

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1992

OPINION NO. 92-1 ~~COUNTIES; MOBILE HOMES; RENT CONTROL~~: Counties are authorized by [NRS 244.335](#) to enact rent control ordinances applicable to mobile home parks in the county outside the limits of incorporated cities and towns. Such ordinances are not necessarily preempted by state law governing landlord-tenant relations in mobile home parks.

Carson City, February 3, 1992

Charles K. Hauser, Esq., Deputy District Attorney, Civil Division Office of the Clark County District Attorney, 225 East Bridger Avenue, Eighth Floor, Las Vegas, Nevada 89155

Dear Mr. Hauser:

You have requested our opinion on the following:

QUESTION

May Clark County enact a program of rent control applicable to privately-owned mobile home parks in the County?

ANALYSIS

Counties are political subdivisions of the state and, as such, possess only those powers which the legislature has expressly granted to them. *County of Pershing v. Sixth Judicial Dist. Ct.*, [43 Nev. 78](#), 181 P. 960 (1914). Therefore, the appropriate legal analysis is not whether the questioned activity is statutorily prohibited, but rather whether the activity is statutorily authorized. *Op. Nev. Att'y Gen. No. 85-9* (June 25, 1985). Since certain aspects of the relationship between landlords and tenants in mobile home parks are governed by provisions of chapter 118B of NRS, we must also determine whether the regulation of rents in such parks is preempted by state law.

STATUTORY AUTHORITY OF COUNTIES  
TO ENACT RENT CONTROL

Under appropriate circumstances, rent control is a proper exercise of a government's police power. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11-12 (1988); *Peppard v. City of Carpinteria*, 278 Cal. Rptr. 100, 102 (Cal. App. 1991). We believe there are two possible statutory grants of police power to Clark County to regulate rents in mobile home parks.

[NRS 244.335](#)(1) provides, in relevant part:

[T]he board of county commissioners may:

- (a) Regulate all character of lawful trades, callings, industries, occupations, professions and business conducted in its county outside of the limits of incorporated cities and towns.
- (b) Fix, impose and collect a license tax for revenue or for regulation or for both revenue and regulation, on such trades, callings, industries, occupations, professions and business.

In *Op. Nev. Att'y Gen. No. 84-14* (Aug. 9, 1984), we concluded that this statute authorized Washoe County to regulate persons operating day care facilities for fewer than five children even though a statute that authorized such regulation applied only to persons caring for five or more children.

[NRS 244.357](#) provides, in relevant part:

1. Each board of county commissioners may enact and enforce such local police and sanitary ordinances and regulations as are not in conflict with the general laws and regulations of the State of Nevada . . . .

2. Such police and sanitary ordinances and regulations may be enacted to apply throughout an entire county or, where the subject matter makes it appropriate and reasonable, may be enacted to govern only a limited area within the county which must be specified in the ordinance.

This statute appears to constitute a general grant of police power to enact ordinances and regulations to promote the health and welfare of persons in the community. Many states, by constitution or statute, have granted local governments general police power by similar "General Welfare" provisions. *See, e.g., Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1009 (Cal. 1976); *Snohomish County v. State*, 648 P.2d 430, 432 (Wash. 1982); *Inganamort v. Borough of Fort Lee*, 303 A.2d 298 (N.J. 1973). Courts in some jurisdictions, however, have taken a more restrictive view of General Welfare provisions. *See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972); *Tietjens v. City of St. Louis*, 222 S.W.2d 70 (Mo. 1949).

In early cases, rent control was held to be a constitutional exercise of the police power only in cases where an emergency, such as the cessation of building activities incident to World War I, resulted in a severe housing shortage. *See, e.g., Levy Leasing Co. v. Siegel*, 258 U.S. 242, 245 (1922). Although the U.S. Supreme Court, in a line of cases beginning with *Nebbia v. New York*, 291 U.S. 502 (1934), has since rejected the notion that "substantive due process" imposes restrictive limitations on the exercise of police power in the area of economic and price regulation, the "emergency doctrine" appears to have influenced some courts in determining the scope of a municipality's police power under a General Welfare grant of authority. *See Birkenfeld*, 550 P.2d at 1021, and cases cited therein; *but see Inganamort*, 303 A.2d at 304.

In *Fleetwood Hotel, Inc.*, the court held that, without specific authorization from the state, a city could not enact a rent control ordinance under the General Welfare provision of its charter. The majority opinion, however, appears to be based in part upon an erroneous premise--that the World War I rent control cases still applied to require the existence of an emergency to justify rent control.<sup>1</sup> *Fleetwood Hotel, Inc.*, 261 So. 2d at 804; *see also Warren v. City of Philadelphia*, 127 A.2d 703 (Pa. 1956). It is now well established that the existence of an emergency is not a constitutional prerequisite to the enactment of rent controls. *Hutton Park Gardens v. Town Council*, 350 A.2d 1 (N.J. 1975); *Birkenfeld*, 550 P.2d at 1018-19; *Pennell*, 485 U.S. at 11-15.

Other decisions holding that local governments were not authorized to enact rent controls are based upon unique circumstances. *See, e.g., Marshall House, I. v. Rent Rev. & Grievance Bd. of Brookline*, 260 N.E.2d 200 (Mass. 1970) (constitution prohibited local legislation "governing civil relationships except as an incident to an exercise of an independent municipal power"); *Wagner v. City of Newark*, 132 A.2d 794 (N.J. 1957) (rent control not enacted in accordance with state statute delegating that authority). There are, however, decisions that take a restrictive view of General Welfare provisions, holding that they do not constitute separate or additional grants of authority. *See, e.g., Board of School Comm'rs of Mobile County v. Hudgens*, 151 So. 2d 247, 251 (Ala. 1963); *City of Stuttgart v. Strait*, 205 S.W.2d 35, 39 (Ark. 1947).

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<sup>1</sup> The majority's restrictive reading of Florida's home rule provisions was questioned in *City of Temple Terrace v. Hillsborough Ass'n, Etc.*, 322 So. 2d 571, 577 (Fla. App. 1975), and, in effect, overruled by subsequent legislation intended to secure the broad exercise of home rule powers "and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those expressly prohibited." *Id.*; *see also City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (1974), which held that this statute authorized a rent control ordinance.

In a number of states, home rule for counties is granted by constitutional provision. Antieau's *Local Government Law--County Law*, Vol. 4, Sec. 31.05, p. 31-19 (1989). The Washington constitutional clause is typical. It provides:

Any county . . . may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

Wash. Const. art. XI, § 11. Courts have uniformly held that, provided the ordinance is local and does not conflict with state law, such a provision grants power as broad as that vested in the state legislature. Antieau's *Local Government Law--County Law*, Vol. 4, Sec. 31.05, p. 31-20 (1989); *Snohomish County*, 648 P.2d at 430. Courts have similarly construed such provisions where they exist by statute. *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980); *City of Radcliff v. Hardin County*, 607 S.W.2d 132 (Ky. App. 1980).

In *Hutchinson*, 624 P.2d at 1126, the court held that when the state has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, *i.e.*, providing for the public safety, health, morals and welfare. The court discussed the rule of strict construction of municipal powers as having its origins "in an era when farm-dominated legislatures were jealous of their power and when city scandals were notorious." *Id.* at 1119. The court, in rejecting the notion that a General Welfare clause is not an independent source of power, noted that:

[S]trict construction, particularly in the face of a general welfare grant of power to local governments, simply eviscerates the plain language of the statute, nullifies the intent of the legislature, and seriously cripples effective local government.

*Id.* at 1121.

The majority of recent cases considering the issue have concluded that a grant of authority to enact local police and sanitary ordinances to promote the health and welfare of a local government's inhabitants constitutes a general grant of police power that, in the absence of conflicting state law, is as extensive as that of the legislature. *Birkenfeld*, 550 P.2d at 1009; *Snohomish County*, 648 P.2d at 430; *Butcher v. City of Detroit*, 347 N.W.2d 702 (Mich. App. 1984); 56 Am. Jur. 2d *Municipal Corporations*, § 432, pp. 477-78; McQuillin, *Municipal Corporations*, §§ 24, 43-44 (3d rev'd ed. 1969). The constitutional or statutory language at issue in these cases is remarkably similar to that of [NRS 244.357\(1\)](#).

Previous opinions of this office suggesting a strict construction of statutes enabling local governments to act did not involve the scope of the police power. *See, e.g.*, Op. Nev. Att'y Gen. No. 85-9 (June 25, 1985) (county hospital not authorized to engage in certain proprietary activities); Op. Nev. Att'y Gen. No. 151 (March 3, 1952) (authority to print legal forms). Similarly, cases in which the Nevada Supreme Court has taken a restrictive view of local government's authority to act have involved nonpolice power activities. *See Clark County v. Los Angeles City*, [70 Nev. 219](#), 265 P.2d 216 (1954) (power to tax not implied from power to license for regulation).

Where it has addressed the scope of a county's police power, the Nevada Supreme Court has not required specific grants of authority. In *Kuban v. McGimsey*, [96 Nev. 105](#), 605 P.2d 623 (1980), the court considered whether a statute which prohibited the licensing of brothels in counties having a population of 200,000 or less evidenced a legislative intent that the suppression of prostitution was the exclusive concern of state government such that a less populated county could not ban prostitution absent a specific grant of authority. In rejecting that argument the court noted that the regulation of brothels has historically been a matter of local concern and that previous decisions had recognized the authority of local governments to enact ordinances not inconsistent with state law.

*Id.* at 110.

Although the Nevada Supreme Court has never directly addressed the scope of authority granted by [NRS 244.357](#)(1) or considered a county's authority to enact rent control, it has addressed a city's authority to enact police power measures under a similar General Welfare provision. In *Ex Parte Sloan*, [47 Nev. 109](#), 217 P. 233 (1923), the court held that the City of Reno was authorized to enact an ordinance prohibiting the manufacture, sale, keeping or storing of intoxicating liquor under the General Welfare clause of its charter,<sup>2</sup> notwithstanding the absence of specific authority to regulate in that area:

This clause of the charter contains a delegation of police powers. It is well settled that the legislature may delegate to municipal corporations the lawful exercise of police powers within their boundaries, and do so under a general grant.

*Id.* at 114.

Based upon the Nevada Supreme Court's decisions in *Kuban* and *Ex Parte Sloan*, and the majority rule expressed in recent cases from other jurisdictions, we conclude that [NRS 244.357](#)(1) constitutes a general grant of authority for counties to enact ordinances under the police power not in conflict with or preempted by state law. The authority set forth in [NRS 244.335](#) to regulate "all character of lawful trades, callings, industries, occupations, professions and business" also constitutes a grant of police power to regulate business activities for the protection and general welfare of the public. *Cf. Ottenheimer v. Real Estate Div.*, [91 Nev. 340](#), 535 P.2d 1284 (1975) (State through its police powers may regulate real estate representatives). We must still determine, however, which of the two statutes applies to authorize Clark County to enact a program of rent control applicable to mobile home parks.

[NRS 244.335](#) is limited to the regulation of business activity conducted outside the limits of incorporated cities and towns within the county. [NRS 244.357](#) allows the exercise of police power throughout the entire county. Thus, with respect to the authority to enact rent controls applicable to parks within the limits of incorporated cities and towns, the statutes conflict. Since [NRS 244.335](#) specifically concerns the use of police power to regulate economic or business activities, we conclude that it must control over the more general grant of police power authority set forth in [NRS 244.357](#). *Laird v. Nevada Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982). Clark County is therefore authorized by [NRS 244.335](#) to enact a rent control ordinance applicable to mobile home parks located outside the limits of incorporated cities and towns within the county to the extent not in conflict with or preempted by state law.

#### PREEMPTION OF LOCAL RENT CONTROL BY STATE LAW

The general rules regarding the preemption of local regulation by state law were set forth by the Nevada Supreme Court in *Lamb v. Mirin*, [90 Nev. 329](#), 526 P.2d 80 (1974).

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<sup>2</sup> The charter provision authorized the city:

To adopt and enforce by ordinance, all such measures and establish all such regulations in case no express provision is in this charter made, as the city council may from time to time deem expedient and necessary for the promotion and protection of health, comfort, safety, life, welfare, and property of the inhabitants of said city, the preservation of peace and good order, the promotion of public morals and the suppression and prevention of vice in the city, and to pass and enact ordinances on any other subject of municipal control or to carry into force or effect any other powers of the city, and to do and perform any, every, and all acts and things necessary or required for the execution of the powers conferred or which may be necessary to fully carry out the purpose and intent thereof.

Whenever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject, through legislation, ceases. In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, the Court may look to the whole purpose and scope of the legislative scheme . . . . In no event may a county enforce regulations which are in conflict with the clear mandate of the legislature.

*Id.* at 332-33. Since Nevada law provides a general statutory scheme for the regulation of landlords and tenants in mobile home parks, [NRS chapter 118B](#), we must determine whether the legislature intended to occupy the field of rent control in mobile home parks "to the exclusion of all local regulation."

Chapter 118B of NRS contains various provisions pertaining to charges for rent. *See, e.g.*, [NRS 118B.100](#), [118B.140](#), 118B.150, 118B.153, 118B.183, 118B.210, 118B.213 and 118B.215. For example, [NRS 118B.140](#) and [118B.150 prohibit](#) landlords from imposing certain types of fees or charges. [NRS 118B.153](#) requires the reduction of rent when certain services, utilities or amenities are reduced or eliminated by the landlord. None of these provisions, however, purport to regulate the maximum amount of rent charged for lots in mobile home parks.

By its creation of the trust fund for low-income owners of mobile homes in [NRS 118B.215](#), the legislature has addressed the issue of affordability of rent charges on lots in mobile home parks. [NRS 118B.213](#) requires owners of mobile home parks to pay a fee for credit to the trust fund. Money from the fund shall be used to assist eligible persons in making rent payments on their mobile home lot. [NRS 118B.215\(3\)](#). This legislation, enacted in 1991, does not constitute rent control. During the same session the legislature considered and rejected the direct regulation of rents in mobile home parks. *See* Assembly Bill 460. It does reflect, however, legislative concern regarding the impact of total rent charges on low-income owners of mobile homes.

The Nevada Supreme Court has not addressed the issue of whether the local imposition of rent control is preempted by state law. This issue has, however, been litigated on several occasions in California. The leading case in this area is *Birkenfeld v. City of Berkeley*, 17 Cal. App. 3d 129, 130 Cal. Rptr. 465 (1976). In *Birkenfeld*, the Supreme Court of California held that:

[Despite] extensive state regulation governing many aspects of landlord-tenant relationships, some of which pertain specifically to the determination or payment of rent . . . neither the quantity nor the content of these statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions . . . . The [local regulatory] purpose of preventing exploitation of a housing shortage through excessive rent charges is distinct from the purpose of any state legislation, and the imposition of rent ceilings does not materially interfere with any state legislative purpose.

*Id.* at 141-42.

In *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 191 Cal. Rptr. 47 (Cal. App. 1983), the court considered whether California's Mobile Home Residency Law had so fully occupied the field of landlord-tenant relations as to preclude by implication local rent control. The court stated that the doctrine of implied state preemption is inapplicable unless:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the

possible benefit to the municipality.

*Id.* at 54. Although noting that the Mobile Home Residency Law and the challenged rent control ordinance both sought to address similar problems, the court held that the rent control ordinance was not preempted by state law.

As always in considering a claim of preemption by implication, the question is what is the relevant "field." . . . [I]f the relevant field is characterized as rent control in mobile home parks, there is virtually no state legislation on the subject and no occupation of the field, either full or partial.

*Id.* at 55. The court specifically rejected the argument that the legislature, by rejecting proposals for rent control at the state level, had evidenced an intent to preclude local legislation.

The nonenactment of legislation is an exceedingly unreliable indicator of legislative intent and an exceedingly weak reed upon which to rest a preemption of the exercise by a municipality of its police powers. There are many possible reasons for the legislature's rejections of the bills it considered, including the possibility it felt rent control might be more appropriately dealt with at the local or regional level.

*Id.* (citations omitted).

In *Palos Verdes Shores v. City of Los Angeles*, 142 Cal. App. 3d 362, 190 Cal. Rptr. 866 (App. 1983), the court also rejected a claim that the Mobile Home Residency Law preempted the local regulation of rents in mobile home parks, emphasizing that rent control is a subject particularly appropriate for local regulation.

"The common thread of cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption." The variety of local conditions that affect mobile home parks in general, and the rents to be charged their residents in particular, make the notion of state preemption in this field less than appealing.

*Id.* at 873 (quoting, *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 133, 155 Cal. Rptr. 435 (1979)). See also *Fisher v. City of Berkeley*, 693 P.2d 261, 310 (Cal. 1984).

We believe these cases are persuasive on the issue presented. The tests formulated by the California courts on the question of implied preemption are similar to the general rule discussed in *Lamb v. Mirin*. While we are unaware of any California legislation creating the type of rent subsidy program set forth in [NRS 118B.213](#) to [118B.218](#), inclusive, we do not believe this distinction requires a different result.

Rent control is a subject particularly well suited for local regulation. Because of unique conditions which may exist at the local level, there may be a significant local interest to be served that may differ from one locality to the next. While chapter 118B of NRS constitutes a comprehensive scheme regulating the landlord-tenant relationship in mobile home parks, it contains provisions which appear to recognize the existence of local regulation in some areas.<sup>3</sup>

Although addressing the problem of affordability of housing to low-income owners of mobile homes, the rental assistance provisions do not address the issue of whether rents may be excessive

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<sup>3</sup> NRS 118B.200, for example, includes as grounds for eviction, the "[f]ailure of the tenant to correct any noncompliance with a law, ordinance or governmental regulation pertaining to mobile homes" and "conduct of the tenant . . . which violates a state law or local ordinance." See also NRS 118B.067 and 118B.125 with respect to local zoning and building requirements.

under particular circumstances and do not purport to regulate or control the total amount of rent charged for mobile home lots. We can discern no legislative intent that rental assistance constitutes the exclusive means of dealing with the problem of affordability of housing for tenants in mobile home parks. Nor do we believe that the rental assistance program would be adversely affected by the enactment of local rent control.<sup>4</sup>

Neither the rental assistance provisions nor any other provision in chapter 118B of NRS evidences a legislative intent to occupy the field of rent control to the exclusion of local regulation. We, therefore, conclude that the enactment by Clark County of a program of rent control will not necessarily be preempted by state law.

We note that you have not asked us to pass upon the validity of any particular proposed ordinance. The preemption of a program of rent control, or any portion thereof, will depend upon the contents of the particular ordinance. If the ordinance is drafted in such a manner that there is no conflict with existing statutes or any interference with the legislative purpose in enacting those statutes, then such an ordinance is not preempted by state law.

### CONCLUSION

Clark County is authorized by [NRS 244.335](#) to enact a program of rent control applicable to privately-owned mobile home parks in the county outside the limits of incorporated cities and towns. Such a program is not necessarily preempted by the statutory scheme set forth in chapter 118B of NRS, Landlord-Tenant: Mobile Home Parks. The preemption of such a program, or any portion thereof, will depend upon the contents of the particular ordinance. If the ordinance does not directly conflict with existing statutes or interfere with the legislative purpose in enacting those statutes, then it will not be preempted by state law.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Deputy Attorney General

OPINION NO. 92-2 SEARCH AND SEIZURE; FISH AND GAME; TRESPASS: Nevada game warden may conduct a warrantless search of private property without a warrant under the open fields doctrine; a warden who conducts a warrantless open-field search is immune from civil or criminal liability for trespass where warden acts in good faith and there are indicia of hunters or hunting activities which justify the search.

Carson City, February 21, 1992

Mr. William A. Molini, Director, Nevada Department of Wildlife, Post Office Box 10678, Reno, Nevada 89520

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<sup>4</sup> The only reference in the rental assistance provisions to local conditions is set forth in NRS 118B.215. Pursuant to subsection (5), the rental assistance supplement may not exceed "the average monthly rent charged per mobile home lot in the county in which the mobile home is located." By limiting the amount of assistance available to persons living in parks where rents are significantly higher than the average in the county this provision appears intended to both discourage the location of low-income persons in such parks and limit the overall liability of the trust fund, thus ensuring the availability of assistance to the widest range of eligible persons. Although a county rent control program could conceivably affect the average monthly rent per mobile home lot in the county, any downward pressure on overall rents in the county would not, in our opinion, be inconsistent with the purpose of this provision.

Dear Mr. Molini:

You have asked this office for an opinion concerning the authority of state game wardens to enter private lands without a warrant in order to fulfill their statutory obligations under state law. You correctly note that an opinion of this office dated May 25, 1955, advised that entry onto private lands by game wardens may not be made without a warrant. You have also noted the existence of contrary authority on this issue which has developed since the opinion. This office submits the following opinion based on an analysis of the contemporary law.

### FACTS

Accompanying your request for an opinion is a factual account relating one warden's enforcement actions. In the course of his duty, the warden observed a number of dove hunters in a field located on a private ranch. The following day, having reason to believe the hunters would again be present on the ranch property, the warden entered onto the property where he observed a game violation occur. He did not obtain a search warrant. Although the warden's actions resulted in a conviction for the violation, he was threatened with liability for civil and criminal trespass.

### QUESTION

May a state game warden enter private property without permission or a search warrant in order to enforce the state's game laws and boating laws?

### ANALYSIS

The question which is asked requires an inquiry into three different aspects of the legality of warrantless searches. First it raises the issue of the constitutionality of a warrantless search; second, it raises the question of the authority of game wardens to act under state law; and third, it presents the problem of the wardens' personal liability, both civil and criminal, for conducting warrantless searches.

#### A. Constitutionality

A previous opinion of this office, Op. Nev. Att'y Gen. No. 66 (May 25, 1955), found that warrantless searches by game wardens acting without reason to believe a violation had occurred were unauthorized. The opinion did not precisely identify a constitutional defect, although its language invited such a finding:

In the opinion of this office, there is no authority either specifically or by implication empowering a Fish and Game Warden to enter privately owned premises without permission simply for purpose of making an investigation of the property or the persons thereon in the absence of a reason to believe that a violation of the law has been or is being committed.

[I]t is also fundamental in our law that every citizen is protected by the law in the ownership of his private property. In the case of his privately owned lands, every unauthorized entry upon such lands constitutes, at least, a civil trespass.

*Id.*

Since this opinion, a significant body of case law has developed on the issue of warrantless open-field searches. Courts now generally accept the premise that an open-field search is not a search within the meaning of the Fourth Amendment, *Oliver v. United States*, 466 U.S. 170, 177

(1984); *United States v. Swann*, 377 F. Supp. 1305, 1307 (D. Md. 1974), and requires neither a warrant nor probable cause. *State v. Sorenson*, 441 N.W.2d 455, 458 (Minn. 1989).

The leading federal case dealing with the open-fields doctrine as specifically applied to game wardens is *McDowell v. United States*, 383 F.2d 599 (8th Cir. 1967). There, the court upheld the defendants' convictions for violation of federal game law, even though it was undisputed that "at no time . . . did the federal game agents have a search warrant or express consent when they entered the land of [defendant McDowell]." 383 F.2d at 602. The court relied upon the open-fields doctrine first enunciated in *Hester v. United States*, 265 U.S. 57 (1926), for the proposition that "[u]nder federal law the search of open fields without a search warrant is not constitutionally 'unreasonable.'" *McDowell*, 383 F.2d at 603.

The *McDowell* precedent has been relied on in subsequent federal opinions. *United States v. Cain*, 454 F.2d 1285 (7th Cir. 1972) (federal agents' entry without a warrant onto grounds of hunting club for routine inspection held not invalid); *Swann*, 377 F. Supp. at 1307 (federal agent's entry without a warrant onto private farmland held not to require a warrant); *United States v. Wylder*, 590 F. Supp. 926 (D. Or. 1984) (warrantless routine check for hunting licenses on private farm upheld).

The open-fields doctrine was adopted by the Nevada Supreme Court in *Casey v. State*, [87 Nev. 460](#), 488 P.2d 546 (1971). There the court held that the Fourth Amendment protection of privacy did not protect the criminal defendant from surveillance by state cattle inspectors conducted inside the fences of private ranch land.

Limitations on the open-fields doctrine have been recognized where access to an area is highly restricted. *United States v. FMC Corp.*, 428 F. Supp. 615 (W.D. N.Y. 1977). The doctrine also does not extend to dwellings and the curtilage surrounding them. However, the vigor of the open-fields doctrine was recently confirmed by the Supreme Court in *United States v. Dunn*, 480 U.S. 294 (1987), where the Court approved a warrantless search conducted by agents who crossed a perimeter fence and several interior fences to witness a criminal violation.

To the extent, then, that the previous opinion implied a blanket constitutional prohibition on warrantless searches of private property by game wardens, the opinion has been overtaken by subsequent development of the law. There is no constitutional impediment to a warrantless search when it is conducted under circumstances which will support application of the open-fields doctrine.

## B. Authority Under State Law

The central finding of the previous opinion was the absence of statutory authority to conduct a warrantless search of private land without reason to believe that a violation of the law had occurred. This conclusion was drawn on the basis of the general rule that "public officers have only such powers as are specifically provided by law or necessarily implied from the terms of the law." The opinion concluded by finding there was neither an express nor an implied power to conduct warrantless searches on private property.

Nevada game wardens are empowered as peace officers to enforce all the laws of the State. [NRS 501.349](#). Among the principal duties of peace officers, including wardens, is the prevention of crime. *Id.* See also *Wyndham v. United States*, 197 F. Supp. 856 (E.D. S.C. 1961); *Kellog v. State*, 762 P.2d 993, 994 (Okla. Crim. App. 1988).

Nevada wardens are expressly authorized by statute to conduct certain warrantless searches in their enforcement efforts. [NRS 501.375](#). The omission of open-field searches from the enumeration contained in the statute does not, however, imply a legislative disapproval of them.

The enumerated searches are of a kind which ordinarily would require a warrant under the Fourth Amendment. But an open-fields search, as described above, carries no warrant requirement at all. The open-fields search is a distinctly different type of activity whose omission from the statute indicates no particular legislative intent. The same is true of other forms of criminal detection which are also not Fourth Amendment searches and are also absent from [NRS 501.375](#), e.g., plain-view search, search of common and public areas, search of abandoned property, and consent searches. See J. Hall, Jr., *Search and Seizure* § 3.1 (1982). These methods of crime detection are necessary incidents of law enforcement. Authorization for their use is embodied within the general authority given to wardens to act as peace officers. [NRS 501.349](#).

The peculiar need for warrantless open-field searches in game law enforcement has been noted. In *Betchart v. California State Dep't of Fish & Game*, 205 Cal. Rptr. 135 (Cal. Ct. App. 1984), the California court found an implied power based on necessity:

California's pervasive scheme of regulating wild game hunting would be a futile pursuit without frequent and unannounced patrols. Certain types of illegal hunting activity must be viewed on the scene . . . . Of practical necessity, wardens must have the power to reasonably enter open private lands to enforce game regulations. . . .

Procedural requirements for issuance of administrative inspection warrants are not compatible with enforcement of hunting regulations.

*Id.* at 138.

The Minnesota court has also found statutory authority to conduct warrantless open-field searches.

We need not look to [the statute authorizing issuance of search warrants] as the means of allowing state conservation officers access to private land because the open-fields doctrine is broad enough to provide sufficient access.

*State v. Sorenson*, 441 N.W.2d at 460.

It is thus the conclusion of this office that warrantless open-field searches are authorized by the statute charging Nevada game wardens with the general duty of enforcing the laws of the State. [NRS 501.349](#). To the extent that the previous opinion of this office states a contrary position, it is hereby reversed.

### C. Liability for Trespass

The opinion in *Clark v. City of Montgomery*, 497 So. 2d 1140 (Ala. Ct. App. 1986), offers the most definitive statement by a court on the issue of trespass by law enforcement officers. On the basis of a thorough review of authority, 497 So. 2d at 1141-42, the court concluded that officers were not trespassers when they entered private property without a warrant to investigate a complaint. See generally Restatement (Second) of Torts §§ 204 and 205 (1965).

Consistent with the weight of authority, it is the opinion of this office that Nevada game wardens are privileged to enter private property without a warrant or permission when acting as peace officers to prevent or detect crime. Although the applicability of the privilege under the open-fields doctrine has not been directly addressed by any court, this office concludes that the privilege would extend to open-field searches which are reasonably executed and are within the warden's lawful authority.

This office also concludes, however, that the privilege would not be extended by a court to create a permission to trespass at will. Because of the paucity of authority on the issue, it is

impossible to define the extent of the privilege. However, the opinion in *People v. Layton*, 552 N.E.2d 1280 (Ill. App. 1990), offers a useful standard, even though it was developed in somewhat different circumstances.

In order to justify a warrantless search of receptacles which might contain illegally taken game, the court required wardens to find "indicia that the person in question is a hunter, immediately or very recently engaged in hunting. Such indicia might include wearing hunting garb, carrying a weapon, and carrying game or a game bag, in conjunction with location in or near a hunting situs." 552 N.E.2d at 1287. Similarly, it is appropriate to require wardens to identify indicia of hunters and hunting activities before they may claim a privilege to enter private open fields.

#### CONCLUSION

It is the opinion of this office that there is no constitutional prohibition against a warden performing a warrantless search of private property when the circumstances justify application of the open-fields doctrine. This office further concludes that the authority to conduct open-field searches is found within the statute establishing wardens as peace officers. Finally, this office finds no liability in trespass for individual wardens conducting a reasonable, good-faith, open-field search, provided there are indicia of hunters or hunting activities to justify entry onto the property.

Sincerely,

FRANKIE SUE DEL PAPA

Attorney General

By: C. WAYNE HOWLE  
Deputy Attorney General

OPINION NO. 92-3 LICENSES; FOREIGN CORPORATIONS; MORTGAGE COMPANIES: A firm that, from an office in Nevada, solicits advance fees exclusively from persons outside the state for the purpose of making or arranging mortgage loans must be licensed as a mortgage company pursuant to [NRS chapter 645B](#) prior to engaging in that activity. A person who, from a location outside the state, solicits advance fees or mortgage loan business from Nevada residents through the use of local advertising media, direct mail or telephone, must be licensed pursuant to [NRS chapter 645B](#) prior to engaging in that activity. Foreign corporations engaging in the continuous and active solicitation of business in this manner are not exempt from licensing and regulatory requirements by [NRS 80.015](#) and must, therefore, become licensed pursuant to [NRS chapter 645B](#) prior to engaging in that activity.

Carson City, March 12, 1992

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division  
Department of Commerce,  
406 East 2nd Street, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Walshaw:

The Financial Institutions Division has recently received several inquiries regarding firms that solicit fees in advance for the purpose of making or arranging mortgage loans. In some cases the solicitation is made from an office within this state exclusively to persons who reside outside the state. Although no Nevada residents are solicited, advance fees are sent into the state where they are deposited in the solicitor's local bank account. In other cases, firms with no office in Nevada solicit advance fees or loan business from Nevada residents by the use of local advertising media, direct mail or by telephone. You have advised us that the solicitation is regular, continuous, and

constitutes a substantial part of the solicitor's business.

You have asked the following questions regarding the necessity for such firms to become licensed pursuant to [NRS chapter 645B](#), governing mortgage companies. Since [NRS chapter 645B](#) governs the making or arranging of loans secured by a lien on real property, we shall assume such liens exist in the transactions you have described. We shall also assume that, except as noted, no statutory exemptions from the licensing requirement are applicable.

#### QUESTION ONE

If a firm that, from an office within this state, solicits persons residing outside the state to send advance fees or otherwise enter into mortgage loan transactions required to obtain a license pursuant to the provisions of [NRS chapter 645B](#) prior to engaging in that activity?

#### ANALYSIS TO QUESTION ONE

It is unlawful to engage in the business of a mortgage company without a license issued by the Commissioner of Financial Institutions. See [NRS 645B.210](#). A "mortgage company" means any person who, directly or indirectly,

- (a) Holds himself out for hire to serve as an agent for any person in an attempt to obtain a loan which will be secured by a lien on real property;
- (b) Holds himself out for hire to serve as an agent for any person who has money to lend, if the loan is or will be secured by a lien on real property;
- (c) Holds himself out as being able to make loans secured by liens on real property, unless the loans are made pursuant to subsection 8 or 10 of [NRS 645.015](#);
- (d) Holds himself out as being able to buy or sell notes secured by liens on real property; or
- (e) Offers for sale in this state any security which is exempt from registration under state or federal law and purports to make investments in promissory notes secured by liens on real property.

[NRS 645B.010\(3\)](#).

There is nothing in the statutory definition of mortgage company which limits the jurisdictional reach of [NRS chapter 645B](#) to the protection of persons who reside in this state, and such a limitation on the state's police power is not constitutionally required. *Brown v. Market Dev., Inc.*, 322 N.E.2d 367 (Ohio 1974). In any event, [NRS chapter 645B](#) is also intended to protect those persons who provide money to lend, some of whom may be Nevada residents in the situation you have described. See, e.g., [NRS 645B.175](#) and [645B.185](#). A firm that solicits advance fees from an office in this state for the purpose of making or arranging loans secured by a lien on real property is engaged, in our opinion, in the business of a mortgage company in this state and must, therefore, become licensed pursuant to [NRS chapter 645B](#) prior to engaging in that activity.

#### CONCLUSION TO QUESTION ONE

A firm that, from an office in Nevada, solicits advance fees exclusively from persons outside the state for the purpose of making or arranging loans secured by a lien on real property is engaged in the business of a mortgage company in this state and must obtain a license pursuant to the provisions of [NRS chapter 645B](#) prior to engaging in that activity.

#### QUESTION TWO

Is a firm that, from an office outside the state, solicits Nevada residents by the use of local advertising media, direct mail or telephone to send advance fees or otherwise enter into mortgage

loan transactions required to obtain a license pursuant to the provisions of [NRS chapter 645B](#) prior to engaging in that activity?

### ANALYSIS TO QUESTION TWO

One who holds himself out for hire as being able to make or arrange loans secured by a lien on real property is engaged in the business of a mortgage company as defined by [NRS 645B.010\(3\)](#). We believe that a person who uses local advertising media, direct mail or telephone to solicit advance fees or loan business from Nevada residents is holding himself out as a mortgage company in this state. A natural person, partnership, domestic corporation and any other business organization except a foreign corporation must, therefore, become licensed pursuant to the provisions of [NRS chapter 645B](#) prior to engaging in that activity. Whether a foreign corporation engaged in this activity must be licensed requires a discussion of statutory provisions applicable to such corporation.

[NRS chapter 80](#) contains provisions governing the qualification of foreign corporations doing business in this state. Act of June 25, 1991, ch. 442, § 133, p. 1244, amends [NRS 80.015](#) to read, in part, as follows:

1. For the purposes of this chapter, the following activities do not constitute doing business in this state:

....  
(g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

....  
(1) Transacting business in interstate commerce.

2. The list of activities in subsection 1 is not exhaustive.

3. A person who is not doing business in this state within the meaning of this section *need not qualify or comply with any provision of [NRS 80.010](#) to [80.230](#), inclusive, chapter 645B of NRS or Titles 55 and 56 of NRS* unless he:

(a) Maintains an office in this state for the transaction of business; or

(b) Solicits or accepts deposits in the state, except pursuant to [NRS 666.225](#) to [666.375](#), inclusive. [Emphasis added.]

In addition to creating an exemption from the qualification provisions of [NRS chapter 80](#), subsection (3) of this statute also exempts certain foreign corporations from the licensing and regulatory provisions of [NRS chapter 645B](#). See Op. Nev. Att'y Gen. No. 50 (April 26, 1955).

The exemption does not apply to foreign corporations that solicit or accept deposits in this state. [NRS 80.016](#) contains detailed provisions which determine when a deposit is solicited or accepted in this state. The term "deposit," however, is not specifically defined. To determine whether an advance fee for a mortgage loan is a deposit within the meaning of [NRS 80.015\(3\)\(b\)](#), we must attempt to ascertain the intent of the legislature in enacting this provision. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 38, 752 P.2d 221 (1988). We also note that, as an exception to the general rule requiring qualification under [NRS chapter 80](#) and licensing under [NRS chapter 645B](#), the exemption should be strictly construed. See Op. Nev. Att'y Gen. No. 123 (March 30, 1964) (opinion interpreting former similar statute).

By limiting the exemption from qualification and licensing requirements in [NRS 80.015](#) to those foreign corporations that do not solicit or accept deposits in this state, we believe the legislature intended to further one of the primary purposes of laws governing the licensing and regulation of financial institutions--the protection of Nevada citizens from financial loss. That

purpose is best served by construing the term "deposit" in [NRS 80.015\(3\)\(b\)](#) broadly to encompass any situation where a foreign corporation solicits money from Nevada residents in the manner described in [NRS 80.016](#). We, therefore, conclude that the advance fees described in your question are deposits within the meaning of [NRS 80.015\(3\)\(b\)](#). A direct mail or telephone solicitation is made in this state when "[i]t is directed by the solicitor to a destination in this state and received where it is directed or at a post office in this state if the solicitation is mailed." With respect to "local" advertising media, we would direct you to the provisions of [NRS 80.016\(3\)](#) and (4) to determine whether, in a particular case, the solicitation is made in this state. Since your question also involves the solicitation of mortgage business in general, we must still determine the applicability of the exemption created by [NRS 80.015\(3\)](#) to foreign corporations engaging in this activity.

We must attempt to reconcile [NRS 80.015](#) with [NRS 645B.220](#), which provides in full:

It is unlawful for any foreign corporation, association or business trust to transact any mortgage business unless it:

1. Qualifies under chapter 80 of NRS; and
2. Complies with the provisions of this chapter unless exempted by [NRS 645B.015](#).

By requiring foreign corporations doing a mortgage business to qualify under [NRS chapter 80](#) and become licensed under [NRS chapter 645B](#), this statute appears, on the surface, to conflict with [NRS 80.015\(3\)](#) which exempts foreign corporations from qualification and licensing requirements. This conflict is especially apparent in relation to subsection (2) of [NRS 80.015](#), which provides that the list of activities that exempt foreign corporations under subsection (1) is not exhaustive.

The activities described in [NRS 80.015\(1\)](#) were largely adopted from the Model Business Corporations Act ("Model Act"). Minutes of the Nevada State Legislature, Joint Senate and Assembly Committees on Judiciary, May 7, 1991, Exhibit C, Prepared Testimony of John Fowler in Support of A.B. 655, the Corporate Law Bill, pp. 11-12; Exhibit C-1, Study of Nevada Corporate Law by Vargas and Bartlett, July 30, 1990, p. 1-C.

Neither [NRS chapter 80](#) nor the Model Act attempt to formulate an inclusive definition of what constitutes doing business in a state. Official Comments, Model Business Corporation Act, § 15.01, p. 1570. In the absence of a "safe harbor" provision such as [NRS 80.015](#), the determination of whether activities constitute doing business depends not on a single factor but on the nature and extent of a corporation's activities in the state. *S.A.S. Personnel Consultants, Inc. v. Pat-Pan, Inc.*, 407 A.2d 1139, 1141 (Md. 1979). The Nevada Supreme Court has stated that "casual or occasional transactions" in the state will not constitute doing business, but a corporation doing a substantial part of its ordinary business in a continuous manner will require qualification under [NRS 80.010](#). *In re Hilton Hotel*, [101 Nev. 489](#), 492, 706 P.2d 137 (1985). We believe that, by providing that the list of activities described in subsection (1) is not exhaustive, subsection (2) of [NRS 80.015](#) is merely a recognition that some limited activity will not constitute "doing business in this state" under the general qualification statute, [NRS 80.010](#).

We must also determine the applicability to your question of [NRS 80.015\(1\)\(l\)](#), which exempts from qualification and licensing requirements any foreign corporations "[t]ransacting business in interstate commerce." A literal application of this provision could exempt every foreign corporation conducting business in more than one state and largely defeat the purpose of the qualification and licensing statutes. To avoid this absurd result, we believe this provision must be given a narrow construction.

Since the interstate commerce exemption is derived from the Model Act, it is appropriate to consider the construction placed on this exemption by courts of other states which have adopted this part of the Model Act. *See Ybarra v. State*, [97 Nev. 247](#), 249, 628 P.2d 297 (1981). In *DeKalb*

*Cablevision Corp. v. Press Ass'n, Inc.*, 232 S.E.2d 353 (Ga. 1977), the court stated that the purpose of the interstate commerce exemption was to effectuate the principle that, under the Commerce Clause of the U.S. Constitution, a state may not interfere with a foreign corporation's right to engage in interstate commerce. The question of what is interstate commerce and the extent to which it may be regulated by the states is a federal one. 15A Am. Jur. 2d, *Commerce* § 6, p. 326. In *Contel Credit Corp. v. Tiger, Inc.*, 520 N.E.2d 1385 (Ohio 1987), a loan of money by a foreign corporation engaged in that business to an in-state corporation was held to not fall within the realm of interstate commerce. Consistent with these decisions, we conclude that [NRS 80.015\(1\)\(l\)](#) should be interpreted as exempting only those activities which, under applicable federal law or judicial precedents, may not be regulated by the states without impermissibly burdening interstate commerce. We are aware of no decision holding that a state may not license and regulate persons soliciting loan business within its borders. [NRS 80.015\(1\)\(l\)](#) does not, therefore, exempt foreign corporations soliciting loan business in this state from the licensing and regulatory requirements of [NRS chapter 645B](#).

The question remains whether the solicitation of loan business in this state by the use of local advertising, direct mail or telephone does not constitute doing business under the general qualification statute, [NRS 80.010](#), or because it comes within one of the activities described in [NRS 80.015\(1\)](#). You have advised us that the solicitation takes place in a regular and continuous manner and constitutes a substantial part of the solicitor's ordinary business. This activity would, in our opinion, constitute doing business in this state under [NRS 80.010](#). To determine whether this type of solicitation comes within one of the activities described in [NRS 80.015\(1\)](#), we must consider the interplay of this statute with [NRS 645B.220](#).

The two statutes must, if reasonably possible, be harmoniously construed. *Sheriff, Clark County v. Luqman*, [101 Nev. 149](#), 154, 697 P.2d 107 (1985). As previously noted, the exemption should be strictly construed. See Op. Nev. Att'y Gen. No. 123 (March 30, 1964). Since [NRS 645B.220](#) is a special statute concerned with mortgage activity by foreign corporations, it must control in the event of a conflict with [NRS 80.015](#), a general statute concerned with a broader range of issues. *Laird v. Nevada Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982).

Had the legislature intended to exempt from licensing all mortgage business by foreign corporations who do not maintain an office or solicit deposits in this state, it would have been unnecessary to specifically provide in [NRS 645B.220](#) that mortgage activity by foreign corporations requires licensure and qualification. The legislature has instead provided, in [NRS 80.015\(3\)](#), that such a foreign corporation must not be doing business in this state within the meaning of subsection (1) in order to qualify for the exemption.

Since the proper construction of these statutes is not apparent on their face, it is appropriate to consider legislative history as an aid to determining legislative intent. *Baliois v. Clark County*, [102 Nev. 568](#), 570, 729 P.2d 1338 (1986). The substance of the mortgage company exemption now contained in [NRS 80.015\(3\)](#) was first introduced in legislation enacted in 1989. Act of June 6, 1989, ch. 296, Nev. Stat. 1989, § 1, p. 623. One of the sponsors of the legislation stated that its intent "was to provide a simplified system for an out-of-state lender to be able to qualify through the Secretary of State's office, to make a few loans and 'exit' the state without having to go through licensing or other extensive and sophisticated forms of qualification." Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, May 19, 1989 (Testimony on Assembly Bill 768). The legislation would "primarily apply to charter financial institutions and insurance companies who were doing business somewhere else in the United States or in a foreign country, but were not here to establish a permanent presence." *Id.* "[I]f a person was actively engaged in the business of 'lending,' he would have to apply to the Department of Commerce for a license because the state had an interest in regulating people in the business of lending; but did not have an interest in regulating people who made one or two isolated loans." *Id.* The official Comments to Section 15.01(b) of the Model Act, from which [NRS 80.015\(1\)\(g\)](#) and (h) were derived, states that "[i]n

general terms, any conduct more regular, systematic or extensive than that described in section 15.01(b) constitutes the transaction of business and requires the corporation to obtain a certificate of authority." Model Business Corporation Act Annotated, Vol. 4, p. 1570.

Consistent with this legislative history, we conclude that [NRS 80.015\(3\)](#) exempts from the licensing and regulatory requirements of [NRS chapter 645B](#) and Titles 55 and 56 of NRS, only those foreign corporations whose contacts with the State of Nevada are limited to the activities specifically described in subsection (1) of this statute or are otherwise so limited as to not constitute doing business under [NRS 80.010](#). Such a construction is required, in our opinion, in order to give substantive effect to [NRS 645B.220](#).

Although foreign corporations may, pursuant to [NRS 80.015\(1\)\(g\)](#) and (h), enter into loan transactions and secure and collect such debts, the list of permissible business activities does not include the regular and continuous solicitation of loan and mortgage business in this state by the use of local advertising media, direct mail or telephone. A foreign corporation engaged in such active solicitation of business in this state is clearly holding itself out as a mortgage company and has exceeded, in our opinion, the limited range of activity exempt from the licensing requirement pursuant to [NRS 80.015\(3\)](#). Such a corporation must, therefore, obtain a license pursuant to [NRS chapter 645B](#) prior to engaging in that activity.

#### CONCLUSION TO QUESTION TWO

A natural person, partnership, domestic corporation and any other business organization except a foreign corporation that, from a location outside this state, solicits advance fees or loan business from Nevada residents through the use of local advertising media, direct mail and telephone, must become licensed pursuant to [NRS chapter 645B](#) if the loan will be secured by a lien on real property. Foreign corporations engaging in the continuous and active solicitation of business in Nevada in this manner are not exempt from licensing and regulatory requirements by [NRS 80.015](#) and must, therefore, become licensed pursuant to [NRS chapter 645B](#) prior to engaging in that activity.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Deputy Attorney General

OPINION NO. 92-4 PUBLIC WORKS; CONTRACTOR; BIDDERPREFERENCE; JOINT VENTURES: A joint venture submitting a bid on a contract for a public work may be entitled to the benefits of the Nevada bidder preference law when at least one of the joint venturers has an unlimited Nevada contractor license, independently meets the requirements of the bidder preference law, shares equally in the profits and losses of the joint venture, and has at least equal control in the venture. An awarding agency should make the determination based upon the specific facts in each case.

Carson City, March 18, 1992

Mr. Garth Dull, Director, Nevada Department of Transportation, 1264 South Stewart Street, Carson City, Nevada 89712

Mr. Robert G. Ferrari, Secretary-Manager, Nevada Public Works Board, Kinhead Building, Room

301, 505 East King Street, Capitol Complex,  
Carson City, Nevada 89710

Dear Mr. Dull and Mr. Ferrari:

In June of this year, the Nevada Department of Transportation ("NDOT") advertised for bids on two highway repair projects. The bid opening revealed that the apparent low bidder on both was a joint venture consisting of a construction company located in Nevada and a company principally located in California. The apparent second low bidder on the projects subsequently objected to the awarding of the contracts to the joint venture and asserted that the joint venture, itself, did not meet the requirements of Nevada's bidder preference law, [NRS 338.147](#), and was not entitled to its benefits. The second low bidder clearly was entitled to the preference. Without the preference, the joint venture would fall behind the apparent second low bidder which would be deemed to have submitted a better bid. The amount of the bid of the second low bidder was not more than five percent higher than the joint venture bid as stated in the bidder preference law. The Department of Transportation asked us whether the joint venture qualified for the preference.

The Nevada Public Works Board and the Clark County District Attorney's Office have also previously asked this office whether a joint venture may qualify for the preferential bidder status under the statute. Effective October 1, 1991, the Nevada Legislature amended the bidder preference statute. 1991 Nev. Stat. ch. 713 at 2374. That statute changed the qualifications for the bidder preference. With the many requests for an opinion and with a recent change in the law, we determined that our earlier informal written opinions on this subject should be formalized for the benefit of those working with Nevada's bidder preference law.

#### FACTS

Two construction companies joined forces in a joint venture and submitted bids earlier this year on two NDOT contracts. This joinder of forces will hereafter be referred to as the "joint venture." The joint venture was the low bidder on these contracts. Another construction company was the second low bidder on these projects within five percent of the low bidder. This company demanded that they be declared the low bidder on one contract as they were entitled to the bidder's preference and the joint venture was not. The company's attorney subsequently acknowledged that, because the second contract was federally funded, the bidder preference did not apply.

The joint venturers submitted a "Bidder Preference Affidavit," a form supplied and required by NDOT, certifying that, as a joint venture, they met the requirements of section 338.147 of our statutes. NDOT also received a signed Statement of Joint Venture, an NDOT form, executed by each of the joint venturers and showing a previous date of prequalification. The Department also received a copy of a letter of intent executed in May 1991, between the joint venturers that the corporations intended to bid on certain highway work in Nevada and that these would be joint venture bids with both companies jointly participating in the work and sharing equally in the profits or losses. The Department informed us that one of the joint venturers has been a long-time Nevada corporation and contractor and clearly meets the requirements for the bidder preference statute. NDOT subsequently received a letter from the California corporation portion of the joint venture indicating that they have paid some form of tax in Nevada in each of the past five years and longer and, apparently, also qualified in their own right for the bidder's preference, at least prior to the 1991 amendments.

#### QUESTION

May a joint venture qualify for a preference under the Nevada bidder preference law?

#### ANALYSIS

A. The Bidder Preference Statute.

Before October 1, 1991, the law in Nevada which gave a preference to certain bidders provided as follows:

1. A public body shall award a contract for a public work to the contractor who submits the best bid.
2. Except as otherwise provided by subsection 3, for the purposes of this section, a contractor who has:
  - (a) *Been found to be a responsible contractor* by the public body; and
  - (b) *Paid the state and local taxes within this state for 5 successive years before submitting the bid*, shall be deemed to have submitted a better bid than a competing contractor who has not paid the taxes if the amount of his bid is not more than 5 percent higher than the amount bid by the competing contractor and the bid does not exceed the amount budgeted for the work or the engineer's estimate of the cost of the work, whichever is less.
3. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of subsection 2, those provisions do not apply insofar as their application would preclude or reduce federal assistance for that work.

[NRS 338.147](#) (1989) (emphasis added). The 1991 Legislature changed the statutory scheme:

Section 1. The legislature finds and declares that it is the public policy of the state to confer a preferential bidder status on a contractor licensed pursuant to chapter 624 of NRS who has paid taxes which make public works projects possible, unless the conferral of that status would preclude or reduce federal assistance for a public project.

Sec. 2. [NRS 338.147](#) is hereby amended to read as follows:

1. A public body shall award a contract for a public work to the contractor who submits the best bid.
2. Except as otherwise provided by subsection 3, for the purposes of this section, a contractor who:
  - (a) Has been found to be a responsible contractor by the public body; and
  - (b) At the time he submits his bid, provides proof of the payment of:
    - (1) The sales and use taxes imposed on materials used for construction of not less than \$5,000 for each of the 5 years immediately preceding the submission of his bid; or
    - (2) The motor vehicle privilege tax imposed pursuant to chapter 371 of NRS on the vehicles used in the operation of his business of not less than \$5,000 for each of the 5 years immediately preceding the submission of his bid, shall be deemed to have submitted a better bid than a competing contractor who has not paid the taxes if the amount of his bid is not more than 5 percent higher than the amount bid by the competing contractor.
3. If any federal statute or regulation precludes the granting of federal assistance or reduces the amount of that assistance for a particular public work because of the provisions of subsection 2, those provisions do not apply insofar as their application would preclude or reduce federal assistance for that work.

1991 Nev. Stat. ch. 713, §§ 1-2 at 2374-75 (effective Oct. 1, 1991). Effective October 1, 1996, any contractor seeking to obtain the benefit of the preference must have paid the business tax adopted by the 1991 Legislature "for each of the 5 years immediately preceding the submission of his bid . . ." *Id.* § 3 at 2375, *citing* 1991 Nev. Stat. ch. 727 at 2448-70 (A.B. 303--business tax).

Neither version of this statute addresses itself to the situation where a joint venture submits a bid. Rather, the statutes provide a bidder preference to a "contractor" who meets the specific requirements. With regard to the award of the contract here, NDOT informed us that both partners

in the joint venture had been found to be responsible contractors. Additionally, both have had Nevada Class A unlimited contractor licenses in this state for more than five years. This was confirmed by the State Contractors' Board. Additionally, NDOT received a statement from the California corporation that they paid taxes in this state for at least the past five years. It would appear that each of these contractors would meet the requirements of the statute prior to October, 1991, in their own right. The question becomes whether or not the joint venture meets the requirements of either version of the statute.

Because a joint venture can be considered in this situation to be the "contractor," the bidder preference statute is ambiguous. The statute could reasonably be read either to include or exclude joint ventures from its scope.<sup>5</sup> If the statute was clear on its face, we could not go beyond the language of the statute in determining the intent of the legislature. But, where the statute is ambiguous, we must ascertain legislative intent elsewhere. See *Hotel Employees v. State, Gaming Control Bd.*, [103 Nev. 588](#), 591, 747 P.2d 878 (1987). In determining legislative intent, we must look at the entire act and "its object, scope and extent must be examined." *Nevada Power Co. v. Public Serv. Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867 (1986). Accordingly, we have obtained the legislative history of this statute and have reviewed the court decisions interpreting the statute. We have also reviewed a previous opinion of this office and an opinion of a local district attorney and we have considered the administrative interpretation of the Department.

This statute was enacted in 1989 as Assembly Bill 583. The proponent of the bill testified, "The idea is to give preference to local contractors." The concern of several proponents of the bill was that out-of-state contractors came into the state, did the job, took the money and left and that it was difficult to have the out-of-state contractor come back for warranty work. Additionally, these contractors may buy their materials out of state, hire non-Nevada resident workers, and obtain industrial accident insurance at a cheaper rate from another state,<sup>6</sup> all of which may give these contractors a cost benefit. *Minutes of May 1, 1989 Hearing on A.B. 583 before the Assembly Commerce Committee at 5-7*. One Nevada contractor supported the legislation and indicated that out-of-state contractors would ask for more contract time because they would be unable to move their equipment into the area in a timely manner and that this was unfair to the contracting agency and to the Nevada workers not performing the work. *Minutes of May 24, 1989, Hearing on A.B. 583 before the Senate Committee on Government Affairs at 3*. (Exhibit D). The proponents of the bill also indicated that the State of Arizona had a similar law which had been upheld against challenges.

If we were to conclude that a joint venture must have paid the taxes in Nevada for five successive years or the five years immediately preceding the bid, then only joint ventures which had been in existence for at least that period of time and had made those payments could qualify for the bidder preference. This construction of the statute would mean that even two contractors who qualify independently for the preference could not form a joint venture for one project and receive the preference over an out-of-state contractor who bids slightly less than the joint venture. This interpretation would also preclude a new joint venture from utilizing the preference when one of the two joint venturers is a qualifying contractor and the other one is not. We are required to give effect to the intent of the legislature, however, and to effectuate, not nullify, the manifest purpose of the legislation. The interpretation of statutes should be reasonable and we must avoid absurd results. *Las Vegas Sun v. Eighth Judicial District Court*, [104 Nev. 508](#), 511, 761 P.2d 849 (1988). It is hard to imagine that the legislature intended that one or two independent contractors who otherwise qualify independently for the bidder preference would not qualify for that preference as a new joint venture. The existence of one contractor of the joint venture who pays Nevada taxes and shares

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<sup>5</sup> A "contractor" could be an individual or an entity, such as a joint venture. See NRS 624.020(2) (1991) ("contractor" defined); NRS 0.039 ("person" defined).

<sup>6</sup> We note that Nevada law allows industrial insurance to be obtained from another state only where the other state reciprocates on coverage of out-of-state workers and the cost of the project does not exceed \$250,000. NRS 616.260.

equally in the profits and losses of the joint venture seems to meet the legislative intent. This is especially true when one of the contractors in the joint venture is a company which is located in this state and specifically supported the legislation.

Notably, at the time the Nevada statute was enacted, Arizona law specifically provided that a joint venture could qualify for that state's bidder preference. *Tanner Companies v. Superior Ct.*, 696 P.2d 693, 695-96 (Ariz. 1985).<sup>7</sup> "The general rule in Nevada is that a statute adopted from another jurisdiction will be presumed to have been adopted with the construction placed upon it by the courts of that jurisdiction before its adoption." *Ybarra v. State*, [97 Nev. 247](#), 249, 628 P.2d 297 (1981). Our legislature is presumed to know the construction placed upon an adopted statute by the highest court of the state from which it was taken and this construction is an aid in ascertaining the legislative intent. *State ex rel. Brennan v. Bowman*, [88 Nev. 582](#), 585, 503 P.2d 454, (1972). The Arizona Supreme Court rendered its opinion in 1985 and the Nevada legislation, based upon the Arizona law, was enacted in 1989. Thus, the Arizona ruling is persuasive of the Nevada legislative intent. The language in the Nevada statute referring to the "contractor who submits the best bid" did not change significantly in the 1991 legislation which primarily focused on what taxes had to have been paid. We cannot see any significant indication that the 1991 Legislature desired to distance itself from this aspect of the 1989 legislation.

We must also consider several other opinions which have been issued regarding the Nevada law. In November of 1989, the Clark County District Attorney requested an opinion from the Nevada Attorney General regarding the new Nevada bidder preference law. In that request, the district attorney indicated his opinion that a joint venture would qualify for the preference if any one of the joint venturers had paid the requisite taxes before submitting the bid. Letter to Attorney General Brian McKay from District Attorney Rex Bell at 10 (Nov. 27, 1989). The Nevada Attorney General subsequently opined that "entitlement to the preference must be evaluated on a case-by-case basis, entailing a factual analysis and determination by the awarding entity." Letter to Deputy District Attorney Victor Priebe from Attorney General Brian McKay at 10 (Apr. 23, 1990). The Attorney General cited the *Tanner Companies* case and concluded that joint ventures and corporations are entitled to consideration and review as to the preference. Although attorney general opinions do not constitute binding legal authority or precedent, *Goldman v. Bryan*, [106 Nev. 30](#), 42, 787 P.2d 372 (1990), government officials are entitled to rely on those opinions. See *Cannon v. Taylor*, [88 Nev. 89](#), 91-92, 493 P.2d 1313 (1972).

NDOT also informed us that the Department has previously construed the bidder preference statute to allow a joint venture to qualify for the benefit of that statute when one of the joint venturers meets the requirements of the bidder preference law. Additionally, for many years NDOT has defined the term "contractor" in its standard specifications as the "individual, partnership, firm, corporation, or any acceptable combination thereof, or joint venture, contracting with the Department of Transportation for performance of prescribed work." We note that an "administrative construction that is within the language of the statute will not readily be disturbed

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<sup>7</sup> It should be pointed out that the Arizona bidder preference statute at that time required a contractor to have paid state and local taxes for two years on plant and equipment ordinarily required for performance of the contract or on other real or personal property in the state equivalent in value to the plant. *Tanner Companies*, 696 P.2d at 694 n.1. Subsequent legislative changes allowed a contractor to qualify by paying taxes of only \$200 per year for the plant or its equivalent. *Big D Constr. v. Court of Appeals*, 789 P.2d 1061, 1065-66 (Ariz. 1990). One of the reasons the statute was eventually declared unconstitutional by the state supreme court was that this change meant that the tax payment was "so insignificant in proportion to the amount of the potential preference conferred on even a modest size public work job that any reasonable relationship between the statute and furtherance of the legislative purpose . . . has been destroyed." *Id.* Moreover, a nonresident bidder could apparently qualify for the preference and thwart legislative intent by paying back taxes just before a bid or by forming a joint venture "with an individual not in the contracting business who has already paid taxes on property held for purposes entirely unrelated to construction work." *Id.* at 1069, citing *Tanner Companies*, 696 P.2d at 698-99 (Feldman, J., dissenting). We do not so read the amended Nevada statute. The legislature now requires the payment of what appears to be a significant amount of taxes, \$5,000, on construction materials for a period of five years. We conclude that at least one of the participants in a two-party joint venture must also have qualified on its own for the preference. This means that the one must be a licensed Nevada contractor.

by the courts." *Department of Human Resources v. UHS of the Colony*, [103 Nev. 208](#), 211, 735 P.2d 319 (1987). Finding that the term "contractor" in the bidder preference statute can be a joint venture is certainly a construction within the language of the statute.

During the hearings on the 1991 amendments to Nevada's statute, this office was asked by the committees whether a joint venture could qualify for the preference. This office responded that, based upon the interpretation of the Arizona statute, and previous administrative interpretations of the Nevada statute, a joint venture could qualify. See *Minutes of May 20, 1991, hearing before the Nevada Assembly Committee on Commerce at 16*; *Minutes of June 12, 1991, hearing before the Nevada Senate Committee on Government Affairs at 8*. The 1991 Nevada Legislature did not thereafter amend the statute specifically to preclude such an interpretation even though it had the opportunity to do so. The statute can still be read to define a "contractor" as a corporation, a joint venture or an individual. Legislative acquiescence to this interpretation indicates that the interpretation is consistent with legislative intent. *Sierra Pac. Power Co. v. Department of Taxation*, [96 Nev. 295](#), 298, 607 P.2d 1147 (1980).

#### B. Joint Venture Law.

We must also look to the law on joint ventures to determine whether that law would preclude the joint venture in this situation from qualifying for the bidder preference. "A joint venture is 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 capital contributed, in profits and losses." *Bruttomesso v. Las Vegas Metro. Police*, [95 Nev. 151](#), 154, 591 P.2d 254 (1979). Other state courts have stated that, in order for a joint venture to be valid, there must be an agreement, a common purpose, a community of interest, an equal right to control, and participation in profits and losses. *Tanner Companies*, 696 P.2d at 695; *Connor v. Great Western Sav. & Loan Ass'n*, 447 P.2d 609, 615 (Cal. 1968); *Rhodes v. Sunshine Mining Co.*, 742 P.2d 417, 420-21 (Idaho 1987). A joint venture is usually limited to a single transaction. *Rubi v. Transamerica Title Ins. Co.*, 641 P.2d 891, 894 (Ariz. App. 1981); *Dority v. Driesel*, 706 P.2d 995, 997 (Ore. App. 1985). In Nevada, the principles of law regarding a general partnership also apply to a joint venture. *Haertel v. Sonshine Carpet Co.*, [102 Nev. 614](#), 616, 730 P.2d 428 (Nev. 1986); *Sterling Builders, Inc. v. Fuhrman*, [80 Nev. 543](#), 547 n.2, 396 P.2d 850 (1964).

NDOT received a copy of a letter of intent executed between the companies forming the joint venture which indicates that, if the parties are successful bidders, they will enter a formal joint venture agreement as to each project prior to signing contracts and that each partner would share in the profits or losses as specified in the agreements. The parties also executed the NDOT form "Statement of Joint Venture." Thus the parties have agreed to conduct a business enterprise and to share equally in profits and losses. Because joint ventures are usually for single transactions, it is hard to believe that the legislature would preclude a joint venture from receiving the benefit of the bidder preference law unless the joint venture had been in existence for five years.

Nevada law does address joint ventures in the context of contractor licensing.

1. It is unlawful for any two or more licensees, whose licenses have been limited by the board to contracts not exceeding certain monetary sums and each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this state, jointly to submit a bid or otherwise act in the capacity of a contractor within this state without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation.
2. A licensee whose license is limited to contracts not exceeding certain monetary sums cannot be a party to a joint venture unless such licensee has secured an

additional license for such joint venture.

[NRS 624.290](#) (1991). This statute requires an additional license for a joint venture only when each contractor does not have unlimited licenses. As noted previously, both companies here have unlimited Nevada contractor licenses. We have not found any other limiting Nevada statutes regarding joint ventures. One statute does provide that corporations have the power to enter into joint ventures. [NRS 78.070\(7\)](#).

It should also be noted that the Nevada Supreme Court had occasion to discuss whether one joint venturer can receive the benefits of law that another joint venturer has. In the *Haertel* case, the court held that "consonant with the principal of shared liability of joint venturers for their acts . . . we conclude that it is likewise equitable that, where a joint venturer has paid premiums for workmen's compensation to protect itself against loss, the benefit of the protection should also accrue to the other joint venturers." *Haertel v. Sonshine Carpet Co.*, [104 Nev. 331](#), 335, 757 P.2d 364 (1988). This holding seems to indicate that the Nevada Supreme Court would agree with the Arizona Supreme Court decision in *Tanner Companies* which held, "A joint venture, which shares the benefits and liabilities of the separate acts of each individual joint venturer, should also be allowed to benefit from the qualifications of each participant." *Tanner Companies*, 696 P.2d at 695. An Alaska decision is in accord. In *Irby-Northface v. Commonwealth Elec. Co.*, 664 P.2d 557 (Alaska 1983), the Alaska Supreme Court concluded that the bidder preference statute in that state had to be interpreted to allow a joint venture the preference if one of the venturers qualified individually for the preference.

#### CONCLUSION

We conclude that, under the facts presented to us, the joint venture is entitled to the benefits of the bidder preference law. One of the companies on its own clearly qualifies for the bidder preference. The facts indicate that the California company may also qualify for the bidder preference independently as it has been a licensed contractor in Nevada and has paid taxes in this state for at least the past five successive years. Both companies have been found by NDOT to be responsible contractors. Both have unlimited Nevada contractor licenses. Each has also submitted a letter of intent showing that each appears to meet the requirements of Nevada's joint venture law.

We believe that the legislative intent behind the bidder preference statute would not be to preclude a joint venture from receiving the benefits of the bidder preference statute when at least one of the joint venturers qualifies independently for the benefits of the statute, has an unlimited Nevada contractor's license and has agreed to share equally in the profits and losses of the joint venture. Such a venture, however, should not be a sham simply so that a nonresident company can qualify for the preference. Thus if the profits and losses are not shared at least equally by the qualifying partner or the qualifying partner does not have at least equal control, the joint venture may not be entitled to the preference. Nevada public agencies should require appropriate proof of the venture's arrangement. Entitlement to the preference should be determined on a case-by-case basis with the awarding entity reviewing the specific facts involved.

The Nevada statute was based upon the Arizona bidder preference statute and the Arizona Supreme Court had stated that a joint venture could qualify for the bidder preference statute in that state. The Alaska bidder preference statute was similarly construed. This aspect of the 1989 legislation was not changed by the 1991 legislation. The Nevada Supreme Court has also indicated that the benefit of the protection of payment of work-man compensation premiums by one joint venturer would accrue to another joint venturer. This indicates that the Nevada Supreme Court probably would agree with the Arizona Supreme Court regarding the bidder preference statute. Allowing the joint venture here the benefit of the bidder preference statute would be consistent with NDOT's previous administrative determination that a joint venture could so qualify. The Nevada Legislature recently had an opportunity to make clear any contrary intent and declined to do so.

Any changes to the conclusions we reach here must be made by the legislature if it so desires.

As a final note, we should point out that it has been asserted that the Nevada company does not independently have the bonding capacity for the construction contracts and needed the California company for that purpose. NDOT correctly pointed out that the Department only requires that the contractor submit a valid bond at the time the contract is signed and that the bonding capacity of the bidders is not a separate requirement. Accordingly, the fact that the Nevada company does or does not have bonding capacity on its own does not affect the interpretation of the bidder preference statute. Should you have any questions or comments, please let us know.

Sincerely,  
FRANKIE SUE DEL PAPA  
Attorney General

By: BRIAN RANDALL HUTCHINS  
Chief Deputy Attorney General

OPINION NO. 92-5 TAXATION; LIQUOR LICENSING: A nonprofit consumer group, such as the United States Slo-Pitch Softball Association, which holds a special event liquor permit in the course of its charitable endeavors does not qualify as a retail liquor store for purposes of [NRS 369.485\(3\)](#).

Carson City, April 20, 1992

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation 1340 South Curry Street, Carson City, Nevada 89710-0003

Dear Mr. Comeaux:

You have requested an opinion from this office with regard to the following question:

QUESTION

Is a nonprofit consumer group, such as the United States Slo-Pitch Softball Association ("USSSA"), which holds a temporary or special event liquor permit a liquor retailer for purposes of [NRS 369.485\(3\)](#) such that it cannot sell alcoholic beverages distributed by one wholesaler, like Nevada Beverage Company, to the exclusion of brands distributed by other wholesalers in the area?

FACTUAL BACKGROUND

The Bureau of Alcohol, Tobacco and Firearms ("BATF") is investigating Nevada Beverage Company's interaction with the USSSA, a nonprofit organization. In 1991, the USSSA was issued three special event liquor permits from the City of North Las Vegas to sell beer at a local park for charity softball tournaments. Through the BATF's investigation it was discovered that the USSSA sells only Budweiser beer, an Anheuser-Bush product distributed by Nevada Beverage Company, which holds a wholesale liquor license and sponsors the USSSA. The BATF has determined that consumer groups, such as the USSSA which hold special event liquor permits, are retailers in the same sense as a tavern owner or a proprietor who sells packaged alcoholic beverages. Therefore, the BATF has concluded that the relationship between Nevada Beverage Company and the USSSA is in violation of [NRS 369.485\(3\)](#), as well as the anti-competitive provisions of the Federal Alcohol Administration Act ("FAA Act"). 27 U.S.C. § 201 (1988) *et seq.*

ANALYSIS

Your question is whether a nonprofit consumer group, such as the USSSA, which holds a special event liquor permit is a liquor retailer for purposes of [NRS 369.485\(3\)](#) such that it cannot sell alcoholic beverages distributed by one wholesaler, like Nevada Beverage Company, to the exclusion of brands distributed by other wholesalers in the area. Here, the USSSA receives its special event liquor permits from the City of North Las Vegas.

The City of North Las Vegas is organized under a charter and obtains its authority from that charter. The charter provides broad general police powers which by legislative intent are to be liberally construed. North Las Vegas Mun. Code § 1.010 (Nev. 1971). *See Koscot Interplanetary, Inc. v. Draney*, [90 Nev. 450](#), 456, 530 P.2d 108 (1974) (if enacted under police power, presumed to promote public welfare and presumed valid). Title 3 of the North Las Vegas Municipal Code pertains to business licenses and regulations. Chapter 3.12 concerns the control and regulation of liquor sales and businesses within the City of North Las Vegas. *See* North Las Vegas Mun. Code § 3.12 (Nev. 1989). Specifically, section 3.12.120 provides for the issuance of special event liquor permits as follows:

A "special events permit" shall permit the sale or other distribution of alcoholic liquor at such locations and as specified on such license for a period of not more than one week, provided that the Director of Business License shall have first approved the application thereof in writing. A "special events permit" may be issued to allow beer and malt beverages for sale or other distribution in any park or public place under the jurisdiction of the City of North Las Vegas only upon the express approval of the City Council. A "special events permit" shall be issued only to applicants which hold a valid existing liquor license in North Las Vegas and may be issued to nonprofit organizations which hold a valid existing liquor license<sup>8</sup> in North Las Vegas and may be issued to nonprofit organizations which:

- A. The director of business license finds suitable; and
- B. Have been in existence for more than two years; and
- C. Have one hundred or more members; and
- D. Have not been issued more than two of such permits within the preceding twelve-month period; and
- E. Are exempt from United States income tax because of being classified in one of the following categories as defined in Section 501 of the U.S. Internal Revenue Code:
  1. Civic league, an organization not organized for profit but operated exclusively for the promotion of social welfare;
  2. A club organized for pleasure, recreation, and other nonprofit purposes;
  3. Fraternal beneficiary society, order, or association;
  4. War veterans organization or post.

North Las Vegas Mun. Code § 3.12.120 (Nev. 1984) (emphasis added).

Chapter 369 of the Nevada Revised Statutes ("NRS") is entitled "Intoxicating Liquor: Licenses and Taxes" and provides for the regulation, licensing and taxation of alcoholic beverages which are distributed and sold in the State of Nevada. Under [NRS 369.150](#), the Department of Taxation is charged with the duty of administering chapter 369.

Specifically, [NRS 369.090](#) defines a "retail liquor store" to mean "an establishment where

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<sup>8</sup> No person shall engage in the *business of selling alcoholic beverages* without first obtaining and thereafter maintaining a valid unexpired license pursuant to this code. North Las Vegas Mun. Code § 3.12.150 (Nev. 1983) (emphasis added).

beers,<sup>9</sup> wines<sup>10</sup> and liquors,<sup>11</sup> in original packages<sup>12</sup> or by the drink, are sold to a consumer." [Emphasis added.] This same chapter further provides the definition of "wholesale dealer," differing from that of retailer, to mean "a person licensed to sell liquor as it is originally packaged to retail stores or to another licensed wholesaler, but not to sell to the consumer or general public." [NRS 369.130](#) [Emphasis added.]

Presumably, the USSSA meets all the criteria for securing a special event liquor permit. As a prerequisite to holding a special event liquor permit, the USSSA must also hold a valid liquor license in the City of North Las Vegas or satisfy the requirements under A through E of section 3.12.120. See North Las Vegas Mun. Code § 3.12.120, *supra*. However, this fact does not completely illuminate the question presented.

[NRS 598.3596](#) sets forth the civil penalties for the retail act of substituting one alcoholic beverage for another without the customer's consent. This statute was enacted in 1991,<sup>13</sup> and it too provides a definition of a retailer of alcoholic beverages. Subsection (4)(b) defines a retailer to mean an "owner of a business where alcoholic beverages are sold by the drink. The term includes any person employed by the owner." [NRS 598.3596\(4\)\(b\)](#) (emphasis added).

In *State v. University Club*, [35 Nev. 475](#), 479, 130 P. 468 (1913), the Supreme Court considered whether a statute imposing a license tax on persons engaged in the "business of selling liquor" applied to a nonprofit social club where liquor was sold at a fixed rate, and the profits went to the general expenses of the organization. The court held that the term "business" as used in the statute imposing the license tax clearly means "a business in the trade or commercial sense; one carried on with a view to profit or livelihood." *Id.* at 483. See also *Gardner v. City of Reidsville*, 153 S.E.2d 139, 147 (N.C. 1967); *Svithiod Singing Club v. McKibben*, 44 N.E.2d 904, 909 (Ill. 1942).

Under section 3.12.150 of the North Las Vegas Municipal Code "[n]o person shall engage in the *business of selling alcoholic beverages* without first obtaining" a valid liquor license. North Las Vegas Mun. Code § 3.12.150, *supra*, n.1 (emphasis added). The term "business" in section 3.12.150, like the statute in *University Club*, 35 Nev. at 479, must be construed to mean a business in the trade of selling alcoholic beverages for profit. In order to qualify as a "retail liquor store," a valid liquor license must first be obtained. Thus, a retail liquor store is a business in the trade of selling alcoholic beverages for profit.

Even though the USSSA may have obtained a valid liquor license as a means of acquiring its special event liquor permits, it is clearly not in the business of selling alcoholic beverages for profit. The USSSA is a nonprofit amateur sports organization in the business of promoting the game of slow-pitch softball. Obviously, the USSSA does not meet the definition of a retail liquor store under chapter 369 of NRS.

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<sup>9</sup> NRS 369.010 defines beer to mean "any beverage obtained by alcoholic fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or any combination thereof, in water." [Emphasis added.]

<sup>10</sup> NRS 369.140 defines wine to mean "any alcoholic beverage obtained by the fermentation of the natural content of fruits or other agricultural products containing sugar." [Emphasis added.]

<sup>11</sup> NRS 369.040 defines liquor as follows:

1. As used in this chapter, "liquor" means beer, wine, gin, whiskey, cordials, ethyl alcohol or rum, and every liquid containing one-half of 1 percent or more of alcohol by volume and which is used for beverage purposes.

2. Any liquid containing beer or wine in combination with any other liquor shall not be construed to be beer or wine.

<sup>12</sup> NRS 369.050 defines original package to mean "any container or receptacle first used for holding liquor, which container or receptacle is sealed." [Emphasis added.]

<sup>13</sup> 1991 Nev. Stat. ch. 190, § 1.

Furthermore, the determination by the BATF that the relationship between Nevada Beverage Company and the USSSA is a violation of the FAA Act is misplaced. The FAA Act is intended to promote fair competition in the alcohol industry by prohibiting certain anti-competitive practices. 27 U.S.C. § 201 *et seq.* See also *Black v. Magnolia Liquor Co.*, 355 U.S. 24 (1957).

However, in the case of malt beverages or beer, these prohibitions only apply in states which have enacted enabling legislation. 27 U.S.C. § 205(f); 27 C.F.R. § 10.4(b).

Specifically, the BATF is relying upon 27 U.S.C. § 205(b)(3) (1988), which prohibits a wholesaler from providing things of value to a retailer if by doing so, the wholesaler induces the retailer to purchase alcoholic beverages from him rather than competing wholesalers in the area. Similar prohibitions can be found in chapter 369 of NRS. Specifically [NRS 369.485\(3\)](#) sets forth the enabling legislation for 27 U.S.C. § 205(b)(3) as follows:

3. *A wholesale dealer shall not:*

(a) *Loan any money or other thing of value to a retail liquor store.*

(b) *Invest money, directly or indirectly, in a retail liquor store.*

(c) *Furnish or provide any premises, building, bar or equipment to a retail liquor store.*

(d) *Participate, directly or indirectly, in the operation of the business of a retail liquor store.*

(e) *Sell liquor to a retail liquor store except for payment on or before delivery or on terms requiring payment by the retail liquor store before or on the 10th day of the month following delivery of such liquor to it by the wholesale dealer.*

(f) *Sell liquor to a retail liquor store which is delinquent in payment to such wholesale dealer except for payment in cash on or before delivery. [Emphasis added.]*

As discussed above, the USSSA does not qualify as a retail liquor store under chapter 369 of NRS. Therefore, its relationship with Nevada Beverage Company is not in violation of [NRS 369.485\(3\)](#), nor 27 U.S.C. § 205(b)(3).

Further, the rules of statutory construction provide that an act should be reasonably construed to avoid absurd results. *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Ct.*, [104 Nev. 508](#), 509, 761 P.2d 1151 (1988); *Breen v. Caesars Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070 (1986). If [NRS 369.485](#) or any statute or municipal code previously mentioned were construed in such a way that a retail liquor store was equated with a nonprofit organization the end result would be contrary to the holding in *University Club*, 35 Nev. at 479, and charitable endeavors, like the USSSA's charity softball tournaments, would be chilled. Clearly to construe statutes in a manner that would chill rather than encourage charitable functions is absurd and should be avoided. Additionally, if the language of the statutes is plain and unambiguous, courts cannot go beyond the language in an attempt to determine legislative intent. *Roberts v. State Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988). The language and intent of [NRS 369.485\(3\)](#) is clear and unambiguous, and its plain meaning should be followed. Therefore, [NRS 369.485\(3\)](#) is wholly consistent with chapters 369 and 598, and the North Las Vegas Municipal Code. The statute is designed to regulate retail liquor businesses, specifically those in the business of selling alcoholic beverages for profit and not nonprofit organizations pursuing a charitable course, like the USSSA, who are not in the business of selling alcoholic beverages.

## CONCLUSION

A nonprofit consumer group or organization, such as the USSSA, which holds a special event liquor permit in the course of its charitable endeavors does not qualify as a retail liquor store

for purposes of [NRS 369.485\(3\)](#).

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: JEFFREY R. RODEFER  
Deputy Attorney General

OPINION NO. 92-6 PHARMACY BOARD; NURSES: Ability of nurses to accept medication orders from pharmacists in a licensed medical facility pursuant to protocol.

Carson City, July 21, 1992

Mr. Keith W. Macdonald, Executive Secretary, State Board of Pharmacy, 1201 Terminal Way, #212, Reno, Nevada 89502

Dear Mr. Macdonald:

You have requested our opinion on the following question.

#### QUESTION

May a registered nurse in a licensed medical facility accept a medication order for a patient of the facility from a pharmacist, pursuant to a written protocol as provided in [NRS 639.0124](#)?

#### ANALYSIS

As you note, this question arises as the result of potentially conflicting provisions of Nevada law. On the one hand, [NRS 639.0124](#), which defines the practice of pharmacy, provides in pertinent part: "Practice of pharmacy' includes, but is not limited to, the: . . . 8. Development of written guidelines and protocols in collaboration with a practitioner which are intended for a patient in a licensed medical facility and authorize the implementation, monitoring and modification of drug therapy."

On the other hand, [NAC 632.220\(2\)](#) provides in part: "A registered nurse shall take orders only from a licensed physician, dentist, podiatrist or advanced practitioner of nursing."

Additionally, [NRS 632.018](#), which defines the practice of nursing, provides in part: "Practice of professional nursing means . . . the administration of medications and treatments as prescribed by an advanced practitioner of nursing, a licensed physician, a licensed dentist or a licensed podiatrist . . . ."

Finally, [NAC 449.343\(1\)](#) provides in pertinent part: "All medication for patients must be ordered in writing and signed by the attending physician, except in emergencies when a verbal order may be given only to a licensed nurse."

We have carefully considered the legislative history of [NRS 639.0124](#), which was added to the Pharmacy Act in 1991.

Opening remarks concerning the statute clearly indicated that its purpose was to recognize the fact that the practice of pharmacy has evolved beyond the Norman Rockwell conception of the

traditional corner drugstore pharmacist, who merely fills prescriptions transmitted by a physician. Hospital pharmacists testifying in favor of the legislation further indicated that by virtue of their sophisticated training in pharmacy, they had the ability, within certain parameters, to initiate and modify medication for hospital inpatients. Typically, the procedure operates as follows. With respect to certain areas of medication or treatment, *e.g.*, parenteral nutrition, it is possible for physicians and pharmacists to develop protocols regarding the administration regimen which are not specific to a particular patient. The protocol can then be set forth on an order form. It is the physician or other practitioner who orders the initiation of a particular therapy, but he or she can do so essentially by reference to the protocol. By using the protocol mechanism, the physician does, however, delegate to the pharmacist the ability to make adjustments to the administration regimen based on the patient's condition and laboratory results. The physician must approve adjustments made by the pharmacist, but normally does not do so until after the adjustment has been implemented.

It should be noted that typically the physician has the option of using the protocol mechanism in the first instance. Thus, it is ultimately the physician who is choosing to delegate responsibility to the pharmacist to adjust a medication regimen.

It is our understanding that physicians have customarily delegated some responsibility to others in the area of administration of medication in the inpatient hospital setting. For example, a physician may instruct a nurse to administer a medication to a patient "as needed," and it is left to the nurse's discretion to determine when such need arises. Although it could be asserted that this practice violates [NRS 632.018](#) and/or [NAC 632.220\(2\)](#), we have also noted [NRS 630.305\(7\)](#), which addresses the physician's ability to delegate responsibility to others in the care of patients. That provision makes it unlawful for a physician to delegate responsibility for the care of a patient to a person when the physician knows, or has reason to know, that the person is not qualified to undertake that responsibility. Implicitly, this provision suggests that it *is* lawful for a physician to delegate responsibility for a patient's care to an appropriate person.

It is an accepted rule of statutory construction that statutes should be rendered harmonious whenever possible. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982). Here, the statutory provisions set forth in chapters 639 and 630, taken together, allow a physician to use the protocol mechanism to delegate to a pharmacist the ability to initiate and modify drug therapy. Since the physician has the option of using the protocol in the first instance, however, we believe it is fair to conclude that in effect, the order is ultimately derived from the physician, and the nurse who accepts such an order through a pharmacist would not be in violation of the prohibition contained in [NAC 632.220\(2\)](#).

Alternatively, to the extent that the cited provisions of [NRS chapters 639](#) and 630 are in conflict with [NAC 632.220\(2\)](#), it is clear that the statutory provisions would supersede an administrative regulation. *See Jones v. Employment Services Div'n of Human Services Dep't.*, 619 P.2d 542, 1544 (N.M. 1980). It is still necessary, however, to consider [NRS 632.018](#), as well as [NRS 639.235](#), the latter providing:

No person other than a practitioner holding a currently valid license to practice his profession in this state may prescribe or write a prescription, except that a prescription written by a physician not licensed to practice in this state but authorized by the laws of another state to prescribe shall be deemed to be a legal prescription.

The restriction on the authority to prescribe contained in [NRS 639.235](#), as well as the definition of professional nursing in [NRS 632.018](#), suggests that a nurse may be prohibited from accepting an order from a pharmacist. However, we believe that there are at least two responses to this assertion. First, as we suggested above, a medication order that conforms to the protocol

mechanism is, in effect, an order from the physician, and a nurse who accepted such an order would not be in violation of these prohibitions.

Second, both [NRS 632.018](#) and [NRS 639.235](#) use the term "prescribe," whereas the statutes distinguish between "prescription" and "chart order." See [NRS 639.004](#), [NRS 639.013](#), [NRS 454.0041](#), [NRS 454.00961](#), [NRS 453.038](#), [NRS 453.128](#). An order for medication within the inpatient setting is not a "prescription" according to the legal definition of both terms. The statutes spell out a number of requirements applicable to prescriptions, but are relatively silent with regard to chart orders. In our view, this suggests that regulations addressing chart orders to a great extent are properly left to the hospital administration which typically will have the wherewithal, expertise and incentive to establish guidelines that promote optimal health care for inpatients.

Specifically, the distinction between chart order and prescription suggests that whereas a nurse may not accept a prescription from anyone other than a physician or other practitioner, he or she may accept a medication order from a pharmacist, particularly where the order conforms with a protocol approved by a physician. The distinction between chart order and prescription provides a basis for harmonizing the superficial conflict between [NRS 632.018](#) and [NRS 639.235](#) on the one hand, and [NRS 639.0124](#) on the other. See *Weston*, 98 Nev. at 185.

Alternatively, to the extent [NRS 639.0124](#) is in conflict with [NRS 632.018](#) and [NRS 639.235](#), [NRS 639.0124](#), as the most recently enacted statute, is controlling. *Laird v. Nevada Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982).

Nothing in our analysis should be taken to mean that a nurse is without professional discretion to question or even refuse a medication order if he or she has reason to believe it is invalid or irregular. Our analysis only addresses the issue of whether a nurse *is permitted* to accept a medication order from a pharmacist pursuant to a written protocol.

#### CONCLUSION

A registered nurse in a licensed medical facility may accept an order for a patient of the facility from a pharmacist, pursuant to a written protocol as provided in [NRS 639.0124](#).

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT A. KIRKMAN  
Deputy Attorney General

OPINION NO. 92-7 SALES AND USE TAX: The exemption from sales tax in [NRS 372.325\(5\)](#) is limited to sales of tangible personal property to a religious, charitable or eleemosynary organization. Sales of tangible personal property by such entities are subject to sales tax unless some other exemption or exclusion from sales tax applies. The sale of ophthalmic materials to a licensed optometrist, physician or surgeon that are used or furnished in the performance of professional services is subject to sales tax under [NRS 372.055\(3\)](#). The sale of tangible personal property to a charitable hospital that will be used or consumed by that hospital, or furnished in the performance of professional services, is exempt from sales and use tax. To the extent Op. Nev. Att'y Gen. No. 61 (June 5, 1959) is inconsistent with this opinion, it is overruled.

Carson City, July 22, 1992

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation Capitol Complex,  
Carson City, Nevada 89710

Dear Mr. Comeaux:

The Department of Taxation ("Department") has recently been reexamining the scope of the exemption from sales tax set forth in [NRS 372.325\(5\)](#) for religious, charitable and eleemosynary organizations. In this regard, the Department has heretofore been following the advice given in Op. Nev. Att'y Gen. No. 61 (June 15, 1959) (herein referred to as "Opinion 61"), construing [NRS 372.325\(5\)](#) as exempting both sales of tangible personal property to, and sales of tangible personal property by these entities from, sales tax. You have requested this office to review our prior opinion on the construction of [NRS 372.325](#) in response to the following question:

#### QUESTION

Does [NRS 372.325](#) provide that sales of tangible personal property by an entity listed therein are exempt from Nevada sales tax?

#### ANALYSIS

In Opinion 61 this office issued an opinion construing [NRS 372.325](#) as exempting from the sales tax sales of tangible personal property *by* the entities listed in that statute. The Department of Taxation has complied with that opinion ever since. The author of that opinion reached his conclusion despite the fact that the statute expressly exempts only sales *to* such entities.

[NRS 372.325](#) states:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

1. The United States, its unincorporated agencies and instrumentalities.
2. Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.
3. The State of Nevada, its unincorporated agencies and instrumentalities.
4. Any county, city, district or other political subdivision of this state.
5. Any organization created for religious, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual.

This statute was originally enacted at the time the Sales and Use Tax Act was adopted in 1955 and it has not been amended since. *See* Act of March 29, 1955, ch. 397, § 50, 1955 Nev. Stat. 762, 771.

By plain and unambiguous language, the statute specifically exempts from the measure of the sales tax the gross receipts from sales of tangible personal property *to* the entities listed in the statute. The author of Opinion 61, while acknowledging that the language of the statute only specifies *sales to* these entities, concluded that the legislature must have also meant to include *sales by* these entities within the exemption in [NRS 372.325](#). *See* Opinion 61.

The author reached his conclusion by first examining the legislative intent behind the statute. *Id.* He noted that the legislature had considered and rejected the elimination of any exemption for "religious, charitable and eleemosynary" organizations in favor of placing these entities within the same statutory exemption as governmental entities. *Id.* The author concluded that this meant the legislature intended to give religious, charitable and eleemosynary organizations the "same status as regards the exemption from sales tax" that the governmental entities enjoy. *Id.*

The author then reviewed the Sales and Use Tax Act for evidence that the legislature had

specifically exempted "sales by" governmental entities. *Id.* The author noted that the Department had exempted sales by governmental entities under [NRS 372.040](#), but he rejected without analysis this statute as a legal basis for supporting an exemption for sales by such entities. *Id.* It is with this conclusion that we now disagree.

[NRS 372.040](#) provides a definition of "person" for purposes of the Sales and Use Tax Act which states:

"Person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit, *but shall not include the United States, this state or any agency thereof, or any city, county, district or other political subdivision of this state.* [Emphasis added.]

The author of Opinion 61 did not analyze the significance of the emphasized language of [NRS 372.040](#), save to discount it. However, the term "person" is used throughout the Sales and Use Tax Act in describing the duties and responsibilities that "persons" subject to the sales and use tax are obligated to perform.

For example, [NRS 372.105](#) states "[F]or the privilege of selling tangible personal property at retail a tax is hereby imposed upon all *retailers* at the rate of 2 percent of the gross receipts of any *retailer* from the sale of all tangible personal property sold at retail . . . ." [Emphasis added.] The term "retailer" is defined in [NRS 372.055](#)(1) as follows:

(a) Every *seller* who makes any retail sale or sales of tangible personal property, and every *person* engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(b) Every *person* engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the *person* or others for storage, use or other consumption.

(c) Every *person* making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy. [Emphasis added.]

The term "seller" is defined in [NRS 372.070](#) as including "every *person* engaged in the business of selling tangible personal property of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax." [Emphasis added.] [NRS 372.125](#)(1) requires every "*person* desiring to engage in or conduct business as a seller in this state" to file an application for and obtain a permit from the department. [Emphasis added.]

As noted above, [NRS 372.040](#) excludes from the definition of "person" local, state and federal governments and their agencies. Accordingly, these entities do not have to apply for a seller's permit to sell tangible personal property at retail under [NRS 372.125](#), nor are they included within the definition of "seller" or "retailer" in [NRS 372.070](#) and [372.055](#), respectively. Therefore, they are not required to collect and remit sales tax on their retail sales of tangible personal property under [NRS 372.105](#). They are similarly exempt from use tax imposed by [NRS 372.185](#)(1) on their out-of-state purchases of tangible personal property by virtue of [NRS 372.185](#)(2) and [NRS 372.325](#). We conclude, contrary to the author of Opinion 61, that the legislature quite clearly and explicitly used the definition of "person" in [NRS 372.040](#) to exclude the local, state and federal governments and their agencies from the statutory requirement for retailers to collect and remit sales tax on their retail sales of tangible personal property in this state.

Our conclusion is buttressed by the fact that the Nevada Sales and Use Tax Act was taken

largely from the California sales and use tax statutes. *See* Op. Nev. Att'y Gen. No. 19 (April 12, 1971). The definition of "person" in Cal. Rev. & Tax. Code § 6005 in 1955 was identical to the definition adopted by our legislature in 1955 (*see* ch. 397, § 3, 1955 Nev. Stat. at 763) *except* that the California statute specifically *included* the governmental entities in the definition of "person," whereas our legislature specifically *excluded* these entities from that definition. There must have been a purpose behind the legislature adopting a definition of "person" that deviated from the California statutory definition in this respect, and that purpose obviously was to exclude these governmental entities from the responsibility to register as retailers with the Department and the obligation to collect and remit the sales and use tax.

There is no such specific statutory exclusion or exemption for religious, charitable and eleemosynary organizations from the obligation to register and obtain a seller's permit from the Department, or to collect and remit sales tax, if the organization is going to engage in the retail sale of tangible personal property in Nevada. Statutory exemptions from taxation are strictly construed against the taxpayer. *Sierra Pac. Power Co. v. Department of Taxation*, [96 Nev. 295](#), 297, 607 P.2d 1147 (1980). The presumption is that the legislature does not intend to exempt goods or transactions from taxation. *Id.* *See also* [NRS 372.155](#). The language in [NRS 372.325](#) is clear and unambiguous. The exemption from sales tax specified therein is limited to sales of tangible personal property *to* the entities listed in that statute. Accordingly, we must overrule the construction given [NRS 372.325](#) in Opinion 61.

Our review of Opinion 61 compels us to comment on other parts of that opinion. The author of Opinion 61 apparently misconstrued [NRS 372.055\(3\)](#) in his attempt to justify his construction of [NRS 372.325](#) in general, and the tax treatment of charitable hospitals in particular. The author construed [NRS 372.055\(3\)](#) as providing an exemption from sales tax for sales of ophthalmic materials (including lenses and frames) to a licensed optometrist, physician or surgeon that are used or furnished in the performance of his professional services in the diagnosis and treatment of the human eye. *See* Opinion 61. This construction is clearly erroneous.

In [NRS 372.055\(3\)](#), the legislature specifically excluded licensed optometrists, physicians and surgeons from being considered "retailers" of these ophthalmic materials used or furnished in the course of their professional services for their patients, and directed that they be considered the *consumers* of these materials instead. Thus, the legislature made sales of these materials to licensed optometrists, physicians and surgeons retail sales subject to sales or use tax. *See* [NAC 372.320](#).

The author of Opinion 61 also discussed the sales and use tax treatment of charitable hospitals. The author concluded that even though earlier in his opinion he determined that sales of tangible personal property *by* charitable organizations were exempt from sales tax under [NRS 372.325](#), the Department could require the charitable hospital to register and collect sales tax in its operation of a gift shop and outpatient pharmacy on the hospital premises. Opinion 61. The author mentions no legal justification for this dichotomy of treatment, although we presume it is based upon the author's belief that these sales are not sufficiently related to the purpose of the charitable hospital to qualify for the exemption. We note, however, that [NRS 372.325](#) makes no specific mention that entitlement to the exemption depends on the purpose to which the tangible personal property purchased is directed. Rather, that statute exempts the sale of all tangible personal property to an entity listed therein. A hospital falls under this exemption if it qualifies as a charitable organization. However, the purpose to which its purchases are devoted may affect whether it retains its status as an exempt organization.

Thus, to the extent Opinion 61 can be interpreted to say that certain sales of tangible personal property by a charitable hospital are exempt from sales tax under [NRS 372.325](#), such an interpretation is disapproved. Rather, whether or not sales of tangible personal property by a charitable hospital are subject to sales tax will depend on whether some other exemption or exclusion applies to the transaction. *See e.g.* [NRS 372.283](#) (sales of prosthetic devices, medicines,

etc.); Op. Nev. Att'y Gen. No. 82-8 (May 25, 1982) (furnishing of prepared food to patients in convalescent hospitals and inpatients in any hospital excluded from tax as incidental to services provided), [NAC 372.260](#) (tax treatment of hospitals).

Finally, we note that the construction of [NRS 372.325](#) given in Opinion 61 has been followed by the Department for 33 years. Given that fact, we believe that this opinion and any changes in department policy and regulations that may result therefrom should be applied prospectively.

### CONCLUSION

After careful consideration, we conclude that Op. Nev. Att'y Gen. No. 61 (June 5, 1959) erroneously construed [NRS 372.325](#) to exempt from Nevada sales tax retail sales of tangible personal property by religious, charitable and eleemosynary organizations. Accordingly, we now overrule that opinion. All religious, charitable and eleemosynary organizations that engage in the retail sale of tangible personal property must apply for and obtain a seller's permit, and collect and remit Nevada sales tax on their retail sales of tangible personal property unless some other statutory exemption or exclusion applies. Local, state and federal governments and their agencies are excluded from the obligation to obtain a seller's permit and collect and remit sales tax on their retail sales of tangible personal property by virtue of their exclusion from the statutory definition of "person" in [NRS 372.040](#). Any changes in the policy and regulations of the Nevada Department of Taxation taken in response to this opinion should be applied on a prospective basis only.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Deputy Attorney General

OPINION NO. 92-8 LABOR; PRISONS; PUBLIC WORKS; WAGES: State prison inmates may be used as labor on public works projects, but their employment must not be favored over private employees and their employment may only have an insignificant impact on the private labor force.

Carson City, October 6, 1992

Mr. Frank MacDonald, Labor Commissioner, 1445 Hot Springs Road, Suite 108, Carson City, Nevada 89710

Dear Mr. MacDonald:

You have asked three questions regarding whether state prison inmate labor can work on public works projects, and if so, what conditions might be placed upon such employment. Following are responses to each of your questions.

### QUESTION ONE

You have asked whether state prison inmate labor may work on public works projects in Nevada.

### ANALYSIS AND CONCLUSION TO QUESTION ONE

This question was answered in the affirmative in a previous opinion to you dated May 15, 1991, and I refer you to that opinion.

## QUESTION TWO

If state prison inmate labor may be used on public works projects in Nevada, what restrictions must be or may be imposed upon the use of such labor?

## ANALYSIS

The brief answer to this question is that each use of state prison inmate labor on a public works project must be examined on its unique facts. A guiding principle for such inquiries is that the use of private labor must be favored whenever possible over the use of inmate labor.

[NRS 338.130](#)(1) indicates a clear legislative intention to favor the employment of citizens of Nevada for Nevada public works projects, and gives special preference to Nevada veterans. [NRS 338.130](#)(2) states that the preferences listed in subsection (1) would not automatically prevent inmates from being used on public works projects. [NRS 338.130](#)(2) does not, though, in any way invalidate the workings of the preferences listed in [NRS 338.130](#)(1). To read these two subsections together, therefore, is to see that employees shall be hired in the following order of preference: (1) Nevada veterans, (2) Nevada citizens, and (3) Nevada inmates.

That the above order of preference is within statutory intent is confirmed by [NRS 209.461](#)(2)(d) which states that the employment of state prison inmate labor must "[h]ave an insignificant effect on the number of jobs available to the residents of this state." [NRS 209.461](#)(2)(d) distinguishes between inmates and "residents of this state." Thus, [NRS 209.461](#)(2)(d) indicates, just as do [NRS 338.130](#)(1) and (2), that Nevada private "citizens" or "residents" are favored over Nevada inmates in employment on public works projects.

Countervailing to the legislative intent to favor private employees over inmate employees is another public policy to encourage the use of inmate labor. In 1987, the legislature added the language that is now codified as [NRS 209.461](#)(2), which provides:

2. Every *program* for the employment of offenders established by the director must:
  - (a) *Employ the maximum number of offenders possible;*
  - (b) Except as otherwise provided in [NRS 209.192](#), provide for the use of money produced by the program to reduce the cost of maintaining the offenders in the institutions;
  - (c) Produce a profit for the department;
  - (d) *Have an insignificant effect on the number of jobs available to the residents of this state;* and
  - (e) Provide occupational training for offenders. [Emphasis added.]

As can be seen, subsection (2)(a) requires that state prison inmate employment programs employ the maximum number of prisoners *possible*. Subsection (2)(d), though, cautions that state prison inmate labor may have only an "insignificant effect" on the private labor market, consistent with other provisions of law previously discussed. On its face, though, subsections (2)(a) and (d) might come into conflict, since there are times that employing the maximum number of prisoners in a program on a project might involve displacing private employees.

Statutes are to be read, where possible, to be harmonious. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982); *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830 (1977); *First Am. Title Co. of Nev. v. State*, [91 Nev. 804](#), 806, 543 P.2d 1344 (1975). [NRS 209.461](#)(1)(a)

can be read harmoniously with [NRS 338.130](#)(1) and (2) and 209.461(1)(d). The harmonious construction of [NRS 209.461](#)(1)(a) and (d) would be that the director is encouraged to create programs that will employ as many inmates as possible, subject to the stricture that such inmate labor cannot significantly displace or impact private labor. Encompassing [NRS 338.130](#)(1) and (2) into this harmonious construction would result in allowing state prison inmate labor on public works projects only after preference has been given first to Nevada veterans and then to other private Nevada citizens.

The harmonious reading of [NRS 338.130](#)(1) and (2) and 209.461(2)(a) and (d) is only a starting point, though. It would appear that in any public works project in which the use of state prison inmate labor is contemplated, the following factors should be considered in determining whether that use is allowable as having an insignificant effect on private labor: (1) the number of private workers that would be displaced or not used, (2) the types of skills or crafts practiced by the private workers that would be displaced or not used, (3) the location of the work, (4) the type of work to be performed by the state prison inmate labor, and (5) the type of project.

Your question addressed the specific issue of whether state prison inmates could perform skilled craftwork, such as electrician's, pipefitter's, or ironworker's work. The above multi-factor analysis takes this into consideration. For example, if a given public works project would entail the use of skilled workers and private skilled labor is available, the above analysis would require a close look at the effect of the loss of that piece of skilled work to the private employees in that trade. The principle that should always underlie any such inquiry should be the favoring of private employment over the employment of state prison inmates on public works projects.

#### CONCLUSION TO QUESTION TWO

State prison inmates may be used as labor on public works projects, but their employment must not be favored over private employees and their employment may only have an insignificant impact on private labor.

#### QUESTION THREE

Must the prevailing wage be paid to state prison inmate labor on public works projects over \$100,000, and if so, to whom?

#### ANALYSIS

The answer to the first part of the inquiry has been previously answered in the May 15, 1991, opinion to you. As this office pointed out in that opinion, whether a given inmate will be paid the prevailing wage depends on the precise legal relationship between the inmate and his actual employer. Only where the inmate is actually the employee of a private party or the awarding governmental agency, not the employee of the Department of Prisons or the Division of Forestry, will he or she be entitled to payment of the prevailing wage. Such a relationship is rarely the case. Instead, the usual case is that the Department of Prisons or the Division of Forestry are the employer of the inmate, and the Department of Prisons or the Division of Forestry make contracts for the provision of labor to private companies.

If such a case arises wherein the inmate was actually employed by a private party or the awarding governmental agency, he must be paid the prevailing wage. Of course, the Department of Prisons would be entitled to seek reimbursement from the wages received to cover the inmates' costs or other obligations. [NRS 209.463](#).

#### CONCLUSION TO QUESTION THREE

If an inmate is working on a public work costing more than \$100,000, he or she will be paid the prevailing wage for the classification of work he or she is performing only where the inmate is an actual employee of a private employer or the awarding governmental agency.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

OPINION NO. 92-9 CONDEMNATION; WATER LAW: Condemnations and dedications in fee, with no reservation of water rights, include title to the appurtenant water rights.

Carson City, October 6, 1992

R. Michael Turnipseed, P.E., State Engineer, Division of Water Resources,  
123 West Nye Lane, Carson City, Nevada 89710

Dear Mr. Turnipseed:

You have requested an opinion of this office concerning the status of water rights when land is either condemned or dedicated without any mention of the appurtenant water rights. Specifically, you asked whether condemnors receive title to appurtenant water rights when land is condemned in fee and whether appurtenant water rights transfer with statutory dedications of land.

#### BACKGROUND

The response to these questions requires a review of the doctrine of appurtenancy. Under Nevada law, water rights are appurtenant to the benefitted land. [NRS 533.040](#). The appurtenancy rule applies to both statutory water rights and water rights established under common law. *Zolezzi v. Jackson*, [72 Nev. 150](#), 154, 297 P.2d 1081 (1956).

Nonetheless, because water rights constitute an interest in real property, they can be treated as a separate and distinct property right. *Carson City v. Lompa*, [88 Nev. 541](#), 542, 501 P.2d 662 (1972). Water rights may be conveyed, transferred, mortgaged, or passed by descent, indicating that the rights were never inseparable from the lands where the water was used. 2 *Water and Water Rights* § 16.02(c)(3), at 319 (Robert E. Beck ed., Michie Co. 1991) (citations omitted).

In *Zolezzi*, the Nevada Supreme Court construed a deed which conveyed land together with all appurtenances, with no reference to the water rights. The seller of the land argued that, as a matter of law, the water rights were not appurtenant to the land. The court held that, in conveying land together with appurtenances, title to the water rights appurtenant to the land also passed under the conveyance. *Zolezzi*, 72 Nev. at 154.

You explained in your request that, in light of *Zolezzi*, the State Engineer adopted a rule for interpreting deeds that results in the transfer of water rights along with a conveyance of the benefitted land even if the deed does not mention appurtenances or water rights. This practice follows the general canon of construction that "[a] description in a deed includes appurtenances to the tract even though they are not specifically mentioned in the deed." 6A Richard R. Powell et al., *The Law of Real Property* § 889[3][a], at 81A-126 (Patrick J. Rohan ed. 1992). See also, e.g., *State v. Fin & Feather Club*, 316 A.2d 351, 354 (Me. 1974) ("Unless expressly excepted, title also passes, without description or mention, to all appurtenances and incidents belonging to it."). Thus water rights appurtenant to land pass with a conveyance of the property unless specifically reserved from the operation of the grant.

### QUESTION ONE

In the condemnation of property in fee, with no mention of water rights, does title to appurtenant water rights pass with the conveyance of the realty?

### ANALYSIS

Chapter 37 of the Nevada Revised Statutes ("NRS") sets forth the general rules of eminent domain, with [NRS 37.010](#) establishing the public purposes for which the right of eminent domain may be exercised. For entities with condemnation authority, such as the Nevada Department of Transportation, other statutes provide more detailed lists of public purposes and specific procedures that should be followed in condemnation actions. See [NRS 408.487](#), [408.489](#), 408.493, 408.497, 408.503. Before entering a judgment of condemnation, the court must find that the proposed use for acquiring the property is a public use and taking the property is necessary for such a public use. [NRS 37.040](#).

Nevada law allows for condemnation of a lesser estate, as well as fee simple, in real property. [NRS 37.020](#). Consequently, water rights appurtenant to condemned land, but not necessary for the public purpose for which the property is condemned, need not pass with the condemnation. Although appurtenant water rights may remain with the condemnee, the question posed asks whether appurtenant water rights do remain with the condemnee, assuming a condemnation in fee simple without any reference to water rights.

A recent decision of the Wyoming Supreme Court addressed the issue of title to water rights when the court order awarding condemnation makes no mention of appurtenant water rights. *Toltec Watershed Improvement Dist. v. Associated Enter., Inc.*, 829 P.2d 819 (Wyo. 1992). In reviewing an agency's decision that the condemnee retained ownership of the water rights, the court concluded that substantial evidence supported this finding. *Id.* at 822. The court noted that in previous litigation, the condemnor admitted that the "land was condemned as irrigated land and compensation was awarded on that basis, but that [the condemnee] still own[ed] the water rights." *Id.* (citation omitted).

In its analysis of appurtenancy, the Wyoming Supreme Court, *in dicta*, distinguished between voluntary conveyances and condemnations as follows:

[T]he proceeding in eminent domain, which involves the element of compulsion, is in marked contrast to the effect of a voluntary conveyance between individuals. In the latter case, whenever it becomes necessary to construe the instrument of conveyance for the purpose of determining the extent thereof the rule is that the grantee will be allowed the greatest interest possible. In eminent domain, however, that construction must be adopted in the event of uncertainty, indefiniteness or ambiguity as leaves the owner with the greatest possible estate.

*Id.* (citation omitted). Therefore, the court concluded that the water rights were not automatically conveyed as part of the condemnation. *Id.*

However, the Wyoming court did not consider the long-standing rule that when condemning property in fee, appurtenances, such as water rights, pass with the condemnation. "Where the fee simple absolute title to land has been acquired the condemnor acquires all appurtenances thereto, buildings thereon, minerals lying beneath the surface, waters thereon, and easements as to which such land constitutes the dominant estate." 3 Julius L. Sackman & Patrick J. Rohan, *Nichols' The Law of Eminent Domain* § 9.2[5], at 9-30 (3d ed. 1992) (citations omitted). See also, e.g., *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 99 F.2d 902, 913 (8th Cir. 1938), *cert. denied*, *Minneapolis, St. P. & S. S. M. Ry. Co. v. Pike Rapids Power Co.*, 305 U.S. 660, *reh'g denied*, 306 U.S. 667, *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 306 U.S. 640 (1939) (condemnation of land abutting upon water embraces, without mention, riparian rights appurtenant to estate); *Henderson v. Iowa State Highway Comm'n*, 151 N.W.2d 473, 476 (Iowa 1967) (taking of fee title to land by condemnation includes all appurtenances); *Philadelphia Trust, Safe Deposit & Ins. Co. v. Mayor of Merchantville*, 69 A. 729, 731 (N.J. Ch. 1908) (when fee to land is acquired by condemnation, appurtenances, including water, vest with condemnor).

Likewise, because the Wyoming court reviewed the record for substantial evidence, it did not consider whether the appurtenant water rights increased the valuation of the condemned land. "As a general rule, the existence of natural assets such as mineral or water rights can be considered in determining how they enhance the fair market value of a condemned piece of property, but it is not proper to evaluate such appurtenant rights separately." *City of Gunnison v. McCabe Hereford Ranch, Inc.*, 702 P.2d 768, 770-71 (Colo. Ct. App. 1985).

The above principles, disregarded by the Wyoming court, are consistent with Nevada law regarding condemnations. When condemning land in fee, the value of the property taken is its market value, defined as "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market . . . buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable." *City of Elko v. Zillich*, [100 Nev. 366](#), 370, 683 P.2d 5 (1984) (citation omitted). Factors affecting the market value of land, such as mineral deposits, may not be valued separately and added together to determine the fair market value of the land. *State ex rel. Nev. Dep't of Transp. v. Las Vegas Bldg. Materials, Inc.*, [104 Nev. 479](#), 482, 761 P.2d 843 (1988). Rather, condemnation requires just compensation for the property, valuing the land in terms of its highest and best use. *Sorenson v. State ex rel. Dep't of Highways*, [92 Nev. 445](#), 447, 552 P.2d 487 (1976).

Appurtenant water rights, like mineral rights, affect the value of property condemned in fee even though the rights are not valued separately. Water rights expand the uses and purposes to which the land was adapted and for which it was capable. Consequently, water rights influence the highest and best use of land, increasing the valuation of the land. Therefore, because appurtenant water rights generally enhance the value paid for condemned property, the water rights pass as part of the condemnation in fee.

#### CONCLUSION TO QUESTION ONE

When a condemnor acquires fee simple title to land, appurtenances, including water rights, pass with the condemnation. Thus, title to the appurtenant water rights also vests with the condemnor unless the water rights are specifically reserved by the condemnee.

#### QUESTION TWO

When title to dedicated property passes, without mention of water rights, through the

acceptance of the property for streets, do the appurtenant water rights also pass with the dedication?

### ANALYSIS

A dedication is a gift of land for an appropriate public use. *Rainbow Blvd. Expressway-Alexander Rd. v. State ex rel. Dep't of Highways*, [96 Nev. 637](#), 641, 615 P.2d 931 (1980). See also e.g., *City of Phoenix v. Landrum & Mills Realty Co.*, 227 P.2d 1011, 1013 (Ariz. 1951) (dedication is the intentional appropriation of land by the owner to some proper public purpose). Dedications may occur by virtue of common law or through statutes. 11A Eugene McQuillin et al., *The Law of Municipal Corporations* § 33.03, at 294-95 (3d ed. 1991). Common law dedications leave legal title in the original owners, creating only public easements in the properties, while statutory dedications generally vest legal title to the properties set aside for public purposes in the municipal corporations. *Id.* Statutory dedications are almost universally created by the filing and recording of plats. *Id.*

In Nevada, [NRS 278.390](#) provides for the statutory dedication of property for streets. This provision states that "[t]itle to property dedicated or accepted for streets and easements passes when the final map is recorded." [NRS 278.390](#). A street dedication under [NRS 278.390](#), formerly [NRS 116.060](#), vests the governing body with a determinable fee simple in the property. *Peterson v. City of Reno*, [84 Nev. 60](#), 66, 436 P.2d 417 (1968). Although this determinable fee title may continue forever, title could be vacated or abandoned pursuant to [NRS 278.480](#). *Id.*

Research revealed no case law, either in Nevada or elsewhere, regarding who holds title to appurtenant water rights after statutory dedications of the benefitted lands for streets. Instead, we rely on the rule of appurtenancy to answer this question. As previously stated, water rights are appurtenant to the benefitted land. *Zolezzi*, 72 Nev. at 154. Consequently, the general principle that, unless specifically reserved, water rights are conveyed as appurtenances should prevail in statutory dedications. Therefore, water rights appurtenant to lands dedicated, pursuant to [NRS 278.390](#), pass with the dedication.

Case law providing an analogy to this question involves the effect of statutory dedications on title to the mineral estates. Water differs from minerals in that all underground waters, as well as surface waters, within the boundaries of the state belong to the public. [NRS 533.025](#), [534.020\(1\)](#). Those holding water rights do not actually own the water, but they have the right to the beneficial use of water. *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917); see also [NRS 533.035](#). In contrast, the mineral estate is owned by the overlying landowner unless the estates have been severed.

Jurisdictions disagree as to whether statutory dedications of streets include the mineral estates. *Cf.*, e.g., *Belgum v. Kimball*, 81 N.W.2d 205 (Neb. 1957) with, e.g., *City of Evanston v. Robinson*, 702 P.2d 1283 (Wyo. 1985). The *Belgum* court held that the city owned the minerals under the surface of the streets, dedicated to the city by the recording of plats, until such streets were vacated by the city pursuant to law. 81 N.W.2d at 218-219. On the other hand, the *Robinson* court held that the city acquired no interest in the minerals underlying its streets as a result of the recording and acknowledgment of subdivision plats. 702 P.2d at 1290. Despite this difference of opinion, even those courts excepting the minerals and mineral rights construe dedication statutes as conveying fee in the surface estates. See, e.g., *Robinson*, 702 P.2d at 1289-1290. Thus, these cases either directly support the conclusion that statutory dedications for streets include appurtenant water rights, or, at a minimum, they do not contradict the conclusion that water rights pass with dedications as an appurtenance to the surface estate.

This conclusion is further bolstered by the general rule that dedicators may impose such reservations and restrictions as they see fit when dedicating their property to public purposes, subject to the limitation that the reservations and restrictions neither be repugnant to the dedications

nor contrary to public policy. *E.g., City of Sierra Vista v. Cochise Enter., Inc.*, 697 P.2d 1125, 1129 (Ariz. Ct. App. 1984); *North Spokane Irrigation Dist. v. County of Spokane*, 547 P.2d 859, 861 (Wash. 1976). Accordingly, water rights appurtenant to streets may be reserved from the dedication.

Although your question concerned water rights appurtenant to lands dedicated for streets, the same analysis would apply to statutory dedications of lands for schools, parks or other public purposes. For example, dedications of school sites, pursuant to Nev. Comp. Laws 1342 or [NRS 116.020](#)<sup>14</sup>, vest the school districts with determinable fee interests in the lands. *Hynds Plumbing & Heating Co. v. Clark County School Dist.*, [94 Nev. 776](#), 778, 587 P.2d 1331 (1978). Therefore, any water rights appurtenant to the school sites would also transfer to the school districts as part of the dedication, unless specifically reserved.

#### CONCLUSION TO QUESTION TWO

When title to dedicated property passes, with no reservation of rights, the dedications also include appurtenant water rights.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: MARGARET A. TWEDT  
Deputy Attorney General

OPINION NO. 92-10 HUMAN RESOURCES; CONFIDENTIALITY; PUBLIC RECORDS:  
Public records that are made confidential by legislative enactment are confidential as to any request for those records made after the effective date of the enactment.

Carson City, October 19, 1992

Mr. Christopher Thompson, Chief, Health Care Financial Analysis Unit, Department of Human Resources, 505 East King Street, Room 603, Carson City, Nevada 89710

Dear Mr. Thompson:

You have requested an opinion of this office regarding the confidentiality of certain records in the possession of the Department of Human Resources ("Department") which members of the public are attempting to obtain. These records pertain to contracts that hospitals may have with preferred providers that provide a discounted rate for hospital services.

#### BACKGROUND

These requests for records have been stimulated by the recent Nevada Supreme Court ruling in the case of *Neal v. Griepentrog*, 108 Nev., Adv. Op. 114 (Aug. 20, 1992). The case arose out of a legislative subpoena issued during the 1991 legislative session from the Senate Standing Committee on Human Resources and Facilities for various records in the possession of the Director of the Department of Human Resources, the Division of Health Resources and Cost Review, the Commissioner of Insurance, and the Attorney General. The respondents brought an action in the First Judicial District Court seeking to have the records declared to be privileged or confidential. The parties to that proceeding entered into a stipulation that the records would be provided to the

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<sup>14</sup> This provision was repealed in 1977. Act of May 16, 1977, ch. 580, § 81, 1977 Nev. Stat. 1527.

Senate Committee and the Committee would keep the records in a safe place and maintain their confidentiality unless the Attorney General gave prior approval for their dissemination or disclosure to the public.

Pursuant to the stipulation, the Senate Committee requested disclosure of two letters pertaining to Humana Sunrise Hospital which contained information regarding provider contracts and discounted rates. The Attorney General's office denied the request for public disclosure. The Senate Committee filed a motion with the First Judicial District Court seeking to have the letters made public. The First Judicial District Court held that the records were confidential. All of these events occurred prior to the effective date of legislation which was passed by the 1991 Legislature making the subject records confidential. *See* discussion, *infra*. The Senate Committee appealed the determination of the First Judicial District Court. The Nevada Supreme Court held that the records were not confidential. The court elaborated that the Public Records Law, [NRS 239.010](#), makes all records of a public agency public records, unless otherwise made confidential by law. No statute at that time made the letters sought confidential. Therefore, they were public records.

During the same legislative session in which the subpoena was issued, the legislature amended certain statutes to make certain records in the possession of the Department confidential.

#### QUESTION

Are records in the possession of the Department which contain information identifying the payers in preferred provider agreements with hospitals now confidential? If so, are records that were submitted to the Department prior to the effective date of the 1991 legislation confidential?

#### DISCUSSION

The legislature, during the 1991 legislative session, amended two statutes in order to make certain records in the possession of the Department confidential. One of these statutes is contained in [NRS chapter 439A](#). This chapter pertains to the planning for the provision of health care. [NRS 439A.106](#) charged the Department with preparing a quarterly report for public dissemination which lists every hospital in the state and the charges for services. In addition, that section required the Department to report annually to the legislative Committee on Health Care regarding the effects of legislation on the costs of health care. [NRS 439A.106](#) was amended in the 1991 legislative session to change several aspects of the statute. One significant amendment was to add a new section (2), as follows:

The department shall not disclose or report the details of contracts entered into by a hospital, or disclose or report information pursuant to this section in a manner that would allow identification of an individual payer or other party to a contract with the hospital, except that the department may disclose to other state agencies the details of contracts between the hospital and a related entity. A state agency shall not disclose or report information disclosed to the agency by the department pursuant to this subsection in a manner that would allow identification of an individual payer or other party to a contract with the hospital.

In addition, [NRS 449.510](#) was also amended to add essentially the same provision as quoted above to become section (2) of that statute. [NRS 449.450](#) through 449.530, inclusive, vests authority in the Director of the Department to make inquiry regarding matters involving the costs of health care and ensuring the quality of health care in the State of Nevada. Pursuant to [NRS 449.510](#), the Director is required to prepare summaries regarding the matters involved in those sections. These summaries are public records. *See* [NRS 449.510](#)(1). However, the details of contracts entered into by a hospital and any information which would allow identification of the payer or other party to the contract is required to remain confidential. [NRS 449.510](#)(2). This

section of the statute was adopted by the 1991 Legislature and took effect on July 1, 1991. It is clear pursuant to the statutes that effective July 1, 1991, documents in the possession of the Department which report the details of contracts entered into by a hospital or which identify an individual payer or other party to a contract with the hospital are confidential and are not subject to public inspection.

The question remains whether documents that were *filed* with the Director of the Department prior to July 1, 1991, but not *requested* until after that date are also confidential.

Under principles of statutory construction, it is clear that when the language of a statute is clear and unambiguous, the court should give the statute its plain and ordinary meaning. *City Council of Reno v. Reno Newspapers, Inc.*, [105 Nev. 886](#), 891, 784 P.2d 974 (1989); *Atlantic Commercial Dev. Corp. v. Boyles*, [103 Nev. 35](#), 38, 732 P.2d 1360 (1987). In addition, statutes should be construed so as to effect the intent of the legislature in enacting them and avoid absurd results. *Las Vegas Sun v. Eighth Judicial Dist. Ct.*, [104 Nev. 508](#), 511, 761 P.2d 849 (1988).

In applying these principles to the statute cited above, it is clear the legislature intended that certain information in the possession of the Department remain confidential. The Department is mandated not to disclose this information. There is no limitation on the application of this mandate, such as that it applies only to records received after a certain date. It is apparent from the clear and unambiguous language of the statute that the Department must not disclose information in its possession that includes the details of a contract entered into by a hospital or identifying information regarding a payer or other party to a contract with the hospital, regardless of when that information was received.

Although the statute is clear on its face and, therefore, there is no need to resort to legislative history, the legislative history is supportive of the above interpretation. In hearings before the Assembly Committee on Health and Welfare various hospitals brought up the issue of the importance that the details of contracts and the identity of payers or other parties to a contract be kept confidential. They informed the Committee that disclosure of such proprietary information would discourage competition among providers and assist in increasing the costs of health care. *Hearings on AB 577 Before the Assembly Committee on Health and Welfare*, 66th Legislative Sess., at 7-9 (May 7, 1991). Senator Neal raised objection to the confidentiality of this information on the floor of the Senate. Senate Daily Journal, 66th Legislative Sess., at 35 (June 17, 1991). The bill was passed without amendment to the sections governing confidentiality on June 30, 1991. The effective date of the relevant statutes was July 1, 1991. The legislature specifically set an effective date earlier than the October 1 automatic effective date set by statute. See [NRS 218.530](#). The bill was approved by the Governor on July 5, 1991. It is therefore clear the legislature intended the referenced information to be confidential on the earliest possible date.

The decision of the First Judicial District Court regarding the records requested in *Neal* was entered on June 18, 1991, prior to the effective date of the new legislation. Therefore, the records sought were requested prior to the date the records were made confidential. The Nevada Supreme Court recognized this fact in issuing its decision in *Neal*.

We note that [NRS 449.510](#) was amended in 1991 and now states the following:

2. The director shall not disclose or report the details of contracts entered into by a hospital, or disclose or report information pursuant to this section in a manner that would allow identification of an individual payer or other party to a contract with the hospital, except that the director may disclose to other state agencies the details of contracts between the hospital and a related entity. A state agency shall not disclose or report information disclosed to the agency by the director pursuant to this subsection in a manner that would allow identification of an individual payer or

other party to a contract with the hospital.

Thus, [NRS 449.510](#) now removes certain documents from the public sphere and requires that they remain confidential.

*Neal*, 108 Nev., Adv. Op. 114. It is apparent the Nevada Supreme Court considers these records now to be confidential.

The date that is relevant in determining whether records are open to public inspection is the date the request for the records is made. If the reasoning were otherwise, agencies would be put in the onerous and unreasonable position of having to research the law every time a request was made to determine if the record was confidential at the time it was filed or recorded. Such an interpretation of the statute regarding confidentiality would effect an absurd result and defeat the intent of the legislature that certain matters be confidential after the effective date of the statute. Therefore, the laws regarding confidentiality that are in effect at the time a request for records is made are the laws that govern the availability of the records.

#### CONCLUSION

In the instant situation, any request for certain records in the possession of the Department of Human Resources which was made prior to July 1, 1991, must be honored as the records have been held by the Nevada Supreme Court to be public records. Any request for those records which are received after July 1, 1991, must also be honored, however, information which provides details of hospital contracts or identifies payers or other parties to hospital contracts must be kept confidential.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: NANCY FORD ANGRES  
Chief Deputy Attorney General

OPINION NO. 92-11 WORKERS COMPENSATION; DEPARTMENT OF INDUSTRIAL RELATIONS; STATE INDUSTRIAL INSURANCE SYSTEM: The Department of Industrial Relations has the authority to enact regulations which adopt the Third Edition (Revised) of the American Medical Association Guides to Permanent Impairment and amend the guides to delete reference to pain. If an edition is out of print it cannot be adopted by reference.

Carson City, October 20, 1992

Ms. Carol A. Jackson, Director, Department of Industrial Relations, 2500 West Washington, Las Vegas, Nevada 89106

Dear Ms. Jackson:

You have requested an advisory opinion of the attorney general on two questions relating to the rating of permanent impairment.

#### QUESTION ONE

Does the Department of Industrial Relations ("Department") have the statutory authority to enact a regulation which adopts the Third Edition (Revised) ("3d ed.") version of the Guides to the

Evaluation of Permanent Impairment ("Guides") and which amends that guide to remove references to pain?

### ANALYSIS

[NRS 616.427](#)(3), as amended, states in part that:

The department shall adopt regulations incorporating the American Medical Association's Guides to the Evaluation of Permanent Impairment by reference and *may amend such regulations* from time to time as it deems necessary. In adopting the Guides to the Evaluation of Permanent Impairment, the department *shall consider the edition most recently published by the American Medical Association*. [Emphasis added.]

At the present time, the most recently published edition of the Guides is the 3d ed. Unlike previous editions of the Guides, the 3d ed. introduced "pain" as a factor in the determination of a disability rating. Previous to the amendment of [NRS 616.427](#)(3) by the 1991 Legislature, the statute specified a particular edition of the Guides to be used in the evaluation of permanent impairment. Act of July 5, 1991, ch. 723, § 70, 1991 Nev. Stat. 2414. Therefore, the Department used an edition prior to the 3d ed. by statutory command rather than by the authority of adopted regulations, and present regulations do not reference to any edition.

When the language of the statute is plain, there is no need for statutory construction. *Nevada Power Co. v. Public Serv. Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867 (1986). By its plain meaning, [NRS 616.427](#)(3) requires that the Department adopt regulations incorporating the American Medical Association's Guides by reference, but does not *require* that it adopt the most recent edition. The Department must only *consider* the edition most recently published which, at this time, is the 3d ed. Moreover, the legislature is precluded from *requiring* that the Department adopt "the most recent edition" because that would be an improper delegation of authority to the American Medical Association inasmuch as "the most recent edition" would include the present edition as well as any future editions of the Guides. The legislature resolved the constitutional difficulty by the statutory language that does not require the adoption of the most recent edition but merely requires that it be considered. *See* Assembly Bill 410, Minutes of the Assembly Committee on Labor and Management, April 16, 1991, pp. 10-11.

We do not suggest that the legislature did not have the authority to adopt statutory language which required the Department to adopt a specific edition of the Guides had it chosen to do so. However, the most recent edition is not descriptive of a specific edition. It is worthy of note that prior to amendment of [NRS 616.427](#)(3) in the 66th Session of the Legislature (1991), the statute required that the Department evaluate permanent impairment according to the American Medical Association's Guides in the form most recently published and supplemented before January 1, 1986, a specific edition. In the 1991 amendment, the legislature could have named the 3d ed. as the specific edition to be adopted but the legislature chose *not* to specify, as a requirement, any edition.

In addition, in the same subsection, the legislature has given the Department the latitude to amend its regulations as necessary. In determining the meaning of the statute, we must read it as a whole and give meaning to all of its parts. *K.J.B. Inc. v. Second Judicial Dist. Ct.*, [103 Nev. 473](#), 745 P.2d 700 (1987). Since the Department may amend its regulation as necessary, should the Department adopt the 3d ed. by reference and at the same time that the 3d ed. is adopted, amend it to remove references to pain, the results comport with both the requirement that the most recent edition of the Guides be considered and the discretion and latitude given in the statute.

### CONCLUSION TO QUESTION ONE

The Department has the statutory authority to enact regulations which adopt the 3d ed. version of the Guides and which amend the Guides to remove reference to "pain."

## QUESTION TWO

Does the Department have the statutory authority to enact regulations which adopt the Second Edition ("2d ed.") version of the Guides instead of the 3d ed.? If so, what effect does the possibility that the 2d ed. is no longer in print have on the ability of the Department to adopt that edition by reference?

## ANALYSIS

Our analysis of Question One makes it clear that the Department has the authority to adopt by reference any edition of the American Medical Association Guides. However, if the 2d ed. is out of print, that poses a problem for its adoption *by reference*.

[NRS 233B.040](#)(3) provides as follows:

An agency may adopt by reference in a regulation material published by another authority in book or pamphlet form if:

(a) It files one copy of the publication with the secretary of state and one copy with the state librarian, and makes at least one copy available for public inspection with its regulations; and

(b) The reference discloses the source and price for purchase of the publication.

An agency shall not attempt to incorporate any other material in a regulation by reference.

Therefore, the Department may not adopt by reference the 2d ed. if it is out of print because it cannot comply with [NRS 233B.040](#)(3). Because [NRS 616.427](#)(3) states that "[t]he department shall adopt regulations incorporating the American Medical Association's Guides to the Evaluation of Permanent Impairment by reference" the Department cannot adopt the 2d ed. except by reference. The Department can, however, by its authority to amend its regulations as necessary, adopt the 3d ed. by reference and at the same time amend the regulation to incorporate that part of the 2d ed. desired, not by reference, but by expressing the text in the regulations.

## CONCLUSION

The Department has the authority to enact regulations which adopt the 2d ed. version of the Guides instead of the 3d ed. If the 2d ed. is out of print, it cannot be adopted by reference.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

OPINION NO. 92-12 COUNTIES; LIABILITY; HAZARDOUS WASTE; EMINENT DOMAIN; ABANDONED PROPERTY: Under [NRS 361.590](#), a county which receives title to contaminated property has two possible exemptions to pursue from CERCLA liability.

Carson City, December 4, 1992

The Honorable Patricia D. Cafferata, Lincoln County District Attorney, Post Office Box 60, Pioche, Nevada 89043

Dear Ms. Cafferata:

You have requested an opinion concerning a county's possible liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Your question is answered below.

### QUESTION

Is a governmental entity, such as a county, which receives title to contaminated property pursuant to [NRS 361.590](#), subject to liability for the cost of cleaning up the property under CERCLA?

### ANALYSIS

[NRS 361.590](#) sets forth the procedure for the execution of tax deeds and the transfer of property to a county treasurer as trustee for the state and a county:

1. If the property is not redeemed within the time allowed by law for its redemption, the tax receiver or his successor in office must make to the county treasurer as trustee for the state and county a deed of the property, reciting in the deed substantially the matters contained in the certificate of sale or, in the case of a conveyance under [NRS 361.604](#), the order of the board of county commissioners, and that no person has redeemed the property during the time allowed for its redemption.

...  
5. The deed conveys to the county treasurer as trustee for the state and county the property described therein, free of all encumbrances . . . .

CERCLA normally does, with two significant exceptions, impose liability on present owners of facilities (such as a county that becomes the owner of contaminated property conveyed by tax deed) where there has been a release or there is a threatened release of a hazardous substance,<sup>15</sup> 42 U.S.C. §§ 9601-9675; 42 U.S.C. § 9601(20)(A) (Supp. 1992) (owner or operator defined);<sup>15</sup> 42 U.S.C. § 9601(9) (Supp. 1992) (facility defined); 42 U.S.C. § 9601(22) (Supp. 1992) (release defined); 42 U.S.C. § 9601(14) (Supp. 1992) (hazardous substance defined); *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 (1989) (both state and local governments "enjoy

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<sup>15</sup> The text of 42 U.S.C. § 9601(20)(A) (Supp. 1992) provides:

The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

A companion term, 42 U.S.C. § 9601 (20)(D) (Supp. 1992), provides a limited exclusion from the definition for state and local governments:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

special exemptions from liability under CERCLA").

The two major liability exceptions that are available to local governments are summarized in Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 Urb. Law. 79, 105-07 (1990) (footnotes omitted; emphasis in original):

As a threshold matter, a local government facing potential liability as the owner of a Superfund site should consider whether it can qualify for the specific local government exclusion that the law provides from its definition of that term. Thus, a local government which "acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, *or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign*" is not an "owner" under the Act (emphasis added).

The one important qualification on this exclusion is that it does not apply to a local government which has "caused or contributed to" the release. The courts have not yet established that [sic] a local government must do to satisfy this qualification. However, it is likely that the courts will require them to take actions that are necessary to mitigate immediate threats to human health or the environment and that they, as landowners, are in the best position to take. Local governments may argue that such actions should be minimal in comparison to actions that are necessary to clean up the site, while other potentially responsible parties will argue that substantial mitigation should have been undertaken.

A second important defense available to local governments is contained in a second crucial definition, interpreting the term "contractual relationship." The definition of "contractual relationship" [in 42 U.S.C. § 9601(35)(A)(Supp. 1992)] is pivotal to the imposition of liability under CERCLA because the statute provides an affirmative defense for potentially responsible parties who can show the problem arises "solely" because of an "act or omission" of a third party. The PRP seeking to assert this defense must demonstrate that it did not have a "contractual relationship" with the third party. Therefore, if the relationship is defined as falling *outside* the definition of "contractual relationship" the defense is available. The definition [in 42 U.S.C. § 9601(35)(A)(ii) (Supp. 1992)] reads:

The term 'contractual relationship' . . . *includes* . . . land contracts, deeds or other *instruments transferring title* or possession *unless* the real property on which the facility concerned is located was acquired by the defendant *after* the disposal . . . of the hazardous substance . . . and . . . *the defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.* [Emphasis added.]

In addition to proving that it took the land involuntarily or through the exercise of eminent domain, the defendant must also show that it undertook all "appropriate inquiry" into the previous ownership and uses of the property and did not know or have reason to know that a release or threatened release was present. Under this language, a local government that acquires land involuntarily or through the exercise of its eminent domain authority has the opportunity to assert an affirmative defense by showing that it lacked a "contractual relationship" with the third party who owned the property when the contamination occurred, providing that it undertook an appropriate inquiry before taking title.

Because this so-called "innocent landowner" defense requires a showing of

appropriate inquiry prior to taking title, it is clearly more complicated and difficult to assert than simply demonstrating that the local government should be excluded from the case because it acquired the land involuntarily and therefore is not an "owner." However, because the defense significantly expands the universe of purchase or title-taking activities to include the exercise of eminent domain, it remains an important option for local governments seeking to escape liability under the statute.

Once a local government has determined that it does not qualify under either the "involuntary acquisition" exclusion or the "innocent landowner" defense, it must turn to a consideration of the implications of its inevitable liability under the Act. The liability of both past and present owners and/or operators is well established at this point in Superfund's development and there is every reason to believe that these precedents will be applied routinely to similarly situated public entities.

Obviously, a county's ability to fit within an exemption and its possible liability will be closely tied to the facts of a particular case. For example, under the first exemption, county liability will depend upon the factual inquiry into whether or not the county has caused or contributed to a release or threatened release of a hazardous substance on the involuntarily acquired property. *Cf. J.S. Lincoln v. Republic Ecology Corp.*, 765 F. Supp. 633, 636 n.8 (C.D. Cal. 1991) ("However, Monroe has not been able to produce evidence that any of the City-owned vehicles caused or contributed to the release of hazardous substances.") and *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (municipalities held liable for arranging for disposal of hazardous wastes in privately owned landfills).<sup>16</sup> Similarly, under the second exemption, the appropriate inquiry will focus upon the requirements of 42 U.S.C. § 9601 (35)(B)(Supp. 1992), including, according to Steinzor, the presence or absence of "all 'appropriate inquiry'" on the part of a county. *Steinzor, supra*, at 106.<sup>17</sup>

With respect to the suggestion that [NRS 361.590](#) be amended to allow a county to refuse title to contaminated property, we note that such an option might have the inadvertent effect of eliminating the involuntary acquisition element from a county's defense, perhaps eliminating the county's ability to rely upon the two exemptions to CERCLA liability discussed above. Accordingly, any proposed language affecting qualification for the existing exemptions should be carefully considered.

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<sup>16</sup> Simply engaging in the normal regulatory functions of a sovereign is not the equivalent of causing or contributing to a release or a threatened release or arranging for the disposal of hazardous waste. *United States v. Dart Indus., Inc.*, 847 F.2d 144, 146 (4th Cir. 1988) ("The generators are unable to specify any 'hands on' activities by [the state agency] that contributed to the release of hazardous wastes. The district court appropriately described [the agency's] activities as merely "a series of regulatory actions."); *United States v. Azrael*, 765 F. Supp. 1239, 1244 (D. Md. 1991) ("Many courts, including the Fourth Circuit, have recognized that states and the Government enjoy special protection when engaged in regulatory activities under CERCLA."); *J.S. Lincoln*, 765 F. Supp. at 636 ("The emerging trend seems to exclude claims of this nature against municipalities.").

<sup>17</sup> Technically, Steinzor's analysis is probably over-inclusive on this point. 42 U.S.C. § 9601(35)(A)(i-iii) establish three separate qualifying circumstances for exclusion from the definition of contractual relationship--lack of knowledge of disposal, acquisition by a government, and acquisition by inheritance or bequest. Lack of knowledge can be established, pursuant to 42 U.S.C. § 9601(35)(D), by showing that "all appropriate inquiry" was undertaken at the time of acquisition. Since the three circumstances are applied disjunctively, meeting the government acquisition prong does not require a government to also meet the lack of knowledge or acquisition by inheritance or bequest prongs. See H.G. Boggs, *Real Estate Environmental Damage, the Innocent Residential Purchaser, and Federal Superfund Liability*, 22 *Env'tl. L.* 977, 982 n.26 (1992). Nevertheless, 42 U.S.C. § 9601(35)(A) does require that a government meet the additional requirements of 42 U.S.C. § 9607(b)(3)(a) and (b) in order to obtain the exemption. Those provisions require that a government "must also show that 'due care' was exercised under the circumstances and that 'precautions' were taken 'against foreseeable acts or omission of any such third party and the consequences that could foreseeably result from such acts or omissions.'" *Id.* at 982-83.

## CONCLUSION

A county which receives title to contaminated property under [NRS 361.590](#) has at least two possible exemptions from CERCLA liability to pursue. Both exemptions require that certain conditions are met before the exemption will shield a governmental entity.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: BRIAN CHALLY  
Deputy Attorney General

OPINION NO. 92-13 STATE BUILDINGS; STATE PROPERTY; FIRST AMENDMENT ACTIVITIES: Free speech activities on state property which is not a traditional public forum may be reasonably regulated; the solicitation of alms and contributions may be banned; the distribution of literature under these facts may not be banned.

Carson City, December 21, 1992

Mr. James P. Weller, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Weller:

You have asked this office to assess the existing law in relation to solicitation and distribution of literature on Department of Motor Vehicles and Public Safety ("Department") premises with a view to the Department imposing restrictions on such activities.

### QUESTION ONE

Are the Department buildings and the entrance ways thereto a "public forum" such that no restrictions may be placed on First Amendment activities?

### ANALYSIS

Solicitation is a recognized form of speech protected by the First Amendment and the validity of government regulation is determined by the nature of the relevant forum. *United States v. Kokinda*, 110 S. Ct. 3115, 3118-19 (1990). Where government seeks to restrict First Amendment activity on its property that is traditionally open to the public for expressive activity, or has been expressly dedicated by the government to expressive activity, the regulation is subject to constitutional scrutiny. Where the property is not a traditional public forum and the government has not dedicated its property to First Amendment activity, the regulation is examined only for reasonableness. The regulation need not be the most reasonable or the only reasonable limitation. *Id.* at 3122.

It would appear that areas in front of the Department buildings do not have the characteristics of public sidewalks traditionally open to expressive activity. Traditional public fora for purposes of free speech activities are generally considered "streets and parks." *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2706 (1992). The *Krishna* Court reasoned that a right to First Amendment expressive activities flows from the fact that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have

been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.*

In *Kokinda*, respondents were volunteers for the National Democratic Policy Committee who set up a table on the sidewalk near the entrance of the Bowie, Maryland, post office to solicit contributions, and sell books and subscriptions to the organization's newspaper. This postal sidewalk provided the sole means by which post office customers could travel from the parking lot to the post office building and it lay entirely on postal service property. With reference to the Department, it is necessary to consider the physical layout of each building for purposes of determining whether or not it constitutes a public forum. Municipal sidewalks which run parallel to Department properties are arguably public passageways. Department sidewalks, however, are not public passageways; rather they lead only from the parking area to the front door of the Department building.

#### CONCLUSION TO QUESTION ONE

Based upon the foregoing, the sidewalks leading from the Department parking lot to its entrance doors were apparently constructed solely for the passage of individuals engaged in Department business. Therefore, the sidewalks leading to the Department buildings are probably not traditional public forum and, accordingly, any restriction on free speech activities need only be reasonable.

#### QUESTION TWO

Has the Department waived any right to impose additional restrictions on First Amendment activities on its premises where it has designated certain areas for First Amendment activities?

#### ANALYSIS

Groups seeking to conduct First Amendment activities on Department premises may argue that the Department has designated certain areas as public forum. For example, the red lines painted upon the Las Vegas East Sahara office sidewalk apparently designate an area for First Amendment activities. A designated public forum, whether it be limited or unlimited in character, is subject to the same limitations as that governing a traditional public forum--the regulation is subject to the highest scrutiny and will survive only if it is narrowly drawn to achieve a compelling state interest. *Krishna*, 112 S. Ct. at 2705 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The government does not create a public forum by inaction. Nor is a public forum created whenever members of the public are permitted freely to visit a place owned or operated by the government.

The decision to create a public forum must be made by intentionally opening a non-traditional forum for public discourse. *Kokinda*, 110 S. Ct. at 3121 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund*, 478 U.S. 788, 802 (1985)). The location of the forum also has a bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction. By the Department referencing certain areas in front of several of its offices for the purpose of free speech activity, it can be argued that we have intentionally opened a non-traditional forum for First Amendment activities. *Kokinda*, however, recognized that a practice of allowing some speech activities on postal property did not add up to the dedication of postal property to free speech activities. *Kokinda*, 110 S. Ct. at 3121.

While the sidewalks of the Department may be open to the public to conduct Department business, that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment. The Department has permitted some speech activities at several of its offices in Nevada for approximately one year. This is not a long-standing practice especially considering that this was during the period that this subject was under consideration by the Supreme

Court. This permitted activity is conducted behind established barriers and was only done in response to a growing problem of various groups seeking to conduct First Amendment activities at that office which disrupted the normal flow of traffic and interrupted the normal course of business. It cannot be said that the Department properties in general have been intentionally opened by the state to such activity.

### CONCLUSION TO QUESTION TWO

The courts have made it clear that mere acquiescence to a continuing practice of free speech activities is insufficient to constitute a waiver of restrictions on those activities. In fact, under the facts of the *Kokinda* case, the U.S. Postal Service initially permitted solicitation and subsequently banned it. The *Kokinda* Court found that a practice of allowing some speech activities does not constitute an intentional dedication of a public forum. The short-term designation of an area is not sufficient to show an intentional dedication. Based upon the holding in *Kokinda* and the facts known to us, the Department has not waived its right to restrict expressive activities.

### QUESTION THREE

May the Department restrict or prohibit solicitation of alms and contributions on its premises?

### ANALYSIS

The decision in *Kokinda* recently affirmed the U.S. Postal Service's determination to prohibit solicitation of alms and contributions on its premises. It can thus be reasoned that an absolute ban on such solicitation is not unreasonable. Like the U.S. Postal Service, the Department lacks the resources to enforce solicitation regulations in its offices throughout the state. Further, based on the information presented to this office, solicitation is disruptive of the Department's normal course of business and generates customer complaints of being detained. "[I]t is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business." *Kokinda*, 110 S. Ct. at 3123. Solicitation impedes the normal flow of traffic as it requires those who would respond to take some action. A person solicited must decide whether to contribute and, then, having decided to do so, must reach for a wallet, search for money, write a check or produce a credit card. *Id.*

### CONCLUSION TO QUESTION THREE

Based upon *Kokinda* and its progeny and the facts known to us, it appears that an absolute ban of solicitation of alms and contributions on the Department premises is not unreasonable.

### QUESTION FOUR

May the Department restrict or prohibit distribution of literature?

### ANALYSIS

Informational leafletting is generally less intrusive and complicated than soliciting funds. *Lee v. International Soc'y for Krishna Consciousness*, 112 S. Ct. 2709, 2713 (1992) (*per curiam*) (O'Connor, J., *concurring*). The Supreme Court recently struck down a regulation which prohibited the continuous or repetitive distribution of printed or written material. *Id.* The Court held that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, the Court previously held in *Kokinda* that "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . . The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes

to convey; instead, the recipient is free to read the message at a later time." *Kokinda*, 110 S. Ct. at 3123-24 (quoting *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 665 (1981)). Accordingly, it appears that a ban on distribution of literature and leafletting would not pass constitutional muster.

On the other hand, the government could point to other problems intrinsic to the act of leafletting that would make it incompatible with Department operation. For example, avoiding litter as a result of distribution of literature is a legitimate concern. See *Schneider v. State*, 308 U.S. 147, 162 (1939). The Department could further develop evidence that enforcement of the leafletting legislation is overly burdensome. Specifically, monitoring leafletting activity in order to ensure that it is *only* leafletting that occurs and not also soliciting may prove to be just as burdensome as the monitoring required regarding solicitation. As referenced above, the *Krishna* case struck down a port authority regulation restricting the distribution of literature. A dissent by Chief Justice Rehnquist observed that it may remain an open question whether or not the government may restrict distribution of literature, especially if the government is able to develop evidence as referenced in this paragraph. *Krishna II*, 112 S. Ct. at 2710 (Rehnquist, C.J., *dissenting*).

#### CONCLUSION TO QUESTION TWO

As the law presently exists, the Department may promulgate regulations of time, place and manner concerning leafletting, which is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *Id.* at 2715 (O'Conner, J., *concurring*) citing *Perry Educ. Ass'n*, 460 U.S. at 45. Based upon a plurality in the *Krishna* case, 112 S. Ct. at 2710, the present law is that a complete ban on distribution of literature is unconstitutional. This agency may, however, develop evidence as referenced in the above paragraph and a regulation prohibiting distribution of literature may be upheld on appeal under Chief Justice Rehnquist's rationale. The Department may not, however, completely ban leafletting at this time.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: DARCY COSS  
Deputy Attorney General

OPINION NO. 92-14 GOVERNOR; ELECTION; ELIGIBILITY; CONSTITUTION; TERM LIMITATION: The term "years" as used in Article 5, Section 3 of Nevada Constitution means official years. The governor therefore, served as acting governor for less than two years of another person's term and may seek reelection to a second term as governor.

Carson City, December 31, 1992

The Honorable Bob Miller, Governor, State of Nevada, Capitol Complex, Carson City, Nevada 89710

Dear Governor Miller:

You have asked this office for an opinion regarding Article 5, Section 3, of the Nevada Constitution. Specifically, you have asked the following question.

## QUESTION

Does Nev. [Const. art. 5, § 3](#), which provides that "no person who has held the office of Governor, or acted as Governor for more than two years of a term to which some other person was elected Governor shall be elected to the office of Governor more than once", act as a bar to Governor Bob Miller's eligibility to file for reelection to the office of governor?

## FACTS

Richard Bryan began his second term as governor of the State of Nevada on Monday, January 5, 1987. His official term of office in accordance with Nevada law would have been from the first Monday in January 1987 until the first Monday in January four years later when his successor would be installed.

However, Richard Bryan was subsequently elected to the United States Senate at the 1988 general election and resigned his position as governor on Tuesday, January 3, 1989. Pursuant to Nev. [Const. art. 5, § 18](#), upon the resignation of the governor, the lieutenant governor automatically succeeds to the powers and duties of the office of governor. Thus, Bob Miller became acting governor of the State of Nevada on Tuesday, January 3, 1989. Bob Miller was himself elected at the 1990 general election to the office of governor and began serving his present four-year term on Monday, January 7, 1991.

Between the dates of January 3, 1989, and January 7, 1991, Governor Miller served as acting governor for 734 days. Both Governor Miller and former Governor Bryan have indicated that Miller did not serve as acting governor in the absence of Governor Bryan on any occasion prior to January 3, 1989. The state payroll records confirm that Governor Miller was not compensated for any service as "acting governor" before January 3, 1989.

## ANALYSIS

The Nevada Constitution was amended in 1970 to prohibit anyone who has acted as governor for more than two years from being elected governor more than once. Specifically, it is provided in Nev. [Const. art. 5, § 3](#), as follows:

No person shall be eligible to the office of Governor, who is not a qualified elector, and who, at the time of such election, has not attained the age of twenty five years; and who shall not have been a citizen resident of this State for two years next preceding the election; nor shall any person be elected to the office of Governor more than twice; and no person who has held the office of Governor, or acted as Governor for more than two years of a term to which some other person was elected Governor shall be elected to the office of Governor more than once.

Our analysis must focus on the meaning of the word "years" as it is used in Nev. [Const. art. 5, § 3](#). Neither the Nevada Constitution nor Nevada statutes define this term.

The word "years" may be interpreted to mean "official years" based upon the defined gubernatorial term of office found in [NRS 223.020](#) which is "4 years from the time of his installment and until his successor shall be qualified." In accordance with [NRS 223.030](#), a governor takes the oath of office "on the 1st Monday of January next succeeding his election." These statutes make no reference to "calendar years" of 365 days and indeed indicate that the term of office runs simply from the first Monday in January following the election until a successor is sworn in on the first Monday in January following the next election. Under this analysis, the first two years of Governor Bryan's term ran from the first Monday in January 1987 until the first Monday in January 1989. Since Governor Miller did not become acting governor until Tuesday,

January 3, 1989, he served less than two official years as acting governor.

However, if "years" is interpreted to mean "calendar years" (*i.e.* 365 days), then Governor Miller has served "more than two years of a term to which some other person was elected Governor," since he served 734 days of Richard Bryan's term of office. Black's Law Dictionary (6th ed. 1990), defines calendar years as "[t]he period from January 1 to December 31 inclusive. Ordinarily calendar year means 365 days except leap year, and is composed of 12 months varying in length." Thus, if the word "years" as used in Nev. [Const. art. 5, § 3](#), means "calendar years," then anyone who serves as acting governor more than 730 (365 multiplied by 2 equals 730) days of another governor's term, can only personally be elected to the office of governor once. Under this analysis, Governor Miller has served four days too many as acting governor and would be ineligible to seek reelection to the office of governor at the 1994 general election.

For the reasons discussed below, we believe that the "calendar year" interpretation is incorrect since the simple mathematical "counting of the days" in a calendar year cannot be followed when a term of office is defined to begin on a day of the week, such as "the first Monday in January." Such a narrow interpretation ignores relevant case law and produces absurd results as this analysis will demonstrate.

The issue under consideration is one of constitutional interpretation and the well-known rules of statutory construction are applicable. See *Carson City v. Red Arrow Garage*, [47 Nev. 473](#), 484, 225 P. 487 (1924) (rules of statutory construction apply to ordinances); *State v. Dovey*, [19 Nev. 396](#), 399, 12 P. 910 (1887) (rules of statutory construction apply equally to statutes and constitution); *State ex rel. Perry v. Arrington*, [18 Nev. 412](#), 414, 4 P. 735 (1884) (courts are bound by the same rules when construing constitutions or statutes). The basic rule of construction was well-stated in the early case of *State v. Dovey*:

In construing constitutions and statutes, the first and last duty of courts is to ascertain the intention of the convention and legislature; and in doing this they must be governed by well-settled rules, applicable alike to the construction of constitutions and statutes. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over the letter." (*U.S. v. Kirby*, 7 Wall. 482. And see *State v. McKenney*, [18 Nev. 189](#); *State v. Kruttschnitt*, [4 Nev. 178](#).)

*Dovey*, 19 Nev. at 399. See also *Thompson v. First Judicial Dist. Ct.*, [100 Nev. 352](#), 683 P.2d 17 (1984) (the court's main goal is to give effect to the intention of the legislature or the people in adopting a particular statute or constitutional provision); *Las Vegas Sun v. Eighth Judicial Dist. Ct.*, [104 Nev. 508](#), 511, 761 P.2d 849 (1988) (statutes should be construed so as to effect the intent of the legislature in enacting them and avoid absurd results).

First, a court must determine whether the "plain meaning" rule is applicable. It is clear that when the language of a statute is clear and unambiguous, the court should give the statute its plain and ordinary meaning. *City Council of Reno v. Reno Newspapers, Inc.*, [105 Nev. 886](#), 891, 784 P.2d 974 (1989). As the Nevada Supreme Court stated in *McKay v. Board of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438 (1986), "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." However, as the above discussion regarding the possible interpretations of the word "years" demonstrates, this constitutional provision appears to be ambiguous, since it is "capable of being understood in two or more senses by reasonably informed persons." *Id.* at 649. In such a case, the law should be "construed in line with what reason and public policy would indicate the legislature intended."

*Robert E. v. Justice Ct. of Reno Township*, [99 Nev. 443](#), 445, 664 P. 2d 957 (1983).

The legislative history, although often a primary source of interpretive assistance, is silent with regard to the meaning of the word "years" in Nev. [Const. art. 5, § 3](#). The legislative history does, however, indicate the policy objectives which the drafters were trying to achieve by this constitutional amendment. See *City of Las Vegas v. Macchiaverna*, [99 Nev. 256](#), 257-58, 661 P.2d 879 (1983) (the meaning of the words used may be determined by examining the context in which they are used and the causes which induced the legislature to enact the law); *Evans v. Job*, [8 Nev. 322](#), 333 (1873) (the constitution is to be interpreted taking into consideration "the evils that were to be remedied, the dangers sought to be guarded against and protection to be afforded").

The minutes of January 30, 1969, Hearing on SJR 1, before the Senate Committee on Federal, State and Local Governments at 36, reveal the following discussion on proposed constitutional amendment to Nev. [Const. art. 5, § 3](#):

This bill states that no one should be elected to the office of Governor more than twice. Senator Dodge spoke in favor of this bill, stating that he felt it was a healthy thing not to perpetuate a position, regardless of how good a job is being done in that position. In the brief discussion, all members of the committee concurred.

In the 54th Session of the Nevada Legislature, the minutes of February 15, 1967, Hearing of Senate Committee on Federal and Local Governments at 34, reveal the following discussion:

At the request of Chairman Gibson, Senator Fossi [sic] discussed this measure. He stated that the reason for presenting this resolution was to assure that there would be new blood in the Governorship from time to time and that the state would never be controlled by a single person or machine.

Thus, it appears the intent of this constitutional amendment was to prevent extended control of the executive branch by a single individual and to ensure that no individual could be elected to the office of governor more than twice. Although this discussion provides guidance as to the intent behind this measure, it does not assist in determining the meaning of the word "years" as it is used in Nev. [Const. art. 5, § 3](#).

The minutes of the Assembly Committee on Elections for the 55th Session, dated February 11, 1969, reflect a comment from Assemblyman Hilbrecht to the effect that the proposed amendment was based upon a similar provision in the federal Constitution limiting the terms of presidents. Amendment XXII to the United States Constitution was proposed in 1947 and became effective in 1951 in response to President Roosevelt's four successful elections to the office of president. The amendment provides:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.

This provision in the federal Constitution is very similar to Nev. [Const. art. 5, § 3](#). However, the usage of the word "years" is fundamentally different in the federal Constitution, since the president takes office at noon on the 20th day of January--a designated date as opposed to a day of the week.

Thus, the term of office for a president is four calendar years and two calendar years (730 days) is precisely one-half of the term. The legislative history of the amendment to Nev. [Const. art. 5, § 3](#), does not reflect any discussion or consideration by the legislature of the difference in the terms of office for the president (four calendar years) and the governor (four official years--first

Monday in January until the first Monday in January four years later).

The rules of statutory construction also recognize that the language under consideration should be read in light of the entire constitution or legislative enactment in which it is found as an aid in interpreting intent. Specifically, a court will look at how the language in question is used in other provisions. See *White v. Warden*, [96 Nev. 634](#), 614 P. 2d 536 (1980) (the court will look at the entire act and construe it as a whole); *State ex rel. Kendall v. Cole*, [38 Nev. 215](#), 148 P. 551 (1915) (to determine the meaning of a particular word in a provision of the constitution, the court looks to usage of that word in other sections); *Ex Parte Shelor*, [33 Nev. 361](#), 111 P. 291 (1910) (the intent of an ambiguous clause in the constitution should be determined in light of the whole document).

Perhaps most important among the rules of statutory construction, as noted by the Nevada Supreme Court in *Dovey*, is the reasonableness of the result. In interpreting an ambiguous law the court must attempt to effectuate the intent of the people and will assume that the people would not intend a result that is absurd or unreasonable. As the court has stated, "[a] fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." *Sheriff v. Smith*, [91 Nev. 729](#), 733, 542 P.2d 440 (1975) (footnote omitted). See also *State ex rel. Hunting v. Brodigan*, [44 Nev. 306](#), 194 P. 845 (1921) (interpretation of constitution must avoid absurd consequences and be least likely to produce mischief).

In addition, a court will look to the decisions of other courts addressing similar issues. See *Sawyer v. First Judicial Dist. Ct.*, [82 Nev. 53](#), 410 P.2d 748 (1966) (in interpreting the meaning of the word "absence" as used in the Nevada Constitution, the court cited "overwhelming case authority" from other jurisdictions); *State ex rel. Schur v. Payne*, [57 Nev. 286](#), 63 P.2d 921 (1937) (in interpreting the word "district" as used in the Nevada Constitution, the court looked to the decisions of other courts which have addressed the question); *State ex rel. Lewis v. Doron*, [5 Nev. 399](#) (1870) (interpretation of constitutional term by other states was reviewed).

Finally, Nev. [Const. art. 5, § 3](#), must be interpreted in light of the rule that all statutes or other laws which limit candidacy for public office will be liberally construed in favor of the right of the voters to exercise their choice. The Nevada Supreme Court has recognized this presumption favoring the right of the people to vote on a matter in a variety of situations. In *Gilbert v. Breithaupt*, [60 Nev. 162](#), 104 P.2d 183 (1940), the court ruled that a candidate for Las Vegas City Commission was eligible even though he was not a registered voter. Nevada statute required that one be a "qualified voter" in order to be eligible for this office. Ruling in favor of the individual's candidacy the court noted, "[t]he right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office." *Id.* at 165.

In *Gilbert*, the court looked to opinions from other jurisdictions and also looked at the use of the words at issue in other Nevada statutes. The court noted that there were arguments in support of both sides, but concluded that the plaintiff should be eligible for office "unless clearly ineligible under some constitutional or statutory provision. In the light of the authorities cited, we are unable to say it is clear that registration was required in order to constitute appellant a qualified voter . . . ." *Id.* at 172. The court recognized the ambiguity in the statutory language and applied the rule that ambiguities should be resolved in favor of a person's eligibility to hold public office. See also *Schur*, 57 Nev. at 291 (the right of the people to select from qualified citizens electors whomsoever they please to fill an elective office should not be limited except by legal provisions clearly limiting the right). This rule of construction is followed in many other jurisdictions. See, e.g., *People v. Ballard*, 164 Cal. Rptr. 81 (Cal. App. 1980) (the right to hold public office is a fundamental right and restrictions upon its exercise must be strictly construed); *Jarnigan v. Harris*, 226 S.E.2d 108

(Ga. Ct. App. 1976) (the right of a citizen to hold office is the general rule, ineligibility the exception); *Brimmer v. Thomson*, 521 P.2d 574 (Wyo. 1974) (it is the universally accepted rule that provisions which limit one's right to hold office must be construed in favor of the right of the voters to exercise their choice); *Ervin v. Collins*, 85 So. 2d 852 (Fla. 1956) (under all accepted rules of interpretation, doubts about a candidate's eligibility must be resolved in favor of eligibility); *Cannon v. Gardener*, 611 P.2d 1207, 1211 (Utah 1980) (statutes dealing with eligibility for office must receive a "liberal construction favoring freedom of choice in selecting public officials and also the right to aspire to and hold public office"); *State v. Dubuque*, 413 P.2d 972, 982 (Wash. 1966) (The constitution should be interpreted to "foster rather than curb and curtail the elective process. Eligibility should be preserved rather than denied.").

In interpreting the Nevada Constitution, the Nevada Supreme Court has rejected arguments seeking a literal or "plain meaning" interpretation. In *Sawyer* the court rejected the lieutenant governor's argument that the word "absence" in Nev. [Const. art. 5, § 18](#), of the constitution was unambiguous and should be literally interpreted to mean any physical absence from the State of Nevada. The court stated:

"Absence" is ambiguous. "Many words of common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. This word 'absence' is a fair example. It has been held that one may be absent, though actually present, as where a judge, though on the bench does not sit in the cause. He is there taken as absent in contemplation of law. It has also been held to mean 'not present.' It has been held, too, as not meaning 'out of the state only.'"

*Sawyer*, 82 Nev. at 56 (emphasis in original; citations omitted) (quoting *Watkins v. Mooney*, 71 S.W. 622 (Ky. 1903)).

The court looked to decisions in other states as well, and agreed the word "absence" used in this context means "effective absence," *i.e.*, where the governor is physically absent and where there is an immediate need for gubernatorial action. The court ruled that the lieutenant governor's action in convening a state grand jury when Governor Sawyer was out of the state for a few hours, was invalid.

It must be noted that under the holding in *Sawyer*, any absences from the State of Nevada by Governor Miller for meetings, vacations, etc., would not reduce the number of days he served as acting governor. Merely traveling out of state, whether for official or personal reasons, does not make the governor "effectively absent" so that the powers and duties of office devolve to the lieutenant governor pursuant to Nev. [Const. art. 5, § 18](#).

This office has examined the meaning of the word "absence" as used in Nev. [Const. art. 5, § 18](#), in a 1979 attorney general's opinion. At issue in that opinion was whether the lieutenant governor was entitled to compensation "as governor" when the governor would leave the State of Nevada. Op. Nev. Att'y Gen. No. 79-29 (Dec. 19, 1979).

Whenever then Governor List would leave the state, he would notify Lt. Governor Leavitt in writing. A copy of each notification letter was routinely sent to the accounting division of the department of general services and the lieutenant governor would receive payment "as governor" under [NRS 224.050\(2\)](#). *Id.* at p. 1. Citing *Sawyer*, the opinion concludes that the lieutenant governor is not entitled to be paid under [NRS 224.050](#) "as governor" unless it was necessary for him to perform a gubernatorial act. The opinion states:

[I]t is apparent that in Nevada a Lieutenant Governor can act as Governor in the Governor's absence from the State only when the Governor is effectively absent.

The Governor is effectively absent only when he is gone from the State and there is an immediate need for a specific act or function to be performed. It therefore follows that in order for the Lieutenant Governor to be entitled to the compensation allowed by [NRS 224.050](#), subsection 2 the Lieutenant Governor must perform some immediately needed specific act or function acting as Governor in the Governor's absence.

Under this interpretation, the Lieutenant Governor would be "actually employed as Governor," within the meaning of subsection 2 of [NRS 224.050](#), (a) at the moment there is an immediate need to exercise a gubernatorial power or duty during the Governor's absence from the State, (b) which power or duty must be performed at that particular moment and (c) which the governor is unable to perform.

*Id.* at 3. Thus, even though Miller may have been notified whenever Governor Bryan left the state, he did not serve as "acting governor" on those occasions since there was no "immediate need to exercise a gubernatorial power or duty" during those absences. The records of salary paid to Governor Miller when he was lieutenant governor do not reflect any payment pursuant to [NRS 224.050\(2\)](#) for service "as governor" before January 3, 1989.

The different meanings which may be ascribed to the word "years" have been recognized by courts. *See McKee v. Commission on Professional Competence*, 171 Cal. Rptr. 81 (Cal. App. 3d 1981) (the word "year" may be flexible in meaning in accordance with the statutory context in which it is used); *Hirbe v. Hazelwood School Dist.*, 532 S.W.2d 848, 850 (Mo. App. 1975) (the word "year" when used in context of schools, means "school year," not calendar year); *State v. Patterson*, 251 P.2d 123, 131 (Or. 1852) (The word year ordinarily means calendar year, but the meaning in all cases is dependent on the subject-matter and the connection in which the word is used. "It may mean a political year, or the period between two elections.") (*quoting* 62 C.J.S. *Time* § 13).

In examining other provisions of the Nevada Constitution, the word "years" is used several times with regard to the terms of office of elected officials. For example, in Nev. [Const. art. 4, §§ 3 and 4](#), the terms of office for Nevada legislators are defined as "[t]he members of the Assembly shall be chosen . . . on the Tuesday next after the first Monday in November and their term of office shall be two years from the day next after their election" and a senator's "term of Office shall be four Years from the day next after their election." The use of the word "years" and the apparent definition of the terms of office is similar to that for the office of governor.

Similarly, the term of office for a supreme court justice is not based upon a calendar year. The Nevada Constitution, art. 6, § 3, establishes that supreme court justices "shall hold office for the term of Six Years from and including the first Monday of January next succeeding their election."

The word "years" as used in these constitutional provisions cannot be interpreted to mean "calendar years," since to do so would produce absurd and unreasonable results, clearly not intended by the drafters. For example, the term for state assemblymen in 1976 would have begun on Wednesday, November 3, 1976, the day after the 1976 election. Using calendar years to calculate "two years" would indicate that the term of office for these assemblymen would end on November 2, 1978, some four days before the general election in 1978, which was held on November 7, 1978. Under this analysis, the state would not have a sitting assembly for the five day period of November 3 to November 7, until the new assemblymen would take office on November 8.

Continuing this analysis, if calendar years are used to calculate the length of terms, then these assemblymen should hold office from November 8, 1978, to November 7, 1980. However, the 1980 election occurred on November 4, so the assembly took office in accordance with Nev.

[Const. art. 4, § 3](#), on November 5, 1980. Therefore, if calendar years are used, the Nevada Assembly was twice its ordained size for the three days of November 5 until November 7, 1980. It cannot be reasonably argued that the drafters of the constitution intended that at times there would be no assembly, while at other times the assembly would be twice normal size.

A like analysis of senatorial terms, produces equally absurd results. The terms of senators do not correspond to an exact number of calendar days, but rather, in accordance with the constitution, the terms begin on the Wednesday following the general election every four years, *i.e.*, November 3, 1976; November 5, 1980; November 7, 1984; and November 9, 1988.

Similarly, the governor's term is not based upon calendar years and it may exceed or be less than exactly four "calendar years." As discussed hereinabove, the term of office for governor begins the first Monday of January following the general election without regard to "calendar years." If "calendar years" were adhered to, the State of Nevada would at times be without a governor and at other times would have two sitting governors.

Consider, for example, the two terms of Governor Grant Sawyer. Governor Sawyer began his first term on January 5, 1959, and ended it on January 6, 1963, the day before the first Monday in January four years later. If calendar years are used to calculate the length of the governor's term of office, he should serve 1,461 days (365 multiplied by 4 plus 1 day for leap year). However, from January 5, 1959, until January 6, 1963, Governor Sawyer in fact served 1,463 days, exactly two days too many if Nev. [Const. art. 5, § 3](#), in fact means "calendar years." Governor Sawyer's second term began on January 7, 1963, and ended on January 1, 1967, a period of 1,456 days, five days too few under the "calendar years" analysis. If, indeed, he was entitled to 1,461 days, then he would not have concluded his term until January 6, 1967, four days after Governor Laxalt was sworn in on January 2, 1967. Thus, Nevada would have had two sitting governors from January 2, 1967, until January 6, 1967. In accordance with the rules of interpretation established by the Nevada Supreme Court, Nev. [Const. art. 5, § 3](#), should be interpreted to avoid these absurd results. *Dovey*, 19 Nev. at 349.

Other states have reviewed similar provisions and have rejected the calendar year interpretation to avoid such absurd results. In *Temple v. Liquor Control Comm'n*, 230 N.E.2d 457 (Ohio 1965), the court construed a state law which provided that no local option election could be held more than once every "four years." In that case a local option election was held on November 8, 1960, the day of the general election. Another local option election was held at the next general election on November 3, 1964, which had the effect of modifying the outcome of the earlier election. The plaintiffs argued that since less than four full calendar years had passed between the two elections, the second election was invalid. The court, however, rejected this interpretation and cited a case which looked at the term "years" as it is used in defining legislative terms. The Ohio court stated: "In our opinion the language . . . 'no such [local option] election shall be held in any district more than once in each four years' has reference to political or election years and not to a computation of 365 days multiplied by 4 plus 1 [Leap Year]. *Id.* at 460. The court concluded that four "official" years had passed, as required by law, and therefore, the 1964 election was valid. *Accord Hops v. Poe*, 143 P. 1072 (Cal. App. 1915) (court recognized that when a statute used the term "year" in connection with local option election, it meant "political year" not "calendar year"; *Battle Creek Brewing Co. v. Board of Supervisors*, 131 N.W. 160 (Mich. 1911) (court held local option election which was held two days less than full two years was valid, because reference in statute to "two years" meant political years, not calendar years); *McNeely v. Commissioners*, 34 S.E. 510 (N.C. 1899) (court held local option election which was held two days less than full two years was valid, because it is similar to electing members of the legislature every two years; elections are held on the first Tuesday in November which may not be precisely two years if calendar days are counted).

In *Kirkpatrick v. King*, 91 N.E.2d 785 (Ind. 1950), the Indiana Supreme Court rejected the

suggestion that a constitutional provision relating to the office of sheriff should be interpreted to mean "calendar years" since other provisions of the constitution could not be reasonably interpreted to mean "calendar years." The Indiana court noted that the term "years" as used in the constitution to set the terms of office for senators, representatives and governor did not mean "calendar years," but rather "official years" was intended (*e.g.*, from the next day after the general election until the next day after the next general election, or from the first Monday in January after the general election until the first Monday in January after the next general election). *Id.* at 789.

In another case where the word "years" as used in a state constitution was at issue, the Supreme Court of Utah ruled that "official years" as opposed to "calendar years" was intended. *Crockett v. Tuttle*, 197 P. 900 (Utah 1921). The court ruled that the state auditor had improperly overpaid former state officials and improperly deducted three days pay from the new secretary of state, attorney general and other state officers whose terms were three days less than a calendar year. The court stated:

The Constitution fixes the beginning of the official year on the first Monday of January, and hence that year must end on the corresponding Monday of the following year, whether that day falls on the first day of the year or later, and this is so whether the official term is for one or ten years. Again, when the Constitution speaks of "years," it refers to official, as contradistinguished from calendar years.

*Id.* at 901-02.

#### CONCLUSION

Following the reasoning of these cases, it is clear that Nev. [Const. art. 5, § 3](#), can only be interpreted to mean official years and not by the simplistic means of calculating the number of days passed in a calendar year. As applied to Governor Miller, this interpretation would make him eligible to file for another term as governor.

The term of the office of governor runs from the first Monday in January to the first Monday in January four years later. Miller became acting governor on Tuesday, January 3, 1989. Thus, Miller served as acting governor for one day less than two years of Richard Bryan's official term of office. The first two years of Richard Bryan's term as governor ended on Monday, January 2, 1989. Had Governor Bryan resigned before January 2, 1989, then Miller would have served "more than two years of the term to which another person was elected" and would be ineligible to seek election to another term as governor. This conclusion is compelled both by the requirement that absurd and unreasonable results must be avoided in the interpretation of constitutional provisions, and by the presumption which favors eligibility for public office.

In conclusion, the word "years" as used in Nev. [Const. art. 5, § 3](#), means "official years" not "calendar years." Governor Bob Miller therefore, has not served "more than two years" of another person's term as governor and is eligible to seek reelection to the office of governor at the 1994 general election.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
Assistant Attorney General

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OPINION NO. 92-15 TAXATION; VEHICLES: The sales or use tax of a new vehicle is determined from its sale price, which does not include any "used vehicle trade-in allowance" given by the retailer, pursuant to [NRS 374.070\(3\)\(f\)](#). This applies to all retailers who give trade-in allowances, including retailers who do not maintain valid Nevada sales tax permits under [NRS 372.125](#) or 374.130, as well as out-of-state retailers.

Carson City, December 31, 1992

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, 1340 South Curry Street, Carson City, Nevada 89710-0003

Dear Mr. Comeaux:

The State of Nevada, through its Departments of Taxation and Motor Vehicles, has historically allowed a reduction in the sales price for the value of a used motor vehicle trade-in on the purchase of another motor vehicle from a retailer, pursuant to [NRS 374.070\(3\)\(f\)](#). However, no distinction has been made as to whether the retailer is located within the state or if the retailer holds a valid Nevada sales tax permit under [NRS 372.125](#) or [NRS 374.130](#). In addition, the Nevada Franchised Automobile Dealers Association has questioned the state's position, believing that the trade-in allowance should be limited to motor vehicles purchased from Nevada retailers.

In view of the foregoing facts, you have requested an opinion from this office on the following questions:

#### QUESTION ONE

Does [NRS 374.070\(3\)\(f\)](#) provide for a reduction in the sales price for the value of a vehicle<sup>18</sup> trade-in on the purchase of another vehicle from a retailer?

#### ANALYSIS

Chapter 374 of NRS, entitled "Local School Support Tax," together with chapter 372 on "Sales and Use Taxes," chapter 377 on the "City-County Relief Tax," and chapter 377A on the tax for "Mass Transit, Roads and Tourism" make up the component parts of the sales<sup>19</sup> and use<sup>20</sup> taxes imposed in this state. [NRS 374.070](#) defines the term "sales price." Subsection (3), lists those items *not* included within the sales price, specifically excluding "[t]he amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle." [NRS 374.070\(3\)\(f\)](#).<sup>21</sup>

Certainly, the language of [NRS 374.070\(3\)\(f\)](#) is clear and unambiguous and therefore requires no further construction beyond the language. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988). The sales price clearly does not include the value of the used vehicle trade-in.

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<sup>18</sup> NRS 374.107 defines "vehicle" to be "the meaning ascribed to it in NRS 482.135." NRS 482.135 defines "vehicle" as follows:

1. "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

2. The term does not include mobile homes or commercial coaches as defined in chapter 480 of NRS.

<sup>19</sup> See NRS 372.105, 374.110, 377.040(1), and 377A.030(1).

<sup>20</sup> See NRS 372.185, 374.190, 377.040(1), and 377A.030(1).

<sup>21</sup> The provisions of chapter 374 of NRS, the "Local School Support Tax," are also applicable to chapters 377 and 377A of NRS. See NRS 377.040(2) and 377A.030(2). However, it is important to note that the provisions of chapter 374, and more specifically NRS 374.070(3)(f), do not apply to chapter 372 of NRS. Thus, the two percent sales tax in NRS 372.105 would apply to the entire sales price of a vehicle, without regard to any trade-in allowance.

## CONCLUSION TO QUESTION ONE

The Departments of Taxation and Motor Vehicles have properly construed and applied [NRS 374.070\(3\)\(f\)](#) to permit a reduction in the sales price of a vehicle by the value of a used vehicle trade-in.

## QUESTION TWO

Is the "trade-in allowance" available in transactions with vehicle retailers who do not obtain a valid Nevada sales tax permit from the Department of Taxation?

## ANALYSIS

[NRS 374.130](#) sets forth the requirements for obtaining a valid sales tax or seller's permit as follows:

1. Every person desiring to engage in or conduct business as a seller within a county shall file with the department an application for a permit for each place of business, unless he intends to sell vehicles and will make fewer than three retail sales of vehicles during any 12-month period.
2. Every application for a permit must:
  - (a) Be made upon a form prescribed by the department.
  - (b) Set forth the name under which the applicant transacts or intends to transact business and the location of his place or places of business.
  - (c) Set forth such other information as the department may require.
3. The application must be signed by the owner if he is a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which must be attached the written evidence of his authority.

See also [NRS 372.125](#).

This statute merely requires a person desiring to conduct business as a seller<sup>22</sup> to obtain a permit from the Department of Taxation. However, the failure to obtain a seller's permit would not prevent the taxable transaction from being taxed. Nor does the seller's permit make a person desiring to engage in the business of selling taxable tangible personal property a retailer. The seller's permit merely provides proper licensing for "the privilege of selling tangible personal property at retail." [NRS 372.105](#); [NRS 374.110](#). Therefore, regardless of whether the person has obtained a valid seller's permit under [NRS 374.130](#) or 372.125, the activity is still taxable requiring the determination of a sales tax.

As discussed above, the sales tax is determined from the sales price. In the case of a used vehicle trade-in, the appropriate deduction for the value of the trade-in would have to be taken in order to determine the sales price and ultimately the sales tax.

## CONCLUSION TO QUESTION TWO

The "trade-in allowance" would be applicable to retailers who have failed, for whatever reason, to obtain a seller's permit under [NRS 372.125](#) or 374.130.

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<sup>22</sup> NRS 374.075 defines a "seller" to mean "every person engaged in the business of selling tangible personal property of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax." See also NRS 372.070.

### QUESTION THREE

Is the "trade-in allowance" applicable to transactions with out-of-state vehicle retailers?  
ANALYSIS

Transactions with out-of-state retailers invoke this state's use tax provisions. The use tax is intended to compliment the state sales tax by imposing a tax on "all property which was acquired out of state . . . which would have been a taxable sale if it had occurred within the state." [NRS 374.190\(2\)](#). See also [NRS 372.185\(2\)](#). The use tax is imposed on the storage, use or other consumption in a county of tangible personal property purchased out of state for storage, use or consumption in the state. [NRS 374.190\(1\)](#) (emphasis added). See also [NRS 372.185\(1\)](#). In *Great Am. Airways v. Nevada State Tax Comm'n*, [101 Nev. 422](#), 705 P.2d 654 (1985), the Nevada Supreme Court stated that the purpose of the use tax is "to prevent evasion of state sales tax, to equalize the [tax] burdens on interstate and intrastate transactions, and to expand the reach of the sales tax beyond the state boundaries." *Id.* at 427, n.5.

[NRS 374.060](#) defines a "retailer" as follows:

1. "Retailer" includes:

(a) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(b) Every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(c) Every person making any retail sale of a vehicle or more than two retail sales of other tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy.

2. When the department determines that it is necessary for the efficient administration of this chapter to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the department may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this chapter.

See also [NRS 372.055](#).

This statute does not distinguish between Nevada retailers or out-of-state retailers. This makes sense; in light of the application of the use tax to out-of-state transactions which would have been taxable sales if they had occurred in Nevada. Clearly, to limit the term "retailer" to in-state retailers would be contradictory to the purpose of the use tax, and thereby create a loophole or an exemption not specifically intended by the legislature.

### CONCLUSION TO QUESTION THREE

The "trade-in allowance" would be available to reduce the sales price of an out-of-state purchase of a vehicle by the corresponding value of the trade-in, in order to reduce the applicable use tax liability.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: JEFFREY R. RODEFER  
Deputy Attorney General

OPINION NO. 92-16 MAYORS; CITIES AND TOWNS; REDEVELOPMENT AGENCIES:  
The mayor cannot be appointed as a member of the Sparks Redevelopment Agency since he is not part of the legislative body of the city.

Carson City, December 31, 1992

The Honorable Steven P. Elliott, Sparks City Attorney, Post Office Box 857, Sparks, Nevada  
89432-0857

Dear Mr. Elliott:

When the Sparks Redevelopment Agency was created, the Sparks City Council declared itself to be the agency pursuant to [NRS 279.444](#). You have posed a question concerning the appropriate membership of the redevelopment agency.

#### QUESTION

In light of the provisions of [NRS chapter 279](#) and the Sparks City Charter ("Charter"), may the mayor of the City of Sparks serve on the city's redevelopment agency?

#### ANALYSIS

We concur with the analysis and conclusion provided by you in your opinion request. Based upon the legislative language set forth in [NRS chapter 279](#) and the Charter, we conclude that the mayor cannot be a member of the city's redevelopment agency.

It is our state legislature that determines the qualifications for members of a city's redevelopment authority. *See Collins v. Selectmen of Brookline*, 91 N.E.2d 747 (Mass. 1950). In the case of a redevelopment agency in our state, the legislature has provided alternative means of creating the membership of the legislative body for such an agency.

Pursuant to [NRS 279.440](#) the mayor, with the approval of the legislative body, may appoint five resident electors of the community as members of the redevelopment agency. This method was not used to create the Sparks Redevelopment Agency.

The method, which was utilized in the City of Sparks, is found in [NRS 279.444\(1\)](#).

As an alternative to the appointment of five members of the agency, the legislative body may, at the time of the adoption of a resolution pursuant to [NRS 279.428](#), or at any time thereafter, declare itself to be the agency, in which case all the rights, powers, duties and privileges and immunities . . . in an agency are vested in the legislative body of the community.

Under this statute, it is the "legislative body" of a city which may appoint itself as the redevelopment agency. "Legislative body" is defined in [NRS 279.396](#) as the city council, board of county commissioners, or other legislative body of a community. There is no language including a mayor as a member of that legislative body. In fact, the provisions of the Charter illustrate that the

mayor functions in the executive department and is not a member of the legislative body of the city.

Pursuant to section 2.010 of the Charter the legislative power is vested in the city council consisting of five councilmen. Under Charter section 2.060, it is the city council which makes and passes all ordinances and resolutions. Additionally, in Charter section 2.060(4), it is the city council that possesses the powers conferred on governing bodies of cities in the Nevada Revised Statutes.

In contrast, the mayor's powers and duties are set forth in section 3.010 of the Charter. That section is grouped into the executive branch sections of the city Charter. Additionally, section 3.010(1)(d) sets forth that the mayor may: "Perform such other duties as may be prescribed by ordinance or by the provisions of Nevada Revised Statutes which apply to a mayor."

#### CONCLUSION

The mayor cannot be appointed as a member of the redevelopment agency since he is not part of the legislative body of the city. The city council functions as the legislative body of the city pursuant to Charter section 2.010 and may serve as the redevelopment agency pursuant to Charter section 2.060(4) and [NRS 279.444](#).

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Deputy Attorney General

OPINION NO. 92-17 COSMETOLOGY; ADVERTISING: Cosmetologists may not lawfully perform manual lymph drainage massages; the Board of Cosmetology can restrict advertising of unregulated activities by a licensed cosmetological establishment.

Carson City, December 31, 1992

Ms. Bonnie Schultz, President, Board of Cosmetology, 1785 East Sahara Avenue, Suite 255, Las Vegas, Nevada 89104

Dear Ms. Schultz:

You have requested opinions from this office on the following issues: (1) whether a licensed aesthetician may perform manual lymph drainage massage; and (2) whether the Board of Cosmetology ("Board") has the authority to regulate salon advertising where the services being advertised are activities which are outside the practice of cosmetology, such as tattooing, reflexology and body massage.

#### QUESTION ONE

Can a licensed aesthetician perform manual lymph drainage massage?

#### ANALYSIS

An aesthetician is defined in [NRS 644.0205](#) as a "person" who engages in the practice of:

1. Beautifying, massaging, cleansing or stimulating the skin of the human body,

except the scalp, by the use of cosmetic preparations, antiseptics, tonics, lotions or creams or any device, electrical or otherwise, for the care of the skin;

2. Applying makeup or eyelashes to any person, tinting eyelashes and eyebrows and lightening hair on the body except the scalp; and

3. Removing superfluous hair from the body of any person by the use of depilatories, waxing or tweezers, but does not include the branches of cosmetology of a cosmetologist, electrologist or manicurist.

Based upon information provided to the Board, lymphatic drainage massage is represented as a system of massage that "helps move waste matter through the body through the lymphatic system, thus detoxifying the body." See *Introduction to Dr. Vodder's Manual Lymph Drainage*, Karl F. Haug Verlag GmbH & Co., Heidelberg 1982. The pamphlet indicates that lymphatic drainage massage involves applying gentle pressure along the main circulation channels of the lymphatic system in the face.

The massage, as represented, at least in part, suggests some therapeutic purpose, and, therefore, goes beyond "beautifying, massaging, cleaning or stimulating the skin of the human body." As such, the practice falls outside the scope of an aesthetician's license.

Furthermore, [NRS 630.020](#) defines the practice of medicine as:

1. To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.

2. To apply principles or techniques of medical science in the diagnosis or the prevention of any such condition.

Manual lymph drainage massage may, by the words themselves, suggest a form of medical treatment and as such would constitute the practice of medicine. Only professionals involved in the healing acts, who are properly licensed and practicing within the scope of their license, may engage in the diagnosis, treatment or prevention of human disease, ailment or infirmities. Licensed aestheticians are not included within the definition of a professional practicing within the healing acts. [NRS 629.031](#) defines "provider of health care" as:

[A] physician licensed under chapter 630, 630A or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, licensed marriage and family therapist, chiropractor, doctor of Oriental medicine in any form, medical laboratory director or technician, pharmacist or a licensed hospital as the employer of any such person.

It is unknown whether Dr. Vodder, the originator of manual lymph drainage massage, was a medical doctor. It is apparent from the descriptive pamphlet that the technique at issue was originally intended as a medical treatment for respiratory ailments. It is believed by the proponents of the technique that manipulation of the lymph system (admittedly interconnected with the digestive and circulatory systems) has other beneficial effects, particularly upon the skin. The treatment is claimed to be "useful in treating acne and similar skin disorders." While the condition of a person's skin may be of obvious concern to a licensed aesthetician, acne is a disease, and may, by law, be diagnosed and treated only by a licensed physician. The determination of the need for, and administration of, any treatment intended to affect an important internal system of the body such as the lymph system is plainly beyond the purview of an aesthetician.

#### CONCLUSION TO QUESTION ONE

It is, therefore, the opinion of this office that a licensed aesthetician may not, under the

scope of a cosmetology license, perform manual lymph drainage massage.

## QUESTION TWO

Does the Board have the authority to regulate salon advertising where the services being advertised are activities which are outside the practice of cosmetology, such as tattooing, reflexology and body massage?

## ANALYSIS

[NRS 644.024](#) defines "cosmetology" as "the occupation of a cosmetologist, aesthetician, electrologist or manicurist." [NRS 644.038](#) makes it unlawful for one to practice any profession other than cosmetology in a cosmetological establishment. Services such as tattooing and body massages do not fall within the definition of cosmetology. However, these services are often offered in an area adjacent to, or in close proximity to, the cosmetological establishment. The question presented is whether the Board may prohibit or restrict the advertising of those non-cosmetological services by the cosmetological establishment.

The Board's authority is limited to those activities prescribed in chapter 644. The Board cannot regulate activities which are beyond its statutory authority. An administrative agency may not interpret a statute so as to include persons or activities not intended to be within its purview nor may it give the statute any greater effect than its statutory language allows. *Boulware v. State, Dep't of Human Resources*, [103 Nev. 218](#), 219, 737 P.2d 502 (1987); *Southern Nev. Memorial Hosp. v. State, Dep't. of Human Resources*, [101 Nev. 387](#), 394, 705 P.2d 139 (1985). Activities being performed outside the cosmetological establishment and which are not themselves cosmetological services are outside the scope of the Board's regulatory authority.

However, advertisements by a licensed establishment which suggest, or imply, that all of the services being offered by the establishment are within the scope of the licensed and regulated activities may constitute deceptive advertising. Commercial speech, such as advertising, is protected speech under the First Amendment and a state may not restrict or restrain the flow of information which is presented in the form of truthful advertising. However, a state may, without violating the First Amendment, regulate commercial speech that is deceptive or misleading. There is no First Amendment right to disseminate such information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Federal Trade Comm'n v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1978), *cert. denied*, 426 U.S. 919 (1978). *Family Counseling Serv. Of Clark County, Nev., Inc. v. Rust*, 462 F. Supp. 77 (D. Nev. 1978).

Since advertisements by a cosmetological establishment which may create an impression that all of the services are activities regulated by the Board could be characterized as deceptive or misleading, such advertising could be regulated by the Board without being violative of the First Amendment. For instance, a regulation which requires disclosure in the advertisement of those specific services which are regulated by the Board would be a permissible form of state restriction on commercial speech. Additionally, this approach would satisfy the concern outlined above since the regulation would relate solely to those activities which are within the Board's statutory authority.

## CONCLUSION TO QUESTION TWO

Based upon the foregoing analysis, it is the opinion of this office that the Board could not blanketly prohibit certain advertising by a cosmetological establishment, however, the Board could adopt regulations which would require cosmetological establishments to disclose in their advertisements those services which are licensed or regulated by the Board.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: PAGE UNDERWOOD  
Deputy Attorney General

OPINION NO. 92-18 EMPLOYEES; MARRIAGE AND FAMILY THERAPIST EXAMINERS: An intern who is unlicensed and subject to direct supervision may be an employee rather than an independent contractor.

Carson City, August 5, 1992

Shirley Emerson, Ph.D., President, Board of Marriage and Family Therapist Examiners, 2585 East Flamingo Road, Suite 8, Las Vegas, Nevada 89121

Dear Dr. Emerson:

You have requested an opinion from this office concerning the legal relationship between an intern and a supervisor. Specifically, you have asked the following question:

QUESTION

Is the relationship between an intern and the supervisor one of an employer-employee, or, may the intern be employed by the supervisor as an independent contractor?

ANALYSIS

The respective roles and responsibilities for the supervisor and the intern are set forth in [NRS chapter 641A](#). [NRS 641A.220\(5\)](#) requires each applicant to furnish evidence that he has "at least 1 year of postgraduate experience in marriage and family therapy." Before an applicant is eligible for licensure, the applicant must "complete at least 1 year of supervised and documented experience in clinical practice." [NAC 641A.125](#). [NAC 641A.165](#) requires each trainee to have at least two supervisors and during the course of the supervision, the primary supervisor must meet with the trainee at least once every other week to discuss and evaluate the trainee's performance in his clinical practice; and the secondary supervisor must meet with the trainee for a minimum of 20 hours. [NAC 641A.165](#) requires that the supervision relate directly to a review of the intern's clinical practice.

[NAC 641A.175](#) delineates the specific responsibilities of the supervisor. The supervisor must ensure that: (a) the work of the trainee in his clinical practice is conducted in an appropriate professional setting, (b) the work of the trainee is consistent with the standards of the profession, and (c) the trainee is familiar with the current literature concerning human development, the pathology of behavior, the theory of personality, human sexuality, marriage and family therapy and professional ethics. The supervisor may analyze the performance of the trainee through information obtained from: (a) direct observation or participation in his clinical practice, (b) his notes, or (c) audio and visual recordings of his actual sessions with a client. [NAC 641A.185](#) provides that the supervisor may agree to provide or to continue the supervision of a trainee only if he believes that the trainee will qualify for licensure and will uphold the professional and ethical standards of the practice of marriage and family therapy.

Whether an employer-employee relationship exists is an issue which has been examined in a number of different areas, such as federal income withholding taxes, federal social security withholding taxes, the state's workmen's compensation law, as well as general tort liability based upon the doctrine of *respondeat superior*. In general, the common law factors ordinarily used in determining the master-servant relationship for purposes of the doctrine of *respondeat superior* have been employed by the courts and the various federal agencies. These factors are set forth in Restatement (Second) of Agency § 220 (1958) as follows:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) The extent of control which, by the agreement, the master may exercise over the details of the work; (b) Whether or not the one employed is engaged in a distinct occupation or business; (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is a part of the regular business of the employer; (i) Whether or not the parties believe they are creating the relation of master and servant; and (j) Whether the principal is or is not in business.

Although the other factors are to be considered, the Restatement provides that the right to control is the determinative factor.

Similarly, in agency rulings and court cases involving federal social security withholding and federal income tax withholding, an employer and employee relationship has been found where the person for whom services are performed possesses the right to control and direct the activities of an individual who performs the services. *See generally*, Annotation, *Tax Withholding--"Employees"*, 51 A.L.R. Fed. 59 (1981); Annotation, *Labor--Fair Labor Standards Act--Who Is "Employee"*, 51 A.L.R. Fed. 702 (1981); *United States v. Polk*, 550 F.2d 566 (9th Cir. 1977).

*Polk* involved an appeal from a United States district court which held that the fundamental test of an employer relationship in determining the obligation to make withholdings from wages for social security and income tax is the common law test of the right to control the worker's activity with regard to both the result and the means by which the result is accomplished.

In the health care setting, the Internal Revenue Service ("IRS") has ruled that health care providers such as anesthetists, dental hygienists, nurses and physicians may be considered employees for tax withholding purposes if their activities are subject to direction and control of another. *See generally*, 51 A.L.R. Fed. 59, *citing* Rev. Rul. 57-380, C.B. 1957-2 p. 634; Rev. Rul. 58-268, C.B. 1958-1 p. 353; Rev. Rul. 75-41, C.B. 1975-1 p. 323; Rev. Rul. 75-41, C.B. 1975-1 p. 323; Rev. Rul. 75-101, C.B. 1975-1 p. 318; Rev. Rul. 57-21, C.B. 1957-1 p. 317. In these rulings, the IRS has noted that although professionals offering services to the public are generally considered independent contractors, the requisite relationship may exist where they may become employees where one retains a right of direction and control over their work.

A similar analysis has been employed by the Nevada courts in determining coverage under the state's workmen's compensation act. In general, the courts have looked at five different factors, including: the degree of supervision, the source of the worker's wages, the existence of a right on the part of the putative employer to hire and fire the worker, the extent to which the worker's activities further the general business concerns of the putative employer, and the putative employer's right to control the hours and location of employment, *Clark County v. State Indus. Ins. Sys.*, [102 Nev. 353](#), 724 P.2d 201 (1986); *Montgomery v. Ponderosa Constr.*, [101 Nev. 416](#), 705 P.2d 652 (1985); *Antonini v. Hanna Indus.*, [94 Nev. 12](#), 573 P.2d 1184 (1978); *Whitley v. Jake's*

*Crane & Rigging, Inc.*, [95 Nev. 819](#), 603 P.2d 689 (1979). Particular importance, however, has been given to the authority to supervise. The inability of the alleged employer to control the activities of the individual has been considered "highly persuasive" in determining whether an employer-employee relationship exists for workmen's compensation purposes. *Clark County*, 101 Nev. at 354, *citing Montgomery*, 101 Nev. at 416.

The current regulations mandate that the intern be subject to supervision throughout his internship by both the primary and secondary supervisor. The level of supervision required must be such that the supervisor is able to ensure that the work is being conducted in an appropriate setting; that the work meets the applicable standard of care; and that the intern is familiar with the current literature in the field of marriage and family therapy and current standards of professional ethics. [NAC 641A.175](#). The regulations also provide that the supervisors may unilaterally terminate the internship if the supervisor believes that the intern would not qualify for licensure and, if licensed, would not uphold the professional and ethical standards of the practice of marriage and family therapy. [NAC 641A.185](#).

The regulations create a relationship which involves a substantial degree of supervision, including a right on the part of the supervisor to directly observe or participate in the intern's clinical sessions. [NAC 641A.175](#). Based upon the various agency rulings and court decisions as discussed above, this level of supervision, combined with the supervisor's unilateral right to terminate the relationship, may create an employer-employee relationship. It is not the intent of this office in issuing this opinion to conclude that the various federal and state agencies would, in fact, find that an employer-employee relationship exists, but rather to point out that the Board's regulations present the potential for such a finding by these agencies.

The issues relating to the possible tax consequences and the possible liability under the state's workmen's compensation act present serious concerns, particularly to the private practitioner; however, the Board must also recognize its obligation to protect the public from unqualified and incompetent therapists. The legislative declaration in [NRS 641A.010](#) states: "The practice of marriage and family therapy is hereby declared a learned profession, *profoundly affecting public safety and welfare and charged with the public interest, and therefore subject to protection and regulation by the state.*" [Emphasis added.]

The stated purpose of [NRS chapter 641A](#) must be considered in the construction of any statutes or regulations adopted under this chapter. *Hotel Employees & Restaurant Employees Int'l Union v. State ex rel. Nev. Gaming Control Bd.*, [103 Nev. 588](#), 591, 747 P.2d 878 (1987); *Alper v. State ex rel. Dep't of Highways*, [96 Nev. 925](#), 928, 621 P.2d 492 (1980). The apparent intent of the regulations in creating the supervisor-intern relationship is to establish a system that requires that the therapist just out of his educational training receive continuous monitoring and supervision in his clinical practice by someone who is qualified and experienced. By employing interns as independent contractors, the supervisor may be attempting to create a contractual arrangement where the degree of control and supervision is reduced in order to limit the supervisor's responsibilities and perhaps liability. This arrangement does not appear to satisfy the intent of the regulations.

More importantly, the practical effect of employing the intern as an independent contractor is that the intern is operating in a private setting, largely unsupervised, *before he is licensed*. [NAC 641A.125](#) requires one year of supervised clinical practice *before* an applicant is eligible for licensure. Hiring the intern as an independent contractor not only allows the intern to engage in unlicensed activities, but also does not adequately protect the public from these inexperienced and unlicensed therapists. On the other hand, if the supervisor was, in fact, the employer he would be accepting full legal responsibility for the acts and conduct of the intern and the intern would be operating under the scope and protection of the supervisor's license.

It also bears noting that the practice of hiring an intern as an independent contractor may be based upon an erroneous assumption that such a contractual arrangement eliminates the supervisor's potential liability. Regardless of whether an actual employment relationship exists, under the doctrine of *respondeat superior*, the supervisor may be treated as the employer and may be held legally responsible for negligent acts committed by the intern. In *Meagher v. Garvin*, [80 Nev. 211](#), 391 P.2d 507 (1964), the Nevada Supreme Court held that under the doctrine of *respondeat superior* a private employer could be held liable for the negligence of a person who was not in the employ of the private employer where the non-employee was acting in furtherance of the employer's business. In *Meagher*, the employer was held liable for the negligence of an unauthorized non-employee driver who was involved in a fatal automobile accident.

In elaborating upon its decision in *Meagher*, the court stated in *National Convenience Stores, Inc. v. Fantauzzi*, [94 Nev. 655](#), 657, 584 P.2d 689 (1978), that Nevada's policy rationale for the doctrine of *respondeat superior* is grounded on the theory of control. The court stated:

The term "control" has been applied to establish the master-servant relationship itself, the *sine qua non* [an indispensable requisite or condition] of the *respondeat superior* doctrine. Succinctly stated, the employer can be vicariously responsible for only the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the "employee" is under the control of the "employer." *Martarano v. United States*, 231 F.Supp. 805 (D.Nev. 1964).

The court further stated, citing *Wells, Inc. v. Shoemaker*, [64 Nev. 57](#), 64, 177 P.2d 451 (1947):

The relation between parties to which responsibility attaches to one, for the acts of negligence of the other, must be that of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the *control* of the former. The responsibility is placed where the power exists. Having power to control, the superior or master is bound to exercise it to the prevention of injuries to third parties, or he will be held liable. [Emphasis added.]

Based upon these Nevada decisions, once it is found that the supervisor exercised sufficient control over the intern who would not otherwise be deemed an "employee," the intern will be regarded as an "employee" under the doctrine of *respondeat superior*, and the supervisor will be vicariously liable for the negligent acts of that intern. Thus, the apparent benefits of hiring the intern as an independent contractor may be illusory.

#### CONCLUSION

The level of supervision of intern by the primary and secondary supervisor may create an employer-employee relationship for tax purposes as well as for general tort liability. But, more importantly, the Board has a statutory duty to ensure that the public is protected from incompetent and unqualified therapists. The employment of interns as independent contractors has allowed interns to set up their own private practices, largely unsupervised. Such arrangements do not adequately protect the public. Accordingly, it is the recommendation of this office that interns should not be employed as independent contractors.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: PAGE UNDERWOOD

Deputy Attorney General

OPINION NO. 92-19 CRIMINAL LAW; PROBABLE CAUSE DETERMINATION: Neither a formal adversarial proceeding nor a personal appearance by the defendant are required for determining probable cause for a warrantless arrest, as long as the determination is made by a magistrate and a formal record of the basis of the probable cause determination is made and maintained.

Carson City, January 28, 1992

The Honorable Keith Loomis, Lyon County District Attorney, Lyon County Courthouse, 31 South Main Street, Yerington, Nevada 89447

Dear Mr. Loomis:

You have requested an opinion from the Attorney General addressing the procedures necessary to comply with the 48-hour probable cause hearing following a warrantless arrest, as mandated by the United States Supreme Court decision in *Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

DISCUSSION OF RIVERSIDE DECISION

Facts/Issues

McLaughlin brought a class action suit seeking injunctive and declaratory relief on behalf of persons who had been arrested without a warrant and who remained in custody without a prompt probable cause determination. The class action consisted of "all present and future prisoners in the Riverside County jail including those pretrial detainees arrested without warrants and held in the Riverside County jail from August, 1, 1987, to the present, and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings." *Riverside*, 111 S. Ct. at 1664. The Supreme Court found that McLaughlin's class action had standing because the "relation back" doctrine was properly invoked to preserve the case's merits for judicial resolution.

At issue in the *Riverside* case was the Riverside County policy of combining probable cause determinations with its arraignment procedures. Under county policy, "arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest." This two-day requirement excluded from its computation holidays and weekends. As a result, it was possible for a suspect to remain detained for as long as five days, and over Thanksgiving, up to seven days, before a probable cause determination would be made on the suspect's warrantless arrest. *Id.* at 1665. Pertinent to your request, the Court addressed the issue of determining whether Riverside County's policies and practices comported with the Fourth Amendment requirements of providing a "prompt" probable cause determination, as articulated by the Court in *Gerstein v. Pugh*, 420 U.S. 107 (1975). *Id.*

Ruling

"[J]udicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges." *Id.* at 1670. "[I]ntervening weekends" do not qualify as an extraordinary circumstance for delay of a probable cause determination beyond 48 hours. *Id.*

Argument/Analysis

The issue to be resolved by the Court in *Riverside* was what is "prompt" under the *Gerstein* interpretation of the Fourth Amendment. *Id.* at 1665. The *Riverside* Court relies almost exclusively on the language and analysis utilized previously in its *Gerstein* opinion. In *Gerstein* the Court held unconstitutional a Florida procedure under which persons arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause. The Court balanced the state's interest in protecting public safety by detaining those persons who are reasonably suspected of having engaged in criminal activity, against the interests of suspects, whose prolonged detention based on incorrect or unfounded suspicion might unjustly imperil their jobs, interrupt their source of income, and impair their family relationships. *Gerstein*, 420 U.S. at 114. The *Gerstein* Court held: "[States] must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125.

The *Gerstein* decision left the determination of the definition of "prompt" open to the discretion of the individual states. *Id.* The *Riverside* Court narrowed *Gerstein* by defining "prompt" judicial determination of probable cause as 48 hours from the time of the warrantless arrest. *Riverside*, 111 S. Ct. at 1665, 1670.

The *Riverside* Court also notes, however, that even hearings conducted within 48 hours may be challenged if the arrested individual can prove that his probable cause determination was delayed unreasonably within that 48 hours. *Id.* at 1670. A 48-hour rule creates only an immunity from systemic challenges to the promptness of the probable cause determination. *Id.* Where the probable cause determination is not made within 48 hours, the burden shifts to the "government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance," that prevented the determination from being made within 48 hours. *Id.* Unreasonable delays may include gathering additional evidence to support an arrest, a delay motivated by ill will, or delay just for delay's sake. Weekends and holidays are not extraordinary circumstances justifying delay beyond the 48 hours. *Id.*

The *Riverside* opinion gives rise to certain questions of application in Nevada, as posed by your request for an Attorney General opinion. First, whether the detainee must personally appear before a magistrate for a probable cause determination following a warrantless arrest, and second, can probable cause be established by the magistrate through affidavit or declaration of probable cause for arrest and detention made to or before the magistrate, either orally or in writing, by the arresting officer after the warrantless arrest?

#### QUESTION ONE

Must the detainee personally appear before a magistrate for a probable cause determination following a warrantless arrest?

#### ANALYSIS

The *Riverside* opinion places an outer range of 48 hours within which a probable cause determination must be made on a warrantless arrest. The 48-hour period applies to a determination of probable cause for the arrest only, and not to other pretrial procedures, although the determination may be combined with bail hearings and arraignments. *Id.* There is no language in the *Riverside* decision to indicate that there need be a personal appearance by the suspect before the magistrate in order to make the probable cause determination regarding the warrantless arrest.

However, the underlying court of appeal's decision in *Riverside* and *McGregor v. San Bernardino*, 888 F.2d 1276 (9th Cir. 1989), does address and discuss the counties' policies of requiring an arrestee's attendance at the probable cause determination as follows:

The Supreme Court in *Gerstein* did not hold that the fourth amendment affords

arrestees the right to attend a probable cause determination. The Supreme Court based its holding that warrantless arrestees must receive a prompt probable cause determination upon the premise that warrantless arrestees should be treated on a par with those arrested with a warrant. *Gerstein*, 420 U.S. at 120, 95 S. Ct. at 866 . . . . Those arrested with a warrant have not attended the probable cause determination made before issuance of the warrant. We perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right . . . presence is not constitutionally mandated. Our decision in the case at bar complies with our decision in *Bernard [v. City of Palo Alto]*, 699 F.2d [1023] at 1024 [(9th Cir. 1983)], where we upheld a probable cause determination for warrantless arrestees by ex parte affidavit.

*Id.* at 1279.

The Ninth Circuit Court of Appeal's decision that the arrestee need not be present at the probable cause determination is not modified by the Supreme Court's decision in *Riverside*. In addition, there appears to be no requirement by the Nevada statutes that a personal appearance be had for the probable cause determination.

[NRS 171.174](#) requires an appearance for admission to bail after a warrantless arrest, as follows:

If the arrest is without a warrant, the prisoner shall without unnecessary delay be taken before a municipal court or a justice of the peace or other magistrate of the county wherein such an arrest was made, and such court shall admit such person to bail, if the offense is bailable, by taking security by way of recognizance for the appearance of such prisoner before the court having jurisdiction of such criminal offense.

The appearance for setting bail required by [NRS 171.174](#) must be made within 72 hours pursuant to [NRS 171.178](#), as follows:

1. Except as provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

4. When a person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith.

5. Except as provided in [NRS 178.487](#) [bail after arrest for felony offense committed while on bail], where the defendant can be admitted to bail without appearing personally before a magistrate, he must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.

[NRS 171.178](#), when read in its entirety, does not address an appearance for probable cause determination following a warrantless arrest and is, therefore, not affected by the *Riverside* opinion.

The *Riverside* decision similarly does not specifically require a "personal appearance" before the magistrate for purposes of determining probable cause for arrest and does not modify the underlying court of appeals' decision that specifically states that no personal appearance is required.

The appearance for bail setting mandated by [NRS 171.178](#) falls under the "other pretrial" procedure category discussed in *Riverside* as appropriate to combine with the probable cause determination as feasible, but the opinion does not require a combination of such proceedings, nor does it require that such other proceedings be conducted within 48 hours. *Riverside*, 111 S. Ct. at 1670-71. "The [*Gerstein*] Court explained that 'flexibility and experimentation' were 'desirab[le]'; that '[t]here is no single preferred pretrial procedure'; and that 'the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole.' *Gerstein*, 420 U.S. at 123." *Id.* at 1669.

### CONCLUSION TO QUESTION ONE

The *Riverside* decision does not appear to require a personal appearance before a magistrate for purposes of making the determination of probable cause for the warrantless arrest.

### QUESTION TWO

Can probable cause be established by the magistrate through affidavit or declaration of probable cause for arrest and detention filed by the arresting officer after the warrantless arrest and would an oral affidavit recorded in the presence of the magistrate be sufficient?

### ANALYSIS

The *Riverside* opinion, itself, is vague as to what proceedings are necessary for the magistrate to make a probable cause determination. The Court substitutes the term "hearing" for "determination" at several points in the opinion but never clearly specifies what procedures will satisfy the hearing or determination requirement. The *Gerstein* decision, however, clearly discusses what procedures are necessary to make a prompt probable cause decision and the *Riverside* decision merely narrows the *Gerstein* requirements by requiring that the determination be made within 48 hours of the arrest. It does not narrow *Gerstein's* analysis for how that probable cause determination is to be made procedurally.

The *Gerstein* Court acknowledged that the adversarial safeguards (counsel, confrontation, cross-examination, and compulsory process for witnesses) are not essential for the probable cause determination required by the Fourth Amendment, as follows:

The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard--probable cause to believe the suspect has committed a crime--traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony. The Court has approved these informal modes of proof.

*Gerstein*, 420 U.S. at 119-20.

The probable cause determination regarding arrest is not a critical stage of the proceeding. "The use of an informal procedure to determine probable cause is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself." *Id.* at 121. "The probable cause determination is not a 'critical stage' in the prosecution . . . . 'Critical stages' are those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." *Id.* at 122. Although:

[C]onfrontation and cross-examination might . . . enhance the reliability of probable cause determinations in some cases . . . [i]n most cases, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

*Id.* at 121-22.

Standards and procedures for arrest and detention are derived from the Fourth Amendment. *Id.* at 111. The standard for arrest is probable cause defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Id.* (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). See [NRS 171.178](#), and see Nev. [Const. art. 1, § 18](#).

The magistrate may issue an arrest warrant based upon an affidavit that establishes probable cause for the affiant's belief that an offense has been committed and for the affiant's belief that the suspect to be arrested committed the offense. Specifically, [NRS 171.106](#) provides:

If it appears from the complaint or a citation issued pursuant to [NRS 484.795](#), [488.360](#), or 501.386, or from an affidavit or affidavits filed with the complaint or citation that there is probable cause to believe that an offense, triable within the county, has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall be issued by the magistrate to any peace officer.

Relying upon [NRS 171.106](#) and upon the authority in *Gerstein* as referenced by *Riverside*, a post-arrest determination that there was probable cause for the arrest can reasonably be made based upon an affidavit of probable cause. Although not specifically addressed by either *Riverside* or *Gerstein*, the magistrate's determination apparently does not need to be made based upon a written affidavit of probable cause. As long as a record is made and preserved for appellate review of what the basis of the probable cause was and of what was relied upon by the magistrate in making his determination of probable cause, whether the sworn statement of probable cause is written or oral, appears to make no significant difference in the validity of the determination and the arrest may be deemed valid.

#### CONCLUSION TO QUESTION TWO

The probable cause determination may be decided by a magistrate in a nonadversarial proceeding based upon hearsay testimony, either orally or in writing. A formal adversarial proceeding is not necessary to comport with the Fourth Amendment requirements for determining probable cause, as long as a record of the basis of the probable cause determination is made and maintained.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: STEPHANIE TUCKER  
Deputy Attorney General

OPINION NO. 92-20 TAXATION; FREE PORT LAW: The provisions of [NRS chapters 369](#), 370, 372, 374, 377 and 377A do not apply to the operation of a federally licensed and bonded warehouse and duty-free shop selling liquor, cigarettes and other items of tangible personal property to persons who will be immediately departing McCarran International Airport for a destination

outside the United States. However, the provisions of [NRS chapter 364A](#) do apply to the operation of such a bonded warehouse and duty-free shop.

Carson City, February 21, 1992

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, Capitol Complex,  
Carson City, Nevada 89710-0003

Dear Mr. Comeaux:

The Department of Taxation has recently learned that a business will soon be opening a retail "duty-free" shop at McCarran International Airport in Las Vegas in the international terminal. The business will be selling imported goods such as liquor, perfume and leather goods, as well as domestically produced alcoholic beverages and cigarettes. The business stores its imported and domestic goods at its federally bonded warehouse in California free from duties imposed by the United States Customs Service and excise taxes imposed by the Internal Revenue Service. The duty-free shop planned for the international terminal at McCarran will also be a federally bonded warehouse under the provisions of 19 U.S.C. § 1555 (1991), and will be supplied by the warehouse in California. The duty-free shop will sell goods only to airline passengers holding tickets for a flight departing for a destination outside the United States. The customers will receive their purchases as they are boarding their flight. The business is fully licensed and bonded with the appropriate federal agencies to operate a bonded warehouse and duty-free retail operation.

In view of the foregoing, you have requested an opinion from this office on the following question.

#### QUESTION

Is a retailer operating a federally bonded duty-free shop selling cigarettes, liquor and other items of tangible personal property to airline passengers departing the country subject to the provisions of [NRS chapters 364A](#), 369, 370, 372, 374, 377 and 377A?

#### ANALYSIS

The answer to the foregoing question depends on an analysis of whether the federal statutory and regulatory scheme governing the import and export of goods from this country preempts the state's ability to tax and regulate the retailer in this situation. The United States Supreme Court considered this issue in *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982), a case closely analogous in part to the situation presented here.

In that case, Xerox Corp. manufactured and assembled copiers in Mexico which were shipped to Xerox's federally bonded warehouse in Houston, Texas, where they were stored duty free pending sale. All of these copiers were specifically segregated and designated for export and sale in Latin America. The City of Houston and the County of Harris, Texas, attempted to assess ad valorem property taxes against these copiers.

The United States Supreme Court invalidated the tax, holding that the city's and county's attempts to tax the copiers was preempted by Congress's comprehensive regulation of customs duties. *Id.* at 154. The Court initially noted that Congress created the duty-free warehouse system for the purpose of stimulating "foreign commerce by allowing goods in transit in foreign commerce to remain in secure storage, duty free, until they resumed their journey in export." *Id.* at 150. The ultimate goal of this policy was to make the United States a center of world commerce to the concomitant benefit of American commerce. *Id.* at 151.

The Court then posed the critical inquiry:

The question is whether it would be compatible with the comprehensive scheme Congress enacted to effect these goals if the states were free to tax such goods while they were lodged temporarily in Government-regulated bonded storage in this country.

*Id.* The Court relied on its prior opinion in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940),<sup>23</sup> in reaching the conclusion that allowing the local assessment of ad valorem property taxes on imported copiers destined for export would be incompatible with the federal policy, and so held the tax preempted by federal law:

The analysis in *McGoldrick* applies with full force here. First, Congress sought, in the statutory scheme reviewed in *McGoldrick*, to benefit American industry by remitting duties otherwise due. The import tax on crude oil was remitted to benefit oil refiners employing labor at refineries within the United States, whose products would not be sold in domestic commerce. Here, the remission of duties benefited those shippers using American ports as transshipment centers. Second, the system of customs regulation is as pervasive for the stored goods in the present case as it was in *McGoldrick* for the refined petroleum. In both cases, the imported goods were segregated in warehouses under continual federal custody and supervision. Finally, the state tax was large enough in each case to offset substantially the very benefits Congress intended to confer by remitting the duty. In short, freedom from state taxation is as necessary to the congressional scheme here as it was in *McGoldrick*.

Although there are factual distinctions between this case and *McGoldrick*, they are distinctions without a legal difference. We can discern no relevance to the issue of congressional intent in the fact that the fuel oil in *McGoldrick* could be sold only as ships' stores whereas Xerox had the option to pay the duty and withdraw the copiers for domestic sale, or that in *McGoldrick* the city sought to impose a sales tax and here appellees assessed a property tax.

*Xerox*, 459 U.S. at 153 (footnote omitted).

In the situation at hand, the business will be operating an "airport store," defined in 19 U.S.C. § 1555(b)(8)(A) (1991) as "a duty free sales enterprise which delivers merchandise to, or on behalf of, individuals departing from the customs territory from an international airport located within the customs territory." It will be selling products imported into the United States on which no federal duty or federal tax has been paid which will be immediately taken by the purchaser out of the country. Thus, the factual situation, at least as to the imported goods the business intends to sell, is not materially different than that in *McGoldrick* and *Xerox*.

As noted above, the business will also be selling domestically produced alcoholic beverages and cigarettes at its duty-free shop. Federal law provides for domestic manufacturers of these goods to sell them under customs bonds for purposes of export from the country without the payment of federal excise taxes. *See generally* 19 U.S.C. § 1311 (1991); 27 C.F.R. § 252.1 (1993) *et seq.* The business will acquire the domestically produced goods from the bonded stock of the manufacturer, store them in its bonded warehouse in California with its imported goods, and then ship them to its bonded warehouse "airport store" at McCarran International Airport in Las Vegas for sale to passengers departing for foreign destinations.

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<sup>23</sup> *McGoldrick* involved New York's attempt to impose a sales tax on the sale of fuel oil to ships in foreign commerce. Gulf imported crude oil which it then refined under bond into fuel oil. None of the oil was made available for domestic consumption. The Court held the tax preempted by federal law.

At the time the current subsection (b) of 19 U.S.C. § 1555 (1991) was enacted, Congress also included the following statement of intent:

(a) Findings. The Congress finds that:

- (1) duty-free sales enterprises play a significant role in attracting international passengers to the United States and thereby their operations favorably affect our balance of payments;
- (2) concession fees derived from the operations of authorized duty-free sales enterprises constitute an important source of revenue for the State, local and other governmental authorities that collect such fees;
- (3) there is inadequate statutory and regulatory recognition of, and guidelines for the operation of, duty-free sales enterprises; and
- (4) there is a need to encourage uniformity and consistency of regulation of duty-free sales enterprises.

Act of Aug. 23, 1988, Pub. L. 100-418, Title I, Subtitle H, Part 1, § 1908(a), 102 Stat. 1315 (1988).

Congress has thereby clearly indicated that it considers duty-free shops located at international airports in this country an important element of foreign commerce. Permitting the state to subject the sale of both imported and domestic goods to departing passengers in federally bonded airport stores to state sales and excise taxes would largely offset the benefit provided by Congress in allowing these goods to be sold to airline passengers leaving the United States free of federal import duties and excise taxes.

Federal law also preempts the state's authority to impose many of its regulatory requirements and duties on a business operating a federally bonded airport store. For example, in *3M Health Care, Ltd. v. Grant*, 908 F.2d 918 (11th Cir. 1990), the court held that the federal Foreign Trade Zones Act (19 U.S.C. §§ 81a-81u) preempted Florida's regulatory power to inspect and seize pharmaceutical and other products that failed to meet state law requirements from customs bonded warehouses situated in federally designated foreign trade zones where the products had been imported into the United States solely for export. A significant basis for the court's conclusion rested on the fact that such goods were not intended for sale, distribution or consumption within the United States in general, or the State of Florida in particular. *Grant*, 908 F.2d at 921. Therefore, the state could demonstrate no interest in regulating these products. *Id.* at 922.

In *Division of Beverage, Dep't of Business Regulation v. Bonanni Ship Supply, Inc.*, 356 So. 2d 308 (Fla. 1978), the Supreme Court of Florida invalidated a Florida statute under the Commerce Clause which purported to give the state the power to license exporters of "in bond" liquor. The state was attempting to exact an annual license fee and bond to cover potential tax liabilities. *Id.* at 310. The court noted that since the liquor was being stored under bond for export outside the United States and none of it was destined for domestic consumption in Florida, the state had no interest in regulating the business. *Id.* The federal government's regulatory authority over the activities of a business importing and exporting liquor under bond fulfilled all the legitimate state regulatory concerns. *Id.* at 310-11.

Chapters 369 and 598 of NRS give the state regulatory authority over the import and sale of alcoholic beverages in Nevada. Of particular significance are [NRS 598.351-.359](#), 369.388 and 369.485, which together impose a strict three-tiered liquor distribution system for alcoholic beverages imported and sold for consumption in Nevada. Since the alcoholic beverages intended for sale in the bonded airport store are not intended for consumption in Nevada, and are sold under strict federal regulations designed to prevent their distribution and consumption in Nevada, the state's regulatory authority over the import and sale of these products is preempted.

Similarly, cigarette sales in Nevada are regulated under the provisions of chapter 370 of NRS. Since these regulatory laws are directed at cigarettes that are imported into Nevada for sale and consumption here, federal law preempts their application to bonded cigarettes imported for purposes of export sales at the airport store.

However, it is our opinion that federal law does not preempt the state's ability to impose its business license tax on the business' activities in Nevada pursuant to chapter 364A of NRS. The business tax is directed at all Nevada businesses for the privilege of doing business in the state. [NRS 364A.140\(1\)](#). Imposition of this tax does not interfere in any way with the federal government's regulation of the federally bonded airport store, nor does it interfere with the policies of the federal government in permitting duty-free sales enterprises to sell goods free of federal duties and excise taxes. The measure of the business tax, the number of employees performing their duties in Nevada, does not lend itself to creating a direct burden on the sale of these goods, as does a sales tax.

### CONCLUSION

It is the conclusion of this office that the Department of Taxation is preempted by federal law from taxing or otherwise regulating the sale of imported goods or domestically produced beverages and cigarettes acquired under bond taking place at a federally bonded airport store located at McCarran International Airport, where the goods are intended for export and will be immediately taken from the United States for consumption elsewhere. Therefore, the business operation of the "duty-free" shop is not subject to the provisions of chapters 369, 370, 372, 374, 377 or 377A of NRS. However, the business is subject to the provisions of chapter 364A of NRS and to the license fee and tax imposed thereunder.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Deputy Attorney General

OPINION NO. 92-21 PUBLIC LANDS; MINING; PERMITS: A right of access across public land can be regulated by permit or otherwise as long as the burden imposed by the regulation does not amount to a taking; the federal land management agencies have authority to require closure of existing access as part of mining reclamation when closure bears some relationship to reclamation of the disturbed area and would not effect a taking.

Carson City, April 13, 1992

Mr. Russell A. Fields, Executive Director, Department of Minerals, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Fields:

By your letter dated January 22, 1992, you have asked for an opinion regarding the authority of federal land management agencies to regulate use of historic public land access in the State of Nevada. You have also inquired whether the federal agencies may require mining reclamation to include closure of historic access routes. This opinion is offered in answer to your questions.

QUESTION ONE

May federal land management agencies require a permit to use historic public land access to reach private lands?

### ANALYSIS

Access to private inholdings surrounded by U.S. Forest Service ("USFS") lands has been statutorily guaranteed. The Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980), reads in part:

[S]ubject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to non-federally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

16 U.S.C.A. § 3210(a) (1985) (emphasis in original).

The court in *Montana Wilderness Ass'n v. United States Forest Serv.*, 655 F.2d 951 (9th Cir. 1981), gave this provision nationwide effect on USFS land.

The statute also requires the Bureau of Land Management ("BLM") to allow reasonable access to surrounded private lands. 16 U.S.C.A. § 3210(b) (1985). The issue of the nationwide effect of this requirement has not been addressed by the court, *Alvin R. Platz, et al.*, 114 IBLA 8 (March 30, 1990), and there is reason to interpret it differently from the USFS requirement by limiting its effect to lands in Alaska. *Montana Wilderness Ass'n*, 655 F.2d at 954.

ANILCA on its face requires private landowners who apply for access to comply with agency regulations. There can thus be no question that the rights created by ANILCA are subject to a properly promulgated permit requirement. The real issue regarding the agencies' authority to impose a permit requirement arises with respect to rights created under other, older statutes.

As the analysis below will show, there is no constitutional impediment to a permit requirement for use of historic access. However, the resolution of the permit issue will depend in a given case on the circumstances which surround the access in question. In addition to the statutory source of the access rights, important factors in the determination are the present and historical status of the land, the purpose served by the access, the requirements imposed for obtaining a permit, and the statutory and regulatory authority of the federal agency whose responsibility it is to manage the public land in question.

The following examination of the authority of the federal land management agencies to permit certain types of access will address not only the authority of the agencies regarding these particular forms of access, but it will also show the type of analysis which is necessary to determine the agencies' authority with regard to other rights of access.

#### 1. EXPRESS GRANT UNDER LODE LAW OF 1866.

Historically there have been numerous statutory sources of access on the public lands, but one of the principal ones is the express grant found in the Lode Law of 1866. Act of July 26, 1866, 14 Stat. 251, R.S. § 2477, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 ("FLPMA"). Section 8 of the act, later codified at 43 U.S.C. § 932 *repealed*, read: "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Such highways are generally referred to as R.S. 2477 highways.

Even though FLPMA repealed the express grant in 1976, those rights of way in existence at the time of FLPMA were expressly preserved as valid existing rights. FLPMA §§ 509(a), 701(a), and 701(h), codified at 43 U.S.C. §§ 1769(a), and 1701, Savings Provisions (a) and (h) (1988).

#### A. Establishing the Right.

As a starting point in the analysis, it is necessary to determine the legal basis for a given access route.

Three elements must be proved to establish the existence of an R.S. 2477 highway: (1) the highway must have been over public lands; (2) the public lands must not have been reserved for public uses; and (3) a highway must have been constructed. L. Latta, Jr., *Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 Santa Clara L. Rev. 811, 828-36 (1988). In addition, the R.S. 2477 right of way must be perfected. This is done by satisfying state law requirements for establishment of a public road.

Each of these elements must be carefully scrutinized in a particular case in order to determine the validity of a claim of right under R.S. 2477. Public lands, for instance, do not include "tidelands, submerged lands, lands donated for timber purposes, acquired lands, or Indian/Native lands"; nor do they include lands where there exists a prior "valid claim or third-party right to public land." *Id.* at 829.

Careful attention must also be given to the status of the land. Reserved lands which are not subject to R.S. 2477 include national forests, Indian reservations, national parks, and wildlife refuges. *Id.*

An unsettled issue concerns the requirement for construction. Since the grant was for "the construction of highways," some courts require that actual construction has occurred. In Nevada, the state courts have refused to recognize such a requirement and require only public user. *Anderson v. Richards*, [96 Nev. 318](#), 322, 608 P.2d 1096 (1980).

Perfection of the rights granted under R.S. 2477 is made by complying with state requirements for establishment of public highways. 43 C.F.R. § 244.55 (1939), *cited in Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988).

[A] party had to meet state statutory requirements regarding the creation of a public highway . . . . State law generally provides that the acceptance by use of the public for whom the road was necessary or convenient established a public use and dedicated the road.

4 *American Law of Mining* § 101.02[1][b] (1991).

To determine what is necessary for perfection under state law, it is necessary to review the state statutes in effect at the time when perfection is said to have occurred. In *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 335-36 (D. Nev. 1963), the court held that compliance with any local custom or local law was sufficient to perfect a right in Nevada in 1921 because there were no state laws regarding establishment of public highways. The court found that local custom in Nevada in 1921 was for miners to "build roads over the most easily traversed public domain for mining purposes." *Id.* at 336. Thus the court found perfection based simply on the construction of a road.

The court may have been incorrect in finding no state law to apply. As early as 1885 Nevada law prescribed a method of establishing a public road or highway by petitioning the county

commissioners of the affected county. General Statutes of Nevada § 456 (1885). In 1917, the Nevada Legislature amended a parallel statute to directly address R.S. 2477 grants:

The board of county commissioners in their respective counties in the state are hereby authorized and empowered to accept the grant of rights of way for the construction of highways over public lands of the United States not reserved for public uses, contained in section 2477 of the Revised Statutes of the United States, and such acceptance shall be by resolution of such county commissioners spread upon the records of their proceedings; *provided*, that nothing herein contained shall be construed to invalidate the acceptance of such grant by general public use and enjoyment heretofore or hereafter had.

Revised Laws of Nevada § 3008 (1919) (emphasis in original). It thus appears that Nevada law would recognize perfection by either a resolution of acceptance or by public user. There is no indication in the statute that construction by itself is adequate to perfect a grant under R.S. 2477, although in most cases user probably would have been sufficient if an operator devoted the time and expense necessary for construction of a road.

#### B. Nature of the Right as Property Interest.

Ordinarily the right granted under R.S. 2477 is a nonexclusive right of the public. *Alfred E. Koenig*, 4 IBLA 19 (1971). Therefore, it is often a governmental body which acts to enforce the rights created by the law. *See Humboldt County v. United States*, 684 F.2d 1276 (9th Cir. 1982); *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979).

However, a grant under R.S. 2477 may also create private property interests. Such interests are compensable for governmental taking under the Fifth Amendment of the United States Constitution. This raises the issue of what constitutes a taking. The easiest case is like the one found in *9,947.71 Acres of Land*, 220 F. Supp. at 337. Compensation was ordered there when mining claimants were totally precluded from using access in order to reach their claims. A more difficult case is one where use is not precluded but only limited by regulation, such as by a permit requirement.

#### C. Regulation of the Right.

To determine whether access may be regulated, it is necessary to examine three sources of law: the constitution, statute, and regulation.

Under accepted interpretation of the U.S. Constitution, the existence of a private property interest does not per se prohibit regulation of that interest without compensation. "The court recognizes that a government can regulate without engaging in a taking. The court also recognizes, however, that when regulation reaches the point of seriously impinging on 'investment-backed expectations,' it can constitute a taking." *Andrus*, 486 F. Supp. at 1011.

Generally, where a right of access exists, "the legislature may, in the lawful exercise of police power, regulate the right of ingress and egress without compensation, so long as there is no denial of ingress and egress." 1 Nichols, *Law of Eminent Domain* § 1.42[7] (1991). In the urban context, the Nevada court has said that, "if [a land owner] has free and convenient access to his property and his means of egress and ingress are not substantially interfered with, he has no cause for complaint." *State ex rel. Dep't of Highways. v. Linnecke*, [86 Nev. 257](#), 260, 468 P.2d 8 (1970). The important determination is whether there has been a "substantial impairment of access." *Lied v. County of Clark*, [94 Nev. 171](#), 173, 579 P.2d 171 (1978).

The opinion in *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988), shows that

regulation of existing public land access is not totally precluded by the Fifth Amendment. There the Ninth Circuit refused to acknowledge a taking resulting from a permit requirement where the operator attempting to use an R.S. 2477 road failed to show that "a permit ha[d] been denied and the denial's effect prevent[ed] the 'economically viable' use of land." *Id.*

Even though regulation of existing access is constitutionally permissible, it remains to determine whether and to what degree Congress has authorized the federal land management agencies to regulate access, and in particular preexisting access.

There are two principal federal land management agencies in Nevada, the USFS and the BLM. The USFS has clear statutory authority to regulate surface use. "Broad authority is conferred by 16 U.S.C. §§ 497 and 551 for the Secretary [of Agriculture] to issue use permits under such regulations as he may make and upon such terms and conditions as he may deem proper." *Sabin v. Butz*, 515 F.2d 1061, 1066 (10th Cir. 1975).

The authority of the USFS to regulate surface use has been specifically recognized in connection with mining activities. In *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981), the court upheld the requirement for an approved mining plan of operation found at 36 C.F.R. pt. 228 (1991), and said:

While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.

*Weiss*, 642 F.2d at 299. *See also United States v. Doremus*, 888 F.2d 630, 633 (9th Cir. 1989) ("we conclude that the requirement of prior approval does not 'endanger or materially interfere with' appellants' mining operations, and that the regulations at issue are therefore consistent with [regulation recognizing the rights of miners under the Mining Laws Act of 1872]").

Even before the passage of FLPMA, the BLM had a similarly broad grant of authority. "The Department [of Interior] has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). This authority extends to all surface uses.

In managing the public lands, the Secretary [of Interior] shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, *through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate*, the use, occupancy, and development of the public lands . . . . In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

43 U.S.C. § 1732(b) (1991) (emphasis added). The Congress further directed that "the Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands." 43 U.S.C. § 1733(a) (1991).

On the basis of these broad grants of authority, it would appear that Congress intended the agencies to exert regulatory control over all surface uses, including access. The next question is whether the agencies have exercised their authority. This requires a close examination of the applicable regulations.

Even where Congress has authorized regulatory control, control by means of a permit requirement must be pursuant to legally promulgated regulation. *United States v. Rainbow Family*, 695 F. Supp. 294, 314 (E.D. Tex. 1988). If there is no valid regulatory requirement for a permit, then a permit cannot be demanded. *Id.* In some instances, the agency may affirmatively choose not to require a permit. *See, e.g.*, 36 C.F.R. § 251.50(d) (1991) ("Unless otherwise required . . . the use of existing forest development roads and trails does not require a special-use authorization.").

The mechanism by which the agency's control is exercised may not always be a permit. *Rainbow Family*, 695 F. Supp. at 313. The applicable means of control will depend in part on the type of use which is proposed and how it is characterized. Access to unpatented mining claims on BLM land may, for instance, be gained either through approval of operations pursuant to the surface management regulations and in reliance on the implied right of access, *see* 43 C.F.R. subpart 3809 (1991); 36 C.F.R. pt. 228 (1991); or through application for a separate right of way. 43 C.F.R. pt. 2800 (1991); 36 C.F.R. pt. 251 (1991). *See generally*, 4 *American Law of Mining* § 101.02[4][a] (1991). Regulation may also be by court action. A hybrid remedy was applied in *Sierra Club v. Hodel*, where the court ordered the right-of-way holder to apply for a permit from the BLM even though the BLM was not able to treat the application in the normal fashion and could not deny the use. *Sierra Club*, 848 F.2d at 1088.

If it is determined that a regulatory requirement would apply to a given use, then it must be determined whether the authority of the land management agencies to regulate the use extends to access rights which existed before the relevant rules and regulations were promulgated.

The BLM has, by regulation, extended its authority over all preexisting non-mining access, including R.S. 2477 access. 43 C.F.R. § 2801.4 (1991). The question becomes, then, whether the regulation is valid.

Some authorities hold that Congress did not intend to permit retroactive regulation, at least under FLPMA, and that an established R.S. 2477 right of access can only be regulated pursuant to the regulations in effect at the time the access was created.

As a general matter, the holder of a right-of-way issued under one of the statutes repealed by FLPMA [including R.S. 2477] is entitled to have that right-of-way administered in accordance with the regulations which were in effect at the time the right-of-way was granted.

P. Schlauch, *Access for Mineral Exploration and Development after FLPMA*, Institute on Rights of Access and Surface Use, 8-5 (Rocky Mtn. Min. L. Found. 1984).

The principal authority relied upon for this conclusion is the opinion in *City & County of Denver v. Bergland*, 695 F.2d 465 (10th Cir. 1982). One of the important issues in that case was the retroactive effect of FLPMA, and regulations promulgated under it, to a right-of-way granted before FLPMA's enactment. Two divergent lines of Supreme Court authority exist on the issue, one favoring retroactive application, *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), the other requiring prospective application unless there is an unequivocal congressional intent to the contrary, *Greene v. United States*, 376 U.S. 149 (1964). *See generally* *Wright v. Director, FEMA*, 913 F.2d 1566, 1573 (11th Cir. 1990). The *Bergland* court followed the *Greene* line of authority and concluded that because there was no clear congressional intent to apply FLPMA retroactively, the Secretary of Interior continued to have authority over the subject right of way even though FLPMA gave the Secretary of Agriculture authority over similar rights of way granted after FLPMA's enactment. *Bergland*, 695 F.2d at 481.

Congress appears to have signaled its disagreement with the *Bergland* decision when it enacted Pub. L. 99-545, § 1(b), (c), Oct. 27, 1986, 100 Stat. 3047-48, which amended 43 U.S.C. §

1761 (Supp. 1991), to read:

The Secretary of Agriculture shall have the authority to administer all rights-of-way granted or issued under authority of previous Acts with respect to lands under the jurisdiction of the Secretary of Agriculture, including rights-of-way granted or issued pursuant to authority given to the Secretary of the Interior by such previous Acts.

43 U.S.C.A. § 1761(b)(3) (Supp. 1991). Therefore, the court's conclusion in *Bergland* regarding retroactive application of FLPMA must be used advisedly, and may, in fact, have no validity.

In contrast to the *Bergland* holding, the Interior Board of Land Appeals (IBLA) has allowed administration of R.S. 2477 access under subsequently enacted regulations. *Penasco Valley Tel. Coop., Inc.*, 55 IBLA 360 (1981). And in *Sierra Club, et al.*, 111 IBLA 122 (1989), the IBLA, relying on the language of the Tenth Circuit in *Sierra Club*, 848 F.2d at 1068, allowed regulation of a pre-FLPMA R.S. 2477 road to prevent "unnecessary and undue degradation," a standard established under § 603 of FLPMA dealing with management of wilderness study areas. *See also Vogler*, 859 F.2d at 642, n.5 ("We note that in *Sierra Club*, the Tenth Circuit recognized that permits may be required to prevent the unreasonable degradation of a wilderness study area, even if access to the area could not be totally denied.").

The "unnecessary and undue degradation" standard also appears in § 302 of FLPMA addressing management of the public lands in general, 43 U.S.C. § 1732(b) (1991), so perhaps all pre-FLPMA access is subject to regulation to the extent necessary to prevent unnecessary or undue degradation. This, however, has not been tested in any reported decision.

In further contrast to the *Bergland* holding against retroactivity is the opinion of the Ninth Circuit in *Vogler*. The court upheld a park service permit requirement for use of an existing R.S. 2477 road.

Even if we assume that the trail is an established right of way, we do not accept [defendant] *Vogler's* argument that the government is totally without authority to regulate the manner of its use.

Congress has made it clear that the Secretary has broad power to regulate and manage national parks. The Secretary's power to regulate within a national park to "conserve the scenery and the nature and historic objects and wildlife therein . . ." applies with equal force to regulating an established right of way within the park. *See* 16 U.S.C. § 1.

*Vogler*, 859 F.2d at 642.

None of these decisions expressly holds that established R.S. 2477 access should generally be subjected to subsequently promulgated regulations. The *Vogler* decision in particular considered the question under the Mining in the Parks Act, 16 U.S.C.A. §§ 1901-12 (1985), which expressly makes mining access subject to retroactive regulation. Nonetheless, these decisions, together with Congress' rejection of the *Bergland* decision, demonstrate a likelihood that FLPMA was intended to have retroactive effect.

The only real issue in any case will be the extent to which regulation is allowed. By regulation the BLM has limited the burden which it may impose by retroactive regulation to that which does not "diminish or reduce any rights conferred by the grant or the statute [from which the right of access derives]." 43 C.F.R. § 2801.4 (1991).

The USFS has not dealt by regulation as straightforwardly with the retroactivity issue as has

the BLM. The USFS has in the past, however, given its regulations retroactive effect. The problem was expressly considered and dealt with by Congress as it concerned irrigation rights of way. The problem was thus described:

Over a number of years, and especially since the enactment of FLPMA in 1976, the Forest Service evidently has adopted policies of seeking to require issuance of permits for . . . pre-FLPMA irrigation systems, and has made these permits more and more detailed as to the terms and conditions which are said to be applicable to the affected irrigation systems. In addition, the Administration evidently has adopted the view that continued use of rights-of-way for the pre-FLPMA irrigation systems is subject to payment to the United States of an annual rental fee such as that prescribed by section 504(g) of FLPMA.

. . . .  
Obviously, resolution of such a dispute over the interpretation of applicable law could be sought through the judicial process . . . . However, if enacted, the reported bill would provide an optional alternative which a qualified user of a water conveyance systems [sic] within the bill's scope could elect to utilize instead of seeking judicial relief.

H. Rep. No. 99-554, 99th Cong., 2d Sess. 3-4, *reprinted in* 1986 U.S. Code Cong. & Admin. News (99 Stat.) 5086-87. The solution enacted into law grants to water systems users, upon application, a "permanent easement, without a requirement for reimbursement," 43 U.S.C. § 1761(c) (1991), when certain conditions are met.

No similar attention has been devoted to the issues involving regulation of other access rights on USFS lands. Thus the only definitive resolution of the issue would involve resort to the courts. But the previously cited decisions allowing retroactive application of FLPMA show that some retroactive application would probably be allowed, leaving the magnitude of the permissible regulatory burden as the only true issue.

## 2. IMPLIED RIGHT OF ACCESS.

An implied right of access exists where the courts find a congressional intent to provide access in connection with some other grant of rights on the public lands. Such a right was found to exist in *Andrus* in connection with the school land grant program.

The general mining laws also create an implied right of access. *Rights of Mining Claimants to Access Over Public Lands to their Claims*, 66 Interior Dec. 361 (1959). The right is a "necessary incident to accepting the invitation from Congress to enter and explore the public lands which remain open to mineral entry and to purchase mineral lands if a discovery is made." A. Biddle, *Access Rights Over Public Lands Granted by the 1866 Mining Law and Recent Regulations*, 18 Rocky Mtn. Min. L. Inst. 415, 424 (1973).

### A. Establishing the Right.

The implied right of access is established through judicial pronouncement on the intent of Congress concerning the statutory authority in question. The miner's implied right of access is well-established, as is the more recently litigated access rights for state school land grants. It is more difficult to identify other implied rights because of the dearth of decisional law on the subject.

Access developed under an implied right may also qualify, through user, as an R.S. 2477 highway. However, the two types of access are distinct and should be differentiated. *Id.* at 427-28.

### B. Nature of the Right as Property Interest.

The legal nature of the implied right has not been precisely defined. Some commentators have concluded, on the basis of the opinion in *9,947.71 Acres of Land*, that the miner's implied right is a compensable property interest. 4 *American Law of Mining* § 101.02[2] (1991). However, it has been noted that the opinion in *9,947.71 Acres of Land* addressed an R.S. 2477 right, not an implied grant.

It is not entirely clear, however, that this logic [setting forth the miner's property right in R.S. 2477 access] would apply with equal force to a means of access established pursuant to the implied grant of access contained in the mining laws . . . . [I]t might be argued the construction of such a road or other means of access pursuant to an implied grant does not withdraw or segregate the land through which it passes from the public domain and that a miner constructing such a road or facility does not by that act gain any property interest in the specific lands through which it passes. The rationale for this approach would be that although the mining laws contain an implied right of access, they do not grant rights in any particular route of access.

*Access for Mineral Exploration and Development after FLPMA*, at 8-3. The commentator concludes that the implied right does create a vested property interest. Other legal decisions, however, at least reveal the unclear nature of the interest. For example, in *Bob Strickler*, 106 IBLA 1 (1989), an implied right of access was determined to no longer exist once the mining purpose for which it was developed had ceased.

### C. Regulation of the Right.

Even if the implied right of access creates a compensable property interest, that interest is subject to reasonable regulation the same as an R.S. 2477 right of way. As described above, regulation is not a per se taking of private property, but can constitute a taking if the effect on the private property right is too restrictive. The constitutional analysis of the agencies' authority to regulate is controlled by the same considerations as described in the section dealing with R.S. 2477 access.

Again, the agencies' power to regulate must be found in statutory authorization. In addition to the statutory surface management authorities discussed above which allows regulation of R.S. 2477 access, the general mining law of 1872 expressly permits regulation of mining activities. 30 U.S.C.A. § 22 (1986). See *Andrus*, 486 F. Supp. at 1006 (the law "makes clear that rights of access to mining claims are not absolute"). The miner's implied right of access was preserved by § 302 of FLPMA, 4 *American Law of Mining* § 101.02[3] (1991); see 43 U.S.C. § 1732(b) (1991); but even though preserved, "[t]he implied right of access is subject to regulation by federal land management agencies to minimize adverse impacts on federal lands." Martz, Love & Kaiser, *Access to Mineral Interests by Right, Permit, Condemnation or Purchase*, 28 Rocky Mtn. Min. L. Inst. 1075, 1088-89 n.33 (1983). See also 4 *American Law of Mining* § 101.02[2]. The last sentence of 43 U.S.C. § 1732(b) (1991), expressly amends the Mining Law of 1872 by requiring the Secretary of Interior to manage the public lands so as to prevent "unnecessary or undue degradation of the lands," *Access for Mineral Exploration and Development after FLPMA*, at 8-4.

Preexisting mining operations are expressly made subject to the BLM surface management regulations at 43 C.F.R. § 3809.1-8 (1991); and to USFS regulations at 36 C.F.R. § 228.4(b) (1991). Thus the agencies have already taken a position on the retroactivity issue. The arguments and considerations discussed above in connection with R.S. 2477 access are equally relevant to the consideration of retroactive rulemaking for preexisting implied access.

### 3. OTHER ACCESS RIGHTS.

There are many other statutory sources of historic public lands access too numerous to analyze separately in this opinion.

Section 706 of FLPMA repealed 30 different statutes related to rights-of-way on public lands and lands in the national forests. These statutes varied widely. Permits, leases, licenses, easements and other forms of formal authorization were all issued. Each statute was narrow in scope, covering just one type of use. These laws provided little guidance to administrative agencies on the terms and conditions of the use, and thus the terms varied widely. Tenure ranged from grants of fee title to permits revocable at will.

G. Achterman, *Rights-of-Way under Title V of FLPMA*, Institute on Rights of Access and Surface Use, 7-2 (Rocky Mtn. Min. L. Found. 1984). The text of the Achterman article provides a brief overview of the more important of these access statutes. Because each statute is different, the facts and law surrounding the access in question must in every case be closely scrutinized in order to determine the right of access.

#### CONCLUSION TO QUESTION ONE

Generally, a right of access across public land can be regulated by permit or otherwise so long as the agency has the statutory and regulatory authority to regulate and the burden imposed by the regulation does not amount to a taking. The determination in any particular case will depend upon a close examination of the relevant facts and law.

#### QUESTION TWO

May federal land management agencies require closure of historic public land access as part of a mining reclamation plan?

#### ANALYSIS

The authority of the federal agencies to require reclamation of the public lands is contained in the mining laws at 30 U.S.C.A. § 22 (1986), and in the general authorizations given to the federal agencies, as discussed above, to manage surface activities. The BLM's authority is found at 30 U.S.C.A. § 22 (1986), and 43 U.S.C. § 1201 (1986),<sup>24</sup> and in FLPMA, and the USFS's authority is found in the Organic Administration Act of 1897, 16 U.S.C. §§ 478 and 551 (1985). See D. Deisley, *Bonding for Reclamation of Oil, Gas, and Hard Rock Minerals Development*, 37 Rocky Mtn. Min. L. Inst. 19-1, 19-11 to 19-13 (1991).

Finding a statutory authority for an agency's reclamation requirements, it is also necessary to examine the applicable regulations. The USFS reclamation regulations expressly provide for closure of roads without regard to whether they predated the mining operation.

Unless otherwise approved by the authorized officer, roads no longer needed for operations:

(1) Shall be closed to normal vehicular traffic.

....

(4) The road surface shall be shaped to as near a natural contour as practicable and be stabilized.

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<sup>24</sup> Under these statutes, the U.S. Supreme Court found that the Department of Interior "has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

36 C.F.R. § 228.8(f) (1991).

The BLM regulations are less specific, with a requirement for "taking such reasonable measures as will prevent unnecessary or undue degradation of the Federal lands." 43 C.F.R. § 3809.0-5(j) (1991).

As with any agency action taken pursuant to regulation, a requirement for access closure must not be arbitrary, capricious or an abuse of discretion. *Bunyard v. Hodel*, 702 F. Supp. 820 (D. Nev. 1988). However, an agency's interpretation of its own regulations is generally entitled to a high degree of deference and should be upheld as long as it is not plainly erroneous or inconsistent with the language of the regulation. *Washington State Health Facilities Assoc. v. Department of Social & Health Serv.*, 879 F.2d 1014, 1020 (9th Cir, 1987). It is, therefore, likely that closure of roads would come within either agency's reclamation regulations where the requirement for closure bears some relationship to reclaiming the disturbed land.

Although the land management agencies probably have statutory and regulatory authority to require closure of access, the requirements are, like any form of regulation, subject to constitutional takings challenge. In particular, the Fifth Amendment of the U.S. Constitution would prevent the uncompensated closure of a road in which there was a vested property interest. For example, as described above, a compensable private property interest can be created in an R.S. 2477 road. Thus any requirement for closure of such a road would give a user of the road a private cause of action. Because an R.S. 2477 road is a public highway, a closure would also create a cause of action in the county or state in which the road occurs.

An implied right of access is a more indefinite right than are the property interests in an R.S. 2477 right of way. The decision in *Bob Strickler* suggests that the miner's implied right exists only so long as it is needed for mineral development. A requirement for access closure after depletion of the mineral resource it serves would therefore probably not constitute a taking. However, this issue has never been explored in a reported decision, and only further judicial development of the concept will permit a definitive settlement of the agencies' authority to close such access.

As for other forms of access, a requirement for closure must be measured against the nature of the interest created by the specific grant or authorization for access.

#### CONCLUSION TO QUESTION TWO

The federal land management agencies have the authority to require closure of existing access routes as part of a mining reclamation plan when closure bears some relationship to reclamation of the disturbed areas and when closure would not effect a taking of any public or private property interests in the access.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Deputy Attorney General

OPINION NO. 92-22 FIRE PROTECTION DISTRICTS; INTERLOCAL COOPERATION ACT; FUNDS; AMBULANCES: Independent fire protection district is a governmental entity separate from county and may enter into interlocal contract to provide ambulance services to county; fire

district lacks statutory authority to open and maintain bank accounts separate from the county treasurer and cannot provide otherwise by interlocal agreement with county.

Carson City, August 26, 1992

The Honorable Patricia D. Cafferata, District Attorney for Lincoln County,  
Post Office Box 60, Pioche, Nevada 89043

Dear Ms. Cafferata:

You have asked this office for an opinion regarding the legal status of the Pahrnagat Valley Fire District ("District"). The District was created by election pursuant to the procedure set forth at [NRS 474.005-.450](#). The District has proposed that Lincoln County ("County") enter with it into an interlocal agreement through which the District would provide certain ambulance services to the County in return for reimbursement of costs. The proposed agreement also provides that the District will maintain its own bank accounts free of County control.

In considering the request from the District that the County enter with it into the agreement, the County finds it necessary to answer the following questions.

#### QUESTION ONE

Is a fire district created by election pursuant to [NRS chapter 474](#) an entity authorized by statute to enter into interlocal agreements with other governmental subdivisions?

#### ANALYSIS

It is the opinion of this office that the District is a local government and a subdivision of the state which may enter into interlocal agreements with the County.

Fire districts established by election as authorized by [NRS 474.005-.450](#) are controlled by an elected board of directors whose powers and duties are set out by statute. [NRS 474.160](#). This office has previously recognized the independent nature of such a board.

Neither the State, nor an agency thereof or political subdivision of the State has any control over such board of directors. Such members are elected, and inducted into office. Thereafter the board controls and regulates the district in accordance with the statutory law.

Op. Nev. Att'y Gen. No. 149 (March 25, 1960).

This view is consistent with the law of other jurisdictions. In *Owens v. Hanse*, 273 N.Y.S.2d 406, 408 (N.Y. App. Div. 1966), the court found fire districts to be "distinct entities not subject to supervision of their internal affairs by municipal authorities governing the areas in which fire districts are established." The court found no significance in the fact that the municipality collected the funds which supported the fire districts: "The fact that the funds are collected by municipal agencies does not operate to vest municipal authorities with control or jurisdiction thereof." *Id.* See generally 3A Antieu's Local Government Law, *Independent Local Governments*, §§ 30D.00 to 30D.11 (1992).

Under separate statutory authority, the counties may establish their own fire districts, which are then served by the county fire departments. [NRS 244.2961-.2967](#). A fire department, however, cannot assume any rights, duties or liabilities which are already borne by a district established pursuant to [NRS chapter 474](#). [NRS 244.2963\(2\)](#). The legislative differentiation between these

separately authorized forms of fire districts adds further foundation to the view that the District is not merely a subordinate office of the County but is an independent political subdivision of the state.

### CONCLUSION TO QUESTION ONE

Public agencies which are authorized to enter into interlocal agreements are defined broadly to include "[a]ny political subdivision of this state, including without limitation counties, incorporated cities and towns, including Carson City, unincorporated towns, school districts *and other districts.*" [NRS 277.100\(1\)\(a\)](#) (emphasis added). Because the District is a governmental entity separate from the County and with its own independent governing board, it falls within this broad definition and may enter into an interlocal agreement with the County pursuant to the authority found in [NRS chapter 277](#).

### QUESTION TWO

Is such a fire protection district entitled to open and maintain bank accounts separate from the county treasurer?

### ANALYSIS

Depositories of public money are addressed in [NRS chapter 356](#). As you point out, sections 356.120 to 356.200 deal with the authority of the counties to deposit money into banks or savings and loans. County treasurers are authorized to make deposits into time or demand accounts, [NRS 356.120\(1\)](#), and other county officers may do so provided they obtain the unanimous consent of the county bondsmen. [NRS 356.200\(1\)](#).

Because the District is an entity separate from the County, this portion of the statute dealing with county authority has no application to the authority of the District. The District, as an independent local government, need not obtain the prior approval of the County. However, the inapplicability of this portion of the statute does not leave the District free to deposit money as it sees fit.

A local government may only deposit money in a bank or savings and loan pursuant to express statutory authorization. [NRS 356.005\(1\)](#). A review of [NRS 474.005-.450](#) reveals no such authority. The board of directors is given the discretion to determine how to spend the District's funds, [NRS 474.160\(5\)](#), but the only authority for deposit of funds is contained at [NRS 474.200\(3\)](#): taxes which are collected for fire protection districts "must be placed in the treasury of the county in which the greater portion of the district is located, to the credit of the current expense fund of the district, and may be used only for the purpose for which it was raised." Furthermore, payment from district funds is "by warrants drawn on the county treasurer." [NRS 474.210](#). It is thus the opinion of this office that the District has no authority to establish accounts with commercial banks or savings and loans, but is instead required to treat the County treasury as its depository for public funds.

This leaves the question whether by interlocal agreement or contract the County and District may alter this statutory arrangement by providing for the District to manage its own deposits. In this office's opinion, they may not.

The purpose of the Interlocal Cooperation Act, [NRS 277.080-.180](#), is set forth in the statute:

[T]o permit local governments to make the most efficient use of their powers by enabling them to cooperate with other local governments on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to

forms of governmental organization which will best accord with geographic, economic, population and other factors influencing the needs and development of local communities.

[NRS 277.090](#).

It is doubtful that relinquishment of County authority over District funds to the District itself could meet the requirement for statutory depository authorization under [NRS 356.005\(1\)](#). Even if it could, this office believes that relinquishment cannot be effected under the Interlocal Cooperation Act ("Act"). It is difficult to see how the County's relinquishment of its duty to maintain District funds would serve any of the statutorily identified purposes of the Act. The difficulty is heightened by the opposing policies favoring safekeeping of public funds and accountability of those who deal with them.

#### CONCLUSION TO QUESTION TWO

If the District wishes to escape the statutory requirements for deposit of its funds with the County, it should attempt to persuade the legislature of the merits of the concept. The Act will not serve as an instrument for such change.

#### QUESTION THREE

May a fire district provide ambulance services outside its boundaries?

#### ANALYSIS

The policies underlying the Act are set forth above. The law is intended to make the most efficient use of government resources for the benefit of the public. The District proposal to provide ambulance services to Lincoln County is precisely the type of arrangement encouraged by the Act. District authority to operate an ambulance service is set forth at [NRS 474.180](#), and it contains no express limitation on the territory which may be served. Counties are also given authority to provide ambulance services. [NRS 244.1605\(4\)](#). In a large rural area such as Lincoln County, it is entirely appropriate for governmental subdivisions to share their resources and thereby avoid unnecessary and duplicative expenses in meeting their governmental obligations.

This office notes that the consideration in the proposed agreement consists of County payment for services rendered by the District. It would therefore be more appropriate to denote the agreement as an interlocal contract pursuant to [NRS 277.180](#), rather than an interlocal agreement pursuant to [NRS 277.080-170](#). See Op. Nev. Att'y Gen. No. 119 (March 13, 1973).

#### CONCLUSION TO QUESTION THREE

The District may agree to provide ambulance services to the County pursuant to an interlocal contract.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: C. WAYNE HOWLE  
Deputy Attorney General

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