OPINION NO. 95-01 MARRIAGES; JUSTICES OF THE PEACE: A justice of the peace from one township may enter a different commissioner township on a restricted basis under NRS 122.080 to perform a limited number of marriages.

Carson City, February 8, 1995

The Honorable Thomas A. Dill, District Attorney, Lincoln County, Post Office Box 60, Pioche, Nevada 89043

Dear Mr. Dill:

You have posed the following question:

QUESTION

May a justice of the peace from a particular township enter a different commissioner township in order to perform a limited number of marriages pursuant to NRS 122.080?

ANALYSIS

You concluded in your opinion request that NRS 122.080 would, under certain limited circumstances, allow a justice of the peace from one township to enter into a different commissioner township to perform marriages. We agree with that conclusion.

NRS 122.080(3) sets forth:

> In any calendar year, a justice of the peace may perform not more than 20 marriage ceremonies in commissioner townships if he does not accept any fee, gratuity, gift, honorarium or anything of value for or in connection with solemnizing the marriage.

NRS 122.080(1) declares it lawful for *any* justice of the peace to marry persons capable of marriage in a commissioner township if the justice of the peace follows the restrictions of subsection (3) of NRS 122.080. The plain language of the statute allows a justice of the peace from one township to enter a different commissioner township on a restricted basis in order to perform marriages.

CONCLUSION

A justice of the peace may enter other commissioner townships to perform marriages as long as the justice follows the restrictions of NRS 122.080(3).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

OPINION NO. 95-02 PRISONERS: Non-terminal competent inmates may execute declarations for no resuscitation. However, Nevada Department of Prisons medical staff may disregard such declarations if legitimate penological reasons exist.

Carson City, February 23, 1995

Mr. George Kaiser, Medical Director, Nevada Department of Prisons, Post Office Box 7011, Carson City, Nevada 89702

Dear Dr. Kaiser:

You have asked this office for an opinion regarding the Nevada Department of Prisons' (NDOP) legal position with respect to requests by inmates that resuscitation efforts be withheld under certain circumstances. More specifically, your question is as follows:

QUESTION

May an inmate, who has no terminal illness and is found to be competent, request and obtain a physician's order for no resuscitation?

ANALYSIS

By statute, the Director of NDOP is responsible "for the supervision, custody, treatment, care, security and discipline of all offenders under his jurisdiction." NRS 209.131(4).

Nevada law provides that "[a] person of sound mind and 18 or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment." NRS 449.600(1).

Under this statute, competent adults apparently may freely execute such directives. The NRS does not exclude inmates from the ability to sign these declarations under the plain meaning of the statute. *Demosthenes v. Williams*, 97 Nev. 611, 614, 637 P.2d 1203 (1981). Consequently, inmates may execute directives under the statute. Nonetheless, it is within the discretion of the NDOP to disregard such directives executed by inmates for legitimate penological concerns.

In general, prison officials have an affirmative duty to attend to the medical needs of inmates under their care. *Estelle v. Gamble*, 429 U.S. 97 (1976). NRS 209.131 recognizes this in defining the duties of the Director of NDOP, which are to:

> 4. Be responsible for the supervision, custody, treatment, care, security and discipline of all offenders under his jurisdiction.
> 5. Establish regulations with the approval of the board and enforce all laws governing the administration of the department and the custody, care and training of offenders.
> 6. Take proper measures to protect the health and safety of the staff and offenders in the institutions and facilities of the department.

Since 1989, the NDOP has permitted inmates to execute a "Directive to Physicians" form (Medical Directive 6-21-89), which authorizes withdrawal or withholding of life-sustaining measures in the event the inmate has an incurable and terminal condition.[1] However, NDOP also has a procedure for seeking a court order for forced treatment to protect an inmate's safety (whether the inmate is terminal or not).[2]

---

[1] Under Nevada law, a competent adult suffering from a terminal illness may sign a declaration authorizing the withdrawal of life-sustaining measures, under the Uniform Act on the Rights of the Terminally Ill (NRS 449.535 *et seq.*). The act defines terminal illness as "an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time." NRS 449.590.

[2] Pursuant to statutory authority, the Director issued A.R. 638 on August 8, 1984, concerning inmate Consent or Refusal of Medical Treatment. Section V(A)(6) of A.R. 638 provides in part that:

> Treatment beyond that required for the safety of the patient in an emergency situation shall not be forced by the health care staff. For such cases, a court order for treatment may be sought by the Warden/Director after consultation with the treating physician. In all cases involving the forced treatment of an inmate whether under emergency conditions for the safety of the patient or otherwise, careful determination shall be included in the health record.

The question presented is whether, in the event a competent, nonterminal inmate executes a directive to physicians, the directive must be honored by the NDOP.

The Nevada Supreme Court, in *McKay v. Bergstedt*, 106 Nev. 808, 815, 801 P.2d 617 (1990), held that an individual has a right, based upon his due process liberty interest set forth in article 1, § 8 of the Nevada Constitution, to refuse or withdraw medical treatment and support. However, the right is not absolute; the individual's right must be balanced against the relevant state interests.

In *McKay*, the petitioner was a competent, nonterminal, quadriplegic adult (but not a prisoner) who was dependent upon a respirator. The court acknowledged the state has a fundamental and compelling interest in preserving life and held that a competent quadriplegic's right to withdraw a respirator to sustain his life outweighed the state's interest in preserving life. However, the court noted there was a significant distinction between a competent individual faced with artificial survival resulting from heroic medical intervention and an individual otherwise healthy or capable of sustaining life without artificial support who simply desires to end his life. The court applied its ruling to situations in which "the present or prospective quality of life may be so dismal that the right of the individual to refuse treatment or elect discontinuance of artificial life support must prevail over the interest of the State in preserving life." *McKay*, at 818.

The court identified numerous state interests to be considered, including:

1. Preservation of the sanctity of all life, including the life of the specific patient;
2. Prevention of suicide;
3. Protection of innocent third persons who may be adversely affected by the death of the party seeking relief;
4. Preservation of the integrity of the medical profession; and
5. Encouragement of charitable and humane care of persons whose lives may be artificially extended under conditions which have the prospect of providing a modicum of quality living.

The *McKay* opinion stated the decision to decline life-sustaining medical treatment is not equated to a suicide attempt. Rather, a refusal to accept medical intervention allows disease or injury to take its natural course.

There is no Nevada case which addresses this situation in the context of prisoners. However, it is instructive to consider a similar case decided in California in 1993, *Thor v. Superior Court*, 855 P.2d 375 (Cal. 1993). The California Supreme Court relied heavily on the *McKay* analysis in reviewing the case of a quadriplegic prisoner serving a life term who began to refuse food and then refused medication and treatment. As a result, his bodily functions deteriorated. Psychiatrists determined he was depressed but mentally competent to understand and appreciate his situation. In

that case, the court found that the evidence established that allowing the quadriplegic inmate to forego life-sustaining procedures did not threaten prison security or endanger the public. However, the court stated its decision would not preclude prison authorities from establishing the need to override an inmate's choice to decline medical intervention if circumstances warranted. *Thor*, at 370.

The court recognized that the right to be free from enforced medical care is not absolute, noting the state's interest in "preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties." *Thor*, at 365. *See also, Commissioner of Correction v. Myers*, 399 N.E.2d 452, 456 (Mass. 1979). Under the rationale of both *Thor* and *McKay*, the decision to allow a competent, nonterminal inmate to refuse life-sustaining measures may depend on the specific facts of each situation, or upon a determination that such an election by one or more inmates jeopardizes prison security, or is contrary to the public interest.

Prison administrators must make complex decisions in an environment which poses many considerations not present in ordinary society. *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Prisons contain many difficult and manipulative inmates whose individual decisions may also severely impact other inmates, staff, services and budget. *State, ex rel. White v. Narick, et al*., 292 S.E.2d 55, 58 (W. Va. 1982). It is not unusual, for example, for an inmate to attempt to self-inflict wounds or to embark upon a hunger strike for motives unrelated to a reasoned and deliberate evaluation of the quality of one's life. *Myers*, at 458. At times it may be necessary, for legitimate penological reasons, for prison s to intervene to prevent an inmate from engaging in inappropriate and self-destructive medical behavior which often encourages other inmates to act similarly.[3] *Van Holder v. Chapman*, 450 N.Y.S.2d 623, 625 (App. Div. 1982); *State ex rel. White*, at 58. In *Chapman*, the Court considered evidence that the inmate's hunger strike had disrupted the unit in which he was housed, caused resentment among other patients, and had induced other inmates to attempt starvation. The Court held that: "Chapman's status as a prisoner renders his First Amendment rights subject to the reasonable limitations necessary for the maintenance of order and discipline in a penal institution [citing *Sheffery v. Winters*, 72 F.R.D. 191, 194]." *Chapman*, at 627.

Prison authorities have been permitted to compel medical treatment when an otherwise healthy prisoner attempted to starve himself, because it threatened prison discipline and security. *In re*

---

[3] For example, the Nevada Department of Prisons has adopted Medical Directive 9-27-90 as a means of handling inmate hunger strikes. Section 8 of the Directive provides:

> Intervention: if an inmate's clinical status deteriorates so as to endanger the inmate's life as an emergency matter, then the inmate may not refuse treatment and appropriate medical measures will be taken to resolve the emergency . . . . A court order for treatment may be sought by the Warden/ Director if warranted.

Caulk, 480 A.2d 93 (N.H. 1984). In that case, the prisoner's motivation for embarking upon a hunger strike was to force a change in his custody status, obtain a special diet, and essentially manipulate special treatment for himself. The court noted that: "If the defendant is successful in evading the prison's control over his behavior, this may jeopardize prison discipline and tax prison resources." *In re Caulk*, at 96.

Thus, whether competent inmates having no terminal illness may direct that no life-sustaining measures be employed is a question initially subject to the *McKay* analysis. Second, any regulation which might impact upon an inmate's First Amendment right to privacy is also subject to the standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987).

The *Turner* standard applies if an inmate's constitutional rights are impinged by a prison rule, regulation or practice, and provides that the court must consider the following factors:

1. Whether the regulation has a logical connection to the legitimate government interests invoked to justify it,
2. Whether there are alternative means of exercising the rights that remain open to the inmates,
3. The impact the accommodation of the asserted constitutional rights will have on other inmates, guards and prison resources, and
4. The presence or absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

The U.S. Supreme Court has repeatedly emphasized that, in determining the validity of regulations impinging on the constitutional rights of inmates, courts are to accord great deference to prison officials' assessment of their interests. *See e.g.*, *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). The realities of running a penal institution are complex and difficult and prison authorities are best equipped to make the intricate decisions regarding prison administration. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-28 (1977). Thus, when a prison regulation impinges on *any* constitutional right of an inmate, it is valid if it is reasonably related to legitimate penological interests. *Washington v. Harper*, 494 U.S. 210 (1990); *O'Lone*, at 349; *Turner*, at 95-96.

When analyzing the question under *McKay*, it is clearly important for the state to encourage inmates to appreciate and respect the sanctity of human life. It is in the public interest that prison officials take appropriate measures to prevent inmate suicides. It is also essential, in the prison context, for prison medical staff to intervene when an inmate's self-destructive actions (self-mutilation, hunger strikes, etc.) threaten his safety or the safety of others in the prison facility.

Many competent, nonterminal inmates are able to make the same determination as nonincarcerated persons regarding whether they would prefer to submit to a natural course of

events (including possible death), rather than to continue to live by means of artificial supports and heroic measures. However, as demonstrated herein, there are also legitimate penological reasons why prison officials may wish to deny this option to incarcerated persons. When applying the *Turner* standard, a prison regulation limiting a competent, nonterminal inmate's election not to be afforded life-sustaining measures can be upheld under certain circumstances. The NDOP has a legitimate government interest in preventing suicides and widespread hunger strikes, and conserving prison resources. The NDOP also has a legitimate interest in preventing inmates from manipulating prison officials by threatening self-destructive behavior.

With respect to an inmate's First Amendment right to freedom of expression, there are alternative methods by which an inmate can make known his protests. The inmate's right to privacy, as discussed in *McKay* and *Thor*, is subject to limitation by the countervailing public interest in preventing suicide. And as case law suggests, an inmate's self-destructive actions can adversely impact prison staff and inmates, and consume prison resources. Finally, there do not appear to be any alternative methods of fully accommodating a decision which an inmate has made, for inappropriate reasons and against the public interest, to forego life-sustaining measures.

CONCLUSION

It is concluded that a competent, nonterminal adult inmate may, under NRS 449.600, execute a declaration authorizing withholding or withdrawal of life-sustaining equipment. Attending medical staff are entitled to rely on such a directive and respect the inmate's wishes. However, NDOP may elect to disregard the directive for legitimate penological reasons.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ANNE B. CATHCART
Senior Deputy Attorney General

OPINION NO. 95-03 COUNTIES: Emergency powers granted to the Governor under NRS chapter 414 will preempt any county ordinance purporting to grant emergency powers beyond those set forth in NRS 414.090(2).

Carson City, March 13, 1995

The Honorable Brian Kunzi, Mineral County District Attorney, Post Office Box 1210, Hawthorne, Nevada 89415

Dear Mr. Kunzi:

This is in response to your request for an opinion from this office concerning the following inquiry:

QUESTION

Will the Mineral County Commissioners exceed their legal authority by adopting an ordinance which authorizes the following acts in the event of an emergency:

(a) Establishment of a curfew allowing only authorized persons in public places;
(b) Forbidding or limiting the number of persons who may gather or congregate in public places;
(c) Prohibition or restriction on traffic on public streets and roads;
(d) Prohibition of sale or distribution of gasoline (or other flammable/combustible), except in vehicle gas tanks or other proper container;
(e) Closure of businesses which sell gasoline (or other flammable/combustible);
(f) Prohibition of sale or distribution of alcohol;
(g) Closure of businesses which sell alcohol;
(h) Prohibition of sale or distribution of guns, ammunition or explosives;
(i) Closure of businesses which sell guns, ammunition or explosives?

ANALYSIS

A. County Authority

Under the authority set forth in Nevada's emergency management statutes (NRS chapter 414), primary responsibility in the event of an emergency rests with the Governor and with the Chief of the state's Division of Emergency Management.[4] Political subdivisions like Mineral County "may establish a local organization for emergency management in accordance with the state's plan and program for emergency management." NRS 414.090(1). Within this function, political subdivisions are specifically authorized to "enter into contracts and incur obligations necessary to combat such a disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such a disaster." NRS 414.090(2).

[4] *See* NRS 414.060(1) ("[t]he governor is responsible for the carrying out of the provisions of this chapter . . ."); NRS 414.040(3) ("[t]he chief . . . shall carry out the program for emergency management in this state . . .").

The contract and debt powers within NRS 414.090(2) are the only emergency powers explicitly granted to counties under this chapter.[5] It is noted that these powers may be exercised "without regard to time-consuming procedures and formalities prescribed by law," though constitutional requirements are not waived in the event of an emergency. NRS 414.090(2). *See also* 16 Am. Jur. 2d *Constitutional Law* § 71 (1979) ("No emergency justifies the violation of any of the provisions of the United States Constitution.").

Under traditional legal principles, the scope and extent of a county's authority to act is contained within, and limited by, its enabling statutes. *County of Pershing v. Sixth Judicial Dist. Ct.*, 43 Nev. 78, 81, 181 P. 960, 961 (1914). In short, Mineral County can exercise only those powers that are expressly granted to it by law, or by such implication as are reasonably necessary to carry out the express powers. Op. Nev. Att'y Gen. No. 874 (February 21, 1950). Courts will construe municipal powers strictly rather than liberally. *Ex Parte Sloan*, 47 Nev. 109, 110, 217 P. 233, 234 (1923).

As described above, all Nevada counties have certain explicit emergency powers enumerated in NRS 414.090(2)—namely, the power to enter into contracts and incur obligations, in order to combat disaster, protect the public, and provide emergency assistance to victims. Section 6 of the emergency management ordinance proposed by Mineral County contains the contract and debt powers enumerated within NRS 414.090(2), along with a number of additional powers that are not explicitly authorized within this statute. These additional emergency powers purport to allow the Mineral County Commissioners (or Mineral County Director of Emergency Management) to:

(a) Establish a curfew allowing only authorized persons in public places;
(b) Forbid or limit the number of persons who may gather or congregate in public places;
(c) Prohibit or restrict traffic on public streets and roads;
(d) Prohibit the sale or distribution of gasoline (or other flammable/combustible), except in vehicle gas tanks or other proper container;
(e) Close businesses which sell gasoline (or other flammable/combustible);
(f) Prohibit the sale or distribution of alcohol;
(g) Close businesses which sell alcohol;
(h) Prohibit the sale or distribution of guns, ammunition or explosives;
(i) Close businesses which sell guns, ammunition or explosives.

Clearly, these above-listed powers are beyond the county's express authority to "enter into contracts and incur obligations necessary to combat such a disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such a disaster," as authorized within NRS 414.090(2). In that these additional emergency powers are not the limited

[5] No specific emergency powers are included within the relevant section of Nevada's County Government Law. *See* NRS 244.150-.194.

contract and debt powers specifically authorized by statute, they must be found to exist by implication in order to survive initial scrutiny.

It is the opinion of this office that the additional emergency powers sought by Mineral County cannot be said to exist by implication. The expansive powers sought (e.g., highway closure, business closure, prohibitions against public assembly and the sale of otherwise legal goods) are simply too broad and sweeping in light of the limited emergency powers explicitly granted to political subdivisions under NRS 414.090(2) (i.e., powers relating only to contracts and debt), and the broad emergency authority granted to the Governor under that chapter. *See generally State, Dep't of Motor Vehicles v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988) (had the legislature intended to grant broadened powers to counties, it easily could have). Accordingly, statutory change to NRS chapter 414 would be required if Mineral County (or any other Nevada county) wishes to authorize the types of additional emergency powers as those set forth in subsections (a)-(i) of section 6 of its proposed ordinance.

B. Preemption

Even if the proposed powers were found to exist by implication, in the absence of wholesale statutory change, such powers would be preempted by analogous, specific state law. "It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and statewide application is universally held to be invalid." 56 Am. Jur. 2d *Municipal Corporations* § 374 (1971). As noted within the opinion request letter, the emergency police powers set forth at subsections (a)-(i) of section 6 may impermissibly conflict with existing state statutes.[6] Counties, after all, are only empowered to enact such local police ordinances "as are not in conflict with the general laws and regulations of the State of Nevada . . . ." NRS 244.357(1).

For example, regarding control of firearms, NRS 244.364 clearly states that counties may regulate only the unsafe discharge of firearms, and that "no county may infringe upon" the power of the legislature to regulate, *inter alia*, the sale and possession of firearms. NRS 244.364(1). Subsections (h) and (i) of the proposed ordinance are thus plainly improper in that they purport to regulate far more than the unsafe discharge of firearms. As to the sale of liquor, this is an area where counties may regulate. *See* NRS 244.350(2)(a)-(c); *Kochendorfer v. Board of County Comm'rs*, 93 Nev. 419, 422, 566 P.2d 1131, 1133 (1977). Subsections (f) and (g) of the proposed ordinance (regulating the sale of alcohol) thus initially pass muster.

---

[6] The opinion request letter additionally asserts conflict with existing Mineral County ordinances. It is noted that section 10 of the proposed emergency management ordinance appears to address this concern by specifically repealing all conflicting ordinances.

Most importantly, however, under chapter 414, the Governor is given specific powers in the event of an emergency that will preempt all emergency-related county ordinances that are not themselves specifically authorized by statute. For example, NRS 414.060 allows the Governor to direct and control the "conduct of civilians and the movement and cessation of movement of pedestrians and vehicular traffic" along with "public meetings and gatherings" in the event of an emergency.[7] NRS 414.060(3)(g)(5) and (6). These specific emergency powers directly conflict with subsections (a) (re: curfews), (b) (re: congregation of persons) and (c) (re: traffic restrictions) of section 6 of the proposed ordinance.

Further, the Governor has been given broad and general powers to "perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety of the civilian population." NRS 414.070(6); *see also* NRS 414.070(1) (Governor has power "[t]o enforce all laws and regulations relating to emergency management and to assume direct operational control of any or all forces and helpers for emergency management in this state."). As plainly stated by this office in 1957, "[t]here can be no question but that the Legislature intended to give to the Governor *the broadest possible powers* consistent with constitutional government in a time of dire emergency." Op. Nev. Att'y Gen. No. 336 (December 12, 1957) (emphasis added); Op. Nev. Att'y Gen. No. 36 (May 29, 1963) (same holding). Similarly, the Governor (or the Legislature) is empowered to declare a state of emergency, and only the Governor can declare martial law. NRS 414.070 (declaration of emergency); NRS 412.122(4) (martial law).

The broad grant of power given to the Governor in the event of an emergency is wholly inconsistent with the broad emergency powers sought by Mineral County in its proposed ordinance. Accordingly, preemption of the cited provisions in section 6 of the proposed ordinance is justified. *See generally Walsh v. River Rouge*, 189 N.W.2d 318, 326 (Mich. 1971) (In the event of an emergency, "local government is without power to act since the field of permitted action has been entirely preempted by state law."). Only emergency-related contract and debt powers may be exercised by counties in this state. *See* NRS 414.090(2).

Practical considerations also support preemption. If an emergency should cover more than one Nevada county, it is clear that the Governor must be able to exercise necessary police powers consistently statewide, so to avoid "piecemeal" application of emergency measures between the Nevada counties. *Walsh*, 189 N.W.2d at 322-23. For example, it would defeat the public safety purpose of chapter 414 to allow individual counties to determine, perhaps inconsistently, what kind of traffic can pass on highways that pass through more than one county.

---

[7] *See also* NRS 484.359(1) (state police officers may establish roadblocks in the event of an emergency).

In sum, based on the above analysis, it is the opinion of this office that preemption applies to each of the proposed emergency powers set forth at subsection (a) through (i) of section 6 of Mineral County's proposed ordinance.

C. Constitutional Concerns

Lastly, in that the powers within section 6 make criminal certain lawful acts—e.g., public gatherings, sale of alcohol, gasoline and firearms—they may also be found to be unconstitutional.[8] *See* NRS 414.090(2). A brief discussion of constitutional concerns is thus warranted. As discussed earlier, neither political subdivisions nor the Governor can waive constitutional requirements in the event of an emergency. While it is acknowledged that certain state legislatures have given emergency powers to their governors that are similar to those sought by Mineral County, the emergency powers sought may impact on rights recognized by the state and federal constitutions.[9] For example, the curfew power sought by Mineral County, along with the power to restrict public gatherings and public travel, raises first amendment concerns—namely, the unlawful restriction on the freedoms of speech, public assembly and association, and on the right of interstate travel. In that the proposed ordinance allows the closure of legitimate businesses in the event of an emergency, fifth amendment concerns regarding governmental "takings" are raised.

As an overall constitutional concern, the specific powers set forth in the proposed ordinance may be impermissibly broad in that they leave too much discretion in the hands of the county officials. In order to pass constitutional muster, restrictions on constitutional rights must be narrowly drawn. For example, curfews should be set by government officials only during those hours where the danger of civil unrest is highest. *See, e.g.*, *U.S. v. Chalk*, 441 F.2d 1277, 1283 (4th Cir. 1971), *cert. denied*, 404 U.S. 943 (1971). The proposed ordinance, as currently drafted, does not contain prudent limiting language.

CONCLUSION

In sum, it is the opinion of this office that Mineral County will exceed its current statutory authority if it proceeds to adopt the emergency powers set forth in subsections (a)-(i) of section 6 of its proposed ordinance relating to emergency management. Further, such powers, if enacted, would be preempted by other grants of power set forth in chapter 414 and elsewhere. Lastly, the types of powers sought by Mineral County raise constitutional concerns that would have to be resolved before passage.

---

[8] Section 11 of the proposed ordinance makes it a misdemeanor to do any act forbidden by rule or regulation issued pursuant to section 6.

[9] *See, e.g.* , Iowa Code Ann. § 29C.3 (West 1989); N.D. Code § 37-17.1-05 (1987).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: LISA W. CLAYTON
Deputy Attorney General

OPINION NO. 95-04 ELECTED OFFICIALS; ELECTIONS; RECALL; SECRETARY OF STATE: The Nevada Constitution does not permit an official to be recalled within the first six months of his term regardless of whether the official is in his first term or a subsequent term.

Carson City, April 3, 1995

The Honorable Dean Heller, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Heller:

You have requested an opinion from this office regarding recall of a reelected official within the first six months of his new term.

BACKGROUND

Recall is the procedure by which an elected official may be removed from office by a vote of the people before his term expires. The authority of the people of Nevada to recall their elected officials is located in article 2, § 9 of the Nevada Constitution. Article 2, § 9 also allows the legislature to enact laws regarding recall which the legislature has done in chapter 306 of the NRS.

Article 2, § 9 states in pertinent part: "No such petition shall be circulated or filed against any officer until he has actually *held his office six (6) months . . . .*" [Emphasis added.]

According to the information you have provided, Lincoln County Commissioner Ed Wright was reelected in November 1994 and is now the subject of a recall. A notice of intent to circulate a recall petition was filed with the Lincoln County Clerk on March 3, 1995, pursuant to NRS 306.015(1).

QUESTION ONE

Does the Nevada Constitution permit an official to be recalled within the first six months of his term regardless of whether the official is in his first term or a subsequent term?

ANALYSIS

The language in article 2, § 9 is clear that a newly elected public officer is not subject to recall within the first six months of taking office. Therefore, the first time a person is elected to and takes his office, no recall petition may be circulated against him until he has held his office for six months. This language is not so clear when applied to a person who is reelected to an office.

Nevada amended its constitution in 1912 to provide for recall of public officers as a result of the national progressive movement. Several other western states also adopted recall at about the same time. Both Arizona and Oregon have language that is identical to Nevada's regarding this "first six months free" phrase.

The Attorney General of Arizona issued an opinion in 1981 interpreting Ariz. Rev. Stat. Ann. § 19-202(A) which states in pertinent part: "A recall petition shall not be circulated against any officer until he has *held office for six months* . . . ." [Emphasis added.] The Arizona Attorney General states that "the six-month period runs from the date of original occupancy of the office." Op. Ariz. Att'y Gen. No. I81-064 (May 18, 1981). No cases were cited and only loose rules of statutory construction were applied.

The Attorney General of Oregon issued an opinion in 1966 interpreting article II, § 18 of the Oregon Constitution which provides: "No such [recall] petition shall be circulated against any officer until the officer has actually *held the office six months* . . . ." [Emphasis added.] The Oregon Attorney General concluded "that the word 'office' as used in Article II, § 18, supra, is limited to the term a person is serving at the time recall is instituted . . . ." Op. Or. Att'y Gen. No. 6212 (December 22, 1966) (emphasis in original). The Oregon Attorney General cited two cases to support his conclusion. We find the analysis of the Oregon Attorney General to be persuasive and agree with the conclusion regarding the interpretation of the phrase in question.

"Office" is the key word in the phrase "held office six months." Black's Law Dictionary states: "The most frequent occasions to use the word arise with reference to a duty and power conferred on an individual by the government; and, when this is the connection, 'public office' is a usual and more discriminating expression." *Black's Law Dictionary* 1082 (6th ed. 1990). Black's defines public office as: "The right, authority, and duty created and conferred by law, by which *for a given period*, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public." *Id.* at 1083 (emphasis added).

The Supreme Court of Oregon adopted the following definition of public office:

> "In general, the term 'public office' embraces the ideas of *tenure, duration,* emolument, powers, and duties; and it has been defined as a public station or employment conferred by the appointment of government, or the right, authority, and duty created and conferred by law, by which *for a given period* an individual is invested with part of the sovereign function of the government." 67 C.J.S., Officer, § 2, p. 97.

Recall Bennett Committee v. Bennett, 249 P.2d 479, 491-92 (1952) (emphasis added). The court was struggling with the issue of whether a recalled official could have his name placed on the ballot in the election held to fill the unexpired portion of his term. The court held he could not and cited several comparable cases involving removal of elected officers by judicial means to determine essential characteristics of the office in question. The court held "that a public office is an entity and that the duration of the term of office is a part of the entity." *Id.* at 493.

The Supreme Court of Tennessee looked to a prior Tennessee case as well as a United States Supreme Court case to clarify meaning of the word "office", stating: "'office' implied, 'not merely place, but *term or tenure* as well' . . . 'office' 'embraces the ideas of *tenure, duration,* emolument, and duties.'" *State ex rel Thompson v. Crump*, 183 S.W. 505, 507 (1916) (emphasis added). The court was interpreting a specific phrase in the state's Ouster Act which provided that for certain conduct, any state, county, or municipal officer "shall forfeit his office, and shall be ousted from such office in the manner hereinafter provided." *Id.* at 506. In holding that the removed officials were only ousted from the term they were serving at the time of removal and since they had been reelected, they were eligible to enter into their new terms, the court stated:

> [W]hen one is removed from an office, he is removed for the current term, and he cannot thereafter be re-elected to that term. This is so because the term is part of the office. . . . [T]he office itself is limited by the term. If we go beyond the current term, then we have to deal with another office.

Id. at 507.

These definitions of "office" all explain that the duration of the office, as specified by the term imposed by either the state constitution or the state laws, is a necessary element to establish the meaning of the word. In Nevada the term for an individual office may be found in either the Nevada Constitution, the Nevada Revised Statutes, county ordinances, or city ordinances. *See* Nev. Const. art. 15, § 11. The term of office for county commissioners is established in NRS 244.030 as four years. NRS 244.030 states:

> County commissioners shall enter upon their duties on the 1st Monday of January succeeding their election, and, except for 2-year terms established pursuant to NRS 244.018 [which provides for staggered terms for additional commissioners], *shall hold*

their offices for 4 years as provided in this chapter; and the term of office shall expire at 12 p.m. of the day preceding the 1st Monday in January following a general election.

In view of the facts that "public office" implies that the office is for a specified term and even the statute that establishes county commissioners contains the phrasing that the commissioners shall hold their offices for four years, it is our conclusion that a public officer holds his office for the specified term only. This means that each time a public officer is reelected he begins to hold his office on the day he takes his oath of office for that term.

This conclusion also preserves the integrity of each general election. The voters have spoken at a general election as to their choice for each office voted upon. That vote should remain valid and untouched for the first six months of each officer's new term whether elected for the first time or reelected. The county is also spared the cost of holding a special election during this time.

CONCLUSION TO QUESTION ONE

The Nevada Constitution does not permit an official to be recalled within the first six months of his term regardless of whether the official is in his first term or a subsequent term.

QUESTION TWO

If the conclusion to question one is that the Nevada Constitution does not permit an official to be recalled within the first six months of his term regardless of whether the official is in his first term or a subsequent term, should the filing officer accept a recall petition for filing if the officer who is the subject of the recall is either in his first term or in a subsequent term?

ANALYSIS

Article 2, § 9 of the Nevada Constitution prohibits the circulation and filing of a recall petition until the public officer has held his office for six months. The section also authorizes the legislature to provide additional legislation as may aid the operation of the section. The legislature has done this in chapter 306 of the NRS.

Chapter 306 explains that to begin the recall process, a notice of intent must be filed, NRS 306.015(1) and (2), and once the recall process has begun, the recall petition must be submitted to the county clerk whether sufficient signatures are gathered or not. Failure to do so is a misdemeanor. NRS 306.015(3). The county clerk then begins the signature verification process as proscribed in NRS 293.1276—.12795. If it is found that the recall petition contains sufficient signatures, the county clerk must file it with the appropriate filing officer. NRS 306.015(4).

It is the opinion of this office that at this point in the recall against Mr. Wright the Lincoln County Clerk must not file the recall petition for the reason that article 2, § 9 of the Nevada Constitution prohibits such a filing. However, the statutory provision governing the submission of the recall petition for signature verification must be complied with.

Regarding the recall of Lincoln County Commissioner Ed Wright which was started on March 3, 1995, the recall petition must be submitted to the Lincoln County Clerk, the signature verification must be completed, but the Lincoln County Clerk must not file the recall petition. In future recalls the filing officer should not file a notice of intent if the officer who is the subject of the recall, has not held the office for six months. This includes reelected officers.

CONCLUSION TO QUESTION TWO

A filing officer may not accept a recall petition for filing if the officer who is the subject of the recall is either in the first six months of his first or subsequent term, nor may the filing officer file a notice of intent in such a situation.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 95-05 COURTS: Municipal courts in Nevada are not empowered by law to collect a fee for filing and acting upon property or bail bonds.

Carson City, April 10, 1995

Mr. Michael F. Mackedon, City Attorney, Fallon City Attorney's Office, 55 West Williams Avenue, Fallon, Nevada 89406

Dear Mr. Mackedon:

This is in response to your request for an opinion from this office concerning whether a municipal court can charge a fee for filing and acting upon bail or property bonds. More specifically, you ask:

QUESTION

Can the municipal courts charge a $40 fee for filing and acting upon bail or property bonds, as do the justices' courts, pursuant to NRS 4.060(1)(o)?

ANALYSIS

The Nevada Constitution, art. 6, § 1, provides for municipal courts in the following manner: "The Judicial power of this State shall be vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns."

The Nevada Constitution, art. 6, § 9, further provides:

> Provision shall be made by law prescribing the power[,] duties and responsibilities of any Municipal Court that may be established in pursuance of Section One, of this Article; and also fixing by law the jurisdiction of said Court so as not to conflict with that of the several courts of Record.

The justices' courts are authorized by the Nevada Constitution. Moreover, NRS 4.060 expressly provides authority for the justices' courts to "charge and collect the following fees: . . . [f]or the filing and acting upon each bail or property bond . . . $40.00."

In contrast, the municipal courts are created by statute. A court which is the creation of a statute has only the authority given to it by statute. *McKay v. City of Las Vegas*, 106 Nev. 203, 205, 789 P.2d 584, 585 (1990). Jurisdiction is not given by implication. *A.B. Paul & Co. v. W.H. Beegan, et al.*, 1 Nev. 327, 330 (1865).

NRS 5.050 defines the limits of the jurisdiction of municipal courts. Nothing contained in that statute or the others outlining authority and powers of the municipal courts empower municipal courts to collect a fee for filing and acting upon bail or property bonds. NRS 5.010-.090.

It may be argued that NRS 5.073 allows the municipal court to collect a fee for filing and acting upon bail bonds. That statute states in relevant part: "The practice and proceedings in the municipal court must conform, as nearly as practicable, to the practice and proceedings of justices' courts in similar cases." However, NRS 5.073 merely requires that the municipal court conform its practice and proceedings to that of the justices' courts. It does not confer the jurisdiction of the justices' courts upon the municipal courts. Although the municipal courts possess those powers reasonably required to enable them to perform their judicial functions, they remain a creation of statute. They possess only the jurisdiction expressly provided for them in NRS 5.050. This

statutory provision does not allow the municipal courts to charge and collect a fee for filing and acting upon bail or property bonds. Therefore, the municipal courts are bound by this statutory restriction and limitation of its authority. Until and unless the legislature provides authority similar to the authority conferred by NRS 4.060(1)(o) on the justices' courts, the municipal courts may not collect fees in the same fashion as do the justices' courts.

CONCLUSION

The municipal courts are not empowered by the Nevada Constitution or legislative act to collect a fee for filing and acting upon bail or property bonds.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN CUNNINGHAM, III
Deputy Attorney General

OPINION NO. 95-06 FINANCIAL INSTITUTIONS; LOANS; CONSTI-TUTIONAL LAW: A linked deposit program will not constitute making a gift or lending credit or money as prohibited by the Nevada Constitution.

Carson City, May 10, 1995

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division, 406 East Second Street, Carson City, Nevada 89710

Dear Mr. Walshaw:

As a member of the Finance and Industrial Development cluster group of the Department of Business and Industry, you have been requested to explore the feasibility of adopting a "linked deposit program" in the State of Nevada similar to that in operation in the State of Missouri.[10] In a linked deposit program, the state treasurer agrees to deposit state funds in an account at a depository institution at below market interest rates in exchange for the institution's agreement to lend its own funds at a comparably lower interest rate to an identified class of persons or

[10] The Missouri program is established pursuant to sections 30.750-.767, inclusive, of the Missouri Revised Statutes.

businesses. The Missouri law is designed to spur economic development and growth by reducing financing costs of those who wish to borrow money for agriculture, job creation, small business, multi-family housing, education and drought relief. The participating lender assumes all the risks associated with making the loans. Mo. Rev. Stat. § 30.765 (1988). Because the program benefits the individual borrowers directly and the participating lenders indirectly, you have asked the following with respect to a linked deposit program:

QUESTION

Would a linked deposit program violate Nev. Const. art. 8, § 9, which prohibits the state from donating or loaning money, or its credit, to private entities?

ANALYSIS

Nev. Const. art. 8, § 9, states: "The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." On its face, this provision would seem to be implicated any time an expenditure of public funds benefits a private business. However, the courts in this and many other states with similar provisions have indicated that "lending of credit" provisions are to be construed in light of the specific mischief they are intended to prevent, not hinder the government from carrying out its essential function to secure the health and welfare of its citizens.

"Lending of credit" provisions were added to state constitutions to prevent the losses to the state and its taxpayers that can occur when the state becomes a surety or guarantor of private debts. In *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986), the court quoted the following statement from a member of the constitutional convention of New York of 1867 regarding the purpose of New York's lending of credit provision:

> The past history of this state previous to the constitution of 1846 was this: if a railroad or some enterprise of that kind was started in any portion of the State, and was unable as it seemed to get along without some State aid the State came in as an indorser or security for the road, loaning to the road or to the corporation its bonds, payable at a future period of time, with an agreement on the part of the corporation to take care of the interest as it became due and ultimately to redeem the principal. The result was in very many instances the State lost the entire amount of the investment.

Id. at 410.[11] The court went on to note that the Governor of New York in 1845 reported that more than three-fifths of the debt chargeable on the general fund had been incurred by loans of the state's credit to railroad corporations which subsequently failed. *Id.* at 410. The cases construing lending of credit provisions therefore examine the effect of the law in question on the future taxpayers of the state as well as the question whether the measure furthers a legitimate public purpose.

In *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d 1321 (1973), the court considered a challenge to the County Economic Development Revenue Bond Law on grounds, among others, that the law permitted public funds to be spent for private purposes and violated the lending of credit provision of Nev. Const. art. 8, § 9. While noting that the law would indeed benefit those business receiving the lower cost financing, the court rejected these challenges. It first observed that the law specifically provided that the bond law "forbids pecuniary liability of the County, or a charge against its general credit or taxing powers." *Brennan*, 89 Nev. at 332. It also found that the law had a proper public purpose "to encourage industry to either locate or remain in this State and, thereby, aid in relieving unemployment and maintaining a stable economy." *Id.* at 333. Courts in jurisdictions with similar lending of credit prohibitions have uniformly rejected challenges that economic development bond laws violate that constitutional provision. *See, e.g. Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986); *Wash. State Housing Finance Comm'n v. O'Brien*, 671 P.2d 247 (Wash. 1983); *Redevelopment Agcy., Etc. v. Shepard*, 75 Cal.App.3d 456, 142 Cal.Rptr. 212 (Cal.Ct.App. 1977).

A common thread of these cases is that a constitutional prohibition against making gifts or lending the money or credit of the state is not violated if the expenditure is for a valid public purpose. In *Redevelopment Agcy., Etc. v. Shepard*, 75 Cal.App.3d at 457, the court, quoting an earlier

case, stated: "The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefitted therefrom."[12] *See also, Tacoma v. Taxpayers if City of Tacoma*, 743 P.2d 793, 804-808

---

[11] Utah's lending of credit provision states: "The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking." Utah Const. art. VI, § 29.

[12] California's lending of credit provision states:

> The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other corporation or political subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or

(Wash. 1987). What constitutes an adequate public purpose for expenditures which incidentally benefit private persons is primarily a matter of legislative discretion which will not be disturbed by the courts if it has a reasonable basis. *Id.*; *see also, Utah Technology Finance Corp.*, 723 P.2d at 412.

Another recurring theme of the cases is that a law will not offend the lending of credit limitation if it does not obligate future legislatures and taxpayers to support a private enterprise. For example, in *Utah Housing Finance Agency v. Smart*, 561 P.2d 1052 (Utah 1977), the court considered whether a provision of the Utah Housing Finance Agency Act which authorized, but did not require, appropriations to a capital reserve fund for retiring the agency's housing bond obligations, violated the state's lending of credit provision:

> If the legislation requires future appropriations to defray the obligations of the Agency it would be invalid as lending the state's credit, but where, as here, it merely allows future appropriations without requiring such, it creates no binding obligation upon the state and therefore does not result in a debt of the state or the lending of the state's credit.

Id. at 1056; *see also, In Re Interrogatories By Colo. State Senate*, 566 P.2d 350, 355 (Colo. 1977).

Applying these principles to a linked deposit program, we believe that a legislative finding that the provision of low cost loans to certain groups will benefit the state's economy and general welfare will be entitled to judicial deference if there is a reasonable basis for such a finding.[13] Although legislation that may come out of the cluster group's work may not incorporate the same classifications as the Missouri program, the areas targeted for lower cost loans in that program may generally be classified as enhancing the economic development of the state. Our Supreme Court in the *Brennan* case specifically found that relieving unemployment and maintaining a stable economy are valid public purposes. Numerous other cases have so held with respect to the provision of housing for low and middle income persons. *See, e.g., Utah Housing Finance Agency*, 561 P.2d at 1055; *Wash. State Housing Finance*, 671 P.2d at 250. The interest rate subsidy may be seen as the consideration paid by the state for encouraging certain types of loans that will benefit the economic and general welfare of the state. Provided the legislature is reasonably able to conclude that providing lower cost loans to the groups identified in the statute will provide economic benefits to all the citizens of this state, we believe a valid public purpose of the legislation will be shown regardless of the personal benefits bestowed on the recipients of the loans and the incidental benefits obtained by the lenders participating in the program.

---

thing of value to any individual, municipal or other corporation whatever . . . .

Cal. Const. art. XVI, § 6.

[13] We believe a linked deposit program can only be implemented with legislative approval.

On the question whether a linked deposit program would result in making a gift or lending the state's credit to the participating lenders or loan recipients, we note first that the Missouri statute specifically provides that the state is not liable or responsible to the banks for any of the loans made under the program. The bank assesses the credit risks associated with each application, makes the initial determination whether to proceed with the loan, and assumes all risk that the loan will be repaid according to its terms. Mo.Rev.Stat. § 30.765 (1988). We also observe that the decision to participate in the program, as well as the level at which to participate, is within the discretion of the legislature and the treasurer. In a linked deposit program the state forgoes interest income it would otherwise have earned on deposits dedicated to the program. Although this will have an effect on future budget projections, the level of that effect is within the control and discretion of the legislature and the treasurer. The same is true with respect to any appropriations that may be necessary for additional staff or equipment needed to administer the program. The program does not require the state to guarantee the debt of another or obligate future legislatures or taxpayers to continue funding the program. We therefore conclude that a linked deposit program similar to that in operation in Missouri will not constitute making a gift or lending credit or money as prohibited by Nev. Const. art. 8, § 9.

CONCLUSION

Provided the legislature may reasonably conclude that providing lower cost loans to the groups identified in the statute will provide economic benefits to Nevada citizens, we believe a valid public purpose of the legislation will be shown, regardless of the personal benefits bestowed on the recipients of the loans and the incidental benefits obtained by the lenders participating in the program. Since the program does not require the state to guarantee the debt of another or obligate future legislatures or taxpayers to continue funding the program, a linked deposit program similar to that in operation in Missouri will not constitute making a gift or lending credit or money as prohibited by Nev. Const. art. 8, § 9.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E. WALTHER
Senior Deputy Attorney General

Overruled by *State v. Granite Constr. Co.*, 118 Nev. Adv. Op. No. 9, 40P.3d 423 (2002), decided February 13, 2002.

OPINION NO. 95-07 LABOR; PUBLIC WORKS; WAGES: Materials delivery truck drivers are not entitled to the prevailing wage when they deliver materials to a public works project.

Carson City, May 30, 1995

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

Dear Mr. MacDonald:

This office issued Op. Nev. Att'y Gen. No. 93-01 (March 16, 1993) to you addressing the issue of whether certain truck drivers who deliver materials to the site of Nevada public works projects should be paid the prevailing wage. At that time, we opined that under certain circumstances some materials delivery truck drivers were entitled to receive the prevailing wage. Recently this opinion has come into question, and by this letter I must inform you that Op. Nev. Att'y Gen. No. 93-01 must be rescinded.

QUESTION

Are employees who drive trucks to the site of prevailing wage projects to deliver materials for immediate use at the site entitled to payment of the prevailing wage under NRS 338.020?

ANALYSIS

In our previous opinion, we opined that the answer to the above question was that in some circumstances, truck drivers would be entitled to payment of the prevailing wage. Our previous opinion must now be reversed and rescinded.

The main reason for rescission of the opinion is a decision entitled *Sparks & Wiewel Constr. Co. v. Martin*, 620 N.E.2d 533 (Ill.App.Ct. 1993). This decision was rendered ***after*** Op. Nev. Att'y Gen. No. 93-01 was issued. The facts in *Sparks & Wiewel* are too similar to the facts regarding our previous opinion to be ignored or disregarded. In *Sparks & Wiewel*, the Illinois Attorney General issued an opinion that reached the same conclusion we reached in Op. Nev. Att'y Gen. No. 93-01, namely that some materials delivery truck drivers who were placing their materials in specific locations in specific ways upon a public works job site were entitled to receive the prevailing wage for the time they were on site. In that case, the truck drivers were delivering dirt and rocks in dump trucks, belly-dumps, and dump trucks with "pups" to a highway construction project where

they placed the materials directly on the work site as directed and were immediately followed by a bulldozer that incorporated their deliveries into the work site.

As a result of the opinion of the Illinois Attorney General, the Illinois Department of Labor conducted a prevailing wage prosecution of Sparks & Wiewel Construction Co. for failure to pay the prevailing wage to its truck drivers. The administrative hearing resulted in a finding against Sparks & Wiewel, so Sparks & Wiewel filed a legal action against the Department of Labor seeking to have the administrative proceedings declared void.

The trial court reversed the administrative determination, finding that the opinion of the Illinois Attorney General and the holding of the administrative hearing were inconsistent with Illinois' prevailing wage laws. In particular, the trial court found that materials delivery truck drivers were either sellers or suppliers and were exempt from payment of the prevailing wage. *Id.* at 537.

On appeal, the Illinois Appellate Court agreed with the trial court, finding that the opinion of the Illinois Attorney General was inconsistent with the plain language of Illinois prevailing wage laws. *Id.* at 541. The court expressly found that the mere act of spreading material with a belly-dump truck or with a regular dump truck with a "pup" was merely a function of unloading a load of material and did not constitute construction work on the job site. *Id.* at 541. The court also discussed many of the cases discussed in our previous opinion and determined that those cases were not persuasive authority to disregard the plain meaning of Illinois prevailing wage law. *Id.* at 541-42.

The facts and circumstances in *Sparks & Wiewel* are indistinguishable from the facts and circumstances that gave rise to our previous opinion. While it is true that a decision of the Illinois Court of Appeals is not binding authority upon a Nevada court, the similarities between the facts and law of Illinois and Nevada lead us to believe that a Nevada court would very likely consider the *Sparks & Wiewel* opinion as important and guiding precedent. The two most recent cases to address this issue, namely *Sparks & Wiewel* and the "Midway" case (*Building & Const. Trades Dept. v. Dept. of Labor*, 932 F.2d 985 (D.C.Cir. 1991)), indicate a trend that weighs entirely against our previous opinion. It is our opinion that pursuing any administrative prosecution based upon our previous opinion would be futile.

Therefore, we hereby rescind our Op. Nev. Att'y Gen. No. 93-01. It is our understanding that the one administrative prosecution your office commenced based upon our previous opinion has been indefinitely stayed pending this letter, so issuance of this letter ought not cause disruption or harm.

CONCLUSION

A truck driver who delivers materials to a Nevada public work does not need to be paid the prevailing wage.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: LOUIS LING
Deputy Attorney General

OPINION NO. 95-08 EMPLOYMENT SECURITY DIVISION; SOCIAL SECURITY; STATUTES: The Administrator of the Employment Security Division has the sole authority to hire salaried examiners who hear appeals of denials of unemployment compensation.

Carson City, June 2, 1995

Ms. Linda K. Lee, Chairperson, Board of Review, Employment Security Division, 70 West Taylor Street, Suite 202, Reno, Nevada 89520

Dear Ms. Lee:

The Employment Security Division's Board of Review has requested a legal opinion on the following matter.

QUESTION

Regarding appealed claims for unemployment compensation benefits, which official or board has the statutory authority to hire appeal examiners who are selected to decide appeals at the initial level of review?

ANALYSIS

Officers and agents of the State of Nevada must be chosen or appointed in the mode prescribed by law of the entity's creation. *See State of Nevada v. Rosenstock*, 11 Nev. 128, 140 (1876). The legislature's language must be reviewed to ascertain the legislative intent on the *manner* prescribed to select appeal examiners for the Employment Security Division and its Board of Review. *See Donaldson v. Sisk*, 114 P.2d 907 (Ariz. 1941).

In 1941 the legislature enacted laws creating the Employment Security Department for Nevada and defining the powers and duties of the Department's Executive Director. Section 4 of that enabling legislation vested the Executive Director with the power "to employ, in accordance with the provisions of this act, such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable . . . ." Section 4(d) of that act empowered the Executive Director to select all personnel of the department and to fix their compensation, powers and duties. *See* Act of March 20, 1941, ch. 59, § 4, 1941 Nev. Stat. 68.

Today, the provisions cited above are codified within NRS chapter 612. The law now provides for a division of the department of employment, training and rehabilitation called the Employment Security Division. NRS 612.049. The Employment Security Division now has an Administrator instead of a Department Director. NRS 612.016. The Administrator's power to select, hire and fire employees is in NRS 612.230 as follows:

> 1. For the purpose of insuring the impartial selection of personnel on the basis of merit, the administrtor *shall fill all positions in the division*, except the post of , from registers prepared by the department of personnel, in conformity with such rules, regulations and classification and compensation plans relating to the selection of personnel as may be adopted or prescribed by the administrator.
> 2. The administrator *shall select all personnel* either from the first five candidates on the eligible lists as provided in this chapter . . . . The administrator may fix the compensation and prescribe the duties and powers of such personnel, including such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of the duties under this chapter, and may delegate to any such person such power and authority as he deems reasonable and proper for its effective administration. [Emphasis added.]

In 1951 the legislature amended the unemployment compensation laws to provide for, among other items, an appeals process for persons making claims for unemployment benefits. The 1951 amendments enabled a party entitled to a notice of benefits determination to file an appeal with an appeal tribunal in the first instance. Further appeal was also possible through a Board of Review.

The relevant part of section 6.8 of the 1951 act is:

> To hear and decide appealed claims, the board of review shall appoint one or more impartial appeal tribunals consisting in each case of either a salaried examiner, *selected in accordance with section 4(d) of the employment security administration law (Statutes 1941, chapter 59)* or a body consisting of three members, one of whom shall be a salaried examiner, and who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the board of review and be paid a fee of not more than $15 per day of active service on such tribunal, plus necessary expenses. No

person shall participate on behalf of the executive director or the board of review in any case in which he is an interested party. The board of review may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal.

See Act of March 21, 1951, ch. 233, § 6.8, 1951 Nev. Stat. 347 (emphasis added).

The current NRS 612.490 is essentially the same as section 6.8 of the 1951 act except that "NRS 612.230" is substituted for the italized phrase.

As reflected in the language set forth above, the legislature authorizes two methods for initial appeals to be heard and decided. The appeal tribunal could consist of either a single salaried examiner or could be a three-member body comprised of a salaried examiner as chairman, an employers' representative and an employees' representative. Each of the latter two members serve at the pleasure of the Board of Review but their fee cannot exceed $80 per day. NRS 612.490(1). Historically, only the single salaried examiners act as appeal referees. Three-member panels have not been used to determine initial appeals.

Both the Administrator of the Division and the Board of Review have taken the position that they have the sole and separate power to hire the salaried examiners who act as the initial appeal referees. Based upon NRS 612.490(1), we conclude the Administrator of the Employment Security Division has the sole authority to select, hire, and appoint the salaried examiners. In turn, the Board of Review decides if individual examiners or three member panels shall hear cases and assigns cases to those tribunals.

Generally, every sentence, phrase, and word is to be read to render it meaningful within the context of the purpose of the legislation. *See Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102 (1983). Initially, NRS 612.215(2) describes the duties of the administrator as including "full administrative authority" for the "operation and functions of the unemployment compensation service." In addition, NRS 612.220(2) authorizes the Administrator to employ persons to administer chapter 612. Finally, NRS 612.230(1) states "the administrator shall fill all positions in the division, except the post of administrator." Language within NRS 612.490(1) sets forth that the salaried examiners are to be "selected in accordance with NRS 612.230."

On the other hand, NRS 612.490(1) also expressly provides that: "To hear and decide appeals, the board of review shall appoint one or more impartial appeal tribunals consisting in each case of either a salaried examiner, selected in accordance with NRS 612.230, or a body consisting of three members . . . ." Whenever possible, confusing or conflicting portions of a statute should be harmonized to effect the desired legislative purpose. *See Ex parte Iratacable*, 55 Nev. 263, 283, 30 P.2d 284 (1934). In order to harmonize the seeming conflict within NRS 612.490, it is necessary to recognize that the term *appoint* does not always equate with the actual hiring of an officer or an

employee. To appoint, in certain circumstances, may mean to nominate a person designated to carry out a certain purpose.

The Board of Review has the authority to decide what type of tribunal— three-member panels or single, salaried examiners—shall hear cases. Neither agency challenges that authority. In addition, the words, "[t]o hear and decide appealed claims, the board of review shall appoint" in NRS 612.490(1) means that the Board of Review assigns cases to specific examiners. This may be done by policy, for example, by assigning all cases where the appealing party's last name begins with the letters A-C to a specific examiner or by assigning the cases on a *random* basis.

This interpretation is further supported by the words of NRS 612.520(1) which states: "The board of review, for cause, may remove or transfer to another appeal tribunal any appeal pending before an appeal tribunal." The section authorizes the reassignment of a case from one appeal tribunal to another. This is a logical extension of the Board of Review's authority in NRS 612.490(1) to assign cases to appeal tribunals.

In addition, NRS 612.490(4) empowers the Board of Review to designate alternates to serve in the absence or disqualification of *any* member of an appeal tribunal. That power would apply to salaried examiners as well as to others. This appears to be another logical extension of the authority to assign cases to specific examiners.

The final issue examined was whether hiring salaried examiners by the Administrator would violate federal laws which allow the various states to receive funding under the Social Security Act. The issue was reviewed because the Administrator actually participates in the initial appeals as a party respondent. NRS 612.495(1). We found that the Administrator's participation in the selection of salaried examiners would not violate federal laws.

In order to receive federal funding for the unemployment compensation program, the Secretary of Labor must find that Nevada's laws include certain provisions. Among those necessary provisions our state law must include: "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . ." 42 U.S.C.A. § 503(a)(3) (West 1993). Initially, federal laws do not supersede state laws unless there is a clear manifestation of intention by the Congress. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *see Anderson v. Edwards*, 115 S. Ct. 1291 (1995). The standard for a "fair hearing" under 42 U.S.C.A. § 503(a)(3) is the same as the standard for constitutional procedural due process. *Camacho v. Bowling*, 562 F. Supp. 1012 (N.D. Ill. 1983).

The Due Process Clause of the 14th Amendment allows one agency to investigate and prosecute a case before a hearing officer supervised and controlled by the same agency. *See Butler v. Dept. of Public Safety & Corrections*, 609 S.2d 790 (La. 1992). In addition, the language of 42 U.S.C.A. § 503(a)(3) may be compared to other federal statutes with stricter hearing requirements.

For example, the Individuals with Disabilities Education Act specifically states: "No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child." 20 U.S.C.A. § 1415(b)(2) (West 1993). This sharply contrasts with the language of 42 U.S.C.A. § 503(a)(3) which requires simply a "fair hearing" for appeals of the denial of unemployment compensation.

In Idaho, appeals examiners are appointed by the Director of the Department of Employment. An appeal on a benefits determination may first be heard by an appeals examiner and may thereafter be taken to the Idaho Industrial Commission and the courts. Idaho Code § 72-1368 (1993).

In the case of *Fouste v. Department of Employment*, 540 P.2d 1341 (Idaho 1975), a claimant asserted that this statutory appeals scheme violated the federal requirements for a fair hearing. The Idaho Supreme Court held that the statutory appeals scheme satisfied the fair hearing requirement of the federal Social Security Act. *Id.* at 1345-46. The Nevada statutory scheme of the Administrator hiring the examiners conforms with the Social Security Act.

The Idaho Code and the Nevada Statutes are similar. In Idaho, the Director of the Department of Employment (Idaho Code § 72-1333 (1991)) hires the appeals examiners. Idaho Code § 72-1368(f) (1993). The Director is an interested party to the proceeding before the examiner. Idaho Code 72-1323 (1980) ("The term, 'interested party' with respect to a claim for benefits means . . . the Director."). In Nevada, the Administrator hires the examiners (NRS 612.230(1) and 612.490) and that Administrator is a party to the proceeding. NRS 612.495(1).

CONCLUSION

NRS 612.230 authorizes the Administrator of the Employment Security Division to select all salaried examiners to hear initial appeals of unemployment benefits. The Board of Review decides whether salaried examiners or three-member panels shall hear those appeals. In addition, the Board of Review may assign cases to specific examiners. Hiring of examiners by the administrator does not violate the federal Social Security Act.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN ALBRECHT
Deputy Attorney General

OPINION NO. 95-09 DISTRICT ATTORNEYS; NYE COUNTY; COM-MISSIONERS: A board of county commissioners has no authority under Nevada law to remove the district attorney as counsel of record from a lawsuit against the county over the objection of the district attorney who is ready, willing, and able to provide legal services for the county required of him by Nevada law. A board of county commissioners may retain private legal counsel to manage or assist the district attorney in managing a specific case in which the county is a party, though such an arrangement should be made in cooperation with the district attorney.

Carson City, June 8, 1995

The Honorable Robert S. Beckett, Nye County District Attorney, Post Office Box 593, Tonopah, Nevada 89049

Dear Mr. Beckett:

This is in response to your written request for an Attorney General's opinion concerning the legal authority of the Nye County Commission (Commission) to remove the Nye County district attorney from a lawsuit against the county and hire outside counsel to handle the case over the district attorney's objections.

FACTUAL BACKGROUND

According to your letter, the United States filed a civil suit against Nye County in federal district court on March 8, 1995. You answered the lawsuit by filing responsive documents within the statutory time frame pursuant to the Federal Rules of Civil Procedure. The Commission, objecting to the content of the documents you filed, called an emergency meeting on March 30, 1995, for the purpose of removing you from the case. At the meeting, the Commission scheduled a hearing on the matter of your removal for April 4, 1995.

On April 4, 1995, the Commission did not remove you from the case, but instead hired a private attorney from another state to act as co-counsel for the case under the direction and control of the district attorney's office. Subsequently, however, the Commission convened another emergency meeting on April 11, 1995, whereat it voted unanimously to remove you from the case and have the previously retained attorney serve as counsel of record on behalf of Nye County in the matter.

You have objected to your removal from the case and stated that you are ready, willing, and able to defend the case and perform the necessary legal services on behalf of the county. It is your position that the Commission has no authority to remove and replace you, as you are a state officer

elected by the people and charged by the Nevada Legislature with the duty to defend all suits brought against Nye County.

QUESTION

Does the Commission have the legal authority under Nevada law to remove the county's elected district attorney from a lawsuit against the county and hire private counsel to control and direct the litigation, over the objection of the district attorney who is ready, willing, and able to provide such services?

ANALYSIS

In 1980 the Attorney General issued an opinion concluding that a board of county commissioners does not have the authority under Nevada law to hire private legal counsel over the objection of the elected district attorney who is ready, willing and able to render all the legal services required of him by Nevada statutes. Op. Nev. Att'y Gen. No. 80-37 (October 14, 1980). When counsel other than the district attorney is needed for the purpose of litigating a specific case, a county commission has authority to hire such counsel; however, such arrangements should be made with the advice and consent of the district attorney. The opinion did not directly address the authority of a county commission to remove the district attorney from a case against his will and replace him with private counsel.

This opinion must begin, as did the 1980 Attorney General's opinion, by stating that it has become axiomatic in Nevada case law that county commissioners have only such powers as are expressly granted by the Nevada Legislature or as may be necessarily incidental for the purposes of carrying such powers into effect. *See State ex rel. King v. Lothrop,* 55 Nev. 405, 408, 36 P.2d 355, 357 (1934); *Sadler v. Bd. of Comm'rs of Eureka County,* 15 Nev. 39, 42 (1880); *State v. Canavan*, 17 Nev. 422, 424 (1883); Nev. Const. art. 4, § 26; NRS 244.195.[14]

A county has no express statutory authority to hire private legal counsel for any purpose. NRS 244.165 grants boards of county commissioners authority to control the prosecution or defense of all suits to which the county is a party. The Nevada Supreme Court has cited NRS 244.165 as authority for an implied power in a board of county commissioners to retain private legal counsel to protect the interest of the county. *See Ellis v. Washoe County,* 7 Nev. 291 (1872). The Supreme Court explained that even though the law provided for a district attorney to serve the legal needs of the county, circumstances may arise when the district attorney "may be unable to attend to the

---

[14] NRS 244.195 states as follows: "The boards of county commissioners shall have power and jurisdiction in their respective counties to do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board."

business of the county, or its interests may be of such magnitude that the assistance of counsel would be very desirable, or possibly indispensable." *Id.* at 293.

The Nye County district attorney is charged by law to "defend all suits brought against his county." NRS 252.110(2); *see also* NRS 269.145(2) (district attorney must defend all suits brought against a board of county commissioners). As the 1980 Attorney General's opinion concluded, even if the board of county commissioners retained private counsel to assist in the defense of the federal lawsuit against the county, the district attorney would not be relieved of his statutory duty to defend all suits brought against the county.

At the April 4, 1995, meeting, the Nye County Board of Commissioners hired a private attorney to act as co-counsel in the federal case against the county, working under the direction and control of the office of the district attorney. The attorney retained has extensive experience in the type of case involved. The federal lawsuit against the county appears to be a case of such magnitude that specialized counsel would be very desirable to protect the interests of the county, in fact presenting one of the precise circumstances contemplated by the Nevada Supreme Court in *Ellis* that would justify the board retaining private counsel to assist the district attorney in performing his statutory duties.

The district attorney has express statutory authority to appoint deputies, who may transact all official business appertaining to the offices, to the same extent as their principals. NRS 252.070(1). Such appointment of a deputy by the district attorney is not subject to the approval of the board of county commissioners, as is the appointment of clerical, investigational and operational staff. *See* NRS 252.070(5). The Commission's hiring of specialized co-counsel for the case, to act under the auspices of and in cooperation with the office of the district attorney, is an exercise of its authority to control the defense of a suit against the county complementing the express statutory duty of the district attorney to defend all suits brought against the county and the express statutory authority to appoint deputies to assist him in carrying out such duties. The board's vote removing the district attorney and replacing him as the attorney of record in the case by another attorney, however, cannot be harmonized with the statutory scheme and legal authority that applies.

Other states and authorities have addressed these issues. The authority of an attorney to appear for his client is presumed. *See generally* 17 McQuillan Mun. Corp. § 49.33 (3d ed. rev. 1993). The party challenging the attorney's authority to appear must be overcome by a clear and convincing showing. *Traxler v. Bd. of Trustees of Fireman's Pension Fund*, 701 P.2d 607 (Colo. Ct. App. 1984). A county board may not hire outside counsel for purposes of litigation unless and until the county attorney refuses to provide such services, consents to the employment of outside counsel or determines that he is unable to provide those services. *Bd. of Sup'rs of Maricopa Co. v. Woodall*, 586 P.2d 628, 629-30 (Ariz. 1978). The right of the governing body to retain associate counsel in defending suits in which it is interested does not include the right, on the part of the

municipal authorities, under the guise of such employment, to withdraw from the elected attorney charged by law with such duties any particular case and confide its management to others. 10 McQuillan Mun. Corp. § 29.12 (3d ed. rev. 1990); *see also Byrne v. Wildwood*, 112 A. 305 (N.J. 1921). Authority of a governing body to employ legal services from another source should not be interpreted as abrogating the responsibility and authority vested in a designated public official unless the express statutory language so provides. *Jaynes v. Stockton*, 14 Cal. Rptr. 49, 55 (Cal. Ct. App. 1961).

The board of county commissioners may appoint an interim or replacement for the district attorney if he "dies, resigns, is removed, disappears or is permanently disabled from performing the duties of his office." NRS 252.060(1). When a final judgment is obtained against a county officer for a breach of the conditions of his bond, or if he is convicted of a felony or any offense involving a violation of his official oath, the board declares his office vacant. NRS 245.160. Nevertheless, when a district attorney fails to attend a session of the district court, or for any reason is disqualified from acting in a matter coming before the court, it is the judge who may appoint another person to perform the duties of the district attorney in his courtroom. NRS 252.100(1).

Nevada law provides three methods for the removal of elected officials such as the Nye County District Attorney. The district attorney may be removed by impeachment for misdemeanor or malfeasance in office under article 7, § 1 of the Nevada Constitution; by accusation by grand jury for wilful or corrupt misconduct in office under NRS 283.300 and 283.430; or by summary proceedings under NRS 283.440 for malpractice or malfeasance in office, or for refusing or neglecting to perform any official act in the manner and form prescribed by law. A vote of the Nye County Board of Commissioners, even a unanimous one, cannot operate to remove the Nye County district attorney from his office or from his position as counsel of record representing the county in a particular case, which undertaking was commenced pursuant to his express statutory duty to defend all suits against the county.

Because the Nye County district attorney is not only obligated by statute, but is also ready, willing, and able to provide the legal services needed in cooperation with private legal counsel with relevant specialized skills already retained, this office is of the opinion that Nevada law does not permit the Nye County Commissioners to remove him from the case absent formal proceedings for removal. This does not suggest that the board may not retain private legal counsel to assist the district attorney or his staff and to provide specialized legal services. However, as the 1980 Attorney General Opinion concluded, any such arrangements should be clearly necessary to carry out an express statutory power of the county commissioners and should be made with the advice and consent of the district attorney.

CONCLUSION

The Nye County Board of Commissioners does not have the legal authority to remove the Nye County district attorney as attorney of record in a federal lawsuit against the county over his objections when he is ready, willing, and able to perform the legal services required of him by Nevada statutes. Arrangements for specialized legal counsel to assist in the defense of the federal case at issue should be made with the advice and consent of the district attorney in order to foster the spirit of cooperation between county officials which will necessarily tend to the good of the county as a whole.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: RONDA L. MOORE
Deputy Attorney General

OPINION NO. 95-10 SECRETARY OF STATE; NOTARY PUBLIC; OFFICERS: The Secretary of State may appoint a United States Postmaster to be a notary public.

Carson City, June 12, 1995

The Honorable Dean Heller, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Heller:

You have requested an opinion from this office as to whether a United States Postmaster is eligible to be appointed as a notary public.

QUESTION

May the Secretary of State appoint a United States Postmaster to be a notary public?

ANALYSIS

The Attorney General's office issued an opinion in 1900 advising the postmaster at Battle Mountain he was "ineligible to hold the office of Notary Public while holding the office of Postmaster, the compensation of which exceeds five hundred dollars per annum." Op. Nev. Att'y Gen. (June 4, 1900). The opinion cited *State ex rel. Summerfield v. Clarke*, 21 Nev. 333, 31 P. 545

(1892) which held that the office of notary public is a civil office of profit under this state, within the meaning of article 4, § 9 of the Nevada Constitution.

Article 4, § 9 of the Nevada Constitution states:

> No person holding any lucrative office under the Government of the United States, or any other power, shall be eligible to any civil office of Profit under this State; Provided, that Post-Masters whose compensation does not exceed Five Hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office.

In 1911 the Attorney General issued an opinion that concluded "if the compensation of a postmaster does not exceed $500 per annum, he is eligible to hold the civil office of Notary Public; otherwise not." Op. Nev. Att'y Gen. (November 8, 1911). The reasoning of that opinion is also based upon article 4, § 9 of the Nevada Constitution and stated: "The office of Notary Public is a civil office of profit under the State within the meaning of section 9, article 4, of the Constitution." Op. Nev. Att'y Gen. (November 8, 1911).

In 1956 this office once again opined on the appointment of notaries public. The specific question was whether "the issuing of a notary commission to an employee of the United States Government [is] prohibited by reason of Art. IV, Sec. 9, Constitution of the State of Nevada." Op. Nev. Att'y Gen. No. 229 (December 11, 1956). This office followed the reasoning the Nevada Supreme Court applied in *State ex rel. Kendall v. Cole,* 38 Nev. 215, 148 P. 551 (1915) to reach the conclusion that an employee of the United States Government could be appointed a notary public. The court in *Kendall* had examined the distinction between the terms "office" and "employment" and found they were not synonymous. The 1956 Attorney General Opinion agreed that the constitutional prohibition against "holding any lucrative office under the Government of the United States" found in article 4, § 9 of the Nevada Constitution did not extend to employment by the government of the United States.

Prior to the Postal Reorganization Act, 39 U.S.C.A. § 1001 (1970), the President appointed postmasters with the consent of the Senate. Clearly, these postmasters held a lucrative office under the government of the United States, and if their compensation exceeded $500 per year, they could not be appointed as notaries public. One effect of the Postal Reorganization Act has been to eliminate the presidentially appointed position of postmaster and establish a new system to employ postmasters. *Munnelly v. United States Postal Service*, 614 F. Supp. 519, 522 (Neb. 1985). The issue in *Munnelly* was whether the United States Postal Service had the authority to remove a postmaster who had been appointed by the President prior to the Postal Reorganization Act in 1970. The court found that the Postal Service did have that authority, but that the removal and appeal procedures for nonbargaining unit employees such as postmasters must be followed. *Id.* at 525.

In seeking to answer this question, a closer examination of the applicable section of the Nevada Constitution is helpful. Article 4, § 9 as quoted above has not been amended since it was adopted in 1864. According to *State ex rel. Nourse v. Clarke*, 3 Nev. 566, 570 (1868), by enacting this provision: "[T]he framers of the Constitution intended to prohibit one who was holding a lucrative Federal office from holding a State office at the same time."

The framers of the Nevada Constitution based their document on the California Constitution, as adopted in 1849 and amended in 1862. *Reports of the 1863 Constitutional Convention of the Territory of Nevada* (William C. Miller et al. eds., 1972). In 1887 the California Supreme Court examined the provision of that state's constitution upon which article 4, § 9 was based and commented as follows:

> If the section in controversy can be so construed as to permit the holder of a civil office of profit under the state to be appointed to and hold at the same time a lucrative office under the United States, then the prime object of the members of the constitutional convention which made such section a part of the law of the land, viz., the prevention of dual office-holding by one person under two separate and distinct governments, and the separation of the allegiance justly due one by its officers from that due to another power, would be defeated, and the earnest intentions of that body rendered utterly abortive.

People ex rel. Marshall v. Leonard, 73 Cal. 230, 232, 14 P. 853 (1887).

The Supreme Court of Vermont addressed a similar matter in *Baker v. Hazen*, 341 A.2d 707 (Vt. 1975). The issue in that case was whether the defendant, who was simultaneously serving as a town selectman and as a village postmaster, had to give up his position as postmaster on the grounds that he was occupying incompatible offices under the Vermont Constitution. Vermont's constitution has a prohibition similar to Nevada's that barred one from holding an office of profit or trust under the authority of Congress and being appointed to any executive office in the state, among others. The court stated:

> With an uncertainty in the measure of the mischief sought to be prevented, and a strong dilution of the proscribed status of the old office of postmaster, the question takes on a different aspect. The constitutional provision represents a denial of a right to a citizen. If it cannot be clearly demonstrated that he falls within its proscription, or equally plainly shown that he is in violation of its purpose, he is entitled to be held free of its prohibition.

Id. at 710. The court held that the defendant could hold both positions. *Id.*

The Supreme Court of Texas has adopted the rule that: "Any constitutional or statutory provision which restricts the right to hold public office should be strictly construed against

ineligibility." *Whitehead v. Julian*, 476 S.W.2d 844, 845 (Tex. 1972). This office agrees with Vermont and Texas.

Notwithstanding the fact that a notary public is appointed by the Secretary of State, takes the oath set forth in the Nevada Constitution and files a bond, the ordinary functions of the office are ministerial in nature and the issue of loyalty to the state if one is a notary and employed as a postmaster is not so great as to warrant the prohibition.

With the reorganization of the post office in 1970 and the fact that postmasters are not presidential appointments, the evil sought to be eliminated with the enactment of article 4, § 9, i.e., divided loyalty especially as applied to postmasters, is no longer the concern it was in the late 1880s.

CONCLUSION

The Secretary of State may appoint a United States Postmaster to be a notary public. This opinion overrules Op. Nev. Att'y Gen. (June 4, 1900) and Op. Nev. Att'y Gen. (November 8, 1911).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 95-11 ATTORNEYS; CHILD ABUSE AND NEGLECT; COURTS; INDIGENTS: NRS 432B.420, 432B.470, and 432B.480 do not require the court to appoint counsel to indigent parents in a protective custody hearing.

Carson City, June 27, 1995

Mr. Michael D. Jensen, White Pine County Deputy District Attorney, Post Office Box 240, Ely, Nevada 89301

Dear Mr. Jensen:

You have requested an opinion on whether a court must appoint an attorney for indigent parents prior to a protective custody hearing which must be conducted within 72 hours, and whether the hearing can be postponed pending such appointment. Your question involves the construction of the statutory language in NRS 432B.420, NRS 432B.470, and NRS 432B.480. In preparation for this opinion, contributions from your office and the legislative history of the statutes were reviewed by this office. An assumption is made for the purposes of this opinion that both the mother and father of the child are indigent and provided proof of that to the court. This assumption is necessary for the court to be permitted to appoint counsel under NRS 432B.420(1).

QUESTION

Is a court required to appoint an attorney in all stages of a NRS chapter 432B proceeding, and may the appointment of an attorney be a permissible basis for extending the time of the initial protective custody hearing?

ANALYSIS

NRS 432B.420, NRS 432B.470, and NRS 432B.480 are contained within the chapter of NRS governing protection of children. The 1985 Nevada Legislature extensively overhauled the chapter with the passage of A.B. 199. All the sections stated above were added by this single piece of legislation. The respective statutes read as follows:

NRS 432B.420 reads in part:

> 1. A parent or other person responsible for the child's welfare who is alleged to have abused or neglected a child *may* be represented by an attorney at all stages of any proceedings under NRS 432B.410 to 432B.590, inclusive. If the person is indigent, the court *may* appoint an attorney to represent him. The court may, if it finds it appropriate, appoint an attorney to represent the child. [Emphasis added.]

NRS 432B.470 reads in part:

> 1. A child taken into protective custody pursuant to NRS 432B.390 must be given a hearing, conducted by a judge, master or special master appointed by the judge for that particular hearing, *within 72 hours*, excluding Saturdays, Sundays and holidays, after being taken into custody, to determine whether the child should remain in protective custody pending further action by the court. [Emphasis added.]

NRS 432B.480 reads in part:

1. At the commencement of the hearing on protective custody, the court shall *advise* the parties of their right to be represented by an attorney and of their right to present evidence. [Emphasis added.]

If NRS 432B.480(1) is interpreted to mean that a court is required to appoint counsel in a protective custody hearing, then it eviscerates the language of "may" in NRS 432B.420 and has the practical effect of violating the 72-hour requirement of NRS 432B.470. Based on the plain language of the statutes, and giving effect to all the statutory provisions, NRS 432B.480 only requires a court to *advise* the parties of their right to be represented by counsel at that hearing if they choose. In interpreting the two statutes together, it is clear the provision in NRS 432B.480 does not give the parents an entitlement to have counsel appointed to represent them. *Weston v. County of Lincoln*, 98 Nev. 183, 185, 643 P.2d 1227, 1229 (1982) (obligation to render statutes compatible whenever possible); *State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830, 836 (1977) (obligation to render statutes compatible). Statutory construction indicates the purpose for the notification of a "right to be represented by an attorney" is to ensure the parties are informed by the court that this is a proceeding where an attorney can be present if the parents choose to be represented.

NRS 432B.480(1) must be read to give effect to all provisions of the statutes. *K.J.B. Inc. v. Second Judicial Dist. Court*, 103 Nev. 473, 476, 745 P.2d 700, 702 (1987); *McCrakin v. Elko County School District*, 103 Nev. 655, 658, 747 P.2d 1373, 1375 (1987); *Colello v. Administrator, Real Estate Div.*, 100 Nev. 344, 347, 683 P.2d 15, 16 (1984) (intent from entire act as a whole in light of its purpose). Because these statutes were created by the same legislative act, there is a strong presumption that the statutes were not intended to override each other. *Board of School Trustees v. Bray*, 60 Nev. 345, 354, 109 P.2d 274, 278 (1941). Therefore, the court in a protective custody hearing must inform the parties that they are permitted to be represented in the proceedings under that chapter. If the parents want an attorney, then the court *may* appoint counsel for the parents if they are indigent and the circumstances warrant that appointment.

The legislative intent contained in the record for A.B. 199 gives the court guidance as to what are the appropriate circumstances to appoint counsel. In the Senate Judiciary Committee minutes dated April 25, 1985, on page 10, Senator Wagner expressed concern about appointment of counsel in every case, and Assemblyman Stone addressed those concerns. The following is an excerpt from that testimony:

> Senator Wagner asked, "what kind of an estimate did you have ... in terms of the fiscal impact of that?" Mr. Stone answered, "by making it optional, if we had made it mandatory, the fiscal impact would be substantial. By making it optional, the court, most likely, would only appoint an attorney for a parent or parents in a situation where in the court's view it is likely that civil proceedings may eventually lead to some sort of criminal proceeding ... there's no way of knowing what percentage of cases that's going be."

The court is under an obligation to interpret and apply the statutes consistent with the intent of the legislature. *See Rose v. First Federal Savings & Loan*, 105 Nev. 454, 457, 777 P.2d 1318, 1319 (1989); *Sheriff, Clark County v. Lugman*, 101 Nev. 149, 155, 697 P.2d 107, 111 (1985) (give effect to clear intent; effectuate, not nullify, manifest purpose). Therefore, only in those limited cases described by the legislative intent is the court appointment of counsel appropriate.

Finally, the legislative intent of holding the protective custody hearing within 72 hours is clear. The purpose at this hearing is to determine whether the child should remain out of his home pending further proceedings. See NRS 432B.470(1). In the Joint Senate and Assembly Committees on Judiciary minutes dated February 27, 1985, on page 9, Assemblyman Humke and Senator Hickey discussed the 72-hour requirement. The following is an excerpt from that testimony:

> It is important to note in Section 55 that it mandates a hearing in 72 hours. Mr. Humke said in favor of the 72 hour report that it was primarily necessary for the rural areas. Senator Hickey wondered if the committee had received testimony regarding changing the time to 48 hour[s] in the urban areas and the time limit for the rural areas being 72 hours. Mr. Humke stated that during the break in the hearing he had been informed by Judge McGority [sic] that Clark County already complies with the 48 hour standard. The intent was to make the 72 hours a base line and if it could be done in a shorter time frame so much the better.

The intent is clear that 72 hours was the "base line." The legislature wanted the hearing conducted in a shorter time frame, but at the most 72 hours after the child was removed from the home. The court is obligated to give effect to the legislative intent. If by appointing an attorney in every protective hearing a court must move that hearing beyond the 72-hour time limit, then the court is not giving effect to the legislative intent or requirement with the result that the child may remain out of his home longer than necessary. *See Rose*, 105 Nev. at 457; *Lugman*, 101 Nev. at 155.

The United States Supreme Court, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), *reh'g denied*, 453 U.S. 927 (1981), held the Constitution does not require the appointment of counsel for indigent parents in every parental status proceeding. *Id.* at 31. The Court stated there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. The Court used a "fundamental fairness" test to help define when the "due process" consideration might overcome the aforementioned presumption. The elements of the test are: (1) the private interests at stake, (2) the government's interest, (3) the risk that the procedures used will lead to erroneous decisions. *Id.* at 27.

In *Lassiter*, the case dealt with termination of the parent's rights which by definition seriously affects parents' private rights. In the Court's own words: "Here the State has sought not simply to infringe upon that interest, but to end it." *Id.* However, in *Lassiter* the Court denied the parent the right to appointed counsel under the circumstances present in that case.

The issue which is the subject of this opinion is far less onerous. In this case the only issues in a protective custody hearing held within 72 hours is whether there existed reasonable or probable cause to believe the child was in imminent danger by remaining in the home, and if there is a continuing threat to that child requiring the child to remain out of his home pending further proceedings. In this case the parents' private rights are infringed, but only to the extent necessary to protect the state's compelling interests in protecting the child.

Lassiter's third element, the risk of erroneous decisions, is low because there is no final decision made by the court concerning custody of the child. The Supreme Court of the State of Nevada already determined that in an *adjudicatory* hearing, which determines whether the child is in need of protection, a temporary custody order giving the Division of Child and Family Services (Division) legal and physical custody is not a final order. In *In re Temporary Custody of Five Minors*, 105 Nev. 441, 445, 777 P.2d 901, 902 (1989) the court stated that the mandatory periodic reviews of the court's adjudicatory order make those orders not substantively appealable. *Id.* at 443. Therefore, no ultimate decision on the parents' private rights is ever made which would require appointment of an attorney for the parents in a NRS chapter 432B proceeding under the analysis set forth in *Lassiter*.

CONCLUSION

There is no constitutional right to appointed counsel in a proceeding brought by the State of Nevada pursuant to NRS chapter 432B. The statutes must be read to give effect to all statutory provisions. The legislative intent of NRS 432B.420 is clear that a court *may* appoint counsel for the parents only if the appropriate circumstances are present. The practical effect of appointing counsel in every protective custody case would prevent the court from giving effect to the legislative intent of NRS 432B.470. Finally, the *Lassiter* case criteria and the Nevada Supreme Court cases do not require that a court automatically appoint counsel under NRS 432B.480(1). Accordingly, it is the opinion of this office that the court is not required to appoint counsel in all stages of a NRS 432B proceeding. Before the court appoints counsel, a court must measure each appointment according to the legislative intent established for NRS 432B.420 and the *Lassiter* criteria.

Sincerely,

FRANKIE SUE DEL PAPA

Attorney General

By: DONALD J. WINNE
Deputy Attorney General

OPINION NO. 95-12 CITIES AND TOWNS; LOCAL GOVERNMENT;MAYORS: A newly elected mayor is not required to appoint or reappoint all appointed city officials after each city election. If the mayor takes no such action, the terms of existing officers are automatically extended for an indefinite period of time.

Carson City, June 13, 1995

The Honorable David R. Olsen, Ely City Attorney, Post Office Box 299, Ely, Nevada 89301

Dear Mr. Olsen:

You have requested an opinion from this office regarding appointment of city officials by the mayor.

QUESTION

Must a newly elected mayor in a city incorporated pursuant to the general law for incorporation of cities and towns (NRS ch. 266) appoint or reappoint all appointed city officials after each city election?

ANALYSIS

Ely is a second class city that is organized pursuant to chapter 266 of the NRS. As such "[t]he mayor, by and with the advice and consent of the city council, may appoint all such officers as may be provided for by law or ordinance." NRS 266.395.

> In each city of the first or second class in which the officers are appointed pursuant to ordinance, the mayor, by and with the advice and consent of the city council, shall appoint all of the officers. The officers shall hold their respective offices at the pleasure of the mayor and city council.

NRS 266.405(2). This section was added to the statute in 1989. Act of June 28, 1989, ch. 549, § 2, 1989 Nev. Stat. 1164. *See also,* Ely Municipal Ordinance 489, I.A.1.j.

> Except as otherwise provided by law, the term of office of all appointive officers continues until the city election next following their appointment and until their successors are appointed and qualified, unless sooner removed by the mayor, with the concurrence of a majority of the members of the city council, except that any such person so appointed may be removed by the votes of all the members of the city council, if the council so provides by resolution.

NRS 266.415.

According to information you provided, a new mayor was elected at the city general election held in Ely on June 6, 1995. The newly elected mayor is completely satisfied with the current appointed officials of Ely and does not wish to appoint anyone new at this time. He would like to reappoint the current city appointed officials, but believes that if he attempts to do so, he will not receive the consent of the city council required by law, as the two newly elected council members and two of the incumbent members have apparently joined forces to seek removal of the city attorney, city engineer and municipal judge from their respective appointed positions.

This office agrees that you, as the city attorney, have a conflict of interest in this matter and therefore would not be able to advise the mayor and city council.

To answer the question posed, the statutes quoted above must be analyzed to establish the procedure to be used regarding appointments or reappointments of city officials by the mayor.

Clearly, the mayor, with the consent of the city council, appoints all applicable city officials. NRS 266.405(2) states that these appointees serve at the pleasure of the mayor and city council. Although NRS 266.415 states that the term of office continues until the next city election after the appointment, the term extends beyond the election until successors are appointed and qualified. The statute does not require the mayor to reappoint existing officers or successor officers. If no action is taken, the terms of the existing officers are automatically extended for an indefinite period of time.

The language in the relevant statutes is clear and unambiguous on its face and courts have held that if such is the case, the plain meaning rule is applied and the court cannot go beyond the meaning to determine legislative intent. "[I]t is not within the purview of this court to infer legislative intent or go beyond the ordinary meaning of a statute absent an ambiguity in the statute." *Allstate Ins. Co. v. Pilosof*, 110 Nev. 311, 315, 871 P.2d 351, 354 (1994).

If the statutes were perceived to be in conflict, then the provision that was enacted later would control. *Laird v. Nevada Pub. Employees Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171 (1982). NRS 266.405(2) was enacted in 1989 and NRS 266.415 was last amended in 1987.

For the reasons stated above, it is the opinion of this office that a newly elected mayor in a city incorporated pursuant to the general law for incorporation of cities and towns (NRS ch. 266) is not required to appoint or reappoint all appointed city officials after each city election. If the mayor takes no action to reappoint existing officers or appoint successor officers, the terms of existing officers are automatically extended for an indefinite period of time.

CONCLUSION

A newly elected mayor in a city incorporated pursuant to the general law for incorporation of cities and towns (NRS ch. 266) is not required to appoint or reappoint all appointed city officials after each city election. If the mayor takes no action to reappoint existing officers or appoint successor officers, the terms of existing officers are automatically extended for an indefinite period of time.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 95-13 JUSTICES OF THE PEACE: Acts of county commissions of appointing justices of the peace pro tempore do not violate the Nevada Constitution.

Carson City, July 19, 1995

The Honorable Stewart Bell, Clark County District Attorney, Post Office Box 552212, Las Vegas, Nevada 89155-2212

Dear Mr. Bell:

You have asked whether NRS 4.032, a provision empowering various county commissions to appoint justices of the peace pro tempore, violates Nev. Const. art. 6, § 8. We conclude that the statute is not contrary to the constitutional provision.

QUESTION

Does Nev. Const. art. 6, § 8 preclude the legislature's ability to provide for, by delegation to the various county commissions, appointment of justices of the peace pro tempore?

ANALYSIS

In 1991, the legislature enacted NRS 4.032. That statute sets forth in part:

> 1. The board of county commissioners of each county shall select a number of persons it determines appropriate to comprise a panel of *substitute* justices of the peace. The persons so selected must possess the qualifications set forth in NRS 4.010 for the office of justice of the peace in the respective county.
> 2. Whenever a justice of the peace is disqualified from acting in a case pending in the justices' court or is unable to perform his official duties because of his *temporary* sickness or absence, or other cause, he shall, if necessary, appoint a person from the panel of substitute justices of the peace . . . . [Emphasis added.]

The language of NRS 4.032 clearly sets forth that persons appointed by the county commissions shall only fulfill the functions of sitting justices of the peace on a temporary basis. This language is consistent with the definition of a justice of the peace pro tempore. The term pro tempore means: "for the time being; temporarily; provisionally." *See Black's Law Dictionary*, 639 (5th ed. 1983); *Application of Eng*, 776 P.2d 1336, 1344 (Wash. 1989). Accordingly, appointment of a panel of substitute justices by the county commission does not create additional judicial positions. The substitute justices solely fill in on a temporary basis for already elected officials.

Nevertheless, some attorneys in Clark County have asserted that NRS 4.032 violates Nev. Const. art. 6, § 8. That constitutional provision sets forth in part:

> The Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State, and shall fix by law their qualifications, their terms of office and the limits of their civil and criminal jurisdiction . . . .

Those who assert that NRS 4.032 is unconstitutional claim that the legislature must set the number of total justices of the peace and that said positions must be filled by election. *See Bull v. Snodgrass*, 4 Nev. 524 (1868). But even within the *Bull* case the Nevada Supreme Court distinguished the creation of a new justice of the peace position from a situation where a person fills in on an emergency or special basis for a justice sitting in an existing position. *Id*. at 526.

Absent specific constitutional limitations to the contrary, the legislature's power to enact laws is practically absolute. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P. 2nd 237 (1967). An interpretation rendering a statute constitutional is always favored over a negative interpretation

unless there is a clear showing of invalidity. *See Sheriff, Washoe County v. Wu*, 101 Nev. 687, 708 P.2d 305 (1985).

In the present case we believe that NRS 4.032 must be read in harmony with the Nevada Constitution simply by finding that temporary replacements for justices of the peace do not fall into the category wherein the legislature is fixing the total number of positions. Nev. Const. art. 6, § 8 does not expressly prohibit such temporary appointments and appears to be silent on that particular matter. Because there is no express limitation on the legislature's power, we conclude that NRS 4.032 is constitutional. *See Dobbs v. Board of County Commissioners*, 257 P.2d 802 (Okla. 1953); *Munson v. Snyder*, 275 P.2d 249 (Okla. 1954).

CONCLUSION

NRS 4.032, which authorizes various county commissions to appoint justices of the peace pro tempore, does not violate Nev. Const. art. 6, § 8.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

OPINION NO. 95-14 CORPORATIONS; FEDERAL GOVERNMENT; SECRETARY OF STATE: The Secretary of State may refuse to file organizing documents when the proposed name of the business entity is the same as, or deceptively similar to, a federal, state, or local government agency.

Carson City, July 31, 1995

The Honorable Dean Heller, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Heller:

You have requested an opinion from this office regarding certain commercial recordings in your office.

QUESTION

Does the Secretary of State have the authority to refuse to file organizing documents when the proposed name of the business entity is the same as, or deceptively similar to, a department or agency of the United States, a state, or local government?

BACKGROUND

According to the information you have provided, the Secretary of State filed a corporation with the name "Department of the Treasury—Internal Revenue Service" in November 1994. This filing was accepted for the reason that no specific authority exists in the Nevada Revised Statutes to reject a corporation with this name. Recently another filing was received with the name "Department of the Treasury—Bureau of Alcohol, Tobacco and Firearms." Attorneys for the United States government agencies, the Internal Revenue Service and the Bureau of Alcohol Tobacco and Firearms, provided federal statutes that you are requesting this office to analyze.

ANALYSIS

"It is well settled in the law of this State that the Secretary of State is purely a ministerial officer insofar as corporations are concerned and that, as a ministerial officer, he can exercise only such powers as are specifically granted in the law." Op. Nev. Att'y Gen. No. 776 (July 14, 1949). However, "[i]t is within the discretion of the Secretary of State to determine whether the articles of incorporation submitted to him comply, on their face, with the statutory requirements." Op. Nev. Att'y Gen. No. 29 (March 29, 1955). Both of these Attorney General Opinions cite *Nevada ex rel. Security Savings & Loan Ass'n v. Brodigan*, 44 Nev. 212, 192 P. 263 (1920), wherein the court held that the Secretary of State has no discretion to refuse to file corporate papers that substantially comply, as to matters of form, with the statutes.

Nevada Revised Statutes Title 7 contains several chapters governing incorporation and organization of different types of business entities in Nevada by the Secretary of State. The principal section dealing with names of these business entities is NRS 78.039 which states:

> 1. The secretary of state shall refuse to accept for filing the articles of incorporation of any corporation whose name is the same as or deceptively similar to the name of a corporation, limited partnership or limited-liability company existing under the laws of this state or a foreign corporation, foreign limited partnership or foreign limited-liability company authorized to transact business in this state, or a name to which the exclusive right is, at the time, reserved in the manner provided under the laws of this state, unless the written acknowledged consent of the holder of the registered or reserved name to use the same name or the requested similar name accompanies the articles of incorporation.

2. For the purposes of this section, a proposed name is not distinguished from a registered or reserved name solely because one or the other contains distinctive lettering, a distinctive mark, a trade-mark or a trade name or any combination of these.

See also NRS 80.010(2), 81.010, 82.096, 86.171(2)(b), 88.320(3), (4), and (5) and 89.030. (Statutes that contain the same or similar provisions regarding the names of the various business entities.) The mandate to the Secretary of State under these statutes is very clear; the Secretary of State may *not* accept a corporate filing with the same as, or deceptively to, the name of another business entity.

In addition, NRS 78.030(1) states:

One or more natural persons may associate to establish a corporation for the transaction of any *lawful business*, or to promote or conduct any *legitimate object or purpose*, pursuant and subject to the requirements of this chapter, by:
(a) Executing, acknowledging and filing in the office of the secretary of state articles of incorporation; and
(b) Filing a certificate of acceptance of appointment, executed by the resident agent of the corporation, in the office of the secretary of state. [Emphasis added.]

This statute restricts the purpose for which a corporation may be established to a lawful or legal one. Therefore, if a corporation is to be formed for an unlawful or illegal purpose, the Secretary of State would have the authority, under this statute, to refuse to file the articles of incorporation.

The United States Code was recently amended by adding a new section that bars the use of Department of Treasury names in connection with a business activity. 31 USC § 333 (1994). This section specifically prohibits a person from using the words "Department of the Treasury," or the name of any service, bureau, office, or other subdivision of the Department of the Treasury in connection with, or as a part of, any advertisement, solicitation, business activity, or product, whether alone or with other words, letters, symbols, or emblems. Use of these words is unlawful and carries with it both criminal and civil penalties.

Since use of Department of Treasury names in the previously described manner is in violation of federal law, it follows that to attempt to use these names as the name of a corporation would violate NRS 78.030(1) by establishing a corporation for an illegal purpose. In that circumstance, the Secretary of State has the authority to refuse to file the articles of incorporation.

The Secretary of State has no duty to search all of the laws of the United States, other states, or local laws before filing organizing documents for a business entity to determine if the filing is legal. However, if a law is brought to the attention of the Secretary of State, then that law should be examined with the Attorney General to ascertain the effect of that law on the filing. Based upon

this opinion, this office recommends that the Secretary of State develop a policy regarding these type of filings.

CONCLUSION

The Secretary of State has the authority to refuse to file organizing documents when the proposed name of the business entity is the same as, or deceptively similar to, a department or agency of the United States government, or of state and local government if a specific statute makes such use illegal.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 95-15 COUNTIES; ROOM TAX; TAXATION: Counties may not impose tax on the gross receipts from rental of transient lodging on rental of spaces in recreational vehicle parks or campgrounds.

Carson City, August 11, 1995

Mr. Leon Aberasturi, Deputy District Attorney, Office of the District Attorney, Lyon County, 31 South Main Street, Yerington, Nevada 89447

Dear Mr. Aberasturi:

You have requested an opinion from this office concerning application of tax on the gross receipts from rental of transient lodging imposed pursuant to NRS 244.3351-.3359, inclusive, to recreational vehicle parks and campgrounds. According to your letter of May 31, 1995, you have determined that some of the counties in this state are imposing tax upon recreational vehicle parks and campgrounds, and other counties are not. Due to the apparent conflict among various counties in applying this tax, you have asked for an opinion on the following question.

QUESTION

May a county impose tax on the gross receipts from rental of transient lodging set forth in NRS 244.3351-.3359, inclusive, upon the gross receipts on rental of space or sites in recreational vehicle parks and campgrounds?

ANALYSIS

NRS 244.3351-.3359, inclusive, set forth the statutory provisions imposing tax on the gross receipts from rental of transient lodging. Tax on transient lodging (commonly referred to as the room tax) actually constitutes two taxes; a tax which a county is required to impose and a tax which a county may impose.[15] Mandatory provisions were enacted by the legislature in 1983. Optional provisions were enacted in 1991.

The term "lodging" is not defined in chapter 244 of NRS. When a statutory term is not defined, the assumption is that "the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. 16, 21 (1983); *see also*, *In re Application of Filipini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949); *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). *Webster's International Dictionary of the English Language*, 2691 (2d ed. 1952), defines "lodging" as a "[d]welling; abode; habitation; esp., temporary abode; sleeping place; quarters."

It is not clear from the statute whether the term "lodging" was intended to include a space or a site in a recreational vehicle park or a campground. It might be argued that a sleeping place could include a space or a site in a recreational vehicle park or a campground. On the other hand, construing the term "lodging" to include a space or site in a recreational vehicle park or campground seems to broaden or extend the definition beyond the generally understood meaning of the term "lodging" as a room in a motel or similar establishment. While a campground or recreational vehicle park offers a space or site as a sleeping place, the renter is generally expected to provide his own lodging or shelter.

In *Cashman Photo Concessions & Labs v. Nevada Gaming Comm'n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975), the court stated: "Taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers. A tax statute particularly must say what it means. We will not extend a tax statute by implication."

---

[15] NRS 244.3352, 244.3354 and 244.3356 set forth mandatory provisions of tax on the gross receipts from rental of transient lodging. NRS 244.3351-.33516, inclusive, set forth optional provisions of tax on the gross receipts from rental of transient lodging. *See also*, NRS 268.096, requiring incorporated cities in the state to impose a tax on gross receipts from rental of transient lodging.

As we are construing the operative terminology in a tax statute which has not been defined by the legislature, we must follow dictates of *Cashman* and construe the definition of the term "lodging" narrowly in accordance with its commonly understood meanings.

Legislative history does not support an expansive construction of the term "lodging," either. In 1983, the legislature had ample opportunity to impose tax on the gross receipts from rental of transient lodging on recreational vehicle parks and campgrounds. Senate Bill Number 170 introduced in the 1983 Legislative Session sets forth the provisions that ultimately became NRS 244.3352, 244.3354 and 244.3356 (the mandatory tax provisions).[16] The bill as introduced defined "lodging" to include "accommodations at trailer courts and campgrounds." That definition of lodging does not appear in the enrolled bill.[17] Legislative history of the bill does not reveal the reason the definition was removed from the bill. Had the legislature intended to extend tax on transient lodging to trailer courts and campgrounds it could easily have left the definition in the bill. *See State, Dep't Mtr. Vehicles v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988). Rejection by the legislature of a specific provision contained in a bill is persuasive evidence that the legislature intended to exclude the provision. *Carey v. Donohue*, 240 U.S. 430, 437-38 (1916). The bill that added the optional tax provisions which ultimately were codified as NRS 244.3351-.33516, inclusive, did not attempt to define the term "lodging."[18] There is nothing in the legislative history of that bill which discusses the issue.

CONCLUSION

It is the opinion of this office that pursuant to the current statutory language of NRS 244.3351-.3359, inclusive, tax on the gross receipts from rental of transient lodging may not be imposed upon the gross receipts on rental of spaces in recreational vehicle parks or campgrounds. Definition of the term "lodging" should be construed narrowly in accordance with its commonly understood meaning as a room or some other form of physical shelter provided by the business to the transient user.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

---

[16] *See*, Minutes of March 22, 1993, hearing on S.B. 170 before the Senate Taxation Comm. at 660.

[17] *See*, Act of April 29, 1983, ch. 207, 1983 Nev. Stat. 476.

[18] *See*, 66th Nev. Legislature, Summary of Legislation Introduction of S.B. 112 at 1A.

By: KERRY L. SCHOMER
Deputy Attorney General

OPINION NO. 95-16 REDEVELOPMENT AGENCIES; REFERENDUM: City voters may not use a referendum petition to repeal the ordinance wherein the city council approved the redevelopment plan. Such an attempt would violate the Constitution of the United States and of the State of Nevada.

Carson City, August 14, 1995

The Honorable Bradford R. Jerbic, City Attorney, City of Las Vegas, 400 East Stewart, Las Vegas, Nevada 89101

Dear Mr. Jerbic:

You have posed a question regarding the functioning of the City of Las Vegas Downtown Redevelopment Agency (Redevelopment Agency).

QUESTION

May the qualified voters of the City of Las Vegas use a referendum petition to repeal a 1986 ordinance wherein the city council approved the redevelopment plan to be used by the city's Redevelopment Agency?

ANALYSIS

In your opinion request you conclude that the voter's attempt to use a referendum petition to repeal the redevelopment plan would impair existing contracts between the Redevelopment Agency and its bondholders and would therefore violate article 1, section 10 of the United States Constitution. We agree with your conclusion that the voter's power of referendum is unavailable in this matter. We conclude that the city's adoption of the redevelopment plan was administrative, not legislative, in nature and therefore cannot be the subject of a referendum petition under article 19, section 4 of the Nevada State Constitution. We also agree that the ballot measure would plainly and palpably violate the United States Constitution based upon the analysis you provided on the subject of impairment of contracts.

The subject of urban renewal and redevelopment of blighted areas within municipalities is a matter of statewide concern. In order to address this problem, the legislature enacted a

comprehensive set of laws contained within NRS chapter 279 to apply uniformly to all municipalities.

NRS chapter 279 provides a statutory scheme whereby blighted and underutilized areas may be eliminated in order to promote the public health, safety, morals and welfare. Elimination of these blighted and underutilized areas by acquisition, clearance and disposition, or reclamation and rehabilitation has been declared by the legislature to be within the public interest. *See* NRS 279.230; NRS 279.416; NRS 279.418; *Urban Renewal v. Iacometti,* 79 Nev. 113, 379 P.2d 466 (1963).

Pursuant to statutory procedure, the city council declared a need for the creation of the Redevelopment Agency to function within its community. The Redevelopment Agency thereafter developed a redevelopment plan. On March 5, 1986, the city council adopted the redevelopment plan and set forth the legal description of the boundaries of the area to be redeveloped. *See* NRS 279.586. The approved redevelopment plan included a mechanism whereby a portion of the tax increment collected on the taxable property located within the redevelopment area could be used to finance redevelopment projects. The Redevelopment Agency thereafter issued bonds to fund redevelopment projects and pledged the revenues from the tax increment financing in order to create a major portion of the repayment funds needed to retire the debt on said bonds.

Early in 1995, a group of qualified voters in the city circulated a referendum petition. The purpose of the petition was to force a reconsideration and repeal of the city's 1986 ordinance adopting the redevelopment plan for the downtown area. On July 5, 1995, the city clerk informed the city council that the referendum petition contained sufficient signatures of qualified voters to cause an election on the matter.

For the reasons set forth below, we conclude that referendum cannot be used by the voters to undo the redevelopment plan.

Initiative is that power reserved to the people to propose new laws. Referendum gives the people the power to veto those laws passed by their representatives. The initiative and referendum powers extend to the registered voters of each municipality as to all local, special and municipal legislation of every kind. Nev. Const. art. 19, § 4.

It is a basic principle, however, that these broad based powers only apply to "legislation" and that administrative acts are excepted from initiative and referendum under the state constitution.

In the case of *Forman v. Eagle Thrifty Drugs and Markets*, 89 Nev. 533, 516 P.2d 1234 (1973), the Nevada Supreme Court held that changing a zoning classification by city ordinance was not subject to initiative or referendum. While declaring that zoning was a matter of statewide concern, the court concluded:

> We think that whether or not the citizens of a state wish to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when, as in the present case, such policy has been determined and the changing of such areas, or the granting of exceptions has been committed to the planning commission and the city council in order to secure uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is administrative and not referable.

Id. at 537-38.

We believe that the court would use an identical analysis when reviewing the present city ordinance implementing the state redevelopment laws. As previously noted, the redevelopment of blighted areas is a matter of state policy and state concern. NRS 279.230; NRS 279.416; NRS 279.418. By statute, the legislature has created the Redevelopment Agency in Las Vegas, as well as other urban renewal agencies in each municipality, to administer the laws within the statutory guidelines. *See* NRS 279.370; NRS 279.426; *City of Sparks v. Best*, 96 Nev. 134, 605 P.2d 638 (1980). Once the need for the Redevelopment Agency to function was determined, all subsequent acts by the city council and the agency in implementing the redevelopment plan involved executive and administrative functions. Thus the present attempt to nullify the redevelopment plan by way of referendum is prohibited. *See Gibbs v. City of Napa*, 130 Cal. Rptr. 382 (Cal. App. 1976).

We further agree, as set forth in your analysis, that if the voters could repeal Ordinance No. 3218 by way of referendum, important security provisions for the existing bondholders would be eliminated and would unconstitutionally impair the state's contracts with said bondholders. *See United States Trust Company of New York, Trustee, v. New Jersey*, 431 U.S. 1 (1977).

CONCLUSION

Referendum simply may not be used to undo the redevelopment plan in this case because the city council's adoption of the plan was administrative and not legislative in nature. Additionally any attempt to place the repeal of the redevelopment plan on the ballot would plainly violate article 1, section 10 of the United States Constitution.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

OPINION NO. 95-17 ELECTED OFFICIALS; ELECTIONS; FEDERAL GOVERNMENT; SECRETARY OF STATE: Question 8 (federal term limits) may not be placed on the general election ballot in 1996.

Carson City, August 30, 1995

The Honorable Dean Heller, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Heller:

You have requested an opinion from this office regarding the ballot question limiting terms of office of congressional representatives.

QUESTION

May Question 8 be placed on the general election ballot in 1996?

ANALYSIS

Question 8 qualified for the general election ballot in 1994 as a result of an initiative petition to amend the Nevada Constitution to limit terms of office for U.S. senators and representatives. The measure passed in 1994 and would normally be placed on the general election ballot in 1996 pursuant to Nev. Const. art. 19, § 2 ¶ 4. The Secretary of State has the duty of providing copies of ballot questions to the county clerks. NRS 293.253(1).

On May 22, 1995, the U.S. Supreme Court decided *U.S. Term Limits, Inc. v. Thorton*, 63 U.S.L.W. 4413 (1995) and held that the states did not have the authority to adopt term limits for congressional service.

The question then is whether the Secretary of State should place this question on the ballot in 1996 in light of the U.S. Supreme Court's decision.

In 1992 the Nevada Supreme Court decided *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992). That case also involved federal terms limits. Granting a permanent writ of mandamus, the court ordered the Secretary of State to remove from the November 1992 ballot an initiative proposal which sought to place limits on the number of terms a U.S. senator or representative from Nevada could serve.

The court in a 3-2 decision stated: "The term limits initiative clearly and 'palpably' violates the qualifications clauses of Article I of the United States Constitution." *Id.* at 830 (footnote omitted). The court went on to state: "The question here cannot be implemented in a constitutional manner, and we envision no political utility in burdening an already strapped public fisc with the expense that would inevitably be incurred by placing a meaningless question on the ballot, conducting the election, and tallying the votes." *Id.* at 831.

The court distinguished *Las Vegas Chamber of Commerce v. Del Papa*, 106 Nev. 910, 802 P.2d 1280 (1990) for the reason that the ballot question in that case, arguably, "might have been applied in a constitutional manner." *Stumpf*, 108 Nev. at 831. The court instead relied on *Caine v. Robbins*, 61 Nev. 416, 131, P.2d 516 (1942), a case involving the constitutionality of an initiative petition.

In *Caine* the court affirmed the district court's order enjoining the county clerk "from proceeding in any manner toward submitting the proposed measure to the electorate of said Elko County at the next general election or any subsequent election to be voted upon as to its adoption or rejection." *Id.* at 418. The court reasoned: "The initiative measure proposed by the petition would, if enacted by the vote of the electors, be clearly unconstitutional for lack of enacting clause required by the state constitution in initiative proceedings." *Id.* at 420.

The Court in *Thorton* concluded that the United States Constitution prohibits the states from imposing additional congressional qualifications.

> We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process—through the Amendment procedures set forth in Article V.

Thorton, 63 U.S.L.W. at 4430 (footnote omitted).

Following the reasoning in *Stumpf* and *Caine*, since the United States Supreme Court has determined that state-imposed term limits on congressional representatives violate the United States Constitution, the Secretary of State may not proceed with placing Question 8 on the general election ballot in 1996.

CONCLUSION

Question 8 may not be placed on the general election ballot in 1996.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 95-18 CONTESTS; LIABILITY; SALES TAX: A contest promoter who contracts with an automobile dealer to provide 30 cars as prizes in a "car a day" drawing to be chosen by contest winners from the dealer's lot is considered the purchaser liable to remit sales tax to the dealer. The promoter may require the contest winners to pay the sales tax to the dealer on each car if this is specifically provided in the contest rules.

Carson City, September 12, 1995

Mr. Norman T. Glaser, Chairman, Nevada Tax Commission, Capitol Complex, Carson City, Nevada 89710

Dear Chairman Glaser:

An issue was recently presented to the Nevada Tax Commission concerning application of sales tax on tangible personal property purchased for purposes of providing a prize in a contest. In this particular case, the promoter of the contest contracted with a car dealer to provide 30 automobiles that were to be "given away" by the promoter (one each day) in a drawing. According to the contract, the dealer would make a certain model of automobile available on its car lot. The promoter paid the dealer a set amount for each automobile which was equivalent to the sales price of that particular model. Each winner of the drawing would be allowed to pick an automobile of that model out of the dealer's stock on hand at the time. If the winner wanted additional features on the automobile over and above what came standard with that model, the winner would pay the dealer for those separately. If the winner wanted an entirely different model, the dealer would allow the winner a certain dollar value of credit toward the different model in exchange for the model won.

With regard to the contest, the contest rules state simply that the contest winner is responsible for all taxes.

Based on the foregoing factual scenario, you have asked this office for an opinion on the following questions.

QUESTION ONE

For purposes of determining application of sales tax to the purchase of the automobiles "given away" in the contest drawing, who is responsible for paying the sales tax to the dealer, the contest promoter or the contest winner who chooses his prize from the car lot?

ANALYSIS

The question of who the dealer (retailer) is to collect the sales tax from on its sales of the automobiles (tangible personal property) requires an analysis of the statutory scheme for the imposition and collection of the sales and use tax.

According to NRS 372.105, sales tax is imposed on all retailers selling tangible personal property at retail in this state at the rate of 2 percent of the gross receipts from the sale of the tangible personal property. NRS 372.110 states further that the tax "shall be collected from the consumer insofar as it can be done." NRS 372.155-.180 refers to giving of a resale certificate by a "purchaser" so to avoid the sales tax. NRS 372.350 notes that a "purchaser" who certifies in writing to a seller that the sale is subject to an exemption from the sales tax, but then uses the property for another purpose that would have resulted in the sale being subject to sales tax, thereby becomes subject to liability for the sales tax at the time of such use.

The use tax is the statutory complement to the sales tax. *State, Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 871 P.2d 331,334-35 (1994). The use tax is imposed on the storage, use or other consumption of tangible personal property in Nevada purchased from a retailer for storage, use or other consumption in Nevada. NRS 372.185(1). The tax applies to tangible personal property purchased outside Nevada that would be subject to the sales tax had it been purchased from a retailer in Nevada. NRS 372.185(2). NRS 372.195 states that: "every retailer maintaining a place of business in this state and making sales for storage, use or other consumption in this state . . . shall . . . collect the tax from the purchaser and give to the purchaser a receipt. . . ." NRS 372.225-.245 again refers to the giving of a resale certificate by a "purchaser."

In a retail sales transaction, the purchaser and the consumer are typically the same person or entity and the tax statutes appear to use the terms interchangeably. However, as in this factual context, there are times when the purchaser is purchasing tangible personal property that will be used or consumed by another. In determining which party is responsible for remitting the sales tax, as can be seen from a description of the cases below, the courts focus on which party was the actual purchaser of the property under the facts and circumstances presented.

In *L.M. Berry & Co. v. Blackmon*, 199 S.E.2d 610 (Ga. App. 1973), the court considered a taxpayer who purchased telephone directories from out-of-state printers for direct delivery to the

taxpayer's customers by the printer pursuant to advertising (service) contracts between the taxpayer and its customers. The taxpayer argued that it purchased the directories for resale to the Georgia customers (not simply incidental to services rendered) and should not be liable for use tax on its cost for purchasing the directories. The court answered this question by finding that the person who orders and pays for the tangible personal property is the purchaser, even if that person is purchasing the property for the use or consumption by another. *Id*. at 612-13. Accordingly, the legal obligation to remit the sales (or use) tax falls on the purchaser, since the purchaser is actually the consumer due to his contractual obligation to supply the directories to his customers. *Id*. at 613. The court noted that the taxpayer was billed by the printer for the cost of the directories and paid the printer for them. *Id*. at 612.

In *Brown Plumbing & Heating Co. v. State Tax Comm'n*, 848 P.2d 181 (Utah App. 1993), the court considered a case in which a school district, which had contracted with a general contractor for the construction of a school, actually purchased some of the materials for the school from a supplier directly. The materials were installed by a subcontractor. The Tax Commission then attempted to impose a sales tax against the subcontractor for the materials. The court held that the school district was the actual purchaser of the materials since the district submitted a purchase order for them and paid for them directly with the supplier. *Id*. at 183-84.

Similarly, in *Avco Mfg. Corp. v. Connelly*, 140 A.2d 479 (Conn. 1958), a sales and use tax assessment was made against a manufacturer of aircraft engines who had contracted with the federal government to manufacture aircraft engines to government specifications and using government facilities. Under the manufacturer's contract with the government, the materials used to manufacture the engines were to be purchased using a purchase order form that specified the materials were being purchased for the federal government and that title would pass to the federal government f.o.b. the vendor's plant. *Id*. at 481. The bill of lading to be used was a government form identifying the government as the owner of the goods in shipment. *Id*. The contract also specified that the government would reimburse the manufacturer for the cost of the goods upon their acceptance after inspection. The court, under these facts, found that the government was the actual purchaser of the materials, not the manufacturer. *Id*. at 483-84.

In contrast to *Brown Plumbing* and *Avco Manufacturing*, in *Maecon, Inc. v. State, Dep't of Taxation*, 104 Nev. 487, 761 P.2d 411 (1988), the court determined that the contractor was actually the purchaser of tangible personal property which the contractor then used to fulfill a government construction contract to design, fabricate and install special industrial machinery, despite a contractual provision that provided for title to the materials purchased to pass to the federal government upon delivery to the job site. *Id*. 104 Nev. at 489-90. In that case, the contractor actually purchased materials from the vendors under its own purchase orders and, prior to delivery to the federal job site, had full control over their use in completing the contract or otherwise as the contractor saw fit. *Id*. at 492.

Pervel Industries, Inc. v. Groppo, 562 A.2d 1158 (Conn. Super. Ct. 1987), involved a contract between a general contractor and the owner whereby the owner provided an exemption certificate to the general contractor with which to purchase certain materials and equipment for construction of an improvement to real property without paying sales or use tax. The owner agreed to reimburse the general contractor the cost of the purchases and to take title directly from the vendor. After being assessed the tax on these goods, the owner alleged that he was not the purchaser of the goods and so could not be taxed on their purchase. The court found that since the owner had contracted with the general contractor to take title to the goods and had presented his exemption letter (improperly) to avoid tax, he became liable for the sales and use tax on the goods as the purchaser.

The aforementioned cases are instructive in analyzing the facts in this case. In this case, the contest promoter actually ordered and paid the dealer for 30 automobiles, which were to be provided from existing stock on hand as each contest winner chose. Although actual delivery of the automobiles did not take place until prize winners picked out the specific automobile from the dealer's stock on hand, the fact that physical delivery was never made to the contest promoter is not significant under these facts. For example, in *Blackmon*, physical delivery to the taxpayer never occurred. In viewing the factual circumstances surrounding the contest as a whole, it is apparent the contest winner was not "purchasing" an automobile, if he picked out the model that was listed as the prize. As to the model of automobile identified as the prize for winning the contest, there was no true sales contract between the dealer and the contest winner, nor did any consideration pass between the contest winner and the dealer or between the contest winner and the contest promoter. Thus, there was no "sale" to the contest winner that would be subject to the sales tax. Rather, the sale was actually made to the contest promoter, and the contest promoter gave the automobile to the contest winner as the prize. Accordingly, the contest promotor is the purchaser of the automobiles and bears the legal obligation to remit the sales tax to the dealer on the agreed sales price of the 30 automobiles.

CONCLUSION TO QUESTION ONE

Under the facts as given, a contest promoter who contracts with an automobile dealer to provide automobiles as prizes to contest winners, where the winner will pick the automobile from available stock on the dealer's lot, is considered the purchaser of the automobiles and is responsible to pay the sales tax to the dealer on the sales price of the automobiles.

QUESTION TWO

Did the contest promoter assign to the prize winner the obligation to pay the retailer the sales tax on the purchase of the prize by including in the contest rules the statement "taxes are the responsibility of the prize winner?"

ANALYSIS

The contest in this case constitutes an enforceable contract between the contest promoter and those who enter the contest and abide by the rules of the contest. *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 27-28, 359 P.2d 85 (1961). The contest rules provide simply that "taxes are the responsibility of the prize winner." This rule does not state specify that the contest winner is obligated to reimburse or assume the tax liability of the contest promoter in purchasing the prize to be given away. It does not seem reasonable that an informed person entering the contest would construe this rule as obligating him to assume the contest promoter's sales tax liability in purchasing the prize. Rather, this language would appear to mean that the prize winner is responsible to pay all taxes for which he is legally responsible as a result of winning the prize, such as the vehicle privilege tax to be paid upon registering the automobile.

There appears to be nothing in the law that would prohibit a contest promoter from requiring the contest winner to reimburse or assume responsibility for paying the sales tax on behalf of the contest promoter if this obligation is specifically set forth in the contest rules.[19] However, the status of the prize winner would not be relevant in determining whether tax was owed on the specific model being given away, for which the contest promotor paid the dealer. For example, if the contest winner was himself a retailer of automobiles, he could not give the dealer a resale certificate to avoid sales tax because his status as a retailer, or his intent to resell the automobile, would not be relevant. It is the status of the contest promotor that is relevant.

If the contest winner wanted an additional option on the model of automobile given away as a prize, that is considered a separate contract between the contest winner and the dealer which may or may not result in sales tax being imposed on the sales price of that transaction. Similarly, if the contest winner wants a different model from that identified as the prize, and the dealer agrees, the prize should be considered as a trade in on the different model and handled accordingly as a transaction between the contest winner and the dealer.

CONCLUSION TO QUESTION TWO

While the contest promotor, as the purchaser of the automobile cannot avoid his legal statutory obligation to remit sales tax to the dealer, the contest promotor may require the contest winner to pay the sales tax due on the automobile prize to the dealer on behalf of the contest promotor as a part of the contest rules as long as that obligation is specifically spelled out in the rules of the contest.

---

[19] Failure to fully explain the contest winner's responsibility to pay sales tax on behalf of the contest promoter could cause the promoter to run afoul of the deceptive trade practices statutes. *See* NRS 598.136.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN S. BARTLETT
Senior Deputy Attorney General

OPINION NO. 95-19 ATTORNEYS; CONFLICT OF INTEREST; PUBLIC SERVICE COMMISSION: A commissioner should recuse himself from any matter before the commission if he personally and substantially was involved in the matter while in private practice. A commissioner has a duty to recuse himself if his impartiality might reasonably be questioned.

Carson City, November 7, 1995

Mr. John F. Mendoza, Chairman, Public Service Commission, 555 East Washington Avenue, Room 4600, Las Vegas, Nevada 89101

Dear Chairman Mendoza:

You have requested an opinion from this office based upon the following factual scenario:

A commissioner acts as a hearing officer or sits as a member of a panel to decide contested cases. A new commissioner has recently been appointed to the Public Service Commission of Nevada (Commission). That commissioner is an attorney who has been employed for several years with a law firm with a statewide practice.

Based upon these facts, you have asked for an opinion from this office on the following questions:

QUESTION ONE

Under what circumstances should a commissioner recuse himself where the commissioner is an attorney who represented or performed legal services for a client in connection with an active Commission docket/case or a docket/case which will soon be filed?

ANALYSIS

The specific applicable statutory authorities are Nevada Supreme Court Rules 161 and 159, and the Nevada Code of Judicial Conduct Canon 3E.

Nevada Supreme Court Rule (SCR) 161 provides in pertinent part:

> 3. Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
> (a) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter;
> . . .
> 4. As used in this Rule, the term "matter" includes:
> (a) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
> (b) Any other matter covered by the conflict of interest rules of the appropriate government agency.

SCR 161 was adopted by the Nevada Supreme Court in 1986. The language used in SCR 161(3) is taken almost word-for-word from the *Model Rules of Professional Conduct* Rule 1.11(c).[20] The comment to the *Rules of Professional Conduct* Rule 1.11 states:

> A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in [Model] Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflicts of interest.

Model Rules of Professional Conduct Rule 1.11(c) cmnt. 2 (1987).

Rule 1.11(c) imposes restrictions on lawyers while they are in government service. When a government lawyer participated personally and substantially in a matter before joining government service, he or she may not then further participate in that matter. *See*, Annotated Model Rules, *Client-Lawyer Relationship*, 204-5 (2d ed. 1992). When a lawyer moves into the government from private practice, he may not divulge any information about a former client and may not oppose the client in a matter in which he had previously represented him, or in a matter substantially related.

---

[20] SCR 161(3) omits the last portion of the last sentence of the *Model Rules of Professional Conduct* Rule 1.11(c)(2), which concerns law clerks' negotiating for private employment.

See, Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, 364-65 (2nd ed. 1994 Supplement). The answer is to screen the affected lawyer from participation in government activity that is adverse to his former clients and related to work that he performed for them. *Id.* at 364.

SCR 159 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
> 1. Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents, preferably in writing, after consultation; or
> 2. Use information relating to the representation to the disadvantage of the former client except as Rule 156 would permit with respect to a client or when the information has become generally known.

SCR 159 was adopted by the Nevada Supreme Court in 1986 and is based upon the *Model Rules of Professional Conduct* 1.9. The Nevada Supreme Court examined SCR 159 in context of a defendant doctor's motion to disqualify an attorney from representing a plaintiff because the attorney had defended the doctor in a previous, unrelated matter. *Robbins v. Gillock*, 109 Nev. 1015, 862 P.2d 1195 (1993). In making a determination whether a conflict of interest exists between an attorney and a former client, the court should take a realistic appraisal of whether confidences might have been disclosed in the prior matter that will be harmful to the former client in the current matter. *Id.* at 1018. The focus should be on the precise nature of the relationship between the present and former representation to determine if they are substantially related. The Ninth Circuit has said that substantiality is present if the factual contexts of the former and present matters are similar or related. *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980). If the matters are substantially related, it is assumed that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the present matter. *Id.* at 998.

A commissioner's role as a hearing officer or as a member of a panel to decide contested cases is quasi-judicial. The Nevada Code of Judicial Conduct "Application of the Code of Conduct" states:

> A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer who is a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code . . . .

Our research did not reveal any Nevada authorities applying this section to commissioners. However, at least one jurisdiction, New York, interpreting an identical provision, has held that administrative law judges and others in administrative agencies acting in quasi-judicial capacities

are subject to provisions of the Code of Judicial Conduct.[21] Other jurisdictions have stated that the Code of Judicial Conduct may provide guidance in determining propriety of conduct of attorneys serving in quasi-judicial roles.[22]

Canon 3 of the Code of Judicial Conduct provides in part:

> **A judge shall perform the duties of judicial office impartially and diligently.**
> . . . .
> E. Disqualification.
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> . . . .
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it . . . .

The Commentary to Canon 3E provides that a judge should disqualify himself whenever his impartiality might reasonably be questioned. The Commentary states that the judge should disclose on the record information that the judge believes the parties or their attorneys would find relevant to the question of disqualification, regardless of whether the judge believes there is a real basis for disqualification.

Our research revealed no Nevada case authorities or Nevada State Bar ethics opinions on point. However, there are some illustrative ethics opinions and court decisions from other jurisdictions which will aid in answering the question.

The New York State Bar Association's Committee on Professional Ethics has issued recent opinions which discuss the New York rules that are equivalent to the Nevada Supreme Court Rules set forth above. In New York Ethics Op. No. 638 (1992), the rules were examined in context of a former private attorney elected as county prosecutor. The issue was whether the attorney could act as prosecutor in a murder case where his former firm had been retained as the suspect's defense counsel just prior to the attorney's departure from the firm. The attorney had never met the suspect and had no personal knowledge of or involvement with the defense case.

---

[21] The New York State Bar Association's Committee on Professional Ethics has issued a number of different ethics opinions applying various provisions of the CJC to administrative hearing officers. *See generally*, Op. 617 (1991).

[22] Florida State Bar Association Ethics Opinion 80-4; Philadelphia Bar Association Professional Guidance Committee Ethics Opinion 87-20.

The opinion applied New York's DR 9-101(B)(3)(a) (*N.Y. Judiciary Law, Appendix, Code of Professional Responsibility* (McKinney 1992)), which is identical to Nevada SCR 161(c). The opinion concluded that the attorney could not prosecute the suspect, or any other client of his former firm, if the lawyer had "participated personally and substantially in the matter while in private practice." The opinion stated the rule makes it clear the attorney's participation must be more than a nominal supervisory responsibility. Absent such "personal and substantial" participation, the attorney is not disqualified under the rule.

However, the opinion's analysis did not end with the personal and substantial responsibility test. Next, the opinion considered application of New York's DR 5-108, which is the equivalent of Nevada SCR 159, dealing with former clients. The opinion interpreted the rule to require disqualification in instances where the attorney had personally represented the former client in the same or a substantially related matter. Additionally, although the attorney may not have participated personally or substantially, he had to examine whether he had acquired any relevant confidences and secrets of the client inadvertently. If the attorney possessed any relevant confidences or secrets of any client represented by his former firm, he must withdraw from a prosecution of that client.

New York Ethics Op. No. 617 (1991) addressed whether an administrative law judge (ALJ) must recuse himself in tax appeals cases where he had previously worked as a staff attorney in the state tax department. The opinion applied the Code of Judicial Conduct Canon 3C to the problem. *N.Y. Judiciary Law, Code of Judicial Conduct Canon 3C* (McKinney 1992). Recusal was required if the ALJ previously represented the tax department in the same or an unrelated matter involving the same taxpayer.

If the taxpayer had been prosecuted by another tax department attorney during the ALJ's tenure at the department, recusal might still be required. This depended upon whether the ALJ's impartiality might reasonably be questioned. In determining whether recusal was appropriate, the ALJ should consider the size of the legal office involved, whether the ALJ had substantial decision making or supervisory responsibility in the office, and the extent to which cases were discussed with lawyers other than those formally assigned to them. If any question could be raised about the ALJ's impartiality, recusal was required.

In *Klamath Falls v. Environ. Quality Comm.*, 851 P.2d 602 (Or. Ct. App. 1993), *aff'd* 870 P.2d 825 (Or. 1994), the Oregon Appeals Court found no error when a member of the Environmental Quality Commission (EQC) refused to recuse herself from a hearing on a city's application for certification of a hydroelectric project's compliance with applicable water quality standards. The commissioner was a former attorney with the Oregon Department of Justice, which acts in an advisory or advocacy role in matters concerning water quality and siting of hydroelectric facilities.

Recusal was not required since the commissioner stated on the record that her prior work did not involve legal or factual questions dealing with water quality.

Federal decisions addressing recusal also provide some guidance. 28 U.S.C. § 455 (1993) governs recusal of federal judges. Section 455 was amended in 1974 and again in 1988 to conform to the language of the ABA's *Code of Judicial Conduct*.[23]

Applying the federal statute in a case in the Third Circuit, the court held that it was not necessary for a judge to refuse to recuse herself from a criminal matter. The judge had no prior involvement as counsel in criminal prosecution of the defendant, although she had been employed in the United States Attorney's office at the time the prosecution commenced. *U.S. v. DiPasquale*, 864 F.2d 271, 278 (3d Cir. 1988). Another federal court stated that prior representation of a party by a judge or his firm with regard to a matter unrelated to litigation before him does not automatically require recusal. *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). Rather, a judge should inquire into circumstances of the prior representation to determine whether recusal is required. *Id.* A judge has an affirmative duty not to disqualify himself unnecessarily. *Id.*

Finally, a judge considering whether to recuse must always consider whether his impartiality might reasonably be questioned. The United States Supreme Court has said that the test is an objective one. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-62 (1988).[24] The Supreme Court concluded that recusal is required if a reasonable person, knowing all the circumstances, would expect that the judge have actual knowledge of the facts indicating his interest or bias in a case. *Id.*

CONCLUSION TO QUESTION ONE

The commissioner should recuse himself from any matter before the Commission if he personally and substantially was involved in the matter while in private practice. Even if he was not substantially involved, he must recuse himself if he possesses any confidence or secret of the former client that may be relevant to the matter before the Commission. Above all, the commissioner has a duty to recuse himself if his impartiality might reasonably be questioned.

QUESTION TWO

---

[23] The language of 28 U.S.C. § 455 (1993) is almost identical to Cannon 3E of Nevada's Code of Judicial Conduct.

[24] *Liljeberg* held that 28 U.S.C. § 455(a) (1974) had been violated when a judge failed to recuse himself *after* he became aware of facts that created an appearance of impropriety due to his position as a trustee of Loyola University. The judge did not become aware of the facts until after he had rendered final judgment in a bench trial.

Under what circumstances should a commissioner recuse himself where he represented or performed legal services for a client in connection with matters before the Commission that have been resolved?

ANALYSIS

The rules and applications discussed in answering Question One are applicable to this inquiry. In matters already resolved before the Commission, there is no need for recusal. However, the commissioner must examine whether he has obtained confidential information concerning the former client which may be relevant in matters that may appear before the Commission in the future. Recusal is required if the commissioner's prior representation of the client gave him access to confidential information that could affect his decisions in future matters involving the former client.

Even if the commissioner does not possess any confidences or secrets of the former client which may be relevant to future proceedings, recusal may still be warranted. As the Code of Judicial Conduct states, a judge should disqualify himself in a proceeding whenever his impartiality might reasonably be questioned. At the very least, disclosure of the commissioner's prior relationship with the client is required. The Commentary to the Code of Judicial Conduct Cannon 3E states that a judge should disclose on the record information which he believes that the parties or their attorneys would find relevant to the question of impartiality and disqualification. Canon 3F allows the judge to disclose on the record any basis for disqualification and to ask the parties and their lawyers to consider whether to waive the disqualification.

CONCLUSION TO QUESTION TWO

The commissioner should recuse himself from a proceeding involving a former client if he has obtained confidences or secrets of the client through previous representation of the client. Even in instances where the commissioner does not possess any relevant confidences or secrets of the former client, he should disclose his previous representation on the record to all parties and their attorneys, even if that previous representation is unrelated to the proceeding before the Commission. If the commissioner's impartiality might be reasonably questioned, he should recuse himself. He may ask the parties to consider a waiver of the disqualification. If the parties decide to waive the basis for disqualification, the waiver should be made a part of the record. In a proceeding that may be adverse to the former client, but not involving any confidences or secrets of the client, the commissioner should disclose to all parties and obtain the former client's consent on the record before taking part in the proceeding.

QUESTION THREE

Under what circumstances should the commissioner recuse himself where he previously represented a client in matters unrelated to the Commission or utility regulation, but the former client now may have business before the Commission through another attorney within the law firm or through another attorney?

ANALYSIS

Although your question did not explicitly state so, for purposes of answering this question, we assume that the former client was not represented by other attorneys in the law firm while the commissioner was still a member of the firm.

The commissioner should recuse himself if the former client's business before the Commission is substantially related to previous legal representation of the client by the commissioner. If there is no substantial relationship between the matters, then the commissioner should determine whether he inadvertently obtained any confidential information of the former client through the previous representation.

If there is no confidential information, then the commissioner should disclose on the record to all parties that he previously represented the client in unrelated matters. If the client is represented by the Commissioner's former law firm, that fact should be disclosed on the record as well. If the matter is one adverse to the former client, the client's consent should be requested and made part of the record. The parties and their counsel should be asked to consider whether to waive any disqualification of the commissioner. If the parties consent to waive any disqualification, the waiver should be made part of the record.

CONCLUSION TO QUESTION THREE

The commissioner does not have to recuse himself from a proceeding involving a former client if the matter before the Commission is not substantially related to the commissioner's previous representation of the client and the commissioner does not possess any secrets or confidences of the client which are relevant to the proceeding. Disclosure of the previous representation to all parties is required, as well as disclosure of the commissioner's prior association with the law firm now representing the client. Waiver of any disqualification must be sought from the parties to the proceeding, and should be on the record.

QUESTION FOUR

Under what circumstances should a commissioner recuse himself where he personally conducted no legal services for the client, but the client was represented by other attorneys within the firm while the commissioner was a member of the law firm?

ANALYSIS

This question is answered by the same analysis as above. Where the commissioner did not perform any legal services for the client, and he did not have any knowledge of the client's matters being handled by other attorneys within the firm, there is no per se disqualification. However, the commissioner must make a disclosure on the record, as discussed above, and determine whether any party objects to his participation in the proceeding. Recusal may be warranted if his impartiality might be reasonably questioned.

In determining whether his impartiality might reasonably be questioned, the commissioner should examine the following factors: (1) size of his former law firm; (2) whether he had substantial decision making or supervisory responsibility; and (3) the extent to which cases and clients were discussed with other attorneys in the firm.

CONCLUSION TO QUESTION FOUR

The commissioner is not disqualified per se. As discussed above, he must examine whether he obtained any confidential information about the client while a member of the firm. Full disclosure should be made on the record of the firm's representation of the client. The parties and their counsel should be asked to consider waiver and any waiver should be put on the record. Again, if there is any reasonable question concerning the commissioner's impartiality, he should recuse himself.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JONATHAN L. ANDREWS
Chief Deputy Attorney General

OPINION NO. 95-20 LOANS; MOTOR VEHICLES: A pawnbroker who makes a loan on a vehicle and retains only the certificate of ownership or title, and not the vehicle itself, does not have to be licensed as an installment lender pursuant to NRS chapter 675 prior to engaging in that activity.

Carson City, November 17, 1995

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division, 406 East Second Street, Carson City, Nevada 89710

Dear Mr. Walshaw:

You have requested our opinion as to whether a pawnbroker who makes a loan secured by a motor vehicle and retains only the certificate of ownership or title, and not the vehicle itself, is exempt from licensing as an installment lender pursuant to NRS 675.040(1).

QUESTION

Is a pawnbroker who makes a loan secured by a vehicle and retains only the certificate of ownership or title, and not the vehicle itself, engaged in the business of a pawnbroker as authorized by NRS chapter 646 and exempt from licensing as an installment lender pursuant to NRS 675.040(1)?

ANALYSIS

Most businesses that loan money in this state must be licensed as installment lenders pursuant to NRS chapter 675. NRS 675.060 provides in full:

> 1. No person may engage in the business of lending without first having obtained a license from the commissioner [of the Financial Institutions Division].
> 2. For the purposes of this section, a person engages in the business of lending if he:
> (a) Solicits loans in this state or makes loans to persons in this state, unless these are isolated, incidental or occasional transactions; or
> (b) Is located in this state and solicits loans outside of this state or makes loans to persons located outside of this state, unless these are isolated, incidental or occasional transactions.

The licensing requirement does not apply, however, to "[a] person doing business *under the authority of any law* of this state or of the United States relating to banks, savings banks, trust companies, savings and loan associations, credit unions, development corporations, mortgage companies, thrift companies, *pawnbrokers* or insurance companies." NRS 675.040(1) (emphasis added).

The issue you raise usually arises in the following situation: A consumer comes to a pawnbroker needing money. The pawnbroker agrees to make a loan to the consumer and, in exchange, the consumer agrees to put his or her vehicle up as collateral. In many cases, the pawnbroker retains the vehicle itself as pledged property. When the consumer pays the loan back in full the pawnbroker releases the vehicle back to the consumer.

In some cases, however, the pawnbroker retains only the certificate of ownership or title to the vehicle and permits the borrower to retain and continue to use the vehicle. Although in the possession of the borrower, the vehicle remains collateral for the loan. If the consumer defaults on the loan, the vehicle is repossessed by the pawnbroker. In other cases, the pawnbroker will have the consumer execute a security agreement pursuant to the Uniform Commercial Code. *See* NRS 104.9101-.9507, inclusive. The pawnbroker may actually record his or her security interest on the title to the vehicle[25] by having the pawnbroker's name placed on the title of the vehicle as a secured party.[26] The pawnbroker again retains the certificate of ownership or title and the consumer continues to drive the vehicle. In this case, the consumer is also usually required to maintain insurance on the vehicle and list the pawnbroker as a loss payee.

In both situations, the pawnbroker deviates slightly from the normal pawn loan arrangement and retains not the actual collateral but evidence of the collateral in the form of the certificate of ownership or title. It is, of course, an obvious advantage to the consumer to continue to have use of his or her vehicle.

NRS 646.010 defines "pawnbroker" as "[e]very person engaged, in whole or in part, in the business of loaning money on the security of pledges, deposits *or other secured transactions in personal property* . . . ." [Emphasis added.] We do not believe the legislature intended by this provision to limit pawnbrokers in making loans that are secured solely by pledges or deposits of personal property collateral that remain in the possession of the pawnbroker until redeemed by the owner.

---

[25] NRS 482.432 provides in full:

> Compliance with the applicable provisions of NRS 482.423 to 482.431, inclusive, is sufficient for the perfection and release of a security interest in a vehicle and for exemption from the requirement of filing of a financing statement under the provisions of paragraph (b) of subsection 3 of NRS 104.9302. In all other respects the rights and duties of the debtor and secured party are governed by the Uniform Commercial Code - Secured Transactions and chapter 97 of NRS to the extent applicable.

[26] NRS 482.428 reads in full:

> 1. Whenever a security interest is created in a motor vehicle, other than a security interest required to be entered pursuant to NRS 482.423, 482.424 or 432.426, the certificate of ownership of the vehicle shall be delivered to the department with a statement signed by the debtor showing the date of the security agreement, the name and address of the debtor and the name and address of the secured party.
>
> 2. The department shall issue and deliver to the secured party a certificate of ownership with the name and address of the secured party noted thereon.

The legislature has also indicated in other statutory provisions that this type of pawn loan would be permitted. NRS 244.348, NRS 268.0973, and NRS 269.182 all provide that a local government (city, county or unincorporated town) can require an additional business license "if the pawnbroker accepts motor vehicles as pledged property *or in any other manner allows the use of a motor vehicle as collateral for a loan*." [Emphasis added.] These provisions clearly reflect the legislative intent to allow pawnbrokers to make loans on automobiles and take the vehicle as collateral in some manner other than as an outright pledge. The legislature considered the implications and through these statutes created an additional business license requirement for those pawnbrokers who engaged in this type of activity.

A pawnbroker is exempt from licensing under the Installment Loan Act if he is acting under the authority of the Pawnbroker Act. NRS 675.040(1). Since pawn transactions authorized by NRS chapter 646 allow the pawnbroker to engage in "other secured transaction in personal property," retention of the certificate still fits within the "pawnbroker" definition. Such transactions are therefore exempt from licensing by NRS 675.040(1) and a pawnbroker who makes such loans does not need to obtain a license pursuant to provisions of NRS chapter 675 issued by the Commissioner of Financial Institutions.

CONCLUSION

A pawnbroker who makes a loan secured by a motor vehicle and retains only the certificate of ownership or title, and not the vehicle itself, is exempt from licensing pursuant to NRS 675.040(1), and, therefore, does not need to be licensed as an installment lender pursuant to NRS chapter 675 prior to engaging in that activity.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOE S. ROLSTON IV
Deputy Attorney General

OPINION NO. 95-21 SPEED LIMIT; LOCAL GOVERNMENT: The Reno City Council did not abuse its discretion in setting a speed limit on a city street at 30 miles per hour; a recommendation of 35 miles per hour by the traffic engineer following a traffic engineering study conducted in accordance with the Manual on Uniform Traffic Control Devices did not bind the City Council to the specific recommendations under these facts.

Carson City, December 4, 1995

Mr. Chan Griswold, Deputy City Attorney, Reno City Attorney's Office, Post Office Box 1900, Reno, Nevada 89505-1900

Dear Mr. Griswold:

By letter dated September 29, 1995, you asked the office the following:

QUESTION

Did the Reno City Council (City Council) violate provisions of NRS 484.781 or 484.783 when it approved a reduction in the speed limit on portions of Skyline Boulevard from 35 miles per hour to 30 miles per hour after the traffic engineer had recommended the speed limit remain at 35 miles per hour following consideration of the factors set forth in section 2B-10 of the Manual on Uniform Traffic Control Devices (MUTCD)?

ANALYSIS

The City Council adopted the MUTCD on June 27, 1995. Thereafter, some residents requested that the speed limit on portions of Skyline Boulevard be lowered from 35 miles per hour to 30 miles per hour. The traffic engineer considered the factors set forth in section 2B-10 of the MUTCD, including the 85-percentile speed and pace speed. Based upon these factors, the engineer recommended that the speed limit remain at 35 miles per hour. Subsequently, the City Council approved a reduction in the speed limit to 30 miles per hour.

A. Applicable Statutes

There are several state statutes and portions of the MUTCD we must consider. Pursuant to NRS 484.781, the Nevada Department of Transportation (NDOT) adopted the MUTCD. Subsection 2 requires that all devices used by local authorities or the department conform with said manual. NRS 484.779 sets forth the powers of local authorities. With the exception that an ordinance enacted under this section is not effective with respect to highways constructed and maintained by NDOT, NRS 484.779(1) provides:

> [A] local authority may adopt, by ordinance, regulations with respect to highways under its jurisdiction within the reasonable exercise of the police power:
>
> . . . .
>
> (e) Adopting such other traffic regulations related to specific highways as are expressly authorized by this chapter.

NRS 484.783 provides additional discretion in that it requires local authorities to "place and maintain such official traffic-control devices upon highways under their jurisdiction *as are determined necessary* to indicate and to carry out the provisions of this chapter and to regulate, warn or guide traffic." [Emphasis added.]

The MUTCD provides in section 1A-4 "Engineering Study Required," that the decision to use a particular device at a particular location "should be made on the basis of an engineering study of the location." Section 1A-4 further states: "Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation." Pursuant to section 2B-10, a speed limit sign shall display the limit established by law, or by regulation, after an engineering and traffic investigation has been made in accordance with established traffic engineering practices. In order to determine the proper numerical value for a speed zone on the basis of an engineering and traffic investigation, section 2B-10 provides factors which should be considered.

With these statutes and sections of the MUTCD in mind, we must determine how to apply them to the present situation. Statutes in Nevada concerning the same subject must be read harmoniously in order to give effect to all of them. *First Am. Title Co. of Nevada v. State*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975). Thus, while we must follow the MUTCD provisions, we must also give effect to the other Nevada statutes which apply. Additionally, there is case law in Nevada and in other jurisdictions which demonstrate that governmental bodies have considerable discretion when carrying out their duties in setting speed limits.

B. Discretion Afforded to Local Authority

Evidence of a local authority's discretion to set speed limits within its jurisdiction can be seen in three contexts: (1) professional judgment allowed traffic engineers pursuant to the MUTCD, (2) tort liability, and (3) mandamus actions. First, section 1A-4 of the MUTCD provides that the manual is not a substitute for engineering judgment. The decision to use a particular device at a particular location should be based on an engineering study of the location. Section 2B-10 of the MUTCD states that a speed limit sign shall display the limit established by law, or by regulation, after an engineering and traffic study has been made in accordance with established traffic engineering practices. There is no requirement within this section that the local authority set the speed limit in strict accordance with the engineer's recommendation. So long as the engineering and traffic study is performed prior to the enactment of the regulation, it appears that the local authority would have some level of discretion to set the speed limit.

Further, NRS 484.783 does not require local authorities to install traffic control devices as determined necessary by the traffic engineer. Rather, it indicates that the local authority is to place

traffic control devices upon highways within its jurisdiction as are determined necessary to carry out the provisions of chapter 484 and to regulate, warn or guide traffic. In this instance, the City Council has determined that a speed limit of 30 miles per hour is necessary to carry out the requirements of NRS ch. 484. Based on the above, it would not appear that the City Council violated NRS 484.781 or 784.783 when it set the speed limit five miles per hour less than what the traffic engineer recommended.

Secondly, with regard to tort liability, NRS 41.032 creates an exemption from liability for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused. The Nevada Supreme Court recently reexamined the discretionary immunity doctrine. In this regard, the court concluded that the decision to place traffic controls at an existing intersection or road is a discretionary function and that the county was immune from liability for its failure to install such controls. *Nevada Power Co. v. Clark County*, 107 Nev. 428, 430, 813 P.2d 477, 478 (1991).

Although we have been unable to find any case law in Nevada dealing specifically with setting of speed limits, case law from other jurisdictions illustrates the general rule that setting of a speed limit by a governmental entity is a discretionary act. *Kolitch v. Lindedahl*, 497 A.2d 183, 187 (N.J. 1985) (summary judgment in favor of state was appropriate in wrongful death actions brought on behalf of four people killed in collision on state highway). Setting of a speed limit is within a city's police power regarding traffic regulation and as such it is immune. *Barrera v. City of Garland*, 776 S.W.2d 652, 658 (Tex. Ct. App. 1989) (action against city to recover for injuries when car went off road at curve, while reversed on other grounds, summary judgment held appropriate as to city because its decision concerning speed limits is discretionary). The county cannot be liable for its failure to lower a speed limit. *Ferla v. Metropolitan Dade County*, 374 So.2d 64, 67 (Fla. App. 1979) (negligence action against county for injuries sustained in head-on collision, summary judgment in favor of county upheld because setting of speed limit is a planning function for which city has no tort liability).

Finally, the law regarding mandamus demonstrates the discretion accorded to the City Council. A writ of mandamus may be issued to compel performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. NRS 34.160. The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy at law. NRS 34.170. Mandamus will not lie to compel a discretionary act. *Brewery Arts Center v. State Bd. of Examiners*, 108 Nev. 1050, 1054, 843 P.2d 369, 372 (1992). However, mandamus will lie where discretion is manifestly abused or exercised arbitrarily or capriciously. *Id.* at 1053. In *State Ex Rel. Ohio Motorists Ass'n v. Masten*, 456 N.E.2d (Ohio App. 1982), plaintiff filed an action in mandamus against the city council requesting the court issue an order requiring that any traffic control devices erected by the council conform with the MUTCD. The court held that the MUTCD merely established guidelines for the village to follow in regulating traffic by means of traffic control devices. The court stated

that the village was free to regulate the flow of traffic within its boundaries, as long as its traffic control devices conformed to the statewide uniform standard. *Id.* at 572.

It should also be noted that in order for speed limits to be enforceable, due process requires that the public be given notice that a speed limit has been set at a particular level in accordance with statutory requirements. In this instance, a public meeting was held where the issue was discussed and statutory requirements were followed and an engineering study was performed pursuant to the MUTCD. Due process further requires that the speed limit be rationally related to a legitimate governmental interest. The governmental interest involved here would be public safety.

CONCLUSION

In the situation presented here, the City Council set a speed limit of 30 miles per hour although the traffic engineer recommended a speed of 35 miles per hour. The traffic engineer properly considered the factors required in the MUTCD. State statutes and case law give discretion in setting speed limits to the City Council and the MUTCD also allows for engineering judgment and does not require that a local authority set a speed limit strictly according to the engineer's recommendation. It cannot be said under the facts presented that the City Council abused its discretion in deciding that the speed limit should be 30 miles per hour, rather than 35 miles per hour.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BRIAN RANDALL HUTCHINS
Chief Deputy Attorney General

OPINION NO. 95-22 FEDERAL GOVERNMENT; FORFEITURES; FUNDS; LAW ENFORCEMENT: Funds shared by the federal government with the State of Nevada remain subject to the Department of Justice guidelines. "Ordinary operating expenses" of Nevada Division of Investigation for purposes of NRS 179.1187(2)(a), are those expenses which result from regular and daily operation and maintenance of the agency and its property.

Carson City, December 8, 1995

Mr. John Drew, Chief, Division of Investigations, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada, 89711

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

Dear Messrs Drew and Comeaux:

This letter is in response to your respective requests for legal opinions regarding proper distribution and uses of certain forfeiture money.

QUESTION ONE

You have asked whether the federal forfeiture money shared with the State of Nevada remains subject to the Department of Justice guidelines or whether they become state funds controlled by NRS ch. 179.

ANALYSIS

Federal statutes, 21 U.S.C. § 881(e)(1) (1991) and 19 U.S.C. § 1616(a) (1991), as made applicable by 21 U.S.C. § 881(d) (1991), allow for sharing forfeiture money by the federal government with state and local law enforcement agencies.

The United States Department of Justice has prepared a document entitled *A Guide to Equitable Sharing of Federal Forfeited Property for State and Local Law Enforcement Agencies* (March 1994) (Guide). Section X(A)(1) lists permissible uses for those funds and those are activities calculated to enhance future investigations, law enforcement training, law enforcement equipment and operations, detention facilities, law enforcement facilities and equipment, drug education and awareness programs, pro rata funding, and asset accounting and tracking. Those permissible uses are set out in the Guide and are given complete explanation in that regard.

Section X(A)(2) specifies a list of impermissible uses which are payment of salaries for existing positions, uses of forfeited property by nonlaw enforcement personnel, payment of nonlaw enforcement expenses, uses not specified in the DAG-71, uses contrary to the laws of the state or local jurisdiction, nonofficial government use of shared assets, and extravagant expenditures.[27] The Guide also allows for funds to be passed through to other state or local agencies. However, as a general rule, pass-throughs are not generally allowed. The Guide gives four separate situations where funds may be passed through as set forth in Section X(A)(3)(a)-(d):

> **Permissible Pass-Throughs to Other Agencies.** Although state or local law enforcement agencies may not generally pass-through (*i.e.* transfer) shared cash, proceeds, or tangible

[27] The DAG-71 is an application for transfer of federally forfeited property which requires the state to specify its intended use.

property to other governmental agencies, there are four types of transfers that are now permitted:

a. **Cash Transfers**—Receiving agencies may, in their discretion, transfer:
   (1) up to fifteen percent (15%) of any of their shared monies; and/or
   (2) in "windfall situations," (where federal sharing transfers represent over 25 percent of a state or local agency's annual budget), any amount over the 25 percent level to governmental departments or agencies to support drug abuse treatment, drug and crime prevention and education, housing, and job skills programs, or other community-based programs. Such governmental departments or agencies may, in turn, transfer any monies so received to private, non-profit community organizations to be spent for such purposes.
b. **Tangible Personal Property Transfers**—as provided in subsection X.D. below.
c. **Real Property Transfers**—as provided in subsection X.C. below.
d. **Transfers to Other Law Enforcement Agencies**— Receiving law enforcement agencies may transfer or pass-through a portion of their sharing receipts to another law enforcement agency to be spent by that agency for a law enforcement purpose.[28]

Such pass-throughs must be expressly provided for in the DAG-71 and the general purpose indicated, *e.g.*, "drug prevention."

Section XIII of the Guide gives state and local agencies receiving federal funds a list of sanctions that it will impose if the funds are not used as authorized as set forth in the Guide. Those are:

A. Being barred, temporarily or permanently, from further participation in the sharing program;

B. Offsets from future sharing in an amount equal to impermissible uses;

C. Civil enforcement actions in U.S. District Court for breach of contract; or

D. Where warranted, federal criminal prosecution for false statements under 18 U.S.C. § 1001, fraud involving theft of federal program funds under 18 U.S.C. § 666, or other sections of the criminal code, as applicable.

As can be seen, the penalties for noncompliance with the Guide can be extremely severe, including criminal penalties. As a general rule the Guide indicates in Section X(B) that forfeiture money should be used to supplement existing resources rather than supplanting an existing resource.

---

[28] Such expenditures are subject to the no supplantation rule described in Section B below.

NRS 179.1187 sets forth the manner in which state forfeiture monies should be used:

> 1. The governing body controlling each law enforcement agency that receives proceeds from the sale of forfeited property shall establish with the state treasurer, county treasurer, city treasurer or town treasurer, as custodian, a special account, known as the "..... forfeiture account." The account is a separate and continuing account and no money in it reverts to the state general fund or the general fund of the county, city or town at any time. For the purposes of this subsection, the governing body controlling a metropolitan police department is the metropolitan police committee on fiscal affairs.
> 2. The money in the account may be used for any lawful purpose deemed appropriate by the chief administrative officer of the law enforcement agency, except that:
> (a) The money must not be used to pay the ordinary operating expenses of the agency.
> (b) Money derived from the forfeiture of any property described in NRS 453.301 must be used to enforce the provisions of chapter 453 of NRS.
> (c) Money derived from the forfeiture of any property described in NRS 501.3857 must be used to enforce the provisions of Title 45 of NRS.

Therefore, any funds that are received pursuant to the shared federal forfeiture money program should be used in strict compliance with the Guide and should not be used in any manner that is inconsistent with those guidelines. Notwithstanding the fact that NRS 179.1187 does give some guidelines as to how state forfeiture monies should be used, federal forfeiture monies should be used completely in accordance with the United States Attorney General's Office March 1994 Guide.

CONCLUSION TO QUESTION ONE

While NRS 179.1187 does give some general guidelines as to the appropriate uses of forfeiture money, the federal guidelines are more explicit and restrictive. The federal guidelines set forth several areas of specific uses for federal forfeiture money. NRS 179.1187 also contains no sanction for an agency failing to use the funds as deemed appropriate by the statute. Of course, as has been previously pointed out, the federal guidelines do contain a list of possible consequences for failure to use the federally shared money as stated in the guidelines. Those consequences range from being barred from participating in the federal sharing program in the future to criminal prosecution for making false statements and fraud.

In conclusion, those funds that are shared by the federal government with the State of Nevada remain subject to the Department of Justice guidelines and must be used in strict accordance with and in the manner specified in those guidelines. Failure to do so can result in severe sanctions even including criminal sanctions for the state.

QUESTION TWO

What are the "ordinary operating expenses" of the Nevada Division of Investigation (NDI) as that term is used in NRS 179.1187(2)(a)?

ANALYSIS

The law governing disposition of property seized by law enforcement agencies during law enforcement activities is set forth at NRS 179.1156-.121, inclusive. As noted in our analysis in Question One, NRS 179.1187 provides for creation of a separate account within the different law enforcement agencies for deposit and accounting of proceeds of the sale of forfeited property, specifically providing in relevant part that the money in the account: "[M]ay be used for any lawful purpose deemed appropriate by the chief administrative officer of the law enforcement agency, except that: (a) The money must not be used to pay the *ordinary operating expenses* of the agency." NRS 179.1187(2) (emphasis added).

The Guide specifically prohibits spending of federal forfeiture money or use of federal forfeited property for uses contrary to the laws of the state or local jurisdictions. Information we have been provided from NDI's 1993 Special Forfeiture Report indicates expenditures by that agency for per diem, in-state and out-of-state transportation, office supplies, contract services, publication costs, vehicle operations, vehicle maintenance, uniform purchases, postage, "flash money," telephone calls, subscriptions, reference manuals, furniture, vehicle purchases, and office equipment. Your concern is that while these kinds of expenditures may be appropriate under Guide standards for allowable expenditures of federal forfeiture money, some may also constitute "ordinary operating expenses" of NDI under NRS 179.1187(2)(a) and therefore be impermissible under that statute and the Guide prohibition against spending for "uses contrary to the laws of the state."

There is no Nevada statutory definition of "ordinary operating expenses" in chapter 179 of NRS and the Nevada Supreme Court has not had the opportunity to interpret the term. An "ordinary" municipal expense is one "in the ordinary course of the transaction of municipal business or the maintenance of municipal property it may and is likely to become necessary." *Black's Law Dictionary* 1249 (4th ed. 1968). Bankruptcy courts have defined the term "operating expenses" to mean "expenses arising out of everyday operation and maintenance of the project". *Matter of EES Lambert Associates*, 63 B.R. 174, 175 (N.D. Ill. 1986). For purposes of federal income taxation, the term "ordinary expense" is an expense which is "a 'normal, usual or customary' practice for the type of business involved" arising out of "transactions that are of common or frequent occurrence in the type of business involved." *Danville Plywood Corp. v. United States*, 899 F.2d 3, 4-5 (Fed. Cir. 1990). *See also*, 26 U.S.C. § 162(a) (1991). We note that the federal definition of ordinary expense devolves from federal regulation and is contrasted by regulation with the term "capital expense," defined as an expenditure whose benefits are to be

enjoyed over a comparatively lengthy period of business operation. 26 U.S.C. § 162 (1991); *see also, Walters v. Commissioner of Internal Revenue*, 383 F.2d 922, 923 (6th Cir. 1967).

By implication therefore, the spending prohibition does not apply to NDI's capital expenses nor does it apply to *extraordinary* operating expenses. *Clark County Sports Enter., Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P. 2d 171 (1980) (The legislature would have provided language of inclusion if it intended it.). Applying this standard to the list of 1993 NDI expenditures, several appear to be proper as capital expenditures, such as purchases of furniture, a storage shed, and a fax machine. However, many of the other expenditures such as expenditures for vehicle maintenance, fuel, tires, and batteries would seem to be in the nature of operating expenses which would only be allowable if they were of an extraordinary nature, such as those expenses associated with a major drug sting operation or special project which is outside the scope of NDI's normal statutory functions.

It is clear to us that application of the above standard on a case-by-case, line-item-by-line-item basis would be difficult and time consuming. Accordingly, we suggest that you work together to propose an amendment to NRS 179.1187 which will expedite review of expenses of forfeiture money. In light of the fact that the terms "operating expenses" and "capital expenses" have generally settled definitions, such an amendment might consist simply of removal of the troublesome term "ordinary" from NRS 179.1187(2).

CONCLUSION TO QUESTION TWO

"Ordinary operating expenses" of NDI, for purposes of NRS 179.1187(2)(a), are those expenses which result from regular and daily operation and maintenance of the agency and its property. The term does not include the agency's capital expenses or operating expenses which are extraordinary, such as expenses which result from a major drug sting operation or special project which are outside the scope of NDI's normal statutory functions.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General
and JAMES C. VAN WINKLE
Deputy Attorney General

OPINION NO. 95-23 TAXATION; HOSPITALS; PROPERTY: A hospital district created pursuant to NRS 450.550-.700, inclusive, is permitted to hold real property in its name. *See* NRS 450.690. NRS 361.060 permits an exemption from property taxes of property owned by a political subdivision. A hospital district, even though not expressly delineated in NRS 361.060 as an exempt entity, should properly be considered a political subdivision and, therefore, exempt from taxation.

Carson City, December 31, 1995

Mr. Leon Aberasturi, Deputy District Attorney, Lyon County, 31 South Main Street, Yerington, Nevada 89447

Dear Mr. Aberasturi:

You have requested an opinion from this office regarding application of an exemption (NRS 361.060) from property tax to property owned by a hospital district created pursuant to chapter 450 of the Nevada Revised Statutes. Your question is more specifically stated as follows:

QUESTION

Could real property held in the name of a hospital district created pursuant to chapter 450 of the Nevada Revised Statutes be subject to property tax imposed pursuant to chapter 361 of the Nevada Revised Statutes?

ANALYSIS

For property tax purposes, all property is generally presumed to be taxable. *See* NRS 361.045. Presumption of taxation can be rebutted by the application of an appropriate exemption. Accordingly, in order to determine whether the property of a hospital district is not subject to the property tax, it is necessary to review the exemptions from the property tax found in NRS 361.045-.159, inclusive. The only relevant exemption which could apply to property owned by a hospital district is NRS 361.060. NRS 361.060 provides:

> **NRS 361.060 Property of political subdivisions and municipal corporations exempted.** All lands and other property owned by any county, domestic municipal corporation, irrigation, drainage or reclamation district or town in this state shall be exempt from taxation, except as provided in NRS 539.213 with respect to certain community pastures.

As delineated in the title to the statute, this exemption is intended to apply to property of political subdivisions and municipal corporations. It is appropriate to review the title of a statute when seeking to determine the intent of the legislature as to which entities are exempt from taxation. The Supreme Court has held: "In determining what the Legislature intended, the title of the statute may be considered in construing the statute." *A Minor v. Clark County Juvenile Court Services*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971). Thus, it is appropriate to conclude that the legislature intended to exempt political subdivisions and municipal corporations of the state from taxation.

Based upon the foregoing, in order for property to be exempt from taxation pursuant to NRS 361.060, the property must be held by either a municipal corporation or political subdivision. A hospital district by definition is not a municipal corporation. *See* NRS 450.560.[29] Thus, the determination as to whether property owned by a hospital district is exempt from taxation requires an analysis as to whether a hospital district is considered to be a political subdivision as such term is contemplated in NRS 361.060.

Unfortunately, the express language of NRS 361.060 does not specifically address the application of this exemption to hospital districts created pursuant to chapter 450 of the Nevada Revised Statutes. The express language of NRS 361.060 does, however, specifically address the exemption of irrigation, drainage or reclamation districts from the imposition of property tax.[30] Accordingly, in order to determine whether a hospital district created pursuant to NRS 450.550-.700, inclusive, is a political subdivision, it is necessary to examine other chapters of the Nevada Revised Statutes.

NRS 354.474 provides in pertinent part "'local government' means every political subdivision or other entity which has the right to levy or receive money from ad valorem or other taxes or any mandatory assessments, and includes without limitation . . . other districts organized pursuant to . . . NRS 450.550 to 450.700, inclusive. . . ."[31] For purposes of chapter 354 of the Nevada Revised Statutes, a hospital district constitutes a local government. Thus, it is necessary to determine

---

[29] A county hospital district is created by a motion of the board of county commissioners of any county. By contrast, creation of a municipal corporation is generally accomplished through the incorporation process pursuant to Nev. Const. art. 8, § 8.

[30] The express delineation of the irrigation district, drainage district and the reclamation district is easily explained in that these are three districts most likely to possess real property. These districts by their very nature are required to possess real property in furtherance of their statutory duties.

[31] NRS 288.060 defines a local government employer as any political subdivision of this state or any public or quasi-public corporation organized under the laws of this state and includes, without limitation, counties, cities, unincorporated towns, school districts, hospital districts, irrigation districts and other special districts. Accordingly, NRS 288.060 includes a hospital district within the definition of a political subdivision.

whether a local government constitutes a political subdivision as such term is delineated in NRS 361.060.

This office has previously reviewed NRS 354.474, and, based upon our review, this office stated: "The law clearly states that 'local government' means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes." Op. Nev. Att'y Gen. No. 67-403 (May 5, 1967). Thus, when reviewed together, NRS 354.474 and Op. Nev. Att'y Gen. No. 67-403 (May 5, 1967), require that in the determination process as to whether a particular entity constitutes a political subdivision, the relevant inquiry becomes whether that entity has the right to levy or receive money from ad valorem or other taxes or any mandatory assessments.

NRS 450.660 mandates that the board of county commissioners shall levy a tax equal to the amount budgeted for the hospital district. The monies collected from the tax which is levied pursuant to NRS 450.660 are required to be placed in the county treasury and credited to the current expense fund of the hospital district. Thus, the board of county commissioners is required to levy a tax on behalf of the hospital district and the hospital district has the right to receive the monies. Accordingly, pursuant to 354.474 and Op. Nev. Att'y Gen. No. 67-403 (May 5, 1967), it is reasonable to conclude that a hospital district is a political subdivision of the State of Nevada. As a political subdivision all property owned by the hospital district is exempt from taxation pursuant to NRS 361.060.

Furthermore, the Nevada Supreme Court has stated that "Nevada's legislative intent [is] to exempt its governmental entities from taxation." *Nevada Tax Commission v. Harker & Harker*, 101 Nev. 229, 232, 699 P.2d 112, 114 (1985). This acknowledgement of the presumptive legislative intent by the Nevada Supreme Court is consistent with NRS 361.060, which clearly is drafted with the intent to exempt property owned by local government entities from property taxes. To conclude that real property owned by a hospital district, which is a governmental entity, is subject to property tax imposed by chapter 361 of the Nevada Revised Statutes would subject a hospital district to the same tax which it is required to levy for its economic support. Thus, despite the legislature's failure to specifically mention hospital districts in the statute, such a construction of the language in NRS 361.060 would be unreasonable.

CONCLUSION

A hospital district created pursuant to NRS 450.550-.700, inclusive, is permitted to hold real property in its name. *See* NRS 450.690. NRS 361.060 permits an exemption from property taxes of property owned by a political subdivision. A hospital district, even though not expressly delineated in NRS 361.060 as an exempt entity, should properly be considered a political subdivision and, therefore, exempt from taxation.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Deputy Attorney General

OPINION NO. 95-24 TAXES; PROPERTY; BANKRUPTCY: The exemption in NRS 375.090(12)(d) is not limited to conveyances of real property by a corporation involved in bankruptcy proceedings. The exemption applies to transfers of real property pursuant to any reorganization plan involving a corporation whereby a mere change in identity, form, or organization is effected. Additionally, the exemption applies to all businesses which reorganize or adjust their affairs pursuant to a plan of reorganization or adjustment if the transaction is not considered a sale pursuant to the Internal Revenue Code. In the case of a corporate reorganization, the exemption applies if the transaction would not have been considered a sale pursuant to the Internal Revenue Code as it existed before it was amended in 1982.

Carson City, December 31, 1995

The Honorable Richard A. Gammick, District Attorney, Washoe County Court House, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Gammick:

You have requested an opinion from this office concerning an exemption set forth in NRS 375.090 from the tax on the transfer of real property imposed by NRS 375.020 and 375.025. According to your letter of August 10, 1995, a local attorney has raised an objection to the manner in which the exemption has historically been construed. You feel his objection has merit. Your office, the Washoe County Recorder, the Clark County District Attorney, and the Clark County Recorder have for some time construed the exemption as applying only to a conveyance of real property by a corporation involved in bankruptcy proceedings. Therefore, you have asked for an opinion on the following questions.

QUESTION ONE

Does the exemption from the real property transfer tax set forth in NRS 375.090(12)(d) apply only to a conveyance of real property by a corporation involved in bankruptcy proceedings?

ANALYSIS

NRS 375.090(12) sets forth an exemption from the tax on the transfer of real property imposed by NRS 375.020 and 375.025. The exemption applies to:

> The making, delivery or filing of conveyances of real property to make effective any plan of *reorganization or adjustment*:
> (a) Confirmed under the Bankruptcy Act, as amended, Title 11 of U.S.C.;
> (b) Approved in an equity receivership proceeding involving a railroad as defined in the Bankruptcy Act;
> (c) Approved in an equity receivership proceeding involving a corporation, as defined in the Bankruptcy Act; or
> (d) Whereby a mere change in *identity, form or place of organization* is effected, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation, if the making, delivery or filing of instruments of transfer or conveyance occurs within 5 years after the date of the confirmation, approval or change. [Emphasis added.]

In order to properly address this question it is necessary to review the legislative history of NRS 375.090. The real property transfer tax and the exemption in question were enacted in 1967 by passage of S.B. 456, 54th Leg., 1867 Nev. Sess. The bill became effective on January 1, 1968. *See* Act of April 27, 1967, ch. 548, §§ 1-13, 1967 Nev. Stat. 1759. The provisions of the first sentence and paragraphs (a), (b), and (c) of the bill as enacted have not changed in a significant manner. The changes to NRS 375.090(12)(d) will be discussed below. The specific question which you have asked is whether the exemption set forth in NRS 375.090(12)(d) is limited to a conveyance of real property involved in a bankruptcy. This provision is ambiguous. The language in paragraph (d) could be construed to apply not only in the case of a transfer connected to a bankruptcy proceedings but also in the case of a transfer not involving a bankruptcy proceeding. Therefore, it is proper to construe paragraph (d). *See Roberts v. State, Univ. of Nevada System*, 104 Nev. 33, 37, 752 P.2d 221 (1988).

The construction previously given to this statute by your office, the Washoe County Recorder, the Clark County District Attorney and the Clark County Recorder appears reasonable, but is not persuasive. This construction seems reasonable because paragraphs (a), (b), and (c) of the exemption are specifically limited to conveyances taking place pursuant to the *Federal Bankruptcy Act*. One could conclude that the legislature intended paragraph (d) to also be limited to conveyances taking place pursuant to the *Bankruptcy Act*. Furthermore, this interpretation seems reasonable in light of the first sentence in NRS 375.090(12). This sentence restricts the exemption to a conveyance to "make effective any *plan of reorganization or adjustment*." [Emphasis added.] This restriction applies to paragraphs (a)—(d), inclusive. The terms *plan of reorganization* and

adjustment are frequently used in the law of bankruptcy.[32] The concept embraced by the law of bankruptcy is that the debtor should be given the opportunity to avoid liquidation by reorganizing or adjusting his affairs.[33] The debtor begins this process by filing a plan with the bankruptcy court. Filing a *plan of reorganization* is central to the concept of the rehabilitation of certain debtors pursuant to chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1101-74 (1978). Filing a plan for the *adjustment* of the debtor's debts is allowed in the cases of a municipality, certain family farmers and certain individuals pursuant to chapters 9, 12, and 13 of the Bankruptcy Code.[34] The courts also refer to an *adjustment of debt* in bankruptcy cases. *See generally Meyer v. Commissioner of Internal Revenue*, 383 F.2d 883-84, 888 (8th Cir. 1967), *U.S. v. Bekins*, 304 U.S. 811, 814-15 (1938).

Even though the term *plan of reorganization and adjustment* is frequently referred to in the law of bankruptcy, the term is not exclusively used in bankruptcy. Businesses frequently reorganize and adjust their affairs for business reasons. The term is frequently used in the law of taxation. The 1964 Internal Revenue Code § 367(c) is entitled "Corporate distributions and adjustments," while the Internal Revenue Code § 393(b) is entitled "Special rules for *plans of reorganization*."[35] (Emphasis added.) Therefore, it cannot be argued that the term *plan of reorganization* applies exclusively in the bankruptcy context.

In construing a statute "words should be given their plain meaning unless this violates the spirit of the act." *In re Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535 (1949). NRS 375.090(12) states as follows:

---

[32] To ascertain the intent of the Nevada Legislature in enacting NRS 375.090 in 1967, it was necessary to review the provisions of 11 U.S.C. as it existed in 1964. The term *plan of reorganization* was most frequently used in chapters 8 and 10 of 11 U.S.C. Chapter 8 involves a *plan of reorganization* of railroads engaged in interstate commerce. Chapter 10 involves a *plan of reorganization* of corporations in general.

[33] The original *Bankruptcy Act of 1898* was not designed to assist the debtor since only the creditor could invoke the bankruptcy of the debtor. The purpose was to assist the creditor in liquidating the debtor's property. After the period of "The Great Depression," the *Bankruptcy Act* was amended to provide some relief to the debtor. The subsequent bankruptcy codes emphasize rehabilitating the debtor through plans of reorganization and adjustments. *See generally*, 6 Am. Jur. (Rev.Ed.), Bankruptcy §§ 1269-70 (1950).

[34] Title 11 of the United States Code as it existed in 1964 provided for the *readjustment of railroads*. The term *adjustment of the indebtedness of a debtor in a proceeding under this chapter* and is used in sections, 795 (chapter 11), section 920 (chapter 12), and section 1079 (chapter 13). This indicates that *adjustment* is a term of art used in bankruptcies by which the debtor is given the opportunity to rehabilitate his financial affairs.

[35] The 1964 Internal Revenue Code is used in this example to illustrate that the terms were commonly used in situations other than bankruptcy near the date on which NRS 375.090 was enacted in 1967.

> The making, delivery or filing of conveyances of real property to make effective *any* plan of reorganization or adjustment:
>
> . . . .
>
> (d) Whereby a mere change in identity, form or place or organization is effected, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation. . . . [Emphasis added.]

It is clear that the plain meaning of this provision is not limited to bankruptcy law.

Another indication of legislative intent can be found by comparing paragraphs (a), (b), and (c) with paragraph (d) of NRS 375.090(12). The legislature specifically referred to the *Federal Bankruptcy Act* in NRS 375.090(12)(a), (b), and (c). NRS 375.090(12)(d) does not refer to the *Bankruptcy Act*. The Nevada Supreme Court, citing numerous prior decisions, has stated that "[t]he maxim 'EXPRESSIO UNIS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 505 P.2d 237 (1967). By including the reference to the *Bankruptcy Act* in NRS 375.090(12)(a), (b), and (c), and excluding a reference to the *Bankruptcy Act* in NRS 375.090(12)(d), it is presumed no reference was intended.

Furthermore, the legislature has had ample opportunity to limit paragraph (d) to a conveyance of real property involved in bankruptcy proceedings. *See State, Dep't of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, 526, 762 P.2d. 882 (1988). NRS 375.090 has been amended five times since it was enacted. NRS 375.090(12)(d) was amended by A.B. 97, 63rd Leg., 1985 Nev. Sess., adding after the term *is effected* the phrase *such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation*. *See* Act of May 25, 1985, ch. 283 §2, 1985 Nev. Stat. 860. The title of A.B. 97 does not mention the word *bankruptcy*. "The title of an act or statute may be considered in construing a statute." *See Roberts* at 37. The title states "clarifying an exemption from the real property transfer tax regarding corporate transfers." *See* Act of May 25, 1985, ch. 283 §2, 1985 Nev. Stat. 860. The word *bankruptcy* is not mentioned in the title nor was it mentioned in any testimony before the taxation committees. *See* Minutes of May 7, 1985, hearing on A.B. 97 before the Assembly Taxation Committee at 644-45 and Minutes of May 16, 1985, hearing on A.B. 97 before the Senate Taxation Committee at 393.

As you mentioned in your letter of August 10, 1995, the words in NRS 375.090(12)(d) seem to have come from section 368 of the Internal Revenue Code. When NRS 375.090(12)(d) was enacted, it nearly mirrored I.R.C. § 368(a)(1)(F).[36] This supports the proposition that the Internal Revenue Code and not the Bankruptcy Code was the inspiration for paragraph (d).

---

[36] A corporate reorganization is defined by the I.R.C. § 368(a)(1)(F)(1964) as "a mere change in identity, form, or place of organization, *however* effected." [Emphasis added.] In 1967 NRS 375.090(12)(d) stated: "[w]hereby a mere change in identity, form or place of organization, *is* effected." [Emphasis added.]

CONCLUSION TO QUESTION ONE

The exemption set forth in NRS 375.090(12)(d) is not limited to conveyances of real property by a corporation involved in bankruptcy proceedings. The exemption should be applied to transfers of real property pursuant to any reorganization plan involving a corporation whereby a mere change in identity, form, or organization is effected.

QUESTION TWO

Is the exemption set forth in NRS 375.090(12)(d) available to entities which are not corporations such as a conveyance from a partnership to a limited liability company?

ANALYSIS

The only reference to a corporation in NRS 375.090(12)(d) is an example. The phrase *such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation* is not a limitation. NRS 375.090(12)(d). *See also Donovan v. Anheuser-Bush, Inc*., 666 F.2d 315 (6th Cir. 1981). The example clarifies that paragraph (d) applies to corporations but does not limit it to corporations. The legislature could have easily limited paragraph (d) to corporations by so stating as it did in NRS 375.090(12)(c). *See* Act of May 25, 1985, ch. 283 §2, 1985 Nev. Stat. 860. NRS 375.090(12)(c) states, "[a]pproved in a equity receivership proceeding involving a *corporation*." [Emphasis added.] The legislature could have easily inserted in NRS 375.090(12)(d) after the term *place of organization* the term *of a corporation* if it intended to limit paragraph (d) to corporations. Therefore, we must examine the legislative history to determine the intent of the legislature in amending NRS 375.090(12)(d).

As was discussed above, NRS 375.090(12)(d) was amended by A.B. 97. Legislative history of the bill is of little assistance in construing this paragraph. The title of the bill states *clarifying an exemption from the real property transfer tax regarding corporate transfers* *See* Act of May 25, 1985, ch. 283 §2, 1985 Nev. Stat. 860. The title is ambiguous and thus it is proper to construe the exemption. *See Roberts* at 37. Since the legislative history is of little assistance, it must be concluded that the plain language of NRS 375.090(12)(d) indicates that the legislature did not intend to limit the provisions to corporations. *See generally In re: Application of Filipini*, 66 Nev. 17, 24, 202 P.2d 535 (1949). It should also be noted there appears to be no rational basis for excluding other businesses from the exemption.[37] Other businesses reorganize pursuant to a plan

[37] NRS 375.090(12)(d) is an exemption from tax and the Nevada Supreme Court has stated that presumptions are against an intent by the state to provide an exemption and the one claiming exemption must demonstrate clearly an intent to exempt. *See Sierra Pacific Power Co. v. Dep't. of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147 (1980). However, in this case the plain language of NRS 375.090 must prevail. Limiting

of reorganization or adjustment and should be treated in the same manner as corporations are treated.

NRS 375.090(12)(d) is not limited by the type of business involved, it is limited by the type of transaction involved. The first sentence restricts the exemption to a conveyance to *make effective any plan of reorganization or adjustment*. The inquiry that must be made is whether the business reorganized pursuant to a plan of reorganization or adjustment or whether a sale occurred. If a sale has occurred, the business is not entitled to the exemption set forth in NRS 375.090(12)(d). To determine whether a reorganization, adjustment, or a sale has taken place, we look to the Internal Revenue Code and the Internal Revenue Regulations and the cases interpreting them for guidance.

As you mentioned in your letter of August 10, 1995, the first phrase of NRS 375.090(12)(d), "[w]hereby a mere change in identity, form or place of organization is effected" nearly mirrors I.R.C. § 368(a)(1)(F)(1964).[38] Section 368 sets forth the definition of *tax-free corporate reorganization* and the definition set forth in I.R.C. § 368(a)(1)(F)(1964) is a "mere change in identity, form, place or organization, however effected." As your letter pointed out, the courts have, over the years, established the criteria for determining whether a mere change in *identity, form or place of organization has occurred* or whether a sale has occurred. *See* Boris I. Bittker and James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* § 12.21[2] (6th ed. 1994). This criteria is also set forth in the Internal Revenue Regulations. The regulations set forth the general requirements for any corporate reorganization. These general requirements are: (1) Continuity of interest therein on the part of those persons who were the owners of the enterprise prior to the reorganization; (2) Continuity of business enterprise; (3) Legitimate business purpose; and (4) Plan of Reorganization. *See* Treas. Reg. § 1.368-1(a-c) (as amended in 1980).

1. Continuity of interest.

The purpose of the first requirement is to "deny tax free status to the transaction which is in fact a 'sale' although it complies with the literal definition of a reorganization." *Estate of Stauffer v. C.I.R.*, 403 F.2d 611, 616-17 (9th Cir. 1968). It is unclear how much interest the original owners must retain in a reorganized corporation in order to meet this requirement, but it is clear that the interest must be an equity interest. *See Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384 (1935); *LeTulle v. Scofield*, 308 U.S. 415, 420-21 (1940). In addressing the issue, the court stated:

> While no precise formula has been expressed for determining whether there has been retention of the requisite interest, it seems clear that the requirement of continuity of

---

the exemption to corporations is not appropriate.

[38] In 1982 Congress added a single-corporation requirement.

> interest consistent with the statutory intent is not fulfilled in the absence of a showing: (1) that the transferor corporation or its shareholders retained a substantial proprietary stake in the enterprise represented by a material interest in the affairs of the transferee corporation, and (2) that such retained interest represents a substantial part of the value of the property transferred.

Southwest Natural Gas Co. v. C.I.R., 189 F.2d 332, 334 (5th Cir. 1951), *cert. denied*, 342 U.S. 860 (May 30, 1951).

The courts have consistently ruled that less than 100 percent continuity of equity ownership after the reorganization was acceptable. *See US v. Adkins-Phelps, Inc.*, 400 F.2d 737 (8th Cir. 1968).[39] Therefore, the courts would probably interpret the term a "mere change in identity, form or place of organization" in NRS 375.090(12)(d) to require less than 100 percent continuity of interest.[40]

2. Continuity of business enterprise.

The basic requirement for continuity of business enterprise is set forth in the Internal Revenue Regulations. The regulation states the "acquiring corporation (P) either (i) continue the acquired corporation's (T's) historic business or (ii) use a significant portion of T's historic business assets in a business." Treas. Reg. 1.368-1(d)(2) (as amended in 1980). The regulations also state that the policy underlying this rule is "to ensure that reorganizations are limited to readjustments of continuing interests in property under modified corporate form." *Id*. However, it could be argued that, in the case of a § 368 (a)(1)(F) reorganization, this requirement may be more stringent.

The Internal Revenue Service and the Tax Court originally took the position that the term *mere change in identity, form or place of organization* refers to a sole corporation. The courts overturned this view. *Estate of Stauffer v. C.I.R.*, 403 F.2d 611, 616 (9th Cir. 1968). The Internal Revenue Service then took the position that two or more corporations may qualify as a § 368

---

[39] It also appears that it is acceptable in a § 368(a)(1)(F) reorganization to have as your motive for reorganization the freeze out of the minority shareholders by redemption of their shares. In *Aetna Cas. & Sur. Co. v. United States*, 568 F.2d 811, 822 (2nd Cir. 1976), the second circuit determined that a freeze out of the minority shareholders for business reasons did not strip what would have otherwise been a qualified § 368(a)(1)(F) reorganization of its tax-free status. Therefore, it would appear that the courts would interpret the term *mere change* in *identity, form or place of organization* in NRS 375.090(12)(d) to mean a reorganization involving less then 100 percent retained equity ownership.

[40] NRS 375.090 was amended by passage of S. B. 475, 63rd Leg., 1985 Nev. Sess. This bill added in subsection (10) an exemption for corporations or other business organizations "if the person conveying the property owns 100 percent of the corporation or organization to which the conveyance is made." The courts will probably interpret NRS 375.090(12)(d) as requiring less than 100 percent ownership interest. *See* Act of June 12, 1985, ch. 635 §10, 1985 Nev. Stat. 2046.

(a)(1)(F) reorganization, but they had to have complete identity of shareholders.[41] In 1982 the controversy was resolved when Congress required that § 368 (a)(1)(F) reorganizations involve a sole corporation. 26 U.S.C.S. § 368, Pub. L. No. 97-248 § 225(a)(1982) (codified at I.R.C. § 368).

Regardless of this change to 26 U.S.C. § 368, we believe the courts would likely interpret the term *a mere change in identity, form or place of organization* to not be limited to adjustment of the structure of a single corporation as they did when the commissioner advocated the sole corporation theory. Furthermore, NRS 375.090(12)(d) specifically provides the exemption for related corporations such as "a corporation and its parent corporation, a subsidiary or an affiliated corporation." Therefore, even though the federal law is now more stringent, the provisions of the Nevada Revised Statutes would prevail, and the exemption would apply to a reorganization involving more than one business.

3. Legitimate business purpose.

The reorganization must take place for a bona fide reason and must be an "ordinary and necessary incident of the conduct of the enterprise and must provide for a continuation of the enterprise." Treas. Regs. 1.368-1(c) (as amended in 1980).

4. Plan of reorganization.

Transfer of property must be pursuant to a plan or reorganization. Treas. Reg. 1.368-2(g) (as amended in 1980) of the Internal Revenue Regulations defines "plan of reorganization" as follows:

> The term "plan of reorganization" has reference to a consummated transaction specifically defined as a reorganization under section 368(a). The term is not to be construed as broadening the definition of "reorganization" as set forth in section 368(a), but it is to be taken as limiting the nonrecognition of gain or loss to such exchanges or distributions as are directly a part of the transaction specifically described as a reorganization in section 368(a).

---

[41] Rev. Rule 79-71, 1979-1 C.B. 151, states:

> Rev. Rul. 75-561 provides that the combination of two or more corporations may qualify as a reorganization within the meaning of section 368(a)(1)(F) of the Code if (1) there is *complete* identity of shareholders and their proprietary interests in the transferor corporations and acquiring corporations; (2) the transferor corporations and the acquiring corporation are engaged in the *same* business activities or integrated activities before the combination; and (3) the business enterprise of the transferor and the acquiring corporations continue unchanged after the combination. [Emphasis added.]

In conclusion, the exemption set forth in NRS 375.090(12)(d) applies to any business entity that, pursuant to a plan or reorganization or adjustment, reorganizes or adjusts its affairs rather than participates in the sale of its assets and affairs.

You have specifically asked if the exemption applies to a transfer from a limited partnership to a limited liability company. Having concluded that the exemption applies to business entities which are not corporations, one must again look to the Internal Revenue Code to determine whether a transfer from a limited partnership to a limited liability company is a reorganization or adjustment or a sale. NRS ch. 86 sets forth the provisions for limited liability companies. The Internal Revenue Service has ruled that a limited liability company organized pursuant to NRS ch. 86 is classified as a partnership for federal taxation purposes. Rev. Rule. 93-30 1993-1 C.B. 231. Because a limited liability company in Nevada is treated as a partnership, the rules for mergers of partnerships should apply to a limited partnership merging into a limited liability company. The Internal Revenue Code § 721 provides that certain mergers of partnerships are not sales. Therefore, if a limited partnership is merged into a limited liability company in a transaction which is not a sale pursuant to the Internal Revenue Code, it is an exempt reorganization or adjustment pursuant to NRS 375.090(12)(d) and is not a sale.

CONCLUSION TO QUESTION TWO

The exemption set forth in NRS 375.090(12)(d) applies to all businesses which reorganize or adjust their affairs pursuant to a plan of reorganization or adjustment if the transaction is not considered a sale pursuant to the Internal Revenue Code. In the case of a corporate reorganization, the exemption applies if the transaction would not have been considered a sale pursuant to the Internal Revenue Code as it existed before it was amended in 1982.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KERRY L. SCHOMER
Deputy Attorney General
