road Service, Inc. v. Integrity Ins. Co.*, 102 Nev. _____, 717 P.2d 581, 583 (1986). Moreover, any construction of [NRS 293.463](#) would be controlled by the intent of the statute. *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17 (1984). The legislature has stated its intent with respect to election laws in [NRS 297.127](#): “This Title shall be liberally construed to the end that all electors shall have an opportunity to participate in elections. . . .” This broadly stated intent encompasses the protective purpose of providing citizens with the opportunity to vote, which purpose must, of course, be imported into [NRS 293.463](#). *Colello v. Administrator, Real Estate Div.*, [100 Nev. 344](#), 347, 683 P.2d 15 (1984).

Alongside the broader proposition is the repeatedly recognized specific intent of statutes such as [NRS 293.463](#) to encourage worker participation in elections. *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469, 472 (1952) (“[T]o safeguard the right of suffrage by taking from employers the incentive and power to use their leverage over employees to influence the vote.”); *Benane v. International Harvester Co.*, 299 P.2d 750, 753 (Cal.App.Dep’tSuper.Ct. 1956) (“[A]n increase in election participation and the free exercise of the right to vote.”); *State v. International Harvester Co.*, 63 N.W.2d 547, 553 (Minn. 1954) (“[T]o protect the right of suffrage and guard and promote the general welfare.”); *State v. Day-Brite Lighting, Inc.*, 220 S.W.2d 782, 785 (Mo.Ct.App. 1949) (“That every citizen should be given both the right and the opportunity to vote is a matter of public interest . . . And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary or unreasonable burden on the employer.”); *Williams v. Aircooled Motors, Inc.*, 127 N.Y.S.2d 135, 137 (N.Y.App.Div. 1954) (“The purpose of the statute is clearly to encourage voting, to make it financially immaterial to a voter whether he works or takes time off.”); Note, *Pay While Voting*, 47 Colum.L.Rev. 135, 137 (1947) (“[T]o stimulate the exercise of the franchise by eliminating the deterrent effect which a loss of income might have on employees.”)

Notably, courts have given little consideration to employer complaints of the economic burdens of lost wages and lost production when those concerns are balanced against the purpose of exercising the fundamental right to vote as well as the acknowledged infrequency of elections. See *State v. Day-Brite Lighting, Inc.*, 240 S.W.2d 886, 892 (Mo. 1951). They have also held that the terms of the statute are a part of the employment contract. *Ballarini v. Schlage Lock Co.*, 226 P.2d 771, 773 (Cal.App.Dep’tSuper.Ct. 1950); *State v. International Harvester Co.*, 63 N.W.2d at 551.

The proper interpretation of [NRS 293.463](#) is to treat it liberally, broadly, in a manner that will ensure working voters have, as is their right under the terms of the statute, the unconstrained

opportunity to exercise the right to vote. The proper application of [NRS 293.463](#) is directly premised on that interpretation. Other factors in the application include the 7 a.m. to 7 p.m. duration of polling under [NRS 293.273](#)(1), the length of a working day, and the distance from the place of work to the polling place. All of these factors are necessarily involved in evaluating whether or not it is impracticable for a particular worker to vote before or after the workday.

For example, an employee working a 12 a.m. to 8 a.m. shift would not find it impracticable to vote after the shift was completed. If, for another example, an employee's workday ends at 4:30 p.m. and the employee, because of the distance from the workplace to the polling place, needs to leave the workplace before that time in order to reach the polling place before 7 p.m., the employee, if the employer should designate time at the end of the shift, is entitled to one, two, or three hours of time absent from the workplace, depending on the distance from the workplace to polling place. Thus, if the workplace is more than ten miles from the polling place, the employee is entitled to leave the workplace at 1:30 p.m. The employer, under the plain language of the statute, may not allow the employee to leave at 4 p.m. and assert that the three-hour period between 4 p.m. and 7 p.m. fulfills the requirements of the statute:

The statute is plain. It says that any person entitled to vote shall *** “be entitled to absent himself from any services in which he is then employed***” How can the employee absent himself from services in which he is employed unless he does so during working hours; during the time in which he is employed? How can the employer “designate” the two hours [in] which the employee may absent himself unless these hours are within the working period? The employer has no control over the employee's hours outside his regular working time. In the case at bar the employer attempted to say to the workmen, “You have ample time to vote after your work shift ends; I designate the three and one-half hours from 4:30 to eight o'clock, the time of the closing of the polls, as the period when you can vote.” To hold with this construction would abrogate the statute. The designated time must be two hours when the employee is rendering services to the employer and between the opening and closing of the polls. Both of these requirements must be met, under the plain terms of the statute; and the employee must not be penalized by deduction from his salary or wages because of such absence.

The language of the statute is so plain that we shall not further labor the obvious by discussing it.

Lorentzen v. Deere Manufacturing Co., 66 N.W.2d 499, 501 (Iowa 1954); *cf.* Iowa Code Ann. § 49.109 (West 1973) (“[S]hall be entitled to such time off from his work time to vote as will in addition to his non-working time total three consecutive hours during the time the polls are open”; as amended by 1955 Iowa Acts ch. 69) and Iowa Op. Att’y Gen. No. 190 (October 31, 1950) (showing of necessity for time off required); *accord Benane v. International Harvester Co.*, 299 P.2d at 752 and Cal. Op. Att’y Gen. No. 52-185 (October 18, 1952); *cf.* Cal. Elec. Code § 14350 (West 1977) (“[V]oter may . . . take off enough working time which when added to the voting time available outside of working hours will enable the voter to vote”; as amended by 1976 Cl. Stat. ch. 220).

Although application of the statute to individual fact situations naturally requires an individual assessment of the facts involved, the general principles underlying [NRS 293.463](#) are certain. The statute favors the provision to employees of time away from the workplace in order to exercise the right to vote. That purpose should be the goal borne in mind when particular questions regarding the application of the statute arise.

CONCLUSION

[NRS 293.463](#) is a statute which should be interpreted and applied in a liberal manner in order to achieve its salutary purpose of ensuring that employees have the unfettered opportunity to vote during an election. If it is impracticable for an employee to vote before or after the workday and the employee meets the other qualifying terms of the provision, the plain language of the statute affords the employee a specified amount of time absent from the workplace in which to vote.

Sincerely,

BRIAN MCKAY, *Attorney General*
By BRIAN CHALLY, *Deputy Attorney General*

OPINION NO. 86-20 COURTS; PURCHASING PROCEDURES: Justice and municipal courts not subject to requirements of [NRS ch. 332](#), Local Government Purchasing Act.

CARSON CITY, December 2, 1986

THE HONORABLE NOEL S. WATERS, *Carson City District Attorney*, 208 North Carson Street, Carson City, Nevada 89701-4298

DEAR MR. WATERS:

You have requested an opinion concerning the applicability of the Local Government Purchasing Act ([NRS ch. 332](#)) to the Carson City justice court and municipal court.

QUESTION

Is the purchase of a computer system by the justice and municipal courts subject to the requirements of [NRS ch. 332](#), the Local Government Purchasing Act?

ANALYSIS

[NRS 332.015](#) provides:

For the purpose of this chapter "local government" means:

1. Every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes or other taxes or from any mandatory assessments, including counties, cities, towns, school districts and other districts organized pursuant to chapters 244, 309, 318, 379, 450, 473, 474, 539, 541, 543 and 555 of NRS.
2. The Las Vegas Valley Water District created pursuant to the provisions of chapter 167, Statutes of Nevada 1947, as amended.
3. County fair and recreation boards and convention authorities created pursuant to the provisions of [NRS 244A.597](#) to [244A.667](#), inclusive.
4. District boards of health created pursuant to the provisions of [NRS 439.370](#) to [439.410](#), inclusive.

In determining whether or not the justice and municipal courts fall within this provision, the status of both courts must be kept in mind. Justice courts are constitutionally established members of the coequal judicial branch of government. Nev. [Const. art. 6, § 1](#). Municipal courts are also members of the judicial branch:

It is, of course, true that our Constitution does not itself establish municipal courts. It authorized the Legislature to do so. However, once municipal courts

are established, they exist as a coequal branch of local government within the judicial department of this state . . . and a part of the constitutional judicial system of this state. . . .

City of North Las Vegas v. Daines, [92 Nev. 292](#), 295, 550 P.2d 399 (1976) (citations omitted).

For several reasons, neither of these members of the coequal judicial branch comes within the boundaries of [NRS 332.015](#). First, the statute, by its own terms, does not expressly include either court within its ambit. [NRS 332.015](#)(2), (3) and (4) clearly do not bring either of the courts within the definition of “local government.” [NRS 332.015](#)(1) does refer to counties and cities, which, in this context, comprise the corresponding legislative and executive branch of local government. The distinction between the legislative-executive and the judicial branches is directly delineated in [NRS 332.025](#)(3): “ ‘Governing body’ means the board, council, commission or other body in which the general legislative and fiscal powers of the local government are vested.” A governing body may be a county commission, a city council, or a board of supervisors. A governing body will not be a municipal or a justice court, neither of which possesses “general legislative and fiscal powers.” Moreover, the governing body is charged with numerous duties under the statute, including contract advertising, determination of bidder responsibility, rejection of bidders, and the aware of contracts. See [NRS 332.045](#); [332.065](#); [332.085](#). Of course, such contracts are those which the governing body, in the course of its own business, may execute. Neither the initial authority of the governing body to enter into its own contracts nor the means for doing so set forth in [NRS ch. 332](#) confers any additional responsibility for, or authority over, contracts entered into by individual courts of the judicial branch. The plain, unambiguous language of the statute does not subject the governing body to such responsibility, nor confer additional authority. *Thompson v. District Court*, 100 Nev.. 352, 354, 683 P.2d 17 (1984); *City of Las Vegas v. Macchiaverna*, [99 Nev. 256](#), 258, 661 P.2d 879 (1983). Had the legislature desired that result, equally plain language stating the governing body’s power could have been employed.

Second, an extension of the requirements of [NRS ch. 332](#) to the justice or municipal courts introduces a conflict over the issue of separation of powers among coequal branches of government. See *Azbaria v. City of North Las Vegas*, [95 Nev. 108](#), 111, 590 P.2d 161 (1979); *City of North Las Vegas v. Daines*, 92 Nev. at 295; *Young v. Bd. of County Comm’rs*, [91 Nev. 52](#), 54-56, 530 P.2d 1203 (1975). The extension, in producing the conflict, also produces an unreasonable result. “ ‘A fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statutes is reason for rejecting that interpretation in favor of another that would produce a reasonable result.’ ” *Hughes Properties, Inc. v. State of Nevada*, [100 Nev. 295](#), 298, 680 P.2d 970 (1984) (quoting *Sheriff v. Smith*, [91 Nev. 729](#), 733, 542 P.2d 440 (1975)). The alternative interpretation discussed above is based on the proposition that the language of [NRS ch. 332](#) does not include the judicial branch within its reach. That interpretation provides a reasonable result without a needless and unintended engagement of the separation of powers issue. *Colello v. Admir’r, Real Estate Div.*, [100 Nev. 344](#), 347, 683 P.2d 15 (1984).

Finally, the legislature’s permissive view of the judiciary’s use of executive department purchasing procedures has been clearly stated in [NRS 333.469](#):

1. Any agency, bureau, commission or officer of the legislative department or the judicial department of the state government . . . may obtain supplies, material or equipment on a voluntary basis through the facilities of the purchasing division.

This provision was enacted twelve years before [NRS ch. 332](#). 1963 Nev. Stat. 488; 1975 Nev. Stat. 1536; compare [NRS 333.020](#)(4) (confining definition of a “using agency” to executive department). There is no expressed intent that the enactment of [NRS ch. 332](#) was intended to repeal [NRS 333.469](#). Nor should an intent to repeal be implied or presumed, since the statutes

are not repugnant and, in fact, can be easily placed in “complete harmony.” *Lemberes v. State*, [97 Nev. 492](#), 499, 634 P.2d 1219 (1981); *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982). In short, the legislature, long before the enactment of [NRS ch. 332](#), recognized the independence of the judicial branch in the area of basic procurement procedures in [NRS 333.469](#). The enactment of [NRS ch. 332](#) did not attempt to alter the legislature’s previous recognition of that independence. That later statute does not change the earlier result.

CONCLUSION

Municipal and justice courts are coequal branches of local government as well as belonging to the separate judicial department of state government. [NRS ch. 332](#), by its own terms, does not include the judicial branch and does not extend to a local governing body the responsibility for, or authority over, procurement procedures used by municipal or justice courts. Further, the separation of powers doctrine and the legislative recognition of judicial independence in procurement matters contained in [NRS 333.469](#) support the conclusion that the requirements of [NRS ch. 332](#) do not apply to municipal or justice courts. For these reasons, we concur in the conclusion set forth in your Opinion No. 29, dated September 2, 1986.

The purchasing practices of the various courts comprising our court system are probably subject to the authority of the Chief Justice of the Supreme Court as administrative head of the court system. See Nev. [Const. art. 6, § 19](#). Pursuant to its rule-making authority, the Supreme Court, in its discretion, could require all courts in Nevada to comply with procedures like those found in chapters 332 and 333 of NRS.

Sincerely,

BRIAN MCKAY, *Attorney General*
By BRIAN CHALLY, *Deputy Attorney General*

OPINION 86-21 ADVERTISING—PROFESSIONAL SERVICES: State licensing boards may prevent dissemination of advertising that is false, deceptive or misleading or that proposes an illegal transaction.

CARSON CITY, December 8, 1986

MICHAEL J. RILEY, D.C., *Secretary*, Nevada State Board of Chiropractic Examiners, 4600 Kietzke Lane, Building G, Suite 173, Reno, Nevada 89503

DEAR DR. RILEY:

You have requested an opinion from this office regarding a state licensing board’s authority to adopt regulations governing professional advertising.

QUESTION

What is the present legal status of a state licensing board’s authority to adopt regulations governing professional advertising?

ANALYSIS

Your question requires discussion of the protections provided by the first amendment to the United States Constitution. These protections are made applicable to individual states by the fourteenth amendment to the same document. Your question also calls into consideration the prohibitions set forth in the Federal Trade Commission Act and the Sherman Antitrust Act.

I

First Amendment

There is no longer any room to doubt that what has come to be known as “commercial speech” is entitled to the protection of the first amendment, albeit to protection somewhat less extensive than that afforded “noncommercial speech.” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980). More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed “commercial speech, but it is clear enough that speech which is no more than advertising pure and simple falls within these bounds. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2275 (1985).

The United States Supreme Court’s general approach to restrictions on commercial speech is now well-settled. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. at 2275. The states and the federal government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, see *Friedman v. Rogers*, 440 U.S. 1 (1979), or that proposes an illegal transaction. See *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376 (1973). When the particular content or method of advertising suggests that it is inherently misleading or when experience has proven that such advertising is subject to abuse, states may impose appropriate restrictions. *In re R.M.J.*, 455 U.S. 202-03. However, states may not place an absolute prohibition on certain types of merely potentially misleading information, e.g., listing areas of professional practice, if the information may also be presented in a way that is not deceptive. *Id.* The remedy in such situations in the first instance is a requirement of disclaimer or explanation, rather than a blanket prohibition. *Id.* Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception. *Id.* Commercial speech that is not false, deceptive or misleading and does not concern unlawful activities may be restricted (a) only in the service of a substantial government interest, and (b) only through means that both directly advance that interest and are no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. at 566.

States may also regulate commercial speech by time, place and manner restrictions provided the restrictions are justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for communication of the information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 771 (1976). Finally, the special problems of advertising on the electronic broadcast media may warrant special consideration. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (citing for comparison *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.C. 1971), *aff’d sub nom. Capital Broadcasting Co. v. Acting Att’y Gen.*, 405 U.S. 1000 (1972)).

In applying the foregoing principles to the commercial speech of attorneys, the United States Supreme Court has concluded that a blanket ban on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible, see *Bates v. State Bar of Arizona*, 433 U.S. 350; *In re R.M.J.*, 455 U.S. 191, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); but cf. *In re Primus*, 436 U.S. 412 (1978). A federal district court applying the foregoing principles recently held that attorneys were entitled to a preliminary injunction against enforcement of code of professional responsibility provision prohibiting direct mail advertising to a targeted audience. *Adams v. Attorney Registration and Disciplinary Comm’n*, 617 F.Supp. 449 (N.D.Ill. 1985). Finally, by the application of the same principles, the United States Supreme Court found unconstitutional a federal statute which prohibited the mailing of unsolicited advertisements for contraceptives. *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60 (1983).

When adopting regulations, the board must apply the rules contained in the cases cited previously. The fact situations of each of these cases make the foregoing principles

understandable. We recommend that any advertising regulations which the board desires to adopt first be submitted to this office for review in light of these rules.

II

Sherman Antitrust Act

Federal Trade Commission Act

The Sherman Antitrust Act (15 U.S.C. § 1-7) is the first and most significant of the U. S. antitrust laws. It makes agreements “in restraint of trade” and “monopolization” illegal, subject to civil remedies and criminal penalties in actions by the United States Department of Justice and to treble damages actions in private suits. Its purpose is to make competition the rule in United States trade and commerce and to outlaw conduct that might lead to monopoly, but its general language provides virtually no standards. By framing the act in broad common-law concepts, Congress has in effect passed the problem to the executive branch and, in the end, to the federal courts. 9 *The Guide To American Law* 251 (1984).

The United States Supreme Court has interpreted this act as “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” It is based on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” Recognizing that economic “decentralization” might occasionally result in “higher costs and prices,” it generally assumes that “possession of unchallenged economic power deadens initiative . . . and rivalry is a stimulant to industrial progress.” *Id.* at 253.

The Federal Trade Commission Act (hereinafter FTCA) (15 U.S.C. § 41-77) passed in 1914 created the Federal Trade Commission (hereinafter FTC). The FTC is charged with administrative interpretation and enforcement of the Sherman Act and the FTCA and also shares responsibilities with the Antitrust Division of the United States Department of Justice. *Id.* at 253-54. Section 5 of the FTCA, 15 U.S.C. § 45(a)(1), declares as unlawful unfair methods of competition and unfair or deceptive acts or practices in commerce. Violations of the Sherman Act are violations of § 5 of the FTCA. *FTC v. Cement Institute*, 333 U.S. 683, 690-92 (1948).

The first question to be answered in analyzing a state regulation under the Sherman Act is whether there has been a “combination” or “conspiracy.” These terms are derived from the Sherman Act, which prohibits every “contract, combination . . . or conspiracy in restraint of trade.” 15 U.S.C. § 1 (1982). State health profession boards are capable of engaging in a combination or conspiracy in restraint of trade. *Massachusetts Board of Registration in Optometry*, No. 9195 (initial decision F.T.C. June 23, 1986) (Timony, A.L.J.). If the challenged regulation is the product of a “combination or conspiracy” and is also unreasonably anticompetitive, the state board responsible for promulgating the regulation will be found to have violated § 1 of the Sherman Act and thereby § 5 of the FTCA. *FTC v. Cement Institute*, 333 U.S. at 690-92.

Analysis of the question whether a challenged regulation is unreasonably anticompetitive necessitates an awareness of the role advertising and solicitation play in the efficient operation of a competitive economy. Advertising serves to inform the public of the availability, nature, and prices of products and services, and thus performs an “indispensable role in the allocation of resources in a free enterprise system.” *Bates v. State Bar of Arizona*, 433 U.S. at 364; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 765 (1976); *American Medical Ass’n*, 94 F.T.C. 701, 1005 (1979), *modified*, 638 Fed.2d 443 (2nd Cir. 1980), *aff’d*, 455 U.S. 676 (1982). The Sherman Act assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost—are favorably affected by the free opportunity to select among alternative offers. *National Society of Professional Engineers v. United States*. 435 U.S. 679, 695 (1978); *American Medical Ass’n*, 94 F.T.C. at 1005 n.47. A ban on advertising serves to increase the difficulty of discovering the lowest cost seller of

acceptable ability. As a result, and to this extent, sellers are isolated from competition, and the incentive to price competitively is substantially reduced. *Bates*, 433 U.S. at 377; *American Medical Ass'n*, 94 F.T.C. at 1005. Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. *Massachusetts Board of Registration in Optometry*, supra, at 36. “[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality.” 94 F.T.C. at 1005.

Under the Sherman Act the question whether a regulation is unreasonably anticompetitive is determined by subjecting the regulation to two doctrines developed by the United States Supreme Court, namely the *per se* doctrine and the rule of reason doctrine. In *NCAA v. Board of Regents*, 468 U.S. 85, 103-104 (1984), the Supreme Court explained the *per se* doctrine:

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. . . . [T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition. (Citations omitted.)

The *per se* presumption may be used if a restraint is facially anticompetitive, and it has no redeeming virtue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U. S. 1, 19-20 (1979).

The test of legality under the rule of reason is whether the restraint imposed merely regulates and perhaps thereby promotes competition or whether it may suppress or even destroy competition. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). “[T]here is often no bright line separating *per se* from Rule of Reason analysis,” *NCAA v. Board of Regents*, 468 U.S. at 104, n. 26, and a restraint may be held unlawful under the rule of reason without an elaborate market analysis. *American Medical Ass'n*, 95 F.T.C. at 1004-1006. If the restraint causes anticompetitive effects, the proponent of the restraint has a heavy burden to demonstrate the existence of a procompetitive justification. *NCAA*, 468 U.S. at 113. Moreover, absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services—a regulation limiting customer choice by impeding the ordinary give and take of the market place cannot be sustained under the rule of reason. *FTC v. Indiana Fed. Dentists*, 160 S.Ct. 2009, 2018 (U.S. 1986) (citations omitted). In fact, where there is no plausible procompetitive justification for a restraint the rule of reason can be applied “in the twinkling of an eye.” *NCAA v. Board of Regents*, 468 U.S. at 109-10 n. 39. Finally, if there is a procompetitive justification, it must be reasonably related to the imposed restraint. *American Medical Ass'n*, 94 F.T.C. at 1008-10. The restraint in such situations must also be narrowly tailored to achieve the procompetitive goal. *Id.*

Section 5 of the FTCA (15 U.S.C. § 45(a)(1)) is often utilized by the FTC to invalidate regulations promulgated by state health profession boards which have an anticompetitive purpose and effect. See *Massachusetts Bd. of Registration in Optometry*, supra; *Montana Board of Optometrists*, 106 F.T.C. 80 (1985). In resolving the question whether a regulation is unreasonably anticompetitive, the FTC considers the degree to which the regulation restrains competition among the providers of the professional service and the extent of injury to consumers of the service. *Id.* The FTC also considers the acts and practices which the health profession board employs in enforcing the regulation. *Id.*

Nevertheless, a state health profession board may formulate ethical guidelines governing the conduct of licensed members of the profession. In particular, the board may regulate representations that it reasonably believes would be false or deceptive within the meaning of § 5 of the FTCA or the state statutes which address false, deceptive or misleading advertising. The board may also formulate guidelines with respect to uninvited, in-person solicitation of actual or

potential patients, who, because of their particular circumstances, are vulnerable to undue influence. *American Medical Ass'n v. Federal Trade Comm'n*, 638 Fed.2d 443, 452-53 (2nd Cir. 1980); *Massachusetts Bd. of Registration in Optometry*, supra, at 53-54.

The FTC has agreed to review and submit comments free of charge on the anticompetitive effects and antitrust risks of any advertising regulation which the board desires to adopt. By this service, unnecessary litigation could be avoided. Therefore, this office recommends that future proposed regulations on chiropractic advertising be submitted to the San Francisco Regional Office of the FTC, Box 36005, San Francisco, California, 94102.

CONCLUSION

State licensing boards retain authority to adopt regulations governing professional advertising. Nevertheless, advertising is a form of commercial speech which is protected by the first and fourteenth amendments to the United States Constitution. The general approach to restrictions on commercial speech is now well-settled. States are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false, deceptive or misleading and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that both directly advance that interest and are no more extensive than necessary to serve that interest.

Further, professional advertising is guarded by the Sherman Act and the Federal Trade Commission Act. These laws are an expression of public policy, namely, to prevent the free enterprise system from being stifled, substantially lessened, fettered by monopoly or restraints on trade, or corrupted by unfair or deceptive trade practices that deprive the consumer of free choice in the market place. Advertising restrictions which are the product of a "combination or conspiracy" and which are unreasonably anticompetitive in purpose and effect violate both of these federal laws.

Very truly yours,

BRIAN MCKAY, *Attorney General*
By ROBERT F. BALKENBUSH, *Deputy Attorney General*
