

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1998

OPINION NO. 98-01 HOMEOPATHIC MEDICAL EXAMINERS, STATE BOARD OF; HOMEOPATHIC MEDICINE; MEDICAL EXAMINERS; BOARDS AND COMMISSIONS; ADMINISTRATIVE LAW: The Board of Medical Examiners may regulate the practice of its licensees even where that regulation may adversely affect the practice of licensees who are also licensed by the Board of Homeopathic Examiners.

Carson City, January 13, 1998

Dr. F. Fuller Royal, President, Nevada State Board of Homeopathic Examiners, Post Office Box 34329, Las Vegas, Nevada 89133-4329

Dear Dr. Royal:

You have asked four questions regarding the interrelationship of the Board of Homeopathic Examiners (BHE) and the Board of Medical Examiners (BME). In reading your request, your four questions could all be addressed through answering a single, reformulated question. We have, therefore, reformulated your questions into a single question, and our analysis of this question follows.

QUESTION

May the BME regulate licensees who are licensed by their board and also by BHE, even where the regulation by the BME may prohibit or effect practices that are condoned by the BHE?

ANALYSIS

Under [NRS 630.020](#)(1) the “practice of medicine” means: “To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.” [NRS 630.130](#)(2) empowers the BME to “adopt such regulations as are necessary or desirable to enable it [the BME] to carry out the provisions of this chapter.” [NRS 630.003](#) further states that “[t]he powers conferred upon the board by this chapter must be liberally construed to carry out this purpose [that only competent persons practice medicine within this state].”

[NRS 630A.040](#) defined “homeopathic medicine” and “homeopathy” as follows:

“Homeopathic medicine” or “homeopathy” means a system of medicine employing substances of animal, vegetable, chemical or mineral origin, including nosodes and sarcodes, which are:

1. Given in micro-dosage, except that sarcodes may be given in macro-dosage;
2. Prepared according to homeopathic pharmacology by which the formulation of homeopathic preparations is accomplished by the methods of Hahnemannian dilution and succussion, magnetically energized geometric patterns, applicable in potencies above 30X as defined in the official Homeopathic Pharmacopoeia of the United States, or Korsakoffian; and
3. Prescribed by homeopathic physicians or advanced practitioners of homeopathy according to the medicines and dosages in the Homeopathic

Pharmacopoeia of the United States, in accordance with the principle that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person, resulting in the elimination and prevention of illness utilizing classical methodology and noninvasive electrodiagnosis.

[NRS 630A.090](#)(4) provides that “[t]his chapter does not authorize a homeopathic physician to practice medicine, including allopathic medicine, except as provided in [NRS 630A.040](#).”

The above statutes show a clear differentiation in scope of practice between the BME and the BHE. The use of broad language in [NRS 630.020](#)(1) evidences a legislative intent to grant practitioners within the BME’s jurisdiction the broadest possible scope of practice. On the other hand, the specific language in [NRS 630A.040](#) evidences a legislative intent to grant the practitioners within the BHE’s jurisdiction a limited and delineated scope of practice. In fact, the language in [NRS 630A.090](#)(4) quoted above underscores that homeopathic practitioners are not authorized to practice allopathically and are, instead, limited to the scope of practice defined in [NRS 630A.040](#).¹

[NRS 630A.230](#)(2)(c) mandates as a condition of licensure with the BHE that a practitioner be “licensed to practice allopathic or osteopathic medicine in any state or country, the District of Columbia or a territory or possession of the United States.” We are aware that of the licensees of the BHE some are licensed by the BME, some are licensed by the Nevada Board of Osteopathic Examiners, and some are licensed by boards from other states or countries.

Because some licensees of the BHE are also licensed by the BME, our research focused on cases where one licensing board or professional association has challenged the statute or regulation of another licensing board as infringing on the authority of the first board or the practices of its licensees. The closest analogous case in Nevada was *Natchez v. State*, [102 Nev. 247](#), 721 P.2d 361 (1986). In *Natchez*, the Supreme Court examined whether an optometrist (regulated by the Nevada State Board of Optometry) can be employed by and share fees with an ophthalmologist (regulated by the BME). Based upon the plain language of [NRS ch. 636](#) (relating to the Optometry Board), and even after finding that an ophthalmologist is *not* within the authority and jurisdiction of [NRS ch. 636](#), the Supreme Court concluded that [NRS 636.300](#)(2) and (5) could prohibit an ophthalmologist from hiring and sharing fees with an optometrist. In so holding, the Court based its reasoning, in part, on the statutorily created “distinction between optometrists and ophthalmologists for regulatory purposes: ophthalmologists are regulated by the Board of Medical Examiners and optometrists are regulated by the Board of Optometry.” *Natchez* at 250.

In *Christenot v. State, Dep’t of Commerce*, 901 P.2d 545 (Mont. 1995), the Montana Supreme Court reviewed regulations passed by that state’s Dental Board that required a licensed dentist to refer his or her patient to a dentist before the dentist could make dentures for the patient. Using the well-established principle that “the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong” *Id.* at 548, the Montana Supreme Court vacated the trial court’s injunction against the regulation because it found that the regulation as a whole did not add “provisions not envisioned by the legislature.” *Id.* at 548-9.

In *Washington State Nurses Assoc. v. Board of Medical Examiners*, 605 P.2d 1269 (Wash. 1980), the Washington Supreme Court reviewed regulations by that state’s Board of Medical Examiners that allowed physician’s assistants to prescribe drugs under the supervision of a physician. The state’s Nurses Association challenged this regulation as being beyond the

¹ Your letter to this office dated November 12, 1997, also argues strenuously and persuasively that the Legislature intended the practices of allopathy and homeopathy to be differentiated.

scope of the Medical Examiners' authority, and the trial court agreed and ruled in favor of the Nurses Association. The Washington Supreme Court examined the statutes and regulations and reversed the trial court, finding that the regulations were precisely what the legislature intended when it created the statute authorizing physician's assistants and authorizing the Medical Examiners to regulate the use and practice of physician's assistants.

In *Best v. Board of Dental Examiners*, 423 S.E.2d 330 (N.C. Ct. App. 1992), the question was the correctness of the State Board of Dental Examiners' interpretation of the statute defining a nurse "legally qualified" to administer intraoral injections of anesthetic to include certified registered nurse anesthetists (CRNAs) where the State Board of Nursing objected and issued a contrary opinion.² The trial court concluded that the Nursing Board had the authority to determine the definition of "lawfully qualified nurse" found in the Dental Board's statutes. The North Carolina Court of Appeals disagreed and reversed the trial court, reasoning as follows:

Nurses are regulated under Chapter 90, Article 9A, more commonly referred to as the Nursing Practice Act. Under these statutory provisions, the North Carolina Board of Nursing is empowered to "(1) [a]dminister *this* Article; (2) [i]ssue its interpretations of *this* Article; [and] (3) [a]dopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of *this* Article." N.C.G.S. § 90-171.23(b) (1990) (emphasis added). The intraoral injection of anesthetic by lawfully qualified nurses is not a subject covered in the Nursing Practice Act, but instead is specifically provided for - and characterized as "dentistry" - in the Dental Practice Act. *We do not believe our Legislature intended that one profession set the standards of qualification for another.* The authority granted the Nursing Board is limited to the practices found in the Nursing Practice Act. (Emphasis supplied.)

Id. at 332-3. The Court of Appeals held that the Dental Board was the "correct agency to determine what kind of nurse qualifies as a 'lawfully qualified nurse' pursuant to N.C.G.S. § 90-29(b)(6) [the Dental Board's practice act]." *Id.* at 333.³

In each of the above cases, the courts resolved the challenges by straightforward statutory analysis. Where the Legislature had given a specific board authority to regulate a given practice, the court deferred to the Legislature's direction, even where the regulation would affect licensees outside the regulatory authority of the board. In *Natchez v. State*, an ophthalmologist's practice was limited by the Optometry Board; in *Christenot v. State, Dep't of Commerce*, denturists' practices were drastically effected by the Dental Board; in *Washington State Nurses Assoc. v. Board of Medical Examiners*, nurses were ordered to take orders from physician's assistants as a result of regulations by the Medical Examiners Board; and in *Best v. Board of Dental Examiners*, the term "lawfully qualified nurse" was allowed to be defined by the state's Dental Board, not the state's Nursing Board.

We think the analyses of the above cases are readily applicable to the question raised by this request. The core concern expressed throughout your request seems to be whether the BME may regulate the practice of people who are licensed by both itself and the BHE. In particular,

² The North Carolina Court of Appeals defined its issue as determining "whether the Dental Board or the Nursing Board has the authority and jurisdiction to define 'lawfully qualified nurse' under this provision of the Dental Practice Act." *Id.* at 331.

³ See also *Board of Optometry v. Board of Medicine*, 616 S.2d 581 (Fla. App. 1993) (Board of Medicine's "Surgical Care Rule" was affirmed as within the Board's authority even though the rule effected the practices of optometrists); *State ex rel. Lakeland v. State Medical Board*, 600 N.E.2d 270 (Ohio App. 1991) (Medical board may opine whether podiatrists may use anesthetics in podiatrists' private practices); *Arkansas State Nurses Ass'n v. Arkansas St. Medical Bd.*, 677 S.W.2d 293 (Ark. 1984) (Medical Board's rule restricting the number of registered nurse practitioners who may be employed by a given physician or practice site was ruled invalid because it attempted to regulate the practice of licensees outside the Medical Board's jurisdiction and authority).

you have expressed your concern with the BME's proposed regulation amendment to [NAC 630.230](#) which will include the new language that a physician shall not⁴:

(n) Prescribe or dispense Disodium Ethylene Diamine Tetra Acetic Acid (EDTA) or use Chelation Therapy, except that the substance or the procedure, or both, may be used for the treatment of proven heavy metal poisoning or any other unusual or infrequent condition which the board finds warrants its use.

The use of any procedure or substance which is prohibited by this subsection is harmful to the public, detrimental to the public health, safety and morals and constitutes unprofessional conduct.

This proposed new language is functionally identical to [NAC 633.340\(1\)\(c\)](#) by which the Board of Osteopathic Examiners has prohibited the use of EDTA and chelation therapy (with the same limited narrow exception) for osteopathic physicians since 1980. Our research shows that [NAC 633.340\(1\)\(c\)](#) has not been challenged in the 17 years it has been in force.

We must conclude that the BME's proposed restriction of the use of EDTA and chelation therapy for its practitioners is within the BME's statutory authority under [NRS 630.130\(2\)](#). Not only is the scope of practice governed by the BME the broadest possible under [NRS 630.020\(1\)](#), but equally broad is the scope of the BME's regulatory authority under [NRS 630.130\(2\)](#) because the BME is empowered "to adopt such regulations as are necessary or desirable to enable it [the BME] to carry out the provisions of this chapter." With such intentionally and expressly broad authority, we cannot say the regulation of a specific procedure or drug by the BME is outside the Legislature's intent.

The BME's proposed regulation seeks only to effect the practices of the BME's licensees. The BME would not have the authority to regulate the practices of homeopathic physicians any more than the BHE would have the authority to regulate the practices of allopathic physicians. Just as in the above cases, any incidental effect that the BME's regulation might have upon its licensees that are also licensed by the BHE cannot invalidate the regulations. To hold otherwise would be to give the BHE "veto power" over the BME's regulation of the BME's licensees. Such a "veto power" cannot be inferred and must, instead, be expressly made by the Legislature.

We are not deeming the BME "superior" (to use your word) to the BHE, but instead, we are merely acknowledging the system created and intended by the Legislature. The Legislature clearly intended to grant physicians the broadest possible scope of practice, and empowered the BME to regulate that broad practice as it deemed necessary and desirable. The Legislature clearly intended to require those people who wish to practice within the much narrower homeopathic methodology and modality to be licensed and regulated by the BHE. The choices of a few people to be licensees of both the BME and BHE cannot be allowed to sway the clear public policy enunciated by the Legislature.

You have raised section 1(4) of Statutes of Nevada, chapter 407 (1997) as indicative of a legislative intent to prohibit the BME from regulating practices that may be shared by both allopathy and homeopathy. Section 1(4) provides that the BHE will:

4. Investigate, hear and decide all complaints made against any homeopathic physician, advanced practitioner of homeopathy, homeopathic assistant or any agent or employee of any of them, or any facility where the primary practice is

⁴ The BME has regulated the use of other specific drugs and therapies. [NAC 630.205](#) (regulating the use of certain drugs for weight loss); [NAC 630.230\(1\)\(g\)](#) (regulating the use of anabolic steroids); [NAC 630.230\(1\)\(j\)](#) (regulating the use of chorionic gonadotropic hormones, thyroid, and thyroid synthetics for weight loss).

homeopathic medicine. If a complaint concerns a practice which is within the jurisdiction of another licensing board, including, without limitation, spinal manipulation, surgery, nursing or allopathic medicine, the board shall refer the complaint to the other licensing board.

Section 1(4) states the obvious: the BHE shall have disciplinary authority over its licensees, but where the complaint concerns dually licensed practitioners (such as nurses, chiropractors, allopathic physicians, or osteopathic physicians), the complaint *must* be referred to the board having jurisdiction over those practitioners. Thus, section 1(4) merely confirms our analysis that each board has jurisdiction and regulatory authority over its licensees independent of the jurisdiction and regulatory authority of other boards.

The end result of our analysis may well be that the BME could prohibit some practices that the BHE condones. In fact, this situation has existed for 17 years for those homeopathic physicians who are also licensed by the Board of Osteopathic Examiners. It may well be that the EDTA regulation would effect those few practitioners that are licensed by the BME and the BHE and who also use EDTA and chelation therapy, but this tangential effect in no way invalidates the BME's regulation or its authority to regulate its licensees as it deems necessary or desirable. Furthermore, with the advent of advanced practitioners of homeopathy, it is foreseeable that licensees of the BHE may also be licensees of the Board of Nursing or the Board of Chiropractic Examiners as well as licensees of the Board of Osteopathic Examiners and the BME.

Unless and until the Legislature says otherwise, we must conclude that each board has jurisdiction and regulatory authority over its licensees and that practitioners licensed by more than one board must comply with the statutes and regulations governing both of their licenses. If the statutes or regulations of two licensing boards conflict, a practitioner with two licenses will need to decide which practice to adhere to, cease the prohibited practice, or relinquish one of his or her licenses. These may be difficult alternatives, but they are the result of the Legislature's design.

CONCLUSION

The Board of Medical Examiners may regulate the practice of its licensees, and such regulation may prohibit practices for its licensees that are allowed by the Board of Homeopathic Examiners.

FRANKIE SUE DEL PAPA
Attorney General

By: LOUIS LING
Deputy Attorney General

OPINION NO. 98-02 MANUFACTURED HOUSING; MOBILE HOMES; LICENSES; LIENS:
Mobile home park owners must either have a dealer's license or hire a licensed dealer to resell a manufactured home acquired in a landlord's lien sale because there is no exemption from the dealer licensing requirements for them in [NRS chapter 489](#).

Carson City, February 10, 1998

Ms. Renee Diamond, Administrator, Manufactured Housing Division, 2501 East Sahara Avenue,
Room 204, Las Vegas, Nevada 89104

You have requested an opinion regarding the applicability of dealer licensing requirements to the resale of manufactured homes¹ by park owners who have acquired the homes through exercise of their [NRS chapter 108](#) landlord's lien sale rights.

QUESTION

Must a mobile home park owner obtain a dealer's license or hire a licensed dealer to resell a manufactured home acquired in a lien sale?

ANALYSIS

Regulation of the manufactured home sales industry in Nevada is set forth in [NRS chapter 489](#). Recognizing the possibility of unascertained defects in manufactured homes, our Legislature expressed its stated policy and purpose in enacting chapter 489, "to protect the public against these hazards and to prohibit the manufacture, sale, alteration, transportation and installation in this state of manufactured homes . . . which are not constructed in a manner which provides reasonable safety and protection to owners and users." [NRS 489.021](#).

"Dealer" is broadly defined within [NRS 489.076](#):

1. "Dealer" means any person who:

- (a) For compensation, money or other things of value, sells, exchanges, buys or offers for sale, negotiates or attempts to negotiate a sale or exchange of an interest in a manufactured home, mobile home or commercial coach subject to the requirements of this chapter, or induces or attempts to induce any person to buy or exchange an interest in a manufactured home, mobile home or commercial coach;
- (b) Receives or expects to receive a commission, money, brokerage fees, profit or any other thing of value from either the seller or purchaser of any manufactured home, mobile home or commercial coach;
- (c) Is engaged wholly or in part in the business of selling manufactured homes, mobile homes or commercial coaches, or buying or taking them in trade for the purpose of resale, selling, or offering for sale or consignment to be sold, or otherwise dealing in manufactured homes, mobile homes or commercial coaches; or
- (d) Acts as a reposessor or liquidator concerning manufactured homes, mobile homes, or commercial coaches, whether or not they are owned by such persons.

Specific exemptions from the "dealer" definition are contained in section 2 of [NRS 489.076](#):

2. The term does not include:

- (a) Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the order of any court;
- (b) Public officers while performing their official duties;
- (c) Banks, savings and loan associations, credit unions, thrift companies or other financial institutions proceeding as reposseors or liquidators of their own security; or
- (d) An owner selling his private residence.

¹ The term "manufactured home" is defined in NRS chapter 489, as are the terms "mobile home" and "commercial coach." For purposes of this opinion, the distinction among these terms is not relevant to the issue herein, and they will be referred to synonymously throughout as "manufactured home" or "home."

[NRS 489.311](#) requires dealers to apply to the Manufactured Housing Division for a license. To obtain a license applicants must show they have the experience; financial responsibility; knowledge of federal mobile home construction regulations and the safety, finance, and lien laws of Nevada; good character; and a reputation for honesty and integrity. [NRS 489.321](#); [NAC 489.310](#). Consistent with the legislative policy expressed in [NRS 489.021](#), chapter 489 imposes obligations on dealers to maintain separate trust accounts, honor warranties, deal honestly with lenders, and hire only licensed servicemen and installers who must also show a level of financial responsibility and knowledge of manufactured homes. [NRS 489.724](#), [489.727](#), 489.416(2), 489.401(6)-(7), 489.411(3), 489.321(1)(g), 489.351; [NAC 489.310\(3\)-\(4\)](#). Additionally, the 1997 Nevada Legislature stiffened the regulation of licensed dealers in two separate bills. Senate Bill 106 provides for suspension or revocation of a dealer's license and a fine for inadequate supervision of an installer or serviceman and for failing to disclose to a prospective purchaser, "any material facts, structural defects or other material information which the licensed dealer knew, or which by the exercise of reasonable care and diligence should have known, concerning the manufactured home or concerning the sale, purchase or lease of the manufactured home." Act of May 2, 1997, ch. 53 § 1 and 4, 1997 Nev. Stat. 95-97. Assembly Bill 297 adds restrictions on withdrawal from the trust account dictated by [NRS 489.727](#). Act of June 1, 1997, ch. 108 § 2, 1997 Nev. Stat. 212.

Mobile home park owners may assert a statutory landlord's lien against a manufactured home for unpaid lot rent and utilities. [NRS 108.265](#), *et seq.* After notice, publication, expiration of four months, and nonpayment, the mobile home park owner may satisfy the lien by conducting a sale by auction. [NRS 108.310](#), [108.315](#). The issue raised by your inquiry arises only when the mobile home park owner is the highest bidder at the auction and thereafter wishes to sell the home.

A mobile home park owner who resells a manufactured home acquired in a lien sale falls squarely within the definition of "dealer" in [NRS 489.076\(1\)](#). The exemptions are specific and none exists for mobile home park owners. The Legislature has exempted other occasional manufactured home sellers such as public officers who sell to satisfy a judgment or tax lien² and lenders who dispose of collateral after default.³ The Legislature could carve out a similar exemption for park owners if that is what is intended.

Thus, absent an exemption, we conclude that a mobile home park owner who desires to resell a manufactured home acquired in a lien sale must either obtain a dealer's license or hire a licensed dealer.

The rules of statutory construction support this conclusion. Statutes must be given a reasonable construction with a view to promoting rather than defeating the legislative policy behind them. *State, Dept of Motor Vehicles v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988). The Legislature's stated policy of protecting the public from unsafe manufactured homes is furthered by our conclusion. Where the Legislature could easily have inserted exception language into a statute but has chosen not to, courts decline to judicially create such exceptions. *Id.* at 526.

The Legislature is presumed to act with full knowledge of existing statutes relating to the same subject when enacting a statute. *City of Boulder v. General Sales Drivers*, [101 Nev. 117](#), 119, 694 P.2d 498, 500 (1985). The mobile home park owner's lien for unpaid rent was created in 1961. Act of April 6, 1961, ch. 298, § 2 1961 Nev. Stat. 483-485. The definition of "dealer" in [NRS chapter 489](#) originated in 1975 when the responsibility for licensing was transferred from the Department of Motor Vehicles to the State Fire Marshal Division of the Department of Commerce.

² NRS 489.076(2)(b).

³ NRS 489.076(2)(c).

Act of May 27, 1975, ch. 739, § 19 1975 Nev. Stat. 1571. The exemptions were added in 1983. Act of May 13, 1983, ch. 325, § 9 1983 Nev. Stat. 775, 777.

In construing the definition of "used vehicle dealer," this office issued an opinion in 1965 that garagemen who acquire a motor vehicle through a statutory lien sale and resell to satisfy their liens, are not liable for licensing. Op. Nev. Att'y Gen. No. 65-256 (August 18, 1965) Used Car Dealers Defined; Sales Tax (construing Act of April 15, 1965, ch. 527, § 5 1965 Nev. Stat. 1471, 1472). The opinion also concluded that finance companies may repossess and resell cars secured by chattel mortgages without liability for licensing. However, the 1965 definition of "used vehicle dealer," as "any person . . . who *buys and sells* . . ." prompted our opinion that one who obtains possession under a statutory right or defaulted chattel mortgage does not *buy* the vehicle and is therefore not a "used vehicle dealer" liable for licensing. *Id.* (emphasis added).

The present definition of "dealer" in [NRS 489.076\(1\)](#) applies to one who buys *or* sells a manufactured home. This distinction renders the reasoning of the 1965 opinion inapplicable here. Since issuance of the 1965 opinion, the Legislature more broadly and similarly defined dealers of both vehicles and manufactured homes. *See* Act of May 27, 1975, ch. 739, § 2 1975 Nev. Stat. 1571; Act of May 19, 1975, ch. 577, § 1975 Nev. Stat. 1069-70. In 1975, the Legislature expressly exempted financial institutions that acquire collateral upon default from the "vehicle dealer" definition, and in 1983 it exempted them from the "manufactured home dealer" definition. *Id.*; Act of May 13, 1985, ch. 325, § 9 1983 Nev. Stat. 775, 777.

One who acquires possession of a vehicle under a statutory lien and resells to satisfy the lien may now be exempted from the "vehicle dealer" definition in [NRS 482.020\(2\)](#).⁴ No similar exemption exists in the definition of "dealer" of manufactured homes in [NRS 489.076](#). Had the Legislature wished to create such an exemption as it apparently did for vehicle dealer licensing in 1975, it could have done so.

CONCLUSION

[NRS 489.076](#) defines a "dealer" of manufactured homes without any exemption for a mobile home park owner who has acquired a home in a lien sale. Chapter 489 allows only licensed dealers to sell manufactured homes. The chapter provides broad protections for owners and occupants of manufactured homes against undisclosed latent defects, faulty service and fraudulent sales practices. To require park owners to either obtain a dealer's license or hire a licensed dealer to resell a manufactured home serves the Legislature's stated policy and provides maximum protection for the public until the Legislature acts to provide an exemption.

FRANKIE SUE DEL PAPA
Attorney General

By: LESLIE A. NIELSEN
Senior Deputy Attorney General

OPINION NO. 98-03 ELECTIONS; WASHOE COUNTY; PUBLIC OFFICER; COMMISSIONERS: The Washoe County Commission may reapportion the commissioner election districts more frequently than once every ten years when population changes occur.

⁴ In NRS 482.020(2)(a), an exemption from vehicle dealer licensing exists for, "[a]n insurance company, bank, finance company, government agency or *any other person* coming into possession of a vehicle . . . if the sale of the vehicle is for the purpose of saving the seller from loss . . ." (Emphasis added.)

Carson City, January 16, 1998

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

Dear Mr. Gammick:

You have requested an opinion from this office regarding reapportioning the Washoe County Commissioner election districts.

QUESTION

May the Washoe County Commission (Commission) reapportion the commissioner election districts more frequently than once every ten years when population changes occur?

ANALYSIS

According to information you supplied, the Commission currently appears to reapportion once every ten years based upon the national decennial census. Your inquiry is whether the Commission must wait for the results of the next national decennial census that will be conducted in 2000 before it can reapportion or whether the Commission may reapportion in 1998.

Substantial growth has occurred in Washoe County since the last reapportioning occurred based on the national decennial census conducted in 1990. This growth has resulted in a considerable discrepancy as to the population each county commissioner represents. According to the information you provided, the county commissioner election districts range in size from approximately 51,130 to 70,553 persons or 17.1 to 23.6 percent.

You provided a legal analysis that concludes this difference in population violates the "one person, one vote" principle. We agree. This difference in population also violates [NRS 244.014](#), the statute that governs the number and terms of county commissioners in counties the size of Washoe and requires the county commissioner election districts to be as nearly equal in population as practicable.

The Nevada Supreme Court addressed the issue of apportionment and county commissioner election districts in *County of Clark v. City of Las Vegas*, [92 Nev. 323](#), 550 P.2d 779 (1976). The issue on appeal was the constitutionality of a plan dividing Clark County into seven commissioner election districts from which 11 commissioners would be elected. The court held "it was constitutionally impermissible to base an initial apportionment for the new commissioner districts on admittedly outdated and inaccurate population estimates when more recent and accurate estimates were just as readily available." *Id.* at 333. Although the question you present does not deal with initial apportionment, but reapportionment, the legal analysis the court used in arriving at its holding is helpful.

The court was absolutely clear as to the importance of the "one person, one vote" principle:

Unquestionably, if a basis of apportionment or *reapportionment* is adopted which does not reasonably assure adequate protection of the integrity of the individual's vote, the 'one man, one vote' concept is violated. (Citations omitted.) Clearly, the Nevada and United States Constitutions require strict compliance with the 'one man, one vote' concept whenever possible (emphasis added).

Id. at 332-33.

Although when the Commission reapportioned after the 1990 national decennial census, it was in compliance with the “one person, one vote” principle, since that time the population has grown within Washoe County so the principle is now in danger of being violated.

The court in *County of Clark* reaffirmed “that reapportionment every ten years based on population changes is ‘reasonable’ as that term is necessarily defined by the courts.” *Id.* at 333. The court also “recognized that to require reapportionment more frequently than every ten years might impose on government burdens unreasonable in relation to the benefits achieved.” *Id.*

These pronouncements by the court clarify that reapportionment more frequently than every ten years is not required. However, we agree with your conclusion that nothing in the court’s decision prohibits more frequent reapportionment if such a need exists.

Indeed, the statutes provide for a method for county commissions to reapportion based on a change in population. [NRS 244.018](#)(1) states:

If new or changed county commissioner election districts must be established because of changes in population or applicable law, the board of county commissioners shall establish those districts by ordinance and provide for the election from specified districts of the proper numbers of county commissioners for 4-year and 2-year terms respectively so that the numbers of county commissioners to be elected at each general election thereafter will be as nearly equal as possible.

[NRS 0.050](#) provides the following definition of “population”:

Except as otherwise expressly provided in a particular statute or required by the context, “population” means the number of people in a specified area as determined by the last preceding national decennial census conducted by the Bureau of the Census of the United States Department of Commerce pursuant to section 2 of article I of the Constitution of the United States and reported by the Secretary of Commerce to the governor pursuant to 13 U.S.C. § 141(c).

While the statutory definition of “population” clearly means the number of people in an area as determined by the last national decennial census, the definition also allows for an exception if the context of a particular statute so requires. The context of [NRS 244.018](#)(1) requires the use of another definition of population if there have been changes in population so that “changed county commissioner districts must be established.” WEBSTER defines “population” as “the whole number of people or inhabitants in a . . . region.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 915 (1st ed. 1985). Clearly, when the whole number of people in a region changes, the county commission has the option of also changing the county commissioner election districts.

You furnished reliable data showing the population, the whole number of people in Washoe County, has substantially changed, so the fundamental legal principle of “one person, one vote” is in danger of being violated. This data appears to be the “more recent and accurate [population] estimates” to which the court in *County of Clark* was referring. *County of Clark*, 92 Nev. at 333. Under these circumstances, the Commission has the authority to change the county commissioner election districts to bring these districts into compliance with the “one person, one vote” concept.

The Clark County District Attorney's office addressed this issue in an opinion dated September 6, 1996. The opinion concluded that legislative authorization was needed if the Clark County Board of County Commissioners desired to reapportion districts more frequently than every ten years using population calculations other than the Federal Census. Based upon the above analysis, we disagree with that conclusion. The plain language of the statutes authorizes a county commission to reapportion the county commissioner election districts, based on reliable data, more frequently than every ten years when population changes occur.

CONCLUSION

The Washoe County Commission may reapportion the commissioner election districts more frequently than once every ten years when population changes occur.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 98-04 TIME SHARES; ZONING; CITIES AND TOWNS: The City of Mesquite may require a time share developer to obtain a conditional use permit prior to selling time shares. This requirement does not conflict with the purpose or intent of [NRS 119A.200](#) and is a reasonable exercise of the city's ability to regulate zoning and planning within its jurisdiction.

Carson City, February 5, 1998

Tony Terry, Esq., City of Mesquite City Attorney, 1200 South 4th Street, #D, Las Vegas, Nevada 89104

Dear Mr. Terry:

You have asked for a legal opinion from the Office of the Attorney General regarding whether the City of Mesquite may require a time share developer to comply with zoning requirements and obtain a conditional use permit from the city prior to the developer selling time shares within Mesquite, Nevada.

QUESTION

Can the City of Mesquite require a time share developer to comply with zoning requirements and obtain a conditional use permit prior to the developer selling time shares within Mesquite, Nevada?

DISCUSSION

Analysis of relevant statutes and legislative history support the conclusion that time share projects are subject to local government planning, zoning, and construction regulation. Local governments are prohibited from direct regulation of time shares under [NRS 119A.200](#).

[NRS 119A.200](#) does not restrict the ability of local governments, like the City of Mesquite, to require time share developers to obtain conditional use permits or comply with zoning and planning within the city limits. This statute prohibits a local government from directly regulating a time share developer as follows: “[t]ime shares and time-share projects to which this chapter applies are subject to licensing by local governments for revenue *but not for regulation.*” *Id.* (emphasis added).

Nonetheless, chapter 278 of the Nevada Revised Statutes specifically grants to the cities and counties the ability to adopt and implement zoning and planning requirements and restrictions. [NRS 278.020](#) states that “[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures.” *Id.* As such, local governments such as the City of Mesquite are charged with implementing and enforcing zoning requirements that apply to all developments of land. Zoning and planning restrictions apply to all entities that develop land, not just time share developers. The zoning and planning regulations adopted by local governments are not the type of licensing regulations specifically prohibited by [NRS 119A.200](#).

The legislative history supports this conclusion. On two separate occasions in front of the Senate Judiciary Committee and Assembly Commerce Committee in the Nevada Legislature, attorneys representing several local governments expressed their concerns with draft S.B. 176 § 54 (1983), which was later codified as [NRS 119A](#). The original language in S.B. 176 § 54 is identical to [NRS 119A.200](#). The local government attorneys were generally concerned with a local government’s ability to regulate time share developers within city limits.

There were suggested amendments that would change the original language to state, “[t]ime shares and time-share projects to which this chapter applies are subject to licensing by local governments for revenue [but not for regulation] *shall not be regulated by local governments in a manner which duplicates the regulations imposed by the Division.*” (Alteration in original.) (Letter to Honorable John E. Jeffrey, Nevada State Assembly, Chairman, Commerce Committee, from Stephen C. Balkenbush, Chief Deputy District Attorney for Douglas County, dated May 11, 1983) (on file with the legislative history of S.B. 176 (1983)).

Chief Deputy District Attorney Stephen C. Balkenbush testified later that day in front of the Assembly Commerce Committee and stated that local governments need to be able to regulate planning, zoning, and construction matters, and that the bill as written precludes them from regulating time shares except with respect to revenue. Chairman Jeffrey responded by concluding that local governments have the authority to regulate planning, zoning, and construction under other ordinances and statutes, and that he did not see that anything in the bill precluding local governments from regulating local planning and zoning. *Regulation of Time Shares: Hearings on S.B. 176 Before the Assembly Committee on Commerce*, 1983 Legislative Session, 4 (May 11, 1983).

The original language in S.B. 176 § 54 remained unchanged when the final vote was taken on May 11, 1983. It could be inferred the Nevada Legislature in both houses considered the draft language in § 54 to be adequate and rejected any additional amendments. Thus, the legislative intent of S.B. 176 § 54 was to limit the local government’s ability to impose any additional regulations or conditions specifically upon time share developers but not to remove the local government’s exclusive power to regulate zoning and planning in the city or county.

This means that [NRS 119A.200](#) does not prohibit a city from requiring time share developers to comply with zoning and planning requirements and obtain a “conditional use permit” if required by the city’s zoning ordinances. However, local governments may not impose their own additional regulations over and above what is required in [NRS chapter 119A](#) with

respect to time shares. Therefore, the City of Mesquite may require a conditional use permit with respect to zoning requirements prior to a developer selling time shares.

CONCLUSION

The City of Mesquite may require a time share developer to obtain a conditional use permit prior to selling time shares. This requirement does not conflict with the purpose or intent of [NRS 119A.200](#) and is a reasonable exercise of the city's ability to regulate zoning and planning within its jurisdiction.

FRANKIE SUE DEL PAPA
Attorney General

By: CHRISTINE S.

Deputy Attorney General

MUNRO

OPINION NO. 98-05 INDUSTRIAL RELATIONS, FEES;WORKERS COMPENSATION:
The Board for the Administration of the Subsequent Injury Fund for Self-Insured Associations does not have the authority to adopt a regulation imposing a non-refundable filing fee for the filing of claims against the fund by the members of the associations.

Carson City, February 18, 1998

Mr. John Wiles, Division Counsel, Department of Industrial Relations, 2500 West
Washington Avenue #100, Las Vegas, Nevada 89106

Dear Mr. Wiles:

On behalf of the Board for the Administration of the Subsequent Injury Fund for Self-Insured Public or Private Employers (Board), you have asked for an opinion of the attorney general regarding a proposed regulation for the administration of the fund. The proposed regulations would establish a nonrefundable filing fee to accompany a claim made against the Board. The Board has asked for our opinion to guide them in the adoption of the proposed regulation.

QUESTION

Does the Board have the authority to impose, by regulation, a fee for filing claims against the fund established pursuant to [NRS 616B.563](#)?

ANALYSIS

The Board was established in 1995 along with other reforms of Nevada's workers compensation law. Pursuant to [NRS 616B.575](#), the Board is granted authority to administer the fund in accordance with the provisions of [NRS 616B.575](#), [616B.578](#) and [616B.581](#). Associations of self-insured employers are groups of employers who form the association to collectively self-insure for the purposes of workers compensation and who share similar risk. There are associations of private employers or public employers.⁵ A claim is made against the

¹ Currently there are nine associations of self-insured employers in Nevada.

fund by submitting it to the administrator of the Division of Industrial Insurance who evaluates the claim and submits it to the Board with recommendations. [NRS 616B.575\(1\)](#).

An administrative board has no general or common law powers but only such powers that have been conferred by law expressly or by implication. *Andrews v. Board of Cosmetology*, [86 Nev. 207](#), 467 P.2d 96 (1970); *Ruley v. Nevada Board of Prison Comm'rs*, 628 F. Supp. 108 (Nev. 1986). The Legislature has granted the Board the authority to adopt regulations for the establishment of assessment rates, payments, and penalties. "Assessment rates must reflect the relative hazard of the employment covered by associations of self-insured public or private employer, and must be based upon expected annual expenditures for claims for payments from the subsequent injury fund for associations of self-insured public or private employers, or *any costs associated with the fund.*" [NRS 616B.575\(6\)](#). [Emphasis added.] The statutory scheme for self-insured associations claims against the subsequent injury fund does not grant the authority to charge a filing fee to a member who makes a claim. Nor does a review of the legislative history provide any hint that the Legislature intended such authority. The costs associated with processing a claim are part of administrative costs. Those costs are a component of the definition of an assessment rate and are therefore borne by the membership as a whole. Our analysis and conclusion is consistent with our letter opinion of June 19, 1990, to the director of the Department of Commerce (now the Department of Business and Industry) who asked if he had the authority to charge an application fee in connection with allocation requests.

If the Board finds that the efficient administration of processing claims would benefit from a nonrefundable filing fee, it must seek the authority to levy the fee from the Legislature.

CONCLUSION

The Board for the Administration of the Subsequent Injury Fund for Self-Insured Associations does not have the authority to adopt a regulation imposing a nonrefundable filing fee for filing claims against the fund by the members of the associations.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-

Deputy Attorney General

CROSSLEY

AGO 98-06 BOARD OF ARCHITECTURE; ARCHITECTURE; PLANNING BOARD; PUBLIC WORKS BOARD; COPYRIGHT; STATE BUILDINGS; CONTRACTS:
Architectural drawings and specifications are entitled to copyright protection. If a state agency wants to reuse an architect's drawings and specifications on future projects, the state agency must include contract provisions in the professional services agreement which clearly set out the rights and duties of the parties.

Carson City, March 26, 1998

Yvonne Benson, Deputy Manager, State of Nevada, Public Works Board, 505 East King Street,
#301, Carson City, Nevada 89701

Dear Ms. Benson:

You have requested an Attorney General's Opinion about the ownership rights to architectural plans.

QUESTION

What ownership rights does the State of Nevada have in architectural plans and designs for public works projects?

ANALYSIS

Architectural drawings and specifications are entitled to copyright protection. Copyright law is governed almost exclusively by the Copyright Act of 1976 and the Architectural Works Copyright Protection Act of 1990.⁶ Under federal copyright laws, the architect retains ownership of a copyright in the plans or drawings, and the client retains ownership of the material object, *i.e.*, a particular copy of the plans. The architect's copyright includes the right to reproduce and use the drawings, while ownership of a particular copy includes only the right to use that particular copy for its intended purpose.

If the state wants to reuse an architect's drawings and specifications on future projects, the state must include contract provisions into the professional services agreement which clearly set out the rights and duties of the parties. From the outset of negotiations, the state agency and the architect would understand that any fees or costs associated with the reuse of the original drawings and specifications would be substantially reduced if the state agency wanted to reuse the drawings and specifications for another project.

Reuse contract provisions which allow the state agency to reuse the architectural plans and designs for future projects would not be inconsistent with [NAC 623.780](#) because the reuse of the drawings and plans with the architect's participation would be contemplated when the he agreed to build the project. However, if the State instead decides to engage a different architect, the plans would have to be redrawn to the new site by the new architect pursuant to [NRS 623.270](#). Further, the architect would waive his copyright in the original projects plans, thereby permitting the new architect to use his original drawings and specifications to make the necessary new site modifications for any future projects.

A. Contractual Provisions

In Nevada, there are no statutes or contractual language which provide that the documents or plans shall remain the property of the State or that the State has the right to reuse the plans without the approval of the architect. On the contrary, the Nevada Administrative Code (NAC), places an affirmative duty on the architect to ensure that his drawings are not reused for projects not contemplated at the time those drawings were completed. [NAC 623.780](#) states in its entirety:

Possession and use of drawings and specifications.

Each architect, residential designer and interior designer who holds a certificate of registration shall:

1. Take such reasonable steps as are necessary to ensure that his drawings and specifications are not used for projects not contemplated at the time those drawings and specifications are completed.

⁶ 17 U.S.C. §§ 101 through 810. Judicial Improvements Act of 1990, Title VII—Architectural Works, Pub. L. No. 101-650, 104 Stat. 5133 (1990).

2. Include in all contracts between himself and a client the following language: Drawings and specifications remain the property of the design professional. Copies of the drawings and specifications retained by the client may be utilized only for his use and for occupying the project for which they were prepared, and not for the construction of any other project.

3. Retain possession of all original line drawings prepared for a project.

4. Not permit the dissemination of original drawings and specifications in any form, including, but not limited to, computer disks, which, when duplicated, could be indistinguishable from the original drawings and specifications.

(Added to NAC by Bd. of Architecture, eff. 9-15-89; amended by Bd. of Architecture, Interior Design & Residential Design, 5-20-96.)

Moreover, the professional services agreements currently utilized by the Nevada State Public Works Board specifically provide that the architect's drawings and plans are his property. Article 2, Ownership and Use of Documents, provides "[T]he parties agree that all designs, specifications, reports or other documents produced by the Consultant in the performance of this agreement are his property. The Consultant agrees that the Board has the exclusive right to use such documents."

The above-mentioned provision does give the state agency the exclusive right to use the architect's drawings, but does not mention the right to reuse the drawings for another project. Without further contractual language which affirmatively grants to the State the right to reuse such drawings and plans, it is likely any reuse would result in litigation for copyright infringement.

The best remedy for this issue would be to include contract provisions in the professional services agreement which clearly define the right and liabilities of the parties with respect to the reuse of the construction drawings.

The state agency and the architect should agree that any fees or costs associated with the reuse of the original drawings and specifications would be substantially reduced if the state agency wanted to reuse the drawings and specifications for another project. For example, under a separate subsection in the professional services contract, the following language could be used:

All designs, drawings, specifications, design calculations, notes and other work developed in the performance of this contract shall be the joint property of Owner (state agency) and Architect, provided however, the rights of ownership are limited as follows:

1. Owner may utilize the drawing and specifications with respect to the construction, maintenance, repair and modification of the Project.

2. Architect may utilize any of the constituent parts of the drawings and specifications on any other project except for any unique or distinctive architectural components or effects which taken independently or in combination would produce a project with substantially similar or distinctive features.

3. Owner may also utilize the original drawings and specifications with respect to another project if Owner engages an architect to perform architectural services with respect thereto. In the event the Owner engages a new architect to perform architectural services on another project utilizing the original drawings and specifications, Architect agrees to waive his copyright on the original drawings and specifications to the extent necessary for the new architect to make modifications and changes which take into account the new site specific conditions for the new project.

4. In the event the owner engages the original architect to perform architectural services on another project utilizing the original drawings and specifications, the Owner agrees

to pay the architect resite fees necessary for the new site adaptation of the original drawings and specifications, as follows:

- a) Compensation for architectural services for the original design is \$_____ (or ___% of construction cost).
- b) Resite compensation shall be in the amount of \$_____ (or ___% of construction cost).
- c) Design and/or changes to the original drawings and specifications which are necessary for the new site adaptation and which are required based upon site specific conditions shall be considered additional services and compensation and shall be paid in the amount of ___% construction costs or (\$____/hour).

It would also be expected that the fees and costs associated with the reuse of the original drawings and specifications would be reduced to a smaller percentage. The reduced fee is appropriate because most of the costs associated with research and design calculations went into the original drawings and specifications and the architect has already been compensated for this work. For example, an architect might receive as compensation 6 percent of the construction costs for the original project, but that percentage would be reduced if the state agency reused his drawings for another project. The architect would receive compensation for actual costs associated with the new site adaptation of the original drawings and specifications for any future projects. This kind of provision would allow the State to reuse the architectural plans and designs for future projects.

This provision would not be inconsistent with [NAC 623.780](#) because the reuse of the drawings and plans with his participation would be contemplated when the architect agreed to build the project. However, if the State instead decides to engage a different architect, the original plans would have to be redrawn to the new site by the new architect pursuant to [NRS 623.270\(d\)](#). The initial architect would have agreed to waive his copyright in the original project plans, thereby permitting the new architect to use his original drawings and specifications to make the necessary new site modifications for any future projects.

B. Reuse Statutes

In an attempt to facilitate the State's reuse of public works construction documents, several states have enacted laws which demand a right to reuse construction design documents on later public works projects. These statutes are generally based on the notion that clients of architects have "purchased the plans," and should therefore be free to do what they wish with them.

Reuse statutes have been enacted in New Mexico, Tennessee, and Louisiana. New Mexico has a reuse statute which provides that all contracts between a state agency and an architect for construction of new buildings or for remodeling or renovation of existing buildings shall contain the provision that all designs, drawings, specifications, notes and other work developed in the performance of the contract are the sole property of the state. N.M. Stat. Ann. § 13-1-123 (Michie 1992) states in its entirety:

Architectural, engineering, landscape architectural and surveying contracts.

- a. All contracts between a state agency and an architect for the construction of new buildings or for the remodeling or renovation of existing buildings shall contain the provision that all designs, drawings, specifications, notes and other work developed in the performance of the contract are the sole property of this state.
- b. All documents, including drawings and specifications, prepared by the architect, engineer, landscape architect or surveyor are instruments of professional

service. If the plans and specifications developed in the performance of the contract shall become the property of the contracting agency upon completion of the work, the contracting agency agrees to hold harmless, indemnify and defend the architect, engineer, landscape architect or surveyor against all damages, claims and losses, including defense costs, arising out of any reuse of the plans and specifications without the written authorization of the architect, engineer, landscape architect or surveyor.

c. A copy of all designs, drawings and other materials which are the property of this state shall be transmitted to the contracting agency. The contracting agency shall index these materials, and a copy of the index shall be provided to the records center.

History: Laws 1984 N.M. Laws, ch. 65, § 96; 1989 N.M. Laws, ch. 69, § 15; as codified at N.M. Stat. Ann. § 13-1-123 (Michie 1992).

Similarly, Louisiana has a statute which provides that any and all plans, designs, specifications, or other construction documents resulting from professional services paid for by any public entity shall remain the property of the public entity whether the project for which they were prepared was constructed or not. La. Rev. Stat. Ann. § 38:2317 states in its entirety:

Ownership of documents.

a. Any and all plans, designs, specifications, or other construction documents resulting from professional services paid for by any public entity shall remain the property of the public entity whether the project for which they were prepared was constructed or not. Except as otherwise provided herein, such documents may be used by the public entity to construct another like project without the approval of, or additional compensation to, the design professional.

b. The designer shall not be liable for injury or damage resulting from any reuse of plans, designs, specifications, or other construction documents by a public entity, if the designer is not also involved in the reuse project.

c. The designer may reuse his design documents however he so desires.

d. The right of ownership provided for in this Section shall not be transferable.

e. Prior to the reuse of construction documents for a project in which the designer is not also involved, the public entity shall remove and obliterate from the construction documents all identification of the original designer, including name, address, and professional seal or stamp.

1982 La. Acts. No. 693, § 1 as amended; as codified at La. Rev. Stat. Ann. § 38:2317 (West 1988).

Tennessee has a statute which provides that a correctional facility design may be used by the state to construct similar buildings at different sites at a future time. Tenn. Code Ann. § 12-4-116 (1988) states in its entirety:

Standard prototype design for correctional facilities.

(a) A "state standard prototype," for purposes of this part, is defined as a design on which a state correctional facility is based so that the design can be used by the state to construct similar buildings at different sites at a future time. The building commission may designate state standard prototypes from design documents which were originally prepared for the exclusive use of the state. The state architect shall place the appropriate designation on a document which is determined to be a state standard prototype.

(b) Prior to the reuse of documents for a project in which the original architect or engineer is not also involved, the state shall remove and obliterate from all

documents the identification of the original architect or engineer, including name, address, professional seal or stamp, and signature. The architect or engineer who is involved in a state standard prototypical reuse project shall affix such architect's or engineer's seal or stamp to such design, and shall be solely responsible for all documents on which such architect's or engineer's seal or stamp is placed, and shall hold the original architect or engineer harmless from suits by third parties.

(c) The original architect or engineer shall not be liable for injury or damage resulting from reuse of plans, designs, details, specifications or construction documents of a state standard prototype by the state or third parties, if the original architect or engineer is not also involved in the re-use project. It is the intent of this section that the architect or engineer who seals or stamps a prototype is legally responsible only for that set of documents on which such architect's or engineer's seal or stamp is placed.

1988 Tenn. Pub. Acts ch. 800, § 2 as amended; as codified at Tenn. Code Ann. § 12-4-116 (Michie 1990) (Supp. 1995).

It should be noted that reuse statutes have been criticized by legal commentators and have only been enacted in three states. Forty-seven states do not have reuse statutes. When evaluating the usefulness of reuse statutes, several legal considerations must be addressed. State laws of agency, contract, tort and unfair competition, as well as federal copyright, trademark, and constitutional law are relevant. Three predominant zones of concern can be distilled from the array of questions raised by these statutes: public safety; economic responsibility, liability and risk; and intellectual property right. Public policy and the parties' interests and obligations within these zones are complexly interwoven, making bright line distinctions inevitably under-inclusive.⁷

1. Public Safety

Society's recognition of the personal element in professional services is consistent with the reality that "[a]rchitects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences [and that there] . . . is an inescapable possibility of error which inheres in these services[.]" *City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 424 (Minn. 1978). The reality of document imperfection often manifests itself during construction when unforeseeable factors such as sub-surface conditions, weather, and previously hidden conditions take their toll on the delivery team. Typically, the start of construction requires commitment of financial resources that substantially magnify the consequences of delays or errors in design. *Roberts* at 36.

Using structural calculations as an example, an engineer's judgment remains important even in an age of computers. Such judgment is applied at every stage of design, from selecting sources of input through inspecting welds in the final structure. This personal judgment can never be fully communicated through printed plans and specs. Moreover, it is difficult for a single set of drawings to incorporate the numerous changes in detail that design professionals and contractors typically adopt to correct errors and adapt to site conditions. The person who designed the original details is most likely to understand the underlying assumptions and the likely consequences of changes for the structural system as a whole. Such knowledge may be essential in the evaluation of a proposed contract modification. *Roberts* at 37.

Reuse of plans to construct a building at a different site could require significant modification to the plans. For example, seismic and soil conditions can vary widely even within the same valley and will impact structural requirements, including footing depths, sizes, types,

⁷ David Roberts, "AFTER THE BALL: SUBSEQUENT USE OF CONSTRUCTION DOCUMENTS AFTER THE PROJECT FOR WHICH THEY WERE ORIGINALLY PREPARED: A SKETCHY AREA OF THE LAW," 17-Apr *Constructional Law*, 35, 36 (1997).

the cement types used, and draining requirements. A roof designed for the desert climate may not be structurally adequate to accommodate snow loads in a winter climate. It is also common for an architect to improve a design based upon accumulated experience in its implementation. If one architect's plan is adapted by another, the new architect must act without the benefit of whatever experience underlayed the original design. *Id.*

2. Economic Responsibility, Liability, and Risk

This severance of continuity will combine with the inevitable imperfections of even well-prepared plans to increase financial risk for everyone involved. Design-related problems are more likely to be discovered later in the construction process, when costs of correction are greater, or they may not be discovered during construction at all.⁸ The foreseeable increase in liability to reuse owners, contractors, and third parties would have to be considered by any architect who competes for a contract to prepare a design that is subject to uncontrolled reuse. Contractors would also have to consider the added risks of bidding on jobs that may require more extensive design corrections and delays, because the architect has taken over someone else's work product without full knowledge of its antecedents. *Roberts* at 37.

If an architect's liability in reuse schemes is uncertain, it logically follows that recovery by owners, contractors, or third parties against the architect is also uncertain. This financial uncertainty is increased exponentially for all parties when the original architect's control and direct input are eliminated. Courts have assumed the existence of this "one-to-one" personal communication in establishing the current rules governing architect liability to third parties. *Chubb Group Ins. Cos. v. C.F. Murphy & Assoc., Inc.*, 656 S.W.2d 766, 780 (Mo. Ct. App. 1983). Open-ended reuse of architectural work product renders professional services more analogous to "product" manufacturing, where the producer must effectively tender perfect goods to avoid liabilities after they leave the "factory." Architect liability could easily slide from the "prevailing standard" of care to something more closely resembling strict product liability. *Roberts* at 37.

3. Intellectual Property Issues

A copyright is a grant from the federal government. It confers upon the copyright owner the right to exclude others from reproducing and distributing the copyrighted work for a limited period of time. 17 U.S.C. § 106 (1976). The Copyright Act extends protection to certain works of original authorship which are fixed in a tangible medium of expression. Until December 1, 1990, all such 3-dimensional architectural objects were ineligible for copyright. This continues to be the law even now as to all such objects *except* buildings.

Prior to December 1, 1990, it was clear that, in contrast to the situation regarding 3-dimensional architectural models and 2-dimensional architectural drawings, copyright protection did not extend to full size utilitarian 3-dimensional buildings and other full-sized utilitarian 3-dimensional fixed structures, even if such buildings and structures were depicted in copyrighted architectural drawings or models, and even if such buildings and structures had original aesthetic architectural features. This was because such structures were regarded by the copyright law as "useful articles," a categorization which previously made them ineligible for copyright protection. 4 Steven G.M. Stein, CONSTRUCTION LAW, 20-27-28 (1997).

On December 1, 1990, however, the Architectural Works Copyright Protection Act went into effect, making radical changes in the copyright law with respect to buildings. Among other changes, the new Act adds to § 101 of the copyright law the following newly defined category of protected work: "An 'architectural work' is the design of a building as embodied in any tangible

⁸ Kenneth R. Michael, "Design Professional Liability: A balanced Framework for Third Party Actions by Tenants and Users, 14 Construction Law 8, 15 (1994) *quoted in Roberts, supra* at 37.

medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include standard features.” *Id.*

Valid reuse legislation demands effective assignment of copyrights. The effectiveness of copyright assignments is of fundamental importance. “An architect owns his drawings, unless expressly agreed otherwise by the parties.” *Kunycia v. Melville Realty Co.*, 755 F. Supp. 566, 572 (S.D.N.Y. 1990). If courts deem an assignment ineffective, persons who copy the work, make derivative works based on it, or use unauthorized copies (i.e., the non-immune owners, “downstream” architects, consulting engineers, contractors, sub-contractors, suppliers, and employees of all these parties) may be directly or indirectly liable for infringement. *Arthur Rutenburg Homes, Inc. v. Maloney*, 891 F. Supp. 1560, 1568 (M.D. Fla. 1995).

The right to copy construction documents pursuant to a state reuse statute was addressed in *Guillot-Vogt Assoc., Inc. v. Holly & Smith*, 848 F. Supp. 682 (E.D. La. 1994). There, a consulting engineer sued the State of Louisiana and its reuse architect for copyright infringement when the original architect for whom the engineer had prepared drawings retired from practice before the completion of the project. The original consulting engineer had an oral contract with the original architect. When the state exercised its contract right to assign original documents to a new architect, the court held that this assignment was not binding on the original engineer who held an independent copyright. *Id.* at 688. The court rejected defendants’ arguments that they were acting in good faith and under the ostensible direction of Louisiana law. *Id.* at 688-90.

Effective assignment is, of course, meaningful because penalties for infringement are severe, and they can potentially be applied to several parties in a judicially invalidated reuse scheme. *Johnson v. Jones*, 921 F. Supp. 1573, 1586 (E.D. Mich. 1996). Copyright holders may be eligible for injunctive relief and for recovery of actual damages plus any profits of the infringer. 17 U.S.C. §§ 502, 504 (1976). If a plaintiff can prove the infringer’s gross profit, the burden shifts to the infringer to prove offsetting expenses. 17 U.S.C. § 504(b) (1976). Plaintiffs who have satisfied the requisite formalities may elect, in lieu of damages and profits, to receive statutory damages that can range from \$500 to \$20,000 for each infringement, or up to \$100,000 for willful infringements. 17 U.S.C. § 504(c) (1976).

Courts have discretion to award costs and reasonable attorney’s fees to prevailing parties as part of the costs. 7 U.S.C. § 505 (1976).

Safe harbor for persons who have copied in reliance on an invalid written assignment or under some other subjectively reasonable claim of right may be found in the legal fiction of an implied license. Courts have implied a nonexclusive license that can be granted orally, or “even implied from conduct.” Nimmer § 10.03[A] at 10-40.1, as cited in *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996).

Though some courts have refused to imply a license from mere payment of fees by owners and delivery of the drawings to that owner by the architect, others have not. In *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996), an architect, Shaver, prepared schematic drawings for a building at the Gary Regional Airport under a letter of agreement with a developer. The architect delivered his drawings to the airport authority with a letter stating: “[w]e trust that our ideas and knowledge exhibited in our work will assist the airport in realizing [the project.]” *Id.* at 771. The developer subsequently retained another architect who incorporated elements of Shaver’s drawings. The Court of Appeals inferred a non-exclusive license from Shaver’s conduct. *Id.* at 777.

Because this fact pattern is so common in the construction industry, it is highly probable that implied non-exclusive license could become a common defense. *Roberts* at 39. Plaintiffs

may respond by offering evidence of facts suggesting that the defendant exceeded the reasonable scope of any such implied license. *Id.*

An original architect who submits to a state reuse contract may impliedly consent to the state's re-licensing of his work. *Id.* At present, the scope of that license is limited only by imagination. In sharp contrast to the factual simplicity in *Shaver*, a state's distribution of CAD documents may spread the original architect's "protected" work like a virus. *Id.* Judicial creation of an industry-specific, fact-driven "oral license exception" to an otherwise writing-based statutory scheme will burden both the courts and the industry with unwanted, ad hoc, fact-specific litigation. *Id.* As a result, reuse statutes may introduce heightened potential for injury to the public and liability to the state.

C. Ownership of a Valid Copyright

To qualify for copyright protection, the work must be (1) copyrightable subject matter that is (2) original to the author and (3) fixed in a tangible medium of expression. *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 345 (1991). An initial determination of copyrightability is made by the Register of Copyrights before issuance of a certificate of registration. 17 U.S.C. § 410(a) (1976). Provided registration is made within five years of the first publication of the work, a certificate of registration constitutes "prima facie evidence of the validity of the copyright and of the facts stated in the certificate" in any judicial proceeding. 17 U.S.C. § 410(c) (1976). The presumption of validity includes the requirements of originality and susceptibility to copyright. *Donald Frederick Evans and Assoc., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986). The presumption, however, is rebuttal. *Id.* at 903. "The evidentiary weight to be accorded the certificate of a registration . . . [is] within the discretion of the court." *Id.* Nevertheless, the burden of proof shifts to the defendant to rebut the presumption of copyrightability. *Id.*

D. The Useful Article Doctrine

1. Statutory Guidelines

A "useful article" is defined in § 101 of the Copyright Act as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Thus, a building which exists primarily to perform the utilitarian function of sheltering people or equipment is regarded as a useful article within the meaning of the copyright law. *Stein* at 20-28.

In 1990 a new category of expressly copyrightable useful works, "architectural works," was added by amendment to § 102(a) of the Copyright Act.⁹ At the same time, the following definition of "architectural work" was added to § 101 of the Copyright Act: "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."¹⁰ Accordingly, the design of a building is now copyrightable, notwithstanding its utility.

Under traditional notions of United States copyright law a building was not protectable because its functional aspects were considered inseparable from its aesthetic elements. 17 U.S.C. § 101 (1976). The current codification of title 17 provides that a useful article can be protected only to the extent that it incorporates features that can be identified separately from the

⁹ See 17 U.S.C. § 102(a)(8), added by § 703(3) of the Architectural Works Copyright Protection Act, Title VII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (effective Dec. 1, 1990).

¹⁰ See 17 U.S.C. § 101: the definition of "architectural work," added by § 702(a) of the Architectural Works Copyright Protection Act, Title VII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (effective Dec. 1, 1990).

form and are capable of existing independently from the utilitarian aspects of the article. Additionally, an article that is a part of a useful article is considered a “useful article.”¹¹

E. Infringement

Buildings covered by the Architectural Works Protection Act can be infringed not only by copying the design in the form of 2-dimensional plans or drawings or a 3-dimensional model, but also by the construction of a full-sized building which embodies the protected design. *Stein* at 20-88. Further, the Copyright Act overrides the states’ immunity from suit under the Eleventh Amendment to the United States Constitution. *Supra*. Therefore, a state government agency may be sued for infringement of an architectural copyright.¹² 17 U.S.C.A. § 511 (1990) states in its entirety:

Liability of States, instrumentalities of States, and State officials for infringement of copyright.

(a) In General.—Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

(b) Remedies.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510.

F. Severability

The Copyright Act defines an architectural work as encompassing the following aspects of a design: (1) the overall form, (2) the arrangement and composition of the spaces in the design, and (3) the arrangement and composition of the elements in the design, less (4) individual standard design features. 17 U.S.C. § 101 (1976). The House Report explains that the term “arrangement and composition of spaces and elements” acknowledges that: (1) the creative process generally includes the “selection, coordination, or arrangement of unprotectable elements into an original, protectable whole”; and (2) an architect may integrate “new, protectable design elements into otherwise standard, unprotectable building features.” *See* H.R. Rep. No. 101-735, at 18 (1990). Under the definition, the scope of protection does not include standard features or elements designed during the construction documents phase.¹³ As examples of standard features that are not protected, the House Report mentions “common windows, doors, and other staple building components.” *See* H.R. Rep. No. 101-735, at 18 (1990).

¹¹ 17 U.S.C. § 101 (1976). A useful article is defined as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”

¹² *See Guillot-Vogt Assocs. v. Holly & Smith Architects*, 848 F. Supp. 682, 30 U.S.P.Q.2d 1689 (E.D. La. 1994)(the State of Louisiana Department of Facility Planning and Control).

¹³ Raleigh Newsam, II, “Architecture and Copyright--Separating the Poetic from the Prosaic,” *Tul. L. Rev.* 1073, 1116 (1997).

The House Report suggests that courts apply a 2-step test for determining the copyrightability of an architectural work. Step one examines whether there are original design elements present, particularly with respect to overall shape and interior architecture. *Id.* at 20. If the court concludes that the design contains original design elements, step two inquires into whether the design elements are functionally required. *Id.* at 20-21. If these elements are not functionally required, copyright protection is accorded the work without regard to issues of physical or conceptual severability. *Id.* The House Report has left it to the courts to fashion a strategy for defining and locating “original design elements,” and for evaluating whether such elements are functionally required. Newsam, *supra* at 1117.

CONCLUSION

Without contractual or statutory language declaring the rights of the parties, the federal copyright laws fill the void. This conclusion is consistent with the section of the Copyright Act which distinguishes between ownership of a copyright (which is what the architect retains, unless modified by statute or contract provision) and ownership of a material object, i.e., a particular copy of the plans, which is all the client (state agency) is entitled to. The copyright includes the right to reproduce and use the drawings, while ownership of a particular copy includes only the right to use that particular copy for its intended purpose.

If the State wants to reuse an architect’s drawings and specifications on future projects, the State must include contract provisions into the professional services agreement which clearly set out the rights and duties of the parties. From the outset, the state agency and the architect would understand that any fees or costs associated with the reuse of the original drawings and specifications would be substantially reduced if the state agency wanted to reuse the drawings and specifications for another project.

Reuse contract provisions which allow the state agency to reuse the architectural plans and designs for future projects would not be inconsistent with [NAC 623.780](#) because the reuse of the drawings and plans with his participation would be contemplated when he agreed to build the project. However, if the State instead decides to engage a different architect, the plans would have to be redrawn to the new site by the new architect pursuant to [NRS 623.270](#). Further, the architect, as part of the initial agreement would agree to waive his copyright in the original projects plans, thereby permitting the new architect to use his original drawings and specifications to make the necessary new site modifications for any future projects.

FRANKIE SUE DEL PAPA
Attorney General

By: CHARLES T.
Special Deputy Attorney

MEREDITH
General

OPINION NO. 98-07 CONTRACTS: The Welfare Division satisfied Nevada law and regulations regarding its agency direct procurement through an interlocal contract for joint procurement with the Western States EBT Alliance Colorado RFP. Under Nevada agency direct procurement statutes, regulations, and applicable policies the WSEA Colorado RFP is a contractual document, the terms of which may be strictly enforced, waived or negotiated. A structured lease or installment purchase contract on terms consistent with Nevada law could be utilized to provide partial financing of the EBT system acquisition.

Carson City, March 2, 1998

Ms. Myla C. Florence, Welfare Administrator, Welfare Division, 2527 North Carson Street,
Carson City, Nevada 89710

Dear Ms. Florence:

You have asked this office to evaluate the facts and law regarding the legality of the State of Nevada's participation in the Western States Alliance, Colorado Request For Proposal (RFP) for Electronic Benefits Transfer (EBT) system development and implementation. The facts, upon which this opinion is based, were provided to this office in the forms of executed memoranda, letters and agreements. The facts are addressed prior to your questions.

FACTUAL BACKGROUND

In 1995, the Western Governor's Association (WGA) contracted with Phoenix Planning and Evaluation LTD (Phoenix) for technical assistance in the development of a regional EBT system for 11 states (not including Nevada). Thereafter, the WGA and Phoenix commenced a dialogue involving potential vendors of EBT services to develop specifications for a regional EBT system. During this process the states of Alaska, Idaho, Hawaii, Oregon, Nevada, and Washington formed the Western States EBT Alliance (WSEA) through a memorandum of understanding to seek a joint EBT procurement utilizing the Colorado procurement process.

Colorado issued RFP NC601017-EBT on behalf of the WSEA on January 9, 1996. The RFP was submitted to any parties expressing interest; no notice of the RFP was published. The RFP reserved the right to add additional states to the procurement process no later than February 2, 1996 (RFP § 1.0(C)). The WSEA Colorado RFP was approved at the federal level by the Department of Agriculture, and the Department of Health and Human Services.

The RFP set forth a contract period from July 1, 1996 - June 30, 2003 (RFP § 3.0), with four project phases: the Design Phase (RFP § 5.1.1) was to commence with the contract award; the Development Phase (RFP § 5.1.2) was to commence concurrently or thereafter; the Implementation Phase (RFP § 5.1.3) to commence pilot operations no later than February 1, 1997; and state-wide implementation no later than June 30, 1998 (RFP §§ 5.1.3.3, 5.12.4), with the Operations Phase (RFP § 5.1.4) to continue for the remainder of the contract period.

The Colorado EBT procurement was conducted pursuant to Colo. Rev. Stat. § 24-103-203 (1995), which authorizes procurement by purchasing agencies through competitive sealed proposals. The Colorado statute requires solicitation through a request for proposals that discloses evaluation factors, requires adequate public notice of the process, and allows potential vendors to submit "best and final offers" after negotiations with the state prior to an award. Colo. Rev. Stat. § 24-103-203(7) (1995) states in pertinent part:

The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation.

Colo. Rev. Stat. § 24-109-102 (1995) governs protests of solicitations and awards and grants the head of a purchasing agency the authority to settle and resolve protests. Colo. Rev. Stat. § 24-109-107 (1995) provides that a decision pursuant to Colo. Rev. Stat. § 24-109-102 is effective unless stayed or until reversed on appeal.

Addendum No. 1 to the RFP was issued February 2, 1996, adding Alaska, Hawaii, Idaho, Oregon, Nevada, and Washington and providing that addenda adding state specific information to the RFP would be issued no later than March 1.

Amendment No. 1 to the RFP was issued March 1, 1996, adding Arizona and withdrawing Oregon and Nevada from the WSEA. However, it also included the required state specific addenda for Nevada, and allowed for Nevada's reentry as follows:

Oregon and Nevada are eligible to rejoin the Western States EBT Alliance and to avail themselves of the services described in this Request for Proposal and *may contract with the successful offeror up to 12 months after the contract has been awarded*. All terms and conditions of the Request for Proposal and the successful vendor's proposal shall apply. [Emphasis added.]

Colorado issued a notice of intent to award the EBT contract to Citibank EBT Services (Citibank) in partnership with Deluxe Data and Lockheed Martin IMS on May 15, 1996. Transactive Corporation, an unsuccessful offeror, filed a protest on May 24. The protest was denied on June 5 and the Citibank contract was awarded effective July 1, 1996. This decision was subsequently upheld on administrative appeal under Colorado law on October 8, 1996.

On June 26, 1997, the Welfare Division notified Mark Tandberg, the Colorado EBT Coordinator, that Nevada had commenced contract negotiations with Citibank and requested an extension of the RFP's time frames through July 1999. Tandberg forwarded this request to Citibank on June 30, 1997, and Stan Frerking, WSEA Project Director for Citibank, responded on August 14, 1997, that "we are optimistic about our ability to provide competitive rates for EBT, consistent with our final WSEA proposal" but deeming any agreement to an extension premature.

As of January 1998, all other states in the WSEA have contracted with Citibank and have adhered to the procurement schedule set forth in the RFP. Oregon initiated its own procurement process and has awarded a contract with competitive terms to Deluxe Data in partnership with U.S. Bank.

Citibank presently represents a willingness to negotiate a contract with Nevada under the same terms as the WSEA and allows Nevada access to an open EBT system within the WSEA region, in contrast to a closed system which poses distinct risks such as limiting interoperability and user portability (a clear disadvantage given Nevada's transient population) and requires merchants to install separate point-of-sale terminals for Nevada EBT users.

QUESTION ONE

Has the Welfare Division satisfied Nevada procurement law in its participation in the Western States EBT Alliance Colorado RFP?

ANALYSIS

Nevada law authorizes agency direct procurement, or a using agency may utilize the services of the State Purchasing Division. See [NRS 333.160](#); SAM § 1514.0. The direct procurement of services by agencies must comply with [NRS 284.173](#), the State Administrative Manual (SAM) and any regulations promulgated by the agency. SAM § 0338.0 requires that agencies solicit and review at least three bids for each contract whenever possible, and states the Board of Examiners' policy that contracts be rebid at least every two years if the amount is more

than \$100,000. The Board of Examiners may deviate from this policy by approving a contract that requires a longer term.

Direct procurement by the State Welfare Division is governed by chapter 2000 of the Welfare Administrative Manual (WAM), promulgated by the State Welfare Administrator pursuant to [NRS 422.238](#) (the Welfare Division is exempt from the Administrative Procedure Act under [NRS 233B.039\(g\)](#)). WAM § 2001(D) cites [NRS chapter 277](#), [NRS 284.173](#) and the SAM as controlling authority for agency contracting. WAM § 2003 reiterates the SAM bidding requirements and sets forth requirements for the contents of agency solicitations and responsive bids and the basis for bid awards, stating in part:

Contracts should be awarded to the vendor meeting prerequisites of contracting with a state agency and submitting the lowest bid meeting the specifications and requirements of the service needed. If other evaluation criteria is required to be used by state or federal regulation in the selection of a vendor, the vendor ranking best regardless of bid amount should be selected.

The Welfare Division's authority to participate in the Colorado EBT procurement is determined by relevant provisions of [NRS chapter 277](#). Because there is no joint exercise of powers in the WSEA Colorado RFP it is not a cooperative agreement under [NRS 277.110](#). Nevada law on interlocal contracts states in part:

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. [Emphasis added.]

[NRS 277.180](#); *see also* SAM §§ 0314.0, 0316.0; WAM § 2002(B). A "public agency" includes any state agency and any political subdivision of another state. *See* [NRS 277.100](#). SAM § 0316.0 permits state agency ratification of interlocal contracts by agency administrators. While no independent contractor agreement is valid unless and until approved by the Board of Examiners, an interlocal contract need not be approved by the Board of Examiners. *See* [NRS 284.173\(6\)](#); *see also* SAM § 0322.0; *compare* SAM § 0318.0. WAM § 2004(A) sets forth requirements for the contents of interlocal contracts to which the Welfare Division is a party.

The WSEA Colorado RFP constitutes an interlocal agreement within the scope and meaning of [NRS 277.180](#), approved by the respective states' appropriate authorities and conducted consistent with the Welfare Division's direct procurement requirements under Nevada law. The contents of the RFP, Citibank's bid, and the basis upon which the award was made substantially comply with WAM § 2003. All bidders were on notice regarding the State of Nevada state-specific addenda and their right to rejoin and contract with the awarded bidder. The procurement obtained federal approval and withstood a challenge under the Colorado procurement laws. Neither SAM nor WAM require publication for agency direct service procurement of this type.

ANSWER TO QUESTION ONE

The Welfare Division has satisfied Nevada law and regulations regarding its agency direct procurement through an interlocal contract for joint procurement with the Western States EBT Alliance Colorado RFP.

QUESTION TWO

Under Nevada law may the Welfare Division contract with Citibank pursuant to the terms of the Western States EBT Alliance Colorado RFP regardless of the fact it failed to execute a contract with Citibank within the terms of the RFP Amendment No. 1?

ANALYSIS

Nevada has not strictly complied with the terms of RFP Amendment No. 1, which would have ensured Nevada's contractual right to avail itself of the terms of the Colorado RFP procurement. *See Jim L. Shetakis Distributing Co., Inc. v. Centel Communications Co.*, [104 Nev. 258](#), 261, 756 P.2d 1186, 1188 (1988) (no binding contract absent compliance with contemplated procedure of contract formation). Strict compliance required contracting with Citibank no later than July 1, 1997. Citibank has not acknowledged an express obligation to contract with Nevada on the WSEA's terms, only a willingness to negotiate toward this goal. The WSEA's assent to Nevada's reentering the alliance does not affect Nevada's contractual rights with Citibank, insofar as the terms of the WSEA Memorandum of Understanding were not incorporated into the Colorado RFP and are not binding on Citibank.

An RFP procurement is contractual in nature under Nevada agency direct procurement law. *See, e.g., Nevada Comm'n on Ethics v. JMA/Lucchesi*, [110 Nev. 1](#), 7, 866 P.2d 297, 301 (1994); *Gulf Oil Corp. v. Clark County*, [94 Nev. 116](#), 118, 575 P.2d 1332, 1333 (1978) (bid or proposal in response to solicitation is an offer to contract). The respective rights and obligations of both the parties and the unsuccessful bidders are thus defined by the terms of the RFP itself, rather than in statute or regulation. As long as the underlying procurement was consistent with Nevada law and allows for post-award contract negotiations, which is the case with the Colorado RFP, the parties may adhere to or waive any RFP term or condition in negotiations toward a contract.

The unsatisfied 12-month Nevada reentry right was an RFP contractual term which Citibank can waive. *See Mahban v. MGM Grand Hotels, Inc.*, [100 Nev. 593](#), 596, 691 P.2d 421, 423 (1984) (waiver is the intentional relinquishment of a known right). While Citibank could choose to deny Nevada the right to enter a contract under the negotiated terms offered to other WSEA members, a decision to waive or extend Nevada's opportunity would not change the legality of the Colorado joint procurement under Nevada law. Additionally, the procurement schedule required pilot operations by February 1, 1997, and mandates state-wide implementation no later than June 30, 1998. Because it is not feasible for Nevada to comply with these time restrictions, Citibank must also be willing to deviate from them.

CONCLUSION TO QUESTION TWO

Under Nevada agency direct procurement statutes, regulations, and applicable policies, the WSEA Colorado RFP is a contractual document, the terms of which may be strictly enforced, waived, or negotiated. Citibank possesses the contractual power to waive or alter RFP Amendment No. 1, to all Nevada to reenter the contract.

QUESTION THREE

The Welfare Division's EBT appropriated budget for the biennium is less than the anticipated cost of a contract with Citibank. May the Welfare Division legally enter into a contract that includes vendor financing until the next biennial budget is approved by the Legislature?

ANALYSIS

A contract with Citibank will require a substantial commitment from Nevada in terms of time and money to enable a fast-track implementation schedule. Since the Welfare Division does not have all of the necessary funds appropriated for the current biennium, Citibank must either provide financing and assume all the risk of a nonappropriation in the next Legislative Session or work with the Welfare Division to obtain the necessary funding from the Interim Finance Committee for the anticipated costs during the current biennium. Most likely, a combination of both efforts will be needed to accomplish significant development work during 1998 and implementation in 1999.

Any financing that creates contractual obligations that exceed biennial appropriations must not violate article 9, section 3 of the Nevada Constitution. Article 9, section 3 sets forth the constitutional requirements of public debt that would be payable from a legislative pledge of the taxing power of the state. Further, it provides for a limit on all such debt at 2 percent of the assessed value of the state. The law regarding contractual obligations beyond a biennial appropriation has recently been clarified by the Nevada Supreme Court in the case of *Business Computer Rentals v. State Treasurer, Robert L. Seale*, 114 Nev. Adv. Op. 8 (Case No. 30426, filed January 22, 1998).

In *Business Computer Rentals*, the court recognized the current revenue doctrine in the context of an installment lease-purchase contract for computer hardware that exceeded the Treasurer's biennial appropriation. *Id.* at 7. The court held that a nonappropriation clause in the lease-purchase contract brought the agreement outside the scope of Nevada Constitution article 9, § 3, because the Legislature is not compelled to appropriate money in the future. *Business Computer Rentals* at pp. 8-9. The Court noted: "We also recognize that governmental agencies often need flexibility in acquiring property, and lease purchase agreements and financing arrangements provide this flexibility." *Id.* at footnote 5. [Emphasis added.]

Further, Nevada law makes it a misdemeanor crime for any state officer, commissioner, head of state department, or other employee, whether elected or appointed, to expend, to bind, or attempt to bind, the state in any amount in excess of the specific amount provided by law, or in any other manner than that provided by law, for any purpose whatsoever. See [NRS 353.260](#). A nonappropriation clause, by its terms, allows contract avoidance upon the event of the legislature's nonappropriation of installments beyond the "specific amount provided by law." Such a clause prevents a violation of [NRS 353.260](#).

However, the Court's rationale suggests that the current revenue doctrine does not necessarily apply to all subjects of installment financing. The Court stated:

The agreement's subject matter is fungible equipment, susceptible to repossession. Further, the contract clearly provides that payments are contingent on funds being appropriated by the legislature. The agreement automatically terminates if the legislature fails to appropriate sufficient funds for the payments, and in such a situation, BCR is entitled to repossess the equipment. Under the current revenue doctrine, no constitutionally proscribed public debt is created (emphasis added).

Business Computer Rentals at 8.

Therefore, any anticipated use of installment financing subject to a nonappropriation clause should be limited to the hardware, software, and any other property involved in an EBT system development and implementation contract.

CONCLUSION TO QUESTION THREE

A structured lease or installment purchase contract on terms consistent with Nevada law could be utilized to provide partial financing of the EBT system acquisition.

FRANKIE SUE DEL PAPA
Attorney General

By: BRETT KANDT
Deputy Attorney General

OPINION NO. 98-08 COUNTIES; FAIR AND RECREATION BOARD; LOCAL GOVERNMENT: Persons appointed pursuant to [NRS 244A.599](#)(3)(a), (b) and (c), must possess minimum qualifications of industry expertise in the designated categories of hotel operator, motel operator, and other commercial interests.

Carson City, March 9, 1998

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

Dear Mr. Hanford:

You have requested a legal opinion on the following question.

QUESTION

Must persons appointed to a fair and recreation board under [NRS 244A.599](#)(3)(a), (b), and (c) hold certain minimum qualifications or may any person from the public at large represent such positions?

ANALYSIS

Membership requirements for a fair and recreation board in a county whose population is less than 100,000 persons are described in [NRS 244A.599](#) as follows:

3. In all other counties whose population is less than 100,000, any incorporated city which is the county seat must be represented by one member, who must be appointed and certified as provided in subsection 2, and the board of county commissioners shall appoint three representatives as follows:
 - (a) One member to represent the motel operators in the county.
 - (b) One member to represent the hotel operators in the county.
 - (c) One member to represent the other commercial interests in the county.
4. In all counties whose population is less than 100,000, one member of the board of county commissioners must be appointed by the county commissioners to serve on the board for the remainder of his term of office.
5. In all counties whose population is less than 100,000, and in which there is no incorporated city, the board of county commissioners shall appoint one member to represent the county at large

You have asserted that the phrases contained within [NRS 244A.599](#) concerning appointment of board members from designated categories (a), (b), and (c) are plain and unambiguous. You conclude that any person, whether they can demonstrate any special qualifications or not, may be appointed by the county commission to “represent” each of the categories, such as motel

operators, hotel operators, and other commercial interests. We disagree with that analysis and conclusion. We believe that ambiguity exists in the terms used by the Legislature in listing various categories of persons who may be appointed to the Fair and Recreation Board (Board). Based upon common rules of statutory construction and legislative history regarding similar statutes, we conclude that the Legislature intended to impose certain minimum qualifications for certain categories of Board members.

When the Legislature indicated a county commission should appoint “one member to represent the motel operators in the county” what was the intent in using that phrasing? Similar questions must be resolved concerning the categories for hotel operators and other commercial interests. The term “to represent” could mean the appointee must act the part or role of the designated business operator. In the alternative, the term “to represent” could mean that any person could act in the place of the designated business operator. *See* the definition of “represent” set forth in WEBSTER’S NEW COLLEGIATE DICTIONARY 982 (1976).

If your conclusion was accepted that anyone, whether having any special qualifications or not, could represent each described category, it would render numerous phrases within [NRS 244A.599](#) meaningless. Under your interpretation all of the phrases concerning the described categories of motel operators, hotel operators, and other commercial interests would have to be ignored as surplus statutory language. Common rules of statutory construction prohibit such a result.

Courts must construe statutes to give meaning to all of their parts and language. When interpreting a statute, a court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. A reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided. *Bd. of County Comm’rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983).

Subsection 5 of [NRS 244A.599](#) sets forth that in certain counties one member of the Board must be appointed to represent the county at large. If the Legislature had intended that all Board members could be appointed with no special expertise or qualifications, it could have simply foregone listing various categories of membership and could have stated that all members should be appointed from the county at large. Because [NRS 244A.599](#) contains very specific categories which must have representative members on fair and recreation boards, we must accord specific meaning to that statutory language.

The leading rule for construction of statutes is to ascertain the intention of the Legislature in enacting the statute. The intent when ascertained will prevail over the literal sense of the words used. *Roberts v. State of Nevada*, [104 Nev. 33](#), 38, 752 P.2d 221, 224 (1988). Because the language regarding categories of membership has been included within [NRS 244A.599](#) since the 1960s, it is difficult to determine the legislative history on that particular statute. A more recent amendment to a similar statute, [NRS 244A.601](#), provides some guidance, however, on the Legislature’s intent regarding the categories of Board membership.

[NRS 244A.601](#) sets forth categories of membership for fair and recreation boards in counties whose population is between 100,000 and 400,000 persons. The categories of membership were altered in 1983 when the Legislature enacted A.B. 548. The Legislature chose the following language to describe categories of membership:

The members entitled to vote shall select:

- (1) One member who is a representative of airlines.
- (2) One member who is a representative of motel operators.
- (3) One member who is a representative of banking or other financial interests.

(4) One member who is a representative of other business or commercial interests.

(5) Two members of the association of gaming establishments whose membership collectively paid the most gross revenue fees to the state pursuant to [NRS 463.370](#) in the county in the preceding year. If there is no such association, the two appointed members must be representatives of gaming . . . AB 548, 1983 Statutes of Nevada at p. 1664.

The witnesses who testified before the Assembly and Senate Government Affairs Committee on A.B. 548 consistently stated that the purpose of the bill was to increase the level of *industry expertise* in certain categories of board membership.

The Legislature controls the method of selection and appointment of municipal officers. With respect to qualifications for office holding, the Legislature may prescribe qualifications which reasonably relate to the specialized demands of an elective or appointive office. *See Coyne v. State ex rel. Thomas*, 595 P.2d 970, 972 (Wyo. 1979); *Fair Hous. Council, Inc. v. N.J. Real Estate Comm'n*, 358 A.2d 221 (N.J. Super. Ct. App. Div. 1976). We conclude that the Legislature imposed certain minimum qualifications on the Board members who are designated to represent the motel operators, hotel operators, and other commercial interests in the county. The appointing authority must determine that the person to be appointed in each of these categories can demonstrate industry expertise in order to properly represent that category of membership.

While we will leave it to the discretion of the appointing authority to decide what combination of education or experience will provide sufficient evidence of expertise to qualify an appointee, we note that the Nevada Supreme Court has interpreted the term “hotel operators” for purposes of collecting room taxes as including those persons who either own or manage a hotel property. *20th Century Hotel v. County of Clark*, [97 Nev. 155](#), 625 P.2d 576 (1981). Thus it appears that persons owning or managing a hotel or motel or possessing some similar affiliation could qualify as having sufficient expertise to represent hotel or motel operators as members of a fair and recreation board.

CONCLUSION

Persons appointed to a fair and recreation board pursuant to [NRS 244A.599](#)(3)(a), (b), and (c), must possess minimum qualifications of industry expertise in the designated categories of hotel operator, motel operator and other commercial interests. A person with no special expertise in the designated categories would not meet the minimum qualifications for appointment. The county commission, as the appointing authority, must exercise its discretion in a reasonable manner when determining the degree of experience and education an appointee must possess in order to demonstrate expertise in the category of appointment.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

OPINION NO. 98-09 SECRETARY OF STATE; ELECTIONS; CONSTITUTIONAL LAW;
FIRST AMENDMENT ACTIVITIES: That part of article 2, section 10(2) of the Nevada Constitution which limits ballot question advocacy contributions is arguably valid and does

not violate the First Amendment rights of association and expression found in the U.S. Constitution. The provision is operative and a violation could be punishable as a misdemeanor.

Carson City, March 4, 1998

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Mr. Heller:

You have requested an opinion from this office regarding the validity of the Nevada Constitution dealing with ballot question advocacy contribution limits.

QUESTION ONE

Does that part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions violate the First Amendment rights of association and expression found in the United States Constitution?

ANALYSIS

The Nevada Constitution provides a mechanism for the voters of the State to amend the state constitution. Nev. [Const. art. 19, § 2](#). To amend the constitution using this procedure, first an initiative petition must be circulated. If the petition has the required number of verified signatures, the measure is placed on the next general election ballot as a ballot question. If the voters approve the ballot question at that election, the ballot question is placed on the next general election. The ballot question must be approved by voters of both general elections before it becomes an amendment to the constitution.

In the 1996 general election, voters ratified for the second time Ballot Question 10, which amends the Nevada Constitution by imposing new campaign contribution limits on candidates and a campaign contribution limit of \$5,000 on ballot question advocacy. Previously, no limit on contributions for ballot question advocacy existed in Nevada.

Ballot Question 10 appears in the Nevada Constitution as article 2, § 10 and reads as follows:

1. As used in the section, "contribution" includes the value of services provided in kind for which money would otherwise be paid, such as paid polling and resulting data, paid direct mail, paid solicitation by telephone, and paid campaign paraphernalia printed or otherwise produced, and the use of paid personnel to assist in a campaign.
2. The legislature shall provide by law for the limitation of the total contribution by any natural or artificial person to the campaign of any person for election to any office, except a federal office, to \$5,000 for the primary and \$5,000 for the general election, *and to the approval or rejection of any question by the registered voters to \$5,000*, whether the office sought *or the question submitted* is local or for the state as a whole. The legislature shall further provide for the punishment of the contributor, the candidate, and any other knowing party to a violation of the limit, as a felony. [Emphasis added.]

The language in italics is the subject of this opinion.

Advising a state official on the constitutionality of a provision within the Nevada Constitution is sometimes a difficult task and one this office does not undertake without careful evaluation. In *Op. Nev. Att’y Gen. No. 85* (June 19, 1972), we noted, “Unless it is virtually certain that a court of competent jurisdiction would strike down the provisions of the State Constitution, this office would be reluctant to advise any public official not to adhere to the requirements of that Constitution.”

A strong presumption exists that the constitution is lawful and legal since it is the document the people of this state have enacted as a basis for general rules of governance. The state constitution must also adhere to the United States Constitution, but unless it is absolutely clear that a provision of the state constitution violates a provision of the United States Constitution, the state constitution remains “constitutional.”

The Nevada Supreme Court acknowledged this important presumption in *State ex rel. Santini v. Swackhamer*, [90 Nev. 153](#), 521 P.2d 568 (1974). *Santini* involved a provision in the Nevada Constitution that appeared to prevent a state judge from being a candidate for Congress. In holding the Nevada Constitution did not bar a state judge from running for federal office, the court noted:

When a state law or constitutional provision may be construed in two ways, one offensive to the U.S. Constitution and one not, this Court will ordinarily adopt the construction which favors constitutionality, thus permitting the state law or constitutional provision to operate to the extent compatible with the U.S. Constitution.

Id. at 157 (citation omitted).

The First Amendment of the United States Constitution guarantees several rights including freedom of speech. These rights are applicable to the states through the Fourteenth Amendment. State governments may restrict First Amendment rights if there is a compelling governmental interest unrelated to the expression of free speech and the incidental burden on speech is no greater than necessary. Arguably, contribution limits on ballot question advocacy could withstand a First Amendment challenge since these are reasonable limits narrowly tailored to further Nevada’s interests.

In 1981, the United States Supreme Court addressed the issue of “whether a limitation of \$250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 291. The *Citizens Against Rent Control* case dealt with an ordinance adopted by voters of Berkeley, California, which “placed limits on expenditures and contributions in campaigns involving both candidates and ballot measures.” *Id.* at 292.

The Court noted, “Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression.” *Id.* at 298. Regulating such First Amendment rights is subject to strict scrutiny and must “advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.” *Id.* at 299. The Court determined:

[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed.

Id. at 299-300. Based on this determination, the Court held, “The restraint imposed by the Berkeley ordinance on rights of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment.” *Id.* at 300.

In the seventeen years since *Citizens Against Rent Control* was decided, the public perception that large campaign contributions exert an undue influence in the electoral process continues to grow. This was evidenced in Nevada when in 1994 an initiative was circulated that limits campaign contributions to both candidates and ballot questions. The petition qualified in 1994 with 60,962 voter signatures. 51,339 signatures were needed. 281,694 voters endorsed it at the polls that November, and only 83,174 voters opposed it. In 1996, 300,886 voters endorsed it and 123,024 voters opposed it. Nevadans have definitively spoken. They support reasonable campaign contribution limits. This type of mandate from Nevadans and voters around the country has encouraged Nevada’s Attorney General as well as a significant number of other attorneys general from other states to call for the United States Supreme Court to review the entire issue of financing campaigns. In addition, many state election officials as well as respected campaign reform advocates have supported reexamination of this issue.

In 1997, 24 attorneys general joined in support of two campaign contribution and expenditure cases to urge the Court to revisit and reverse the 1976 decision, *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* held, among other things, that it was a violation of the First Amendment to impose campaign spending limitations.

The attorneys general joined in *Suster v. Marshall*, No. 97-3174 (6th Cir. filed February 26, 1997) and argued *Buckley* should not apply to nonpartisan judicial elections. In *Suster*, two judicial candidates challenged mandatory campaign expenditure limits for judicial elections in Ohio.

The attorneys general also joined together in *Kruse v. Cincinnati*, Nos. 97-3193, 97-3194, & 97-3210 (6th Cir. filed March 3, 1997; March 3, 1997; and March 7, 1997, respectively), which has a similar issue challenging another statute involving campaign spending limitations enacted by the City of Cincinnati on all candidates for city council.

Additionally, the State of Montana is currently litigating in federal district court the issue of whether a state statute that prohibits certain business entities from making either direct contributions or expenditures in connection with ballot issues or contributions to political committees organized for the purpose of supporting or opposing ballot initiative and referenda is a violation of the United States Constitution. *Montana Chamber of Commerce v. Argenbright*, No. CV-97-6-H-CCL (D. Mont. filed Feb. 14, 1997).

In defending the Montana statute, their Attorney General’s office argues that records of contributions and expenditures in past Montana ballot issue elections from 1982 through 1994 demonstrate the pervasive influence of large commercial dollar contributions and expenditures. Defendant’s Response to Plaintiffs’ Motion for Summary Judgment at 14-16, *Montana Chamber of Commerce v. Argenbright*. In 14 of 23 ballot questions, “[T]he side that reported spending the most money prevailed in the election.” *Id.* at 15.

Although this analysis has not been done in Nevada, we believe if such a study were done, the results would be similar. The side that spent the most money often prevails in an election. Arguably, a reasonable limit on the amount contributed to support or oppose a ballot question equalizes the playing field so that all supporters or opponents have a somewhat equal voice.

Recently, the voters of Austin, Texas, amended their city charter by petition to prohibit corporations, associations, and labor unions, with a narrow exception, from making expenditures in support or opposition to ballot items. These three examples of limitations on financing ballot questions enacted by the voters in Nevada, Montana, and Texas clearly demonstrate the growing public perception that further campaign reform is needed.

In light of this public perception, if the United States Supreme Court were to again look at the issue of financing campaigns for candidates and ballot question advocacy, the Court might well find a state's interests justify any reasonable intrusion limits on contributions to ballot question may have. These interests include: 1) sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government; 2) preserving the integrity of the electoral process; 3) preserving the individual citizen's confidence in government; 4) preventing corruption or the appearance of corruption in the electoral process; 5) preserving the free speech of the citizens of Nevada; and 6) promoting individual citizen participation in the electoral process.

Justice White, in writing the dissent in *Citizens Against Rent Control*, examined the role of large corporate spending in ballot question advocacy and stated:

While it is not possible to prove that heavy spending 'bought' a victory on any particular ballot proposition, there is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process. Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.

Citizens Against Rent Control, 454 U.S. at 307-08 (footnotes omitted).

Justice White defends the limitation on contributions and expenditures in ballot measure campaigns by explaining:

By restricting the size of contributions, the Berkeley ordinance requires major contributors to communicate directly with the voters. If the ordinance has an ultimate impact on speech, it will be to assure that a diversity of views will be presented to the voters. As such, it will 'facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.' *Buckley*, 424 U.S., at 92-93.

Id. at 308.

Justice White has been the dissenting voice in the cases addressing the issue of financing campaigns. In *Buckley*, he argued that limits on expenditures should be valid and that the moral danger attending the risk of unethical use of campaign money justifies incidental effects that the limitations visit upon First Amendment rights. *Buckley*, 424 U.S. at 744-49. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a case where the Court held a Massachusetts criminal statute prohibiting corporations from making contributions or expenditures to influence the outcome of a vote on a ballot question to be invalid, Justice White argued in his dissent that the statute was valid and stated "that fear of corporate domination of the electoral process would justify restrictions upon corporate expenditures and contributions in connection with referenda." *Id.* at 810.

Clearly, it is time for the United States Supreme Court to revisit its rulings regarding financing campaigns. The public has spoken. Change is needed. In light of the foregoing, and in particular the strong presumption of constitutionality, this office will not declare a part of

Nevada's Constitution to be in violation of the United States Constitution when the issues are in such a state of flux.

The constitutional officers in Nevada, as well as the deputy attorneys general, have taken an oath to support, protect, and defend the State's constitution. This office will not advise the Secretary of State to disregard that section of Nevada's constitution that places reasonable campaign contribution limits on ballot question advocacy.

CONCLUSION TO QUESTION ONE

That part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions is arguably valid and does not violate the First Amendment rights of association and expression found in the United States Constitution.

QUESTION TWO

What is the effect of the failure of the 1997 Session of the Legislature to implement the provisions of that part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions?

ANALYSIS

Article 2, § 10(2) of the Nevada Constitution states in relevant part, "The legislature shall provide by law for the limitation of the total contribution by any natural or artificial person to the . . . approval or rejection of any question by the registered voters to \$5,000, whether the . . . question submitted is local or for the state as a whole." The 1997 Session of the Legislature did not do this and since this office determined that part of the Nevada Constitution which limits ballot question advocacy contributions is arguably valid, the next question is what is the effect of the Legislature's failure to act.

This issue has been defined by courts as to whether such a constitutional provision is self-executing, meaning whether a legislature has to act for the provision to be in effect.

In 1978, the Supreme Court of North Dakota addressed this issue and explained, "A constitutional provision is self-executing if it establishes a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect." *North Dakota ex rel. Vogel v. Garaas*, 261 N.W.2d 914, 918 (N.D. 1978). The court also noted, "this Court is asked to construe the laws so as to maximize the intent of the people under the present circumstances." *Id.* at 919. The court concluded that part of the constitutional provision at issue was non-self-executing and part of the constitutional provision was self-executing. (The constitutional provision dealt with the governor's authority to appoint district court judges.)

Following North Dakota's approach, we conclude that part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions establishes a sufficient rule by which its purpose can be accomplished without the need of legislation. This ruling also maximizes the intent of the Nevada voters under the present circumstances.

CONCLUSION TO QUESTION TWO

That part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions is operative even though the 1997 session of the Legislature did not establish relevant statutes on this topic.

QUESTION THREE

What is the effect of the failure of the 1997 Session of the Legislature to implement the provision of that part of article 2, § 10(2) of the Nevada Constitution which establishes the punishment for violating the campaign contribution limits for ballot question advocacy to be a felony?

ANALYSIS

Article 2, § 10(2) of the Nevada Constitution states in relevant part, “The legislature shall further provide for the punishment of the contributor, the candidate, and any other knowing party to a violation of the limit, as a felony.” The 1997 Session of the Legislature did not establish this penalty for a violation of that part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions. In light of the conclusions to question one and question two, what is the penalty for a violation of the contribution limits for ballot question advocacy?

Even though that part of the constitution at issue is self-executing, the implementation of the penalty to be a felony without legislation is not self-executing. The Nevada Supreme Court has long held:

‘Penal statutes should be so clear as to leave no room for doubt as to the intention of the Legislature, and where a reasonable doubt does exist as to whether the person charged with a violation of its provisions is within the statute, that doubt must be resolved in favor of the individual.’ *Ex Parte Davis*, [33 Nev. 309](#), 318, 110 P. 1131, 1135 (1910).

Sheriff v. Hanks, [91 Nev. 57](#), 530 P.2d 1191 (1975). *See also Anderson v. State*, [95 Nev. 625](#), 629, 600 P.2d 241, 243 (1979) (“it is settled that penal statutes should be strictly construed and resolved in favor of the defendant when the applicability of such statute is uncertain”); *Carter v. State*, [98 Nev. 331](#), 334-35, 647, P.2d 374, 376 (1982) (“Where the legislative intent of a criminal statute is ambiguous, the statute must be strictly construed against imposition of a penalty for which it does not provide clear notice”); and *State v. Webster*, [102 Nev. 450](#), 454, 726 P.2d 831, 834 (1986) (“The purpose of the rule requiring strict construction of a penal statute is to ensure that individuals have notice of conduct which is deemed criminal by the state”).

Without specific legislation and in light of the above-stated rules of statutory construction regarding penal statutes, this office concludes the punishment for a violation of the campaign contribution limits for ballot question advocacy is not a felony.

Having limits on contributions for ballot question advocacy without a penalty for violating the limits is absurd and unreasonable. Courts do not favor construing laws in this manner. *See State, Dep’t of Motor Vehicles & Pub. Safety v. Lovett*, [110 Nev. 473](#), 477, 874, P.2d 1247 (1994) (statutes are generally construed with a view to promoting, rather than defeating, legislative policy behind them). The rule applies even though in this case we are dealing with a constitutional provision, rather than a statute, and we are dealing with the intent of the voters, not legislative policy. There must be a penalty for violating this provision of the constitution. Not having a penalty defeats the voters’ intent of having the limitations at all.

A provision exists in Nevada statutes that could be used as a penalty where there is no other penalty. [NRS 193.170](#) provides, “Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.”

[NRS 193.170](#) speaks in terms of “any statute,” but in the circumstances described in this opinion, the term should be expanded to include the constitution in the same way the Nevada Supreme Court extended the rules of statutory construction to apply to the constitution in *Santini*. 90 Nev. at 157.

To preserve the voters’ intent of limiting contributions for ballot question advocacy and establishing a penalty for violating the limit, we believe that a violation is a misdemeanor pursuant to [NRS 193.170](#).

CONCLUSION TO QUESTION THREE

A violation of that part of article 2, § 10(2) of the Nevada Constitution which limits ballot question advocacy contributions could be punishable as a misdemeanor.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 98-10 BOARD OF EXAMINERS; CONTRACTS; INSURANCE: Agreements of the program of reinsurance defined in [NRS 689C.790](#) are subject to approval of the Commissioner of Insurance. They do not require approval of the Board of Examiners.

Carson City, March 31, 1998

Mrs. Alice A. Molasky-Arman, Commissioner, Division of Insurance, 1665 Hot Springs Road, No. 152, Carson City, Nevada 89710

Dear Mrs. Molasky-Arman:

You have asked this office for an opinion regarding the agreements of the program of reinsurance for administrative and actuarial services.

QUESTION

Must contracts entered into by the Program of Reinsurance, [NRS 689C.740](#) *et seq.*, be approved by the Board of Examiners?

ANALYSIS

The “program of reinsurance for small employers and eligible persons” (program of reinsurance) was enacted by the 1997 Legislature as Act of July 16, 1997, chapter 586, 1997 Nev. Stat. 2930, [NRS 689C.740-760](#). The program provides a mechanism for reinsuring certain risks of entities that issue health insurance policies or HMO contracts to persons who would otherwise be unable to purchase insurance. The Legislature has defined authority of the program of reinsurance in [NRS 689C.790](#), which states:

Notwithstanding any provision of this Title to the contrary, the program of reinsurance shall be deemed to have the general powers and authority granted under the laws of this state to insurance companies and health maintenance

organizations licensed to transact business in this state, except that the program of reinsurance shall not issue any health benefit plans directly to small employers or individuals, or both. The program of reinsurance may:

1. With the approval of the commissioner, enter into such contracts as are necessary to carry out the provisions of this chapter and [NRS 689A.470](#) to [689A.740](#), inclusive, including entering into contracts with similar programs of reinsurance of other state for the joint performance of common functions, or with persons or other organizations for the performance of administrative functions, relating to programs of reinsurance.

The plan operates as follows:

1. Insurers either elect to reinsure risks or assume the risk of an eligible person (as defined in [NRS 689A.515](#)).

2. Insurers may elect to place certain eligible persons into the plan of reinsurance to limit the risk of loss.

Members of the board of directors of the program of reinsurance have been duly appointed by the State Insurance Commissioner pursuant to [NRS 689C.750](#), and seek to enter contracts to obtain for the program of reinsurance.

The Nevada Legislature created the program of reinsurance stating “There is hereby created a nonprofit entity to be known as the program of reinsurance for small employers and eligible persons.” [NRS 689C.740](#). Its operations are funded by premiums charged to insurers for reinsuring risks. [NRS 689C.810](#). Any net loss from reinsuring would be recouped through assessment against participating risk-assuming carriers. [NRS 689C.840](#).

The Legislature delegates authority to supervise the board of directors to the Commissioner, [NRS 689C.750\(1\)\(b\)](#). The commissioner’s role is discretionary, involving special expertise and personnel of the Division of Insurance, regarding insurers, actuaries and related contracts. The commissioner’s approval of contracts of the program is similar to other discretionary approvals of the commissioner over policies of insurance and other contracts of insurance companies.

The State Board of Examiners reviews independent contractor agreements entered into by elective officers, department heads, boards, commissions or institutions of the State of Nevada. *See* [NRS 284.173\(1\)](#). Specifically, the board reviews to consider “(a) whether sufficient authority exists to expend the money required by the contract and; (b) whether the service which is the subject of the contract could be provided by a state agency in a more cost-effective manner.” *See* [NRS 284.173\(8\)](#).

The agreements do not require Board of Examiners approval under [NRS 287.173](#) for the reasons that (1) the Legislature has specifically delegated authority to approve the agreements to the commissioner ([NRS 689C.790\(1\)](#)); and (2) the agreements are not state contracts subject to payment from state funds.

Further, the agreements are part of this unique federal-state statutory scheme. The program of reinsurance must be actuarially funded and the reinsurance itself is subject to strict standards of eligibility. The program of reinsurance reflects the response of the Legislature to the Health Insurance Portability and Accountability Act (HIPAA), also known as the Kennedy Kasselbaum (Act), Pub. L. No. 96-104 (1996). The Act envisions that each state may require health insurers to meet the requirements of the Act. *See* 42 U.S.C. 300gg-22 (1997).

CONCLUSION

The program of reinsurance is a unique statutory creation. Agreements of the program of reinsurance defined in [NRS 689C.790](#) are subject to approval of the Commissioner of Insurance. They do not require approval of the Board of Examiners.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

AGO 98-11 EDUCATION; SCHOOL DISTRICT; PUBLIC SCHOOLS: Pursuant to [NRS 392.130](#)(1) a teacher or principal shall give written approval for a pupil's absence upon the request of the parent or guardian and regardless of the reason if the request is made in advance of the absence.

Carson City, April 2, 1998

The Honorable Noel Waters, Carson City District Attorney, 333 North Curry Street, Carson City, Nevada 89703

Dear Mr. Waters:

You have asked this office for an opinion concerning [NRS 392.130](#), the truancy statute, which was amended in the 1997 Legislative Session pursuant to A.B. 486.

QUESTION

Under what circumstances may a parent or guardian determine whether a pupil's absence is excused?

ANALYSIS

The 1997 Legislature enacted a number of provisions which resulted in new tools to address the problem of habitual truancy in the public schools. School districts must report attendance and truancy rates by grade level, school, and the district as a whole. [NRS 385.347\(2\)\(g\)](#). Local advisory boards to review school attendance were created. [NRS 392.126](#). These boards are responsible for reviewing attendance and truancy rate records, identifying factors contribution to truancy within the school district, establishing programs to reduce the rate of truancy, informing parents of the policies and procedures adopted, and have the authority to issue citations for habitual truancy. [NRS 392.128](#). If a pupil is determined to be an habitual truant, the principal is authorized to report the pupil as a habitual truant to a law enforcement agency. A habitual truant is a pupil who has been declared a truant three or more times within one school year or, once declared a habitual truant, may again be so declared if the pupil has an unexcused absence the next year. [NRS 392.140](#). The law enforcement agency is authorized to issue citations requiring the pupil to appear in juvenile court for such truanancies. [NRS 392.142](#). The juvenile courts are authorized to impose sanctions upon a child found to be in need of supervision because of habitual truancy. These sanctions include fines, community service hours, and suspension of driver's licenses. [NRS 62.224](#).

[NRS 392.130](#) as amended, provides in relevant part as follows:

1. Within the meaning of this chapter, a pupil shall be deemed a truant who is absent from school without the written approval of his teacher or the principal of the school, unless the pupil is physically or mentally unable to attend school. *The teacher or principal shall give his written approval for a pupil to be absent if an emergency exists or upon the request of a parent or legal guardian of the pupil.* Before a pupil may attend or otherwise participate in school activities outside the classroom during regular classroom hours, he must receive the approval of the teacher or principal. [Emphasis added.]

2. Absences for any part of a day shall be deemed a truancy for the purposes of this section.

3. If a pupil is physically or mentally unable to attend school, the parent or legal guardian or other person having control or charge of the pupil shall notify the teacher or principal of the school orally or in writing within 3 days after the pupil returns to school.

4. An absence which has not been approved pursuant to subsection 1 or 3 shall be deemed an unapproved absence.

The statute also provides that in the event of an unapproved absence, the parents, legal guardian or other person having control of the child will be informed in writing of the truancy. The crucial question is whether the teacher or principal must give written approval for a pupil to be absent if the parent or guardian requests it, no matter how ill advised, specious, or detrimental to the child. There are no legislative restrictions on the discretion granted parents in this provision.

The language in section 14 of the first reprint of the bill stated that the teacher or principal *may* give written approval upon the request of the parent or legal guardian that his or her child be excused from school. “[M]ay” was changed to “shall” by amendment in the Assembly Committee on Ways and Means and appears for the first time in the second reprint. The issue of parental control of absences not for physical or mental inability to attend school or an emergency was addressed because of testimony from concerned parents that parents should be able to approve a planned absence from school for educational or cultural purposes. *Hearing on A.B. 486 Before Assembly Committee on Ways and Means*, 11-14 (June 26, 1997).

Many educators, social service professionals and law enforcement personnel have noted that irresponsible parents are often a major factor in the repeated absence of pupils in the public schools. Some parents keep a child home to baby-sit younger siblings, some parents are unwilling or unable to exercise sufficient supervision to assure their child attends school without legal prodding, and some will allow a child to remain home on a frequent basis simply because the child dislikes school. The problem of habitual truancy is acute in the state of Nevada and the legislative changes we find in current law were born out of a broad-based task force to develop meaningful methods to combat the problem.¹⁴

Statutes should be construed to promote rather than defeat the legislative policy behind them. *See State Dept. of Motor Vehicles v Lovett*, [110 Nev. 473](#), 477, 874 P.2d 1247 (1994). We note that the statutory language states that written approval shall be given for a pupil *to be* absent upon the request of a parent or legal guardian. [NRS 392.130\(3\)](#). Thus, it is a request for an absence in the future for a planned event. This assures that at a minimum, the parent has considered his child’s absence in advance and the statute cannot be used after the absence to avoid the sanctions for truancy. Though the language of the statute does not grant the school official the ability to deny the request if it is not for an educational or cultural purpose, the language does direct us to conclude that it must be a request made in advance. The statute does

¹⁴ According to testimony on the bill, in one Clark County School District high school, 2100 students out of approximately 2600 students were absent from school ten or more times in the 1996-1997 school year, and in another high school 600 of the 2000 students were absent on any given day. *Hearing on A.B. 486 before the Assembly Committee on Ways and Means*, 8 (June 26, 1997).

not prohibit the teacher or principal from giving written approval for an absence if requested by a parent or legal guardian after the fact if the principal or teacher chooses to do so consistent with the policies of the school district.

The following absences would be considered excused and therefore not truanancies:

1. The pupil is physically or mentally unable to attend school and the parent or legal guardian notifies the teacher or principal of the absence within three days after the pupil returns to school. [NRS 392.130](#)(1) & (3).

2. The parent or legal guardian requests in advance that the pupil be allowed to be absent from school [NRS 392.130](#)(1).

3. The teacher or principal of the school provides a written approval for the pupil's absence, either because an emergency exists or because the absence otherwise satisfies the school policy. [NRS 392.130](#)(1). Presumably, in this category the school district advisory boards and the district board of school trustees would develop policies and procedures concerning excused and unexcused absences. See [NRS 392.128](#).

To some extent, the efforts of school districts and their advisory boards to address the high rate of truancy in Nevada is frustrated by the lack of legislative guidance regarding restrictions on parental discretion. A limitation on parental requests to excuse a pupil's absence only for educational or cultural purposes requires a legislative change of the statutory language. We are advised that local school districts are considering seeking legislative changes.

CONCLUSION

A parent or legal guardian who requests that his or her pupil be excused from school before the absence occurs can determine whether the absence is excused. A principal or teacher shall give written approval for a pupil to be absent in the future upon the request of the parent or legal guardian. In such instance, the written approval cannot be withheld because of the reason for the absence.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-
Deputy Attorney General

CROSSLEY

AGO 98-12 MOBILE HOMES; LOCAL GOVERNMENTS; ZONING: State law does not provide for a time limit on the use of a recreational vehicle as a permanent residence in a particular location. A city or county may properly impose limitations on the use of recreational vehicles as permanent residences.

Carson City, April 17, 1998

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

Dear Ms. Lynch:

The Reno City Council (City) is considering adopting an ordinance that will prohibit a person from residing in a recreational vehicle in a recreational vehicle park for more than 90 days or 180 days in one year. The City plans to enforce the ordinance through attrition with respect to those persons who currently live in recreational vehicles as their permanent residence. The ordinance will apply to persons moving into or relocating from recreational vehicle parks after adoption of the ordinance. The definition of recreational vehicle and the 90-day limitation for parking a recreational vehicle in a recreational vehicle park were patterned after language set forth in [NRS 40.215](#) and other sections of NRS. During its consideration of the ordinance, the question arose whether these statutes imposed time limitations on parking recreational vehicles in recreational vehicle parks or mobile home parks, and whether the City could enforce its own time limitations through a process of attrition. You have therefore asked the following:

QUESTION ONE

Do references in state statute to recreational vehicles which are located in a particular place for less than three months establish a limit on the time a recreational vehicle may stay in a recreational vehicle park or mobile home park in the State of Nevada?

ANALYSIS

In 1989, the Nevada Legislature added definitions for recreational vehicle, recreational vehicle lot and recreational vehicle park to provisions governing unlawful detainer and rental agreements. Act of June 26, 1989, ch. 505, § 1, 1989 Nev. Stat. 1081. These definitions were part of A.B. 828 and are now set forth in [NRS 40.215](#) (5), (6), and (7):

5. "Recreational vehicle" means a vehicular structure primarily designed as temporary living quarters for travel, recreational or camping use, which may be self-propelled or mounted upon or drawn by a motor vehicle.

6. "Recreational vehicle lot" means a portion of land within a recreational vehicle park, or a portion of land so designated within a mobile home park, which is rented or held out for rent to accommodate a recreational vehicle overnight or for less than 3 months.

7. "Recreational vehicle park" means an area or tract of land where lots are rented or held out for rent to accommodate a recreational vehicle overnight or for less than 3 months.

In addition to this statute, we have considered several statutes in chapter 118B of NRS, landlord and tenant relations in mobile home parks. The definition of "mobile home lot" in [NRS 118B includes](#) "a portion of land within a mobile home park which is rented or held out for rent to accommodate . . . [a] recreational vehicle for 3 months or more." [NRS 118B.016\(2\)](#). [NRS 118B.017](#) states in full:

"Mobile home park" or "park" means an area or tract of land where two or more mobile homes or mobile home lots are rented or held out for rent. The terms do not include an area or tract of land where:

1. More than half of the lots are rented overnight or for less than 3 months for recreational vehicles.
2. Mobile homes are used occasionally for recreational purposes and not as permanent residences.

The definitions of recreational vehicle set forth in [NRS 118B.018](#) and [482.101](#) are identical to the definition contained in [NRS 40.215\(5\)](#).

A.B. 828 was intended to clarify that the unlawful detainer law applied to permit the eviction of persons living in recreational vehicles in recreational vehicle parks and mobile home parks. *Hearing on A.B. 828 Before the Assembly Committee on Judiciary*, 1989 Legislative Session, 2 (May 30, 1989). The bill was amended in the Assembly to make a distinction between persons living in recreational vehicles in that part of a mobile home park designated for recreational vehicles and persons living in recreational vehicles in other parts of the park. *Hearing on A.B. 828 before the Assembly Committee on Judiciary*, 1989 Legislative Session, 5 (June 7, 1989); see also [NRS 40.251](#) (3) and (4). Persons living in recreational vehicles on a lot designated for recreational vehicles in a mobile home park are entitled only to a 5-day notice of eviction. [NRS 40.251](#)(4). Persons living in recreational vehicles in other parts of the park are entitled to whatever period of notice is required of tenants of mobile home parks in [NRS 118B.190](#). [NRS 40.251](#)(3). It is clear from these provisions and the definition of mobile home lot set forth in [NRS 118B.016](#) that a person living in a recreational vehicle used as a permanent residence for three or more months is entitled to the protections of a tenant under the provisions of [NRS chapter 118B](#). See also [NRS 40.253](#)(9).

You have suggested that references in state law to a 90-day, or 3 month, period for recreational vehicles may constitute a limitation of such vehicles staying longer at any particular location. The only references to a 90-day limitation on recreational vehicles are in the statutory definitions discussed above. There is no indication these definitions were intended to limit a person's right to use a recreational vehicle as a permanent residence. Three months is simply the state standard for determining whether a person is using a recreational vehicle as a temporary or permanent residence. The distinction is used in determining whether a park is a mobile home park governed by [NRS chapter 118B](#), whether the tenant has rights as a tenant under that chapter, and for other purposes. [NRS 118B.016-017](#); [118B.0185](#), [40.253](#) (9). Were the statutes intended to limit a person's right to use a recreational vehicle as a permanent residence, there would have been no need for statutory provisions granting such persons the status of tenants in a mobile home park.

CONCLUSION TO QUESTION ONE

State law does not provide for a time limit on the use of a recreational vehicle as a permanent residence in a particular location.

QUESTION TWO

May the City enact an ordinance which grandfathers tenants in recreational vehicle parks or mobile home parks who have been there longer than three months to allow the parks to come into compliance through attrition.

ANALYSIS

There is no indication the statutory provisions discussed above were intended to create a substantive right for a person to use a recreational vehicle as his or her permanent residence in a recreational vehicle or mobile home park in this state or restrict a local government's authority to regulate the use of recreational vehicles, recreational vehicle parks or in areas in mobile home parks designated for recreational vehicles. The City has expressed concern that recreational vehicle parks, zoned and regulated for temporary stays, have become more akin to mobile home parks or apartment housing without having to comply with the statutes, ordinances and other requirements that accompany those types of permanent housing. Of particular concern are the fire and health safety codes which are more stringent for permanent housing. These have traditionally been areas of local concern and local governments are specifically empowered to regulate in the areas of planning and zoning to promote the health and welfare of its citizens. [NRS 278.020](#).

Chapter 461A of NRS governs the construction of mobile home parks and contains minimum health and safety standards for mobile homes. For those purposes, the term “mobile home” includes a recreational vehicle that is “used as a dwelling for a period of 30 days or more at one location.” [NRS 461A.070](#), [461A.050](#). Local governments are specifically authorized to adopt more stringent standards for recreational vehicles used as permanent residences. [NRS 461A.110\(2\)](#); [NAC 461A.520](#).

Since state law does not specifically prohibit the use of recreational vehicles as permanent residences, the City’s attempt to enforce the proposed 90-day limit against *existing* tenants in recreational vehicle or mobile home parks would raise some difficult questions. For example, [NRS 118B.067](#) provides:

If a landlord approves the placement of a mobile home on a lot in a park and it is determined after the home is placed on the lot that the placement of the home does not conform to the requirements of the local ordinances relating to that placement, the landlord shall pay the cost to ensure compliance with those requirements.

By limiting its prospective effect to the placement of recreational vehicles occurring *after* enactment of the ordinance, the City avoids potential disputes regarding the liability of recreational vehicle and mobile home parks for the cost of moving recreational vehicles to conform to the new requirement. This is a reasonable approach, in our opinion, that will permit advance notification and education regarding the requirement, minimize disruption of existing relationships and living situations while ensuring the long-term beneficial effects of the ordinance.

CONCLUSION TO QUESTION TWO

Although state law recognizes that a person using a recreational vehicle as a permanent residence is entitled to certain rights, it does not grant a substantive right for those persons to use a recreational vehicle as a permanent residence or limit the authority of a city or county to regulate the use of recreational vehicles as permanent residences. A city or county may therefore establish reasonable regulations pertaining to the location and use of recreational vehicles to promote the health and welfare of its citizens. Such a regulation may properly include limitations on the use of recreational vehicles as permanent residences. This is a reasonable approach, in our opinion, that will permit advance notification and education regarding the requirement, minimize disruption of existing relationships and living situations while ensuring the long-term beneficial effects of the ordinance.

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E.

Senior Deputy Attorney General

WALTHER

AGO 98-13 INSURANCE; STATE INDUSTRIAL INSURANCE SYSTEM (SIIS); WORKERS COMPENSATION: The commissioner shall adopt an assigned risk plan pursuant to [NRS 686B.1771](#) to implement “three-way” workers’ compensation insurance. After July 1, 1999, workers’ compensation premiums must be based upon NCCI rates pursuant to [NRS 686B.177\(3\)](#).

Carson City, May 14, 1998

Mrs. Alice A. Molasky-Arman, Commissioner, Division of Insurance, 1665 Hot Springs Road,
Room 152, Carson City, Nevada 89710

Dear Mrs. Molasky-Arman:

You have asked this office for an opinion regarding the State Industrial Insurance System.

QUESTION ONE

Does Act of July 5, 1995, ch. 580, § 193, 1995 Nev. Stat. 2060, allow the commissioner of insurance to prevent the State Industrial System (SIIS) from becoming the *de facto* assigned risk insurer without an appropriate rate or pooling mechanism?

ANALYSIS

The question presented must be viewed in the larger context of workers' compensation insurance in Nevada. [NRS 616A.465](#).

The 1995 Nevada Legislature authorized a complex transition to a "3-way" system from the present monopolistic State Industrial Insurance System. The question posed concerns Act of July 5, 1995, ch. 580, § 193, 1995 Nev. Stat. 2060, an element of the transition. SIIS will enter a competitive marketplace on July 1, 1999. Other insurance companies will begin transacting workers' compensation insurance on that date. [NRS 690B.090](#). A problem arises for employers that are canceled, non-renewed or denied coverage by either SIIS or other insurance companies after July 1, 1999. Workers' compensation is a mandatory coverage. Employees may not work without this coverage.

The request for opinion states the problem as follows:

The question posed arises from the provisions of Section 193 of chapter 580, Statutes of Nevada 1995, at page 2060, which appears as transitory language and provides that each employer paying premiums to SIIS on July 1, 1999, remains insured by SIIS "until that employer *elects* to" purchase industrial insurance from a private insurer, self-insures or joins as association of self-insured employers. [Emphasis added.]

Thus, SIIS must continue insurance on risks which might properly be "assigned risks" if the risks had to apply for continuation of insurance with the SIIS, or apply for replacement insurance with a private carrier. (The current law does not require a Nevada business to initiate and carry out an application process for workers' compensation insurance.)

At the same time, while SIIS may cancel or non-renew a policy of insurance in accordance with the provisions of [NRS 687B.310](#) to [687B.355](#), inclusive, the cancellation prerogative is severely limited. ([NRS 616B.033\(3\)](#)). (Subsection 3 of section 17 of chapter 580, Statutes of Nevada 1995, at page 2002).

The provisions of section 193, appear to require SIIS to continue to provide industrial insurance to an employer insured on July 1, 1999, until the employer "elects" to self-insure, join an association of self-insured private or public employers or purchase industrial insurance pursuant to Act of July 5, 1995, ch. 580, § 193, 1995 Nev. Stat. 2060. While the transitory

language of section 193 allows an insured employer to keep SIIS coverage until the employer “elects” to alter coverage as provided in section 193, a more comprehensive statute provides for cancellation and non-renewal in subsection 3 of [NRS 616B.033](#):

3. If an insurer or employer intends to cancel or renew a policy of insurance issued by the insurer pursuant to chapters 616A to 617, inclusive, on NRS, the insurer or employer must give notice to that effect in writing to the administrator and to the other party fixing the date on which it is proposed that the cancellation or renewal becomes effective. The notices must comply with the provisions of [NRS 687B.310](#) to [687B.355](#), inclusive, and must be served personally on or sent by first-class mail or electronic transmission to the administrator and the other party. If the employer has secured insurance with another insurer which would cause double coverage, the cancellation must be made effective as of the effective date of the other insurance.

A resolution to the dilemma posed by the transition may be approval of a plan pursuant to [NRS 686B.1771](#). An assigned risk plan provides a residual insurance market for employers who cannot obtain coverage. You have adopted on page 10, in Cause Number 97.197, the following Orders:

4. NCCI will assume all costs associated with the establishment of an Assigned Risk Pool Mechanism prior to July 1, 1999. NCCI will propose an assessment method, to be approved by the Commissioner, to pay for costs associated with the establishment of an Assigned Risk Pool Mechanism, in accordance with the payment provisions of the RFP. This assessment will be effective on July 1, 1999 and charged to SIIS and those carriers that are authorized to transact workers’ compensation insurance.

5. Pursuant to subsection 2 of [NRS 686B.1771](#), the Commissioner shall adopt regulations to carry out the NCCI Assigned Risk Pool Mechanism.

The Division is presently preparing regulations to designate the National Council on Compensation Insurance (NCCI) as an assigned risk plan or to create a pool for employers. SIIS is concerned about being required to finance the plan due to an assessment provision. Nev. Const. art 9, § 2. SIIS must, pursuant to section 193 continue to operate as the insurer of last resort until the Division approves an assigned risk plan that will insure employers who are unable to obtain coverage in the voluntary market. SIIS may non-renew certain risks after the assigned risk plan is in place. [NRS 616B.033](#)(3). After the Division creates an assigned risk plan, insurers may cancel or non-renew pursuant to [NRS 616B.033](#)(3). Creation of the assigned risk plan will correct a defect in the market.

CONCLUSION TO QUESTION ONE

The adoption of the assigned risk plan, the review of rates, the education of agents, the authorization of insurers and the investigation of insurer solvency, are duties delegated to the commissioner as part of the transition from a monopolistic system to a competitive system of workers’ compensation insurance. [NRS 616A.465](#). The provisions of Act of July 5, 1995, ch. 580, § 193, 1995 Nev. Stat. 2060, require SIIS to provide industrial insurance coverage until the employer “elects” to change to a different form of coverage. [NRS 616B.033](#)(3) provides that an insurer may cancel or non-renew coverage after July 1, 1999. The commissioner shall approve an assigned risk plan submitted by insurers pursuant to [NRS 686B.1771](#). Regulations may be adopted to accomplish this end.

QUESTION TWO

Must the SIIS re-rate policies mid-term to reflect the NCCI rates which become effective on July 1, 1999, and to reflect new rates potentially effective on July 1 of each subsequent year? Alternatively, may SIIS continue coverage until the policy expiration date subsequent to July 1, 1999, at the initial policy term rates, which were approved by the commissioner only for the SIIS prior to the effective date of "3-way?"

ANALYSIS

The rates for industrial insurance prior to July 1, 1999, must be approved by the commissioner pursuant to [NRS 616B.206](#). After July 1, 1999, the Legislature has enacted a complex scheme for rate regulation. [NRS 686B.1751-1799](#).

The National Counsel of Compensation Insurance (NCCI) has been selected as the advisory organization for Nevada by the commissioner. NCCI is presently preparing basic premium rates for Nevada to be used when "3-way" insurance becomes effective. Any rate changes after that date would be governed by rates adopted from NCCI proposals. [NRS 686B.177\(3\)](#) sets rate restrictions of NCCI rates to prevent inadequate rates in Nevada. Since this law governs insurance written after July 1, 1999, all renewals of SIIS employers would be controlled by NCCI rates. All new policies written after July 1, 1999, will be controlled by NCCI rates. Until July 1, 1999, SIIS may use its approved rates pursuant to [NRS 616B.206](#). SIIS may seek a rate adjustment for small employers pursuant to [NRS 616B.211](#).

CONCLUSION TO QUESTION TWO

SIIS may seek to amend its rates prior to July 1, 1999, pursuant to [NRS 616B.206](#). After July 1, 1999, rates must be based upon NCCI advisory rates and classifications to attain an orderly transition to the new market environment.

SIIS may further seek to implement NCCI rates on the renewal dates for policies after July 1, 1999. SIIS may seek special rates for small employers pursuant to [NRS 616B.211](#).

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

AGO 98-14 HIGHWAYS; TRANSPORTATION; ADMINISTRATIVE LAW; PLANNING; STATUTES: The Department of Transportation is not precluded by law from creating outside its statutorily-created planning division a unit which reports directly to the deputy director and the duties of which include interaction and coordination with the urban transportation entities for the primary purpose of carrying out federal highway acts for developing state highway programs.

Carson City, May 14, 1998

Jeffrey Fontaine, Deputy Director, Nevada Department of Transportation, 1263 South Stewart Street, Carson City, Nevada 89712

Dear Mr. Fontaine:

On March 18, 1996, you issued a directive that the Metropolitan Planning Division in your department was to report directly to the Director's Office and that the division name would be changed to Program Development Office. At the same time, you stated that the former Programs and Budget Office would be renamed the Financial Management Office, and the Transportation Planning Division would be renamed the Intermodal Planning Division. You subsequently listed the responsibilities of the Program Development Office (PDO). Although you have indicated you have believed the arrangement is legal, you have asked whether this arrangement violates any law.

BACKGROUND

The basis of your inquiry is the fact that Nevada law makes reference to a planning division with certain duties. The planning division is to be one of four divisions within the Nevada Department of Transportation (NDOT). The other divisions are administrative, operations and engineering. The head of a division is an assistant director. [NRS 408.111](#). Even though this statute, in existence since 1979, provides that an assistant director is the head of each division, the practice at NDOT for many years has been to treat these divisions as larger areas of responsibility with more specific divisions within these areas being managed by division chiefs. The assistant directors have supervised several divisions and have reported to the deputy director and the director. Some divisions have reported directly to the deputy director. The attached organizational chart from 1990 illustrates this.

The planning division set forth in statutes is the only division for which the Legislature has provided specific responsibilities.

1. The primary responsibilities of the planning division are to:
 - (a) Develop and coordinate balanced transportation policy and planning which are consistent with the social, economic and environmental goals of the state
 - (b) Coordinate local plans for balanced transportation facilities and services and assist in application for federal grants which must be submitted through an appropriate or designated state agency
2. The planning division, in cooperation with other state agencies and with agencies of local government, shall:
 - (a) Establish planning techniques and processes for all modes of transportation at an appropriate level, according to the requirements of the state and local areas of the state.
 - (b) Prepare, revise when appropriate, provide supporting information for and assist in carrying out the transportation plan by providing assistance in the development of the department's capital program for all modes of transportation.
 - (c) Test and evaluate the policies, plans, proposals, systems, programs and projects of the department within the framework of the goals of the department.
 - (d) Conduct research in planning techniques, travel needs, transportation potential for the state, investigating, testing and demonstrating methods and equipment suitable for application to the problems of transportation facing the state.

[NRS 408.233](#). This statute was also adopted in 1979.

In your directive, you stated the responsibilities of the new PDO:

1. Development and distribution of the STIP.
2. Conduct county tours.
3. In cooperation with Clark and Washoe Counties, development of the urban TIPs.
4. Cooperative development of the Regional Transportation Plan and Unified Planning Work Program with Clark and Washoe Counties.

5. Oversight and monitoring of MPO [Metropolitan Planning Organization] activities in Clark and Washoe Counties.
6. Cooperative development of Annual Work Program requests from rural counties.

Memorandum of March 18, 1996. Your directive concluded that the planning division will support the PDO in its activities. We understand that the PDO was formerly in the department's planning division and, in fact, was made up of personnel from the planning division. Your question asks whether all of these duties may be withdrawn from the planning division.¹⁵

QUESTION

Whether the Nevada Department of Transportation (NDOT) is precluded by law from creating the Program Development Office (PDO) with certain specified functions outside of the planning division and which reports directly to the deputy director.

ANALYSIS

In order to determine the limitations of the law, the functions you listed in your directives and the historical function of the planning division must be understood. Statutory requirements and changes must also be analyzed and a determination made as to their effect on the functions of the division.

A. Functions of the PDO and Historical Function of the Planning Division.

A STIP is a state transportation improvement program. The term comes from the 1991 federal highway bill known as the Intermodal Surface Transportation Efficiency Act (ISTEA). The law required such programs for metropolitan areas and statewide with a directive that the two be coordinated. ISTEA, Act of December 18, 1991, Pub. L. No. 102-240, §§ 1024-1025, 105 Stat. 1959-61, 1963-65, *codified at* 23 U.S.C. §§ 134-135 (1994). The final product approved by NDOT and the governor is the STIP. It contains all projects in the state proposed for funding with federal funds and must be consistent with long-range plans.¹⁶ One reference in your directive was that the PDO, cooperating with Washoe and Clark Counties, develop the urban TIPS. This is also derived from the processes required by ISTEA.¹⁷ The oversight and monitoring of MPO activities in these two counties is also a reference to the ISTEA provisions listing urban areas of more than 50,000 people as metropolitan planning areas and requiring approval of a program by a metropolitan planning organization (MPO).¹⁸

¹⁵ Your May 3, 1996, memorandum was designated as a "follow-up" to your March 18 memorandum and stated that the PDO was established by the planning division but that the chief of the PDO would report directly to you as deputy director for day-to-day supervision with copies of most correspondence and other matters being sent to the assistant director for planning. Further, no major actions were to be taken by the PDO without consultation with the assistant director and the deputy director, and approval by the director. The major actions for the PDO included those duties listed in the March 18 memorandum, along with the work on major investment studies, *see* note 10 *infra*, and appointments to regional transportation commission committees. You have not asked our opinion on this organizational structure.

¹⁶ The definition of STIP actually comes from the federal regulations. It is defined as "a staged, multiyear, statewide, intermodal *program* of transportation *projects* which is consistent with the Statewide transportation plan and planning processes and metropolitan plans, TIPS and processes." 23 C.F.R. § 450.104 (1997) (emphasis added) (defining "Statewide transportation improvement program"). A project is defined as "an undertaking to construct a particular portion of a highway, or if the context so implied, the particular portion of a highway so constructed." 23 U.S.C. § 191(a) (1994) (defining "project").

¹⁷ The TIP is also defined in federal regulations consistent with the STIP definition only it is at the local level and consistent with the metropolitan transportation plan. 23 C.F.R. § 450.104 (1997).

¹⁸ An MPO is a metropolitan planning organization which is the entity designated by federal law responsible for planning and

There are references in your directive to "[c]onduct county tours" and "[c]ooperative development of Annual Work Program requests from rural counties." These tours and development of work programs have been performed by the department for many years and emanate from a statutory requirement for an annual fiscal year highway work program for highway construction and maintenance to be done in the counties during the fiscal year. [NRS 408.280](#). The statute does not require that this be done by the planning division and, as we understand it, these tours and preparation of work programs have historically been done, with few exceptions, by the director and deputy director with assistance from the programs and budget division.

The other reference in your directive is that the PDO be responsible for the "cooperative development of the Regional Transportation Plan and Unified Planning Work Program with Clark and Washoe Counties." Again, this is a reference to the MPOs and the title of actual documents they have prepared. The former is the 20-year plan required by ISTEA and the latter is a document required in federal regulations of MPOs describing transportation-related air quality planning activities anticipated within the area during the next one or two year period. 23 C.F.R. § 450.314(a)(1)(1997).

As seen in the 1990 organizational charts, the assistant director for the planning area has had the title of assistant director of planning and program development. The planning division also had its functional responsibilities set forth in the organizational charts. Among those responsibilities, the division was to:

1. Prepare all necessary work documents required to conduct each phase or element of the statewide transportation planning program. . . .
-
4. Identify, evaluate and rank rail and non-urbanized transit projects. Prepare program of projects and submit grant or project applications including such support documentations as: work plans, project budgets, project justifications, sources and application of matching funds, and required assurances
5. Review all program reports or related documents prepared by any District Planning staff. . . .

With regard to development of programs, the same organizational charts provided for the chief of the division of "programs and budget" to report directly to the deputy director. Moreover, that division contained a programs section and was charged with the duties to:

1. Prepare and control NDOT and Federal-Aid annual work programs and short and long-range project schedules.
2. Program, monitor, and revise Federal-Aid and State funded preliminary Engineering, Right-of-Way and Construction projects.
-
6. Formulate, monitor, and revise executive biennial budget, including related position control files.
7. Formulate, monitor, and revise Department annual budget work program.

It can be seen that "programmng" has been done by the programs and budget division even though the words "program development" were in the name of another division. With this understanding of the functions you listed in your directive, we can look to the legal requirements in these areas.

B. Statutory History.

Section 408.233 of our statutes focuses on the planning function for NDOT. That law was adopted in 1979 with the creation of a department of transportation, Act of June 5, 1979, ch. 683, § 57, 1979 Nev. Stat. 1762, following an interim legislative study which recommended the expansion from a highway department to an agency which would be broader in scope. Legislative Comm'n of Nev. Legisl. Counsel Bureau, *Feasibility of Creating a Commission to Regulate Transportation* at 9-11 (Oct. 1978) [hereinafter referred to as Interim Study]. The primary purpose of the legislation was so that the previous highway department could receive federal mass transit funds, and be involved with planning of aviation and railroad systems. *See Nevada Assembly Comm. on Gov't Affairs, Minutes of Feb. 13, 1979*, at 1-2; Nevada Assembly Comm. on Gov't Affairs, *Minutes of May 8, 1979*, at 4-7. The interim study noted that forthcoming federal legislation and rapid urban growth in Nevada made it necessary to develop a "coordinated transportation planning and operation agency with statewide responsibilities for transportation in all modes and in all areas." The recommendation included "a planning division with clear statutory authority for multi-modal, integrated transportation planning." Interim Study, *supra* at 11.

As a matter of fact, the Nevada legislation followed the enactment of a federal highway bill in 1978 which post-dated the interim study but which was foreseen by the study. *See Surface Transportation Assistance Act of Nov. 6, 1978, Pub. L. No. 95-599, 92 Stat. 2689 (STAA)*. Notably, much of the language found in [NRS 408.233](#) can be found in the federal statute. For instance, the federal law amended then section 134(a) of title 23 to the United States Code and promoted "various modes of transportation" and required cooperation with the states and local officials in developing plans and programs with due consideration to "overall social, economic, environmental . . . goals and objectives" STAA, Pub. L. No. 95-599, § 169, 92 Stat. 2723 (1978).

A major change in the 1991 ISTEA federal legislation was to give the large urban areas the responsibility for planning and the final decision for the priority of projects to receive available federal funding.¹⁹ The Act also requires both, local MPOs and states, to adopt "long range plans" and "transportation improvement programs." The former are to relate to a 20-year forecast period for the MPOs, while the latter are more geared to imminent federal funding of certain projects.²⁰ Compare ISTEA, § 1024(a) (amending 23 U.S.C. § 134(g)) and ISTEA, § 1025(a) (amending 23 U.S.C. § 135(e)) with ISTEA, § 1024(a) (amending 23 U.S.C. § 134(h)) and ISTEA, § 1025(a) (amending 23 U.S.C. § 135(f)). In contrast, the local TIPs include "projects" to be carried out within a 3-year period only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. 23 U.S.C. § 134(h)(2) & (5) (1994). The state STIP must also include projects for which funding is anticipated to be available within the time for project completion and must be reviewed and approved by the federal authorities at least biennially. *Id.* § 135(f)(2) & (4).

The thrust of the federal legislation is that "programs" are more specific short-term objectives to be funded by identifiable sources while "planning" has a long-range view of many factors. The former is referenced in regard to the submission of projects by a state transportation agency for federal funding in a fiscal year. 23 U.S.C. § 105 (1994).²¹ The 1978 federal legislation discusses planning more in the terms of a long-range assessment of transportation needs and alternatives for urban areas. Pub. L. 95-599, § 169(a), 92 Stat. 2723, *amending* 23 U.S.C. § 134(a).

¹⁹ Technically, the local MPO develops the long range plan and selects projects to be carried out with federal participation except on the National Highway System which are selected by the state. 23 U.S.C. §§ 134(g) & (i)(4) (1994). The projects must be in conformance with the required transportation improvement program which is approved by the MPO and the governor. *Id.* § 134(h)(1).

²⁰ As a matter of fact, the state planning process is also required by federal regulation to cover a period of at least 20 years. 23 C.F.R. § 450.214(b)(2) (1997).

²¹ The statute actually states that a state highway department must submit "[a]s soon as practicable after the apportionment for the Federal-aid systems have been made for any fiscal year . . . a program or programs of proposed projects for the utilization of the [highway] funds apportioned." 23 U.S.C. § 105(a) (1994).

The planning process includes multi-faceted transportation needs and is policy-oriented while the program or project function is more of an implementation of plans through short-range prioritization and funding.²² And, since 1991, there is more of a separation of function for the large urban areas in that state control of federally-funded projects is essentially gone.²³

C. Effect of Statutory Change on the Planning Division.

Keeping in mind the direction and intent of the relevant state and federal legislation, we must focus on the effect your transfer of functions has. What can be seen from the historical function of NDOT and the statutory history is that there are several uses of the term "programs" in the NDOT organizational documents. Those relate to both the planning division and the programs and budget division. There are only two references to "programs" in the statutes. These require the planning division to provide "*assistance* in the development of the department's capital program for all modes of transportation" and to "[*t*est and evaluate the policies, plans, proposals, systems, programs and projects of the department within the framework of the goals of the department." [NRS 408.233](#)(2)(b),(c) (emphasis added). The key is whether any of this involves the duties you seek to transfer from the planning division.

The STIP is a short-term program document with specific projects for funding. There is a similar purpose with the development of the urban TIPs and the conduct of the county tours and development of rural county annual work programs. These are not the "planning" functions referenced in section 408.233 which the planning division is to develop and coordinate or for which the division is to establish planning techniques and processes. Rather, these are the capital program and project functions for which section 408.233 directs that the planning division is only to assist "in the development of the department's capital program" The capital program for NDOT has historically been prepared by the programs and budget division and the front office. It included the local capital program until after ISTEA changed things in 1991. As such, the statute does not prohibit the placement of functions relating to state or local program development outside the planning division.

In light of the fact that the MPOs now actually develop their own long-range plans and TIPs under federal law, the direction in section 408.233 that the NDOT planning division coordinate local plans for transportation facilities and services is inconsistent as it relates to the MPOs. Your directive that the new PDO had the duty of "oversight and monitoring of MPO activities in Clark and Washoe Counties" is a recognition of the change in direction in the federal law. Practically speaking, NDOT does not have "oversight" authority over the MPOs and cannot "coordinate" their planning effort under federal law. The planning division can and still does coordinate local plans in the rural counties and provides assistance to the MPOs with other planning aspects such as transit and bicycle matters. There does in fact appear to be some inconsistency between the Nevada statute and federal law.

With regard to the Regional Transportation Plan and Unified Planning Work Program in Clark and Washoe Counties, again, under federal law, NDOT has no control over the MPO planning or project process. NDOT is the conduit, however, of some federal monies to the MPOs and NDOT must coordinate its own projects in the MPO areas with what the MPOs want to do. Again, [NRS 408.233](#)(1)(b) causes some difficulty with the requirement that the planning division "[c]oordinate local plans for balanced transportation facilities" The thrust of your entire

²² Federal law actually sets out the numerous factors and policies which must be considered by an MPO and state planners. 23 U.S.C. §§ 134(f), 135(c) (1994); 23 C.F.R. §§ 450.316, 450.208 (1997). No federal law or policy can be found which requires state or local planning functions to be performed by a planning division.

²³ While the federal law changed in 1991, the present director and deputy director were appointed in early 1995. The genesis for the subject change in department structure occurred in the latter part of 1995.

directive, however, appears to be to place the "program" or "project" function with the new PDO and to recognize the importance and independence of the MPOs under federal law.²⁴

D. Resolution of the Issues.

It is apparent that the Nevada statute regarding the NDOT planning division is outdated and fails to take into account the change in direction of the 1991 federal legislation giving MPOs control. When construing our statutes, however, the primary focus is on giving effect to the legislative intent. *Roberts v. State, Univ. of Nevada System*, [104 Nev. 33](#), 37, 752 P.2d 221, 223 (1988). All statutes relating to a subject must be construed to render them compatible and to give effect to the legislative intent of each if possible. *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830, 836 (1977). In this situation, we must look to other statutes describing the organization of NDOT and other statutes regarding transportation matters in Nevada.

The primary responsibility for NDOT policy lies with its board of directors, [NRS 408.100](#), which is specifically authorized to delegate its authority to the director as it deems necessary.²⁵ *Id.* § 408.131(6). It is the director who has supervision of the highways, facilities and services authorized under chapter 408. *Id.* § 408.195. The deputy director has authority to perform any duty permitted of the director. *Id.* § 408.175(1)(a). It is the director who must submit ten year and three year reports to the Legislature regarding the requirements for highway construction and maintenance, *Id.* § 408.203, and who has other necessary and proper power and authority under chapter 408, *Id.* § 408.205(2). Although the statutes created a planning division with certain duties, the statutes also provide that Nevada and the Department "accepts and assents to" the provisions of the federal highway laws and "accepts as a continuing obligation any and all acts amendatory or supplementary to such federal acts." *Id.* § 408.245. The 1991 ISTEA federal legislation is such an amendatory or supplementary act. The department must also enter into any agreements, submit plans and programs, and "do all other things necessary to carry out the cooperation and programs contemplated and provided for by such federal acts." *Id.* § 408.250(1).

Local transportation planning and control in Nevada is also addressed in state law. Regional transportation commissions (RTCs) are given the authority, among other things, to be designated as an MPO, accept federal funds, and develop transportation plans for their region. [NRS 373.055](#), .113, .1161. In the urban areas in Nevada, the RTCs have been designated as the MPOs. As such, federal law requires that the responsibilities for cooperatively carrying out transportation planning and programming be spelled out in an agreement between the MPO and the state. 23 C.F.R. § 450.310(a)(1997). This has been done in Nevada and, in the agreements with Clark and Washoe County RTCs signed by the NDOT director and deputy director, the NDOT director is listed as an ex-officio member of the RTCs. Cooperative Agreement for Regional Transportation Planning (Clark Co. RTC, Oct. 12, 1995); Agreement (Washoe Co. RTC, Jan. 1, 1996). The deputy director currently sits on the Executive Advisory Committee for the Clark County RTC. It is the director of NDOT whom statutes state may be consulted by and obtain information from county officials, including RTCs, relative to local highway matters. [NRS 408.200](#)(3).

Construing Nevada statutes as a whole and in light of relevant federal law, it is clear that the Nevada Legislature's intent is that NDOT function in a way to give effect to federal highway acts and to coordinate transportation matters in Nevada among federal, state, and local entities. It is the NDOT director, not the planning division, who is given the authority to carry out these duties. The Legislature could not have intended to have section 408.233 construed in such a way to inhibit the

²⁴ A major investment study ("MIS") is required by federal regulation where "the need for a major metropolitan transportation investment is identified, and Federal funds are potentially involved . . ." 23 C.F.R. § 450.318(a) (1997). Local planning by the MPOs is to assess capital investment and other measures to preserve the existing transportation system. *Id.* § 450.322(b)(5). What would be "major" or when such investment must be identified is not clear. Nevertheless, this MIS process is connected with MPO matters.

²⁵ The statutes do not require the board of directors to approve an organizational change. In any event, a reorganization idea was reported to the board of directors.

discretion given to the director in other statutes or to contradict federal statutes. If the Legislature had intended that section 408.233 be read so as to include duties within the planning division which may have been only historically performed by the planning division, it could have so provided. If the Legislature had intended to prevent a removal of those duties from the planning division and a consolidation with other similar duties in a reorganization deemed by the director and deputy director to be more effective to carry out new federal requirements, the legislature could have so provided.²⁶ See *State, Dep't of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 883 (1988) (Legislature could easily have inserted language but chose not to and court would not add language). Our statutes must not be read in a way which would produce absurd results. *Breen v. Caesars Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070, 1072 (1986).

Federal law now gives authority for planning and programming to urban MPOs with relatively minor input from NDOT which basically only includes in the STIP MPO projects ready for programming. The director and deputy director of NDOT have decided to place responsibility for programming and interaction with MPOs with a unit outside of the planning division which still retains its primary focus on planning, as opposed to programming. This does not contradict the intent of the legislature found in chapter 408 of our statutes.

CONCLUSION

Based on a reading of the whole statutory scheme for transportation planning and programming in Nevada, it is concluded that NDOT is not precluded from creating outside of its planning division a unit which reports directly to the deputy director and the duties of which include interaction and coordination with the urban transportation entities for the primary purpose of carrying out federal highway acts or for developing state highway programs. The specific duties which could be undertaken by this unit would include coordination and development of the STIP and TIPs, conducting county tours and developing work programs, monitoring MPO activities in the urban areas, and assisting the MPOs with the development of documents required by federal acts. In order to give effect to section 408.233, other planning efforts should remain in the planning division to the extent not inconsistent with this opinion.

FRANKIE SUE DEL PAPA
Attorney General

By: BRIAN HUTCHINS
Chief Deputy Attorney General

AGO 98-15 ELECTIONS; SECRETARY OF STATE; REAPPORTIONMENT; COUNTIES; CLARK COUNTY: Noncensus population data may be used to redistrict if the data has a very high degree of accuracy. The methodology and definitions used by the U.S. Census Bureau is the best example, but other data may also be considered, i.e. voter registration records, Housing Unit Method calculations, annual census information, and direct surveys.

Carson City, May 14, 1998

Paul D. Johnson, Deputy District Attorney, Clark County District Attorney's Office, Post Office Box 552215, Las Vegas, Nevada 89155-2215

²⁶ As a comparison, the Legislature has required legislative approval before the Department of Motor Vehicles and Public Safety is reorganized and has provided for division responsibilities and functions. NRS 481.067, .071 (1997).

Dear Mr. Johnson:

You have requested an opinion from this office regarding possible redistricting of the Clark County Commission before the next national decennial census in 2000.

QUESTION

What population data, if any, is sufficiently reliable to permit redistricting short of an actual census being taken?

ANALYSIS

Pursuant to a request from the Washoe County district attorney, the Attorney General's office issued an opinion in January 1998, concluding that under Nevada law the Washoe County Commission may reapportion the commissioner election districts more frequently than once every ten years when population changes occur. Op. Nev. Att'y Gen. No. 98-03 (January 16, 1998). This opinion was based upon [NRS 244.018\(1\)](#), which authorizes a county commission to change county commissioner districts because of changes in population. [NRS 0.050](#) defines population to be the national decennial census conducted by the Bureau of the Census of the United States Department of Commerce pursuant to section 2 of article I of the Constitution of the United States except as required by the context of a particular statute. In light of the well-established principle of "one person, one vote," the context of [NRS 244.018\(1\)](#) may require the definition of population to be something other than the national decennial census.

The opinion concluded that, although not required to do so more frequently than every ten years, the commission had the authority to reapportion more frequently when population changes occur.

You have now asked the follow-up question: If the Clark County Commission decides to redistrict the commissioner election districts prior to the results of the year 2000 national decennial census because of changes in population, what type of population estimates may be used?

According to information you provided, Clark County has been informed that a special census from the United States Census Bureau will not be possible prior to the decennial census in the year 2000. Certainly, a special census would provide the most accurate population estimates.

Courts have addressed the issue of reapportioning or redistricting congressional districts, and state legislative districts, as well as districts for local units of government. Guidelines provided by the courts in these various situations are helpful in our analysis.

The United States Supreme Court addressed the issue of using data other than the national decennial census in redistricting congressional districts and stated:

Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner.

Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969), *reh'g denied*, 395 U.S. 917 (1969). The *Kirkpatrick* case dealt with a 1967 redistricting plan for congressional seats in Missouri. The Court ultimately rejected the state's plan but clarified that where shifts in projected population

from the date of the last census can be predicted with a high degree of accuracy, the state's congressional redistricting plan may properly consider such shifts. *Id.*

In 1997, a federal district court in Texas agreed with the *Kirkpatrick* court and stated, "A court is not confined to United States census data in deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy *Gingles I.*" *Perez v. Pasadena Independent School Dist.*, 958 F. Supp. 1196, 1210 (S.D. Tex. 1997) (citations omitted). The *Perez* case dealt with a challenge by Hispanic and Mexican-American citizens to an at-large voting system for electing members of a school board. The *Gingles* case referred to by the court is the governing case that describes a three part test to determine if at-large voting impedes "the ability of minority voters to elect representative of their choice." *Perez*, 958 F. Supp. at 1200-01, citing *Thornberg v. Gingles*, 478 U.S. 30 (1986).

The *Perez* court also stated:

[T]he census figures are presumed accurate until proven otherwise. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. Federal census data must be used unless there is more reliable data. "Estimates based on past trends are generally not sufficient to override 'hard' decennial census data."

Perez, 958 F. Supp. at 1210 (citations omitted).

It is clear from these cases that noncensus population data may be used in redistricting, but the degree of accuracy of this data must be very high in order to pass constitutional scrutiny. Courts have also struggled with what type of noncensus population data meets this high standard. Again, their guidelines help in our analysis.

The Ninth Circuit Court of Appeals addressed this issue in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), a case involving the redistricting of county supervisor districts. The court analyzed the landmark reapportionment case, *Reynolds v. Sims*, 377 U.S. 533 (1964), *reh'g denied*, 379 U.S. 870 (1964), and stated:

The Court in *Reynolds* instituted a requirement of periodic reapportionment based upon current population data. It stated that decennial reapportionment "would clearly meet the minimal requirements," and less frequent reapportionment would "assuredly be constitutionally suspect." 377 U.S. at 583-84, 84 S.Ct. at 1393. The Court further noted, however, that while more frequent apportionment was not constitutionally required, it would be "constitutionally permissible," and even "practicably desirable." *Id.* Thus, *Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall.

Since *Reynolds* would permit redistricting between censuses, it appears to assume that post-census data may be used as a basis for such redistricting.

Garza, 918 F.2d at 772.

The *Garza* court also examined a Fifth Circuit Court of Appeals case, *Westwego Citizens for Better Government v. Westwego*, 906 F.2d 1042 (5th Cir. 1990), a case involving the election of city aldermen on an at-large basis. The *Garza* court stated:

The Fifth Circuit has held that non-census data may be considered in

reapportionments between censuses if the relevant information cannot be obtained through census data. Such a practice makes sense not only where, as in *Westwego* itself, census data on the population in question was unavailable because of the limited nature of the compilations and manipulations performed by the census; it is also logical where, as here, the census data is almost a decade old and therefore no longer accurate.

Garza, 918 F.2d at 773 (citation omitted) (footnote omitted).

In 1976, a federal district court in Tennessee addressed the issue of whether to use the 1970 federal census figures or “provisional estimates” published by the Bureau of Census of the Department of Commerce in 1975 in reapportioning several congressional districts. The court noted that it was “not confined as a matter of law to the 1970 Federal census figures and that [it] may consider the estimates [published by the Bureau of Census].” *Dixon v. Hassler*, 412 F. Supp. 1036, 1040 (W.C. Tenn. 1976), *aff’d*, 429 U.S. 934 (1976) (citation omitted). After a thorough examination of the procedure used by the Bureau of Census to arrive at the “provisional estimates,” the court concluded that the party advocating for the use of the “provisional estimates” had “not presented clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current populations of these Districts and that the ‘provisional estimates’ of the Bureau of Census are the best evidence of such populations.” *Id.* at 1041.

The *Perez* court characterized the provisional estimates in *Dixon* as being “overly simplistic, crude analysis that are easy and inexpensive to calculate but too inaccurate to serve as a basis for changing the basis of conducting elections.” *Perez*, 958 F. Supp at 1211 (citation omitted). The *Perez* court also rejected “straight-line projections” for population growth as not being sufficiently reliable. *Id.* at 1212. The court went on to state, “it would depart from the census and its presumption of accuracy only if the ‘proof of changed figures’ was ‘clear and convincing.’” *Id.* at 1213.

“Estimates based on past trends are generally not sufficient to override ‘hard’ decennial census data.” *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir., 1988), *cert. denied* 490 U.S. 1031 (1989). Projections also may not offer that “high degree of accuracy” required to supplant the population figures of the prior decennial census and such a product might not be the “careful and substantial demographic analysis” upon which a court might question the current legitimacy of the census figures. *Graves v. Barnes*, 446 F. Supp. 560, 568 (D.C. Tex., 1977), *aff’d* 435 U.S. 901 (1978).

The cases we have analyzed all deal with the legality of reapportionment plans that were either in place or proposed, and the guidelines make it clear that other data besides the national decennial census may be used to redistrict, but that data must have a very high degree of accuracy. The courts also rule as to whether the noncensus data used achieved this very high degree of accuracy. However, the courts do not provide alternative data that might be used.

Based on these cases, it is clear that noncensus data may be used in redistricting, but any noncensus data that is used must have a very high degree of accuracy. Trends or projections probably do not meet this standard, nor do other simplistic methods.

In addition to the national decennial census population data, the United States Census Bureau publishes population estimates on a yearly basis. These figures may have a very high degree of accuracy, but the smallest units of population figures are incorporated cities. For redistricting purposes, population figures for a “census tract,” “Block Numbering Area,” “Block

Group,” “Block” or their equivalent would be needed.²⁷ So the yearly population estimates published by the United States Census Bureau do not cover the geography needed for redistricting.

At least one United States Supreme Court case allowed the use of voter registration figures for apportionment. In *Burns v. Richardson*, 384 U.S. 73, 95 (1966), the Court, in explaining why Hawaii could base the apportionment of its legislature on the number of registered voters, stated, “It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.”

At least one subsequent case clarified that voter registration should not be the sole criterion. However, it is certainly a criterion which can be considered, as can voting age population. *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1162-63 (5th Cir., 1981). The *Wyche* court was insightful in its pronouncement of guidelines for federal district courts to follow when examining the legality of voting plans:

We are aware that many of the strictures are negative and that “thou-shalt-nots” are much less helpful than affirmative prescriptions. However, we cannot reduce to a formula the factors that require the consideration of the district court. The district judge must steer a middle course, following the guidance afforded by *Marshall v. Edwards*. He must be mindful of the impact of a proposed plan on different racial groups. He must analyze the plan and determine that it does not dilute minority voting strength but he must avoid a strict proportionality brought about by the manipulation of district lines. He should fix boundaries that are compact, contiguous and that preserve natural, political and traditional representation. Beyond that courts should not go: “We are not legislatures.” *Marshall v. Edwards*, 582 F.2d at 937.

Wyche, 635 F.2d at 1163. (The *Marshall* case involved a reapportionment plan for a parish police jury and school board in Louisiana. The Fifth Circuit Court of Appeals provided guidance to federal district courts when these district courts were examining reapportionment plans. *Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir., 1978)).

The Clark County Commission may consider voter registration numbers if it redistricts prior to the results of the year 2000 decennial census as long as the distribution of registered voters approximates the distribution of another permissible population base. As of March 31, 1998, the number of registered voters in Clark County is 524,184, according to information supplied to the Secretary of State by the Clark County Registrar of Voters. The estimated population of Clark County as of July 1, 1997, is 1,106,047. U.S. Census Bureau; “Estimates of the Population of Counties (alphabetical list) for July 1, 1997, and Population Change: April 1, 1990 to July 1,

²⁷ According to the United States Census Bureau, census tracts in metropolitan areas and other highly populated counties are established and maintained for the decennial census by local committees. (For example, in Clark County, census tract boundaries are being redrawn for the 2000 census, and the lead agency for this committee is the City of Las Vegas. Memorandum from Dr. Judson dated May 12, 1998.) Census tracts do not cross county lines. Census tract boundaries are delineated using visible permanent features, insofar as possible, with the intention that they be maintained over a long period of time. Census tracts may be changed by splitting the tract into one or more smaller tracts; the smaller tracts must be exclusive and exhaustive. Census tracts may be combined in areas with substantial population decline. Census tracts may be changed by modifying boundaries to match changes in roads or natural features. See also NRS 218.051(3).

According to the United States Census Bureau, for areas without census tracts, the statistical equivalent of a census tract is a Block Numbering Area (BNA). In 1990, for the first time, BNAs covered all counties that did not have census tracts. Rules for BNAs are parallel to those for census tracts. Thus a BNA can be treated as the equivalent of a census tract for estimation purposes.

The United States Census Bureau defines Block Group (BG) as a cluster of blocks within a census tract or BNA. BGs do not cross the boundary of a census tract or BNA. See also NRS 218.051(2).

The United States Census Bureau defines Block as a small area bounded on all sides both by visible features such as streets, roads, etc., and by invisible features such as county lines, city and town lines, etc. Blocks do not cross the boundary of census tracts or BNAs. See also NRS 218.051(1).

1997;" released March 17, 1998, <http://www.census.gov/population/estimates/county/co-97-1/97C1_32.txt>.²⁸

The Nevada State Demographer, Dean H. Judson, Ph.D., prepared a memorandum dated May 14, 1998, for our office regarding the registered voter method. The basic registered voter method is expressed as: population equals the number of registered voters in the geographical area multiplied by the number of "persons per voter." The "persons per voter" factor fluctuates greatly, and for that reason, Dr. Judson considers the registered voter method to be highly variable. Any attempt to use it at levels useful for redistricting would need to pay careful attention to estimation of the persons per voter factor. Judson 5/14/98 Memorandum at 2.

Another option, if the Commission decides to proceed with redistricting, is to conduct their own count of population using the same type of methodology and definitions used by the U.S. Census Bureau, i.e. a house-to-house survey. Our research shows this method is complex and expensive but would presumably produce figures with a very high degree of accuracy.

Dr. Judson also prepared a Memorandum dated May 5, 1998, for our office with his comments on small area population estimates. A copy of this memorandum is enclosed. Dr. Judson explained that, "Population *estimates* are intended to represent the condition 'on the ground' on a particular date, and incorporate existing data sources heavily, making as few assumptions as possible." Judson 5/5/98 Memorandum at 1. Dr. Judson's memorandum deals solely with "population estimates." *Id.*

Dr. Judson informed us, "The Nevada State Demographer's Office currently produces population estimates for counties, incorporated cities, and unincorporated towns." *Id.* He went on to explain that "Very few organizations produce estimates at any lower level of geography . . . because data sources are very limited at the subcounty level." *Id.* It is Dr. Judson's opinion that "estimates at the block group level of geography (approximately 4 city blocks) or at the census tract level of geography" would be needed for redistricting purposes. Judson 5/5/98 Memorandum at 2.

According to Dr. Judson, "The most common method of estimating the population at the subcounty level is known as the *Housing Unit Method*." *Id.* Using this method, population equals the number of housing units multiplied by the percentage of housing units that are occupied multiplied by the persons per household. To this figure add the group quarters population. *Id.* "Information on each of these can be obtained or reasonably estimated at the subcounty level, albeit with different degrees of error." *Id.* In his 5/5/98 memorandum, Dr. Judson explains each of these components in detail. Judson 5/5/98 Memorandum at 2-3.

Dr. Judson also addresses accuracy for subcounty estimates. Judson 5/5/98 Memorandum at 3. After analyzing three reports on accuracy for subcounty estimates, Dr. Judson concludes, "if census tracts are used as the basis for redistricting efforts, errors in estimation in the range of 10% are common, with errors in the range of 30-50% possible in extreme cases." *Id.*

Clearly, any method of estimating population that the Clark County Commissioners may use for redistricting, if it decides to reapportion before the next census in the year 2000, will be very complicated and must have a very high degree of accuracy. The entire process of redistricting is difficult and requires intensive research that undoubtedly will be extensive. We hope the suggestions we have provided in this opinion will help guide the Commission.

²⁸ The State Demographer estimates the population of Clark County to be 1,192,200 persons. Judson, D., Nevada Population Estimation Method 1997 Annual Estimates and Review of Methodology (March 1998).

CONCLUSION

The cases we analyzed above indicate that in the event the Clark County Commission decides to proceed with redistricting, noncensus population data may be used, but any population data that is used must have a very high degree of accuracy. The best example is the methodology and definitions followed by the United States Census Bureau, i.e. house-to-house surveys that include demographic and economic information, which in all likelihood could pass muster and produce sufficiently accurate data if done properly. Other data may also be considered including voter registration records in combination with other population information, i.e. the "Housing Unit Method" calculations, annual United States Census Bureau information, and direct surveys. Because of the complexity of the entire process of redistricting, the above list is not all inclusive but is intended to provide the Clark County Commission with examples of the type of highly detailed and specific population data that must be used if the Commission decides to redistrict.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 98-16 ANIMALS; CONSERVATION & NATURAL RESOURCES; WILD HORSES:
Amendment to Wild Horse Commission's primary duties should be interpreted to mean the Commission should focus on the preservation of wild horses on federally designated wild horse management areas.

Carson City, June 1, 1998

Mr. Peter G. Morros, Director, Department of Conservation and Natural Resources, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Morros:

This opinion is in response to your question regarding an amendment to [NRS 504.470](#) on the Wild Horse Commission.

QUESTION

How does the 1997 amendment to [NRS 504.470](#), declaring a primary duty of the Commission for the Preservation of Wild Horses (Commission) to preserve viable herds of wild horses on lands federally designated as *sanctuaries*, affect the authority of the commission?

ANALYSIS

The Commission was established after the Governor's Wild Horse Committee issued its report on November 26, 1984. Governor's Wild Horse Committee, Report to the Governor, November 26, 1984, at 1 (Governor's Committee Report). The purpose of the Governor's committee was to determine how funds from the will of Leo Heil should be spent to preserve

wild horses in Nevada.²⁹ *Id.* The committee recommended that a Heil Trust (Trust) be created, but the Trust should not be expended rapidly and should be spent only in Nevada. *Id.* at 1-7. The committee recommended the governor appoint a 3-member committee to oversee the activities of a director. *Id.* at 7-13.

In 1985, the Legislature directed the governor to appoint a three person commission based on the recommendations of the Governor's committee.³⁰ Act of June 10, 1985, ch. 594, § 3, 1985 Nev. Stat. 1887. The Legislature created a trust fund for proceeds from the Heil will and other sources of funds for wild horses, and authorized the Commission to administer the fund.³¹ The primary duty of the Commission was to preserve the herds of wild horses. Eleven directives were drawn from the Governor's committee to direct the Commission on how to accomplish its primary duty. Act of June 10, 1985, ch. 594, §§ 6-8, 1985 Nev. Stat. 1888. The Commission was also empowered to make grants, adopt regulations necessary to further its directives, and enter into agreements with the federal government to conduct research, create a preserve, finance improvements, and apprehend violators of laws regarding wild horses. *Id.*

In 1991, statutes pertaining to the Commission were amended. Act of June 14, 1991, ch. 350, § 1-11, 1991 Nev. Stat. 910-14. The Legislature required state agencies which consult with the Secretary of Interior pursuant to 16 U.S.C.S. 1333(b)(1) (1997) regarding wild horses, to confer with the Commission prior to those consultations. The Legislature augmented the Commission's primary duty by stating the Commission must also "identify programs to maintain the herds in a thriving ecological balance." *Id.*

In 1997, statutes relating to the Commission were amended through S.B. 211. The Commission was placed within the Department of Conservation and Natural Resources (DCNR) and the ability of the Commission's administrator to file grazing appeals was restricted.³² Act of July 16, 1997, ch. 537, §§ 3-5, 1997 Nev. Stat. 2533. The focus of this opinion is on the amendment which states the Commission's primary duties are "to preserve viable herds of wild horses on public lands *designated by the Secretary of Interior as sanctuaries for the protection of wild horses and burros pursuant to 16 U.S.C.S. 1333(a).*" *Id.* at § 6, 1997 Nev. Stat. at 2534-35 (emphasis added). The Commission is directed to do this "within the limitations of the natural resources of those lands and the use of those lands for multiple purposes, and to identify programs for the maintenance of those herds." *Id.* The Commission was also directed to prepare a statewide plan for submission to the Legislature in 1999, describing how it will carry out its statutory obligations and spend the Trust. *Id.* at § 9-11, 1997 Nev. Stat. at 2537. To prepare the plan, the Commission was given \$75,000 and directed to conduct public meetings. *Id.*

A. The Plain Meaning of [NRS 504.470](#).

²⁹ Leo Heil's holographic will contained a residual clause, leaving the residue of his estate "to the State of Nevada for the preservation of wild horses in Nevada."

³⁰ A Research Analyst for the Legislative Counsel Bureau, stated "this bill is a result of the recommendations of a committee appointed by Governor Bryan in November, 1984." *Hearing on S.B. 485 before Senate Committee on Natural Resources*, 1985 Legislative Session, 2 (May 30, 1985).

³¹ The Commission was not authorized to expend funds if the trust principal would go below \$900,000. The Commission was authorized to appoint a director with expertise in issues confronting wild horses and whose duty it was to carry out the policies of the Commission. Act of June 10, 1985, ch. 594, §§ 4-5, 1985 Nev. Stat. 1887-88.

³² The Legislature made the director of the Commission an administrator under the director of DCNR and provided the director of DCNR, not the Commission, with the authority to appoint the commission's administrator and administer the Heil Trust. Act of July 16, 1997, ch. 537, §§ 3-5, 1997 Nev. Stat. 2533. As for appeals, before they can be filed, the director of DCNR must provide his approval and a copy of the protest, petition or appeal must be provided to 1) any person authorized to graze livestock on public land subject to the protest, petition or appeal, 2) the chairman of the county commission in each county containing public land subject to the protest, petition or appeal, and 3) each member of the commission. *Id.*

If the language of a statute is plain and unambiguous, there is no room for construction of its meaning. *Nevada Power Co. v. Public Serv. Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). The words in a statute should be given their plain meaning unless the spirit of the act is violated. *Rodgers v. Rodgers*, [110 Nev. 1370](#), 1373, 887 P.2d 269, 271 (1994).

The plain meaning of amended [NRS 504.470](#) is that a primary duty of the Commission is to preserve viable herds on *sanctuaries* that have been designated by the Secretary of Interior. The Wild Free-Roaming Horse and Burro Act (Act), 16 U.S.C. 1331-1340, was enacted by Congress in 1971.³³ The Act gave the Secretary of Interior the authority to designate and maintain specific ranges on public lands as *sanctuaries* for the protection of wild horses and burros. 16 U.S.C.S. 1333(a) (1997). The Act also mandated that the Secretary manage horses in a manner designed to achieve and maintain a thriving ecological balance on public lands. *Id.* The Secretary uses herd management areas and ranges to fulfill his responsibilities under the Act.³⁴ 43 C.F.R. 4700.0-2 (1997). The Secretary of Interior has not promulgated regulations dealing with *sanctuaries*, and has not created *sanctuaries* in Nevada.³⁵

Since *sanctuaries* do not exist in Nevada, the Commission's duties would be drastically curtailed if the plain meaning on [NRS 504.470](#) were embraced. This office concludes the Legislature could not have intended the plain meaning of [NRS 504.470](#) because the result of the plain meaning would be absurd and would render many other statutes meaningless.

B. Plain Meaning Of [NRS 504.470](#) Leads To Absurd Result

Statutory construction should avoid absurd or unreasonable results. *Alsenz v. Clark Co. School Dist.*, [109 Nev. 1062](#), 1065, 864 P.2d 285, 286-87 (1993); *McCrackin v. Elko County School Dist.*, [103 Nev. 655](#), 658, 747 P.2d 1373, 1375 (1987); *State v. Webster*, [102 Nev. 450](#), 453, 726 P.2d 831, 833 (1986). A statute should not be construed to produce an unreasonable result when another construction will produce a reasonable result. *Breen v. Caesar's Palace*, [102 Nev. 79](#), 82, 715 P.2d 1070, 1073 (1986).

The Commission was created to oversee the Trust for the purpose of preserving wild horses in Nevada, and it retains significant authority for the preservation of wild horses. Nothing from the legislative history of S.B. 211 indicates the Legislature intended to dramatically strip the Commission of its traditional function. Therefore, interpreting amended [NRS 504.470](#) in a manner that would strip the commission of its authority would be absurd. *See State, Dep't of Motor Vehicles & Public Safety v. Lovett*, [110 Nev. 473](#), 477, 874 P.2d 1247, 1250 (1994) (statutes are generally construed with view of promoting, rather than defeating, legislative policy behind them); *State, Dep't of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882, 884 (1988) (statutes must be given reasonable construction with view to promoting rather than defeating legislative policy).

Further, the Heil Will left money to the state for the preservation of wild horses and a Trust was created in which the state acts as trustee.³⁶ [NRS 504.450](#). The language of the will's

³³ Congress found free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West and they should be protected from capture and considered an integral part of the public lands. 16 U.S.C.S. 1331 (1997).

³⁴ Herd management *areas* are established for the maintenance of wild horse and burro herds, by managing herds in those areas with consideration given to the habitat requirements of the herds, the relationship between the herd and other uses of the public and adjacent private lands, and limiting the animals' distribution to herd areas. 43 C.F.R. 4710.3-4710.4 (1997). Wild horse and burro *ranges* may be designated where the range should be managed principally, but not necessarily exclusively, for wild horse and burro herds. *Id.*

³⁵ While the Bureau of Land Management ("BLM") has established a number of *sanctuaries* in the United States, those *sanctuaries* are established on private land, through contract, with the exclusive use of the sanctuary being horse and burro use. These sanctuaries were not established pursuant to the Secretary's authority from the Act.

³⁶ The Commission is responsible for taking any action necessary to further the intent of the trust, and the director of DCNR is responsible for administering the trust. *Id.*; NRS 504.470(1)(k).

residual clause stated expressly that the intent of the bequest was for the preservation of wild horses in Nevada. Since no *sanctuaries* exist in Nevada, a plain meaning interpretation of amended [NRS 504.470](#) would restrict the Commission from taking the action necessary to further the intent of the trust, and the director of DCNR could not administer the Trust for the benefit of wild horses in Nevada. Such restrictions on the state's ability to administer the Trust would subject the state to litigation for failing in its trust obligations.

The plain meaning of amended [NRS 504.470](#) would lead to the absurd result of the Commission being unable to participate in wild horse preservation, and the state being subject to litigation for failing in its trust responsibilities. This office concludes such an interpretation of amended [NRS 504.470](#) is inappropriate because a reasonable interpretation of the amendment is available. See *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court*, [104 Nev. 508](#), 511, 761 P.2d 849, 851 (1988) (interpretation of statute should be reasonable and avoid absurd results).

C. Plain Meaning of [NRS 504.470](#) Would Render Many Other Statutes Meaningless.

A statute should not be interpreted in a fashion that would render another statute nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided. *Rodgers*, 110 Nev. at 1373, 887 P.2d at 271. Statutory interpretation should avoid a reading which would render part of a statute redundant or meaningless when a substantive interpretation of that part can be given. *Board of County Comm'rs Clark County v. White*, [102 Nev. 587](#), 590, 729 P.2d 1347, 1350 (1986); *Board of County Comm'rs Clark County v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983).

The Commission retains directives given to it to carry out its duties, and can adopt regulations to carry out those duties.³⁷ See [NRS 504.470\(1\)\(a\)-\(k\)](#), [NRS 504.470\(2\)\(b\)](#). If the Commission's primary duties were limited to *sanctuaries*, the Commission could not fulfill its directives and its authority to promulgate regulations would be meaningless because *sanctuaries* do not exist in Nevada.

S.B. 211 added a procedure for filing protests, petitions, and appeals by the Commission's administrator, and provided \$75,000 for the commission to prepare a plan. See [NRS 504.460\(3\)](#); Act of July 16, 1997, ch. 537, § 11, 1997 Nev. Stat. 2534, 36. If the Commission's primary duties were limited to *sanctuaries*, the [NRS 504.460\(3\)](#) appeal procedure would be meaningless because no appeals will arise regarding *sanctuaries*, and the plan would be meaningless because it could only focus on *sanctuaries*.

The Commission retains its authority to enter into agreements with the federal government to conduct research, create a range for studying and viewing wild animals, finance improvements to benefit wild horses, and coordinate efforts to prosecute offenders for wild horse crimes. See [NRS 504.480](#). If the Commission's primary duties were limited to *sanctuaries*, the Commission could not enter these agreements, rendering [NRS 504.480](#) meaningless.

The commission retains its right to have other wildlife agencies in the state confer with the commission regarding consultation with the Secretary of Interior when the Secretary prepares wild horse inventories, or determines when removal is necessary, what the appropriate management levels are on public lands, and whether appropriate management levels should be

³⁷ Those directives include 1) promoting the management and protection of wild horses; 2) acting as liaison between the state, the general public and horse protection groups; 3) advising the governor on issues involving wild horses; 4) soliciting and accepting contributions for the trust fund; 5) recommending legislation consistent with federal law; 6) developing and managing programs to study wild horses and their habitat; 7) monitoring the activities of federal, state and military agencies which affect wild horses; 8) participating in programs designed to protect wild horses; 9) developing a plan to educate the public about the activities of the Commission; 10) reporting biannually to the Legislature; and 11) taking any action necessary to fulfill the intent of the Heil bequest. [NRS 504.470\(1\)\(a\)-\(k\)](#).

met through removal, destruction, or other control methods. See [NRS 504.485](#). If the Commission's primary duties were limited to *sanctuaries*, the [NRS 504.485](#) consultation process would be meaningless because state agencies will never consult with the Secretary regarding *sanctuaries*.

This office concludes a plain meaning interpretation of amended [NRS 504.470](#) is inappropriate because it would render the Commission's retained authority meaningless and a separate substantive interpretation is available. *Bd. of County Comm'rs*, 99 Nev. at 744, 670 P.2d at 105 (a reading of legislation should not render any part thereof meaningless, if that part may be given a separate substantive interpretation).

D. Reasonable Interpretation of Amended [NRS 504.470](#).

Given the inappropriate result of the plain meaning of amended [NRS 504.470](#), it is necessary to look beyond the statute to find a reasonable meaning of the amendment. *Breen*, 102 Nev. at 82, 715 P.2d at 1070 (a statute will not be construed to produce an unreasonable result when another construction will produce a reasonable result). S.B. 211 should be construed to give meaning to all of its parts and language. *State ex rel. List v. AAA Auto Leasing*, [93 Nev. 483](#), 568 P.2d 1230 (1977); *Nevada State Personnel Division v. Haskins*, [90 Nev. 425](#), 529 P.2d 795 (1974). Each sentence, phrase, and word should be interpreted to render it meaningful within the context of the purpose of the S.B. 211. *State Gen. Obligation Bond v. Koontz*, [84 Nev. 130](#), 437 P.2d 72 (1968).

The purposes of S.B. 211 were to bring the Commission into DCNR, require the Commission to prepare a plan, tailor the administrator of the commission's ability to object to grazing decisions, and characterize the meaning of preservation.³⁸

1. Legislative History of Sanctuary Language

The first draft of S.B. 211 contained a proposed definition for "management area," defining it as "any area in the state in which wild horses are controlled and managed by the Federal Government pursuant to the provisions of the Wild Free-Roaming Horses and Burros Act." S.B. 211, March 13, 1997, at § 1, pp. 1-2. At the first hearing on S.B. 211, Eureka County proposed amendments to S.B. 211 that included a definition for "management area" as "any area in the state designated by the Secretary of Interior as a *sanctuary* for the protection and preservation of wild horses." *Hearing on S.B. 211 Before Senate Committee on Natural Resources*, 1997 Legislative Session, Exhibit N (May 7, 1997). This appears to be the origin of the *sanctuary* language.

Amendments to S.B. 211 on June 18, 1997, defined preservation as the perpetuation of viable wild horse herds, within Bureau of Land Management delineated wild horse and burro herd areas, at management levels known to achieve a thriving natural ecological balance between the limits of natural resources and multiple use of the public lands. At the second reading of S.B. 211 in the Senate, the language used to define preservation was moved to the explanation of the primary duties of the commission. Senate Daily Journal, June 29, 1997, p. 101.

³⁸ The legislature was clearly concerned with defining preservation. Senate Committee Chairman Dean Rhoads asked Eureka County lobbyist Mike Baughman and Commission Chairman Jackson to define preservation. *Hearing on S.B. 211 Before Senate Committee on Natural Resources*, 1997 Legislative Session, 10, 13 (May 7, 1997). Mr. Baughman and Chairman Jackson agreed to report back to the Committee with definitions of preservation. *Id.* At an Assembly committee hearing on A.B. 645, the committee discussed S.B. 211 and the definition of preservation. *Hearing on A.B. 645 Before Assembly Committee on Natural Resources, Agriculture and Mining*, 1997 Legislative Session, 8-9 (June 26, 1997). Stephanie Licht, representing the Nevada Farm Bureau, urged the Committee to develop a definition of preservation that would provide direction. *Id.*

On July 5, 1997, three days before the end of the legislative session, the second reading of S.B. 211 in the Assembly amended the commission's primary duties by inserting, "on public lands designated by the Secretary of the Interior as *sanctuaries* for the protection of wild horses and burros pursuant to 16 U.S.C. § 1333(a)" Assembly Daily Journal, July 5, 1997, p 55-57. This is the first appearance of the *sanctuary* language in a version of S.B. 211. No testimony or discussions exist in the record to explain why this language was added.³⁹

2. Legislative Intent of Sanctuary Language

It appears the Legislature amended the Commission's primary duties to refine what preservation means. Given that intent, it is essential to examine the context of the primary duties language.

Absent the *sanctuary* term, amended [NRS 504.470](#) stated the Commission's primary duty is to preserve viable herds of wild horses on public lands designated by the Secretary of Interior, at levels known to achieve a thriving natural ecological balance within the limitations of natural resources of those lands and the use of those lands for multiple purposes, and identify programs for the maintenance of those herds. The Legislature intended to direct the Commission to focus on preservation of wild horses on federally designated lands, and to focus on management that achieves a thriving ecological balance given multiple uses and demands for public lands. These three concerns were included in all of the drafts of S.B. 211 before the *sanctuary* language appeared.

The Secretary of Interior uses herd management areas and ranges to manage horses to achieve and maintain a thriving ecological balance on public land, and to manage wild horses while managing lands for multiple uses.⁴⁰ 16 U.S.C.S. 1333(a) (1997); 43 C.F.R. 4700.0-2 (1997). Management areas have been adopted pursuant to the authority of 16 U.S.C.S. 1333(a) (1997), and exist in Nevada.

The Legislature's intent to have the Commission's primary duties focus on federally designated areas, management for a thriving ecology, and the balance of multiple uses of public land would be furthered if amended [NRS 504.470](#) were interpreted to mean the Commission's primary duties are to preserve wild horses on federally designated wild horse management areas. This interpretation also furthers the Legislature's desire to articulate the concept of preservation. Accordingly, this office concludes amended [NRS 504.470](#) was intended to change the Commission's primary duties to preserving wild horses on federally designated wild horse management areas. See *Maine v. Thiboutot*, 88 U.S. 1, 14, 100 S. Ct. 2502, 2509 (1980) (statutes are to be construed not only based upon their words, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed).

CONCLUSION

The plain meaning of amended [NRS 504.470](#) is that the primary duty of the Commission is to preserve viable herds on *sanctuaries* that have been designated by the Secretary of Interior. Since no *sanctuaries* exist in Nevada, this interpretation would lead to the absurd result of the Commission being unable to participate in wild horse preservation, the state being subject to litigation for failing in its trust responsibilities, and would render the Commission's retained

³⁹ On July 6, 1997, the Assembly amendments were read in the Senate, including the change involving *sanctuaries*. Senate Daily Journal, July 5, 1997, p 38-41. After the reading of the amendments, Senator Rhoads made a motion for the Senate to concur in the Assembly amendments. His motion passed, and S.B. 211 was ordered enrolled. *Id.* On July 7, 1997, the legislature adjourned.

⁴⁰ Management areas are used to manage wild horses as an integral *part* of the public lands to keep horse populations *in balance with other uses and the productive capacity of their habitat*. 43 C.F.R. 4700.0-2; 43 C.F.R. 4700.0-6(a) (1997).

authorities meaningless. This office concludes such an interpretation of amended [NRS 504.470](#) is inappropriate because a separate, reasonable interpretation is available.

The Legislature intended to refine the concept of preservation and have the Commission's primary duties focus on federally designated areas, management for a thriving ecology, and the balance of multiple uses of public land. That intent is furthered by interpreting S.B. 211 to direct the Commission to focus on federally designated horse management areas. Accordingly, this office concludes amended [NRS 504.470](#) was intended to change the Commission's primary duties to preserving wild horses on federally designated wild horse management areas.

Given the complexity of this question, and the adoption of the contested language during the closing days of the 69th Legislature, this office strongly urges the Commission to consider requesting clarification of the amendment to [NRS 504.470](#).

FRANKIE SUE DEL PAPA
Attorney General

By: PAUL G. TAGGART
Deputy Attorney General

AGO 98-17 CRIMINAL LAW; JAILS; NYE COUNTY: Juveniles who are certified to stand trial as adults may be housed in the general population of the Nye County Jail. In doing so, Nye County must avoid unconstitutional punishment of pretrial detainees.

Carson City, May 27, 1998

Robert W. Lane, Deputy District Attorney, Office of the Nye County District Attorney, Post Office Box 593, Tonopah, Nevada 89049

Dear Mr Lane:

You have asked this office whether juveniles who have been certified as adults may be housed with the general population of the Nye County jail, or must they be housed in separate facilities. In responding to this inquiry, both federal and state requirements and restrictions are explored.

ANALYSIS

Juveniles who have been certified as adults may legally be housed with the general population of the Nye County Jail.

Under the existing state adult certification statute, the issue of housing in county facilities for juveniles certified as adults is not addressed. [NRS 62.080](#) speaks only to the actual certification process for youths aged 14 and up.⁴¹ Nevertheless, the law is clear that once the certification process is complete, the juveniles become merely children in age only, and are no longer children within the meaning of Nevada law, for the purposes of adjudicating their alleged crime.

⁴¹ This is the new certification law passed in the 1997 Nevada Legislative Session. The prior procedures for certification of minors between the ages of 16 to 18 was specifically repealed during that session.

[NRS 62.020](#)(1) specifically excludes from the definition of a "child" under [NRS chapter 62](#), "a person who is certified for criminal proceedings as an adult pursuant to [NRS 62.080](#) or 62.081."⁴² Therefore, the limited prohibition against housing a "child" (on either a pre- or post-adjudicatory basis) in *any* "police station, lockup, jail, prison or facility where the child has regular contact with any adult convicted of a crime or under arrest and charged with a crime," found at [NRS 62.170](#) (5), does not apply to children certified as adults.⁴³ As such, there is no limitation under state law for the housing of children certified as adults with the general adult jail population in Nye County.

Substantial case law precedent in Nevada supports this interpretation of the law regarding treatment of certified youth. In *In the Matter of Seven Minors*, [99 Nev. 427](#), 664 P.2d 947 (1983), the criteria for adult certification is directly addressed. In its determination, the Nevada Supreme Court was clear that the central point of inquiry at the certification hearing should be whether "the public interest requires that the youth be placed within the jurisdiction of the adult criminal courts." *Id.* at 434.

The court reasoned that "the public interest and safety require that some youths be held accountable as adults for their criminal misconduct and be subjected to controls, punishment, deterrence and retribution found only in the adult criminal justice system. This is the reason for transfer." Moreover, it was crucial to the court that some youth "in the public interest, necessarily have to suffer the consequences of adult prosecution." *Id.* at 433.

The court's plain language indicates that the controls unique to the adult criminal justice system, including the range of possible punishments, the ability to promote future deterrence and the swift retribution elements, are precisely the reasons why certification is appropriate under certain circumstances with select juveniles. Placement of a minor in an adult jail setting, even on a preadjudicatory basis, is central to this philosophy.⁴⁴ Accordingly, the Nevada Supreme Court's ruling would be consistent with any county's desire to co-locate adult and juvenile detainees. If co-location were not contemplated, much of the rationale and effectiveness of such a certification to the adult justice system would be undermined.

The court's directive was even more specific when, in contemplating the fate of minor, Sandra, the court clearly recognized that certification meant she would be facing adult imprisonment. *Id.* at 44. Therefore, there is a clear indication that any post-certification mixing with adult persons in an adult correctional facility is completely appropriate.

⁴² Although beyond the scope of the requested opinion, for the sake of completeness, it is important to note that NRS 62.081 deals with adjudicated delinquents who are escapees from juvenile detention facilities. Under this limited scenario, it would logically follow that juvenile delinquents who escape from such facilities would be reintroduced to the criminal justice system as legal adults for the purposes of adjudicating the escape crime, and would no longer be subject to the strict juvenile restrictions for housing with the adult population found at NRS 62.170(5).

⁴³ To be sure, alleged or adjudicated delinquents can also be housed with the general adult population. In these cases however the prohibition can only be overcome under certain circumstances and guidelines including:

- (a) The child is alleged to be delinquent;
- (b) An alternative Facility is not available; *and*
- (c) The child is separated by sight and sound from any adults who are confined or detained therein.

NRS 62.170(5).

Certifying a minor as an adult simply removes the need for these statutorily created procedural protections.

⁴⁴ This interpretation applies to all elements and stages of the adult criminal justice process. The court did not except out preadjudicatory detainees as deserving special status and shelter from the adult system. This case stands for the proposition that, once certification occurs, the minor is subject to the entire adult system from start to finish, as required by the best interests of public safety and welfare. As stated by the court, "once in a given case transfer is decided upon . . . the youth is no longer presumed to be a child in the eyes of the law and no longer entitled to the grace provided by the Juvenile Court Act in that particular case." *Id.*

In, *Jeremiah B. v. The State of Nevada*, [107 Nev. 924](#), 823 P.2d 883 (1991), the Nevada Supreme Court affirmed an order transferring the case of a 17-year old who was accused of vehicular homicide to the adult system. In its ruling, the court concluded that:

[W]e must . . . all face the bitter truth: Jeremiah was, but for his not meeting the legal criterion for adulthood, an adult at the time he committed these crimes. He has committed an adult crime; and he must face an adult punishment. It is too bad; but this is the truth of the matter . . . Jeremiah will now be treated by our law as an adult and not as a child.

Id. at 931.

Properly interpreting the court's directives, it is apparent that consequences for such a crime merit immediate placement in any and all adult correctional facilities that are part of the adult criminal justice system. This plainly includes county jails and lockups on a pre-adjudicatory basis.

The impact of federal law was also considered in the formulation of this opinion. There exists no current federal law which would limit Nye County's ability to house juveniles certified as adults in the general prison population.⁴⁵

Having acknowledged the ability of Nye County to place children certified as adults in the general jail population, it is important to mention one caveat the Nye County Jail administrators should consider in developing policy pursuant to this opinion. This is particularly critical since the vast majority of the certified individuals we are concerned with for the scope of this opinion will be in the Nye County jail on a preadjudicatory basis.

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), the United States Supreme Court indicated that a state does not have the power to punish a preadjudicatory detainee. In *D.B. et. al. v. Tewksbury*, 545 F. Supp. 896 (D. Ore., 1982), a class of juvenile preadjudicatory detainees challenged Columbia County's ability to confine children to adult jail. In its ruling, the Federal District Court for the District of Oregon cited *Bell* in holding that the county violated the due process rights of the plaintiff class by instituting impermissible pretrial punishments on those juveniles held in an adult correctional facility. According to the court:

Those extraordinary conditions which alone and in combination constitute punishment are:

1. Failure to provide any form of work, exercise, education, recreation or recreational materials.
2. Failure to provide minimal privacy when showering, using toilets, or maintaining feminine hygiene.
3. Placement of intoxicated or drugged children in isolation cells without supervision or medical attention.
4. Placement of younger children in isolated cells as a means of protecting them from older children.
5. Failure to provide adequate staff supervision to protect children from harming themselves and/or other children.
6. Failure to allow contact between children and their families.
7. Failure to provide an adequate diet.

⁴⁵ *The Juvenile Justice Delinquency and Prevention Act*, 42 U.S.C. 5601 (1974) *et. seq.*, prohibits co-location of juveniles with adult offenders for nonfelony offenses and status offenses. See 42 U.S.C. § 5633 (1974). As Nevada certification statute allows certification only for felony offenses, this federal law bears no impact on this opinion.

8. Failure to train staff to be able to meet the psychological needs of confined children.
9. Failure to provide written institutional rules, sanctions for violation of those rules, and a grievance procedure.
10. Failure to provide adequate medical care.

Id.

While these items are technically nonbinding on the counties in the State of Nevada, it is strongly advised that any county that maintains preadjudicatory, certified children in an adult jail, should adhere to this example and provide the things to child inmates not provided in *Tewksbury*. Following these guidelines will have two benefits. First, it will help counties avoid illegal and unconstitutional preadjudication punishment of these minors. Second, these ten items amount to sound risk management practice. If followed carefully, they could serve to reduce any potential liability that the county faces as a result of incarcerating this "vulnerable" population in a dangerous adult jail setting.

CONCLUSION

In summary, housing juvenile offenders who have been certified as adults in the general jail population in Nye County is legally permissible. State law is clear that any protections associated with such a placement found in chapter 62 do not apply to certified juveniles. Moreover, case law supports the contention that once certification occurs, a case is immediately treated like any other adult criminal matter. The best interests and safety of the public so require.

Lastly, it is important to prevent constitutionally impermissible pre-adjudicatory punishment of juveniles certified as adults that are housed in the general jail population. The guidelines set forth in *Tewksbury* should be followed toward that end. These practices are also sound risk management principles and will limit any future liability against counties or other government entities that may arise from the housing of this "vulnerable" child population in adult jails.

FRANKIE SUE DEL PAPA
Attorney General

By: MIKE DREITZER
Deputy Attorney General

AGO 98-18 BOARDS AND COMMISSIONS; NURSES; LICENSES: Applications for renewal of licensure must be received on or before the end of the business day on which authorization to practice expires. If authorization to practice expires on a weekend or holiday, the business day is considered the day after a weekend or holiday.

Carson City, June 11, 1998

Kathy Apple, R.N., M.S., Executive Director, Nevada State Board of Nursing, 1755 East Plumb Lane, Suite 260, Reno, Nevada 89502

Dear Ms. Apple:

You have submitted a request for a written opinion on the interpretation of [NAC 632.192](#) (1), which reads as follows:

Two months before the expiration of each license or certificate, the board will mail to the person authorized to practice as a registered nurse, licensed practical nurse or nursing assistant, at his address of record, a form to apply for the renewal of his license or certificate. The application for renewal must be received in the office of the board on or before the end of the business day on which the authorization to practice expires.

QUESTION

Specifically, you have asked “given that a license or certificate may expire on a weekend or holiday, which business day is considered the deadline? Is it the business day preceding the weekend or holiday, or is it the immediate business day after the weekend or holiday?”

ANALYSIS

The key in answering your question is found in the cited language of [NAC 632.192](#) (1), which refers to the expiration of the authorization to practice. It is well established that an individual may practice until the date his license expires. Since the date of expiration may fall on a nonbusiness day, that person’s license would not be considered expired on the business day preceding a weekend or holiday. It follows then that the business day the authorization to practice expires would necessarily be the day after a weekend or holiday. By analogy, rule 6(a) of the Nevada Rules of Civil Procedure deals with computation of periods of time for civil cases. That rule excludes weekends and nonjudicial days in computing time and indicates that a given time period runs until the next day that is not a Saturday, Sunday, or nonjudicial day. In comparing rule 6(a) with the Nevada State Board of Nursing’s application process it is apparent that the business day referred to in [NAC 632.192](#)(1) is the immediate business day which follows a weekend or holiday. Similarly, [NRS 293.1275](#) provides that if the last day for filing an election document falls on a Saturday, Sunday, or holiday, the time for filing expires on the following business day at 5 p.m.

CONCLUSION

The authorization to practice under an occupational license continues until expiration. When a person’s license to practice is due to expire on a nonbusiness day, the license remains in effect until the next business day. As such, the application deadline for renewal of licensure is the next business day that follows a weekend or holiday.

FRANKIE SUE DEL PAPA
Attorney General

By: KEITH D. MARCHER
Senior Deputy Attorney

General

AGO 98-19 SECRETARY OF STATE; ELECTIONS; CANDIDATES; JUDGES: A candidate who holds office as a judge and is seeking election to another judicial office may use the title “Judge” in conjunction with campaign materials. A candidate who resigned as a judge to seek election in a nonjudicial office may not use the title “Judge” in conjunction with campaign materials. Use of “elect” or “for” in campaign materials removes the implication of incumbency.

Carson City, June 18, 1998

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Mr. Heller:

You have requested an opinion from this office regarding use of the title “Judge” on campaign material.

QUESTION

May a candidate who holds office as a judge in a court of record and who is seeking election to another office, either within or without the judiciary, use the title “Judge” in conjunction with his or her name in campaign materials?

ANALYSIS

In 1989, the Nevada Legislature amended the campaign practices law to include provisions prohibiting the use of the term “reelect” during an election campaign unless the candidate was previously elected to the office, and prohibiting a candidate from indicating that he or she is an incumbent if he or she is not. These provisions were codified as [NRS 294A.330](#) and [294A.340](#) and provide as follows:

A person shall not use the term “reelect” in any material, statement or publication supporting the election of a candidate unless the candidate:

1. Was elected to the identical office with the same district number, if any, in the most recent election to fill that office; and
2. Is serving and has served continuously in that office from the beginning of the term to which the candidate was elected.

[NRS 294A.330.](#)

A person shall not use the name of a candidate in a way that implies that the candidate is the incumbent in office in any material, statement or publication supporting the election of a candidate unless:

1. The candidate is qualified to use the term “reelect” pursuant to [NRS 204A.330](#);
- or
2. The candidate:
 - (a) Was appointed to the identical office with the same district number, if any, after the most recent election to fill that office; and
 - (b) Is serving and has served continuously in that office since the date of appointment.

[NRS 294A.340.](#) These provisions have not been amended since their original enactment in 1989.

Examination of the legislative history A.B. 690, Act of June 23, 1989, ch. 448, 1989 Nev. Stat. 960, reveals that general discussions were held on creating the implication of incumbency by candidates, but the specific question here, use of the title “Judge,” was not addressed. *Hearing on A.B. 690 Before the Assembly Committee on Elections*, 1989 Legislative Session, 7 (May 16, 1989); *Hearing on A.B. 690 Before the Senate Committee on Government Affairs*, 1989 Legislative Session, 13 (June 9, 1989).

In accordance with [NRS 294A.330](#), a person must be holding the identical office either by appointment or through election in order to use the term “reelect” or to otherwise imply

incumbency. It has been the policy of the Secretary of State that use of “elect” or “for” in campaign materials removes the implication of incumbency, e.g. “Elect John Doe — District Court” or “Jane Smith for Governor.”

Your specific inquiry concerns the use of the title “Judge” by candidates who are or were judges and are seeking election to either another judicial office or a nonjudicial office.

“Judge” is defined as including “every judicial officer authorized, alone or with others, to hold or preside over a court of record.” [NRS 193.016](#); 208.045. The Nevada Constitution states in pertinent part, “The Supreme Court, the District Courts, and such other Courts, as the Legislature shall designate, shall be Courts of Record.” Nev. [Const. art. 6, § 8](#). If a person is a duly authorized judicial officer, the person would be permitted to use the title “Judge.” If such a judge seeks election to another judicial office, he or she may use the title “Judge” in campaign material. Unless the judge is seeking election to the identical office with the same district number in which he or she is currently serving, the judge could not use “reelect” in campaign material or otherwise imply incumbency to that office.

Canon 5 of the Code of Judicial Conduct requires a judge to resign from judicial office upon becoming a candidate for a nonjudicial office. In addition, the Nevada Constitution states, “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.” Nev. [Const. art. 6, § 11](#). When a judge resigns from judicial office, he or she is no longer a duly authorized judicial officer and is not permitted to use the title “Judge.” Such a candidate seeking election to a nonjudicial office may not use the title “Judge” in campaign material.

If a former judge, who is a candidate for a nonjudicial office, uses the title “Judge” in his or her campaign material, this could constitute the publication of a “false statement of fact concerning the candidate” in violation of [NRS 294A.345](#). The Nevada Commission on Ethics has jurisdiction over this statute.

CONCLUSION

A candidate who holds office as a judge in a court of record and who is seeking election to another judicial office may use the title “Judge” in conjunction with his or her name in campaign materials. A candidate who resigned as a judge to seek election in a nonjudicial office may not use the title “Judge” in conjunction with his or her name in campaign materials. Use of “elect” or “for” in campaign materials removes the implication of incumbency.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 98-20 COLLECTION AGENCIES; CONTRACTS; INTEREST: If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in [NRS 99.040](#) from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store account as discussed herein. In the case

of open or store accounts, interest may be imposed or awarded only by a court of competent jurisdiction in an action over the debt.

Carson City, June 24, 1998

Burns Baker, Deputy Commissioner, Financial Institutions Division, 406 East Second Street,
Carson City, Nevada 89710

Dear Mr. Baker:

You have asked several questions regarding the authority of collection agencies licensed pursuant to the provisions of [NRS chapter 649](#) to impose and collect interest on accounts assigned to them for collection.

QUESTION ONE

May a collection agency collect interest on a past due debt when the creditor assigning the account has not previously imposed interest?

ANALYSIS

The authority of a collection agency to collect interest must be determined in the context of [NRS 649.375\(2\)](#), which provides:

A collection agency, or its manager, agents or employees, shall not:

2. Collect or attempt to collect any interest, charge, fee or expense incidental to the principal obligation unless:

(a) Any such interest, charge, fee or expense as authorized by law or as agreed to by the parties has been added to the principal of the debt by the creditor before receipt of the item of collection;

(b) Any such interest, charge, fee or expense as authorized by law or as agreed to by the parties has been added to the principal of the debt by the collection agency and described as such in the first written communication with the debtor; or

(c) The interest, charge, fee or expense has been judicially determined as proper and legally due from and chargeable against the debtor.

The statute makes a distinction between interest and other charges that have been added to the principal amount of the debt by the creditor before it has been assigned for collection and interest and other charges that have been added after such assignment. Whenever a collection agency adds interest or some other charge to a debt, it must be described as something separate and apart from the principal amount of the debt.

In addition to this statute, the Fair Debt Collection Practices Act (FDCPA), in section 1692f(1) prohibits “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” A violation of any provision of the FDCPA is considered an act or omission inconsistent with the faithful discharge of the agency’s duties and obligations and will subject the agency to disciplinary action by the Financial Institutions Division. [NRS 649.395\(1\)\(b\)\(2\)](#); [NAC 649.150](#).

Whether granted by agreement or statute, the authority of a collection agency to impose interest depends on the relationship between the creditor and the collection agency with respect to the debt. If the collection agency has *purchased* the account in exchange for a cash payment

to the creditor, it may become the legal and equitable owner of the account. In that case, it would be entitled to enforce whatever rights the creditor had with respect to imposition of interest. In most cases, however, a collection agency receives an assignment of a debt *for collection only* with the creditor to receive payment, and the agency to receive its compensation, only when money is received on the account. In that case, the collection agency/assignee holds legal title to the claim but the creditor/assignor retains the equitable interest. *DeBenedictis v. Hagen*, 890 P.2d 529 (Wash. Ct. App., 1995); *see also* Op. Nev. Atty. Gen. No. 88-5 (May 31, 1988) (creditor holds equitable interest in any judgment obtained by collection agency on its behalf). These authorities also establish that a collection agency collecting on a claim assigned for collection owes a fiduciary duty to and acts as the agent of the creditor.⁴⁶

The extent of the authority granted the collection agency may be expressed in writing or implied from the circumstances. *Nevis v. Fidelity New York, N.A.*, [104 Nev. 576](#), 763 P.2d 345 (1988) (Powers of Attorney). If clearly authorized in writing, the collection agency may collect whatever interest on the debt the creditor would be authorized to impose. The problem occurs, however, when the terms of the collection agreement are silent or ambiguous on the issue of interest. In *Jacobson v. Best Brands, Inc.*, [97 Nev. 390](#) 632 P.2d 1150 (1981), the parties to a guarantee initialed a part of the agreement that deleted language providing for imposition of interest. The court held that statutes that fixed a rate of interest in the absence of an agreement did not apply because the parties had agreed no interest be applied. Similarly, in *Paradise Homes, Inc. v. Central Sur. & Ins. Corp.*, [84 Nev. 109](#), 437 P.2d 78 (1968), the court found that interest would have been due from sometime prior to commencement of legal action, but since the creditor had only sought interest commencing from the date the action was filed, interest would be so limited. In *DeBenedictis v. Hagen*, 890 P.2d 529 at 532-533, the court held that a creditor had the power to terminate a collection agency's authority to collect a debt even if to do so constituted a breach of its agreement with the agency. It is clear from these cases that a collection agency's authority to impose interest, even in cases where interest may properly be imposed, depends on the creditor's intent to authorize the collection of interest. Even in cases where the creditor has arguably authorized the collection agency to impose interest by agreement, it always possesses the power, if not the right, to withdraw or change that authority. In case of doubt regarding a collection agency's authority to collect interest, the creditor/principal has the final say on the issue.

The existence of the agency relationship and the extent of an agent's authority are factual issues that depend on all the circumstances relating to the issue. *Cf. Schlotfeldt v. Charter Hosp. of Las Vegas*, [112 Nev. 42](#), 910 P.2d 271 (1996) (Existence of agency relationship question of fact for the jury). However, it is possible to provide some general guidance this issue. In the absence of evidence of a contrary intent, we believe a collection agency's authority to collect interest on behalf of a creditor may be implied in cases where the creditor has properly imposed interest on the account prior to assigning it for collection. Conversely, a creditor who has not imposed interest on an account assigned for collection should be deemed not to have authorized the collection agency to impose interest on its behalf, unless that intent is clearly evidenced in the collection agreement or by other circumstances.

CONCLUSION TO QUESTION ONE

If clearly authorized in writing, the collection agency may collect whatever interest on the debt the creditor would be authorized to impose. In the absence of evidence of a contrary intent, a collection agency's authority to collect interest on behalf of a creditor may be implied in cases where the creditor has properly imposed interest on the account prior to assigning it for collection. The fact that a creditor had not previously imposed interest on a past due account

⁴⁶ Because the outright purchase of past due debts is quite rare, we shall assume, for purposes of our analysis, that the issue of a collection agency's authority to impose interest arises only in cases where the debt has been assigned for collection only.

indicates an intent not to authorize the collection agency to impose and collect interest, unless a contrary intent is clearly manifested.

QUESTION TWO

Under what circumstances may a collection agency impose interest on a past due account that contains no agreement for the payment of interest?

ANALYSIS

In most cases where a written agreement between the creditor and the debtor providing for the imposition of interest charges on past due balances does not exist, the creditor does not have a contractual basis for imposing interest.⁴⁷ If an agreement exists, or other circumstances indicate the parties to the original debt intended that interest *not* be imposed on past due balances, that agreement or intention must be respected. *Jacobson v. Best Brands, Inc.*, 632 P.2d at 1152. Otherwise, a creditor's right to impose interest in the absence of an agreement depends on the application of [NRS 99.040](#). This statute states:

1. When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, in the following cases:

- (a) Upon contracts, express or implied, other than book accounts.
- (b) Upon the settlement of book or store accounts from the day on which the balance is ascertained.
- (c) Upon money received to the use and benefit of another and detained without his consent.
- (d) Upon wages or salary, if it is unpaid when due, after demand therefor has been made. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

2. The provisions of this section do not apply to money owed:

- (a) For the construction or remodeling of a building pursuant to [NRS 624.325](#); or
- (b) By a contractor to his subcontractor pursuant to [NRS 624.326](#).

In most cases, interest will be authorized, if at all, pursuant to subsections (1)(a) or (b) of the statute.

The Nevada Supreme Court has said, at least in the context of *judicially* awarded interest, that imposition of interest under this statute is mandatory and not subject to the court's discretion. *Clark County v. Mullen*, 172, [175 Nev. 533](#) P.2d 156-158 (1975). This does not, in our opinion, authorize interest where the creditor has specifically elected *not* to impose interest. See *Paradise Homes, Inc. v. Central Sur. & Ins. Corp.*, [84 Nev. 117](#), 437 P.2d at 84 (1968); *Jacobson v. Best Brands, Inc.*, [97 Nev. 393](#), 632 P.2d at 1152. If the creditor has specifically elected not to impose interest, it has presumably not authorized the collection agency to do otherwise.

A review of the Nevada Supreme Court cases discussing [NRS 99.040](#) reveals that, although the statute has existed in some form since the earliest days of Nevada's history, it has

⁴⁷ If the only evidence of an agreement on interest is a statement to that effect appearing on a billing statement sent to the debtor, there is probably no agreement under the statute. *Pacific Pools Const. Co. v. McClain's Concrete, Inc.*, Nev. 557, 706 P.2d 849 (1985).

been given some confusing and seemingly inconsistent interpretations by the court.⁴⁸

The issue of whether the statute in its present form authorizes imposition of interest on open book or store accounts has not been squarely decided by the court. Moreover, court has not even discussed the effect of subsection (1)(b), although it has addressed open accounts in the context of subsection (1)(a).

The first form of the statute was enacted in 1861, and provided:

When there is no express contract, in writing, fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill, or promissory note, or other instrument of writing, on any judgment recovered before any court in this territory, for money lent, *for money due on the settlement of accounts, from the day on which the balance is ascertained*, and for money received to the use of another (emphasis added).

This statute was first construed in *Flannery v. Anderson*, [4 Nev. 437](#) (1868), a suit upon an open account wherein after concluding the trial court improperly allowed interest prior to judgment, the court observed:

This statute does not allow interest on money due on an open account; and it is a legal presumption that it was not the intention of the Legislature to allow it in any cases save those mentioned in the Act. The account here sued on was open and unsettled—hence under this statute no interest is recoverable on it. We know of no good reason why it should not be allowed on all money due on account from the time it becomes payable, except that the Legislature has provided otherwise.

Id. at 443. The language of the initial statute with respect to open accounts is sufficiently similar to [NRS 99.040\(1\)\(b\)](#), in our opinion, to remain persuasive authority for the way the current statute should be interpreted.

In *Skinker v. Clute*, [9 Nev. 342](#) (1874), the court concluded interest prior to judgment was a proper allowance in a suit upon an open account where plaintiff's demand was admitted and the issue at the trial was the correctness of defendant's counterclaim:

The complainant prays for interest upon \$314.30, from June 6, 1873. It would seem that this interest was not allowed, since the verdict is for \$312.93. In the case of *Flannery v. Anderson*, [4 Nev. 437](#), it was decided under Sec. 32 (Comp. Laws) that in the absence of an express contract thereto in writing, interest was not recoverable upon money due upon an open account. The same statute declares that interest shall be allowed upon money due on the settlement of accounts from the day on which the balance is ascertained.

In our view of this case the account was liquidated and the balance ascertained by the admissions of the answer, and interest upon the balance was, therefore, allowable.

Id. at 345.

⁴⁸ In *Paradise Homes, Inc. v. Central Sur. & Ins. Corp.*, 437 P.2d 78, 84 Nev. 109, 112 (1968), the court stated: Allowance of interest incident to civil litigation is a vexations question not only in Nevada, but everywhere. There seems to be little uniformity on the matter in either the statutes, the cases, or the law of the several jurisdictions in this country.

A reading of these two cases suggests that interest on open accounts is allowable only if the balance is “liquidated.” In *Paradise Homes, Inc. v. Central Sur. & Ins. Corp.*, 437 P.2d 78, [84 Nev. 109](#) (1968), however, the court seemed to eschew this rationale, at least in contract actions not involving open accounts. In *Paradise*, [84 Nev. 109 at 115-116](#), the court noted that, although the “liquidated” versus “unliquidated” issue had become the rule in the court’s earlier cases, the court had never done a good job of defining when damages were “liquidated” when deciding whether to allow interest prior to judgment.⁴⁹ The court instead announced a new rule that focused on the phrase “from the time it becomes due.”

It is beyond argument that interest is recoverable as a matter of right in actions upon contracts, express or implied, upon all money from the time it becomes due. Three items must be determined to enable the trial court to make an appropriate award of interest: (1) the rate of interest; (2) the time when it commences to run; and (3) the amount of money to which the rate of interest must be applied. The rate of interest is set by our statute at 7 percent per annum. [NRS 99.040](#). The statute also states that interest runs from the time ‘money becomes due.’

We construe that to be the time when performance was due as resolved by the court upon trial of the cause. The amount of money to which the interest rate will be applied must be determined by the following factors: (1) if the contract breached provides for a definite sum of money, that sum; (2) if the performance called for in the contract, the value of which is stated in money or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, that sum.

Pre-judgment interest shall be allowed on the amount of the debt or money value so determined, after making all the deductions to which the defendant may be entitled (citations omitted). A seemingly different conclusion in any other Nevada case cited above is specifically overruled (emphasis added.)

Id. at 116-117. The emphasized language suggests that prejudgment interest may only be fixed and awarded by a court of law. It is also important to note that *Paradise* specifically limited its holding to cases involving express or implied contracts—not those involving open accounts.

In the case of “book or store accounts,” interest is allowed “[u]pon the settlement of” the account. [NRS 99.040\(1\)\(b\)](#). Even more than the phrase “from the time it becomes due,” this language suggests that interest may not be imposed for any period during which balance on a book or store account is not “liquidated.” Unless the amount and date due is specifically admitted by the debtor, it would appear that judicial action would be necessary to liquidate a book or store account and therefore interest may only be awarded under the statute from the date the judgment is entered. Cases applying [NRS 99.40](#) or its predecessors to open accounts containing no agreement on interest were not specifically overruled by *Paradise*. The rule in those cases appears to be that, unless there is absolutely no dispute as to the amount and time when the book account became due, prejudgment interest under [NRS 99.040](#) is not permitted. Even where permitted, every case has involved a situation where the *court* has imposed or allowed interest. The issue then becomes, what is an “open” book or store account?

In *Checker, Inc. v. Zeman*, [86 Nev. 216](#), 467 P.2d 100 (1970), the alleged debtor claimed that interest could not be awarded under [NRS 99.040](#) because there was no written contract providing for interest and the alleged debt was based on an “open account.” The court, without

⁴⁹ The Nevada Supreme Court has never addressed the issue of whether NRS 99.040 only allows collection of interest if awarded in a judicial action. We believe that, although the statute is ambiguous in this regard, it should be construed as authorizing imposition of interest by creditors and collection agencies prior to litigation over the debt. If construed otherwise, creditors and collection agencies would be encouraged to file actions to establish their right to interest even where the principal amount is undisputed. If a debtor wishes to contest only the obligation to pay interest, he may withhold that amount and litigate that issue in a subsequent action.

disapproving the early *Flannery* case, held that interest was recoverable because the debt was not based on an open account within the meaning of the statute:

Here there was no running account with a changing balance but only one bill given at the end of a period when the work had been performed. Therefore, the services performed by the accountants cannot be labeled a 'book account' which would preclude any interest award for respondent.

Id. at 219. In *De Met v. Zeman*, [87 Nev. 294](#), 486 P.2d 487 (1971), the court held that interest should not have been allowed on what it concluded was an "open" book account:

From the testimony of respondents' witnesses, it appears respondents rendered their statements at two week billing periods, entering the amounts billed in red on their books of account. Thus, it was erroneous for the lower court to allow interest on what respondents themselves alleged to be, and what evidently was, and 'open book account.'

Id. at 298. Although not entirely clear from either the *Checker* or *De Met* cases, the court appears to have addressed only the issue of whether *prejudgment* interest was properly awarded under [NRS 99.040](#).

It is difficult to reconcile the rule announced in cases discussing the so-called "open book" exception to [NRS 99.040\(1\)\(a\)](#) that interest is not allowed on open book accounts with the provision of subsection (1)(b) that so clearly appears to permit interest at the statutory rate on book or store accounts upon the "settlement" of the account from the date the balance is ascertained. Although the statute has been amended substantially since the *Flannery* and *Skinker* cases, the substance of subsection (1)(b) has been present in the statute since its inception. Moreover, the current language of subsection (1)(b) was present in the statute in substantially the same form when the *Checker* and *De Met* cases were decided in accordance with the rules announced in the earlier decisions. If the Nevada Supreme Court has ruled that [NRS 99.040](#) does not allow *the court to* award pre-judgment interest in any case involving an unliquidated open book account, it follows that the statute cannot be read as allowing such interest by a creditor before action on the debt is filed. In our opinion, [NRS 99.040](#) cannot be used as authority for a creditor or a collection agency to impose interest prior to entry of a judgment in a judicial action involving the debt in a case involving an open book account when there is no written agreement setting forth a different rate of interest.

The rationale of the court seems to be that, by definition, an "open account" can never be considered "settled" as required by [NRS 99.040\(1\)\(b\)](#) until a court has done so in a judicial action and therefore no interest may ever be awarded prior to entry of judgment.

Stated differently, in the case of book accounts, the court will look to determine whether the amount due was "liquidated" prior to entry of judgment in determining whether to allow prejudgment interest. Book and store accounts are considered implied contracts that, pursuant to [NRS 99.040\(1\)\(a\)](#) are subject to interest only if authorized by subsection (1)(b). If the account has been "settled" or "liquidated," it is not "open" and apparently an award of prejudgment interest is not precluded. The court has also seemingly defined "book or store accounts" as accounts involving a revolving line of credit with ongoing, changing balances. If an account evidences only a one-time obligation that becomes due at a specific, ascertainable time, it is not considered a "book account" and an award of prejudgment interest is not precluded. This definition of book or store accounts is consistent with decisions from other jurisdictions that discuss open accounts. *See, e.g., Martinez v. Albuquerque Collection Services, Inc.*, 867 F.Supp. 1495, 1509-1510 (D.N.M. 1994).

Unfortunately, the court has still not provided a bright line test to determine whether prejudgment interest should be awarded in book or store accounts. In the absence of such a test, we suggest these guidelines be followed:

1. If the debt is a one time obligation and the “account” that evidences it does not appear to permit ongoing additions to that obligation, it should not be considered a “book or store account” and prejudgment interest may be permitted as in the case of other express or implied contracts. A one time sale of goods or services would appear more likely to fall in this category than an ongoing debtor-creditor relationship such as the provision of medical services on an ongoing basis.

2. If the account has been “settled” or “liquidated” in some manner, prejudgment interest may be allowed. An account should be considered settled or liquidated only if the account has been closed in the sense that the creditor is permitting no additional charges and/or otherwise not subject to dispute as to amount. A closed account balance which a debtor has admitted as to amount, is more likely to be considered settled than an account on which there has been continuing credit and/or debit activity.

3. If an account does not fall into either of the above categories, it should probably be considered an open book or store account on which no prejudgment interest may be awarded.

[NRS 99.040](#) authorizes, in our opinion, the imposition of simple interest only. The distinction between simple interest and compound interest was discussed in *Martinez v. Albuquerque Collection Services, Inc.*, 867 F.Supp. at 1509:

Plaintiff correctly maintains that ACS assessed interest on the Lovelace debt, a sum which included interest charges. The evidence demonstrates that the interest ACS added to the Lovelace debt did not overlap in time with the interest Lovelace charged. In fact, at least one month passed (February 1992) in which neither Lovelace nor ACS assessed interest on the unpaid debt. Nonetheless, when ACS calculated interest on the Lovelace balance (\$1086.74), it did so without first deducting interest already assessed (citation ommitted). This method is an assessment for compound interest. 45 Am.Jur.2d Interest & Usury Sec. 76 (1969) (compound interest is interest computed on a principal balance which includes interest).

CONCLUSION TO QUESTION TWO

A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Otherwise, simple interest may be imposed at the rate established in [NRS 99.040](#) from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store account as discussed herein. In the case of open or store accounts, interest may be imposed or awarded only by a court of competent jurisdiction in an action over the debt.

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E.

WALTHER

Senior Deputy Attorney General

AGO 98-21 JUDGES; CONSTITUTIONAL LAW: A statute requiring a district court judge to approve the bond and sureties of a county treasurer carries a presumption of constitutional validity. There has been no clear showing of a separation of powers violation which would defeat this presumption of the statute's validity.

Carson City, July 23, 1998

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

Dear Mr. Johnson:

You have posed the following question.

QUESTION

Does the requirement set forth within [NRS 249.030](#)(1) that the county treasurer's official bond and sureties be approved by a district court judge violate the constitutional separation of powers provision?

ANALYSIS

The question presented is whether certain requirements of [NRS 249.030](#)(1) are unconstitutional in light of the separation of powers provision set forth in Nev. [Const. art. 3, § 1](#). [NRS 249.030](#) requires a county treasurer to obtain an official bond securing the faithful performance of the treasurer's duties. The language of section 1 of the statute sets forth:

1. The board of county commissioners shall, on or before the 1st Monday in September preceding the election of the county treasurer, and at any other time when the funds are substantially increased, prescribe the amount in which the county treasurer must execute an official bond. The bond and sureties of the county treasurer must, before the bond can be recorded and filed, be approved by a judge of the district court. All persons offered as sureties on the bond may be examined on oath touching their qualifications, and no person can be admitted as surety on any such bond unless he is a resident and freeholder or householder within the state, and is worth in real or personal property, or both, situate in this state, the amount of his undertaking, over and above all sums for which he is already liable, exclusive of property exempt from execution and forced sale.

[NRS 249.030](#)(1).

This language appears to vest at a minimum some authority, and quite possibly a duty, in the district court judges to approve the form of a county treasurer's official bond. The language also appears to vest some authority in district court judges to investigate the qualifications of the sureties for such bonds. These activities appear to be nonjudicial in character and do not fall within the district judges' more traditional role of deciding cases and controversies. *See* Nev. [Const. art. 6, § 6](#). There has been no showing, however, that such acts would diminish existing judicial power or place an undue burden on the courts. We must now review whether such a legislative action delegating this authority or duty to the courts constitutes a separation of powers violation.

Article 3, § 1 of the Nevada Constitution provides:

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

As illustrated by this provision, the state constitution distributes governmental powers into the legislative, executive and judicial departments.

Each department is separate from the others. In addition to the constitutionally expressed powers and functions of each department, each possesses inherent and incidental ministerial powers. It is in this area of ministerial functions of each department where there frequently occurs an overlapping or even a duplication of functions. *Galloway v. Truesdell*, [83 Nev. 13](#), 422 P.2d 237 (1967).

In *Galloway*, the court reviewed a scenario where the Legislature delegated nonjudicial duties to the courts within a statute detailing qualifications for ministers who perform marriages. [NRS 122.070](#), as it read at the time, required district court judges to determine the qualifications of a minister before the minister could receive a certificate to perform marriages. The statute also authorized the courts to conduct investigations regarding the minister's qualifications and to revoke certificates to perform marriages upon a finding of good cause.

In holding that [NRS 122.070](#) violated article 3, § 1, of the Nevada Constitution, the Nevada Supreme Court concluded:

By no stretch of the imagination can the ministerial functions imposed by the statute on District Judges be traced back to the Judicial Power and Judicial Function described above. They are not derived from the basic Judicial Power. District Judges are constitutional officers (Art. 6, Secs. 1, 5 and 6). The statute in question attempts to impose on District Judges non-judicial functions that would change, alter or modify the judicial functions of District Courts and District Judges. (Citations omitted.)

Galloway, 83 Nev. at 31.

The Nevada Supreme Court reviewed another instance in which the Legislature delegated a licensing duty to the courts in the case of *Desert Chrysler-Plymouth v. Chrysler Corp.*, [95 Nev. 640](#), 600 P.2d 1189 (1979). In *Desert Chrysler-Plymouth*, various statutes in [NRS chapter 482](#) set forth a procedure for an existing automobile dealership to challenge the establishment of a new dealership. If the existing automobile dealer filed for injunctive relief, the director of the Department of Motor Vehicles could not issue a license for the new dealership until a court determined that there was good cause for the establishment of the dealership. In concluding the statutes posed a clear violation of the separation of powers provision, the court stated:

In *Galloway v. Truesdell*, [83 Nev. 13](#), 422 P.2d 237 (1967), we held that a statute which delegated to the district courts the obligation of certifying licensed or ordained ministers to perform marriages was unconstitutional because the legislation imposed on the judiciary an administrative duty (licensing) which was not related to a judicial function. (Citation omitted.) Although the licensing function of the court was more conspicuous in the *Galloway* statutory scheme than it is here, the statutes herein involved nonetheless require the district courts

to determine if a license should issue. Since the director of the Department of Motor Vehicles cannot license the new dealership until the district court has ascertained if “good cause” mandates the additional dealer, the court is in reality the licensing entity. Under this scheme the court is performing a pre-licensing fact-finding function rather than resolving an actual case or controversy. The Legislature cannot, using the guise of permitting a party to seek “injunctive relief”, require the courts to perform such a non-judicial function.

Id. at 644.

More recent cases from other jurisdictions have taken additional factors into consideration in addition to tracing the function at hand back to the basic judicial power. In the case of *Mistretta v. U.S.*, 488 U.S. 361 (1989), the Congress created the United States Sentencing Commission as an independent body in the judicial branch. The sentencing commission was vested with the power to promulgate sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses. Federal judges, as well as nonjudges, served on the sentencing commission. In determining a test to use in reviewing the separation of powers question, the court stated:

In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed “tasks that are more properly accomplished by other branches,” *Morrison v. Olson*, 487 U.S. at 680-681, 108 S. Ct., at 2613, and second, that no provision of law “impermissibly threatens the institutional integrity of the Judicial Branch.” *Commodity futures Trading Comm’n v. Schor*, 478 U.S., at 851, 106 S. Ct. at 3258.

Mistretta, 488 U.S. at 383.

The court concluded in *Mistretta* that the placement within the judicial branch of an independent agency charged with the promulgation of sentencing guidelines did not prevent the judicial branch from accomplishing its constitutionally assigned functions.

In the case of *In re D.L.*, 669 A.2d 1172 (Vt. 1995), a statutory inquest procedure was examined under a separation of powers analysis. In the procedure the judge was authorized to carry out several nonadjudicatory acts to assist in the investigative functions involved in the inquest. In finding the statutes to be constitutional, the court stated:

Although the district courts are facing new stresses from caseload growth, we cannot conclude that the inquest responsibility “impermissibly interferes with the judiciary’s core functions.” (Citation omitted.) This follows in part from our determination that the court can refuse to hold an inquest. The statutes contain no deadlines for court action, and the court has no responsibility for post-inquest findings of fact or conclusions of law. We can take judicial notice that inquests are sought only infrequently.

In re D.L., 669 A.2d at 1180.

In the case of *Matter of Estate of Lahr*, 744 P.2d 1267 (Okla. 1987), a statute required that wills or will codicils executed by wards had to be signed in the presence of a district judge. The court found that requiring the judge to be present to witness the signing of a ward’s will was not a burden on the judiciary and did not impair the district judge’s decision making authority in the judge’s adjudicatory functions. Thus, the statutory provision did not violate the separation of powers provisions of the Oklahoma Constitution.

In reviewing [NRS 249.030](#)(1) to determine where it fits within the body of case law described above, we start with the presumption that the statute is constitutional as enacted. A party attacking a statute's validity is faced with a formidable task. In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and the courts will interfere only when the Constitution is clearly violated. Further, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. *Universal Elec., Inc. v. State ex rel. Labor Comm'r*, [109 Nev. 127](#), 847 P.2d 1372 (1993).

It seems difficult to trace the nonadjudicatory act of approving a treasurer's bond back to the basic judicial power. Historically this act was probably assigned to a judge because of the expertise and position of trust possessed by that judicial officer. Conversely, there has been no showing in the materials provided to our office that this nonadjudicatory act will, in any manner, weaken the power of the district court judges or will overburden them with tasks that will reduce time available to decide cases and controversies. Accordingly, we have not found a clear demonstration of unconstitutionality of [NRS 249.030](#)(1). At this time we must presume the statute remains constitutional and does not violate the separation of powers provision set forth within Nev. [Const. art. 3, § 1](#).

CONCLUSION

[NRS 249.030](#)(1) possesses a presumption of constitutional validity. There has been no clear showing to overturn the presumption of constitutional validity of the statute presented within this opinion request. Thus, we do not believe a separation of powers violation exists when a district court judge is called upon to approve the official treasurer's bond and sureties.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney

General

AGO 98-22 COUNTY; LIVESTOCK; PERSHING COUNTY: Counties have authority, pursuant both to specific authority at [NRS 568.359](#), and pursuant to their police powers, to enact ordinances regulating livestock grazing. Pershing County may not categorically declare free-ranging livestock a public nuisance, in absence of a pre-established state or county prohibition of such activity.

Carson City, August 7, 1998

The Honorable Belinda Quilici, District Attorney, Pershing County, Post Office Box 299,
Lovelock, Nevada 89149

Dear Ms. Quilici:

You have requested an opinion of this office regarding the authority of Pershing County (County) to regulate livestock in the County's Grass Valley, which has been generally considered "open range" but has been partially designated an urban area as of June 1989 by Pershing County, Nevada, Ordinance 104 (June 1989). To date, approximately 350 homes have

been constructed in Grass Valley. As a result, a conflict between roaming livestock and residential development has occurred.

You explained that approximately eight years ago, the county passed a resolution requiring fencing of all subdivisions and parcel splits. Some individual civil actions have been commenced against some livestock owners for trespass on private residential property. A petition to close the open range and to transfer grazing rights to the town in the urbanized areas was denied by the county commission in 1993.

A second petition was recently presented to the commission to take some action in favor of the homeowners who have complained of damage to lawns, trees and bailed hay due to grazing occurring without their consent by roaming cattle.

QUESTION ONE

Is the County authorized to regulate livestock on private property in open range areas?

ANALYSIS

Nevada, like most western states, is a “fencing out” state for purposes of establishing civil liability for roaming cattle in open range areas. In other words, owners of livestock are not held liable for damage caused in open range areas unless a legal fence is first erected by the complaining property owner. The operation of this principle is well-defined in numerous decisions from western states. *See, e.g., Chase v. Chase*, [15 Nev. 259](#) (Nev. 1880); *Yager v. Deane*, 853 P.2d 1214, 1217-1218, (Mont. 1993); *Kenney v. Walla Walla County*, 728 P.2d 1066, 1068, (Wash. Ct. App. 1986). *See also Maguire v. Yanke*, 590 P.2d 85, 91 n.7, (Idaho 1978), and cases cited therein.

A discussion of Nevada’s specific legislative scheme governing civil liability for cattle grazing is relevant and necessary to determine whether the state has preempted the field of livestock regulation.

A. State Laws and Preemption

Nevada law has, since 1893, exempted owners of “livestock running at large on the ranges or commons” from civil liability for trespass pursuant to [NRS 568.300](#). *See generally* Op. Nev. Att’y Gen. No. 259 (August 24, 1965). *See also* [NRS 569.450](#), which prohibits an award of damages for “trespass of livestock on *cultivated land* in this state if the land, at the time of the trespass was not enclosed by a legal fence.” (Emphasis supplied.) Also consistent with Nevada’s laws favoring livestock owners, [NRS 568.360](#) exempts the livestock owner from liability for any damages related to the traversing of animals on highways in those areas.

The only exception to the general enclosure rule is found at [NRS 568.340](#), which prohibits livestock being herded or driven onto the “lands or possessory claims of other persons, or at any spring or springs, well or wells, belonging to another, to the damage thereof, or [herding] the same or [permitting] them to be herded within 1 mile of a bona fide home or a bona fide ranchhouse.” A civil remedy exists in these circumstances.

Having established that Nevada law makes Nevada a fencing-out state, it then is necessary to determine the preclusive effect of this law on the County’s ability to regulate livestock. If the Legislature has preempted the field, then counties may not alter the rule unless expressly allowed.

In determining whether the Legislature intends to occupy a particular field to the exclusion of local regulation, it is appropriate to look to the whole purpose and scope of the legislative scheme. Op. Nev. Att’y Gen. 97-19 (June 2, 1997), citing, *Lamb v. Mirin*, [90 Nev. 329](#), 332-33, 526 P.2d 80, 82 (1974). After such review, it is the opinion of this office that the Legislature has not occupied the field of livestock grazing regulation, and that counties therefore are not precluded from regulating in the area.

Relevant authority is contained in the decision of the Idaho Supreme Court in *Benewah County Cattlemen’s Assn. v. Board of County Commissioners*, 668 P.2d 85 (1983). The Idaho court therein distinguished a county’s ability to regulate the activity of cattle running at large as an aspect of its police power, and establishment of rules for civil liability in tort actions. It held that a county ordinance criminally prohibiting cattle running at large on open range and requiring livestock owners to fence cattle in was within the county’s authority and not inconsistent with state law. Of particular importance, the county ordinance expressly disclaimed any purport to affect civil tort liability, and therefore avoided conflict with state statutes creating civil liability only for trespass in designated herd districts. *Id.* at 89-90.

By the same reasoning, a county ordinance carefully drawn to require fencing, but not purporting to establish rules for tort liability would avoid any conflict with Nevada’s statutory scheme. Nevada’s rule at [NRS 568.300\(3\)](#) is not comprehensive, it is only a rule limiting civil liability for trespass. It does not affirmatively create a rule relieving livestock operators from regulation. Thus a carefully circumscribed ordinance would not conflict with the state rule. The conclusion of the Idaho court in *Benewah County Cattlemen’s Assn.* is applicable in Nevada: “in the absence of a state legislative enactment clearly indicating that livestock must be free to roam the lands of [Nevada] uninhibited by the ownership or character of the lands, counties and municipalities may validly exercise their police powers to prohibit such free roaming livestock.” *Id.*

B. Express County Authority.

Having found that the Legislature has not precluded the county from regulating in the area of livestock control, it is next necessary to identify an affirmative grant of authority upon which the county may rely for effecting a regulation. The general rule in this state has long been that a county, as a political subdivision, is limited to those powers expressly granted by the Legislature. *Schweiss v. District Court*, [23 Nev. 226](#), 45 Pac. 289 (1896).

The Legislature has expressly authorized each board of county commissioners to enact and enforce an ordinance or ordinances regulating or prohibiting the running at large and disposal of all kinds of animals pursuant to [NRS 244.359\(1\)\(b\)](#). The statute states: 1. Each board of county commissioners may enact and enforce an ordinance or ordinances: . . . (b) Regulating or prohibiting the running at large and disposal of all kinds of animals.

The scant legislative history for this statute might indicate that it was intended only for control of pet animals in residential areas, based upon its sponsorship by the Humane Society. *See Hearing on S.B. 529 Before the Senate Committee on Federal, State, and Local Governments*, 1973 Legislative Session, ___ (March 30, 1973). However, the statute does not distinguish between open range and urban areas, and it patently applies to “all kinds” of animals. Therefore, it admits of no construction, and the unambiguous nature of the provision permits no resort to legislative history for interpretation. *Nevada Power Co. v. Public Serv. Comm’n*, [102 Nev. 1](#), 4, 711 P.2d 867, 870 (1986). This office concludes that the provision authorizes a local ordinance to control free-roaming livestock in the situation which you present.

C. Police Powers

Counties are expressly empowered to enact and enforce such local police and sanitary ordinances and regulations that are not in conflict with the general laws and regulations of the state pursuant to [NRS 244.357](#). See generally Op. Nev. Att’y Gen. No. 97-19 (1997) (concluding that county had authority to adopt ordinances regulating the placement and testing of wells pursuant to police and zoning powers). The counties’ police powers, granted by the Legislature at [NRS 244.357](#), may be coextensive with those of the state, to the extent they are “not in conflict with or preempted by state law.” Op. Nev. Att’y Gen. No. 92-1 (February 3, 1992). See also Op. Nev. Att’y Gen. No. 97-19 (June 2, 1997) (county authorized to regulate placement and testing of domestic water wells pursuant to police powers and zoning authority); Op. Nev. Att’y Gen. No. 92-1 (February 3, 1992) (county authorized to enact rent control ordinances pursuant to police powers). But see Op. Nev. Att’y Gen. No. 97-24 (September 18, 1997) (power to assess mitigation fees not authorized); Op. Nev. Att’y Gen. No. 85-9 (June 25, 1985) (county hospital not authorized to engage in certain activities).

The Nevada Supreme Court has not required particularized grants of police power in areas of customary local control. In *Kuban v. McGimsey*, [96 Nev. 105](#), 605 P.2d 623 (1980), the court considered whether a statute prohibiting brothels in larger counties evidenced legislative intent to preempt local control over brothels in smaller counties absent an express grant of authority. The court held that the general police powers allowed smaller counties to prohibit brothels, reasoning that prostitution had historically been a matter of local concern.

Likewise, the court in *Ex Parte Sloan*, [47 Nev. 109](#), 217 P. 233 (1923), upheld the City of Reno’s authority to regulate the sale of liquor under the general welfare provision contained in [NRS 244.357](#), notwithstanding the absence of specific authority to regulate in that area.

It is indisputable that control of livestock grazing falls within the police powers of the state. See *Ansolabehere v. Laborde*, [73 Nev. 93](#), 99, 310 P.2d 842 (1957) (citing “numerous cases sustaining the right of the state in an exercise of its police powers to make reasonable regulations as to the grazing of livestock”). It furthermore appears that such regulation is legitimately a matter of local control. The Idaho Supreme Court in *Benewah County*, 668 P.2d at 88, found that control of grazing or ranging livestock was within the customary powers of the counties, and subject to local police power regulation. The court identified only three restrictions on the exercise of this regulatory authority: (1) the ordinance or regulation must be confined to the geographical limits of the governmental body enacting the same; (2) it must not be in conflict with other general laws of the state; and (3) it must not be an unreasonable or arbitrary enactment. *Id.*

The decision in *Benewah* includes reference to a lower court finding that livestock running at large in the county created serious and persistent problems for the county and its inhabitants by polluting water sources, damaging or destroying crops, hay, fences and gardens, injuring persons and vehicles on highways, and by causing soil erosion and plant regeneration. *Id.* at 87. These circumstances indicate the strong local effects of grazing, which in turn justify the conclusion that grazing is a matter subject to local regulation. On the basis of this, we conclude that counties and municipalities may validly exercise their police powers to prohibit such free roaming livestock. *Id.* at 90.

Legislative acknowledgment appears in [NRS 568.330](#) of county authority to control livestock grazing, and this serves to reinforce the foregoing conclusion. Subsection 1 of the statute makes livestock grazing unlawful where the county has designated an area unsuitable for grazing because of proximity to water sources for municipal, drinking or domestic uses. Then section 2 limits application of the first subsection in three circumstances, including “livestock running at large upon the open range, unless by county ordinance any board of county commissioners has provided otherwise in the case of the county concerned.” [NRS 568.330\(2\)\(b\)](#) (emphasis added). This inferential legislative reference to county authority is consistent with

the principle that local governments have police power authority to control the manner of livestock grazing.

CONCLUSION TO QUESTION ONE

The laws pertaining to livestock roaming or grazing on private property of another limit civil remedies for livestock trespass, but they do not preempt county authority to otherwise regulate livestock grazing. Counties have authority, pursuant both to specific authority at [NRS 568.359](#), and pursuant to their police powers, to enact ordinances regulating livestock grazing.

QUESTION TWO

May the County influence the designation of open range?

ANALYSIS

The significance of your second question appears based upon a presumption that, by altering the open range designation of an area, the county might thereby also change the attendant fencing-out requirement. In fact, however, it appears the fencing-out requirement is not dependent upon an official or legal designation of open range.

The term “open range” is defined by statute in only one place, and for a limited purpose:

As used in [NRS 568.360](#) and [568.370](#), unless the context otherwise requires, “open range” means all unenclosed land outside of cities and towns upon which cattle, sheep or other domestic animals by custom, license, lease or permit are grazed or permitted to roam.

[NRS 568.355](#). The limited purpose of the referenced statutory sections is to define liability of a person for driving grazing livestock of another from the range, and to fix and limit liability for livestock on highways in open range areas. The provisions do not purport to define or delimit the fencing-out rule in state law. That rule arises instead from the customary use of the range, and from statutes and case law which have developed around that customary use. *See generally Chase v. Chase*, [15 Nev. 259](#), 264 (1880) (“[t]he entire legislation of this state is . . . ‘wholly inconsistent with the doctrine that it is unlawful for the owner of animals to allow them to run at large, and that he is liable in damages for a trespass in case they go upon the uninclosed grounds of another’”). Usage of the term “open range” in describing the fencing-out rule invokes a more generic and lay connotation which is not fixed by official designation. As a result, the answer to your second question is contained within the answer to the first: the County may regulate the ranging of livestock, and as a consequence may affect the open nature of range use.⁵⁰

CONCLUSION TO QUESTION TWO

The County has authority to regulate ranging of livestock, and therefore may influence the open nature of range use, although this does not involve alteration of any legal or official designation of the range.

QUESTION THREE

⁵⁰ This opinion makes no conclusion about county authority vis-à-vis federal land management authority to regulate grazing on federally owned lands.

May the County designate trespassing livestock a public nuisance in certain circumstances?

ANALYSIS

The County is authorized by [NRS 244.360](#) to abate a public nuisance upon a complaint filed with the Board of County Commissioners. The County may by resolution declare an activity to be a public nuisance if it comes within the definition contained in [NRS 40.140](#).⁵¹ [NRS 244.360](#)(1). Your question is whether the County may, pursuant to this authority, prohibit unrestricted livestock grazing.

It is the opinion of this office that, absent a legal prohibition of free-ranging livestock, Nevada law will not permit categorical classification of such activity as a public nuisance. Nothing which the law itself authorizes can be declared a public nuisance. *Home Sales, Inc. v. City of North Myrtle Beach*, 382 S.E.2d 463 (S.C. 1989). This rule has been applied specifically in the case of ranging livestock in a western state. *See Montana v. Finley*, 738 P.2d 497 (Mont. 1987). Since Nevada law clearly recognizes open range use as part of the livestock custom in the state, *see Chase v. Chase*, any effort to declare such activity a public nuisance is irreconcilable with stated legislative support for the livestock industry. *See also Williams Estate v. Nevada Wonder Mining Co.*, [45 Nev. 25](#), 32, 196 Pac. 844 (1921) (livestock operators “may, and in the great majority of cases do, lawfully permit their stock to roam at will and graze over the public ranges, and also over the unfenced land of private owners”) (emphasis added). *Cf. NRS 561.015*(2) (setting forth legislative intent to promote the “encouragement, advancement and protection of the livestock and agricultural industries of the State of Nevada”).⁵²

CONCLUSION TO QUESTION THREE

Nevada law does not authorize the County to categorically declare free-ranging livestock a public nuisance, in absence of a pre-established state or county prohibition of such activity.

FRANKIE SUE DEL PAPA
Attorney General

By: JEAN M. MISCHER
Deputy Attorney General

AGO 98-23 CITATIONS, MISDEMEANORS, LICENSES, ARRESTS, IDENTIFICATION, INVESTIGATIONS: Senior license officers who issue misdemeanor citations for business license violations may take individuals before magistrates for failure to sign citations. Persons may not be required to identify themselves to senior license officers during the course of lawful investigations.

Carson City, August 25, 1998

⁵¹ [A]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance, and the subject of an action.

⁵² This conclusion does not rule out private civil remedies where an operator overstocks his range or otherwise conducts livestock grazing activities in an improper manner. *See, e.g.*, NRS 568.260 and 568.300(2). Nor does it preclude county authority to evaluate specific grazing practices of individual operators under the nuisance provisions, on a case-by-case basis.

Liza Conroy, Assistant City Attorney, City of Henderson, 240 Water Street, Henderson, Nevada 89015

Dear Ms. Conroy:

You have requested an Attorney General's opinion on the following questions: 1) Can a senior license officer who issues misdemeanor citations for violations of title 4 of the Henderson Municipal Code arrest an individual for failure to sign a citation issued for a business license violation; and 2) When may an individual be required to identify him or herself to a senior license officer during the course of a lawful investigation?

QUESTION ONE

Can a senior license officer who issues misdemeanor citations for violations of title 4 of the Henderson Municipal Code arrest an individual for failure to sign a citation issued for a business license violation?

ANALYSIS

Pursuant to [NRS 171.17751](#), county commissioners are authorized to designate inspectors to write citations:

1. Any board of county commissioners or governing body of a city may designate the chief officer of the organized fire department or any employees designated by him, and certain of its inspectors of solid waste management, building, housing and licensing inspectors, zoning enforcement officers, parking enforcement officers, animal control officers, traffic engineers, and marshals and park rangers of units of specialized law enforcement established pursuant to [NRS 280.125](#), to prepare, sign and serve written citations on persons accused of violating a county or city ordinance.

2. The state health officer and the health officer of each county, district and city may designate certain of his employees to prepare, sign and serve written citations on persons accused of violating any law, ordinance or regulation of a board of health that relates to public health.

In Henderson, the senior licensing officers are officials charged with issuing business licenses and enforcing title 4 of the Municipal City Code of Henderson. The Municipal City Code of Henderson provides such officials with enforcement powers including the power to arrest and the power to issue citations. Section 4.04200 states, in pertinent part:

(a) It shall be the duty of the Director, his agents, and all officials charged with the issuance of licenses, and/or those with police powers, to enforce the provisions of this title.

(b) Such enforcement power shall include, but not be limited to, the power to *issue citations*, serve notices of correction, *make arrests*, issue orders of suspension or limitation, prohibit unlawful business activities, prevent activities in contravention of the licensing ordinances, require findings of suitability, and all other duties relating to licensing enforcement as provided in this Title. [Emphasis added.]

[NRS 171.1771](#) further provides authority for peace officers to take any person who is detained for a misdemeanor violation to the magistrate if the peace officer has grounds to believe that the person will disregard a written notice to appear. However, [NRS 171.1771](#) applies only to peace officers:

Whenever any person is detained by a peace officer for any violation of a county, city or town ordinance or a state law which is punishable as a misdemeanor and he is not required to be taken before a magistrate, the person shall, in the discretion of the peace officer, either be given a misdemeanor citation, or be taken without unnecessary delay before the proper magistrate. He shall be taken before the magistrate when he does not furnish satisfactory evidence of identity or when the peace officer has reasonable and probable grounds to believe he will disregard a written promise to appear in court.

As senior licensing officers are not peace officers, the authority to take a person before the magistrate for failure to sign a citation derives from the Henderson Municipal Code, quoted above, and [NRS 171.177\(4\)](#), which provides:

Except as otherwise provided in [NRS 171.122](#) and [171.178](#), whenever any person is detained by a peace officer for any violation of a county, city or town ordinance or a state law which is punishable as a misdemeanor, he must be taken without unnecessary delay before the proper magistrate, as specified in [NRS 171.178](#) and [171.184](#), in the following cases:

1. When the person demands an immediate appearance before a magistrate;
2. When the person is detained pursuant to a warrant for his arrest;
3. When the person is arrested by a peace officer; or
4. In any other event when the person is issued a misdemeanor citation by an *authorized person* and refuses to give his written promise to appear in court as provided by [NRS 171.1773](#).⁵³ [Emphasis added.]

CONCLUSION TO QUESTION ONE

It is the opinion of this office that a senior license officer who issues misdemeanor citations for violations of title 4 of the Henderson Municipal Code may take an individual before the magistrate for failure to sign a citation for a business license violation.

While senior licensing officers have not acquired peace officer status, they are clearly an authorized person pursuant to [NRS 171.177\(4\)](#). As an authorized person with the authority to issue citations and make arrests within the specifics of title 4 of the Municipal Code of Henderson, there is authority for bringing a person before the magistrate if he refuses to give his written promise to appear.

QUESTION TWO

When may an individual be required to identify him or herself to a senior license officer during the course of a lawful investigation?

53 NRS 171.1773

1. Whenever a person is detained by a peace officer for any violation of a county, city or town ordinance or a state law which is punishable as a misdemeanor and he is not taken before a magistrate as required or permitted by NRS 171.177, 171.1771 or 171.1772, the peace officer may prepare a written misdemeanor citation in the form of a complaint issuing in the name of "The State of Nevada" or in the name of the respective county, city or town, containing a notice to appear in court, the name and address of the person, the state registration number of his vehicle, if any, the offense charged, including a brief description of the offense and the NRS or ordinance citation, the time when and place where the person is required to appear in court, and such other pertinent information as may be necessary. The citation must be signed by the peace officer.

ANALYSIS

The statutory authority for detention applies to peace officers and extends the authority to demand identification only under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

[NRS 171.123](#) provides that:

1. Any peace officer may detain any person whom the officer encounters under circumstance which reasonably indicate that the person has committed, is committing or is about to commit a crime.
2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of his parole or probation.
3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person was arrested.

CONCLUSION TO QUESTION TWO

It is the opinion of this office that a person may not be required to identify him or herself to a senior license officer during the course of a lawful investigation. Neither the Nevada Revised Statutes nor the city codes allow detention or ascertainment of identification by persons other than peace officers. Thus, a person does not have to identify himself to a senior licensing officer. However, a senior licensing officer whose request for identification is denied, may solicit the assistance of a police officer or other law enforcement with peace officer status in appropriate circumstances.

FRANKIE SUE DEL PAPA
Attorney General

By: RONDA CLIFTON
Deputy Attorney General

AGO 98-24 CONTROLLER; ESCHEAT: The estates of intestate decedents leaving no heirs escheat to the state for educational purposes. Upon the entry of a decree of distribution or judgment of escheat, the estate must be transferred to the state immediately to be held in trust within the escheated estate fund. However, escheat is not final until the 6-year limitations period set forth in [NRS 154.120](#) has passed and the estate is transferred into the state permanent school fund pursuant to [NRS 154.115\(3\)\(c\)](#).

Carson City, August 26, 1998

Mr. Darrel Daines, State Controller, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Daines:

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

QUESTION

When does property escheat to the State of Nevada?

ANALYSIS

The escheat of property to the state was previously examined in Op. Nev. Att’y Gen. 387 (February 20, 1967): “The English common law provided for the escheat of land, upon the failure of heirs, to the lord of the fee or to the king in the case of crown lands . . . the escheat of general property of Nevada domiciliaries is provided for in [NRS 134.020](#) and [154.010](#).” See also *In re Estate of Sticknoth*, [7 Nev. 223](#), 230 (1872) (“Escheated estates go to the state simply because no other owner can be found—because no man has a better right to them than any other man, nor so good a right as the state, the ultimate heir in trust for all the people”); 27A Am.Jur.2d Escheat § 1 (1996); 30A C.J.S. Escheat § 2 (1992).

[NRS 134.120](#) provides that “[I]f the intestate shall leave no husband, or wife, or kindred, the estate shall escheat to the state for educational purposes.” [NRS 154.010](#) states:

Estates shall escheat to and be vested in the State of Nevada for educational purposes if any person dies or has died, within this state, seised of any real or personal estate, and leaving no heirs, representatives, devisees or legatees capable of inheriting or holding the same, and in all cases where there is no owner of such estate capable of holding the same.

Only estates which are subject to the jurisdiction of Nevada courts may escheat to the state. [NRS 136.010](#). See also *Bergeron v. Loeb*, [100 Nev. 54](#), 58-9, 675 P.2d 397, 400-1 (1984) (probate in Nevada is in the nature of an “in rem” proceeding), *cert. denied* 469 U.S. 1212, 105 S.Ct. 1182, 84 L.Ed.2d 330 (1985). Statutory provisions mandating the expenditure of all escheated property for educational purposes have their basis in the Nevada Constitution. “All estates that escheat to the state . . . and the proceeds derived from [same] . . . are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses.” Nev. [Const. art. 11, § 3](#).

Public administrators are charged with the statutory duty of administering escheatable estates within their respective counties. See generally [NRS chapter 253](#); see also Op. Nev. Att’y Gen. 116 (December 18, 1959); 31 Am.Jur.2d Executors and Administrators § 1214-1221 (1998); 34 C.J.S. Executors and Administrators § 1052 (1998). Public administrators execute an official bond for the faithful performance of their duties ([NRS 253.020](#)) and are fiduciaries ([NRS 162.020](#)(1)(b)) required to use reasonable diligence in administering escheatable estates ([NRS 143.035](#)(1)). See also *Bergeron*, 100 Nev. at 57, 675 P.2d at 399-400 (“The entire statutory scheme set out in [NRS] title 12 demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedents' estates”).

In the discharge of their official responsibilities public administrators must render a full account of their administration of each escheatable estate and petition the court for a final distribution thereof. [NRS 150.080](#); 150.280; 151.080. Thereafter public administrators must take action as directed by the court’s decree of distribution and [NRS 151.110](#):

1. Where the accounts of an executor or administrator have been settled and a decree for the distribution of the estate made by the court, the executor or administrator shall, without any unnecessary delay, distribute the estate remaining in his hands as directed by the decree.

2. In the decree, the court shall name the persons and the proportion or parts to which each shall be entitled, and such person shall have the right to demand and recover his or her respective share from the executor or administrator, or any other person having the same in possession.

See also Breckenridge v. Andrews, [88 Nev. 520](#), 525 501 P.2d 657, 660 (1972) (decree of distribution has force and effect of final judgment); 31 Am.Jur.2d Executors and Administrators § 1095 (1998); 34 C.J.S. Executors and Administrators § 529 (1998). Once an escheatable estate has been fully administered in accordance with the decree of final distribution, a public administrator may apply to the court for a decree discharging him or her from any further liability. [NRS 151.230\(1\)](#).

In addition to the escheat of property upon final distribution of an intestate decedent's estate, the attorney general shall, upon receipt of information that any real or personal property has become escheatable to the state, appear in district court of the county where any portion of the estate is situated to obtain an order to "show cause why the estate should not vest in the State of Nevada." [NRS 154.020\(1\)](#); [NRS 154.030\(1\)](#).

The court may appoint a receiver pursuant to [NRS 154.040](#) to manage any real or personal property until title is settled. *See Fullerton v. Second Judicial Dist. Court*, [111 Nev. 391](#), 399, 892 P.2d 935, 940-41 (1995); *Lynn v. Ingalls*, [100 Nev. 115](#), 119, 676 P.2d 797, 800-01 (1984); *see also* 66 Am.Jur.2d Receivers §§ 184-85 (1994); 75 C.J.S. Receivers §§ 104, 171 (1986). The receiver is a fiduciary who must account in equity for all action taken pursuant to the appointment. [NRS 162.020\(1\)\(b\)](#); *In re Niles*, 106 F.3d 1456, 1461-62 (9th Cir. 1997); *see also* 1 Am.Jur.2d Accounts and Accountings § 55 (1994); 1A C.J.S. Accounting § 25 (1985).

[NRS 154.070](#) provides that after appropriate notice and hearing, the court may enter judgment that the property be escheated to the state. The statutory procedure set forth in [NRS 154.020](#) to [154.070](#), inclusive, may apply years after an intestate's death, subject to the applicable statute of limitations.

Any money escheating to the state must be immediately paid into the state treasury and held in trust within the escheated estate fund pursuant to [NRS 154.140](#). Real or personal property escheating to the state must be disposed of in accordance with [NRS 154.080](#) and [NRS 154.105](#), respectively, and the proceeds paid into the state treasury for credit to the escheated estate fund.

[NRS 154.120](#) establishes a six-year limitation period within which any person may initiate proceedings to recover property held in trust within the state's escheated estate fund:

1. If, within 6 years after any judgment escheating property to the state, any person claims any money or any real or personal property vested in the state by the judgment, the person may file a petition in the district court of Carson City, stating the nature of the claim, with an appropriate prayer for the relief demanded.

...

7. All persons, except infants and persons of unsound mind, who fail to appear and file their petitions within the time limited in subsection 1, are barred forever. Infants and persons of unsound mind have the right to appear and file their petitions at any time within 5 years after their respective disabilities are removed.

The controller's statutory responsibilities in accounting for escheated property are set forth in [NRS 154.115](#), which provides that the controller shall:

1. Keep a true account of all money paid into the state treasury for credit to the fund for escheated estates and of all real and personal property vested in the state by escheat.
2. Account separately for the proportionate share of interest earned on the money in the fund for escheated estates and credit an amount equal to that interest to the fund.
3. Transfer:
 - (a) All of the interest earned on the money in the fund for escheated estates;
 - (b) All income of any kind which is earned on any real or personal property vested in the state by escheat; and
 - (c) All estates which are not claimed within the period fixed by [NRS 154.120](#), to the state permanent school fund at least annually.

Consequently, escheat is not final until the estate is transferred into the state permanent school fund pursuant to [NRS 154.115\(3\)\(c\)](#). See 27A Am.Jur.2d Escheat § 18 (1996) (“Where state statutes provide for a period of time within which a claim to escheated property must be made, the state holds the property or its proceeds in trust for the rightful owner until the statutory time has expired”); 30A C.J.S. Escheat § 21 (1992) (“Where under the controlling statute escheat is not complete until lapse of a specified period without the appearance of a claimant, title does not vest absolutely and unconditionally in the state until lapse of the statutory time”).

CONCLUSION

The estates of intestate decedents leaving no heirs escheat to the state for educational purposes. Upon the entry of a decree of distribution or judgment of escheat, the estate must be transferred to the state immediately to be held in trust within the escheated estate fund. However, escheat is not final until the six-year limitations period set forth in [NRS 154.120](#) has passed and the estate is transferred into the state permanent school fund pursuant to [NRS 154.115\(3\)\(c\)](#).

FRANKIE SUE DEL PAPA
Attorney General

By: BRETT KANDT
Deputy Attorney General

AGO 98-25 SCHOOL DISTRICTS; MOTOR VEHICLES; PRIVATE SCHOOLS: The 11 to 15 person van may be used by private or public schools to transport students to extra curricular activities only under certain circumstances. The words “regularly operated for the transportation of children” in [NRS 484.148](#) does not mean “operated daily for the transportation of children.”

Carson City, September 3, 1998

Dr. Keith Rheault, Deputy Superintendent, Instructional, Research and Evaluative Services,
Department of Education, 700 East Fifth Street, Carson City, Nevada 89701-5096

Dear Dr. Rheault:

You have asked the Attorney General for an opinion regarding numerous issues raised by private and public schools within Nevada concerning use of passenger vans designed to carry 11

to 15 persons to transport pupils for school-related activities. You have asked the following questions:

QUESTION ONE

May a public or private school legally use vans designed to carry 11 to 15 persons that are owned or leased by a private school or public school district to transport students to school-related events on a less than regular basis if the van does not meet school bus standards pursuant to the State Board of Education regulations regarding school buses?

ANALYSIS

A board of trustees of a school district may permit school buses or vehicles belonging to school districts to be used for the transportation of public school students to and from interscholastic contests, school festivals, and other activities properly a part of a school program. The use of the school buses or other vehicles belonging to the school district is governed by the regulations of the board of trustees provided they are not in conflict with regulations of the State Board of Education. [NRS 392.360\(1\) & \(2\)](#). Thus, the statutes contemplate that a school district may use either school buses or other vehicles to transport students to the extracurricular activities. However, if it is a “school bus,” it must meet the standards of the state board regulations.

The answer to your question focuses on the definition of “school bus” and whether an 11 to 15 person van fits within that definition. The education chapters of the Nevada Revised Statutes do not define a school bus. However, state law defines a school bus in the chapters of the Nevada Revised Statutes related to traffic safety and driver’s licenses, and for purposes of this opinion we adopt that definition..

1. “School bus” means every motor vehicle owned by or under the control of a public or governmental agency or a private school and *regularly operated for the transportation of children to or from school or a school activity* or privately owned and regularly operated for compensation for the transportation of children to or from school or a school activity.
2. “School bus” does not include a passenger car operated under a contract to transport children to and from school, a common carrier or commercial vehicle under the jurisdiction of the Surface Transportation Board or the transportation services authority when such vehicle is operated in the regular conduct of its business in interstate or intrastate commerce within the State of Nevada (emphasis added).

[NRS 484.148.](#)

At the threshold, the definition of school bus applies to “every motor vehicle” used as described that is not a common carrier and not a passenger car. A passenger car is defined in [NRS 484.101](#) as “every motor vehicle, except motorcycles, power cycles, and motor-driven cycles, designed for carrying 10 passengers or less and used for the transportation of persons.” The 11 to 15 person van owned or operated by the school district or private school cannot be considered a passenger car and therefore is not an exception to the definition of school bus.

Your question parenthetically implies that “regularly used for” means used every day. The statutory language is “regularly operated for the transportation of children to or from a school activity” “Regularly” is defined as “occurring at fixed intervals; periodic.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1521 (3d ed. 1992). A bus used daily would be used at fixed intervals, but a less frequent use could also be a use occurring at

fixed intervals. For example, if the van is operated to transport student team members every other Friday to a game or meet it is “regularly used” for the transportation of students. It is immaterial that the individual student being transported changes or the nature of the sporting event changes from time to time provided that the use is periodic or occurs at fixed intervals. However, if the van was regularly operated to transport faculty or parents to school-related events, it would not be a school bus even if pressed into service for the transportation of students occasionally.⁵⁴

CONCLUSION TO QUESTION ONE

The 11 to 15 person van may be used by private or public schools to transport students to school-related events provided that such use is not the regular operation of the vehicle. Whether the vehicle is regularly operated for that use is not measured by whether it occurs on a daily basis.

QUESTION TWO

May public or private schools legally use passenger vans to transport students to and from school related activities by contracting with a common motor carrier rented by the school or the public school district as authorized by [NRS 392.330](#)?

ANALYSIS

The answer to the question is yes. [NRS 392.330](#) authorizes boards of trustees of school districts to arrange and pay for transportation provided by a common motor carrier holding a certificate from the transportation services authority. Of course, [NRS 392.330](#) is not relevant to the expenditure of funds by the private school. [NRS 392.330](#) does not override the threshold considerations of whether the transportation provided must be in a vehicle that meets school bus safety standards. However, generally, the common motor carrier’s service to the school or school district will fit within the exception to the definition of school bus found in [NRS 484.148\(2\)](#).

Subsection 2 of [NRS 484.148](#) defines what is *not* a school bus. That definition excludes a common carrier vehicle under the jurisdiction of the Surface Transportation Board or the Transportation Services Authority when such vehicle is operated in the regular conduct of its business in interstate or intrastate commerce within the State of Nevada.

It is within the regular conduct of its business for a common motor carrier to contract for charter service or special service, provided the carrier has the requisite license or permits. [NAC 706.353](#) and [NAC 706.232](#). Therefore, a common motor carrier that provided a passenger van to transport the students as a charter service or special service would not be providing a “school bus.” The van it provides would not have to meet school bus safety standards. We caution that there are proscriptions in regulations to chapter 706 of the Nevada Revised Statutes governing charter and special service that must be followed. The transportation of the students cannot be so frequent as to constitute a “regularly scheduled route or service” and remain a permissible charter service. See [NAC 706.353](#).

⁵⁴ In an analogous question this office opined that if a vehicle is not regularly operated for the transportation of children to or from school activities it is not defined as a school bus. We expressed no opinion regarding whether less than daily operation would fit within the term “regularly operated.” See Letter opinion dated March 17, 1978, to John R. Gamble.

Your question also asks if there is a different conclusion if the van provided by the common carrier is provided without charge. Section 1 of [NRS 484.148](#) describes a “school bus” as a motor vehicle privately owned and regularly operated *for compensation* for the transportation of children to and from school and school-related activities. If the transportation is without compensation, the definition does not apply. However, the result is the same whether or not there is compensation. Either by being outside the language of the definition itself (because there is no compensation) or by being within the exception to the definition described in subsection two (because it is the regular business of the common carrier), the van as described in question two is not a school bus.

CONCLUSION TO QUESTION TWO

An 11 to 15 passenger van chartered from a common carrier by a private or public school may be used to transport students to and from a school-related activity because, under such circumstances, it is excluded from the definition of “school bus” in [NRS 484.148](#). Private schools and public school districts should not assume this opinion gives carte blanche to the use of charter or special service vans because there are limitations under the rules that regulate common carriers and charter service.

QUESTION THREE

Do the conclusions to questions one and two apply to a school operating as an Exempt Private School pursuant to [NRS 394.211](#) that only uses 11 to 15 person vans to provide transportation services to children attend neighboring private or public schools before or after attendance at the exempt school?

ANALYSIS AND CONCLUSION TO QUESTION THREE

The school’s status as an exempt private school does not make such school exempt from all laws and regulations. It is exempt from the requirement of licensure and specifically is exempt only from [NRS 394.201](#)-394.351, inclusive. See [NRS 394.211](#). Therefore, the statutes and regulations discussed above related to school buses are applicable to both exempt and licensed private schools.

Question three focuses on a particular circumstance. In at least one instance, a private exempt school provides care for children in grades kindergarten through second, who also attend the public school. The program in the after school care includes instruction in the required curriculum and meets the definition of a school. As long as the program that the children are being transported to and from is a school, all of the above conclusions apply. If the program is “day care” and the entity does not have the status of a school (exempt or otherwise) the children are being transported to day care, not to school or a school-related event.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-
Deputy Attorney General

CROSSLEY

AGO 98-26 EMPLOYEES (STATE); LOCAL GOVERNMENT; RETIREES; GROUP INSURANCE; DEPENDENTS; HEALTH CARE; RISK MANAGEMENT: Surviving dependents of a state health care program participant have specific and narrowly defined opportunities to continue, join, or reinstate state program benefits.

Carson City, September 23, 1998

Randy Waterman, Acting Risk Manager, Committee on Benefits, 400 West King Street, Suite 300, Carson City, Nevada 89703-4222

Dear Mr. Waterman:

You have requested an opinion of this office regarding the coverage rights under the State of Nevada's plan of self-insurance, as set forth in [NRS 287.023](#), [NRS 287.0235](#), and [NRS 287.0475](#), upon the death of an employee or retiree of an applicable government employer. Each of these statutes apply to separate circumstances and will be addressed accordingly. Your questions have been rephrased to simplify explanation. In this opinion "local governments" are referred to broadly, including all of the various forms of non-state government entities which are entitled to provide for a program of health insurance under [NRS chapter 287](#).

QUESTION ONE

With regard to dependents of a retiree participant in a state or local government health insurance program, who may continue coverage in the State of Nevada's program and who may jump from a local government program to the state's program?

ANALYSIS

The key word in the analysis is the Legislature's use of the word "continue" in [NRS 287.023](#). From the outset, it should be noted that upon retirement the local government employee is faced with an option to either continue existing coverage with the local government program or join the State of Nevada's program. [NRS 287.023\(1\)](#) does not address the rights or options of active employees of either the state or a local government health insurance program. See [NRS 287.047](#) (where the right of state active employees to retain membership in the state program is set forth). However, subsection 2 of [NRS 287.023](#) does provide options to the surviving dependents of both active employees and retirees that are participants in the state program. The entire statute provides:

1. Whenever an officer or employee of the governing body of any county, school district, municipal corporation, political subdivision or other public agency of the State of Nevada retires under the conditions set forth in [NRS 286.510](#) or 286.620 and, at the time of his retirement, was covered or had his dependents covered by any group insurance or medical and hospital service established pursuant to [NRS 287.010](#) and [287.020](#), the officer or employee has the *option upon retirement to cancel or continue any such group insurance or join the state's program of group insurance or medical and hospital coverage to the extent that such coverage is not provided to him or a dependent by the Health Insurance for the Aged Act (42 U.S.C. §§ 1395 et seq.)*.

2. A retired person who *continues coverage under the state's program of group insurance* shall assume the portion of the premium or membership costs for the coverage *continued* which the governing body does not pay on behalf of retired officers or employees. A person who joins the state's program for the first time upon retirement shall assume all costs for the coverage. *A dependent of such a retired person has the option, which may be exercised to the same extent and in*

the same manner as the retired person, to cancel or continue coverage in effect on the date the retired person dies. The dependent is not required to continue to receive retirement payments from the public employee's retirement system in order to continue coverage.

3. Except as otherwise provided in [NRS 287.0235](#), notice of the selection of the option must be given in writing to the last public employer of the officer or employee within 30 days after the date of retirement or death, as the case may be. If no notice is given by that date, the retired employee and his dependents shall be deemed to have selected the option to cancel the coverage or not to join the state's program, as the case may be.

4. The governing body of any county, school district, municipal corporation, political subdivision, public corporation or other public agency of this state may pay the cost, or any part of the cost, of group insurance and medical and hospital service coverage for persons eligible for that coverage under subsection 1, but it must not pay a greater portion than it does for its current officers and employees. [NRS 287.023](#) (emphasis added).

The plain meaning of "continue" in the context of the statute presumes there were benefits in place that could be continued. See *Building Constr. Trades v. Public Works*, [108 Nev. 605](#), 610, 836 P.2d 633, 606 (1992) (when construing a specific portion of a statute, the statute should be read as a whole, and should be read to give a plain meaning where possible to all of its parts). The word "continue" is not defined in [NRS chapter 287](#). Its plain meaning is "1. to remain in existence or effect; last; endure; as the war continued for five years. 2. to go on in a specified condition or course of action; as, we continued to let him have his way; she continued ailing." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 395 (2d ed. 1973).

Subsection 1 of [NRS 287.023](#) sets forth the three options which are available at the local government employee's retirement: 1) cancel existing group insurance; 2) continue any such existing group insurance; or 3) join the state's program of group insurance. However, all of these options are contingent upon a requirement that "at the time of his retirement, [he] was covered *or had his dependents covered* by any group insurance or medical and hospital service established pursuant to [NRS 287.010](#) and [287.020](#)." [NRS 287.023](#) (emphasis added); see also [NRS 287.010](#) and [287.020](#) (which set forth the authority for local government group insurance programs); compare [NRS 287.041](#)-049 (which sets forth the authority for the state's program of group insurance). Timely notice under [NRS 287.023](#)(3) is a condition precedent to the option to continue coverage with the local government or otherwise join the state program for the first time. See also [NRS 287.045](#)(5).

Either the employee or his dependents must have something that could be continued at his retirement before the option to join the state program matures. The phrase "*or had his dependents covered*" is mutually exclusive of the employee's individual coverage, allowing for either event as a condition precedent to the option to join the state's program. The option to continue relates back to the existing coverage in place at retirement that can be continued with that local government program. On the other hand, the option to join the state's program is analogous to an open enrollment. It allows the retiree, as a newcomer to the state program, to enroll himself, his dependents, or any combination thereof, regardless of a lack of identical coverage(s) under the local government program.

However, except as otherwise provided in [NRS 287.0235](#), there is nothing in the relevant statutes that suggests that the surviving dependents of a local government program participant, have any individual or separate option to join the state's program. If a local government employee chose at retirement to continue coverage with the local government program, his dependents do not have an option to join the state's program at the retiree's death. This

particular class of surviving dependents may have other continuation rights in the local government program, as their particular plan document might provide.

Subsection 2 of [NRS 287.023](#) deals primarily with the fiscal responsibility of the three types of state program participants: 1) a state employee who continues coverage as a retiree; 2) a person who joins the state's program for the first time upon retirement; and 3) a surviving dependent of either retired person. *See* Act of June 25, 1993, ch. 304, § 1, 1993 Nev. Stat. 875; *see also* Act of July 5, 1995, ch. 572, § 2, 1995 Nev. Stat. 1956 (where the option to join the state's program was added by the legislature to the existing law regarding retiree and dependent continuation of coverage under local government programs, and a new subsection 2 was created that was only relevant to the state program option).

In addition to fiscal responsibility, subsection 2 of the statute specifically provides a unique option to dependents upon the death of any type of state program participant, as follows:

A dependent of such a retired person has the option, which may be exercised to the same extent and in the same manner as the retired person, to cancel or continue coverage in effect on the date the retired person dies. [NRS 287.023](#)(2) (emphasis added).

The phrase “*such a retired person*” relates back to both types of retiree plan participants: 1) those that continue coverage in state program (e.g. state employees that continue coverage at retirement); and 2) those that join the state's program of the first time (e.g. a local government employee that opted into the state's program at retirement.)

In addition, the phrase “*to the same extent and in the same manner as the retired person,*” as set forth in the statute, must be given meaning. *See Board of County Comm'rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983) (where a court must give meaning to all language used in a statute; read each sentence, phrase, and word to give meaning in the context of the purpose of the legislation); *see also One 1978 Chevrolet Van v. County of Churchill*, [97 Nev. 510](#), 512, 634 P.2d 1208, 1209 (1981) (where no statutory language should be turned into mere surplusage). Therefore, this statute should be construed to allow this particular class of dependents, as a matter of law, to stand in the place of the decedent with regard to the power to continue coverage, whether or not the decedent chose to enroll his dependents in the state's program prior to his death.

If subsection 2 of [NRS 287.023](#) was read without giving meaning to the phrase “*to the same extent and the same manner as the retired person,*” the dependents would merely have the option to cancel or continue the coverage in effect on the date the retired person dies. In which case, if the decedent failed or did not choose to cover his dependents, there would not be any dependent coverage to continue. However, if this phrase is given its plain meaning in the same instance, it is the decedent's individual coverage that produces the continuation option for the dependents. Such a construction would be consistent with the purpose of the statute to expand insurance coverage opportunities, including the allowance of survivor coverage even if they no longer will receive retirement payments from the public employees retirement system. *See [NRS 287.023](#)(2)* (where “the dependent is not required to continue to receive retirement payments from the public employee's retirement system in order to continue coverage”).

CONCLUSION TO QUESTION ONE

Under [NRS 287.023](#) there are two classes of dependents of a retiree that can continue coverage or join for the first time in the State of Nevada's health insurance program: 1) At the death of any retiree participating in the state program, the surviving dependents stand in the decedent's place and may continue the decedent's coverage in their names; and 2) a local

government employee who can legally join the state's program at retirement, may enroll his dependents in a manner that is analogous to an open enrollment.

QUESTION TWO

[NRS 287.0235](#) and [NRS 287.0475](#) appear to provide biennial scheduled opportunities for open enrollment and benefits reinstatement in the State of Nevada's health insurance program, respectively. Who is entitled to exercise these opportunities?

ANALYSIS

A. Biennial Open Enrollment Period

The rights established under [NRS 287.0235](#) stand alone as defined therein. See [NRS 287.0235](#)(1) (where the provisions of [NRS 287.023](#) and [NRS 287.045](#) are expressly excluded from applicability); see also [NRS 287.023](#)(3) (where this statute also provides in part: "Except as otherwise provided in [NRS 287.0235](#), notice of the selection of the option must be given in writing to the last public employer of the officer or employee within 30 days after the date of retirement or death, as the case may be"). Clearly, it was the intent of the legislature that no provisions, conditions or requirements of [NRS 287.023](#) or [287.0475](#) would limit, or otherwise alter the express rights set forth in [NRS 287.0235](#).

[NRS 287.0235](#) provided for a specific 5-month open enrollment window from September 1, 1995, through January 31, 1996. This window of opportunity has passed. Thereafter, the statute provides for a biennial (beginning every September 1 of an odd numbered year until the next succeeding January 31) 5-month open enrollment period for a public employment retiree or the surviving spouse of such retiree.

In either case the enrollment opportunity is limited to a retiree or surviving spouse, "who did not, at the time of his retirement *pursuant to the conditions set forth in [NRS 286.510](#) or [286.620](#), have the option to participate in the state's program of group insurance."*

[NRS 287.0235](#)(1) (emphasis added). The statute further provides that only the biennial open enrollment, and not the 1995-1996 enrollment window, is subject to the enrollee's evidence of insurability.

However, there exists an inherent ambiguity in the Legislature's choice of words. A close reading of [NRS 286.510](#) and [286.620](#) reveals that neither of these statutes express any particular conditions that would indicate that a retiree would not have the option to join the state's program under [NRS 287.023](#). Therefore, it would be appropriate to look to the legislative history to resolve the ambiguity and determine what "conditions" the statute refers to. See *Hotel Employees & Restaurant Employees Int'l Union v. State ex rel. Nevada Gaming Control Bd.*, [103 Nev. 588](#), 591, 747 P.2d 878, 880 (1987).

In committee testimony on A.B. 328, which was codified as [NRS 287.0235](#), Assemblyman Roy Neighbors introduced Martin Bibb, Executive Director of the Retired Public Employees of Nevada, who gave in part the following testimony just prior to unanimous passage of final amendments to A.B. 328. The minutes state:

He said the original version of the bill called for an annual enrollment period for enrollment into the group insurance program of the retired public employees. That has been modified to a one-time only open enrollment window of five months, from September 1995, to January 1996. Employees would be allowed to enroll in the group insurance program without proof of insurability and would be pooled and rated separately.

Mr. Bibb indicated the amended bill would limit this program to the individual or surviving spouse who did not have the opportunity to enter the group insurance program at the time of their retirement, eliminating those who did have that option and neglected to exercise it. It would also basically delete this once-in-a-lifetime option for retired public employees to come into the program because after the one-time open enrollment period, they would only be allowed to come in every other year with proof of insurability.

Mr. Bibb said the only way a person could go in again after the one-time enrollment period would be with proof of insurability and it was felt that qualifier would address the issue of negative impact that could result from someone repeatedly coming and going in and out of the program.

Hearing on A.B. 328 Before the Assembly Committee on Government Affairs, 1995 Legislative Session, 2-3 (May 1, 1995).

When A.B. 328 was considered by the Senate Government Affairs Committee, Martin Bibb, Executive Director of the Retired Public Employees of Nevada, provided an overview of the bill:

Section 4 of the bill provides for a 5-month open enrollment period for retired public employees who did not have an opportunity to join a group insurance program at the time of their retirement. He said they will be pooled and rated separately from other retirees and will pay all of their own premiums. Additionally, those employees will be able to come into the program on an even numbered year basis like state employees, if they miss the 5-month window. He said during the first 5-month open enrollment plan, the employee will be allowed in without evidence of insurability. If the retired employee missed the 5-month open enrollment, the employee could enroll during the even year, but would have to provide proof of insurability.

Hearing on A.B. 328 Before the Senate Committee on Government Affairs, 1995 Legislative Session, 4 (June 28, 1995).

The legislative history reveals that the “conditions” intended by the Legislature were a narrow group of existing retirees or their surviving spouses that: 1) never got the option to join the state’s program due to the fact the option was not available when they retired; 2) missed the 1993 one-time Senate Bill 278 window to enter the state’s program; and 3) missed the 1995-1996 5-month open enrollment window. *See* Act of June 25, 1993, ch. 304, § 2, 1993 Nev. Stat. 875. Only those persons who met these narrow parameters could join the state’s plan during these open enrollment opportunities.

The legislative history also suggests that the Legislature did not want to revisit this each legislative session, leaving a biennial open enrollment available to this special class of retirees and their surviving spouses. Obviously, each year new retirees are given the option under [NRS 287.023](#) to join the state’s program, eliminating their qualifications under [NRS 287.0235](#). Therefore, this class of persons will get smaller each year and there may come a point when the statute should be amended to provide for a sunset or it should be repealed.

Both of these open enrollments provided for in A.B. 328 ([NRS 287.0235](#)) are only available to the retiree or the surviving spouse of the retiree. The statute does not extend this extra opportunity to join the state’s program to the retiree’s other dependents, if any. *See* Act of July 5, 1995, ch. 572, § 2, 1995 Nev. Stat. 1956 (where [NRS 287.0235](#) was originally codified

and [NRS 287.023](#), which is applicable to all dependents, was simultaneously amended in the same statute, leaving no doubt that the Legislature was aware of the difference); *compare* [NRS 287.023](#)(2) (where a dependent's rights to continue coverage are expressly set forth). The rights to such open enrollments are also limited by the additional conditions set forth in [NRS 287.0235](#)(1)(a)-(d).

Therefore, the right to participate in this unique biennial open enrollment is only subject to the conditions expressed in [NRS 287.0235](#). The class of persons to whom this opportunity is available is a narrowly defined group of retirees or their surviving spouses. While this class of persons must now show evidence of insurability, their coverage choices are otherwise open.

2. Biennial Reinstatement Period

In addition to this narrowly defined biennial open enrollment period under [NRS 287.0235](#), the Legislature has provided a (January 1 through January 31 of an even-numbered year) conditional reinstatement period for any insurance, except life insurance, "which was provided to [the retiree or the surviving spouse and the retiree's dependents] at the time of the [retiree's] retirement under [NRS 287.010](#), [287.020](#) or 287.0433 as a public employee." *See* [NRS 287.0475](#)(1) (paraphrase in brackets).

Biennial reinstatement is available separately for local government and state program retirees and their qualifying dependents. *See* [NRS 287.0475](#)(1) (where the right is available to "a public employee *who has retired* pursuant to [NRS 286.510](#) or 286.620 or a retirement program provided pursuant to [NRS 286.802](#), or the surviving spouse of such a retired public employee who has deceased") (emphasis added). The reinstatement notice must be given to the employee's last public employer within a certain time and under certain conditions. *See* [NRS 287.0475](#). There is no right to cross over and join the state's program under this reinstatement right.

However, the Legislature's use of the phrase "*who has retired*" is clearly in past tense. This language is not consistent with legislative language used in [NRS chapter 287](#) when a right or opportunity is anticipated for future retirees. *Compare* [NRS 287.023](#)(1) (where the Legislature anticipates an ongoing right for future local government retirees to continue coverage or join the State's program by using the phrase "whenever an employee retires"). This apparent inconsistency creates an ambiguity regarding whether the Legislature intended the biennial reinstatement period to be available to a finite group of retirees or for all retirees, then and in the future. To resolve this ambiguity, it would be proper to look to the legislative history. *See Hotel Employees & Restaurant Employees Int'l Union*, 103 Nev. at 591.

In a hearing before the Senate Finance Committee on S.B. 292, which became [NRS 287.0475](#), John Caserta represented the Retired Public Employees of Nevada. The minutes state:

S.B. 292 is a repeat of A.B. 13 and 14 which were passed during the last legislative session. Dr. Caserta noted the committee has been given copies of a letter which has letters attached from employees affected by this problem (Exhibit F). If a retiree chose option 1, with no continuing benefits to the surviving spouse, when that retiree died the insurance coverage was automatically dropped for the spouse. The contention was the person was no longer receiving a retirement check and so was out of the system. S.B. 292 was originated to allow these people who were dropped from the system to reinstate their coverage provided they can show proof of insurability and are willing to pick up their share of the insurance premium.

Senator Raymond Rawson said the best way to deal with this is to never terminate the person in the first place. In this bill, we are dealing with a small group of people who were terminated because that was what the law demanded. Again, will you submit written suggested language on these lines, he asked Mr. Guisti who agreed to do so.

Mr. Guisti stated his final recommendation is that, because we have seen a form of this bill for the last three sessions, the language be changed in section 4, line 20. Instead of using January 31, 1988, this should be changed to January 31 of the even numbered years and then this will not be brought up again.

Hearing on S.B. 292 Before the Senate Committee on Finance, 1987 Legislative Session, 7-9 (April 2, 1987).

The legislative history indicates that for the most part the law was intended to apply in the past tense to those that had already been terminated from the program due to a past unfair legal consequence of a particular retirement option. Yet, the reinstatement period date was left open as a safety net for any other surviving spouses that were likewise terminated from the program, or otherwise failed to seek reinstatement in the prior legislative windows provided. While the Legislature left this biennial safety net in place, in the 11 years of its existence, it is likely there are few, if any, persons that fit the intended class of who could seek reinstatement.

Like the word “continue” as set forth above, “reinstatement” must be given its plain meaning under the rules of statutory construction. *Id.* The word is defined: “a reinstating or being reinstated; the act of putting in a former state; re-establishment.” WEBSTER’S at 1524. Only those persons who were enrolled in the particular program of insurance at the time of the original retirement may be reinstated to the program. It is the coverage at the time of retirement that controls what may be reinstated.

Therefore, the biennial reinstatement period is applicable to a very narrow class of persons, that most likely have already been served by the existence of the statute. [NRS 287.0475](#) should not be construed as a general reinstatement right for persons who have left the program for any number of other reasons.

ANSWER TO QUESTION TWO

[NRS 287.0235](#) and [NRS 287.0475](#) provide unique opportunities to seek open enrollment or reinstatement on a biennial basis. The separate classes of persons that these statutes intend to serve are narrowly defined, and are likely to shrink in number each year. These opportunities should only be provided to those intended persons that fit within the analysis of this opinion, if any.

FRANKIE SUE DEL PAPA
Attorney General

By: RANDAL R. MUNN
Senior Deputy Attorney

General

AGO 98-27 ETHICS IN GOVERNMENT; PUBLIC OFFICIALS DISCLOSURE AND ABSTENTION: Abstention required when independence of judgment of reasonable person is materially affected by tangible interest of another.

Carson City, September 25, 1998

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

Dear Mr. Jerbic:

You have presented your analysis and requested an opinion from this office in an attempt to provide some clarification to public officials who are members of boards and commissions as to when they would need to consider disclosing and abstaining from voting based upon ethical considerations.

QUESTION

When does a member of a board or commission need to disclose a possible conflict of interest and abstain from voting because of an acquaintance or friendship with a person interested in, but not a party to the outcome of an item before the governing body?

ANALYSIS

The requirements regarding disclosure and abstention in Nevada must be determined by analysis of Nevada's ethics in government laws as well as other relevant statutes, legislative history, opinions issued by the Commission on Ethics (Ethics Commission), and any applicable case precedent. As you know, these issues involve largely uncharted waters in our state due to the lack of relevant case precedent available here or nationally to provide guidance. In the first instance, questions concerning ethical requirements should always be addressed to one's counsel. In more difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission since that is the body vested by the Legislature with jurisdiction and responsibility to enforce the laws. The job of interpreting and enforcing the statutes is sometimes difficult in light of the often complex factual scenarios, which are presented to the Ethics Commission. As you have indicated the variety and breadth of questions has contributed to some growing confusion as to the applicability of the relevant statutes.

It is apparent from the increasing number of questions concerning these statutes that the Nevada Legislature will in all likelihood be asked to consider reviewing and refining the current laws so public officials will better understand and be able to comply with the rules. As you know, this office does not have authority to resolve these matters and can only address your question in an advisory capacity in the hope of assisting you and other lawyers who represent public bodies. Appeals from Ethics Commission rulings go to the district court in accordance with [NRS 233B.130](#). The ultimate rulings and interpretations on these questions must come from the Ethics Commission, the courts and the Legislature.

In your request, you put forth the scenario of a personal friendship between a public officer and a person interested in, but not a party to the outcome of a matter upon which the public officer will be voting. The friendship is a long standing one (the friend being a well-liked customer of the public officer in his private capacity), although the friends had not engaged in any social activities. The friend voiced his opposition to the matter to the public officer. The public officer consulted with counsel and disclosed the friendship on the record before voting on the matter. It is your conclusion that in such circumstances the public official's obligation was to disclose the matter, but that abstention was not required. This was the advice given by your office and followed by the public official. A question has now been raised as to whether the public officer should have abstained as well.

[NRS 281.501\(2\)](#) provides that a member of the legislative branch must abstain from a vote where he has a commitment in a private capacity to the interests of others “with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by” that private interest of others. This is the legal standard that governs whether a public officer must abstain from voting on a matter. “Member of the legislative branch” is defined under [NRS 281.4355](#) to include legislators and members of boards of county commissioners, city councils or other political subdivisions. The requirement for disclosure set forth in [NRS 281.501\(3\)](#), prohibits public officers and employees from acting upon a matter unless they have disclosed the full nature and extent of any private interest which would reasonably affect their judgment. Also, [NRS 281.481\(2\)](#) provides, “[a] public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.” The language in these statutes is not clear and the terms are not specifically defined in [NRS chapter 281](#) or in case precedent. In the absence of specific standards or definitions, the confusion you describe regarding the applicability of these statutes is understandable.

The Ethics Commission has articulated, in its recently issued opinion concerning the Clark County airport concessions at Terminal D, four considerations which it will use in its future analysis of the nature and impact of a public official’s personal relationships. Nevada Commission on Ethics Opinion (NCOE) Nos. 97-54, 97-59, 97-66, 97-53, and 97-52, (Terminal D Opinion). You have indicated that these criteria do not give sufficient guidance to either public officials or their lawyers who on a regular basis must make decisions about whether to make disclosures and when to abstain from voting on matters. As noted above, there is very little legal precedent to assist in providing guidance.

Our representative form of government is based upon our elected officials being typical of the constituents who elected them. Frequent contact between elected officials and their constituents is necessary for elected officials to truly represent their communities and is almost a daily occurrence in Nevada’s smaller communities. If elected officials do not communicate with their constituents, some of whom may be acquaintances and personal friends, the elected officials will not be as well informed. We do not believe that the ethics in government law was intended to prevent government officials from seeking or receiving input from constituents who may also include acquaintances and friends. Rather, the law tries to strike a balance wherein public officials must disclose certain outside interests and in some cases abstain from voting where their independence of judgment is materially affected. The law places particular emphasis on the need for public officials to disclose conflicts or potential conflicts on the record, with abstention being required only in limited circumstances where the independence of judgment of a reasonable person would in fact be materially affected.

As stated above, the terms “materially affected by” or “commitment in a private capacity to the interests of others,” are not specifically defined by the Legislature or the Ethics Commission in the Terminal D opinion. Although the four personal relationship criteria are helpful in the analysis, they do not precisely fix the point at which a “personal relationship” will be considered to *materially affect* the independence of judgment of a public official.

The criteria provide no guidance regarding the specific meaning of the term “interests of others.” Does that term apply only to persons who are in fact impacted either directly or indirectly by the matter being voted upon by the public official? Or does this term mean simply that the other person has an opinion on the subject matter? Although [NRS 281.501\(2\)](#) contains some limiting language, these are questions which are not clearly answered and which have created a climate of some doubt and uncertainty.

Although the evaluation of ethical concerns is sometimes difficult and necessarily qualitative, public officials, who consult with counsel to determine their obligations, should be able to carry out their public duties without concern that they may still be found to have acted inappropriately after the fact. As you know good faith reliance on advice of counsel after full disclosure of relevant facts can constitute a defense in criminal matters. *See, e.g., In the Matter of Vandelinde*, 366 S.E.2d 631, 637 (W.Va. App. 1988)(Defense of good faith reliance on advice of counsel can be established where there has been complete disclosure of facts and the advice given is not patently erroneous); *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968)(To assert the reliance defense, the defendant must establish good faith reliance on an expert coupled with full disclosure to the expert). A similar defense has been recognized in at least one published ethics decision involving an attorney. *See Committee on Legal Ethics of W. Va. State Bar v. Coleman*, 377 S.E.2d 485, 490, 500 (W.Va. App. 1988) (Good faith reliance on statutory interpretation was a defense to excessive fee allegation). Thus, the good faith reliance of a public official upon advice of counsel which has been rendered in a sincere attempt to help the public official comply with ethics provisions, we believe should be a defense in appropriate cases.

Nevada's ethics in government law recognizes consultation with counsel as a defense to the element of willfulness in ethics cases. [NRS 281.551](#)(6) provides:

An action taken by a public officer or employee or former public officer or employee relating to [NRS 281.481](#), [281.491](#), 281.501 or 281.505 is not a willful violation of a provision of those sections if the public officer or employee:

- (a) Relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the employer of the public employee;
- (b) Was unable, through no fault of his own, to obtain an opinion from the commission before the action was taken; and
- (c) Took action that was not contrary to a prior opinion issued by the commission to the public officer or employee.

This defense could be expanded to constitute a complete defense in appropriate cases as discussed above. Public officials who sincerely attempt to comply with the law by consulting with counsel, and completely disclose relevant facts to their counsel, and who receive and follow advice consistent with the ethics in government law should not be found in violation, even if there is some subsequent disagreement regarding the advice given. In such cases it may be more appropriate to give the public official instruction or direction for the future. A public officer's duty is defined in [NRS 281.421](#), which provides:

1. It is hereby declared to be the public policy of this state that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.
2. The legislature finds that:
 - (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
 - (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

[NRS 281.421](#) creates an obligation on the part of the public officers to avoid conflicts between their private and public interests. To assist in assuring this, the Legislature, in [NRS 281.501](#) as amended in 1997, set forth requirements as to when a commitment in a private capacity to the interests of others would require disclosure and even abstention. [NRS 281.501](#), provides:

1. Except as otherwise provided in subsection 2 or 3, a member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

3. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest, without disclosing the full nature and extent of the gift, loan, commitment, or interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body that makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected.

4. If a member of the legislative branch declares to the legislative body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

5. If a member of the legislative branch is voting on a matter which affects public employees, he shall make a full public disclosure of any personal pecuniary interest that he may have in the matter.

6. After a member of the legislative branch makes a disclosure pursuant to subsection 3, he may file with the director of the legislative counsel bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when

the matter is further considered by the legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the legislative counsel bureau.

As long as the independence of judgment of a reasonable person would not be *materially affected* by a commitment in a private capacity to the interests of others, it appears a member of the legislative branch may vote. To determine whether the independence of judgment is materially affected by a commitment, the statute sets forth a presumption that the independence of judgment of a reasonable person would *not* be materially affected by his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him *or to the other persons whose interests to which the member is committed* is not greater than that accruing to any other member of the general business, profession, occupation or group. Under this statute, public officials are presumed *not to be materially affected* by a private commitment, unless there is some tangible extra benefit or detriment derived by either party (the official or the private person). Thus, before a public official may be required to abstain, we believe there must be some evidence of a benefit or detriment, which is greater than that experienced by similarly situated persons. Even if a greater benefit or detriment exists, the statute still may not require abstention unless the independence of judgment of a reasonable person in that situation would be materially affected by this tangible interest.

At the time of the creation of [NRS 281.501](#) in 1977, the Legislature defined a conflict of interest to be when a legislator received some monetary benefit outside his salary for performing his official duty. The Legislature indicated that it did not want to prevent input from constituents. A legislative body is made stronger as a result of the input that it receives from a variety of people. Overly restricting the voting ability of legislative bodies would defeat the purpose of having such lay legislative groups. One legislator stated, “[I] do not believe that a legislator should be precluded from . . . voting on legislation merely because it is something that may be desirable to a client. Ethics should deal with the problems where a legislator is financially rewarded because of introducing a measure that a client wanted.” *Hearing on A.B. 450 Before the Senate Government Affairs and Assembly Elections Committee, 1977 Legislative Session*, 3 (March 28, 1977).

The statute was amended in 1991 to prohibit voting where a conflict of interest actually exists. The original law made abstention optional and in 1991 language was added to make abstention mandatory where a conflict of interest is found. However, in 1991 the Legislature also apparently sought to limit when abstention is actually required by adding a presumption that an official’s independence of judgment is *not* materially affected where a pecuniary benefit or detriment exists if the benefit or detriment is the same as that experienced by others similarly situated.

The then Chairman of the Ethics Commission offered the following advice:

Obviously, it is a question of degree and the particular circumstances. One should not have to abstain from voting simply for being personally representative of or in the same circumstances as one’s constituents. That may be a reason why one is elected in the first place. That is in the very nature of a “Citizen Legislature.” However, where the circumstances change to such a degree that independence of judgment *is* in fact so materially affected or impaired, one should be required to abstain from voting even though the benefit or detriment accruing to him or her is the same.

Hearing on A.B. 190 Before the Senate Committee on Government Affairs, 1991 Legislative Session, Exhibit 1 (May 8, 1991).

In 1997, [NRS 281.501](#)(2) of the statute was further amended to expand the presumption against the existence of a conflict to include the situation where an official may have a commitment in a private capacity to the interests of others. In other words, there is a presumption against finding a conflict where a public official has a commitment to the private interests of others, if the resulting benefit or detriment is the same as others similarly situated. Language broadening the abstention requirement could have been added, but the Legislature instead chose to narrow the abstention requirement. Expansion of abstention requirements can only be achieved through legislative action. Under the current statutory language of [NRS 281.501](#) discussed above, if on an objective level it appears that a reasonable person would not be able to separate himself from the tangible interest of another, such that his independence of judgment is materially affected, then he should abstain.

As discussed above, the Ethics Commission's evaluation of the impact of personal relationships on the independent judgment of public officials is most recently found in the Terminal D Opinion. In seeking to qualitatively adjudge such relationships, the Ethics Commission interpreted [NRS 281.501](#) to require a look at the substance of the relationship itself, rather than the label on it. In doing this, the Ethics Commission came up with four factors to analyze a personal relationships for conflict of interest purposes. These factors are: 1) the length of a relationship, 2) the context of the relationship, 3) the substance of the relationship, and 4) the frequency of the relationship. Recognizing these personal relationships are difficult to adjudge, the Ethics Commission stated, "By legislative design, the determination of whether a given relationship would materially affect the independence of judgment of a reasonable person will always be a case-by-case examination." Terminal D Opinion, at 13.

Summarizing the Terminal D Opinion, significant personal relationships that required disclosure and abstention, were found under the following circumstances:

(1) where one is considered a "best friend" in which the friendship is forged in the context of common political and philosophical beliefs that both parties felt strongly enough about to become politically active on behalf of;

(2) a "long-term very close friend with the spouse of the public officer" where the public officer knows little information about this person or the other applicants, yet votes for the friend of his spouse's matter in front of the public body;

(3) a "long-term business relationship where reliance and trust have been such large factors that many facets of their lives intersect in their relationship," and finally

(4) where there were "substantial efforts to support the public officer's candidacy as evidenced by raising large amounts of money for the public officer combined with events such as the official's daughter participating in the friend's wedding" that the relationship has become a political alliance in which both were dedicated to common causes, one of which was the furtherance of the public officer's political aspirations which in turn made the public officer beholden to her friend.

In each of these situations, the "friend" was directly interested in and significantly benefited from the matter being voted upon by the public official. The Ethics Commission found that the public officials had violated [NRS 281.501](#)(2) and (3), and [NRS 281.481](#)(2). This is quite different from the situation that you have outlined where the "friend" is not before the public body, but has privately expressed a strong opinion to the public official.

Although the close and long-term friendships at issue in the Terminal D matter required disclosure and abstention, under the analysis in the opinion it would be reasonable to conclude

that abstention would only be required where the other party to the friendship is actually before the public body or benefits from the particular vote. It does not follow that the comments of a friend who is not personally impacted by the vote would require disclosure *and* abstention. We agree with your suggestion that the legislative process could be entirely undermined if a member of a public body is required to abstain from a vote because he has an acquaintance or friendship with someone interested in a matter, but not actually affected (receiving a benefit or detriment greater than others) by the vote on the particular matter. If the Legislature intended otherwise, it would have expressed that intent in the language of [NRS 281.501](#), which has been amended four times since its enactment.

We can derive from the current [NRS 281.501](#), the 1991 and 1997 amendments, and from the opinions of the Ethics Commission, that the law does not place a blanket prohibition on voting where an acquaintance or friendship exists. Only in circumstances, where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter, is abstention required. In such circumstances, the public official's independence of judgment would be materially affected.

According to other Ethics Commission opinions, a public officer was not required to abstain from a vote on a contract amendment and renewal matter which involved a friendship and business relationship with the person who came before the board because the matter before the board did not involve actually choosing the candidate to be awarded the contract. NCOE Opinions 94-27, 94-30. In addition, an arms-length business relationship with one before the public body, such as a private business loan in the amount of \$200,000, does require disclosure but not abstention unless the relationship materially affects the independence of judgment of the public officer. NCOE Opinion 94-05. Finally, when a public officer considers a matter that is only tenuously related to a previous matter which required disclosure and abstention, the public officer may vote (the public body was deciding whether or not to seek review of a court decision). *Board of Commissioners of the City of Las Vegas, Nevada v Dayton Development Company*, [91 Nev. 71](#), 530 P.2d 1187 (1975).

Under Nevada's law, public officers have a responsibility to consider whether their private interests conflict with a public matter. Thus, whenever a public officer has reasonable notice a friend (or other private interest) may be involved in a matter on which they will be voting, the disclosure and/or abstention requirements must be taken into consideration. However, in this regard, the Ethics Commission has stated in the Terminal D Opinion:

In the future, deliberate ignorance of readily knowable facts will not be condoned by this Commission. We insist each public official vigilantly search for reasonably ascertainable potential conflicts of interest. The solution for a public official who knows that her best friend may end up appearing before her, or who is overwhelmed with the volume of her workload, is to task her staff with assisting her to root out potential ethical concerns.

Terminal D Opinion at 16. Thus, if a public officer *knows* his friend has a matter coming before the public body, the official clearly has an obligation to consider the relevant circumstances, disclose and abstain if the official's independence of judgment would be materially affected by the friendship. Public officials should always consult with counsel on these matters, and as noted in the Terminal D opinion, should never deliberately try to remain ignorant of potential conflicts.

However, we are concerned that this portion of the Terminal D opinion seems to suggest that staff should be tasked with conducting research if the public official is too busy to review agendas for potential conflicts. This language, as well as the reference to "conflict software" implies that all public bodies should have staff available to conduct research into all possible

conflicts, and that public funds should be expended to obtain conflict software and any necessary hardware. Public bodies may not have budgeted for such software and hardware. This suggestion also raises some concern about the propriety of using public resources to research the private interests of officials and others.

CONCLUSION

The Legislature should revisit these very complex and difficult issues to consider clearer guidance to all public officials. Although ultimately judicial interpretation of the relevant statutes may provide more definitive guidance on these matters. We recognize that the Ethics Commission's job of interpreting and enforcing the statutes is difficult in light of the often complex factual scenarios which are presented, and that through its decisions and regulation drafting authority, the Commission continuously seeks to clarify the responsibilities of public officials under Nevada's ethics in government laws.

The ethics in government law is intended to prevent public officials from acting out of self-interest or from using their office to give unfair advantage to others. As the former chair of the Ethics Commission stated, "where the circumstances change to such a degree that independence of judgment *is in fact so materially affected or impaired*, one should be required to abstain from voting" (emphasis added). Under [NRS 281.501](#), and in light of the interpretation of this statute as articulated to the Legislature by the former chair of the Ethics Commission, abstention is only required where there exists objective evidence that a reasonable person in the public official's situation would have his or her independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others. Public officials should always disclose any relevant private interests on the record and with the advice of counsel explore whether such an interest would require abstention. If it is determined that the independence of judgment would not be materially affected and/or that the friend or acquaintance has no tangible interest in the particular matter, the basis for such conclusions should be carefully articulated on the record.

In light of the variety and breadth of questions that have been recently raised, we believe all public entities and their counsel would be well advised to carefully review and reconsider the procedures used to evaluate contracts or other matters requiring a public vote. Consultation with ethics experts such as the Josephson Institute in Los Angeles or others may also be helpful. Bidding and bid protest procedures from similarly situated public entities, as well as national or state organizations which provide training in this regard, should be considered as well. See *MCM Construction, Inc. v. City & County of San Francisco, et al*, 66 Cal. App. 4th 359 (Cal. App. 1998) (Detailed discussion of airport bid and bid protest procedures). Although our comments can only be treated as advisory, they will hopefully assist you and other lawyers in advising clients.

FRANKIE SUE DEL PAPA
Attorney General

AGO 98-28 JUDGES; PENSIONS: [NRS 3.090](#)(4) does not provide authority for a senior judge recalled to active service to earn credit toward a supplemental pension in the Judges' Retirement System if that senior judge previously retired under the Public Employees Retirement System.

Carson City, October 19, 1998

Ms. Karen Kavanau, Director, Administrative Office of the Courts, Supreme Court of Nevada,
Supreme Court Building, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-
4702

Dear Ms. Kavanau:

You have requested a legal opinion on the following matter.

QUESTION

A district court judge or supreme court justice attains sufficient age and service credit to retire under the Public Employees' Retirement System. Thereafter this judge or justice retires and receives retirement benefits. If this judge or justice is recalled to active service as a senior judge, may this judicial officer earn service credit toward a second, supplemental pension in a different retirement system called the Judges' Retirement System?

ANALYSIS

The Public Employees Retirement System (PERS) is a contributory pension plan governed by a body of statutes set forth within [NRS chapter 286](#). The Judges' Retirement System is a noncontributory pension plan providing benefits to retired justices and judges (hereinafter solely called judges) by legislative appropriation in accordance with [NRS 2.060](#) and [3.090](#).

With the passage of legislation in 1960, judges were permitted to elect participation as members in either PERS or the Judges' Retirement System.⁵⁵ That 1960 legislation also clearly prohibited judges from receiving pension benefits under both the PERS' plan and the Judges' Retirement System plan as a result of the public employees' judicial service. [NRS 286.305](#), from 1960 to the present, has included a provision prohibiting a double receipt of pension benefits under both of the pension plans available to judges. Subsection 3 of that statute sets forth:

3. Any justice of the supreme court and any district judge who is a member of the system and who qualifies for a pension under the provisions of [NRS 2.060](#) or 3.090 may withdraw from the public employees' retirement fund the amount credited to him in the account. *No justice or judge may receive benefits under both this chapter and under 2.060 or 3.090.* [Emphasis added.]

Based on the hypothetical facts of the opinion request, there may exist one or more judges who have attained sufficient age and service credit to have retired under PERS. Those judicial officers would be presently receiving retirement benefits under the PERS system. There might also exist another group of judges who have attained sufficient age and service credit to have retired under the Judges' Retirement System ([NRS 2.060](#) and [3.090](#)). The judicial officers in this group would be receiving retirement benefits through legislative appropriation under the Judges' Retirement System.

The present controversy centers on the retirement impact to these two distinct groups of judges, retired under the two pension plans, if such retired judges returned to active judicial service.

Article 6, § 19, of the Nevada Constitution empowers the chief justice of the Nevada Supreme Court to administer the court system. Part of the administrative power of the chief

⁵⁵ Subsequent legislation excludes from PERS membership district judges and justices of the supreme court first elected or appointed on or after July 1, 1977, who are not enrolled in the PERS system at the time of election or appointment. NRS 286.297.

justice permits the chief justice to recall to active service any retired justice or judge of the court system who consents to such recall and who retired in good standing. The recalled “senior judge” could be assigned to temporary duty within the court system under SCR 10. Under SCR 10, senior judges eligible for recall to active service would include judges retired under both PERS and the Judges’ Retirement System.

In 1981, the Legislature amended the provisions of the Judges’ Retirement System by adding new language to [NRS 2.060](#) and [3.090](#). The passage of A.B. 546 entitled certain retired justices and judges to accumulate additional credit toward a maximum pension in the Judges’ Retirement System when recalled to active service. The legislation was silent, however, on the question of whether judges retired under PERS could use recalled service to commence credit on a new and supplemental pension under the Judges’ Retirement System. [NRS 3.090](#) sets forth in part:

4. Any judge who has retired pursuant to subsection 3 [the Judges’ Retirement System] and is thereafter recalled to additional active service in the court system is entitled to receive credit toward accumulating 22 years’ service for the maximum pension based upon the time he actually spends in the additional active service (Material in brackets is added.)

The plain language of [NRS 3.090](#) solely applies to those judges participating in the Judges’ Retirement System.⁵⁶ Even if we looked beyond the plain language of the statute, there is nothing in the legislative committee testimony regarding A.B. 546 reflecting that the bill was in any manner intended to apply to judges retired under PERS and thereafter recalled to active service.

Public pension benefits are solely confined to the body of statutes provided by the Legislature. In this case, the language regarding accumulation of additional service credit for judges retired and recalled to active service, in plain and unambiguous terms, solely applies to judges who have retired under the Judges’ Retirement System. The Legislature could have easily placed some language into [NRS 2.060](#) and [3.090](#) directing that those judges retired under PERS would be allowed, upon recall to active service, to accumulate new service credit toward a supplemental pension in the Judges’ Retirement System. To date the Legislature has not included such language and has as yet failed to amend language set forth within [NRS 286.305](#) precluding judges from receiving pension benefits under both PERS and the Judges’ Retirement System.

The plain meaning of the words used by the Legislature on this issue preclude those judges retired under PERS from accumulating any new benefits under a different retirement system. Even though this interpretation creates distinctions for those judges retired under the two pension plans and thereafter recalled to active service, we cannot change the Legislature’s clear intent. We will have to await further legislative clarification by way of statutory amendments to determine if these distinctions will be eliminated. *See Gulbrandson v. Carey*, 901 P.2d 573 (Mont. 1995).

CONCLUSION

A justice or judge retired under PERS and thereafter recalled to active service as a senior judge may not earn service credit toward a second, supplemental pension in the Judges’

⁵⁶ This office issued a letter opinion on November 15, 1989, concerning a person who had retired under the PERS system in a nonjudicial capacity and was thereafter elected as a district judge. In that opinion we concluded that the elected district judge could participate in the Judge’s Retirement System. In this case, the treatment of senior judges recalled to active service is specifically controlled by the language of [NRS 3.090\(4\)](#). Thus the present matter is distinguishable from matters previously considered in our letter opinion.

Retirement System. Legislative clarification, by way of statutory amendments, will be needed to eliminate the distinctions between the senior judges retired under PERS and the senior judges retired under the Judges' Retirement System.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney

General

AGO 98-29 BOARDS AND COMMISSIONS; ETHICS; BOARD OF EXAMINERS; SECRETARY OF STATE: If an elected official who is a member of a board has filed all campaign contribution and expenditures reports, he does not need to disclose and abstain from voting when the contributor has an item before the board. The facts of each scenario relating to friendships and business relationships must be examined separately to determine if an elected official must disclose and abstain pursuant to the Ethics Code.

Carson City, November 5, 1998

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Mr. Heller:

You have requested an opinion from this office regarding when you, as a member of the Board of Examiners (Board), must disclose and abstain from voting on a matter before the Board based upon ethical considerations.

QUESTION ONE

When must an elected official who is a member of a board disclose campaign contributions given by a person or entity with an item before the board and abstain from voting on the matter?

ANALYSIS

You have presented two fact patterns which we will evaluate. Your question in each of these situations is: 1) must you disclose, and 2) if you disclose must you also abstain from voting on the matter. The first fact pattern is that your former employer has a contract before the Board for approval. You continue to have a retirement account with this former employer and the former employer has given you campaign contributions during previous campaigns, but to date has not contributed to your current campaign. You have not spoken to the former employer regarding its pending contract with the State of Nevada.

The second fact pattern is that former campaign contributors have contracts before the Board. You have not spoken to these contributors regarding their pending contracts with the State of Nevada.

During each of your election campaigns you filed the required contribution and expenditure reports.

Before evaluating these fact patterns, we will analyze the requirements governing the disclosure of campaign contributions. In the 1991 Legislature, the then chairman of the Commission on Ethics (Ethics Commission) defined campaign contributions as “public funds in the sense that they are solicited and received for a public purpose, the election to public office to serve the public. They are not solicited or given for private or personal use and, if used personally, that use converts the contribution to a personal gift.” *Hearing on A.B. 190 Before the Senate Committee on Government Affairs*, 1991 Legislative Session, 15 (May 8, 1991). Campaign contributions are treated differently from “pecuniary interests” that may create a conflict of interest. A campaign contribution is considered a constitutional right on the part of the contributor to participate in the electoral process; whereas a pecuniary interest is afforded no protection at all in the ethical realm of government.

Only a pecuniary interest which amounts to a conflict of interest will require disclosure and abstention. [NRS 281.501](#) defines when a pecuniary interest constitutes a conflict of interest and states in relevant part:

2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) *His acceptance of a gift or loan;*

(b) *His pecuniary interest;* or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

3. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) *In which he has a pecuniary interest,*

without disclosing the full nature and extent of the gift, loan, commitment or interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected.

....

6. After a member of the legislative branch makes a disclosure pursuant to subsection 3, he may file with the director of the legislative counsel bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the legislative counsel bureau. [Emphasis added.]

Had the Legislature intended for campaign contributions to trigger a possible conflict of interest, the Legislature could have included campaign contributions in [NRS 281.501](#).

Disclosure was discussed in the 1997 Legislature where it was concluded one disclosure for legislators was sufficient because the disclosure was considered to be continuing. One member of the Senate Committee on Government Affairs stated:

As legislators, I think we make very deliberate attempts, assiduously to make disclosures and I don't think we would be in a position where we ought to be required, every time the subject is discussed, to make a continuing disclosure. So I just want that part of the record. I don't want anybody tripped up in here because you come in on another day when something is being discussed and you have not again made a disclosure.

Hearing on S.B. 214 Before Senate Committee on Government Affairs, 1997 Legislative Session, 8 (June 2, 1997).

With regard to campaign contributions, once an elected official properly files his contribution and expenditure report, it becomes public information. Additional disclosure by the elected official is not therefore required. In the 1991 Legislature, a member of the Assembly Committee on Legislative Functions and Elections commented, "In Clark County when we file our disclosures or expenditures, the press is there. It's all open. The same day you file it, it appears in the newspaper." *Hearing on A.B. 190 Before Assembly Committee on Legislative Functions and Elections, 1991 Legislative Session, 15 (March 14, 1991).*

[NRS 281.501](#)(2) requires abstention when a member of a legislative branch's pecuniary interest, his commitment in a private capacity to the interest of others, or his acceptance of a gift or loan would materially affect the independence of judgment of a reasonable person in his situation. [NRS 281.501](#)(3) allows abstention if the public officer has accepted a gift or loan, if he would be reasonably affected by his commitment in a private capacity to the interest of others, or if he has a pecuniary interest. These sections enumerate the criteria for what conduct amounts to a conflict of interest leading to abstention and do not include campaign contributions as a criteria.

Although a campaign contribution may be a gift or loan pursuant to the definition of contribution in [NRS 294A.007](#), if the campaign contribution is not used for personal use then it is not considered a gift or a loan to the individual under the ethics code. Abstention is not required unless a conflict of interest exists under [NRS 281.501](#). Campaign contribution is defined in [NRS 294A.007](#) which states:

"Contribution" means a gift, loan, conveyance, deposit, payment, transfer or distribution of money or of anything of value other than the services of a volunteer, and includes:

(a) The payment by any person, other than a candidate, of compensation for the personal services of another person which are rendered to a:

- (1) Candidate;
- (2) Person who is not under the direction or control of a candidate or group of candidates or of any person involved in the campaign of the candidate or group who makes an expenditure on behalf of the candidate or group which is not solicited or approved by the candidate or group;
- (3) Committee for political action, political party or committee sponsored by a political party which makes an expenditure on behalf of a candidate or group of candidates; or

(4) Person or group of persons organized formally or informally who advocates the passage or defeat of a question or group of questions on the ballot, without charge to the candidate, person, committee or political party.

(b) The value of services provided in kind for which money would have otherwise been paid, such as paid polling and resulting data, paid direct mail, paid solicitation by telephone, any paid paraphernalia that was printed or otherwise produced to promote a campaign and the use of paid personnel to assist in a campaign.

2. As used in this section, "volunteer" means a person who does not receive compensation of any kind, directly or indirectly, for the services he provides to a campaign.

The Legislature sought to keep conflicts of interest and campaign contributions separate in that they are governed by different sections of the NRS. In [NRS 281.465](#), the Legislature limited the Ethics Commission's jurisdiction over campaign practices to matters involving the publication of false statements and willfully impeding a campaign. [NRS 281.465](#) provides:

1. The commission has jurisdiction to investigate and take appropriate action regarding an alleged violation of:

(a) This chapter by a public officer or employee or former public officer or employee in any proceeding commenced by:

(1) The filing of a request for an opinion with the commission; or

(2) A determination of the commission on its own motion that there is just and sufficient cause to render an opinion concerning the conduct of that public officer or employee or former public officer or employee.

(b) [NRS 294A.345](#) or 294A.346 in any proceeding commenced by the filing of a request for an opinion pursuant thereto.

2. The provisions of paragraph (a) of subsection 1 apply to a public officer or employee who:

(a) Currently holds public office or is publicly employed at the commencement of proceedings against him.

(b) Resigns or otherwise leaves his public office or employment:

(1) After the commencement of proceedings against him; or

(2) Within 1 year after the alleged violation or reasonable discovery of the alleged violation. [Emphasis added.]

Nevada public officials are regularly required to disclose any and all campaign contributions. [NRS 294A.120](#) provides:

1. Every candidate for state, district, county or township office at a primary or general election shall, not later than:

(a) Seven days before the primary election, for the period from 30 days before the regular session of the legislature after the last election for that office up to 12 days before the primary election;

(b) Seven days before the general election, whether or not the candidate won the primary election, for the period from 12 days before the primary election up to 12 days before the general election; and

(c) The 15th day of the second month after the general election, for the remaining period up to 30 days before the next regular session of the legislature, report the total amount of his campaign contributions on forms designed and provided by the secretary of state and signed by the candidate under penalty of perjury.

2. Except as otherwise provided in subsection 3, every candidate for a district office at a special election shall, not later than:

(a) Seven days before the special election, for the period from his nomination up to 12 days before the special election; and

(b) Thirty days after the special election, for the remaining period up to the special election,

report the total amount of his campaign contributions on forms designed and provided by the secretary of state and signed by the candidate under penalty of perjury.

3. Every candidate for state, district, county, municipal or township office at a special election to determine whether a public officer will be recalled shall report the total amount of his campaign contributions on forms designed and provided by the secretary of state and signed by the candidate under penalty of perjury, 30 days after the special election, for the period from the filing of the notice of intent to circulate the petition for recall up to the special election.

4. Reports of campaign contributions must be filed with the officer with whom the candidate filed the declaration of candidacy or acceptance of candidacy. A candidate may mail the report to that officer by certified mail. If certified mail is used, the date of mailing shall be deemed the date of filing.

5. Every county clerk who receives from candidates for legislative or judicial office, except the office of justice of the peace or municipal judge, reports of campaign contributions pursuant to subsection 4 shall file a copy of each report with the secretary of state within 10 working days after he receives the report.

6. Each contribution in excess of \$100 and contributions which a contributor has made cumulatively in excess of that amount since the beginning of the first reporting period must be separately identified with the name and address of the contributor and the date of the contribution, tabulated and reported on the form provided by the secretary of state.

Additional disclosure requirements are found in [NRS 294A.125](#), which requires disclosure of receipt of more than \$10,000 in a year before the year of election. [NRS 294A.350](#) requires a report to be filed even though no contributions were received or no expenses were incurred.

Case law from other states concludes that a conflict of interest does not necessarily exist where a board member has received a campaign contribution. In a Washington case, the court concluded an administrative decision maker's participation after receiving campaign contributions from an interested party does not necessarily violate the appearance of fairness doctrine pursuant to Wash. Rev. Code § 42.36.050 (1997). In *Snohomish County Improvement Alliance v. Snohomish County*, 808 P.2d 781 (Wa. 1991), the court held when two council members participated in a quasi-judicial proceeding after contemporaneously receiving campaign contributions from interested parties, they did not violate the appearance of fairness doctrine. In deciding this, the court stated: "Moreover, such participation by said Councilmembers was not a conflict of interest The mere receipt of campaign contributions by a councilmember does not constitute a 'direct or indirect substantial financial or familial interest,'" *Id.* at 786. The court implied there may have been another result had there been a failure to report the campaign contributions. *Id.*

In *Woodland Hills v. City Council*, 609 P.2d 1029 (Cal.1980), the California court held that absent bribery or some significant conflict of interest, a campaign contribution is not sufficient to require recusal of a council member prior to a vote on projects of developers who gave the contributions. *Id.* at 1032. Although the trial court found the party before the council member had made substantial contributions of money to the campaign (exceeding \$9,000), it found the petitioner was not denied a fair hearing. *Id.* The court concluded it was not improper for a member of the council to vote on the projects nor were they required to disqualify themselves in such circumstances because expression of political support by campaign

contribution does not prevent a fair hearing before an impartial city council when the contributions were lawfully made and received, and disclosed pursuant to laws governing campaign contributions. *Id.* at 1032. The campaign laws require disclosure instead of disqualification. *Id.*

However, the court noted an official would still be precluded from participating in a decision in which he has “a financial interest.” *Id.* Campaign contributions are expressly excluded from the definition of financial interest. *Id.* at 1033. Hence, the court concluded the Political Reform Act deals comprehensively with problems of campaign contribution and conflict of interest and does not prevent a city council member from acting upon a matter involving the contributor. *Id.* The court discussed the importance of the political contribution in that it is an exercise of fundamental freedom protected by the First Amendment of the United States Constitution and article I, section 2 of the California Constitution. Because of this importance the court stated, “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” *Id.*

Florida examined the issue under circumstances involving a judge who received campaign contributions from a party before him. In *Honorable Mary Ann MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332 (Fla. 1990), the court concluded the judge was also not required to recuse herself because Florida’s Code of Judicial Conduct together with Florida’s statutory limitation on campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against the concerns raised by the United States Supreme Court in *CSC v. Letter Carriers*, 413 U.S. 548 (1973): 1) the tendency or possibility to create a quid pro quo relationship and 2) the creation of an appearance of influence or corruption. *MacKenzie* at 1335.

Some states addressed the issue in statutes. Georgia puts the responsibility of reporting contributions on the person who makes an application to a board. If the applicant has given a campaign contribution of more than \$250 to a board member within the previous two years, the applicant must file a disclosure report. Ga. Code Ann. § 36-67A-3 (1998).

In Montana, the rules of conduct for public officers provide that they may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift that would tend improperly to influence a reasonable person in the person’s position to depart from the faithful and impartial discharge of the person’s public duty. The statute then defines an economic benefit tantamount to a gift and excludes campaign contributions reported as required by statute. Mont. Code Ann. § 2-2-104 (1997).

Public policy strongly encourages the giving and receiving of campaign contributions. These contributions do not automatically create an appearance of unfairness or a conflict of interest. Adequate protection against corruption and bias is afforded through the disclosure statutes found in chapter 294A of the NRS. Therefore, without evidence of improper influence, additional disclosure should not be required outside the chapter 294A requirements.

In a previous decision by the Ethics Commission, a city councilman did not violate the Code of Ethics by placing on the council agenda an item to reopen a settlement agreement between the city and a business owned by two of the councilman’s constituents who had contributed significantly to his campaign. There was an independent reason for reviewing the settlement agreement, and insufficient evidence that the councilman was improperly influenced by the campaign contributions at issue. *Matter of David A. Wood*, NCOE Opinion No. 95-51 (1997) (Wood Opinion). In this opinion, the councilman received a total of \$4,240 from the constituents. Some of this money was given before the councilman discussed with the constituents their relationship with the city, including the way the constituents had been treated

in a settlement matter with the city, and some of the money was given after these discussions. The councilman then sought to reopen the settlement matter with the city for the contributing constituents. In finding no conflict of interest, the Ethics Commission stated proof of an improper correlation between the benefits conferred upon the councilman and the subsequent benefit he conferred upon them was needed. Although this matter presented a close question, the Ethics Commission could not find a violation. The Ethics Commission stated, "We agree that democracy, as practiced in the United States, allows citizens to actively participate in a candidate's candidacy through the donation of money or services and that this practice cannot be discouraged." *Id.* at 9.

In discussing whether the acceptance of a campaign contribution amounts to a gift, the Ethics Commission stated:

We are not prepared to issue a blanket statement that properly disclosed campaign contributions will never qualify as a "gift . . . which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties." As the test makes clear, the question is not whether money is a "gift," but rather whether the money would improperly influence a reasonable man. It is conceivable that a campaign contribution could be deemed to improperly influence a reasonable man depending upon the amount of the contribution, the identity of the donor, the timing of the gift, and other such factors.

Id.

In light of the fact that the councilman's campaign received only 6 percent of his total budget from these constituents, it could not be inferred that the councilman was actually improperly influenced by the campaign contributions in issue. There was also no direct evidence of an express quid pro quo. The Ethics Commission also concluded the councilman did not confer unwarranted privileges, preferences, or advantages on the contributing constituents because there was an independent and colorable reason for reviewing the Settlement Agreement. *Id.* at 10.

In the present case, you received small contributions in previous campaigns from a party now before you as a member of the Board which you reported on your contribution and expenditure reports. No conversations occurred with regard to what, if anything, the contributor may have expected from you. Because these campaign contributions were given in previous years, and because the Board does not actually choose the recipient of the contract, but only approves the funding for the contract, the Wood Opinion should control this situation and one can reasonably conclude you would not violate [NRS 281.481](#)(1) or (2) by having accepted campaign contributions and thereafter voting to approve the funding on the contract awarded the contributor. Under the two fact patterns you presented above, you would not need to disclose that you received campaign contributions from the person or entity with an item before the Board because you filed the required campaign contribution and expenditure reports.

The facts you submitted include the question of whether you, as a member of the Board, may vote to approve a contract where your former employer is the recipient. The former employer is a bank where you also continue to have your retirement account. You have asked if this creates a conflict of interest which may require disclosure and abstention. [NRS 281.481](#)(2) and [NRS 281.501](#)(3) offers guidance. [NRS 281.481](#) (2) states, "A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person."

The analysis requires a determination of whether the approval of the contract is some sort of unwarranted privilege, preference, or advantage given to the former employer/bank in which you have a significant pecuniary interest. As the Ethics Commission states in the *Matter of Bob Miller*, NCOE Opinion No. 94-27/94-30 (1995) (Miller Opinion), the Board is simply in the position to approve a contract that has been previously awarded through a competitive process. The Board is not in the position to decide to whom to award the contract, just whether to approve the funds for the awarded contract. *Id.* at 9-10. Hence, since your former employer/bank has already prevailed in the competitive process and been awarded the contract, there does not appear to be any unwarranted privilege, preference or advantage given to the bank by the Board's approval of the funds for the contract. In addition, the vote may be warranted in that the bank is entitled to the funding as they have already been granted the contract. If the funding can be granted by the Board as in the regular course of business, then the bank has not received an unwarranted privilege. Wood Opinion at 10.

The next analysis needs to address whether the bank is a business entity in which you have a significant pecuniary interest because you have a retirement account at the bank. The retirement account will continue to accrue as it always has according to the previously agreed upon contract between you as a private citizen and the bank. So you are not in a position to reap significant additional retirement monies if you vote to approve the funds for the previously awarded contract. The intent of the Legislature in [NRS 281.481\(2\)](#) is to avoid the public official voting on a matter wherein he is a stockholder in a corporation who is before the official on a matter that will potentially increase the value of the stock the official holds. (Where state officer held minimal interest in private corporation that contracted with state but did not participate in or directly benefit from transaction, he did not violate provisions of former [NRS 281.220](#) or former provisions of 281.230 (cf. [NRS 281.481](#)), prohibiting conflicts of interest by state and other public officers, or any common law prohibition. Op. Nev. Att'y Gen. No. 16 (March 2, 1971).

We must also analyze these facts under [NRS 281.501\(3\)](#), and the issue is whether you are reasonably affected by your commitment in a private capacity to the interest of others, i.e., your former employer/current bank. In the *Matter of Richard Stone*, NCOE Opinion No. 96-32 (1998), the Ethics Commission concluded a General Improvement District trustee should have disclosed and abstained on a matter before him where the matter involved his current employer, who was not only a business colleague but personal friend for years as well. The Ethics Commission concluded because of this relationship a person in this trustee's position could not have helped but have his independence of judgment affected by his concerns about his employer, his future employment, and the welfare of his boss and friend. Because this case dealt with a current employer, it may be said that a former employer, which can neither offer nor receive a benefit from the public official, would not require disclosure and abstention because the public official would no longer be concerned with his future employment and the welfare of his former boss.

In the *Matter of Frank Hawkins, Jr.*, NCOE Opinion No. 94-05 (1995), the Ethics Commission decided an arm's length business relationship with one before the public body, such as a private business loan, does require disclosure but not abstention unless the relationship materially affects the independence of judgment of the public officer. In the present matter, the case can be made that if a private business loan only requires disclosure, then surely retention of a bank account, which involves something less than that relationship required for a loan, does not require disclosure. Essentially, the nature of a bank account is one at arm's length in that it does not require special permission to obtain or any sort of special attention such as a loan.

CONCLUSION TO QUESTION ONE

If an elected official who is a member of a board has filed all campaign contribution and expenditure reports required by law, the elected official does not need to disclose and abstain

from voting when a person or entity who has given a campaign contribution has an item before the board. The elected official also does not need to disclose and abstain from voting when a person or entity that is a former employer of the elected official, and with whom the elected official still maintains a retirement account, has an item before the board.

QUESTION TWO

Must an elected official who is a member of a board disclose a possible conflict of interest and abstain from voting because of a business relationship and friendship with a person who has an item before the board?

ANALYSIS

You have also presented the following facts for our analysis. Your personal accountant, who you also consider a friend, has a pending contract before the Board. You have not spoken with him regarding this pending contract.

The Ethics Commission addressed this issue in the Miller Opinion. Governor Miller asked the Ethics Commission whether he had a conflict of interest in voting as a member of the Board of Examiners on two contracts for advertising services with a company, the principal of which was a friend and political advisor.

The Ethics Commission concluded Governor Miller's friendship and business association with the principal of the company did not give Governor Miller a pecuniary interest of any type defined by law, nor did it concern a commitment in a private capacity to the interests of others as defined by law that would require Governor Miller to make a full disclosure. This conclusion was reached because Governor Miller did not receive discounted services from the company, was billed in the same manner as other clients, and had no ownership or financial interest in the company. There was no evidence to suggest that Governor Miller's actions in regard to this contract were reasonably affected by his relationship with the principal.

The Ethics Commission concluded Governor Miller was not required to abstain from voting on the contract because there was no evidence in the record regarding any pecuniary interest of or commitment to the interest of others by Governor Miller that would have materially affected the independence of judgment of a reasonable person in his situation. Governor Miller, as a member of the Board, did not choose this contractor to provide services to the state, but rather voted on spending the money appropriated by the legislature in this manner.

The facts you present are similar to those in the Miller Opinion. A person with whom you have a business relationship and a friendship has a contract before the Board for approval. You did not award this contract to your friend, but rather as a member of the Board will only be voting on whether to spend money appropriated by the Legislature in this manner. Therefore, under the guidance of the Miller Opinion, you do not need to disclose this relationship or abstain from voting on the matter.

The Attorney General's office examined a recent Ethics Commission opinion⁵⁷ dealing with personal relationships in Op. Nev. Att'y Gen. No. 98-27 (September 25, 1998) and stated:

In seeking to qualitatively adjudge such relationships, the Ethics Commission interpreted [NRS 281.501](#) to require a look at the substance of the relationship itself, rather than the label on it. In doing this, the Ethics Commission came up with four factors to analyze a personal relationships (sic) for conflict of interest

⁵⁷ *Matters of Yvonne Atkinson Gates, Myrna Williams, and Lance Malone*, NCOE Opinion Nos. 97-54, 97-59, 97-66, 97-53, and 97-52 (1998).

purposes. These factors are: 1) the length of a relationship, 2) the context of the relationship, 3) the substance of the relationship, and 4) the frequency of the relationship. Recognizing these personal relationships are difficult to adjudicate, the Ethics Commission stated, "By legislative design, the determination of whether a given relationship would materially affect the independence of judgment of a reasonable person will always be a case-by-case examination."

You have provided the following facts regarding your personal relationship with your account/friend: the relationship has lasted for eight years on both a business and personal level; on the personal level, you see and visit with your friend at ballgames in which your children and his children participate and at the speedway where you are both participants. You do not socialize at any other time. In analyzing these facts against the four factors enumerated by the Ethics Commission, we come to the following conclusion: although your personal relationship has lasted for several years, the context and substance of the relationship is not such as would require disclosure and abstention. Outside of your business relationship, you only see your friend at sporting events you attend for the purpose of watching your children or participating yourself.

CONCLUSION TO QUESTION TWO

According to Nevada statutes, an elected official who is a member of a board must disclose a conflict of interest if a person with whom the elected official has a friendship and business relation has an item before the board and the elected official has accepted a gift or loan, has a pecuniary interest or would be reasonably affected by his commitment in a private capacity to the interest of his friend. An elected official in this situation must disclose and then abstain if the independence of judgment of a reasonable person in his situation would be materially affected by the acceptance of a gift or loan, by his pecuniary interest or by his commitment in a private capacity to the interest of his friend pursuant to Nevada law. This analysis must be done on a case by case basis and the facts you have presented do not necessitate either disclosure or abstention.⁵⁸

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 98-30 PAROLE AND PROBATION; AND PRISON: Nevada's Risk Assessment Team should take steps to have incorrect information removed from community notification files. Regardless, law enforcement officers may provide the public with notification concerning any person who poses a threat to public safety. The Team should provide all records of a sex offender, necessary to conduct an assessment, to the assessment team for the state where the offender has relocated.

Carson City, November 3, 1998

Toni Gillen, Unit Manager, Pre-Release Unit, State of Nevada, Department of Motor Vehicles and Public Safety, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104, Carson City, Nevada 89706

⁵⁸ For a further analysis of this issue, see Op. Nev. Att'y Gen. No. 98-27 (September 25, 1998).

Dear Ms. Gillen:

You have requested an opinion from the Attorney General's office concerning Nevada's sex offender registration and community notification laws.

QUESTION ONE

What can Nevada's Risk Assessment Team (Team) do if an offender, who has not been convicted of a crime listed at [NRS 179D.620](#), has mistakenly been assessed and assigned a tier level?⁵⁹

ANALYSIS

Your request indicated that the Team has reported offenders of crimes, listed at [NRS 179D.210](#) and [179D.410](#), to local law enforcement agencies for the purpose of community notification. The conviction of a sexual offense listed at [NRS 179D.620](#) triggers the application of Nevada's laws on community notification. If an offender, not convicted of a crime listed at [NRS 179D.620](#), has been erroneously assessed and assigned a tier level, the Team should remove this information from its "community notification" files. If the Team has taken the additional step of sending this incorrect information to law enforcement agencies and the offender, it should notify these agencies and the offender of the oversight. It should also advise the law enforcement agencies to remove such data from its "community notification" files. However, even if the offender is not a "sex offender" as defined at [NRS 179D.610](#), notification may be appropriate if he poses a threat to public safety. *See* 179D.710(3).

QUESTION TWO

Under what circumstances can law enforcement officers notify the public about offenders who have not been convicted of an offense listed at [NRS 179D.620](#)?

ANALYSIS

Nevada's "community notification" law ([NRS 179D.600](#) - 179D.800) "must not be construed to prevent law enforcement officers from providing the public with notification concerning *persons who pose a threat to the safety of the public.*" NRS 179D.710(3) (emphasis added). An "offense that poses a threat to the safety or well-being of others" is broadly defined at [NRS 179D.060](#).⁶⁰ Furthermore, law enforcement agencies and their officers

⁵⁹ The Risk Assessment Team, that evaluates an offender who has had prior contact with Nevada's Department of Prisons (NDOP), is a two-member team consisting of the Mental Health Director of NDOP and the Chief of the Division of Parole and Probation (Division). The Risk Assessment Team, that evaluates an offender who has had no prior contact with NDOP, is the Chief of the Division with the assistance of a psychiatrist or psychologist licensed to practice in Nevada and qualified in the assessment of sex offenders. *See* Nevada's Guidelines and Procedures, Rev. August 1998, at paragraph 3.00(2), p. 4.

⁶⁰ NRS 179D.060(1) provides as follows:

1. "Offense that poses a threat to the safety or well-being of others" includes, *but is not limited to*, an offense that involves:

- (a) A victim less than 18 years of age;
- (b) A crime against a child as defined in NRS 179D.210;
- (c) A sexual offense as defined in NRS 179D.410;
- (d) A deadly weapon, explosives or a firearm;
- (e) The use or threatened use of force or violence;
- (f) Physical or mental abuse;
- (g) Death or bodily injury;
- (h) An act of domestic violence;
- (i) Harassment, stalking, threats of any kind or other similar acts;
- (j) The forcible or unlawful entry of a home, building, structure, vehicle or other real or personal property; or

and employees are immune from liability “for an act or omission relating to information obtained, maintained or disclosed pursuant to the provisions of this chapter . . . (179D).” [NRS 179D.850\(2\)](#).

QUESTION THREE

Can the Team provide sensitive and otherwise confidential information to another state’s assessment team when the sex offender moves to that state?

ANALYSIS

The federal government envisions a gap-free nationwide community notification network. Our Legislature recognized that sex offenders move from time to time. The Team, in assessing sex offenders, must base their decisions on information from “agencies of this state and *agencies from other jurisdictions.*” [NRS 179D.720\(2\)](#) (emphasis added). If a sex offender moves to Nevada, the Team should request and receive from the previous state’s assessors “all records of the sex offender that are necessary to conduct (an) assessment.” [NRS 179D.720\(3\)](#). Likewise, if a sexual offender from Nevada moves to another state, the Team should provide that state’s assessment team with “all records of the sex offender that are necessary to conduct (an) assessment.” [NRS 179D.720\(3\)](#). The “sex offender shall be deemed to have waived all rights of confidentiality and all privileges relating to those records for the limited purpose of the assessment.” *Id.*

CONCLUSION

In the event of an incorrect assessment and tier level assignment, please take the corrective measures suggested above. Regardless, law enforcement officers are not precluded from notifying the public about a person who poses a threat to their safety. Finally, Nevada’s Team should provide all records of the sex offender, necessary for an assessment, to the state’s assessment team where the offender has relocated.

FRANKIE SUE DEL PAPA
Attorney General

By: JOE WARD, JR.
Deputy Attorney General

AGO 98-31 COUNTIES; ELECTIONS; SECRETARY OF STATE; VOTERS/VOTING: A rent receipt for the voter’s place of business may not be accepted as proof of residency after a challenge to vote has been filed unless the voter can also prove the voter actually resides at the voter’s place of business.

Carson City, October 29, 1998

The Honorable Janet Hess, Storey County District Attorney, Post Office Box 496, Virginia City, Nevada 89440

Dear Ms. Hess:

(k) The infliction or threatened infliction of damage or injury, in whole or in part, to real or personal property. [emphasis added].

You have requested an opinion from this office regarding the use of rent receipts to prove residency when a voter has been challenged.

QUESTION

May a rent receipt for a voter's place of business be accepted by the county clerk or the election board as proof of residency after a challenge to vote has been filed questioning the legal residence of a voter who registered to vote by mail or registered to vote with a deputy registrar? Is the answer different if the voter previously voted in the county?

ANALYSIS

According to the facts you presented, challenges have been filed with the county clerk alleging registered voters in the county are using business addresses as their residence address for voting purposes. When a person registers to vote, the county clerk shall require the person to submit official identification as proof of residence and identity, such as a driver's license or other official document, before registering the person to vote. [NRS 293.517](#). Because the Legislature chose the term "official" identification or document to prove residency prior to registering a person to vote, it must be concluded "official" means some form of government documentation, such as a driver's license, social security card, or identification card issued by the department of motor vehicles and public safety. *See* [NRS 293.507\(4\)\(a\)](#). However, if a registered voter is challenged pursuant to [NRS 293.303\(1\)](#), the election board shall not issue the person a ballot until he furnishes satisfactory identification that contains proof of the address at which he actually resides. [NRS 293.303\(7\)](#). Hence, it appears a challenged voter must only produce satisfactory evidence of residency while a person registering for the first time must have official identification.

In *Robinson v. Smith*, 683 A.2d 481 (D.C. 1996), and *Braddock v. Smith*, 711 A.2d 835 (D.C. 1998), the courts, in determining residency for tuition purposes, concluded that receipts for payment of rent on a District of Columbia residence in which the applicant actually resided was evidence of residency. One question is whether rent receipts for one's business address are sufficient. [NRS 293.507\(4\)\(c\)](#) answers this by stating, "The form for an application to register to vote must include a notice that the voter may not list his address as a business unless he actually resides there."

In 1962, the Attorney General opined that under [NRS 293.497](#), the residence of a man for voting purposes, who works in one county and maintains a family home in another county, is the family home absent evidence of different intent. Op. Nev. Att'y Gen. No. 276 (March 7, 1962).

In *De La Cruz v. Dufresne*, 533 F. Supp. 145 (D. Nev. 1982), the issue of whether a brothel can also be a residence for voting purposes was addressed and the court held a place of business or post office address is not per se equivalent to a residence. *Id.* at 149. *De La Cruz* also stated upon a challenge, the election board members have a right to ask any relevant question of the challenged voter as may be considered necessary to arrive at a decision. *Id.*

Therefore, it appears that in Nevada, rental receipts for a place of business are not appropriate documentation of residency for voting purposes unless the voter can prove that the voter lives at the business and intends that to be the voter's home. The burden is on the voter to prove the voter's residency. [NRS 293.303\(7\)](#) (the voter must furnish satisfactory identification which contains proof of the address at which he actually resides); [NRS 293.495](#) ("If a person having a fixed and permanent home in this state breaks up such home and removes to another state, territory or foreign country, the intent to abandon his residence in this state shall be presumed, and the burden shall be upon him to prove the contrary. The same rule shall apply

when a person removes from one county to another within the state, or from one precinct to another within the county”).

In Texas, the court found where a voter’s driver’s license showed the address of her business which is located in the voting district, but she received mail at a different county’s address, was not conclusive evidence that she did not reside in the voting district where her business was located. The court concluded that some probative evidence existed that the voter resided in the voting district and therefore legally voted in that district. Although there was also contradicting evidence, the record did not show that the judge’s findings were so weak as to render the outcome manifestly unjust or clearly wrong. *Slusher v. Streater*, 896 S.W.2d 239, 244 (Tex. 1995).

At issue is the fundamental right to vote; therefore, the government must have a compelling interest to infringe upon that right. In *Sloane v. Smith*, 351 F. Supp. 1299 (D. Penn. 1972), the court held the requirement that members of the student class meet a more stringent test of residency than other voter registration applicants is unjustifiable and violates the equal protection clause of the Fourteenth Amendment. *Id.* at 1305. The court enjoined the county commissioners from requiring additional documentation of residency beyond the sworn affidavit of an applicant unless defendants reasonably believed the individual applicant’s claim of residency was untrue. *Id.* In *Sloane*, college students were denied the right to vote because they could not produce driver’s licenses, two or more credit cards, or “black and white factual proof” that each applicant actually intends to claim the county address as the applicant’s legal residence. *Id.* at 1301. However, nonstudents were allowed to register to vote without furnishing any proof of residency, although their current driver’s licenses showed another state’s address. *Id.* at 1300. The county attempted to argue their compelling government interest was to prevent a “community takeover” by the large student population. *Id.* at 1303. The court found for the students and enjoined the county from discriminating against students by applying different standards of eligibility from those applied to other registrants. *Id.* at 1305.

The challenge statute, [NRS 293.303\(8\)](#), does not require a higher standard of proof for voters who registered to vote by mail. The voter must furnish satisfactory identification which contains proof of the address at which the voter actually resides regardless of whether the voter registered to vote by mail or with a deputy registrar. There is also no distinction made for a voter who previously voted in the county. The standard of proof the voter must provide to overcome a challenge is the same for all voters.

Applying this analysis to the facts you presented, if a challenged voter furnishes a rent receipt as proof of residency and the rent receipt is for the voter’s place of business, unless the voter can also prove the voter resides at the voter’s place of business, such a rent receipt alone would not overcome the challenge.

CONCLUSION

A rent receipt for the voter’s place of business may not be accepted by the county clerk or the election board as proof of residency after a challenge to vote has been filed questioning the legal residence of a voter who registered to vote by mail or registered to vote with a deputy registrar, unless the registered voter can also prove the voter actually resides at the voter’s place of business. This conclusion also applies to a voter who previously voted in the county.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 98-32 BONDS; INDUSTRIAL DEVELOPMENT REVENUE BONDS; PUBLIC UTILITIES; UTILITIES: The director does not have any statutory authority to directly issue industrial development revenue bonds for the benefit of public utilities.

Carson City, November 5, 1998

Mr. Steve Ghiglieri, Chief, Department of Business and Industry, Office of Business Finance and Planning, Kietzke Plaza, Building F, 4600 Kietzke Lane, Suite 154, Reno, Nevada 89502

Dear Mr. Ghiglieri:

You have requested an Attorney General opinion regarding whether the director of the Department of Business and Industry (director) may issue state obligations in the form of Revenue Bonds for Industrial Development (IDR bonds) for the benefit of public utilities pursuant to [NRS 349.580\(2\)](#).

QUESTION

May the director issue revenue bonds for industrial development for the benefit of public utilities pursuant to [NRS 349.580\(2\)](#)?

ANALYSIS

Pursuant to [NRS 349.580](#), the director shall not finance a project unless, before financing:

1. The director finds that:

(a) The project to be financed has been approved for financing pursuant to the requirements of [NRS 244A.669](#) to [244A.763](#), inclusive, or 268.512 to 268.568, inclusive; and

(b) There has been a request by a city or county to have the director issue bonds to finance the project; or

2. The director finds and both the board and the governing body of the city or county where the project is to be located approve the findings of the director that:

(a) The project consists of any land, building or other improvement and all real and personal properties necessary in connection therewith, excluding inventories, raw materials and working capital, whether in existence, suitable for new construction, improvement, preservation, restoration, rehabilitation or redevelopment.

(1) For manufacturing, industrial, warehousing, civic, cultural or other commercial enterprises, educational institutions or organizations for research and development;

(2) For a health and care facility or a supplemental facility for a health and care facility;

(3) Of real or personal property appropriate for addition to a hotel, motel, apartment building, casino or office building to protect it or its occupants from fire; or

(4) Of a historic structure.

(b) The project will provide a public benefit;

(c) The contemplated lessee, purchaser or other obligor has sufficient financial resources to place the project in operation and to continue its operation, meeting the obligations of the lease, purchase contract or financing agreement;

- (d) There are sufficient safeguards to assure that all money provided by the department will be expended solely for the purposes of the project;
- (e) There are existing and projected needs for the project and the project would alleviate an existing shortage of facilities or services in the state;
- (f) The project would be compatible with existing facilities in the area adjacent to the location of the project;
- (g) The project is compatible with the plan of the state for economic diversification and development or for the marketing and development of tourism in this state;
- (h) Through the advice of counsel or other reliable source that the project has received all approvals by the local, state and federal governments which may be necessary to proceed with construction, improvement, rehabilitation or redevelopment of the project; and
- (i) There has been a request by a city, county, lessee, purchaser, other obligor or other enterprise to have the director issue revenue bonds for industrial development to finance the project.

There is no specific authority in chapter 349 which gives the director independent authority to issue IDR bonds to finance projects by utilities. You have also indicated your belief that there is no precedent for issuance of such bonds by the director. However, the director may issue IDR bonds pursuant to [NRS 349.580\(1\)](#), if there has been a request by a city or county to have the director issue these bonds to finance the project. The question then is whether the director may issue bonds for the benefit of “and at the request of” public utilities when no specific statutory authority exists.

[NRS 244A](#) (the County Economic Development Revenue Bond Law) addresses the financing of public improvements by counties in this state. [NRS 244A.689](#) defines “project” with respect to this law. It states:

“Project” means:

- 2. The refinancing of any land, building or other improvement and any real and personal property necessary for:
 - (a) A health and care facility;
 - (b) A supplemental facility for a health and care facility;
 - (c) The purposes of a corporation for public benefit; or
 - (d) Affordable housing.
- 3. Any land, building, structure, facility, system, fixture, improvement, appurtenance, machinery, equipment, or any combination thereof or any interest therein, used by any natural person, partnership, firm, company, corporation (*including a public utility*), association, trust, estate, political subdivision, state agency, or any other legal entity, or its legal representative, agent or assigns.
 - (a) For the reduction, abatement, or prevention of pollution or for the removal or treatment of any substance in a processed material which otherwise would cause pollution when such material is used.
 - (b) In connection with the furnishing of water if available on reasonable demand to members of the general public.
 - (c) In connection with the furnishing of energy or gas.
- 5. Any undertaking by a *public utility*, in addition to that allowed by subsections 2 and 3, which is solely for the purpose of making capital improvements to property, whether or not in existence, or a *public utility*
[Emphasis added.]

Therefore, the Nevada Legislature has specifically given counties the authority to issue bonds to finance projects involving public utilities. Further, [NRS 244A.695](#) states:

It is the intent of the legislature to authorize *counties* to finance, acquire, own, lease, improve and dispose of properties to:

....
(3) Protect the health, safety and welfare of the public and promote private industry, commerce and employment in this state by:

....
(b) Furnishing energy, including electricity to the public
[Emphasis added.]

The Legislature has declared in its legislative intent that the counties of this state are authorized to issue bonds relating to the services public utilities perform, such as supplying electricity and “energy.” Moreover, [NRS 268.512](#)-268.568 (the City Economic Development Revenue Bond Law), contains language which mirrors that used in [NRS 244A.689](#). The City Economic Development Revenue Bond Law, [NRS 268.522](#), also defines “project” as including “[a]ny undertaking by a public utility” [NRS 268.522\(5\)](#). The legislative declaration of this statute also includes a direct reference to “furnishing energy.” See [NRS 268.524\(3\)\(b\)](#).

Although the Legislature has specifically given counties and cities the ability to issue bonds for projects involving public utilities, no similar provision is granted to the director under [NRS 349.580\(2\)\(a\)](#). To determine whether the legislature intended to give the director the ability to issue bonds directly for public utility projects, we must look “to the purpose of the statute as a whole as evidenced by the statutory scheme.” *Breen v. Caesars Palace*, [102 Nev. 79](#), 83 (1986). Moreover, the two acts of the Legislature should be “construed together, so as to give effect to the language of both, as far as consistent” *State of Nevada v. Tax Commission*, [38 Nev. 112](#), 116 (1914). However, “[c]ourts may not read something into the statute which is not there” *Young Electric Sign Co. v. Erwin Electric Co.*, [86 Nev. 822](#), 825 (1970).

At issue is whether the Legislature intended to give the director the ability to directly issue IDR bonds to finance public utility projects. [NRS 349.580](#) specifies two distinct ways the director is authorized to finance projects. First is for the director to find that the project has been approved by the cities or counties pursuant to chapter 244A or 268 of the Nevada Revised Statutes. See [NRS 349.580\(1\)](#). Second is for the director to find that the project is allowed by law and meets the criteria established in [NRS 349.580\(2\)\(a\)-\(b\)](#).

Cities and counties are given express statutory authority to issue bonds for the benefit of public utilities. See [NRS 268.522\(5\)](#) & [244A.689\(5\)](#). These specific references are found in the statutes which define a “project” for the purpose of issuing revenue bonds. By contrast, [NRS 349.510](#) defines “project” for the purpose of the director issuing IDR and does not include the term “public utility” as an allowed “project.”⁶¹ See [NRS 349.510](#). This is an important

⁶¹ NRS 349.510 defines “project” to mean:

1. Any land, building or other improvement and all real and personal properties necessary in connection therewith, excluding inventories, raw materials and working capital, whether or not in existence, suitable for new construction, improvement, rehabilitation or redevelopment for:
 - (a) Industrial uses, including assembling, fabricating, manufacturing, processing or warehousing;
 - (b) Research and development relating to commerce or industry, including professional, administrative and scientific offices and laboratories;
 - (c) Commercial enterprises;
 - (d) Civic and cultural enterprises open to the general public, including theaters, museums and exhibitions, together with buildings and other structures, machinery, equipment, facilities and

distinction, which illustrates the Legislature's intent to specifically exclude public utilities from those projects the director may approve. See, e.g., *Hale v. Burkhardt & Associates*, [104 Nev. 632](#), 636 (1988) (the Legislature's omission of a term raises the presumption that it was not the Legislature's intent to require it).

It is inappropriate for a court or other public entity to "fill in alleged legislative omissions based on conjecture as to what the Legislature would or should have done." *McKay v. Board of County Commissioners of Douglas County*, [103 Nev. 490](#), 492 (1987). Further, to determine what the Legislature intended, we should "look to the purpose of the statute as a whole, as evidenced by the statutory scheme." See *Breen*, 102 Nev. at 83; see also *State of Nevada v. Hamilton*, [33 Nev. 418](#), 422 (1936) (one section of a statute treating specifically of a matter will prevail over other sections in which incidental or general reference is made to the same matter). Chapter 349 makes a specific reference to chapters 244A and 268 as they relate to the prerequisites to financing a project. See [NRS 349.580\(1\)\(a\)](#). As such, these statutes should be read together. See *Tax Commission* at 116.

Additionally, the legislative declaration of chapters 244A and 268 specifically authorize cities and counties to finance or improve facilities which furnish energy. See [NRS 244A.689](#) and [268.522](#). However, no mention is made in the legislative declaration of [NRS 349.560](#) regarding the issuance of IDR bonds by the director which benefit public utilities⁶². Had the Legislature intended to give the director the ability to issue IDR bonds for use by public utility projects pursuant to [NRS 349.580\(2\)](#), it would have included the language "any undertaking by a public utility" found in of [NRS 244A.689](#), [268.522](#), and 349.510. See *Clark County Sports Enterprises*,

appurtenances thereto which the director deems useful or desirable in connection with the conduct of any such enterprise;

(e) An educational institution operated by a nonprofit organization not otherwise directly funded by the state which is accredited by a nationally recognized educational accrediting association;

(f) Health and care facilities and supplemental facilities for health and care; or

(g) The purposes of a corporation for public benefit.

2. Any real or personal property appropriate for addition to a hotel, motel, apartment building, casino or office building to protect it or its occupants from fire.

3. The preservation of a historic structure or its restoration for its original or another use, if the plan has been approved by the office of historic preservation of the department of museums, library and arts.

⁶² NRS 349.560 states that the legislative intent with respect to these bonds is to authorize the director to finance, acquire, own, lease, improve and dispose of properties to:

1. Promote industry and employment and develop trade by inducing manufacturing, industrial, warehousing and commercial enterprises and organizations for research and development to locate, remain or expand in this state to further prosperity throughout the state and to further the use of the agricultural products and the natural resources of this state.

2. Enhance public safety by protecting hotels, motels, apartment buildings, casinos, office buildings and their occupants from fire.

3. Promote the public health by enabling the acquisition, development, expansion and maintenance of health and care facilities and supplemental facilities for health and care facilities which will provide services of high quality at reasonable rates to the residents of the community in which the facilities are situated.

4. Promote the educational, cultural, economic and general welfare of the public by financing civic and cultural enterprises, certain educational institutions and the preservation or restoration of historic structures.

5. Promote the social welfare of the residents of this state by enabling a corporation for public benefit to acquire, develop, expand and maintain facilities that provide services for those residents.

Inc. v. City of Las Vegas, [96 Nev. 167](#), 174 (1980) (“[h]ad the legislature intended inclusion, it would have specifically so provided by language to that effect”); *see also Hamilton* at 422 (where one section of a statute treats a matter specifically, it will prevail over other sections in which incidental of general reference is made of the same matter).

Therefore, it can be inferred the Legislature intended to exclude public utilities from the list of IDR bond projects the director could independently authorize pursuant to [NRS 349.580\(2\)](#).

Although chapter 349 does not specifically state that the director may independently issue IDR bonds for use by public utilities, the director may finance a project for “commercial enterprises.” *See* [NRS 349.580\(2\)\(a\)\(1\)](#). The next question then is whether a public utility is considered a “commercial enterprise” under Nevada law.

“When construing a statute, words will be given their ordinary meaning if possible.” *Dumaine v. Nevada*, [103 Nev. 121](#), 125 (1987). No Nevada cases define what “commercial enterprise” encompasses. However, the Appellate Court of Illinois has issued an opinion with respect to this issue. In *Illinois Development Finance Authority v. Bean*, 485 N.E.2d 1202 (Ill. App. 1985), some Illinois public utilities sought a declaration that certain construction projects proposed by them fell within the scope of the Illinois Development Finance Authority Act (Act). *Id.* at 1203. The public utilities contended that the projects were improvements to a “commercial” or “service” facility for use by a “commercial enterprise.” However, the court found that examination of the Act did not support this contention. *Id.* at 1205.

The court stated that “the term ‘commercial enterprise,’ as used in the Act, did not include a public utility.” *Id.* The court found that “public utilities are commonly regarded as different from other commercial enterprises because of their regulated status.” *Id.* at 1206.

The court also stated that the “legislature’s exclusion of utilities from the list of included enterprises evidences its intention to exclude utilities from the purview of the statute.” *Id.* Finally, the court noted that the Illinois Supreme Court recognized that “public utilities are not formed for a purely mercantile purpose as are other corporations, but ‘form a particular class by themselves and are regulated by special provisions of our statute’” *Id.* (citation omitted).

Similarly, the Nevada Legislature has excluded public utilities from the list of projects which qualify for IDR bonds issued directly by the director. Also, public utilities in Nevada are regulated by the Public Utilities Commission of Nevada. *See* [NRS 704.001](#) et seq. The Nevada Legislature did not include public utilities as a “project” the director could independently authorize, unlike the cities and counties. Public utilities do not meet the definition of a commercial enterprise. The Legislature specifically gave cities and counties the ability to approve IDR bonds for the benefit of public utilities. Therefore, no statutory authority exists which permits the director to issue IDR bonds on behalf of a public utility, unless a city or county government first approves and requests the financing.

CONCLUSION

The director does not have any statutory authority to directly issue industrial development revenue bonds for the benefit of public utilities.

FRANKIE SUE DEL PAPA
Attorney General

By: CHRISTINE S. MUNRO
Deputy Attorney General

AGO 98-33 MORTGAGE COMPANY; LICENSES FINANCIAL INSTITUTIONS; FUNDS:
The commissioner may not issue a license for an out-of-state location of a mortgage company.

Carson City, November 6, 1998

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

Dear Mr. Walshaw:

This is in response to your request for an opinion of this office concerning whether a licensed mortgage company may transact business from an office outside the state of Nevada. You have provided a letter that seeks a response as to whether the Money Store, a licensed mortgage company, may open an office, obtain a license, and lend money from a Sacramento location.

QUESTION

May the commissioner of Financial Institutions (Division) issue a license for an office of a mortgage company that is located outside the State of Nevada?

ANALYSIS

Mortgage companies are defined and regulated in chapter 645B of NRS. Mortgage companies make or arrange loans secured by a lien on real property. Op. Nev. Att’y Gen. No. 92-3 (March 12, 1992). Mortgage companies assist consumers who seek to invest money in deeds of trust. The legislature has provided statutory guidance to the commissioner concerning licensing of locations.

[NRS 645B.020](#)(2)(b) provides that “[t]he application must state the location of the applicant’s principal office and branch offices *in the state*.” (Emphasis added.)

[NRS 645B.050](#)(2) provides as follows:

The commissioner shall require a licensee to deliver a financial statement prepared from his books and records by an independent public accountant who holds a permit to engage in the practice of public accounting *in this state* which has not been revoked or suspended. The financial statement must be dated not earlier than the close of the latest fiscal year of the company and must be submitted within 60 days thereafter. The commissioner may grant a reasonable extension for the submission of the financial statement if requested before the statement is due. [Emphasis added.]

The term “in the state” [NRS 645B.020](#)(2)(b) refers to licensed locations within the State of Nevada. Based upon the foregoing, the commissioner lacks authority to license an office of a mortgage company that is not in this state.

There are additional reasons to support this view that the Legislature did not intend licensure of out-of-state locations for mortgage companies. There is a need for close regulation by the commissioner. Mortgage companies accept deposits from consumers and invest the money in Nevada real property deeds of trust. The money may be invested in fractional interests in deeds of trust. The money of consumers is invested by the mortgage company in trust. [NRS](#)

[645B.175](#). The mortgage company receives funds from consumers based upon advertising its expertise in lending. The mortgage company statute presents specific regulatory needs for close supervision. The Division must be vigilant in regulating this type of financial institution. See *Scott v. Dept. of Commerce*, [104 Nev. 580](#), 763 P.2d 341 (1998). This office has previously rendered the opinion that foreign corporations engaging in solicitation of business of mortgage companies in Nevada must be licensed. Op. Nev. Att’y Gen. No. 92-3 (March 12, 1992).

You have indicated that the Money Store has a unique method of doing business under chapter 645. By way of contrast with other mortgage companies, the Money Store seeks to lend its own money. It does not seek to solicit and lend the money of consumers. If the Money Store seeks to lend its own money, its operation is closer to that of a bank, thrift, savings and loan, or exempt company than to a mortgage company. The Division has previously allowed the Money Store to perform certain functions at out-of-state locations. This practice is consistent, in our opinion, with the general constitutional provisions governing interstate commerce announced in *Pike v. Bruce Church*, 397 U.S., 137, 145 (1970).

CONCLUSION

In light of the somewhat unique operation of the Money Store, the Division may also wish to seek legislation to create a new category of lender that lends its own money and not the money of consumers. The commissioner may not issue a license for an out-of-state location of a mortgage company.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

AGO 98-34 INSURANCE; GROUP INSURANCE; NURSES: The Division of Insurance has the authority to discipline insurers under the unfair trade practices act and other provisions of title 57 if they violate [NRS 689B.045](#) by paying certain registered nurses at a rate lower than other health care providers for similar services.

Carson City, December 3, 1998

Ms. Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry, 1665 Hot Springs Road, Suite 152, Carson City, Nevada 89701

Dear Commissioner Molasky-Arman:

You have requested an opinion from this office to clarify the meaning of [NRS 689B.045](#).

QUESTION ONE

Does the Division of Insurance (Division) hold the authority and responsibility to determine if a nurse practitioner is performing “similar services” ([NRS 689B.045](#)(2)(b)) to those of another provider?

ANALYSIS

[NRS 689B.045](#) is a statute that deals with reimbursement for services performed by certain registered nurses, which services are covered by group health insurance.⁶³ The statute

⁶³ See also NRS 689A.0495, NRS 695B.199, and NRS 695C.179, passed as part of the same bill, S.B. 322, in 1985, which are

requires that registered nurses authorized by the State Board of Nursing to perform additional acts under emergency or other special conditions (hereinafter “authorized registered nurse”) who perform services within the authorized scope of practice of an authorized registered nurse must be reimbursed for these services if other health care providers are also reimbursed for these same services. [NRS 689B.045](#)(1). The statute reads as follows:

1. If any group policy of health insurance provides coverage for services which are within the authorized scope of practice of a registered nurse who is authorized pursuant to chapter 632 of NRS to perform additional acts in an emergency or under other special conditions as prescribed by the state board of nursing, and which are reimbursed when provided by another provider of health care, the insured is entitled to reimbursement for services provided by such a registered nurse.
2. The terms of the policy must not limit:
 - (a) Coverage for services provided by such a registered nurse to a number of occasions less than for services provided by another provider of health care.
 - (b) Reimbursement for services provided by such a registered nurse to an amount less than that reimbursed for similar services provided by another provider of health care.
3. An insurer is not required to pay for services provided by such a registered nurse which duplicate services provided by another provider of health care.

Subsection 2 prohibits the terms of a group policy of health insurance from limiting the number of times or amount that an insured can be reimbursed for services performed by an authorized registered nurse to a number or amount less than what is reimbursed to another health care provider. Your question deals specifically with subsection (2)(b), the term “similar services,” and whether the Division has the authority to determine if a registered nurse is performing similar services.

Also relevant to this discussion is Nevada Administrative Code (NAC) 686A.270, which prohibits an insurer from distinguishing one health care practitioner from another in the payment for medical services under a health care policy as long as the health care practitioner is licensed and operating within the scope of his authority.

Because an insured’s claim for reimbursement under a group policy of insurance is an insurance claim, the Division has the jurisdiction and authority under chapter 686A of NRS to determine whether the insurance company violated any provisions of this chapter. If an insurance company fails to reimburse the insured the same amount, or to pay the same amount to an authorized registered nurse as the amount reimbursed or paid to another health care provider for similar services, in violation of [NRS 689B.045](#), this may be a violation of an unfair trade practice under [NRS 686A.310](#)(1)(d) or (e) and subject the insurance company to discipline under [NRS 686A.160](#) and [NRS 686A.183](#).

CONCLUSION TO QUESTION ONE

The Division has the authority under chapter 686A of NRS to determine whether an insurance company or other entity engaged in the business of insurance has committed an unfair trade practice. A claim for coverage for services performed by an authorized registered nurse and within the scope of her authority under chapter 632 of NRS is an insurance claim over which the Division has authority to determine whether an unfair trade practice has occurred. If such a claim is not paid in accordance with provisions of title 57 of NRS requiring such claims to be

identical to NRS 689B.045 with the exception that NRS 689A.0495 deals with reimbursement under individual health policies, NRS 695B.199 deals with reimbursement under contracts with nonprofit corporations, and NRS 695C.179 deals with reimbursement under an HMO policy.

reimbursed at the same rate as for other health care practitioners, the Division may discipline the insurer pursuant to chapter 686A of NRS.

QUESTION TWO

Does [NRS 689B.045](#) in its entirety apply only to “emergency or . . . other special conditions” according to the terms of subsection 1 of [NRS 689B.045](#), and thus limit the “similar services” referred to in paragraph b of subsection 2 of [NRS 689B.045](#) to “emergency or . . . other special conditions”?

ANALYSIS

Subsection 1 of [NRS 689B.045](#) by its terms applies to coverage under group health policies “within the authorized scope of practice of a registered nurse authorized . . . to perform additional acts in an emergency or under other special conditions as prescribed by the state board of nursing” Therefore, any services that may be performed by an authorized registered nurse, from routine acts to emergency acts, are covered within this definition. The plain meaning of this phrase is that it is not limited solely to acts in an emergency situation or under special conditions, but rather applies to *any* services that may be performed by such a qualified nurse *within* the nurse’s authorized scope of practice. Therefore, the “similar services” under subsection (2)(b), which must be reimbursed at the same rate as other health care practitioners, is not limited to services only performed in an emergency or under other special conditions.

CONCLUSION TO QUESTION TWO

[NRS 689B.045](#) applies to any services, including routine services, performed by an authorized registered nurse and is not limited only to services performed in an emergency or under other special conditions.

QUESTION THREE

Is the Division responsible for enforcement of contracts between a nurse practitioner and an insurer, HMO, or PPO?

ANALYSIS

While, as a general rule, the commissioner may not dictate the terms of contracts between nurse practitioners and insurers, HMO’s, or PPO’s, any contract between these entities that contravenes state law is within the authority of the commissioner to review and take disciplinary action, if warranted and authorized under law. [NRS 689B.045](#) is clear that no policy of group health insurance may limit reimbursement for services provided by an authorized registered nurse to less than that provided to other health care providers as long as the registered nurse is authorized to perform such acts. Any contract between an insurer, HMO, or PPO and a registered nurse that requires registered nurses be paid at a rate less than that of other health care practitioners for the same or similar services directly contravenes the mandate and legislative intent of [NRS 689B.045](#), which requires that nurses receive the same reimbursement as that of other health care practitioners. Therefore, an insurer, HMO, or PPO which enters into such a contract with a registered nurse may be in violation of one or more of the following: [NRS 689B.045](#), [NRS 695C.179](#) (HMO), [NAC 686A.270](#), or has committed an undefined unfair trade practice pursuant to [NRS 686A.170](#). Violation of these statutes subjects a person to discipline or punishment by the Commissioner of Insurance under various statutes within title 57 of NRS including, but not limited to, [NRS 680A.200](#) for insurance companies, [NRS 695C.330](#) for HMO’s, and [NRS 686A.170](#) for any person committing an undefined unfair trade practice.

It should be noted that [NRS 689B.045](#) in no way requires an insurer, HMO, or PPO to allow registered nurses to perform certain services or credential a registered nurse or other health care practitioner at a certain level to perform certain services. The credentialing of a health care practitioner by an insurer, HMO, or PPO within one of these entities is a matter between them and the health care practitioner and a matter of private contract law over which the Division has

no regulatory authority. [NRS 689B.045](#) only requires that if such a registered nurse performs services within her authority as a registered nurse, she must be paid for those services at the same rate as other health care practitioners.⁶⁴

CONCLUSION TO QUESTION THREE

The Division is generally not responsible for enforcement of contracts between an insurer, HMO, and PPO as those are private contractual matters; however, if any of these entities enters into a contract with a registered nurse authorized to perform under emergency or other special conditions for the provision of services, which pays the registered nurse at a lower rate for similar services than that paid to other health care practitioners, the insurer, HMO, or PPO would be in violation of the requirements of [NRS 689B.045](#), subjecting them to discipline under various sections of title 57 of NRS.

FRANKIE SUE DEL PAPA
Attorney General

By: EDWARD T. REED
Deputy Attorney General

AGO 98-35 PUBLIC DEFENDER; CONTINGENCY FUND; COUNTIES; FEES: Counties that have chosen to utilize the services of the State Public Defender are liable for any extraordinary costs the State Public Defender incurs in preparing a defense for their client.

Carson City, December 8, 1998

Mr. John P. Comeaux, Director, Department of Administration, 209 East Musser Street, Suite 200, Carson City, Nevada 89701-4298

Dear Mr. Comeaux:

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

QUESTION

Is Pershing County or the State of Nevada liable for the costs of hiring Attorney Richard Cornell to assist the State Public Defender concerning the resentencing of Gerald Gallego?

ANALYSIS

[NRS 260.010](#) allows for the creation of county public defender's offices. [NRS 260.010\(2\)](#) states, in pertinent part, ". . . in counties whose population is less than 100,000, boards of county commissioners *may* in their respective counties create by ordinance, at the beginning of a fiscal year, the office of the public defender." [Emphasis added.]

[NRS 180.010](#) creates the State Public Defender's office. [NRS 180.090](#) states that [NRS chapter 180](#) applies "only to counties in which the office of the public defender has not been created pursuant to the provisions of chapter 260 of NRS." In this particular instance, the Pershing County Board of Commissioners (Board) has not created a county public defender's

⁶⁴ It should also be noted that NRS 689B.045 pertains only to reimbursement for services within the scope of practice of a registered nurse authorized to perform under emergency or other special conditions and does *not* authorize a registered nurse performing services outside of the scope of practice of a registered nurse to be reimbursed at the same rate as another health care practitioner, even if the registered nurse may perform these services because she is qualified as another type of health care professional.

office. The Board has chosen to utilize the services of the State Public Defender's office to represent the indigent defendant. As such, [NRS chapter 180](#) is the governing authority in this matter.

[NRS 180.080](#) delineates the duties of the State Public Defender to submit certain reports to the governor, participating counties and the legislative commission. Specifically, [NRS 180.080](#)(1)(b) states that the State Public Defender shall submit “. . . [t]o each participating county, on or before December 1 of each even-numbered year, the total proposed budget of the State Public Defender for that county, including the projected number of cases *and the projected cost of services attributed to the county for the next biennium.*” [Emphasis added.]

[NRS 180.110](#) addresses the collection of fees from counties who utilize the services of the State Public Defender. It states:

1. Each fiscal year the state public defender may collect from the counties amounts which do not exceed those authorized by the legislature for use of his services during that year.

2. The state public defender shall submit to the county an *estimate* on or before the first day of May and that estimate becomes the final bill unless the county is notified of a change within 2 weeks after the date on which the county contribution is approved by the legislature. The county shall pay the bill:

- (a) In full within 30 days after the estimate becomes the final bill or the county receives the revised estimate; or

- (b) In equal quarterly installments on or before the 1st day of July, October, January, and April respectively.

The counties shall pay their respective amounts to the state public defender who shall deposit the amounts with the treasurer of the State of Nevada and shall expend the money in accordance with his approved budget.

The cost of retaining Mr. Cornell to assist the State Public Defender's office with Mr. Gallego's resentencing could be handled in one of two ways. Since the amount of money necessary to retain Mr. Cornell exceeds the budgeted amount for the State Public Defender's office, you, as the Director of the Department of Administration, could, pursuant to [NRS 353.268](#)(1) submit a request to the State Board of Examiners for an allocation by the Interim Finance Committee from the contingency fund to cover the expense. Pursuant to [NRS 353.268](#)(2) the Board of Examiners shall consider the request. If the Board of Examiners deems that the allocation of funds for the retention of Mr. Cornell is necessary, it shall recommend the amount of the allocation to the Interim Finance Committee for its independent evaluation and action. However, the Interim Finance Committee is not bound to follow the recommendation of the Board of Examiners.

If the Board of Examiners deems the allocation necessary, the request shall be transmitted to the director of the Legislative Counsel Bureau who, in turn, notifies the chairman of the Interim Finance Committee. Pursuant to [NRS 353.269](#)(3), if the Interim Finance Committee, after independent determination, finds that the allocation recommended by the Board of Examiners should and may be lawfully made, the Interim Finance Committee shall by resolution establish the amount and purpose of the allocation, and direct the State Controller to transfer that amount to the State Public Defender's account. The State Controller shall then make the contribution to the proper account. It is my understanding from you that both the Board of Examiners and the Interim Finance Committee have made financial decisions similar to the issue at bar which contain caveats requiring that the State be reimbursed for the monies allocated to cover the extraordinary expense. Should the Board of Examiners and the Interim Finance Committee allow for the expenditure of funds necessary to retain Mr. Cornell, this type of caveat should be included.

In the alternative, pursuant to [NRS 180.080\(1\)\(b\)](#), the State Public Defender could recover the costs of retaining Mr. Cornell by factoring these costs into the projected costs of services the Public Defender will incur in representing Pershing County for the next biennium. In this instance, reimbursement for Mr. Cornell's services would not be immediately forthcoming, but would be collected over the next biennium.

In Op. Nev. Att'y Gen. No. 79-14A (July 5, 1979) the legality of requiring counties of a population of less than 100,000 to pay a proportionate share of the cost of the Nevada State Public Defender's office was addressed. The legislative history of [NRS 180 et seq.](#) was thoroughly researched and it was determined "[a]ny county having a population of less than 100,000 that has not created a county public defender office pursuant to [NRS 260.010](#) must pay its proportionate share of expenses for the use of the State Public Defender as required by [NRS 180.110](#)." [Emphasis added.] Op. Nev. Att'y Gen. No. 79-14A (July 5, 1979). This opinion implicitly states that Pershing County is responsible for the additional costs of retaining Mr. Cornell to assist with the resentencing hearing of Mr. Gallego.

This question as to who is responsible for the retention of Mr. Cornell may be a moot issue. Pursuant to [NRS 260.060](#), Steve McGuire, the Nevada State Public Defender, filed a motion before the Sixth Judicial District Court asking the court, at county expense, to appoint Mr. Cornell as co-counsel to assist the State Public Defender's office with Mr. Gallego's resentencing. [NRS 260.060](#) states, in pertinent part that:

For cause, the . . . district court *may* on its own motion or upon motion of the public defender . . . *appoint and compensate out of county funds* an attorney other than, or in addition to, the public defender to represent such indigent person at any stage of the proceedings or on appeal in accordance with the laws of this state pertaining to the appointment of counsel to represent indigent criminal defendants. [Emphasis added.]

This motion was heard on November 13, 1998, and taken under submission by the district court judge. Subsequently, Gallego was ordered to be housed in the Northern Nevada Correctional Center infirmary for a period not to exceed three months so that psychological evaluations could be completed by Lakes Crossing employees. If the examination is to exceed 30 days, monthly reports must be submitted to the district court. It appears that a ruling on the motion to appoint may be forthcoming soon. However, pursuant to *Sechrest v. State*, [101 Nev. 360](#), 705 P.2d 626 (1985), and *DePasquale v. State*, [106 Nev. 843](#), 803 P.2d 218 (1990), the appointment of co-counsel lies solely within the court's discretion. In *Sechrest*, the court determined that before co-counsel can be appointed, it should consider the number of pretrial motions, whether the defense theory will require substantial amounts of investigative work, how long the trial is expected to last, and whether the services of co-counsel could be performed by someone other than an attorney. In other words, each case is factually evaluated by the judge to see if the above threshold for appointment of co-counsel has been established. If the district court judge orders that Mr. Cornell be retained to assist the State Public Defender with Mr. Gallego's resentencing, the State Public Defender would enter into an independent contract with Mr. Cornell, pay him directly, and seek reimbursement from Pershing County.

In this instance, Mr. McGuire states that the number of pretrial motions should be small, the defense intends to call approximately 12 witnesses and will have to do substantial amounts of investigative work for the resentencing which is expected to last over three weeks. Since Mr. Cornell has worked on this case for the last 11 years, it is doubtful that someone else could step in and fill his shoes by the January 20, 1999, scheduled hearing date. As stated above, this motion is currently under submission with the Sixth Judicial District Court.

CONCLUSION

Pursuant to statute and previous Attorney General opinions, Pershing County should be held liable for the costs necessary to retain the legal services of Richard Cornell regarding the Gallego resentencing hearing. The Pershing County Board of Commissioners chose to utilize the services of the State Public Defender's office rather than create its own county public defender's office. When the Board made this choice, it also agreed to pay the State Public Defender's office for its services. This process is delineated in [NRS 180.080](#) and [NRS 180.110](#). It is unfortunate that this unexpected expenditure has arisen. However, to ensure that Mr. Cornell is retained well in advance of the January 20, 1999, hearing, the Interim Finance Committee and the Board of Examiners should approve the expenditure and pay for it out of the State contingency fund with an order that Pershing County reimburse the State for these costs. In the alternative, the State Public Defender could recover the costs of retaining Mr. Cornell by factoring them into the projected costs of services the public defender will incur in representing Pershing County for the next biennium. Finally, this issue may be resolved if the district court grants the State Public Defender's motion to appoint co-counsel.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT F. BONY
Deputy Attorney General

AGO 98-36 ETHICS; ETHICS COMMISSION; FINES; PUBLIC OFFICER; FINANCIAL DISCLOSURE; PENALTIES: The Nevada Commission on Ethics may waive, in whole or in part, civil penalties due from a public officer under [NRS 281.581](#).

Carson City, December 16, 1998

Ms. Mary E. Boetsch, Chairwoman, Nevada Commission on Ethics, 755 North Roop Street, No. 212, Carson City, Nevada 89701-3197

Dear Ms. Boetsch:

You have asked whether the Nevada Commission on Ethics may waive some or all of a civil penalty due under [NRS 281.581](#), and if so, what criteria might be appropriate for the Commission to consider when making such a decision. The brief answer to your question is that the Commission may waive some or all of a civil penalty due under [NRS 281.581](#). Our analysis follows.

QUESTION PRESENTED

May the Nevada Commission on Ethics waive some or all of a civil penalty due from a public office under [NRS 281.581](#), and if so, what criteria may the Commission consider in making such a determination?

ANALYSIS

The legislative history of [NRS 281.581](#) shows that the penalty for a public official's failure to file his or her financial disclosure statement with the Commission was changed by the 1997 Legislature from a misdemeanor to a civil penalty that escalates over time up to a maximum of \$100 per day. The reason for the change from a criminal penalty to a civil, monetary penalty was that the criminal penalty was unenforced, and therefore, without practical effect. At all times, though, the

legislative intent for the penalty, whether criminal or civil, was to assure compliance with the salutary public policy goals promoted by the financial disclosure statement in [NRS 281.561-.581](#).

It is our understanding that while compliance with the financial disclosure statement requirements was generally good in March 1998, there are still approximately 200 public officers (out of 4,500) who have yet to comply despite requests for compliance. Of those, it is our understanding that over 60 have already requested some relief from the civil penalty provided in [NRS 281.581](#). Furthermore, it is likely that when efforts are commenced to gain compliance from those public officers who have not yet requested relief from the penalties, many of those public officers will also seek relief from the penalties.

The Ethics Commission may waive some or all of the civil penalties due from a public officer under [NRS 281.581](#) for two reasons. First, the last sentence of [NRS 281.581](#) indicates that unpaid civil penalties are to be sought through civil action in the courts. Implicit in any such civil action is the power and authority to compromise the civil claim where doing so assures the Legislature's intent, promotes the public good, and promotes the most effective use of the court's and this office's resources. *Clark County v. Lewis*, [88 Nev. 354](#), 356-357, 498 P.2d 363 (1972).

Second, "the leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense." *Roberts v. State of Nevada*, [104 Nev. 33](#), 38, 752 P.2d 221 (1988). The legislative intent may be determined by examining the circumstances that propelled the enactment of the statute. *Id.* at 38. Regarding [NRS 281.581](#), the Legislature's intent was and always has been to assure that all public officers file their financial disclosure statements because such statements provide a salutary public benefit. When it changed the penalty in [NRS 281.581](#) from a criminal penalty to a civil penalty, the Legislature intended to create a better mechanism to assure compliance, not to create a new source of revenue for the general fund. If waiving some or all of a public officer's civil penalty will result in the promotion of the Legislature's intent, we can find no authority that would prohibit the Commission from granting such a waiver.

You have asked that if the Commission had the authority to waive a civil penalty, what criteria should the Commission consider in making such a determination. We would suggest that the Commission consider the following criteria:

1. Compliance. No waiver may be granted without a precedent filing of a financial disclosure statement.
2. Context. Was the waiver sought with the late filing of a financial disclosure statement, without the filing of a financial disclosure statement, after the Commission notified the public officer and threatened suit to assure compliance, or after the Commission was required to file suit against the public officer? The Commission's waiver might differ for each such context.
3. Reason for Waiver. Was the request for a waiver resultant from factors outside the public officer's control (such as death or illness or unforeseeable catastrophe), resultant from factors within the public officer's control (such as failure to open or respond to his or her mail), or resultant from open defiance of the law? The Commission's waiver might differ depending on the reason given by the public officer.
4. Fairness. Any waivers granted must be equitably given to all similarly situated public officers and must be fair in substance and appearance.

CONCLUSION

The Nevada Commission on Ethics may waive, in whole or in part, civil penalties due from a public officer under [NRS 281.581](#).

FRANKIE SUE DEL PAPA
Attorney General

By: LOUIS LING
Senior Deputy Attorney

General

AGO 98-37 PUBLIC DEFENDER; INDIGENT; REIMBURSEMENT; PROBATION: District courts have the discretion to require repayment of attorney's fees from indigent defendants as a condition of probation if the court determines that the defendant is actually able or will become capable of repayment.

Carson City, December 21, 1998

Kirk Vitto, Assistant District Attorney, Nye County District Attorney's Office, Post Office Box 593, Tonapah, Nevada 89049

Dear Mr. Vitto:

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

QUESTION

Can an "indigent" defendant, represented by a county public defender, be required to repay the county for the cost of his or her legal representation as a condition of probation?

ANALYSIS

In relevant part, [NRS 176A.400](#) states: 1. In issuing an order granting probation, the court may fix the terms and conditions thereof, including, without limitation: (a) A requirement for restitution;

In pertinent part, [NRS 178.3975](#) states:

1. The court *may order a defendant to pay all or any part of* the expenses incurred by the county, city or state in providing the defendant with an attorney which are not recovered pursuant to [NRS 178.398](#). The order may be made at the time of or after the appointment of an attorney and may direct the defendant to pay the expenses in installments.

2. The court shall not order a defendant to make such a payment unless the defendant is or will be able to do so. In determining the amount and method of payment, the court shall take account of the financial resources of the defendant and the nature of the burden that payment will impose.

3. A defendant who has been ordered to pay expenses of his defense and who is not willfully or without good cause in default in the payment thereof may at any time petition the court which ordered the payment for remission of the payment or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due or modify the

method of payment.

4. The money recovered must in each case be paid over to the city, county or public defender's office which bore the expense and was not reimbursed by another governmental agency. [Emphasis added.]

In *Taylor v. State*, [111 Nev. 1253](#), 903 P.2d 805 (1995), the Nevada Supreme Court addressed this issue. Mr. Taylor was arrested in White Pine County on August 21, 1993. He eventually pleaded guilty to possession of a controlled substance. The district court sentenced him to two years in the Nevada State Prison, suspended the sentence, and placed Taylor on probation for four years. In addition to the usual conditions of probation, Taylor was ordered to reimburse White Pine County for his defense costs. Before imposing sentence, the district court referenced the presentence report which contained information regarding Taylor's age, level of education, employment, and earnings for 1993. When sentence was imposed, the district court considered Taylor's financial circumstances by reducing his fine from \$2,000 to \$500 and by giving him the entire probationary period to pay the legal fees. Furthermore, the district court informed Taylor that the probation terms were modifiable and, if the fees were excessive, the district court would reduce them to a reasonable amount. Taylor appealed this sentence to the Nevada Supreme Court arguing that he should not have been required to reimburse White Pine County for the cost of his defense because (1) the legislature did not intend that granting probation could be contingent upon the reimbursement of attorney's fees incurred in defending him; and (2) that this was contrary to the holding in *Fuller v. Oregon*, 417 U.S. 40 (1974), which strongly suggested that a statute requiring reimbursement is valid only if reimbursement is made contingent on ability to pay.

In *Fuller*, an indigent defendant, represented by court-appointed counsel, pleaded guilty and was sentenced to five years probation, conditioned upon his compliance with the requirements of a work release program at the county jail, and also upon his reimbursement to the county of the fees and expenses of his attorney. Among other items, Fuller challenged the constitutionality of conditioning his probation on the payment of such defense costs, as was authorized by Oregon statutes.

The United States Supreme Court determined that the Oregon statutory scheme authorized recoupment by the state from a convicted defendant of the costs of furnishing him with effective representation of counsel when he was indigent at the time of the criminal proceedings, but subsequently acquired the means to pay the cost of his legal defense. Furthermore, the Court determined that the Oregon statutes authorized, but did not mandate, recoupment of such costs and the imposition of the obligation to repay such costs as a condition of probation, and that the statutes were tailored to impose such obligations only upon those with a foreseeable ability to comply. Finally, the Court concluded that the Oregon statutes were tailored to enforce such obligations only against those who actually became able to meet it without experiencing hardship. As such, the Supreme Court upheld the sentence of the district court regarding reimbursement of legal fees by an indigent defendant to the public defender's office. *Id.*

The Nevada Supreme Court upheld the probation condition imposed in *Taylor*. In making this determination, the Court stated that [NRS 176A.400](#) and [NRS 178.3975](#) grant district courts discretion to condition probation on repayment of attorney's fees. [NRS 176A.400](#) contains a general bestowal of discretion to "fix the terms and condition [of probation]." *Taylor*, 111 Nev. at 1258, 903 P.2d at 809 (1995). Furthermore, [NRS 178.3975](#) provides that a "court may order a defendant to pay all or part of the expenses incurred by the county, city, or state in providing the defendant with an attorney" *Taylor*, 111 Nev. at 1259, 903 P.2d at 809 (1995).

The Nevada Supreme Court noted that the statutory safeguards contained in Oregon's recoupment statute, vis-à-vis *Fuller*, requiring that recoupment be conditioned on ability to pay,

were contained in [NRS 178.3975](#). The Court stated that the facts presented at Taylor's sentencing in district court supported the finding that Taylor would be able to reimburse White Pine County for the cost of his defense. Finally, the Court determined that Taylor was informed by the district court that he could petition the district court for relief from this reimbursement at any time. As such, the Nevada Supreme Court concluded that the spirit of *Fuller* was satisfied in this instance.

CONCLUSION

Nevada Revised Statutes and Nevada case law grant district courts discretion to require repayment of attorney's fees as a condition of probation. However, such a condition may only be imposed upon those defendants whom the sentencing court determines are actually able or will become capable of repaying the state, county, or city.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT F. BONY
Deputy Attorney General

AGO 98-38 CONTRACTS; LEASES; PRISONS; SECURITIES: Within statutory and constitutional debt limits, the NDOP may refinance and/or fund additional state-incurred debt to expand the capacity of the privatized southern Nevada women's prison. Public bidding for such expansion construction is not required under the original debt authority statute.

Carson City, December 22, 1998

John P. Comeaux, Director, Department of Administration, 209 East Musser Street, Blasdel Building, Room 200, Carson City, Nevada 89701

Dear Mr. Comeaux:

The Nevada Department of Prisons (NDOP) has indicated that there is an urgent need to expand the capacity of the privatized Southern Nevada Women's Correctional Facility (Women's Prison) owned and operated by Corrections Corporation of America (now known as CCA Prison Realty Trust) (CCA). In your effort to finalize the executive budget, you have asked this office to provide a review of the applicable contract terms with CCA and an opinion regarding the state's right under the original authorizing statute to refinance and/or incur additional debt for expansion of the Women's Prison without public bidding. Your questions are answered separately.

QUESTION ONE

If the State has contract authority, under 1995 S.B. 278, 68th Leg. (Nev. 1995), to refinance the CCA privately-placed financing of the state's general obligation lease-purchase debt for the Women's Prison, may the State refinance and incur additional state debt to expand the prison's capacity?

ANALYSIS

The NDOP's contract with CCA for construction, lease-purchase, and management services provides at section 3.4 that, at any time, with or without consent of CCA, and without

interest charge or penalty, the NDOP may cause, or the State may act to issue tax-exempt debt instruments to refinance and “take-out” CCA’s capital financing at the prepayment purchase option amount (a fully amortized 20-year payoff schedule), and continue the lease agreement and the management agreement, which shall conform to an IRS-qualified management contract. Alternatively, the contract allows the State to use appropriated funds, tax-exempt debt financing, or other financing to pay its prepayment purchase option and continue the management agreement at its sole discretion.

The State, without question, has the contractual right to refinance CCA’s private capital financing of the state’s lease-purchase of the Women’s Prison. The contract at section 4.7 provides, “the Purchase Agreement Debt Service of the State of Nevada shall include the expansion anticipated in the RFP and as further negotiated in Exhibits 7 and 8. Contractor shall construct the Facility in a manner that allows for further future expansion.” Both the State and CCA anticipated that expansion of the facility would be required in the future. Therefore, the contract terms would not conflict with a state desire to approach CCA at this time to either refinance, expand, or both.

The critical question is whether the debt authorized by the Legislature pursuant to S.B. 278, codified as Act of July 5, 1995, ch. 656, § 4, 1995 Nev. Stat. 2529, will allow for expansion of the facility without further legislative action. The original general obligation debt authorization was for a total of \$44 million that must be fully repaid within 20 years from the date of passage of the act.⁶⁵ The act was passed on June 30, 1995, leaving approximately 17 years from the current date for repayment of any refinanced or additional debt. The lease-purchase contract with CCA was for the principal amount of \$27,971,319, leaving approximately \$16 million of unused debt authorization, provided such unused S.B. 278 authorization still exists.

Section 4 of S.B. 278 states: “The provisions of [NRS 349.238](#) to [349.248](#), inclusive, apply to the payment of the debt. Interest on the debt must be paid at least semiannually and the principal must be paid within 20 years after the date of passage of this act.” These cited statutes are the parts of the State Securities Law which establish the “special appropriation” sources of general obligation debt repayment required under the Constitution. However, the specifically authorized debt instrument of an “assignable lease or installment purchase agreement,” which the state has characterized as a “lease-purchase contract,” does not conform to any of the types of securities specifically authorized for issuance under the State Securities Law. See [NRS 349.216](#) (which authorizes the issuance of notes, warrants, bonds, temporary bonds and interim debentures); see also [NRS 349.218](#) (which defines notes and warrants as securities not exceeding one year maturity that cannot be extended or funded except by the issuance of bonds or interim debentures, which interim debentures are less than five-year short-term financing).

Therefore, at least for the purposes of S.B. 278, the Legislature has authorized a new type or types of general obligation debt securities that should be treated as such in determining the boundaries of refinancing and/or expanding the existing debt instrument. The State Securities Law provides:

For the purpose of paying the cost of any project authorized by law (other than the State Securities Law), *at any time or from time to time the state may borrow*

⁶⁵ A general obligation debt is a public debt as specified in Nev. Const. Art. 9, § 3 of the Nevada Constitution, which is backed by a legislative pledge of the taxing power of the state to support repayment of the debt. See *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 953 P.2d 13 (1998). Art. 9, § 3 of the Nevada Constitution requires that the public debt be *authorized by a law* (as it was in section 4 of S.B. 278); that the authorizing law provide for the *levy of an annual tax* for repayment (as it was in section 4 of S.B. 278); that the *principal must be repaid within 20 years* from the passage of the law (as it was required in section 4 of S.B. 278); and that a *special appropriation* of the proceeds of such taxes be made for the repayment (as it was in the incorporation of NRS 349.238 to 349.248, inclusive, in section 4 of S.B. 278). See *State Gen. Obligation Bond v. Koontz*, 84 Nev. 130, 437 P.2d 72 (1968).

money or otherwise become obligated for the project and may evidence any such obligation by the issuance of state securities in accordance with the provisions of the State Securities Law, to the extent otherwise authorized by law. [Emphasis added.]

[NRS 349.214.](#)

If the debt issuance authority of S.B. 278 has not expired, the State Securities Law allows, “at any time or from time to time” both funding of new securities and refunding the old S.B. 278 authorized security (the NDOP-CCA lease-purchase agreement) up to the original authorized limit. However, such funding or refunding that goes beyond the formerly evidenced security (which was the \$27,971,319 NDOP-CCA lease-purchase agreement) may not exceed the principal debt limit provided in S.B. 278 (which originally was \$44,000,000). The State Securities Law goes on to provide:

If a debt limitation pertains to any general obligation bonds, or other securities of the state constituting an indebtedness and relating to any project, no general obligation securities pertaining to the project and creating an indebtedness, by funding or refunding special obligation securities or otherwise (in contradistinction to funding or refunding bonds merely reevidencing an indebtedness formerly evidenced by the securities funded or refunded), may be issued in a principal amount exceeding that debt limitation.

[NRS 349.320](#)(4) (emphasis added); *see also* Nev. Const. art 9, § 3 (where public debt is characterized as principal debt, exclusive of interest, with regard to the overall 2 percent debt limit of the assessed valuation of the state for general obligations. As in all cases, any additional incurred state debt under any project’s statutory debt limit authorization must likewise not exceed this 2 percent overall constitutional debt limit).

The remaining question, regarding the unused portion of the original debt authorization (approximately \$16,000,000), is whether the nonutilization of all debt authority in the original authorized security has somehow caused a reversion or expiration of the unused balance of debt authority. Looking at the act as a whole, section 2 of S.B. 278 contains additional specific appropriation of general fund money to design additional housing units for the Lovelock Correctional Center. Any unused balance of that section 2 appropriation expressly was to revert back to the state general fund.

Notwithstanding the Legislature’s obvious intent to cause reversion of any unused portion of the general fund appropriation for the Lovelock facility, there is no similar reversion or sunset language in section 4 or elsewhere in S.B. 278 regarding the \$44 million debt authorized for the Women’s Prison. Further, S.B. 278 was an amendment to S.B. 551 from the 1991 Legislative Session, codified as an Act of July 3, 1991, ch. 573, §§ 1-8, 1991 Nev. Stat. 1893, which likewise had no reversion or sunset language expressed therein. Neither act contains any language that would cause the act to expire, except the time of principal debt repayment of 20 years from the date of passage of S.B. 278. Additionally, [NRS 349.256](#) bars repeal, amendment or impairment of authorized state securities until they are fully discharged by repayment or authorized redemption. *See Moore v. Board of Trustees of Carson-Tahoe Hosp.*, [88 Nev. 207](#), 210, 495 P.2d 605, 607 (1972) (where the court stated “[i]t is axiomatic under the rule of statutory construction that a power conferred by statute necessarily carries with it the power to make it effective and complete”).

Therefore, in light of the entire circumstances and the rules of statutory construction, the absence of reversion language or a statutory expiration date strongly suggests that the legislature intended that the debt authority be available for this Women’s Prison for the life of the project

(20 years from the date of passage of the act), and the unused portion of that authority is still available for refunding the old lease-purchase security and/or funding one or more new S.B. 278 general obligation securities for the refinance and expansion of the Women's Prison.

CONCLUSION TO QUESTION ONE

The State has an absolute contractual right to refinance the current Women's Prison lease-purchase arrangement with CCA. The balance of unused debt authority of S.B. 278 appears on the face of the act to be available for refunding and/or funding of new incurred debt for a period of time not exceeding the unexpired expressed principal repayment period of 20 years after the date of passage of the act.

QUESTION TWO

Under the authority of S.B. 278, may an expansion of the Women's Prison be negotiated directly without public bidding?

ANALYSIS

S.B. 278 contains unique authorization that is contrary to the Legislature's prior expression of public policy under public works law. Therefore, this opinion is limited to the particular circumstances of this unusual legislative act.⁶⁶ The Legislature previously had declared:

1. The legislature hereby finds as facts:

(a) That the construction of public buildings is a specialized field requiring for its successful accomplishment a high degree of skill and experience not ordinarily acquired by public officers and employees whose primary duty lies in some other field.

(b) That this construction involves the expenditure of large amounts of public money which, whatever their particular constitutional, statutory or governmental source, involve a public trust.

(c) That the application by state agencies of conflicting standards of performance results in wasteful delays and increased costs in the performance of public works.

2. The legislature therefore declares it to be the policy of this state that all construction of public buildings upon property of the state or held in trust for any division of the state government be supervised by, and final authority for its completion and acceptance vested in, the state public works board as provided in [NRS 341.141](#) to [341.148](#), inclusive.

[NRS 341.153](#).

Section 4 of S.B. 278 contains mandatory language that the NDOP "shall, to the extent of legislative appropriations and authorizations, enter into a contract in accordance with the provisions of chapter 573, Statutes of Nevada 1991, at page 1893 [which S.B. 278 was amending], for the construction and operation of a new correctional facility for women in southern Nevada."

⁶⁶ Notwithstanding the legal conclusion of this opinion that finds public bidding is not required under S.B. 278, this office has in the past, and will continue in the future, to recommend, where reasonably possible, fair competitive public bidding even when the legislature leaves the need for public bidding to the sole discretion of a state agency. In this case competitive bidding by the state to construct an addition to CCA's property may not be reasonable under the circumstances of the existing contractual relationship.

While the creation of the Women's Prison by the state was required by the legislature, the discretion of the executive branch in accomplishing that mandatory duty was expressly broad and in apparent contradiction to the conventional wisdom previously expressed regarding public works projects. Section 6 of S.B. 278 provided a permissive right to enter into a single contract for financing, acquiring, constructing, and operating the proposed facility. It further provided a permissive right to issue an RFP for correctional services by a private vendor. However, with regard to for financing, acquiring, constructing, and operating the facility, section 6 expressly exempted the contract from the bidding requirements of the public works board, [NRS 341.145-.151](#), inclusive. Clearly, section 6 of S.B. 278 may be construed to allow the NDOP to negotiate a direct contract without public bidding.

Notwithstanding legislative authority to contract directly without public bidding by the public works board, the NDOP chose to issue an agency-direct RFP for competitive bidding for the financing, acquisition, construction, and operation of the Women's Prison by a private vendor. The winner of that RFP process was the current owner and operator of the Women's Prison, CCA. This private vendor has granted to the state an exclusive, irrevocable lease-purchase right to the facility with an additional absolute right to refinance that lease-purchase and/or purchase to own. It cannot reasonably be concluded that the legislature intended, in the face of its prior public works policy declaration and the act's permissive language regarding public bidding, that the NDOP was required to issue its own RFP or utilize the State Purchasing Division to issue an RFP on its behalf. The NDOP's choice to experiment with its own RFP process has not altered the underlying statutory authority to do otherwise.

Therefore, because in the first instance the NDOP had the statutory authority to enter into a direct contract for the financing, acquisition, construction, and operation of the Women's Prison without public bidding, it logically follows that under the same statutory authority the NDOP can negotiate directly with the awarded vendor of the original non-mandatory bidding process to refinance and/or expand the facility without the need for any further public bidding.

CONCLUSION TO QUESTION TWO

Expansion of the Women's Prison through any chosen form of refinanced debt under the authority of S.B. 278 would not require any additional public bidding for the resulting new construction work at the facility.

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