

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1996

OPINION NO. 96-01 CORPORATIONS; PROSTITUTION; SECURITIES: Securities registration materials do not constitute advertising a brothel in Nevada counties where such activities are illegal.

Carson City, February 7, 1996

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

Dear Mr. Heller:

You have posed a question regarding an application for security registration filed by Sporting Houses Management Corporation (hereinafter Sporting Houses). Before acting on the application you seek guidance on the following matter.

QUESTION

Would the Sporting Houses prospectus, and other sales literature, filed with the company's initial registration, constitute unlawful advertising of a house of prostitution under [NRS 201.430](#) or [NRS 201.440](#) if such materials were distributed to investors in Nevada counties where all forms of prostitution are prohibited?

ANALYSIS

Unless exempt, a person must register a security transaction with the Securities Division of the Secretary of State's office. Security registration must occur prior to any sale or offer to sell such securities in our state. See [NRS 90.460](#).

Sporting Houses, a Nevada corporation, filed a common stock registration on January 10, 1996. Sporting Houses registered its stock offering by qualification as allowed under [NRS 90.490](#). Sporting Houses also filed an exempt offering notice with the Federal Securities and Exchange Commission pursuant to rule 504 of Regulation D promulgated under the Securities Exchange Act of 1933.

Both [NRS 90.490](#) and the Regulation D filing allow general solicitation of investors in the offered securities throughout all Nevada counties.

In the materials filed with the Secretary of State, Sporting Houses disclosed that it intends to develop and operate a resort hotel located generally in Nye County, Nevada. Sporting Houses further disclosed an intent to purchase an existing legal brothel and 300 acres of land adjacent thereto. Sporting Houses declares in its prospectus an intent to expand the existing business into an adult fantasy resort.

The existing brothel is currently licensed and regulated under Nye County ordinances. See Nye County Code, Chapter 9.20. Sporting Houses has disclosed its intent to apply for new county licensing for brothel operation once it has purchased the business.

Within the registration documents, Sporting Houses filed a prospectus detailing the company, its financial status, and its proposed business plan for the venture in Nye County. Sporting Houses also provided sales literature regarding the proposed resort hotel, as well as a document intended to solicit offerings of securities commonly known as a "tombstone."

The above-described materials are subject to review by staff of the Securities Division to assure compliance with state law. If the Secretary of State finds that the entity attempting to register securities for sale is engaged in illegal activity *where performed*, he may in the public interest deny filing the securities registration. When the Sporting Houses materials were so reviewed, a concern arose regarding legality of the materials to be distributed to potential investors.

The Secretary of State now requests our guidance on whether provisions of [NRS 201.430](#) or 201.440 would be violated if Sporting Houses was allowed to solicit investors in its proposed business venture using the filed prospectus and other materials. Based upon this legitimate concern, the Secretary of State seeks this opinion.

Under [NRS 90.510\(1\)\(d\)](#), the Administrator of the Securities Division may deny a registration of securities if the administrator finds that the order is in the public interest and that "[t]he issuer's enterprise or method of business includes or would include *activities that are illegal where performed*." [Emphasis added.]

We first examined Sporting Houses' proposal to determine if the enterprise would be illegal where performed.

Under Nevada's laws, brothel prostitution is prohibited entirely in certain counties. In other counties brothel prostitution is allowed through local regulation and licensing. See [NRS 244.345](#). In the counties where prostitution is statutorily permitted, our Supreme Court has concluded that regulation of brothels, whether they are licensed or banned entirely, is a matter of local concern. *Kuban v. McGimsey*, [96 Nev. 105](#), 605 P.2d 623 (1980). Brothels have been described as a business activity which is not a nuisance per se. Thus, a county does not have to abate brothel activity as a nuisance if the county chooses to regulate such a business. See *Nye County v. Plankinton*, [94 Nev. 739](#), 587 P.2d 421 (1978).

Reviewing the materials submitted by Sporting Houses, it appears that this company's proposed resort hotel, including prostitution activities, will not be illegal if Nye County regulates and licenses the operation. The enterprise would not be illegal where performed and therefore could involve sale of securities. This would be possible even though some of the potential investors might reside in other Nevada counties, or other states, where prostitution is totally prohibited by law.

A similar enterprise is found within Nevada's casino gaming industry. While casino gaming is lawful throughout Nevada, it is prohibited in several other states. See [NRS ch. 463](#); *State Gaming Control Bd. v. Breen*, [99 Nev. 320](#), 661 P.2d 1309 (1983). Casino gaming stocks are routinely traded by way of public offerings throughout the United States. This trading occurs even though many of the investors live in areas of our country where such casino gaming is totally banned by law. Nevertheless, the activity is lawful where performed and offering such securities does not, in and of itself, amount to fraud upon the potential investors. See e.g. *In re Donald J. Trump Casino Securities Lit.*, 7 F.3d 357 (3rd Cir. 1993); *Doumani v. Casino Control Comm'n of New Jersey*, 614 F. Supp. 1465 (D.C. N.J. 1985).

Reviewing the facts of the present case, it appears that the enterprise contemplated by Sporting Houses does not violate [NRS 90.510\(1\)\(d\)](#). Once regulated and licensed by Nye County, the enterprise could include prostitution activities which are legal within that county.

The final issue to be determined is whether Sporting Houses' method of business is illegal where performed. Specifically, Nevada has criminal statutes limiting commercial advertising of prostitution solely to the areas of the state where prostitution may be permitted. For example, an advertisement posted within Nye County for an existing licensed brothel would not violate the statutes. In counties where prostitution is prohibited by state statute or local ordinance, commercial advertising of prostitution is prohibited. See [NRS 201.430](#); [NRS 201.440](#). As a further example, an advertisement in a Clark County newspaper providing the telephone number of and directions to a Nye County licensed brothel is illegal.

The question is whether the prospectus and sales literature amounts to an illegal advertisement for the brothel which now operates in Nye County. Based upon our review of the statutes and the Sporting Houses materials, we conclude that release of the materials to investors in all Nevada counties would not constitute advertising of the Nye County brothel.

[NRS 201.430](#) makes it unlawful in counties where prostitution is prohibited for any owner, operator, agent, or employee of a house of prostitution to advertise such a house of prostitution. Subsection (2) of that statute provides guidance on the specific content contained in a document which would amount to the actual advertising of the brothel as follows:

Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

[NRS 201.430\(2\)](#).

[NRS 201.440](#) makes it unlawful in counties where prostitution is prohibited for any person, company, association, or corporation to knowingly allow the above-described persons to advertise a house of prostitution in their place of business.

Sporting Houses is not an owner, operator, agent, or employee of the existing brothel for purposes of [NRS 201.430](#) analysis. Since Sporting Houses has not as yet purchased the existing brothel, it appears that the only criminal statute which needs to be examined for possible application is [NRS 201.440](#). In reviewing Sporting Houses' registration materials, we believe there is no evidence demonstrating an intent by Sporting Houses to knowingly allow the existing brothel to advertise its current business.

In our review of Sporting Houses' sales brochure, we found no mention of the existing brothel. The existing brothel is not named, there is no telephone number for the brothel, there are no directions on how to get to the brothel, and there is no map or other means of identifying the location of the existing brothel contained within the sales brochure. A person reading this document would have no knowledge that Sporting Houses intends to purchase an existing brothel.

The "tombstone" which Sporting Houses intends to use to solicit investors informs the potential investor that the corporation specializes in the development and management of brothels in Nevada. That is the only mention of prostitution in the document. There is no description of an existing brothel, its location, its telephone number or any directions thereto. A person reading this document would have no knowledge that Sporting Houses intends to purchase an existing brothel.

Sporting Houses' prospectus is a 35-page document. The document is intended to provide all material facts to a potential investor about Sporting Houses' corporation and its business

plan to develop an adult fantasy resort in Nye County, Nevada. Under Nevada law, Sporting Houses must make a full disclosure to potential investors of the subject matter of its securities offering. If Sporting Houses made any untrue statements of material fact or omitted any statements of material fact in its offering materials, then Sporting Houses would violate [NRS 90.570](#). Material information which should be required in filing materials is that information which a reasonable investor might have considered important in making an investment decision. See *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, 389 F. Supp. 689 (1974).

On page 17 of the prospectus, Sporting Houses discloses that it intends to develop a fantasy resort on approximately 300 acres of property located in Nye County, Nevada near Las Vegas. On page 19 of the prospectus, the resort site is discussed. The name of the existing brothel is mentioned on this page and investors are told that Sporting Houses intends to acquire this brothel and surrounding acreage. The potential investor is told that this existing brothel is approximately 60 miles from Las Vegas. It appears that these facts are material to those who might invest in the venture.

The prospectus does not provide the address of the existing brothel. The prospectus does not provide the telephone number of the existing brothel. The prospectus does not provide directions to the existing brothel. The prospectus does not provide a map or other means of identifying the exact location of the existing brothel.

[NRS 201.440](#) is a statute which involves criminal penalties for multiple offenses. Such a criminal statute must be strictly construed so that any vague portions of the statute are not arbitrarily imposed upon persons. See *Republic Entertainment v. Clark County*, [99 Nev. 811](#), 672 P.2d 634 (1983).

In reviewing the sales literature, "tombstone" and prospectus filed by Sporting Houses, we find no intent to provide any information to investors other than the types of material information they need to make an informed decision on the risks inherent in this type of a business venture. We find no intent to knowingly advertise the existing brothel in counties where prostitution is totally banned.

#### CONCLUSION

Sporting Houses' registration materials, when distributed to investors throughout the state, would not involve an enterprise or method of business that is illegal where performed. The materials do not advertise an existing brothel in counties where prostitution is totally banned. Sale of securities in the enterprise proposed by Sporting Houses would be similar to sale of casino gaming stocks in areas of the country where such gaming is prohibited.

Based upon our analysis, we find no legal basis for your office to deny Sporting Houses' application.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-02 GENERAL IMPROVEMENT DISTRICT: A county commission is the proper entity to determine if the primary purpose of formation of a district is to finance costs of developing private property.

February 7, 1996

The Honorable Belinda Quilici, Pershing County District Attorney, Post Office Box 299, Lovelock, Nevada 89419

Dear Ms. Quilici:

You have provided our office with an analysis of certain statutes set forth in the special district control law ([NRS ch. 308](#)) and the general improvement district law ([NRS ch. 318](#)). These statutes, [NRS 308.060\(1\)\(g\)](#) and [NRS 318.015\(2\)](#), are intended to discourage formation of a general improvement district for the primary purpose of financing costs of developing private property.

You have also set forth specific facts regarding a proposed general improvement district intended to improve electrical power transmission and distribution into a subdivided area of your county. While we agree with the legal analysis you have provided on the legislative intent of the statutes in question, we believe the proper body to apply the facts to these particular statutes is the county commission.

#### QUESTION

Do the private developer prohibitions set forth within [NRS 308.060\(1\)\(g\)](#) and [NRS 318.015\(2\)](#) apply to a proposed general improvement district intended to enhance electrical power transmission and distribution services within the district? The area to be serviced is already subdivided and is partially developed.

#### ANALYSIS

You have conducted a detailed analysis of the statutory intent behind the prohibitions described in [NRS 308.060\(1\)\(g\)](#) and [NRS 318.015\(2\)](#). We concur with your interpretation of the legislature's intent regarding these statutes.

In a 1976 legislative commission study on creating, financing, and governing general improvement districts, the commission suggested inclusion of statutes designed to prohibit developers from using general improvement districts as a private development tool. The suggested language was intended to address the following problem:

Throughout the subcommittee's study, the question of the use of general improvement district law by developers was discussed. The subcommittee agreed that chapter 318 of NRS should not be used as a device to finance the front-end costs for developers. There was discussion about minimum criteria of population or assessed valuation before a district could be created. This would prevent developers from using chapter 318. Such criteria might also prevent a group of people for whom the chapter is a legitimate option from using it. The subcommittee concluded that a more general response to this problem was appropriate.

Therefore, the subcommittee recommends that:

*The legislative declaration section of chapter 318 of NRS be amended to provide additional guidance to county commissioners by declaring that the chapter is not intended as a device*

*for financing the commercial costs of developers and that chapter 308 of NRS be amended so that the criteria for disapproval of a service plan shall include evidence that the proposed district is primarily to pay the commercial costs of a developer.*

See Bulletin No. 77-11, Legislative Commission of the Legislative Counsel Bureau of the State of Nevada, (September 1976), at p. 31 (emphasis in original).

Based in part on the subcommittee recommendations referenced above, the legislature enacted A.B. 163 in 1977. A.B. 163 added the statutory language now contained in [NRS 308.060\(1\)\(g\)](#) and [NRS 318.015\(2\)](#). As you noted in your analysis, during the legislative process the phrase "commercial costs of developers" was changed to "costs of developing private property." The section guide to the general improvement district bill provided some meaning of this reworded language as follows:

This is statutory revision to reflect the service plan requirement for a board of county commissioners, but it also adds a paragraph to establish an additional basis for disapproval of a proposed district, that being evidence that the district would be used to pay the costs of developing private property. By this the subcommittee meant streets, curbs, gutters, sidewalks, street lights, storm drainage and similar improvements. It could also mean the costs of installing water and sewer lines, especially if the development is being advertised in such a way that one would think the purchase price included the costs of these utilities.

Turning to the facts of the present case, you have reviewed the various aspects of the proposed electrical power district and have concluded that the district does not have a primary purpose of furthering development of private property for the developer of the subdivision in question. Based upon the statutory language, we believe that the county commission is the proper body to make this factual determination. Therefore, we offer no conclusion on this fact specific question.

The proposed general improvement district would provide extended and improved electrical power facilities into a residential subdivision. Provision of adequate power facilities to a subdivision is a matter of development concern that a governing body may review before approving subdivision maps. See [NRS 278.349\(3\)\(c\)](#). Therefore, provision of adequate power facilities to a development could indeed be one of the costs of developing private property contemplated under the prohibitions set forth in the special district control law and the general improvement district law.

[NRS 308.060](#) provides the county commission with the *discretion* to disapprove a special district service plan under certain circumstances. Under subsection 1(g) of the statute, "[e]ach such board of county commissioners may disapprove the service plan of a proposed special district upon satisfactory evidence that . . . (g) [t]he proposed district is being formed for the primary purpose of financing the cost of developing private property." This language contemplates that the county commission will receive the facts regarding the proposed district and will make a determination as to the primary purpose of the formation of the district.

### CONCLUSION

[NRS 308.060\(1\)\(g\)](#) and [NRS 318.015\(2\)](#) are intended to discourage formation of a general improvement district for the primary purpose of financing the cost of developing private property. The proper entity to take evidence on the primary purpose of formation of a general improvement district, and to determine if the prohibitions of the statutes apply is the county commission.

Sincerely,

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-03 GUARDIANSHIP; SOCIAL WORKERS: The social worker/client relationship is maintained through trust and with a basic understanding that boundaries limit the relationship in order for goals to be reached. The overall purpose of social work is to restore interaction between individuals and society and assist clients in being more productive. Assumption of roles of power of attorney, guardian, or representative payee negates a client's decision-making. It would thus be inappropriate for a social worker to assume any of these positions for a client.

Carson City, March 6, 1996

Ms. Lisa Adams, Executive Secretary, Board of Examiners for Social Workers, 4600 Kietzke Lane, A101, Reno, Nevada 89502

Dear Ms. Adams:

You have requested an Attorney General's opinion on the following issue:

QUESTION

Under what circumstances is it appropriate for a social worker to assume any type of power of attorney, guardianship, or representative payee for a client?

ANALYSIS

You have requested this issue be addressed with reference to all levels of social work licensure. Regardless of the level of licensure, a dual relationship would develop as a result of *any* social worker assuming the role of attorney-in-fact, guardian, or representative payee for a client. The analysis is the same for each type of social worker.

As a point of initial clarification, it must be noted that the Nevada Revised Statutes (NRS) do not specifically prohibit any qualified person from assuming power of attorney responsibilities or the role of guardian or representative payee. Additionally, there is nothing that forbids a social worker from accepting any of these roles for a person who is not a client of the social worker. The issue is problematic only when a social worker assumes any of these roles for a client. In explaining the dilemma created when a social worker becomes responsible in any of these roles for a client, it is paramount that the terms are defined and the law clarified in order to support this evaluation.

I. DEFINITIONS

A conventional "power of attorney" is designed primarily to give another person the temporary right to completely or partially manage one's financial affairs. Dennis Clifford, *The Power of Attorney Book 2* (Nolo Press 1990). The "principal" is the person who creates the power of attorney document. Dennis Clifford, *The Power of Attorney Book 2* (Nolo Press 1990). An "attorney-in-fact" is the person who is authorized to act for the principal. Dennis Clifford, *The*

*Power of Attorney Book 2* (Nolo Press 1990). A "durable power of attorney" gives someone authority to make necessary financial or medical decisions if the principal becomes incapacitated. Dennis Clifford, *The Power of Attorney Book 3* (Nolo Press 1990). A "guardian" is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. *Black's Law Dictionary* 361 (5th ed. 1983). A "guardianship" is the office, duty, or authority of a guardian. *Black's Law Dictionary* 362 (5th ed. 1983) A "representative payee" is a qualified individual who provides financial management for beneficiaries who are unable to receive and manage their own funds. *Representative Payee Program*, pamphlet from Jared E. Shafer, Clark County Public Administrator and Public Guardian (1994).

## II. POWER OF ATTORNEY

### A. Background

When the National Conference of Commissioners on Uniform State Laws began to draft the Uniform Probate Code in the late 1960s, it was recognized that guardianships or conservatorships had become increasingly cumbersome and expensive. A suggested solution was the power of attorney which permits a contractual relationship whereby one person can act on behalf of another without court intervention. Francis J. Collin, Jr., et al., *Drafting The Durable Power of Attorney* 5 (1984).

The original drafters intended the power of attorney to apply to matters relating to care and custody of persons, as well as management of property. By 1977, 33 states had passed legislation to permit a power of attorney to survive the incompetency of the principal. As of November 1983, 50 states had passed such legislation. Francis J. Collin, Jr., et al., *Drafting The Durable Power of Attorney* 5 (1984).

The Nevada State Legislature approved a durable power of attorney statute on February 21, 1983. The NRS which sets forth the law in the area of power of attorney, is [NRS 111.460](#)<sup>1</sup> and [111.470](#)<sup>2</sup>.

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<sup>1</sup> NRS 111.460 states:

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney is not affected by disability of the principal," or "This power of attorney becomes effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred may be exercised notwithstanding his disability, the authority of the attorney in fact or agent may be exercised by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his guardian or heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a guardian thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment shall account to the guardian rather than the principal. The guardian has the same power the principal would have had if he were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency.

<sup>2</sup> NRS 111.470 states:

1. The death, disability or incompetence of any principal who has executed a power of attorney in writing other than a power as described by NRS 111.460 does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees and personal representatives.

2. An affidavit, executed by the attorney in fact or agent, stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence is, in the absence of a showing of fraud or bad faith, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

3. This section does not alter or affect any provision for revocation or termination contained in the power of attorney.



The NRS lists no formalities which must be followed in executing any power of attorney. As indicated by the statute, acts performed by an attorney-in-fact during any period of uncertainty whether the principal is dead or alive, or when he is incompetent or disabled, bind the principal or his guardian, heirs, devisees and personal representative as if the principal were alive, competent, and not disabled. Unlike in some states, the agent need not sign an affidavit that he had no knowledge of the principal's death when he performed the act.

#### B. Social Workers

In accordance with [NRS 641B.030\(2\)](#), "[s]ocial work' means the application of methods, principles and techniques of case work, group work, community organization, administration, planning, consultation and research to assist persons, groups or communities to enhance or restore their ability to function physically, socially and economically."

[NRS 641B.030\(3\)](#) states "[c]linical social work' means the application of methods, principles and techniques of case work, group work, community organization, administration, planning, consultation, research and psychotherapeutic methods and techniques to persons, families and groups to help in the diagnosis and treatment of mental and emotional conditions."

Another definition, as adopted by the National Association of Social Workers, is as follows:

Social work is the professional activity of helping individuals, groups, or communities to enhance or restore their capacity for social functioning and to create societal conditions favorable to their goals.

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The purpose of social work is to promote or restore a mutually beneficial interaction between individuals and society in order to improve the quality of life for everyone. Social workers hold the following beliefs:

The environment (social, physical, organizational) should provide the opportunity and resources for the maximum realization of the potential and aspiration of all individuals, and should provide for their common human needs and for the alleviation of distress and suffering.

Individuals should contribute as effectively as they can to their own well-being and to the social welfare of others in their immediate environment as well as to the collective society.

Transactions between individuals and others in their environment should enhance the dignity, individuality, and self-determination of everyone. People should be treated humanely and with justice.

A client may be an individual, a family, a group, a community, or an organization.

Dean H. Hepworth and JoAnn Larsen, *Direct Social Work Practice, Theory & Skills 4-5* (3rd ed. 1990).

In interviewing various clinical social workers, it became apparent the very essence of social work is to help people become more productive by locating and coordinating resources. If a client is in need of a home, the proper course of conduct is to give the client a list of agencies to assist in locating affordable housing. It is not be appropriate to have the client move in with the social worker, as the relationship of landlord and social worker do not further the same goals.

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If a client is lonely and in need of affection, it would be improper for a social worker to date that client or establish a sexual relationship with that client to meet this basic need.<sup>3</sup> Referring the client to social groups which would encourage interaction with other people would be appropriate.

Landlord/social worker as well as lover/social worker are dual relationships. Establishing a dual relationship with a client is one of the fundamental ethical violations taught to social work students nationwide. Due to the fact that a dual relationship signifies dual goals, the client will ultimately suffer if any of the goals are inconsistent.

Likewise, if a person is in need of assistance with financial or health care decisions, the proper course of conduct is to help the client locate a different person to accept the role as attorney-in-fact. To assume the responsibility as attorney-in-fact, the social worker would definitely create a dual relationship with the client since the power of attorney gives an attorney-in-fact authority to make financial decisions, often without consultation of the client. As the goal of the social worker is to assist in making clients more productive, negating the clients decision-making authority is inconsistent with the social worker's primary goal.

Durable powers of attorney often confer discretion of affairs of incompetent people upon the attorney-in-fact. As previously indicated, the primary goal of social workers is to assist clients in contacting resources to improve their ability to function in society. Managing the personal and financial concerns of a person who is not capable in any regard of functioning in society will not only create a dual relationship, but may be beyond the social worker's scope of practice and training as well.

[NAC 641B.200](#)(1) specifically states:

The status of a licensed social worker must not be used to support any claim, promise or guarantee of successful service, nor may the license be used to imply that he has competence in another profession. The licensee shall not misrepresent his own professional qualifications, affiliations and licenses, nor those of the institutions and organizations with which he is associated. If he holds more than one occupational license, he shall disclose to his client orally and in writing which of the licenses apply to the service he is rendering to that client.

This section of the administrative code clearly prohibits a social worker from using his license to imply that he has competence in another profession. Taking on the obligation of handling the financial and personal dealings of others implies a knowledge outside the boundaries for which social workers are trained.

Additionally, [NAC 641B.200](#)(1) mandates disclosure of more than one occupational license and which license applies to the service the social worker is rendering. This denotes that a social worker must specify which service is provided in order to avoid a dual relationship.

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<sup>3</sup> NAC 641B.205(11) states:

A licensee who is serving a client who is psychologically or financially dependent upon the licensee shall not influence or attempt to influence the client in any manner which will reasonably result in the licensee deriving benefits of an unprofessional nature, including sexual activity from the client. The board will presume that the client is dependent upon the licensee if the sexual activities occur or other benefits are received during the time the client is receiving professional service from the licensee or within six (6) months after termination of those services.

Besides the provision of unfettered discretion in handling another person's affairs, a power of attorney is usually a relationship which is compensated for by the principal. [NAC 641B.200](#)(3) states "[a] licensee shall not use his relationship with a client to further his own personal, religious, political or business interests."

Clearly, receiving payment for a service as attorney-in-fact is a furtherance of one's business interest. Further, if the original relationship was that of social worker/client, then the compensated business relationship of attorney-in-fact and social worker was a result of a client/social worker relationship which is a direct violation of this regulation.

While the statutes governing social work do not specifically state that a social worker cannot become an attorney-in-fact for a client, [NRS 641B.400](#) states professional incompetence as grounds for discipline. Professional incompetence is defined in [NAC 641B.225](#) and will be interpreted by the board to mean a lack of knowledge, skill, or ability in discharging a professional obligation and includes malpractice and gross negligence.

Entering into the dual relationship which is fraught with possible conflicts of interest could cause, or in and of itself be considered, below standard performance.

Nevada case law holds that statutes should be construed to be given a reasonable construction and a common sense meaning, avoiding absurd results. *See Holiday v. McMullen*, [104 Nev. 294](#), 756 P.2d 1179 (1988); *Las Vegas Sun, Inv. v. Eighth Judicial District Court*, [104 Nev. 508](#), 761 P.2d 849 (1988); *State Dep't of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 762 P.2d 882 (1988). The Nevada Supreme Court has also indicated statutes will not be construed to produce an unreasonable result when another construction will produce a reasonable result. *See Breen v. Caesars Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070 (1986). In the spirit of consistency with the goals of social work, it would not be reasonable to interpret a statute to allow assumption of a role which deviates from the main objectives of social work practice.

### III. GUARDIANSHIP

A guardianship is a legal relationship under which one person (a guardian) has the legal right and duty to care for another (a ward) and his or her property. A guardianship is established because of the ward's inability legally to act independently.

The difference between a guardian and a power of attorney is that a guardian is court appointed and the power of attorney is a contractual relationship without court intervention between the attorney-in-fact and the principal. According to Nevada law, the relationship of attorney-in-fact and principal is effected if, subsequent to the power of attorney relationship, a guardian is appointed. In this situation, the attorney-in-fact or agent, during continuance of the appointment, shall account to the guardian rather than the principal. The guardian has the same power the principal would have if he or she were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency. *See n.l.*

Like the attorney-in-fact, the guardian establishes a role which may be inconsistent, if not on a collision course, with the goals and skills of a social worker. A guardian makes all decisions affecting the ward's financial, personal, and medical situation. Since the social worker is primarily motivated by theories of accessing resources, stepping in as a guardian and deciding all crucial matters of a person's life is blatantly inconsistent with the actual purpose of a social worker. While directing a client to the public guardian would be appropriate, petitioning a court to be appointed as a guardian would be improper for a social worker.

For similar reasons discussed above, accepting the duties of guardian for a client would be considered a violation of NAC ch. 641B. As noted, the dual relationship and implication

of skills outside boundaries of a social worker violate [NAC 641B.200\(1\)](#). The fact that guardians are compensated for services, creating a business opportunity, denotes a violation of [NAC 641B.200\(3\)](#) which forbids a use of a client relationship in this manner. Lastly, the basic impropriety of a social worker assuming a guardianship for a client suggests professional incompetence in violation of [NAC 641B.225](#).

#### IV. REPRESENTATIVE PAYEE

A representative payee is one who is given power to receive payment from another party on behalf of a principal. More specifically, a representative payee is a qualified individual who provides financial management for beneficiaries who are unable to receive and manage their own funds. The representative payee's authority to handle funds is granted by the Social Security Administration or any other benefit source that will grant payeeship. Many public guardians in Nevada offer a representative payeeship program for social security beneficiaries and private pensioners who require assistance to manage their financial affairs.

People who need a representative payee include adults who are unable to manage their finances due to physical or mental limitations, individuals who receive payment due to disabilities related to drug addiction or alcoholism, and those who experience difficulty utilizing the monthly benefit checks to meet their daily needs.

Clients are referred to the representative payee program by local social service and mental health agencies, homeless shelters, housing projects, family members, or the beneficiaries themselves. Anyone can make a referral.

Duties of a representative payee confer such obligations as financial management and acceptance of funds on behalf of another. For the same rationale previously discussed, accepting this position for a client would be improper and a possible violation of the same sections of [NAC 641B](#). While it would not be appropriate for a social worker to assume the role of representative payee for a client, it would be appropriate for a social worker to refer a client to a representative payee program.

#### CONCLUSION

As with most professional relationships, the social worker/client relationship is maintained through trust. The client in this relationship is vulnerable and dependant upon the expertise and position of the social worker. It is therefore the social worker who is responsible for establishing boundaries of the association. *See At Personal Risk, Boundary Violation in Professional-Client Relationships*, Marilyn R. Peterson (1992).

Just as a social worker should not become sexually involved with a client or become the client's landlord, accepting the responsibilities as attorney-in-fact, guardian, or representative payee creates a similar conflict. In order to preserve the integrity of the profession, it is paramount that every level of social worker avoid assuming roles which conflict with the basic foundation of social work even though the best intentions support the decision to do so.<sup>4</sup>

Sincerely,

FRANKIE SUE DEL PAPA

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<sup>4</sup> This opinion is designed as a guideline to discourage individual social workers from developing dual relationships with clients. It is not intended to hinder functioning of the public agencies such as county public guardians, which hire social workers and provide representative payee and guardian programs within the same agency.

Attorney General

By: RONDA CLIFTON  
Deputy Attorney General

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OPINION NO. 96-04 COUNTIES; PUBLIC OFFICERS: A county commission may authorize county officers, as enumerated in statute, to operate branch offices away from the county seat.

Carson City, March 6, 1996

The Honorable Stewart L. Bell, Clark County District Attorney, 200 South Third Street, Post Office Box 552211, Las Vegas, Nevada 89155-2211

Dear Mr. Bell:

You have posed a question regarding whether a particular county officer, the county assessor, has the authority to open a branch office away from the county seat. The question is set forth below.

#### QUESTION

In light of Nev. [Const. art. 15, § 7](#), may the county assessor operate a branch office within the county even though the branch office is not located at the county seat?<sup>5</sup>

#### ANALYSIS

Apparently, the legislature interprets the constitutional provision set forth above as including the flexibility for county officers to operate branch offices away from the county seat.

The legislature enacted S.B. 188 in 1989. S.B. 188 specifically authorizes operation of branch offices for certain enumerated county officers. The county assessor is included within the group of county officers who may operate such branch offices as long as they maintain an office at the county seat.

S.B. 188 amended the language of [NRS 245.040\(3\)](#) as follows:

The board of county commissioners may authorize a county officer to rent, equip and operate, at public expense, one or more branch offices in the county. The branch office must be kept open for the transaction of public business on the days and during the hours specified in subsections 1 and 2. The provisions of this subsection do not preempt any other statutory provisions which require certain duties to be performed at the county seat.

We must assume the legislature was aware of Nev. [Const. art. 15, § 7](#), when it enacted the statutory amendment to [NRS 245.040](#) described above. Accordingly, we believe the statute must be construed as being in harmony with the constitutional section. *State ex rel. Williams v. Fogus*, [19 Nev. 247](#), 249, 9 P. 123 (1885).

#### CONCLUSION

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<sup>5</sup> Nev. Const. art. 15, § 7, states: "All county Officers shall hold their Offices at the County seat of their respective Counties."

The county commission may, pursuant to [NRS 245.040\(3\)](#), authorize certain enumerated county officers, including the county assessor, to operate branch offices away from the county seat. We find the statute to be in harmony with Nev. [Const. art. 15, § 7](#). In light of the statutory change, Op. Nev. Att'y Gen. No. 155 (March 19, 1956) is no longer applicable.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-05REFUND; BAIL; FORFEITURES; TREASURER: The State Board of Examiners must approve a request for refund of bail bond forfeitures which are paid into the state treasury pursuant to [NRS 178.518\(2\)](#) when the request is made pursuant to a final judgment entered by a court more than one year from the date of the forfeiture's deposit into the treasury.

Carson City, March 13, 1996

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

Dear Mr. Comeaux:

You have requested our interpretation as to the effect [NRS 353.115](#) may have with reference to certain requests for refunds of bond forfeitures.

#### QUESTION

May the State Board of Examiners (Board) approve a request for refund of bond forfeitures which are paid into the state treasury pursuant to [NRS 178.518](#) when the request for refund is made pursuant to a final judgment entered by a court more than one year after the date of the forfeiture's deposit into the treasury?

#### ANALYSIS

[NRS 178.518](#) provides in relevant part: "Money collected pursuant to [NRS 178.506](#) to [178.516](#), inclusive, which was collected: . . . . (2) From a person who was charged with a gross misdemeanor or a felony must be paid over to the state treasurer for deposit in the fund for the compensation of victims of crime."

A refund of money from the state treasury is subject to approval by the Board when the Board is "satisfied with the correctness and justice" of the claim. [NRS 353.120\(1\)](#). A statute which imposes conditions on refunds from the state treasury is [NRS 353.115](#), which provides:

- A claim for refund of money deposited in the state treasury or paid to a state agency or officer shall be made within 1 year from the date of such deposit or payment unless:
1. Payment was made under protest; or
  2. The statute applicable to claims against or refunds by a particular state agency or officer prescribes a different period.

The clear purpose of the statute is to provide for finality of claims against the state treasury. Statutes of limitation are common in Nevada Revised Statutes. See chapter 11 of NRS. It would be easy to end our inquiry here by holding that [NRS 353.115](#) precludes payment of bail bond forfeitures which were deposited more than a year ago, but you have provided materials which may argue against that result.

The provisions of [NRS 178.506](#)-.516 address forfeiture of bail bonds due to breach of a bond condition by a defendant or failure of a defendant to make a court appearance. [NRS 178.512](#) sets forth certain conditions under which a court shall set aside a forfeiture and order return of the forfeited money to the surety. The statute does not specifically address any period of limitation within which a surety must apply for a return of a forfeiture. However, despite the legislative restrictions placed upon courts, the Nevada Supreme Court has held: "The decision to grant exoneration or discharge of a bond rests with the discretion of the trial judge, as long as the sureties do not aid in the defendant's absence." *State v. American Bankers Ins.*, [106 Nev. 880](#), 883, 802 P. 2d 1276 (1990)(citing [NRS 178.512](#)).

You have provided us with backup materials including several court orders which were forwarded to the State Controller from the Clark County Department of Finance (County) in support of the County's requests for refund of forfeitures. These orders show the State of Nevada as a party in the underlying criminal cases. While these orders were issued in late 1995, some of them order refund of bail which was forfeited to the state treasury as long ago as 1989. There are several possible reasons for such a delay between a bond forfeiture and an order setting aside the forfeiture. We are advised that it is a common occurrence for a defendant to "skip" to a location outside Nevada to avoid a court appearance, thereby failing to appear and causing forfeiture of bail. It may be years before the defendant is either extradited back to Nevada or returns voluntarily and is arrested on some other crime, at which point the surety is notified of the defendant's presence in the state and has a right to arrest the defendant for the purpose of surrendering the defendant to the court. [NRS 178.526](#). In three of the examples which you supplied, we are advised that it was the Gaming Control Board who requested that the district attorney move to quash outstanding bench warrants on the defendants and to dismiss the case, reportedly after a year-long investigation failed to produce evidence sufficient to support a conviction. In any event, actions seeking the setting aside of forfeitures are often filed and heard more than one year after bail has been forfeited to the state treasury.

At proceedings for setting aside bail forfeitures, the state is represented by the district attorney. It is at this time that any defense of the state treasury based on [NRS 353.115](#) should be raised. The former and current deputy district attorneys which we have discussed the issue with admit to not being familiar with provisions of [NRS 353.115](#) and therefore to not having raised the statute in court. Even if properly raised and argued, it is not clear that every court would be convinced by the legal argument that [NRS 353.115](#) prohibits such a refund from the state treasury in light of the standards for obtaining a refund of bail forfeiture set forth in [NRS 178.512](#) and especially in light of the fact that the statute itself does not have any specific period of limitation within which an action to set aside a forfeiture must be filed and in light of the broad discretion granted to trial judges to discharge a bond in *American Bankers, Inc.* Absent legislative clarification as to the proper balance between the competing provisions of chapters 178 and 353 of NRS, there is a real potential for conflicting decisions in courts of first impression and in courts of appeal. Further, in many cases the relatively small amounts at issue would probably not warrant a serious appellate effort by the district attorney. Accordingly, it is our suggestion that the most feasible long-term solution to this issue is a legislative amendment to relevant provisions of chapter 178 of NRS to clarify that actions to set aside bond forfeitures which have been deposited into the state treasury either are, or are not, subject to the one-year refund limitation provision of [NRS 353.115](#).

In the several examples of justice court and district court judgments which you have provided, all have apparently been received by the State Controller after the expiration of time for appeal. See Justices' Courts' Rules of Civil Procedure 72B(a); *State v. Eighth Judicial District Court*, [97 Nev. 34](#), 623 P. 2d 976 (1981); Nev. R. App. P. 4(a). Accordingly, the state is bound by these final judgments and must pay over the refunds from the state treasury as ordered. The Board must acknowledge and comply with these unappealed orders by allowing refunds of forfeitures ordered.

### CONCLUSION

The State Board of Examiners must approve a request for refund of bail bond forfeitures which are paid into the state treasury pursuant to [NRS 178.518\(2\)](#) when the request is made pursuant to a final judgment entered by a court more than one year from the date of the forfeiture's deposit into the treasury. We suggest that the issue of the legislature's intent as to the scope of protection of [NRS 353.115](#) be presented to the 1997 Legislature for clarification.

FRANKIE SUE DEL PAPA  
Attorney General

By: JAMES T. SPENCER  
Senior Deputy Attorney General

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OPINION NO. 96-06 AGRICULTURE, DIVISION OF: BRAND INSPECTORS; VETERINARIANS: In order for an animal to be impounded on agricultural land, the sheriff or his designee, a licensed veterinarian, and the district brand inspector or his designee must concur that the animal is deprived of food or water and they must supervise removal of that animal.

Carson City, March 15, 1996

Mr. Steve Mahoney, Chief, Bureau of Livestock Identification, Division of Agriculture, 350 Capitol Hill Avenue, Reno, Nevada 89502

Dear Mr. Mahoney:

You have written our office to request an opinion on the following:

### QUESTION

Does [NRS 574.055\(6\)](#) require concurrence and supervision of a veterinarian and a brand inspector to impound animals on agricultural land?

### ANALYSIS

[NRS 574.055](#) deals generally with procedures for impounding animals that are being treated cruelly. Subsection (6) specifically addresses the procedure for impounding animals found on land being employed for an agricultural use. [NRS 574.055\(6\)](#) states in its entirety:

This section does not apply to any animal which is located on land being employed for an agricultural use as defined in [NRS 361A.030](#) unless the owner of the animal or the person charged with the care of the animal is in violation of subsection 2 of [NRS 574.100](#) and the impoundment is accomplished with the concurrence and supervision of the sheriff or his designee, a licensed veterinarian and the district brand inspector or his designee. In such a



case, the sheriff shall direct that the impoundment occur no later than 48 hours after the veterinarian determines that a violation of subsection 2 of [NRS 574.100](#) exists.

A look at the legislative history of this subsection reveals that prior to 1989 the subsection stated simply "[t]his section does not apply to any animal which is located on land being employed for an agricultural use as defined in [NRS 361A.030](#)." Animals on agricultural land were exempt from being impounded for cruel treatment under [NRS 574.055](#).

Testimony presented before the Assembly Committee on Natural Resources, Agriculture & Mining on March 6, 1989, reveals that the subsection was amended by Assembly Bill No. 245 (A.B. 245) in order that there be some recourse for impounding animals being treated cruelly on agricultural land. *See, Minutes of March 6, 1989, hearing on A.B. 245 before the Assembly Committee on Natural Resources, Agriculture & Mining at 4.* The minutes for the committee meeting provide a summary of Assemblyman Robert E. Gaston's comments on A.B. 245. They state:

[T]here had been egregious events which had taken place relative to animals. Most cases of neglect or abuse fall within [sic] statutory regulation. However, animals on agricultural property were exempt from being impounded in the same manner as domestic animals. Those animals in a situation of abuse or neglect may not be removed from the property for their own protection.

*Id.* Assemblyman Gaston went on to detail accounts of two extreme cases of animals being starved on agricultural land.

During further discussions of AB 245, concerns were raised over animals being impounded on agricultural land due to misconceptions of routine acts of animal husbandry. Assemblyman John Carpenter suggested that the amendment could be limited by reference to [NRS 574.100](#). [NRS 574.100](#) states: "Except in any case involving a willful or malicious act for which a greater penalty is provided by [NRS 206.150](#), a person who: . . . . 2. Deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink . . . is guilty of a misdemeanor.

Assemblyman Carpenter suggested that if AB 245 was amended solely to address the issue of starvation, that the livestock industry would accept it. *See, Minutes of March 6, 1989, hearing on A.B. 245 before the Assembly Committee on Natural Resources, Agriculture & Mining at 7.*

The committee continued its discussion of A.B. 245 on March 13, 1989. The discussion concerned ways of limiting the circumstances under which animals on agricultural land could be impounded. Mr. Dallas Byington of the Nevada Cattleman's Association (NCA) went on record as being opposed to A.B. 245. Assemblyman Carpenter proposed an amendment. He suggested "the involvement of the local sheriff, a licensed veterinarian and the brand inspector would provide the authority and expertise necessary to evaluate and determine if animals should be impounded and charges should be filed." *See, Minutes of March 6, 1989, hearing on A.B. 245 before the Assembly Committee on Natural Resources, Agriculture & Mining at 4.* With these additions, the NCA indicated that they would not oppose the bill.

The purpose of A.B. 245 then was to remove the exemption from impoundment for animals on agricultural property. At the same time, A.B. 245 limited the circumstances under which animals on agricultural property could be impounded. They could only be impounded if: (1) the owner was in violation of [NRS 574.100](#)(2), that is the animal was being deprived of food or water; and (2) the impoundment was accomplished with the concurrence and supervision of the sheriff or his designee, a licensed veterinarian, and the district brand inspector or his designee.

## CONCLUSION

[NRS 574.055](#)(6) requires that, in order for an animal to be impounded on agricultural land, the sheriff or his designee, a licensed veterinarian, and the district brand inspector or his designee must concur that the animal is being deprived of food or water and must supervise removal of that animal.

FRANKIE SUE DEL PAPA  
Attorney General

By: GINA SESSION  
Deputy Attorney General

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OPINION NO. 96-07VOLUNTEERS; FIREMEN; OCCUPATIONAL SAFETY & HEALTH:  
The fact that volunteer firefighters are employees for purposes of workers compensation coverage is too tenuous to be an indirect gain to achieve jurisdiction of the Division of Industrial Relations for purposes of OSHA regulations. However, those volunteer firefighters who participate in the Public Employees Retirement System, with contributions paid on their behalf, are receiving sufficient gain to put their workplace within the jurisdiction of the Division.

Carson City, March 27, 1996

Mr. Ron Swirczek, Administrator, Department of Business & Industry, Division of Industrial Relations, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Swirczek:

You have asked the opinion of the Attorney General related to whether volunteer firefighters are within the ambit of OSHA regulations which are administered through the Division of Industrial Relations ("Division").

### QUESTION ONE

Does the fact that volunteer firefighters are defined by [NRS 616.070](#) as "employees" for the purposes of workers compensation insurance constitute direct or indirect gain or profit such that the volunteer firefighters are also within the jurisdiction of the Division for purposes of OSHA regulations?

### ANALYSIS

Chapter 616 of the Nevada Revised Statutes is known as the Nevada Industrial Insurance Act. [NRS 616.010](#). Volunteer firefighters are employees for purposes of industrial insurance. [NRS 616.070](#). It has long been the interpretation of the Division that being an employee for purposes of chapter 616 does not, of itself, bring volunteer firefighters within the ambit of chapter 618, which is known as the Nevada Occupational Safety and Health Act. [NRS 618.005](#).

The purpose of chapter 618 is to provide safe and healthful working conditions for every employee by establishing and enforcing regulations, providing for education and training of employees and establishing reporting procedures for job-related accidents and illnesses. [NRS 618.015](#). An employee is defined as "every person who is required, *permitted* or directed by any

employer to engaged in any employment, or to go to work or *be at any time in any place of employment.*" [NRS 681.085](#) (emphasis added). An employer includes any unit of local government. [NRS 618.095](#).

The Division has authority over working conditions *in all places of employment* except conditions that may exist in household domestic service, that may exist in motor vehicles operating on public highways, or that are regulated by certain federal acts not relevant to the question before us. [NRS 618.315](#).

"Place of employment" means any place whether indoors or out or elsewhere, and the premises appurtenant thereto, where, either temporarily or permanently, any industry, trade, work or business is carried on, including all construction work, and where *any person is directly or indirectly employed by another for direct or indirect gain or profit.* [Emphasis added.]

[NRS 618.155](#).

Our analysis examines whether there is any direct or indirect gain or profit realized by volunteer firefighters. We believe that coverage under workers compensation is too tenuous to be a gain or profit. At best, injured firefighters are simply made whole through benefits of the coverage should they become injured. In this regard, we agree with the long-standing interpretation of the Division.

However, volunteer firefighters may be participants in the Public Employees Retirement System ("PERS"). That would be a direct or indirect gain. Volunteer fire departments are organized pursuant to [NRS 474.470\(3\)](#).

The volunteers of a regularly organized and recognized fire department may, by the joint application of a majority of those volunteers addressed to the board, become members of the system. A volunteer fireman who joins a fire department of which all the volunteers have become members of the system becomes a member of the system. The volunteers of a participating fire department may withdraw from the system by the joint application of a majority of those volunteers addressed to the board.

[NRS 286.367\(1\)](#).

We are advised there are fire departments with participation of their volunteer firefighters in PERS. Where they do participate, the contribution is paid by the local county government on their behalf. Those volunteer firefighters who participate in PERS, with contributions to PERS paid on their behalf, are receiving an indirect or direct gain. In addition, if a volunteer firefighter receives compensation for his or her services in whole or in part, the compensation would be an indirect or direct gain.<sup>6</sup>

We note that the language of [NRS 618.155](#) is very broad. It refers to a place "where *any person* is directly or indirectly employed by another for direct or indirect gain or profit." [Emphasis added.] Thus, if a volunteer fire department employed with compensation one person, for example the fire chief, and all the other firefighters were volunteer, the criteria of the definition would be met and jurisdiction of the Division would attach to all the firefighters. Similarly, in those places where volunteer firefighters are attached to a regular fire district, presence of paid

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<sup>6</sup> In some cases, a fire protection district may make a payment to the nonprofit organization of volunteer firefighters who assist at fires, but there is no payment to the firefighters.

firefighters is sufficient for Division jurisdiction to attach to the place of employment and thus, encompass the volunteers as well.

### CONCLUSION

In order to be within the jurisdiction of the Division of Industrial Relations for purposes of OSHA regulations, there must be an indirect or direct gain for the firefighter, or any person, in that place of employment. The fact that volunteer firefighters are employees for purposes of workers compensation coverage is too tenuous to be an indirect gain to achieve jurisdiction of the Division of Industrial Relations for purposes of OSHA regulations. However, those volunteer firefighters who participate in PERS, with contributions paid on their behalf, are receiving sufficient gain to put their workplace within the jurisdiction of the Division.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN CROSSLEY  
Deputy Attorney General

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OPINION NO. 96-08PUBLIC HEALTH; PUBLIC SAFETY; THERAPISTS: Emergency medical technicians were intended to be exempt from certification requirements of [NRS chapter 640B](#) which requires licensure of respiratory therapists.

Carson City, April 4, 1996

Ms. Yvonne Sylva, Administrator, Health Division, 505 East King Street, Kinkead Building, Room 201, Carson City, Nevada 89710

Dear Ms. Sylva:

You have requested a legal opinion regarding impact of Senate Bill (S.B.) 72 of the 1995 Legislative Session upon emergency medical technicians (EMTs).

### QUESTION

Are EMTs exempted from the respiratory therapist licensure requirement enacted by S.B. 72, now found in [NRS chapter 640B](#), since EMTs administer oxygen and perform cardiopulmonary resuscitation as part of their scope of practice?

### ANALYSIS

[NRS 640B.030](#) defines "practice of respiratory care" which provides in pertinent part: "'Practice of respiratory care' includes: . . . . 5. Cardiopulmonary resuscitation and maintenance of natural airways and the insertion and maintenance of artificial airways . . . ." Those engaged in practice of respiratory care are required to be certified as a practitioner of respiratory care pursuant to [NRS chapter 640B](#). Other licensed practitioners of the healing arts are exempt from this requirement. [NRS 640B.080](#) provides: "This chapter does not apply to: . . . . 6. Other practitioners of the healing arts who are licensed to practice pursuant to chapters 630 to 640, inclusive, of NRS, when they are performing acts authorized pursuant to those chapters."

Emergency medical technicians are licensed pursuant to [NRS chapter 450B](#). Basic emergency care is defined in [NRS 450B.1905\(2\)](#) as including: "(a) Procedures to establish and maintain an open airway in a patient; (b) Administration of oxygen, both manually and by a device which uses intermittent positive pressure; (c) Cardiopulmonary resuscitation . . . ."

The question therefore becomes whether an EMT is required to be certified as a practitioner of respiratory care before he can perform cardiopulmonary resuscitation or other procedures designed to maintain an airway.

There are numerous previous Attorney General opinions on the subject of statutory construction in addition to a plethora of cases delving into the intent of the legislature in response to challenges to various statutes. In *State Dep't of Mtr. Vehicles v. Lovett*, [110 Nev. 473](#), 874 P.2d 1247 (1994), the court stated that statutes are generally construed with a view of promoting, rather than defeating, the legislative policy behind them. When a statute is subject to more than one interpretation, it should be construed in line with what reason and public policy would indicate the legislature intended. The leading rule is to ascertain the intent in enacting the statute and the ascertained intent will prevail over the literal sense. See *Roberts v. State, Univ. of Nevada System*, [104 Nev. 33](#), 752 P.2d 221 (1988).

It is also a well established premise that interpretation of a statute should avoid an absurd, unreasonable or mischievous result. See *Holliday v. McMullen*, [104 Nev. 294](#), 756 P.2d 1179 (1988), *Las Vegas Sun, Inc., v. Eighth Judicial Dist. Court*, [104 Nev. 508](#), 761 P.2d 849 (1988). The absurd result in interpreting [NRS chapter 640B](#) to require EMTs to be licensed and/or certified under its provisions would be to prevent EMTs from practicing emergency care without such certification and to negate or supplant the requirements found in [NRS chapter 450B](#). If the consequence of an interpretation is to render another statute ineffective, the interpretation is subject to scrutiny. See *Nevada Tax Comm'n v. Bernhard*, [100 Nev. 348](#), 683 P.2d 21 (1984). If [NRS chapter 640B](#) is interpreted to require licensure and certification for EMTs pursuant to its terms, the statutory requirements found at [NRS chapter 450B](#), which were intended to govern EMTs, are rendered ineffective, duplicative, and unreasonably burdensome. [NRS chapter 640B](#) must be construed to give effect to all provisions of the statutes. See Op. Nev. Att'y Gen. No. 95-11 (June 27, 1995).

There is an obligation to render statutes compatible. *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830 (1977). The Nevada Supreme Court mandated that inconsistent parts of acts on the same subject should be harmonized when possible to avoid the construction which would create an inconsistent position. See *State ex rel. Allen v. Brodigan*, [34 Nev. 486](#), 492, 125 P. 699 (1911). When a mistake or error in the use of words is not calculated to mislead as to the subject of an act, that mistake or error is to be regarded as a clerical error and when certain words are necessary to give an act complete sense, the court will read those words into the act. See *State ex rel. Bartlett v. Brodigan*, [37 Nev. 245](#), 250, 141 P. 988 (1914); *State ex rel. Drury v. Hallock*, [19 Nev. 384](#), 389, 12 P. 832 (1887). Additionally, in *Sanson Inv. Co. v. 268 Ltd.*, [106 Nev. 429](#), 432, 795 P.2d 493 (1990) the court stated:

If the language [of a statute] is capable of two constructions, one of which is consistent . . . with the evident object of the legislature in passing the law, that construction must be adopted which harmonizes with the intention. *Recanzone v. Nevada Tax Commission*, [92 Nev. 302](#), 305, 550 P.2d 401, 403 (1976) (quoting *State of Nevada v. Cal. M. Co.*, [13 Nev. 203](#), 217 (1878)).

Finally, case law provides that specific statutory provisions will govern over general provisions. See *McIntosh v. Streight*, [110 Nev. 1148](#), 881 P.2d 1337 (1994). [NRS chapter 640B](#) provides that respiratory care givers who administer oxygen and CPR, among other procedures, must be licensed under its provisions and exempts other professions required to be

licensed under specific statutory requirements. See [NRS 640B.080\(6\)](#). The statute fails to exempt EMTs by omission of reference to [NRS 450B](#). NRS 450B is the more specific statutory language which provides for licensing requirements of EMTs.

The legislative intent contained in the record for [NRS chapter 640B](#) gives guidance as to the respiratory care givers for whom licensure and certification were sought. It reveals in numerous instances that EMTs were not considered and therefore not addressed. It is clear from the legislative minutes and exhibits that only respiratory care givers, i.e., therapists, were considered in need of regulation and virtually all dialogue regarding licensing or certification of respiratory care givers focused on unlicensed, uncertified personnel who administer respiratory care. Several statements throughout the process indicate that "other healing arts" *are* regulated and therefore not included in this proposed chapter. Specific references follow:

- "Other licensed practitioners of the healing arts and the domestic administration of family remedies are also exempt." *Nevada Legislature Sixty-Eighth Session 1995, Summary of Legislation, Prepared by Research Division Legislative Counsel Bureau, at 2.*

- "Respiratory care is the only allied health care profession involved in life-saving and life-sustaining measures that is *not* now licensed by the State of Nevada." "Currently there is no formal training or licensure requirement to practice respiratory care in the state of Nevada." "Other qualified, licensed health care personnel *are not* prevented from providing respiratory care." *Minutes of February 23, 1995, hearing on S.B. 72 before the Senate Committee on Commerce and Labor, Exhibit G, pages 3, 4, and 6.*

- "Mr. Logan said the amended bill stated health care providers, physicians, nurses, or anyone else whose scope of practice included respiratory care were not prevented from doing so." *Minutes of May 26, 1995, hearing on S.B. 72 before the Assembly Committee on Commerce at 13.*

- Dr. Jackson, a practicing pulmonary and critical care physician in northern Nevada stated, in reference to the purpose of S.B. 72, "[i]t only said if one held oneself out as a Respiratory Therapist, certain minimum standards had to be met." *Minutes of May 26, 1995, hearing on S.B. 72 before the Assembly Committee on Commerce at 16.*

These discussions were held in the attempt to refine language of the bill. An effort was made to include all persons who provide respiratory care but are *not* otherwise licensed or certified. Exemptions were provided for at Sec. 7(6), now found at [NRS 640B.080](#) which states: "This chapter does not apply to: . . . . 6. Other practitioners of the healing arts who are licensed to practice pursuant to chapters 630 to 640, inclusive, of NRS, when they are performing acts authorized pursuant to those chapters."

As stated throughout the legislative discussion on S.B. 72, it was the desire to establish minimum requirements for competency of respiratory care givers which initiated introduction of this bill. It appears to be an inadvertent omission that EMTs, who are licensed and regulated under [NRS chapter 450B](#), were not included in the exemptions. They are clearly *not* respiratory therapists, they *are* clearly required to be trained, licensed, and regulated to perform certain duties which involve respiratory care within the scope of their practice. Training for EMTs meets or exceeds the criteria for minimum training and includes training in administration of oxygen, both manually and by a device which uses intermittent positive pressure, and cardiopulmonary resuscitation. [NRS 450B.1905\(2\)](#). It appears clear that EMTs are one of the

licensees whose scope of practice includes limited respiratory care which the legislature intended to be exempt from provisions of [NRS chapter 640B](#).

### CONCLUSION

It is this office's opinion that EMTs were intended to be exempt from certification requirements of [NRS chapter 640B](#). It appears clear from the legislative history that the legislature intended respiratory caregivers or therapists, who were previously unregulated by any statutes, be certified to protect public health and safety. All other licensed practitioners were exempted from certification under [NRS chapter 640B](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: NANCY FORD ANGRES  
Chief Deputy Attorney General

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OPINION NO. 96-09COPYRIGHT; PUBLIC RECORDS;ENVIRONMENTAL PROTECTION:  
Data in environmental consultant report is not subject to copyright though a compilation that includes data might be if it meets criteria. Protected material can be copied without infringement if use is limited in circumstances described in the *fair use doctrine*. Absence of copyright mark does not invalidate copyright under certain conditions.

Carson City, April 9, 1996

Mr. Lew Dodgion, Administrator, Department of Conservation and Natural Resources, Division of Environmental Protection, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Dodgion:

You have asked this office for an opinion related to environmental reports routinely submitted to the Division of Environmental Protection (Division), and the federal copyright law. You desire to know how the copyright law comports with [NRS 239.010](#), Nevada's public records law. These reports describe environmental conditions of private and public real property, typically prepared by an environmental consultant for the facility owner or operator, and filed with the Division.

The environmental reports are often reviewed, cited, and copied by other private interests, including environmental professionals, to document conditions of adjacent or nearby property. In some cases, pertinent excerpts are reproduced in the offices of the Division by staff as a service to the public.

In the context of the foregoing, you have asked the following questions:

### QUESTION ONE

Can environmental data obtained from public and private real property be copywritten by a consultant?

### ANALYSIS

It is not relevant to our analysis whether the data was obtained from public or private real property. Regardless of the status of the real property, the data in the report may *not* be protected by copyright.

A constitutional requirement for copyright protection is originality of authorship. U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (1995). Because facts do not owe their origin to an act of authorship, no one may claim originality as to facts. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 346 (1991). The consultant, through inspection and laboratory testing of soil taken from a site, may *discover* information about the metal or organic material in the soil but he or she is not the author of the fact. The copyright act provides that its protection does not extend to any discovery. 17 U.S.C. § 102(b) (1995); 37 C.F.R. § 202.1(d) (1995); *Feist Publications*, 499 U.S. at 354; *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.C. 1980) (discovery of quotations from unpublished letters written by others does not justify copyright by the discoverer.); 1 M. Nimmer, D. Nimmer, *Nimmer on Copyright*, § 2.11(A) (1995) However, our analysis does not rest here.

Because the consultant reports may be a *compilation* of data, the report as a whole may be subject to copyright. The seminal case to decide the issue is *Feist Publications v. Rural Telephone Service*. Prior to *Feist*, two theories developed among the federal circuit courts. The seventh, eighth, and tenth circuits followed the "sweat of the brow" theory. These courts were reluctant to preclude copyright protection for the person who spent the time and resources to gather facts and produce them in a list or catalog such as a telephone directory. While the list consists of facts, those courts were loath to allow competitors to take those facts from the compiled source and reproduce them for their own gain with little more trouble than it took to copy them from the first producer. The "sweat of the brow" cases lost sight of the standard of originality of authorship as it had been understood in copyright law.

The "selection or arrangement" theory looks for the presence of originality as the basis for application of copyright protection. This theory was followed by four circuits; the second, fifth, ninth, and eleventh. *See Worth v. Selchow and Righter Co.*, 827 F.2d 569, 574 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

The United States Supreme Court in the *Feist* decision reconciled the split in the circuits and affirmed that copyright law requires application of the selection or arrangement theory regarding compilations.

The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship.

*Feist*, 499 U.S. at 357.

The *Feist* decision concerned a telephone "white pages" directory produced by a telephone company. It included in part, names, addresses, and telephone numbers copied from Rural Telephone's directory. The court examined whether there was the minimum level of originality in the compilation. It noted that as to white pages, the arrangement in alphabetical order was hardly an act of originality, it was an inevitable arrangement for a telephone directory! The requirement of originality is not met in an arrangement that is obvious, commonplace, traditional, expedient or inevitable. *Feist*, 499 U.S. at 363. However, the requisite amount of originality or creativity is a minimal amount. *Feist*, 499 U.S. at 345; *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).



It is immaterial for copyright eligibility that an environmental consultant expended time or money gathering the facts. What is material is whether compilation of those facts was independently assembled and contains a minimum of originality or creativity.

### CONCLUSION TO QUESTION ONE

Facts or data in the consultant's report are not eligible for copyright. However, whether the report as a whole may be copied depends on whether arrangement or selection of the facts demonstrates originality of authorship as that term is used in the law of copyright. The originality standard is a low one. Bear in mind that even if the compilation is protected by copyright, it is never an infringement for someone to inspect or read the compilation or to copy just the facts.

### QUESTION TWO

Assuming that a report, as a compilation of facts, meets the standard of originality of authorship, under what circumstances may it be copied?

### ANALYSIS

The copyrighted material may be copied without infringement under certain limited circumstances. These circumstances are known as the *fair use doctrine*. The law specifies that copying may be done for use in research, criticism, comment, news reporting, teaching, or scholarship. The statute spells out the factors to be considered to determine whether the use is within the doctrine. The factors are: (1) whether the purpose and character of the use is commercial or non profit; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) effect of the use upon market or value of the copyrighted work. 17 U.S.C. § 107 (1995).

A copyrighted report may be copied if the intended use fits within the *fair use doctrine*. Copying only facts or data, without copying the arrangement or compilation, is not an infringement of copyright protection and does not have to fit within the *fair use doctrine*. However, Division personnel would be in a difficult position if asked to analyze each report against the legal criteria for *fair use* or to analyze each report to determine if a particular report has minimum creativity or originality to meet the threshold for copyrightability of the report itself, albeit the facts in the report are never subject to copyright. This office suggests that the Division personnel not attempt the analysis for the benefit of those who request a copy.

The public record law does not require the Division provide a copy or perform copying of the consultant reports. The law only requires that the public record be made available for inspection and copying. [NRS 239.010](#). Division staff may allow a person who requests a copy to make for themselves a copy of a report that purports to be copyrighted. The Division staff should make the record available for copying, inform requesters of the possibility that the report as a whole may be protected by the copyright act, and assume no responsibility for infringement, if any, done by the person who copied the document. In the alternative, if integrity of the file is an issue, the requester may designate the pages to be copied and clerical staff may make the copies provided that the requester is informed of possible copyright protection and that the public records law is not a defense against any infringement. We suggest the Division prepare highly visible signs to this effect and the signs be posted prominently in the area where reports are to be viewed.

### CONCLUSION TO QUESTION TWO

A copyrighted work may be copied without infringement under the *fair use doctrine*. Division staff should not attempt to determine if the requester's intended use is within the *fair use doctrine*. The requester may make copies at his or her own risk of infringement.

### QUESTION THREE

If the data can be copied, how should the Division proceed with providing the data given the requirements of [NRS 239.010](#)?

### ANALYSIS AND CONCLUSION TO QUESTION THREE

Though data or facts may not be copyrighted, we recommend the Division not copy the data for requesters, but allow them to do it as described above. This removes the Division from the difficult position of deciding whether, in copying data, original elements of the work have also been copied impermissibly or perhaps permissibly copied under the *fair use doctrine*.

### QUESTION FOUR

If an environmental report may legally be copyrighted, must it state in writing that it is copyrighted?

### ANALYSIS

Your question reaches to issues of notice and defenses to infringement of copyright. The outright omission of notice of copyright (the copyright symbol or other words specified in the statute) does not automatically forfeit copyright protection. 17 U.S.C. § 405(a) (1995). Since the Berne Convention in 1988, statutory protection is secured automatically when a work is created and is not lost even if the copyright notice is omitted. Section 405 of the Copyright Act provides that, with respect to copies publicly distributed by authority of the copyright owner, omission of the copyright notice or symbol does not invalidate the copyright of a work if: (1) the notice has been omitted from a relatively small number of copies; or (2) registration of the work was made before or within five years after publication provided a reasonable effort is made to add notice after the omission is discovered.

Furthermore, a person acting in good faith with no reason to think otherwise is ordinarily able to assume that the work is in the public domain if there is no notice whereby the infringer is shielded from liability as an "innocent infringer." 17 U.S.C. § 405(a) and (b) (1995).

The thrust of your question is undoubtedly related to liability concerns if Division staff innocently copy an environmental report which does not give notice that it is copyrighted. While the innocent infringer defense would be available, we recommend the best course of action is to allow public inspection and allow requesters to make their own copy after informing them that a copy of the full report might be protected by the copyright law.

### CONCLUSION TO QUESTION FOUR

An environmental report does not have to state in writing that it is copyrighted. For works published after March 1988, the author does not automatically lose protection of copyright if the work is published without notice of the copyright. However, a person who copies the work without any reason to know it is copyrighted may assert the defense of "innocent infringer" and generally will not be liable in damages for the infringement. An innocent infringement does not result in the work being in the public domain.

FRANKIE SUE DEL PAPA

Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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OPINION NO. 96-10 PRISONERS; INDIGENTS; MEDICINE: The Director of the Nevada Department of Prisons has authority to charge inmates a copayment for medical care provided no inmate is denied medical care due to indigency and that due process protections are afforded.

Carson City, April 19, 1996

Michael Fitting, D.O., Medical Director, Nevada Department of Prisons, Post Office Box 7011, Carson City, Nevada 89702

Dear Dr. Fitting:

You have requested an opinion from this office regarding potential legal problems which might result from implementing a portion of Assembly Bill (A.B.) 389 authorizing the Director of the Nevada Department of Prisons (NDOP) to charge inmates a copayment for medical care.

QUESTION ONE

Can or should NDOP charge copayments for inmates who are classified as chronically ill?

QUESTION TWO

Can or should NDOP charge copayments for extraordinary medical expenses (over \$10,000)?

ANALYSIS

A. History of Medical Copayment Legislation

In 1987, the Nevada State Legislature amended [NRS 209.246](#) to authorize the Director of NDOP to establish, with prison board approval, regulations to deduct reasonable sums from offender accounts to "[d]efray the costs paid by the department for medical care for the offender." Act of June 27, 1987, ch. 807, § 1, 1987 Nev. Stat. 2238.

With passage of A.B. 389 in the 1995 Legislative Session, [NRS 209.246](#) was amended, effective August 15, 1995, to expand the Director's authority to charge inmates for medical care to:

Defray, as determined by the director, a portion of the costs paid by the department for medical care for the offender including, but not limited to:

- (a) Except as otherwise provided in paragraph (b) of subsection 1, expenses for medical or dental care, prosthetic devices and pharmaceutical items; and
- (b) Expenses for prescribed medicine and supplies.

Act of June 15, 1995, ch. 219, § 3, 1995 Nev. Stat. 365.

B. Authority of Legislature to Adopt Copayment Legislation

Nevada was one of the first states to enact legislation requiring inmates to contribute to medical care costs. To date, courts considering legal challenges of such statutory provisions have upheld them as constitutional. *Johnson v. Dept. of Public Safety and Correctional Svcs.*, 885 F. Supp. 817 (D. Md. 1995); *Shapley v. Nevada Board of State Prison Commissioners*, 766 F.2d 404 (9th Cir. 1985).

The U.S. Supreme Court in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), addressed matter of payment of medical care afforded to an inmate. Although the Court did not address legality of any specific inmate copayment plan, it considered whether the incarcerating jurisdiction or the medical provider was responsible for payment of an inmate's medical care. The Supreme Court concluded that as long as the inmate was not denied necessary medical care, state law determined who would pay the cost.

### C. Eighth Amendment Challenges

Inmates objecting to conditions of their confinement traditionally seek redress under the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment. Cruel and unusual punishment is the "wanton and unnecessary infliction of pain." *Wilson v. Seiter*, 501 U.S. 294 (1991). The U.S. Supreme Court has held that in the medical context, prison officials may not act with "deliberate indifference to an inmate's serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

To prevail on a claim for a violation of his Eighth Amendment right to adequate medical treatment, the inmate must show: (1) an acute physical condition; (2) the urgent need for medical care; (3) the failure or refusal to provide medical care; and (4) tangible residual injury. *Stiltner v. Rhay*, 371 F.2d 420, 421 (9th Cir. 1967); *Smith v. Schneekloth*, 414 F.2d 680, 681 (9th Cir. 1969). Thus, prison staff may not deny an inmate care necessary to treat a serious medical need, regardless of the inmate's ability to pay. *Shapley*, 766 F.2d at 404. Whether or not the statute specifically states this does not appear to be important, as long as the prison policy is that medical care will be provided without regard to the inmate's ability to pay.

The court in *Johnson* rejected the inmate's Eighth Amendment claim, noting the defendant's policy "is flexible and makes a wide variety of exceptions to avoid imposing unnecessary hardship on seriously or chronically ill prisoners" and "it appears that the only inmates likely to be subjected repeatedly to the co-pay requirement are those who overuse prison medical services with frequent visits for minor complaints." *Johnson*, 885 F. Supp. at 820. The court also noted "because the policy mandates that no one shall be refused treatment for an inability to pay, the copay policy will not result in a denial of care, even for inmates who abuse the system." *Id.* The court found the policy "represents a commendable effort to promote inmates responsibility and the efficient use of scarce medical resources." *Id.* The plaintiff in *Johnson* failed to allege he had ever been denied medical treatment for lack of funds, or that he had been charged for medical services which he did not receive. *Id.*

### D. Right to Equal Protection

The claim of the plaintiff in *Johnson*, that the policy was unfair to poor inmates under the Fourteenth Amendment, was rejected by the U.S. District Court in Maryland. The court pointed out poverty is not a suspect class, and thus any discriminatory classifications on the basis of wealth would receive only rational basis scrutiny (citing *Maher v. Roe*, 432 U.S. 464, 471 (1977)). Clearly, any copayment policy should not improperly discriminate against suspect classes of persons, i.e., white inmates cannot be charged more for a medical service than black inmates.

The court, in examining the equal protection claim, held that: "The DOC clearly has a legitimate interest in both the efficient use of its prison resources as well as promoting inmates' personal responsibility for their own health. The copay policy is well-suited to accomplish this goal." *Johnson*, 885 F. Supp. at 821.

The stated purpose of the copayment policy adopted in Maryland was to reduce inmate abuse of the sick call system, promote inmate responsibility for their own health, and to allow facility medical resources to be used more efficiently. *Id.* at 818. The court found the copayment system bore a rational relationship to legitimate government interests, and was constitutional.

The court further noted the following characteristics of the Maryland copayment system: (1) the statute permits prison officials from assessing a fee not greater than \$4.00 for medical visits and enumerates certain exceptions to it; (2) the Division of Corrections had adopted a policy available to inmates which described how the copayment system worked, and describing the various exceptions (no charge for emergency services, routine health assessments, necessary follow-up visits, chronic care, infirmary care, and secondary care services); and (3) the policy and practice of the Division of Corrections, of which inmates had notice, was that treatment would not be denied for lack of funds. *Id.*

#### E. Right to Due Process

Courts have held that inmates retain a protected property interest in their inmate accounts, and are therefore entitled to some due process in the event money is taken from their accounts. *Quick v. Jones*, 754 F.2d 1521 (9th Cir. 1994).

In *Scott v. Angelone*, 771 F. Supp. 1064 (D. Nev. 1991), *aff'd*, 980 F.2d 738 (9th Cir. 1993), the court considered an inmate's claim that he had been improperly charged a medical copayment, and challenged both the state law and the regulations implementing the copayment program. The court rejected his claims, finding there was clear statutory authority for the program, and the inmate had received adequate due process protections. The inmate requested the services, received prior notice that a charge would be made, and there was a process by which the inmate could challenge the appropriateness of the charges imposed. The court noted under the statute in effect at the time, the copayment charges applied to inmate-initiated, nonemergency medical visits.

The *Johnson* court also rejected the inmate plaintiff's due process challenge to the medical copayment system. The record in that case reflected the inmates were informed of the policy, the medical care was documented, and the inmates were to sign a log book when the service was provided. The inmate's refusal to sign did not change the court's analysis. *Johnson*, 885 F. Supp. at 821.

#### F. Other Constitutional Considerations

The Department of Prisons must ensure that its medical copayment policy or practice does not violate any other constitutional right afforded to inmates. For example, under the Eighth Amendment, inmates are entitled to basic hygiene items. If such items must be purchased, the inmate must have sufficient funds with which to buy them. In a prison system which does not supply hygiene items to inmates, imposition of medical copayment charges cannot deprive the inmate of funds necessary to purchase hygiene items. *Romer v. Collins*, 962 F.2d 1508 (10th Cir. 1992).

### CONCLUSION TO QUESTIONS ONE AND TWO

The Nevada Legislature has authority to enact laws permitting the Director of NDOP to establish a medical copayment program compelling inmates to contribute toward the cost of

providing them with medical care. Under [NRS 209.246](#), determination of what medical care will be subject to a copayment is left to the Director's discretion, subject to prison board approval. The legislation bears a reasonable relationship to legitimate government interests.

The remaining question is whether there are limitations on the Director's authority to implement the medical copayment program. Based upon court decisions to date and *dicta* therein, it is recommended that policies and procedures should be developed with the following general guidelines:

1. The plan should be designed to further legitimate goals of the NDOP, including:
  - a. Discourage inmate abuse of availability of medical care;
  - b. Encourage inmate responsibility in determining necessity for seeking medical care;
  - c. Defray cost to the taxpayers of providing medical care to inmates; and
  - d. Free up medical staff to enable them to devote limited resources to treating inmates with legitimate medical concerns.
2. The plan should include adequate due process protections.
  - a. A copy of the copayment plan should be available to inmates by posting in all infirmaries, law libraries, and other appropriate areas of each prison facility. In addition, at the time an inmate is seeking medical care, the written form he signs authorizing the treatment should indicate that a copayment charge may be imposed; and
  - b. A post-deprivation process by which an aggrieved inmate can challenge propriety of the charges to his inmate account.
3. The plan should clearly provide that no inmate will be denied medical care due to inability to pay.
4. The plan should reflect reasonable copayment charges, as well as a reasoned approach to determining what items will be subject to charges. It is suggested the following considerations be taken into account in developing the plan:
  - a. The cost to NDOP in providing the service;
  - b. Whether the service is mandatory or inmate-initiated;
  - c. Whether the service is chronic (requiring regular visits, medication, or other continual care);
  - d. The degree to which the service is abused by inmates;
  - e. Impact of any required documentation, tracking or accounting services on the resources of NDOP (is the implementation cost-effective?);
  - f. Whether the copayment charge is likely to encourage inmates to make more responsible decisions regarding their own medical care;
  - g. Whether imposing copayment charges for particular services may result in fewer unnecessary medical visits, thereby freeing medical staff resources;

- h. The extent to which any specific copayment charge affects other NDOP goals and policies.
5. The plan should not adversely impact on any other constitutional rights of inmates.
- a. It is recommended NDOP continue its policy of permitting inmates to retain a reasonable percentage of the income received into their accounts prior to taking deductions for copayment charges; and
  - b. It is recommended NDOP continue its policy of providing basic hygiene items to inmates without charge.

### QUESTION THREE

Is the ability of NDOP to charge copayments for mental health care affected by any court orders in the previously litigated case entitled *Taylor v. Wolff*, CV-N-79-162-JMB?

### ANALYSIS

*Taylor v. Wolff* was a civil rights lawsuit litigated as a class action by inmates in the NDOP system alleging deficiencies in delivery of mental health care to inmates. Originally filed in 1979, the case was closed in 1994. During that period, court monitors evaluated NDOP mental health care system and recommended changes to the court, which approved various recommendations based upon an amended stipulated settlement agreement entered into by the parties in 1988.

Neither the agreements between the parties nor the relevant court orders entered in *Taylor v. Wolff* appear to address the subject of charging inmates for mental health care services rendered. It should be noted NDOP agreed its mental health care program would comply with standards of the American Correctional Association as set forth in the document entitled *Standards for Adult Correctional Institutions* (2d ed. 1981). Thus, to the extent these standards contained guidelines for charging copayments for mental health care, NDOP would have been obligated to follow them.

Notwithstanding *Taylor v. Wolff*, a plan to implement copayment charges for mental health care services to inmates would be subject to the same analysis set forth in this opinion for Question One and Question Two.

### CONCLUSION TO QUESTION THREE

A review of all court orders in the *Taylor v. Wolff* case revealed no restrictions or limitations on the ability of NDOP to impose copayment charges for mental health services. Copayment charges relating to mental health care would also be subject to the same analysis and guidelines as set forth in this opinion.

FRANKIE SUE DEL PAPA  
Attorney General

By: ANNE B. CATHCART  
Senior Deputy Attorney General

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OPINION NO. 96-11 REDEVELOPMENT AGENCIES; CITIES: Agency could not enact an administrative policy exceeding the statutory authority regarding class of persons entitled to certain

types of relocation assistance benefits. City council is appropriate body to determine the public benefit of entering into a long term lease with a private business on city owned property.

Carson City, April 25, 1996

The Honorable Patricia A. Lynch, Reno City Attorney, Post Office Box 1900, Reno, Nevada 89505-1900

Dear Ms. Lynch:

You have requested an opinion from this office based on the following facts:

On February 20, 1996, the City of Reno Redevelopment Agency (Agency) adopted its Relocation Policy pursuant to [NRS 342.045](#). The adopted policy included an amended section 28.2 which provided:

*The provisions of this section do not apply to month-to-month tenancies, unless the business has been in continuous operation for more than twelve (12) months prior to acquisition by the Agency. (Subject to approval by the Attorney General of the State of Nevada.)*

*Policies of Redevelopment Agency of the City of Reno to Provide Relocation Assistance and Make Relocation Payments to Persons Displaced From Their Dwellings or Business as a Result of Acquisition of Property by the Agency* (italicized portion is the amended language adopted by the Agency).

Subsequently, members of the Redevelopment Agency Board proposed that the City enter into a 5-year lease with a 2-year renewal option with Colombo's. Colombo's is a restaurant located in the city owned Riverside Garage and occupies the premises as a month-to-month tenant. The members also proposed that the Agency purchase the Riverside Garage after the Colombo's lease is executed. You have advised that under the Agency's current policy on use of eminent domain (adopted February 5, 1996), the Agency could not terminate the leasehold through eminent domain. Therefore, the Agency could not convey the property unencumbered by the lease to any private developer.

You have posed two questions regarding actions of the Agency and the City Council:

#### QUESTION ONE

Whether the Redevelopment Agency, in adopting its Relocation Policy, has the authority to alter, modify, or amend a statutory provision adopted by the legislature expressly excluding a month-to-month tenancy from receiving certain types of displacement benefits provided by [NRS 342.055](#).

#### ANALYSIS

We conclude the Agency was without authority to modify [NRS 342.055](#) in order to expand the class of persons eligible to receive certain relocation payments. While the Agency does have discretion to increase the amount of relocation benefits to which a displaced person or business is eligible, it does not have the discretion to create a new type of benefit for a displaced person or business for which there is no statutory entitlement. Additionally, the provision which makes the regulation subject to approval by the Attorney General of the State of Nevada is void since the Agency may not prescribe a duty for this state officer to perform.



[NRS chapter 342](#) was enacted by the 1995 Nevada Legislature as Assembly Bill 532. Act of July 5, 1995, ch. 603, § 1, 1995 Nev. Stat. 2232. The statutes relevant to this inquiry are [NRS 342.045](#), [NRS 342.055](#)(1) and (2), and [NRS 342.075](#)(2).

[NRS 342.045](#) provides:

Before undertaking a project that will result in the displacement of a natural person or a business, each governmental body shall adopt policies pursuant to [NRS 342.015](#) to [342.075](#), inclusive, to provide relocation assistance and make relocation payments to each person displaced from his dwelling or business establishment as a result of the acquisition of property in a manner substantially similar to and in amounts equal to or greater than those which are provided for in the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto.

[NRS 342.055](#) provides in part:

1. In addition to the relocation benefits provided pursuant to [NRS 342.045](#), each person who is displaced from his business establishment as a result of the acquisition of property by an agency created pursuant to chapter 279 of NRS or by any person or entity acting on behalf of, in cooperation with or under contract with such an agency, *and whose lease of the premises on which the establishment is situated is terminated as a consequence of the acquisition*, must be paid:

.....  
2. *The provisions of this section do not apply to month-to-month tenancies.* [Emphasis added.]

[NRS 342.075](#)(2) provides:

Notwithstanding the provisions of [NRS 342.015](#) to [342.065](#), inclusive, a governmental body may, if appropriate under the circumstances, pay to a displaced person an amount of benefits that exceeds the amounts set forth in [NRS 342.015](#) to [342.065](#), inclusive. The governmental body has sole discretion to decide whether benefits will be paid in an amount that exceeds the amounts set forth in [NRS 342.015](#) to [342.065](#), inclusive, and its decision on that matter is final.

It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act. *McKay v. Board of Supervisors of Carson City*, [102 Nev. 644](#), 648, 730 P.2d 438, 441 (1986), citing *Application of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535, 538 (1949). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *Cirac v. Lander County*, [95 Nev. 723](#), 728, 602 P.2d 1012, 1015 (1979); *Allstate Insurance Co. v. Pilosof*, [110 Nev. 311](#), 315, 871 P.2d 351, 354 (1994). "Additionally, in determining the meaning of a specific provision of an act, the act should be read as a whole." *Nevada Tax Comm'n v. Bernhard*, [100 Nev. 348](#), 350-51, 683 P.2d 21, 23 (1984); *White v. Warden*, [96 Nev. 634](#), 636, 614 P.2d 536, 537 (1980).

[NRS 342.045](#) provides relocation assistance benefits to a certain class of persons and businesses. Benefits allowed under [NRS 342.045](#) are provided in a manner similar to those provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 and the regulations adopted pursuant thereto.

Under section 26 of the Agency's relocation assistance policies, adopted in accordance with [NRS 342.045](#), types of relocation benefits which a person or business may receive include:

1. Transportation, packing, unpacking and storage up to 12 months of personal property;
2. Disconnecting, dismantling, removing, reassembling and reinstalling equipment, machinery, and personal property;
3. Replacement value insurance or payment of replacement value for property lost, damaged, or stolen during relocation;
4. Prorated payment of fees for licenses, permits, or certificates required for new location;
5. Relettering signs and replacing stationery;
6. Professional services for planning, moving, and installing property at new location;
7. Expenses connected with search for new location, up to \$1,000;
8. Expenses of selling property that is not relocated;
9. Purchase of substitute property; and
10. Other eligible moving expenses the Agency determines to be reasonable and necessary.

*Policies of Redevelopment Agency of the City of Reno, sec. 26.*

In addition to the relocation benefits available under section 26, a displaced small business is entitled to receive a payment, not to exceed \$10,000, for expenses actually incurred in relocating and reestablishing the business at the replacement site. The eligible reestablishment expenses include, but are not limited to:

1. Repairs or improvements to new location as required by statute, code, or ordinance;
2. Modifications to new location to accommodate business operation;
3. Constructing and erecting new signage and advertising for new location;
4. Redecorating or replacing worn or soiled surfaces at new location;
5. Licenses, fees, permits not paid as part of moving expenses;
6. Various surveys, testing, and studies;
7. Professional services connected with purchase or lease of new location;
8. Estimated increased cost of business operation for first two years for such items as leases or rental charges, property taxes, insurance, and utility charges;
9. Impact fees or one-time assessments for heavy utility usage; and
10. Other items considered by Agency to be essential to reestablishment of business.

*Policies of Redevelopment Agency of the City of Reno, sec. 27.* Note that sections 26 and 27 provide the same enumerated benefits as the federal relocation regulations found at 49 C.F.R. Part 24.303-.304 (1994).

[NRS 342.055](#) provides benefits *in addition* to those listed above for certain classes of businesses which have had leases terminated as a consequence of acquisition. Month-to-month tenants are, by plain statutory language, excluded from this class of persons. Under [NRS 342.055](#) and under section 28 of the Agency's policies, the types of displacement expense benefits which an eligible business might receive include:

1. Alterations and other physical changes required to be made to new location to make it suitable for the business operation;
2. Modifications to machinery, equipment and property relocated to new location, not to exceed cost of acquisition of the item less accumulated depreciation;
3. Prorated fees for licenses, permits, certificates required to operate business at new location;
4. Actual fees for professional services incurred in connection with acquiring new location, including attorneys, engineers, appraisers, realtors, and other consultants; and
5. The difference between the business' old rent and the rent required to lease a comparable location for a term equal to the period that remained on the old lease.

**OR**

The fair market value of the business if the business owner is unable to relocate to a comparable location because of a governmental regulation, ordinance or restriction, or because a comparable location is not available.

Not only does [NRS 342.055](#) provide for additional types of displacement payments for a long-term leaseholder, it also provides a unique fair market value payment for the business if the entity could not be relocated. In order to receive these unique benefits, the displaced business must be a long-term leaseholder, not a month-to-month tenant. When Colombo's did not preserve its long-term lease agreement, it lost the benefit of this classification.

The language of [NRS 342.055\(2\)](#) is clear and unambiguous. Month-to-month tenancies are expressly excluded from receiving the additional relocation benefits set forth in the statute. In this case, it is apparent from the act as a whole that the reestablishment benefits payable under [NRS 342.055](#) are *in addition to* the relocation benefits described in [NRS 342.045](#). Furthermore, the first paragraph of [NRS 342.055](#) refers to a person who is displaced from his business establishment *and whose lease of the premises is terminated as a consequence of the acquisition*. The language indicates that the legislative intent was to protect leaseholders who have cognizable property rights. A month-to-month tenancy is not within this class. A tenancy from month-to-month is not a continuing right of possession, but ends and recommences at the expiration of every month; each new month of a month-to-month tenancy is a separate contract. *See*, 49 Am. Jur. 2d *Landlord and Tenant* § 130 (1995).

The Agency cannot extend benefits by regulations to a class of persons not included within the authorizing statute. *Harris v. Lynn*, 555 F.2d 1357, 1358 (8th Cir. 1977).<sup>7</sup> An administrative agency has no authority to enact rules or regulations which alter or enlarge terms of legislative enactments. *California Sch. Emp. A. v. Personnel Comm'n of P.V.U.S.D.*, 474 P.2d 436, 439 (Cal. 1970). It may not, by its rules, amend, alter, enlarge, or limit the terms of a statute. *University of Oregon Co-Op. St. v. State, Dept. of Revenue*, 542 P.2d 900, 906 (Or. 1975); *Matter of George*, 579 P.2d 354 (Wash. 1978). When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict. *Idaho City. Nurs. Home v. Dept. of Health*, 821 P.2d 988, 992 (Idaho 1991). An agency regulation that is inconsistent with, and which goes beyond the specific language of the authorizing statute, is invalid. *Tullock v. State Highway Comm. of Missouri*, 507 F.2d 712, 716-17 (8th Cir. 1974).

[NRS chapter 342](#), which applies to all political subdivisions of the State of Nevada and their departments or agencies, is an act of the state legislature and is clearly a state law of general application. It sets forth conditions for providing relocation assistance and payments. The legislature specifically excluded month-to-month tenancies from eligibility for reestablishment benefits payable to dislocated businesses. [NRS 342.055\(2\)](#). If the legislature had wanted to provide an exception for businesses in existence more than 12 months, language to that effect could easily have been inserted in the statute. *State of Nevada Dept. of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988). When the language of a statute is plain and unambiguous, its ordinary meaning cannot be added to or extended. *Hartz v. Mitchell*, [107 Nev. 893](#), 897, 822 P.2d 667, 669 (1991).

The Reno City Council, acting as the Redevelopment Agency Board, was without power to enact a policy which expanded the class of those eligible for nonresidential displacement benefits to include certain month-to-month tenancies. The policy directly conflicts with the statute as enacted by the legislature in that it permits that which the statute forbids.

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<sup>7</sup> Interpreting HUD regulations promulgated under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*, the U.S. Court of Appeals, Eighth Circuit, said: "To the extent the regulations can be read to confer benefits not authorized by the Act's statutory provisions, they are beyond the agencies' delegated powers."

The Agency does have some flexibility in determining amount of benefits awarded to displaced persons or business. [NRS 342.075\(2\)](#) permits the Agency, if appropriate under the circumstances, to pay to a displaced person or business an amount of relocation benefits which exceed the amounts set forth in [NRS 342.015-.065](#), inclusive. Colombo's would be entitled to receive relocation assistance and relocation payments under [NRS 342.045](#). The Agency has discretion to determine whether the circumstances warrant paying Colombo's an amount in excess of the relocation payments authorized under [NRS 342.045](#). However, [NRS 342.075](#) does not authorize the Agency to expand the class of persons eligible for the nonresidential displacement benefits payable under [NRS 342.055](#).

Finally, the provision in the amended policy which states it is "subject to the approval of the Attorney General of the State of Nevada" is void. The powers and duties of the Attorney General are prescribed by the Nevada State Constitution and by state statutes. The Agency has not been delegated any power to prescribe a duty for this state officer.

## QUESTION TWO

Whether creation of a legal obligation on the part of the City or Agency in furtherance of a private interest which in this case would be the agreement for a long-term lease with Colombo's, with no apparent benefit to the public, constitutes a public purpose.

## ANALYSIS

The issue presented is whether the City of Reno may execute a 5-year lease with Colombo's prior to the City conveying the Riverside Garage to the Agency.

The Charter of the City of Reno states the City Council may acquire, control, improve, and dispose of any real or personal property for the use of the city, its residents and visitors. Reno City Charter § 2.140(1).

As a general proposition, the governing board of a local government has discretion to lease publicly owned property and to make arrangements for the management, control, and maintenance of the property, provided the public interest is served thereby. 10 McQuillin, Municipal Corporations, § 28.42 (3rd ed. 1988). It is not within the purview of this office to make a determination whether a particular lease of municipally owned realty creates a public benefit. The City Council is empowered to control city owned property, and it is within the City Council's powers to make the determination whether the public interest is served by executing a long-term lease with Colombo's.

## CONCLUSION TO QUESTIONS ONE AND TWO

The Redevelopment Agency lacked the authority or the power to amend [NRS 342.055](#) to include certain month-to-month tenants within the class of persons eligible to receive certain displacement benefits in addition to the relocation benefits provided under [NRS 342.045](#). While the Agency has some discretion under [NRS 342.075\(2\)](#) to increase amounts of benefits to displaced persons or businesses, it does not have discretion to award a new type of benefit to a displaced person or business that does not qualify for such a category of benefits. Finally, the Reno City Council is the governing body with discretion to lease city owned property and to determine whether granting a long-term lease creates a public benefit.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-12SHERIFFS: Sheriff's duties within a city involve the same express statutory duties as that officer performs elsewhere throughout the county.

Carson City, May 6, 1996

The Honorable John Hanford, White Pine County District Attorney, White Pine County Courthouse, Post Office Box 240, Ely, Nevada 89301

Dear Mr. Hanford:

On December 8, 1995, our office issued a legal opinion upon your request. In that opinion we concluded the sheriff had a duty to keep and preserve peace throughout the county and that such jurisdictional right and duty included performance of such services within an incorporated city located within said county. You have now asked a follow-up question on the same matter.

#### QUESTION

In the absence of an interlocal agreement, what specific mandated duties does the sheriff have to an incorporated city which has neither maintained its own local police force nor formed a metropolitan police force?

#### ANALYSIS AND CONCLUSION

The sheriff holds an office created through the State Constitution. Nev. [Const. art. 4, § 32](#) sets forth in part that the legislature shall fix by law duties and compensation of the sheriff. The sheriff's powers and duties are generally created by expressed legislative enactment, by common law, and by implied powers reasonably necessary to carry out express provisions. See *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993).

As noted in our prior legal opinion, the sheriff's authority is county-wide. Thus, the simple answer to your present question is that the sheriff's duties within a city involve the same express statutory duties as the sheriff performs elsewhere throughout the county. The sheriff's duty to provide services within a city is discussed in the case of *State v. Williams*, 144 S.W.2d 98 (Mo. 1940) as follows:

His authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the state has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. Usage cannot alter the law. It is self evident that a custom or usage repugnant to the express provision of a statute is void. A policeman is an officer whose duties have been, for local convenience, carved out of the old duties of constable, and the constables were always part of the general force at the disposal of the sheriff. There is no division of authority into those of the sheriff and the police. Each is a conservator of the peace possessing such power as the statutes authorize. . . . In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony. In the larger communities where dense population has increased the hardship of proper law enforcement police departments have developed scientific methods

of crime detection and prevention. Larger means and a greater number of men are available to a local police department than to the county sheriff. Methods of rapid communication and transit are provided. Under these circumstances the sheriff may leave local enforcement in local hands, but only so long as reasonable efforts in good faith are made to enforce the law.

The courts have taken cognizance of the development of local enforcement agencies. It has been held, and correctly so, that a sheriff may assume that a city police department will do its duty in enforcing the law and hence will not be guilty of any serious neglect of duty if he gives little attention to police matters in such city. But this rule has a proper qualification. If the sheriff has reason to believe that the police force is neglecting its duty it is his duty to inform himself. And if he knows that the police are ignoring or permitting offenses his duty to prevent and suppress such offenses is the same as it would be if there was no municipality and no police force. . . .

*Id.*, at 104-105 (citations omitted). Thus, the sheriff must perform express statutory duties even if those acts are to occur within an incorporated city. The sheriff must keep and preserve the peace. [NRS 248.090](#). The sheriff must serve warrants and process for the courts of the state. Statutes reflect that the sheriff must perform such service of warrants and process even for municipal courts. [NRS 5.060](#); [NRS 248.100](#). Other statutory duties are spread throughout the chapters and are too numerous and varied to be fully described herein.

As stated in our prior opinion, the sheriff is vested with discretion in determining how the limited resources of the office will be used throughout the county.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-13 LAW ENFORCEMENT; PUBLIC UTILITIES: A telecommunications company is required to disclose to the head of the requesting law enforcement agency the name and address of the person listed in the records of customers held by the company.

Carson City, May 22, 1996

Mr. John Drew, Chief, Nevada Division of Investigation, 555 Wright Way Carson City, Nevada 89711

Dear Chief Drew:

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

QUESTION

Does state law permit release of nonpublished subscriber information held by a telecommunications company upon the written request of a chief executive law enforcement officer to further a criminal investigation?

ANALYSIS

## A. Background

The legislature conferred on the Public Service Commission power to regulate public utilities. See [NRS 704.001](#). In 1989, the legislature amended [NRS chapter 704](#) by requiring disclosure of certain customer information listed in the records of a public utility upon written request of a head of a law enforcement agency.

Accordingly, the Nevada Division of Investigations (NDI) routinely seeks cooperation of telephone companies in obtaining subscriber information during the early stages of an investigation into purported criminal activity when NDI is without sufficient information to obtain a search warrant and is further precluded from obtaining customer information by subpoena as no charges have been filed. This becomes the only avenue available in obtaining information. Lack of cooperation by a telephone company can frustrate law enforcement efforts in moving forward with an investigation.

It is my understanding that the current inquiry stems from the reluctance of certain telephone companies to disclose information pertaining to nonpublished subscribers as these customers pay an additional fee to ensure their privacy.

## B. Statutory Interpretation

There is nothing in [NRS chapter 704](#) prohibiting release of nonpublished (unlisted) customer information to law enforcement for the purpose of furthering an investigation. Specifically, [NRS 704.201](#) provides:

1. To further a criminal or civil investigation, the chief executive officer of any law enforcement agency of this state or a command officer designated by him may submit a written request to a public utility that the name and address of a person listed in the records of the customers of the public utility be disclosed to the agency.
2. The request must:
  - (a) If available, contain the social security number of the person about whom the request is made;
  - (b) Contain a statement that the request is made to further a criminal or civil investigation being conducted by the agency; and
  - (c) Be signed by the chief executive officer of the law enforcement agency or the command officer he has designated.
3. As used in this section, "command officer" means an officer in charge of a department, division or bureau of the law enforcement agency.

"Public utility" for purposes of [NRS chapter 704](#) includes in its definition "[t]elephone companies and other companies which provide telecommunication or a related service to the public." [NRS 704.020\(1\)\(b\)](#).

Further, [NRS 704.202\(1\)](#) makes disclosure by the public utility mandatory. "Upon receipt of a request by a law enforcement agency pursuant to [NRS 704.201](#), a public utility shall disclose the name and address of the person listed in the records of customers of the public utility to the agency."

It is a fundamental principle of statutory construction that statutes should be construed to give effect to the legislative intent. *Sheriff v. Morris*, [99 Nev. 109](#), 117, 659 P.2d 852, 858 (1983). Such intent is to be gleaned from reading the entire statute. *A Minor v. Clark County Juvenile Court Services*, [87 Nev. 544](#), 548, 490 P.2d 1248, 1250 (1971). Moreover, "statutes should be construed in order to validate each provision of the statute." *Sheriff v. Morris*, 99 Nev. at 117.

Reading the relevant provisions of [NRS chapter 704](#) conjunctively, it is apparent that the legislature intended to include a telephone company subjecting it to the disclosure provisions of [NRS 704.201](#), *et seq.*

Equally fundamental is the rule of statutory construction that "[w]hen a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." *Building and Construction Trades Council of Northern Nevada v. Public Works*, [108 Nev. 605](#), 610, 836 P.2d 633, 636 (1992). Plainly stated, "[i]f a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent." *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17, 19 (1984). The language found in [NRS 704.201](#) and [704.202](#) is clear and unambiguous.

Moreover, the statutory provisions do not distinguish between nonpublished and published subscriber information. Had the legislature intended to limit access by law enforcement to published subscriber information, it could have done so by inserting language to that effect. *See generally State Department of Motor Vehicles and Public Safety v. Brown*, [104 Nev. 524](#), 762 P.2d 882 (1988). It chose not to do so. A telephone company is required to disclose to law enforcement certain customer information contained in its customer records.

Inherent in these statutory provisions are certain protections afforded the customer, apparently to prevent abuses by law enforcement. [NRS 704.201](#) and [NRS 704.202](#) restrict disclosure of customer information to either the chief executive officer of the law enforcement agency or a designated command officer. Even then, the information disclosed is limited to only the customer's name and address. [NRS 704.201](#) and [NRS 704.202](#).

The legislature further chose to afford the public utility certain protection, namely from liability: "A disclosure made in good faith pursuant to subsection 1 does not give rise to any action for damages for the disclosure of the name and address of a customer by a public utility." [NRS 704.202\(3\)](#). If the legislature chose to limit law enforcement access to published customer information only, the argument can be made that there would be no need to afford the public utility immunity from liability as published customer information is readily available to the public. The better interpretation is that the legislature intended that law enforcement have access to both published and nonpublished customer information. "Statutes must be given reasonable construction with a view to promoting rather than defeating the legislative policy behind them." *State, Department of Motor Vehicles and Public Safety*, 104 Nev. at 526.

Finally, statutes enacted in the exercise of police power are presumed to promote the public welfare and are further presumed to be valid. *Koscot Interplanetary, Inc. v. Draney*, [90 Nev. 450](#), 456, 530 P.2d 108, 112 (1974). There can be no dispute that provisions of [NRS chapter 704](#) were enacted to promote public welfare by permitting law enforcement access to customer information in furtherance of an investigation.

## CONCLUSION

It is clear from the plain language of these statutory provisions that a telecommunications company is required to disclose to the head of the requesting law enforcement agency the name and address of the person listed in the records of customers held by the company.

FRANKIE SUE DEL PAPA  
Attorney General

By: MARIAH L. SUGDEN  
Senior Deputy Attorney General



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OPINION NO. 96-14CREDITS; PRISONERS; PROBATION; RESIDENTIAL CONFINEMENT: Prisoners are not entitled to credit for time served in residential confinement as a condition of probation.

Carson City, May 22, 1996

Mr. Robert Bayer, Director, Nevada Department of Prisons, Post Office Box 7011, Carson City, Nevada 89702

Dear Mr. Bayer:

You have requested an opinion from this office regarding applicability of [NRS 209.446](#) to persons who have been sentenced to probation with a condition of residential confinement.

#### QUESTION ONE

Does [NRS 209.446](#) apply to persons who have been sentenced to probation with a condition of residential confinement?

#### ANALYSIS

[NRS 209.446](#) grants "good time" credits to prisoners incarcerated within the Nevada Department of Prisons. [NRS 209.446\(1\)](#) provides:

1. Every offender who is sentenced to *prison* for a crime committed on or after July 1, 1985, who has no serious infraction of the regulations of the department, the terms and conditions of his residential confinement, or the laws of the state recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, must be allowed:

(a) . . . .

(b) For the period he is in residential confinement, a deduction of 10 days from his sentence for each month he serves. [Emphasis added.]

[NRS 209.432](#) defines an *offender*, as used in [NRS 209.433](#)-.451, as "a person who is convicted of a *felony* under the laws of this state and sentenced, ordered or otherwise assigned to serve a term of residential confinement." *Residential confinement* is defined as "the confinement of a person convicted of a felony to his place of residence under the terms and conditions established pursuant to specific statute. The term does not include any confinement ordered pursuant to [NRS 176.2155](#), [176.219](#), 176.2231 to 176.2237, 213.15105, 213.15193 or 213.152 to 213.1528, inclusive." *Id.*<sup>8</sup> However, [NRS 209.429](#) provides for assignment of offenders to residential confinement by the director of the department of prisons under certain circumstances.

Chapter 209 also cross-references [NRS 4.3762](#) and [5.076](#). [NRS 4.3762](#) permits a justice court to "sentence" a person convicted of a *misdemeanor* to residential confinement. [NRS 5.076](#) permits a municipal court to sentence a person convicted of a *misdemeanor* to residential confinement. However, [NRS 209.446](#) pertains only to persons convicted of a *felony*. See [NRS 209.432](#).

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<sup>8</sup> NRS 176.2155 pertains to residential confinement of an alleged *probation violator* by parole and probation pending preliminary inquiry. NRS 176.2231 - .2237 pertain to the court-ordered residential confinement of a person who violates a condition of his probation, in lieu of imposing the sentence to be executed. NRS 213.15105, 213.15193, 213.152-.1528 pertain to residential confinement of a *parole violator* by the parole board either pending inquiry or in lieu of suspending his parole and returning him to confinement.

In short, chapter 209 does not specifically refer to, nor does it exclude, residential confinement or intensive supervision as a condition of probation where execution of a sentence of imprisonment has been suspended pursuant to [NRS 176.185](#). However, the Nevada Supreme Court has held that where probation is revoked, a person is not entitled to credit against a prison sentence for time served in residential confinement. "[A person] is not entitled to credit for time spent on probation outside of incarceration. *Van Dorn v. Warden*, [93 Nev. 524](#), 569 P.2d 938 (1977). The imposition of residential confinement as a condition of [a person's] probation is insufficient to change the character of his probation from a conditional liberty to actual confinement." *Webster v. State*, [109 Nev. 1084](#), 1085, 864 P.2d 294 (1993).

Review of the relevant statutes indicates that [NRS 209.446](#) pertains to offenders who have served in residential confinement pursuant to [NRS 209.429](#) under the control and direction of the Nevada Department of Prisons. Inmates on probation are not under the control and/or custody of the Nevada Department of Prisons.

### CONCLUSION TO QUESTION ONE

[NRS 209.446](#) does not apply to persons who have been sentenced by a court to probation with a condition of residential confinement. Offenders who have served time in residential probation as a condition of probation are not entitled to credit against their prison sentence when probation is revoked.

### QUESTION TWO

Is residential confinement as a condition of probation considered time served prior to conviction, entitling an inmate to credit, as in [NRS 176.055](#)?

### ANALYSIS

Under [NRS 176.055](#), a defendant may have credit against a sentence of imprisonment for time served in confinement prior to conviction of a crime. [NRS 176.055](#)(2) provides:

A defendant who is convicted of a subsequent offense which was committed while he was:

.....

(b) Imprisoned in a county jail or state prison or on probation or parole from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement which is within the period of the prior sentence, regardless of whether any probation or parole has been formally revoked.

This statute makes it clear that a person is not entitled to credit for confinement which resulted from an unrelated offense. If a person is convicted of a subsequent offense while he is on probation, he is not entitled to credit for any time served prior to conviction of the subsequent offense during the period of probation. Thus, it follows that a person who spends time in residential confinement *as a condition of probation* would not be entitled to credit for that time served prior to conviction of a subsequent offense because the residential confinement resulted from an unrelated offense and is excluded from sentence credit by [NRS 176.055](#). "Only incarceration pursuant to a charge for which sentence is ultimately imposed can be credited against that sentence." *McMichael v. State*, [94 Nev. 184](#), 194, 577 P.2d 398, 404 (1978). "[NRS 176.055](#) exempts from sentence credit 'confinement . . . pursuant to a judgment of conviction for another offense.'" *Dearing v. State*, [90 Nev. 297](#), 298, 525 P.2d 601 (1974); *see also Webster v. State*, [109 Nev. 1084](#), 864 P.2d 294 (1993) (defendant whose probation is revoked is not entitled to credit for time spent on probation outside of incarceration).

## CONCLUSION TO QUESTION TWO

Residential confinement as a condition of probation is not considered time served prior to conviction entitling an inmate to credit under [NRS 176.055](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: CAMERON P. VANDENBERG  
Deputy Attorney General

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OPINION NO. 96-15ETHICS; FINANCIAL DISCLOSURE: Department heads and staff directors who serve at the pleasure of the county manager and county board of supervisors do not need to file financial disclosure statements pursuant to [NRS 281.561](#).

Carson City, May 28, 1996

Mr. S. Mahlon Edwards, County Counsel, Office of the District Attorney  
Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Edwards:

You have asked whether employees of Clark County who are designated department heads and staff directors are "public officers" under [NRS 281.4365](#) so that they would be required to file financial disclosure statements as required by [NRS 281.561](#). The brief answer to your question is that such employees do *not* need to file financial disclosure statements. Our analysis follows.

### QUESTION

Are Clark County's department heads and staff directors "public officers" as defined in [NRS 281.4365](#) who would be required to file financial disclosure statements pursuant to [NRS 281.561](#)?

### ANALYSIS

In Op. Nev. Att'y Gen. No. 193 (September 3, 1975) (AGO 193), this office opined the definition of "public officer" under [NRS 281.005](#) and an earlier version of the Nevada Ethics in Government Law. In that opinion, we discussed the difference between public officers and public employees in pertinent part as follows:

Persons who hold the position of deputies and assistants in state and local government agencies would also be considered employees, because they may exercise only such authority and powers as their principals may see fit to grant them. It is true that many statutes which authorize positions for deputies and assistants state that they may exercise all the powers of their principals, but the principal has the responsibility for the agency and may permit the deputies or assistants to exercise full or only such partial authority as he sees fit. Exercise of the authority, in other words, depends upon the will or pleasure of the principal. As such, a deputy or assistant is wholly subordinated and responsible to his superiors.

Neither passage of time nor the slight differences between [NRS 281.005](#) and [NRS 281.4365](#) require us to alter our analysis in AGO 193. It is clear from Clark County Code 2.40.100 that

Clark County's department heads and staff directors are *not* "public officers" under [NRS 281.4365](#) because, like the deputies and assistants discussed in AGO 193, their authority is dependent upon "the will or pleasure of the principal," i.e., the county manager and the county commission. Therefore, Clark County's department heads and staff directors need not file financial disclosure statements according to [NRS 281.561](#).

#### CONCLUSION

Clark County's department heads and staff directors are not "public officers" under [NRS 281.4365](#) and are not required to file financial disclosure statements according to [NRS 281.561](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

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OPINION NO. 96-16 COUNTIES; ELECTIONS; SECRETARY OF STATE: Procedures to follow to fill county office if county officer dies.

Carson City, June 25, 1996

Mr. Leon Aberasturi, Deputy District Attorney, Office of the Lander County District Attorney, Post Office Box 187, Battle Mountain, Nevada 89820

Dear Mr. Aberasturi:

You have requested an opinion from this office regarding the procedure for filling a vacancy occurring in the office of the county assessor.

#### FACTS

The office of Lander County Assessor has recently become vacant due to the death of the assessor. The office of county assessor has not been designated "nonpartisan."

[NRS 245.150](#) requires the clerk of the board of county commissioners to certify to the Secretary of State that a vacancy has occurred in a county office and the county commissioners declare the office vacant. [NRS 245.160](#). The procedure for filling the vacancy is found in [NRS 250.040](#) which provides as follows:

In case of a vacancy in the office of the county assessor . . . the board of county commissioners shall appoint some suitable person possessing the qualifications of an elector, residing within such county, to fill the vacancy. The person thus appointed shall give bond and take the oath of office prescribed by law that is required of county assessors elected by the people, and shall hold his office until the next ensuing biennial election.

The office of county assessor would not normally appear on the ballot in 1996. The official declaration of the vacancy did not occur until after the statutory close of filing, June 4, 1996. [NRS 293.177](#)(1).

#### QUESTION ONE

May the county commissioners consider the political party of the applicants who apply to fill the position of county assessor?

#### ANALYSIS

The language in [NRS 250.040](#) is clear as to the qualifications of a suitable person to be appointed as county assessor. The person must be a qualified elector and must reside within the county. A "qualified elector" is defined in article 2, § 1 of the Nevada Constitution and is not synonymous with "qualified voter." *Caton v. Frank*, [56 Nev. 56](#), 71-72, 44 P.2d 521 (1935); *State ex rel. Schur v. Payne*, [57 Nev. 286](#), 291-92, 62 P.2d 921 (1937). Registering to vote is not a criterion to be a qualified elector. *Id.*

Membership in a political party is not a qualification for a person to be appointed as the county assessor.

#### CONCLUSION TO QUESTION ONE

The county commissioners may not consider the political party of the applicants who apply to fill the position of county assessor.

#### QUESTION TWO

Must the vacancy be filled in the general election set in November 1996?

#### ANALYSIS

[NRS 250.040](#) is clear the person appointed county assessor will only hold the position until the next biennial election. The next biennial election is the general election in November 1996. The county commissioners can fill the vacancy by appointment, but the appointee will only hold the position until the general election. As a practical matter, the appointee will hold office until January 6, 1997. [NRS 250.010](#)(2) and 245.170.

The person elected county assessor at the general election in November 1996 will hold office for the remainder of the unexpired term. [NRS 250.010](#)(2); Op. Nev. Att'y Gen. No. 237 (November 9, 1918).

#### CONCLUSION TO QUESTION TWO

The office of county assessor must be filled by election at the general election in November 1996.

#### QUESTION THREE

What are the procedures for candidates to use to place their names on the general election ballot?

#### ANALYSIS

Normally, a candidate files a declaration of candidacy with the appropriate filing officer. The filing deadline for major party candidates to file a declaration of candidacy was June 4, 1996. [NRS 293.177](#)(1). The filing deadline for minor party candidates to file a declaration is July 3, 1996. [NRS 293.1725](#)(3). And the deadline for independent candidates is also July 3, 1996. [NRS 293.200](#)(10).

Since the vacancy was certified after the close of filing for major party candidates, the procedure outlined in [NRS 293.165\(1\)](#) should be followed for major parties to nominate a candidate for this office. The county central committee for the major parties may designate a candidate whose name will appear on the general election ballot. This designation must be made by September 10, 1996. [NRS 293.165\(5\)](#).

Minor parties which are qualified to place names of candidates on the general election ballot pursuant to [NRS 293.1715\(2\)\(a\)](#) or (b) may nominate a candidate by submitting the name of the candidate to the Secretary of State by June 28, 1996. [NRS 293.1725\(1\)\(b\)](#). The candidate must then file a declaration of candidacy by July 3, 1996. [NRS 293.1725\(3\)](#).

Other minor parties not qualified for ballot access may nominate a candidate by submitting the name of the candidate to the Secretary of State by June 28, 1996, and following the petition procedure in [NRS 293.1715](#). The petition for minor party ballot access must be submitted for signature verification by July 11, 1996. [NRS 293.172\(1\)\(c\)](#).

Independent candidates may also file for this office. An independent candidate must file a declaration of candidacy by July 3, 1996, ([NRS 293.200\(10\)](#)) and submit an independent candidate petition for signature verification to the county clerk by July 11, 1996. [NRS 293.200\(2\)](#) and (4); [NRS 293.1276](#)-.1279.

#### CONCLUSION TO QUESTION THREE

The procedures for candidates to use to place their names on the general election ballot are as follows: major party candidates are nominated by the major party county central committee by September 10, 1996; minor party candidates file a declaration of candidacy by July 3, 1996, (if the minor party is not qualified for ballot access, a minor party petition must also be submitted by July 11, 1996); and independent candidates must file a declaration of candidacy by July 3, 1996, and submit an independent candidate petition by July 11, 1996.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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**OPINION NO. 96-17TAXES; LOCAL GOVERNMENT; PUBLIC UTILITIES; FEES:** The state and its agencies are immune from paying the franchise taxes or fees imposed by local governments on public utility companies providing services within the county or incorporated city pursuant to [NRS 244.335\(1\)\(b\)](#) and [NRS 268.095\(1\)\(a\)](#) and billed to the state as a customer of the utility in the absence of a specific statutory waiver of that immunity. The state and its agencies are not immune from bearing the economic burden of a franchise fee imposed on a utility under the provisions of [NRS 709.110](#) and [NRS 709.230](#).

Carson City, July 1, 1996

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

Dear Mr. Comeaux:

In your memorandum of February 8, 1996, to this office you indicated your office has received inquiries about various “franchise” fees or local taxes that are separately described on bills for services provided by various local utilities to state agencies. These fees and taxes have been routinely paid by the state in the past. You provided this office with several examples of bills received from utility companies which depict separate charges for a franchise fee or a local tax in addition to the charge for provided services. Accordingly, you have requested an opinion from this office on the following question:

### QUESTION

Are state agencies exempt from paying franchise fees or similar types of local taxes or fees that are passed on by local utility companies in their bills for services provided to the state agencies?

### ANALYSIS

Local governments are empowered to grant franchises to utility companies pursuant to provisions of ch. 709 of the Nevada Revised Statutes. Under the franchise agreement with the local government, a utility is required to make a payment to the county school district fund of an amount equal to 2 percent of its net profits. See [NRS 709.110](#); [NRS 709.230](#).

Local governments are also authorized by statute to “fix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on [all] trades, callings, industries, occupations, professions and businesses.” [NRS 244.335](#)(1)(b); [NRS 268.095](#)(1)(a). This authority includes imposing license taxes on utility companies operating in the city or county for the purpose of raising revenue, unless the specific franchise agreement between the local government and the utility precludes them. See *City of N. Las Vegas v. Cent. Tel. Co.*, [85 Nev. 620](#), 622-23, 460 P.2d 835-36 (1969).

In 1995 the legislature enacted legislation designed to clarify ch. 354 of Nevada Revised Statutes pertaining to authority of local governments to impose license fees and taxes on public utilities operating in the local jurisdiction. See Act of July 5, 1995, ch. 591, §§ 1-11, 1995 Nev. Stat. 2187. The amount of the business license fee on public utilities that a local government may impose is limited by provisions of [NRS 354.59883](#). The total measure of all fees (as defined in [NRS 354.59881](#)(2)) can be no more than 5 percent of the gross revenues that the utility derives from services provided within the jurisdiction of the city or county. [NRS 354.59883](#)(3)(b). The ordinance imposing the fee cannot alter the terms of any franchise agreement between the local government and the utility. [NRS 354.59883](#)(1).

It is apparent that the fees which local governments are authorized to impose on public utilities are intended primarily for general revenue raising purposes, not for the purpose of regulating these industries. Accordingly, these fees are in substance “taxes” designed for the general support of the local government. See *Cotton States Mut. Ins. Co. v. DeKalb County*, 304 S.E.2d 386, 387 (Ga. 1983); *Consol. Coal Co. v. Emery County*, 702 P.2d 121, 123 (Utah 1985); *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 105 S.E.2d 260, 272-73 (W.Va. 1958).

[NRS 354.59887](#) governs how the fees imposed on public utilities are to be collected as follows:

1. The entire amount of any fee to which the ordinance applies must be imposed at the same rate upon each public utility that provides similar services within the jurisdiction of the city or county.
2. The city or county:
  - (a) Shall require the quarterly payment of all fees imposed upon each public utility to which the ordinance applies.

(b) May, to the extent it determines that it is impracticable to collect from a public utility to which the ordinance applies any of the fees it imposes upon the public utility, collect any of those fees directly from the customers of the public utility located within the jurisdiction of the city or county in proportion to the amount of revenue the public utility derives from each of those customers.

(c) May, except as otherwise provided in this paragraph, assess combined penalties and interest of not more than 2 percent per month of the delinquent amount of any fee to which the ordinance applies. If a city annexes any land, it may not assess any penalties or interest pursuant to this paragraph regarding any fee imposed for the operation of a public utility within the annexed land during any period:

(1) Before the effective date of the annexation; or

(2) More than 30 days before the city provides the public utility with notice of the annexation, whichever occurs later.

3. A public utility to which the ordinance applies shall, except for any fees collected by the city or county pursuant to paragraph (b) of subsection 2, collect the aggregate of all its fees imposed by the city or county directly from its customers located within the jurisdiction of the city or county in proportion to the amount of revenue the public utility derives from each of those customers. The fees may be shown on a customer's bill individually or collectively.

Terms of this statute suggest the legislature envisioned a collection scheme whereby the fees imposed on public utilities would be borne ultimately by customers of the public utilities. The statute even provides for a local government to collect the fees directly from the customers of the utility if it is “impracticable” to collect them from the utility. Accordingly, under the recently enacted statutory scheme, the local government could bill the state directly for the fees it ostensibly imposes on the public utilities. There are no statutes in chs. 354, 244, or 268 of Nevada Revised Statutes that specifically exempt a federal, state, or local governmental entity from paying any of utility franchise fees, taxes or license fees, or taxes imposed by local governments that are passed through to the government as a consumer of those services by the utility. However, the issue to resolve is not whether the state is exempt from paying these fees, but whether the state is *immune* under principles of sovereign immunity from paying these fees.

There is a presumption that the legislature does not intend to subject publicly owned property to taxation by the state or local governments, and that such property is impliedly immune from taxation unless an intention to tax such property is clearly manifested. *State v. Lincoln County Power Dist.*, [60 Nev. 401](#), 407, 111 P.2d 528, 530 (1941). The weight of authority seems to indicate that in those jurisdictions that recognize an implied state immunity from taxation in the absence of express statutory authority, the same is true of excise taxes imposed by a local government on the state or its political subdivisions. *King County v. City of Algona*, 681 P.2d 1281, 1283 (Wash. 1984); *City of Tempe v. Ariz. Bd. of Regents*, 461 P.2d 503, 504 (Ariz. App. 1969); *Dickinson v. City of Tallahassee*, 325 So.2d 1, 3 (Fla. 1975); *Commonwealth Edison Co. v. Community Unit Sch. Dist. No. 200*, 358 N.E.2d 688, 692 (Ill. App. 1976); *cf. Waukegan Community Unit Sch. Dist. 60 v. Waukegan*, 447 N.E.2d 345, 350-51 (Ill. 1983) (wherein the court explained that in Illinois there is no established concept of implied state or local governmental immunity from taxation, including property tax). While the legislature typically has indicated its intent by expressly exempting state and local governments from those taxes it believes these governments should be exempted from, including property taxes (*see, e.g., NRS 372.325, NRS 361.055, NRS 361.060, and NRS 364A.020(3)(b)*), under sovereign immunity analysis reliance on a statutory exemption is immaterial. *Dickinson*, 325 So.2d at 3; *King County*, 681 P.2d at 1283. Thus, absent an express waiver of that immunity by statute or constitutional provision, a local government is generally held to be without the power to impose a tax on the state. *Dickinson*, 325 So.2d at 3 (a case invalidating a local ordinance that imposed a 10 percent tax on the purchase of utility services as applied to purchases made by state agencies); *but see Manhattan & Queens Fuel Corp. v. County of Nassau*, 497 N.Y.S.2d 843 (N.Y. App. Div. 1986), (wherein the court reviewing



legislative history of a state fuel tax concluded legislature intended to tax fuel sales to state agencies).

The next issue is whether the statutory scheme for the business license fees on public utilities constitutes a tax imposed on the state agencies. This issue requires a consideration of where the legal incidence of the tax falls. While the statutory scheme in [NRS 354.59887](#) places the primary burden of collecting and remitting the fee on the public utilities, there are two aspects of this statute that suggest the true legislative intent was to lay this tax on the utility customers. First, the statute *requires* the utilities to pass on the fees to their customers. Second, the customers of the public utilities may be billed for the fees *directly* by the local government if it is impracticable to collect the fees from the utility. This latter provision might be applicable in the situation where the franchise agreement between the local government and the utility prohibits imposition of a license fee on the utility in addition to the franchise fee provided for in [NRS 709.110](#) and [NRS 709.230](#). It is uncertain whether this provision would authorize the local government to pursue collection from the customers whenever payment was not received from the utility. However, the legislative history of this statute does not reveal any statements that explain why this provision was included.

In *Commonwealth Edison*, a case involving a municipal utility tax, the court concluded that where the statute specifically levied the tax on the utility companies, the legal incidence falls on the utilities, despite the fact that the economic burden of the tax was contemplated to be passed on to the customers of the utilities. The court noted that if the tax is not remitted by the utility, the city cannot pursue collection from the customers. The court also noted that the pass-through was not actually required by law, even though it is passed through in practice. Thus, the municipal utility tax examined in *Commonwealth Edison* was held to be valid because the pass-through of the tax was not mandatory, nor was the city given statutory authority to collect the tax directly from the customers (for example, the state.) *Commonwealth Edison*, 358 N.E.2d at 692-93. On the other hand, in *First Nat'l Bank of Stillwater v. Oklahoma ex. rel. Tax Commission*, 466 P.2d 644, 646 (Okla. 1970), the court held that the legal incidence of the Oklahoma sales tax fell on the purchaser where the vendor was statutorily required to collect the tax from the purchaser.

The Nevada sales tax is imposed on retailers of tangible personal property. [NRS 372.105](#). However, the tax is to be collected from consumers insofar as it can be done. [NRS 372.110](#). The Nevada Supreme Court has implied in the sales tax context that the legal incidence of the tax is on the purchaser, at least where the federal government is the purchaser of tangible personal property. As a result, the court held that the sale could not be taxed due to the constitutional immunity of the federal government from state taxation. *See Scotsman Mfg. Co. v. State, Dep't of Taxation*, [107 Nev. 127](#), 134, 808 P.2d 517, 521 (1991), *cert. denied* 502 U.S. 1100, 112 S. Ct. 1184 (1992).

Given the obvious legislative mandate for the customers of the utilities to bear the burden of paying the business license fees on utilities imposed under [NRS 244.335\(1\)\(b\)](#), [NRS 268.095\(1\)\(a\)](#), and [NRS 354.59881-.59889](#), inclusive, it is our opinion that the state and its political subdivisions are immune from having to remit these fees either to the utility companies or to the local governments directly in the absence of an express waiver of that immunity by the legislature. On the other hand as a result of the absence of any statutory requirement to collect franchise fees from its customers, to the extent that the economic burden of franchise fees imposed under the provisions of [NRS 709.110](#) and [NRS 709.230](#) are passed on to the state as a customer of a utility, the state is not immune from paying them.

## CONCLUSION

The state and its agencies are immune from paying the franchise taxes or fees imposed by local governments on public utility companies providing services within the county or incorporated city pursuant to [NRS 244.335\(1\)\(b\)](#) and [NRS 268.095\(1\)\(a\)](#) and billed to the state as a customer of the utility in the absence of a specific statutory waiver of that immunity. The state and its agencies are

not immune from bearing the economic burden of a franchise fee imposed on a utility under the provisions of [NRS 709.110](#) and [NRS 709.230](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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OPINION NO. 96-18TAXES; PENALTIES; PROPERTY: A person who seeks relief from penalties imposed pursuant to provisions of [NRS 361.483](#) must make application to the Nevada Department of Taxation. The Nevada Department of Taxation has the sole authority by statute to consider waiver or reduction of tax penalties imposed under [NRS 361.483](#).

Carson City, July 3, 1996

Mr. James I. Barnes, Deputy District Attorney, Washoe County District Attorney's Office, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Barnes:

By your letter of May 14, 1996, you have informed me that an issue has arisen with respect to whether a person who wishes to assert a claim for refund of a property tax penalty must file the claim with the Nevada Department of Taxation. In that regard, you have requested an opinion from this office in answer to the following question:

QUESTION

Must a person who desires to seek a waiver or refund of a property tax penalty file a claim with the Nevada Department of Taxation?

ANALYSIS

Property taxes are imposed pursuant to provisions of ch. 361 of Nevada Revised Statutes. According to [NRS 361.483](#), property taxes on real property may be paid in installments as provided in that statute. Failure to make a timely installment payment of property taxes subjects the taxpayer to a penalty of 4 to 7 percent. [NRS 361.483](#)(5). Failure to pay property taxes on a mobile home results in imposition of penalties of 10 percent or more. [NRS 361.483](#)(6). The *ex officio* tax receiver for each county is required to notify every person who may be subject to the penalties imposed pursuant to the foregoing sections of [NRS 361.483](#) of the existence of the person's rights to seek relief under [NRS 360.410](#) and [NRS 360.419](#). See [NRS 361.483](#)(7).

In accordance with [NRS 361.483](#)(7), the Washoe County Treasurer places the notice on each tax bill mailed. However, apparently the treasurer still receives petitions from taxpayers who seek a reduction or elimination of penalties imposed due to late payment of taxes. In accordance with past practice the treasurer forwards the petition to the district attorney.

No statutory authority exists which permits the tax receiver to accept or reject taxpayer petitions to reduce or eliminate property tax penalties imposed under [NRS 361.483](#). The legislature has clearly indicated its intent that taxpayers file their petition for relief from property tax penalties with the Nevada Department of Taxation pursuant to provisions of either [NRS 360.410](#) or [NRS 360.419](#). The former statute states:

1. If the department finds that a person's failure to make a timely return or payment of a tax imposed by this Title, except for chapters 364, 366 and 371, is due to circumstances beyond his control and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect, the department may relieve such person of all or part of any penalty imposed.

2. Any person seeking relief from such penalty shall file with the department a statement under oath setting forth the facts upon which he bases his claim for relief.

[NRS 360.410](#)(2) clearly establishes that persons seeking relief from property tax penalties must file a statement with the Nevada Department of Taxation. [NRS 360.419](#) states:

1. The department may, for good cause shown, waive or reduce the payment of the interest or penalty, or both, on any tax which is owed to the state or to a county by any person. The department shall, upon the request of any person, disclose the:

(a) Name of the person whose interest or penalty was waived or reduced; and

(b) Amount so waived or the amount of the reduction.

2. This section applies to all taxes imposed under this Title except for those imposed pursuant to chapter 364, 366, 371 or 375 of NRS.

This statute allows the Department to waive or reduce both penalties and interest. Both [NRS 360.410](#) and [NRS 360.419](#) apply to ch. 361 of Nevada Revised Statutes.

The Nevada Tax Commission has adopted regulations to administer both [NRS 360.410](#) and [NRS 360.419](#), and these regulations set forth the standards by which the department will adjudge applications for relief from tax penalties and interest. Accordingly, it is the opinion of this office that the legislature intended persons seeking relief from penalties imposed under provisions of [NRS 361.483](#) to make application to the Nevada Department of Taxation, not to the county treasurer.

#### CONCLUSION

A person who seeks relief from penalties imposed pursuant to provisions of [NRS 361.483](#) must make application to the Nevada Department of Taxation. The Nevada Department of Taxation has the sole authority by statute to consider waiver or reduction of tax penalties imposed under [NRS 361.483](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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OPINION NO. 96-19 MANUFACTURED HOUSING; MOBILE HOMES: Municipal or other local government ordinances, which establish a maximum pier height for installation and erection of mobile and manufactured homes that is more stringent than the requirements of [NAC 489.420](#), violate NRS/NAC chapter 489 and are superseded by [NRS 489.288](#).

Carson City, July 3, 1996

Ms. Renee Diamond, Administrator, Manufactured Housing Division, 2501 East Sahara Avenue, Suite 204, Las Vegas, Nevada 89158

Dear Ms. Diamond:

You have requested our opinion on the following question:

### QUESTION

Do certain Washoe County Development Codes, which establish a maximum pier height for installation and erection of mobile and manufactured homes that is more stringent than requirements of [NAC 489.420](#), violate NRS/NAC chapter 489 and are they superseded by [NRS 489.288](#)?

### ANALYSIS

[NRS 489.231](#), [489.235](#), 489.241, 489.251, and 489.261 authorize the Administrator of the Manufactured Housing Division of the Department of Business and Industry, State of Nevada (Division), to adopt regulations establishing standards of safety and construction with respect to mobile and manufactured homes installed or erected in this state.

[NRS 489.288](#) allows a local governing body to adopt its own ordinances and regulations regarding mobile and manufactured homes, provided they are not more stringent than provisions of [NRS chapter 489](#) and other applicable federal or state regulations. [NRS 489.288](#) provides in full:

1. A local governing body may adopt ordinances and regulations which, except for ordinances and regulations regarding any prerequisites to the classification of a manufactured home or mobile home as real property pursuant to [NRS 361.244](#), are no more stringent than the provisions of this chapter, the regulations adopted pursuant to this chapter and applicable federal statutes and regulations. Compliance with an ordinance or regulation of a local governing body does not excuse any person from compliance with this chapter and the regulations adopted pursuant to this chapter.

2. The provisions of this chapter and the regulations adopted pursuant to this chapter supersede and preempt any ordinance or regulation of a local governing body that is more stringent than those provisions, except for an ordinance or regulation regarding any prerequisites to the classification of a manufactured home or mobile home as real property pursuant to [NRS 361.244](#).

[NAC 489.420](#) sets forth the State of Nevada's requirements for installing stabilizing systems, footings, and pier supports of mobile and manufactured homes. [NAC 489.420](#) provides in full:

All used manufactured homes, mobile homes or commercial coaches not installed pursuant to the manufacturer's installation instruction must be installed according to this section and [NAC 489.425](#):

1. Footings must be constructed of:

- (a) Precast or poured-in-place concrete, not less than 16 inches by 16 inches by 4 inches;
- (b) Two concrete pads 4 inches by 8 inches by 16 inches installed side by side; or
- (c) Other materials and sizes approved by the division which provide equivalent load-bearing capacity and resistance to decay or when justified by soil compaction analysis.

2. Steel piers sufficient to carry the weight of the manufactured home, mobile home or commercial coach must be installed under the supporting frame, spaced at a distance not exceeding 6 feet on center, with the end piers not farther than 2 feet from the end of the manufactured home, mobile home or commercial coach. No steel pier may be used unless it has been approved by the division and has a minimum 3,000 pounds of compressive strength.

3. Concrete, cinder or pumice block piers sufficient to carry the weight of the manufactured home, mobile home or commercial coach must be installed under the supporting frame, spaced at a distance not exceeding 6 feet on center, with the piers not further than 2 feet from the end of the manufactured home, mobile home or commercial coach. Concrete, cinder or pumice block piers must be constructed of blocks 8 inches by 8 inches by 16 inches. The cells of the blocks must be vertical and placed perpendicular (crosswise) to the main frame. All block piers must be topped with a solid concrete, cinder, pumice or wood cap measuring 8 inches by 16 inches by 2 inches nominal size, or with other material approved by the division. No other material will be approved unless it provides equivalent load-bearing capacity and resistance to decay.

4. Block piers more than 40 inches but not more than 80 inches in height must be constructed by using double tiers with interlocking concrete, cinder or pumice blocks. Block piers more than 60 inches in height must be constructed of concrete, cinder or pumice blocks laid in mortar with 1/2-inch reinforcing steel bars inserted vertically and the cells of the blocks poured solid with concrete.

While [NAC 489.420](#) does not expressly prescribe a maximum height for installation and erection of mobile and manufactured homes, it does clearly establish specific regulatory requirements for footings and pier supports for such homes. The regulations do, however, in subsection (4), reflect that a block pier of a mobile or manufactured home can be *more than 40 inches but not more than 80 inches in height*. This subsection sets forth the installation requirements for block piers that fall within this range. [NAC 489.420](#), pursuant to [NRS 489.288](#), cannot be circumvented or modified, either directly or indirectly, by any local government ordinance, regulation, or code.

For example, even though [NAC 489.420](#) does not expressly establish a minimum or maximum height for mobile or manufactured homes, the fact that it does dictate specific footing and pier support requirements could, in many instances, create certain height allowances that local ordinances or codes could not circumvent. If the footing and pier requirements of [NAC 489.420](#) cause or allow a mobile or manufactured home's pier to exceed a certain height, no local ordinance can require a pier height maximum shorter than that pier height which may result when a mobile or manufactured home is installed or erected in compliance with state regulations.

Washoe County Development Code (WCDC) Article 312, section 110.312.10(f), Article 206, section 110.206.05(b)(6), and Article 218, section 110.218.35(b)(6), are in violation of [NRS 489.288](#). These local codes provide that the foundation system of a mobile or manufactured home must be *set so that the height at the perimeter does not exceed a maximum of 36 inches as measured from the bottom of the frame (e.g. support I-beam) to the surrounding finished grade, with at least one section of the perimeter not exceeding 16 inches in height*.

In analyzing technical aspects of NRS and NAC chapter 489, it appears that the WCDC are not safety related regulations or codes. The WCDC are intended to limit the overall height of mobile and manufactured homes for aesthetic purposes only. The height restriction of the WCDC are designed merely to try to avoid a particular mobile or manufactured home from exceeding a height which the local county government has apparently found to be visually unappealing.

Based on the Division's receipt of comments from the mobile and manufactured home industry and the general public, it has become readily clear that when a mobile or manufactured home is installed or erected on a sloping lot (more prevalent in the northern part of the state) in compliance with provisions of [NAC 489.420](#) that the height of the pier, will, in many instances, exceed 36 inches. The slope of a particular lot many times will require the pier at the lower portion of the home to be more than 36 inches to make the mobile or manufactured home not only level, but livable as well.

In other words, the above-referenced articles and sections of the WCDC actually set requirements that are *more stringent* than the provisions of [NRS chapter 489](#) and its accompanying regulations. Because the above WCDC articles and sections are more stringent than [NAC 489.420](#), they are in violation of [NRS 489.288](#). In light of the fact that the legislature saw fit to adopt a general scheme for the regulation of mobile and manufactured homes, the local control ceased and the state statutes govern. *Lamb v. Mirin*, [90 Nev. 329](#), 526 P.2d 80 (1974). The above articles and sections of the WCDC are superseded by [NRS 489.288](#).

### CONCLUSION

Municipal or other local government ordinances, which establish a maximum pier height for installation and erection of mobile and manufactured homes that is more stringent than requirements of [NAC 489.420](#), violate NRS and NAC chapter 489 and are superseded by [NRS 489.288](#). The Washoe County Development Codes set forth above, establish a maximum pier height for installation and erection of mobile and manufactured homes that is more stringent than requirements of [NAC 489.420](#). These codes violate NRS and NAC chapter 489 and are superseded by [NRS 489.288](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE S. ROLSTON IV  
Deputy Attorney General

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OPINION NO. 96-20FIREARMS; WEAPONS; PERMITS: Chapter 202 of the NRS does not require a permittee to reapply for a concealed weapons permit solely because of a change in residence from one county to another county within the State of Nevada.

Carson City, July 15, 1996

Mr. J. Michael Memeo, Chief Deputy District Attorney, Elko County District Attorney's Office,  
575 Court Street, Elko, Nevada 89801

Dear Mr. Memeo:

This letter is in response to your request for an opinion concerning a concealed weapons permit issued pursuant to chapter 202 of the NRS.

### QUESTION

Does a person have to reapply for a concealed weapons permit if he or she has a current permit and moves to a different county within the State of Nevada?

### ANALYSIS

Although chapter 202 of the NRS does not specifically address the question of whether it is necessary for a person to reapply for a concealed weapon permit when he or she moves to a different county within the State of Nevada, the legislative intent is clear.

The maxim "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS", the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State. *See also: In re Bailey's Estate*, [31 Nev. 377](#), 103 P. 232 (1909); *Leake v. Blasdel*, [6 Nev. 40](#) (1870);

*State v. Arrington*, [18 Nev. 412](#), 4 P. 735 (1884); *Ex parte Arascada*, [44 Nev. 30](#), 189 P. 169 (1920).

*Galloway v. Truesdell*, [83 Nev. 13](#), 26, 422 P.2d 237 (1967).

In *Bopp v. Lino*, [110 Nev. 1246](#), 885 P.2d 559 (1994), the court recently used this maxim in a situation analogous to legislative regulation of the power to revoke a concealed weapons permit. The statute in question provided child "visitation can be granted at three distinct times: (1) in a divorce decree; (2) in an order for separate maintenance; or (3) upon a petition filed by an eligible person after a divorce or separation, or upon relinquishment of parental rights." *Id.* at 1252. The court held: "Utilizing the maxim of statutory construction *expressio unius est exclusio alterius*, those three times are the only times when visitation can be granted under [NRS 125A.330](#)." *Id.*

In reference to concealed weapons permits, [NRS 202.366\(4\)](#) provides: "Unless suspended or revoked by the sheriff who issued the permit, a permit expires on the fifth anniversary of the permittee's birthday. . . ." [NRS 202.3657\(3\)](#) details each circumstance under which the sheriff *shall* revoke a permit. [NRS 202.3657\(4\)](#) describes the circumstances under which the sheriff *may* revoke a permit. [NRS 202.3657\(5\)](#) describes a single circumstance under which the sheriff *must* suspend a permit. Neither [NRS 202.3657\(3\)](#), (4), nor (5) include a change of residence from one county to another as a basis for revoking or suspending a permit.

#### CONCLUSION

Since the legislature enumerated the circumstances under which a permit shall and may be revoked and shall be suspended, but did not authorize revocation or suspension based on a change in residence from one county to another, the permittee does not have to reapply for a concealed weapons permit solely because he or she changes residence from one county to another county within the State of Nevada.<sup>9</sup>

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN E. SIMMONS  
Senior Deputy Attorney General

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OPINION NO. 96-21 MARRIAGE; MINISTERS; RESIDENCY; SECRETARY OF STATE: A minister who has been issued a certificate of permission to perform marriages in his/her county of residence may perform marriages in other counties of the state.

Carson City, July 25, 1996

The Honorable Stewart Bell, Clark County District Attorney, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Bell:

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<sup>9</sup> NRS 202.369 provides: "The department may adopt such regulations as are necessary to carry out the provisions of NRS 202.3653 to 202.369, inclusive." Regulations have been proposed but as of this writing have not been adopted. The proposed regulations do not provide for revocation or suspension of a permit based upon a change of residence.

You request the opinion of this office on a question concerning the extent of power of certified ministers to perform marriages.

### QUESTION

May a minister who has been issued a certificate of permission to perform marriages in the minister's county of residence use that certificate to perform marriages in other counties throughout the state?

### ANALYSIS

The Clark County Clerk seeks guidance on whether a minister who has been certified to perform marriages in another county may enter Clark County in order to perform marriages. Based upon our review of the statutes and the legislative history, we conclude that once a minister obtains and holds a valid certificate of permission to perform marriages, that minister may perform marriage ceremonies in any county within the state.

Under [NRS 122.064](#), a minister must apply in his/her county of residence for a certificate of permission to perform marriages. The county clerk located where the minister has applied must review the application to make certain determinations as to the minister's qualifications before issuing such a certificate. The county clerk must review the application to make sure that the applicant is a licensed or ordained minister and that the minister has a bona fide congregation. [NRS 122.064\(1\)\(b\)](#). The county clerk located where the applying minister resides must also determine that the applicant's ministry is primarily one of service to his/her congregation or denomination and that his/her performance of marriages will be incidental to that service. [NRS 122.064\(3\)\(a\)](#); *Paramore v. Brown*, [84 Nev. 725](#), 448 P.2d 699 (1968).

In reviewing the 1967 legislation establishing the statutory language described above, we found the purpose of the provision was to create a mechanism for determining that ministers were legitimate and qualified to marry persons. There were no legislative discussions on S. B. 66 (Act of April 20, 1967, ch. 487, 1967 Nev. Stat. 1289) limiting the marriage practice of certified ministers solely to their county of residence.

[NRS 122.062\(1\)](#) sets forth in part:

Any licensed or ordained minister in good standing within his denomination, whose denomination, governing body and church, or any of them, are incorporated or organized or established in the State of Nevada, *may join together as husband and wife persons who present a marriage license obtained from any county clerk of the state*, if such minister first obtains a certificate of permission to perform marriages as provided in this section and [NRS 122.064](#) to [122.073](#) inclusive. [Emphasis added.]

The plain language of [NRS 122.062\(1\)](#) empowers a minister certified in his/her county of residence to marry persons in other counties. Other statutes creating a statewide notification process regarding certified ministers support this interpretation.

Once a county clerk has certified a minister to perform marriages under [NRS 122.064](#), the clerk must notify the secretary of state of the approval. The secretary of state thereafter shall immediately certify the name of such minister to *each county clerk and county recorder in the state*. [NRS 122.066](#). If a county clerk who has issued a certificate to a residing minister has cause to believe the minister has severed ties with his/her congregation or is unqualified in some other respect, the county clerk may revoke the certificate for good cause after a hearing. [NRS 122.068](#). If the minister's certificate is revoked, the county clerk shall inform the secretary of state of the



revocation and the secretary of state shall immediately remove the name of such minister from the statewide list and shall notify *each county clerk and county recorder in the state*. [NRS 122.068\(2\)](#).

We believe the secretary of state must add and delete names from this list and maintain notice with all counties because the ministers could perform marriages in each of the counties. The apparent purpose of the list is to allow county clerks and recorders to determine the qualification of a minister entering from another county in order to perform a marriage. There is no other apparent reason for requiring such a compilation and updating of a statewide list of certified ministers. We read the secretary of state's notice duties under [NRS 122.066](#) and [122.068](#) in this manner in order to avoid rendering parts of those statutes meaningless. *See Board of County Comm'rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983).

#### CONCLUSION

A minister who has been issued a certificate of permission to perform marriages in his/her county of residence may perform marriages in other counties of the state pursuant to the authority of that certificate.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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OPINION NO. 96-22ELECTIONS; PUBLIC OFFICERS: Incumbent county and township officers are eligible to run for election to the office of county commissioner. Such county and township officers must resign their positions if elected to the office of county commissioner. This opinion reverses Op. Nev. Att'y Gen. No. 80-20 (June 19, 1980) to the extent it is inconsistent with this opinion.

Carson City, August 6, 1996

Ms. Madelyn Shipman, Assistant District Attorney, Washoe County District Office, Post Office Box 11130, Reno, Nevada 89520 Attorney's

Dear Ms. Shipman:

We have received your letter of August 5, 1996, requesting the opinion of this office regarding eligibility of a county officer for the position of county commissioner.

#### QUESTION

May an incumbent county or township officer run for the office of county commissioner without resigning his current office?

#### ANALYSIS

Specifically, your request concerns whether the Director of the Washoe County Parks and Recreation Department can be a candidate for county commissioner in light of [NRS 244.020\(2\)](#) which provides: "No county or township officer shall be eligible to the office of county commissioner." As you point out in your opinion request, in 1980 this office issued a formal opinion which concluded that the word "eligible" as used in [NRS 244.020\(2\)](#) should be defined to

mean "ineligible to run for election" as well as "ineligible to hold the public office." In light of more recent case precedent, and as explained below, we hereby reverse Op. Nev. Att'y Gen. No. 80-20 (June 19, 1980) to the extent it is inconsistent with this opinion.

The Nevada Supreme Court in *SNEA v. Lau*, [110 Nev. 715](#), 720, 877 P.2d 531, 535 (1994), construing the Nevada Constitution, held that a provision affecting a candidate's eligibility, if capable of two reasonable interpretations, should be construed "liberally in favor of the right of the voters to exercise their electoral choice. . . ." Quoting from *Gilbert v. Breithaupt*, [60 Nev. 162](#), 165-66, 104 P. 2d 183, 185 (1940), the Nevada Supreme Court stated:

The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of the right of the people to exercise freedom of choice in the selection of officers. Furthermore, disqualifications provided by the legislature are construed strictly and will not be extended to cases not clearly within their scope." [Citations omitted.]

See also *Nevada Judges Association v. Lau*, [112 Nev. 51](#), 54, 910 P.2d 898, 901 (1996) (ambiguities are to be resolved in favor of eligibility to hold office). Attorney General Opinion No. 80-20 notes the term "eligible" as used in [NRS 244.020\(2\)](#) is capable of two different definitions under Nevada law, yet does not consider the mandate of *Gilbert v. Breithaupt*, [60 Nev. 162](#). The Nevada Supreme Court's conclusion in *Gilbert*, recently affirmed in *SNEA v. Lau*, requires a strict interpretation of [NRS 244.020\(2\)](#). *SNEA v. Lau*, [110 Nev. 715](#). Since the term "eligible" is capable of two interpretations, the ambiguity must be "resolved in favor of the right of the people to exercise freedom of choice in the selection of officers." *Gilbert v. Breithaupt*, [60 Nev. 162](#). Therefore, [NRS 244.020\(2\)](#) must be construed to mean that incumbent county officers are eligible to run for the office of county commissioner, but must resign if they are elected to that office.

#### CONCLUSION

It is the opinion of this office that under [NRS 244.020\(2\)](#), incumbent county and township officers are eligible to run for election to the office of county commissioner. Such county and township officers must resign their positions if elected to the office of county commissioner.

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
Assistant Attorney General

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OPINION NO. 96-23ELECTIONS; LOCAL GOVERNMENT; PUBLIC OFFICERS: If voters approve term limits for state and local officials in November 1996, only periods of service commencing after November 27, 1996, will be counted as a term for limitation purposes. "Local governing body" is defined and local offices evaluated to determine to which ones term limits will apply.

Carson City, August 9, 1996

The Honorable Scott W. Doyle, Douglas County District Attorney, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Doyle:

You have requested an opinion from this office regarding term limits for state and local public officials.

### BACKGROUND

In 1994 an initiative petition proposing to amend the Nevada Constitution to limit terms for various state and local public officers qualified for the general election ballot. This ballot measure was identified as Question 9. The full text of the petition follows. Voters at two consecutive elections must approve such a ballot question before it becomes law. Nev. [Const. art. 19, § 2\(4\)](#). Voters in the 1994 general election approved Question 9.<sup>10</sup> Voters must again approve this question in the 1996 general election for it to be effective.<sup>11</sup> Since 70 percent of the voters approved the question in 1994, the issues raised in this opinion request are relevant, as the probability of the question passing in 1996 is high.<sup>12</sup>

The initiative proposes to limit terms of service of three groups of elected officials: all state officers, all judges, and certain local officials. The language of the initiative is clear that all state officers and all judges are included. However, the language is not clear as to which local officials are included.

In drafting the explanation and arguments for and against passage that appear on the ballot, general and inclusive language was used to inform the voters that state and local public officers were subject to the term limitations of the initiative. Since local judges as well as members of local governing bodies would be affected by the initiative, the general term local public officers was used. Also, the initiative petition filed with the Secretary of State is entitled "Initiative to Limit Terms of State and Local Officers." The question then becomes which local public officers would be subject to term limitations if the voters again approve the ballot question.

The full text of the initiative petition as filed with the Secretary of State pursuant to [NRS 295.015](#) is as follows:

#### INITIATIVE TO LIMIT TERMS OF STATE AND LOCAL OFFICERS

EXPLANATION -- Matter in italics or underscored is new;  
matter in brackets[] is material to be omitted.

The People of the State of Nevada do enact as follows:

Section 1. Section 3 of article 4 of the constitution of the State of Nevada is hereby amended to read as follows:

[Sec:] Sec. 3. 1. The members of the Assembly shall be chosen [biennialy] biennially by the qualified electors of their respective districts, on the Tuesday next after the first

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<sup>10</sup> The 1994 General Election Returns supplied by the Secretary of State at page 12 indicates 259,211 votes in favor of Question 9 and 108,780 votes against.

<sup>11</sup> If a majority of voters approve the ballot question, it will become part of the Nevada Constitution upon completion of the canvass of votes by the Nevada Supreme Court. The canvass will be conducted on November 27, 1996. Nev. Const. art 5, § 4; NRS 293.395(2).

<sup>12</sup> The Nevada Judges Association (Association) filed a lawsuit in 1995 to remove from the ballot that portion of the question pertaining to justices of the supreme court, district judges, and justices of the peace. The Nevada Supreme Court denied the relief the Association sought, but split the initiative into two questions: one pertaining to supreme court justices, district court judges, justices of the peace, and all other judges; and the other, to the other affected elected officials. *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996). The court in a footnote clarified: "If either proposal passes in the 1996 general election, the Constitution will be effectively amended as to the proposal or proposals receiving a majority vote." *Id.* 112 Nev. at 904, n.2. The Association petitioned for a rehearing arguing the divided question pertaining to judges required passage in two general elections before it could be effective. The court denied the rehearing confirming its previous determination that either part of the question only needs to be approved by the voters in the 1996 general election. *Nevada Judges Association v. Lau*, No. 26177 (Nev. Apr. 30, 1996) (order denying rehearing).

Monday in November and their term of office shall be two years from the day next after their election.

2. No person may be elected or appointed as a member of the Assembly who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, from any district of this state.

Sec. 2. Section 4 of article 4 of the constitution of the State of Nevada is hereby amended to read as follows:

[Sec:] Sec. 4. 1. Senators shall be chosen at the same time and places as members of the Assembly by the qualified electors of their respective districts, and their term of Office shall be four Years from the day next after their election.

2. No person may be elected or appointed as a Senator who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, from any district of this state.

Sec. 3. Section 19 of article 5 of the constitution of the State of Nevada is hereby amended to read as follows:

[Section] Sec. 19. 1. A secretary of state, a treasurer, a controller, and an attorney general, shall be elected at the same time and places, and in the same manner as the governor. The term of office of each shall be the same as is prescribed for the governor.

2. Any elector shall be eligible to [either of said] any of these offices[.], but no person may be elected to any of them more than twice, or more than once if he has previously held the office by election or appointment.

Sec. 4. Section 11 of article 6 of the constitution of the State of Nevada is hereby amended to read as follows:

Sec. 11. 1. The justices of the supreme court and the district judges shall be ineligible to any office, other than a judicial office, during the term for which they shall have been elected or appointed; and all elections or appointment to any such judges by the people, legislature, or otherwise, during said period, to any office other than judicial, shall be void.

2. No person may be elected a justice of the supreme court, judge of any other court, or justice of the peace more than twice for the same court, or more than once if he has previously served upon that court by election or appointment.

Sec. 5. Section 3 of article 15 of the constitution of the State of Nevada is hereby amended to read as follows:

[Section] Sec. 3. 1. No person shall be eligible to any office who is not a qualified elector under this constitution.

2. No person may be elected to any state office or local governing body who has served in that office, or at the expiration of his current term if he is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this constitution.

## QUESTION ONE

To which offices does the term "local governing body" as used in section 5 of the proposed initiative apply?

## ANALYSIS

Section 5 of the initiative proposes to amend section 3 of article 15 of the Nevada Constitution by adding language to limit the number of terms members of local governing bodies may serve. However, the initiative does not define "local governing body."

Courts from various jurisdictions provide guidance. The Minnesota Court of Appeals stated "it is the power to decide, as opposed to the right to recommend, that determines whether one is a member of a governing body." *Blaine v. Anoka-Hennepin Independent School District*, 498 N.W.2d 309, 314 (1993). *See also Minnesota Education Association v. Bennett*, 321 N.W.2d 395

(1982). The Supreme Court of Georgia in one case described a governing body as a policy-making apparatus. *City of Cave Spring v. Mason*, 310 S.E.2d 892, 893 (1984). In another case, the Supreme Court of Georgia identified a governing authority with performing legislative functions. The Supreme Court of Florida agrees a governing body would have the last word concerning policies. *Metro-Dade Fire Rescue Service District v. Metropolitan Dade County*, 616 So.2d 966 (1993).

The Supreme Court of Virginia characterizes a governing body as having the authority to legislate by ordinance. *Laird v. City of Danville*, 302 S.E.2d 21 (1983). The Supreme Court of Texas agrees a governing body exercises legislative powers. *Burch v. City of San Antonio*, 518 S.W.2d 540 (1975). The Superior Court of New Jersey also equates governing body with legislative functions. *Mentus v. Town of Irvington*, 191 A.2d 806 (1963).

After reviewing these court decisions, it is our opinion a governing body performs legislative functions, makes policy for the jurisdiction it governs, and makes decisions as opposed to making recommendations. Applying this definition, we evaluated many different local boards to determine which are governing bodies whose members would be subject to the term limitations.

Term limits clearly apply to members of a county commission, board of supervisors, or a city council since these bodies are local governing bodies. The Supreme Court of Delaware, in an unreported case, characterized the New Castle County Council as the legislative governing body of the county. *Riley v. Moyed*, 1986 WL 8169 (Del. July 22, 1986).

It is also equally clear, term limits would not apply to other elected county officials, such as county clerk, recorder, sheriff, treasurer, assessor, district attorney, and public administrator, since they are not members of governing bodies. The same conclusion applies to elected city attorneys, city clerks, and city treasurers<sup>13</sup>, as well as township constables.<sup>14</sup> The Minnesota Supreme Court in *McGuire* stated the city attorney is not part of the governing body. *McGuire v. Hennessy*, 193 N.W.2d 313 (1971). Pursuant to various enabling statutes, these elected officials discharge their duties individually or with the assistance of deputies and staff. See [NRS 246.060](#); 246.030; 247.060; 247.030; 248.090; 248.040; 249.090; 249.010; 249.060; 250.010; 250.060; 252.110; 252.070; 253.040; 253.025; 258.070; 258.060; 266.405; 266.470; 266.480; 266.500; and 266.455. The nature of these offices does not involve a governing body in performance of duties and therefore, these officers are not subject to the proposed constitutional term limitations.

However, if an elected official is a member of a group whose function is to govern, that is to control, direct, or exercise authority over others, or perform legislative or policy making decisions, then that officer would be subject to the term limitations.

The office of mayor and other local boards are more difficult to analyze. It is not clear whether mayors are included, nor is it clear which boards within a county would be affected. Mayors have both executive and legislative duties. Cf. [NRS 266.165](#); 266.190; and 266.200. An examination of the instrument creating each city is necessary before a conclusion can be reached as to whether a mayor would be subject to term limits. If the creating instrument indicates the mayor's main function is to be an administrator for the city, and the mayor does not exercise legislative power as a member of the city council, then the mayor would not be subject to term limits. If, on the other hand, the mayor functions as a member of the city council, a governing body, then term limits would apply to that position as well as to the other members of the city council.

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<sup>13</sup> If a city has an auditor who is elected, that auditor would not be subject to term limits.

<sup>14</sup> Term limits would apply to justices of the peace and elected municipal court judges pursuant to section 4 of the initiative petition.

Cities can be created either by special charter or by general law. Nev. [Const. art. 8, §§ 1, 8](#). General law cities have the authority to create the office of city manager. [NRS 266.390](#)(1). These city managers can have the duties of chief administrator for the city. If such is the case, the duties performed by the mayor are more legislative in nature, that is, to preside over city council meetings and exercise legislative power as a member of the council. Therefore, the proposed term limitations would apply to mayors of general law cities if the office of city manager has been created and the city manager is the chief administrator for the city. In general law cities with no city manager and the mayor's duties are executive in nature (i.e., mayor is not voting member of council), the proposed term limitation would not apply.

The charters of cities created by special charter must be examined on a city by city basis. If the mayor is appointed, instead of elected, then the mayor is not subject to term limits. If the mayor is elected, has voting authority, and does not merely preside over council meetings, then the mayor is a member of the governing body and the number of terms served would be limited. In those cities, the mayor is part of the governing body that discharges legislative duties for the city.

Carson City is unique in that it is a consolidated city and county government with features comparable to both cities and counties. The functions performed by members of the board of supervisors and the mayor are legislative in nature, so the proposed initiative would apply to both the board members and the mayor.

If members of a town board are elected and perform legislative duties comparable to those in municipalities, then such members would be subject to term limitations. Citizen advisory council members would not be subject to the limitation since such offices are appointive and merely advisory. The same conclusion applies to town advisory boards if the members are appointed.

However, if members of a town advisory board are elected, they would be subject to term limits. We reach this conclusion even though the board may be denominated the "town *advisory* board" since such a board may often have the same attributes as a local governing body. By statute, a town advisory board may be responsible for providing and managing many town services, may control expenditures, and may have the authority to promulgate town bylaws and codes as well as acquire, manage, and improve town property. See [NRS 269.575](#); 269.580; 269.590; 269.595; 269.600; 269.610; and 269.620.

Elected trustees of county school districts would be included in the term limitation due to the nature of the responsibilities they discharge pursuant to [NRS 386.350](#) and the fact that school districts are political subdivisions pursuant to [NRS 386.010](#)(2). "Elected members of a county board of education are `members of the legislative body of [a] political subdivision . . .'" *West Virginia v. West Virginia Public Employees Retirement System*, 401 S.E.2d 916, 918 (1991).

Statutory authority exists for creation of other local districts. The test to determine whether term limits will apply to the directors of such districts is two-fold: (1) Are the directors elected? and (2) Is the function of the directors legislative in nature? Examples of these types of boards include: districts created pursuant to the Nevada Improvement District Act, [NRS 309.050](#) and [309.070](#); general improvement districts, [NRS ch. 318](#); boards of hospital trustees and district hospitals, [NRS ch. 450](#); county fire protection districts and districts for the control of floods, [NRS ch. 474](#). An example of a board to which term limits would not apply is an irrigation district.

[NRS ch. 539](#) authorizes creation of irrigation districts. If such a district is created, it is to be administered by elected directors. [NRS 539.045](#). However, the Nevada Supreme Court has characterized an irrigation district as a "public corporation" and elaborated that "[t]he district is not established for political or governmental purposes." *In re Walker River Irrigation District*, [44 Nev. 321](#), 339, 195 P. 327, 335 (1921). Subsequent courts have agreed with this reasoning. See

*Truckee-Carson Irrigation Dist. v. McLean*, [49 Nev. 278](#), 287, 245 P. 285, 294 (1926); *Truckee-Carson Irrigation Dist. v. Barber*, [80 Nev. 263](#), 266, 392 P.2d 46, 49 (1964).

If such a district has no governmental purpose, then it cannot be a local government for purposes of the term limitation petition and its directors would not be members of a local governing body. This conclusion is supported by *State of Nevada Employees Ass'n, Inc.* which requires liberal construction in favor of the right of the voters to exercise their electoral choice. *State of Nevada Employees Ass'n v. Lau*, [110 Nev. 715](#), 720, 877 P.2d 531, 535 (1994).<sup>15</sup>

Elected members of the State Board of Education would be subject to the 2-term limitation pursuant to the language in section 5 of the initiative petition that includes other state elected officials. [NRS 385.021](#)(6) currently imposes a limitation of three terms upon members of this state board; however, the exemption granted in section 5 of the petition is only for those offices where the term is already limited by the Nevada Constitution, like the position of governor.

Members of the board of regents would also be subject to the term limitation under the "any state office" limitation in section 5 of the initiative petition.

If a question arises concerning an elected local position which is not resolved by the guidelines provided above, this office will issue a supplemental opinion upon request of the district attorney or city attorney.

### CONCLUSION TO QUESTION ONE

The initiative will apply to county commissioners for the reasons that they are elected and perform a legislative function as members of the county commission, a "local governing body." The petition will not limit terms of service of the county clerk, recorder, sheriff, treasurer, assessor, district attorney, and public administrator because they do not perform legislative functions as part of a "local governing body."

The initiative will also apply to city councils and to mayors in general law cities where city managers have been appointed, but not to mayors in general law cities where no city manager has been appointed and the mayor exercises only executive functions. The petition will not limit terms of service of city attorneys, city clerks, and city treasurers. Nor will it limit terms of township constables.

For special law cities, the limitation will apply to city council members and those mayors who, by charter, are part of the city council.

Members of an elected town board would be subject to term limitations, but advisory board members would not, if they are appointed, not elected. If advisory board members are elected and perform legislative functions, term limits would apply.

For other districts, the test is whether the directors are elected and whether the function of the directors as a board is legislative in nature. If the answer to both of these questions is yes, then term limits would apply. An exception to this is an irrigation district.

### QUESTION TWO

How will limitations on elective service be construed and applied should the initiative be approved by the voters in the general election in November 1996?

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<sup>15</sup> This case is discussed more fully in the analysis to the second question of this opinion.

## ANALYSIS

If this measure is approved in November, limitations on terms of elective service for most state and many locally elected officials will be placed in the Nevada Constitution. To answer this second question, two issues must be resolved: (1) When does the initiative go into effect? and (2) Which terms of office will be counted under the proposed limitations on service?

The issue of when the initiative goes into effect is controlled by a 1977 opinion issued by the Nevada Supreme Court. In *Torvinen v. Rollins*, [93 Nev. 92](#), 560 P.2d 915 (1977), the court addressed a similar question regarding the effective date of a constitutional amendment approved by the voters extending the term of office for district court judges.

In *Torvinen* the lower court ruled the amendment applied retroactively to all judges holding office at the time it was adopted, thereby extending their 4-year terms to six years. *Id.* at 93. The supreme court reversed, holding "the amendment applies prospectively only to elections held after its effective date." *Id.* at 94.

The supreme court reasoned:

We therefore determine a constitutional amendment adopted pursuant to article 16 becomes effective upon the canvass of the votes by the supreme court. This provides uniformity for the effective date of amendments adopted pursuant to article 16 and those adopted pursuant to the initiative procedures of article 19, which specifically mandates such amendments "become a part of this constitution upon completion of the canvass of voters by the supreme court." Nev. [Const. Art. 19 §2](#).

As a general rule, a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms. Here, the amendment is void of any term indicating the legislature or electorate intended retrospective application.

*Id.* (citations omitted). Accordingly, if the voters approve this term limitation initiative, the provisions will go into effect on the day of the canvass, November 27, 1996.

The *Torvinen* case also assists in analyzing the second issue in this question: Which terms of office will be counted under the proposed limitations on service?

The court in *Torvinen* applied the general rule that "a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms." *Id.* The court had previously stated "statutes are presumed to operate prospectively and shall not apply retrospectively unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the legislature cannot be otherwise satisfied." *Holloway v. Barrett*, [87 Nev. 385](#), 390, 487 P.2d 501, 506 (1971).

An examination of the language of the term limitation initiative reveals the petition is not clear as to when the tenure limitations start. In fact, it is vague and ambiguous on the point of when to begin counting terms. The Arkansas Supreme Court in *U.S. Term Limits, Inc., v. Hill*, 872 S.W.2d 349, 360 (1994) *aff'd* *U.S. Term Limits, Inc. v. Thornton*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 1842 (1995)<sup>16</sup>, noted several other states have adopted term limitation amendments and provided a date certain from which terms will be counted:

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<sup>16</sup> *Hill* addressed term limitations for state and congressional officers. The U.S. Supreme Court granted certiorari, but limited its review to the issue of term limits for congressional officers.



--State of Washington. Wash.Rev.Code § 29.15.240 (Supp.1993) (no terms served before November 3, 1992, may be used to determine eligibility to appear on the ballot) (approved Nov. 3, 1992).

--State of California. Cal. Const. art. XX, § 7 (applies to terms of state constitutional officers and legislators where the official was elected or appointed to the office after November 6, 1990) (adopted Nov. 6, 1990).

.....  
--State of Colorado. Colo. Const. art. XVIII, § 9a (applies to terms of office in Congress beginning on or after January 1, 1991) (approved Nov. 6, 1992).

--State of Wyoming. Wyo.Stat. §§ 22-5-103, 22-5-104 (1992) (terms of service in state offices and in Congress prior to January 1, 1993, shall not be counted) (approved Nov. 3, 1992).

Nevada's term limits initiative does not provide a date after which terms of service will be counted, although it easily could have stated that it applies to all prior terms of service.

The court in *Hill* concluded only periods of service commencing on or after the effective date of the amendment would be counted as a term for limitation purposes. *Id.* at 361. Besides applying the rule of statutory construction that constitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise, the court also reasoned "with respect to an amendatory act the legislation will not be construed as retroactive when it may be reasonably construed otherwise. The same rule of construction is equally applicable to a constitutional amendment." *Id.* at 361 (citations omitted); *see also State v. Dovey*, [19 Nev. 396](#), 399 (1885).

Since the initiative fails to include specific language indicating it is intended to be retroactive in effect, it must be applied prospectively. This is especially apparent in light of the Nevada Supreme Court holding: "The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office. *Gilbert v. Breithaupt*, [60 Nev. 162](#), 165-66, 104 P.2d 183, 185 (1940)." *Nevada Judges Ass'n*, 112 Nev. at 54.

In 1994, the court addressed the term limitation provision imposed on the governor by article 5, section 3 of the Nevada Constitution. In holding a governor who had served two "years" of another governor's term was eligible for reelection since "years" as used in the constitution referred to "official years" rather than "calendar years," the court stated:

Most importantly, we conclude that the people's ability to choose a governor should not be restricted by an ambiguous provision. Petitioners should prevail only if the phrase "years of a term" cannot possibly refer to anything other than "calendar years." If a constitutional provision is capable of being understood in two or more senses by reasonably informed persons, it must be liberally construed in favor of the right of the voters to exercise their electoral choice:

The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office . . . .

"Statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers." *Gilbert v. Breithaupt*, [60 Nev. 162](#), 165-66, 104 P.2d 183, 185 (1940) (quoting 46 C.J.S. *Officers Sec. 32* at 937 (1928)).

*State of Nevada Employees Ass'n v. Lau*, [110 Nev. 715](#), 720, 877 P.2d 531, 535 (1994) (citations omitted).

Since the effective date of the petition would be November 27, 1996, the term limitations will not apply to affected officials elected in the 1996 general election. If approved, term limits would be in effect for the 1997 municipal elections, and the 1998 primary and general elections, and so on.

### CONCLUSION TO QUESTION TWO

If the voters approve the Initiative to Limit Terms of State and Local Officers in the general election in November 1996, only periods of service commencing after November 27, 1996, will be counted as a term for limitation purposes.<sup>17</sup>

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 96-24 BOARD OF PRISON COMMISSIONERS; PRISONS, NEVADA DEPARTMENT OF: Board is head of Department of prisons, sets policies, and guides the Director of the Department of Prisons. The Director is responsible for administration, including budget. Interlocal agreements and contracts are given effect by the Board. The Board need not hold meetings unless action is required by statute, and it may meet jointly with the Board of Examiners. Board approval of women's prison under S.B. 278 is not required, but the Department of Prisons anticipates seeking Board approval under the request for proposal. The Board serves public interest by guiding prison policies and acting as check on the Director.

Carson City, September 5, 1996

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

Dear Mr. Heller:

You have requested an opinion from this office in response to various questions regarding the role and responsibilities of the Board of Prison Commissioners (Board).

### QUESTION ONE

What is meant by the term "head of the department" as used in [NRS 209.101\(2\)](#) to describe the Board?

### QUESTION TWO

How does this designation relate to the appointment of the prison director in [NRS 209.121](#) and the delineation of his responsibilities in [NRS 209.131](#)?

### QUESTION THREE

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<sup>17</sup> Officials elected at the general election on November 5, 1996, but who take office at a later date, are not affected by this opinion.

What is meant by "full control of all grounds, buildings, labor and property of the department" as stated in [NRS 209.111](#)?

The remaining questions will be addressed in the latter part of this opinion.

### ANALYSIS AS TO QUESTIONS ONE, TWO, AND THREE

The term "head of the department" as it applies to the Board is not specifically defined in the Nevada Revised Statutes. However, under the traditional rules of statutory construction, one looks to the plain language of the statute. *Thompson v. Hancock*, [49 Nev. 336](#), 341 (1926). If the language of the statute is plain and unambiguous, it must be given effect unless to do so would violate the spirit of the act. *In re Application of Filipini*, [66 Nev. 17](#), 24, 202 P.2d 535, 538 (1949). Where the legislature uses plain ordinary language expressing a definite idea, the court should not construe the language to convey a different meaning. *Eddy v. State Bd. of Embalmers*, [40 Nev. 329](#), 334 (1917). Words are to be given their ordinary meaning if possible. *Dumaine v. State*, [103 Nev. 121](#), 125, 734 P.2d 1230, 1237 (1987). Words which have definite and plain meaning retain that meaning unless clearly not intended. *State v. State of Nevada Employees Assn., Inc.*, [102 Nev. 287](#), 289, 720 P.2d 697-98 (1986).

The word "head" is generally defined as "a person who leads, rules or is in charge of something: leader, chief, or director . . ." *American Heritage Dictionary*, 606 (2d ed. 1976). The plain intention of the legislature appears to be that the Board would therefore appear to have ultimate authority over the Nevada Department of Prisons (NDOP), at least to the extent of the parameters of its authority under the NRS.

Chapter 209 of the Nevada Revised Statutes governs establishment and operation of the state prison system. Section 209.101, added in 1977, provides:

1. The department of prisons is hereby created.
2. The head of the department is the board of state prison commissioners.
3. The governor is the president of the board. The secretary of state is the secretary of the board.
4. Any two members of the board constitute a quorum for the transaction of business.
5. The secretary shall keep full and correct records of all the transactions and proceedings of the board.

The Board is defined in section 209.021 to mean "the board of state prison commissioners as defined by section 21 of article 5 of the Nevada Constitution." The Nevada Constitution provides:

The Governor, Secretary of State and Attorney General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall also constitute a Board of Examiners, with power to examine all claims against the State (except salaries or compensation of Officers fixed by law) and perform such other duties as may be prescribed by law, and no claim against the State (except salaries or compensation of officers fixed by law) shall be passed upon by the Legislature without having been considered and acted upon by said "Board of Examiners."

Nev. [Const. art. 5, § 21](#).

Thus, the Nevada Constitution contemplates the legislature will establish the parameters of the Board's duties. The extent of the powers and duties of the Board as presently constituted are described in [NRS 209.111](#):

The board has full control of all grounds, buildings, labor, and property of the department, and shall:

1. Purchase, or cause to be purchased, all commissary supplies, materials and tools necessary for any lawful purpose carried on at any institution or facility of the department.
2. Regulate the number of officers and employees of the department.
3. Prescribe regulations for carrying on the business of the board and the department.

In *State ex rel. Fox v. Hobart*, [13 Nev. 419](#) (1878), the Nevada Supreme Court affirmed that the powers of the Board are defined by state statute. In *Craig v. Hocker*, 405 F. Supp. 656, 681-82 (U.S.D.C. Nev. 1975), the United States District Court examined the Nevada Constitution, as well as the provisions of the Nevada Revised Statutes creating the Board, and concluded that the Board is primarily responsible for administration of the prison and promulgation of rules and regulations governing the prisoners, employees, and other persons. To the warden alone, however, is delegated authority to make rules and regulations governing the "separation and classification" of prisoners. See [NRS 209.270](#).<sup>18</sup> These functions are somewhat interrelated.

The *Craig* court stated:

Prison officials have a very difficult task. In their constant association with social misfits, faced with insults, threats and danger to the safety of themselves and their employees, they are apt to acquire a somewhat myopic view of the rights and privileges of prisoners as citizens and human beings. The Nevada Constitution and statutes place responsibility for supervision of the prison in a board of prison commissioners. The evident intent is that this lay board, removed from the difficult problems of prison administration, should review and pass upon the basic rules and regulations in the light of their own experiences, knowledge of public affairs, social conscience and legal expertise.

*Craig*, 405 F. Supp. at 682.

Subsequently, in 1977 the position of Director of the NDOP was established by the legislature through passage of [NRS 209.121](#), significantly changing the administrative structure of the NDOP:

1. The chief administrative and fiscal officer of the department is the director.
2. The director:
  - (a) Shall be appointed by the governor.
  - (b) Is responsible to the board.
  - (c) Shall be selected with special reference to his training, experience and aptitude in the field of corrections.
  - (d) Is entitled to receive an annual salary in an amount fixed by law.
  - (e) Shall not engage in any other gainful employment or occupation.

### [NRS 209.121](#)

Under [NRS 209.131](#), the director's responsibilities are as follows:

1. Administer the department under the direction of the board.
2. Supervise the administration of all institutions and facilities of the department.
3. Receive, retain and release in accordance with law offenders sentenced to imprisonment in the state prison.

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<sup>18</sup> At the time of the *Craig* decision in 1975, the position of Director of the Nevada Department of Prisons had not yet been created; the Warden of the Nevada State Prison was responsible for the day-to-day administration of prison affairs. The position of director was approved by the legislature in 1977.

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.

7. Cause to be placed from time to time in conspicuous places about each institution and facility copies of laws and regulations relating to visits and correspondence between offenders and others.

8. Provide for the holding of religious services in the institutions and facilities and make available to the offenders copies of appropriate religious materials.

In *Buckner v. State*, 599 F. Supp. 788, 790 (U.S.D.C. Nev. 1984) the court noted the role of the Director of the NDOP under [NRS 209.131\(4\)](#) as having "direct responsibility 'for the supervision, custody, treatment, care, security and discipline' of all inmates of Nevada's prisons" and is "charged with the duty of establishing regulations covering the same subject matter." *Id.* at 790.

An examination of the growth of the prison population in this state is helpful in understanding how the respective roles of the Board and the Director have evolved both legislatively and from a practical standpoint since the days when Nevada was a new state. In 1880, for example, there were 150 inmates, and the annual budget for the NDOP was \$175,000. In 1952, 72 years later, the prison population finally doubled to 300. Only 13 years after that, in 1965, the population doubled again to 600. Since the early 1970s, the rate of incarceration increased at a phenomenal rate. In the last ten years alone, the number of inmates has once again doubled from 4,000 (1986) to nearly 8,000 (projected 1996). The annual budget is now approximately \$130,000,000, and the NDOP employs nearly 2,000 officers and staff to manage its correctional facilities. Today, it is one of the state's largest agencies.

Board minutes from the 1970s and 1980s reveal that much of the Board's time was devoted to discussing the NDOP's efforts to construct new facilities in which to house the burgeoning inmate population. Until 1964, the only prison facility in Nevada was the Nevada State Prison in Carson City. In the mid-1960s, the state added the Nevada Women's Correctional Center and the Northern Nevada Correctional Center. In 1978 and 1982, respectively, the Southern Nevada Correctional Center and Southern Desert Correctional Center were opened in the Las Vegas area. Finally, in 1989 Ely State Prison became the state's maximum security facility, and in 1995, the first phase of the Lovelock Correctional Center opened. During the 1980s, most of the state's conservation camps and restitution centers were created, now numbering 12.

Since the early days of the prison system, the role of the Board has changed dramatically. When the prison consisted of a single facility holding no more than a few hundred inmates, the Board met somewhat more frequently, and almost always for the sole purpose of approving detailed payments for services, equipment, and supplies (e.g., for thread, stable rent, malt, buckskin mittens, hogfeed, food for inmate meals, and, on one occasion \$5 to a physician for examining the insane). The warden was a part-time job of the lieutenant governor until 1873 when the board was empowered to select the warden. Finally in 1977 the legislature created the Director's position, making it appointed by the governor, and gave the Director the authority to appoint the wardens for each institution.

Legislation should be construed in light of its purpose and as a whole. *20th Century Hotel & Casino, Ltd. v. Clark County Fair & Recreation Board*, [97 Nev. 155](#), 156, 625 P.2d 576, 577 (1981); *Colello v. Administrator, Real State Div.*, [100 Nev. 344](#), 347, 683 P.2d 15, 16 (1984). Legislative acts should be harmoniously construed where reasonably possible. *First American Title Co. of Nevada v. State*, [91 Nev. 804](#), 806, 543 P.2d 1344, 1345 (1975); *Ex Parte Iratacable*, [55 Nev. 263](#), 283 (1934). From the language of the statutes, it may be fairly concluded that the

legislative purpose behind the provisions of chapter 209 concerning the Board and the Director is that the responsibility for the day-to-day operations of the NDOP rests with the director, subject to the oversight of the board in the areas described in [NRS 209.111](#).

Consequently, as the size and complexity of the state's prison system has increased, the Board has approved administrative regulations delegating certain authority to the Director and his staff. For example, in exercising its authority to control purchasing of "all commissary supplies, materials and tools" under [NRS 209.111](#)(1), the Board has approved regulations specifying the procedures to be followed by NDOP staff in purchasing items for the department. Administrative Regulation (AR) 210, adopted August 1, 1992. Other related financial functions necessary to the day-to-day operation of the NDOP were similarly approved by the board. (*See, e.g.*, AR 200 series).

The Board is also responsible for regulating the number of officers and employees of the NDOP. [NRS 209.111](#)(2). The only instance in which it appears Board action was necessary in this regard was on January 21, 1992, when it approved personnel layoffs at the Southern Nevada Correctional Center in an effort to reduce the NDOP budget.

Finally, under [NRS 209.111](#)(3), the Board has authority to prescribe regulations for "carrying on the business of the board and the department." In 1990, the Board approved a regulation which set forth guidelines for development, review, and approval of administrative regulations. AR 100, adopted November 6, 1990. Under AR 100, the Director and NDOP staff are responsible for proposing administrative regulations to the Board for approval. The Director has the authority to issue Information Bulletins until such time as the board meets to consider a proposed administrative regulation. AR 100V(F)(3).

### CONCLUSIONS TO QUESTIONS ONE, TWO, AND THREE

As the provisions of chapter 209 of the NRS have been interpreted by court decisions and by application of the rules of statutory construction, the Director of the NDOP is responsible for day-to-day operations of the NDOP, subject to the oversight of the Board. The Board, under its authority to adopt regulations for carrying on the business "of the Board and the department," may delegate these functions to the extent of its statutory authority.

### QUESTION FOUR

Should the Board play any role in development of NDOP's budget? I note for your reference that minutes of the board since 1986 contain no record of it ever having been consulted on budget issues. Am I therefore to assume that the governor's constitutional authority is supreme in this regard?

### ANALYSIS

As described hereinabove, the powers and duties of the Board as set forth in [NRS 209.111](#) do not impose upon the Board any specific responsibilities with respect to development of a budget for the NDOP. The Director, under [NRS 209.121](#), is the chief administrative and fiscal officer of the NDOP, appointed by the governor and responsible to the Board.

The Board may choose to examine the NDOP budget as part of its role in overseeing purchase of items necessary to operate the prison system under [NRS 209.111](#)(1) and may promulgate policies or regulations which affect the NDOP budget process. Further, to the extent the Board regulates the number of officers and employees of the NDOP under 209.111(2), such actions may impact the budget.

Past Board minutes reflect that the Board has been apprised from time-to-time of the status of the budget and on one occasion approved a budget reduction in which layoffs of personnel were recommended pursuant to its statutory obligation to regulate the number of officers and employees of the NDOP. *See* Board Minutes of January 21, 1992. Information regarding budgets pending before the legislature and matters impacting the NDOP's budget have periodically been brought to the attention of the Board. However, it appears that historically the Board has not required in-depth budget presentations. For example, in 1981, then Director Wolff stated "it has never been the policy for the Prison Board to be involved with the budget process before, nor other problem areas. These have all been traditionally funneled through the Governor's office. He indicated he would be happy to do so if that were to become the policy of the Board." Board Minutes of August 25, 1981. Subsequent Board minutes do not reflect that the Board expressed a desire to adopt such a policy, nor is there an indication that the Board has been refused any requested information or briefings.

Board participation in development of the NDOP's budget is not a statutory requirement. It would appear from statutory language that this is the responsibility of the Director. Ultimate approval of the budget rests with the state legislature.

#### CONCLUSION TO QUESTION FOUR

The Board is not required by statute to play any role in the development of the NDOP budget. However, the Board has authority to review and set policies relating to NDOP budget matters, and is empowered to regulate the number of officers and employees of the NDOP.

#### QUESTION FIVE

Should the Board approve contracts and/or cooperative agreements? What is the force and effect of such contracts or agreements if they are entered into without a Board vote?

#### ANALYSIS

##### A. Interlocal (Cooperative) Agreements

[NRS 277.100](#), known as the Interlocal Cooperation Act, provides guidelines under which state and other public agencies may enter into interlocal (or cooperative) agreements with each other for the most efficient use of governmental resources. [NRS 277.110\(2\)](#) provides:

Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of [NRS 277.080](#) to [277.170](#), inclusive. Those agreements become effective only upon ratification by appropriate ordinance, resolution or otherwise pursuant to law on the part of the governing bodies of the participating public agencies.

The State Administrative Manual (SAM) summarizes a cooperative agreement as "an agreement between two or more public agencies for the 'joint exercise of powers, privileges and authority,' including, but not limited to law enforcement." SAM 0306.0. Interlocal (cooperative) agreements are not required to be approved by the Board of Examiners, but must be approved as to form only by the Attorney General's office. The agreement must be filed with the appropriate county recorder, and with the Secretary of State. [NRS 277.140](#); SAM 0310.0.

State law requires that an interlocal agreement must be ratified by one of several actions which may be taken by an agency's governing body (in this case the Board). The Board may ratify through passage of an ordinance, a resolution, or "otherwise pursuant to law" ([NRS 277.110](#)). For example, in *Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc.*, 819 F.2d 910

(9th Cir. 1987), the court held that under Nevada's Interlocal Cooperation Act, cities and counties could delegate to the district board of health their authority to award an exclusive franchise for the provision of ambulance services. Another obvious method of vesting authority to approve or ratify an agreement is by legislative act.

## B. Interlocal Contracts

Interlocal contracts are permitted under [NRS 277.180](#)(1), which provides:

Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform. Such contract shall be ratified by appropriate official action of the governing body of each party to the contract as a condition precedent to its entry into force. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.

SAM 0314.0 states: "Interlocal contracts are distinguished from cooperative agreements in that cooperative agreements are for the 'joint exercise of powers, privileges and authority' by public agencies, and interlocal contracts are agreements by public agencies to 'obtain a service' from another public agency."

The statutes governing interlocal contracts do not require approval of the Attorney General's office as to form, nor is Board of Examiners' approval required. [NRS 277.180](#).

Through approval of AR 212 (Contract Controls, Management, and Monitoring) on March 24, 1988, the Board adopted contract guidelines for NDOP staff. On May 2, 1991, the Board approved a revision of AR 212, superseding the original version. The purpose of AR 212 is described as follows: "To establish standardized procedures for the Administrative Office and originators of contracts within the Department of Prisons. The objective of this procedure is to implement guidelines for the proper method and standardization of the submission, maintenance and monitoring of contracts and contract files."

AR 212 provides guidelines to NDOP staff for entering into contracts, including cooperative agreements, interlocal contracts, and independent contracts and requires staff to adhere to the procedures set forth in the SAM beginning with section 0300. AR 212(III)(A). The regulation requires the NDOP Contract Coordinator to obtain approval of the Attorney General's office as to form for all such documents. AR 212(IV)(C)(5). In addition, the Contract Coordinator is to "[o]btain contractor's and Assistant Director's [of Support Services] signatures and submit document with all appropriate attachments to proper authority for final execution to effect document." AR 212(IV)(C)(6).

The question appears to be whether the Board must approve interlocal (cooperative) agreements on behalf of the NDOP, whether it has delegated this authority to the director, or whether the director independently has this authority.

[NRS 209.141](#) provides the Director with independent authority to enter into "agreements with other governmental agencies and private organizations . . . ." Thus, not only does the Director under [NRS 277.110](#) have authority to enter into interlocal (cooperative) agreements which must be ratified by the Board, the Director appears to have been granted this authority by the legislature through [NRS 209.141](#), which requires that such agreements must be made "with the approval of the board."

AR 212 does not clearly state who or what is the "proper authority" for final execution of agreements and contracts. However, since AR 212 requires NDOP staff to follow the procedures



in section 0300 of SAM, it must be assumed that the NDOP is expected to obtain approval (or ratification) from the Board for interlocal (cooperative) agreements. Therefore, any interlocal (cooperative) agreement is subject to ratification or approval by the Board.

Should an interlocal (cooperative) agreement be entered into by the NDOP without ratification by the Board, or where no specific legislative act has authorized the Director to enter into such an agreement, then under [NRS 277.110](#), the agreement is not effective until ratification occurs.

The question is also asked as to what the "force and effect" might be of an unratified agreement. In the absence of specific statutory direction addressing this situation, it is likely the usual principles of contract law would be applied to any dispute between the parties to the agreement. Each party would be free to request that a court provide equitable relief in the appropriate circumstances.

It should be noted that during the current biennium, the Attorney General's office has been conducting a comprehensive study of contract and purchasing procedures for state agencies. Recommendations for preparation and review of requests for bid proposals, contract negotiation and drafting, financing, and related functions will be designed to bring uniformity, clarity, and efficiency to these areas. It is anticipated reorganization of efforts will provide state agencies with access to the expertise of appropriate state agencies and personnel, and result in better contracts at less cost to the state.

#### CONCLUSION TO QUESTION FIVE

Interlocal agreements and interlocal contracts must be ratified through appropriate official action by the governing body of each party to the contract. Unlike interlocal agreements, there is no statutory requirement that an interlocal contract must be approved either by the Attorney General's office or by the Board of Examiners. However, NDOP regulations require its staff to obtain approval of the Attorney General's office as to form.

#### QUESTION SIX

Since the same three individuals who comprise the Board—Governor, Secretary of State, and Attorney General—also comprise the Board of Examiners, are separate meetings of the two bodies required under either the Open Meeting Law or other state statute in the event both bodies must act on the same issue?

#### ANALYSIS

The statute which creates the NDOP and the Board authorizes the Board to transact business, but does not require the Board to meet any minimum number of times, or at all. [NRS 209.101](#). It may be inferred from the legislature's silence in this regard that it is left to the discretion of the president of the Board (the Governor) as to when and whether it is desirable to call a Board meeting.

Chapter 241 of NRS, commonly known as Nevada's Open Meeting Law, generally provides that the meetings of all public entities where action is to be taken by a majority of its members are to be noticed in advance and open to the public. Any action taken by a public entity which has not adhered to the requirements of chapter 241 is void. [NRS 241.036](#). There is no provision in chapter 241 which requires that any public entities hold meetings, only that certain procedures must be followed in the event they do.

Section 241.030 of NRS, which states the exceptions to the open and public meeting requirements, does not exempt the Board. Thus, whenever a Board meeting is called by the

president for the purpose of taking action as defined under [NRS 241.015\(1\)](#), the notice and meeting requirements of chapter 241 must be met. If no such action is contemplated, then chapter 241 does not apply.

With respect to the question of whether the Board of Examiners and the Board must hold separate meetings if both entities must act on the same matter, there does not appear to be any statute which addresses this question. However, as long as each entity fulfills the requirements of chapter 241 if action is anticipated (e.g., notice and a meeting open to the public), a joint meeting of both boards would not appear to violate either the letter or spirit of the Open Meeting Law.

### CONCLUSION TO QUESTION SIX

Under the Open Meeting Law, if the President of the Board calls a meeting for the purpose of taking action pursuant to [NRS 241.015\(1\)](#), the meeting must be noticed and open to the public. Joint meetings of the Board of Examiners and the Board of Prison Commissioners are permissible. There is no requirement that the Board hold any minimum number of meetings.

### QUESTION SEVEN

Based on state law and/or the request for proposals recently issued by the Department of Prisons for a new women's correctional facility in southern Nevada, must the Board approve the selected bid before a contract can be voted upon by the Board of Examiners?

### ANALYSIS

Senate Bill 278, which was approved in the 1995 Legislative Session, authorized the director of the NDOP to enter into a contract for the construction and operation of a new correctional facility for women in southern Nevada. The bill specifically set forth requirements of the contemplated contract, prohibited delegation of certain powers of the Director under the contract, and exempted the contract from the normal state bidding requirements under NRS. Act of March 17, 1995, ch. 656, § 10, 1995 Nev. Stat. 2529.

Section 4 of S.B. 278 requires approval of the amount of the contract by the Board of Examiners, but not by the Board of Prison Commissioners. The legislature could have required Board approval, but apparently chose not to do so. Under the rules of statutory construction, the legislature would have provided language of inclusion if it had so intended. *Clark County Sports Enter., Inc. v. City of Las Vegas*, [96 Nev. 167](#), 174, 606 P.2d (1980). In general, when certain things have been enumerated by the Legislature, other things are to be excluded. *State ex rel. Nev. Tax Comm'n v. Boerlin*, [38 Nev. 39](#), 45, 144 P. 738 (1914); *State ex rel. Leake v. Blasdel*, [6 Nev. 40](#), 44 (1870).

Senate Bill 278 contemplates the Director enter into an agreement with an independent contractor experienced in the management and operation of private correctional facilities. The State Administrative Manual delineates the general responsibilities of state agencies with respect to entering into agreements with independent contractors in sections 0320.0 through 0344.0. In section 0322.0(2), SAM provides:

- The Board of Examiners shall review each contract submitted for approval and consider:
- A. Whether sufficient authority exists to expend the money required by contract; and
  - B. Whether the services which are the subject of the contract could be provided by a state agency in a more cost effective manner.

There is no reference in SAM or in the NRS to any requirement that the governing board of a state agency must approve agreements with independent contractors. Only the Board of Examiners

is required to approve such agreements. [NRS 284.173\(b\)](#). Nonetheless, it should be noted that the NDOP, in its request for proposal issued on January 26, 1996, provided in article IV, section 4.4, that:

No agreement shall be effective or binding upon the state until it is approved by the Director of the Nevada Department of Prisons, the Director of the Department of Administration, the State Public Works Board, the Department of Taxation, the Department of Administration [sic], the Attorney General, the State Board of Examiners, and the Board of Prison Commissioners, and reviewed by the Interim Finance Committee.

Thus, the NDOP contemplates requiring approval of various state entities as a condition to be satisfied before any agreement negotiated by the Director with an independent contractor selected by him for the southern women's prison will take effect. Inclusion of the above paragraph in the request for proposal indicates the Director's expectation Board members will be requested to review and approve the negotiated contract.

There is no requirement either in the NRS or in the request for proposal that the Board or any other entity must review or approve any of the women's prison proposals submitted to the Director for his evaluation and consideration. The NDOP, through its Director, was given sole authority and discretion to select, or not select, a proposal for the purpose of entering into contract negotiations.

#### CONCLUSION TO QUESTION SEVEN

The approval of the Board is not required by statute for any contract contemplated under S.B. 278 for construction of a women's correctional facility in southern Nevada. However, under the terms of the request for proposal issued by the NDOP, Board approval of the final agreement will be required.

#### QUESTION EIGHT

If you determine that the Prison Board is a ceremonial or "pass through" entity, what regulations must be adopted to effectively clarify its responsibilities vis-a-vis those of the Prison Director? Furthermore, if you reach this conclusion, do you believe Nevadans would be better served by a constitutional amendment to abolish the Board?

#### ANALYSIS

In responding to this question, it is helpful to understand the role of the Board as it has evolved from a historical perspective.

The first territorial prison was established in 1862. The territorial governor appointed Abram Curry as the first warden that same year. In 1864, the territorial legislature passed an act establishing a Board of Prison Commissioners, which originally consisted of the secretary of the territory, the territorial auditor, and the territorial treasurer. In 1864, Robert M. Howland replaced Curry as warden.

When Nevada's Constitution was adopted in 1864, the members of the Board of Prison Commissioners included the Governor, the Secretary of State, and the Attorney General; the Lieutenant Governor was designated the *ex officio* warden. The warden was to submit monthly statements of estimated expenditures to the Board, and the secretary of the Board was responsible for auditing and paying amounts due for prison purchases.

The Board was authorized to arrange for employment of prisoners, to advertise for bids for any prison supplies, to maintain legal actions to collect money owed for items made or services performed by prisoners, to post rules regarding visitors to inmates, to determine and regulate which inmates should be granted credits for work and good behavior, and to appoint a warden in the event of a vacancy. The Board was required to hold at least one meeting, on the first Monday after the act was passed, to organize itself and "take charge of the prison." Act of March 4, 1865, ch. LXIX, § 5, 1865 Nev. Stat. 219.

Little had changed by 1873, when the legislature enacted the following statutory change:

Government of the State Prison of this State shall be under the control of the Board of State Prison Commissioners . . . who shall have full and exclusive control of, and over, all the State Prison grounds, buildings, prisoners, Prison labor, Prison property, and all other things belonging or appertaining to said Prison, and shall establish such rules, regulations, and by-laws, for the government and regulation thereof, as they may deem proper, and shall, from time to time, visit the Prison, examine into its affairs and government, and, from personal observation and conference with the officers, change, alter, or abolish the same, as, in their judgment, may be found necessary for the well-being thereof.

Act of March 7, 1873, ch. CIX § 1, 1873 Nev. Stat. 181.

The legislature vested in the Board the responsibility to "appoint all necessary help, and have the general superintendence of the business of the Prison and Prison labor. . . ." *Id.* at 182. The Board was to receive a detailed monthly report from the warden, as well as detailed requisition for clothing, provisions, medicines, stores, and supplies. *Id.* The Board was given the additional duty of providing "for the holding of divine services in the State Prison on each Sabbath day . . . a copy of the Bible, and such other books and papers as may be deemed for the well-being of the prisoners." *Id.* at 184.

The legislature required the Board to have one meeting on the first Monday of April 1873 to select a warden who was subject to removal by the Board at any time, and who would receive a salary up to \$3,000 per year. *Id.* at 182. The lieutenant governor of the state was thus no longer designated the ex officio warden of the state prison. Later, in 1893, the legislature further defined the role of the warden as the "chief executive officer of the Prison, at a salary of two thousand dollars per annum, and shall reside at the Prison . . ." Act of March 6, 1893, ch. XCI, § 2, 1893 Nev. Stat. 101. The warden was "subject, at all times, to the order and direction of said Board of State Prison Commissioners." *Id.*

Since the legislature's creation of the position of Director in 1977, the Board met on three occasions in 1978, primarily to approve a Code of Penal Discipline and Manual of Procedures, and to receive reports on construction. There were three meetings in 1979, and four in 1980. The Board met five times in 1981, but only once in 1982. The Board, as it was comprised in the 1980s, held meetings during the period when prison construction was proceeding at a rapid pace (three meetings in 1983, four in 1984, and five in 1985). There was one meeting in 1986, two in 1987, three in 1988, six in 1989, three in 1990, two in 1991, three in 1992, one in 1993, and one to date in 1996. At meetings held during the late 1980s and early 1990s, many of the NDOP's administrative regulations were adopted and/or revised by the Board.

The Director is appointed by the Governor, and the Governor as President of the Board determines whether it appears necessary or desirable to call a Board meeting. The NRS does not require the Board to meet any minimal number of times. Thus, the frequency of Board meetings or the business conducted would appear to depend on the need to adopt or review administrative regulations, to approve an increase or decrease in the number of officers and staff, or if the Board

no longer wishes to delegate purchase decisions to the director. Finally, it depends in part upon the philosophy of the Governor and other members of the Board and the Director.

The type of Board involvement in the administration of prison operations which existed during the NDOP's early years is no longer appropriate or necessary. The function of the Board today is more akin to that of a guiding hand for the Director and the NDOP where the need to provide such guidance or to conduct a review of statewide NDOP regulations or policies arises. Whether the Board chooses to meet or not, however, it exists to provide an important "check" on the Director of the NDOP, and to discuss any matters the Board is either statutorily required to, or for other reasons wishes to, raise at a public forum.

#### CONCLUSION TO QUESTION EIGHT

As reflected by provisions of [NRS chapter 209](#), the Board provides guidance to the Director when it deems necessary, rather than involving itself in day-to-day administration of NDOP activities. The extent to which the Board chooses to meet, to request information from the Director, and to provide direction, is a matter which the legislature has left to the discretion of the Governor and other members of the Board. The Board acts as a "check" on the management of the NDOP. In this regard, the public interest is served by having a Board.

To ensure that members of the Board receive regular reports from the Director and have a reasonable opportunity to provide guidance to him or her, it is recommended that the Director give periodic reports on the state's prison system, and that the Board meet at a regularly scheduled meeting or as part of a regularly scheduled Board of Examiners meeting, at least twice a year for this purpose.

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Senior Deputy Attorney General

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OPINION NO. 96-25EMPLOYEES; EMPLOYERS; LABOR COMMISSION: The legislature intended the employee to have two 10-minute breaks throughout the day, however, these breaks do not apply when only one person is employed at a particular place of employment. Moreover, the [NRS 608.019](#)(3)(b) exemption applies to [NRS 608.019](#)(1) and (2).

Carson City, September 9, 1996

Mr. David Dahn, Nevada State Labor Commissioner, 555 East Washington Avenue, Suite 4100,  
Las Vegas, Nevada 89101

Dear Mr. Dahn:

You have asked this office for an opinion regarding certain provisions of [NRS 608.019](#). Your questions are specifically addressed as follows:

#### QUESTION ONE

Does [NRS 608.019](#)(2) require an employee receive a rest period of at least ten minutes in duration or may the rest period be divided into smaller intervals?

## ANALYSIS

[NRS 608.019](#)(2) provides that an employer shall allow an employee to take a 10-minute break for every four hours that the employee has worked each day. These 10-minute breaks shall be taken, insofar as practicable, "in the middle of each work period."

This statute contemplates that an employee shall take two breaks of ten minutes each, in the middle of each 4-hour period. [NRS 608.019](#)(2). An exhaustive review of A.B. 219 and its legislative history reveals that little if any discussion had taken place concerning duration of the break time. Act of May 27, 1975, ch. 741, § 1, 1975 Nev. Stat. 1582.

The leading rule of statutory interpretation is to ascertain intent in enacting the statute and ascertained intent will prevail over the literal sense. See *Roberts v. State, Univ. of Nevada System*, [104 Nev. 33](#), 752 P.2d 221 (1988). The intent of A.B. 219 was to remove numerous discriminatory provisions within the state's labor laws. A.B. 219 was enacted to benefit as well as to add protection for employees, not the employers. Act of May 27, 1975, ch. 741, § 1, 1975 Nev. Stat. 7. If the language in a statute is ambiguous, then the construction that best reflects the legislative intent should be adopted. *Nevada Power Co. v. Public Service Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867, 874 (1986).

## CONCLUSION TO QUESTION ONE

The language regarding whether the ten minutes can be taken all at one time is ambiguous. The clear intent of A.B. 219 was to benefit the employee. The statutory language clearly provides for a 10-minute break in the middle of each work period (morning period, lunch, and afternoon period). Accordingly, it can be inferred that the legislature intended the worker to have two 10-minute breaks, one in the morning and one in the afternoon.

## QUESTION TWO

Should [NRS 608.019](#)(3)(a), which exempts an employer from [NRS 608.019](#) when only one person is employed at a particular place of employment, be read narrowly or should it be read more broadly, allowing an employer to utilize the exemption when several employees are employed at one location but work in different areas of the property?

## ANALYSIS

[NRS 608.019](#)(3)(a) provides an exception to [NRS 608.019](#)(1) and (2) which mandates a continuous 10-minute rest period or an uninterrupted 30-minute lunch period, unless only one person is employed at a particular place of employment. In this situation, the plain language of the statute controls. If language is plain and unambiguous, there is no room for construction. *Nevada Power Co.*, 102 Nev. at 4.

This exemption applies when there is only one person working at a place of employment at a certain period of time where it would be impracticable or impossible to grant the employee a 10-minute break or a 30-minute lunch period. Examples might include only one clerk working at a Seven-Eleven, only one night security guard at an apartment complex, or employees in other such situations.

## CONCLUSION TO QUESTION TWO

The [NRS 608.019](#)(3)(a) exemption should be read narrowly and would only apply in situations where there is *one* person employed at a particular place of employment.

### QUESTION THREE

Does the collective bargaining agreement exemption mentioned in [NRS 608.019\(3\)\(b\)](#) apply to [NRS 608.019\(1\)](#) and (2)?

#### ANALYSIS

[NRS 608.019\(3\)\(b\)](#) provides that employees included within the provisions of a collective bargaining agreement are exempted from [NRS 608.019\(1\)](#) and (2). In order to have the employer bound to the collective bargaining agreement, the union *must* represent a majority of the employer's workers. Otherwise, pursuant to the National Labor Relations Act 8(a)(5), 29 U.S.C. 158(a)(5) (1935), such bargaining constitutes an unfair labor practice. *N.L.R.B. v. Albany Steel, Inc.*, 17 F.3d 564, 568 (2nd Cir. 1994). Once a viable collective bargaining agreement exists, the rights employees have under such an agreement can be determined.

The collective bargaining agreement usually controls the employment relationship. For waivers of statutorily protected rights, such rights must be "clearly and unmistakably articulated" within the collective bargaining agreement. *Furniture Renters of America, Inc. v. N.L.R.B.*, 36 F.3d 1240 (3rd Cir. 1994), citing *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708, (1983). "As a matter of federal labor law, courts will not intervene in the collective bargaining process and require the employer to take steps unauthorized by the duly-negotiated agreement." *Marshall v. Western Grain Co., Inc.*, 830 F.2d 1165, 1169 (11th Cir. 1988).

Generally, as long as the collective bargaining agreement is nondiscriminatory, the courts, in order to promote respect for the collective bargaining process, will refuse to tamper with the agreement. *Id.* However, the United States Supreme Court has recently ruled that when liability is governed by independent state law, the mere need to look to the collective bargaining agreement for damage computation is no reason to hold the state law claim defeated by the pre-emptive powers National Labor Relations Act § 301 (1947). *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2079 (1994).

In *Livadas*, Karen Livadas, a supermarket employee, was terminated from her job. Pursuant to California state law, the employer must pay Livadas her earned wages immediately upon termination or the employer would have to pay Livadas' wages every day thereafter for a 30-day period. The collective bargaining agreement stated that all resolutions should be handled through arbitration. The employer paid Livadas' wages three days after her termination. Livadas filed a claim with the California Labor Commission stating that pursuant to California law, she was due three days wages.

The Labor Commissioner denied her claim because there existed a collective bargaining agreement which stated that all such matters are to be decided by an arbitrator. The federal district court ruled for Livadas, but the 9th Circuit Court of Appeals reversed the district court's ruling. The Supreme Court reversed the 9th Circuit stating that:

Denying represented employees basic safety protections might "encourage" collective-bargaining over that subject, and denying union employers the protection of generally applicable state trespass law might lead to increased bargaining over the rights of labor pickets, but we have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course.

*Livadas*, 114 S. Ct. at 2081 (citation omitted).

The United States District Court in California published an exemplary remedial order interpreting the Supreme Court's ruling in *Livadas*. The district court further cited another

Supreme Court ruling which clarified *Livadas, Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994). "[I]f the state law right is *completely* stated in the statute and there is no need to interpret the CBA [collective bargaining agreement] to resolve or enforce that right, there is no reason for [LMRA § 301] preemption to apply." *Livadas v. Bradshaw*, 865 F. Supp. 642, 644 (N.D. Cal. 1994) (emphasis in original).

Certain statutes create mandated rights and although subject to certain restrictions, are applicable to all Nevada employees whether or not such employees are covered by a collective bargaining agreement.

An example of such a right is illustrated by the following: A union represented employee claims that her employer failed to pay her wages during the employee's trial period. [NRS 608.016](#) provides that an employer shall not allow an employee to work without wages during the trial period. The collective bargaining agreement states that all grievances must be taken before an arbitrator. [NRS 608.016](#) creates a state-mandated right to be paid during the trial period. In this case, the Labor Commissioner can enforce [NRS 608.016](#), even though the agreement provides for an arbitrator. [NRS 608.016](#) creates a state mandated right to collect wages during the trial period.

### CONCLUSION TO QUESTION THREE

[NRS 608.019](#)(1) and (2) were specifically exempted by [NRS 608.019](#)(3)(b). The legislature intended for employers and employees to be able to bargain for lunch and rest periods. However, if the collective bargaining agreement is devoid of any reference to lunch breaks and/or rest periods, then 608.019(1) and (2) will prevail. Accordingly, the [NRS 608.019](#)(3)(b) exemption applies to [NRS 608.019](#)(1) and (2).

FRANKIE SUE DEL PAPA  
Attorney General

By: MATTHEW T. DUSHOFF  
Deputy Attorney General

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OPINION NO. 96-26DRIVER'S LICENSES; MOTOR VEHICLES; SOCIAL SECURITY NUMBERS: The Department of Motor Vehicles and Public Safety may release social security account numbers and related records only to states or their political subdivisions for purposes specified in 42 U.S.C.A. § 405(c)(2)(C)(i) (1991).

Carson City, September 13, 1996

Mr. James P. Weller, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711-0525

Dear Director Weller:

You have asked this office for an opinion regarding the Department of Motor Vehicles and Public Safety's (Department) disclosure of social security account numbers and related records.

### QUESTION ONE

To whom may the Department disclose social security account numbers under current state and federal law?



## ANALYSIS

As an overview, a state agency's lawful authority to require that a social security account number be provided is extremely limited. The Privacy Act of 1974 provides that it is unlawful for a state agency to deny an individual any right or privilege based on his or her refusal to furnish his or her social security account number. 5 U.S.C.A. § 552a (1996).

However, in 1976 Congress provided for certain limited exceptions, whereby only state agencies administering tax, public assistance, driver's license, or motor vehicle registration, may *require* that the person provide a social security account number. *See* 42 U.S.C.A. § 405(c)(2)(C)(i) (1991). It provides that individuals may be required to provide their social security numbers, but only for certain specified, limited purposes:

It is the policy of the United States that any State (or political subdivision thereof) *may*, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and *may require* any individual . . . to furnish . . . the social security account number . . . issued to him . . . .

42 U.S.C.A. § 405(c)(2)(C)(i) (1991) (emphasis added). The above provisions evince an intent to protect the privacy of one's social security account number, even from state agencies.

Thus, pursuant to the above provision, the Department may require that an individual furnish his or her social security account number for purposes of establishing identification pursuant to administration of any tax, driver's license, or motor vehicle registration law. The 1989 Nevada Legislature enacted provisions relative to obtaining and maintaining social security account numbers and related records. [NRS 483.290](#) requires driver's license applicants to furnish social security information. [NRS 483.345](#) provides that the drivers license number will be the social security number, or a unique number formulated on the basis of the social security number.

With regard to the social security account numbers and related records which the Department requires under federal and state law, the next issue is to whom may the Department disclose such information. The Nevada Legislature recently amended Nevada Revised Statutes 481.063, 482.170 and 483.916. Act of July 5, 1995, ch. 560 § 1, 1995 Nev. Stat. 1927. The amendments prohibit the Department from releasing "personal information" except as specifically permitted by statute. The "personal information" to be protected is defined to include social security numbers and driver's license numbers. This definition of "personal information" is identical to the information deemed protected by the federal Driver's Privacy Protection Act of 1994. 18 U.S.C.A. § 2721 (Cum. Supp. 1996). However, simply because state law may allow release of "personal information" under specified circumstances does not mean that such release is not subject to federal law governing release of social security account numbers or related records.

Nor does the federal Driver's Privacy Protection Act eliminate the well-established protections afforded social security account numbers and information. This is so particularly as the express purpose of the Act is driver's privacy protection. The federal Driver's Privacy Protection Act carves out "personal information" for special treatment—it is not to be disclosed by the Department except as provided by law. That social security account numbers are defined as "personal information" does not mean any permitted user of "personal information" is ipso facto entitled also to social security information. To so find would eliminate the long-standing, long-recognized privacy protections afforded by the 1974 Privacy Act and the 1976 amendment of the social security laws. 5 U.S.C.A. § 552a (1996); 42 U.S.C.A. § 405(c)(2)(C)(i) (1991) respectively. This would produce an absurd result and fails to harmonize the two provisions.

Thus, the Department may require an individual to furnish his social security number but only for administration of driver's license or motor vehicle registration law. Further, the Department's use of the social security information should only be used or disclosed for the express purposes in 42 U.S.C.A. § 405(c)(2)(C)(i) (1991): "[T]he administration of any tax, general public assistance, driver's license, or motor vehicle registration law . . . for the purpose of establishing the identification of individuals affected by such law . . ." *Id.*

In 1990 Congress enacted 42 U.S.C.A. § 405(c)(2)(C)(viii)(I) (1991), which provides: "Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record." It also provides that willful unauthorized disclosure by authorized personnel of confidential social security account numbers and related records is a felony.

NRS provisions relevant to the Department's obtaining and maintaining social security account numbers or related records were enacted in 1989: [NRS 483.290](#) governs furnishing to the Department social security information for drivers license applicants; [NRS 483.345](#) governs the Department assigning a driver's license number formulated on the basis of the social security number (social security account number related records). Because these statutes predate the October 1, 1990, cutoff, it appears that 42 U.S.C.A. § 405(c)(2)(C)(viii)(I) (1991) does not apply to the Department's use of social security information. However, the intent of the federal law is clear to limit unauthorized disclosure by authorized personnel.

The federal Privacy Act of 1974, 42 U.S.C.A. § 405(c)(2)(C)(i) and (viii) (1991), which makes unauthorized willful disclosure a felony, and the Driver's Privacy Protection Act of 1994, have the clear purpose of protecting individuals from compelled disclosure of social security information except to specific authorized agencies for specific purposes. If these federal laws were interpreted to allow the Department to disclose social security account numbers and related records to anyone pursuant to state law, it would emasculate the federal protections of this federal identifier. The federal protections would be effectively nullified. That would produce an absurd result.

Laws must be interpreted harmoniously, to avoid an absurd result. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227, 1229 (1982); *First American Title Co. v. State of Nevada*, [91 Nev. 804](#), 806, 543 P.2d 1344, 1345 (1975). Further, "statutes must be given a reasonable construction with a view to promoting rather than defeating the legislative policy behind them." *State, Dep't Mtr. Vehicles v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988).

The policy is to afford privacy protection, with exceptions as needed for the state or political subdivision to administer any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction.

The Department's prior release of social security account numbers and related records is not expressly and specifically prohibited by federal law. However, based on the federal laws which limit the purposes for which a social security account number may be required, and which punish as a felony unauthorized disclosure by authorized persons of confidential social security account numbers and related records, the clear implication is that the Department should limit disclosure of social security account numbers and related information to those agencies entitled to such pursuant to 42 U.S.C.A. § 405(c)(2)(C)(i) (1991).

#### CONCLUSION TO QUESTION ONE

To promote the policy behind the Privacy Act, this office recommends that the Department limit disclosure of social security account numbers and related records to the users and purposes specified in 42 U.S.C.A. § 405(c)(2)(C)(i) (1991):

[A]ny State (or political subdivision thereof) . . . in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction . . . for the purpose of establishing the identification of individuals affected by such law. . . .

*Id.* County or city government would be included as political subdivisions of the state to whom disclosure would be permitted for the administration of any tax, welfare program, driver's license, or registration law within its jurisdiction for the purpose of correctly identifying the individual affected.

## QUESTION TWO

To whom may the Department disclose a person's drivers license number?

### ANALYSIS

As discussed above, there are restrictions on disclosure of social security account numbers and "related records." 42 U.S.C.A. § 405(c)(2)(C)(viii)(IV) (1991) defines "related record" as any record, list or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a social security account number or request for a social security account number is maintained.

Pursuant to the Department's current interpretation of [NRS 483.345\(1\)](#), the driver's license number is numerically formulated based on the social security number. Thus, the social security account number can be numerically derived from the driver's license number. This means that the driver's license number is a record which directly or indirectly indicates the identity of an individual with respect to his or her social security number. As such, the driver's license number is a "related record" which must be afforded the same protection as the social security account number itself.

### CONCLUSION TO QUESTION TWO

The Department may release the driver's license number only to those entitled to receive social security account numbers or related records, as the drivers license number is a "related record" in that it directly or indirectly indicates the identity of an individual with respect to his or her social security number.

FRANKIE SUE DEL PAPA  
Attorney General

By: LAURIE B. BUCK  
Deputy Attorney General

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OPINION NO. 96-27CIVIL RIGHTS; FELONS; VOTING: Felons convicted in a Nevada district court may have their civil rights restored pursuant to NRS. Nevada can only restore the civil rights of Nevada felons. Federal felons may have their civil rights restored only by presidential pardon. Whether Nevada must afford full faith and credit to the restoration of civil rights by a foreign jurisdiction depends on the individual circumstances.

Carson City, September 25, 1996

The Honorable Stewart L. Bell, Clark County District Attorney, 500 South Grand Central Parkway, Post Office Box 552215, Las Vegas, Nevada 89155-2255

Dear Mr. Bell:

You have requested an opinion on the "correct course of action" to take on the request of a Clark County resident who is a federal felon convicted in the United State District Court, Southern District of New York, who wishes to regain the right to vote. Your inquiry raises several questions.

### QUESTION ONE

How do Nevada felons (felons convicted in a Nevada district court) obtain restoration of their civil rights?

### ANALYSIS

Article 2, § 1 of the Nevada Constitution states: "no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights" may vote. There are several statutory mechanisms in place for restoration of civil rights to Nevada felons depending on whether the felon is on probation, receives a pardon, successfully completes probation, or serves a sentence.

[NRS 176.227](#) provides for the restoration of civil rights of a convicted person after honorable discharge from probation by the district court where the felon was convicted. If the convicted person was granted an honorable discharge from probation, has not previously been restored to his civil rights, and is not convicted of any offense greater than a traffic violation within six months after the discharge, he may apply to the Division of Parole and Probation for restoration of civil rights. The Division of Parole and Probation then petitions the court in which the applicant was convicted for restoration of the convicted person's civil rights. If the Division refuses to petition the court, the convicted person may petition the district court in which the conviction was obtained directly for restoration of his civil rights.

Pursuant to [NRS 213.090](#), the Nevada Board of Pardons Commissioners may restore civil rights of felons at the time a pardon is granted or at a later date. If restoration of civil rights is granted at a date subsequent to the pardon, the applicant shall not have been convicted of any offense greater than a traffic violation within five years after the pardon was granted. If the Board of Pardons Commissioners refuses to restore the applicant's civil rights, the applicant may petition the district court in which the conviction was obtained for an order directing the Board of Pardons to grant such restoration.

The Nevada Parole Board, pursuant to [NRS 213.155](#), may restore a paroled prisoner to his civil rights at expiration of his parole. If the convicted person did not receive a restoration upon expiration of his parole, and has not been convicted of an offense greater than a traffic violation within five years after completion of parole, he may apply to the Parole Board for restoration of his civil rights. If the Parole Board refuses to restore the applicant's civil rights, the applicant may petition the district court in which the conviction was obtained for an order directing the Parole Board to grant such restoration.

The Division of Parole and Probation may restore a convicted person's civil rights after his sentence has been served pursuant to [NRS 213.157](#). If the convicted person has not been convicted of any offense greater than a traffic violation within five years of his release, he may apply to the Division for restoration of his civil rights. Upon submission of proof that the convicted person meets the criteria for restoration of his civil rights, the Division of Parole and Probation shall

petition the district court in which the conviction was obtained for restoration of the applicant's civil rights. If the Division of Parole and Probation refuses to submit such a petition, the applicant may directly petition the district court in which the conviction was obtained for an order directing the Division of Parole and Probation to grant such restoration.

### CONCLUSION TO QUESTION ONE

Depending on the status of the convicted person, restoration of civil rights may be obtained for Nevada felons from the district court in which the felon was convicted, the Board of Pardons or the Parole Board.

### QUESTION TWO

Can Nevada restore civil rights of felons who were not convicted in a Nevada district court?

### ANALYSIS

The statutory language referred to in Question One limits authority of the Board of Pardons Commissioners, the Board of Parole Commissioners, and the Nevada district courts to restoring the rights of Nevada felons only. It is almost axiomatic that a state's ability to pardon and restore civil rights is limited to convicted persons over which the state has jurisdiction. This proposition is buttressed by the opinion of the U.S. Supreme Court in *Beecham v. U.S.*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1669 (1994). *Beecham* involved federal felons who obtained state restorations of their civil rights and were subsequently convicted of being felons in possession of firearms in violation of 18 U.S.C.A. § 922(h) (1994).

The question before the Supreme Court in *Beecham* was "[W]hich jurisdiction's law is to be considered in determining whether a felon 'has had civil rights restored.'" *Beecham*, 114 S. Ct. at 1670 (emphasis added).

The *Beecham* Court went on to hold:

Throughout the statutory scheme, the inquiry is: Does the person have a qualifying conviction on his record? Section 922(g) imposes a disability on people who "ha[ve] been convicted." The choice-of-law clause defines the rule for determining "[w]hat constitutes a conviction." The exemption clause says that a conviction for which a person has had civil rights restored "shall not be considered a conviction." Asking whether a person has had civil rights restored is thus just one step in determining whether something should "be considered a conviction." By the terms of the choice-of-law clause, *this determination is governed by the law of the convicting jurisdiction.*

This interpretation is supported by the fact that the other three procedures listed in the exemption clause--*pardons, expungements, and set-asides*--are either always or almost always (depending on whether one considers a federal grant of habeas corpus to be a "set aside," a question we do not now decide) *done by the jurisdiction of conviction.* That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well. *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S.Ct. 929, 934-935, 108 L.Ed.2d 23 (1990); *Third Nat. Bank in Nashville v. Impac Limited, Inc.*, 432 U.S. 312, 322, 97 S.Ct. 2307, 2313, 53 L.Ed.2d 368 (1977); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961).

*Beecham*, 114 S. Ct. at 1671 (emphasis added). See also *U.S. v. Jones*, 993 F.2d. 1131 (4th Cir. 1993) (state's post-conviction restoration of rights scheme cannot eliminate prior federal conviction as prior conviction for federal offense as being a felon in possession of a firearm); *U.S. v.*

*Dupaquier*, 74 F.3d 615, 617 (5th Cir. 1996) (the federal court looks to state law to determine whether a defendant's civil rights were restored); and *U.S. v. Lowe*, 50 F.3d 604 (8th Cir. 1995) (Minnesota lacks authority to restore civil rights of Minnesota resident convicted in another state).

*Beecham* involved a violation of federal firearms laws. However, the rationale of *Beecham* and its application to voting rights cases is supported by a lack of authority or rationale for deviating from it.

### CONCLUSION TO QUESTION TWO

Because of Nevada's express statutory language and the rationale of the *Beecham* line of cases, Nevada can only restore the civil rights of Nevada felons.

### QUESTION THREE

How do federal felons obtain restoration of their civil rights?

### ANALYSIS

There does not appear to be a procedure under federal law for restoring a federal felon's civil rights. See *United States v. Geyler*, 932 F.2d 1330, 1333 (9th Cir. 1991); *Beecham*, at 1671-72. In a footnote, the *Beecham* Court stated:

We express no opinion on whether a federal felon cannot have his civil rights restored under federal law. This is a complicated question, one which involves the interpretation of the federal law relating to federal civil rights, see U.S. Const., Art. I, Sec. 2, cl. 1 (right to vote for Representatives); U.S. Const., Amdt. XVII (right to vote for Senators); 28 U.S.C. Sec. 1865 (right to serve on a jury); consideration of the possible relevance of 18 U.S.C. Sec. 925(c) (1988 ed., Supp. IV), which allows the Secretary of the Treasury to grant relief from the disability imposed by Sec. 922(g); and the determination whether civil rights must be restored by an affirmative act of a government official, see *United States v. Ramos*, 961 F.2d 1003, 1008 (CA1), *cert. denied*, 506 U.S. \_\_\_, 113 S.Ct. 364, 121 L.Ed.2d 277 (1992), or whether they may be restored automatically by operation of law, see *United States v. Hall*, 20 F.3d 1066 (CA10 1994). We do not address these matters today.

*Id.* at 1672, n. 2.

### CONCLUSION TO QUESTION THREE

The only method available for a federal felon to obtain restoration of his civil rights appears to be a presidential pardon pursuant to U.S. Const., art. II, § 2; authority of the President as Chief Executive, 28 U.S.C. §§ 509 and 510 (1993); and 28 C.F.R. 0.35 and 1.1 (1993).

### QUESTION FOUR

Is Nevada required to give full faith and credit to restorations of civil rights by other states?

### ANALYSIS

The Full Faith and Credit Clause of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

The purpose of the Full Faith and Credit Clause is to preserve rights acquired or confirmed under public acts or judicial proceedings of one state by requiring recognition of their validity in other states. 16A Am. Jur. 2d *Constitutional Law* § 863 (1995). However, "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2122 (1988), quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 59 S. Ct. 629, 632 (1939). Nor is a state required to enforce a law obnoxious to its public policy. *Griffin v. McCoach*, 313 U.S. 498 (1941), citing *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932); *Hartford Indemnity Co. v. Delta Co.*, 292 U.S. 143 (1934).

A split of authority exists regarding recognition of acts of clemency by sister states. There is authority that, under the Full Faith and Credit Clause, one state need not recognize a pardon issued by a sister state for an offense committed in that sister state. See *Carlesi v. New York*, 233 U.S. 51 (1914) (a presidential pardon operated only with regard to the sovereign that issued it); *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974), cert. denied, 420 U.S. 972 (1975) (U.S. not required to recognize state pardon); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), cert. denied, 455 U.S. 1027 (1982) (Texas sheriff not barred from firing a deputy who failed to indicate at the time of hire that he had been convicted of a felony in California even though that conviction was later expunged); *Yaconvone v. Bolger*, 645 F.2d 1028, cert. denied, 454 U.S. 844 (1981) (U.S. Postal Service in deciding whether to employ someone convicted of shoplifting in Vermont was not required to recognize Vermont's pardon of the offense); *Groseclose v. Plummer*, 106 F.2d 311 (9th Cir.), cert. denied, 308 U.S. 614 (1939) (California not required to recognize Texas pardon); *Delehant v. Board of Police Standards and Training*, 855 P.2d 1088 (Or. 1993) (Oregon not required to recognize Idaho's expunction of defendant's Idaho conviction); *State v. Edmondson*, 818 P.2d 855, cert. quashed, 818 P.2d 419 (N.M. 1991) (New Mexico not required to recognize Texas expunction of defendant's Texas conviction).

Other courts, however, have ruled that the law of comity requires that states recognize a sister state's restoration of a convicted person's civil rights. See *Wickizer v. Williams*, 173 S.W. 288 (Tex. Ct. App. 1914) (pardon for felony committed in Mississippi by Mississippi authorities removes disability of person to sit on jury in Texas); *U.S. v. McMurrey*, 827 F.Supp. 424 (S.D. Tex. 1993) (U.S. required to recognize Governor of Oklahoma's pardon of defendant's prior Oklahoma conviction); *People v. Willis*, 435 N.Y.S.2d 655 (N.Y. App. Div. 1982) (New York would not consider a Texas felony conviction for enhancement purposes where Texas would not use the same conviction for enhancement under Texas law).

In determining whether the statute of a state under which foreign rights arose or the law of the forum should control in matters involving policy and conflicting interests, the rule is fairly well settled that different considerations usually apply where the statute creating a foreign right, which it is claimed should be given effect, is set up by way of defense to an asserted liability, from those where merely affirmative rights are claimed under a foreign statute . . . . In both the conflict is to be resolved not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its statutes to those of the other, but by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight.

16A Am. Jur. 2d *Constitutional Law* § 867 (1995) (footnotes omitted).

[A]s a general rule, recognition will be required, unless the matter involves local sovereignty over purely local questions, such as criminal or penal laws, or the statute conflicts with a statute or policy of the forum state and the governmental interests of the forum state in the persons, property, or events in the state involved in the litigation outweigh the governmental interests of the foreign state for whose statute recognition is sought.

*Id.* at § 868 (footnote omitted).

Recognition of restoration of civil rights almost always involves affirmative rights that are claimed under a foreign statute. Therefore, the question of whether Nevada must recognize a sister state's restoration of a convicted person's civil rights is determined by weighing the governmental interests of Nevada and the foreign state. Several factors are relevant to this process including what jurisdiction restored the civil rights, whether the restoration of civil rights was pursuant to some affirmative act or by operation of law, the interest of the foreign state in having Nevada recognize its restoration, and Nevada's interest in not recognizing the restoration.

Restoration of civil rights of a felon who was convicted in that state's courts would tend to support extending full faith and credit to that state's restoration. If the restoring state purports to restore the civil rights of a felon who was *not* convicted within that jurisdiction, it would present a strong argument for nonrecognition under the full faith and credit clause. *See Beecham*, 114 S. Ct. at 1671 and Question Two.

Judgments of other states are almost always given recognition under the full faith and credit clause. Under full faith and credit principles, if the court that issued the judgment had jurisdiction to render the judgment, other states are obligated to recognize the judgment. *Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Assn.*, 102 S. Ct. 1357 (1982). Therefore, if a state restores the civil rights of one of its felons by way of an affirmative act that results in a judgment or a finding by a tribunal, board or commission, rather than by mere operation of law, a stronger argument is presented for recognition.

The jurisdiction that originally imposed the disabilities on the convicted felon has strong interests in whether those disabilities are removed or remain with the felon. Certainly, there are situations where the convicting jurisdiction would desire to have the disabilities associated with a felony conviction removed. For example, if the convicting state issued the felon a pardon based on information that the convicted person was actually innocent of the crimes he was convicted of, the convicting state would have a strong interest in restoring the convicted person's civil rights and remove any stigma that person might have for the unjust conviction.

A jurisdiction that purports to restore the civil rights of a felon who was not convicted in that jurisdiction and did not impose the disabilities associated with being a convicted felon on that person, has little, if any, governmental interest in removing those disabilities. Likewise, that jurisdiction's governmental interest in having that person vote in Nevada is nonexistent.

Nevada's interest in carefully scrutinizing another state's restoration of civil rights to a convicted felon is founded in Nevada's Constitution. Nevada's constitutional mandate that "no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights" may vote, expresses Nevada's very strong interest in keeping convicted felons from voting. Nev. [Const. art. 2, § 1](#). Nevada's interest in not recognizing another state's restoration of civil rights is especially strong where the restoration is relevant only to rights exercised in, and relating to, Nevada, such as voting in state elections.

Although the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6, prohibits felons from voting, the right to vote is primarily a function of a state's prerogative. Certainly, a state may decide who votes in its own state elections. If one state has the prerogative to allow federal felons to vote in its elections, then Nevada certainly can just as surely prevent federal felons from voting in its elections unless their civil rights have been restored.

When all of the factors mentioned above are weighed and evaluated, the conclusion is that Nevada is not bound to recognize another state's statute authorizing federal felons or out-of-state



felons to vote in that state's elections as having restored the convicted felon's constitutional rights pursuant to the full faith and credit clause for two primary reasons: (1) Pursuant to *Beecham*, states do not have jurisdiction to remove disabilities imposed by the federal government or by other states; and (2) such statutes are not restorations at all. Rather, statutes that merely authorize federal and out-of-state felons to vote do only that. Such statutes clearly do not purport to restore civil rights.

#### CONCLUSION TO QUESTION FOUR

Nevada should give full faith and credit to restorations of civil rights where certain criteria are met. The restoring jurisdiction must have also been the convicting jurisdiction. The restoration must purport to be just that, a restoration of the convicted person's civil rights, and meet all the constitutional and statutory requirements of the restoring jurisdiction. Nevada must not have any overriding reason, such as a public policy set out in a statute or Nevada's Constitution, for not recognizing the restoration. If all these questions can be answered affirmatively, then Nevada should recognize a restoration of civil rights by a foreign jurisdiction.

#### QUESTION FIVE

What is the "correct course of action" to take on the request of a Clark County resident to regain the right to vote who is a federal felon convicted in federal district court?

#### ANALYSIS

As stated above in Question One, the Nevada Constitution prohibits felons from voting unless they have had their civil rights restored. Nev. [Const. art. 2, § 1](#). The federal felon in question has supplied documentation that on November 16, 1977, he was convicted of a felony in the United States District Court-Southern District of New York. This person served his sentence at the Federal Prison Camp at Lompoc, California, and was released to the Central District of California where he was under special parole supervision with the U.S. Probation Office for the Central District of California. This person has supplied documentation that he was successfully discharged from parole supervision on October 3, 1985.

The federal felon claims that his civil rights have been restored by New York State and relies on a New York statute that states in pertinent part:

No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or to vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the president of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

N.Y. Election Law § 3 (Consol. 1995).

The statutory language quoted above does not purport to restore the civil rights of federal felons as required by the Nevada Constitution. The language of the statute itself contemplates the distinction between a pardon or a restoration of rights and merely expiring a sentence or being discharged from parole. The cited language simply allows federal felons who have been pardoned or restored or who have expired their sentences or who have been discharged from parole to vote in New York. The statute does not purport to confer any rights that would be associated with a restoration of rights.

The federal felon argues that his rights were restored by the State of New York even though he was convicted in federal court. Pursuant to the rationale of *Beecham*, New York was without

jurisdiction or authority to restore his civil rights. Hence, recognition of his "restoration" is not required. *See* Question Two. Moreover, since the language of the New York statute does not even purport to constitute a restoration of the convicted person's civil rights, a full faith and credit issue is not presented. There is no restoration of civil rights to recognize or not recognize.

In order for this person to vote in Nevada, he must obtain a restoration of his civil rights from the jurisdiction that convicted him—federal authorities. He will need to seek a presidential pardon, which is admittedly an exacting and time-consuming process. Nevada could allow this person, and others similarly situated, to vote if the language in Nevada's Constitution were modified and Nevada enacted statutory language similar to that found in the New York statute relied on by the federal felon. However, at present, this person is not qualified to vote in Nevada.

#### CONCLUSION TO QUESTION FIVE

The proper course of action in this person's case is to direct him to the United States Pardon Office. The Clark County Registrar of Voters should not allow him to register to vote until he has obtained restoration of his civil rights from federal authorities.

FRANKIE SUE DEL PAPA  
Attorney General

By: CHARLES HILSABECK  
Deputy Attorney General

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OPINION NO. 96-28LIENS; PERSONAL PROPERTY; TAXATION; TAXES: The summary seizure and sale remedy of [NRS 361.535](#) is available to collect delinquent taxes assessed against the specific personal property to which an [NRS 361.450\(1\)](#) lien has attached, but is no longer owned by the person assessed. A holder of a recorded security interest in personal property is entitled to notice by mail or personal service prior to tax sale of the personal property as a supplement to the constructive notice required by [NRS 361.535](#) in order to satisfy the requirements of due process. However, due process does not require notice to a mere holder of a recorded security interest prior to seizure of the property by the county assessor.

Carson City, September 27, 1996

Mr. Paul D. Johnson, Deputy District Attorney, Office of the District Attorney, Civil Division, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Johnson:

You have requested an opinion from this office on two questions relating to the summary seizure and sale of personal property for delinquent taxes authorized by [NRS 361.535](#). Our response follows.

#### QUESTION ONE

Is the seizure and sale remedy of [NRS 361.535](#) available to collect delinquent taxes assessed against personal property no longer owned by the person assessed?

#### ANALYSIS

[NRS 361.450](#)(1) creates “a perpetual lien against the property assessed” for taxes levied under [NRS chapter 361](#) “until the tax and penalty charges and interest which may accrue are paid.” With certain exceptions, “the lien attaches on July 1 of the year for which the taxes are levied.” [NRS 361.450](#)(2). The statutes are clear. A personal property tax lien attaches to the personal property assessed and remains with the property until satisfied, regardless of subsequent transfer(s) of the property. See *State of Nev. v. Yellow Jacket Silver Mining Co.*, [14 Nev. 220](#), 231 (1879) (analyzing a tax lien statute substantially similar to [NRS 361.450](#)(1), the court stated “the lien created continues indefinitely, or until the tax is paid . . . the effect of which is to subject the property to the payment of the tax, although it may have passed into other hands subsequent to the date of the lien”); cf. *Magee v. Whitacre*, [60 Nev. 208](#), 214-17, 106 P.2d 751, 753-55 (1940).

In 1977 the legislature amended [NRS 361.450](#). Act of January 26, 1977, ch. 483 § 4, 1977 Nev. Stat. 1000. The amendment created an exception for mobile homes whereby the tax lien expires upon sale, except liens for personal property taxes for the preceding twelve months. [NRS 361.450](#)(3). “Where a former statute is amended . . . it has been held that such amendment is persuasive evidence of what the legislature intended by the first statute.” *Hughes Properties v. State of Nev.*, [100 Nev. 295](#), 298, 680 P.2d 970, 972 (1984). Although [NRS 361.450](#)(1) was and is clear, the 1977 amendment confirms that a personal property tax lien created by [NRS 361.450](#)(1), with the exception of mobile homes, remains attached to the property upon transfer.

[NRS 361.535](#) sets forth the time for payment of personal property tax, the penalty for failure to pay, and authorizes the summary seizure and sale of personal property to satisfy delinquent taxes and costs. [NRS 361.535](#) provides in pertinent part:

1. If the person, company or corporation so assessed neglects or refuses to pay the taxes within 30 days after demand, a penalty of 10 percent must be added. If the tax and penalty are not paid on demand, the county assessor or his deputy shall seize, seal or lock enough of the personal property of the person, company or corporation so neglecting or refusing to pay to satisfy the taxes and costs.
2. The county assessor shall post a notice of the seizure, with a description of the property, in three public places in the township or district where it is seized, and shall, at the expiration of 5 days, proceed to sell at public auction, at the time and place mentioned in the notice, to the highest bidder, for lawful money of the United States, a sufficient quantity of the property to pay the taxes and expenses incurred. For this service the county assessor must be allowed from the delinquent person a fee of \$3.

While one might argue that the summary seizure and sale remedy provided in [NRS 361.535](#) applies only to the assessed taxpayer, the most reasonable conclusion, based on the lien created by [NRS 361.450](#)(1), the purposes of the statutes, and case law from this and other jurisdictions, is that the summary seizure and sale remedy follows lien property into the hands of subsequent transferees for taxes assessed against that personal property. To conclude otherwise would frustrate the legislative intent and render the lien for delinquent personal property taxes a nullity upon mere transfer of the personal property.

Statutes and rules are to be read, construed, and interpreted in harmony with other statutes and rules so as to render them compatible wherever possible. *City of Las Vegas v. Mun. Court*, [110 Nev. 1021](#), 1024, 879 P.2d 739, 741 (1994); *Allianz Ins. Co. v. Gagnon*, [109 Nev. 990](#), 993, 860 P.2d 720, 723 (1993); *City Council of Reno v. Reno Newspapers*, [105 Nev. 886](#), 892, 784 P.2d 974, 978 (1989); *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227, 1229 (1982) (holding that real property redemption statute, [NRS 361.585](#), applied to patented mining claims in addition to [NRS 517.410](#)). When construing statutory provisions, “[a]n entire act must be construed in light of its purpose and as a whole.” *Acklin v. McCarthy*, [96 Nev. 520](#), 523, 612 P.2d 219, 220 (1980); see also *List v. Whisler*, [99 Nev. 133](#), 138-39, 660 P.2d 104, 107 (1983) (determining constitutionality of factoring provisions of 1981 tax package, “construction of legislation should be

based on legislative intent, and legislative intent is to be determined by looking at the whole act, its object, scope and intent”); *Ex Parte Iratacable*, [55 Nev. 263](#), 282-83, 30 P.2d 284, 290 (1934) (construing provisions of act for licensing of motor vehicles, the “clear purpose of [which was] to raise revenue,” entire act must be looked to and considered as a whole).

Although tax statutes are construed most strongly against the government and in favor of the taxpayer, the rule of strict construction is only one of several factors to be considered, and is to be utilized in conjunction with other rules of statutory construction. It is the duty of this court to give effect to the clear intention of the Legislature and to construe the language of a statute so as to give it force and not nullify its manifest purpose.

*Hughes*, 100 Nev. at 297 (citations omitted) (construing gaming license fees statutes and regulation in light of their primary purpose which is to produce revenue); *see also McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 650-51, 730 P.2d 438, 443 (1986). When there are alternative possible interpretations of a statute, an interpretation which produces an unreasonable result should be rejected in favor of one producing a reasonable result. *Hughes*, 100 Nev. at 298. “If the language [of a statute] is capable of two constructions, one of which is consistent and the other is inconsistent with the evident object of the legislature in passing the law, that construction must be adopted which harmonizes with the intention.” *Recanzone v. Nev. Tax Comm'n*, [92 Nev. 302](#), 305, 550 P.2d 401, 403 (1976) quoting *State of Nev. v. Cal. M. Co.*, [13 Nev. 203](#), 217 (1878) (where [NRS 361.260](#) neither specifically permitted nor prohibited cyclical plan of reappraisal, the purpose of the statute to ensure that all property be assessed as current as practicable and to ensure obtaining maximum revenue from property tax structure, 5-year cyclical reappraisal of areas within a county was appropriate rather than a reappraisal of the entire county.)

Long ago, in a case involving various aspects of summary proceedings for the collection of taxes, the Nevada Supreme Court stated:

Revenue--money is what the state needs and must have to maintain its credit and keep the machinery of government in motion. Taxes are assessed upon the property of the people for the purpose of obtaining it. While the constitution requires that property shall not be taken from the owner, either for taxes or anything else without due process of law, that provision, as applied to the collection of taxes, requires the observance only of the most essential and fundamental steps. While the rights of the individual must be protected, the government should not be unnecessarily hampered in its efforts to make collections . . . .

*State of Nev. v. Cent. Pac. R.R. Co.*, [21 Nev. 260](#), 269-70, 30 P. 689, 692 (1892), *aff'd*, 162 U.S. 512 (1896). Additionally, in an action to recover personal property sold at tax sale, wherein it was held that personal property sold under a conditional sales contract which retained title in the seller was assessable to the buyer in possession, the court explained:

The property itself is subject to taxation. The legal owner knows this. . . . Such taxes are a primary lien, enforceable by seizure and sale. Both constitutional and statutory requirements for equal taxation compel a reasonable and practicable method for making all property share, through taxation, in the expense of government.

*Gen. Elec. Cr. Corp. v. Andreen*, [74 Nev. 199](#), 205-06, 326 P.2d 731, 734 (1958).

Application of the foregoing rules and principles leads to the conclusion that the summary seizure and sale remedy of [NRS 361.535](#) follows specific personal property, upon which tax was assessed and to which a statutory lien has attached, into the hands of a transferee. [NRS 361.535](#) must be read and interpreted in conformity with [NRS 361.450\(1\)](#) and the purposes of Nevada's revenue laws. In order to give effect to the intention of the legislature, the statutes must be construed as to give them force and not nullify their manifest purpose. In so doing, the most

reasonable conclusion is that liened personal property is subject to seizure and sale for taxes assessed against that property in the hands of a transferee.

Numerous courts have arrived at this conclusion under similar statutes. See *In Re Ever Crisp Food Products Co.*, 11 N.W.2d 852 (Mich. 1943) (summary seizure and sale of personal property subject to specific and perfected personal property tax lien authorized as against subsequent, bona fide purchaser); *Owens v. Or. Livestock Loan Co.*, 47 P.2d 963 (Ore. 1935) (tax assessed against specific personal property is a lien on that personal property, which is subject to seizure and sale upon transfer of ownership); *Farm & Cattle Loan Co. v. Faulkner*, 242 P. 415 (Wyo. 1926) (to the same effect); *Milliken v. O'Meara*, 222 P. 1116 (Colo. 1924) (where personal property has been assessed and is subject to lien, methods of enforcing discharge of lien applies to subsequent owner); *Robinson v. Youngblood*, 103 N.E. 347 (Ind. Ct. App. 1913) (transferred personal property subject to seizure and sale to enforce tax lien); *Minshull v. Douglas County*, 234 P. 661 (Wash. 1925) (“[u]nder the various statutes and under our own decisions it is manifest that the personal property tax is a specific lien against the specific property assessed; that the assessed personal property may be followed into the hands of a transferee and the assessed taxes collected”); *Mills v. County of Thurston*, 47 P. 759 (Wash. 1897) (summary seizure and sale remedy applies to transferred personal property to which tax lien has attached); cf. *Magee v. Whitacre*, 60 Nev 208, 106 P.2d 751, 753-55 (1940); *Davis v. State of Ariz.*, 401 P.2d 749 (Ariz. Ct. App. 1965).

In *Mills* the court reasoned as follows:

It is further contended that the right of distraint can only be exercised against the person owing the tax, and that, where the goods have been transferred and the title has passed, the remedy is lost. But applying the same rule of a fair construction to effect the purpose of the law, it would seem that the goods not only pass subject to the lien, but also subject to the remedy given. The statute provides that: ‘Immediately after the first day of December the county treasurer shall proceed to collect all delinquent personal property taxes, and if such taxes are not paid on demand he shall distraint sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same.’ The lien would be of little or no consequence if it was to cease upon the sale of the property to a third party, as a transfer would be easy to make at any time, and the payment of the taxes thus evaded in many instances. Taxes are usually collected in a summary manner; and necessarily so, that there may be no harmful delay in providing the public revenue. Unreasonable restrictions should not be placed thereon. The state is not required to resort to judicial proceedings to enforce payment. If the contention of the plaintiffs was true, it would destroy the object for which the lien was given, and would render that part of [the lien statute] relating to personal property nugatory. No other means of enforcing the lien is provided. The statutes referred to must be construed together, and one part will not be given a construction that nullifies another part unless they are clearly inconsistent. It is evident that the lien was given for the purpose of insuring the collection of the tax, and to prevent a loss by reason of a transfer of the property. There is no reason why the same remedy should not obtain against the party purchasing as against the original owner, so far as the property purchased is concerned. The legislature had in mind the subjection of the property to the payment of the tax, in giving this lien, rather than enforcing a mere personal obligation of the original owner. [The summary collection statute] directs the distress of goods and chattels, if found within the county; and this would indicate that it was not intended that the original owner should be considered as the only person who could be ‘charged with such taxes,’ but that property might be taken anywhere in the county, regardless of ownership or possession, where the lien had attached.

*Mills*, 47 P. at 760-61 (citations omitted).

In *State of Nev. v. Yellow Jacket Silver Mining Co.*, [14 Nev. 220](#) (1879) the court discussed the remedies provided under the revenue laws, including a summary seizure and sale statute substantially similar to [NRS 361.535](#), vis-a-vis the applicable statute of limitations. The court cited a tax lien statute substantially similar to [NRS 361.450](#) as providing a remedy against the property. The court then stated “that the lien created continues indefinitely, or until the tax is paid, or the property is sold under tax sale . . . the effect of which is to subject the property to the payment of the tax, although it may have passed into other hands subsequent to the date of the lien.” *Yellow Jacket Silver Mining Co.*, 14 Nev. at 231.

The reasoning of the *Mills* court, and the statements of the *Yellow Jacket* court, are persuasive and applicable to [NRS 361.535](#) and [NRS 361.450](#)(1). The evident object of the Nevada legislature in passing the laws was to subject personal property to not only the lien right but also the summary seizure and sale remedy.

### CONCLUSION TO QUESTION ONE

The summary seizure and sale remedy of [NRS 361.535](#) is available to collect delinquent taxes assessed against the specific personal property to which an [NRS 361.450](#)(1) lien has attached, but is no longer owned by the person assessed.

### QUESTION TWO

Whether the seizure and sale of personal property in accordance with [NRS 361.535](#) satisfies the requirements of procedural due process as applied to a security interest holder of record?

### ANALYSIS

[NRS 361.535](#)(2) provides as follows:

The county assessor shall post a notice of the seizure, with a description of the property, in three public places in the township or district where it is seized, and shall, at the expiration of 5 days, proceed to sell at public auction, at the time and place mentioned in the notice, to the highest bidder, for lawful money of the United States, a sufficient quantity of the property to pay the taxes and expenses incurred. For this service the county assessor must be allowed from the delinquent person a fee of \$3.

[NRS 361.535](#)(4) provides:

Upon payment of the purchase money, the county assessor shall deliver to the purchaser of the property sold, with a certificate of sale, a statement of the amount of taxes or assessment and the expenses thereon for which the property was sold, whereupon the title of the property so sold vests absolutely in the purchaser.

Both the Fourteenth Amendment of the United States Constitution and article 1, section 8 of the Nevada Constitution provide that “no person shall . . . be deprived of life, liberty or property without due process of law.” The Nevada Supreme Court has recognized that notice of a tax sale of a mobile home pursuant to [NRS 361.535](#)(3) must be “reasonably calculated, under all the circumstances, to apprise [property owners] of the pendency of the action and afford them an opportunity to present their objection.” *Keck v. Peckham*, [93 Nev. 587](#), 590, 571 P.2d 813, 815 (1977), quoting *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). The court has also recognized that prior to a tax sale of land under [NRS 361.565](#), “a county tax collector must give personal notice to the holder of a recorded interest in the land.” *Bell v. Anderson*, [109 Nev. 363](#), 366, 849 P.2d 350, 352 (1993), citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983).

In *Mennonite*, the U.S. Supreme Court held that publication, posting, and mailed notice to the owner of real property, prior to a tax sale, was inadequate to notify the holder of a recorded mortgage, and did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. The Court stated:

When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.

*Mennonite*, 462 U.S. at 798.

In *Omnibank Iliff, N.A. v. Tipton*, 843 P.2d 71 (Colo. Ct. App. 1992), the court held that a holder of a recorded security interest in personal property was entitled to notice by mail or personal service of tax sale, and statutory constructive notice was not sufficient under the due process clause. Likewise, in *Joe Self Chevrolet v. Bd. of County Comm'rs*, 802 P.2d 1231 (Kan. 1990), the court held that the sale of personal property for delinquent taxes assessed, without actual notice to a secured creditor of record, violated due process and rendered the statute unconstitutional as applied, although it was not unconstitutional on its face.

Based upon the above authorities, a holder of a recorded security interest in personal property, is entitled to actual notice of a tax sale as a supplement to the constructive notice required by [NRS 361.535\(2\)](#). However, this does not end the inquiry. We must also determine whether due process requires notice to a secured creditor of record prior to seizure of the personal property.

In *T.M. Cobb Co. v. County of Los Angeles*, 547 P.2d 431 (Cal. 1976), the purchaser of a taxpayer's personal property at foreclosure sale conducted by secured creditors of taxpayer, sued the city and county to recover taxes assessed against the property and paid by the purchaser under protest. The court examined the constitutionality of the California statute authorizing the summary seizure and sale of personal property to collect delinquent taxes. The court held that the statute did not deny the assessee due process insofar as it authorized the seizure of the assessee's property. The court reasoned as follows:

[T]he county has a substantial interest in the collection of revenue. The protection of this interest justifies the summary seizure of property. Only in this manner can the assessee be prevented from dissipating his assets and impeding the collection of the tax which he owes. While seizure of the property may deprive the assessee or a third party claimant such as plaintiff of the use of the asset during the period between the seizure and the final determination of rights in the property at an administrative hearing, the collection of taxes is one of those extraordinary situations where `summary procedure may well meet the requirements of due process . . . .'

*Id.* at 436 (citations omitted).

The reasoning and holding of the California Supreme Court in *T.M. Cobb* as set forth above applies to and answers the question at hand. Procedural due process does not require notice to a secured interest holder of record prior to the seizure of personal property authorized by [NRS 361.535](#).

#### CONCLUSION TO QUESTION TWO

A holder of a recorded security interest in personal property is entitled to notice by mail or personal service prior to tax sale of the personal property as a supplement to the constructive notice

required by [NRS 361.535](#) in order to satisfy the requirements of due process. However, due process does not require notice to a mere holder of a recorded security interest prior to seizure of the property by the county assessor.

FRANKIE SUE DEL PAPA  
Attorney General

By: HARRY J. SCHLEGELMILCH  
Deputy Attorney General

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OPINION NO. 96-29COUNTIES; ELECTIONS; PUBLIC OFFICERS;SECRETARY OF STATE: When a county commissioner is elected to a 4-year term; his seat becomes vacant due to resignation, death, or removal during the first two years of the term; and an appointment is made by the governor to fill the vacancy, this county commission seat must appear on the next general election ballot.

Carson City, October 10, 1996

The Honorable Robert S. Beckett, Nye County District Attorney, Post Office Box 39, Pahrump, Nevada 89041

Dear Mr. Beckett:

You have requested an opinion from this office regarding the definition of "next general election" as found in [NRS 244.040](#).

#### QUESTION

When a county commissioner is elected to a 4-year term; his seat becomes vacant due to resignation, death, or removal during the first two years of the term; and an appointment is made by the governor to fill the vacancy, must this county commission seat appear on the next general election ballot?

#### ANALYSIS

A Nye County Commissioner was elected in November 1994 for a 4-year term and his seat became vacant in 1996.<sup>19</sup>

When a vacancy occurs in a board of county commission, the governor fills the vacancy by appointing a suitable person of the same political party as the most recent holder of the vacant office. [NRS 244.040\(1\)](#). A vacancy can occur due to resignation, death, or removal. In August 1996, the governor filled this vacancy by appointment.

The term of office for the appointed person extends until the day before the first Monday in January following the next general election. [NRS 244.040\(2\)](#). In order to answer this question, the phrase "next general election" must be defined.

In 1948 the Attorney General issued an opinion addressing this same question. Op. Nev. Att'y Gen. No. 571 (February 9, 1948). The facts were almost identical to those here. A 4-year county

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<sup>19</sup> Commissioner Copeland died in August 1996.



commissioner resigned a few months after taking office. The governor appointed a replacement. The question was whether the newly appointed county commissioner was appointed for the entire remainder of the unexpired term or whether a successor was to be elected at the next biennial election.

The Attorney General concluded the appointment was for the entire remainder of the term. *Id.* In reaching this conclusion the Attorney General relied on three Nevada Supreme Court cases in which the court had addressed a similar issue regarding filling vacancies in offices of prosecuting attorney, *Sawyer v. Haydon*, [1 Nev. 64](#) (1865); county clerk, *State ex rel Bridges v. Jepsen*, [48 Nev. 64](#), 227 P. 588 (1924); and state senate, *Grant and McNamee v. Payne*, [60 Nev. 250](#), 107 P.2d 307 (1940). In *Bridges* the court stated the next general election meant the "next general election held at the time fixed by law for the election of county offices." 48 Nev. at 70. In *Grant* the court defined general election to be "the general election at which state senators are ordinarily elected." 60 Nev. at 254. *Sawyer* dealt with laws of the Territory of Nevada which did not provide in any manner for an election to fill a fraction of a term. "No law was passed to authorize an election by the people to fill a vacancy, or to elect for a fractional term." 1 Nev. at 66-67.

In 1954 the Nevada Supreme Court again dealt with the phrase "next general election." *Brown v. Georgetta*, [70 Nev. 500](#), 275 P.2d 376 (1954). In this case the court interpreted the phrase "next general election" as used in the statute providing the method to fill a vacancy in the office of United States Senator. The court concluded "next general election . . . means the ensuing biennial election." *Id.* at 506. In reaching its conclusion the court discussed both *Bridges* and *Grant*. *Id.* at 502-04. However, the court based its conclusion on the Seventeenth Amendment to the United States Constitution and construction of the amendment by Nevada officials from the time the amendment was adopted in 1913 until 1954. 70 Nev. at 504-06.

The Attorney General in 1960 issued an opinion again pertaining to the length of term of an appointee to an unexpired term. Op. Nev. Att'y Gen. No. 168 (July 12, 1960). A county commission seat became vacant during the first two years of the 4-year term. The governor filled the vacancy by appointment. The question was whether the appointment was for the duration of the term or until the next general election. The Attorney General determined the office should appear on the ballot of the next general election and the term would be for the duration of the predecessor's term (two years).

In reaching this conclusion the Attorney General relied on the *Brown* case and the reasoning that any other construction of [NRS 244.040\(2\)](#) would render that subsection meaningless.

We affirm Op. Nev. Att'y Gen. No. 168 (July 12, 1960) and overrule Op. Nev. Att'y Gen. No. 571 (February 9, 1948) based on the intervening Nevada Supreme Court Case, *Brown*, and in light of the reasoning in the 1960 Attorney General Opinion.

### CONCLUSION

When a county commissioner is elected to a 4-year term; his seat becomes vacant due to resignation, death, or removal during the first two years of the term; and an appointment is made by the governor to fill the vacancy, this county commission seat must appear on the next general election ballot.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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OPINION NO. 96-30EDUCATION: Members of State Board of Education may review pilot proficiency examinations for grades 11 and 12 to the extent that the review relates to their official duties. Such review must be conducted under supervision of Department of Education staff to provide security for the examination. Parents may not review the current proficiency exam for grades 4 and 8.

Carson City, October 10, 1996

Ms. Mary Peterson, Superintendent of Public Instruction, Department of Education, 700 East Fifth Street, Carson City, Nevada 89710

Dear Ms. Peterson:

You have asked this office for an opinion regarding [NRS 389.015\(5\)](#) and confidentiality of achievement and proficiency examinations.

The legislature provided funding to the State Department of Education (Department) to develop a new high school exit examination to be administered to students in grades 11 and 12. Passing this examination is a requirement for graduation from Nevada public schools. The Department hired staff, appointed teams of educators which have reviewed existing test item banks, developed new test items, and received training in the standard setting process. At this time a pilot examination in seven versions is ready to be administered as a pilot test. The pilot testing is anticipated to begin early November 1996. Based on the results of the pilot test, final forms of the examination will be developed for administration in the fall of 1997.

The State Board of Education (Board) is an 11-member board. [NRS 385.021](#). The members are elected and some are currently public school teachers or school district administrators. A Board member who is also an administrator of a math institute in Clark County School District has requested that he be given a copy of the pilot examination to keep in his possession for purposes of review. As State Superintendent of Public Instruction you have offered to allow him or any other board member to review the test, but under conditions designed to protect security of the test.

In another matter related to [NRS 389.015](#), certain parents in Nye County School District desire to see the test questions of the TerraNova Test prior to administration of the test to their children in grades 4 and 8.

#### QUESTION ONE

May Board members review the pilot proficiency examination for students in grades 11 and 12? If so, under what conditions?

#### ANALYSIS

[NRS 385.347](#)(1) and (2) mandate administration of state wide examinations in grades 4, 8, and 11 as part of a program of accountability for quality of Nevada public schools and educational achievement of the pupils in every school district. The report of the achievement is based on results of the examinations administered pursuant to [NRS 389.015](#).

[NRS 389.015](#)(1) provides that all public school districts shall administer examinations for proficiency in reading, writing, and mathematics before completion of grades 4, 8, and 11. [NRS 389.015](#)(5) further directs as follows:

The state board shall prescribe standard examinations of achievement and proficiency to be administered pursuant to subsection 1. The examinations on reading and mathematics prescribed for grades 4 and 8 must be selected from examinations created by private entities and administered to a national reference group, and must allow for a comparison of the achievement and proficiency of pupils in grades 4 and 8 in this state to that of a national reference group of pupils in grades 4 and 8. *The questions contained in the examinations and the approved answers used for grading them are confidential, and disclosure is unlawful except:*

(a) *To the extent necessary for administering and evaluating the examination.*

(b) *That a disclosure may be made to a state officer who is a member of the executive or legislative branch to the extent that it is related to the performance of that officer's duties.*

(c) That specific questions and answers may be disclosed if the superintendent of public instruction determines that the content of the questions and answers is not being used in a current examination and making the content available to the public poses no threat to the security of the current examination process. [Emphasis added.]

The statute specifically states that test items and answers are confidential and must not be disclosed. The statute does allow an exception to the prohibition for state officers of the executive branch.<sup>20</sup>

A Board member is a state officer who is a member of the executive branch. *See* Op. Nev. Att'y Gen. No. 246 (July 21, 1965).

Disclosure to the Board member is permissible to the extent that it is necessary for the member to perform his or her official duties. Not all of the questions that are being tested in the pilot program will be in the final form. Some questions will be discarded for various reasons, and some will be kept. The decision as to the final form of the test will be made by the Board. It is anticipated that the selection of the final form will come before the Board in March or April of 1997. You may disclose the pilot test to Board members because of the members' need to review the test items for the purpose of making the ultimate decision. Similarly, Board members may also review the proposed final form of the test.

Your question also asks under what conditions the test items may be viewed. There are strict protocols for the security of tests that must be followed by teachers and school administrators who receive the tests to administer to the students. The protocols have been the policy and practice of the Department and were codified in regulation in September 1996. The whereabouts of each test must be accounted for at all times, they must be locked up when not attended, and test questions and answers in current use must not be disclosed except for purposes of administering the test. Whether exposure of the test items is inadvertent or deliberate, the potential for harm is the same. Not only is there potential for compromise of the goal of the testing because assessment of the performance of schools and students would be inaccurate, but potentially new tests would have to be purchased or developed if the breach of security was substantial. These concerns are not abated simply because the test is at the pilot stage and the final form is not yet determined.

You have made the pilot forms available but required that Board members review the test items at the Department offices in Carson City or Las Vegas with staff supervision. The arrangements do not set a limit on how much time the member will need or a limit on how many days the materials will be available for review. Nor do they require that the materials only be reviewed during regular business hours. In addition, the time for the Board to select the final form of the test is not until March or April 1997. These arrangements reasonably provide for security of the test

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<sup>20</sup> NRS 385.355 is a similar statute prohibiting disclosure of General Educational Development examinations, commonly known as the G.E.D., except that disclosure may be made to a state officer of the executive branch to the extent that it relates to official duties.

forms assuring that only persons with the statutory authorization have access and accommodate the need of the Board members to perform their official duties.

### CONCLUSION TO QUESTION ONE

Board members may review the pilot proficiency examination for grades 11 and 12 to the extent that it relates to their official duties. Since members will be prescribing the final form of the exam, their review of the pilot forms and the final form relates to that duty. It is reasonable to limit review of the examination to the security of Department offices under staff supervision because of the duty of the State Superintendent of Public Instruction to protect security of the test and such conditions do not prevent board members from an adequate review.

### QUESTION TWO

May parents review the proficiency examinations administered to students in grades 4 and 8? If so, under what conditions?

### ANALYSIS AND CONCLUSION TO QUESTION TWO

[NRS 389.015](#) does not contain an exception to the nondisclosure and confidentiality requirement for parents to review the examination. We have carefully considered whether there was any provision that would allow review by parents and found none. It cannot be said that such a review is necessary to administration or evaluation of the examination, or that the "state officer" exception applies. The examination can still be given by the school district whether an individual parent has reviewed the questions beforehand.

The only time that test questions would be disclosable to parents, or any other member of the public, would be if the content of the questions and answers were no longer being used in a current examination and making the content available to the public posed no threat to the security of the current examination. [NRS 389.015\(5\)\(c\)](#). The current test is new, and has never before been used in this state or another state. Therefore, at this time there are no test questions that could be disclosed.

FRANKIE SUE DEL PAPA  
Attorney General

By: BROOKE A. NIELSEN  
Assistant Attorney General

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OPINION NO. 96-31 TRANSPORTATION, DEPARTMENT OF; BOARD OF EXAMINERS; CONTRACTS: The Department of Transportation has independent authority to enter into independent services contracts and is not required to submit these to the Board of Examiners for prior approval.

Carson City, November 4, 1996

Thomas E. Stephens, P.E., Director, Nevada Department of Transportation, 1263 South Stewart Street, Carson City, Nevada 89712

Dear Mr. Stephens:

You have stated that there is a recurring question outside of the Department of Transportation (NDOT) as to whether NDOT's contracts for services of independent contractors need to be submitted to the State Board of Examiners for approval prior to their execution. Under its current practice, NDOT does not submit any of its contracts to the State Board of Examiners for approval. As a result, staff for the Board of Examiners and others, from time to time, have expressed concern as to the legality of NDOT's practice. More recently, you have learned that a legal opinion was issued by Legislative Counsel indicating that contracts executed by NDOT for certain services are subject to filing and approval requirements of section 284.173(5), (6) of the Nevada Revised Statutes. You have asked this office for an opinion on this issue.

### QUESTION

Must NDOT submit any of its contracts for services of independent contractors to the State Board of Examiners for approval prior to their execution and effectiveness?

### ANALYSIS

Our analysis starts with a review of the applicable state statutes and the rules for statutory construction. Following that review will be a discussion of past and current practices regarding the subject contracts and the policy reasons for contract review procedures. Our analysis will then turn to a review of the legislative counsel opinion.

#### A. Statutes and Statutory Construction.

Pursuant to [NRS 284.173](#), heads of departments may contract for services of independent contractors. Each contract for services of a person as an independent contractor must be submitted to the Board of Examiners for approval before becoming effective. Subsection (7)(a), however, provides that copies of contracts executed by NDOT "for any work of construction or reconstruction of highways" need not be filed with or approved by the State Board of Examiners as provided in subsections (5) and (6). There is no definition of "highways" or any other explanation of the phrase "construction or reconstruction of highways" in chapter 284.

The Department of Transportation is governed largely by chapter 408 of NRS which is entitled "Highways and Roads." A brief examination of several of the statutes contained in chapter 408 indicates that, in addition to the exception provided NDOT under [NRS 284.173\(7\)\(a\)](#), the legislature has supplied NDOT with broad authority to enter into contracts. Section 408.100, which is a broad statement of legislative intent, indicates that the legislature has given NDOT significant authority with respect to management of state highways.<sup>21</sup> Another statute concerns duties of the NDOT Board of Directors and provides that the board shall: "5. *Execute or approve all instruments and documents in the name of the state or the department necessary to carry out the provisions of this chapter.* 6. . . . *delegate to the director such authority as it deems necessary under the provisions of this chapter.*" [NRS 408.131\(5\), \(6\)](#) (emphasis added). The NDOT Board of Directors has seven members "consisting of the governor, the lieutenant governor, the attorney general and the state controller, who serve ex officio, and three members who are appointed by the governor. . . ." [NRS 408.106\(1\)](#). Of significance is the fact that the Board of Examiners is

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<sup>21</sup> NRS 408.100 provides in pertinent part:

4. [T]he legislature places a high degree of trust in the hands of those officials whose duty it is, within the limits of available funds, to plan, develop, operate, maintain, control and protect the highways and roads of this state, for present as well as future use.

5. To this end, it is the express intent of the legislature to make the board of directors of the department of transportation custodian of the state highways and roads and to provide sufficiently broad authority to enable the board to function adequately and efficiently in all areas of appropriate jurisdiction, subject to the limitations of the constitution and the legislative mandate proposed in this chapter. [Emphasis added.]

comprised of the governor, the secretary of state, and the attorney general. [NRS 353.010](#). Of those three members, only one, the secretary of state, is not also a member of the NDOT Board of Directors.<sup>22</sup>

As with the Board of Directors, the legislature has provided the Director of NDOT with a high degree of authority:

1. With the approval of the board, *the director may execute all plans, specifications, contracts and instruments in the name of State of Nevada* necessary for the carrying out of the provisions of this chapter, except those construction contracts as provided in [NRS 408.327](#) and [408.347](#).

2. *The director has such other power and authority as is necessary and proper under the provisions of this chapter, or as the board delegates to him.*

[NRS 408.205](#) (emphasis added).<sup>23</sup> The Director is specifically and statutorily authorized to contract for "technical services required for the purpose of this chapter." [NRS 408.225](#).

In connection with the Director's powers indicated above, [NRS 408.172\(5\)](#) provides "[a]ll contracts, instruments and documents executed by the department must be first approved and endorsed as to legality and form by the [department's] chief counsel." No other state agency is required to have its contracts approved as to "legality," nor is any other state agency required to have a "chief counsel" appointed by the Attorney General at the request and approval of its board of directors.

While chapter 408 provides NDOT with broad authority concerning contracts, it contains no provision requiring NDOT to submit all of its independent contractor agreements to the Board of Examiners for review and approval. Notably, chapter 408 does mention the Board of Examiners in the context of payment of NDOT's bills out of the state highway fund:

All bills and charges against the state highway fund for administration, construction, reconstruction, improvement and maintenance of highways under the provisions of this chapter must be certified by the director and must be presented to and examined by the state board of examiners. When allowed by the state board of examiners and upon being audited by the state controller, the state controller shall draw his warrant therefor upon the state treasurer.

[NRS 408.235\(6\)](#). Additionally, and more importantly, chapter 408 does require any contracts into which NDOT wishes to enter with a board member or employee to be submitted "to the state board of examiners for approval." [NRS 408.353\(2\)](#). Thus, the legislature knows how to specify that NDOT contracts must be so submitted. This is an indication that, had the legislature intended that NDOT independent contractor agreements be approved by the Board of Examiners, the legislature

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<sup>22</sup> Notably, if one of the four constitutional offices (the offices of governor, lieutenant governor, attorney general, and state controller) on the NDOT Board of Directors is vacant, "the *secretary of state* shall serve ex officio on the board until the vacancy is filled." [NRS 408.106\(1\)](#) (emphasis added).

<sup>23</sup> [NRS 408.327](#), referenced in [NRS 408.205\(1\)](#), provides procedures for the advertising for bids, "for such work according to the plans and specifications prepared by him." [NRS 408.347](#), which concerns execution of construction contracts, provides:

1. All construction contracts authorized by [NRS 408.327](#) must be executed in the name of the State of Nevada and must be signed by the chairman of the board and attested by the director, under the seal of the department, signed by the contracting party or parties, and the form and legality of such contracts approved by the attorney general or chief counsel of the department.

2. When the contract is fully executed, a copy of the same, including plans and specifications, must be filed in the office of the department at Carson City, Nevada, and with the clerk of the board of county commissioners of the county in which the work is to be performed.

would have specifically so provided. See *Clark County Sports v. City of Las Vegas*, [96 Nev. 167](#), 174, 606 P.2d 171, 176 (1980).

Finally, chapter 408 does provide a definition of "highways" which we must note when determining the meaning of the phrase in [NRS 284.173](#) "any work of construction or reconstruction of highways." The definition of "highway"<sup>24</sup> contained in chapter 408 reads:

"Highway" means roads, bridges, structures, culverts, curbs, drains and *all buildings, communication facilities, services and works incidental to highway construction, improvements and maintenance required*, laid out, constructed, improved or maintained as such pursuant to constitutional or legislative authorization.

[NRS 408.070](#) (emphasis added). If this is the definition applied to the phrase in [NRS 284.173](#), it appears that most contracts for services of independent contractors for NDOT would fall within that exemption from Board of Examiners approval. Most of the work NDOT performs under chapter 408 is incidental to highway construction and maintenance.

We start our construction of these statutes with the premise that statutes must be construed to give effect to the legislative intent. *Roberts v. State, Univ. of Nevada System*, [104 Nev. 33](#), 37, 752 P.2d 221, 223 (1988); *Sheriff v. Morris*, [99 Nev. 109](#), 117, 659 P.2d 852, 858 (1983). Statutory interpretation should not yield an unreasonable result if a more reasonable result is available. *Breen v. Caesars Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070, 1072 (1986); *State Indus. Ins. Sys. v. Jesch*, [101 Nev. 690](#), 694, 709 P.2d 172, 175 (1985). When there is more than one statute regarding the same subject, the statutes must be construed to render them compatible if possible. *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830, 836 (1977); *City of Carson v. County Comm'rs*, [47 Nev. 415](#), 423, 224 P. 615, 617 (1924). "Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." *Laird v. State of Nev. Pub. Emp. Ret. Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171, 1173 (1982) (citing cases). See also *McIntosh v. Streight*, [110 Nev. 1148](#), 1151, 881 P.2d 1337, 1339 (1994); *State Indus. Ins. Sys. v. Surman*, [103 Nev. 366](#), 368, 741 P.2d 1357, 1359 (1987).

In the situation before us, [NRS 284.173](#) generally provides authority to state agencies to contract for services of independent contractors and generally requires prior approval of the Board of Examiners. Numerous exceptions to the prior approval are listed, one of which is for NDOT contracts as stated above. Chapter 408, however, contains more specific provisions for the operation of NDOT, including the authority of NDOT to enter into agreements. Notably, [NRS 284.173\(7\)\(a\)](#) was added to the Nevada Revised Statutes in 1961 (Act of April 6, 1961, ch. 345, § 1, 1961 Nev. Stat. 687) and has remained unchanged since then except for a cosmetic change in 1976 which replaced the phrase "Department of Highways" with "Department of Transportation." (Act of June 5, 1979, ch. 683, § 91, 1979 Nev. Stat. 1791-92). The enabling statutes for NDOT have existed in almost the same form for almost 40 years. See Act of April 1, 1957, ch. 370, §§ 27(5), 28(5), 41(1), 1957 Nev. Stat. 666, 668. Thus, it seems logical that we should look to how the executive branch has interpreted interplay of these statutes with regard to the approval of independent contracts. As a matter of fact, an administrative construction of statutes which is within the language of the statutes will not be readily disturbed by the courts. *Dep't of Human Res. v. UHS of The Colony*, [103 Nev. 208](#), 211, 735 P.2d 319, 321 (1987). The construction adopted by officials entrusted with administration of the independent contracts at issue is of persuasive force. See *Alper v. State ex rel. Dep't of Highways*, [96 Nev. 925](#), 929, 621 P.2d 492, 495 (1980). With

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<sup>24</sup> Three other chapters of the Nevada Revised Statutes contain statutes defining "highway": chapter 482-vehicle licensing, registration (NRS 482.045); chapter 483-driver's license and schools (NRS 483.030); and chapter 484-traffic laws (484.065). All of these definitions generally provide that "highway" means the entire width between the boundary lines of every way maintained by a public authority when any part of such way is open to the use of the public for purposes of vehicular traffic. None of these statutes concerns operation of NDOT in chapter 408 or construction or reconstruction of highways as discussed in [NRS 284.173\(7\)\(a\)](#).

this in mind, we turn to a review of how the state has processed NDOT independent contracts over almost four decades.

## B. History of Approval of NDOT Independent Contractor Agreements.

We have been informed that NDOT has *never* submitted independent contracts to the Board of Examiners for filing, review, or approval. As a matter of fact, in 1983 a former NDOT Assistant Director requested a legal opinion from NDOT legal counsel regarding this very issue. In a memorandum dated August 30, 1983, an NDOT Assistant Chief Counsel and Deputy Attorney General addressed the issue. He stated that there had been some question as to whether certain types of independent contracts needed to be submitted to the Board of Examiners. He concluded in his brief three-page memorandum, based on review of some of the statutes noted above, that the then-present practice by NDOT of not submitting independent contracts for approval was "supported by legal authority and statutory construction."<sup>25</sup> Memorandum to NDOT Assistant Director Gene Phelps from Deputy Attorney General William Raymond of August 30, 1983, at 3. The opinion relied heavily on the broad definition of highways in chapter 408 as providing breadth to the general exemption in [NRS 284.173\(7\)\(a\)](#). It was also pointed out that the legislature had over 22 years or 11 sessions to limit the scope of the exemption in [NRS 284.173\(7\)\(a\)](#) and had not done so, thus indicating legislative approval of the practices followed by NDOT.<sup>26</sup> Based on this 1983 memorandum, NDOT continued to follow and has continuously followed to date, its practice of not submitting its independent contracts to the Board of Examiners. NDOT was entitled to rely on this opinion. *Cf. Cannon v. Taylor*, [88 Nev. 89](#), 91-92, 493 P.2d 1313, 1314 (1972) (government officials are entitled to rely in good faith on attorney general opinions and avoid damages responsibility).

The issue again arose in 1991 when the clerk of the Board of Examiners asked the Attorney General several questions concerning hiring independent contractors by NDOT. The first four questions concerned the propriety of NDOT contracting with former employees and the criteria in determining whether an individual is considered an independent contractor or an employee. The fifth and final question submitted stated was: "Is it the Attorney General's opinion that [NRS 284.173](#) contracts should *continue* to be exempt from review by the Board of Examiners?" Memorandum to Deputy Attorney General James T. Spencer from Director of Department of Administration Judy Matteucci of May 28, 1991 (emphasis added).<sup>27</sup> As had been the case for many years, NDOT was not submitting independent contracts to the Board of Examiners for prior

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<sup>25</sup> It was stated in the memorandum that the opinion was not to be construed or held out as an official attorney general's opinion which would require more in-depth research and analysis. Nevertheless, we have been informed that NDOT has relied on this opinion in not obtaining prior approval of independent contracts since that time.

<sup>26</sup> The opinion concluded:

[T]he present practice as followed by the Department is supported by legal authority and statutory construction. If we should suggest otherwise, we can, as can you, envision just another layer of delay for the approval request standing between the contractor and the employer. I do not feel that this was intended. I further do not feel that NRS 284.173(7)(a) should be read or construed in any manner so as to limit or minimize its full operation and effectiveness.

Memorandum of August 30, 1983, at 3.

<sup>27</sup> In the memorandum dated May 28, 1991, the then-Director of the Department of Administration referred to contracts concerning the following: (1) contract file purging and related training; (2) chip seal research and training; (3) development of Incident Management Plan; (4) completion of Strategic Highway Research program; (5) updating material safety data sheets; (6) Upgrading snow removal/avalanche control plan; (7) coordinating NDOT's portion of the Pacific Snow Conference; (8) development of work program procedures; (9) Project Management training; (10) computer software training for Construction Division; (11) training new employees in Programs and Budgets Division; (12) bridge inspection; (13) landscape design and plan development; (14) erosion control consulting and training; (15) contractor claim defense research and preparation. The memorandum also requested that the written opinion include "the answer as to whether it is the Attorney General's opinion that *such contracts should continue to be exempt from Board of Examiners review.*" The wording of the inquiry illustrates the assumption that, at the very least, a very broad range of NDOT contracts had been exempt from Board of Examiners review at least by practice.



approval. The answer was: "Currently NDOT is exempt from Board of Examiners review for independent contracts having to do with 'any work of construction or reconstruction of highways.' [NRS 284.173\(7\)\(a\)](#). The Attorney General believes that amendment or abolishment of that exemption is a policy decision properly left to the Legislature." Letter Opinion to Director of Department of Administration Judy Matteucci from Deputy Attorney General James T. Spencer of May 30, 1991. Although there was no legal analysis of the situation, it appears that the Director of the Department of Administration (and clerk to the Board of Examiners) was acknowledging the long-standing practice of NDOT not to submit, and of the Board of Examiners not to approve, NDOT independent contracts.

In order to understand the ramifications of an interpretation of the statutes involved here, we have obtained information from NDOT regarding its approval process for independent contracts. NDOT presently processes approximately 600 nonconstruction contracts each year. Of these, more than 200 are what would be considered as independent services agreements. These consist of landscape and janitorial services, engineering design, right-of-way acquisition and condemnation, appraisal services, computer services,<sup>28</sup> security assessments, expert witnesses, training services, utility adjustments, and DOT facility construction, maintenance, and repairs. Additionally, NDOT constantly monitors these and processes numerous amendments each year. Requiring those contracts to be filed with and approved by the Board of Examiners would significantly impede the efficiency of this process. The Board of Examiners currently meets every four to five weeks. According to a Board staff member, a state agency requesting Board approval of a contract must submit it at least three weeks prior to the meeting for which it is calendared. If the contract is found to contain any errors, including insignificant errors, it is rejected and sent back to the agency. Under such circumstances, the agency will not be able to get the contract before the Board until the following month. If a contract generally takes about two to three weeks to go through the NDOT review process, it is reasonable to conclude that, even under ideal circumstances, there will be at least a 4-week addition to the process of contract approval and execution. What benefits this could provide is not known.

We have also located numerous federal statutes and regulations binding NDOT with regard to engagement of consultants, or independent contractors. These federal laws apply because NDOT receives federal highway funds which come with numerous requirements. When federal money is involved, NDOT must follow award procedures for contracts for construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services. 23 U.S.C. § 112 (1995). There are laws against discrimination, 23 U.S.C. § 140, and restrictions on lobbying and on use of federal funds by contractors, 31 U.S.C. § 1352. There are also specific regulations regarding engineering and design related service contracts, 23 C.F.R. pt. 172 (1993), and the Federal Acquisition Regulations, 48 C.F.R. pt. 31, require audits of certain consultant agreements. The NDOT Board of Directors or NDOT staff must be familiar with these requirements and apply them for independent contracts.

The general statute requiring Board of Examiner approval of independent services contracts exempts NDOT-executed contracts for any work of construction or reconstruction of highways. Chapter 408 defines "highways" to include any services and works "incidental to highway construction, improvements and maintenance." The mission of NDOT in chapter 408 of NRS is largely to construct, improve, and maintain highways. Contracting for independent services to carry out that mission appears to be largely incidental to that mission.<sup>29</sup> *See Black's Law*

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<sup>28</sup> It may be arguable that some computer services fall within the separate exemption from Board of Examiner contract review for "[c]ontracts executed with business entities for any work of maintenance or repair of office machines and equipment." NRS 284.173(7)(e).

<sup>29</sup> It should be pointed out that NDOT also has responsibilities to develop and coordinate balanced transportation policy and planning for railways, urban public transportation and aviation. NRS 408.233(1). It may be stretching it to say that these duties are "incidental" to highway construction or maintenance. Nevertheless, the statute has been in existence for more than 15 years. *See* Act of June 5, 1979, ch. 683, § 57, 1979 Nev. Stat. 1782.

*Dictionary* 904 (4th ed. 1968) (defining "incidental"). It appears that administrative construction of the statutes by practice of NDOT and the Department of Administration is within the language of the statutes.

We believe the appropriate reading of [NRS 284.173](#), in light of the more specific statutes in chapter 408 and the practices and understandings followed by NDOT and the state Department of Administration for several decades, is that independent contracts executed by NDOT need not be filed with or have prior approval of the Board of Examiners. The broad definition of "highways" in chapter 408 provides meaning to the exemption in [NRS 284.173\(7\)\(a\)](#) and includes any services and works incidental to highway construction.

### C. Impact of Legislative Counsel Opinion.

As previously noted, the legislature has not changed interpretation of the statutory interplay by the executive branch for several decades. It would seem that, if the legislature intended that NDOT submit any or all of its independent contracts to the Board of Examiners for review and approval, the legislature could have easily provided such a requirement. *See State, Dep't of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988); *Penrose v. Whitacre*, [62 Nev. 239](#), 243, 147 P.2d 887, 889 (1944).

In spite of the broad definition of "highways" in chapter 408 and the long-standing practice of the executive branch, the Legislative Auditor recently requested a legal opinion of Legislative Counsel regarding this subject. Specifically, the inquiry was whether NDOT's contracts for certain services<sup>30</sup> are required to be filed with and approved by the Board of Examiners. In a nutshell, Legislative Counsel concluded that the contracts executed by NDOT for the services specified by the Legislative Auditor were subject to filing and approval requirements of [NRS 284.173](#). With all due respect to the Legislative Counsel, we disagree.

The opinion of the Legislative Counsel did note the broad definition of "highways" in chapter 408 but only said:

[NRS 408.070](#) specifically refers to "services and works" which are "incidental to highway construction[.]" *Thus it is reasonable to conclude that the exemption provided in paragraph (a) of subsection 7 of [NRS 284.173](#) is broad enough to include a contract executed with an independent contractor which is "incidental" to the construction of a highway.*

Letter to Legislative Auditor from Legislative Counsel of January 31, 1996, at 3 (emphasis added). Immediately following this quotation, and without any further analysis, the opinion states, "Despite this broader interpretation," however, [NRS 284.173](#) still requires NDOT to file with, and obtain the approval of, the Board of Examiners any contracts *not* for any work of construction or reconstruction of highways. *Id.* The opinion failed to note that most of the work performed by NDOT involves "services and works incidental to highway construction" The difficulty here is that most of the independent contracts executed by NDOT are for the purpose of carrying out its mission to build and maintain "highways" as defined by 408.070.

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We have not been informed as to whether there have been any independent services contracts in these areas or whether the review process is any different for these. We reserve judgment as to contracts in these areas.

<sup>30</sup> Listed in the request were contracts for such services as: (1) conversion of computer systems; (2) development of policy and procedure manuals for accounting and maintenance; (3) audit services; (4) geological studies; (5) expert witnesses; (6) leases of communication equipment; (7) personal computer training; (8) acquisition of rights-of-way; and (9) airport system planning consultants.

The Legislative Counsel opinion also stated that NDOT's interpretation of [NRS 284.173\(7\)\(a\)](#), "is of questionable import" because NDOT "has not been specifically charged with the administration of the provisions of [NRS 284.173](#), but is simply an agency to which provisions of [NRS 284.173](#) apply." *Id.* at 4, citing *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 636 (1990). The opinion failed to note, however, that [NRS 284.173\(7\)\(a\)](#) is only one piece of the statutory scheme from which NDOT derives its policies and procedures with respect to its independent contracts. The opinion failed to recognize that the majority of NDOT's reliance on the legality of its practice concerning the processing of its contracts is based on the numerous statutes within chapter 408 which provide the NDOT Board and Director with extremely broad authority with respect to independent contracts.

Importantly, while failing to note the decades-long practice of *both* NDOT and the Department of Administration with respect to NDOT independent contracts, the Legislative Counsel opinion theorized that NDOT's interpretation of [NRS 284.174\(7\)\(a\)](#) *might* be based upon a 1992 proposal by the Legislative Commission's Subcommittee on Feasibility of Privatizing the Provision of Governmental Services. *See* Legislative Counsel Bureau Bulletin No. 93-18. The opinion states that "the amendment was proposed by the Subcommittee based on a perceived need to clarify the limit on the authority of the Department of Transportation to enter into certain contracts without the approval of the State Board of Examiners." Opinion at 4.<sup>31</sup> Because the "clarifying amendment" was indefinitely postponed by a 1993 senate committee, Legislative Counsel asserted, without citing authority, "that a court would not consider the action of four senators . . . as controlling evidence of the intent of the entire Legislature."<sup>32</sup> Legislative Counsel concluded that the language of [NRS 284.173](#) is plain and unambiguous and, thus, we cannot go beyond the face of the statute to lend it a contrary construction.

Again, reading the statutes *in pari materia*, we disagree that it is clear that the language of [NRS 284.173](#) mandates prior approval of all NDOT independent agreements. This would nullify a large number of statutes in chapter 408, contrary to the rules of construction. This would also nullify the historical interpretation by practice of NDOT and the Department of Administration. Moreover,

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<sup>31</sup> Senate Bill No. 158 (February 1, 1993) proposed several changes to NRS 284.173. It was proposed that subsection 7(a) be amended by replacing the word "highways" with the phrase "a highway," so that the subsection would read: "Contracts executed by the department of transportation for any work of construction or reconstruction of a highway." The bill also proposed to add subsection 8 to NRS 284.173:

As used in this section, "work of construction or reconstruction of a highway" includes only work and services directly related to the actual construction, reconstruction, improvement, maintenance or design of a highway. The term does not include:

- (a) Administrative work or service; or
- (b) Other work or service which is merely incidental to the construction, reconstruction, improvement, maintenance or design of a highway.

<sup>32</sup> The Senate Committee on Government Affairs discussed Senate Bill No. 158 on April 14, 1993. On April 14, 1993, Ron Hill, Deputy Director, Nevada Department of Transportation, testified against the bill. Mr. Hill's main concern was that the increased time necessary to execute NDOT contracts caused by having NDOT's contracts reviewed by the Board of Examiners may hinder the department's ability to complete federal aid projects. NDOT's agreements are authorized through its Board of Directors, and NDOT's audits are performed by its own internal auditing division, legislative auditors, and the Federal Highway Administration. Therefore, Mr. Hill felt that passage of Senate Bill 158 would add a bureaucratic step that would not serve to save money or streamline the process of handling federal funds. On April 16, 1993, based on Mr. Hill's testimony, Senator Hickey moved to postpone indefinitely Senate Bill 158. In response to Senator Raggio's opposition, Senator Hickey stated:

With all due respect, the testimony that we heard here, it interferes with the fluid operation of the Department of Transportation in it's entering in of contracts [*sic*]. That interference could cause delay and also an increase in expenses. With that testimony that we heard and under the present system it seems to be working well, I support my motion.

Minutes of April 16, 1993, hearing on S.B. 158 before the Senate Committee on Government Affairs at 895. Senator Lowden, who seconded the motion, added:

My opinion was that it was another layer of bureaucracy that I believe there are two or three members of the board of examiners that are already on the board of transportation and it did seem to me to be bureaucratic.

*Id.* The motion then passed. The above statements indicate a conscious decision, on the part of the Committee, to reject the bill.

the fact that the legislature had the opportunity to amend the statute to change this historical interpretation and practice is indicative of an intent to reject the idea of a change. *See McKay v. Board of County Comm'rs of Douglas County*, [103 Nev. 490](#), 492 n.2, 746 P.2d 124, 125 n.2 (1987). If the legislature had wished or intended to limit the breadth and scope of the exemption set forth in subsection 7(a) of [NRS 284.173](#) in connection with chapter 408, it has had over 35 years in which to do so. That it has not indicates that the past and present procedures followed by NDOT and the Department of Administrative have legislative approval. *Summa Corp. v. State Gaming Control Bd.*, [98 Nev. 390](#), 392, 649 P.2d 1363, 1365 (1982); *Sierra Pac. Power Co. v. Department of Taxation*, [96 Nev. 295](#), 298, 607 P.2d 1147, 1149 (1980) (legislative acquiescence to agency's reasonable interpretation of statute indicates interpretation is consistent with legislative intent).

### CONCLUSION

The legislature has provided NDOT with broad authority throughout chapter 408. It has further provided in [NRS 284.173\(7\)\(a\)](#) that NDOT need not file *any* contracts of construction or reconstruction of highways to the Board of Examiners for approval. The definition of highways in chapter 408 is very broad and includes any services and works incidental to highway construction and maintenance which is NDOT's primary mission. Since 1961, when [NRS 284.173\(7\)\(a\)](#) was added to the Nevada Revised Statutes, NDOT has not submitted its independent services contracts to the Board of Examiners for approval. In 1983, NDOT requested and received an opinion as to the legality of this practice. It was the conclusion of that opinion that NDOT's practice was supported by legal authority. Based on that opinion, NDOT has continued to follow the procedure for approximately 13 additional years. The Department of Administration has acknowledged the practice of NDOT. Requiring NDOT to submit its independent contracts to the Board of Examiners for another round of review and approval is bureaucratic redundancy. The fact that NDOT and the Department of Administration has been following the existing procedure for so long, and that the legislature has not amended [NRS 284.173\(7\)\(a\)](#), indicates that the legislature has acquiesced to this interpretation of the statute and, thus, NDOT's procedure with respect to independent contracts. Based on the above, one can reasonably conclude that NDOT has authority to contract for the services of most independent contractors as set forth in chapter 408 without submitting the contracts to the State Board of Examiners for approval.<sup>33</sup>

FRANKIE SUE DEL PAPA  
Attorney General

By: BRIAN HUTCHINS  
Chief Attorney General

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OPINION NO. 96-32SALES TAX; EXEMPTIONS; LOCAL GOVERNMENT: [NRS 372.320\(4\)](#) provides an exemption from the sales tax for sales of tangible personal property to a county. Therefore, in order for the exemption to apply, the county must be the entity that actually purchases the tangible personal property. The purchase of tangible personal property by private property management companies that contract with Clark County to manage and maintain its commercial properties is subject to sales tax unless: (1) the management contract between the companies and the county specifically designate the companies as purchasing agents with the authority to bind the county contractually for the purchase of tangible personal property necessary to carry out the companies contractual obligations under the contract; (2) the fact of the companies

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<sup>33</sup> The exceptions might be for independent services related to airports, railways and transit which may not be incidental to highway construction and maintenance. *See* footnote 9.

agency status on behalf of the county is disclosed to the vendors on the purchase orders, invoices or purchase contracts; and (3) the county is directly liable to the vendor for the purchase price.

Carson City, November 6, 1996

Mr. E. Lee Thomson, Deputy District Attorney, Clark County District Attorney's Office, Post Office Box 552215, Las Vegas, Nevada 89155-2215

Dear Mr. Thomson:

Clark County, through its Department of Aviation, owns certain commercial and residential rental properties. It has contracted with several property management companies to manage and maintain these properties. The county's contract with Ribeiro Corporation is an example. Ribeiro Corporation, in the course of its activities to manage and maintain these rental properties, is required to purchase tangible personal property. The county's contract with Ribeiro Corporation and other documents have been submitted to support the county's position that Ribeiro Corporation's purchases under its Commercial Property Management Services Agreement should be exempt from sales tax under [NRS 372.325\(4\)](#). In this regard, you have asked this office for an opinion to the following question.

#### QUESTION

Does [NRS ch. 372](#) require collection of sales tax on purchases made by a county's real estate management agent on behalf of and in the name of the county?

#### ANALYSIS

It is presumed that sales tax is owed on the retail sale of tangible personal property in this state. [NRS 372.155](#). Thus, unless some exemption or exception applies, sales tax is owed on the purchase of tangible personal property in this state. *Campbell v. State, Dep't of Taxation*, [109 Nev. 512](#), 516, 853 P.2d 717, 719 (1993). Tax exemptions are strictly construed in favor of finding taxability, and any reasonable doubt about whether an exemption applies must be construed against the taxpayer. *Sierra Pac. Power Co. v. Dep't of Taxation*, [96 Nev. 295](#), 297, 607 P.2d 1147, 1148 (1980).

The retail sale of tangible personal property to a county is exempt from sales tax pursuant to [NRS 372.325\(4\)](#). However, [NRS 372.340](#) states:

The taxes imposed under this chapter apply to the sale of tangible personal property to and the storage, use or other consumption in this state of tangible personal property by a contractor for a governmental, religious or charitable entity which is otherwise exempted from the tax unless the contractor is a constituent part of that entity.

It is evident that a private for profit property management company, such as Ribeiro Corporation, hired by the county to manage and maintain the county's commercial properties, is not a constituent part of the county government. However, paraphrasing *Scotsman Mfg. Co. v. State, Dep't of Taxation*, [107 Nev. 127](#), 134 n.4, 808 P.2d 517, 521 (1991), [NRS 372.340](#) does not apply if, upon analysis of the purchase transaction, the county is found to be the actual purchaser of the tangible personal property as opposed to the contractor.<sup>34</sup> Accordingly, for purposes of our

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<sup>34</sup> The *Scotsman* case is not applicable to the question presented by the county. The "legal incidence" test described by the Nevada Supreme Court in *Scotsman* was applied in a case involving a federal contractor acting under a contract with the federal government. In *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954) the "legal incidence" test was developed and applied to resolve the issue whether state sales tax could constitutionally be applied to purchases of tangible personal property by government contractors which would become federal government property. The *Scotsman* court concluded that the legal incidence of the Nevada sales tax *under federal law* fell on the federal government under the circumstances in that case.

analysis, it is necessary to examine the specifics of the contractual relationship between Ribeiro Corporation and the county.

The contract itself is described as a “Commercial Property Management Services Agreement.” According to the terms of the agreement the county is seeking to have Ribeiro Corporation perform property management services for the county's commercial properties. Ribeiro Corporation's specific duties are set out in Exhibit A to the agreement, and are divided into four sections; namely, Management, Collections, Maintenance, and Landscape Maintenance. Among the duties listed under the Management section of Exhibit A are:

2. Employ, supervise, discharge and pay on behalf of and for County all servants, employees or contractors necessary to be employed in the management and operation of the Property;
3. Purchase on behalf of and in the name of County, all materials, supplies, uniforms, laundry services, exterminating and other services necessary for the maintenance or operation of the Property;
- ....
5. Make, with the written permission of County's Designated Representative, except as otherwise provided herein-and at County's expense, all repairs, decorations, revisions, alterations and improvements to the Property as are necessary for the proper maintenance thereof. . . .
6. Maintain and operate, at the expense of the County, all common areas and facilities in the Property;

Under the duties described in the Landscape Maintenance section of Exhibit A is Ribeiro Corporation's obligation to “purchase and maintain all equipment, tools, appliances, materials, supplies, and uniforms necessary or appropriate for the ordinary landscape maintenance of the Property.” Replacement of trees, fountain repairs, replacement and repairing sprinkler heads, valve lines or major lines are to be performed by Ribeiro at the county's expense.

Terms of compensation and payment are set forth in Article IV of the agreement. Article IV of the agreement also describes the financial relationship between Ribeiro and the county. Ribeiro is required to establish a bank account, termed a “Property Management Account,” in which all money received by Ribeiro from the tenants is deposited and all expenses incurred by Ribeiro, approved by the county, are reimbursed from that account. Additionally, Ribeiro's compensation for performing services under the agreement is withdrawn from this account. Each month, Ribeiro disburses the money in the account to the county minus reimbursement and payment for services. Article V of the agreement requires Ribeiro to obtain liability insurance coverage for itself and the county.

Based on the contract and the bank accounts records submitted, Ribeiro was the actual entity which established the bank accounts and signed the signature cards. There is no evidence that county employees or officials have signatory power to withdraw funds from the accounts. Checks drawn on the accounts are Ribeiro's corporate checks that also reference the specific group of Clark County properties to which the account relates. Ribeiro is listed by the vendors as the purchaser of various items of tangible personal property and sales tax has been charged. Although the rental agreements are between the county as lessor and a business as tenant, the rent checks are made payable to Ribeiro Corporation and deposited into these bank accounts.

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However, the determination of where the legal incidence of the sales tax falls may differ under state law. *See, e.g., Hibernia Bank v. State Bd. of Equalization*, 212 Cal. Rptr. 556, 562 (Cal. Ct. App. 1985) (the court held that absent a federal law issue, state courts have final authority to interpret state laws, such as where the legal incidence of the state sales tax lies and, under California law, the legal incidence of the sales tax falls on the retailer, not the purchaser). The Nevada Supreme Court has never determined where the legal incidence of the Nevada sales tax falls under our state law. However, for purposes of this opinion it is not necessary to make this determination.

The issue to be resolved is whether the county's contractual authorization to Ribeiro to make certain purchases of tangible personal property “on behalf of and in the name of the county” makes the county the purchaser of the property for sales tax purposes. Under this contractual authorization, Ribeiro purchases certain items of tangible personal property and pays for the property by a draw from the separate bank accounts. Courts faced with this issue often analyze whether the contractor has purchased the property from the vendor for resale to the government. This analysis assumes that the contractor was the initial purchaser. Under this analysis, the courts look to whether the purchasing contractor makes any use of the property purchased other than to simply transfer title or possession to the government. Where the property is purchased for the contractor's use to carry out its contractual obligations to the government, the courts tend to conclude that the sale to the contractor is subject to sales or use tax since the sale is to the contractor and no resale to the government occurred even though ownership of the property transferred to the government. See *Regional Transportation Dist. v. Martin Marietta*, 805 P.2d 1102, 1105 (Colo. 1991); *American Totalisator Co., Inc. v. Dubno*, 555 A.2d 414, 417 (Conn. 1989).

Other courts focus on determining whether, under the facts presented, the contractor is acting as an agent for the government in making the purchase. For example, in *Weed v. City of Pueblo*, 591 P.2d 80, 82 (Colo. 1979), the court noted in order to determine whether a contractor's purchases are exempt as a sale to an exempt entity, such as the city, it must be established that the contractor acted as the agent of the exempt entity when the purchase was made. One of the essential characteristics of such an agency is the agent's power to bind the principal contractually to a third party. *Id.* at 82; see also *Bill Roberts, Inc. v. McNamara*, 539 So.2d 1226, 1229 (La. 1989), wherein the court held proof of an agency relationship was lacking simply because the bid forms and purchase orders the contractor received from the government agency stated sales tax should not be included in the bid or that the government was exempt from paying sales tax. In *Brown Plumbing & Heating v. Tax Comm'n*, 848 P.2d 181 (Utah 1993), *aff'd*, 861 P.2d 435 (Utah 1993), the court held where the construction contract provided that the school district could directly purchase some of the materials to be used by the contractor in completing construction of a school, the contract did not make the school district a purchasing agent for the contractor and subject the contractor to use tax liability for those materials. In a similar case, the Utah Supreme Court held that use tax could not be imposed on a contractor on materials purchased by an exempt entity for use by the contractor in completing a construction contract for the exempt entity absent proof of the exempt entity's purchase of materials as agent for the contractor. *Thorup Bros. Constr. Co. v. Auditing Div.*, 860 P.2d 324 (Utah 1993). The court found that the exempt entity made the purchases because it:

(1) directly issued the purchase orders for the materials, (2) issued checks for materials directly to vendors, (3) took title in its own name, (4) inspected and stored the material on its own property, (5) insured those materials, (6) assured that associated warranties ran to itself, (7) exercised direct supervision, and (8) explicitly reserved in its contract [the right to purchase the materials]. . . .

*Thorup*, 860 P.2d at 328.

While the property purchased under paragraph 3 of the Management Section of Exhibit A to the agreement was to be purchased “on behalf of and in the name of” the county, Ribeiro has not been purchasing this property in the name of the county, but in its own name and with funds it controls. Ribeiro has not disclosed to the vendors that it is acting solely as an agent of the county to purchase the tangible personal property, nor has evidence been submitted that Ribeiro is authorized to contractually bind the county to pay the vendors. Although the property purchased by Ribeiro under paragraph 3 of the agreement eventually becomes property belonging to the county, under the current manner in which the management contract is being carried out, the

vendors are clearly looking to Ribeiro for payment not the county. Furthermore, the property being purchased is used by Ribeiro to carry out its contractual obligations to the county to manage and maintain the rental properties. All the county has agreed to do is to reimburse Ribeiro for its purchases under the contract. Since Ribeiro is actually using the property to fulfill its management contract, Ribeiro is not simply reselling the property to the county.

The property purchased under the Landscape Maintenance section of the contract does not contain language indicating that the property is being purchased on behalf of or in the name of the county. The contract language simply states Ribeiro will purchase and maintain that personal property it needs to carry out ordinary landscape maintenance of the properties.

Upon review and analysis of the contract between Ribeiro and the county, we believe that Ribeiro is acting as an independent contractor and as an agent of the county for certain purposes. However, we do not find that Ribeiro is acting as a purchasing agent for the county under the provisions of this contract such that its purchases of tangible personal property are exempt as purchases by the county, an exempt agency. Case law suggests that unless the county is actually listed as the purchaser on the purchase orders and invoices for the tangible personal property purchased by the property management companies, and the management contract clearly authorizes the property management companies to bind the county contractually in the purchase of tangible personal property, sale of the tangible personal property to those companies is subject to sales tax.

#### CONCLUSION

[NRS 372.320\(4\)](#) provides an exemption from the sales tax for sales of tangible personal property to a county. Therefore, in order for the exemption to apply, the county must be the entity that actually purchases the tangible personal property. The purchase of tangible personal property by private property management companies that contract with Clark County to manage and maintain its commercial properties is subject to sales tax unless: (1) the management contract between the companies and the county specifically designate the companies as purchasing agents with the authority to bind the county contractually for the purchase of tangible personal property necessary to carry out the companies contractual obligations under the contract; (2) the fact of the companies' agency status on behalf of the county is disclosed to the vendors on the purchase orders, invoices or purchase contracts; and (3) the county is directly liable to the vendor for the purchase price.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOHN S. BARTLETT  
Senior Deputy Attorney General

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OPINION NO. 96-33ETHICS; FINANCIAL DISCLOSURE: Las Vegas's city manager is a "public officer" under [NRS 281.4365](#) and must, therefore, file a financial disclosure statement according to [NRS 281.561](#). Other appointive officers of Las Vegas, including deputies, department heads, and directors are not "public officers" under [NRS 281.4365](#) and are not required to file financial disclosure statements according to [NRS 281.561](#).

Carson City, November 8, 1996

Mr. Larry G. Bettis, Deputy City Attorney, Las Vegas City Attorney's Office, 400 East Stewart, 9th Floor, City Hall, Las Vegas, Nevada 89101



Dear Mr. Bettis:

You have asked whether certain employees of the city of Las Vegas are "public officers" under [NRS 281.4365](#) so that they would be required to file financial disclosure statements as required by [NRS 281.561](#). The brief answer to your question is that the city manager is a "public officer" who is required to file a financial disclosure statement, but the employees appointed by the city manager are not "public officers" and thus do *not* need to file financial disclosure statements. Our analysis follows.

### QUESTION

Are Las Vegas's city manager and department heads and staff directors "public officers" as defined in [NRS 281.4365](#) who would be required to file financial disclosure statements pursuant to [NRS 281.561](#)?

### ANALYSIS

In Op. Nev. Att'y Gen. No. 193 (September 3, 1975) (AGO 193) and Op. Nev. Att'y Gen. No. 96-15 (May 28, 1996) (AGO 96-15), this office opined the definition of "public officer" under [NRS 281.005](#) and an earlier version of the Nevada Ethics in Government Law. As you are aware, in AGO 96-15 we concluded that department heads and staff directors employed by Clark County were not "public officers" who were required to file financial disclosure statements. Because of the differences between the Clark County ordinances and the Las Vegas ordinances, our analysis is slightly different in this matter than it was in AGO 96-15.

Las Vegas Code § 3.030 (1991) provides that the city manager is "the chief administrative officer of the city" and that he or she is "responsible to the city council for the efficient and proper administration of *all* the affairs of the city." Thereafter are nine affirmative duties or obligations placed upon the city manager, including supervision of all departments and divisions of city government (Las Vegas Code § 3.030(2)), preparation of the city's annual budget (Las Vegas Code § 3.030(4)), enforcement of all general laws and city ordinances (Las Vegas Code § 3.030(5)), and execution, monitoring, and enforcement of all city contracts (Las Vegas Code §§ 3.030(6) and (7)).

The city manager is a public officer because: (1) his position is "established by . . . ordinance of a political subdivision of the state, and (2) his position "involves the continuous exercise of a public power, trust or duty." [NRS 281.4365](#). Las Vegas Code § 3.030 (1991) satisfies both parts of the "public officer" test, since it simultaneously creates the position and defines the broad authority granted to the position. As we stated in our conclusion in AGO 193:

2. A person appointed to a governmental position, whether on a state, district, county or municipal level, is a public officer if his position is created by the Constitution, a statute or ordinance and if, further, his duties are specifically set forth in the Constitution, statute or ordinance and that person is made responsible, by the Constitution, statute or ordinance, for the direction, supervision and control of his agency.

Regarding the other appointive officers employed by Las Vegas, they are not "public officers" under [NRS 281.4365](#) because although their positions are created by ordinance,<sup>35</sup> their duties are

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<sup>35</sup> See Las Vegas Code § 3.070 (1991) (appointment of director of financial management, director of public services, fire chief, city clerk, and directors of other departments); Las Vegas Code § 3.080 (1991) (appointment of deputies and other employees); Las Vegas Code § 3.090 (1991) (appointment of city clerk); Las Vegas Code § 3.130 (1991) (qualifications and duties of director of financial management); Las Vegas Code § 3.150 (1991) (duties of city treasurer); and Las Vegas Code § 3.170 (1991) (duties of city auditor).

only such as are delegated to them by higher authorities such as the city council, the city manager, directors, or department heads. Because their duties are derived through higher officials, they are not "public officers" under [NRS 281.005](#). See AGO 193, at 57 and 61, *quoted in* AGO 96-15.

### CONCLUSION

Las Vegas's city manager is a "public officer" under [NRS 281.4365](#) and must, therefore, file a financial disclosure statement according to [NRS 281.561](#). Other appointive officers of Las Vegas, including deputies, department heads, and directors, are not "public officers" under [NRS 281.4365](#) and are not required to file financial disclosure statements according to [NRS 281.561](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: LOUIS LING  
Deputy Attorney General

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OPINION NO. 96-34CLERKS; RECORDS; EVIDENCE: Few records of the clerk's office are held in a fiduciary or custodial capacity within the meaning of [NRS 52.247](#). Under prescribed circumstances, original vital records may be destroyed after they are electronically recorded or rerecorded.

Carson City, November 12, 1996

Mr. Larry G. Bettis, Deputy City Attorney, City of Las Vegas, 400 East Stewart, 9th Floor, City Hall, Las Vegas, Nevada 89101

Dear Mr. Bettis:

You have asked the Attorney General for an opinion concerning [NRS 52.247](#) which was amended in the 1995 Legislative Session by S.B. 90. Act of May 31, 1995, ch. 131, § 1, 1995 Nev. Stat. 181. The statute now provides that unless a record is held in a fiduciary or custodial capacity, it may be destroyed once copied by a governmental agency and that a copy reproduced from such copied records is admissible into evidence to the same extent as an original, without regard to whether original is available for inspection. You have sought our opinion because the legislature did not give any guidance as to when a record is deemed to be held in a fiduciary or custodial capacity.

### QUESTION ONE

Once records are filed with the city clerk's office are they then considered to be held in a fiduciary or custodial capacity?

### ANALYSIS

[NRS 52.247](#) provides:

1. *Unless held in a fiduciary or custodial capacity* or unless specifically prohibited by a federal or state statute or regulation, by a local ordinance or by an order or judgement of court of competent jurisdiction, if any business or *governmental agency* has, in the regular course of business:

(a) Produced, kept or maintained any document, memorandum, writing, entry, print or other record of any act transaction, occurrence or event relating to the conduct of its business; and

(b) Has caused any of those records to be rerecorded, copied or reproduced by any photographic, photostatic or other process which ensures an accurate reproduction or creates a reliable medium for reproducing the original of any of those records, the business or governmental agency may, in the regular course of its business, destroy any of those records.

2. Any rerecorded, copied or reproduced record specified in subsection 1 is admissible to the same extent as an original, regardless of whether the original is available for inspection or has been lost or destroyed, if the rerecorded, copied or reproduced record is sufficiently authenticated.

4. If a governmental agency destroys any of its records and causes those records to be rerecorded, copied or reproduced pursuant to subsection 1:

(a) The rerecorded, copied or reproduced record shall be deemed a public record for the purposes of chapter 239 of NRS; . . . . [Emphasis added.]

This statute allows for admission into evidence any rerecorded record, any copied record, or any reproduction of a record to the same extent as the original if the record was produced, kept, or maintained in the regular course of business and was rerecorded, copied, or reproduced in a reliable medium. If the business or governmental agency meets this criteria, it may destroy any of those records in the regular course of business except records held in a fiduciary or custodial capacity.

The statute enables records that are already held in nonpaper medium to be rerecorded into the latest technology.

The statute does not define "fiduciary or custodial capacity." "One is said to act in a 'fiduciary capacity' . . . when the . . . property which he handles, is not his own or for his own benefit, but for the benefit of another person as to whom he stands in a relationship implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part." *Black's Law Dictionary* 563-64 (5th ed. 1979). We believe that custodial capacity as used in the statute conveys the same element of holding a document which belongs to another as found in the term "fiduciary capacity." While held in a fiduciary or custodial capacity, the document must be safeguarded for the owner. These terms have very limited effect regarding documents in the clerks' office. In some jurisdictions, the county recorder and the county clerk are the same office. An example of a document held in fiduciary or custodial capacity can be found in the recorder's office. The recorder's office receives a deed to real property for the purpose of recording it. While the deed is in the possession of the recorder's office it is held in a fiduciary or custodial capacity. Once it is recorded, it is returned to the owner. A city or county clerk's office receives a myriad of documents including records of the court and minutes of the governing boards. The Las Vegas City Clerk's Office is also the repository for certain records relating to voter registration. Only those documents for which ownership resides in someone other than the city, county, or district court are held in a fiduciary or custodial capacity.

#### CONCLUSION TO QUESTION ONE

The mere fact that a record is filed with the clerk's office does not make it a record held in a fiduciary or custodial capacity. The city clerk's office holds documents in a "fiduciary or custodial capacity" only if ownership of a document remains with another. Very few of the records in the clerk's office would meet this standard.

#### QUESTION TWO

Is the city prohibited from destroying records categorized as "vital records" even after the originals have been electronically recorded and a copy of the recorded documents can be reproduced with the same clarity and content as the original record?

### ANALYSIS

You have advised us that the state archivist sent a notice to all local governments dated June 12, 1996, regarding a new record retention schedule. You ask Question Two because the comment associated with "vital records" in information from the state archivist describe vital records as "[t]hese records are irreplaceable or copies do not have the same value as originals."

The answer to Question Two is no. The city may destroy the form of the vital records after they have been recorded electronically because state law defines electronic recording *as an original* and chapter 239 provides for destruction after electronic recordation.

Pursuant to [NRS 52.205](#)(1) "[a]n original of a writing or recording is the writing or recording itself or *any counterpart* intended to have the same effect by a person executing or issuing it." [Emphasis added.] [NRS 52.205](#)(3) states that "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown accurately to reflect the data, is an 'original.'"

[NRS 239.051](#)(1) states:

Unless destruction of a particular record without reproduction is authorized by a schedule adopted pursuant to [NRS 239.080](#) or 239.125, any custodian of public records in this state may destroy documents, instruments, papers, books and any other records or writings in his custody only if those records or writings have been placed on microphotographic film or if the information they contain has been entered into a computer system which permits the retrieval and reproduction of that information. *A reproduction of that film or that information shall be deemed to be the original.* [Emphasis added.]

A "vital record" does not have to be kept in the particular form the governmental office of record had kept it yesterday or keeps it today. As that record is rerecorded into a different form, it is still an original vital record. A copy can be made of that original vital record, in whatever form it resides, and be admissible to the same extent as the original pursuant to [NRS 52.247](#).

We note that [NRS 52.247](#) applies to private business as well as government. The need for such a statute to allow for storage of records in space saving medium without jeopardy should the record need to be used as evidence was more urgent for private records because chapter 239 and chapter 52 of NRS has addressed much of the evidentiary concern *for governmental records*.

There may be some confusion regarding "vital records" because of the comment that they are records where the original has more value than a copy. A "vital record" should not be confused with a record that has *intrinsic historical value*, such as the original Nevada Constitution.

### CONCLUSION TO QUESTION TWO

The city may destroy records categorized as "vital records" after the records have been recorded into another form and a copy can be produced with the same clarity and content as the original, provided destruction is not otherwise prohibited. If a vital record has also been identified as a record with intrinsic value (such as a historical document) it should not be destroyed even if it has been microfilmed or placed in another format. Whether a document has intrinsic value is determined by the office of the state archivist. See [NRS 378.250](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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OPINION NO. 96-35 COURTS; PENALTIES: The penalty provisions of [NRS 444.630](#) permit a court to impose criminal penalties of fines and imprisonment in addition to community service by which a person convicted of a misdemeanor may be sentenced.

Carson City, December 19, 1996

Mr. Bruce Nelson, Deputy City Attorney, Las Vegas City Attorney's Office, 400 East Stewart Avenue, 4th Floor, City Hall, Las Vegas, Nevada 89101

Dear Mr. Nelson:

You have requested an opinion regarding the scope of penalty provisions of [NRS 444.630](#), with particular regard to the exclusive or inclusive nature of those provisions:

#### QUESTION

Do penalty provisions of [NRS 444.630](#) preclude a court from imposing criminal penalties in addition to community service by which a person convicted of a misdemeanor may be sentenced?

#### ANALYSIS

[NRS 444.630](#) states every person who improperly or unlawfully disposes of garbage or sewage is guilty of a misdemeanor. The pertinent section of this statute further provides, "if the convicted person agrees, he shall be sentenced to perform 10 hours of work for the benefit of the community under the conditions prescribed in [NRS 176.087](#)." [NRS 444.630](#)(2).

[NRS 193.150](#)(1) provides:

Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than \$1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such misdemeanor prescribed a different penalty.

As is the case with [NRS 444.630](#), [NRS 193.150](#) contains a community service provision which refers to [NRS 176.087](#). [NRS 193.150](#)(2) provides:

*In lieu of all or a part of the punishment which may be imposed pursuant to subsection 1, the convicted person may be sentenced to perform a fixed period of work for the benefit of the community pursuant to the conditions prescribed in [NRS 176.087](#). [Emphasis added.]*

[NRS 176.087](#) itself states:

Except where the imposition of a specific criminal penalty is mandatory, a court may order a convicted person to perform supervised work for the benefit of the community:

(a) *In lieu of all or a part of any fine or imprisonment which may be imposed for the commission of a misdemeanor . . . . [Emphasis added.]*

Nowhere do the above-referenced statutes indicate that sentencing of a convicted person to community service will operate to preclude imposition of other available penalties. To the contrary, [NRS 176.087](#) plainly states that performance of community service may be "in lieu of all or a *part* of any fine or imprisonment which may be imposed for the commission of a misdemeanor . . . ." [NRS 176.087](#)(1)(a) (emphasis added).

The "plain meaning rule" of statutory construction holds that the words in a statute should be given their plain meaning unless this violates the spirit of the act. *McKay v. Board of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438, 441 (1986) (citing *Application of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535, 538 (1949)). Further, where a statute is clear on its face, a court may not look beyond the language of the statute in determining the intent of the legislature. *McKay*, 102 Nev. at 648 (citing *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, [99 Nev. 443](#), 445, 664 P.2d 957, 959 (1983)).

The relevant language of the statutes at issue, "in lieu of all or a part of any fine or imprisonment," ought to be construed according to the plain meaning of its terms; that a sentence of community service can be imposed in connection with the other punishment available or instead of the other punishment available, rather than as the exclusive penalty for a misdemeanor conviction.

There is no indication whatsoever that community service is intended to be the sole or exclusive punishment imposed under the statutes in question. The clear and unambiguous language of the pertinent statutes thus renders a determination of the proportionality of fines, imprisonment, and community service a discretionary matter which is for the sentencing judge to decide.

Assuming, *arguendo*, that reasonably informed minds could understand the statute(s) in question in two or more senses, the statute(s) could be considered ambiguous. *McKay*, 102 Nev. at 649 (citing *Robert E.*, 99 Nev. at 445). Ambiguous statutes can be construed "in line with what reason and public policy would indicate the legislature intended." *Id.* It is necessary to examine a statute's legislative history in order to determine such intent.

The operative statute regarding community service, [NRS 176.087](#), was amended with the addition of the community service provisions on July 3, 1991. A perusal of the Judiciary Committee discussion of the proposed amendment (S.B. 84) reveals that the intent of the legislature in enacting those provisions was not to make community service an exclusive remedy vis-a-vis fines and imprisonment. Rather, the legislators' major concern was to provide an *alternative* to imprisonment in an effort to reduce overcrowding of confinement facilities. Minutes of February 11, 1991, at 191; February 26, 1991, at 153; March 14, 1991, at 864 hearings on S.B. 84 before the Senate Committee on Judiciary.

Additionally, proponents of the amendment expressed an intent that imposition of community service be in addition to issuance of a monetary fine. The legislators reasoned that imposition and payment of a fine has little or no impact on the person who has committed a crime, while a sentence of community service constitutes actual punishment. *Id.*

The legislative history of the community service provisions of [NRS 176.087](#) provides compelling evidence that those provisions were not intended to supersede, but rather to augment the fines and imprisonment authorized under that statute, as well as under those to which it refers.

## CONCLUSION

Penalty provisions of [NRS 444.630](#) (and, by reference, [NRS 193.150](#) and [NRS 176.087](#)) do not prescribe or imply that fines, imprisonment, or community service are independent penalties, or that only one type of these punishments may be imposed by a sentencing judge. To the contrary, the clear language of the statutes, as well as the underlying legislative intent, indicates that the criminal penalties of fines and imprisonment may be imposed in addition to community service by which a person convicted of a misdemeanor may be sentenced.

FRANKIE SUE DEL PAPA  
Attorney General

By: GRENVILLE T. PRIDHAM  
Deputy Attorney General

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