STATE OF NEVADA

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March 23, 2007

OPINION NO. 2007-01

MINIMUM WAGES; EMPLOYERS; INITIATIVE: Any increase in the federal minimum wage must take effect on the date established in the law. If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year. During the review, a comparison must be made between the amount of increases, expressed as percentages, in the federal minimum wage over $5.15 per hour and the cumulative increase in the CPI from December 31, 2004. Any adjustment to the two tier minimum wage becomes effective July 1st of the same year.

Michael Tanchek, Labor Commissioner
Office of the Labor Commissioner
675 Fairview Drive, # 226
Carson City, Nevada 89701

Dear Commissioner Tanchek:

You have requested an Attorney General Opinion on the recent constitutional amendment to Nev. Const. art. 15, § 16 (Amendment) affecting minimum wage, and you have posed six questions.

GENERAL BACKGROUND INFORMATION

The Amendment was first approved by the voters, through the initiative process, in the 2004 general election and was approved by the voters again in the 2006 general election. The Amendment states, in relevant part, as follows:

> Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits…These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1.

The Amendment provides that either the Governor or an agency designated by the Governor "shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1." The Labor Commissioner would likely be the "designated agency" as he is mandated to "enforce all labor laws of the State of Nevada…[t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." NRS 607.160.

QUESTION ONE

Because the adjustments in the minimum wage rates are generally applicable to all employers in Nevada, do the rulemaking procedures of NRS chapter 233B, the Nevada Administrative Procedure Act, need to be followed in order to make the adjustments?

ANALYSIS

NRS chapter 233B is Nevada's Administrative Procedure Act (APA) and contains the requirements for the adoption of regulations. More specifically, NRS 233B.038 defines a regulation in pertinent part as follows:

> 1. "Regulation" means:

> (a) An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;

Pursuant to NRS 233B.039, the Governor is exempt from APA rulemaking requirements. If he should take on this annual adjustment responsibility, he would not be constrained by the procedural requirements of the APA.

If the Labor Commissioner or other State agency was delegated the duty to annually review and publish the minimum wage, this review and publication of a potential increase could be accomplished without having to comply with the APA rulemaking procedures. The formula for establishing the minimum wage is contained within the Amendment and all that remains is the review and application of the formula on an annual basis to determine the appropriate minimum wage rate.

In *Morgan v. Committee on Benefits,* 111 Nev. 597, 894 P.2d 378 (1995), the Court reviewed whether the State Committee on Benefits actions in adjusting rates and coverage was "rulemaking" subject to the APA. The Court stated:

> Where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by the enabling statute. This authority need not always be exercised through a process of formal rule making.

Id. at 605, 894 P.2d at 384-85.

The issue in *Morgan* was an increase in the premium rates charged state employees for benefit coverage. The Court concluded that setting rates within the statutory confines set out by the legislature does not constitute rulemaking and was not subject to the procedural requirements of the APA.

The Court compared the situation in *Morgan* with that found in *Public Service Comm'n v. Southwest Gas Corp.,* 99 Nev. 268, 662 P.2d 624 (1983). *Public Service Comm'n* involved a change to the utility's "rate design" which had been noticed as a rate change. The Court noted that while a simple rate change did not need to comply with the APA, any changes to the utility's "rate design" (forms of rate structure based on type of customer) by the Public Service Commission should, however, comply with APA rulemaking requirements. *Id.* at 383, 894 P.2d at 383.

Here, the "design" for the annual review and publication is found within the Amendment. The annual calculations to determine the appropriate adjustment are an implementation of that design, the application of a mathematical formula, with no discretion allowed to the office or agency.

CONCLUSION TO QUESTION ONE

Neither the Governor nor an agency charged with the duty to review and publish the adjustments required by the Amendment are required to follow the rulemaking procedures of the APA.

QUESTION TWO

If increases are made in the federal minimum wage, when do those increases become effective?

ANALYSIS

Section 6(a)(1) of the Federal Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) contains the federal minimum wage. The current federal minimum wage is $ 5.15. This minimum wage rate became effective on September 1, 1997. This effective date is contained in the text of 29 U.S.C. 206(a)(1).

Pursuant to 29 § USCA 202(b), Congress may elect to exercise its power to "regulate commerce among the several States . . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." Those conditions include "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ." 29 § USCA 202(a).

Congress is currently considering a bill (H.R.2) to amend 29 U.S.C. 206(a)(1) and raise the federal minimum wage. The portion of H.R. 2 (2007) relevant to this discussion is set out below:

> Sec.101 – Minimum Wage
> (a) In General – Section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is amended to read as follows:
>
> (1) except as otherwise provided in this section, not less than –
>
> (A) $ 5.85 an hour, beginning on the 60th day after the date of the enactment of the Fair Minimum Wage Act of 2007;
> (B) $ 6.55 an hour, beginning 12 months after that 60th day; and
> (C) $ 7.25 an hour beginning 24 months after that 60th day.
>
> (b) Effective Date – The amendment made by subsection (a) shall take effect 60 days after the date of enactment of this Act.

Under H.R. 2, the effective date(s) of the federal minimum wage increase(s) are set out in the amendment. If H.R. 2 fails, any bill which amends 29 U.S.C. 206(a)(1) will need to set out the effective date of the federal minimum wage increase.

CONCLUSION TO QUESTION TWO

The bill amending Section 6(a)(1) of the Federal Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), thereby raising the federal minimum wage, will contain the effective date(s) of the increase(s).

QUESTION THREE

Using the current rates of $5.15 per hour and $6.15 per hour, how would the cost of living adjustment be calculated, what would the rates be, and when would they become effective under the following scenarios:

Scenario 1: The federal minimum wage is not increased before April 1, 2007.

Scenario 2: The federal minimum wage is increased before April 1, 2007.

Scenario 3: The federal minimum wage is increased after April 1, 2007, but prior to July 1, 2007.

Scenario 4: The federal minimum wage is increased after July 1, 2007, but prior to April 1, 2008.

ANALYSIS OF QUESTION THREE

The Amendment provides two methods for adjusting Nevada's minimum wage and requires the use of the method resulting in the greater increase. A discussion of these methods as well as the impact of a federal minimum wage increase is necessary prior to answering the questions posed.

Any increase in the federal minimum wage must take effect on the date established in the law. *See Dail v. Arab*, 391 F.Supp.2d 1142 (M.D.Fla. 2005) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895 (1945)) (Federal Labor Standards Act's provisions are mandatory.) If the current Nevada minimum wage is less than the federal wage, the Nevada wage must be raised to the federal level on the date specified in the federal law.

For example, if on March 29, 2007, the federal minimum wage was raised to $5.85, the lower tier Nevada minimum wage would become $5.85, on that day. The Amendment does not contemplate a review of the minimum wage more than once per year. It specifically calls for a publication on April 1 of each year with an effective date of July 1. Because there is no review before April 1, the upper tier would remain at $6.15 because it is higher than the federal minimum wage. Any potential increase to the upper tier would be accomplished through the annual review conducted the following April 1 with the effective date of any increase being the following July 1.

The Amendment delineates that the minimum wage rate “shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, *or*, if greater, by the cumulative increase in the cost of living.” (emphasis added.) While the Nevada Supreme Court has found that the term "or" can mean either "and" or "or," *see Desert Irrigation, Ltd. v. State,* 113 Nev. 1049, 944 P.2d 835 (1997), we conclude in this case that the rules of statutory construction dictate otherwise.

"[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)). Further, the Court in *Nevadans for Nevada v. Beers*, 142 P.3d 339, 347 (2006), stated that, unless "ambiguous, the language of a constitution provision is applied in accordance with its plain meaning."

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 (5th ed. 1979). Following the rules of statutory construction, the presumption here is that the word "or" is given its ordinary meaning.

The Nevada Supreme Court has held that use of the term "or" between phrases indicates an alternative and suggests 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.

The Amendment offers no indication that "or" is to be read as anything but disjunctive. Accordingly, the "or" at issue in the Amendment reveals an intentional separation of two distinct methods of adjusting the Nevada minimum wage. Further, no increase in the federal minimum wage is necessary to trigger a review or adjustment based on the cost of living. The disjunctive “or” requires one occurrence or the other but not necessarily both. *See Anderson, supra*.

The first method contained in the Amendment is the adjustment of Nevada's rate by the same increase as that imposed by the federal law. For instance, using the same wage rate increase as above, if the federal minimum wage rate is increased to $5.85, a raise of seventy (70) cents over the prior minimum wage of $ 5.15, the potential adjustment to Nevada's minimum wage would likewise be a raise of seventy (70) cents.

The second method sets out an adjustment based on the "cumulative increase in the cost of living." The amendment then defines the calculation of the cost of living increase as "the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency."

The CPI for December 31, 2004, is to be used as the base rate. The "cumulative" increase refers to the requirement that the year 2004 be used as a base with the addition of the increases to the CPI that may occur in subsequent years. *Black's Law Dictionary*, 343 (5th ed. 1979), defines "cumulative" as follows: "Additional; heaping up; increasing; forming an aggregate. The word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other." Thus, the "cumulative increase in the cost of living" would be the adding together of the CPI increases from 2004 forward to form an aggregate increase in the CPI between the current year and 2004. *See Del Papa, supra*.

The Amendment does not contain the word "annual" or other language which mandates an increase on a yearly basis. The Amendment calls for a comparison to be done. In interpreting a constitutional provision, the Nevada Supreme Court has stated that it is "not free to presume that the framers of the [initiative] and those who enacted it meant anything other than exactly what they said." *See Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 26 P.3d 753, 759 (2001).

Other states in addressing this same issue have drafted their minimum wage increase provisions differently, clearly delineating that an increase will be on an annual basis tied to the cost of living. For example**,** Arizona's minimum wage law found at Ariz.Rev.Stat.Ann sec. 36-363 (effective January 1, 2007) states in pertinent part:

> The minimum wage shall be increased on January 1, 2008 and on January 1 of successive years by the increase in the cost of living. The increase in the cost of living shall be measured by the percentage increase as of August of the immediately preceding year over the level as of August of the previous year of the consumer price index (all urban consumers, U.S. city average for all items) or its successor index as published by the U.S. department of labor or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of five cents.

Likewise, Missouri has recently implemented a new minimum wage law which calls for an annual increase or decrease. Mo.Ann.Stat. sec. 290.502 (effective January 1, 2007) in pertinent part:

> The minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living. On September 30,

> 2007, and on each September 30 of each successive year, the director shall measure the increase or decrease in the cost of living by the percentage increase or decrease as of the preceding July of the immediately preceding year of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase or decrease rounded to the nearest five cents.

In our case, the plain meaning and utilization of the word "cumulative" is to refer to the requirement that during the annual review, the percentage increase is not calculated on a year by year basis, but rather that the increase in the minimum wage be compared to the cumulative increase in the CPI. Therefore, the annual review would not be reviewing the increase of CPI from year to year but rather the total increase from 2004 forward compared to the total increase in the federal minimum wage.

The Amendment calls for the comparison of the amount of a federal increase to the change in the CPI. As the federal increase is expressed in monetary terms and the change in CPI is expressed in points, a direct comparison cannot be made between monetary amounts and CPI points. Therefore, in order to do a comparison, the amounts must be converted to a similar basis, i.e. percentage change.

Using our earlier example of a seventy cent increase in the federal minimum wage on March 29, 2007, the change from $5.15 to $5.85 would be a 13.6 % increase in the federal minimum wage.

The Consumer Price Index (All Urban Consumers, U.S. City Average), is calculated using 1982 as a base year, with the amount assigned to it of 100. The CPI identifies the increase in the cost of living using that baseline as the starting point. Pursuant to the Bureau of Labor Statistics, as of December 31, 2004, the CPI was 190.3. *See* http://data/bls.gov. The CPI as of December 31, 2006, was 201.8, i.e., an increase of 11.5 points over December 31, 2004. http://data/bls.gov. This 11.5 point increase from 2004 represents a 6% increase.

At the first April 1 review after the implementation of the federal increase – the seventy cents would presumably be added to the Nevada minimum wage because the 13.6% increase in the federal minimum is larger that the 6% increase in the CPI. In subsequent years, unless there was an additional increase in the federal minimum wage, there would not be an increase to the minimum wage until the CPI increase from base year 2004 to that reviewing year was greater than the percentage change in the increase to the federal minimum wage.[1]

[1] This opinion centers on the legal issues surrounding the interpretation of the Amendment. Due to the potential for sequential increases to the Federal Minimum Wage and changes to the percentage calculations, the Attorney General would defer to the specialized knowledge of the Labor Commissioner and/or any economists or accountants he may employ to assist him, for the actual formulas and calculations to be employed in adjusting the Nevada minimum wage.

We now apply these principles to the four scenarios posed.

Scenario 1: The federal minimum wage is not increased before April 1, 2007.

Under Scenario 1, if the federal minimum wage did not increase by April 1, 2007, a comparison of the 0% change to the federal minimum wage would be compared to the 6% change in the CPI to determine any adjustment, up to a maximum 3%, with the adjusted Nevada minimum wage rate effective July 1, 2007.

Scenario 2: The federal minimum wage is increased before April 1, 2007.

If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. For purposes of the April 1, 2007 review, the percentage of the federal minimum wage increase would be compared to the CPI percentage increase, to determine any adjustment to the two tiers of the Nevada minimum wage that would become effective on July 1, 2007.

Scenario 3: The federal minimum wage is increased after April 1, 2007, but prior to July 1, 2007; and

Scenario 4: The federal minimum wage is increased after July 1, 2007, but prior to April 1, 2008.

If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. For purposes of the April 1, 2008 review, the percentage of the federal minimum wage increase would be compared to the CPI percentage increase, to determine any adjustment to the two tiers of the Nevada minimum wage that would become effective on July 1, 2008.

CONCLUSION TO QUESTION THREE

Any increase in the federal minimum wage must take effect on the date established in the law. If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year. During the review, a comparison must be made between the amount of increases, expressed as percentages, in the federal minimum wage over $5.15 per hour and the cumulative increase in the CPI from December 31, 2004. Any adjustment to the two tier minimum wage becomes effective July 1st of the same year.

QUESTION FOUR

How would the answers in scenarios 2, 3, and 4 posed in Question 3 change if the amount of any raise in the federal minimum wage rate is less than the cost of living increase to be announced on April 1, 2007?

QUESTION FIVE

How would the answers in scenarios 2, 3, and 4 posed in Question 3 change if the amount of any raise in the federal minimum wage rate is greater than the cost of living increase to be announced on April 1, 2007?

CONCLUSION TO QUESTIONS FOUR AND FIVE

The Amendment requires that the annual method resulting in the greater percentage increase in the minimum wage be utilized.

QUESTION SIX

What is the effect of the phrase "cumulative increase in the cost of living" on the minimum wage rate in subsequent years and how does that affect the annual calculation?

CONCLUSION TO QUESTION SIX

Please see our response to question three.

Sincere regards,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JAMES T. SPENCER
Chief Deputy Attorney General

JTS:efb

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September 21, 2007

OPINION NO. 2007-02

CITIES AND TOWNS; GRAZING AND RANGING; LIVESTOCK: The City of Fernley has express statutory authority to enact ordinances to regulate the running at large of any animal, as well as the authority to impose criminal sanctions not to exceed those for a misdemeanor, or a civil penalty not to exceed $500 for violations of such ordinances.

Paul G. Taggart, Esq.
City of Fernley
108 North Minnesota Street
Carson City, Nevada 89703

Dear Mr. Taggart:

You have requested an opinion from this Office on behalf of the City of Fernley (City), Nevada, concerning the authority of the City to adopt an ordinance prohibiting an owner of a cow or cattle to allow the cow or cattle to roam in the City, and what fines or penalties may the City adopt to enforce such an ordinance.

QUESTION ONE

Is the City authorized by law to adopt an ordinance that prohibits an owner of a cow or cattle from allowing his cow or cattle to roam in the City?

ANALYSIS TO QUESTION ONE

Nevada, like most western states, is a "fencing out" state for purposes of establishing civil liability for roaming cattle in open range areas. Specifically, owners of livestock are not held liable for damage caused in open range areas unless a fence is first erected by the complaining property owner. *See, e.g., Chase v. Chase*, 15 Nev. 259 (1880); *Yager v. Deane*, 258 Mont. 453, 458-59, 853 P.2d 1214, 1217-18 (1993); *Kenney v. Walla Walla County*, 45 Wash. App. 861, 864, 728 P.2d 1066, 1068 (Wash. Ct. App. 1986). *See also Maguire v. Yanke,* 99 Idaho 829, 590 P.2d 85, 91 n.7 (1978), and cases cited therein. NRS 568.355 defines "open range" as "all unenclosed land *outside of cities and towns* upon which cattle, sheep or other domestic animals by custom, license, lease or permit are grazed or permitted to roam." [Emphasis added.]

In Op. Nev. Att'y Gen. No. 98-22 (August 7, 1998) (hereinafter 1998 Opinion) this Office addressed whether Pershing County had authority to regulate livestock in open range. The Attorney General opined that an ordinance that is carefully tailored and which does not attempt to alter the civil tort liability relative to livestock roaming on open range as described in NRS Chapter 568 would be a permissible regulation. *See id.; Benewah County Cattlemen's Ass'n, Inc. v. Bd. of County Comm'rs*, 105 Idaho 209, 213, 668 P.2d 85, 89 (1983) (ordinance expressly disclaimed any intended effect on civil tort liability relating to open range grazing practices). However, as you indicated, the City is not considered open range, thus it is not necessary to determine the preclusive effect of the "fencing out" law on the City's ability to regulate livestock. Therefore, the following analysis does not contemplate open range and is limited to the land located within the City.

Cities may only exercise those powers which are expressly granted to them by the Legislature. *Cf. Horne v. City of Mesquite*, 120 Nev. 700, 704-05, 100 P.3d 168, 171 (2004). As the City is an incorporated city organized under NRS Chapter 266, it is bound by the provisions of Chapter 266. *Id.* at 704, 100 P.3d at 170-71.

The Legislature has expressly authorized each city council to regulate animals pursuant to NRS 266.325. NRS 266.325(2) provides that the city council may "[r]egulate or prohibit the running at large and disposal of all kinds of animals and poultry." In our 1998 Opinion this Office analyzed NRS 244.359, which is very similar to NRS 266.325. NRS 244.359 provides, in relevant part:

> 1. Each board of county commissioners may enact and enforce an ordinance or ordinances:
> . . .
> (b) Regulating or prohibiting the running at large and disposal of all kinds of animals.

The Attorney General concluded that NRS 244.359 authorized a county ordinance to control free-roaming livestock. Op. Nev. Att'y Gen. No. 98-22. Although NRS 266.325 does not specifically refer to "enact[ing] and enforc[ing] an ordinance," it expressly states that the city council "may . . . [r]egulate or prohibit the running at large" of any animal. Insofar as the two statutes are analogous, we conclude similarly to our 1998 Opinion. Specifically, NRS 266.325 authorizes the City to regulate free-roaming animals. In addition, NRS 266.105(1) permits the city to:

> [m]ake and pass all ordinances, resolutions and orders, not repugnant to the Constitutions of the United States or of the State of Nevada . . . necessary for the municipal government and the management of the city affairs, for the execution of all powers vested in the city, and for making effective the provisions of this chapter.

Therefore, since NRS 266.325 specifically permits the City to regulate the running at large of any animal, it follows that NRS 266.105 enables the City to enact ordinances to effectuate that purpose.

Furthermore, NRS 268.018 provides that an incorporated city, unless otherwise prohibited by law, may establish by ordinance as a city misdemeanor any offense which is a misdemeanor pursuant to the laws of Nevada. On its face, NRS 268.018 appears to limit an incorporated city's authority to proscribe acts as misdemeanors that are not otherwise designated as such by the NRS. However, counties and cities have generally proscribed various offenses which are not enumerated in the Nevada statutes. *See cf. City of Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. ___, 146 P.3d 240, 245 (Adv. Op. 90, November, 2006) (city ordinance made it a misdemeanor to engage in certain touching between a patron and an erotic dancer).

Therefore, the City has express statutory authority to enact ordinances to regulate the running at large of any animal.

CONCLUSION TO QUESTION ONE

Pursuant to NRS 266.325, NRS 266.105 and NRS 268.018, the City is expressly authorized by law to adopt an ordinance that prohibits an owner of a cow or cattle from allowing his cow or cattle to roam in the City.

QUESTION TWO

What fines or penalties may the City adopt to enforce such an ordinance?

ANALYSIS TO QUESTION TWO

Several statutes are relevant to this analysis. First, NRS 266.105(2) authorizes city councils to provide for fines or penalties to enforce their ordinances so long as they do not exceed those provided by law for a misdemeanor. Punishments for misdemeanors are set forth in NRS 193.150. Specifically NRS 193.150 provides:

> 1. Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such misdemeanor prescribed a different penalty.
> 2. In lieu of all or a part of the punishment which may be imposed pursuant to subsection 1, the convicted person may be sentenced to perform a fixed period of community service pursuant to the conditions prescribed in NRS 176.087.

Further, NRS 176.087 provides, among other things, that if community service is imposed for a misdemeanor the amount fixed by the court must not exceed 200 hours. In addition, NRS 268.019(1) permits a city to impose a civil penalty not to exceed $500, in lieu of criminal sanctions.

Therefore, pursuant to NRS 266.105(2) and NRS 268.019(1), the City may impose criminal sanctions not to exceed those for a misdemeanor as provided above or a civil penalty not to exceed $500.

CONCLUSION TO QUESTION TWO

Pursuant to NRS 266.105 and NRS 268.019, the City may adopt criminal sanctions not to exceed those for a misdemeanor or a civil penalty not to exceed $500 to enforce such an ordinance.

CONCLUSION

The City of Fernley has express statutory authority to enact ordinances to regulate the running at large of any animal, as well as the authority to impose criminal sanctions not to exceed those for a misdemeanor, as provided above, or a civil penalty not to exceed $500 for violations of such ordinances.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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KSA/lsd

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January 4, 2007

OPINION NO. 2007-03

BOARDS & COMMISSION; SECRETARY OF STATE: The scope of the Secretary of State's duty when attesting to an official act of appointing a member to a State Board or commission by the Governor is to attest, or certify, that the signature of the Governor is legitimate. The Secretary of State has no obligation to conduct due diligence on an appointment if there is a question concerning the existence of a vacancy or of the legality of a previous appointment.

Honorable Ross Miller
Secretary of State
100 North Carson Street, Suite 3
Carson City, Nevada 89701-4786

Dear Secretary Miller:

By letter dated January 4, 2007, you have asked questions concerning the duties of the Secretary of State (Secretary) with regard to the filing of certain records with the Secretary. Your inquiry was prompted by reports that certain appointment documents which were submitted to you for attestation and filing may have been for positions which were already allegedly filed with your Office prior to your term. You expressed concern over your duties in such a situation and we suggested that you submit a request for a written opinion.

QUESTION ONE

What is the scope of the duty of the Secretary when attesting to an official act of appointing a member to a State board or commission by the Governor?

ANALYSIS

The Secretary's duties concerning attestation of appointments by the Governor are set out in NRS 225.080(1):

> The Secretary of State shall:
>
> 1. Attest all the official acts and proceedings of the Governor, and affix the seal of the State, with proper attestations, to all commissions, pardons and other public instruments to which the signature of the Governor is required. A copy of these instruments must be filed in the Office of the Secretary of State.

The Secretary's duty to "attest", means generally to "bear witness to, certify; declare to be correct." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Second Edition, 1987.

The Secretary's duties with regard to the subject records appear to be mainly ministerial, to certify that the signature of the Governor is in fact that of the Governor. The ministerial nature of this duty is further clarified by NRS 225.083(1), which provides in relevant part:

> 1. The Secretary of State shall prominently post the following notice at each office and each location on his Internet website at which documents are accepted for filing:
>
> The Secretary of State is not responsible for the content, completeness or accuracy of any document filed in this office.

The required posting language provided by the legislature indicates that the Secretary has no duty to ensure the accuracy of, or the legality of, documents which are filed pursuant to NRS 225.080.

CONCLUSION

The scope of the Secretary of State's duty when attesting to an official act of appointing a member to a State board or commission by the Governor is to attest, or certify, that the signature of the Governor is legitimate.

QUESTION TWO

Does the Secretary have any obligation to conduct due diligence on an appointment if there is a question concerning the existence of a vacancy or of the legality of a previous appointment?

ANALYSIS

In light of our analysis in Question One, above, we must answer this question in the negative.

CONCLUSION

The Secretary of State has no obligation to conduct due diligence on an appointment if there is a question concerning the existence of a vacancy or of the legality of a previous appointment.

Sincere regards,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JAMES T. SPENCER
Chief Deputy Attorney General

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

RANDAL R. MUNN
Assistant Attorney General

June 5, 2007

OPINION NO. 2007-04

COMMISSIONER; TERM LIMITATIONS; STOREY COUNTY: The term limitation found in NEV. CONST. ART. 15, § 3(2) of the Nevada Constitution does not prohibit Mr. Greg Hess of the Storey County Commission from seeking another four-year term in 2008, since at the time of the election in 2008, Mr. Hess will have served a total of ten years in the office, which is fewer than the 12 years in office at that time or at the end of his current term which would bar him from seeking re-election.

Harold Swafford
Storey County District Attorney
P.O. Box 496
Virginia City, NV 89440

Dear Mr. Swafford:

You have requested an opinion from this Office regarding whether a Storey County Commissioner, Mr. Greg Hess, may run for another term as Commissioner in view of term limit restrictions.

QUESTION

May Mr. Greg Hess, who was first elected to Storey County Commissioner in 1998, run for re-election in 2008 to a four-year term?

ANALYSIS

Your letter states that Mr. Hess was first elected in 1998 to a two-year term to fill out the unexpired term of a Commissioner who died after being elected to a four-year term in 1996. You also state that Mr. Hess was re-elected in 2000 to a four-year term and was subsequently re-elected in 2004 to another four-year term.

The limiting law is contained in the Nevada Constitution which states:

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

NEV. CONST. ART. 15, § 3(2).

There is no question that a County Commission is a "local governing body" as that term is used in paragraph 2 quoted above. *See* Op. Nev. Att'y Gen. No. 96-23 (August 9, 1996), copy enclosed. Therefore, the limitations established therein apply to Mr. Hess. However, they do not prevent him from seeking an additional term. At the time of the next election for Storey County Commission in 2008, Mr. Hess will have served in his current term nearly ten years, and at the end of that term, he will have served a total of ten years. Therefore, he may be elected to another term at that time, since he will have served fewer than 12 years at the expiration of the current term.

CONCLUSION

The term limitation found in NEV. CONST. ART. 15, § 3(2) of the Nevada Constitution does not prohibit Mr. Greg Hess of the Storey County Commission from seeking another four-year term in 2008, since at the time of the election in 2008, Mr. Hess will have served a total of ten years in the office, which is fewer than the 12 years in office at that time or at the end of his current term which would bar him from seeking re-election.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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Senior Deputy Attorney General
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CATHERINE CORTEZ MASTO
Attorney General

RANDAL R. MUNN
Assistant Attorney General

August 8, 2007

OPINION NO. 2007-05

ENGINEERS; LICENSES; SOCIAL SECURITY: Pursuant to the requirement contained in NRS 625.387(1)(a), the Board may and must continue, as it has in the past, to collect the social security numbers of applicants for professional licenses.

Noni Johnson
Executive Director
State of Nevada
Board of Professional Engineers and Land Surveyors
1755 East Plumb Lane, #135
Reno, Nevada 89502

Dear Ms. Johnson:

You have, on behalf of the Board of Professional Engineers and Land Surveyors (Board), asked for an opinion about the continued appropriateness of requiring applicants for professional licenses to supply their social security numbers to the Board. While NRS 625.387(1) expressly requires this information, NRS 239B.030, which went into effect on January 1, 2007, generally protects confidentiality of social security numbers. Citing the apparent conflict between these statutes, you have asked the following question.

QUESTION

Whether the Board may continue to require applicants to include their social security numbers in their applications submitted to the Board.

ANALYSIS

The Board is established by the Legislature. NRS 625.100. Among its duties, the Board "[i]ssue[s] licenses to qualified and competent persons as professional engineers and professional land surveyors and certif[ies] qualified and competent persons as engineer interns and land surveyor interns." NRS 625.152(1). A person applying for such license or certification must include his or her social security number with an application. NRS 625.387(1)(a). This requirement was enacted by the Nevada Legislature in response to provisions of federal law contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Pub. L. No. 104–193, 110 Stat. 2105 (1996).[1] Among other things, this law requires states, in order to receive certain federal funds, to record social security numbers from "any applicant for a professional license, driver's license, occupational license, recreational license, or marriage license . . . ." 42 U.S.C. § 666 (2007).

Eight years after enactment of NRS 625.387, the 2005 Nevada Legislature added NRS Chapter 239B to Nevada law to protect the privacy of social security numbers. This law states, in part, that "a governmental agency shall not require a person to include the social security number of a person on any document that is recorded, filed or otherwise submitted to the governmental agency on or after January 1, 2007." NRS 239B.030(1). However, this requirement applies "[e]xcept as otherwise provided in subsection 2 [of NRS 239B.030]." *Id.* Section 2 expressly provides that an exception exists to the general prohibition against requiring disclosure of a social security number when "the social security number of a person is required to be included in a document that is recorded, filed or otherwise submitted to a governmental agency on or after January 1, 2007, pursuant to a specific state or federal law, for the administration of a public program . . . ." NRS 239B.030(2).

Based upon this language, there is no conflict between statutes. NRS 239B.030(1) expressly excepts specific state law requirements to include social security numbers. NRS 625.387(1)(a) requires disclosure of an applicant's social security number for the administration of a public program, namely child support enforcement. Nevada's requirement for disclosure of the social security number is therefore consistent with NRS 239.030(1). Consequently, there is no need for construction of the statutes, because their meaning is plain and unambiguous. *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003).

[1] Other similar provisions were added to Nevada statutes during the 1997 legislative session establishing this requirement for virtually all types of occupational, professional, and recreational licenses. *See generally* Act of July 16, 1997, ch. 483, §§ 2—3.8, 1997 Nev. Stat. 425.

CONCLUSION

Pursuant to the requirement contained in NRS 625.387(1)(a), the Board may and must continue, as it has in the past, to collect the social security numbers of applicants for professional licenses. This express requirement does not conflict with the general confidentiality protections created in NRS Chapter 239B, which recognize exceptions to the protections when state laws such as NRS 625.387(1)(a) specifically require inclusion of a social security number for the purpose of administration of a public program.

Sincerely,

CATHERINE CORTEZ-MASTO
Attorney General

By: _____
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August 9, 2007

OPINION NO. 2007-06

TAXATION, DEPARTMENT OF; LOCAL GOVERNMENT; WHITE PINE COUNTY; AND FINANCIAL (EMERGENCY), COUNTY COMMISSION: NRS 354.685(7) empowers the Nevada Tax Commission to order Department of Taxation to take over management of a local government when it is found to be in a condition of severe financial emergency. Because management of White Pine County was found to be in a condition of severe financial emergency, the Department of Taxation is not required to obtain County Commission approval to fulfill its mandated duties. NRS 354.695(1).

Dino DiCianno, Executive Director
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-2000

Dear Mr. DiCianno:

You have requested an opinion from this Office clarifying the Department of Taxation's authority to exercise its authority under NRS 354.695(1) when a local government has been found to be in a condition of severe financial emergency.

QUESTION ONE

Is the Department of Taxation required to obtain White Pine County Commission approval for requirements delineated under NRS 354.695(1), specifically the appointment of a financial manager for the local government?

ANALYSIS

NRS 354.685(7) empowers the Nevada Tax Commission (Commission) to order the Department of Taxation (Department) to take over management of a local government when it is found to be in a condition of severe financial emergency as defined in NRS 354.685(1). In this case, the Commission declared a severe financial emergency in White Pine County (County) and ordered the Department take over the County's management at the Commission's public meeting on June 27, 2005. NRS 354.695(1) enumerates the Department's duties in the case of a severe financial emergency. It states in part:

> [A]s soon as practicable after taking over the management of a local government, the Department *shall*, with the approval of the [Committee on Local Government Finance]:
> . . . .
> (b) Provide for the appointment of a financial manager *for* the local government who is qualified to manage the fiscal affairs of the local government. [Emphasis added.]

Because the Legislature chose "shall," not "may," the Department must consider its duties under NRS 354.695(1) as mandates. *Givens v. State,* 99 Nev. 50, 54, 657 P.2d 97, 100 (1983), *overruled on other grounds, Talacon v. State,* 102 Nev. 294, 721 P.2d 764 (1986). Additionally, NRS 354.695(1)(b) states the Department shall provide for the appointment of a financial manager "for" the local government not "by." "[C]ourts must construe statutes to give meaning to all of their parts and language . . . to render it meaningful within the context of the purpose of the legislation." *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

The Legislature has given the local government a role in cases of severe financial emergency, but it is an advisory role. NRS 354.695(3) states that, "[t]he governing body of a local government which is being managed by the Department . . . *may* make recommendations to the Department or the financial manager concerning the management of the local government." [Emphasis added.] "May" is permissive, not mandatory, *Givens*, 99 Nev. at 54, and even if the local government makes recommendations, the Department is not bound by the recommendations.

"When determining how to give effect to a statute, a court should look first to its plain language." *Smith v. Crown Fin. Servs. of America,* 111 Nev. 277, 284, 890 P.2d 769, 773 (1995). The plain language of NRS 354.695(1) specifically preempts the authority of the local government with respect to the enumerated powers (a) through (m). *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) (Look to whole purpose and scope of legislative scheme; general scheme preempts local control). The County Commissioners may make recommendations to the Department, but the Department is charged with management of the County. NRS 354.695(3).

To provide specific methods for the treatment of local governments declared to be in a severe financial emergency, "the provisions of NRS 354.655 to 354.725, inclusive, must be broadly and liberally construed." NRS 354.657(1) and (2).

Additionally, counties are a creation of the Legislature. *See* NEV. CONST. art. 4, § 26. Consequently, the powers of the county derive exclusively from legislative acts. Op. Nev. Att'y Gen. No. 88 (November 12, 1963). By enacting NRS 354.655 to NRS 354.725, inclusive, the Legislature effectively preempted certain powers of the local governing body when the Commission declared a severe financial emergency. *Lamb*, 90 Nev. at 332.

Once the Commission ordered the Department to take over management of the County, the Department, acting in consultation with the Committee on Local Government Finance, assumed these powers from the County Commissioners. If interpreted otherwise, the spirit and intent of NRS Chapter 354 would not be served. Statutes must be construed in light of their purpose as a whole. *Hampton v. Brewer,* 103 Nev. 73, 74, 733 P.2d 852, 853 (1987), *cert. denied*, 482 U.S. 915 (1987). To allow the County Commissioners to continue to exercise these powers or, in essence, overrule decisions made by the Department, the Committee on Local Government Finance, and/or the Nevada Tax Commission, would be contrary to the purpose and intent of NRS 354.655 to NRS 354.725, inclusive.

CONCLUSION TO QUESTION ONE

Because management of White Pine County was found to be in a condition of severe financial emergency pursuant to NRS Chapter 354, the Department of Taxation is not required to obtain County Commission approval to fulfill its mandated duties delineated under NRS 354.695(1).

QUESTION TWO

If the County fails to comply with any request made by the Department, pursuant to NRS 354.695, what steps may the Department take to gain compliance with its request?

ANALYSIS

NRS 354.715 allows the Department to apply to the district court to compel compliance of a local government if it fails to comply with any request made by the Department pursuant to NRS 354.695.

As discussed in Question One, the Department is charged with the management of local governments declared to be in a severe financial emergency. NRS 354.695 outlines powers and duties that the Department is required to fulfill as soon as practicable with the approval of the Committee on Local Government Finance. NRS 354.695(1). County

Commission approval is not required nor was it contemplated by the plain meaning of the statutes at issue. *Smith,* 111 Nev. at 284.

Nevertheless, the Department could not accomplish its duties, pursuant to NRS 354.695(1), without assistance and cooperation from the White Pine County Commissioners and/or County employees. The Legislature, through enactment of NRS 354.715, provided a mechanism for the Department to compel assistance from the local government when necessary to accomplish its duties pursuant to NRS 354.695.

CONCLUSION TO QUESTION TWO

If the local government does not cooperate and assist the Department in accomplishing the duties outlined in NRS 354.695(1), the Department may apply to the district court to compel compliance, under authority established in NRS 354.715.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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Tax Section
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STATE OF NEVADA

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RANDAL R. MUNN
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August 31, 2007

OPINION NO. 2007-07

CONSANGUINITY; TAXES; REAL PROPERTY TRANSFER; TAXATION, DEPARTMENT OF:
The phrase "first degree of lineal consanguinity or affinity" refers to ascending and descending blood relations within one degree of separation. Transfers of real property between adopted children and their adoptive parents, stepchildren and stepparents, parents-in-law and children-in-law, and spouses all qualify for the tax exemption. NRS 375.090(5).

Dino DiCianno, Executive Director
State of Nevada
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. DiCianno:

You have requested an opinion from this Office to resolve a current conflict in the application of NRS 375.090(5). In pertinent part, NRS 375.090 states, "[t]he taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to: 5. [a] transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of lineal consanguinity or affinity." Specifically, you seek to resolve two conflicting district attorney opinions concerning the application of NRS 375.090(5), which result in disparate treatment of taxpayers.

By way of background, the Department of Taxation (Department) received copies of two written opinions from the Douglas County District Attorney concerning the application of NRS 375.090 as enacted prior to the 2005 legislative amendments.[1] The first opinion was rendered on August 14, 1985, and was reiterated in an opinion rendered on May 22, 2002.

[1] NRS 375.090 prior to the 2005 legislative amendment read: 375.090 The taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to: 9. A transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of consanguinity.

The opinions rendered by Douglas County assert that the real property transfer tax exemption does not apply to transfers between stepchildren and stepparents because that relationship is not encompassed in the term "consanguinity." The Department also received a written opinion from the Washoe County District Attorney, rendered on November 6, 1985, also discussing the application of NRS 375.090 as enacted prior to the 2005 legislative amendments. The Washoe County opinion directly conflicts with the two opinions issued by the Douglas County District Attorney in that Washoe County asserts that the real property tax exemption found in NRS 375.090 as previously enacted does apply to transfers between stepchildren and stepparents. Accordingly, taxpayers in Douglas County are being subjected to a different tax treatment than citizens of Washoe County by the respective county recorders' offices.

You also seek guidance on how the 2005 legislative expansion of NRS 375.090 affects the analysis. Importantly, you suggest that the conflict between the two counties in the application of NRS 375.090 remains subsequent to the 2005 legislative amendments, thus necessitating this opinion.

In attempting to resolve the current conflict, you have asked this office the following questions:

QUESTION ONE

What does the phrase "first degree of lineal consanguinity or affinity" found in NRS 375.090(5) mean, and what relationships does it include?

ANALYSIS

As an initial matter, it is important to clarify how NRS 375.090 was modified by the various 2005 legislative amendments. NRS 375.090 was amended by three legislative measures that were adopted in the 73rd Session of the Nevada Legislature including Senate Bill No. 64 (S.B. 64), Assembly Bill No. 544 (A.B. 544), and Senate Bill No. 390 (S.B. 390).

S.B. 64 expanded NRS 375.090(9) by adding the term *affinity.* A.B. 544 limited the exemption to those "within the first degree of *lineal* consanguinity or affinity." Finally, S.B. 390 removed the exemption for real property transfers between spouses found NRS 375.090(5) as previously enacted and replaced it with the current version of NRS 375.090(5) which includes the modifications made through S.B. 64 and A.B. 544 and reads: "[a] transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of lineal consanguinity or affinity." As discussed in further detail below, the exemption for real property transfers between spouses under NRS 375.090(5) as enacted prior to the 2005 legislative amendments is encompassed in the current version of NRS 375.090(5).

To render a determination of the meaning of the phrase "first degree of lineal consanguinity or affinity," and pronounce the relationships that phrase includes, we turn to principles of statutory construction. A primary tenant of statutory construction holds that

words in a statute are to be given their plain meaning unless this violates the spirit of the act. *Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). Courts will look to a dictionary to ascertain the plain meaning ascribed to a word. *See generally, Whealon v. Sterling*, 121 Nev. 662, 119 P.3d 1241 (2005).

The term "consanguinity" is defined as "[t]he relationship of persons of the same blood or origin." BLACK'S LAW DICTIONARY 243 (7th ed. 2000). The phrase "lineal consanguinity" limits consanguinity to the "relationship between persons who are directly descended or ascended from one another (for example, mother and daughter, great-grandfather and grandson, etc.)." BLACK'S LAW DICTIONARY at 244. The use of the word "lineal" differentiates consanguinity from collateral consanguinity, which refers to blood relations that are derived from the same ancestry but are not descended or ascended from one another, for example, uncle and nephew, etc. BLACK'S LAW DICTIONARY at 244. The term "degree" is defined as "a measure of removal determining the proximity of a blood or marital relationship." BLACK'S LAW DICTIONARY at 347.

NRS 134.150 states, "[t]he degrees of kindred shall be computed according to the rules of the civil law." Under civil law, "the degree is calculated by counting the generation from one relative up to the common ancestor and from the common ancestor to the other relative. In such computation the first relative is excluded, the other included, and the ancestor counted but once." *In re Way's Estate. Love v. Brown*, 29 Cal. App. 2d 669, 672, 85 P.2d 563 (1938). Thus under civil law, parents and children are related within the first degree of consanguinity. *See* Table of Consanguinity attached.

Under a strict construction of the terms as defined thus far (i.e. *first degree of lineal consanguinity*), the tax exemption found in NRS 375.090(5) would apply only in transfers of real property between parents and children. However, another rule of statutory construction dictates that statutes should be interpreted to be in harmony with other rules and statutes. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993). Under this view, NRS 375.090(5) must, if at all possible, be harmonized with other statutes pertaining to familial relations, including adoption under NRS chapters 12 and 134.

The Nevada Legislature declared adopted children to have all rights and duties vis-à-vis their adoptive parents as natural children. NRS 127.160 provides:

> Upon the entry of an order of adoption, the child shall become the legal child of the persons adopting him, and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child. By virtue of such adoption he shall inherit from his adoptive parents or their relatives the same as though he were the legitimate child of such parents, and in case of his death intestate the adoptive parents and their relatives shall inherit his estate as if they had been his natural parents and relatives in fact. After a decree of adoption is entered, the natural parents of an adopted child shall be relieved of all parental

> responsibilities for such child, and they shall not exercise or have any rights over such adopted child or his property. The child shall not owe his natural parents or their relatives any legal duty nor shall he inherit from his natural parents or kindred. Notwithstanding any other provisions to the contrary in this section, the adoption of a child by his stepparent shall not in any way change the status of the relationship between the child and his natural parent who is the spouse of the petitioning stepparent.

To be consistent with the Legislative intent embodied in NRS 127.160, transfers to and from adopted children and their adoptive parents must be included within the meaning of consanguinity found in NRS 375.090(5). Otherwise, NRS 375.090(5) would be in direct conflict with both the intent and the language of NRS 127.160. Accordingly, adopted children and their adoptive parents are within the first degree of lineal consanguinity.

Finally, the term "affinity" is defined as "[t]he relation that one spouse has to the blood relatives of the other spouse." BLACK'S LAW DICTIONARY at 45. The term is further defined as "[a]ny familial relation resulting from a marriage." *Id*. NRS 375.090(5) limits affinity to relations within the first degree. Calculating the degrees of kindred under the civil law as required under NRS 134.150, stepparents and stepchildren, as well as parents-in-law and children-in-law, are related within the first degree of affinity. *See generally In re Way's Estate. Love v. Brown*, 29 Cal. App. 2d 669, 85 P.2d 563 (1938); *see also* Table of Consanguinity attached.

The notion that transfers of real property between parents-in-law and children-in-law are exempt under NRS 375.090(5) is further supported by a review of the legislative history. Specifically, NRS 375.090(5) was amended to add the term "affinity" to provide for transfers of real property directly from parents-in-law to children-in-law. Under the previous version of NRS 375.090, in order for an in-law to take advantage of the exemption, a parent would first have to transfer property to his or her son or daughter, then the son or daughter would have to make a second transfer to his or her spouse under the spousal exemption previously located in NRS 375.090(5).[2] The newly enacted NRS 375.090(5) provides for the tax exempt transfer of real property directly from a parent to a son or daughter-in-law, or from a son or daughter to a mother or father-in-law, without the need to perform two distinct transfers. Indeed, eliminating the two-step transfer process precipitated the addition of the term "affinity" through S.B. 64. In the May 18, 2005 Meeting of the Assembly Committee on Judiciary,
Mr. Jim Nadeau, Government Affairs Director, Nevada Association of Realtors, explained that transferring real property to an in-law requires a two step process in order to achieve the transfer without taxation. *See Minutes of the Meeting of the Assembly Committee on*

[2] NRS 375.090(6) as previously enacted read as follows: "The taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to: (6) A transfer of title between spouses, including gifts, or to effect a property settlement agreement or between former spouses in compliance with a decree of divorce."

Judiciary, 2005 Leg., 73rd Sess. (May 18, 2005). Mr. Nadeau stated that adding the term "affinity" would provide for a tax exempt transfer of real property to an in-law without having to make two separate transfers. *Id*.

With regard to transfers of property between spouses, NRS 375.090 as originally enacted specifically exempted inter-spousal transfers of real property from any tax treatment. *See* footnote number 2 *supra*. While the specific spousal exemption was removed from the current version of NRS 375.090, it is clear from the legislative history that the spouses are included within the term "affinity."[3]

CONCLUSION TO QUESTION ONE

Based on the foregoing, the phrase "first degree of lineal consanguinity or affinity" refers to ascending and descending blood relations within one degree of separation; and ascending and descending relations resulting from marriage also within the first degree of separation. This phrase captures the following relationships:

- Natural parent and natural child
- Adoptive parent and adopted child
- Stepparent and stepchild
- Parent-in-law and child-in-law
- Spouses

QUESTION TWO

Does the real property transfer tax exemption provided in NRS 375.090(5) apply to transfers between kindred of the half blood, adopted children and their adoptive parents, and stepchildren and their stepparents?

ANALYSIS

You asked whether the tax exemption adopted in NRS 375.090(5) applies specifically to transfers of real property between kindred of the half blood, adopted children and their adoptive parents and stepchildren and their stepparents. To complete the analysis, transfers between parents-in-law and children-in-law as well as inter-spousal transfers must also be examined.

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[3] *See Minutes of the Meeting of the Senate Committee on Taxation,* 2005 Leg., 73rd Sess. (April 12, 2005) relating to S.B. 390, wherein Kathy Burke, Washoe County Recorder, stated that phrase "first degree of lineal consanguinity or affinity" included deeding to spouse only.

Kindred of the Half blood

Kindred of the half blood do *not* qualify for the exception found in NRS 375.090(5) because they do not lie within the first degree of lineal consanguinity or affinity as described above. Half blood is defined as "[t]he relationship existing between persons having the same father or mother, but not both parents in common." BLACK'S LAW DICTIONARY at 134. Thus the term describes sibling relationships, which by their nature always exist in the second degree of consanguinity and therefore lie outside the scope of NRS 375.090(5) as envisioned by the Legislature. *See* Table of Consanguinity.

Accordingly, transfers of real property between kindred of the half blood are not exempt under NRS 375.090(5).

Adopted Children and Adoptive Parents

NRS 375.090(5) applies equally to adopted children and their adoptive parents as to natural children and their natural parents. As explained above, the Legislature has declared that adopted children and their adoptive parents succeed to all rights and duties as natural children and natural parents. *See NRS 127.160*. In order to harmonize NRS 375.090(5) with NRS 127.160, the real property transfer tax exemption must apply to adopted children and their adoptive parents. Any other reading would work an unequal application of the law and would be inconsistent with clear legislative intent. Accordingly, transfers of real property between adoptive parents and their adopted children, as well as transfers from adopted children to their adoptive parents, are exempt under NRS 375.090(5).

Stepchildren and Stepparents

NRS 375.090(5) applies to real property transfers between stepchildren and stepparents. Affinity describes *any* familial relationship resulting from marriage. The stepchild and stepparent relationship falls squarely within that description. Moreover, stepchildren and stepparents exist within the first degree of lineal affinity and therefore succeed to the tax exemption. Consequently, real property transfers between stepparents and their stepchildren are exempt from the transfer tax pursuant to NRS 375.090(5).

Parents-in-Law and Children-in-Law

While your question as presented did not request an analysis of transfers between parents-in-law and children-in-law, this relationship should be examined to provide a more complete analysis.

NRS 375.090(5) does apply to transfers between parents-in-law and children-in-law. The relationship between a mother or father-in-law and a son or daughter-in-law lies squarely within the first degree of lineal affinity. Affinity captures relations that are the result of marriage. And parents-in-law and children-in-law are separated by only one

degree of affinity as calculated under the civil law in accordance with NRS 134.150. Importantly, NRS 375.090(5) as amended in 2005 specifically added the term "affinity" in order to exempt transfers from parents-in-law to children-in-law or vice versa. *See generally Minutes of the Meeting of the Assembly Committee on Judiciary,* 2005 Leg., 73rd Sess. (May 18, 2005) relating to S.B. 64. Consequently, transfers between parents-in-law and children-in-law are exempt from the real property transfer tax under NRS 375.090(5).

Spouses

NRS 375.090(5) does apply to real property transfers between spouses. The spousal relationship is captured in the term "affinity" because it is a relationship resulting from marriage. Moreover, it is clear from the Legislative history that the Legislature intended to capture the spousal relationship within the term "affinity." *See Minutes of the Meeting of the Senate Committee on Taxation,* 2005 Leg., 73rd Sess. (April 12, 2005) relating to S.B. 390. The Legislature specifically removed the spousal exemption found in NRS 375.090 as previously amended with the understanding that this relationship would be captured in the newly amended subsection 5, which included the term "affinity." *Id*. Accordingly, real property transfers between spouses are exempt from taxation under NRS 375.090(5).

CONCLUSION TO QUESTION TWO

Based on the foregoing analysis, transfers of real property between adopted children and their adoptive parents, stepchildren and stepparents, parents-in-law and children-in-law, and spouses all qualify for the tax exemption found in NRS 375.090(5). However, real property transfers between relations of the half blood are not exempt from taxation.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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CHS:skj
Attachment

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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September 28, 2007

OPINION NO. 2007-08

PUBLIC EMPLOYEES' BENEFITS PROGRAM; NEVADA CONSTITUTION; FUNDS: While some jurisdictions have rejected the special fund rule, we believe that the special fund doctrine applies in this case. Article 8, § 10, does not apply in this case, and therefore, investment of funds in accordance with S.B. 457, § 5, would not violate the provisions of Article 8, § 10, of the Nevada Constitution.

Leslie Johnstone
Executive Officer
Public Employees' Benefits Program
901 South Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Ms. Johnstone:

You have requested an opinion from this Office as to whether the investment of the assets of the State Retirees' Health and Welfare Benefits Fund (RHWBF) established by Senate Bill 547 (S.B. 547) (2007) in the Retirement Benefit Investment Fund (RBIF) established by Senate Bill (S.B. 457) (2007) would violate Article 8, §§ 9–10 of the Nevada Constitution. Additionally, you have requested an opinion as to whether the money in the RHWBF is exempt from federal income tax.

The Governmental Accounting and Standards Board has issued statements which require that governmental entities begin to account for long-term liabilities associated with future retiree benefits other than pensions. In order to offset some of these long-term liabilities, the 2007 Legislature passed S.B. 457 and S.B. 547, which are designed to allow the Public Employees' Benefits Program (PEBP) to increase the rate of return on its investments. *See Hearing on S.B. 457 Before the Senate Committee on Finance,* 2007 Leg., 74th Sess. 10 (April 2, 2007); *Hearing on S.B. 547 Before the Senate Committee on Finance,* 2007 Leg., 74th Sess. 12 (April 2, 2007). S.B. 457 and S.B. 547 were signed by the Governor, respectively on May 31, 2007, and June 14, 2007. The effective date for the provisions in both bills related to this request was July 1, 2007. You have informed our Office that, based upon current funding levels, the present value of benefits other than pensions ranges from $3.3 billion to $3.9 billion depending on the rate of return that can be obtained on the assets of the RBIF.

QUESTION ONE

Would investing assets of the RBIF in private stock in accordance with S.B. 457, § 5, violate the provisions of Article 8, § 9, of the Nevada Constitution?

ANALYSIS

Article 8, § 9 of the Nevada Constitution provides:

> The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.

S.B. 457 and S.B. 547 are summarized below.

S.B. 457

S.B. 457, § 3, permits local governments to create trusts for the purpose of providing retirement benefits to retired public employees of that local government. The trust must be irrevocable and must be governed by a Board of Trustees selected by the board of governors of the local government. The Board of Trustees acts in a fiduciary capacity for the beneficiaries of the trust.

S.B. 457, § 5, creates the Retirement Benefits Investment Board (RBIB), which is composed of the Public Employees' Retirement System (PERS) Board members, who serve ex officio and receive no additional compensation. The RBIB has the same powers and duties in carrying out the provisions of S.B. 457 as those pertaining to the administration of the Public Employees' Retirement Fund (PERF) by the PERS Board. S.B. 457, § 5(4). The bill creates the RBIF, which the RBIB is to administer, and the

RBIB must invest the assets in the same way that PERS assets are invested. S.B. 457, § 5(2).

S.B. 547

S.B. 547, § 4, creates the RHWBF as an irrevocable trust. Its purpose is to offset the future cost of subsidizing benefits other than pensions for retirees who participate in PEBP. S.B. 547, § 5, permits PEBP to invest the money in the RHWBF in the RBIF, created by S.B. 457. S.B. 547 states that the money held in the RHWBF "belongs to the officers, employees and retirees of this State in aggregate and is to be held in trust by the Board."

As discussed, S.B. 457 and S.B. 547 create two irrevocable trusts, the RBIF and the RHWBF, that must be used to invest the RBIF and RHWBF funds for the purpose of offsetting the costs of providing future benefits to retirees. S.B. 457 also permits local governments to establish their own irrevocable trusts, and to pool assets from multiple local governments' trusts. The RBIB then invests the irrevocable trust assets in the RBIF and the RHWBF. The RBIB is directed to invest the money in the RBIF in the same manner as money in the PERF is invested. S.B. 457 § 5(2).

The PERF, through the PERS Board members, invests the money in PERF "to assure the highest return consistent with safety in accordance with accepted investment practices." NRS 286.220(2). PERF invests in a variety of investments, including stocks, bonds, real estate investment trusts and private equity. *See* the Comprehensive Annual Financial Report of the Public Employees' Retirement System of Nevada, dated June 30, 2006. Additionally, PERF currently invests in equity securities and since 1984 has generated a net return of approximately 10.8 percent. *See* PERS' Investment Program at www.nvpers.org/public/investments (July 19, 2007).

The Board of PEBP may deposit any of the assets of the PEBP in the RBIF for purposes of investment if it obtains an opinion from its legal counsel that "the investment of those assets . . . will not violate any provisions of Sections 9 and 10 of Article 8 of the Constitution of the State of Nevada." S.B. 457 §5(5).

The PERS currently invests in the stock of private corporations pursuant to NRS 286.220(2). Prior to amendment of Article 9, § 2, of the Nevada Constitution in 1993 which added PERS to § 2, this office considered whether investing PERS funds in the stock of private corporations would violate Article 8, § 9, of the Nevada Constitution. Specifically, in 1959, the Governor asked the Attorney General to review the constitutionality of S.B. 295 which was transmitted to his office for approval. S.B. 295 sought to increase the earnings of the PERS Trust Fund thereby adding to the actuarial solvency of the system. In analyzing S.B. 295, the Attorney General noted that the PERS Trust Fund was "completely beyond the domination and control of the State to withdraw." Op. Nev. Att'y Gen. No. 1959-35 (April 6, 1959).

This Office also considered, in the 1959 opinion, the mischief designed to be remedied or guarded against by the clause and found as follows:

> [I]n view of the evils sought to be avoided by the constitutional provision, also the law of presumption of constitutionality (*King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221); and in view of the further fact that such funds as are contributed by the State of Nevada, by appropriation from general funds, are contributed in trust, beyond the power of the Legislature to repossess for other uses, and that certain persons now have vested rights in their pensions, by having been pensioned, (See: 98 A.L.R. 507), it is our opinion that this fund meets all qualifications of a "special fund," as beyond the power of the Legislature to diminish, and that therefore a bill providing that it be in part invested in common stocks of private corporations, for income augmentation purposes, is not in conflict with the provisions of Section 9 of Article VIII of the Constitution.

Id.

In fact, the evils sought to be avoided by enactment of such constitutional provisions was the investment of public monies or subscribing to stock in railroad companies. Almost all the states enacted such provisions between 1851 and 1876 as market conditions and fraud schemes led to railroad insolvencies. M. L. Cross, Annotation, *Constitutional or Statutory Provisions Prohibiting Municipalities or Other Subdivisions of the State from Subscribing to, or Acquiring Stock of, Private Corporation,* 1*52 A.L.R. 495* (1944).

After thorough analysis and historical discussion of constitutional provisions restricting investment by the state in private stock, the Oregon Supreme Court found that its own constitutional amendment restricting investment in corporate stock, which is almost identical to Nevada's, constituted a general prohibition against the purchase of corporate stocks by the state of Oregon. *Sprague v. Straub*, 252 Or. 507, 518, 451 P.2d 49, 55 (1969). Nevertheless, the Court held that such a provision would not prohibit investment of funds of the state retirement system and the state worker's compensation system which were deposited in a trust which the state treasurer held only as a custodian and in which the state had no interest. *Id.* at 522, 451 P.2d at 57.[1]

[1] Conversely, however, other jurisdictions have failed to adopt the special fund doctrine and have interpreted constitutional provisions prohibiting investment in corporate stocks as a bar to trust fund investment in such stocks. *Board of Trustees v. Pearsons*, 459 N.E. 2d 715 (1984) (trust funds cannot be invested in private stock where state has legal obligation to reimburse for any losses due to financial failure of investments); *West Virginia Trust Fund, Inc. v. Bailey*, 199 W. Va. 463, 485 S.E.2d 407 (1997) (West Virginia Trust Fund Act transferring pension and worker's compensations funds to trustee for investment in share of corporation violated constitutional provision against investing state money in corporation).

With respect to the provisions of S.B. 457 and S.B. 547 we also start with the presumption that they are constitutional. Like the funds sought to be invested by PERS in 1959, the RHWBF, as created by S.B. 547, is an irrevocable trust like the PERF and therefore a "special fund." Similarly, the monies in the RHWBF are beyond the power of the Legislature to use for other purposes. Specifically, S.B. 547, § 5(6), provides: "[a]ny money remaining in the Retirees' Fund at the end of a fiscal year does not revert to the State General Fund, and the balance in the Retirees' Fund must be carried forward."

Furthermore, S.B. 547 § 6(3) states that "[t]he money in the Retirees' Fund belongs to the officers, employees and retirees of this State in aggregate and is to be held in trust by the Board." The purpose of the RHWBF is to account for the financial assets designated to offset the portion of the current and future costs of health and welfare benefits paid on behalf of retirees. S.B. 547 § 4(2). Finally, the monies in the RHWBF will be invested by the PERS Board as those Board members are the ex officio members of the RBIB. The PERS Board has the authority to invest in the stock of private corporations as discussed above.

CONCLUSION TO QUESTION ONE

While some jurisdictions have rejected the special fund rule, we believe that the special fund doctrine applies in this case. The funds held in the RHWBF are beyond the control of the legislature to use for any other purpose. The RHBF funds are held in an irrevocable trust for the benefit of State retirees. The RHWB is invested in the RBIF by the RBIB in the same manner as the PERS Board invests its funds. Accordingly, the RHWBF is a special fund and investment of said funds by the RBIB in private stock does not violate Article 8, § 9, of the Nevada Constitution.

QUESTION TWO

Would investing assets of the RBIF in private stock in accordance with S.B. 457, § 5, violate the provisions of Article 8, § 10, of the Nevada Constitution?

ANALYSIS

Article 8, § 10 of the Nevada Constitution provides in relevant part:

> No county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation or association whatever, or loan its credit in aid of any such company, corporation or association, except, rail-road corporations[,] companies or associations.

As discussed above, S.B. 457 and S.B. 547 create two irrevocable trusts, the RBIF and the RHWBF, to be used to invest money for the purpose of offsetting the costs of providing future benefits to retirees. The two trusts created by S.B. 457 and S.B. 547 are State created and managed trusts. Article 8, § 10, of the Nevada Constitution does not apply in this case because said section applies only to cities, towns, or other municipal corporations holding corporate stock.

CONCLUSION TO QUESTION TWO

Article 8, § 10, of the Nevada Constitution relates to local governments' investment. Conversely, the two trusts created by S.B. 457 and S.B. 547 are State created and managed trusts. Accordingly, Article 8, § 10, does not apply in this case, and therefore, investment of funds in accordance with S.B. 457, § 5, would not violate the provisions of Article 8, § 10, of the Nevada Constitution.

QUESTION THREE

Whether the money in the RHWBF is exempt from federal income tax?

ANALYSIS

Generally, states are exempt from federal income tax. This exemption is based on the theory that, because states are sovereigns, they should not, as such, be subjected to federal taxes. *See Massachusetts v. U. S.*, 435 U.S. 444, 454-55 (1978). Furthermore, 26 U.S.C. § 501(c)(9) provides a federal income tax exemption for:

> Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

PEBP is a voluntary employee benefit plan that provides for the payment of life, sick, accident, and other benefits to its members and beneficiaries. Additionally, it has no private shareholders or individuals who benefit from its earnings. Accordingly, the monies in the RHWBF would not be subject to federal income tax.

CONCLUSION TO QUESTION THREE

The monies in the RHWBF are exempt from federal income tax under 26 U.S.C. § 501(c)(9).

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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DEC/lsd

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
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CATHERINE CORTEZ MASTO
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October 10, 2007

OPINION NO. 2007-09

PUBLIC EMPLOYEES' BENEFITS PROGRAM; DEPENDENTS; NEVADA LEGISLATURE: It is clear that the Board has the legal authority to amend the definition of eligible dependents in the PEBP coverage unit as contained in NAC 287.312(2) provided that the Board does not legally recognize or give effect to a same-sex marriage in amending said definition. Furthermore, any such regulation defining eligible dependents is subject to approval or rejection by the regulatory review process established by the Nevada Legislature.

Leslie A. Johnstone
Executive Officer
Public Employees' Benefit Program
901 South Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Ms. Johnstone:

You have requested an opinion from this Office regarding whether the Public Employees' Benefits Program Board (Board) has the legal authority to amend the definition of eligible dependent contained in Nevada Administrative Code (NAC) 287.312 to expand Public Employees' Benefits Program (PEBP) benefit eligibility.

The request for this opinion is based on a Petition submitted pursuant to NRS 233B.100 and NAC 287.196, which allows a person to request in writing that the Board amend its regulations. The *Petition to Provide Competitive & Equitable Benefits* was presented by the Nevada System of Higher Education (NSHE) on April 12, 2007, requesting that the Board amend its regulations to provide PEBP benefits for reciprocal beneficiaries.

QUESTION ONE

Does the Board have the legal authority to amend the definition of eligible dependents contained in NAC 287.312?

ANALYSIS

The Board was created by the Nevada Legislature during the 1999 legislative session and codified at NRS 287.041. NRS 287.043 gives the Board broad authority to establish and carry out the Public Employees' Benefits Program (PEBP). Specifically, NRS 287.043(2)(h) provides in pertinent part that the Board shall adopt such regulations and perform such other duties as are necessary to administer the PEBP. Further, NRS 287.0434(1) gives the Board the authority to provide coverage for dependents. Accordingly, the Board unquestionably has the authority to adopt or amend its regulations within the parameters of its statutory authority.

Pursuant to such authority, the Board has previously promulgated regulations governing participation in the PEBP and such regulations have been approved by the Legislative Commission. In 2000, the Board defined "Dependents" in NAC 287.035 as one spouse and all other declared members of a program coverage unit. At that same time, "program coverage unit" was also defined by the Board as the family unit declared pursuant to NAC 287.312 that seeks coverage or insurance from the Program for more persons than the sole eligible public officer, public employee or retired officer or employee. Those eligible to be in the "program coverage unit" are provided in NAC 287.312(2).

Since 2000, the Board has amended NAC 287.312 in 2004 and 2006. *See* R154-03, 3-22-2004 and R089-05, 6-28-2006. Such amendments were also approved by the Legislative Commission. Based on the foregoing, it is clear that the Board has the authority to amend its regulations and determine who is an eligible dependant under the PEBP.

QUESTION TWO

Does Article I, § 21 of the Nevada Constitution limit the Board's ability to amend the definition of eligible dependent contained in NAC 287.312 to include same-sex partners, opposite sex partners and/or other adult dependents?

ANALYSIS

In 2000 and 2002, Nevada voters ratified an amendment to the Nevada Constitution entitled "Limitation on recognition of marriage." The Nevada Constitution Article I, § 21 provides, "Only a marriage between a male and female person shall be recognized and given effect in this state" ("Marriage Amendment") NEV. CONST. art. 1, § 21. When interpreting Nevada Constitutional amendments, the court must evaluate the plain language of the amendment in order to ascertain the intent of the voters. *Guinn v. Legislature of the State*, 119 Nev. 277, 71 P.3d 1269 (2003). The court must give words their plain meaning unless it violates the "spirit of the provision." *Id.*

The Nevada Marriage Amendment is narrow in scope. The plain language states that Nevada only recognizes and gives effect to marriages between a man and a woman. The Marriage Amendment has no clause that refers to insurance or other benefits, nor does it contain language that indicates intent to prohibit the extension of insurance or other benefits.

Assuming, *arguendo*, that the language of the Marriage Amendment was not clear, we must turn to statutory rules of construction to resolve ambiguity. *Guinn* at 285. Statements that voters are given in favor of the passage of an amendment are relevant in evaluating the intent behind an amendment. *See e.g., Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 26 P.3d 753 (2001). The Arguments for Passage of the Nevada Marriage Amendment explain only that the Marriage Amendment would prevent the Full Faith and Credit Clause of the United States Constitution from forcing Nevada to recognize same-sex marriages that occur in other states.[1]

The plain language and the arguments for passage of the Marriage Amendment indicate that the intent of Nevada's Marriage Amendment was to ensure that Nevada would give legal effect exclusively to marriages that occur between a man and a woman. In adopting the Marriage Amendment, Nevada voters adopted an amendment that chooses not to recognize same-sex marriages that occur legally in other states if those who were married in same-sex marriage states moved to Nevada.

[1] The ballot included the following language under "Arguments for Passage." Proponents argue that passage will ensure that Nevada law upholds the definition of marriage as being only between a man and a woman. While a Nevada statute provides that marriage may only be between a male and a female, current law provides that a legal marriage that took place outside Nevada is generally given effect under the "Full Faith and Credit Clause" of the United States Constitution. Proponents argue that if same gender marriages ever become legal in another state, under the Full Faith and Credit Clause Nevada could be required to recognize such marriages entered into legally in another state. Proponents argue that this constitutional amendment is needed to define Nevada's public policy on marriage being only between a male and a female. A "Yes" vote means that the Nevada Constitution should be amended to provide that only marriages between a male and a female should be recognized and given effect in this state.

As noted above, the Board has previously amended the definition of eligible dependant contained in NAC 287.312 and continues to have the authority to amend said provision. Given this, the Marriage Amendment limits the ability of the Board to provide coverage that would be based on recognizing a same-sex marriage performed in another state when it promulgates its regulations.

Accordingly, amending NAC 287.312 to include as eligible dependents either same-sex partners, opposite sex partners or another adult dependent would not implicate Article I, § 21 of the Nevada Constitution so long as the basis for extending any such benefit does not rely upon a recognition of a lawful marriage performed in another state that is between two persons of the same-sex.

CONCLUSION

Based on the foregoing, it is clear that the Board has the legal authority to amend the definition of eligible dependents in the PEBP coverage unit as contained in NAC 287.312(2) provided that the Board does not legally recognize or give effect to a same-sex marriage in amending said definition. Furthermore, any such regulation defining eligible dependents is subject to approval or rejection by the regulatory review process established by the Nevada Legislature.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

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