

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1999

OPINION NO. 99-01 PAROLE AND PROBATION: The Parole Board's use of current guidelines or standards, promulgated pursuant to [NRS 213.10885](#), does not violate the *ex post facto* clauses of the United States or Nevada.

Carson City, January 11, 1999

Mr. Donald L. Denison, Chairman, Board of Parole Commissioners, 1445 Hot Springs Road #108-B, Carson City, Nevada 89711

Dear Mr. Denison:

On April 17, 1992, this office advised the Nevada Board of Parole Commissioners (Parole Board) that its use of current guidelines or standards, promulgated pursuant to [NRS 213.10885](#), do not violate the *ex post facto* clauses of the United States or Nevada Constitution.<sup>1</sup> The Parole Board requested this office to update this advise.

QUESTION

Does the Parole Board's use of current guidelines, adopted pursuant to [NRS 213.10885](#), violate the *ex post facto* clauses of the United States and Nevada Constitutions?

ANALYSIS

The Parole Board is required by statute to "adopt by regulation specific standards for each type of convicted person to assist the board in determining whether to grant or revoke parole." [NRS 213.10885](#). Such "specific standards" are the guidelines contained in the Nevada Administrative Code found at [NAC 213.510](#) - .560 inclusive.

In determining whether to parole an offender, the Parole Board must consider these guidelines together with various other factors as required by [NRS 213.1099\(2\)](#).<sup>2</sup> Subsections 1 and 2 of [NAC 213.560](#) provide the Parole Board with a great deal of discretion in their ability to grant or deny parole. Specifically, [NAC 213.560\(1\)](#) provides that "[T]he standards contained in [NAC 213.510](#) to [213.550](#), inclusive, may be considered by the board in determining whether to grant, deny, continue or revoke parole, but *nothing contained in those sections shall be construed to restrict the authority of the board . . .*" [NAC 213.560\(1\)](#) (emphasis added). Thus, the Parole

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<sup>1</sup> Article I, section 9 of the Constitution of the United States provides in pertinent part that "No . . . *ex post facto* law shall be passed." Article I, section 10 of the Constitution of the United States provides in pertinent part that "No State shall . . . pass any . . . *ex post facto* Law . . ." Article I, section 15 of the Constitution of the State of Nevada provides in pertinent part that "No . . . *ex-post-facto* law . . . shall ever be passed.

<sup>2</sup> NRS 213.1099(2) provides as follows:

2. In determining whether to release a prisoner on parole, the board shall consider:
  - (a) Whether there is a reasonable probability that the prisoner will live and remain at liberty without violating the laws;
  - (b) Whether the release is incompatible with the welfare of society;
  - (c) The seriousness of the offense and the history of criminal conduct of the prisoner;
  - (d) The standards adopted pursuant to NRS 213.10885 and the recommendation, if any, of the chief; and
  - (e) Any documents or testimony submitted by a victim notified pursuant to NRS 213.130.

Board's discretion to grant or deny parole remains unaffected by these ever-changing guidelines.<sup>3</sup>

This office relied on the case of *Vermouth v. Corrothers*, 827 F.2d 599 (9th Cir. 1987) when it advised the Parole Board in this area of the law. The *Vermouth* court focused on federal parole guidelines which were amended after the offender's conviction and sentencing. Vermouth was convicted of, among other things, possession with the intent to distribute a controlled substance (over 15 kilograms of cocaine). At the time of his conviction and sentencing, this offense fell under a Category Six severity rating. The guidelines were changed before his parole hearing increasing the severity rating to a Category Eight for this offense. Vermouth claimed that the use of the current guidelines, which changed the presumptive parole time range from 40-52 months to 100 or more months, violated the *ex post facto* clause of the Constitution. The *Vermouth* court found that Vermouth ran the risk of being denied parole under either set of standards. It concluded that "a prisoner has no basis to expect parole guidelines to remain constant. The Commission has the statutory authority to grant or deny parole and create or amend guidelines." *Id.* at 602. The court held that "the Commission's parole guidelines are not laws for the purposes of the *ex post facto* clause." *Id.* at 604.

The subject guidelines are not "sentencing guidelines" having the "force and effect of law." *Flemming v. Oregon Board Of Parole*, 998 F.2d 721, 725 (9th Cir. 1993), *citing Miller v. Florida*, 482 U.S. 423, 434 and 435, 96 L. Ed. 2d. 351, 107 S. Ct. 2446 (1987). They are merely "flexible 'guideposts' for use in the exercise of discretion." *Id.* The guidelines have no direct or adverse affect on an offender's sentence. *Id.*

After *Flemming*, the U.S. Supreme Court ruled that a parole board could retroactively apply a statute to take away a prisoner's right to be considered for a parole release annually. The questioned law authorized the deferral of subsequent suitability hearings for up to three years. The high Court concluded as follows:

The amendment did not violate the *ex post facto* clause because the retroactively applied law did not increase the punishment attached to the accused's crime, but simply altered the method to be followed in fixing a parole release date under identical substantive standards, and . . . the amendment created only the most speculative and attenuated risk of increasing the measure of punishment for the crimes to which it applied.

*California Dep't of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). Morales tried to convince the U.S. Supreme Court that the *ex post facto* clause "forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 506. The high Court answered, "Our cases have never accepted this expansive view . . ." *Id.* Such a view would result in the following:

[It] would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement. . . . [T]he judiciary would be charged under the *Ex Post Facto* Clause with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures . . . . [Such] changes might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for *ex post facto* purposes.

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<sup>3</sup> The Parole Board must review these guidelines every second year and adopt revised guidelines as it deems necessary. See NRS 213.10885(5).

*Id.* at 508. The high Court concluded:

[W]e have long held that the question of what legislative adjustments “will be held to be of sufficient moment to transgress the constitutional prohibition” must be a matter of “degree.” *Beazell*, 269 U.S. at 171. In evaluating the constitutionality of the . . . amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. We have previously declined to articulate a single “formula” for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition . . . and we have no occasion to do so here. The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause.

*Id.* at 510, *see also Hendricks v. Kansas*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

The *Flemming* court concluded that its “decision in *Smith* (*Smith v. U.S. Parole Commission*, 875 F.2d 1361 (9th Cir. 1989)), is best limited to the context of . . . parole guidelines and their related regulations.” *Flemming* at 726. That is precisely the focus here. *Smith* contended, among other things, that the Parole Commission violated the *ex post facto* clause by “applying a parole regulation that was in effect at the time of his 1983 revocation hearing, rather than those in effect in 1980 (the time of his arrest).” *Smith* at 1366. The Ninth Circuit Court of Appeals concluded, “clearly, *guidelines* of the Parole Commission . . . are not laws for purposes of the *ex post facto* clause.” *Id.* at 1367. The *Smith* court continued as follows:

[W]e hold that, like the parole guidelines set forth in 28 C.F.R. Section 2.20, the regulation involved is a mere procedural guidepost without the characteristics of law. . . . That the directive before us is denominated a ‘regulation,’ rather than a ‘guideline,’ does not necessarily render it a ‘law’ for purposes of *ex post facto* scrutiny. Nor does its appearance in the Code of Federal Regulations decide the issue; the parole guidelines are printed in the Code also. We conclude, instead, that *the operative factor in assessing whether a directive constitutes a ‘law’ for ex post facto purposes is the discretion that the Parole Commission retains to modify that directive or to ignore it altogether as the circumstances may require* (emphasis added).

*Id.*

The subject guidelines are not laws for *ex post facto* purposes because the Parole Board is not required to grant or deny parole based thereon. The guidelines are not “sentencing guidelines.” Furthermore, the guidelines do not increase the punishment for criminal acts, affect time credit, or have an affect on the parole eligibility date. As stated above, the guidelines are merely one among several factors considered by the Parole Board in the exercise of its broad discretion in granting or denying parole. *See* [NRS 213.1099](#). Any claim that changes to the guidelines affects punishment would be speculative at best.

In upholding the constitutionality of [NRS 213.1099](#), which requires the Parole Board to consider the subject guidelines, the Nevada Supreme Court concluded that “[a] state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority.” *Severance v. Armstrong*, [96 Nev. 836](#), 838, 620 P.2d 369 (1980). The *Severance* court added the following:

No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.

*Id.* (quoting *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, at 13, 99 S. Ct. 2100, 60 L. Ed. 2d. 668 (1979)). Nevada’s law that requires the Parole Board to consider the guidelines and other factors, “only give(s) rise to a ‘hope’ of release on parole, and the Board’s discretionary decision to deny parole is not subject to the constraints of due process.” *Weakland v. Board of Parole Commissioners*, [100 Nev. 218](#), 687 P.2d 1158 (1984).

In a viable *ex post facto* claim, courts would be faced with a two-pronged inquiry. “First, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it.” *Hamilton v. United States*, 67 F.3d 761, 764 (9th Cir. 1995) (*Miller* at 430 (emphasis added)). Considering the foregoing, the subject guidelines are not laws for *ex post facto* purposes. Furthermore, since the Parole Board’s discretion remains unaffected by updated guidelines, they do not disadvantage the offender.

#### CONCLUSION

Granting of parole is an act of grace of the state, and the promulgation of the subject guidelines do not create any right to parole “or interest in liberty or property or establish a basis for any cause of action against the state . . . .” [NRS 213.10705](#); see also *Weakland v. Board of Parole Commissioners*, [100 Nev. 218](#), 687 P.2d 1158 (1984). Since the current guidelines involve the Parole Board’s proper exercise of discretion, courts should reject any *ex post facto* claims.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.  
Deputy Attorney General

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AGO 99-02 CONTRACTORS BOARD; MAGISTRATE; CRIMINAL; CITATIONS: The Nevada State Contractors’ Board Investigators do not have the power to arrest.

Carson City, January 19, 1999

Margi Grein, Executive Officer, State Contractors Board, 4220 South Maryland Parkway, Building D, Suite 800, Las Vegas, Nevada 89119

Dear Ms. Grein:

You have requested an Attorney General’s opinion on the following question:

#### QUESTION

Do Nevada State Contractors' Board (NSCB) investigators have the authority to place under arrest and take to the nearest available magistrate an individual who refuses to sign a criminal citation for a violation of [NRS 624.230](#)?

### ANALYSIS

Pursuant to [NRS 624.160](#), the NSCB has the power to administer the provisions of [NRS chapter 624](#). Further, [NRS 624.230](#) declares that it is unlawful for a person to act as a contractor or submit bids on a job without having a contractor's license. The ability of the NSCB to prepare and issue citations for violations of [NRS 624.230](#) is derived from [NRS 171.17751\(4\)](#).<sup>4</sup>

The law is explicit that the NSCB, through its designees, has the authority to issue citations for violations of [NRS 624.230](#). However, the law is not clear as to the authority of NSCB employees to arrest and take before a magistrate an individual who refuses to sign a citation.

The power to arrest individuals is found within [NRS chapter 171](#). Specifically, [NRS 171.124](#)<sup>5</sup> sets forth when a "peace officer" may make an arrest and [NRS 171.126](#)<sup>6</sup> sets forth when a private person may make an arrest. NSCB investigators have not been anointed "peace officer" status as that term is defined under [NRS 169.125](#). This statute refers to sections 289.150-360, which specifies numerous different categories of individuals that have the powers of a "peace officer." Investigators for the NSCB are not included within the definition of "peace officer." Therefore, NSCB investigators would have the power to arrest only to the same extent a private person would as provided under [NRS 171.126](#), unless a separate statute indicates otherwise.

Interestingly, [NRS 171.177](#) specifies that a person who refuses to promise, in writing, to appear before a magistrate upon the issuance of a misdemeanor citation by an authorized person must immediately be taken before a magistrate.<sup>7</sup> An NSCB investigator is potentially an

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<sup>4</sup> NRS 171.17751(4)

The state contractors' board may designate certain of its employees to prepare, sign and serve written citations on persons accused of violating NRS 624.230.

<sup>5</sup> NRS 171.124

1. Except as otherwise provided in subsection 3, a peace officer or an officer of the Drug Enforcement Administration designated by the Attorney General of the United States for that purpose may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

- (a) For a public offense committed or attempted in his presence.
- (b) When a person arrested has committed a felony or gross misdemeanor, although not in his presence.
- (c) When a felony or gross misdemeanor has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
- (d) On a charge made, upon a reasonable cause, of the commission of a felony or gross misdemeanor by the person arrested.
- (e) When a warrant has in fact been issued in this state for the arrest of a named or described person for a public offense, and he has reasonable cause to believe that the person arrested is the person so named or described.

<sup>6</sup> NRS 171.126

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

<sup>7</sup> NRS 171.177

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

“authorized person” as specified in [NRS 171.177](#) because [NRS 171.17751\(4\)](#) grants authority to NSCB designees to issue citations. However, [NRS 171.177](#) may apply solely to peace officers because the statute begins with reference to people detained by a “peace officer.”

Because of the ambiguity in [NRS 171.177](#), it is appropriate to look to legislative history to determine the intent behind the statute. See *Madera v. State Indus. Ins. Sys.*, [114 Nev. 253](#), 956 P.2d 117, 120 (1998); citing *Moody v. Manny's Auto Repair*, [110 Nev. 320](#), 871 P.2d 935 (1994). Section 171.177 was first enacted in 1973 and was presented as A.B. 68. Testimony by Captain Robert E. Smart of the Reno Police Department indicates that the purpose of A.B. 68 was to give *peace officers* the authority to issue misdemeanor citations in lieu of making arrests. “Instead of an arrest for a minor building code or fire code infraction of the law an officer may issue instead a citation.” *Hearing on A.B. 69 before the Assembly Judiciary Committee*, 1973 Legislative Session, 16 (February 5, 1973). Assemblyman Roy Torvinen explained that “city attorneys throughout the state had different opinions as to whether or not police officers could issue citations for non-traffic violations.” *Hearing on A.B. 68 before the Senate Judiciary Committee*, 1973 Legislative Session, 150 (February 26, 1973). Throughout the legislative history of [NRS 171.177](#), reference is consistently made to “officer,” “police officer,” or “peace officer.” This appears that the legislature intended [NRS 171.177\(4\)](#) to apply only to those people who have “peace officer” status.

Further evidence that the legislature did not intend NSCB investigators to have the power to arrest is in the legislative history of [NRS 171.17751\(4\)](#). Section 171.17751 was amended by A.B. 721 in 1993 to give NSCB designees the power to issue citations for violations of [NRS 624.230](#). In response to Senator Jacobsen’s concern that A.B. 721 would give too much power to NSCB designees, David J. Reese of Cooke, Roberts and Reese, Ltd., attorney for the NSCB, stated “he was against the concept when it was addressed in the last session “as a peace officer situation” and was concerned at that time about the same type of situations mentioned by Senator Jacobsen.” Mr. Reese further stated “[T]he investigators would write a citation and if the offender became agitated or violent, the investigators would be instructed to back away and call a law enforcement officer.” *Hearing on A.B. 721 before the Senate Judiciary Committee*, 1993 Legislative Session, 185 (June 25, 1993). Legislative history of additional amendments to [NRS 171.17751](#) explaining the authority of other officials to issue citations support the proposition that NSCB designees do not have the authority to arrest. *Hearing on A.B. 67 before the Senate Judiciary Committee*, 1993 Legislative Session, 734 (March 10, 1993).

Although this office recently issued an opinion advising that senior license officers of the City of Henderson have the power to make arrests if an individual refuses to sign a citation, that opinion is limited to a different set of facts. See *Op. Nev. Att’y Gen. No. 98-23* (August 25, 1998). In that situation, the City of Henderson had specifically granted, by municipal code, senior license officers the power to arrest as well as the power to issue citations. Therefore, there was little difficulty in reaching the conclusion that senior license officers of the City of Henderson have the power to arrest if an individual refuses to sign a citation. Under the current set of facts, NSCB investigators have not been given the authority to arrest and the Nevada legislature never intended NSCB investigators to have the power to arrest.

## CONCLUSION

It is the opinion of this office that a NSCB investigator who issues misdemeanor citations for violations of [NRS 624.230](#) may not arrest and take an individual before a magistrate if that person refuses to sign a citation. NSCB investigators do not have the status of a “peace officer” and have not been given statutory authority to arrest an individual for refusing to sign a citation.

(..continued)

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 in [NRS 171.1773](#).

However, in the event an individual refuses to sign a citation issued by a NSCB investigator, a peace officer should be summoned to take appropriate action.

FRANKIE SUE DEL PAPA  
Attorney General

By: MICHAEL SOMPS  
Deputy Attorney General

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AGO 99-03 HOMEOWNER ASSOCIATIONS; HOUSING; FEES: A master association that levies an annual assessment against each unit of \$500 or more is not required to pay the fee imposed by [NRS 116.31155](#) to support the office of Ombudsman for Owners in Common-Interest Communities.

Carson City, January 27, 1999

Ms. Shirley M. Penzel, Projects Chief, Real Estate Division, 1665 Hot Springs Road, Suite 155,  
Carson City, Nevada 89706-0663

Dear Ms. Penzel:

You have asked our opinion regarding the following:

QUESTION

Must a master association that levies an annual assessment of \$500 or more against each unit in a common-interest community pay the fee imposed by [NRS 116.31155](#) to support the office of Ombudsman for Owners in Common-Interest Communities?

ANALYSIS

In 1997, the Nevada Legislature enacted S.B. 314, Act of July 17, 1997, ch. 631, 1997 Nev. Stat. 3110 amending provisions of the Common-Interest Ownership Act (Act). S.B. 314 created the office of Ombudsman for Owners in Common-Interest Communities in the Department of Business and Industry, Division of Real Estate. [NRS 116.1116](#). The office is supported by a fee imposed on homeowner's associations based on the number of units in the community. [NRS 116.31155](#) provides in part:

1. An association that is *not a master association and levies an annual assessment against each unit in the common-interest community of \$500 or more* shall:

(a) If the association is required to pay the fee imposed by [NRS 78.150](#) or 82.193, pay to the secretary of state at the time it is required to pay the fee imposed by those sections a fee established by regulation of the administrator of the real estate division of the department of business and industry for every unit in the association.

(b) If the association is organized as a trust or partnership, pay to the administrator of the real estate division of the department of business and industry a fee established by regulation of the administrator for each unit in the association. The fee must be paid on or before January 1 of each year. [Emphasis added.]

A master association is defined by [NRS 116.110358](#) as "an organization described in [NRS 116.212](#), whether or not it is also an association described in [NRS 116.3101](#)." An association

described in [NRS 116.3101](#) is one whose membership consists exclusively of unit owners. [NRS 116.212](#) sets forth provisions that apply to master associations. It provides in subsection 1:

1. If the declaration provides that any of the powers described in [NRS 116.3102](#), are to be exercised by or may be delegated to a profit or nonprofit corporation that exercises those or other powers on behalf of one or more common-interest communities or for the benefit of the units' owners of one or more common-interest communities, *all provisions of this chapter applicable to unit-owners' associations apply to any such corporation, except as modified by this section.* [Emphasis added.]

This section provides, in effect, that all provisions of the Act applicable to unit-owners' associations apply to master associations unless exempted by the section. [NRS 116.212](#) does not address whether master associations are exempt from paying the fee to support the office of Ombudsman.

Not every unit-owners' association has to pay the ombudsman fee. Only those associations that: (1) are not master associations, and (2) levy annual assessments against each unit of \$500 or more, must pay the fee. [NRS 116.31155](#)(1). By the plain meaning of the statute, the obligation to pay the fee arises only if both conditions are met. Stated differently, if either condition does not apply, the obligation to pay the fee does not arise.

A master association exercises powers on behalf of one or more common-interest communities or for the benefit of the owners in one or more common interest communities. [NRS 116.212](#)(1). It does not exist independently of a common-interest community or its association. Any fee imposed by a master association is therefore in addition to any fees imposed by the community association. By limiting the obligation to pay a fee to support the office of Ombudsman for Owners in Common-Interest Communities to those associations that are not master associations, the legislature apparently intended to prevent unit owners from having to pay twice — once on behalf of the community association and once on behalf of the master association.

#### CONCLUSION

A master association that levies an annual assessment against each unit of \$500 or more is not required to pay the fee imposed by [NRS 116.31155](#) to support the office of Ombudsman for Owners in Common-Interest Communities.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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AGO 99-04 CREDIT; LOANS; INTEREST: Deferred-deposit transactions are subject to Regulation Z of the federal Truth in Lending Law if they are entered into primarily for personal, family, or household purposes.

Carson City, February 1, 1999

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



Dear Mr. Walshaw:

In 1997, the Nevada Legislature enacted a law to regulate businesses offering check cashing and deferred-deposit services. Act of July 16, 1997, ch. 495, 1997 Nev. Stat. 2370. These provisions have been codified in chapter 604 of NRS as the Check-Cashing and Deferred-Deposit Services Act (Nevada Act). You have asked the following with respect to this law:

### QUESTION

Are deferred-deposit transactions subject to Regulation Z of the federal Truth in Lending Act?

### ANALYSIS

A deferred-deposit is a transaction in which, pursuant to a written agreement:

1. A customer tenders to a person a personal check drawn upon the account of the customer; and
2. The person:
  - (a) Provides to the customer an amount of money that is equal to the face value of the check, less any fee charged for the transaction; and
  - (b) Agrees not to cash the check for a specified period.

[NRS 604.060](#). A deferred-deposit service is defined as “any person engaged in the business of deferring deposits for a fee, service charge or other consideration.” [NRS 604.070](#).

The federal Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667e, inclusive, is intended to provide consumers with information regarding the cost of credit in transactions that are primarily for personal, family, or household purposes. 15 U.S.C. §§ 1601, 1602(h). TILA is in title I of the Consumer Credit Protection Act and is implemented by the Federal Reserve Board via Regulation Z (12 C.F.R. Part 226). TILA will apply to deferred-deposit transactions if a person who cashes a check in a deferred-deposit transaction is granting “credit” primarily for personal, family, or household purposes as defined in the federal act.

TILA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” 15 U.S.C. § 1602(e). In *In re Brigance*, 219 B.R. 486 (Bankr. W.D. Tenn. 1998), the court discussed whether an unpaid check held in a deferred-deposit transaction was simply a one-time fee for cashing a negotiable instrument or a loan:

This Court agrees that the transactions which are at issue in these cases present more than the mere cashing of checks. When a check is cashed at a bank or grocery store, there is no separate agreement whereby the check is held for a specified period of time during which the drawer may redeem the check. The transaction contemplated clearly is a short-term extension of credit.

*Id.* at 493. In *Miller v. HLT Check Exchange (In Re Miller)*, 215 B.R. 970 (Bankr. E.D. Ky. 1997), a bankruptcy debtor brought an action against a check cashing service seeking damages for, among other things, violation of TILA, with respect to the fees charged for cashing a check in a deferred-deposit transaction. The defendant’s primary argument was that the court must look to state law as to whether a transaction is properly characterized as a credit transaction regulated by TILA. Like Nevada, Kentucky regulates deferred-deposit transactions and refers to the fee charged for the service as a “service charge.” The defendant in *Miller* argued that this statutory characterization precluded application of TILA. The court disagreed:

This Court is of the opinion that the statutory characterization of the fees and charges as “service charges” rather than “interest” is not fatal because the definition of finance charge under TILA and Regulation Z is very broad. It includes a variety of charges incident to the extension of credit. Further, for the defendants to argue that they are not extending credit is disingenuous. They are disbursing funds to people like the plaintiff on the promise of repayment of the sum plus the “service charge,” at a later time. If this is not an extension of credit, this Court finds it hard to imagine any transaction that is.

*Id.* at 974.

A deferred-deposit transaction is an extension of credit for a fee. Consistent with the cases cited above, the fee or service charge is properly characterized as interest or a finance charge subject to TILA if the transaction is entered into “primarily for personal, family, or household purposes.”

### CONCLUSION

Deferred-deposit transactions are subject to Regulation Z of the federal Truth in Lending Law if they are entered into primarily for personal, family, or household purposes.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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AGO 99-05 PAROLE AND PROBATION; FEES; COLLECTION AGENCIES; RESTITUTION: The Division has implicit authority to collect delinquent supervision fees and restitution regardless of whether the offender is discharged from supervision.

Carson City, February 2, 1999

R. Warren Lutzow, Deputy Chief, Nevada Division of Parole and Probation, 1445 Hot Springs Road, No. 104, Carson City, Nevada 89706

Dear Mr. Lutzow:

By letters dated November 12, and December 23, 1998, you have asked the three questions stated below.

In 1997, the Nevada Legislature required the Division of Parole and Probation (Division) to adopt a regulation that would provide for a monthly supervision fee of at least \$30. See [NRS 213.1076\(1\)\(b\)](#) and [NAC 213.230](#). Until [NAC 213.230](#) is amended, in accordance with [NRS 213.1076\(1\)\(b\)](#), the maximum monthly supervision fee that may be imposed is \$20. When [NAC 213.230](#) is amended, it may be applied to all persons on probation, parole, or sentenced to residential confinement. Courts have found such fees to be clearly civil, rather than punitive, in nature. They are intended to reimburse the state for costs associated with probationary services. See *Glaspie v. Director of Corrections and Rehabilitation*, 564 N.W.2d 651 (N.D. 1997); *Taylor v. Rhode Island*, 101 F.3d 780 (1st Cir. 1996); and *Frazier v. Montana State Department of Corrections*, 920 P.2d 93 (Mont. 1996).

### QUESTION ONE

Does the Division have the authority to collect delinquent supervision fees from offenders after they have been discharged from supervision?

## QUESTION TWO

If the Division does have the authority to collect on such delinquent accounts, can it contract with collection agencies?

## QUESTION THREE

Do the answers to questions one and two change if the Division is attempting to collect delinquent restitution ordered by the court or Parole Board?

## ANALYSIS FOR QUESTION ONE

The Division is required by [NRS 213.1076](#) to charge a supervision fee and it would be unreasonable to conclude that it had no authority to collect it. Statutes must be given reasonable construction with a view to promoting rather than defeating legislative policy. *See State, Dep't of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 524](#), 762 P.2d 882 (1988). Furthermore, the express power in the statute to charge the supervision fee carries with it the implied power to collect this debt. *See Folio v. Briggs*, [99 Nev. 30](#), 33, 656 P.2d 842, 844 (1983) and *Checker, Inc. v. Public Service Commission*, [84 Nev. 623](#), 629-30, 446 P.2d 981, 985-86 (1968). By operation of law, a civil liability arises with respect to honorably discharged probationers' unpaid restitution. *See NRS 176A.850*(2). The same is true for dishonorably discharged probationers. *See NRS 176A.870*(3). Civil liability for payment of supervision fees can be accomplished by reducing a delinquency to a judgment. Whether focusing on restitution or statutory supervision fees, because it is responsible for charging such fees, the Division has the authority to take appropriate action as necessary to collect them.

Guidance as to how these fees can be collected is gleaned from [NRS 176.064](#).<sup>8</sup> Pursuant to subsection 1 of [NRS 176.064](#), a court first determines whether a delinquency exists. Pursuant to subsection 2 of [NRS 176.064](#), the Division is then able to collect the delinquent supervision fees through any *lawful means* including the following:

- (a) Report the delinquency to reporting agencies that assemble or evaluate information concerning credit.
- (b) Request that the court take appropriate action pursuant to subsection 3.
- (c) Contract with a collection agency licensed pursuant to [NRS 649.075](#) to collect the delinquent amount and the collection fee. The collection agency must be paid as compensation for its services an amount not greater than the amount of the collection fee imposed pursuant to subsection 1, in accordance with the provisions of the contract.

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<sup>8</sup> NRS 176.064 pertains to fines, administrative assessments, fees or restitution imposed pursuant to chapter 176 of the Nevada Revised Statutes. The subject supervision fees are required by NRS 213.1076. Regardless, since subsection 3 of NRS 213.1076 makes the payment of such supervision fees a condition of the offender's parole, probation, or residential confinement, it directly addresses the court's authority under chapter 176A (formerly 176). Also, NRS 176A.100(3) requires the court to consider the recommendation of the chief of the Division who could fashion a recommendation that incorporates language from NRS 176.064. The 1997 Legislature moved many of the provisions, including those addressing the authority of the courts to grant probation, from chapter 176 to chapter 176A.

[NRS 176.064](#)(2)(a-c). Furthermore, the court may request the prosecuting attorney to undertake the collection of the delinquency. *See*, [NRS 176.064](#)(3). Specifically, after a judgment is obtained, the Division may move the court to do the following:

- (a) Request that a prosecuting attorney undertake collection of the delinquency, including, without limitation, the original amount and the collection fee, by attachment or garnishment of the defendant's property, wages, or other money receivable.
- (b) Order the suspension of the driver's license of the defendant. . . .
- (c) For a delinquent fine or administrative assessment, order the confinement of the person in the appropriate prison, jail or detention facility, as provided in [NRS 176.065](#) and [176.075](#).

[NRS 176.064](#)(3)(a)-(c).

It is the opinion of this office that, although supervision fees are imposed by the Division pursuant to [NRS 213.1076](#), the collection procedures set forth at [NRS 176.064](#) should be followed.

### ANALYSIS FOR QUESTION TWO

After reducing a delinquency to a judgment, the Division may contract with a collection agency licensed pursuant to [NRS 649.075](#) to collect the delinquency.<sup>9</sup> The fee provisions of [NRS 176.064](#)(1) should be followed when contracting with an agency for the collection of supervision fees.<sup>10</sup> A collection agency contract must conform with the Model Contract Form Book published by the Attorney General. *See* STATE ADMINISTRATIVE MANUAL Section 0342.0. A copy of the MODEL CONTRACT FORM BOOK, Second Edition 1998, is provided herewith for your convenience.

### ANALYSIS FOR QUESTION THREE

Your letter of December 23, 1998, requested that this analysis include the area of restitution ordered by the court or the Parole Board. The same analysis given for questions one and two applies here. As for the Parole Board ordering restitution, [NRS 213.126](#) provides that "the amount of restitution must be the amount set by the court pursuant to [NRS 176.033](#)." Thus, the restitution is imposed by the court or the Parole Board pursuant to chapter 176 of the Nevada Revised Statutes. Accordingly, the collection agency would have to be paid pursuant to subsection 1 of [NRS 176.064](#).

In certain instances the court's order of restitution is deemed a judgment for the purpose of collecting.<sup>11</sup> If an order of restitution is not statutorily considered a judgment, the Division would have to reduce the delinquency to a judgment. Then, it could contract with a collection agency agreeable to the [NRS 176.064](#) payment schedule. The collection agency contract would have to conform with the MODEL CONTRACT FORM BOOK published by the Attorney General.

### CONCLUSION

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<sup>9</sup> NRS 649.075 addresses the license requirement of private collection agencies and their agents.

<sup>10</sup> These fees are as follows: "(a) Not more than \$100, if the amount of the delinquency is less than \$2000 (not more than 5%). (b) Not more than \$500, if the amount of the delinquency is \$2000 or greater, but is less than \$5000 (between 10% and 25%). (c) Ten percent of the amount of the delinquency, if the amount of the delinquency is \$5000 or greater." NRS 176.604(1)(a-b).

<sup>11</sup> NRS 205.980 provides that the court's order of restitution to the victim of stolen or damaged property "shall be deemed a judgment against a defendant for the purpose of collecting damages."

The Division has implicit authority to collect delinquent supervision fees and restitution regardless of whether the offender is discharged from supervision. Unless already deemed a judgment by statute, the delinquency must be reduced to a judgment. Then, collection procedures under [NRS 176.064](#) should be followed. If the Division uses a collection agency, that agency would have to be paid pursuant to subsection 1 of [NRS 176.064](#). Any collection agency contract would have to conform with the MODEL CONTRACT FORM BOOK published by the Attorney General.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.  
Deputy Attorney General

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AGO 99-06 HOMEOPATHIC MEDICINE; PHARMACY BOARD; CONTROLLED SUBSTANCES: The Homeopathic Medicine Board's regulation allowing for the prescription of pharmaceutical preparations is invalid. The regulation exceeds the grant of statutory authority delegated to the Homeopathic Medicine Board in light of the Legislature's 1997 action on A.B. 286 deleting pharmaceutical medicine from the definition of homeopathy.

Carson City, February 11, 1999

Mr. Keith W. Macdonald, Executive Secretary, Nevada State Board of Pharmacy, 1201 Terminal Way, #212, Reno, Nevada 89502-3257

Dear Mr. Macdonald:

You have posed the following question.

#### QUESTION

May a singly licensed homeopathic physician prescribe controlled substances as defined in [NRS chapter 453](#) or dangerous drugs as defined in [NRS chapter 454](#) as "pharmaceutical preparations" within the nontraditional therapies described in revised Homeopathic Board regulation LCB File No. R213-97?

#### ANALYSIS

In the 1997 Legislative Session, the Homeopathic Board (Board) proposed a bill expanding the definition of homeopathic medicine and homeopathy. A portion of the first draft of A.B. 286 set forth:

"Homeopathic medicine" or "homeopathy" means a system of medicine employing substances of animal, vegetable, chemical or mineral origin, including, *without limitation*:

2. Noninvasive electrodiagnosis, cell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy, nutrition, *intravenous infusion, chelation therapy and pharmaceutical medicine.* (Emphasis added.)

While testifying in legislative committee in support of this proposed language, Board member, Dr. Fuller Royal, stated his belief that the Board was competent to decide whether licensees or applicants who came before the Board were qualified to write prescriptions for anti-

inflammatory or antibiotic medications. Dr. Royal stated the practice of homeopathic medicine did not call for the use of the above mentioned medications. Nevertheless, if a physician was singularly licensed under the Board, a patient needing a prescription would have to go to another physician in order to obtain the prescription. Dr. Royal thought this procedure was unnecessary. *See Hearing on A.B. 286 Before the Assembly Committee on Commerce, 1997 Legislative Session, (March 31, 1997).*

After the Assembly Committee on Commerce heard strong objections from the Nevada Medical Association and other allopathic physicians on the subject of singly licensed homeopathic physicians prescribing controlled substances and dangerous drugs, the Legislature *deleted* all of the language highlighted above in the first draft of A.B. 286. After the amended version of A.B. 286 was enacted in 1997, the definition of “homeopathic medicine” and “homeopathy” set forth in [NRS 630A.040](#) read as follows:

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

1. Nosodes and sarcodes, which are:

(a) Given in micro-dosage, except that sarcodes may be given in macro-dosage;

(b) Prepared according to homeopathic pharmacology by which the formulation of homeopathic preparations is accomplished by the methods of Hahnemannian dilution and succussion or magnetically energized geometric patterns applicable in potencies above 30X, as defined in the official Homeopathic Pharmacopoeia of the United States; and

(c) 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.

2. Noninvasive electrodiagnosis, cell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy and nutrition.

The amended version of [NRS 630A.040](#) did not include the terms *intravenous infusion, chelation therapy, and pharmaceutical medicine* within the definition of “homeopathic medicine” and “homeopathy.”

In December 1997, the Board adopted regulations within the Nevada Administrative Code (NAC) describing the nontraditional therapies set forth within [NRS 630A.040\(2\)](#). The descriptions of neural therapy and orthomolecular therapy both included the ability for homeopathic physicians to use pharmaceutical medicines. The descriptions of these nontraditional therapies set forth in part:

Neural therapy. 1. Neural therapy is the use of any or all local anesthetics, vitamins, minerals, homeopathic medications, herbal extracts or any other medicinal or pharmaceutical substance for intravenous injection, for injection into acupuncture, acupressure, or trigger points, or into nerve ganglia. . . .

. . . .

Orthomolecular therapy. Orthomolecular therapy is the treatment and prevention of disease by the expert adjustment of the body’s natural chemical constituents on the molecular level, and includes:

1. The prescription of topical and oral supplements, pharmaceutical medicines, the intravenous infusion of various substances, including vitamins, amino acids, peptides, polypeptides, pharmaceutical medications, homeopathic medications, ozone and other bio-oxidative substances, chelating agents such as . . . (EDTA), . . . (DMSO), . . . .

This regulation, LCB File No. R213-97 was considered by the Legislative Commission on June 26, 1998. After hearing from various medical professionals, the Legislative Commission voted to object to the regulation as exceeding the grant of statutory authority delegated to the Board. Commission members expressed concerns that allowing a singly licensed homeopathic physician to prescribe and dispense pharmaceutical medicine would improperly expand the jurisdiction of the Board beyond the 1997 Legislature's definition of homeopathic medicine. *See* Minutes of the Legislative Commission (June 26, 1998).

The Board thereafter revised the regulations and adopted them in their present form. Revised LCB File No. R213-97 contained language allowing homeopathic physicians to use "pharmaceutical preparations," instead of "pharmaceutical medicines," in conjunction with neural therapy and orthomolecular therapy. The revised regulation set forth in part:

(b) "Neural therapy" to mean the injection of vitamins, minerals, homeopathic medications, herbal extracts or other medicinal or pharmaceutical preparations into the:

- (1) Acupuncture, acupressure or trigger points; or
- (2) Ganglia,

of a patient to control pain or produce other beneficial effects.

.....

(d) "Orthomolecular therapy" to mean the treatment and prevention of disease, including, without limitation, infection, malignancy and degenerative illness, by adjusting the natural chemical constituents of the body on the molecular level. the term includes, without limitation:

(1) The prescription of topical and oral supplements and pharmaceutical preparations; and

(2) The intravenous infusion of vitamins, amino acids, peptides, polypeptides, pharmaceutical preparations, homeopathic medications, ozone, bio-oxidative substances or chelating agents, . . . .

2. ....

(c) "Pharmaceutical Preparations" does not include narcotic drugs or opiates that are listed as schedule II controlled substances pursuant to chapter 453 of NRS, except as those substances may be described for use in the official Homeopathic Pharmacopoeia of the United States.

The Legislative Commission reviewed the revised Board regulation on December 18, 1998. Much of the discussion in this Legislative Commission hearing centered on the phrase "pharmaceutical preparations" and what was meant by the use of that phrase within the regulation. From this discussion, it appeared that there was an intent within the revised regulation to allow a singly licensed homeopathic physician to, at least in some limited fashion, prescribe some controlled substances as listed in [NRS chapter 453](#) and dangerous drugs as listed in [NRS chapter 454](#). The Legislative Commission neither approved nor objected to the revised regulation due to the divided nature of the votes within the Commission.

You have requested the present legal opinion because the term "pharmaceutical preparations" is not typical of the terms used within [NRS chapters 453](#) and 454. Board members clarified in the Legislative Commission hearing an intent to interpret the phrase "pharmaceutical preparations" as permitting a singly licensed homeopathic physician to prescribe some controlled substances and dangerous drugs as listed within [NRS chapters 453](#) and 454. We believe this interpretation renders the regulation invalid because the Legislature specifically denied the power for singly licensed homeopathic physicians to prescribe such controlled substances and dangerous drugs through the 1997 legislation on A.B. 286. The regulation cannot restore a power that the Legislature specifically took out of a piece of legislation.

A regulation is invalid if it exceeds the statutory authority delegated by the Legislature to an administrative agency. [NRS 233B.110](#). When the Legislature specifically deleted the term “pharmaceutical medicine” from the definition of homeopathy, its clear intent in enacting the remainder of A.B. 286 was to prohibit the singly licensed homeopathic physician from having the ability to prescribe controlled substances and dangerous drugs in the same manner as an allopathic physician. The Board could not, under the guise of interpreting nontraditional therapies, extend the prescription power back into [NRS chapter 630A](#) and thereby give the statutes expanded effect beyond the grant of the Legislature’s delegated authority. *Boulware v. State, Dept. Human Resources*, [103 Nev. 218](#), 737 P.2d 502 (1987); *Hager v. Nevada Medical Legal Screening Panel*, [105 Nev. 1](#), 767 P.2d 1346 (1989).

### CONCLUSION

If singly licensed homeopathic physicians find the need to prescribe controlled substances or dangerous drugs as listed within [NRS chapters 453](#) and 454, they should obtain a clear grant of such power through statutory amendments made by the Legislature. To date, the Legislature has specifically denied such power to singly licensed homeopathic physicians. Revised NAC regulation LCB File No. R213-97 exceeds the scope of delegated statutory authority and is therefore invalid. We believe that our conclusion in Op. Nev. Att’y Gen. No. 93-21 (September 20, 1993), continues to accurately describe the limited ability of singly licensed homeopathic physicians to possess, dispense, and administer controlled substances and dangerous drugs.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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AGO 99-07 DRIVING UNDER THE INFLUENCE; JUVENILES: A prior DUI, adjudicated by a juvenile court, is not a conviction under Nevada Statutes. Prior offenses for the purposes of enhancement of the penalty for a DUI must be evidenced by a conviction.

Carson City, February 24, 1999

Marla Zlotek, Deputy District Attorney, Nye County District Attorney’s Office, Post Office Box 593, Tonopah, Nevada 89049

Dear Ms. Zlotek:

You have asked the Attorney General for an opinion regarding the following question:

### QUESTION ONE

If a juvenile is adjudicated delinquent for the offense of driving under the influence (DUI), is that adjudication considered a prior conviction for purposes of subsequent DUI prosecution and sentencing enhancement?

### ANALYSIS

The following example is given to illustrate the question:



A juvenile at 17 years of age admits to and is adjudicated delinquent by a juvenile court for DUI, first offense. At 18 years of age the same offender is arrested, pleads guilty to and is convicted as an adult of a DUI, second offense. At 19 years of age, he is again arrested for DUI and the question that arises is whether the current offense should be charged as a DUI, third offense. Stated another way, the question is whether the previous juvenile court adjudication of delinquency for DUI is sufficient to serve as a prior offense for purposes of enhancement under Nevada's DUI statutes.

NRS 484.3792(2), read in conjunction with [NRS 62.216](#), provides the answer. [NRS 484.3792\(2\)](#) states in pertinent part: "An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. . . ." [Emphasis added.] Chapter 62 relates to juvenile courts and juvenile adjudications. [NRS 62.216\(1\)](#) states: "A child adjudicated pursuant to this chapter is not a criminal and any adjudication is not a conviction, and a child may be charged with a crime or convicted in any other court only as provided in [NRS 62.080](#) and [62.081](#)." [Emphasis added.] Because the juvenile adjudication is not a conviction, it cannot be used as proof of a prior offense.

The Nevada Supreme Court's decision in *State of Nevada, Dept. of Motor Vehicles v. Hafen*, [108 Nev. 1011](#), 842 P. 2d 725 (1992), although it relates to license revocations as opposed to a sentencing enhancement, supports the position that a DUI adjudication by juvenile court does not result in a criminal conviction. In *Hafen*, the Department of Motor Vehicles, upon receipt of records of convictions showing an individual had two DUIs within seven years, was required to revoke a driver's license for one year. The court concluded the year long revocation of Mr. Hafen's driver's license was improper because "[i]n the instant case, Hafen's juvenile adjudication does not amount to a final conviction." *Hafen*, 108 Nev. at 1013-14, 842 P.2d 727.

The fact that the individual pled guilty to a second offense DUI at the age of 18 does not change the analysis. The legal validity of prior convictions must be determined by the court as a matter of law. In addition, the prosecution is obligated to present the necessary proof of prior convictions and a defendant may not stipulate to the validity of prior convictions. See *Staley v. Nevada*, [106 Nev. 75](#), 787 P.2d 396 (1990).

Because the DUI adjudicated by juvenile court is not a conviction pursuant to [NRS 62.216\(1\)](#), it cannot be used as evidence of a prior conviction for the purposes of enhancement under [NRS 484.3792\(2\)](#). Applying the analysis to the example given, the individual should be charged with a DUI second offense based on the prior offense committed at age 18.

## CONCLUSION

A juvenile court adjudication of delinquency for DUI is not a conviction. Prior offenses for purposes of enhancing the penalty for a DUI must be evidenced by a conviction. Consequently, the adjudication cannot be used as a prior offense for purposes of enhancing the penalty for a subsequent DUI.

FRANKIE SUE DEL PAPA  
Attorney General

By: GINA C. SESSION  
Deputy Attorney General

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AGO 99-08 EMPLOYEES; BUDGET, INCENTIVE PAY; SALARIES: The Department of Information Technology may require an employee to enter into a contract to repay educational leave stipends for courses taken by the employee leading to a degree related to his employment. The Department does not have authority to require an employee to repay training expenses incurred by the Department in providing general training. The Department may, under certain conditions, agree to purchase retirement credit for a prospective employee as a recruitment incentive. The Department may not otherwise pay financial bonuses to Department employees to encourage recruitment, retention, skills acquisition, or as rewards for the completion of certain projects without legislative authority.

Carson City, March 11, 1999

Marlene Lockard, Director, Department of Information Technology, 505 East King Street, Room 403, Carson City, Nevada 89701-3702

Dear Mrs. Lockard:

You have asked questions concerning the authority of the Department of Information Technology (DoIT) to implement certain proposals which would assist DoIT to recruit and retain highly skilled employees. The proposals and your questions fall into two general categories: employee training and financial incentives.

#### QUESTION ONE

May DoIT require an employee to reimburse DoIT for costs incurred by DoIT in providing training for that employee if the employee terminates or transfers within a certain time following completion of the training?

#### ANALYSIS

We are advised that DoIT has recently provided costly training to certain employees only to have the trained employees resign and take their skills to another employer shortly after the training. We have found two areas in the law which address your employee training concerns. The first has to do with educational leave stipends, and the second concerns training generally.

##### A. Educational Leave Stipends

[NRS 284.343](#)(2) authorizes State agencies to pay educational leave stipends to allow an employee to attend classes leading to certain degrees. [NRS 284.343](#)(2) provides in relevant part:

[N]o person may be granted educational leave stipends until he has entered into a contract with his employing agency whereby he agrees to pursue only those courses required for a *degree related to his employment* with the state and to return to the employ of his employing agency on the basis of 1 year for each 9 months of educational leave taken or to refund the total amount of the stipends regardless of the balance at the time of separation. [Emphasis added.]

See also [NAC 284.514](#) and .518. These sections specifically provide for the sort of mandatory repayment which was the subject of your inquiry. Note, however, these provisions relate only to an employee's pursuit of a college degree related to his State employment and not to training in general.

##### B. General Training

[NRS 284.343](#)(1) provides in relevant part: “After consultation with appointing authorities, and in cooperation with the state board of examiners, the director [of the Department of Personnel] shall prescribe regulations for all training of employees in the state service.”

The Department of Personnel has adopted regulations which govern training for State employees. [NAC 284.482](#) provides:

Each employee is responsible for improving his own professional competence. The employing agency shall, within budgetary constraints, complement the employee’s own efforts by providing the following kinds of training:

1. Training which is beneficial to the agency’s operation or is required by the state, the appointing authority or the federal government.
2. Training which is needed to enable the employee to meet the standards of performance for his position.
3. Training which is needed to update the employee’s skills, knowledge and techniques of his current position.

[NAC 284.490](#) provides:

If an employee requests permission to take a course or workshop, and the training is required by or related to his job:

1. The employing agency may reimburse the employee for the expense of the course or workshop only after his successful completion of the training, or
2. The employing agency may elect to prepay the cost of the course or workshop and *may enter into an agreement with the employee for repayment of the money if the employee fails to successfully complete the training.*
3. For the purposes of this section, “successful completion of training” means:
  - (a) Receiving a grade of C or better;
  - (b) Receiving a passing grade if the students are designated only as passing or failing the course;
  - (c) Receiving a certificate of completion; or
  - (d) Receiving other evidence of completion as predetermined by the appointing authority. [Emphasis added.]

As currently drafted, [NAC 284.490](#) would allow DoIT to recover training expenses only where DoIT’s employee failed to complete training which DoIT paid for. The regulation would not allow DoIT to recover training costs where an employee successfully completes a course of training and then terminates or transfers. However, we believe that the Department of Personnel has authority under [NRS 284.343](#)(1) to adopt a regulation which would broaden the authority of an agency to recoup training expenses. We believe that the statute allows the Department of Personnel to adopt a regulation which would require an employee to contract for repayment of training costs if the employee does not stay with the agency for a specified and reasonable period following the training. Accordingly, we suggest you contact the Department of Personnel’s Acting Director Jeanne Greene to discuss the matter.

#### CONCLUSION TO QUESTION ONE

Pursuant to [NRS 284.343](#)(2), DoIT may require an employee to enter into a contract to repay educational leave stipends for courses taken by the employee leading to a degree related to his employment. The contract must require repayment of all stipends in the event the employee does

not remain employed by DoIT for the equivalent of one year for each nine months of educational leave taken.

DoIT does not have authority to require an employee to repay training expenses incurred by DoIT in providing general training, except where the employee fails to complete the training. [NRS 284.343](#)(1) authorizes the director of the Department of Personnel to adopt a regulation which would require an employee to repay training expenses incurred by a State agency where the trained employee does not remain employed by that agency for a specified and reasonable period of time.

## QUESTION TWO

May DoIT pay financial bonuses as incentives to DoIT employees to encourage recruitment, retention, skills acquisition, and as rewards for the completion of certain projects?

## ANALYSIS

We are advised that DoIT has suffered from unusually high employee turnover and has had trouble recruiting qualified employees. You have described certain bonuses which would be paid to prospective or current DoIT employees, the purpose of which is to lure highly qualified persons to the employ of DoIT and to provide incentive to current employees to remain in service to DoIT. The proposed bonuses include:

1. A signing bonus, payable in lump sum during an employee's first week of hire. Payment of this bonus would require that the new hire possess certain advanced skills.
2. A recruitment bonus, payable to a DoIT employee who recruits a person to fill one of several identified hard to fill DoIT positions.
3. A mission critical bonus, payable to a DoIT employee whose advanced skills are needed for the completion of a mission determined by DoIT to be critical.
4. A skills acquisition bonus, payable to a DoIT employee who acquires defined information technology skills.
5. A mission critical project bonus, payable to an employee who participates in the completion of a project which is certified by DoIT as being critical.

Several of these proposals would require the employee to repay the bonus under various conditions, including the failure of the employee to remain in the employ of DoIT for a prescribed period of time following the payment of the bonus.

Initially, we note that the Legislature has in some degree addressed the recruitment and retention problems faced by the State as an employer by authorizing cash payments to employees under certain circumstances. Examples include [NRS 285.070](#), which authorizes payment of a merit award to an employee who offers a suggestion which saves the State money, and [NRS 284.177](#) which authorizes cash payments to an employee based on the employee's length of uninterrupted service to the State.

Likewise, the Personnel Commission has adopted regulations specifically designed to assist in employee recruitment and retention. [NAC 284.204](#) specifically authorizes the Department of Personnel to authorize a higher initial salary for a classified employee to overcome a difficult

recruiting problem or to recognize an employee's superior qualifications. These salary adjustments are limited to the highest step of the grade of the classified employee's position. We are advised that you are familiar with these recruitment and retention tools and have used them to their full advantage; however, your recruitment and retention problems remain.

The legislatively authorized recruitment tool which most directly compares with your proposals is found in [NRS 286.3007](#). This provision allows a State agency to purchase retirement credit for an employee as a recruitment and retention incentive. [NRS 286.3007](#) provides in relevant part:

Except as otherwise required as a result of [NRS 286.537](#):

1. A state agency shall pay the cost of purchasing credit for service pursuant to [NRS 286.300](#) on behalf of a member if:

(a) The agency entered into an agreement with the member under which the member was employed upon the condition that the employer pay the cost of purchasing the credit; and

(b) The agreement to purchase the credit is in writing, becomes part of the personnel records of the employee and is approved in advance by the state board of examiners.

2. If a state agency is required to purchase credit pursuant to subsection 1, it shall not do so until the member has completed 1 year of service in its employ.

This provision contains a recruitment component requiring a preemployment agreement which must be approved by the State Board of Examiners before it is effective. The "bonus" or recruitment incentive is the agency purchase of retirement credit for the prospective employee. The provision also contains a retention component in that the actual purchase of retirement credit may not be performed until the employee has served with the agency for one year.

Unfortunately, the Legislature has not authorized the sorts of financial incentives which are the subject of this inquiry. For the following reasons we believe that your proposals must be approved by the Legislature before DoIT may attempt to implement them. First, it is beyond doubt that "[e]xcept as limited by the constitution, the legislature has plenary power in authorizing the expenditure of public funds for public purposes." *Norcross v. Cole*, [44 Nev. 88](#), 189 P. 877 (1920). We interpret this statement to mean that there must be some legislative grant of authority, either by statute or by specific appropriation, to allow DoIT to expend public money for the financial incentives proposed.

Second, the intent of the Legislature to retain control over the compensation of State employees is demonstrated in [NRS 284.180\(1\)](#), which provides:

The legislature declares that since uniform salary and wage rates and classifications are necessary for an effective and efficient personnel system, the pay plan [created by the department of personnel and the personnel commission pursuant to [NRS 284.175\(1\)](#)] must set the official rates applicable to all positions in the classified service, *but the establishment of the pay plan in no way limits the authority of the legislature relative to budgeted appropriations for salary and wage expenditures.* (Emphasis added.)

The proposed financial incentives are clearly in the nature of additional compensation, albeit in the form of bonuses. We believe that [NRS 284.180\(1\)](#) must be read to require that payment of such additional compensation is subject to legislative review and approval before it may properly be paid.

Based on the above, we offer two suggestions. First, you may wish to seek statutory changes which would authorize the kinds of financial incentives you envision. To this end, the purchase of retirement credit statute, [NRS 286.3007](#), could serve as a model.

Finally, it appears that your fundamental problem in recruiting and retaining qualified employees is at its base level a lack of adequate compensation for your employees. Another possible solution is to request the Legislature to remove the positions of your employees from the classified service and place them in the unclassified service with salary caps higher than their current classified positions allow. This would serve as a recruitment tool in providing you greater flexibility in setting initial salaries and would serve as a retention aid allowing you to reward employees for their acquisition of certain skills or for the completion of important projects.

#### CONCLUSION TO QUESTION TWO

As a recruiting incentive, and subject to approval by the Board of Examiners, DoIT may enter into a written preemployment contract to purchase up to five years of retirement service credit pursuant to [NRS 286.3007](#) following the employee's completion of one year of service to the agency.

DoIT may not otherwise pay financial bonuses to DoIT employees to encourage recruitment, retention, skills acquisition, or as rewards for the completion of certain projects. Authorization for these kinds of financial incentives must be obtained from the Legislature.

FRANKIE SUE DEL PAPA  
Attorney General

JAMES T. SPENCER  
Senior Deputy Attorney General

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AGO 99-09 MANUFACTURED HOUSING, MOBILE HOMES, LAKE MEAD: Federal regulation of the public recreation use of Lake Mead National Recreation Area preempts [NRS chapters 118B](#) and 489, to the extent there is actual conflict between the state and federal regulation, under the Supremacy Clause.

Carson City, March 30, 1999

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

Dear Ms. Diamond:

You have requested an opinion regarding the Manufactured Housing Division's authority to enforce [NRS chapters 118B](#) and 489 at the Lakeshore Trailer Village within Lake Mead National Recreation Area.

#### QUESTION ONE

Are the tenancies of residents at Lakeshore Trailer Village subject to the requirements of [NRS chapter 118B](#)?

## ANALYSIS

The Lake Mead National Recreation Area (LMNRA) was created and made a part of the National Park System (NPS) in 1964. 16 U.S.C. § 460n, *et seq.* (1988). LMNRA is administered by the Secretary of the Interior for “general purposes of public recreation, benefit, and use, and in a manner that will preserve, develop, and enhance, so far as practicable, the recreation potential . . . of the area.” *Id.* at 460n-3. Specifically, the Secretary may provide for “vacation cabin site use, in accordance with existing policies of the Department of the Interior relating to such use, or as such policies may be revised hereafter by the Secretary.” *Id.* at 460n-3(b)(4). In 1965, Congress enacted the National Park System Concessions Policy Act which vested authority in the Secretary to encourage and enable concessioners to operate facilities deemed desirable for the accommodation of visitors to the national parks. 16 U.S.C. § 20a (1988). The Secretary is authorized to promulgate regulations for the use and management of the parks. 16 U.S.C. § 3 (1988). One such regulation issued by the Secretary prohibits “residing in park areas . . . except pursuant to the terms and conditions of a permit, lease or contract.” 36 C.F.R. § 2.61(a) (1998).

The NPS contracted with Forrest Enterprises, Inc. in 1982 to operate “improved trailer village facilities” within LMNRA. The NPS extends this concessions contract annually. The concessions contract requires the concessioner to abide by various federal and state laws, including the Occupational Safety and Health Act of 1970, title VII of the Civil Rights Act of 1964, title V, § 503 of the Rehabilitation Act of September 26, 1973, state workers’ compensation laws, and state laws imposing taxes upon the property or business of the concessioner. However, the concessions contract contains no broad requirement that the concessioner abide by all applicable state and local laws.

Forrest Enterprises, Inc. manages Lakeshore Trailer Village pursuant to Concession Guidelines, known as NPS-48, and Operating Standards for Trailer Villages (Long Term) Std. No. XV, both of which are issued by the NPS. The LMNRA superintendent also issues Supplemental Elements to the National Operating Standards for Trailer Villages (Long-Term) Std. No. XV and orders governing the operation and management of each of the trailer villages within LMNRA. These directives contain terms regulating rental rates, termination of the month-to-month tenancy, conditions on the appraisal, resale and spacing of trailers, and the duration of visitors’ stays.<sup>12</sup> They conflict with [NRS chapter 118B](#), which governs the relationship between landlords and tenants of mobile home parks in Nevada.<sup>13</sup>

The property clause of the United States Constitution provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U. S. Const. Art. IV, § 3, cl. 2. The United States government owns the land on which Lakeshore Trailer Village sits, and thus the trailer village is subject to regulation by Congress under the Property Clause.

The power of Congress under the Property Clause to administer its own property is virtually unlimited. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). “[T]he Property Clause gives Congress the power over the public lands ‘to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . .

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<sup>12</sup> The federal regulation deemed by certain residents as the most onerous is a Superintendent’s Order that restricts occupancy in the trailer village “to 180 days in a consecutive twelve (12) month period.”

<sup>13</sup> NRS chapter 118B is inapplicable to “[a]ny lot in a mobile home park or mobile home on such lot which is used occasionally for recreational purposes and not as a permanent residence.” NRS 118B.020(4). Generally, NRS chapter 118B requires the Administrator of the Manufactured Housing Division to enforce the chapter by issuing subpoenas, mediating grievances, making inspections, imposing fines, and holding hearings. The chapter regulates all aspects of the landlord-tenant relationship, including the rental agreement, deposits, rent increases, maintenance of common areas, sale of the tenants’ mobile homes, termination of tenancies, and the chapter mandates meetings between landlords and tenants and education for park managers.

.” *Id.* at 540, (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917)). In effect, Congress exercises the powers of both an owner and a legislature over public lands. *Id.* Other courts have recognized the superior authority of the federal government over publicly owned lands. See *United States v. Gardner*, 107 F.3d 1314, 1318 (9<sup>th</sup> Cir. 1997); *United States v. Vogler*, 859 F.2d 638, 641 (9<sup>th</sup> Cir. 1988); *United States v. Nye County*, 920 F Supp. 1108, 1117-18 (D. Nev. 1996); *Nevada ex rel. State Bd. of Agric. v. United States*, 512 F. Supp. 166, 172 (D. Nev. 1981); *Wilkenson v. Dept. of Interior*, 634 F. Supp. 1265, 1279 (D. Colo. 1986).

Specifically, the courts have recognized that Congress made it clear the Secretary of the Interior has broad power to operate and manage the national parks. See *United States v. Brown*, 552 F.2d 817, 822 (8<sup>th</sup> Cir. 1977); *United States v. Vogler*, 859 F.2d at 642; *Wilkenson v. Dept. of Interior*, 634 F. Supp. at 1278; *United States v. 319.88 Acres of Land*, 498 F. Supp. 763, 772 (D. Nev. 1980); *United States v. Carter*, 339 F. Supp. 1394, 1398 (D. Ariz. 1972).

None of the above-cited authority suggests that federal jurisdiction over public lands is exclusive. The states may regulate on public lands, long as such regulation does not conflict with legitimate federal purposes. “The Property Clause itself does not automatically conflict with all state regulation of federal land.” *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). In *Granite Rock*, the United States Supreme Court recently decided that state law is preempted only when there is an actual conflict with the operation or objectives of federal law. *Id.* at 593-94.

Even if Lakeshore Trailer Village were situated on privately owned land within LMNRA, because the United States has obtained concurrent legislative jurisdiction over LMNRA, the Supremacy Clause would still require that any state regulation recede in the face of conflicting federal regulation. See *Peterson v. United States*, 191 F.2d 154, 212-13 (9<sup>th</sup> Cir. 1951); *United States v. 319.88 Acres of Land* at 771-72.

The State of Nevada ceded jurisdiction over LMNRA to the United States by a document recorded with Clark County entitled, “Certificate of Consent of State of Nevada to Acquisition of Concurrent Legislative Jurisdiction by the United States” dated February 11, 1974. Pursuant to the authority set forth in [NRS chapter 328](#), this certificate was issued by the Nevada Tax Commission and countersigned by then-Governor Mike O’Callaghan. It purports to consent to the acquisition of concurrent legislative jurisdiction subject only to the reservation “of the right to serve therein and thereon its civil and criminal process upon persons for violations of the laws of the State occurring elsewhere in the State.” On April 22, 1974, the NPS accepted the concurrent jurisdiction granted by the certificate, and notice was published in the Federal Register of May 8, 1974. 39 Fed. Reg. 89 (1974). The acceptance by the NPS stated, “This acquisition of jurisdiction will enable the National Park Service to assume a more positive role in matters of public health and safety and to otherwise administer the area more effectively.” *Id.*

Congress has created LMNRA, assigned its administration to the Secretary of the Interior, vested authority in the Secretary to contract with concessioners to facilitate accommodating visitors to the national parks, and authorized the Secretary to promulgate regulations for the use and management of the national parks. This legislation, along with the regulations adopted and the directives issued thereunder, are in actual conflict with [NRS chapter 118B](#) and necessarily override conflicting state law.

## QUESTION TWO

Are the activities of the managers of Lakeshore Trailer Village in controlling or brokering sales subject to the dealer licensing and other requirements of [NRS chapter 489](#)?



## ANALYSIS

The analysis under question one is equally applicable here. The Operating Standards and Superintendent's Orders include restrictions on the sale of tenants' trailers.<sup>14</sup> This federal regulation directly conflicts with [NRS chapter 489](#),<sup>15</sup> and therefore preempts the state law.

## CONCLUSION

Under the property clause, Congress has virtually unlimited power to administer its own property. The courts have specifically recognized the broad power Congress has delegated to the Secretary of the Interior to operate and manage the national parks for the recreation and enjoyment of visitors. Because the provisions of [NRS chapters 118B](#) and 489 at issue here are in actual conflict with federal regulation, the State regulation must recede. Thus the answer to both of your questions is no.

FRANKIE SUE DEL PAPA  
Attorney General

By: LESLIE A. NIELSEN  
Senior Deputy Attorney General

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AGO 99-10 BANKRUPTCY; LIENS; PREPAID TUITION PROGRAM: A Program contract purchaser's payments may be subject to claim by the purchaser's bankruptcy estate, and may be liable to execution under lawful lien, or levy and attachment.

Carson City, March 30, 1999

David W. Clapsaddle, Executive Director, Nevada Prepaid Tuition Program, Office of the State Treasurer, 555 East Washington Boulevard #1100, Las Vegas, Nevada 89101

Dear Mr. Clapsaddle:

In structuring the Nevada Prepaid Tuition Program (Program) the Board of Trustees promulgated temporary regulations and entered contractual relationships with contract purchasers for future college tuition payment(s) for named beneficiaries. The possibility of bankruptcy claims, liens, and other legal actions against the accumulated payment(s) toward a particular contract has prompted your Program operational concerns. I have rephrased your questions to simplify the response.

## QUESTION

Is a purchaser's Program payment(s) subject to claim by the purchaser's bankruptcy estate or otherwise liable to execution under lawful lien, or levy and attachment?

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<sup>14</sup> The Operating Standards and Appraisal Guidelines prevent a seller from asking for a price which includes any enhanced value due to the trailer's desirable location inside LMNRA. The concessioner may charge an administrative fee for the concessioner's services in facilitating trailer sales. And presumably, a tenant would not be allowed to list a trailer for sale through an outside dealer licensed under NRS chapter 489.

<sup>15</sup> Generally, NRS chapter 489 requires those who broker sales, as the concessioner does at Lakeshore Trailer Village, to qualify and apply for a dealer license and to refrain from violating the chapter to avoid disciplinary action initiated by the Administrator of the Manufactured Housing Division.

## ANALYSIS

For the purposes of this opinion we need not address the multiple potential sources of lawful lien, or levy and attachment. Any of such mentioned herein are by example only and should not be considered an inclusive list for Program operations. Each event should be evaluated by the Program with legal counsel based upon the particular merits of each case.

The nature of the ownership interest in the Program contract is central to the analysis of the question. Both the Program contract and the Program's regulations establish that the contract is the property of the purchaser, refundable to the purchaser or his estate at an interest rate as determined by the Board of Trustees of the Program, less certain fees.<sup>16</sup> See Program Temporary Regulation, section 5; compare Program Temporary Regulation, section 4 (where the administrative fee schedule is set forth).

The Program is structured in such a way that the anticipated gift to the beneficiary is limited to each individual payment for tuition. Therefore, the beneficiary does not possess a vested property interest in the Program tuition payments until actual irrevocable delivery of each has occurred. The irrevocable nature of such delivery of a particular tuition payment is subject to the facts of each case. See *Edmonds v. Perry*, [62 Nev. 41](#), 140 P. 2d 566 (1943). Assuming the Program funds are not otherwise exempt from execution prior to irrevocable delivery to the beneficiary under certain facts, the bankruptcy estate lien could attach as a matter of law, or a purchaser's creditor could theoretically effect legal service of process upon the Program, attaching a sum certain.

With regard to enforcement of judgments, Nevada law provides:

1. All goods, chattels, money and other property, real and personal, of the judgment debtor, or any interest therein of the judgment debtor *not exempt by law*, and all property and rights of property seized and held under attachment in the action, shall be liable to execution . . . .
2. This chapter does not authorize the seizure of, or other interference with, any money, thing in action, lands or other property held in spendthrift trust for a judgment debtor, or held in such trust for any beneficiary, pursuant to any judgment, order or process of any bankruptcy or other court directed against any such beneficiary or his trustee, where the trust has been created by, or the fund so held in trust has proceeded from, any person other than the judgment debtor or beneficiary himself.

[NRS 21.080](#) (emphasis added).

Therefore, if the Program's contract funds are neither exempt as a matter of law nor held in a spendthrift trust, the Program contract of a particular purchaser could be liable to execution. It cannot be concluded that the Program creates a spendthrift trust.<sup>17</sup> While [NRS 353B.140](#) creates the Nevada Higher Education Tuition Trust Fund within the State Treasury, it would fail to be construed by a court as a spendthrift trust. See [NRS 166.090](#) (where a spendthrift trust must have provisions for support, education, maintenance, and benefit for the beneficiary alone); see also *Ambrose v. First Nat'l Bank*, [87 Nev. 114](#), 482 P. 2d 828 (1971) (where a trust that does not provide for support and maintenance cannot qualify as a spendthrift trust under [NRS chapter 166](#)).

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<sup>16</sup> However, Program administrators must keep in mind that regardless of the fact that there is only one purchaser of a particular Program contract, the source of the purchase money may create other legal claims to the funds paid into the Program. For Example, a purchaser subject to Nevada marital community property law, who uses community resources in making payment(s) into the Program, will be subject in divorce to a community property claim by their spouse for both one half of the payment(s) and accrued interest. See NRS 123.225.

<sup>17</sup> It must be noted that if a spendthrift trust or another expressly exempt source is the "purchaser," or payments are being made from otherwise exempt sources of funds, a legal issue arises whether the particular Program contract enjoys the status of the source of funds or has otherwise changed its character through purchase into the Program. Resolution of such a question is fact specific, and this office declines to opine regarding such in the abstract. Program administrators should avoid providing any opinion or speculation regarding the legal character of the funds paid to the Program pursuant to a Program contract. In response to any inquiry regarding the Program's exemption from bankruptcy claims or any other form of lien, or levy and attachment, a copy of this opinion should be provided without further comment other than to suggest that the purchaser consult private legal counsel. If a dispute arises between the purchaser and any third party regarding competing claims for the funds held pursuant to a Program contract, Program administrators should consult with legal counsel to determine a course of action.

Looking to the specific execution exemptions provided by Nevada law, neither the Program statutes nor the general exemption statute provide protection from execution for the tuition trust fund or any particular contract purchaser.<sup>18</sup> See [NRS 353B.010-.800](#), inclusive; see also [NRS 21.090\(1\)](#) (where in subsection (q)(4) federal internal revenue qualified stock bonus, pension, or profit-sharing trusts are listed in the general exemption statute, but there is no provision applicable to the trust created by the Legislature in the Program).

In considering the power of the trustee regarding any bankruptcy by a purchaser to gain access to the payment(s) paid by the purchaser into the Program, the available debtor exemptions must be fully considered. [NRS 21.090\(3\)](#) provides: “Any exemptions specified in subsection (d) of section 522 of the Bankruptcy Act of 1978 (92 Stat. 2586) do not apply to *property owned by a resident of this state* unless conferred also by subsection 1, as limited by subsection 2, of this section.” [Emphasis added.]

Under [NRS 21.090\(3\)](#) the State of Nevada has exercised its right to opt out of the federal bankruptcy section 522 exemptions. The bankruptcy court has stated: “Where a state has ‘opted out,’ § 522(b)(2)(A) refers to the state or local law that is applicable on the date of the filing of the petition.” *In Re Kolsch*, 58 B.R. 67, 69 (Bkrcty. D. Nev. 1986). In any Nevada bankruptcy, voluntarily or involuntarily, regarding a Program purchaser, the available exemptions set forth in Nevada law at the time of filing of a Nevada bankruptcy will control.<sup>19</sup> However, if a nonresident purchaser files for bankruptcy in another jurisdiction the exemption law applicable to that jurisdiction will control.

For the purposes of Program administration, once the Program is on notice of a pending bankruptcy claim or other lien, levy, and attachment against the purchaser’s Program funds, legal counsel should be consulted before refunding or paying any sum to the purchaser, claimant, or beneficiary.

## CONCLUSION

A Program purchaser’s funds held in the Nevada Higher Education Tuition Trust Fund may be subject to claim by the purchaser’s bankruptcy estate and may be subject to other lawful lien, levy, and attachment. Resolution of such issues can only be done on a case-by-case basis. If such a claim, lien, levy or attachment is asserted against a purchaser’s Program funds, the Program should consult its legal counsel before refunding or paying any sum to the purchaser, claimant or beneficiary.

FRANKIE SUE DEL PAPA  
Attorney General

By: RANDAL R. MUNN  
Senior Deputy Attorney General

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<sup>18</sup> NRS 21.090(1)(r) provides that “[a]ll money and other benefits paid pursuant to the order of a court of competent jurisdiction for the support, education and maintenance of a child, whether collected by the judgment debtor or the state” are exempt from liability to execution. As expressed in footnote number 1, supra, a purchaser of a Program contract pursuant to a “education” support order of the court may arguably acquired the exempt status granted under NRS 21.090(r). Again, such a determination should be made on a case by case basis with legal counsel.

<sup>19</sup> The debtor in an Opt Out state may also look to exemptions provided in other applicable non-Bankruptcy Code federal law. See *In Re Richards*, 57 B.R. 662, 664 (Bkrcty. D. Nev. 1986). However, there does not appear to be any federal laws applicable to prepaid college tuition programs from which a non-Bankruptcy Code exemption could be found.

AGO 99-11 PENSIONS; PUBLIC EMPLOYEES RETIREMENT SYSTEM: One public employer may not unilaterally implement employer pickup of employee contributions thereby altering the method of contributions required to fund the Public Employees Retirement System.

Carson City, April 14, 1999

Mr. George Pyne, Executive Officer, Public Employees Retirement System of Nevada, 693 West Nye Lane, Carson City, Nevada 89703-1599

Dear Mr. Pyne:

You have posed the following question.

#### QUESTION

Can a Nevada public employer, within the definition of [NRS 286.070](#), “pick up” contributions for certain public employees under Internal Revenue Code, Section 414(h)(2) without first obtaining an enabling amendment to [NRS chapter 286](#)?

#### ANALYSIS

The Public Employees’ Retirement System (PERS) was established by the Legislature in 1947. The governing provisions of this defined benefit plan, designed for use by multiple public employers, are set forth within [NRS chapter 286](#). When the Legislature created PERS it provided a method for public employers to pool individual resources with the resources of other public employers for the good of the fund as a whole. As of this writing, 139 public employers participate in PERS in order to provide retirement benefits to their public employees.

PERS’ basic funding policy provides for periodic payroll contributions at a level pattern of cost as a percentage of salary throughout an employee’s working lifetime. Contributions, and investment income earned thereon, accumulate sufficient assets over time to pay benefits when due. Although PERS receives an actuarial valuation annually indicating the employer and employee contribution rates required to fund the system on an actuarial reserve basis, the Legislature retains the power to set the actual contribution rates through specific statute.

The current methods for public employers and employees to remit contributions into PERS are set forth in [NRS 286.410](#) and [286.421](#).

Under the employee/employer plan, the employee makes contributions on the employee’s behalf and the employer makes a matching contribution. The employee portion of the contribution is paid as an after tax deduction from the employee’s pay. A refund is available to the employee for the employee’s share of contributions in lieu of a retirement benefit. The employee portion of the contributions is not taxable when paid to the employee in the form of retirement benefits or in the form of a refund upon withdrawal from the system. The employer portion of the contributions is made on a tax deferred basis. This contribution method is described in [NRS 286.410](#).

Under the employer pay plan, the employer pays the entire contribution on behalf of the employee. Under this plan the employee makes no contributions from pay into the system. The feature allowing refund of contributions upon withdrawal is not available to this group of employees. The increased contribution requirement for the employers is funded by an offsetting reduction in salary increases or in lieu of cost of living increases for participating employees.

The employees in this plan realize an actual increase in take home pay, however, due to changed tax consequences. This contribution method is described in [NRS 286.421](#).

PERS has now been informed by a participating public employer's representative of that employer's intent to unilaterally implement "employer pick up" of contributions as allowed under federal Internal Revenue Code (IRC) 26 U.S.C. § 414(h)(2). This public employer representative takes the position that public employers may change the method of contributions without first obtaining Legislative authority through amendments to [NRS chapter 286](#).

For governmental plans only, IRC § 414(h)(2) provides an exception to the general rule that employee contributions to qualified pension plans shall be included in the employee's gross income. The IRC § 414(h)(2) provision states:

DESIGNATION BY UNITS OF GOVERNMENT-- For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designed as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The impact of a § 414(h)(2) pick up is the recharacterization of mandatory employee contributions as employer contributions. This converts what had previously been an after tax employee contribution into a before tax employer contribution. From a federal tax perspective, employee contributions picked up under IRC § 414(h)(2) will not be currently taxable and will be excluded from the employee's income until such time as the contributions are actually paid back to the employee in the form of retirement benefits. Employer pick up also includes the feature whereby the employee contributions may be refunded upon withdrawal from the system.

[NRS chapter 286](#) currently does not provide for employer pick up of employee contributions. [NRS 286.410](#) sets forth in part:

3. From each payroll during the period of his membership, the employer shall deduct the amount of the member's contributions and transmit the deduction to the board at intervals designated and upon forms prescribed by the board. The contributions must be paid on compensation earned by a member from his first day of service. [Emphasis added.]

The plain language of [NRS 286.410\(3\)](#) requires the employer to "deduct" the employee portion of contributions under the employee/employer pay plan from the employee's after tax pay. When a statute uses words which have a plain and unambiguous meaning, the words so used should retain that meaning. *State of Nevada Employees Ass'n v. Lau*, [110 Nev. 715](#), 877 P.2d 531 (1994). If there was any ambiguity regarding the language of this statute, the Legislature has specifically considered and rejected an amendment to [NRS 286.410](#) providing employer pick up of employee contributions. S.B. 302 was proposed in the 1995 Legislative Session. A portion of that bill would have changed [NRS 286.410\(3\)](#) to provide: ". . . the employer shall deduct the amount of the member's contributions in a manner which reduces the amount of the member's taxable compensation . . ." S.B. 302 was indefinitely postponed in the Senate Finance Committee and failed to become part of the pension plan in 1995. Failure to adopt S.B. 302 clearly indicates that employer pick up of employee contributions is not allowed under the current statute.

It would be improper for one employer in a multiple employer pension plan to unilaterally alter the contribution structure. Such action would amount to an oral modification of the pension plan agreement. Attempting to modify a multiple employer contribution rate structure outside

the strict written terms of the pension plan agreement, [NRS chapter 286](#), creates uncertainty in the pension plan structure. Such oral modifications to the plan documents are not allowed. *Compare Spencer v. Central States Pension Fund*, 778 F. Supp. 985 (N.D. Ill. 1991) (Oral modification of ERISA pension plan documents is not allowed). The Legislature retains authority to determine pension benefits and contribution rates. The Legislature has also delegated administrative authority to the PERS Board to act as fiduciaries for the best interests of all members of PERS. One employer in a multiple employer plan cannot usurp the Legislature's authority and the PERS Board's fiduciary duty regarding the contribution structure for the plan. *Ganton Technologies v. Nat. Indus. Group Pension*, 865 F. Supp. 201 (S.D.N.Y. 1994); *Caterino v. Barry*, 761 F. Supp. 897 (D. Mass. 1991).

## CONCLUSION

One public employer may not unilaterally implement employer pick up of employee contributions thereby altering the method of contributions required to fund the multiple employer PERS pension fund. The Legislature determines the permissible contribution methods by specific statutory amendments to [NRS chapter 286](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

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AGO 99-12 TAXES; REFUNDS; MOTOR VEHICLES: A fuel tax refund is not available to a bus operator who consumes special fuel for any idle time that occurs while the vehicle is off the highway.

Carson City, April 16, 1999

Clay Thomas, Assistant Chief, Motor Carrier Bureau, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Thomas:

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

### QUESTION

Is a fuel tax refund warranted for special fuels consumed by a bus for any idle time that occurs while the bus is off the highway?

### BACKGROUND

Greyhound Lines, Inc. (Greyhound) has requested a refund from the Department of Motor Vehicles and Public Safety (Department) for the use of special fuels consumed by buses while idling off of the highway. Greyhound's request is based on [NRS 366.200](#) which states that the use of special fuel for any purpose other than to "propel" a motor vehicle is exempt from the tax imposed by [NRS chapter 366](#). Greyhound contends that idling its buses off of the highway does not qualify as a taxable use of special fuel pursuant to [NRS 366.200](#). Apparently, a separate fuel tank is not used to supply the bus with fuel while it idles.

### ANALYSIS

Although the question posed to this office is limited to buses, the following analysis is applicable beyond buses to all motor vehicles using fuel subject to taxation under [NRS chapter 366](#). [NRS 366.200](#)(1) provides:

The sale or use of special fuel for any purpose other than to propel a motor vehicle upon the public highways of Nevada is exempt from the application of the tax imposed by [NRS 366.190](#). The exemption provided in this subsection applies only in those cases where the purchasers or the users of special fuel establish to the satisfaction of the department that the special fuel purchased or used was used



for purposes other than to propel a motor vehicle upon the public highways of Nevada.

This question can be resolved by analyzing the legislature's intent in enacting [NRS 66.200\(1\)](#) and in utilizing the word propel. The word "propel," although not defined in [NRS chapter 366](#), is defined in WEBSTER'S NEW WORLD DICTIONARY, College Edition, 1167 (1957) as: "to push, drive, or impel onward, forward, or ahead." Consuming special fuel to idle does not fall within the definition of "propel." Consequently, use of special fuel to allow a bus to idle could arguably be construed as a special fuel use falling outside of the scope of taxability under [NRS chapter 366](#).

A broader examination of [NRS 366.200\(1\)](#), however, leads to a different conclusion. Focusing on the intended and primary use of the special fuel, common sense suggests that special fuel in the fuel supply tank of a motor vehicle is intended and primarily used to propel or drive the motor vehicle. Special fuel is neither intended nor primarily used to allow the vehicle to idle. A motor vehicle is intended to provide transportation between point A and point B, and special fuel in the supply tank accomplishes that primary purpose. Although important, other uses of special fuel are secondary. Thus, if a motor vehicle is consuming special fuel on public roads in Nevada, the entire amount of special fuel contained within the supply tank of that motor vehicle is subject to taxation because that fuel is intended and primarily being used to propel the motor vehicle.

"The intent of the legislature is the controlling factor in statutory interpretation." *County of Clark v. Upchurch*, [114 Nev. 749](#), 961 P.2d 754, 757 (1998) (citing *Cleghorn v. Hess*, [109 Nev. 544](#), 548, 853 P.2d 1260, 1262 (1993)). However, "where a statute is susceptible to more than one interpretation it should be construed 'in line with what reason and public policy would indicate the legislature intended.'" *State, Dep't of Mtr. Vehicles v. Lovett*, [110 Nev. 473](#), 477, 874 P.2d 1247, 1249-50 (1994) (quoting *State, Dep't of Mtr. Vehicles v. Vezeris*, [102 Nev. 232](#), 236, 720 P.2d 1208, 1211 (1986)). The legislative history for [NRS 366.200](#) does not clarify the statute. Therefore, [NRS 366.200\(1\)](#) must be interpreted within the confines of law, reason, and public policy.

[NRS 366.190\(1\)](#) provides in part: "a tax is hereby imposed at the rate of 27 cents per gallon on the sale or use of special fuels." Given the language in [NRS 366.190\(1\)](#), the Nevada Legislature chose, as a general rule, to tax all special fuels while carving out specific exemptions from the general rule in [NRS 366.200](#). In Nevada, tax exemptions are strictly construed. *Sierra Pacific Power Co. v. State, Dep't of Taxation*, [96 Nev. 295](#), 297, 607 P.2d 1147, 1148 (1980) (citing *Bingler v. Johnson*, 394 U.S. 741, 752 (1969)). Further, "[t]here is a presumption that the state does not intend to exempt goods or transactions from taxation. Thus, the one claiming exemption must demonstrate clearly an intent to exempt." *Id.* (citing *Clark County Sports Enterprises, Inc. v. City of Las Vegas*, [96 Nev. 167](#), 606 P.2d 171 (1980)). "Any reasonable doubt about the applicability of an exemption must be construed against the taxpayer." *Id.* (citing *Matter of 711 Motors, Inc.*, 547 P.2d 1343 (Hawaii 1976)).

There is reasonable doubt whether the Legislature intended to specifically exempt the special fuel at issue. Because there is a presumption against tax exemptions and [NRS 366.200\(1\)](#) does not clearly exempt from taxation special fuel consumed by a motor vehicle while idling, applicability of an exemption must be construed against the taxpayer.

Various states have statutes similar to Nevada's and their courts have decided similar issues. For example, in *Lakefront Lines, Inc. v. Tracy, Tax Comm'r.*, 665 N.E.2d 662 (Ohio 1996), a charter bus business sought a refund for fuel taxes paid on fuel consumed while buses idled and on fuel consumed to operate air conditioning equipment on buses. First, the court cited Ohio's law at the time on the subject stating: "[a] user of motor vehicle fuel may seek a refund of the tax

paid under R.C. 5735.14: ‘Any person who uses any motor vehicle fuel, on which the tax imposed by section 5735.05 of the Revised Code has been paid, for \* \* \* any purpose other than the propulsion of motor vehicles upon highways \* \* \* of this state, shall be reimbursed in the amount of the tax so paid on such motor vehicle fuel as provided in this section \* \* \*.’” *Id.* at 663. Second, the court recognized that it must strictly apply statutes against exemption and that statutes must clearly express an exemption. *Id.* at 664. The court then examined the definitions of “propulsion,” “propel” and “drive” and concluded that the definition of “propulsion” encompasses idling and operation of an air conditioning unit. The court determined that an exemption from fuel taxation for the consumption of fuel for operating an air conditioning unit or for idle time is not clearly expressed in Ohio’s law and affirmed the decision of the Ohio Board of Tax Appeals.

Other states that have addressed the issue include Utah in *U.S. Xpress, Inc. v. Utah State Tax Comm’n*, 886 P.2d 1115, 1117 (Utah App. 1994) and Indiana in *Roehl Transport, Inc. v. Indiana Dep’t of State Revenue*, 653 N.E.2d 539 (Ind.Tax 1995). In both *U.S. Express* and *Roehl Transport*, the issue was whether a special fuel tax refund could be obtained for special fuel consumed while motor vehicles idle off-highway. Neither court allowed an exemption from special fuel taxation for fuel consumed by motor vehicles while idling off-highway.

As a practical matter, this conclusion makes sense. To conclude otherwise opens the door to unending amounts and types of potential refund applications. Without a clear declaration from the Legislature otherwise, the Department should not be required to wade through a potential myriad of refund applications.

#### CONCLUSION

Because special fuel consumed while idling is not clearly exempted from taxation and exemptions must be strictly construed, a fuel tax refund is not available to a bus operator who consumes special fuel for any idle time that occurs while the vehicle is off the highway.

FRANKIE SUE DEL PAPA  
Attorney General

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AGO 99-13 PAROLE AND PROBATION: The Parole Board cannot conduct a parole revocation hearing in absentia, unless the parolee waives his right to appear personally at the revocation hearing. Pursuant to chapter 213 of NRS, as amended effective March 16, 1999, the Parole Board may revoke an escaped prisoner’s parole when he is convicted of and incarcerated for a new crime outside Nevada and allow the time during which he is incarcerated in the other jurisdiction to be time served on his Nevada term of imprisonment.

Carson City, April 15, 1999

Donald L. Denison, Chairman, Board of Parole Commissioners, 1445 Hot Springs Road, #108-B, Carson City, Nevada 89711

Dear Mr. Denison:

You have requested an opinion from this office that addresses the following questions.

## QUESTION ONE

May the Board of Parole Commissioners (Parole Board) conduct a parole revocation hearing in absentia on a parolee convicted of a crime outside Nevada while on parole?

### ANALYSIS

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court held that the possible deprivation of liberty inherent in parole revocation proceedings entitles a parolee to minimum due process protections. The basic premise is that “the due process clause applies when government action deprives a person of liberty or property.” *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 441 U.S. 1, 7 (1979). The Court added, that “To determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.” *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). For there to be a protectible right “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it.” *Id.* 408 U.S. at 577. The Supreme Court has ruled, however, that “given a valid conviction the criminal defendant has been constitutionally deprived of his liberty.” *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Thus, assuming a parolee is imprisoned on a valid conviction, a parole revocation arguably would not result in depriving the parolee of his liberty. The following analysis, however, indicates that absent an effective waiver, or a law which makes such a parole revocation automatic, a parolee must be afforded a *Morrissey* revocation hearing.

In two jurisdictions, courts have upheld parole revocations in absentia on offenders convicted of crimes while on parole. *See, Brooks v. Strack*, 669 N.Y.S. 2d 246 (N.Y. App. Div. 1998); *Alevras v. Neubert*, 727 F. Supp. 852, 853 (S.D.N.Y. 1990); and *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir. 1995)(reviewing automatic revocation requirements under Ohio law). The Supreme Court of California and our Ninth Circuit Court of Appeals, on the other hand, have determined that such a parolee must be afforded a *Morrissey* revocation hearing unless he waives his right thereto. *See, In re Bernard A. Shapiro*, 537 P. 2d 888 (Cal. 1975) and *John v. United States Parole Commission*, 122 F.3d 1278 (9th Cir. 1997). At first glance, there appears to be a split of authority; however, the fact that New York and Ohio have a statutory or regulatory provision making such parole revocations automatic is an important distinction.<sup>20</sup> California and Nevada have no such statute or regulation.

The Supreme Court of California, in *In re Bernard A. Shapiro*, 537 P. 2d 888 (Cal. 1975), considered Shapiro’s complaint that the California Adult Authority failed to accord him parole revocation hearings as mandated by *Morrissey*. Shapiro, while on state parole on a theft crime, was convicted of a federal narcotics offense and sentenced to four years in federal prison to run concurrently with his state sentence. The California Adult Authority suspended Shapiro’s parole and issued an arrest warrant and request for notice that was forwarded to the federal prison. The federal prison treated the warrant and request for notice as a detainer. The consequences for Shapiro were as follows:

- (1) it precludes his application for choice work duty such as “camp

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<sup>20</sup> New York law provides in pertinent part as follows: “. . . when a parolee or conditional releasee has been convicted of a new felony committed while under his present parole or conditional release supervision and a new indeterminate sentence has been imposed, the board’s rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification.” N.Y. Exec. Law § 259-i (3)(d)(iii). Ohio parole regulation provides as follows: “In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated.” Ohio Administrative Regulation 5120:1-1-19(1).

assignments” at which “camp good time” can be earned; (2) it results in ineligibility for furloughs for work or school purposes and (3) ineligibility for federal “parole to the community”; (4) it disrupts rehabilitative efforts since he has no way of ascertaining the ultimate length of his term if and when California executes the outstanding warrant. In addition, and perhaps most importantly, the failure of the Adult Authority to either revoke or reinstate parole has denied petitioner the benefit of concurrence which the federal sentence envisaged. As long as parole is merely “suspended” petitioner is considered a technical fugitive from justice . . . and no part of the time during which he is a fugitive from justice shall be part of his term.

*Shapiro*, 537 P.2d at 890.

As for the first *Morrissey* hearing, or the preliminary inquiry, the trial itself could satisfy this requirement “as long as the criminal proceeding occurs promptly after the commission of the charged offense and the parolee-defendant is given notice of its dual purpose.” *Id.* at 891. Regarding the final *Morrissey* revocation hearing, or the revocation hearing, the court pointed out the following:

If petitioner were allowed such a hearing and were able to prevail, the parole violator warrant and attendant detainer would be dissolved and parole status would be reinstated. This would result in a dual benefit: (1) petitioner would then be eligible to participate in rehabilitative programs . . . and (2) the federal and California terms would run concurrently.

*Shapiro* 537 P.2d at 892.

Although the gravity of the parole violation would seem to make a parole reinstatement unlikely, the *Shapiro* court noted that parole reinstatement was still possible. The court concluded that it was:

. . . not prepared to say that conviction of a crime committed while on parole will without exception result in revocation. If that were a proper conclusion the Supreme Court in *Morrissey* and *Gagnon* would have specifically excepted from the requirement of a hearing those parolees whose violations were cemented in a final judgment of conviction. But *Gagnon* expressly dealt with this question and concluded that a hearing, and perhaps even counsel, are necessary since a parolee or probationer might assert “that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate.” *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

*Shapiro*, 537 P.2d at 894.

Focusing on the possibility of a parole revocation in absentia, under circumstances where the parolee is convicted of another crime while on parole, the *Shapiro* court mentioned that the right to a personal appearance may be waived. In this regard, the court stated as follows:

At a minimum, however, we hold that due process requires that parolees incarcerated under intervening sentences be informed of the option of submitting a written waiver of personal appearance at the revocation hearing. After such waiver, hearings in absentia shall be conducted promptly.

*Shapiro*, at 537 P.2d at 896 (footnote omitted).

More recently, the Ninth Circuit Court of Appeals, in *John v. United States Parole Commission*, 122 F.3d 1278 (9th Cir. 1997) held that when a parolee is convicted of another crime while on parole there was no need for a *Morrissey* preliminary inquiry hearing. However, it also held that the subsequent conviction “did not render unnecessary the need for the Commission to conduct the second *Morrissey* hearing — the ‘revocation hearing.’” *John*, 122 F.3d at 1282. Despite the later conviction, parole revocation was not automatic. The *John* court continued as follows:

For example, given the fact that the reparole guidelines made an immediate reparole possible in light of the time that John had already spent in custody on the New Mexico conviction, Commission could well have determined that no purpose was to be served by revoking parole to begin with. Or relatedly, the Supreme Court in *Moody*, 429 U.S. at 89 did not exclude the possibility that even a parolee convicted of a double homicide might nonetheless receive a nonrevocation decision at the second *Morrissey* hearing.

...  
The import is plain that the *Moody* Court did not consider a conviction and attendant incarceration as obviating the need for a specific determination as to revocation of parole. In other words, the existence of a violation does not automatically trigger parole revocation.

Rather, John was entitled to identify “circumstances in mitigation” (*Morrissey*, 408 U.S. at 488) of his violation so that he might demonstrate to Commission that parole revocation was an inappropriate disposition of his case (*id.*; accord, *Black v. Romano*, 471 U.S. 606, 612, 85 L. Ed. 2d 636, 105 S. Ct. 2254 (1985)).

...  
Not only was John constitutionally entitled to a revocation hearing, but Commission was further compelled by *Morrissey* to abide by the six requirements of accurate factfinding set out here as necessary to satisfy the “minimum requirements of due process.” (408 U.S. at 489).

*John*, 122 F.3d at 1282.<sup>21</sup>

The New York Supreme Court, Appellate Division, focused on a situation where a parolee was arrested and convicted of three felonies while on parole. New York’s Parole Board subsequently revoked his parole in absentia. The parolee filed a petition for a writ of habeas corpus claiming that the revocation of his parole in his absence, and the absence of his attorney, denied him his right to due process. The court held that “[a] parolee’s conviction of a crime while on parole is sufficient, in and of itself, to support a revocation of parole.” *Brooks v. Strack*, 669 N.Y.S. 2d 246 (N.Y. App. Div. 1998).

The United States District Court for the Southern District of New York also considered a situation where a New York parolee, while on parole, was convicted of a felony in New Jersey. The court noted that the Supreme Court’s decision in *Morrissey*, which addressed the preliminary and revocation hearing requirements, was set “in the context of parolees suffering revocation based on charges made by their parole officers, and theretofore *not established as true by any court or administrative body.*” *Alevras v. Neubert*, 727 F. Supp. 852, 853 (N.Y. 1990) (emphasis added). The *Alevras* court concluded as follows:

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<sup>21</sup> The six *Morrissey* factfinding requirements are as follows: (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Morrissey*, 408 U.S. at 489.

[T]he requirements of establishing probable cause and then an actual violation of parole have been satisfied by petitioner's convictions. The requirement that petitioner have an opportunity to show "that circumstances in mitigation suggest that the violation does not warrant revocation" *Morrissey* . . . has been made unnecessary by the New York State Legislature's determination that revocation should be automatic when the parolee is convicted of a felony while on conditional release.

*Id.* The *Alevras* court emphasized that in the *Black* case the Supreme Court observed that there was no need to consider the *Morrissey* hearing requirements in the context of "a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of . . . parole." *Id.* (quoting *Black v. Romano* 471 U.S. at 612). The *Alevras* court also noted that "*Morrissey* did not hold that a state is prohibited from declaring that parole will be automatically revoked for serious violations such as conviction of a felony." *Id.* (quoting *Pickens v. Butler*, 814 F.2d 237, 239 (5th Cir. 1987)).

In *Kellogg v. Shoemaker*, 46 F.3d. 503, 506 (6th Cir. 1995) the court dealt with a situation where the Ohio parole revocation procedures "did away with any type hearing if the defendant was convicted by an Ohio court 'for an offense he committed while on any release.'" *Kellogg*, who had been convicted of a crime while on parole, argued that such an automatic revocation violated his procedural due process rights. The *Kellogg* court concluded that the Ohio Adult Parole Authority appropriately revised its parole procedures to eliminate any discretion in deciding whether to revoke parole and cited to the *Black* case "which had indicated that the hearing procedures required in *Morrissey* were applicable only if the parole board exercised discretion in revoking parole." *Kellogg*, 46 F.3d at 506. The Ohio Adult Parole Authority addressed this administratively concluding "that no mitigating circumstances would overcome a subsequent conviction of another felony committed while on parole; thus, an individual hearing would be unnecessary." *Kellogg*, 46 F.3d at 508. Focusing on the *ex post facto* clause, the *Kellogg* court determined that the subject administrative regulation could only be applied to parolees whose initial offense was committed after the effective date of the regulation. *Kellogg*, 46 F.3d at 509-510.

In *Spotted Bear v. McCall*, 648 F.2d 546, 547 (9th Cir. 1980), Bear wanted a speedy parole revocation hearing because a federal warrant and detainer kept him from certain state prison rehabilitative programs and a parole release. The court noted that both the Ninth Circuit Court of Appeals and the United States Supreme Court have held that when the parolee is in state prison "there (is) no constitutional duty on the part of the Parole Commission to hold a parole revocation hearing until the parolee is released from his intervening state sentence and taken into federal custody by execution of the warrant." *Id.* (citing *Moody v. Daggett*, 429 U.S. 78 (1976) and *Reese v. United States Board of Parole*, 530 F.2d 231 (9th Cir. 1976) cert. denied, 429 U.S. 999 (1976)). Bear argued that the failure to afford him a speedy revocation hearing was akin to a failure to afford him a speedy trial. The court disagreed relying on the *Morrissey* case to emphasize that in "revocation proceedings *relitigation of the state conviction* and sentence would be improper." *Spotted Bear*, 648 F.2d at 547 (emphasis added). An automatic revocation would also avoid a relitigation of the conviction.

Nevada's laws and regulations, unlike New York's laws and Ohio's regulations, are silent on this subject. It is firmly established, however, that Nevada's parole statutes do not create a liberty interest in the continuation of parole, because the Parole Board's decision to grant parole is an act of grace of the state. Specifically, [NRS 213.10705](#) provides as follows:

The legislature finds and declares that the release or *continuation of a person on parole* or probation *is an act of grace* of the state. No person has a right to parole

or probation, or to be placed in residential confinement, and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property or establish a basis for any cause of action against the state, its political subdivisions, agencies, boards, commissions, departments, officers or employees. (emphasis added).

### CONCLUSION TO QUESTION ONE

The Parole Board cannot conduct parole revocation hearing in absentia, unless the parolee waives his right to appear personally at the revocation hearing.

### QUESTION TWO

When a Nevada parolee is deemed an escaped prisoner and is convicted of and incarcerated for a new crime outside Nevada, what effect would a parole revocation have on the time he is required to serve on his Nevada term of imprisonment?

### ANALYSIS

A parolee who “does not keep the board informed of his whereabouts must be deemed an escaped prisoner whether or not he has been confined for a new offense.” Letter from Deputy Attorney General Simmons to Chairman Armstrong dated August 20, 1991. His status as an escaped prisoner remains during his incarceration outside Nevada. *Id.*

Section 1 of A.B. 80 recently amended chapter 213 of the NRS, including [NRS 213.15185](#), to give the Parole Board the discretion to revoke a parole immediately or at a later date on a parolee convicted of and incarcerated for a new crime outside Nevada. *See* Section 1 of A.B. 80.<sup>22</sup> Upon such a revocation of parole, the Parole Board may allow the time during which the prisoner is incarcerated in the other jurisdiction to be time served on his Nevada term of imprisonment. Section 3 of A.B. 80 deals with the parolee who is deemed an escaped prisoner and the time served on his term of imprisonment. This discretion to revoke a parole immediately or at a later date extends to the escaped prisoner. *See* Section 3 of A.B. 80.

Thus, with respect to a Nevada parolee who is an escaped prisoner and who is convicted of and incarcerated for a new crime outside Nevada, the time during which he is incarcerated in the other jurisdiction is not time served on his Nevada term of imprisonment unless the Parole Board revokes his parole and allows such time to run concurrent.

### CONCLUSION

Pursuant to chapter 213 of the NRS, as amended effective March 16, 1999, the Parole Board may revoke an escaped prisoner’s parole when he is convicted of and incarcerated for a new crime outside Nevada and allow the time during which he is incarcerated in the other jurisdiction to be time served on his Nevada term of imprisonment.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.  
Deputy Attorney General

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<sup>22</sup> Chapter 213 of the NRS, including NRS 213.15185, was amended by A.B. 80 and signed into law by Governor Guinn on March 16, 1999. The change to this law enables the Parole Board to revoke or continue the parole of an escaped prisoner or absconder and thereby allow the time served on his new term of imprisonment to run concurrently with his Nevada term of imprisonment.

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AGO 99-14 REAL ESTATE; MORTGAGE COMPANY; MORTGAGES; LOANS: A mortgage broker who is not licensed or certified as an appraiser pursuant to [NRS chapter 645C](#) may not prepare and communicate to potential investors his or her estimate or opinion of value of real property proposed as collateral for a mortgage loan. The owner of property proposed to secure a mortgage loan may provide a written or oral estimate or opinion of its value without first being licensed or certified as an appraiser pursuant to [NRS chapter 645C](#).

Carson City, May 4, 1999

Anthony J. Wren, President, Nevada Commission of Appraisers of Real Estate, Post Office Box 20867, Reno, Nevada 89515

Dear Mr. Wren:

The Nevada Commission of Appraisers of Real Estate has requested an opinion regarding the applicability of the Real Estate Appraisal Act (Act), [NRS chapter 645C](#), to certain practices of the mortgage industry. The issue arises when a person acting on behalf of a mortgage company (mortgage broker<sup>23</sup>) who is not licensed or certified as an appraiser pursuant to the Act arranges a loan based on his or her “estimate” of the value of the property that will secure the loan. The mortgage broker may present the estimate orally or in writing or as part of a stated loan-to-value ratio to individual or institutional investors (investors) who rely on the estimate or loan-to-value ratio in deciding whether to invest in the loan. Although the mortgage broker does not receive separate compensation for providing the estimate of value, he or she does receive or expect to receive fees in connection with making the loan. You have also asked for our opinion on the applicability of the Act in the situation where the owner of the property presents an estimate of value in connection with his or her application for a mortgage loan to be secured by the property.

#### QUESTION ONE

May a mortgage broker who is not licensed or certified as an appraiser pursuant to [NRS chapter 645C](#) prepare and communicate to potential investors his or her estimate or opinion of value of real property proposed as collateral for a mortgage loan?

#### ANALYSIS

As part of the federal savings and loan bailout effort, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). *See* 12 U.S.C. §§ 3331 to 3351 (1994). The Nevada Legislature enacted the Real Estate Appraisal Act, [NRS chapter 645C](#), to conform with FIRREA and to protect users of appraisal services.<sup>24</sup> According to the FIRREA legislative history, Congress adopted that portion of the act dealing with real estate appraisers (title XI) to remedy abuses in the appraisal business:

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<sup>23</sup> For purposes of this opinion, we shall assume that the mortgage broker is licensed as a mortgage company pursuant to NRS chapter 645B and is making a loan funded in whole or in part by institutional lenders or natural persons. We shall also assume that the mortgage broker acts as agent for the lender or lenders in the loan transaction.

<sup>24</sup> NRS 645C.140 states:

The purpose of this chapter is to carry out the policy expressed in the portion of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. §§ 3331-3351) which concerns appraisers, to establish a program in this state to license and certify appraisers, and to protect the users of appraisals in this state.



Extensive Congressional hearings, GAO reports and regulatory agency studies have documented the pervasive use of faulty and fraudulent real estate appraisals by unscrupulous thrift managements . . . . Faulty appraisals make unsafe and unsound real estate loans appear adequately collateralized.

Collusion between thrift managers, real estate appraisers and borrowers has cost the [Federal Savings and Loan Insurance Corporation] billions of dollars. In order to thwart real estate appraisal abuses, the legislation establishes a system of uniform national real estate appraisal standards. Act of August 9, 1989, Pub. L. No. 101-73, 1989 U.S.C.C.A.N. (103 Stat. 511) 107.

FIRREA requires state law to meet the minimum federal guidelines if state-licensed appraisers are to perform appraisals related to federal transactions. FIRREA requires, in part, that state-licensed appraisers follow uniform appraisal standards adopted by the Appraisal Standards Board (ASB) of the Appraisal Foundation. 12 U.S.C. 3339. These standards are published annually by the ASB as the Uniform Standards of Professional Appraisal Practice (USPAP).

[NRS 645C.030](#) defines “appraisal” as “an analysis, opinion or conclusion, whether written or oral, relating to the nature, quality, value or use of a specified interest in, or aspect of, identified real estate for or with the expectation of receiving compensation.” An “appraiser” is a person who “prepares or communicates an appraisal, but does not include anyone who merely relays an appraisal on behalf of the person who prepares it.” [NRS 645C.040](#). The Act provides three different types of licensing or certification depending on the type of appraisal work to be performed. [NRS 645C.280](#). A person licensed or certified in another state may also obtain a permit to perform an appraisal in this state. [NRS 645C.363](#).

[NRS 645C.150](#) sets forth certain exemptions from the licensing and certification requirements of the Act. Subsection (5) provides that the Act does not apply to “[a] person who makes an evaluation of real estate as an incidental part of his employment for which special compensation is not provided, if that evaluation is only provided to his employer for internal use within the place of his employment.” Consequently, licensing or certification would not be required for a salaried employee of a mortgage company lending its own money.<sup>25</sup> This exemption does not apply to the situation you describe, however, because the estimate of value is provided to investors outside the mortgage broker’s place of employment. In addition, the mortgage broker will receive special compensation that is contingent on the making of the loan and is usually based on the amount of the loan.

We have found no case law that discusses the specific issue presented here. Courts have, however, discussed licensing requirements for appraisers in connection with their testimony as expert witnesses. See, e.g., *Hutchinson v. Town of Andover*, 715 A.2d 831 (Conn. App. Ct. 1998) (licensing not required); *Lee Gardens Arlington Ltd. Partnership v. Arlington County*, 463 S.E.2d 646 (Va. 1995) (testimony by unlicensed appraiser disallowed). In *Wright v. Las Vegas Hacienda*, [102 Nev. 261](#), 720 P.2d 696 (1986), the court held that a witness need not be licensed to practice in a given field in order to be qualified to testify as an expert.<sup>26</sup> Although the question of unlicensed appraisers testifying as experts in Nevada may be an open one, providing an estimate of value to induce third party investors to purchase an interest in a mortgage loan

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<sup>25</sup> An appraisal prepared under these circumstances could not, of course, be used to sell the loan to a third party.

<sup>26</sup> In *Wright*, the lower court ruled that a witness would engage in the unlicensed practice of psychology or engineering if allowed to testify. The Nevada Supreme Court disagreed, stating “. . . a person does not unlawfully engage in the unlicensed practice of psychology or engineering when he testifies to his knowledge of the subject in a court of law.” 102 Nev. at 263, 720 P.2d at 697. One could argue that *Wright* would not preclude a ruling that testimony by an unlicensed appraiser constitutes the unlicensed practice of real estate appraisal because, by definition, any “analysis, opinion or conclusion” by a person testifying on the value of real property for compensation constitutes an appraisal. NRS 645C.030.

presents an entirely different issue.

Regardless of the terminology used, we believe an estimate of value prepared and communicated by the mortgage broker in the situation you describe falls within the plain meaning of “appraisal” set forth in [NRS 645C.030](#). An estimate of value provided to third parties considering whether to invest in a mortgage loan secured by an identified parcel of real estate is an “analysis, opinion or conclusion” relating to the “value” of the property. The estimate may be written or oral. The mortgage broker provides the estimate with the expectation of consummating a mortgage loan for which he will receive a commission or other form of special compensation.

Regulations governing mortgage brokers also address the issue of appraisals. [NAC 645B.080](#) requires that a mortgage broker provide a lender who is a natural person an appraisal of the property proposed as security unless specifically waived in writing. [NAC 645B.120](#) sets forth requirements for appraisals.<sup>27</sup> Although [NAC 645B.120](#) was adopted prior to the enactment of the Real Estate Appraisal Act, and therefore does not address the issue of state licensing and certification,<sup>28</sup> it does require that appraisals be performed by an appraiser who “(a) Is professionally designated by a major, nationally recognized society of appraisers; (b) Is approved by the Federal National Mortgage Association; or (c) Has verifiable experience or training in the amount necessary to prepare an appraisal in accordance with the guidelines set forth by the association or those societies.” [NAC 645B.120\(2\)](#). Although these regulations do not define the term “appraisal,” an informal statement of estimated value would clearly not qualify as an acceptable appraisal under [NAC 645B.120](#).

The Act is clearly intended to protect users of appraisals in this state. [NRS 645C.140](#). It should therefore be given a liberal construction to accomplish that purpose. *Cf. Brill v. Real Estate Division*, [95 Nev. 917](#), 604 P.2d 113 (1979) (Real estate act should be given a liberal interpretation to protect public against unscrupulous and unqualified persons.) The use of fraudulently or negligently prepared appraisals as a contributing factor to the savings and loan crisis of the 1980s is well documented.

An appraisal performed by a mortgage broker financially interested in the underlying loan transaction would be prohibited by USPAP even if the mortgage broker were properly licensed or certified. The USPAP Ethics Rule states that an appraiser “must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.” USPAP Ethics Rule at 2 (1999). It is also unethical to accept compensation that is contingent

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<sup>27</sup> NAC 645B.120(1) states:

1. An appraisal submitted to a lender pursuant to NAC 645B.080 must:
  - (a) Be written in an objective manner so that a third person can follow the reasoning, logic and analysis of the appraiser in his determination of the final estimate of the market value of the property.
  - (b) Be dated by the appraiser before the date on which a loan which is secured by the appraised property is made.
  - (c) Contain an objective, concise description of the neighborhood, the site of the property and any improvements made to the property.
  - (d) Contain an estimate of the value of the property, formulated according to each of the approaches customarily used by appraisers (cost, market data and income), as applicable.
  - (e) Contain a statement from the appraiser in which he explains any difference in his estimate of the value of the property and the values formulated according to the customarily accepted approaches.

<sup>28</sup> This regulation is proposed to be amended to require that appraisals be performed only by persons who hold the appropriate license, certification, or permit issued by the Real Estate Division of the Department of Business and Industry. Proposed Regulation of the Commissioner of Financial Institutions, LCB File No. R154-98, September 21, 1998. In addition, the proposed amended regulation removes the ability to waive the requirement of an appraisal currently permitted under NAC 645B.080.

upon reporting “a direction in value that favors the cause of the client,” “the attainment of a stipulated result,” “or the occurrence of a subsequent event directly related to the value opinion.” USPAP Ethics Rule at 2 (1999). Standards Rule 2-3 requires each written real property appraisal report to contain a signed certification that affirms, among other things, that the appraiser is not biased or financially interested in the outcome of the transaction.<sup>29</sup>

A construction of the Act that would authorize mortgage brokers to provide estimates of value in the situation described and provide the opportunity for the types of abuses that led to the enactment of FIRREA and the Act would obviously not be favored. *See, State Dep't of Mtr Vehicles v. Lovett*, [110 Nev. 473](#), 477, 874 P.2d 1247, 1250 (1994) (Statutes are generally construed with a view to promoting, rather than defeating, legislative policy behind them.)

### CONCLUSION TO QUESTION ONE

A mortgage broker who is not licensed or certified as an appraiser pursuant to [NRS chapter 645C](#) may not prepare and communicate to potential investors his or her estimate or opinion of value of real property proposed as collateral for a mortgage loan. Even if licensed or certified as an appraiser, it would be unethical for a mortgage broker to prepare an appraisal in connection with a mortgage loan transaction in which he or she has a financial interest.

### QUESTION TWO

May the owner of property proposed to secure a mortgage loan provide a written or oral opinion of its value without first being licensed or certified as an appraiser pursuant to [NRS chapter 645C](#)?

### ANALYSIS

A property owner seeking a mortgage loan stands in a different position in relation to the transaction than does the mortgage broker. Although the owner expects to receive the benefit of the loan proceeds if the loan is approved, he or she does not earn a fee from the transaction. Further, the owner does not regularly engage in the practice of providing estimates of value on property in the same manner as the mortgage broker. An owner's interest in the underlying transaction is, in our opinion, readily apparent to any person considering the estimate of value and is not likely to mislead potential investors. An owner's estimate of value, if not considered

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<sup>29</sup> [Standards Rule 2-3](#) (This Standards Rule contains binding requirements from which departure is not permitted.)

Each written real property appraisal report must contain a signed certification that is similar in content to the following form:

I certify that, to the best of my knowledge and belief:

- the statements of facts contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no (or the specified) present or prospective interest in the property that is the subject of this report, and no (or the specified) personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- my engagement in this assignment was not contingent upon developing or reporting predetermined results.
- my compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
- I have (or have not) made a personal inspection of the property that is the subject of this report. (If more than one person signs the report, this certification must clearly specify which individuals did and which individuals did not make a personal inspection of the appraisal property.)
- no one provided significant professional assistance to the person signing this report. (If there are exceptions, the name of each individual providing significant professional assistance must be stated.)

an appraisal for which licensing or certification is required, would also not satisfy a requirement that an appraisal be used to support the loan. Such an estimate does not present a danger of the type of abuse the Act was intended to prevent.<sup>30</sup> For these reasons, the owner of property proposed to secure a mortgage loan may provide a written or oral opinion of its value without first being licensed or certified as an appraiser pursuant to [NRS chapter 645C](#).<sup>31</sup>

### CONCLUSION TO QUESTION TWO

The owner of property proposed to secure a mortgage loan may provide a written or oral estimate or opinion of its value without first being licensed or certified as an appraiser pursuant to [NRS chapter 645C](#). Such an estimate or opinion of value would not satisfy a requirement that mortgage loans be supported by an appraisal.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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AGO 99-15 PUBLIC OR PATENTED LANDS; MINING; CLAIMS; COUNTIES; TAXES; MINERAL RESOURCES: County may sell undivided fractional interests in a mining claim. Op. Nev. Att’y Gen. No. 211 (June 8, 1936) is overruled.

Carson City, May 5, 1999

Sue Fahami, White Pine County District Attorney, Post Office Box 240, Ely, Nevada 89301

Dear Ms. Fahami:

You have requested a review of Op. Nev. Att’y Gen. No. 211 (June 8, 1936), an opinion that concluded chapter 44, Statutes of 1933 (currently codified at [NRS 517.390](#) et seq.), did not authorize any county to convey a fractional interest in a patented mining claim which became the property of the county by virtue of the revenue laws of the State of Nevada.

### FACTUAL BACKGROUND

In your letter and preliminary opinion to this office regarding this matter, you stated that White Pine County has taken title to a number of mining claims pursuant to nonpayment of taxes.<sup>32</sup> In researching the title to these properties for the purpose of a sale, the White Pine County treasurer discovered that the properties were fractional interests in patented mining claims.<sup>33</sup> You have pointed out that Op. Nev. Att’y Gen. No. 211 (June 8, 1936) (AGO 211) prohibits the county from conveying fractional interests in patented mining claims under former Nevada law now found in [NRS 517.390](#) et seq. Your letter asks for clarification of

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<sup>30</sup> We note that Nevada follows the general rule that an owner may testify to the value of his or her property without being qualified as an expert witness. *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984).

<sup>31</sup> A mortgage broker using an estimate of value prepared by an owner/borrower would have an obligation, in our opinion, to inform all potential lenders or investors, prior to consummation of the transaction, that the value estimate was prepared by the owner/borrower.

<sup>32</sup> See NRS 361.565 et seq.

<sup>33</sup> 30 U.S.C. § 29 (1990); *Mining and Milling Company v. Tunnel Company*, 196 U.S. 337, 347 (1905) (“[t]he patent is the instrument by which the fee simple title to the mining claim is granted”).

the statutes in [NRS 517.390](#) et seq. entitled “Sales By Counties Of Patented Mining Claims.”<sup>34</sup>

In AGO 211, the Attorney General opined that counties were prohibited from conveying fractional interest(s) in a patented mining claim(s) under existing Nevada law. The basis for the opinion was that the Legislature intended this result because the statute failed to use the words “fractional interest,” instead, it only mentions “claim or claims.” For that reason and that reason alone, it was concluded that counties may not convey fractional interests in patented mining claims.<sup>35</sup>

Your argument in opposition to the conclusion in AGO 211, is that the Legislature could not have intended to prohibit the conveyance of fractional interests in patented mining claims since such a policy is counter to the maximization of land productivity, it unreasonably denies revenue to the county from the potential sale of such property, and it avoids other economic benefits when the property is being explored or mined. Secondly, you also assert that such a policy leads to unreasonable results in view of all other related property use statutes. *Alsenz v. Clark Co. School Dist.*, [109 Nev. 1062](#), 1064, 864 P.2d 285 (1993) (statutory interpretation should avoid absurd or unreasonable results).

### QUESTION ONE

Whether [NRS 517.390](#) et seq. prohibits a county from selling a fractional interest in a patented mining claim of which the county became owner pursuant to the revenue laws of this state.

### ANALYSIS

We begin by reviewing the rationale for AGO 211. AGO 211, at page 185, purported to interpret legislative intent, by observing that the legislature failed to use the words “fractional interest” and provided that:

This leads us to the belief that the Legislature in the enactment of the statute contemplated that only such patented mining claims as were wholly and entirely

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<sup>34</sup> The relevant portions of the statutes are as follows:

**NRS 517.390 Affidavit and petition to explore and develop mine or claim.**

1. Whenever a patented mine or mining claim has become the property of a county through operation of the revenue laws of this state, any citizen of the United States may file with the board of county commissioners of such county an affidavit and petition to explore and develop the mine or claim, provided the mine or claim had been the property of the county for less than 1 year, at the time of such filing.

....

**NRS 517.420 Execution of deed to convey title to petitioner; consideration and limitations; disposition of proceeds of sale.**

1. At the expiration of 6 months, or sooner if the petitioner so desires, the county treasurer shall make and execute a deed conveying the title of the county to such mine or claim to the petitioner for the sum for which the property became the property of the county.

....

<sup>35</sup> Op. Nev. Att’y Gen. No. 211 (June 8, 1936) states in part:

Attention is called to the fact that in each and every instance in the statute the legislature has mentioned “claim, or claims” and that in no instance is a fractional interest in a patented mining claim mentioned. This leads us to the belief that the legislature in the enactment of the statute contemplated that only such patented mining claims as were wholly and entirely owned by the county were to be sold and that it did not contemplate the conveyance of any fractional interest in a patented mining claim subject to the provisions of the statute. It cannot be said that a patented mining claim belongs to the county if a fractional interest of the title rests in some other person, or persons, for in that case the mining claim would belong to the county and to such other person who might own an interest in the title.

owned by the county were to be sold and that it did not contemplate the conveyance of any fractional interest in a patented mining claim subject to the provisions of the statute.

No citation was made to legislative minutes, documents, or session laws to bolster the determination of legislative intent. Except for noting the omission of the phrase “fractional interest” in the act, no argument or legal support of any kind was offered. The author of AGO 211 did not conclude that the words “claim or claims” were ambiguous, did not actually resort to legislative history, and did not rely on settled rules of statutory construction in determining that the absence of the words “fractional interest” was dispositive of the question whether the statute authorized counties to sell fractional interests in patented mining claims which became property of the county by virtue of revenue laws of this state. It appears that AGO 211 literally interpreted the words of the statute, the predecessor to [NRS 517.390](#), to exclude any meaning other than the complete claim or one that encompassed unity of title.

Despite the opinion’s reference to legislative intent, we reconsider AGO 211 with scant legislative history or other guidance for assistance. There is no legislative history for the statute in question ( chapter 44, part 1, Statutes of Nevada, 1933, as amended; Statutes of Nevada, 1935, page 25, currently codified at [NRS 517.390](#) et seq.) which would assist in resolution of the issue presented. Although the Legislature in 1971 added two statutes to the procedure for sales of patented mining claims under [NRS 517.390](#) et seq., our investigation into the legislative history of those statutes sheds no light upon the issues presented; that is, whether “claim” also includes a fractional interest of the same claim.

AGO 211 impliedly omitted a “fractional interest” in a patented mining claim from the definition of “claim,” as though a fractional interest is qualitatively different than the whole claim. No authority or rule of statutory construction was cited to support this determination. We cannot agree with the conclusion of AGO 211, that a fractional interest does not constitute a “claim” under [NRS 517.390](#) et seq. Such a conclusion constitutes a literal interpretation of “claim or claims” which we believe was not intended by the Legislature and is not in line with reason and public policy, nor was it correct in view of the context of the statute and its purposes.

#### A. An undivided interest in a mining claim has all the attributes of the whole claim

An undivided (fractional) interest in a mining claim is tantamount to a “claim.” The definition of mining claim does not depend upon the unity of title, instead it describes its physical characteristics. “A mining claim is a parcel of land containing precious mineral deposits in its soil or rock.” *Smelting Co. v. Kemp*, 104 U.S. 636, 649 (1881). Since the early days of mining in Nevada, mining claims have always been subject to ownership by undivided interests since the required labor and finances to work a mining claim are not always possessed by one person. See [NRS 520.010](#) et seq., Mining Corporations and Associations (enacted into law in 1865). In fact, [NRS 520.070](#) provides for the sale of a fractional interest in a mining claim which is subject to an execution of judgment, and gives the purchaser the right of immediate possession. It is also well established that creation of an undivided interest in a mining claim creates the relationship of cotenancy and the correlative right to possession of the property, and the rights to explore for and develop minerals. *Transfer of Limited Mineral Interests*, 3 AM. LAW OF MINING, § 83.01[2],<sup>36</sup> [NRS 520.070](#). Thus, for purpose of possession, use and transferability, a fractional interest in a patented mining claim has all the attributes of the whole claim.

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<sup>36</sup> See section 83.01[2], n.2: only Louisiana, West Virginia, and Illinois allow a nonconsenting coowner to restrain mineral extraction of all the jurisdictions consulted by a leading commentator.

Cotenants of a mining claim that actually unite their resources and efforts through the furnishing of labor, materials, equipment, services, or advice may be said to have formed a mining partnership or joint venture. [NRS 520.160-.260](#); Boigon & Murphy, *Liabilities of Non-Operating Mineral Interest Owners*, 51 U. Colo. L. Rev. (1980). Under the law of mining partnerships, each partner is liable for profits and losses in proportion to his interest in the mining claim. [NRS 520.180](#). Thus it should be clear that mining claims have been subject to fractional interest ownership since the early days of mining in Nevada, regardless of the form that ownership took.

B. Literal interpretation of “claim or claims” hinders the legislative purpose in [NRS 517.390](#)

When a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended. *State, Dep’t of Mtr. Vehicles v. Lovett*, [110 Nev. 473](#), 477, 874 P.2d 1247 (1994). If the language of a statute is plain the court has no right to go beyond it, its meaning must be deduced from its language. *State, Dep’t of Mtr. Vehicles v. McGuire*, [108 Nev. 182](#), 184, 827 P.2d 821 (1992). In reviewing statutes courts should give words their ordinary meaning if possible and as determined from the context used and considering the spirit of the law. *Dumaine v. State*, [103 Nev. 121](#), 125, 734 P.2d 1230 (1987); *State v. Webster*, [102 Nev. 450](#), 453-54, 726 P.2d 831 (1986). Utilizing these principles, we believe the construction given to the words “claim or claims” in AGO 211 was in error. In light of existing law, the context and the spirit of the act under consideration, we believe the meaning to be ascribed to the words “claim or claims” is not ambiguous but includes fractional interests.

A literal interpretation of the words “claim or claims” to exclude fractional interests was not reasonable nor sensible in view of the context of the act under question and existing law and practices in the mining industry. A leading treatise on statutory construction prudently observed:

[I]n construing a statute and its subject matter, reason and effect must be looked to; and when a literal enforcement would lead to consequences which the legislature could not have contemplated, courts are bound to presume that such consequences were not intended and adopt a construction that will promote the purpose for which the legislation was passed.

Sutherland Stat. Const. § 46.02 (5th ed. 1992).

AGO 211 did not consider the context of the act under consideration. Its purpose was to enable counties to collect delinquent taxes and recycle mining claims during the period of redemption, thus promoting economic benefits to the county and the state. No principled reason was given in AGO 211 that would support the exclusion of fractional interests from the operation of the statute. Allowing counties to sell fractional interests under [NRS 517.390](#) et seq. is a sensible reading of the statute rather than a literal reading and is consonant with reason and good discretion. *Id.* (5th ed. supp. 1999) (*citing* Flaherty v. The Enclave, 605 A.2d 301 (N.J. Super. Ct. Law Div. 1992) (court rejected literal and overly broad interpretation of a “whistleblower” statute that would have forced employee to waive all rights against an employer based on his employment relationship)).

C. [NRS 517.390](#) et seq. provides an alternative procedure for the sale of patented mining claim

Having concluded that the word “claim” necessarily includes fractional interests and that [NRS 517.390](#) et seq. may be applied to undivided shares in a mining claim, we further conclude that [NRS 517.390](#) et seq. is not the sole manner or only statutory authority for the sale of such property by a county. The procedure specified in [NRS 517.390](#) et seq. for the sale of patented

mining claims is discretionary and dependent upon third parties. Only when a petition from a third party is received, and then it is determined by the county commission to meet the statute's requirements, does the Legislature use the word "shall" and require the treasurer to sell the property. [NRS 517.460](#). Until then the procedure does not allow the county to take a claim, whether fractional interest or the whole claim, to a tax sale by auction or by any other means. In other words the county may not sua sponte sell a patented mining claim under [NRS 517.390](#) et seq. The statutes in [NRS 517.390](#) et seq. are a special legislative authorization to convey property before the expiration of two year's ownership as required under general redemption and tax delinquency statutes which ultimately authorize sale of property. [NRS 361.570](#) et seq.; *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227, 1229 (1982) (ruling that [NRS 517.410](#) simply authorizes the county to take certain action in addition to that prescribed by [NRS 361.585\(3\)](#)).

In *Weston*, the Nevada Supreme Court held that [NRS 361.585\(3\)](#) is expressly applicable to patented mining claims, and to any property held by the county treasurer in trust by virtue of the operation of the revenue laws of this state. *Weston*, 98 Nev. at 184-85, 643 P.2d at 1228. Thus we believe that the county could sell its fractional interest in a patented mining claim without resorting to [NRS 517.390](#) et seq. The court in *Weston* harmonized chapter 517 and the redemption statute so that the procedure described in [NRS 517.390](#) et seq. is just another means to sell a patented mining claim in addition to the redemption statute at [NRS 361.585](#). *Weston*, 98 Nev. at 185, 643 P.2d at 1229. [NRS 517.390](#) merely provides a mechanism to recycle the property and perhaps economically benefit the county during the period the property is being held in trust and subject to redemption.

#### CONCLUSION

A thorough review of Op. Nev. Att'y. Gen. No. 211 (June 8, 1936) and the legislative purposes behind [NRS 517.390](#), Sale By Counties of Patented Mining Claims, leads us to conclude that our opinion should be overruled. The literal interpretation of the words "claim or claims" to exclude fractional interests in patented mining claims leads to an absurd result. We do not believe the Legislature intended the act to prohibit a county from selling undivided fractional interests, while allowing the county to sell the same claim as long as it possessed the entire title to the claim. This result is unprincipled and unsupported in the opinion. Op. Nev. Att'y Gen. No. 211 (June 8, 1936), is overruled.

FRANKIE SUE DEL PAPA  
Attorney General

By: GEORGE H. TAYLOR  
Deputy Attorney General

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AGO 99-16 CITIES AND COUNTIES; TAXES; PARKS: Residential construction tax proceeds may be spent for "facilities" in an existing park which exceeds the acreage restriction codified in [NRS 278.4983\(8\)\(b\)](#) provided the expenditure benefits the neighborhood which paid the tax as required by [NRS 278.4983\(5\)](#) and is limited to the facilities set forth in [NRS 278.4983\(8\)\(a\)](#).

Carson City, May 12, 1999

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



Dear Mr. Doyle:

You have requested an opinion concerning the proper expenditure of residential construction tax proceeds. Although this office has previously addressed this issue, *see* Op. Nev. Att’y Gen. No. 87-12 (July 8, 1987), you are requesting further clarification regarding whether the proceeds of the residential construction tax may be spent on existing parks which exceed the site criteria set forth in [NRS 278.4983\(8\)\(b\)](#).

### QUESTION

May proceeds of residential construction tax be spent for “facilities” in an existing park which exceeds the acreage restriction for neighborhood parks codified in [NRS 278.4983\(8\)\(b\)](#)?

### ANALYSIS

Any city or county may impose a residential construction tax, pursuant to [NRS 278.497](#) to [278.4987](#) inclusive, for the purpose of raising revenue to provide neighborhood parks and facilities for parks which will serve nearby neighborhoods. The proceeds of the residential construction tax “may only be used for the acquisition, improvement and expansion of neighborhood parks *or* the installation of facilities in existing or neighborhood parks in the city or county.” [NRS 278.4983\(5\)](#) (emphasis added). “Facilities” are defined as “turf, trees, irrigation, playground apparatus, playing fields, play areas, picnic areas, horseshoe pits and other recreational equipment or appurtenances designed to serve the natural persons, families and small groups from the neighborhood from which the tax was collected,” [NRS 278.4983\(8\)\(a\)](#), while [NRS 278.4983\(8\)\(b\)](#) defines “neighborhood park” as “a site not exceeding 25 acres, designed to serve the recreational and outdoor needs of natural persons, families and small groups.”<sup>37</sup>

The issue of whether the proceeds from the residential construction tax may be spent on “facilities” in an existing park was addressed in a prior Attorney General’s Opinion which advised, in part:

[R]esidential construction tax revenues may be spent for improvements to existing parks. Such existing parks need not necessarily be “neighborhood parks” as defined in A.B. 7. However, expenditure of residential construction taxes on existing parks must be reasonably related to new housing construction and must be limited to the installation of “facilities” of the type defined in A.B. 7. If these two conditions are met, we believe residential construction tax money may be spent in a park defined by local ordinance as a “regional facility,” i.e., one designed to serve the recreational needs of more than just the nearby neighborhoods.

Op. Nev. Att’y Gen. No. 87-12, 96 (July, 1987). In other words, the 1987 amendment to [NRS 278.4983](#) limited the spending of residential construction taxes to “neighborhood parks” yet specified that the tax proceeds may also be utilized for the improvement of existing parks as long as the improvements meet certain criteria.

You have requested clarification regarding whether existing parks, which clearly are entitled to benefit from the residential construction tax proceeds, may exceed the acreage restriction included in the definition for neighborhood parks. As stated in your letter of inquiry, [NRS](#)

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<sup>37</sup> In 1987, the Legislature passed A.B. 7 which amended NRS 278.4983 by limiting the permissible uses of the residential construction tax to “neighborhood parks or the installation of facilities in existing or neighborhood parks” and providing definitions for the terms “neighborhood park” and “facilities.” In addition, the amendment restricts the use of the tax proceeds to the neighborhood from which it was collected.

[NRS 278.4983](#)(5) provides for two types of expenditures of the revenue from the residential construction tax. The first provides for “the acquisition, improvement and expansion of neighborhood parks,” which are clearly subject to the acreage restrictions by definition. The second type of expenditure is for “the installation of facilities in existing *or* neighborhood parks in the city or county.” [NRS 278.4983](#)(5) (emphasis added).

The issue here is whether the “or” in the phrase “existing or neighborhood parks” may be construed to mean and include “and,” therefore limiting the existing parks which may be improved with construction tax proceeds to those which are 25 acres or less.<sup>38</sup> As you suggested in your letter, if the term “or” is interpreted to be conjunctive, the site size limitation in [NRS 278.4983](#)(8)(b) applies to both “existing” parks and “neighborhood parks.” However, if this “or” is construed to be disjunctive, the site size limitation in [NRS 278.4983](#)(8)(b) applies to “neighborhood parks” but not “existing” parks. Although the Nevada Supreme Court has previously found that the term “or” can mean either “and” or “or,” *see Desert Irrigation, Ltd. v. State*, [113 Nev. 1049](#), 944 P.2d 835 (1977), we conclude in this case that the rules of statutory construction dictate otherwise.<sup>39</sup>

“[I]t is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.” *Del Papa v. Bd. of Regents*, [114 Nev. 388](#), 956 P.2d 770, 774 (1998) (quoting *McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438, 441 (1986)). Further, it is presumed that definitions of words with well-defined common law meanings are given effect, unless it is clear that another meaning was intended. *Moser v. State*, [91 Nev. 809](#), 812, 544 P.2d 424, 426 (1975) (citing *Sheriff v. Smith*, [91 Nev. 729](#), 542 P.2d 440 (1975)).

The word “or” is commonly defined as an “alternative,” meaning “either” or to give a choice between or among different things. *See* WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 826 (1984); BLACK’S LAW DICTIONARY 1095 (6th ed. 1990). Following the rules of statutory construction, the presumption here is that the word “or” is given its ordinary meaning. Since neither the statute itself nor the legislative history offer any indication that “or” is to be read as anything but disjunctive, the use of the word “or” in [NRS 278.4983](#)(5) clearly establishes a distinction between “neighborhood parks” and “existing” parks. As a result, the site size limitation applicable to all statutorily defined “neighborhood parks” does not apply to “existing” parks which a city or county may wish to improve with residential construction tax proceeds.

Similarly, the general rule is to distinguish between “and” and “or.”<sup>40</sup> The Nevada Supreme Court has held that use of the term “or” between phrases indicates an alternative and suggests

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<sup>38</sup> Generally, if a statute is clear and unambiguous, there is no room for construction. *See Roberts v. State of Nevada*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988). However, if “a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous.” *McKay v. Bd. of Supervisors*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986) (citing *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983)). In this case, it can be argued that the statute is ambiguous in that it provides two different results depending upon the intended meaning of the word “or” as it is used in [NRS 278.4983](#)(5). If a statute is susceptible to more than one possible interpretation, it is the proper subject of statutory construction, including an analysis of legislative intent and public policy. *See State, Dept. of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994).

<sup>39</sup> In addition, *Desert Irrigation* is distinguished from the issue here because the holding in that case is specific to its particular facts. *Desert Irrigation* focuses on a requirement that the State Engineer consider the “number of parcels and commercial or residential units which are contained in or planned for the land being developed or the area being served” when determining whether to grant an extension application for proof of beneficial use in residential development. 113 Nev. at 1054, 944 P.2d at 839 (citing [NRS 553.380\(4\)\(b\)](#)) (emphasis added). That court found that if an area is being served and developed simultaneously, the State Engineer must consider both. As a result, the “or” separating the phrases is effectively treated as an “and” in those particular circumstances. That decision prohibits the State Engineer from merely choosing between the two and avoids the impression of arbitrary selection or capriciousness and unfairness. *Id.* The rationale that led to the *Desert Irrigation* decision is not applicable here and should not affect the plain meaning of the term “or” as it is used in [NRS 278.4983](#)(5).

<sup>40</sup> Only when it is necessary to prevent an absurd or unreasonable result, or where the context requires, may the word “or” be used in a conjunctive manner. *Fredricks v. City of Las Vegas*, 76 Nev. 418, 421, 356 P.2d 639, 641 (1960). Although the facts set forth in *Desert Irrigation* clearly fall within this exception, there is nothing absurd or unreasonable about allowing residential construction tax proceeds to be spent to improve existing parks.

that the phrases have different meanings. See *Orr Ditch Co. v. Justice Court*, [64 Nev. 138](#), 152, 178 P.2d 558, 565 (1947); *Rogers v. State*, [105 Nev. 230](#), 232, 773 P.2d 1226, 1227 (1989). In fact, in *Anderson v. State*, [109 Nev. 1129](#), 1134, 865 P.2d 318, 321 (1993), which discusses the use of the word “or” to separate alternative elements of a crime, the court specifically noted that the legislature’s use of “the disjunctive ‘or,’ and not the conjunctive ‘and,’” required one occurrence or the other but not necessarily both. Accordingly, the “or” at issue in [NRS 278.4983\(5\)](#) reveals an intentional separation of two distinct descriptions of parks. As a result, the term “existing” stands on its own and is not restricted or conditioned by the size limits for neighborhood parks.

Lastly, the rules of statutory construction dictate that meaning be given to each word or phrase so that each contributes to the result intended by the Legislature. Specifically, “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.” *Tomlinson v. State*, [110 Nev. 757](#), 761, 878 P.2d 311, 313 (1994). Moreover, any interpretation which would render a portion of a statute meaningless should be avoided and instead the word or phrase should be given a substantive interpretation. *Bd. of County Comm’rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983). In fact, “effect and meaning must be given to every part of the statute which is being subjected to the process of construction — to every section, sentence, clause, phrase and word.” *Orr Ditch Co.*, 64 Nev. at 150, 178 P.2d at 564.

In this case, the inclusion of the term “existing” commands a finding that existing parks in excess of 25 acres, although not deemed a “neighborhood park” by definition, are entitled to benefit from the residential construction tax proceeds. In order to give proper effect to each word in the statute, the term “existing” must have meaning separate from the term “neighborhood.” Since a neighborhood park must be less than 25 acres yet is not limited to “new” parks by definition, the rules of statutory construction dictate that “existing,” in order to have a distinct meaning, must include other parks which are not limited in size. Thus the inclusion of the term “existing” indicates the Legislature intended to allow the proceeds from the residential construction tax to apply toward improvements for existing parks which may exceed the acreage restrictions in [NRS 278.4983\(8\)\(b\)](#).

In keeping with the statutory construction analysis, the legislative history here indicates that the main objective of the Legislature with regard to this statute was to ensure that the tax proceeds directly benefit the neighborhood which bore the burden of the tax. In addition, the Legislature was concerned with providing a good neighborhood environment for those subdivisions. *Hearing on A.B. 7 Before the Assembly Committee on Government Affairs*, 1987 Legislative Session, 2 (February 4, 1987). Although spending construction tax funds on regional parks was not initially within its intent, the Legislature determined that these taxes could be used for regional parks if they were in an area where new homes were being built and the improvements were limited to those defined in the statute. *Id.* at 5; *Hearing on A.B. 7 Before the Senate Committee on Government Affairs*, 1987 Legislative Session, 5 (June 5, 1987). Thus neighborhoods built near existing parks which are subject to the residential construction tax may benefit by expenditures of that tax on facilities to improve that park. Public policy dictates that, in the event that existing parks may be maintained or improved in a more expedient and cost-efficient manner, and provided the other statutory requirements are met, the tax is properly spent on existing parks and the objectives of the Legislature are satisfied.<sup>41</sup>

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<sup>41</sup> In accordance with our prior conclusion, this opinion focuses on the expenditure of funds for “existing” parks and regional facilities rather than a baseball stadium such as Moana Municipal Stadium in Reno. Moana Stadium is used primarily for professional and college baseball and requires paid admission. This office previously determined that any improvements made to Moana Stadium would not be considered “facilities” as defined in [NRS 278.4983\(8\)\(a\)](#) and are unrelated to any new nearby construction. *Op. Nev. Att’y Gen. 87-12* (July 8, 1987). This opinion reiterates that determination and places further emphasis on the purpose of the residential construction tax which is to provide parks and recreational play areas for nearby neighborhoods. Although many large parks feature ball fields and related facilities, they are directly related to

## CONCLUSION

In a prior opinion, Op. Nev. Att’y Gen. 87-12 (July 8, 1987), this office concluded that residential construction tax revenues may be spent for improvements to existing parks, and that such existing parks need not be “neighborhood parks” as defined in [NRS 278.4983\(8\)\(b\)](#). We now further conclude that the acreage restrictions set forth in [NRS 278.4983\(8\)\(b\)](#) do not apply to existing parks. Consequently, existing parks which are reasonably related to new housing construction are the proper subject of residential construction tax funds and the installation of facilities to improve those parks.

FRANKIE SUE DEL PAPA  
Attorney General

By: DARLENE BARRIER  
Deputy Attorney General

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AGO 99-17 PUBLIC RECORDS; CREDIT; EMPLOY-MENT: Credit information obtained by a public entity under the auspices of The Fair Credit Reporting Act for employment purpose is not public information without consent of the applicant to release.

Carson City, May 17, 1999

Robert Goicoechea, Esquire, Carlin City Attorney, Post Office Box 1358, Elko, Nevada 89803

Dear Mr. Goicoechea:

You have asked this office for an opinion of the attorney general concerning a request for access to a background investigation report done by the Nevada Department of Motor Vehicles and Public Safety, Division of Investigations (NDI), related to the selection of Police Chief Christopher G. Murphy by the Board of Councilmen for the City of Carlin. The investigation report contains a credit information report. You have concluded that the portion of the background report detailing Chief Murphy’s credit information is confidential, but the remaining parts of the report are public record and should be released to a requester, the Elko Daily Free Press. You have asked this office for guidance regarding your conclusion.

## QUESTION

Is the credit information report, as part of the background investigation of the candidate selected to be the Chief of Police of the City of Carlin, public information?

## ANALYSIS

Chief Murphy was appointed Chief of Police for the City of Carlin on December 9, 1998, effective December 14, 1998. The appointment was contingent upon the City Council approving the background report. At their March 24, 1999, meeting, the City Council accepted the background report and removed the contingency on the appointment.

(..continued)

the intent of the Legislature to provide neighborhoods with recreational facilities which are available to the nearby residents. Clearly, stadiums such as Moana were not within the contemplation of the Legislature as a proper recipient of benefits from residential construction tax funds.

The credit information report is marked “confidential.” Before beginning the credit report investigation, NDI obtained a “Waiver of Liability and Release Form” signed by Chief Murphy which states in paragraph 2 as follows: “It has been represented to me that all such information is confidential as it relates to any third party or entity, and that said information will not be released to any third party without either my permission or a court order.”

In addition, the credit information was obtained under the auspices of the Fair Credit Reporting Act (Act). The Act protects the information obtained by restricting the purposes for which the information can be used. The information may be used for employment purposes. 15 U.S.C. § 1681b(a)(3)(B). It may be obtained only under prescribed conditions including the condition that it can only be obtained by authorization in writing from the person it concerns. 15 U.S.C. § 1681b(b)(2)(A)(ii).<sup>42</sup>

[NRS 239.010](#) provides that all public information not otherwise confidential by law shall be available for inspection and may be copied. Because the credit report for employment purposes is available only to certain persons or entities and only with written permission, the Act has made the report of credit information confidential. The Act and the permission given by Chief Murphy makes the information available to the City Council for the legitimate purpose of making its decision whether to hire Chief Murphy, but it is not available to the Elko Free Press whose purpose for the information is not employment or one of the other enumerated permitted purposes. The written permission given by the applicant to NDI to gather credit information was granted on the condition that all information was confidential to third parties and would not be released to any third party without his permission or a court order. The statement of condition that accompanied his signature reiterates the intent of the Act that the credit report be confidential except for use by the City Council in its decision to hire Chief Murphy.

Because we find that the confidential nature of the credit report springs from the Act which allowed compiling of the information, there is no need to examine the facts and circumstances on a balancing of public interests in disclosure or nondisclosure versus the privacy interests of Chief Murphy in the information. You have informed us that Chief Murphy has not given his permission for release of the information to third parties.

We note that the City Council received and approved the credit report in an open meeting of the City Council. The Open Meeting Law requires that supporting materials received by a public body at an open meeting be available to the public *unless* otherwise confidential. [NRS 241.020](#)(4). Therefore the City Council is in compliance with the Open Meeting Law by not releasing the confidential credit report without permission of Chief Murphy.

### CONCLUSION

The credit information report in the investigation report of the background of the Chief of Police is not public information. It was obtained under the auspices of the Fair Credit Reporting Act which makes such information available to the City Council for employment purposes and confidential to third persons.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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<sup>42</sup> The term consumer as used in the Act is not limited to applicants for credit. The Act defines the term to mean an individual. 15 U.S.C. § 1681a(c).

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AGO 99-18 COURT REPORTERS; BOARDS AND COMMISSIONS; ADMINISTRATIVE LAW; REGULATIONS: The Certified Court Reporters Board's regulation requiring the registration of court reporting firms is invalid. The regulation exceeds the grant of statutory authority delegated to the Certified Court Reporters Board in [NRS chapter 656](#) to certify individuals practicing court reporting.

Carson City, May 25, 1999

Steven J. Mack, Esq., Chairman, Certified Court Reporters Board. Post Office Box 237, Las Vegas, Nevada 89125-1663

Dear Mr. Mack:

You have asked for an opinion of the Attorney General regarding the following questions:

QUESTION ONE

Does [NRS 656.340](#) apply to firms, corporations, or other entities, or only to individuals?

ANALYSIS

[NRS 656.340](#)(1) provides that:

It is unlawful for any person to practice court reporting or advertise or put out any sign or card or other device which might indicate to the public that he is entitled to practice as a court reporter without a certificate of registration as a certified court reporter issued by the board.

You have asked whether this statute applies to entities other than individuals. To answer this question, it is necessary to analyze the scope of the Certified Court Reporters Board's (CCRB) jurisdiction as set forth in [NRS chapter 656](#).

The legislative declaration of purpose in enacting [NRS chapter 656](#) was to "(a) Encourage proficiency in the practice of court reporting as a profession; (b) Promote efficiency in court and general reporting; and (c) Extend to the courts and public the protection afforded by a standardized profession by establishing a standard of competency for those engaged in it." [NRS 656.020](#)(1). "Court reporter" means *a person* qualified and registered under [NRS chapter 656](#) to practice court reporting. [NRS 656.030](#)(3). "Practice of court reporting" is defined as "reporting by the use of any system of manual or mechanical shorthand writing" in certain court and administrative proceedings. [NRS 656.030](#)(4). The plain language of these statutes indicates the Legislature did not intend [NRS chapter 656](#) to apply to firms, corporations, or other entities, but only to "persons" employing a "system of manual or mechanical shorthand writing" in certain specified proceedings. When a statute is clear and unambiguous on its face, it is not necessary to look beyond the language of the statute to determine legislative intent. *Roberts v. State of Nevada*, [104 Nev. 33](#), 37, 752 P.2d 221, 223 (1988).

Additionally, the legislative history of [NRS chapter 656](#) supports this interpretation of the statute. A.B. 929 was a bill which "establishe[d] [the] certified shorthand reporters board and provide[d] for examination and licensing of shorthand reporters." The discussion of the bill in committee centered around the need for certifying shorthand reporters due to "specific instances of incompetency and gross error in the area of shorthand reporting," and the need to be able to judge the competency of individuals engaged in the practice of court reporting. *Hearing on*

A.B. 929 Before the Assembly Committee on Judiciary, 1973 Legislative Session, 2 (April 12, 1973). Therefore, A.B. 929 established a standard of competency to encourage and promote efficiency in the practice of court reporting. Absent from the committee discussions of the bill is any mention of the necessity for regulating firms, corporations, or other entities who practice court reporting outside of individual certificate holders.

[NRS 656.340](#)(1) provides that it is unlawful for any *person* to practice court reporting or advertise that he is a court reporter *without a certificate of registration* as a certified court reporter issued by the CCRB. This provision applies only to individuals because the plain language of the statute says “person” and only a person can be issued a certificate of registration from the CCRB. See [NRS 656.150](#)-200, inclusive. The statutory language and legislative history reveal that the CCRB only has jurisdiction over the individual practicing court reporting and not the firm, corporation, or other entity for which they are employed. Thus, the CCRB only has authority to pursue injunctive relief or criminal prosecution against a *person* practicing court reporting without a certificate from the CCRB. [NRS 656.300](#), [656.340](#), and [656.350](#).

### CONCLUSION TO QUESTION ONE

The legislative history and statutory language of [NRS chapter 656](#) leads us to conclude that [NRS 656.340](#) only applies to individuals.

### QUESTION TWO

Did the CCRB exceed its legislative scope of authority by enacting [NAC 656.250](#)?

### ANALYSIS

Boards and commissions are creatures of statute. The CCRB has only such authority and powers that have been expressly granted by the Legislature, or that which may be necessarily incidental for the purpose of carrying out such express powers. *Checker, Inc. v. Public Serv. Comm’n*, 84 Nev. 623, 630, 446 P.2d 981, 985 (1968). Therefore, the CCRB does not have the power to make law, but rather to adopt regulations to carry out the will of the Legislature expressed in statute. *Ruley v. Nevada Bd. of Prison Comm’rs*, 628 F. Supp. 108 (D. Nev. 1986).

The only express authority of the CCRB to adopt regulations relates to waiver or refund of the initial certificate fee in [NRS 656.220](#)(3) and the requirement for court reporters to participate in continuing education in [NRS 656.200](#)(2). [NRS 656.250](#)(9) also gives the CCRB the authority to adopt regulations to enforce the provisions of [NRS chapter 656](#). [NAC 656.250](#) requires that every firm practicing court reporting in Nevada register with the CCRB and, thereby, be subjected to regulation. Consequently, [NAC 656.250](#) does not relate to the waiver or refund of the initial certificate fee or to the requirement for continuing education. Additionally, [NRS chapter 656](#) only applies to individuals and not court reporting firms. Therefore, the CCRB has no express authority to adopt [NAC 656.250](#) relating to the ownership and operation of court reporting firms.

Whether the CCRB has the implied power to regulate court reporting firms depends on whether the regulations are incidental and necessary to the certification of individual court reporters. See *Checker*, 84 Nev. at 630, 446 P.2d at 985. When the provisions of [NAC 656.250](#)-.280, inclusive, are viewed in light of the legislative declaration of purpose in [NRS 656.020](#)(1), the regulations do not further the policies to establish a standard of competency to encourage and promote efficiency in the practice of court reporting. Rather, the regulations create restrictions on the ownership and operation of a court reporting business: a firm practicing court reporting must register with the Board and provide various information about the business ([NAC 656.250](#)(1)); a professional corporation practicing court reporting must contain

the last name of at least one current shareholder ([NAC 656.260](#)); a firm registered with the Board must comply with NRS and NAC chapter 656 ([NAC 656.270\(1\)](#)); each owner of a firm practicing court reporting must be a court reporter ([NAC 656.280\(1\)](#)); firms practicing court reporting must provide the service of court reporting by court reporters only ([NAC 656.280\(2\)](#)); and, if a court reporter who is also a shareholder in a firm has his certificate suspended or revoked, he cannot be paid by the firm ([NAC 656.280\(3\)](#)).

A regulation is invalid if it exceeds the CCRB's statutory authority delegated by the Legislature. [NRS 233B.110](#). Agencies are not given free reign to adopt a regulation that is fundamentally at odds with the statute simply because it is technically consistent. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). A board "may not under the guise of interpretation extend a statute to include persons not intended to be included, nor may it give the statute any greater effect than its language allows." *Boulware v. State, Dept. Human Resources*, [103 Nev. 218](#), 220, 737 P.2d 502, 503 (1987). To interpret [NRS chapter 656](#) to apply to a firm, corporation, or other entity that heretofore would be free from regulation is to legislate and requires a clear grant of such power through statutory amendments made by the Legislature. Op. Nev. Att'y Gen. No. 50 (May, 1959); Op. Nev. Att'y Gen. No. 99-06 (February, 1999).

### CONCLUSION TO QUESTION TWO

[NAC 656.250](#) exceeds the CCRB's legislative scope of authority set forth in [NRS chapter 656](#) because the CCRB does not have either the express or implied power to regulate court reporting firms. Consequently, all of the CCRB's regulations pertaining to the registration of court reporting firms exceed the CCRB's authority. The CCRB may pursue legislation on this subject if it believes further regulation is necessary.

### QUESTION THREE

Do the April 13, 1998, amendments to NAC chapter 656 apply retroactively or prospectively only?

### ANALYSIS

Absent clear legislative intent to make a statute retroactive, a statute will be interpreted to apply prospectively only. *Town of Eureka v. State Engineer*, [108 Nev. 163](#), 167, 826 P.2d 948, 951 (1992). [NRS chapter 656](#) contains no language indicating the Legislature intended to apply the chapter retroactively. To the contrary, the legislative history reveals the Legislature was concerned with grandfathering in those individuals in the State who were currently practicing shorthand reporting so they would not be required to comply with the certification requirements. *Hearing on A.B. 929 Before the Assembly Committee on Judiciary*, 1973 Legislative Session, 2 (April 12, 1973). Since the statute is silent and the legislative history indicates a prospective application only, there is no clear legislative intent that the chapter be applied retroactively. The CCRB's ability to adopt regulations is limited to the extent authorized by [NRS chapter 656](#), therefore, the Board cannot adopt regulations that have any broader effect than the statutes. See *Boulware*, 103 Nev. at 220, 737 P.2d at 503.

In certain cases, statutes and, in turn, regulations may be applied retroactively if they are remedial in nature and do not affect substantive rights. See *Madera v. State Industrial Ins. System*, [114 Nev. 253](#), 956 P.2d 117 (1998). A remedial act is defined in BLACK'S LAW DICTIONARY 1293 (6th ed. 1990) as a law which pertains to or affects a remedy or procedure as distinguished from one that creates, affects, or modifies a substantive right. To the extent the regulations pertain to a procedure for certification ([NAC 656.100-.200](#), inclusive), renewal of a certificate and the statutory requirement for continuing education ([NAC 656.205-.240](#)), or



disciplinary proceedings ([NAC 656.450](#)-.460, inclusive) the regulations may be applied retroactively.

However, the CCRB's regulations do more than create or affect a new remedy or procedure. They create new obligations on court reporting firms to register with the CCRB and comply with NRS and NAC chapter 656 or be disciplined. [NAC 656.330](#) also affects vested rights by prohibiting a court reporter from entering into a contract to provide ongoing services as a court reporter for any action not currently pending. Regulations affecting substantive or vested rights will be construed prospectively only. See *Madera*, [114 Nev. 253](#), 956 P.2d at 120; *County of Clark v. Roosevelt Title Ins.*, [80 Nev. 530](#), 396 P.2d 844 (1964).

### CONCLUSION TO QUESTION THREE

Regulations which pertain to or affect a procedure may be applied retroactively, whereas regulations affecting substantive or vested rights may not. Therefore, [NAC 656.010](#)-.240, inclusive; [656.300](#)-.320, inclusive; and [656.340](#)-.460, inclusive, may be applied retroactively and [NAC 656.250](#)-.280, inclusive, and [656.330](#) may not be applied retroactively.

### QUESTION FOUR

Does [NRS chapter 89](#) apply to [NRS chapter 656](#)?

### ANALYSIS

[NRS chapter 89](#) generally regulates corporations or associations organized to perform a professional service. [NRS chapter 656](#) specifically applies to the regulation of court reporting. Where a general and specific statute are in conflict and cannot be read together, the specific statute controls. *Laird v. State of Nev. Pub. Emp. Ret. Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171, 1173 (1982). Since [NRS chapter 656](#) does not apply to firms, corporations, or other entities and the statute does not contain any limitations on ownership or operation of a court reporting business, there is no basis to require a court reporting firm to be organized as a professional corporation under [NRS chapter 89](#). If a court reporting firm elects to organize as a professional corporation or association, then the provisions of [NRS chapter 89](#) apply. However, the CCRB's regulations cannot create such a requirement that is clearly not contemplated by the statute. See *Cashman Photo v. Nevada Gaming Comm'n*, [91 Nev. 424](#), 538 P.2d 158 (1975).

### CONCLUSION TO QUESTION FOUR

[NRS chapter 656](#) does not require a court reporting firm to be organized as a professional corporation.

FRANKIE SUE DEL PAPA  
Attorney General

By: NANCY L. WENZEL  
Deputy Attorney General

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AGO 99-19 CANDIDATES, ELECTIONS, SECRETARY OF STATE: If the last day for candidate filing is a Friday, the last day to withdraw is the next Tuesday. A city candidate may submit a written withdrawal through a third party under certain circumstances.

Carson City, May 25, 1999

Larry G. Bettis, Deputy City Attorney, City of Las Vegas, 400 East Stewart Avenue, Las Vegas, Nevada 89101

Dear Mr. Bettis:

You have requested an opinion from this office regarding the withdrawal of candidacy by a candidate for city office.

### QUESTION ONE

When is the last day for a candidate for city office to withdraw his or her candidacy if the last day for filing of candidacy is a Friday?

### ANALYSIS

[NRS 293C.195](#) states, “A withdrawal of candidacy for a city office must be in writing and presented to the city clerk by the candidate in person within 2 days after the last day for filing a declaration of candidacy or an acceptance of candidacy.” Your question deals with the situation where the last day for filing a declaration of candidacy is a Friday and whether Saturday and Sunday are counted in computing which day is the second day after the last day for filing. If Saturday and Sunday are counted, the second day would be Sunday, and [NRS 293.1275](#) states, “If the last day limited for filing any paper mentioned in the Title falls on a Saturday, Sunday, legal holiday or any holiday proclaimed by the governor, the period so limited must expire on the following business day at 5 p.m.” Therefore, the time to file a withdrawal of candidacy ends on Monday.

However, [NRS 293.127](#) directs a liberal construction of election laws and states:

This Title [24] shall be liberally construed to the end that all electors shall have an opportunity to participate in elections and that the real will of the electors may not be defeated by any informality or by failure substantially to comply with the provisions of this Title with respect to the giving of any notice or the conducting of an election or certifying the result thereof.

Nevada Rule of Civil Procedure (NRCP) 6(a), which deals with computing periods of time allowed by a statutes, states in part, “When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and non-judicial days shall be excluded in the computation.” The Nevada Supreme Court in several cases has applied the time computation provisions of NRCP 6(a) or its predecessor, NCL 9029, to statutes governing elections. *Rogers v. State*, [85 Nev. 361](#), 364, 455 P.2d 172, 173 ( 1969); *Watson v. Koontz*, [74 Nev. 254](#), 328 P.2d 173 (1958); *McCulloch v. Bianchini*, [53 Nev. 101](#), 109-10, 292 P. 617, 619 (1930).

Combining [NRS 293.127](#) and NRCP 6(a), Saturdays, Sundays, and nonjudicial days must be excluded when computing the time period allowed in [NRS 293C.195](#). Consequently, if the last day for filing a declaration of candidacy falls on a Friday, then the last day to file a withdrawal of candidacy is Tuesday. Computing the time period by excluding Saturdays, Sundays, and nonjudicial days also furnishes a candidate with two business days in which to file a withdrawal of candidacy if the candidates so chooses.

The 1999 Session of the Legislature is currently considering an amendment to [NRS 293C.195](#) that would clarify that Saturdays, Sundays, and holidays are to be excluded when computing this two day time frame. Section 26, A. B. 615, First Reprint.

## CONCLUSION TO QUESTION ONE

If the last day for filing of candidacy falls on a Friday, the last day a candidate for city office may withdraw his or her candidacy is the following Tuesday.

## QUESTION TWO

May a candidate for city office submit a written withdrawal for candidacy through a third party if an exigent circumstance such as illness exists that prevents the candidate from submitting the written withdrawal in person?

## ANALYSIS

[NRS 293C.195](#) requires that a written withdrawal of candidacy be presented to the city clerk by the candidate “in person” in order for such withdrawal to be effective. Your question involves a situation in which the candidate is unable to present the written withdrawal in person within the time frame allotted by the statute because of illness. While the statute specifically requires a candidate for office to file withdrawal papers in person in order for such withdrawal to be effective, applying a liberal interpretation of the statutory language would permit an agent’s personal appearance on behalf of a candidate to be sufficient to establish substantial compliance. [NRS 293.127](#) provides that Title 24, the election law, is to be construed liberally so that “the real will of the electors may not be defeated by any informality or by failure substantially to comply with the provisions of this Title . . . .”

While a liberal construction of Title 24 is permitted, determining which provisions require strict compliance is difficult. One approach to making this determination is to analyze the purpose and effect of the provision on the election process. For example, the candidate must comply with the statutory time for filing withdrawal papers. This is a reasonable restriction, necessary to promote an effective and orderly election process. The candidate’s personal appearance for filing the withdrawal papers does not implicate the same concern, especially where an agent of the candidate is substituted. The need for restrictions is to secure the integrity of the process. The process is protected so long as an authorized agent appears in person for the candidate within the time frame allotted by statute.

Courts favor liberal construction of election law especially when unusual circumstances prevent a reasonable opportunity to comply. *See Slagle v. Hannah*, 837 S.W.2d 100, 102 (Tex. 1992). (The court ruled the Secretary of State had to accept certificates of replacement nominees for a position on the ballot even though all the statutory deadlines had not been complied with because of the unusual circumstance of having a federal court extend other filing deadlines.) *See also Brunswick v. Hart*, 1988 Del. Ch. LEXIS 122. (The court concluded that the fact the candidate did not take action to remedy his defective filing fee until after the withdrawal date had passed does not disable him from having his name placed on the ballot. Technical noncompliance with election law can be excused if the particular circumstances of a case indicate a candidate acted in good faith.)

In light of the allowance for a liberal construction of Title 24, substituting an agent’s physical presence for the candidate’s presence conforms substantially to the dictates of the statute. Where a candidate’s physical presence is precluded, so long as the statutory deadline for withdrawal has not passed, and no factor which would compromise the integrity of the election process exists, it is reasonable to allow an authorized agent to appear on the candidate’s behalf.

## CONCLUSION TO QUESTION TWO

A candidate for city office may submit a written withdrawal for candidacy through a third party, if an exigent circumstance such as illness exists that prevents the candidate from submitting the written withdrawal in person.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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AGO 99-20 PAROLE & PROBATION; SEARCH: Parole and Probation officers may use force to gain entry into an offender's residence to conduct a warrant or warrantless search if, after providing notice of their authority and purpose pursuant to [NRS 179.055](#)(1) ("knock and announce" rule), they are refused admittance. Before conducting a warrantless search of the offender's person, residence or vehicle, the officers must have reasonable grounds to believe that a violation of parole or probation occurred. Unless impracticable, a search warrant should be obtained.

Carson City, June 16, 1999

Carlos C. Concha, Chief, Department of Motor Vehicles and Public Safety Division of Parole & Probation, 1445 Hot Springs Road, Suite 104, Carson City, Nevada 89706

Dear Mr. Concha:

Recently, you asked this office the following question.

### QUESTION

May officers of the Division of Parole and Probation (P&P) use force to gain entry into the residence of a probationer or parolee (offender) to conduct a search?

### ANALYSIS

When a search warrant has been issued under [NRS 179.015](#)—179.115, the officers may do the following:

1. The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.
2. The officer may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of his warrant, is detained therein, or when necessary for his own liberation.
3. All reasonable and necessary force may be used to effect an entry into any building or property or part thereof to execute a search warrant. In the execution of the warrant, the person executing it may reasonably detain and search any person in the place at the time in order to protect himself from attack or to prevent destruction, disposal or concealment of any instruments, articles or things particularly described in the warrant.

[NRS 179.055](#). It should be noted that peace officers who “willfully exceed (their) authority, or exercise it with unnecessary severity, shall be deemed guilty of a gross misdemeanor.” [NRS 199.450](#).<sup>43</sup>

When a search warrant has not been issued, the officers should determine whether a standard search clause is contained in the offender's Probation Agreement and Rules or his Parole Agreement.<sup>44</sup> Even with such a clause, the officers must have reasonable grounds to believe that a violation of parole or probation occurred before conducting a warrantless search of the offender's person, residence or vehicle. *See Seim v. State*, [95 Nev. 89](#), 94, 590 P.2d 1152, 1155 (1979). The *Seim* court observed that there is often “a fine line between purely probationary or correctional purposes and police investigatory objectives.” *Seim*, 95 Nev. at 95, 590 P.2d at 1155. It concluded as follows:

[W]e do not hold that every search of persons or property made incident to a probation search condition would be reasonable. (citations omitted.) Indeed, it seems compatible with our correctional system, consistent with the court's narrow view of any “advance waiver” of constitutional rights (citations omitted) and desirable from a penological point of view to obtain a probation violation warrant, where not impracticable, before conducting a search notwithstanding the existence of a probation agreement waiver.

*Seim*, 95 Nev. at 96, 590 P.2d at 1156. Thus, if it is not impracticable to do so, it is preferable that P&P officers get a warrant before conducting a search of an offender's person, residence or vehicle.<sup>45</sup> As stated by the Ninth Circuit Court of Appeals, “the legality of a warrantless search depends upon a showing that the search was a true probation search and *not an investigation search*.” *United States v. Ooley*, 116 F.3d 370, 372 (9th Cir. 1997) (emphasis added).

Search warrant or no search warrant, the offender is “entitled to the benefit of the rule of announcement necessary to perfect a law enforcement officer's entry into a house.” *Latta v. Fitzharris*, 521 F.2d 246, 248 (9th Cir. 1975). In Nevada, such “rule of announcement” is commonly referred to as the “knock and announce” rule set forth at [NRS 179.055\(1\)](#). Accordingly, whether P&P officers have a search warrant or not, they must follow Nevada's “knock and announce” rule and stay within the parameters of [NRS 179.055](#) when conducting a search of an offender's residence.

## CONCLUSION

In accordance with [NRS 179.055](#), P&P officers may use force to gain entry into an offender's residence to conduct a warrant or warrantless search if, after providing notice of his authority and purpose pursuant to [NRS 179.055\(1\)](#) (“knock and announce” rule), they are refused admittance. Before conducting a warrantless search of the offender's person, residence or vehicle, the officers must have reasonable grounds to believe that a violation of parole or probation occurred. Unless impracticable, a search warrant should be obtained.

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<sup>43</sup> P&P officers are “peace officers.” *See* NRS 289.180.

<sup>44</sup> A Probation Agreement and Rules may contain a special condition requiring the probationer to submit to a search and seizure of his person, residence, vehicle, or any property under his control, at any time deemed necessary by any probation officer, for the presence of controlled substances, alcohol and stolen property. The standard Parole Agreement form contains the following condition: “You shall submit to a search of your person, automobile, or place of residence, by a Parole Officer, at any time of the day or night without a warrant, upon reasonable cause as ascertained by the Parole Officer.”

<sup>45</sup> The *Seim* court relied on *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975) which focused on the warrantless search by a parole officer of a parolee's home. For the purposes of this opinion, “offender” means a supervised parolee or probationer, since there is no material distinction between the two. *See Seim v. State*, 95 Nev. at 94, 590 P.2d at 1154.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.  
Deputy Attorney General

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AGO 99-21 CITIES AND TOWNS, ELECTED OFFICIALS, SECRETARY OF STATE: The provisions of the Wells City Charter and the Gabbs City Charter which prohibit a county employee from also holding the office of mayor or city councilman are unconstitutional as applied to the factual circumstances presented here.

Carson City, July 2, 1999

Robert B. Goicoechea, City Attorney, Wells, Post Office Box 1358, Elko, Nevada 89803

Lew Carnahan, City Attorney, Gabbs, 147 East Liberty Street, Suite 2, Reno, Nevada 89501

Dear Mr. Goicoechea and Mr. Carnahan:

This office has received opinion requests from both the City of Wells and the City of Gabbs regarding the constitutionality of identical sections of their city charters. Although the facts are slightly different, because the charter sections are the same and because both cities need the opinion as soon as possible, we have answered your requests with one response.

#### BACKGROUND – WELLS

According to the facts Mr. Goicoechea supplied, a Court Clerk for the Wells Justice Court, whom Mr. Goicoechea deems an employee of Elko County, was elected at the recent general city election to the Wells City Council. The Councilman-elect is a qualified elector and has been a bona fide resident of the City of Wells for two years as required by the qualification standards for councilman in Section 2.010 of the Wells City Charter. The Councilman-elect is an at-will employee and intends to continue such employment.

Section 1.070 of the Wells City Charter prohibits a person from simultaneously being employed with Elko County and holding a seat on the Wells City Council and states in relevant part:

1. The mayor and councilmen shall not:
  - (a) Hold any other elective office or employment with Elko County or the city, except as provided by law or as a member of a board or commission for which no compensation is received.
  - ....
2. Any person holding any office proscribed by subsection 1 shall automatically forfeit his office as mayor or councilman.

#### BACKGROUND – GABBS

According to the facts Mr. Carnahan supplied, a heavy equipment operator employed by Nye County was elected at the recent general city election to the position of Mayor of Gabbs. The Mayor-elect is a qualified elector and has been a bona fide resident of Gabbs for many years. The Mayor-elect plans to continue his employment with Nye County.

Section 1.080 of the Gabbs City Charter prohibits a person from simultaneously being employed by Nye County and holding a seat on the Gabbs City Council and states in relevant part:

1. The mayor and councilmen shall not:
  - (a) Hold any other elective office or employment with Nye County or the city, except as provided by law or as a member of a board or commission for which no compensation is received.
- .....
2. Any person holding any office proscribed by subsection 1 shall automatically forfeit his office as mayor or councilman.

### QUESTION

Do Wells City Charter Section 1.070, and Gabbs City Charter Section 1.080, both of which prohibit a county employee from holding the office of mayor or city councilman, violate the First Amendment of the U.S. Constitution and/or article 1, sections 9 and 10 of the Nevada Constitution?

### ANALYSIS

Four other cities in Nevada have similar charter provisions: Caliente, Carlin, Las Vegas, and Reno. Five of these charter provisions were enacted in 1971: Caliente City Charter § 1.080; Carlin City Charter § 1.070; Gabbs City Charter § 1.080; Reno City Charter § 1.080; and Wells City Charter § 1.070. The current Las Vegas City Charter has identical language in Section 2.040, which was enacted in 1983.

Examining the constitutionality of constitutional provisions, statutory provisions or, in these requests, charter provisions, is a very serious undertaking for this office. In the past we have declared provisions to be unconstitutional, but only after thorough examination.

We agree with the conclusion of Mr. Goicoechea, in which Mr. Carnahan joined, that section 1.070 of the Wells City Charter and section 1.080 of the Gabbs City Charter are unconstitutional as applied to the factual circumstances presented in these cases. Our analysis, however, is different.

The plain language of the charter provisions requires the newly-elected councilman or mayor to forfeit the offices to which they were elected if they retain their present employment with their respective counties. Both of these newly-elected officials plan to remain county employees. We examine the plain language of these charter provisions in light of the First Amendment rights they restrict.

The United States Supreme Court has ruled that candidacy is not a fundamental right in *Clements v. Fashing*, 457 U.S. 957, 963 (1982), a case in which the provisions of the Texas Constitution that limited a public official's ability to become a candidate for another public office were held not to violate the First or Fourteenth Amendments. The United States District Court for the Northern District of Georgia, Atlanta Division in *Segars v. Fulton County*, 644 F. Supp. 682 (N.D. Ga. 1986), provides us with guidance. *Segars* involved county personnel regulations that mandated if a county employee was elected to a public office, the employee would be separated from employment when sworn into office. *Id.* at 684. The court held the regulations violated the First Amendment and were unconstitutional. *Id.* at 688. In analyzing the regulations, the court stated:

Courts have held that the right to run for public office is not a fundamental right, but is an important right. Restrictions on that right are constitutionally permissible where the government entity impairing the right shows that the strictures placed on the ability to run for office are reasonably necessary to achieve a compelling public objective. Thus, Fulton County must demonstrate (1) that the “ends” of the challenged regulations are compelling and (2) that the “means” are reasonably necessary in order to justify impairing plaintiffs’ First Amendment right.

*Id.* at 685 (citations omitted).

The legislative history of these charter provisions is sketchy and does not shed light on the policy reasons for enacting this prohibition on being employed by the county and holding a seat on the city council. Therefore, we divine the State’s interests in enacting these charter provisions by examining judicial decision in other jurisdictions that have analyzed similar provisions.

Some state interests that have been put forward in cases involving similar laws that prohibit dual office holding and which Mr. Goicoechea lists are as follows: “(1) preventing public servants from accumulating many positions, resulting in a “pyramid of power”; (2) avoiding direct or indirect pecuniary conflicts; (3) preventing employees from asserting control over their supervisors through their elected positions; and (4) assuring that public servants exercise their duties with undivided loyalty.” *Acevedo v. City of North Pole*, 672 P.2d 130, 135 (Alaska, 1983).

While these interests may well justify a restriction on certain county and possibly all city employees from also holding seats on the city council, they do not justify a complete ban on all county employees from also being elected mayor or city councilman. The two county employees who are the subject of this opinion request are good examples. One is the clerk of the justice court, and the other is a heavy equipment operator. Neither was elected to their county position, nor do their county positions involve the exercise of political power or discretionary decision making. No pecuniary conflict could exist because the city council does not regulate the county budget. Also, their supervisors work for the county, not the city. Loyalty would not be an issue because of the nature of the employment of these two individuals. It is entirely possible for them to continue to be loyal to their employers while at the same time being loyal to their city constituents.

*Segars* advances similar interests:

Fulton County identifies the goals of its Regulations as (1) to protect the integrity of the Fulton County Civil Service and address the problem of potential corruption in the civil service system, (2) to protect employees from political interference, (3) to preserve public confidence in government, and (4) to maintain the efficiency of its employees.

*Segars*, 644 F. Supp. at 685.

In analyzing each of these interests *Segars* examined, “First, the potential for overlap between the jurisdictional authority of each position. . . . Second, the nature of an employee’s responsibilities. . . . Third, . . . whether the elective office sought is ‘partisan’ or ‘non-partisan.’” *Id.* at 685-86.

In applying this analysis to the situations in Wells and Gabbs, we find that the jurisdictional overlap is nonexistent because we are dealing with county and city government. The nature of these employees’ responsibilities, again, is a key. These two county employees do not hold high



powerful positions within the county. In Nevada, all elected city positions are nonpartisan, [NRS 293.195\(1\)](#), so the possibility of political interference by a political party with an employee is minimized.

Such an absolute prohibition as found in these charter provisions should only be upheld if narrowly tailored to accomplish compelling state interests. These charter provisions do not do this. The Legislature could craft a prohibition that was not absolute, but at the same time achieve the sound policy of prohibiting certain county officials/employees from also serving on a city council. Examples might be elected county officials, those involved with policy making, or those who have budgetary responsibilities. To include all county employees is too broad.

For these reasons, it is our opinion that these provisions of the city charters would not withstand scrutiny under the First Amendment of the U.S. Constitution.

This opinion analyzes these charter provisions under the First Amendment of the U. S. Constitution. Our analysis under article 1, sections 9 and 10 of the Nevada Constitution would be the same.

### CONCLUSION

Section 1.070 of the Wells City Charter, and Section 1.080 of the Gabbs City Charter, both of which prohibit a county employee from simultaneously holding the office of mayor or city councilman, are unconstitutional under the First Amendment of the U. S. Constitution and, article 1, sections 9 and 10 of the Nevada Constitution as applied to the factual circumstances presented in these two cases.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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AGO 99-22 SCHOOL DISTRICTS; COUNTIES; REAL PROPERTY: Real property of school districts and educational districts abolished by the legislative Act of March 2, 1956, became the property of the new county school districts whose area includes the areas of the school districts and educational districts abolished by the Act.

Carson City, July 13, 1999

Rusty Jardine, Deputy District Attorney, White Pine County District Attorney's Office, County Courthouse, Post Office Box 240, Ely, Nevada 89301

Dear Mr. Jardine:

You represent the White Pine County School District and have been presented with an issue of ownership of real property of the former Preston School District in White Pine County. Until 1956 there were over 200 school districts in Nevada. In 1956, the Legislature abolished all the school districts then in existence and created the county school districts we know today. County school districts are school districts whose boundaries are conterminous with the boundaries of the county.

You have asked for an opinion in response to the following question:

## QUESTION

Under Nevada Law, what is the disposition of real property of the Preston School District which was abolished in 1956?

## ANALYSIS

Until 1956, the rural community of Preston, Nevada, enjoyed its own school district known as the Preston School District. Once abolished, the children of the Preston School District attended schools under the direction of White Pine County School District.

In 1934, two adjoining parcels of unimproved land were acquired by the Preston School District. At the time, a 15-foot wide strip of one of the parcels was transferred to Ray L. Jones who owned adjacent property. The remainder was held by the Preston School District until 1984. In 1984, the White Pine County School District deeded a portion 200 feet by 400 feet (parcel No. 4) to a private civic entity known as the Preston Community Group. This grant was made by "Quit Claim Deed." The Preston Community Group has utilized the property since its transfer from the White Pine School District. The remaining property acquired in 1934 is not in use. Your search of the records of the White Pine County Recorder does not reveal the existence of any documents of transfer concerning the remaining parcels from the Preston School District to any entity, including the White Pine County School District.

The Preston Community Group seeks to obtain title in the name of White Pine County to the remaining parcels to commence development. Title will be held in the name of the county to allow application for community development grants.

Your legal analysis takes note of [NRS 393.370](#), [NRS 393.380](#), and [NRS 243.420–455](#) as possible guidance. The statutes address circumstances when a county is abolished and the school district of the county is also abolished, providing that the property of the abolished school district becomes the property of the county school district to which the territory is annexed. The circumstances under review here differ because White Pine County was not abolished but a school district located in the county was abolished.

We find our answer in the Legislative Act of 1956. The Preston School District, and all the existing school districts in Nevada, were abolished by an act of the Legislature passed in Special Session in 1956. The same act created in their stead county school districts and the possibility of joint school districts. Act of March 2, 1956, ch. 32 § 47(2)—(3), 1956 Nev. Stat. Special Session 70. The act provided for the disposition of real property specifically in section 414, which provides as follows: "On the effective date of this act, the property of the school districts and educational districts abolished by this act shall become the property of the new county school districts whose areas include the areas of the school districts and educational districts abolished by this act." Act of March 2, 1956, ch. 32 § 414, 1956 Nev. Stat. Special Session 173.

Though section 414 specifically addresses your question, one other section may assist you in future decisions and is provided for your convenience.

1. Every school district, joint school district, union school district, consolidated school district, educational district, and every other kind or type of school district or educational district heretofore created and existing and operating under the provisions of "An Act concerning public schools of the State of Nevada, establishing and defining certain crimes and providing punishment therefor, and repealing certain acts and parts of acts relating thereto," approved March 15, 1947, and being chapter 63, Statutes of Nevada 1947, or any other law of the

State of Nevada, is hereby dissolved and disestablished upon the effective date of this act; and the functions of all such school districts and educational districts heretofore existing are hereby transferred to the county school districts created by this act and to the joint school districts which may hereafter be created.

2. On the effective date of this act, all of the debts, liabilities and obligations, except bonded indebtedness, of the school districts and educational districts abolished by this act shall become and be the debts liabilities and obligations of the county school district whose territory includes the area of the school districts and educational districts abolished by this act.

Act of March 2, 1956, ch.32 § 48, 1956 Nev. Stat. Special Session 71.

### CONCLUSION

The cited provisions of the above-referenced act specifically provide that real property of the abolished school district becomes property of the successor county school district. The provisions also transfer all functions of the abolished school district and all debts, liabilities and obligations, except bonded indebtedness, to the successor county school district. Therefore, under Nevada law, the property of the Preston School District became the property of the White Pine County School District in 1956.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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AGO 99-23 PAROLE BOARD; SEX OFFENDERS: The Parole Board is required to apply [NRS 213.1245](#) prospectively to all offenders being paroled who were convicted of a sex offense listed in [NRS 179D.620](#), regardless of the date of the crime. Its application to offenders who committed a sex crime listed in [NRS 179D620 before](#) July 1, 1997, would not violate the *Ex Post Facto* Clause of the Nevada or U.S. Constitution.

Carson City, July 13, 1999

Donald Denison, Chairman, Department of Motor Vehicles and Public Safety  
8250 W. Flamingo Rd., Las Vegas, Nevada 89117

Dear Chairman Denison:

Recently, you asked this office the following question.

### QUESTION

Is the Nevada Board of Parole Commissioners (Parole Board) required to apply [NRS 213.1245](#) to all offenders being paroled who were convicted of a sex offense listed in [NRS 179D.620](#), regardless of the date they committed the offense?

### ANALYSIS

[NRS 213.1245](#)(1) requires the Parole Board to impose certain conditions on the parole releases of sex offenders “convicted of an offense listed in [NRS 179D.620](#).” The effective date of [NRS 213.1245](#) was July 1, 1997. Addressing the retrospective or prospective application of statutes, the Nevada Supreme Court determined as follows:

As a general matter, statutes are presumptively prospective. *See McKellar v. McKellar*, [110 Nev. 200](#), 203, 871 P.2d 296, 298 (1994) (holding that “[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied”). It is also well settled that the presumption of prospective application applies only to vested rights or to penalties. The presumption does not obtain when the new statute affects only remedies. *See T.R.G.E. Co. v. Durham*, [38 Nev. 311](#), 316, 149 P. 61, 62 (1915), in which we held that “the general rule against retrospective construction of a statute does not apply to statutes relating merely to remedies and modes of procedures”; and *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985) (“when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases”). Nevada’s approach mirrors the general rule.

*Madera v. State Industrial Insurance System*, [114 Nev. 253](#), 257-58, 956 P.2d 117, 120 (1998).<sup>46</sup>

It appears from the clear language of [NRS 213.1245](#) that it was designed to protect the public by facilitating close supervision of sex offenders, not to penalize such offenders. Also, no prisoner has a vested right to a parole.<sup>47</sup> Even so, retrospective application of [NRS 213.1245](#) to offenders paroled before July 1, 1997, would alter the conditional liberty they currently enjoy. Constitutional rights of the offenders are “legally extinguished by a valid conviction followed by imprisonment (and are) not revived by the change in status from prisoner to parolee.” *Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir. 1983). However, relying on *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9 (1979), the *Bagley* court concluded that parolees have a constitutional interest in liberty that is presently possessed. *Bagley*, 718 F.2d. at 924. Accordingly, although this law is not a penalty statute, applying it retroactively to parolees who currently enjoy a liberty without such conditions would alter said vested liberty and run afoul of *Bagley*. Thus, the general presumption of prospective application applies here.

Applying [NRS 213.1245](#) prospectively to all pertinent offenders still raises the question of whether it is being retroactively applied, in violation of the *Ex Post Facto* Clause, to those offenders paroled after July 1, 1997, who committed an [NRS 179D.620](#) sex crime before that date. However, to fall within the *ex post facto* prohibition, [NRS 213.1245](#) must be retrospectively applied to disadvantage the sex offender by “altering the definition of criminal conduct or increasing the punishment for the crime.” *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).<sup>48</sup>

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<sup>46</sup> The Nevada Supreme Court overruled its decision in *McKeller* relying on legislative intent contrary to the presumption of prospective application. *See State of Washington v. Bagley*, 114 Nev. 788, 791, 963 P.2d 498, 500 at n.2 (1998).

<sup>47</sup> NRS 213.10705 provides:

The legislature finds and declares that the release or continuation of a person on parole or probation is an act of grace of the state. No person has a right to parole or probation, or to be placed in residential confinement, and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property or establish a basis for any cause of action against the state, its political subdivisions, agencies, boards, commissions, departments, officers or employees.

<sup>48</sup> Article I, section 9 of the U.S. Constitution provides that “No . . . *ex post facto* law shall be passed.” Article I, section 10 of the Constitution of the U.S. Constitution provides that “No State shall . . . pass any . . . *ex post facto* law . . . .” Article I, section 15 of the

Recently, the Ninth Circuit Court of Appeals considered an *ex post facto* clause challenge to the retroactive application of Washington's "Megan's Law." See *Stearns v. Gregoire*, 124 F.3d 1079 (9th Cir. 1996). The *Stearns* court applied a two-prong test that it termed the "Ursery-Hendricks intent-effects test," stating the following:

When examining whether a law violates the *Ex Post Facto* Clause, we inquire whether (1) the legislature intended the sanction to be punitive, and (2) the sanction is "so punitive" in effect as to prevent the court from legitimately viewing it as regulatory or civil in nature, despite the legislature's intent.

*Stearns*, 124 F.3d at 1087 (citing *United States v. Ursery*, 518 U.S. 267, 288 (1996), and *Hendricks v. Kansas*, 521 U.S. 346, 361 (1997)).

The first part of the "Ursery-Hendricks intent-effects test" requires us to turn to the language of [NRS 213.1245](#). The clear language of this law indicates that it was designed to protect the public by facilitating close supervision of sex offenders being paroled who have been convicted of a crime listed in [NRS 179D.620](#). As the *Stearns* court pointed out, Washington's "Megan's Law" (like [NRS 213.1245](#)) facilitates a closer supervision of sex offenders which helps protect communities. "Megan's Law" should also help with investigations and expedite the apprehension of any repeat offender. *Stearns*, 124 F.3d at 1087. [NRS 2313.1245](#) serves similar purposes which enhance public safety.

The second part of the "Ursery-Hendricks intent-effects test" would require the sex offender challenging [NRS 213.1245](#) "to provide 'the clearest proof' that the statutory scheme is so punitive either in purpose or effect as to negate the State's nonpunitive intent." *Stearns*, 124 F.3d at 1087. The *Stearns* court pointed out that "the most significant question under this stage of the analysis is whether the law, 'while perhaps having certain punitive aspects, serves important nonpunitive goals.'" *Stearns*, 124 F.3d at 1091 (quoting *Ursery*, 518 U.S. at 288). It held that Washington's Megan's Law (the Act) was intended to be regulatory and not punitive. It continued, stating that

[t]he possible effects of the notification provision are not so punitive in fact as to prevent us from legitimately viewing the Act as regulatory in nature. Even less do the possible effects amount to "the clearest proof" of a punitive effect sufficient to overcome the legislature's nonpunitive intent. . . . The notification provisions of the Act do not amount to punishment subject to the *Ex Post Facto* Clause."

*Stearns*, 124 F.3d at 1093. Furthermore, addressing the claim that a restrictive parole condition was punishment, the *Bagley* court determined that the offender could have been constitutionally restricted altogether "during the entire term of his sentence by being required to serve a full prison term . . . ." *Bagley*, 718 F.2d at 925.

In *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), Morales tried to convince the U.S. Supreme Court that the *ex post facto* clause "forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 508. The High Court answered, "Our cases have never accepted this expansive view . . . ." *Id.* It stated as follows:

[W]e have long held that the question of what legislative adjustments "will be held to be of sufficient moment to transgress the constitutional prohibition" must be a matter of "degree." *Beazell*, 269 U.S. at 171. In evaluating the

(..continued)

Constitution of the State of Nevada provides that "No . . . ex post facto law . . . shall ever be passed.

constitutionality of the . . . amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. We have previously declined to articulate a single “formula” for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition . . . and we have no occasion to do so here. The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause.

*Morales*, 514 U.S. at 509.

The foregoing analysis is consistent with *Severance v. Armstrong*, [96 Nev. 836](#), 620 P.2d 369 (1980), which concluded that “[a] state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority.” *Severance*, 96 Nev. at 838, 620 P. 2d at 370 (emphasis added). Also, since the Parole Board “may, as a condition of releasing a prisoner on parole, impose any reasonable conditions on the parolee to protect the health, safety and welfare of the community . . .” ([NRS 213.12175](#)), it could conclude that the Legislature came up with reasonable parole conditions when it enacted [NRS 213.1245](#). In any event, the Parole Board “shall” impose such conditions listed at subsection 1 of [NRS 213.1245](#) on prisoners “convicted of an offense listed in [NRS 179D.620](#)” unless it “finds that extraordinary circumstances are present.” [NRS 213.1245](#). Thus, the Parole Board continues to exercise discretion in this regard. Finally, since [NRS 213.1245](#) neither alters the definition of criminal conduct nor increases the punishment for the pertinent sex crime, its application to offenders who committed a sex crime listed in [NRS 179D.620](#) before July 1, 1997, would not violate the *Ex Post Facto* Clause of the Nevada or U.S. Constitution. See *Lynce*, 519 U.S. 433 at 441 (1997) and fn. 3 above.

#### CONCLUSION

The Parole Board is required to apply [NRS 213.1245](#) prospectively to all offenders being paroled who were convicted of a sex offense listed in [NRS 179D.620](#), regardless of the date of the crime. [NRS 213.1245](#) neither alters the definition of criminal conduct nor increases the punishment for the pertinent sex crime. Accordingly, its application to offenders who committed a sex crime listed in [NRS 179D.620](#) before July 1, 1997, would not violate the *Ex Post Facto* Clause of the Nevada or U.S. Constitution.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.  
Deputy Attorney General

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AGO 99-24 LANDER COUNTY; REAL PROPERTY; TAXATION: Lander County may impose landfill user fees on the tax roll subject to the requirements set forth in [NRS 318.201](#).

Carson City, July 20, 1999

Leon Aberasturi, Deputy, Lander County District Attorney’s Office, 315 South Humboldt, Post Office Box 187, Battle Mountain, Nevada 89820

Dear Mr. Aberasturi:

You have requested an opinion concerning the authority of Lander County to collect landfill user fees by notifying real property owners on their tax bills.

### QUESTION

May Lander County collect landfill user fees by including these fees on the tax roll?

### ANALYSIS

We are advised that Lander County has recently imposed an ordinance for the collection of landfill user fees.<sup>49</sup> This opinion addresses the statutory authority of Lander County to impose a landfill user fee and the ability of Lander County to collect it by including the fee on the tax roll.

#### A. County's Authority

Lander County's authority to enact this ordinance for the imposition of a landfill user fee is governed by [NRS 444.520](#), which reads in pertinent part:

1. The governing body of any municipality which has an approved plan for the management of solid waste may, by ordinance, provide for the levy and collection of other or additional fees and charges and require such licenses as may be appropriate and necessary to meet the requirements of [NRS 444.460](#) to [444.610](#), inclusive.

Assuming that Lander County has an approved plan for the management of solid waste, [NRS 444.520](#) authorizes the Board of Commissioners (Board) to finance its waste management system by charging and collecting a fee from all residents served. *See also* Op. Nev. Att'y Gen. No. 111 (January 29, 1973).

While [NRS 444.520](#) authorizes the Board to impose a landfill user fee upon its residents, chapter 444 of the NRS fails to authorize the Board to include a landfill user fee on the tax roll.<sup>50</sup>

A board of commissioners can only exercise such powers as expressly granted by the Legislature, or such powers as necessarily implied to carry out the express powers so granted. *See* [NRS 244.195](#); Op. Nev. Att'y Gen. No. 150 (February 28, 1952). Thus without express or implied statutory authority, the Board cannot include a landfill user fee on the tax roll pursuant to chapter 444 of the NRS.

However, in addition to the powers granted to the Board under [NRS 444.440](#) *et seq.*, [NRS 244.157](#) authorizes a board to exercise any of the powers in any unincorporated areas

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<sup>49</sup> Section 1 of Ordinance No. 98-8, provides, in part:

The Lander County Board of Commissioners hereby find that the operation of landfills requires additional revenue that should be raised through the imposition of a landfill user fee. It is further found by the Lander County Board of Commissioners that no absolute precise mathematical or accounting basis exists to base a user fee structure upon. The Lander County Commissioners find that all users of landfills should pay to support landfill costs without exemptions.

<sup>50</sup> In contrast, the Legislature specifically granted the board of commissioners the authority to collect charges for sewage and waste water fees on the tax roll pursuant to NRS 244A.541, subject to fulfilling the requirements set forth in NRS 244A.543 and NRS 244A.545.

within its county that a board of trustees of any general improvement district is permitted to exercise pursuant to the provisions of chapter 318 of the NRS.<sup>51</sup>

Consequently, the Lander County Board of Commissioners has the power to collect and dispose of garbage and refuse, or to contract for the collection and disposal of garbage and refuse in any unincorporated area within the county. [NRS 318.142](#). Furthermore, the Board may compel all property owners to use the district's collection system and may fix the rates, tolls, or charges for services furnished by the district. [NRS 318.170](#), [NRS 318.197\(1\)](#). Thus, both [NRS 444.520](#) and [NRS 318.197](#) authorize Lander County to collect landfill user fees from its residents.

#### B. Collection of Landfill Fees On Tax Roll

Whereas chapter 444 of the NRS is silent on the issue of collecting landfill user fees on the tax roll, [NRS 318.201](#) specifically authorizes a board to elect to have garbage and refuse charges collected on the tax roll. However, prior to administering the collection of charges on the tax roll, a board must first comply with the detailed statutory requirements set forth in [NRS 318.201](#).

[NRS 318.201\(1\)](#) requires a board to prepare and file with the county clerk a written report containing a description of each parcel of real property receiving the service and the amount of the annual charge.<sup>52</sup> [NRS 318.201\(5\)](#) requires the clerk to notice the filing of the report and the time and place of hearing, by publishing such notice in a newspaper of general circulation once a week for two weeks prior to the date set for hearing. [NRS 318.201\(6\)](#) requires the clerk to provide written notice of the report and notice of the time and place of hearing by mail to each person with a parcel or parcels of real property described in the report.

If a majority of the owners of the parcels protest the report, the charges must be collected separately from the tax roll. [NRS 318.201\(7\)](#). Absent a protest by a majority of parcel owners, a board may determine that the charge should be collected on the county tax roll. If adopted, the clerk must prepare a final report with the amount of the charge to be included on the assessment roll and the county treasurer must include the amount of the charges on the tax bills levied against the respective lots and parcels of land. [NRS 318.201\(9\)](#); [NRS 318.201\(11\)](#).

In summary, [NRS 318.201](#) reveals that the Legislature granted authority to general improvement districts to prescribe a charge for garbage and refuse on the tax bills of its residents. Lander County, within the unincorporated areas of its Board of Commissioners, may exercise the powers of a general improvement district. Therefore, so long as the Board complies with the statutory requirements of [NRS 318.201](#), Lander County may seek to collect landfill user fees by including these fees on the tax roll.

#### CONCLUSION

Based upon the authority granted under [NRS 444.520](#), as well as [NRS 318.142](#), [318.170](#), and [318.197\(1\)](#), Lander County may impose landfill user fees on the residents it serves. These landfill user fees may be collected on the tax rolls of Lander County, subject to fulfilling the requirements set forth in [NRS 318.201](#).

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<sup>51</sup> Subsection (2) of NRS 244.157 also provides: "A board of county commissioners may exercise the powers authorized under subsection 1 only upon compliance with the same procedures that a board of trustees of a general improvement district would be required to follow for the same class of improvements within an improvement district. . . ."

<sup>52</sup> Although NRS 318.201 refers to "the secretary," the county clerk would perform the duties of the secretary for a board of county commissioners. See NRS 244.075.



FRANKIE SUE DEL PAPA  
Attorney General

By: SONIA E. TAGGART  
Deputy Attorney General

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AGO 99-25 CONFIDENTIALITY; TAXATION: The Department of Taxation does not have the authority to provide information on subcontractors' compliance with chapter 364A of NRS directly to contractors.

Carson City, July 22, 1999

Larry Scott, Chief, Revenue Unit, Department of Taxation, 1550 East College Parkway, Suite 115, Carson City, Nevada 89706-7921

Dear Mr. Scott:

You have asked questions concerning the authority of the Department of Taxation (Department) to provide contractors with information on particular subcontractors' compliance with the requirements of chapter 364A of NRS. Your question is raised because of the nondisclosure statute at [NRS 364A.100](#).

#### QUESTION ONE

May the Department directly provide information to contractors on particular subcontractors' compliance with the requirements of chapter 364A of the NRS, if only basic information is reported, with no specific financial data?

#### ANALYSIS

The above question arose because the Department realizes that requiring the contractor to collect evidence of compliance with chapter 364A of the NRS from each subcontractor is very time consuming, while the same information could be quickly and accurately compiled and provided by Department staff. However, the issue is whether the Department has the authority to release such information directly to the contractor.

The information that the general contractor must have regarding each subcontractor, before the general contractor can make payment to the subcontractor, is evidence of the subcontractor's tax payment for the last quarter. [NRS 364A.340](#). However, the Department cannot provide this evidence or information directly to the contractor if doing so violates the nondisclosure statute regarding this information.

The applicable nondisclosure statute is found at [NRS 364A.100](#), which provides in relevant part:

1. Except as otherwise provided in [NRS 360.250](#) and subsections 2 and 3, the records and files of the department concerning the administration of this chapter are confidential and privileged. The department, and any employee engaged in the administration of this chapter, or charged with the custody of any such records or files, shall not disclose any information obtained from the department's records or files or from any examination, investigation or hearing authorized by the provisions of this chapter. Neither the department nor any employee of the

department may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the department and production of records, files and information on behalf of the department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter if that testimony or the records, files or information, or the facts shown thereby are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any return or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular business or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the governor or his agent in the exercise of the governor's general supervisory powers, or to any person authorized to audit the accounts of the department in pursuance of an audit, or to the attorney general or other legal representative of the state in connection with an action or proceeding pursuant to this chapter or to any agency of this or any other state charged with the administration or enforcement of laws relating to workers' compensation, unemployment compensation, public assistance, taxation, labor or gaming.

The nondisclosure statute is broad as to what information it covers, i.e., *all* records and files of the Department concerning the administration of chapter 364A, while the exceptions to the confidentiality are limited. Generally, exceptions to rules are to be strictly construed. *See Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739, 109 S. Ct. 1455, 1463 (1989); *Spokane & Inland Empire Railroad Company v. United States*, 241 U.S. 344, 350, 36 S. Ct. 668, 671 (1916); *McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 651, 730 P.2d 438 (1986); *Kroeger Properties v. Silver State Title*, [102 Nev. 112](#), 114, 715 P.2d 1328 (1986); *Ray v. Stecher*, [79 Nev. 304](#), 309-310, 383 P.2d 372 (1963); Op. Nev. Att'y Gen. No. 92-3 (March 12, 1992). Accordingly, any disclosure of information the Department controls concerning the administration of chapter 364A of the NRS must fit within the limited statutory exceptions to the nondisclosure requirements.

The only exception that could be applicable for the purposes of compliance with [NRS 364A.340](#) is the one whereby the information could be released to the taxpayer or his authorized representative.<sup>53</sup> [NRS 364A.100\(2\)\(b\)](#). It is clear that the subcontractor, being the taxpayer, would have access to the information. However, for the Department to provide information directly to the contractor, the contractor would have to be the subcontractor's "authorized representative."

The statute does not define the term "authorized representative," nor is it defined elsewhere by Nevada statute. Looking at the plain meaning of the term, the "authorized representative" is an agent for the taxpayer, and must somehow be designated as such by the taxpayer. *See The Stop & Shop Companies, Inc. v. Federal Insurance Company*, 136 F.3d 71, 74 (1st Cir. 1998) (authorized representative has been designated as an agent); *Bunker Hill Company Lead and Zinc Smelter v. U.S. Environmental Protection Agency*, 658 F.2d 1280 (9th Cir. 1981) (authorized representative is one who represents another as an agent, and is possessed of control

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<sup>53</sup> The information to be disclosed would not be given as testimony, nor would the disclosure of the information be an exchange of information with the Internal Revenue Service or a disclosure to the Governor or his agent. *See* NRS 364A.100(2)(a), (d), and (e). The information to be provided also does not appear to fit within the exception for the "Publication of statistics so classified as to prevent the identification of a particular business or document," as the provision of information without identifying the subcontractor would be useless to the contractor. *See* NRS 364A.100(2)(c).

or power delegated by the principal); Op. Nev. Att’y Gen. No. 904 (April 11, 1950) (authorized representative is authorized to exercise any and all powers of the person he represents).

Generally, therefore, there must be some type of designation of the authorized representative by the taxpayer, giving power, or control to the representative, to act for, and in the place of, the taxpayer. Neither statute or regulation invests a contractor with such authority, power or control to act on behalf of a subcontractor. In the case of a city issuing building permits to architects, as the authorized representative of the building owner, the city could properly require written authorization from an owner before the city building inspector issued a building permit to the architect hired by the property owner. Such authorizations constitute a record of the fact that the property owner is aware of the possible effect of contemplated construction work with respect to the owner’s property rights. Op. Nev. Att’y Gen. No. 108 (October 28, 1959). This requirement is analogous to protecting the taxpayer’s privacy rights in this instance. The written authorization gives the contractor the authority to request the disclosure of information from the Department. Accordingly, unless the subcontractor has specifically designated a contractor as his authorized representative, the Department is not authorized to release the information on that subcontractor to a general contractor.

Additionally, the burden to the contractor to obtain this information was taken into consideration by the Nevada Legislature. *See Hearing on A.B. 303 Before the Assembly Committee on Taxation*, 1991 Legislative Session, 12-15 (June 17, 1991). The only accommodation made was to allow evidence of compliance to be the provision of a receipt for the last quarter’s tax payment. *See Hearing on A.B. 303 Before the Assembly Committee on Taxation*, 1991 Legislative Session, 6, Exhibit B (June 20, 1991).

Accordingly, as the legislative intent was to impose a requirement on general contractors to gather this information from subcontractors at the time the two parties entered a contract, the Department does not have statutory authorization to provide this information directly to general contractors. Instead, the Department is expressly prohibited from providing such information to contractors unless the contractor has been clearly designated as an “authorized representative” of the subcontractor for purposes of complying with [NRS 364A.340](#).

#### CONCLUSION TO QUESTION ONE

The nondisclosure statute at [NRS 364A.100](#) does not allow the Department to provide information to a contractor regarding a subcontractor’s compliance with chapter 364A of the NRS, unless that contractor has been designated by the subcontractor as the subcontractor’s authorized representative. Such designation should be in writing in order for the Department to have a record that the subcontractor authorized the release of the information to the contractor.

#### QUESTION TWO

Is basic information, without specific financial data, sufficient proof to fulfill the requirements of [NRS 364A.340](#)?

#### ANALYSIS

The information sufficient to satisfy the requirements of [NRS 364A.340](#) is evidence that the last quarterly taxes were paid by the subcontractor. [NRS 364A.340](#). This requirement does not mandate the provision of any financial data, such as the amount of the taxes paid, or the number of full-time equivalent employees the subcontractor has.

#### CONCLUSION TO QUESTION TWO

If the Department is authorized by a subcontractor to release basic information to a contractor, setting forth only information that proves the subcontractor paid the last quarterly payment required pursuant to chapter 364A of the NRS, such information would be sufficient to satisfy the requirements of [NRS 364A.340](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: ELAINE S. GUENAGA  
Deputy Attorney General

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AGO 99-26 MENTAL HEALTH; MENTAL ILLNESS; HOSPITALS: The 72-hour period for observation, evaluation and treatment under an emergency admission to a mental health facility or hospital pursuant to [NRS 433A.150](#) begins upon the client's admission to the facility. The steps outlined in the "Legal 97" do not constitute an emergency admission to a mental health facility and do not trigger the 72-hour.

Carson City, August 5, 1999

Marvin Glovinsky, Ph.D., Chairman, Commission on Mental Health and Developmental Services, 505 East King Street, Room 603, Carson City, Nevada 89710

Dear Dr. Glovinsky:

You have asked for an opinion from this office to clarify when the 72-hour period for emergency admission to a mental health facility begins. In addition, you have asked about the relationship between the 72-hour time period and the process contemplated by the forms called "Legal 97" which are the Division of Mental Health and Developmental Services' forms entitled "Application, Certification, and Medical Clearance for Emergency Admission of an Allegedly Mentally Ill Person to a Mental Health Facility."

#### QUESTION ONE

When does the 72-hour period begin for evaluation, observation and treatment of a mentally ill person on an emergency admission to a mental health facility or hospital?

#### ANALYSIS

The *parens patriae* responsibility of the state to provide mental health services to those persons who are mentally ill and a danger to themselves and others has been codified in title 39 of the Nevada Revised Statutes. Under Nevada law, there are provisions for three types of admission to a public or private mental health facility: voluntary, emergency, and involuntary court-ordered admission. [NRS 433A.120](#). Emergency procedures are intended to provide for the immediate apprehension and detention of those persons for whom it is thought that the delay pursuant to judicial or administrative procedures would be inappropriate. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM, 751 (1974).

Emergency admissions are governed by [NRS 433A.145](#), et seq. [NRS 433A.160](#), .165, .170, and .180 govern the procedures for taking a person into custody, having him medically screened and seen by a psychiatrist, psychologist or physician before that person may be received by a mental health facility or hospital for an emergency admission.

[NRS 433A.150](#) states:

1. Any mentally ill person may be detained in a public or private mental health facility or hospital under an emergency admission for evaluation, observation and treatment subject to subsection 2.

2. Except as otherwise provided in subsection 3, *a person admitted to a mental health facility or hospital under subsection 1 must not be detained in excess of 72 hours, including Saturdays and Sundays, from the time of his admission unless within that period a written petition for an involuntary court-ordered admission has been filed with the clerk of the district court pursuant to [NRS 433A.200](#).*

3. If the 72-hour period specified in subsection 2 expires on a day on which the office of the clerk of the district court is not open, the written petition must be filed on or before the close of the business day next preceding the expiration of that period, except that, if that business day is the same day as that upon which the person was admitted, the petition must be filed on or before the close of the business day next following the expiration of that period. [Emphasis supplied.]

The plain language of the statute provides that the 72-hour period for an emergency admission to a mental health facility begins when an allegedly mentally ill person is admitted to the mental health facility. Where the language of a statute is plain and unambiguous there is no room for construction of the statute. *Atlantic Commercial v. Boyles*, [103 Nev. 35](#), 38, 732 P.2d 1360, 1363 (1987); *Daniels v. National Home Life*, [103 Nev. 674](#), 678, 747 P.2d 897, 900 (1987); *Breen v. Caesars Palace*, [102 Nev. 79](#), 87, 715 P.2d 1070, 1072 (1986); *Nevada Power Co. v. Public Service Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). The plain and unambiguous language must be given its effect. *State v. State Employees Assoc.*, [102 Nev. 287](#), 289, 290, 720 P.2d 697, 699 (1986).

Under the rules of statutory construction, words are to be given their plain meaning unless to do so violates the spirit of the act. *See Application of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535, 538 (1949). Applying this rule to the instant question shows that the interpretation of the plain meaning of the statute comports with the purpose of an emergency admission, which is to evaluate, observe, and treat someone brought in to a facility who is believed to be mentally ill and a danger to himself and/or others. [NRS 433A.160](#)(5) requires that each person admitted to mental health facility or hospital under an emergency admission be evaluated at the time of admission by a psychiatrist or a psychologist, or a physician if neither of the other two mental health professionals is available. Each such emergency admission must be approved by a psychiatrist.

Within the 72-hour period, the treating psychiatrist and the treatment team for the client must assess whether the person (1) is mentally ill as defined in [NRS 433A.115](#), (2) needs to be involuntarily civilly committed for up to six months for further treatment of his mental illness, or (3) will not pose a danger to himself or others if he is released from the mental health facility or hospital within or at the conclusion of the 72-hour observation period. *See [NRS 433A.200](#); [433A310](#)*(1). These assessments require the exercise of professional judgment, which is formed by the professionals after a period of observation.

The provision allowing a person to be held on an emergency basis for no longer than 72 hours strikes the balance between the individual's liberty interest in living his life free from governmental control, and society's interest in preserving the health and safety of persons whose mental illness is at a point where they pose a risk of harm to themselves and others. If, at the close of the time allowed under the emergency admission, it appears that further and long term interruption of the individual's liberty will be needed to provide treatment, then the due process provisions of the involuntary court ordered admissions process are triggered and come into play by filing a petition with the district court. [NRS 433A.200](#) et seq. 53 AM. JUR. 2D, *Mentally*

*Impaired Persons*, § 25 (1996); BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM, at 751-52 (1974).

While no provision is found in statute or regulations defining when an admission to a mental health facility or hospital occurs, it is clear from a reading of other sections of the laws pertaining to the mentally ill that it occurs when a person is found to meet admission criteria, and is accepted for admission to receive services from the facility.

The section on clients' rights in [NRS 433.456](#) et seq. is useful to illustrate this point. In [NRS 433.461](#), "Facility" is defined to mean any:

1. Unit or subunit operated by the mental hygiene and mental retardation division of the department for the care, treatments and training of clients.
2. Unit or subunit operated by the division of child and family services of the department pursuant to [NRS 433B.010](#) to [433B.350](#), inclusive.
3. Hospital, clinic or other institution operated by any public or private entity, for the care, treatment and training of clients.

[NRS 433.471](#), .472, .482, .484, and .531 each start with the preamble: "Each client admitted for evaluation, treatment or training to a facility has the following rights . . . ."

[NRS 433.533](#) states: "Each facility shall, within a reasonable time after a client is admitted to the facility for evaluation, treatment or training, ask the client to sign a document that reflects that he has received a list of his rights and has had those rights explained to him."

Construing these sections together leads to the inescapable conclusion that admission to a facility occurs when the facility has accepted the person for evaluation and treatment. The prerequisite steps prior to admission necessarily include a statutorily mandated screening process. Those steps cannot be construed to constitute admission when the facility has no control over what occurs during those preliminary steps. *See Marshall v. District Court*, [108 Nev. 459](#), 464, 836 P.2d 47, 51 (1992), where the Nevada Supreme Court concluded that the ambulance company that transported the allegedly mentally ill person to the facility had no discretion to conduct its own evaluation of that person.

### CONCLUSION TO QUESTION ONE

The 72-hour period for observation, evaluation and treatment under an emergency admission to a mental health facility or hospital pursuant to [NRS 433A.150](#) begins upon the client's admission to the facility.

### QUESTION TWO

Do the steps outlined in a "Legal 97" constitute an admission to a mental health facility so as to trigger the 72-hour provision of [NRS 433A.150](#)?

### ANALYSIS

The State of Nevada Division of Mental Health and Developmental Services has adopted a form for the Application, Certification, and Medical Clearance for Emergency Admission of an Allegedly Mentally Ill Person to a Mental Facility. The short name for the current form is the "Legal 97"; the revision that will be made for this year will be named the "Legal 99".

The purpose of the form is to guide persons through the steps required before making an emergency admission of a mentally ill person to a facility. The legal definition of mental illness

in [NRS 433A.115](#) is set forth on the form for the user's ease of reference, and to make certain that a person who is suspected to be mentally ill meets the legal definition for the same.

The next portion of the form requires persons who are qualified by statute to apply for an emergency admission of a mentally ill person to state their qualifications and to describe the circumstances under which the person was taken into custody and the reasons therefor. This provision is in accordance with the requirements of [NRS 433A.160](#)(1) and (2).

On the reverse side of the form is a Certification which is to be filled out by a psychiatrist, or licensed psychologist, or by a physician if neither a psychiatrist or a psychologist is available. That section of the form is designed to meet the requirements of [NRS 433A.170](#).

The final portion of the "Legal 97" is the Medical Clearance. This section is designed to make certain the provisions of [NRS 433A.165](#) are met and the person is medically screened to determine whether the person has a medical problem, other than a psychiatric problem, which requires immediate treatment. If such a medical problem is identified, then the allegedly mentally ill person must be admitted to a hospital for appropriate medical care. [NRS 433A.165](#)(1)(a),(b).

This form was designed by the Division to simplify and highlight the steps that have to be completed under Nevada law before a person may be presented for emergency admission to a mental health facility or hospital. The steps serve as a safeguard to make certain that only those who meet the criteria of being acutely mentally ill, and are an immediate danger to themselves or others, are detained and brought to a facility for evaluation, observation and treatment of their mental illness. The form was designed to be simple to use in what is, by definition, an emergency situation.

The form, when completed, does not constitute an admission to a mental health facility. It merely provides the information and the proof that the prerequisite steps have been taken as required by Nevada law prior to the emergency admission of a person to a public or private mental health facility or hospital. As such, no portion of the form is an emergency admission to a mental health facility, and no portion of the same starts the 72-hour clock running pursuant to [NRS 433A.150](#). Rather, the 72 hours begins when the prerequisite steps are met and the facility admits the client.

Concern has been expressed that the initial detention of the individual to begin the process for emergency admission to a mental health facility constitutes a substantial interference with his liberty interests, and it has been suggested that each of the steps following detention must be included within the 72-hour period provided in [NRS 433A.150](#). The Nevada statutory scheme does not provide for this; other states vary in the time and manner in which the emergency detention process works, and whether a hearing must be held to justify the emergency detention. A hearing prior to the initial commitment of an individual is not constitutionally required under the due process clause, at least under the emergency detention statutes, provided that there is a reasonable means of testing the validity of the individual's confinement within a reasonable period of time. See 53 AM. JUR. 2D, *Mentally Impaired Persons*, § 25 at 483 and the cases cited therein.

The pre-admission screening requirements for emergency admission, and the requirement that a petition for involuntary admission be filed at the end of the 72-hour period, provide protections to assure the validity of the detention and emergency admission. If concerns exist about the time it takes to have the prerequisites to emergency admission performed, it may be wise to seek statutory language that clearly sets forth the time in which such acts must take place.

## CONCLUSION TO QUESTION TWO

The steps outlined in the Application, Certification and Medical Clearance for Emergency Admission of an Allegedly Mentally Ill Person to a Mental Facility do not constitute an emergency admission to a mental health facility, and do not trigger the 72- hour provision in [NRS 433A.150](#).

A note of caution must be added. The steps antecedent to an emergency admission must be performed within the professional standards set for the actors authorized to initiate an application for an emergency admission, and with all due speed so that the allegedly mentally ill person does not languish in a legal limbo between the initial detention and the emergency admission to a mental health facility. The risk of improperly depriving a person of their liberty rights increases with the length of time or delay that is experienced in this interval.

FRANKIE SUE DEL PAPA  
Attorney General

By: CYNTHIA PYZEL  
Senior Deputy Attorney General

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AGO 99-27 CITIES AND TOWNS; ELECTED OFFICIALS; SALARIES: If a city council increases the salary for members starting in the next term, members can run for reelection. If an incumbent is reelected, the salary increase does not take effect for one year in certain cities.

Carson City, August 5, 1999

Robert Goicoechea, City Attorney West Wendover, Post Office Box 1358 Elko, Nevada 89803

Dear Mr. Goicoechea:

You have requested two opinions from this office regarding the law relating to increasing the salaries of elected officials in the cities of Carlin, Elko, Wells, and West Wendover. We have combined your opinion requests because our analysis and conclusions are the same for both requests.

#### QUESTION ONE

Do section 1.070(1)(b) of the Carlin City Charter, section 1.100(1)(b) of the Elko City Charter, section 1.070(1)(b) of the Wells City Charter, and [NRS 266.230](#), mean a mayor or city councilman/supervisor cannot run for reelection and must absent himself or herself from office for at least one year if the current city council/board of supervisors increases the salaries for the next term of office?

#### ANALYSIS

The cities of Carlin, Elko, and Wells are special charter cities with charter provisions that read in pertinent part as follows: "The mayor and councilmen shall not: . . . Be elected or appointed to any office created by or the compensation for which was increased or fixed by the board of councilmen until 1 year after the expiration of the term for which such person was elected." Carlin City Charter § 1.070(1)(b); Wells City Charter § 1.070(1)(b); "The mayor and members of the board of supervisors shall not: . . . Be elected or appointed to any office created by or the



compensation for which was increased or fixed by the board of supervisors until 1 year after the expiration of the term for which such person was elected." Elko City Charter § 1.100(1)(b).

West Wendover is a general law city incorporated under the provisions of [NRS chapter 266](#). [NRS 266.230](#) states:

No member of any city council shall, during the term for which he was elected and for 1 year after the expiration of such term, hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased, while he was such member.

You question whether these provisions prevent a person from running for reelection as mayor or city councilman/supervisor if the city council/board of supervisors raised the salary for these offices during the mayor or councilman/supervisor's previous term, but not effective until the next term.

A presumption exists in favor of eligibility of a person who has been elected to public office. *Cannon v. Gardner*, 611 P.2d 1207, 1211 (Utah 1980) (a case involving the eligibility of a nonlicensed land surveyor to be elected county surveyor). The Utah Supreme Court stated that statutes dealing with the right of citizens to aspire to public office and serve if elected "should receive a liberal construction in favor of assuring the right to exercise freedom of choice in selecting public officials and also the right to aspire to and hold public office." *Id.* The court ruled the elected county surveyor could take office even though he was not a registered land surveyor. *Id.*

The Florida Court of Appeals, in a case dealing with the eligibility of a sheriff to be reelected because of term limits stated:

The right to be a candidate for public office is a valuable right, and no one should be denied this right unless the Constitution or applicable valid law expressly declares him ineligible. . . . The imposition of restrictions upon the right of a person to hold public office should receive a liberal construction in favor of the people exercising freedom of choice in the selection of their public officers. . . . If there be doubt or ambiguity in the provisions, the doubt or ambiguity must be resolved in favor of eligibility.

*Vieira v. Slaughter*, 318 So. 2d 490, 491-92 (Fla. Dist. Ct. App. 1975) (citations omitted). The Florida court ruled the sheriff was eligible to seek reelection. *Id.*

The Nevada Supreme Court also favors this policy. In *Gilbert v. Breithaupt*, [60 Nev. 162](#), 165, 104 P.2d 183, 184 (1940) (citations omitted), the court stated:

The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office. . . . "Statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers. . . ."

The Nevada court ruled the successful candidate was a qualified elector and did not need to be registered to vote to be eligible to hold office. *Id.* at 172.

The Nevada Supreme Court has twice recently reaffirmed this policy. In *Nevada Judges Ass'n v. Lau*, [112 Nev. 51](#), 55, 910 P.2d 898, 901 (1996), the court quoted *Gilbert* and also

stated, “We recently reaffirmed this proposition. *See SNEA v. Lau*, 110 Nev.715, 720, 877 P.2d 531, 535 (1994).”

Applying this policy to the situations you presented results in the following conclusion: a city council/board of supervisors voting in favor of a salary increase cannot render a sitting councilman/supervisor ineligible to run for reelection. It is ambiguous at best whether the above-referenced charter provisions and [NRS 266.230](#) prohibit a councilman/supervisor from running for reelection if the council/board has voted for a salary increase. This ambiguity must be resolved in favor of eligibility to run for reelection. Thus the fact that a city council/board of supervisors has voted for a salary increase will not disqualify a sitting councilman/supervisor from running for reelection.

#### CONCLUSION TO QUESTION ONE

If the current city council/board of supervisors increases the salaries for the next term of office, a mayor or city councilman/supervisor can run for reelection and does not need to absent himself or herself from office for one year notwithstanding the language of section 1.070(1)(b) of the Carlin City Charter, section 1.100(1)(b) of the Elko City Charter; or section 1.070(1)(b) of the Wells City Charter, or [NRS 266.230](#).

#### QUESTION TWO

What is the effect of the phrase for one year after the expiration of such term or similar language found in section 1.070(1)(b) of the Carlin and Wells City Charters, section 1.100(1)(b) of the Elko City Charter; or [NRS 266.230](#) if a city council/board of supervisors increases the salary for the mayor and councilmen/supervisors to be effective in the next term of the office?

#### ANALYSIS

You have suggested that [NRS 266.230](#) only applies to *appointive* offices created or which had the salary increased during the councilmember’s term of office. This interpretation would make this statutory provision the same as article 4, section 8 of the Nevada Constitution which states:

No Senator or member of Assembly shall, during the term for which he shall have been elected, nor for one year thereafter be appointed to any civil office of profit under this State which shall have been created, or the emoluments of which shall have been increased during such term, except such office as may be filled by elections by the people.

Clearly, this provision applies only to appointive offices, not elected ones.

However, limiting [NRS 266.230](#) to appointive offices, ignores the word “hold” found in the provision. The Nevada Supreme Court has adopted the rule of statutory construction that:

Courts must construe statutes and ordinances to give meaning to all of their parts and language. . . . The 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.

*Board of County Comm’rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). *See also Tomlinson v. State*, 110 Nev.757, 761, 878 P.2d 311, 313 (1994).

“Hold” is used in addition to “be appointed to” in explaining how a person comes to be an office holder. A person may hold an office or be appointed to an office. A person holds an office because he or she was elected to it as opposed to being appointed to an office. Limiting [NRS 266.230](#) to only appointive offices disregards offices to which a person has been elected. Such disregard discounts the rule of statutory construction cited above. Giving meaning to the word “hold” results in including elected offices.

Therefore, if a city council increases the salaries for elected offices or for newly created offices, the restrictions in [NRS 266.230](#) apply. Clearly, the subject city charter provisions apply to elected offices because the provisions include the words “be elected to.”

You have also asked us to examine [NRS 266.450](#) which states, “All officers of any city shall receive such compensation as may be fixed by ordinance, but the compensation of any such officers shall not be increased or diminished to take effect during the time for which the officer was elected or appointed.” This statute was enacted into law in 1907 and legislative history does not exist. However, the Attorney General has twice opined on [NRS 266.450](#).

In 1962, the Attorney General was asked, “May the Henderson City Council enact an ordinance, applicable as to both elective and appointive officers, by which periodic pay raises may be made available during the terms for which they may, after the effective date of the ordinance, be elected or appointed?” Op. Nev. Att’y Gen. No. S-6 (September 25, 1962). The answer was yes. The opinion analyzed [NRS 266.450](#), which has not been amended since then, as well as article 15, section 9, of the Nevada Constitution. This section of the constitution is similar to [NRS 266.450](#) but has application only to certain state officers. No mention is made of [NRS 266.230](#). The opinion concludes, “An ordinance providing for increases in pay, during the term of an elective or appointive officer, passed prior to election or appointment, would not offend the statute, even though it provides for annual pay increases therein.” Op. Nev. Att’y Gen. S-6, at 36-37.

In 1963, the Attorney General responded no when asked, “Can an ordinance increasing the salary of a mayor and city councilmen be passed during the term for which such officers were elected?” Op. Nev. Att’y Gen. No. 49 (July 1, 1963). A new mayor had been elected in Lovelock and three city councilmen were reelected. An ordinance that would have increased the salaries of the mayor and city councilmen was proposed before the city election, but was not approved and passed until one day after the election. Citing [NRS 266.450](#) in the analysis, the opinion concluded, “The compensation of elected officers of any city shall not be increased during the term for which they are elected by an ordinance approved and passed during that particular term.” *Id.*

The city charters at issue here have similar provisions. Section 2.090(5) of the Carlin and Wells City Charters state, “The board of councilmen shall not pass any ordinance increasing or diminishing the salary of any elective officer during the term for which he is elected or appointed.” Section 2.090(5) of the Elko City Charter states, “The city council shall not pass any ordinance increasing or diminishing the salary of any elective officer during the term for which he is elected or appointed.”

The policy reasons for these provisions are discussed in the 1962 Attorney General Opinion:

Such provisions are predicated partially upon the theory of contract, to the effect that if one becomes a candidate for an office, or accepts an appointment for a term of years to an office, for which a definite salary is provided by law, he is under the theory of contract (in the absence of resignation) entitled to receive the contract sum, which is not to be increased or diminished for the term for which he has been elected or appointed.

Such provisions are based also in part upon the theory that it is conducive to obtaining the best public service available for the amount fixed as the obtainable salary. . . .

Such also is deemed a protection to the public interest in that it tends to prevent using the influence of the office to obtain the favor of salary increases.

Op. Nev. Att’y Gen. No. S-6 (September 25, 1962).

These policy reasons combined with the express language in the law require that mayors and/or city councilmen/supervisors who are members of a city council/board that increases their salaries beginning with the next term and who are then reelected must wait for one year before the salary increase is effective.

The City of Reno recently dealt with this same issue. In October 1998, the city council voted to increase salaries for councilmembers and the mayor. Reno held its city election in November 1998. The mayor was reelected. The issue was whether Reno’s charter provision, which was identical to those specified here, allowed the mayor to accept the salary increase in his new term of office since the salary increase was enacted in the prior term.

Reno requested the 1999 Legislature to amend section 1.080 of the Reno City Charter to clarify that a city councilman or mayor who votes for a salary increase and is then reelected is entitled to the salary increase beginning in his or her new term. The Legislature enacted this amendment in section 2 of A.B. 309. Act of May 28, 1999, ch.327, § 2, 1999 Nev. Stat. 1365, 1366. Similar amendments to the Carlin, Elko, and Wells City Charters, and to [NRS 266.230](#), have not been sought and approved.

#### CONCLUSION TO QUESTION TWO

If a city council/board of supervisors increases the salary for the mayor and/or councilmen/supervisors to be effective in the next term of the office and the incumbent mayor and/or councilmen/supervisors are reelected, the salary increase for these reelected officials does not take effect for one year pursuant to the language found in section 1.070(1)(b) of the Carlin and Wells City Charter; section 1.100(1)(b) of the Elko City Charter; and [NRS 266.230](#).

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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AGO 99-28 TAXATION; PROPERTY; EXEMPTIONS; VETERANS: To be entitled to the property exemption under [NRS 361.090](#)(1)(c), a member or honorably discharged veteran of the armed services must establish that he or she served during the effective period of Public Law 102-1, and that his or her duties had a causal relationship with the Gulf War or advanced the military interests of the United States in the Gulf War.

Carson City, August 5, 1999

Drennan A. Clark, The Adjutant General, State of Nevada, Office of the Military, 2525 South Carson Street, Carson City, Nevada 89701

Dear Mr. Clark:

You have requested an opinion to clarify who qualifies for the property tax exemption under [NRS 361.090\(1\)\(c\)](#). Specifically, you would like a clarification of the language, “served on active duty in connection with” as set forth in [NRS 361.090\(1\)\(c\)](#).

### QUESTION

Under what circumstances may a member or an honorably discharged veteran of the armed forces qualify for the property tax exemption granted under [NRS 361.090\(1\)\(c\)](#)?

### ANALYSIS

[NRS 361.090\(1\)\(c\)](#) grants a property tax exemption to members or honorably discharged veterans of the armed forces who served in connection with carrying out Public Law 102-1. Public Law 102-1 was enacted in January 1991, and authorized the President to use military force against Iraq. [NRS 361.090](#) provides, in relevant part:

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

....  
(c) Has served on active duty *in connection with* carrying out the authorization granted to the President of the United States in Public Law 102-1, and who received, upon severance from service, an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or who, having so served, is still serving in the Armed Forces of the United States, is exempt from taxation. [Emphasis added.]

We are advised that there is confusion among county assessors about how to apply this property tax exemption and, in particular, the application of the language “in connection with.” Some assessors have broadly interpreted this statute to apply to all members or honorably discharged veterans of the armed forces who served on active duty in the armed forces of the United States during the effective period of Public Law 102-1. Other assessors have narrowly interpreted this statute to require proof that a member or honorably discharged veteran of the armed forces was actually deployed to the Persian Gulf.

We believe neither interpretation correctly applies [NRS 361.090\(1\)\(c\)](#). The broad interpretation allowing an exemption for all members or honorably discharged veterans of the armed forces who served during the effective period of Public Law 102-1, disregards the statutory language that the person must serve “in connection with . . . Public Law 102-1.” The Nevada Supreme Court has held that courts must construe statutes and ordinances to give meaning to all of their parts and language. *Bd. of County Comm’rs v. CMC of Nevada*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983); *State ex rel. List v. AAA Auto Leasing*, [93 Nev. 483](#), 487, 568 P.2d 1230, 1232 (1977). The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. *CMC of Nevada*, 99 Nev. at 744, 670 P.2d at 105. A reading of legislation that renders any part redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided. *Id.*; see also *State Gen. Obligation Bond v. Koontz*, [84 Nev. 130](#), 437 P.2d 72 (1968). Therefore, [NRS 361.090\(1\)\(c\)](#) must be read and applied in light of the requirement that the member or honorably discharged veteran of the armed forces served “in connection with” Public Law 102-1.

The narrow interpretation of [NRS 361.090\(1\)\(c\)](#) also misconstrues the statute by unjustifiably limiting the phrase “in connection with” to require a member or honorably discharged veteran of the armed forces to have been actually deployed to the Gulf War. A statute should be read in

light of what is reasonable and not merely conceivable. *Dimond v. Linnecke*, [87 Nev. 464](#), 467, 489 P.2d 93, 95 (1971). It is well recognized that in a modern military war, a war may be prosecuted from almost anywhere in the world. Therefore, it is reasonable for a member or honorably discharged veteran of the armed forces to serve in the Gulf War without actually being deployed to the Persian Gulf.

Although there is no definition of the phrase “in connection with” provided in the statute, when a word is not defined by statute, a court normally construes it in accord with its ordinary or natural meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). Webster’s Dictionary defines “Connection” to include, “. . . causal or logical relation or sequence *b* : contextual relations or associations . . . an arrangement to execute orders or advance interests of another . . .” WEBSTER’S NEW COLLEGIATE DICTIONARY 237 (1981).

Applying the ordinary dictionary definition of “connection,” in order for a member of the armed services or honorably discharged veteran to be entitled to claim a property tax exemption, the applicant’s duties must have a causal or logical relationship to the use of military force in the Gulf War.<sup>54</sup> Alternatively, the applicant’s duties must have advanced the interests of the United States to use military force in the Gulf War.

It is clear an applicant’s deployment to the Gulf War has a causal relationship to Public Law 102-1. However, there are numerous other duties performed by a service person outside of the Gulf War that should be deemed “in connection with” Public Law 102-1. For example, these duties include, but are not limited to the following: maintaining and servicing aircraft, vehicles or vessels for service in the Gulf War; working as a supply clerk in the United States preparing military supplies ready for shipment to Iraq; preparing reports or documents related to the Gulf War; serving as an instructor for Desert Storm training; or providing technical or communication support for the Gulf War. In contrast, general military training and maneuvers would not be sufficient to be deemed “in connection” with the Gulf War. In summary, a meaningful and reasonable reading of the plain language of [NRS 361.090\(1\)\(c\)](#) leads us to conclude that the statute grants members or honorably discharged veterans of the armed forces a property tax exemption if their duties were related to or advanced the United States’ military efforts in the Gulf War.

Having established that an applicant is entitled to an exemption if the applicant’s duties were related to or advanced the United States’ efforts in the Gulf War, the only remaining issue is the methodology of establishing entitlement to this exemption. Pursuant to [NRS 361.090\(6\)](#), the applicant claiming the property exemption under [NRS 361.090](#) has the burden of proving entitlement to the exemption. While [NRS 361.090\(6\)](#) requires a veteran applicant to produce an honorable discharge or certificate of satisfactory service, these documents may be insufficient to establish that the applicant served in connection with Public Law 102-1.<sup>55</sup>

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<sup>54</sup> A review of the 1991 legislative history of [NRS 361.090\(1\)\(c\)](#) enacted through S.B. 329 also supports the position that the Legislature intended the tax exemption to apply only to those members or honorably discharged veterans of the armed forces whose duties were related to or advanced the Gulf War. For example, Nevada State Senator Diana Glomb, from Washoe County District 1, testified that it was her impression that those personnel associated with Operation Desert Storm would be the only military personnel offered an exemption. Hearing on S.B. 329 Before the Senate Committee on Taxation, 1991 Legislative Session, 7 (April 16, 1991).

<sup>55</sup> [NRS 361.090\(6\)](#) reads:

Before allowing any veteran’s exemption pursuant to the provisions of this chapter, the county assessor of each of the several counties of this state shall require proof of status of the veteran, and for that purpose shall require production of an honorable discharge or certificate of satisfactory service or a certified copy thereof, or such other proof of status as may be necessary.

If the discharge documents fail to demonstrate that the applicant served in connection with the Gulf War, the applicant must provide additional documentation from the applicable branch of the armed forces to establish entitlement to the property exemption. If documentation is not available from the armed forces, the applicant should file an affidavit with the county assessor stating that the applicant is seeking an exemption under [NRS 361.090\(1\)\(c\)](#), the dates applicant served on active duty and the assignments performed by applicant in connection with Public Law 102-1. Upon review of the documentation or affidavit, the county assessor can assess whether the applicant served on active duty in connection with Public Law 102-1. If the applicant's duties were connected to, related to, or advanced the military interests of the United States in the Gulf War, the county assessor should allow the exemption.

#### CONCLUSION

In order to qualify for the property tax exemption granted under [NRS 361.090\(1\)\(c\)](#), a member or honorably discharged veteran of the armed services must establish that he or she served "in connection with" Public Law 102-1. In order to serve "in connection with" Public Law 102-1, the applicant must establish that he or she served during the effective period of Public Law 102-1, and that his or her duties had a causal relationship with the Gulf War or advanced the military interests of the United States in the Gulf War.

FRANKIE SUE DEL PAPA  
Attorney General

By: SONIA E. TAGGART  
Deputy Attorney General

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AGO 99-29 SCHOOL DISTRICTS, EDUCATION, PUBLIC SCHOOLS: SCHOOL DISTRICTS, EDUCATION, PUBLIC SCHOOLS: Pursuant to NRS 392.033, a pupil who reaches the eighth grade and does not complete the requirements for promotion to high school must not be promoted. The requirement of NRS 392.125 is applicable to all other grades.

Carson City, August 25, 1999

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 two statutes that concern the promotion of pupils.

#### QUESTION

Can a board of trustees of a school district prohibit a student from being promoted to high school as required by NRS 392.033 for more than one year in light of NRS 392.125, which prohibits the retention of a pupil in the same grade more than once.

#### ANALYSIS

NRS 392.033(2) prohibits a board of trustees of a school district from promoting a pupil to high school if the pupil has not completed the course of study or credit required for promotion to high school. The statute provides that "the state board shall adopt regulations which prescribe the courses of study required for promotion to high school, which may include the credits to be earned." NRS 392.033(1). *See* NAC 389.445. The application of NRS 392.033 is complicated by NRS 392.125 which prohibits a school district from retaining a pupil more than one time in the same grade. Since it is highly probable that a school district will be faced this school year with retention of an eighth grade



student who was retained last year as well, the question arises as to which statute controls.

NRS 392.125 addressed the issue of retention of a pupil generally by providing, before the pupil is retained in the same grade, that the pupil's teacher or principal must make a reasonable effort to arrange a meeting with the pupil's parents or guardian to discuss the reasons and circumstances of that decision. The 1981 amendment to the statute clarified that the decision is to be made jointly by the principal and teacher and they have the final authority to retain the pupil. A.B. 563, Act of June 2, 1981, ch. 449, 1981 Nev. Stat. 871. The amendment further provided that no pupil may be retained more than one time in the same grade. *See* NRS 392.125(2) & (3).

Sixteen years later our Legislature adopted NRS 392.033 as part of the broad approach to education reform embodied in Assembly Bill 376. A.B. 376, Act of July 17, 1997, ch. 522, 1997 Nev. Stat. 2487. The broad reforms set in motion by the 69th Session of the Legislature included a method and mandate to increase academic standards at the elementary and secondary level and the means to ensure that students meet those standards. The high school proficiency examinations, which all students must pass to receive a regular high school diploma, became more rigorous and the passing score raised much higher. Part of these broad reforms is the recognition that sufficient mastery of the courses of study in middle school is a key building block to satisfactory performance of the high school standards.

The original language of section 15 of A.B. 376 set forth the criterion of at least 15 units of credit in order for a pupil in middle or junior high school to be promoted to high school. The issuance of credits and the attendant transcript for middle or junior high school would have been a departure from the established practice. During consideration of A.B. 376, the Legislature deleted a provision which would have required implementation of summer school or other special programs to complete the courses of study required for promotion to high school. The Legislature also deleted a proposed mandate to institute a credit system with a 15-credit minimum requirement at the middle or junior high school level. The language prohibiting the promotion of a pupil to high school

who has not completed the courses of study prescribed by the State Board of Education remained steadfast.

The legislative history of section 15 of the bill demonstrates a clear intent that a pupil must not be promoted to high school who has not met the requirements for promotion. This intent was articulated by the bill's sponsor each time she presented the bill to a committee of the Assembly or Senate. In presenting the bill to the Assembly Committee on Ways and Means, she described section 15 of the bill as a "key section."

The provisions of NRS 392.033(2) and NRS 392.125(3) are in direct conflict where an eighth grade student fails to meet requirements for promotion after having been retained in eighth grade for a year. Under these circumstances, NRS 392.033(2) prohibits his promotion and NRS 392.125(3) prohibits his retention in the eighth grade.

Where two statutes on the same subject are in conflict, the more recent statute controls over the earlier statute. *Laird v. Nevada Pub. Employees Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982). Therefore, the board of trustees of a school district can prohibit a pupil from being promoted to high school even if such decision requires retention of the pupil in the eighth grade more than one time.

#### CONCLUSION

A pupil who reaches the eighth grade and does not complete the requirement for promotion to high school must not be promoted to high school. The pupil who does not complete the requirements after having been retained for one year must continue to be retained and not promoted to high school.

The requirement of NRS 392.125 that a pupil may be retained in a grade only one time is applicable to all other grades.

FRANKIE SUE DEL PAPA  
Attorney General

By: MELANIE MEEHAN-CROSSLEY  
Deputy Attorney General

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AGO 99-30 MOBILE HOME PARKS; LANDLORD AND TENANT: This opinion construes statutory provisions of NRS 118B regarding a landlord's duty to maintain driveways, trim trees, and charge late fees.

Carson City, September 7, 1999

Renee Diamond, Administrator, Department of Business and Industry,  
Manufactured Housing Division, 2501 East Sahara Avenue, #204, Las Vegas, Nevada 89104

Dear Ms. Diamond:

You have asked the following questions regarding chapter 118B of NRS, Landlord and Tenant: Mobile Home Parks.

QUESTION ONE

Is the landlord's obligation as set forth in NRS 118B.090(4) to maintain driveways in a mobile home park limited to driveways furnished by the landlord?

ANALYSIS

NRS 118B.090(4) states that "The landlord shall . . . [m]aintain all driveways within the park and sidewalks adjacent to the street." You have asked how this

obligation applies to situations where the park has not furnished a driveway as part of the rental agreement and the tenant has constructed a driveway or the tenant has extended or altered an existing driveway furnished by the landlord.

The term “driveway” is not defined in the statute and therefore should be used in its ordinary sense if possible. *Dumaine v. State*, 103 Nev. 121, 125, 734 P.2d 1230, 1233 (1987). Webster’s dictionary defines “driveway” as a “private road giving access from a public way to a building on abutting grounds.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 384 (1990). The ordinary sense of “driveway” does not depend on who constructed, furnished, or altered it. However, a court will expand or restrict the ordinary or common meaning of a word used in a statute in order to give effect to all parts of the statute or to avoid an absurd or manifestly unjust result. *In re McGregor*, 56 Nev. 407, 419, 55 P.2d 10, 12 (1936); *Escalle v. Mark*, 43 Nev. 172, 176-77, 183 P. 387, 388-389 (1919). It is also appropriate to consider the context in which the word is used and the spirit of the law. *State v. Webster*, 102 Nev. 450, 453-54, 726 P.2d 831, 833 (1986). The controlling factor in construing a statute is to give effect to the intent of the legislature in enacting it. *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993).

The provisions of NRS chapter 118B are intended to balance the interests of tenants in mobile home parks with the interests of their landlords. For example, landlords are restricted in requirements they can impose on tenants with regard to the construction of capital improvements, but some requirements are authorized. A landlord’s rules and regulations may not “*arbitrarily* . . . require any capital improvement by the tenant which is not specified in the rental agreement or *unreasonably require* a change in any capital improvement made by the tenant and previously approved by the landlord *unless* the landlord can show that it is in the best interest of the other tenants.” NRS 118B.100(2)(d) (emphasis added). A landlord may require a tenant to landscape and maintain his lot, but the requirements must be “reasonable” and the landlord must “advise the tenant in writing” of the requirements. NRS 118B.120(1)(a). A tenant may not construct any improvement on a mobile home or mobile home lot requiring a permit by a local government unless the landlord has first approved the construction, NRS 118B.125, but if the standards for approval are set forth in the park’s rules and regulations, they must be “[u]niformly enforced

against all tenants in the park . . .” NRS 118B.100(2)(e).

Applying the term “driveway” in NRS 118B.090(4) without reference to the landlord’s relationship to the driveway can, in our opinion, lead to absurd and unreasonable results. It would be unreasonable, for example, to require the landlord to maintain a driveway that the tenant improperly constructed without the landlord’s approval as required by NRS 118B.125. Given the spirit of the law to balance the interests of landlord and tenant, we believe the Legislature intended the term “driveway” to be used in a more restricted sense.

Considering the context of the landlord’s responsibility for driveways also leads to the conclusion that the obligation is not unlimited. NRS 118B.090 is entitled “Responsibility of landlord for common areas, facilities, appliances, mail boxes, driveways and sidewalks.” The subsection containing the obligation to maintain driveways also contains an obligation to maintain “sidewalks adjacent to the street.” NRS 118B.090(4). A common thread of these obligations is that they pertain to items that are common to the park as a whole or amenities the landlord has furnished to all tenants. Construing the landlord’s obligation with respect to driveways as limited to driveways the landlord constructed or provided to tenants is consistent with this context and the spirit of the law.

#### CONCLUSION TO QUESTION ONE

A landlord’s obligation as set forth in NRS 118B.090(4) to maintain the driveways in a mobile home park is limited to driveways furnished by the landlord. The landlord is not obligated to maintain driveways that have been altered or extended by the tenant.

#### QUESTION TWO

Does a provision in an existing rental agreement or lease whereby the tenant agrees to trim trees on the tenant’s lot excuse the landlord from the obligation to trim the trees as provided in Act of June 9, 1999, ch. 592, § 2, 1999 Nev. Stat. 3190?

## ANALYSIS

The 1999 Session of the Nevada Legislature approved Assembly Bill 471 which included the following provision amending NRS 118B.120, effective October 1, 1999, regarding the landlord's obligation to trim trees in the park: "The landlord shall trim all the trees located within the park and dispose of the trimmings from those trees absent a voluntary assumption of that duty by the tenant for trees on the tenant's lot." Act of June 9, 1999, ch. 592, § 2, 1999 Nev. Stat. 3190. You have asked whether a tenant may be deemed to have voluntarily assumed the duty to trim trees on his lot if he had previously agreed in a rental agreement or lease that he would trim the trees.

In other contexts, an act is not deemed to be "voluntary" unless one is in possession of all relevant information. For example, one cannot voluntarily assume a risk of which one has no knowledge. *Greyhound Corp. v. Blakley*, 262 F.2d 401, 410 (9<sup>th</sup> Cir. 1958). Similarly, one cannot knowingly and voluntarily waive one's constitutional right to assistance of legal counsel unless one is first informed of the right to such assistance. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

At the time the tenant agreed in a previously executed rental agreement or lease to trim the trees on his lot, the landlord's statutory obligation to assume that duty did not exist. Since the tenant could not have known that he had the right to refuse to agree to trim the trees on his lot, a tenant under those circumstances cannot be said to have voluntarily assumed that duty.

## CONCLUSION TO QUESTION TWO

A tenant is not deemed to have voluntarily assumed the duty to trim the trees on his lot by virtue of a provision in a rental agreement or lease executed prior to October 1, 1999, the effective date of Act of June 9, 1999, ch. 592, § 2, 1999 Nev. Stat. 3190, which imposes a statutory obligation on a landlord to trim all trees located within a mobile home park. Since such a provision is inconsistent with the tenant's rights under NRS chapter 118B, it is void and unenforceable absent evidence that the tenant knowingly and voluntarily relinquished that right.

QUESTION THREE

How does the landlord's right set forth in NRS 118B.140(2) to charge a fee of \$5 per day for late payment of rent apply to provisions in month-to-month tenancy agreements and long-term leases that set the late fee at \$1 per day?

ANALYSIS

Assembly Bill 471, § 3, amends NRS 118B.140, effective October 1, 1999, to raise the amount a landlord in a mobile home park may charge tenants for late payment of rent from \$1 to \$5 per day. Act of June 9, 1999, ch. 592, § 3, 1999 Nev. Stat. 3191. On October 1, 1999, NRS 118B.140 will state, in pertinent part:

The landlord or his agent or employee shall not:

....

2. Charge or receive:

....

(f) Any fee for a late monthly rental payment within 4 days after the date the rental payment is due or which exceeds \$5 for each day, excluding Saturdays, Sundays and legal holidays, which the payment is overdue, beginning on the day after the payment was due. Any fee for late payment of charges for utilities must be in accordance with the requirements prescribed by the public utilities commission of Nevada.

Based on the previous limitation on late fees, many month-to-month tenancy agreements and long-term leases provide for a \$1 per day late payment fee. You have asked whether landlords may unilaterally increase the late fee in cases where the landlord and the tenant have previously agreed in a month-to-month tenancy or long-term lease to a \$1 late payment fee.

NRS 118B.140(2)(f) creates a right on the part of the tenant not to be charged more than \$5 per day for late payment of rent but does not require the late fee be set at the maximum. Agreements between the landlord and tenant

providing for a \$1 per day charge for late payment of rent are not inconsistent with the provisions of NRS chapter 118B and may be enforced according to their terms. On the issue of increases in rent and other charges, however, long-term leases are treated differently than month-to-month tenancies under NRS chapter 118B.

NRS 118B.150(1) provides in pertinent part:

The landlord or his agent or employee shall not:

1. Increase rent or *additional charges* unless:

....

(c) Written notice advising a tenant of the increase is received by the tenant 90 days before the first payment to be increased and written notice of the increase is given to prospective tenants before commencement of their tenancy. In addition to the notice provided to a tenant pursuant to this paragraph, if the landlord or his agent or employee knows or reasonably should know that the tenant receives assistance from the fund created pursuant to NRS 188B.215, the landlord or his agent or employee shall provide to the administrator written notice of the increase 90 days before the first payment to be increased. [Emphasis added.]

This statute authorizes the landlord to increase the charges for late payment of rent in month-to-month tenancies provided the minimum 90 days written notice is given to tenants. The statute's provisions relating to increases of rent or other charges does not apply, however, to long-term leases. *Beenstock v. Villa Borega Mobile Home Parks*, 107 Nev. 979, 823 P.2d 270 (1991). Any limitations on charges for late payment of rent found in long-term leases are enforceable according to their terms and may not be increased unless the tenant and the landlord agree to a new lease or an amendment to the existing lease.<sup>1</sup>

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<sup>1</sup> We have assumed that long-term leases impose a flat late payment charge of \$1, the amount previously authorized by NRS 118B.140(2)(f). If the lease took into account possible changes in the statute by stating, for example, that a late payment fee will be imposed "in the maximum amount authorized by statute," the increased fee would be authorized by the terms of the lease itself.



CONCLUSION TO QUESTION THREE

A landlord may increase the charge for late payment of rent to the \$5 per day authorized by NRS 118B.140 for a month-to-month tenancy provided the landlord gives the tenant written notice of the increase at least 90 days before its implementation in accordance with NRS 118B.150(1)(c). A landlord may not increase the charge for late payment of rent for a tenant with a long-term lease in any manner not authorized by the lease unless the tenant agrees to a new lease or an amendment to the existing lease.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

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AGO 99-31 VOTERS/VOTING; GOVERNMENT-LOCAL; MAYORS: A city of the second class may not, by procedural rule, expand the voting power of its mayor beyond that which is expressly granted by statute.

Carson City, September 8, 1999

The Honorable Terrance P. Marren, Mesquite City Attorney, 10 East Mesquite Boulevard, Mesquite, Nevada 89027

Dear Mr. Marren:

You have requested an opinion from this office regarding the voting power of a mayor in a city of the second class (more than 5,000 and less than 20,000 inhabitants) in Nevada.

QUESTION

May a city of the second class expand the voting power of its mayor by procedural rule in consideration of the express language found in NRS 266.200 and NRS 266.240?

ANALYSIS

You cited two statutes in the analysis you provided to this office, NRS 266.200 and NRS 266.240. NRS 266.200 states in pertinent part:

1. The mayor shall:

(a) Preside over the city council when in session, and shall preserve order and decorum among the members and enforce the rules of the council and determine the order of business, subject to those rules and appeal to the council.

(b) Not be entitled to a vote except in case of a tie, when he shall have a casting vote, except as otherwise expressly provided in this chapter.

2. The mayor may exercise the right of veto upon all matters passed by the council, and it shall require a seven-ninths vote of the whole council in cities of the first class, a four-fifths vote of the whole council in cities with a council composed of five members, and the unanimous vote of the whole council in cities with a council composed of three members, to pass any matter receiving the mayor's veto.

NRS 266.240 states, "The council shall determine its own rules of procedure, may punish its members for disorderly conduct, and, with the concurrence of two-thirds of the members of the council, may expel a member for cause."

NRS 266.200(1)(b) restricts the voting power of a mayor of a city of the second class to two instances: in the case of a tie, and if the Legislature expressly provides in chapter 266 that a mayor may vote. An example of the latter is found in NRS 266.225 where the mayor is authorized to vote to fill a vacancy occurring in the office of councilman if the city council decides not to have a special election. In addition, NRS 266.200(2) grants the mayor the right of veto on all matters passed by the council.

In your opinion request letter, you raise the question of whether NRS 266.240 authorizes the Mesquite City Council to adopt rules of procedure, such as *Roberts Rules of Order*, which would permit the mayor to vote in circumstances other than those expressly set forth in NRS 266.200(1)(b). We agree with your conclusion that NRS 266.240 does not give the Mesquite City Council such authority.

As the Nevada Supreme Court stated in *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, 140 (1876), “a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication.” Applying this general rule to municipal officers means they have only such powers as are expressly granted by statute or those that are necessarily to be implied from those granted.

The ability of a city council to expand the voting rights of a mayor is not such an implied power. Only the Legislature has this power to expand the situations in which a mayor may vote. NRS 266.240 gives a city council the authority to determine its own rules of procedure, but adopting rules that would allow a mayor to vote in situations different from those enumerated in chapter 266 is beyond the scope of rules of procedure.

CONCLUSION

A city of the second class may not, by procedural rule, expand the voting power of its mayor beyond that which is expressly granted by statute.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

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AGO 99-32 STATE BOARD OF EQUALIZATION; TAXATION; PROPERTY (FEDERAL): Both the tenants and DZHC have interests or uses in the housing that would allow taxation of those interests or uses. Accordingly,

the State Board of Equalization can determine which of these two, or both, have an interest or use that, once segregated and identified, has value and place a valuation on that interest or use.

Carson City, September 13, 1999

David P. Pursell, Secretary, State Board of Equalization, 1550 East College Parkway, Suite 115, Carson City, Nevada 89706-7921

Dear Mr. Pursell:

You have asked whether the State Board of Equalization (State Board) has jurisdiction and the legal authority to determine who the proper taxpayer(s) is in a case before the State Board involving the lease and beneficial use of federally owned property. The case involves the issue of whether the proper taxpayer is the private contractor who manages and maintains the housing at an Army depot, or the tenants occupying this housing. If the State Board does have jurisdiction and the authority to make this determination, you have also requested an analysis of the reasoning necessary to determine the proper taxpayer. Your question is raised because of the unusual circumstance of a dispute over who the proper taxpayer is under NRS 361.157, the statute that allows taxation of a leasehold interest, possessory interest, beneficial interest or beneficial use of otherwise tax-exempt property.

#### FACTUAL BACKGROUND

Day & Zimmerman Hawthorne Corporation (DZHC) is a private contractor that manages and maintains the real and personal property at the Hawthorne Army Ammunition Depot (Depot) in Hawthorne, Nevada, under a contract DZHC has with the United States Army. For the 1998-1999 tax year, the Mineral County Assessor assessed property taxes against DZHC on two parcels: APN 7-999-21, which is the majority of the property on the Depot; and APN 7-999-22, which is the parcel containing the property that consists of the Depot's housing units. At a hearing before the State Board on August 20, 1998, evidence and testimony was submitted by the Assessor and DZHC regarding the valuation of APN 7-999-21 and DZHC's tax liability for APN 7-999-22. For

the parcel identified by APN 7-999-21, DZHC did not dispute its liability for its beneficial use of that federally owned property it manages and maintains, as long as the property was listed in a settlement agreement between DZHC, the Army and Mineral County (Settlement Agreement). DZHC did dispute its liability for taxes on the parcel identified by APN 7-999-22, which contains the housing units on the Depot.

In the case involving APN 7-999-22, the State Board requested that DZHC provide further evidence by submitting copies of the tenants' actual leases for the housing units. Transcript of August 20, 1998, State Board Hearing at 278-280, 288-289. On September 30, 1998, the date to which the hearing on APN 7-999-22 was continued, the State Board took up the matter again and reviewed the copies of leases provided by DZHC. The evidence showed that the leases were between the tenants and the Army, and that DZHC was not a direct party to the lease contracts. DZHC stated that it collected the rent, deposited the money with the government, and then the money comes back to DZHC's housing organization from the government. DZHC uses that money to offset costs for maintenance and upkeep of the facility. Transcript of September 30, 1998, State Board Hearing at 46. DZHC also stated that for 1997, the portion of its award fee, base fee, and incentive fee, from its entire contract with the Army for management and maintenance of the Depot, that is attributable to the management and maintenance of the housing was \$30,500. Transcript of September 30, 1998, State Board Hearing at 44. At the conclusion of the public hearing on this matter, the State Board voted that the proper taxpayer was the tenants and the State Board instructed the Assessor to establish individual tax bills for the tenants' possessory interests. Transcript of September 30, 1998, State Board Hearing at 89-90.

On May 27, 1999, a representative for the tenants appeared before the State Board on the issue of liability of the tenants for the tax on the housing units at the Depot, for the 1999-2000 tax year, and on the valuation of the tenants' interests. Testimony given at this hearing was that the proper taxpayer was not the tenants. The State Board, realizing that DZHC needed to be present if its rights were going to be affected by the State Board's decision, continued the hearing on this matter until such time as representatives for both DZHC and the tenants could be present before the State Board. Transcript of May 27, 1999 State Board Hearing at 191-192. On August 24, 1999, the State Board met to

hear this continued case. At that time, the State Board felt that it did not have sufficient legal guidance on the unusual circumstances of a dispute as to who the proper taxpayer was under a relatively new statute that it had not been called upon to interpret in this fashion before. Accordingly, the State Board requested this opinion.

#### QUESTION ONE

Does the State Board have jurisdiction to hear a matter which involves a dispute regarding who the proper taxpayer is under NRS 361.157?

#### ANALYSIS

The State Board's principal duty is to equalize property valuations in this state. NRS 361.395. The State Board also reviews the tax rolls of the various counties and raises or lowers the taxable value of the property, thus equalizing and establishing the taxable value of the property, for the purpose of the valuations established by all the county assessors, county boards of equalization, and the Nevada Tax Commission, of any class or piece of property in whole or in part in any county. *Id.* The State Board also has the duty of hearing all appeals of decisions by county boards of equalization. NRS 361.400.

Equalizing property means making sure that similarly situated taxpayers are treated the same, that a uniform and equal rate of assessment and taxation, and a just valuation for taxation of all property, real, personal and possessory, is provided. Nev. Const. art. 10, § 1. Just principles of valuation are those which, in their application, will result in distributing the burden of taxation in due proportion among owners of all different kinds of property. *State v. Central Pac. R.R.*, 10 Nev. 47, 64 (1875). Part of the process of equalization is determining whether property has been properly valued, and that property is not escaping taxation. The State Board does this by hearing cases brought by taxpayers who claim their property has been over-valued or excessively valued by reason of the under-valuation for taxation purposes of someone else's property, or by reason of any such property not being so assessed. *See* NRS 361.355. Accordingly, just valuation would require the taxation of all different types of property, properly taxable under state law, and to allow such property

to avoid taxation would be a violation of the Nevada Constitution, and an abrogation of the State Board's duties.

While there is no express statutory language granting the State Board the authority to determine who the correct taxpayer is, the State Board has all of the implied powers necessary to carry out its duties to make sure property is taxed uniformly and equally and that property lawfully taxable does not escape taxation. An agency is impliedly clothed with the power to construe the statutes under which it operates. *See SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993); *Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983); *Clark Co. Sch. Dist. v. Local Gov't Employee-Management Relations Board*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974). "It is the universal rule of statutory construction that wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 629-630, 446 P.2d 981, 985 (1968).

Accordingly, the State Board has the power to interpret statutes regarding the assessment of taxes against real and personal property, weigh facts presented to it in connection with such taxes, and take what other steps are necessary to reach the goal of equalizing and establishing the taxable values of property in this State. If it is necessary to determine who the proper taxpayer is in relation to a piece of property, and such a determination can be made by reference to the Nevada statutes on property taxation, which the State Board has authority to interpret, and by weighing the evidence presented to the State Board, then the State Board has the jurisdiction and authority to make such a determination.

In this case, the statute the State Board is being asked to interpret, NRS 361.157, is one involving taxation of real property; a statute within the State Board's clear authority. NRS 361.157 provides, in applicable part:

1. When any real estate or portion of real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit or as a residence, or both, the

leasehold interest, possessory interest, beneficial interest or beneficial use of the lessee or user of the property is subject to taxation to the extent the:

- (a) Portion of the property leased or used; and
- (b) Percentage of time during the fiscal year that the property is leased by the lessee or used by the user, can be segregated and identified. The taxable value of the interest or use must be determined in the manner provided in subsection 3 of NRS 361.227.

The State Board can also rely on the decision of the United States Ninth Circuit Court of Appeals in *United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999), which upheld the constitutionality of NRS 361.157. Application of this statute to a private contractor similar to DZHC was upheld as constitutional. This type of tax on a beneficial use by a private contractor using federally owned property is imposed by other jurisdictions and has been consistently upheld.

The United States Supreme Court found as far back as 1958 that a tax on the beneficial use of federally-owned property by a private contractor, when used in connection with the private contractor's commercial activities, is constitutional. See *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. Boyd*, 378 U.S. 39 (1964); *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958). In *United States v. New Mexico*, and also in *Arizona Dep't of Revenue v. Blaze Constr. Co.*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 957 (1999), the Supreme Court set forth the "clear rule" that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. *United States v. New Mexico*, 455 U.S. at 740-741; *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 119 S. Ct. at 960. The Ninth Circuit found that NRS 361.157 does not impose a levy on the United States, and that private contractors operating much like DZHC does are not instrumentalities of the United States. See *United States v. Nye County*, 178 F.3d at 1085.



Two cases where a taxing statute has not been upheld as constitutional are *United States v. Colorado*, 627 F.2d 217, 220 (10th Cir. 1980), *aff'd mem. sub nom. Jefferson County v. United States*, 450 U.S. 901 (1981), and *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988). However, the taxing statutes at issue were ones where the language of the statute imposed the tax on the property, not on the *use* of the property. The statutes at issue in these two cases were almost identical to Nevada's prior statute which was also found to unconstitutional by the Ninth Circuit in *United States v. Nye County*, 938 F.2d 1040 (9th Cir. 1991). However, the statute at that time had language that stated it was the property being taxed, not the beneficial use. Based on that decision, the Nevada Legislature amended the statute in 1993 to tax the leasehold interest, possessory interest, beneficial interest or beneficial use, instead of the property. It is this statute that is in effect today (with minor amendments not relevant to this analysis), and it is the current statute that the Ninth Circuit Court of Appeals upheld as constitutional in 1999. *United States v. Nye County*, 178 F.3d at 1084. The Ninth Circuit found that the change in language shifting the subject of the taxes from the property itself to the beneficial use of that property was sufficient to keep the tax from being unconstitutional. *Id.* at 1084-1085.

The Supreme Court has also found that a leasehold or possessory interest held by tenants, even when federal employees, can also be taxed. *United States v. County of Fresno*, 429 U.S. 452 (1977).<sup>2</sup> The Supreme Court found that Forest Service employees' possessory interests in housing provided by the Forest Service on Forest Service land, even where residence in that housing was a requirement of employment, were properly taxable. *Id.* at 457. The Supreme Court found that the employees did not occupy the houses solely for the benefit of the Forest Service and that because the occupancy of the Forest Service houses constitutes part of the employees' compensation for services performed, the government was conceding that the occupancy was of personal benefit to the employee. *Id.* at 464-466. The Court also found that the

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<sup>2</sup> This is not to indicate that federal employee tenants' interests are taxable under Nevada's statute. NRS 361.157(2)(h) exempts property leased, loaned or made available to a public officer or employee, incident to or in the course of public employment, from the taxation provisions of NRS 361.157(1).

employees' possessory interest in the housing was unquestionably of some value. *Id.* at 466.

Accordingly, the State Board has the authority to enforce as well as interpret NRS 361.157 as it might apply to either or both of DZHC and the tenants of the Depot housing. With the authority to interpret the appropriate statute, and the decision by the Ninth Circuit that the statute is constitutional and its application to a private contractor like DZHC is constitutional, as well as a Supreme Court decision that a tenant's interest in federal housing can be constitutionally taxed, it is clear that the State Board has the authority to determine the issue of who the proper taxpayer is under NRS 361.157. Determining the issue of who is the proper taxpayer is part of the State Board's duties of equalizing and establishing property valuations, to make sure that all those who have an interest in or use of otherwise tax-exempt property are taxed uniformly.

#### CONCLUSION TO QUESTION ONE

The State Board has the jurisdiction and authority to determine who the appropriate taxpayer is with regard to parcel APN 7-999-22 at the Hawthorne Army Ammunition Depot and to hear the valuation evidence once the proper taxpayer(s) has been determined.

#### QUESTION TWO

Who is the proper taxpayer between DZHC and the tenants, and what is the reasoning necessary to determine this?

#### ANALYSIS

The controlling statute, NRS 361.157, must be looked at step-by-step and element by element to determine who is the proper taxpayer. The required elements are as follows: (1) the proper taxpayer is the one who leases, or otherwise has available the use of the real estate or portion of real estate which is otherwise tax exempt; (2) the real estate must be used in connection with a business conducted for profit or as a residence, or both; and, (3) it must be

possible to segregate and identify the portion of the property leased or used, and the percentage of time during the fiscal year that the property is leased or used, by the party having a leasehold interest, possessory interest, beneficial interest or beneficial use of the property. *See* NRS 361.157

Taking the tenants first, they do lease the real estate and they do use it as a residence, so the first two elements are met. The next step, then, is to determine whether it is possible to segregate and identify the portion of the property leased and the percentage of time during the fiscal year that the property is leased by that tenant. If these elements can be met, then the leasehold interest can be taxed, and the State Board could then turn to the issue of valuation. The tenants obviously use a portion of the property and do so for a percentage of time during the tax year. The fact that while the tenants have leases with a term of one year, the leases are terminable at the discretion of the Army Commander, without the tenants having a reciprocal termination right, is a factor going to valuation.

DZHC has available to it the “use” of the real estate in the sense that DZHC is operates and manages the housing portion of the Depot, the same as the rest of the Depot, for a fee. DZHC has an overall agreement for the management and maintenance of the entire Depot, for which it gets paid under a cost plus fee arrangement. Numerous cases allow for taxation of the beneficial use of private contractors using federal property under a cost plus fee contract, regardless of what type of property is being managed and maintained. *See United States v. New Mexico*, 455 U.S. at 741; *United States v. Boyd*, 378 U.S. at 43; *United States v. City of Detroit*, 355 U.S. at 485; *United States v. Township of Muskegon*, 355 U.S. at 485; *United States v. Nye County*, 178 F.3d at 1085. DZHC’s contract includes the housing, and therefore, DZHC’s beneficial use of the housing, for which it receives compensation under the contract under the cost plus fee arrangement, is subject to taxation.

DZHC has agreed that it has a beneficial use of the federal property that was listed in the Settlement Agreement between DZHC, Mineral County and the Army. This indicates that DZHC recognizes the ability of the county to tax DZHC for the beneficial use of federally-owned property. DZHC’s dispute of its liability for taxation of the beneficial use of the housing units then appears

contradictory, as the housing units are as much a part of the contract DZHC has with the Army as is any of the property referred to in the Settlement Agreement. Additionally, other than for the purpose of DZHC's recognition of the ability of the county to tax DZHC's beneficial use of federal property, the Settlement Agreement is irrelevant.

First, the housing units are not covered by the Settlement Agreement. However, this should not be construed to mean that the housing should be treated differently than the other property. The Settlement Agreement is not controlling as to the taxation of DZHC's beneficial use of *any* of the property at the Depot for any tax year other than 1996 to 1997, the original tax year for which the parties settled the amount to be taxed for that year. The Settlement Agreement, however, attempts to limit the property that can be taxed in future tax years as well. Setting a limit on property valuation for ensuing years is a waiver of the constitutional right and duty of the county to collect taxes for those years, and a waiver of the right and duty of the assessor to make annual assessments of property in each of those years, and is therefore illegal and void. *See Snowpine Village Condominium Bd. of Managers v. Town of Great Valley*, 545 N.Y.S.2d 1004, 1006-1008 (N.Y. 1989). Additionally, such an agreement is an attempt to contract away the power of taxation. *Id.* They may not enter into stipulations which are against sound public policy. *See Daniels v. National Home Life*, 103 Nev. 674, 677, 747 P.2d 897 (1987); and, *Western Cab Co. v. Keller*, 90 Nev. 240, 244, 523 P.2d 842, 845 (1974). Accordingly, the Settlement Agreement is illegal and void, and should not be considered by the State Board in any of its determinations regarding this case.

DZHC has stated that it receives costs plus fees for management and maintenance of the real estate that makes up the housing. *See* Transcript of September 30, 1998, State Board Hearing at 44. The management and maintenance of the housing is really the same as DZHC's management and maintenance of the rest of the Depot, DZHC is just putting it to a different "use." In *United States v. Nye County*, the Ninth Circuit examined whether a distinction should be made as to what type of use was made of federal property by a private contractor. The Ninth Circuit recognized that a contractor who merely performs maintenance work on a government office building uses that building to a less substantial degree than one who uses the facilities to

manufacture goods. *United States v. Nye County*, 178 F.3d at 1085. The same argument could be made that DZHC, by merely performing maintenance work and managing the housing units, uses the housing to a less substantial degree than the rest of the property at the Depot. However, the Ninth Circuit refused to make such a distinction. The Ninth Circuit's reasoning was that attempting to locate government contractors on a goods/services continuum is a slippery task that could well lead to different tax treatment of the different contractors operating at the same facility, or even different treatment for different activities by the same contractor. *Id.*

That possible scenario is just what would happen in this case if DZHC's management and maintenance of the housing was treated differently than its management and maintenance of the rest of the Depot. Even though the housing units comprise a separate assessor's parcel than the rest of the Depot, *both* APN 7-999-21 and 7-999-22 are the property under the contract by which DZHC manages and maintains the Depot. It does not make sense to have a different tax treatment of different activities by the same contractor under the same contract. Furthermore, DZHC does derive an additional beneficial use of the housing units by having them available to its employees. Only active military employees of the Army and civilian employees of the DZHC may live in the housing units. Accordingly, the first element has been met as to DZHC having the use of the property available to it.

The next element to examine is whether DZHC uses the property for a business conducted for profit. DZHC admits it is reimbursed and receives a fee under the cost plus fee arrangement. Testimony received before the State Board was that DZHC could separate out the approximate percentage of its fee attributable to managing the housing, and in 1997, that figure was \$30,500. Transcript of September 30, 1998, State Board Hearing at 44. DZHC is not managing and maintaining the plant for altruistic reasons, but is doing so as a part of its business conducted for a profit. Therefore, DZHC's use of the housing property meets this element as well.

The next element then is whether the portion of the property DZHC uses, and the percentage of time during the fiscal year DZHC uses the property, can be segregated and identified. The facts of the case indicate that DZHC has the

year round responsibility and right to receive fees for management and maintenance of the housing. Therefore, it appears that DZHC uses all of the housing and uses it year round. The State Board can make a determination to what extent, if any, the tenants' leasehold interest affects DZHC's percentage of time for use of the property, for purposes of valuation.

With both DZHC and the tenants as possible taxpayers, the questions left to the State Board are what are the values of the tenants' interest and DZHC's use, based on the percentage of use and portion of property used by each taxpayer. There are cases that have held that the value of the property itself being put to a beneficial use is a reasonable value to be used for the value of the beneficial use. *See, e.g., United States v. County of San Diego*, 53 F.3d 965, 969 (9th Cir. 1995); *United States v. Boyd*, 378 U.S. at 44; *United States v. City of Detroit*, 355 U.S. at 470. However, the Sixth Circuit has held that the amount of the tax may not exceed the value of the property's use to the contractor. *See United States v. Hawkins County*, 859 F.2d at 23. The Supreme Court has hinted at the same. *See United States v. New Mexico*, 455 U.S. at 741 n. 14. Therefore, the State Board can be guided by these decisions, and if it finds that DZHC's use or the tenants' interest have value, make sure that the valuation does not exceed the value of the interest or use.

#### CONCLUSION TO QUESTION TWO

Both the tenants and DZHC have interests or uses in the housing that would allow taxation of those interests or uses. Application of the statute to the facts presented to the State Board leads to this conclusion. Accordingly, the State Board can determine which of these two, or both, have an interest or use that once segregated and identified has value, and place a valuation on that interest or use.

FRANKIE SUE DEL PAPA  
Attorney General

By: NORMAN J. AZEVEDO  
Senior Deputy Attorney General

AGO 99-33 PUBLIC RECORDS; BOARD OF PSYCHOLOGICAL EXAMINERS: The mere fact that a document is maintained by a public agency does not make it a public record. NRS chapter 641 specifies certain records which are deemed to be confidential, privileged, or private. With respect to those records that are not expressly deemed confidential by statute, the agency must weigh the public interest in disclosure against the public interest in nondisclosure on a case-by-case basis.

Carson City, October 12, 1999

Louis F. Mortillaro, Ph.D., State of Nevada, Board of Psychological Examiners,  
Post Office Box 2286, Reno, Nevada 89505-2286

Dear Dr. Mortillaro:

You have asked for an opinion of the Attorney General regarding the following:

QUESTION

What information in a licensee's file relating to a disciplinary proceeding before the Nevada State Board of Psychological Examiners (NBPE) is public record under the Nevada Public Records Law (NRS chapter 239)?

ANALYSIS

NRS 239.010(1) provides in pertinent part: "All public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, . . ." The term "governmental entity" includes a board of the State of Nevada. NRS 239.005(4)(b).

Although NRS 239.010 requires all public records to be open to public inspection, it does not define the term "public records." The statute does specify, however, that it only applies to "public" records of an agency not otherwise confidential.

Chapter 641 of the Nevada Revised Statutes classifies certain records of the NBPE as either public or confidential. NRS 641.090(1) and (2) provide that the following NBPE records are deemed to be public and must be open to inspection: (a) a record of all meetings and proceedings; (b) a record of all violations and prosecutions under the provisions of this chapter; (c) a record of all examinations of applicants; (d) a register of all licenses; (e) a register of all holders of licenses; and (f) an inventory of the property of the NBPE and of the state in the NBPE's possession.

Other provisions of the statute identify certain records of the NBPE which are confidential: Personnel records of applicants may be kept confidential (NRS 641.090(3)); dismissed consumer complaints are confidential (NRS 641.255); and testimony or reports of a psychologist or physician conducting an examination pursuant to NRS 641.272 are privileged communications. NRS 641.272(2).

Additionally, one of the authorized disciplinary actions the NBPE can take against a licensee pursuant to NRS 641.240 is to administer a public or a *private* reprimand. By its very terms, a private reprimand is not public. "Private" is defined in WEBSTER'S NEW WORLD DICTIONARY 468 (1990) as "not open to or controlled by the public," "for an individual person," and "secret." When the language of a statute is clear on its face there is no room for interpretation. *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986). If a private reprimand was interpreted as not being confidential, then it would be identical to a public reprimand. It is a long-standing rule of statutory construction that every word and clause should be given effect and none rendered meaningless. *State ex rel. City of Las Vegas v. County of Clark*, 58 Nev. 469, 481, 83 P.2d 1050, 1054 (1938). The Legislature clearly intended that there be two types of reprimands, one which is public and open to inspection and one which is confidential. Therefore, if a licensee's disciplinary file contains a private reprimand, it is not public record.

The mere fact that a document is maintained by a public agency does not make it a public record: "It is the nature and purpose of the document, not the location where it is kept, which determines its status." Op. Nev. Att'y Gen. No. 86-7 (May 1986). Therefore, with respect to any other items not specifically



declared by law to be confidential, this office has balanced the public interest in disclosure with the public interest served by nondisclosure on a case-by-case basis. Op. Nev. Att’y Gen. No. 86-7 (May 1986); *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990) (applying the balancing test to determine whether certain criminal investigative files are subject to public disclosure). Where there is insufficient justification to maintain the confidentiality of the document, the Nevada Public Records Law should be construed in favor of inspection. Op. Nev. Att’y Gen. No. 86-7 (May 1986).

#### 1. Consumer Complaint

The NBPE’s jurisdiction is invoked by filing a consumer complaint. All consumer complaints filed with the NBPE are confidential pursuant to NRS 641.255, except for the purposes of conducting an investigation. If the NBPE dismisses the consumer complaint, it remains confidential and, therefore, is not a public record. However, if the NBPE decides to proceed with disciplinary action, “confidentiality is no longer required.” NRS 641.255. Since the statute does not specify that the consumer complaint is public record following a determination to proceed with disciplinary action, the NBPE has the discretion to keep the complaint confidential. In applying the balancing test to a consumer complaint of the State Contractor’s Board, we stated in Op. Nev. Att’y Gen. No. 86-7 (May 1986), “absent an express confidentiality statute, the interest of the public in gaining access to such complaints outweighs any interest the board may assert in maintaining such documents as confidential.” Given the great weight of the public interest in disclosure of complaints filed with the NBPE, it is the NBPE’s policy to consider the consumer complaint public record once the NBPE decides to proceed with disciplinary action. However, in some cases the NBPE may conclude that the public interest in keeping the complaint confidential outweighs the public interest in disclosure. For instance, the NBPE might conclude in certain circumstances that the protection of the complainant’s privacy due to the sensitive nature of the complaint, and the need to ensure public candidness in reporting potential misconduct to the NBPE, outweighs the public’s interest in gaining access to the complaint.

## 2. Investigation

Upon receipt of a consumer complaint, an investigation ensues. Part of conducting an investigation may include reviewing psychological records of patients, documentary evidence, and expert reports. The licensee's file may also contain correspondence between the licensee and the NBPE regarding the complaint. Since NRS chapter 641 does not specify that investigation materials are confidential, such materials would generally be public records. However, if documents were obtained from another state board or agency that does have a statute providing for confidentiality of investigation materials, these documents remain confidential in the NBPE's possession. Additionally, all patient records obtained during the investigation are confidential. NRS 629.061(4).

There may also be a constitutional right of privacy implicated in some of the information in the investigative records. Essential to a constitutional claim of a right of privacy is the existence of a legitimate expectation of privacy. *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 458 (1977). The NBPE could find a legitimate expectation of privacy in investigative records which do not lead to filing of formal charges and the complaint is dismissed. NRS 641.255 requires that dismissed complaints are confidential and, therefore, an individual would have a legitimate expectation of privacy in keeping investigative materials confidential as well.

## 3. Formal Charges and Proceedings

The record of all violations and prosecutions consists of the formal charges and Board orders which are matters of public record and must be open to public inspection. Op. Nev. Att'y Gen. No. 90-15 (October 1990). The record of all meetings and proceedings includes the agenda, minutes, audiotape, transcript (if requested), and Board order from any meetings or disciplinary hearings conducted. However, if the NBPE closed a portion of the meeting or hearing from the public to consider the character, alleged misconduct, professional competence or physical or mental health of a person, the minutes and audiotape related to the closed session are not public record. NRS 241.035(2). Additionally, agenda support materials provided to the NBPE pursuant to a nondisclosure or confidentiality agreement, or that pertain to the closed portion

of a meeting or hearing, or that are otherwise declared confidential by law, are not public record. NRS 241.020(4)(c). Thus a settlement agreement which embodied the imposition of a confidential form of discipline, such as a private reprimand, would not be subject to disclosure.

If the complaint is disposed of informally by agreement pursuant to NRS 233B.121(5), the NBPE must weigh the public interest in disclosure against the public interest served by nondisclosure. For example, if a licensee agreed to a settlement requiring supervision, the NBPE could conclude that reports from the licensee's supervisor and reports from the licensee regarding his own rehabilitation are confidential "because the public interest in encouraging candidness from the reporting persons outweighs the public need to know." Op. Nev. Att'y Gen. No. 90-15 (October 1990). However, any further disciplinary action taken by the NBPE due to the licensee's noncompliance with the supervisory requirements imposed by the NBPE is public record. *Id.*

#### CONCLUSION

NRS chapter 641 specifies certain records which are deemed to be public and open to inspection, and certain records which are deemed to be confidential, privileged, or private. With respect to the information in a licensee's file relating to a disciplinary proceeding that is not expressly confidential by statute, the NBPE must balance the public interest in disclosure against the public interest served by nondisclosure on a case-by-case basis. Where there is insufficient justification to maintain the confidentiality of the document, the balance must be struck in favor of public and open government.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

AGO 99-34 INSURANCE; SMALL BUSINESSES; MENTAL ILLNESS: The exemption in Senate Bill 557 (1999) for small employer groups of 2 to 25

employees from severe mental illness health insurance coverage required by this Act takes priority over provisions of chapter 689C of NRS mandating the same coverage for all small employer groups of 2 to 50 employees.

Carson City, October 13, 1999

The Honorable Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business & Industry, 1665 Hot Springs Road, Suite 152, Carson City, Nevada 89706-0661

Dear Commissioner Molasky-Arman:

You have requested an opinion from this office regarding the following:

QUESTION

Must an insurance carrier provide coverage for severe mental illness and other matters required by Senate Bill 557 (1999) for small employer groups size 2 to 25 when such groups are specifically exempted from the requirement of S.B. 557, which exemption conflicts with provisions in chapter 689C of NRS requiring that all small employer groups be offered the same coverage? *See* Act of June 9, 1999, ch. 576, 1999 Nev. Stat. 3100 et seq. (S.B. 557).

ANALYSIS

S.B. 557, enacted in the 1999 Legislative Session, requires that health insurance policies issued in this State under chapter 689A of NRS (individual health policies), chapter 689B of NRS (group health insurance policies), chapter 695B (contracts for hospital or medical services with nonprofit corporations for medical service), and chapter 695C of NRS (governing health maintenance organizations) provide coverage for certain severe mental illnesses enumerated in the Act. The Act also states that these requirements do not apply to health insurance policies or contracts “[d]elivered or issued for delivery to an employer to provide coverage for his employees if the employer has no more than 25 employees.” *See* §§ 2(4)(a), 3(4)(a), and 4(4)(a) of S.B. 557.

This exemption of employer groups of under 26 employees appears to directly conflict with several provisions of chapter 689C of NRS dealing with health insurance for small employers. NRS 689C.095 defines “small employer” as an employer employing at least two but no more than 50 employees. An apparent conflict exists between S.B. 557 and NRS 689C.156. NRS 689C.156 provides in full that:

1. As a condition of transacting business in this state with small employers, a carrier shall actively market to a small employer each health benefit plan which is actively marketed in this state by the carrier to any small employer in this state. The health insurance plans marketed pursuant to this section by the carrier must include, without limitation, a basic health benefit plan and a standard health benefit plan. A carrier shall be deemed to be actively marketing a health benefit plan when it makes available any of its plans to a small employer that is not currently receiving coverage under a health benefit plan issued by that carrier.

2. A carrier shall issue to a small employer any health benefit plan marketed in accordance with this section if the eligible small employer applies for the plan and agrees to make the required premium payments and satisfy the other reasonable provisions of the health benefit plan that are not inconsistent with NRS 689C.015 to 689C.355, inclusive, and 689C.610 to 689C.980, inclusive, except that a carrier is not required to issue a health benefit plan to a self-employed person who is covered by, or is eligible for coverage under, a health benefit plan offered by another employer.

This statute prohibits a carrier from discriminating between different small employer groups in terms of the types of plans marketed and issued to these groups. Any plan marketed and available to one small employer group must be marketed and available to all.

NRS 689C.165 prohibits a carrier from modifying a health benefit plan with respect to a small employer to restrict or exclude coverage or benefits for

specific diseases, medical conditions, or services otherwise covered by the plan. Likewise, NRS 689C.193(1) prohibits a carrier from placing restrictions on a small employer plan that are inconsistent with NRS 689C.015–689C.355, inclusive. There is no question that there is a direct conflict between the exemption of employer groups of 2 to 25 employees in S.B. 557 from the mental health coverage mandates of that bill and the requirements of NRS 689C.156 and other provisions of chapter 689C of NRS requiring equal treatment of all small employer groups, defined as 2 to 50 employees.

The rule in Nevada, expressed numerous times by the Nevada Supreme Court, is that where a general and specific statute, each relating to the same subject, are in conflict and they cannot be read together, the specific statute controls. *Laird v. State of Nev. Pub. Emp. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982). *See also Sheriff v. Streight*, 110 Nev. 1148, 1151, 881 P.2d 1337, 1339 (1994). In the present situation, S.B. 557 is a specific statute mandating certain mental health coverage in health insurance policies. NRS 689C.156 and the other statutes stated above are statutes of more general application relating to health insurance coverage for small employer groups. These statutes are in direct conflict and cannot be read together. For these reasons, the exemption provided for employer groups of 2 to 25 in S.B. 557, the more specific statute, controls, which carves out an exception to the mandates of chapter 689C for small employers.

There is also a line of cases that gives priority to the more recently enacted statute. *Laird*, 98 Nev. at 45, 639 P.2d at 1173; *Marschall v. City of Carson*, 86 Nev. 107, 115, 464 P.2d 494, 500 (1970). S.B. 557 was enacted in 1999. NRS 689C.156, NRS 689C.165, and NRS 689C.193 were enacted in 1997. Therefore, S.B. 557 would also prevail under this rule of resolving statutory conflicts.

#### CONCLUSION

The direct statutory conflict between S.B. 557 and NRS 689C.156 and other provisions of chapter 689C of NRS is resolved by applying the rules laid down by the Nevada Supreme Court to resolve statutory conflicts. Since S.B. 557 is the more specific and more recently enacted statute, the provisions of this statute that exempt small employer groups of 2 to 25 employees prevail over the

more general sections of chapter 689C, which require a carrier to market and make available to a small employer all policies marketed and available to all other small employers. Therefore, a health insurance policy with the mandated mental illness benefits which is marketed and issued to small employer groups of 26 to 50 need not be marketed and issued to small employer groups of 2 to 25. There is nothing prohibiting such a policy from being marketed and issued to groups of 2 to 25 employees; however, there is no requirement to do so. In all other respects, the policies marketed and issued to small employer groups of 2 to 25 must be the same as those marketed and issued to those groups of 26 to 50.

FRANKIE SUE DEL PAPA  
Attorney General

By: EDWARD T. REED  
Deputy Attorney General

AGO 99-35 PAROLE & PROBATION; FEES; FINE; RESTITUTION: It is legal to impose a parole condition requiring the payment of the Division's supervision fee or any court-ordered fee, fine, or restitution. Before revoking parole for violating such a condition, the parolee is entitled to a hearing to show hardship. The Parole Board cannot take away a parolee's conditional liberty and return him to prison solely because he lacks the funds to pay the required fee, fine, or restitution. It must first determine that there were insufficient bona fide efforts to make such payments or that there is no alternative solution which would adequately meet Nevada's interest in punishment and deterrence.

Carson City, November 3, 1999

Donald Denison, Chairman, Nevada Board of Parole Commissioners,  
Department of Motor Vehicles and Public Safety, 1445 Hot Springs Road  
#108-B, Carson City, Nevada 89711

Dear Chairman Denison:

Recently, you asked this office the following questions.

QUESTION

Is it legal to make the payment of Parole & Probation Division's supervision fee, or any court-imposed fee, fine, or restitution, a condition of parole? Also, if the Parole Board finds a parolee guilty of violating such a condition and no other conditions of parole, can it revoke the parole?

ANALYSIS

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution imposes procedural and substantive limits on the revocation of the conditional liberty created by parole. The United States Supreme Court pointed out that, although *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) outline the minimum procedural safeguards required by due process, neither decision purports to restrict the substantive grounds for revoking probation or parole. See *Black v. Romano*, 471 U.S. 606, 611 (1985).

NRS 213.126 addresses the Parole Board's requirement to make restitution a condition of parole. Subsection 7 of this statute makes the parolee's failure to comply with such a restitution requirement "a violation of a condition of parole *unless the parolee's failure was caused by economic hardship resulting in his inability to pay the amount due. The defendant is entitled to a hearing to show the existence of that hardship.*" [Emphasis added.]

With respect to the payment of Parole & Probation Division's (Division) supervision fee, NRS 213.1076 requires that, unless the chief of the Division waives such fee, its required payment becomes a condition of parole. The chief of the Division may waive the supervision fee if he determines that its payment would "create an economic hardship on the parolee." NRS 213.1076(2).

In *Bearden v. Georgia*, 461 U.S. 660, 662 (1983), the United States Supreme Court addressed a probation condition requiring the payment of both a fine and



restitution.<sup>3</sup> The *Bearden* Court focused on the need for a hearing to consider the probationer's or parolee's ability to pay before revocation. *Id.* at 670-672.

Consistent with NRS 213.126, 213.1076, and the *Bearden* case, it is legal to require the payment of a court-ordered fine, fee, restitution, or a statutorily required Division supervision fee, as a condition of parole. However, before revoking parole on the basis of violating such a condition, the parolee is entitled to a hearing to show hardship. A person cannot be imprisoned "solely because he lacks the funds to pay the fine (fee or restitution)." *Bearden*, 461 U.S. at 674. If the Parole Board determines that the parolee did not make sufficient bona fide efforts to pay his fee, fine, restitution, or determines that an alternative, such as extending the time for payments, would not adequately meet the State's interest in punishment and deterrence, imprisonment would be permissible. Unless such a determination is made, fundamental fairness requires that the parolee remain on parole. *Id.*

#### CONCLUSION

It is legal to impose a parole condition requiring the payment of the Division's supervision fee or any court-ordered fee, fine, or restitution. Before revoking parole for violating such a condition, the parolee is entitled to a hearing to show hardship. The Parole Board cannot take away a parolee's conditional liberty and return him to prison solely because he lacks the funds to pay the required fee, fine, or restitution. It must first determine that there were insufficient bona fide efforts to make such payments or that there is no alternative solution which would adequately meet Nevada's interest in punishment and deterrence.

FRANKIE SUE DEL PAPA  
Attorney General

By: JOE WARD, JR.

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<sup>3</sup> Due process requirements apply equally in both parole and probation revocation proceedings. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Also, there is no reason to suggest that the High Court's analysis would change if it also considered a parole condition requiring the payment of a statutory or court-ordered "fee."

Senior Deputy Attorney General

AGO 99-36 BONDS; ELECTIONS; LOCAL GOVERNMENT: The requirement that property ownership is a qualification for validating signatures on a petition to bring a local government bond issuance decision to the vote of the people does not violate the Equal Protection Clause.

Carson City, November 15, 1999

Madelyn Shipman, Assistant District Attorney, Washoe County District,  
Attorney's Office, Post Office Box 30083, Reno, Nevada 89520-3083

Dear Ms. Shipman:

You have requested an opinion from this office regarding the constitutionality of the requirement that property ownership be a qualification for validating a petition pursuant to NRS 350.020(3).

QUESTION

Does the requirement in NRS 350.020(3) that property ownership is a qualification for validating signatures on a petition violate the Equal Protection Clause of the U.S. Constitution?

ANALYSIS

A municipality may issue bonds additionally secured by a pledge of revenue without holding an election.

Unless, within 60 days after publication of a resolution of intent to issue the bonds, a petition is presented to the governing body signed by not less than 5 percent of the registered voters of the municipality who together with any corporate petitioners own not less than 2 percent in assessed value of the taxable property of the municipality.

NRS 350.020(3) (relevant part). A question has arisen regarding that part of this provision that requires petition signers to not only be registered voters, but to be property owners as well.

It is important to clarify that the issue does not question the requirements for a person to vote in an election regarding municipal bonds should one be held. The issue involves the requirements for a person to sign a petition that may result in an election.

In Nevada, it is a long standing rule of statutory construction that statutes enjoy a strong presumption of constitutionality, “which can only be overcome by clear and fundamental violations of the law. *See State v. Com’s Humboldt Co.*, 21 Nev. 235, 238, 29 P. 974 (1892).” *Wise v. Bechtel Corp.*, 104 Nev. 750, 754, 766 P.2d 1317, 1319 (1988). The Nevada Supreme Court has also stated, “Where a statute is susceptible to more than one interpretation, this court will interpret the statute so that it complies with constitutional standards.” *Bell v. Anderson*, 109 Nev. 363, 366, 849 P.2d 350, 352 (1993). *See also Sheriff v. Wu*, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985) (“Where a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored”). These cases show the Nevada Supreme Court favors ruling that statutes are constitutional.

The Supreme Court of New Mexico has addressed the issue we face and concluded, “[t]he statutory requirement that twenty-five percent of the taxpaying electors of the district sign the petition [does not] deny equal protection.” *Lower Valley Water & Sanitation Dist. V. Public Service Co. of N.M.*, 632 P.2d 1170, 1174 (N.M. 1981). Following the analysis used by the court in reaching its conclusion is helpful.

The New Mexico Supreme Court begins by examining the right to vote in elections and restrictions that have been placed on that right. “[D]irect restrictions on the right to vote, such as limiting of the franchise to property owners, are unconstitutional even where the election relates to specialized governmental entities such as school boards.” *Lower Valley Water*, 632 P.2d at 1174. The court also examined the U.S. Supreme Court case, *Reynolds v. Sims*,

that “held that the equal protection clause requires adherence to the principle of one-person-one-vote in elections of state legislators.” *Lower Valley Water*, 632 P.2d at 1174. (citation omitted).

*Reynolds* is a landmark case in which the U.S. Supreme Court held:

As a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

*Reynolds v. Sims*, 377 U.S. 533, 568 (1963). The U.S. Supreme Court has also held state laws tying voting eligibility to property ownership for certain types of election to be invalid. *Lower Valley Water*, 632 P.2d at 1174. Once the New Mexico Supreme Court had confirmed these basic tenants of voting law, it addressed the issue of “whether Reynolds attaches at the petition stage.” *Lower Valley Water*, 632 P.2d at 1174. The New Mexico Supreme Court noted:

[T]his precise question has not been addressed by the United State Supreme Court. The cases discussed supra deal with direct limitations on the right to vote, whereas the restriction here involves not the right to vote but rather the right, created by the Legislature, to propose a district to the voters. Being a step removed from the actual voting process, we conclude that the State need not show a compelling interest but that a rational basis justification will suffice.

*Lower Valley Water*, 632 P.2d at 1174.

We agree with the conclusion of the New Mexico court that the restriction on who may sign the petition does not involve the right to vote, but the right, created by the Nevada Legislature for property owners to compel an election by petition if 5 percent of the registered voters, together with any corporate

petitioners, who own 2 percent in assessed value of the taxable property so desire. If such an election were to be held, voting would not be limited to registered voters who are also property owners. Any eligible registered voter could vote.

Because the right to vote is not involved, but rather the right to sign a petition which, we agree with New Mexico, is a step removed from the actual voting process, Nevada need only show a rational basis, not a compelling interest, for the restriction to suffice. Nevada has a rational basis for restricting the signers of this petition to property owners.

The public will benefit from the expansion/renovation of the convention center; however, the property owners are the taxpayers who will bear the financial burden. The legislature, to protect these taxpayers, may create a petition process for them to bring the entire matter to a vote of the people.

The legislature may want to reexamine this statute, but that is a policy decision outside the scope of this opinion.

#### CONCLUSION

The requirement in NRS 350.020(3) that property ownership is a qualification for validating signatures on a petition to bring a local government bond issuance decision to the vote of the people does not violate the Equal Protection Clause of the U.S. Constitution.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

AGO 99-37 CONSTITUTIONAL LAW; ELECTIONS; INITIATIVE; RECALL  
PETITIONS; REFERENDUM; Nevada provisions requiring petition

circulators to be registered voters violate the U.S. Constitution and should be amended. Nevada is prohibited from requiring petition groups from listing the name, address, and amount paid to each petition circulator. Reporting the amount paid per petition signature or the total amount paid to petition circulators is permissible.

Carson City, December 1, 1999

Pamela Crowell, Deputy Secretary of State for Elections, Office of the Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Ms. Crowell:

You have requested an opinion from this office regarding the impact of a recent United States Supreme Court case on the signature gathering process for petitions in this state.

#### QUESTION ONE

Does the United States Supreme Court decision, *Buckley v. American Constitutional Law Foundation (ACLF)*, 525 U.S. 182 (1999) impact the provision governing the initiative petition process as mandated by the Nevada Constitution and Nevada election law?

#### ANALYSIS

The Nevada Constitution, as well as certain provisions of the Nevada Revised Statutes dealing with election law, has traditionally been interpreted to require the circulator of an initiative petition be a registered voter.<sup>4</sup> However, the United States Supreme Court recently held in *Buckley v. ACLF*, that a similar Colorado law violated the First Amendment of the United States Constitution and was therefore unconstitutional.

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<sup>4</sup> Nev. Const. art. 19, § 3; NRS 295.055(2).

In *Buckley v. ACLF* the Court reviewed three conditions placed on the ballot initiative process by Colorado statutes: “(1) the requirement that initiative-petition circulators be registered voters, . . . ; (2) the requirement that they wear an identification badge bearing the circulator’s name, . . . ; and (3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator, . . .” *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 639. The Court affirmed the judgment of the U.S. Court of Appeal that struck down these three requirements for “trenching unnecessarily and improperly on political expression.” *Buckley v. ACLF*, 525 U.S. at \_\_\_, \_\_\_ 119 S. Ct. at 649, 642.<sup>5</sup>

A background inquiry into the treatment of election regulations<sup>6</sup> shows that the Supreme Court has recognized the state’s interest in preserving the integrity of the electoral process, upholding “generally-applicable and evenhanded restrictions.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983).

While not advocating unregulated access to the ballot, the Supreme Court has struck down regulations which were deemed to place too great a burden on the individual’s free exercise of speech. See *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down a law which prohibited payment to petition circulators) (Nevada has no such law); *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334 (1995) (invalidating law which prohibited anonymous election-related hand billing).

The Supreme Court’s recent decision in *Buckley v. ACLF* guides our review on the issue before us. In that case, the Supreme Court determined that petition circulation is core political speech and found that a restriction that required petition circulators to be registered voters violated the First Amendment because it “significantly inhibits communication with voters about proposed political change, and [is] not warranted by the state interests (administrative

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<sup>5</sup> The holding in *Buckley v. ACLF* was based on First Amendment principles. However, the U.S. Court of Appeals recognized that “when a statute allows some people to speak but not others, the principles of equal protection and free speech are intertwined.” *ACLF v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997).

<sup>6</sup> For purposes of this opinion, “election regulations” include the state constitution, state statutes, and state administrative regulations.

efficiency, fraud detection, informing voters) alleged to justify those restrictions.” *Id.* at 642. Agreeing with *Meyer*, the Court stated, “Petition circulation . . . is ‘core political speech,’ because it involves ‘interactive communication concerning political change.’” *Id.* at 639.

One of the Colorado statutes at issue in *Buckley v. ACLF* provided: “No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated.” Colo. Rev. Stat. § 1-40-112(1)(1998). Although Nevada law does not contain such explicit language, it has traditionally been interpreted to require petition circulators to be registered voters. For example, that part of the state constitution governing initiative petitions provides:

Each signer shall affix thereto his or her signature, residence address and the name of the county in which he or she is a registered voter. The petition may consist of more than one document, but each document shall have affixed thereto an affidavit made by one of the signers of such document to the effect that all of the signatures are genuine and that each individual who signed such document was at the time of signing a registered voter in the county of his or her residence . . . .

Nev. Const. art. 19, § 3.

Through a somewhat circuitous route, this provision has traditionally been interpreted as requiring petition circulators be registered voters. Each petition must be circulated by an individual designated to collect signatures. Each signer of the petition must be a registered voter. Accompanying each petition must be an affidavit, made by a signer of the petition (i.e., the circulator) attesting that all of the signatures are genuine and that each signer was a registered voter.

The petition circulator is the individual responsible for gathering signatures, explaining the purpose of the petition, and obtaining the signatures of those



qualified to sign the document. Despite its seemingly elusive nature, once analyzed, the traditional interpretation of this section of the constitution has been to require that petition circulators be registered voters. The signer of the affidavit can be the petition circulator because the petition circulator is in the best position to attest to the statements in the affidavit. The signer of the affidavit must also sign the petition and only registered voters may sign the petition. Therefore, the petition circulator was required to be a registered voter. Further, there is a provision in Nevada statutes that also requires signers of an initiative petition, like the circulator, to be a registered voter.<sup>7</sup> In light of the Supreme Court's decision in *Buckley v. ACLF*, Nevada's requirement that petition circulators be registered voters would be similarly treated and thereby deemed invalid.

To evaluate the constitutionality of laws regulating the electoral process, we look to the framework established by the Supreme Court in *Timmons*:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the “character and magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.”

*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted) (prohibiting individual from appearing on ballot as candidate of more than one party).

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<sup>7</sup> “Each document of the petition must bear the name of a county, and only registered voters of that county may sign the document.” NRS 295.055(2).

The states clearly have a substantial interest in preserving fairness, order, and integrity in the election process through enacting reasonable regulations. However, regulations that implicate the First Amendment protections are subject to strict scrutiny, i.e. these regulations must be narrowly tailored and advance a compelling state interest that justifies imposing severe burdens on one's First Amendment rights. The Supreme Court has found that the regulation at issue in *Buckley v. ACLF* places a substantial burden on the individual's freedom of expression without sufficient justification from the state. In a similar analysis in *Meyer*, the Supreme Court applied strict scrutiny to strike down another Colorado law that made it a felony to compensate petition circulators. *Meyer v. Grant*, 486 U.S. at 423.

In *Meyer*, the Court reasoned that such a ban on compensation burdened political expression because it reduced the number of potential speakers and limited the size of the audience that could be reached, thereby reducing the quantity of expression. *Id.* at 422-423. The state could not sufficiently justify its interest in placing such a burden on an individual. *Id.* at 425.

Additionally, "statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Meyer v. Grant*, 486 U.S. at 423. The voter registration requirement at issue excludes a certain group of people from participating in the political process. *Buckley v. ACLF* provides clear precedent that such a restriction limits political expression and has a discriminatory effect by excluding a group of persons from participating in core political speech. *See Meyer v. Grant*, 486 U.S. at 421-422. The Supreme Court has held that the voter registration requirement is not narrowly tailored to advance the state's interests nor are the state's interests substantial enough to justify such a burden on the individual's freedom of expression. *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 644. Nevada can preserve the integrity of the signature gathering process on an initiative petition through less restrictive means, such as requiring that all petition circulators be 18 years of age and be residents of the state, and so attest in the affidavit. *Id.* at 644-645 n.10.

Although the voter registration provision at issue before us is contained in the state constitution, it is still subject to strict scrutiny. Colorado's voter registration requirement for petition circulators was adopted by constitutional

amendment as a result of a referendum approved by the people. *ACLF v. Meyer*, 870 F.Supp. 995, 1002 (D. Colo. 1994). The district court found that such a restriction “limits the number of persons available to circulate . . . and, accordingly, restricts core political speech.” *Id.* However, the court erroneously upheld the law, exempting it from any level of scrutiny because it had been adopted as a constitutional amendment. *Id.* The U.S. Court of Appeals properly reversed the district court and struck down the voter registration requirement finding “it unconstitutionally impinges on free expression.” *ACLF v. Meyer*, 120 F.3d at 1100. State laws are not to escape scrutiny simply because they are cloaked within the protection of the state constitution. *Id.* (“the voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation”).

In sum, the *Buckley v. ACLF* decision requires us to conclude that a state law that limits petition circulation to registered voters imposes a burden on political expression in violation of the First and Fourteenth Amendments. The restriction burdens expression by not only limiting the number of people available to circulate a petition and reducing the size of the audience, but by taking away an individual’s right to choose not to register, yet remain politically active. *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct at 644 (reasoning that the choice not to register to vote implicates political thought and expression).

The State of Nevada cannot assert any greater interest in requiring its petition circulators to be registered voters than those asserted by Colorado. Therefore, the holding of the Supreme Court applies with equal force to the provisions governing the initiative petition process as mandated by the Nevada Constitution as well as Nevada election law. Guided by *Buckley v. ACLR*, Nevada law cannot require petition circulators to be registered voters, and any provisions of the state constitution or election law must comply with this mandate.

#### CONCLUSION TO QUESTION ONE

The United States Supreme Court decision, *Buckley v. ACLF*, applies to the Nevada provisions requiring initiative petition circulators to be registered

voters, and based upon this decision these provisions violate the First and Fourteenth Amendments of the U.S. Constitution and are therefore unenforceable or invalid.

## QUESTION TWO

Provided the *Buckley v. ACLF* decision does impact Nevada's initiative petition process, what is the impact on the process for other petitions?

## ANALYSIS

*Buckley v. ACLF* guides our review in determining whether the voter registration requirement for petition circulators is invalid as applied to other petitions in Nevada. It is our opinion that the voter registration requirement for petition circulators is an invalid restriction for all ballot-access petitions in Nevada.<sup>8</sup>

Analyzing these petitions under the canopy of *Buckley v. ACLF*, it is clear that the voter registration requirement for petition circulators at issue is invalid because of the burden it places on political expression, not because of the type of petition involved. It is the act of circulating the petition which the Supreme Court has deemed important enough to invoke the protection of the First and Fourteenth Amendments. Petition circulation has been found to be core political speech because it involves "both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. at 421. Petition circulation implicates these compelling interests without regard to the type of petition being circulated. *See Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 651, J. Thomas, concurring in the judgment, ("the aim of a petition is to secure political change, and the First Amendment,

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<sup>8</sup> This analysis applies to all petitions in Nevada, for example, referendum (Nev. Const. art. 19, § 3, NRS 295.055), major political party (NRS 293.128), minor political party or minor political party candidate (NRS 293.172), independent candidate (NRS 293.200), county initiative or referendum (NRS 295.095(6) and 295.150), municipal initiative and referendum (NRS 295.205), Presidential independent candidate (NRS 298.109), recall (Nev. Const. art. 2, § 9, NRS 306.030), and recall nomination (NRS 306.110).

by way of the Fourteenth Amendment, guards against the State’s efforts to restrict free discussions about matters of public concern”).

Each of these petitions require that an affidavit be attached, signed by the circulator of the petition declaring that the signatures are genuine and that the petition is signed only by registered voters. The voter registration requirement for petition circulators is present for each ballot-access petition in Nevada. This requirement is unconstitutional as to all petitions, as evaluated under the *Buckley v. ACLF* standard. It is the classification of the speech involved that demands constitutional protection. Because petition circulation involves interactive communication about political change, it is “core political speech” and First Amendment protection is “at its zenith.” *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 639-40 (citing *Meyer*, 486 U.S. at 422-25).

#### CONCLUSION TO QUESTION TWO

The voter registration requirement for petition circulators is invalid as applied to any ballot access petition in Nevada, applying the *Buckley v. ACLF* standard.

#### QUESTION THREE

If there is an impact on Nevada’s petition processes, what will be necessary to achieve compliance?

#### ANALYSIS

In order to be compliant with the holding in *Buckley v. ACLF*, the provisions of the Nevada election law that require the petition circulator to be a registered voter can be amended by the Legislature in the next session to reflect the Supreme Court’s decision. This office hereby offers to work with you to draft proposed legislation to be submitted to the Legislature. The provision governing initiative and referendum in the Nevada Constitution poses a larger problem and should also be addressed by the Legislature in the next session. Those provisions in the Nevada Administrative Code that need to be changed

can and should be accomplished shortly, without waiting for the legislature to meet.

Examining each of the petitions mentioned in this opinion, we make the following recommendations.

- Initiative Petitions – The relevant provisions governing initiative petitions are article 19, section 3(1) of the Nevada Constitution, NRS 295.055, and NAC 295.020(2). These provisions must be read so as not to conflict with the United States Constitution and therefore may no longer be interpreted as requiring the petition circulator to be a registered voter. At the very least NAC 295.020(2) should be amended to reflect this fact.
- Referendum Petitions – Referendum petitions are governed by the same provisions as initiative petitions and we make the same recommendation.
- Independent Candidate for President – The relevant provisions for this petition are NRS 298.109(2) and NAC 293.182(1)(b). The statute can be interpreted to be consistent with *Buckley v. ACLF*, and the regulation needs to be amended to also be consistent.
- Major Party – The relevant provisions for this petition are NRS 293.128(2) and NAC 293.182(1)(b). The statute must be amended, but the regulation is fine.
- Minor Party – The relevant provisions are NRS 293.172(1)(b) and NAC 293.182(1)(b). The statute is fine, but the regulation must be amended.
- Independent Candidate – NRS 293.200(2) and NAC 293.182(1)(b) are the relevant provisions for this petition. NRS 293.200(2) was amended by the 1999 Legislature to bring it into compliance with *Buckley v. ACLF*. Act of June 11, 1999, ch. 637, § 13, 1999 Nev. Stat. 3552. The regulation must be amended.
- County Initiative and Referendum – The relevant provisions for these petitions are NRS 295.095(6), NRS 295.150, and NAC 295.020(3)(c). NRS 295.095(6) and

NAC 295.020(3)(c) are fine, but NRS 295.150 needs to be amended.

- Municipal Initiative and Referendum – The relevant provisions are NRS 295.205(6) and NAC 295.020(3)(c). These provisions are fine.
- Recall – Recall petitions are governed by article 2, section 9 of the Nevada Constitution and NRS 306.030(2). Both of these provisions can be interpreted to be consistent with *Buckley v. ACLF*.
- Recall Nomination – This petition is governed by NRS 306.110 and is fine.

You may want to suggest to the Legislature that a provision be added to title 24 of NRS clarifying that no petition circulator must be a registered voter. Another policy decision for the Legislature is whether the affidavit should be signed by the circulator or a signer of the petition if the circulator is not a registered voter. If the circulator is to sign the affidavit, then article 19, section 3 of the Nevada Constitution would need to be amended. Also, *Buckley v. ACLF* upheld additional terms found in the Colorado affidavit that are not found in the Nevada affidavit. The Legislature may choose to add some or all of these terms to the Nevada affidavit.

Other states also have faced this issue. In Arizona the Attorney General issued an opinion concluding, as we have, that *Buckley v. ACLF* applies to all petitions in Arizona and recommending that the Secretary of State continue to use the affidavit language mandated by Arizona law on petition forms until (and unless) the statute is revised. Op. Az. Att’y Gen. No. 199-010, R99-011 (April 13, 1999).

Nebraska has also addressed this issue. A “Nebraska statutory law which prohibit[ed] and criminalize[d] the circulation of initiative petitions by persons who [were] not . . . registered to vote for one month prior to the circulation of the petitions” was challenged in federal court. *Bernbeck v. Moore*, 126 F.3d 1114, (8th Cir. 1997). “The district court concluded that the statutory provisions restrict appellees’ core political speech and, because they are not

narrowly tailored to serve the State’s compelling interests, violate appellees’ First Amendment rights.” *Id.* The U.S. Court of Appeals affirmed. *Id.* at 1115.

#### CONCLUSION TO QUESTION THREE

Those provisions in the Nevada Constitution and in Nevada election law that require the petition circulator to be a registered voter should be amended to bring Nevada into compliance with *Buckley v. ACLF*.

#### QUESTION FOUR

Does this U.S. Supreme Court decision impact the statutory and regulatory provisions governing the reporting of contributions and expenses by ballot advocacy groups or recall committees?

#### ANALYSIS

In addition to the voter registration for petition circulator requirement discussed above, the *Buckley v. ACLF* decision also addressed certain disclosure requirements in Colorado’s law. *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 646-49. The U.S. Court of Appeals struck down that portion of the Colorado law that compelled disclosure of the names and addresses of all paid circulators and the amount paid to each. While affirming the Court of Appeal’s decision, the Supreme Court upheld the record keeping, recording, and disclosure provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 421 et seq. (1970 ed., Supp. IV), but reasoned that “exacting scrutiny is necessary when compelled disclosure of campaign-related payments is at issue.” *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S.Ct. at 647. This is not to say that exacting scrutiny will defeat any and all disclosure requirements. The Supreme Court held that the state’s interest in the disclosure of names of initiative sponsors and the total amount of money expended to collect signatures for their petitions was substantial and upheld that portion of the disclosure requirement. *Id.* It was the compelled disclosure of the names, addresses, and specific amount paid to each circulator that was struck down.



Nevada's campaign disclosure laws require that ballot advocacy groups and committees for the recall of a public officer must file an expenditure report that lists the name, address, and amount of the expenditure. NAC 294A.075(1). This expenditure report contains the very disclosure requirements that were struck down in *Buckley v. ACLF*. Compelled disclosure of the name, address, and amount paid, specific to each petition circulator, is likely to fall within the purview of *Buckley v. ACLF* and be deemed invalid. *Buckley v. ACLF*, 525 U.S. at \_\_\_, 119 S. Ct. at 646.

Requiring disclosure of the total amount paid to the circulators as a group entity or the amount paid per petition signature, rather than the amount paid to each individual and disclosure of personal information specific to each circulator are requirements likely to be upheld under *Buckley v. ACLF*. *Id.* at 647. Such a change would entail amending NAC 294A.075(1) by the Secretary of State's office.

#### CONCLUSION TO QUESTION FOUR

*Buckley v. ACLF* prohibits Nevada from requiring ballot advocacy groups or committees for the recall of a public officer from listing the name, address, and amount paid to each circulator of a petition. However, *Buckley v. ACLF* does permit an expenditure report to reveal the amount paid per petition signature or the total amount paid to petition circulators. Nevada's laws should be amended accordingly.

FRANKIE SUE DEL PAPA  
Attorney General

By: KATERI CAVIN  
Deputy Attorney General

AGO 99-38 COLLECTION AGENCIES, LICENSES, LIENS: A property management firm that attempts to collect delinquent homeowners assessments as part of its overall management duties on behalf of the association is not required to be licensed as a collection agency prior to

engaging in that activity. A firm specifically hired by an association to commence nonjudicial lien foreclosure proceedings against a unit owner who is delinquent in paying assessments must obtain a collection agency license prior to engaging in that activity. Persons such as attorneys, collection agencies, escrow companies, and foreclosure companies hired by a homeowners' association or its manager to engage in specific collection activities for the association, including the foreclosure of liens for unpaid assessments, are not required to hold a property management permit or certificate issued by the Real Estate Division pursuant to NRS 116.31139 prior to engaging in that activity. A person or firm who performs collection activity on behalf of a common-interest community or who forecloses liens for unpaid assessments in such communities is subject to the federal Fair Debt Collection Practices Act.

Carson City, December 1, 1999

Scott Walshaw, Commissioner, Commissioner, Financial Institutions Division,  
406 East Second Street, Suite 3, Carson City, Nevada 89701-4758

Joan Buchanan, Administrator, Real Estate Division, 2501 East Sahara Avenue,  
Suite 102, Las Vegas, Nevada 89104

Dear Mr. Walshaw and Ms. Buchanan:

You have requested our opinion regarding licensing and other requirements that may apply to collection and lien foreclosure services performed on behalf of common-interest communities subject to the provisions of NRS chapter 116.

QUESTION ONE

Is a person who performs collection activity on behalf of common-interest communities, including the foreclosure of liens for unpaid assessments, required to be licensed as a collection agency pursuant to NRS chapter 649 prior to engaging in that activity?

## ANALYSIS

A homeowner in a common-interest community governed by the Uniform Common-Interest Ownership Act, NRS chapter 116, is usually a member of an association that manages the community's affairs and enforces the owners' obligation to pay for common expenses. *See* NRS 116.110315, 116.110353, 116.2107, and 116.3115. To enforce this obligation, the association is granted authority to assess the owners for their share of the common expenses, NRS 116.31155, and has a lien against the owners' units for unpaid assessments. NRS 116.3116. An association may "[i]mpose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association." NRS 116.3102(1)(k). A homeowners' association is also authorized to "[h]ire and discharge managing agents and other employees, agents and independent contractors," NRS 116.3102(1)(c), and may employ a person engaged in property management for the common-interest community. Act of June 9, 1999, ch. 572, § 26, 1999 Nev. Stat. 3007.

Many homeowners' associations have hired professional management firms to assist them in carrying out their responsibilities under NRS chapter 116. Among other services, these firms bill homeowners for regular and special assessments and communicate with owners orally and in writing to collect delinquent assessments, may impose authorized interest, penalties, and fines for delinquent assessments, and may take actions to foreclose the association's lien for assessments. Some associations or their management firms hire firms whose activities are limited to conducting nonjudicial foreclosure of such liens. You have asked whether these activities will subject the persons engaging in them to the licensing requirements of NRS chapter 649, the Collection Agency Act.

NRS 649.020 provides in full:

1. "Collection agency" means and includes all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or

in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another.

2. "Collection agency" does not include any of the following unless they are conducting collection agencies:

(a) Individuals regularly employed on a regular wage or salary, in the capacity of credit men or in other similar capacity upon the staff of employees of any person not engaged in the business of a collection agency or making or attempting to make collections as an incident to the usual practices of their primary business or profession.

(b) Banks.

(c) Nonprofit cooperative associations.

(d) Abstract companies doing an escrow business.

(e) Duly licensed real estate agents.

(f) Attorneys and counselors at law licensed to practice in this state, so long as they are retained by their clients to collect or to solicit or obtain payment of such clients' claims in the usual course of the practice of their profession.

A "claim" is defined by NRS 649.010 as "any obligation for the payment of money or its equivalent that is past due."

The Collection Agency Act is not intended to regulate the activities of a creditor collecting its own debts. A collection agency must be soliciting payment of claims "owed or due or asserted to be owed or due to another." NRS 649.020(1) (emphasis added). Subsection (2)(a) of the statute also exempts from the definition:

[I]ndividuals regularly employed on a regular wage or salary, in the capacity of credit men or in other similar capacity upon the staff of employees of any person not engaged in the business of a collection agency or making or attempting to make collections as an incident to the usual practices of their primary business or profession.

unless such businesses are conducting collection agencies. Collecting past due assessments is, in our opinion, an activity incident to the association's primary purpose of managing the general affairs of the community. Finally, most associations are organized as nonprofit cooperative associations which are specifically exempted by NRS 649.020(2)(c). A homeowners' association, through its officers and regular employees, may therefore engage in collection activity, including the filing and foreclosure of liens for unpaid assessments, without first obtaining a license as a collection agency. This result is consistent with the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to 1692o, inclusive, which generally does not apply to a creditor collecting his or her own debt. *See* 15 U.S.C. § 1692a(6).

A firm hired as an independent contractor to collect a delinquent assessment or initiate foreclosure proceedings on the association's behalf is not, however, collecting its own debt. Delinquent assessments are, in our opinion, "claims" within the meaning of NRS 649.010.<sup>9</sup> The issue becomes whether a general management firm or a firm hired specifically to conduct private lien foreclosure proceedings is engaging in collection activities as its "primary or a secondary object, business or pursuit." NRS 649.020(1).

NRS 116.31139 requires persons providing property management services to an association to either hold a permit to engage in property management issued by the Real Estate Division or a certificate issued by the Real Estate Commission to provide property management services on behalf of common-interest communities. NRS 116.31139(1). This section defines property management as "the physical, administrative or financial maintenance and management of real property, or the supervision of those activities for a fee, commission or other compensation or valuable consideration." NRS 116.31139(4). The collection of delinquent assessments is clearly a part of the financial maintenance and management of the community's property. However, it is not, in our opinion, the primary or secondary object or business of the

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<sup>9</sup> Several courts construing the FDCPA have concluded that past due homeowners' assessments are "debts" within the scope of that Act. *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997); *Newman v. Boehm, Pearlstein & Bright*, 119 F.3d 477 (7th Cir. 1997).

management firm but rather one of many management tasks the firm performs on behalf of the association. We therefore conclude that a property management firm that attempts to collect delinquent homeowners' assessments as part of its overall management duties on behalf of the association is not required to be licensed as a collection agency prior to engaging in that activity.<sup>10</sup>

A firm hired by an association to commence nonjudicial lien foreclosure proceedings against a unit owner who is delinquent in paying assessments is engaged, in our opinion, in an activity the primary purpose of which is to enforce collection of a past due debt. Although decisions construing the FDCPA are not controlling in the interpretation of NRS chapter 649, they are instructive.

In 1977, Congress enacted the Fair Debt Collection Practices Act ("FDCPA" or the "Act") to protect consumers against debt collection abuses. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977), amended by Pub. L. No. 99-361, 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. §§ 1692-1692o (1994)). Originally, attorneys were excluded from the Act's coverage. Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 803(6)(F), 91

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<sup>10</sup> Even assuming that association managers act as collection agencies when attempting to collect delinquent homeowners' assessments, NRS 649.020(2)(e) exempts from the definition of collection agency "[d]uly licensed real estate agents." NRS 645.240 provides that the provisions of NRS chapter 645 do not apply to, and the terms "real estate broker" and "real estate salesman" do not include a "[p]erson while performing the duties of a property manager for a common-interest community governed by the provisions of chapter 116 of NRS." NRS 645.240(1)(d). NRS 116.31139, on the other hand, clearly requires a property manager for such a community hold either a property management permit or certificate issued by the Real Estate Division or Real Estate Commission. A property management permit may only be issued to a person "licensed pursuant to this chapter as a real estate broker, real estate broker-salesman or real estate salesman." NRS 645.6052. A person holding a property management permit issued by the Real Estate Division would therefore be exempt from the collection agency licensing requirement as a "duly licensed" real estate agent pursuant to NRS 649.020(2)(e) even if we assume that its business would otherwise subject it to that Act. A person holding only a "certificate" to manage a homeowners' association, on the other hand, probably does not qualify under this exemption.

Stat. 874, 875 (1977), amended by Pub. L. No. 99-361, 100 Stat. 768 (1986). However, in 1986, the FDCPA was amended, and the exclusion for attorneys was removed. Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (1986) (amending Pub. L. No. 95-109, § 803(6)(F)). After this exclusion was removed, the state courts and lower federal courts were divided on whether and under what circumstances the FDCPA should apply to attorneys. Compare *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (holding that the FDCPA did not apply to attorneys engaged in "purely legal activities") with *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) (finding that attorney performing exclusively legal tasks was not exempt from coverage under the Act). In 1995, the United States Supreme Court, in *Heintz v. Jenkins*, 514 U.S. 291 (1995), resolved the conflict and ruled that attorneys who regularly collect consumer debts fall within the scope of the FDCPA, regardless of whether they collect debts through litigation or through traditional debt collection methods, such as telephone calls to debtors, collection letters, and repossessions.

Following *Heintz*, the courts devised various methods for determining whether an attorney or law firm's activity amounts to "regular" debt collection, many looking at the volume of collection activity as it relates to the percentage of the firm's overall practice and fees earned. See, e.g., *Garrett v. Derbes*, 110 F.3d 317, 318 (5th Cir. 1997) (639 collection letters was "regular" even though the collection work only comprised 0.5 percent of the attorney's practice); and *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D.Mich. 1992) (actual volume of collection activity on behalf of Chrysler Credit Corporation was "regular" even though it comprised only four percent of the firm's practice). In *Crossley v. Lieberman*, 868 F.2d 566 (3rd Cir. 1989), the Third Circuit found that the attorney was a "debt collector" because he "regularly" rendered such services. The attorney rendered debt collection services on behalf of three creditors and had filed 175 mortgage foreclosures and other collection suits in a nineteen-month period. In interpreting the language of the Act, the court quoted from a "leading commentator" who said that the statute applies to "any attorney who engages in collection activities more than a handful of times per year . . . [including] the small firm which collects debts incidentally to the general practice of law." 868 F.2d at 569 (*quoting* R. Hobbs, Attorneys Must Now Comply with Fair Debt Collection Law, X Pa.J.L.Rptr., No. 46, 3 (Nov. 21, 1987)).

Assuming the processing of nonjudicial lien foreclosures constitutes collection activity, a firm engaged exclusively in this activity is, of course, regularly conducting that activity. In *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F. Supp. 1148, 1153 (E.D.N.Y. 1996), the court held that a defendant's notice of sale of property sent in compliance with a statutory condition precedent to foreclosure on a security agreement was not subject to the FDCPA requirements because it was not an attempt to collect a debt, nor an effort to obtain information. Most courts, however, have held that foreclosure proceedings are debt collection activity within the meaning of the FDCPA. See *Zartman v. Shapiro & Meinhold*, 811 P.2d 409 (Colo. App. 1990) (a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt); *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (attorney found to be engaging in debt collection even where 22 of 32 cases were mortgage foreclosures); see also, Patrick A. Randolph, Jr., *Lawyers, Foreclosure and the Fair Debt Collection Practices Act*, Prob. & Prop., Nov./Dec. 1992, at 30.

The FDCPA defines “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). Although the cases just discussed all deal with the activities of attorneys, the determination of whether activity has as its “principal purpose” the collection of debts or whether it is sufficiently “regular” to constitute debt collection, applies to all persons. The definition of “debt collector” is also sufficiently similar to that of “collection agency” set forth in NRS 649.020(1) to be persuasive authority in determining the intended scope of NRS chapter 649.

The statutory provisions regarding the creation and enforcement of a lien for assessments in a common-interest community are set forth in NRS 116.3116 - 116.31168, inclusive, and are similar to procedures used in a nonjudicial foreclosure of a deed of trust. See NRS 107.080 - 107.100, inclusive.<sup>11</sup> A

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<sup>11</sup> Although the nonjudicial foreclosures of deeds of trust is not directly at issue here, we note that, regardless of the application of the FDCPA, as a matter of state law, attorneys



common thread of the procedural requirements is notice to the affected homeowner to provide an additional opportunity to pay the delinquent obligation in order to avoid the loss of property. Since the purpose of the lien foreclosures is to enforce a creditor's rights with respect to a financial obligation that is "past due," we believe one exclusively engaged in the processing of such foreclosures is attempting to collect a debt as its "primary or a secondary object, business or pursuit." NRS 649.020(1). Since such a company is not exempted from the definition of a collection agency, it must obtain a collection agency license prior to engaging in that activity. NRS 649.075.

#### CONCLUSION TO QUESTION ONE

A property management firm that attempts to collect delinquent homeowners' assessments as part of its overall management duties on behalf of the association is not required to be licensed as a collection agency prior to engaging in that activity. A firm specifically hired by an association to commence nonjudicial lien foreclosure proceedings against a unit owner who is delinquent in paying assessments is engaged, in our opinion, in an activity the primary purpose of which is to enforce collection of a past due debt. Since such a company is not exempted from the definition of a collection agency, it must obtain a collection agency license prior to engaging in that activity.

#### QUESTION TWO

Is a person or firm who performs collection activity on behalf of common-interest communities, including the foreclosure of liens for unpaid assessments,

(..continued)

conducting such foreclosures would be exempt from licensing as a collection agency pursuant to NRS 649.020(2)(f). Subsection (2)(d) also exempts from the definition of collection agency "[a]bstract companies doing an escrow business." Although this language has existed in the law since 1931, we believe that escrow activity conducted by a title company regulated pursuant to NRS chapter 692A or an independent escrow company regulated pursuant to NRS chapter 645A is exempt from the definition of collection agency.

required to hold a property management permit or certificate issued by the Real Estate Division pursuant to NRS 116.31139 prior to engaging in that activity?

#### ANALYSIS

NRS 116.31139(4) provides, "property management" means the physical, administrative or financial maintenance and management of real property, or the supervision of those activities for a fee, commission or other compensation or valuable consideration.

As previously stated, the collection of past due homeowners' assessments is clearly part of the definition of property management set forth in NRS 116.31139(4) since it relates to the "financial maintenance and management of real property." However, we do not believe the Legislature intended to require the regulation of every person who performs any part of the duties of a property manager for a homeowners' association. The meaning of certain words in a statute may be determined after examination of the context in which they are used and by considering the spirit of the law. *Welfare Div. v. Washoe Co. Welfare Dep't*, 88 Nev. 635, 637-38, 503 P.2d 457, 459 (1972). Additionally, statutory construction should always avoid an absurd result. *Id. See also Escalle v. Mark*, 43 Nev. 172, 175-76, 183 P. 387, 388 (1919).

Property management for a homeowners' association contemplates a broad range of activity including the physical as well as financial management of the association's affairs. The definition includes the "supervision of those activities." By its use of this phrase, we believe the Legislature intended to regulate a person or firm responsible for the overall management of the association's affairs, but not those persons who might be hired to perform specific tasks for the association subject to the manager's supervision. To conclude otherwise would mean that a person hired by the manager to cut the lawn in the common areas would need to be licensed or certified by the Real Estate Division to engage in that activity. The Legislature could not have intended such an absurd result. Similarly, we do not believe the Legislature intended to regulate under this section the conduct of attorneys or other persons or firms hired by the association or its manager to perform specific collection tasks on behalf of the association.

### CONCLUSION TO QUESTION TWO

Persons such as attorneys, collection agencies, escrow companies, and foreclosure companies hired by a homeowners' association or its manager to engage in specific collection activities for the association, including the foreclosure of liens for unpaid assessments, are not required to hold a property management permit or certificate issued by the Real Estate Division pursuant to NRS 116.31139 prior to engaging in that activity.

### QUESTION THREE

Is a person or firm who performs collection activity on behalf of a common-interest community or who forecloses liens for unpaid assessments in such communities subject to the federal Fair Debt Collection Practices Act?

### ANALYSIS

Although the FDCPA is a federal law not directly enforced by either the Financial Institutions Division or the Real Estate Division, both agencies and the industries they regulate have an interest in the question of whether the federal law applies to collection activities performed on behalf of homeowners' associations. In some cases that interest is quite direct. All collection agencies licensed by the Financial Institutions Division pursuant to NRS chapter 649 must comply with the FDCPA pursuant to NAC 649.150, at least as that law existed on July 1, 1986. By incorporating the FDCPA by reference in NAC chapter 649, the State of Nevada has determined to enforce the act against licensed collection agencies as a matter of state law. As the discussion of question one indicates, courts construing the FDCPA have concluded that: (1) homeowners' assessments in common-interest communities are debts under the FDCPA, (2) persons collecting such debts on behalf of the association must conform their collection activity to the requirements of the Act, and (3) persons foreclosing of liens against real property on behalf of another are subject to the Act.

We have concluded that persons or firms who engage in collection activity as part of the overall management of an association are not required to be

licensed pursuant to NRS chapter 649. Those collection activities are therefore not supervised or regulated by the Financial Institutions Division. Since the Real Estate Division has recently been given the task of supervising such persons through the issuance of property management permits and certificates, it may wish to consider whether to require as part of that regulation that such persons conform their collection practices to the FDCPA as a matter of state law in the same manner as has been done for licensed collection agencies.

CONCLUSION TO QUESTION THREE

A person or firm who performs collection activity on behalf of a common-interest community or who forecloses liens for unpaid assessments in such communities is subject to the federal Fair Debt Collection Practices Act. Persons licensed as collection agencies must comply with the FDCPA as it existed as of July 1, 1986 as a matter of state law by virtue of NAC 649.150. The Real Estate Division may wish to consider requiring as part of its regulation that such persons conform their collection practices to the FDCPA as a matter of state law in the same manner as has been done for licensed collection agencies.

FRANKIE SUE DEL PAPA  
Attorney General

By: DOUGLAS E. WALTHER  
Senior Deputy Attorney General

AGO 99-39 COUNTIES; LIBRARIES; PUBLIC OFFICERS: A county commission may remove a county library district trustee for reasons other than the ground specifically enumerated in NRS 379.022(5).

Carson City, December 10, 1999

Mr. Erik Levin, Deputy District Attorney, Office of the District Attorney Nye County, Post Office Box 593, Tonopah, Nevada 89049

Dear Mr. Levin:

You have posed the following question:

QUESTION

May a County Commission remove a library district trustee for a reason other than the ground enumerated in NRS 379.022(5)?

ANALYSIS

County library districts may be formed and operated in accordance with the provisions of NRS 379.021 *et seq.* Under NRS 379.022(1), the county commission is the appointing authority for the five trustees of a county library district. NRS 379.022(5) illustrates an example of one situation wherein the county commission may remove a library district trustee for one specific cause.

Under this subsection of the statute: “The board of county commissioners may remove any district library trustee who fails, without cause, to attend three successive meetings of the trustees.” NRS 379.022(5).

You now ask whether NRS 379.022(5) restricts the county commission’s ability to remove a county library district trustee for reasons other than the one set forth in that statute.

Unless restrained by law, the power that appoints a municipal officer carries the incidental power to remove that officer. *Eads v. Boulder City*, 94 Nev. 735, 587 P.2d 39 (1978); Op. Nev. Att’y Gen. (January 25, 1900); McQuillan, *Municipal Corporations*, § 12.112 at p. 539. In the present case, NRS 379.022(5) is a legislative acknowledgment of the county commission’s power to remove a county library district trustee for a specific reason. The legislative history on this statutory provision, as enacted in 1971, does not reveal a legislative intent to restrict the county commission’s implicit removal power by a legislative enumeration of one particular ground for removal. Thus we believe that the county commission, as the appointing authority, continues to possess an implicit power to remove county library district trustees for reasons other than the one set forth in NRS 379.022(5).

The terms of county library district trustees are fixed by statute. NRS 379.022. The county commission's removal power over such trustees would, therefore, not include at will dismissals. Because the county library district trustees are appointed for definite terms of office, they are subject to removal for cause only. *See Day v. Andrews*, 188 So. 2d 523 (Alabama 1966). Removal for cause could include situations where the officer is guilty of malfeasance or maladministration in office. *City of Ardmore v. Sayre*, 154 P. 356 (Okla. 1916). Before removal could occur, the county commission would have to provide notice and an opportunity for a hearing to the affected trustee concerning the sufficiency of the cause for removal.

An additional procedure, which a county commission could use to remove a county library district trustee, is set forth in NRS 283.440. Under this statutory procedure any complainant can, for specifically enumerated grounds, e.g. malfeasance or nonfeasance, initiate district court proceedings to remove any person holding any nonjudicial office in this state. This statutory procedure has previously been used against a county officer. In the case of *Schumacher v. Furlong*, 78 Nev. 167, 370 P.2d 209 (1962), the State of Nevada and Ormsby County successfully brought district court proceedings to remove a county assessor for nonfeasance in office.

#### CONCLUSION

A county commission may remove a county library district trustee for reasons other than the ground specifically enumerated in NRS 379.022(5). A library trustee could be removed for malfeasance or nonfeasance pursuant to NRS 283.440.

FRANKIE SUE DEL PAPA  
Attorney General

By: ROBERT L. AUER  
Senior Deputy Attorney General

AGO 99-40 PUBLIC EMPLOYEES RETIREMENT BOARD; RETIREMENT; EMPLOYEES; LAYOFFS: When a state agency is required to reduce the number of its employees, retirement buyout is controlled by NRS 286.3007. NRS 286.3007(3)(b) does not restrict retirement eligibility to only an unreduced service retirement allowance and would instead apply to any type of service retirement.

Carson City, December 10, 1999

Mr. George Pyne, Public Employees' Retirement System, 693 West Nye Lane,  
Carson City, Nevada 89703

Dear Mr. Pyne:

The Public Employees' Retirement System (PERS) asks the following question.

#### QUESTION

When a state agency is required to reduce the number of its employees, the agency must purchase service credit for the affected pension members if the members qualify under NRS 286.3007. When PERS evaluates whether a member is: "eligible to retire or will be made eligible by the purchase of the credit," does that language in NRS 286.3007(3)(b) apply solely to an unreduced service retirement allowance or does the language apply to any service retirement allowance available under NRS 286.510?

#### ANALYSIS

NRS 286.3007 compels a state agency to purchase retirement credit for service whenever the agency is required to reduce the number of its employees.

Before the laid off employees may receive this benefit, however, they must meet the qualifying factors enumerated in the statute as follows:

3. If a state agency is required to reduce the number of its employees, it shall purchase credit for service pursuant to NRS 286.300 for any member who:

- (a) Is eligible to purchase credit;
- (b) Is eligible to retire or will be made eligible by the purchase of the credit;
- (c) Agrees to retire upon completion of the purchase; and
- (d) Has been employed by the agency for 5 or more years.

NRS 286.3007(3).

In the present opinion request we must construe the Legislature's intent in creating factor NRS 286.3007(3)(b) listed above. Specifically, we must discern what type of retirement eligibility is contemplated within that statutory provision. Retirement eligibility is addressed in NRS 286.510 as follows:

1. Except as otherwise provided in subsection 2, a member of the system is eligible to retire at age 65 if he has at least 5 years of service, at age 60 if he has at least 10 years of service, and at any age if he has at least 30 years of service.

....

6. Any member who has the years of creditable service necessary to retire but has not attained the required age, if any, may retire at any age with a benefit actuarially reduced to the required retirement age. . . .

A reading of NRS 286.510(1) illustrates that retirement eligibility is typically a function of a member's age and the amount of service credit the member has accrued in the system. NRS 286.510(6) provides for retirement eligibility at any age, however, as long as an actuarial reduction in the benefit is made to offset the additional length of time in which the member will be receiving retirement payments. When reviewing the buyout provisions contained in NRS 286.3007, PERS has consistently interpreted retirement eligibility to include both types of retirement described in NRS 286.510(1) and (6). If the member is eligible to receive any service retirement benefit from PERS or will be made eligible to receive any service retirement benefit, regardless of any actuarial age reduction



factor, PERS concludes that the qualification factor under NRS 286.3007(3)(b) has been met.

One state agency now questions PERS' interpretation of NRS 286.3007(3)(b). This State agency believes that retirement eligibility under this provision should be restricted to only those members who are eligible to receive an unreduced service retirement allowance as provided for in NRS 286.510(1). Because NRS 286.3007(3)(b) is susceptible to more than one interpretation, we look to the legislative history and various rules of statutory construction to ascertain the legislative intent on the matter.

One applicable rule of statutory construction is that pension legislation is to be liberally construed in favor of the beneficiaries. *Automobile, Etc. v. Department of Retirement*, 598 P.2d 379, 381 (Wash. 1979). PERS' interpretation of NRS 286.3007 construes the retirement rights of members who are being laid off by a state agency in a fashion most favorable to the members. This rule supports PERS' interpretation.

Another rule of statutory construction is that the interpreting party may look to the entire statute, and even to other related statutes, to construe an ambiguous or undefined term. *Advanced Sports Info., Inc. v. Novotnak*, 114 Nev. 336, 956 P.2d 806 (1998). The interpreting party should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. *Attorney General v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998). In statutes other than NRS 286.3007, the Legislature has used clearly distinguishing language when it desired to restrict retirement eligibility to the unreduced age for service retirement. There is no such restrictive language in NRS 286.3007.

For example, section 134 of S.B. 37, as enacted by the 1999 Legislature, contains a purchase of service provision which solely pertains to the Employer's Insurance Company of Nevada and further only applies to an employee reduction occurring after January 1, 2000. The particular language used by the Legislature in this statute illustrates a restrictive approach to the purchase provision as follows:

Except as otherwise required as a result of NRS 286.537:

1. If a domestic mutual insurance company receives the assets and assumes the debts and liabilities of the state industrial insurance system on January 1, 2000, pursuant to section 129 of this act and, after January 1, 2000, that company is required to reduce the number of its employees, the company shall pay the full actuarial cost to purchase credit for not more than 5 years of service pursuant to chapter 286 of NRS, in addition to any years of service previously purchased by the employee pursuant to NRS 286.300, for an employee who:

(a) Will be made eligible to receive an unreduced service retirement allowance pursuant to chapter 286 of NRS by the purchase of the credit; and

(b) Agrees to retire upon completion of the purchase or on or before July 1, 2001, whichever occurs earlier.

Act of May 29, 1999, ch. 388, § 134, 1999 Nev. Stat. 1841.

In this statute, the Legislature restricted the purchase provision to only those employees who would be made eligible for an unreduced service retirement allowance by the purchase of the credit.<sup>12</sup> The word unreduced does not appear within the purchase language of NRS 286.3007(3)(b). We must conclude that the Legislature did not use a superfluous word in Section 134 of S.B. 37 when it referred to an unreduced service retirement. *Automobile, Etc. v. Department of Retirement*, 598 P.2d at 382. Thus the absence of the word unreduced in NRS 286.3007 supports PERS' interpretation that any type of

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<sup>12</sup> NRS 286.6765 illustrates another example of the Legislature's use of precise language when restricting retirement eligibility. This statute, which addresses a spouse's survivor benefit, sets forth in part:

1. . . . the spouse of a deceased member who was fully eligible to retire, both as to service and age, is entitled to receive a monthly allowance equivalent to that provided by option 2 in NRS 286.590. This section does not apply to the spouse of a member who was eligible to retire only under section 6 of NRS 286.510. . . .

service retirement, not just an unreduced service retirement, would meet the qualifications of subsection (3)(b).

Finally, the legislative history regarding NRS 286.3007 supports PERS' interpretation of the buyout provision. In 1985, when the qualifying factors were first proposed within S.B. 447, the original language on retirement eligibility read as follows:

2. If a state agency is required to reduce the number of its employees, it shall purchase credit for service pursuant to NRS 286.300 for any member who:
  - (a) Is eligible to purchase credit;
  - (b) Will be eligible to retire if the credit is purchased;
  - (c) Agrees to retire upon completion of the purchase; and
  - (d) Has been employed by the agency for 5 or more years.

When this draft of the proposed legislation was reviewed by the Senate Committee on Finance, the following exchange took place regarding the interpretation of the eligibility language:

Senator [William J.] Raggio reiterated his belief that section 2(b), as written in the bill, can be interpreted to mean that the employing agency would be required to purchase only sufficient credit to reach eligibility. Mr. [Robert J.] Gagnier replied that was not the intent, and that portion was intended only to say that the time could not be bought if the employee had so little time that the purchase of the credit would not vest the person anyway....<sup>13</sup>

Hearing on S.B. 447, Before the Senate Finance Committee, 1985 Legislative Session, 3-4 (May 10, 1985.)

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<sup>13</sup> In 1985, a minimum of ten years of service was required for a PERS member to vest a pension which matured at age 60. Five year vesting with benefit maturity at age 65 was added to NRS 286.510 in 1989.

On May 17, 1985, the Senate amended S.B. 447 by changing the (2)(b) language as follows: “Is eligible to retire or will be made eligible by the purchase of the credit. . . .” This language, which ultimately became law within NRS 286.3007, supports the unrestrictive interpretation of the buyout provision as described to the Senate Finance Committee by Mr. Gagnier.

#### CONCLUSION

The language of NRS 286.3007(3)(b) applies to any type of service retirement allowable to a PERS’ member. NRS 286.3007 does not restrict retirement eligibility to only an unreduced service retirement allowance.

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