

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1987

OPINION NO. 87-1 LONGEVITY PAY; MILITARY; PROBATION; RETIREMENT;

SALARIES: National guardsman who returns to state service from period of military training not entitled to accrued annual or sick leave for period of training. National guardsman entitled to purchase retirement credits for his military training and his employer must pay its share of the purchase price. Dates for purposes of calculating national guardsman's eligibility for merit salary increase and longevity pay not affected by his absence for military training, but he must complete the active service required in his probationary period before being granted permanent status.

Carson City, January 7, 1987

Mr. George F. Murphy, Director, Department of Personnel, Blasdel Building, Capitol Complex,
Carson City, Nevada 89710

Dear Mr. Murphy:

You have asked this office numerous questions concerning the reemployment rights of an employee returning from active duty for training in the Nevada National Guard. The subject employee is a full-time classified employee who is directly returning from a period of 96 days of instruction in a basic officer's training course.

STATUTORY BACKGROUND

Members of the National Guard are provided with certain reemployment rights pursuant to the Veteran's Reemployment Rights Act ("Act"), 38 U.S.C. § 2021 et seq. (1976). The Act clearly applies to state employees, Peel v. Florida Dept. of Transp., 600 F.2d 1071, (5th Cir. 1979), and protects national guardsmen. Monroe v. Standard Oil Co., 452 U.S. 550, 101 S.Ct. 2510, 69 L.Ed. 2d 226 (1981).

38 U.S.C. § 2024(c) provides in pertinent part:

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces.) . . . (Emphasis added.)

38 U.S.C. § 2024(d) provides in pertinent part:

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

....
(Emphasis added.)

38 U.S.C. § 2024(f) provides in pertinent part:

(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training

....
(Emphasis added.)

Initially, we note that the protections afforded by § 2024(d) are available only to employees "not covered by subsection (c) of this section," and that § 2024(c) refers to employees on training duty for a period of over 12 weeks, or 84 days. Arguably, on the facts of the instant case, the subject employee's 96 days training period is outside the protections of 38 U.S.C. § 2024(d). This position was taken by a defendant employer in Anthony v. Basic American Foods, 600 F.Supp. 352 (N.D. Cal. 1984). The court rejected that position, however, relying on an extensive analysis of the legislative history of the provision and applied the provision to a 4 ½ month leave of absence, concluding "the court finds this congressional statement persuasive and concludes that Congress did not intend there is to be a strict three month limitation in § 2024(d)." Id. at 354. Finding no persuasive authority contrary to that court's holding, we adopt that reasoning and conclude that § 2024(d) does provide the employee in the instant case reemployment benefits.

38 U.S.C. § 2021(a)(B)(1) provides:

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall--

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;

.... (Emphasis added.)

Compare [NRS 284.365](#).

38 U.S.C. § 2021(b)(1) provides:

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be

considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment. (Emphasis added.)

Thus, for purposes of that provision, the returning National Guard member is treated as if he were on a leave of absence without pay in accordance with applicable state statutes, regulations and policies. With the above provisions of the Act in mind, we turn to a review of how the courts have analyzed the Act with regard to specific kinds of benefits.

QUESTION ONE

Is the subject national guardsman entitled to accrue annual and sick leave benefits while on leave of absence without pay during his military training?

ANALYSIS

Annual Leave

In Foster v. Dravo Corp., 420 U.S. 92, 43 L.Ed.2d 44, 95 S.Ct. 879 (1975) the United States Supreme Court engaged in a comprehensive discussion as to vacation entitlements due a returning veteran under the Act. Foster was denied the accrual of vacation benefits for a two year period. During that period Foster had worked only seven weeks the first year and thirteen weeks the second year. A collective bargaining agreement under which Foster was employed provided that vacation benefits accrue only upon an employee's completion of a minimum of 25 weeks of work in a calendar year. The court drew a distinction between pure seniority rights, to which an employee is entitled merely because of the employment relationship, and compensation benefits, which have a work requirement. "[W]here the claimed benefit requires more than simple continued status as an employee, the Court has held that it is not protected by the statute." (Citation omitted.) Id., at 97. In applying this analysis, the Court rejected Foster's claim of entitlement to accumulated vacation benefits for the two subject years, a claim which essentially ignored the 25 week per year work requirement. We find the court's reasoning persuasive:

On petitioner's theory of the case, the company would be required to provide full vacation benefits to a returning serviceman if he worked no more than one week in each year; indeed, following this approach to its logical limits, a veteran who served in the Armed Forces for four years would be entitled to accumulated vacation benefits for all four years upon his return. This result is so sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor that the statute should be applied only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company. Since no such showing was made here, and since petitioner has not met the bona fide work requirement in the collective-bargaining agreement, we conclude that § 9 did not guarantee him full vacation rights for the two year [years] in question. (Emphasis added.)

Id., at 100-101. Put another way, "The statute requires that a returning veteran be treated the

same as an employee ‘on furlough or leave of absence.’ ” (Citation omitted.) Id., at 101-102.

Accrual of annual leave for state classified employees is governed by [NAC 284.5385](#), which provides in pertinent part:

1. An employee does not accrue annual leave when on leave without pay.

Clearly, the regulation contemplates some amount of active duty before annual leave benefits may be accrued, a “work” requirement which removes the benefit from a right based purely on seniority status. The subject employee in the instant case is therefore not entitled to accrual of annual leave benefits for the 96 day period during which he was on leave without pay for his military training. The employee is entitled, however, to the benefit of an increased accrual rate. [NAC 284.5405\(5\)](#) provides:

5. If a person eligible for military reemployment is reemployed, he accrues annual leave at the rate which he would have earned if he had not left state service.

The rate of accrual depends on the length of the employee’s continuous employment with the state and is therefore a right of seniority. [NAC 284.538](#).

Sick Leave

While the provisions governing accrual of sick leave do not expressly condition the benefit as a work requirement as did [NAC 284.5385\(1\)](#), we believe that such a work requirement must be read into the benefit. See, for instance, [NAC 284.542\(1\)](#) which conditions accrual of pro rata sick leave benefits for part time employees upon “full-time service.” This conclusion is also supported by the policy of the state, as indicated to us by the head of the payroll division of the department of personnel, that employees who are on leave without pay do not accrue sick leave while they are in the unpaid leave status. The subject national guardsman is therefore not treated differently from other employees due to his military service. While clarification of this point by regulation amendment or adoption would be recommended, we believe that logical congruity between sick leave and annual leave benefits requires a conclusion that sick leave benefits do not accrue during a military leave of absence without pay. Note, however, that the returning veteran is entitled to full restoration of any unused sick leave accrued at the time of his departure for military training. [NAC 284.551\(3\)](#).

CONCLUSION

The subject national guardsman is not entitled to accrue annual or sick leave for the period he was on leave of absence without pay to attend military training. He is, however, entitled to any increased rate of accrual of annual leave he would have otherwise been entitled to but for that training. He is also entitled to restoration of any sick leave which was accrued and unused at the time he left state service for the training.

QUESTION TWO

Is the subject national guardsman required to make contributions to the state’s retirement plan for the period he is on leave of absence without pay during his military training?

ANALYSIS

Retirement

Subsequent to the Foster decision, supra, the Court had occasion to consider whether, under the analysis provided by Foster and other cases, retirement benefits are prerequisites of seniority or in the nature of compensation for services. The Court provided a holding somewhat modified from that of the Foster decision:

If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and it is in the nature of a reward for length of service, it is a prerequisite of seniority.” (Emphasis added.)

Alabama Power Co. v. Davis, 431 U.S. 581, 52 L.Ed.2d 595, 97 S.Ct. 2002 (1977). To meet this criterion the employee’s job performance, disciplinary history and other facts surrounding his employment must demonstrate that, but for his military service, he would most certainly have accumulated retirement credits. Id. at 591.

The court balanced competing factors in its analysis as to the nature of retirement payments, concluding that a pension plan is a seniority benefit protected by the Act:

Other aspects of pension plans like the one established by petitioner suggest that the “true nature” of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company’s employ, and not the service rendered, that entitled the employee to that increment.

* * *

We conclude, therefore, that pension payments are predominantly rewards for continuous employment with the same employer. Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country’s military needs is the purpose of [the Act].

Id., at 593-594.

As the court stated, the Act protects a veteran from the loss of rewards to which he would have been entitled but for his military service. The Act does not provide the veteran with rewards or benefits above that level. Accordingly, a veteran who is on a joint contribution program of retirement is entitled to purchase the appropriate amount of retirement credits and the employer is obligated to pay its share of the price of the credits. Von Allmen v. State of Conn. Teachers Ret. Bd., 613 F.2d 356 (2d Cir. 1979). Similarly, a veteran who is enrolled in the employer-paid retirement plan is entitled to have his state employer pay the entire amount of the cost of purchasing his credits. We are advised that at least one public employer which participates in the Public Employees Retirement System has submitted such a payment and it has been accepted by the system.

CONCLUSION

The subject national guardsman is entitled to purchase any retirement credits which he would have otherwise been entitled to purchase but for his military training and his state

employer is obligated to pay its share of the purchase price of the credits.

QUESTION THREE

Does the national guardsman's period of leave of absence without pay during his military training count toward calculation of his probationary period and dates of eligibility for merit salary increase and longevity pay benefits?

ANALYSIS

These issues were addressed in substance by this office in Nev. Op. Att'y Gen. No. 80-32 (September 22, 1980) and the conclusions of that opinion were subsequently codified in the Nevada Administrative Code as indicated below.

Merit Salary Increase

Eligibility for merit salary increase depends on receipt of a standard or better evaluation and the increase is only on an employee's date of record. [NAC 284.174](#)(1). The returning national guardsman's date of record is not affected by his military service. [NAC 284.174](#)(9).

Longevity Pay

Eligibility for longevity pay is dependent upon receipt of a standard or better evaluation and a period of continuous service. [NRS 284.177](#). "Continuous service" includes active military service if the person returns to state service within 90 days of his release from military service. [NAC 284.598](#)(1). The subject national guardsman's employment date for purposes of computing longevity pay entitlements is therefore not affected by his 96 day period of military service.

Probationary Period

A classified employee who serves a period of military training before completing his probationary period must return and complete the active state service requirement remaining in that period before he may be granted permanent status. NAC § 284.444(6), [NAC 284.448](#).

CONCLUSION

The returning national guardsman's date of record for purposes of determining his eligibility for a merit salary increase is not affected by his 96 day period of military training. Since he returned to the state service within 90 days of the completion of his military training, the national guardsman's date for purposes of computing longevity pay entitlements is also not affected. The subject national guardsman must complete the remaining active service required in his probationary period before he may be granted permanent status.

Sincerely,

BRIAN McKAY
Attorney General
By: James T. Spencer
Deputy Attorney General

OPINION NO. 87-2 BOARD AND COMMISSIONS; COUNTIES; MEETINGS: The term “10 miles” found in [NRS 244.085](#) refers to miles computed from the boundary of the county seat to a point measured by a straight line on a map.

Carson City, January 8, 1987

Brent T. Kolvet, District Attorney, Judicial and Law Enforcement Center, P. O. Box 218,
Minden, Nevada 89423

Dear Mr. Kolvet:

You have asked this office for an interpretation of references to distance found in [NRS 244.085](#).

QUESTION

Does the term “10 miles” found in [NRS 244.085](#) refer to straight-line distance or to a distance measured by road miles?

ANALYSIS

[NRS 244.085](#) provides in pertinent part:

1. Except as provided in subsections 2, 3, 4 and 5, the meetings of the boards of county commissioners shall be held at the county seats of their respective counties, or at a place not more than 10 miles from the county seat within the boundaries of the county, at least once in each calendar month, on a day or days to be fixed by ordinance. . . .

5. The board may meet with the governing body of any other governmental unit at any location within the county, but the meeting may not be held at a place which is more than 10 miles from the county seat unless the board, in addition to complying with all other requirements for notice of a meeting of the board, provides notice by publication in a newspaper of general circulation within the county, for at least 3 working days before the meeting, of the date, time and place of the meeting. . . .

The two subsections referenced above provide counties with a degree of flexibility in determining the meeting location of their boards of county commissioners. As you note in your inquiry, prior to the 1979 legislative session all board meetings were required to be held at the county seat. It was at the 1979 legislative session that the legislature provided authority for boards to meet at a location within “10 miles of the county seat.” 1979 Nev. Stat. ch. 271 § 1. Your concern is whether the term “10 miles” refers to straight line distance or distance measured on a public road or highway. Where the legislature uses plain, ordinary language to express a definite idea, we may not go out of our way to construe the language to convey a different idea. [Eddy v. State Bd. of Embalmers](#), [40 Nev. 329](#), 163 Pac. 245 (1917). One court has considered identical language in a statute which required a police officer’s residency within 10 miles of the city limits. We find the reasoning of the case persuasive:

A “mile” is a “measure of distance.” Webster’s New Int’l Dictionary, 1557 (2d ed. 1959). It is not a description of how to measure that distance

Had the Legislature desired the method of measurement to be by following existing roads we assume it would have used the term “road miles.” The use of the term “mile” without the qualifying adjective to mean “road miles” is to insert into the statute a word not found therein. . . .

We think that the term “ten miles” means miles as may be computed by measuring the straight line distance between two points on a map.

Burke v. Chief of Police of Newton, 373 N.E.2d 949 (Mass. App. 1978). We have checked our conclusion by reviewing the legislative history of the 1979 amendment. Nothing in that history suggests a special meaning was intended for the term “ten miles.”

CONCLUSION

As used in [NRS 244.085](#), the term “10 miles” refers to miles computed from the boundary of the county seat to a point measured by a straight line on a map.

Very truly yours,

BRIAN McKAY
Attorney General

By: James T. Spencer
Deputy Attorney General

OPINION NO. 87-3 FOREIGN CORPORATIONS; BANKING; NRS 80.010 and 80.240: A national banking association is not a foreign corporation within the provisions of [NRS 80.010](#). The term domestic lender as used in [NRS 80.240](#) includes a national banking association.

Carson City, January 20, 1987

The Honorable Frankie Sue Del Papa, Secretary of State, Capitol Building, Carson City, Nevada 89710

Dear Ms. Del Papa:

Your predecessor in office, Mr. William D. Swackhamer, has requested an interpretation of the provisions of chapter 80 of the Nevada Revised Statutes as applied to the following factual situation.

FACTS

A national banking association chartered in accordance with the provisions of the National Bank Act, 12 U.S.C. section 21 et seq., (the “Agent”), another national banking association, two Swiss banks and a Canadian bank (collectively the “Participating Banks”) propose to enter into a credit agreement under which advances are to be made through the Agent directly to the borrower, a Delaware corporation, according to the respective commitments of the

Agent and the Participating Banks. Each of the Swiss banks and the Canadian bank is a state-chartered branch of its respective foreign bank.

Payments, notices and other actions by or on behalf of the Participating Banks are to be made through the Agent. The obligation to repay the advances and the terms and conditions regarding repayment will be governed by the terms and conditions of the credit agreement and promissory notes to be executed by the borrower to each of the Participating Banks in a principal amount equal to each bank's investment.

The performance of the obligations of the borrower under the credit agreement, the promissory notes and related loan documents will be secured by the following:

1. A security interest in certain personal property and assets of the borrower pursuant to a security agreement between the borrower and the Agent.
2. A mortgage or deed of trust in favor of the Agent encumbering certain geothermal leases, fixtures and certain rights-or-way or easements located in Nevada.

The Agent will be named as the secured party under the security agreement and as mortgagee under the mortgage and will have the right and duty of enforcing all the rights of the secured party and mortgagee in the event of default of the borrower. The two Swiss banks and the Canadian bank will not be parties to the mortgage or the security agreement.

QUESTION NUMBER ONE

Must the Agent and the other participating national banking association qualify as foreign corporations in accordance with chapter 80 of the NRS?

ANALYSIS

The United States Supreme Court has ruled that state laws would apply to national banks "unless they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States. McClellan v. Chipman, 164 U.S. 347, 357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1896).

We need not determine if chapter 80 of the Nevada Revised Statutes expressly conflicts with 12 U.S.C. section 21 et seq., since we find that a national bank is not a foreign corporation within the provisions of [NRS 80.010](#)(1), which states in pertinent part:

Before commencing or doing any business in this state, every corporation organized under the laws of another state, territory, the District of Columbia, a dependency of the United States or a foreign country, which enters this state for the purpose of doing business must file: . . .
(Emphasis added.)

By its own terms, [NRS 80.010](#) does not apply to a corporation organized under the laws of the United States. The Ninth Circuit Court of Appeals in analyzing Arizona's foreign corporation statute reached the same conclusion in Steward v. Atlantic National Bank of Boston, 27 F.2d 224 (1928). Therein, the court stated:

We find nothing in the phraseology of the statute . . . which indicates an intention to classify national banks created by national law as foreign corporations . . . in the absence of unmistakably clear language, it will not be found that the state has attempted to exercise a regulatory power over national agencies established in aid of governmental purpose.

See also N.Y. Guardian Mortgage Corp. v. Davis, 474 A.2d 1101 (N.J. 1984); Indiana National Bank v. Roberts, 326 So.2d 802 (Miss. 1976); State National Bank of Connecticut v. Laura, 256 N.Y.S.2d 1004 (1965); Bank of America, National Trust and Savings Ass'n. v. Lima, 103 F.Supp. 916 (D.C. Mass. 1952); and First National Bank of Tonasket v. Slagle, 5 P.2d 1013 (Wash. 1931).

CONCLUSION

[NRS 80.010](#) does not require a national banking association chartered in accordance with 12 U.S.C. section 21 et seq. to qualify to do business in the state of Nevada before doing any business in the state.

QUESTION NUMBER TWO

Must the Swiss banks and the Canadian bank qualify as foreign corporations in accordance with chapter 80 of the Nevada Revised Statutes, or are these banks exempt from qualification since they intend to participate only in the transaction outlined above?

ANALYSIS

You have indicated that one of the national banks will act as the agent for the Swiss banks and the Canadian bank in the execution and enforcement of the security agreement and the mortgage securing the performance of the borrower's obligations. The Swiss banks and the Canadian bank will not be parties to those documents. All actions of the Swiss banks and the Canadian bank regarding the transaction will be taken through the Agent. Neither the Swiss banks nor the Canadian bank has previously conducted, or is presently conducting, business within the state of Nevada, except the single isolated transaction as outlined above.

The Supreme Court of Nevada has interpreted the qualification statutes set forth in chapter 80 of the Nevada Revised Statutes and has determined that "a single piece of business in the state is not 'doing business' in the sense contemplated by the statute." Pacific States Sec. Co. v. District Court, [48 Nev. 53](#), 57, 226 P. 1106 (1924). This principle of law was recently reiterated by the Supreme Court of Nevada in In re Hilton Hotel, [101 Nev. 489](#), 706 P.2d 137 (1985), wherein the court cites Pacific States for the "general rule that the action of a foreign corporation in entering into one contract or transacting an isolated business act in the state does not ordinarily constitute 'the carrying on or doing of business therein.'" Id. at p. 492. Instead, a foreign corporation must transact "some substantial part of its ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of a character as will give rise to some form of legal obligations." Id. at p. 492.

Based upon the facts as given, the Swiss banks and the Canadian bank have merely entered into a single contract, an isolated business transaction. There is no continuous course of business being transacted in Nevada which comprises a substantial part of the banks' ordinary business. Therefore, pursuant to the holdings in In re Hilton, supra, and Pacific States, supra, the Swiss banks and the Canadian banks need not qualify to do business as foreign corporations in

the state of Nevada.

CONCLUSION

According to the facts provided, the Swiss banks and the Canadian bank have entered into a single, isolated, business transaction in the form of a credit agreement. Since there is no continuing course of business being conducted by the banks within the state of Nevada, the Swiss banks and the Canadian bank are not “doing business” in the sense contemplated by chapter 80 of the Nevada Revised Statutes and, therefore, need not qualify to do business in this state.

QUESTION NUMBER THREE

Does the term “domestic lender” as used in [NRS 80.240](#) include a national banking association?

ANALYSIS

[NRS 80.240](#) provides in pertinent part:

Any corporation or insurance association organized under the laws of any other state, district or territory of the United States, or foreign government, which does not maintain an office in this state for the transaction of business, may carry on any one or more of the following activities:

(a) The acquisition of loans, notes or other evidences of indebtedness secured by mortgages, deeds or deeds of trust on real property situated in this state, by purchase or assignment from, or by participation with a domestic lender, pursuant to the commitment agreement or arrangements made before or after the origination, creation or execution of such loans, notes or other evidences of indebtedness. (Emphasis added.)

It has been consistently held since 1896 that an attempt by a state to define the powers and duties of national banks or control the conduct of their affairs is void wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the legislation or impairs the efficiency of national banks to discharge their duties. Davis v. Elmira Sav. Bank, 161 U.S. 275, 16 S.Ct. 502, 40 L.Ed. 700 (1896). Thus, the extent of powers of a national bank must be determined by interpretation of 12 U.S.C. section 21 et seq., and the views of state courts on the powers of local corporations are irrelevant, except as Congress expressly makes them applicable. Downey v. City of Yonkers, 106 F.2d 69 (C.C.A. N.Y. 1939), *aff'd.*, 309 U.S. 590, 60 S.Ct. 1071, 84 L.Ed. 1420 (1940).

12 U.S.C. section 24, par. 7 defines the powers of a national bank as “. . . all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . .” The federal statute does not speak specifically to participation with other lenders in funding a loan as does [NRS 80.240](#) (1)(a); however, failure to accord a national bank the position of a domestic lender may conflict with the incidental powers clause set forth in 12 U.S.C. section 24, par. 7.

The Ninth Circuit Court of Appeals has adopted the approach employed by the First Circuit Court of Appeals in Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1972) in interpreting the

incidental powers clause set forth in 12 U.S.C. section 24. See, M & M Leasing Corp. v. Seattle First National Bank, 563 F.2d 1377 (1977), cert. den. 436 U.S. 956 (1978). The Ninth Circuit in the M & M Leasing case held that for an activity to be considered as being carried on pursuant to an incidental power “necessary to carry on the business of banking” it must be “convenient or useful in connection with the performance of one of the bank’s established activities pursuant to its express powers under the National Bank Act.” Id. at p. 1382.

The loaning of money, and the obtaining, issuing and circulating of notes are expressly within the power of a national bank. 12 U.S.C. section 24, par. 7. Additionally, the sale of mortgages and other evidences of indebtedness was expressly recognized as an incidental power of a national bank by the United States Supreme Court in First National Bank v. Hartford, 273 U.S. 548, 47 S.Ct. 462, 71 L.Ed. 767 (1927). Therefore, participation with other lenders in funding a loan to a borrower does fall within the scope of powers of a national bank under the National Bank Act.

To interpret “domestic lender” as it is used in NRS 80.240(1)(a) to not include a national bank would result in a national bank being unable to participate in the acquisition, organization, creation or execution of loans, notes or other evidence of indebtedness with a corporation or insurance association organized under the laws of any other state, district or territory of the United States, or foreign government, which does not maintain an office in Nevada for the transaction of business, unless that corporation or insurance association qualifies to do business pursuant to NRS 80.010 to 80.230, inclusive. See NRS 80.250. Clearly, it would be more convenient for a national bank to be able to enter into participation agreements with corporations or insurance associations which may do business in this state without qualification pursuant to NRS 80.240. See M & M Leasing, supra.

Allowing a national bank to engage in participation loans only with corporations which have qualified to do business in this state would necessarily impair the efficiency of a national bank in carrying out its duties under the National Bank Act. See Davis v. Elmira Sav. Bank, supra. Therefore, “domestic lender” as it is used in NRS 80.240(1)(a) should be construed to include a national banking association chartered in accordance with the National Bank Act, 12 U.S.C. section 21 et seq. This construction is consistent with Attorney General’s Opinion No. 126, November 21, 1955, which construed the term “domestic lender” to include a foreign corporation duly qualified to do business in Nevada.

CONCLUSION

The term “domestic lender” as it is used in NRS 80.240 includes a national banking association chartered in accordance with 12 U.S.C. section 21 et seq.

QUESTION NUMBER FOUR

Does the execution of the credit agreement by the Agent and the Participating Banks constitute “participation” for the purposes of NRS 80.240(1)(a)?

ANALYSIS

The term “participation” is not expressly defined in chapter 80 of the Nevada Revised Statutes. Therefore, we must examine the context in which it is used in the statute to determine its meaning. State v. Webster, 102 Nev. 450, 726 P.2d 831 (1986).

The term "participation" is used in [NRS 80.240\(1\)\(a\)](#) in connection with the origination, creation, execution, or acquisition of loans, notes or other evidences of indebtedness secured by mortgages, deeds or deeds of trust on real property situated within this state. Since the term is commonly used by financial institutions in the business of funding loans, and is used in this context within [NRS 80.240](#), we have looked to [Banking Terminology](#), American Bankers Association, 1981, for a definition of "participation" as it is used in connection with lending. The American Bankers Association has defined "participation loan" as "(a) loan funded by more than one lender and serviced by one of them." *Id.* at p. 183.

You have informed us that the Participating Banks propose to enter into a credit agreement under which advances are to be made through the Agent directly to the borrower according to the respective commitments of the Agent and the Participating Banks. The performance of the obligations of the borrower under the credit agreement will be secured by a mortgage or deed of trust in favor of the Agent encumbering real property situated in Nevada. Application of the facts, as stated, to the definition of "participation loan," as the term is defined by the American Bankers Association, results in the inescapable conclusion that, pursuant to the credit agreement, the loan to the borrower is being funded by more than one lender and will be serviced by one of those lenders. Therefore, the execution of the credit agreement by the Agent and the Participating Banks does fall within the scope of "participation" as the term is used in [NRS 80.240\(1\)\(a\)](#).

CONCLUSION

The execution of the credit agreement by the Agent and the Participating Banks will result in a loan to the borrower which will be secured by a mortgage or deed of trust in favor of the Agent encumbering real property situated in Nevada. Pursuant to the credit agreement, the loan will be funded by more than one lender and will be serviced by one of those lenders and, therefore, falls within the scope of the term "participation" as it is used in [NRS 80.240\(1\)\(a\)](#).

Sincerely yours,

BRIAN McKAY
Attorney General

By: Jennifer Stern
Deputy Attorney General

OPINION NO. 87-4 CRIMINAL LAW-EXECUTION OF SENTENCE OF IMPRISONMENT AND FINE: Nevada law does not require the director of Department of Prisons to collect fines imposed against prisoners placed in his custody; a felon sentenced to one year is entitled to sentence credits.

Carson City, January 21, 1987

Mr. Edwin T. Basl, Assistant District Attorney, Washoe County Courthouse, P. O. Box 11130,
Reno, Nevada 89520

Dear Mr. Basl:

You have requested the opinion of this office as to which governmental entity has responsibility for the collection of fines imposed against convicted felons and what procedures should be followed in the collection of such fines. You have also asked to what extent, if any, is a convicted felon sentenced to one year of imprisonment entitled to sentence credits. Each of these questions is addressed separately herein.

QUESTION NO. 1

Which governmental entity has responsibility for the collection of fines imposed against convicted felons and what are the appropriate procedures to be followed in the collection of such fines?

ANALYSIS

Chapter 176 of the Nevada Revised Statutes concerns the imposition of sentence and judgment upon a convicted felon, but is devoid of any specific language directing a particular governmental entity to undertake the collection of fines imposed as part of a judgment of conviction. Further review of other relevant provisions of Nevada Revised Statutes has not revealed any specific language placing responsibility for the collection of such criminal fines in a particular governmental entity. You have suggested that the responsibility for the collection of such fines rests with the Nevada Department of Prisons (NDOP), based upon the provisions of Nev. Rev. Stat. § 176.305, which provide as follows: “If the judgment be imprisonment, or a fine and imprisonment until it is satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.” You state that since the director of the Department of Prisons is required to take custody of all felons sentenced to terms of imprisonment, the Department of Prisons must also have the responsibility to collect any fine which is imposed in a judgment of conviction against a criminal defendant. See Nev. Re. Stat. § 176.335; Nev. Rev. Stat. § 209.131.

In fact, the Department of Prisons does not presently collect fines imposed in the judgments of conviction, nor has the Department of Prisons ever been involved in fine collection. The policy and past practice of the Department of Prisons is entitled to due consideration in our analysis of this question. Sierra Pacific Power v. Department of Taxation, 96 Nev. 295, 297, 607 P.2d 1147 (1980); Alper v. State ex rel. Dept. Hwys., 96 Nev. 925, 929, 621 P.2d 492 (1980).

It is somewhat surprising that under Nevada statutes a district attorney is specifically required only to collect fines which accrue to the county treasury. See Nev. Rev. Stat. § 252.110. There is no similar provision directing either the Department of Prisons or its counsel, the attorney general, to collect criminal fines which accrue to the state treasury. The fines imposed against convicted felons are to be remitted to the state treasury. See Nev. Rev. Stat. § 176.265. Although the state controller is authorized to direct the attorney general to institute suits for the recovery of debts owed to the State under Nev. Rev. Stat. § 227.230, this provision has never been used for the collection of criminal fines.

Under Nevada law, it is the district attorney who has primary responsibility for the prosecution of felony offenses. See Nev. Rev. Stat. §§ 173.055, 173.045, 173.035, 171.202. The attorney general has only limited criminal jurisdiction. See Nev. Rev. Stat. §§ 228.120, 228.170; State v. Ryan, 88 Nev. 638, 503 P.2d 842 (1972). It is also noteworthy that any action for the conversion of a fine into an additional term of imprisonment must take place in the court where the prosecution and judgment occurred. See Nev. Rev. Stat. § 176.085. There also appears to be little doubt that the district attorney, as the representative of the State, could enforce the fine by

foreclosing the lien created by a properly recorded criminal judgment. See Nev. Rev. Stat. §§ 176.275, 21.020.

Nevada statutes presently provide two methods for enforcement and collection of a criminal fine. See Nev. Rev. Stat. §§ 176.065 and 176.275. In both cases, the district attorney has authority to proceed to collect the fine on a criminal judgment where the district attorney has been the prosecutor. On the other hand, there is no clear authority in the office of the attorney general to undertake any action to collect the fines which have been imposed in criminal cases prosecuted by a district attorney. The attorney general would have authority to take action to enforce fines in cases prosecuted by the attorney general. See Nev. Rev. Stat. § 228.125. Similarly, the Department of Prisons has no specific authority to collect fines through deductions from wages or other property of offenders, or to institute any action against an offender to obtain the payment of a fine. The department is given specific authority to collect only certain debts owed by inmates, such as restitution or family support. See Nev. Rev. Stat. § 209.463 and 209.4821 - 209.4843. Criminal fines are not included as a debt which may be collected by the Department of Prisons. This specific grant of authority to collect only certain debts implies a lack of authority to collect others. See Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237 (1967). Our research reveals no other relevant authority for the proposition that the Department of Prisons must take action to collect such fines.

You have also inquired regarding the proper procedure to be followed in order to convert a fine to an additional term of imprisonment. This question can be answered by reference to the relevant statutes, as well as Gilbert v. State, 99 Nev. 702, 669 P.2d 699 (1983). As provided in Nev. Rev. Stat. § 176.085, in order to obtain the reduction or discharge of a fine or an order requiring installment payment, an application must be made to the judge or justice who imposed the fine. The Nevada Supreme Court has ruled that before a defendant may be imprisoned for nonpayment of a fine a hearing must be held to determine his present financial ability to pay. Gilbert v. State, 99 Nev. at 708. This office has been informed that the Nevada Department of Prisons has instituted a procedure whereby the department notifies the district attorney of the impending release of a criminal defendant with an outstanding fine. This action by the Department of Prisons would give the prosecutor sufficient time to file an application before the sentencing judge for a hearing to determine the ability of the criminal defendant to pay the fine.

CONCLUSION

As our analysis indicates, although it is the district attorney who appears to have the authority to take action to collect fines there is a significant lack of specific statutory guidance regarding the collection of criminal fines. There is a clear need for legislation specifying the duties and responsibilities of the various law enforcement agencies with regard to collection of criminal fines. Such legislation is also needed to address the particular mechanisms of collection to be followed, as well as the priority of collection for criminal fines, restitution, family support and other obligations of the criminal offender.

Finally, under Nevada law a court hearing must be held to determine a criminal defendant's ability to pay, before a criminal fine may be converted to an additional term of imprisonment.

QUESTION NO. 2

Is a felon sentenced to one year in the state prison entitled to sentence credits.

ANALYSIS

You have raised a concern regarding the apparent release, prior to their having served a full year, of felons who have received one-year sentences in the state prison. You point out that under Nev. Rev. Stat. § 213.120 a convicted felon must serve one-third of his sentence or one year, whichever is greater. This section of Nevada law, however, applies solely to eligibility for parole and sets the minimum amount of time which must be served by a felon before he or she is eligible for parole. Thus, a convicted felon who receives a sentence of only one year is simply not eligible for parole as provided in Nev. Rev. Stat. § 213.120. The example which you have cited in your letter to this office is the case of a prisoner who received a one-year sentence, but only served approximately eight months. This particular criminal defendant was not paroled, but rather served the complete term of his sentence, when sentence credits are considered. All convicted felons are entitled to receive credits on their term of imprisonment, which operate as deductions from the maximum term of their sentences. See Nev. Rev. Stat. §§ 209.433, 209.443, 209.446 and 209.451.

Thus, a convicted felon sentenced to one year of imprisonment is entitled to statutory "good-time" credits as well as any additional credits which may be earned as provided by law. Under current Nevada statutes and procedures, a prisoner serving a one-year sentence may earn up to 182.5 days of statutory and work credit, and be required to serve as little as 6 months and 2 days. See Nevada Department of Prisons, Classification Coding Manual, p. 64 (May 1, 1986). The 182.5 days of credit excludes an additional 30 days of meritorious credits which may be earned. See Nev. Rev. Stat. § 209.446(4).

CONCLUSION

A convicted felon sentenced to one year of imprisonment is entitled to earn various sentence credits, and, thus, may serve his or her full term of imprisonment in less than one calendar year.

Sincerely,

BRIAN McKAY
Attorney General

By: Brooke A. Nielsen
Chief Deputy Attorney General
Criminal Division

OPINION NO. 87-5 PUBLIC RECORDS: Materials submitted to State Department of Education as part of private school license application are public records within the meaning of Nevada Revised Statutes.

Carson City, January 26, 1987

Ms. Patricia Weninger, Director of Basic Education, Nevada Department of Education, Capitol Complex, Carson City, Nevada 89710

Dear Ms. Weninger:

You have asked our advice in response to the following:

QUESTION

Are materials submitted by private schools to the Nevada Department of Education as part of a school license application public records within the meaning of section 239.010 of the Nevada Revised Statutes?

BACKGROUND

You have advised us that the department has been approached by an individual seeking access to a private school's policy manual, corporate by-laws, and financial statement. These documents, which were submitted to the department by the private school as part of its annual license renewal application, have become a permanent part of the school's license file. The department used the information submitted to determine whether or not the school met the statutory standards for licensure. The actual license renewal decision was made by the state board of education in a public meeting, based upon department staff's recommendation and the licensing materials submitted by the school.

ANALYSIS

Section 239.010 of the Nevada Revised Statutes states that "all public books and public records of . . . offices of the state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person, and the same may be fully copied." The Private Elementary and Secondary Education Authorization Act, codified in Chapter 394 of the Nevada Revised Statutes, does not declare any portion of the records maintained by the department of education for private elementary and secondary school licensing purposes to be confidential.

It is important to note that section 239.010(1) mandates disclosure of "public" records without defining the term. Since the legislature has not designated private school license applications as either confidential or public, some form of analysis is necessary to determine the status of these records.

In a formal opinion issued in May of last year, we expressed our belief that the spirit and intent of Nevada's public records statute requires that it be construed in favor of public inspection where there is insufficient justification for maintaining a document as confidential. See Nev. Op. Att'y Gen. No. 86-7 (May 12, 1986). In that opinion, we adopted a balancing test as the method of analysis for case-by-case evaluation of the sufficiency of the justification offered for nondisclosure. Such evaluation should include "a balancing of (1) the document's content and function; (2) the interest and justification of either the agency or the public in general in maintaining the confidentiality of the document; (3) the extent of the interest or need of the public in reviewing the document." Id. at 6.

The documents submitted to the department of education as part of a private school's license application cover every aspect of an institution's operation, from staff credentials to financial stability. Included among the different items submitted are the school's course of study and class schedule; copies of teacher certificates and staff work permits; sample attendance and evaluation forms; copies of fire and health inspection reports; building and site plans; articles of incorporation and bylaws, if the institution is incorporated; references for particular personnel;

and the institution brochure and catalog. Submission of a financial statement is also required. Institutions with enrollments of 30 to 150 students must submit financial statements compiled by an accountant. If the institution enrolls over 150 students, it must submit a financial statement which has been audited and signed by an accountant.

Minimum standards for private elementary and secondary educational institutions in Nevada are established by statute. See Nev. Rev. Stat. § 394.241. By regulation, the state board of education has construed these minimum standards and set forth a detailed series of requirements for meeting them. Using the documents submitted by the licensee, the department evaluates the school's compliance with the statute and regulations and makes a recommendation to the board regarding licensure.

We can find no legitimate agency interest to be served by nondisclosure of private school license applications. While it may be more convenient for the department to regulate and oversee private schools without public scrutiny, the public interest in access to the records at issue here clearly outweighs department convenience.

There may be a legitimate interest in confidentiality of private school license applications, however, which could be asserted on behalf of the owners and officers of such institutions. Some of the information required for licensure, particularly financial information, is of a nature which the institution and its principals might prefer not to be released to the public. We recognize the sensitive nature of the information, but are unpersuaded that nondisclosure is automatically justified on that basis alone.

At common law, records which were personal matters, the disclosure of which would constitute an invasion of privacy, were exempt from public disclosure. Many states have codified this exemption and made it part of their freedom of information or public records statutes. Similarly, a number of these statutes also contain exemptions which exempt disclosure of information which is a trade secret or is confidential and privileged commercial or financial information, where the release of such information would be an unfair advantage to business competitors. Although Nevada's public record statute does not contain either of these express exemptions, court decisions from jurisdictions with statutes which do exempt trade secrets and personal matters are useful in analyzing the matter at hand.

License and permit applications generally have been held to be public records, see State v. Mayo, 236 A.2d 342 (Conn. 1967) (building permit applications); Gray v. Brigham, 622 S.W.2d 734 (Mo. Ct. App. 1981) (building occupancy permits); Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543 (N.D. 1960) (marriage license applications); State ex rel. Beacon Journal Publishing Co. v. Andrews, 358 N.E.2d 565 (Ohio 1976) (driver's license applications), which are not exempted from disclosure as personal matters or trade secrets. See Kwitny v. McGuire, 422 N.Y.S.2d 867 (N.Y. Sup. Ct. 1979) (public inspection of approved pistol license application required), aff'd 432 N.Y.S.2d 149 (N.Y. App. Div. 1980), aff'd 424 N.E.2d 546 (N.Y. 1981); Apodaca v. Montes, 606 S.W.2d 734 (Tex. Civ. App. 1980) (personal financial statement and property listing filed with application for bail bondsman's license not exempt from public disclosure on privacy or trade secret basis); Wisconsin Electric Power Co. v. Public Service Commission, 316 N.W.2d 120 (Wis. Ct. App. 1981) (competitive cost and pricing data contained in contracts, bids and letters of negotiation submitted to plaintiffs as part of application packet to commission to construct nuclear power plan not entitled to protection from disclosure as trade secret), aff'd, 329 N.W.2d 178 (Wis. 1983).

These cases are persuasive authority for concluding that private school licensing

applications are public records within the meaning of section 239.010 of the Nevada Revised Statutes, and not exempt from disclosure. Trade secrets are specialized information, equipment, designs, processes, procedures, formulas or improvements used in the conduct of business, which are not intended by their owners to be available for use by anyone else and which give their owners a competitive advantage over others. Wisconsin Electric Power Co. v. Public Service Commission, 316 N.W.2d at 122. None of the documents submitted to the department of education by private schools meets this definition.

Nor can we fairly say that any of the licensing materials fall within the scope of the exemption for commercial or financial information obtained from a person as privileged or confidential. The rationale behind this prong of the exemption is the protection of privileged commercial, technical and financial data submitted by private businesses to government while insuring the government's ability to obtain the information. See National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The fact that the information in question may be of a sort not generally available for public perusal is not sufficient to bring it within the reach of the exemption. Id. at 770. Rather, the nature of the information must be such that its disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom it was obtained. Apodaca v. Montes, 606 S.W.2d at 736. Neither of these results is likely to occur here if private school licensing application materials are disclosed.

Finally, we do not feel that disclosure of any of the information contained in the license application would be an unwarranted invasion of privacy justifying confidentiality. Most licensed private schools in the state are proprietary businesses which routinely are required to furnish various government agencies with information about their operation. Given the breadth of Nevada's public records law and the absence of an express confidentiality statute for private school license applications, applicants cannot assume as a matter of course that their records will not be released to the public upon request. We are unaware of any contrary assurances made by department staff to this effect, and thus conclude that any expectation of confidentiality on the applicant's part is simply not reasonable.

We stated above that we believe the public interest in access to private school records clearly outweighs any agency interest in nondisclosure. The magnitude of this public interest is such that we believe it outweighs the interests of the institution and its owners and officers as well. The Private Elementary and Secondary Education Authorization Act, enacted in 1975, was part of a legislative effort to cure the ills of the private school industry in Nevada through standardized regulation of private elementary, secondary, vocational, and postsecondary schools. Assembly Bills 24 and 54: Hearings Before the Assembly Committee on Education, 58th Session of the Nevada Legislature (1975) (statement of John Gamble). The expressed purpose of this effort is the protection, education, and welfare of Nevada's citizens, its educational, vocational, and professional institutions, and its students. Nev. Rev. Stat. § 394.125. Minimum standards for quality of education, ethical and business practices and fiscal responsibility are established to protect against "substandard, transient, unethical, deceptive, or fraudulent institutions and practices . . ." Id.

The overwhelming thrust of the Private Elementary and Secondary Education Authorization Act is the protection of the public and its right to quality education. We believe the best way to serve this purpose is to freely allow public access to school licensure records, since a major part of consumer protection must be consumer awareness. Where the public has the right to inspect the records of a private school, including its financial records, prior to

enrollment, it has the ability to make an informed choice in selecting an educational institution. While not every member of the public will make the effort to avail himself of this right, we are of the opinion that the intent of the law requires that the opportunity to do so exist.

We must add the caveat that department records made confidential by a statute outside Chapter 394 do not become public records on the mischance of being included in a school's license file. Thus, a teacher's certification file, declared confidential by section 391.035 of the Nevada Revised Statutes, is not subject to public access merely because the teacher happens to be employed at a private school.

CONCLUSION

Materials submitted by private schools to the department of education as part of a school license application are public records within the meaning of section 239.010 of the Nevada Revised Statutes and are thus subject to public inspection and copying.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 87-6 COUNTY HOSPITALS: A county hospital may not compromise undisputed, unlitigated patient bills.

Carson City, February 9, 1987

Mr. Zev E. Kaplan, Deputy District Attorney
Clark County Courthouse
Las Vegas, Nevada 89155

Dear Mr. Kaplan:

You have requested our opinion as to whether the Board of Trustees of University Medical Center may compromise certain hospital bills.

QUESTION

May the Board of Trustees of the University Medical Center compromise undisputed and unlitigated hospital bills?

ANALYSIS

The facts you have provided indicate that University Medical Center ("UMC") is a hospital which is owned and operated by Clark County. UMC has periodically been asked, for various reasons, to compromise bills due the hospital for services rendered to patients. In these cases there is no dispute as to the amount of the patient's financial obligation. The bills in

question have not been turned over to your office for collection.

This office has recently opined on the nature of county hospitals and the extent of their powers. The following principles provide a starting place for our analysis:

A county hospital created pursuant to [NRS chapter 450](#) has no legal standing apart from the county. [Citations omitted.] Therefore, the powers of a county hospital must be evaluated under the same rules that apply to counties and other local governmental entities.

Counties are political subdivisions of the State, and as such, possess only those powers which the Legislature has expressly granted to them. [Citation omitted.]

The authority of a county is limited to the exercise of “only such powers . . . as are specially provided for by law.” [Citation omitted.]

‘It is well settled that county commissioners have only such powers as are expressly granted or as may be necessarily incidental for the purpose of carrying such powers into effect.’ [Emphasis in original.] [Citation omitted.]

Therefore, the appropriate legal analysis is not whether the questioned activities are statutorily prohibited, but rather whether such activities are statutorily authorized.

See Nev. Op. Att’y Gen. No. 85-9 (June 25, 1985).

Since the county has the right to sue or be sued pursuant to [NRS 244.165](#), the county has the incidental power to compromise disputed claims. Clark County v. Lewis, [88 Nev. 354](#), 356, 498 P.2d 363 (1972). Likewise, UMC’s board of trustees may call upon your office to collect unpaid claims. [NRS 450.260](#), [NRS 252.110](#); Nev. Op. Att’y Gen. No. 79-25 (December 11, 1979).

The holding in Clark County v. Lewis, *supra*, that the county has the power to compromise disputed claims comports with the view of the vast majority of jurisdictions. “Unless forbidden by charter or applicable general law, a municipal or other public corporation has power to settle and compromise disputed claims in its favor or against it. . . .” 17 McQuillan, Municipal Corporations, § 48.17, p. 106. However, it is as broadly held that a public corporation has no authority to compromise an undisputed claim against it.

Not even a county legislature, however, could compromise any and all claims asserted on behalf of the county. It may not compromise an undisputed claim in its favor. [Citations omitted.]

In re Estate of Andrus, 381 N.Y.S.2d 985, 987 (Surr. Ct. 1976).

“It is ordinarily said that claims about which no reasonable and legitimate dispute exists cannot be compromised by local governments. . . .” Antieau, Municipal Corporation Law, § 16.04, p. 16-13. One of the primary reasons for the prohibition is that such a compromise results in an unlawful diversion of public money to private use. See also, 56 Am. Jur. 2d, Municipal Corporations, Etc., § 819, p. 814; Annotation, Municipal Claim - Power to Compromise, 15

A.L.R.2d 1359, 1376.

There is, however, a very limited exception to the rule enunciated above, having to do with insolvent judgment debtors:

Suppose, for instance, that the financial condition of the judgment debtor is such that the board is unable to discover any way of collecting any part of the judgment; the board should have the power to accept a part in satisfaction of the whole of its judgment, if thereby the best interests of the county would be promoted. The rules of business conduct, by which a prudent person is governed, are applicable to a county in the management of its affairs under similar circumstances.

Washburn County v. Thompson, 75 N.W. 309, 312 (Wis. 1898), citing Collins v. Welch, 12 N.W. 121 (Iowa 1882).

If the financial condition of the judgment debtor is such that the municipal authorities in their considered judgment hold that the best interests of the municipality would be promoted by accepting part payment in satisfaction of the full judgment, they have the power to do so.

56 Am. Jur. 2d, Municipal Corporations, Etc., § 824, p. 816. See also Annotation, Municipal Claim - Power to Compromise, supra, at 1381; Oakman v. City of Eveleth, 206 N.W. 514, 516 (Minn. 1925).

We have found no authority which expands the debtor insolvency exception beyond situations involving claims which have been reduced to judgment by a court of law. We therefore decline to apply the exception to the facts posed in your request involving unlitigated claims and hereby adopt the general rule that neither a political subdivision nor a hospital under its control may compromise undisputed claims in their favor. Any power to compromise uncollectible claims must be created by express grant. See, for example, [NRS 360.265](#), authorizing the Nevada tax commission to remove from its records the name of a debtor and the amount of the debtor's tax, penalty and interest if the sums remain impossible or impracticable to collect after 5 years.

CONCLUSION

The Board of Trustees of University Medical Center has no authority to compromise undisputed, unlitigated hospital bills.

Very truly yours,

BRIAN McKAY
Attorney General

By: James T. Spencer
Deputy Attorney General

OPINION NO. 87-7 JUDGES; RECALL; PUBLIC OFFICER; CONSTITUTION: A district

judge is a public officer within the context of Nev. [Const. art. 2, sec. 9](#) and [NRS 306.020](#) and, therefore, is subject to recall by the registered voters of the district from which he was elected.

Carson City, March 27, 1987

The Honorable Brent T. Kolvet, Douglas County District Attorney, Judicial and Law Enforcement Center, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Kolvet:

You have requested an opinion regarding the following:

QUESTION

Is a district judge “a public officer” within the context of Nev. [Const. art. 2, sec. 9](#) and [NRS 306.020](#) and, therefore, subject to recall by the registered voters of the district from which he was elected?

ANALYSIS

Nev. [Const. art. 2, sec. 9](#) (hereinafter referred to as art. 2, sec. 9) states, in pertinent part, “[e]very public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district or municipality, from which he was elected.” Art. 2, sec. 9 expressly provides authority to the legislature to enact “additional legislation as may aid the operation of this section.” Chapter 306 of the Nevada Revised Statutes, Recall of Public Officers, is the legislation enacted to facilitate the operation of art. 2, sec. 9. The term “public officer” is not expressly defined in the constitution. Although the term is defined in several sections of the Nevada Revised Statutes, those definitions are expressly limited to certain purposes and, therefore, are of no help to us here. See [NRS 169.164](#), [193.019](#), [281.005](#) and [281.4365](#).

The Supreme Court of Nevada has not had the opportunity to determine whether a judge is a public officer for purposes of art. 2, sec. 9. However, the court has held that where the language used in the constitution is plain and free from ambiguity, we are not permitted to construe that which requires no construction. [State ex rel. Summerfield v. Clarke](#), [21 Nev. 333](#), [337](#), 31 P. 545 (1892). Therefore, we must determine whether “public officer,” in the plain and ordinary sense of the term, includes a district court judge.

The Nevada Supreme Court has set forth guidelines to aid in making the determination whether a particular position constitutes a public office. See, [State ex rel. Kendall v. Cole](#), [38 Nev. 215](#), 148 P. 551 (1915). When faced with interpreting the term “civil office of profit” as it appears in Nev. [Const. art. 4, sec. 8](#), the court outlined, at length, many factors to consider in making a determination that a particular position is a public office. [Id.](#) at 219-233. These factors include: (1) whether the holder of the office is entrusted with some portion of the sovereign authority of the state; (2) whether his duties involve the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty; (3) whether his compensation, period of employment and the details of his duties are set forth in statute or in the constitution; (4) whether he must take the oath of public office pursuant to Nev. [Const. art. 15, sec. 2](#); and (5) whether he must keep a record of his official acts. [Id.](#) at 231, 232.

Each of the foregoing questions, as applied to a district court judge, must be answered in the affirmative. See generally Nev. [Const. art. 6 and NRS 3.010 et seq.](#) Additionally, since there is no language contained within the provisions of art. 2, sec. 9 to indicate that the term “public officer” should be construed other than in its ordinary sense, we are of the opinion that a district court judge is a public officer within the ordinary sense of the term. See [In the Matter of Ming, 42 Nev. 472](#), 181 P. 319 (1919); cited in [Cragun v. Nevada Pub. Employees’ Ret. Bd., 92 Nev. 202](#), 207, 547 P.2d 1356 (1976).

The Nevada Supreme Court has also stated that the Nevada Constitution should be construed in its ordinary sense unless some apparent absurdity or unmistakable interest of its framers forbids such construction. [State ex rel. Lewis v. Doron, 5 Nev. 399](#) (1870). To determine whether the construction of the term “public officer” in its plain and ordinary sense would give effect to the intent of the people, we now examine the history and political climate during the period of time that the Senate Substitute for Assembly Joint and Concurrent Resolution Number 8 (now art. 2 sec. 9) was being approved by the legislature in 1909 and 1911, and ratified by the people at the 1912 general election.

The right of the electorate to recall public officials while they are still in office is a relatively new political idea in the United States. The concept first came to light in the early twentieth century during the progressive movement. Fossey, [Meiners v. Bering Strait School District and the Recall of Public Officers: A Proposal for Legislative Reform](#), 2 Alaska L. Rev. 41, 42 (1985). Initiative, referendum and recall were the political reforms advocated by the progressive movement, which espoused the philosophy that voters should have the power to bypass or countermand elected officials. [Id.](#)

The progressive movement in the western states was particularly strong. The first state to place a recall provision in its constitution was Oregon in 1908. A. MacDonald, [American State Government Administration](#), 362 (6th ed. 1960). Oregon was soon followed in 1912 by Nevada, Arizona, California, Colorado, Idaho and Washington. See Nev. Const. art. II, sec. 9; Ariz. Const. art. VIII, sec. 1; Cal. Const. art. II, sec. 13; Colo. Const. art. XX, sec. 1; Idaho Const. art VI, sec. 6; Wash. Const. art. I, sec. 33. By 1927, twelve states had constitutional recall provisions.

The progressives during the early 1900’s centered their arguments in favor of recall around the judiciary. They argued that government, especially the judiciary with its long terms in office, was controlled by special interests. Moser, [Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State](#), 66 Marquette L. Rev. 1, 36 (1982). Their opponents argued that, because judges are frequently called upon to render unpopular decisions, an independent judiciary would be destroyed if its members continuously had to gauge the impact of a decision on an unenlightened and overzealous electorate. [Id.](#)

It has been reported that during the progressive era the American Bar Association, together with the state bar associations and a united state judiciary, were organizing their opposition to the progressive movement’s attempt to provide for the recall of judges. J. Hurst, [The Growth of American Law](#), 360 (1950). The Carson City Appeal, just prior to the general election of November 1912, when the question of recall was on the ballot, reported that the Nevada Bar Association voted 45 to 40 in opposition to the recall of judicial officers. As stated in the article, the Nevada Bar Association was “following the course pursued by other state bar associations throughout the country, all acting under a suggestion from a committee of the American Bar Association . . . [to take] a vote on the question of the recall of judges.” [Carson City Appeal](#), July 26, 1912, at 4, col. 3. Despite the opposition of the American Bar Association

and the Nevada Bar Association, the people of Nevada voted 8,418 to 1,683 to amend the constitution to provide for the recall of all public officers. Secretary of State (William D. Swackhamer), Political History of Nevada, (Carson City: State Printing Office, 1986) at 262.

Public sentiment against the judiciary was not new for Nevada. During the debates at the constitutional convention, dissatisfaction was expressed with regard to the judiciary. Nevada Constitutional Debates and Proceedings, Andrew J. Marsh, Official Reporter (San Francisco: Frank Eastman, 1866), at 542. This was one reason why the framers of the Nevada Constitution provided for legislative removal of judges for causes that “may or may not be sufficient grounds for impeachment. . . .” Nev. Const. art. 7, sec. 3 and Eleanor Bushnell with Don W. Driggs, The Nevada Constitution: Origin and Growth, 5th ed. (1980) at 125. Clearly, therefore, the intent of the framers of our constitution and of art. 2, sec. 9 will not be thwarted by construing the term “public officer,” in its plain and ordinary sense, to include a judicial officer.

In determining the meaning of the term “public officer,” as it is used in art. 2, sec. 9, a presumption arises that it was used in the sense that the same or similar terms are used in constitutions of other states, unless the constitution itself negates such a presumption. State ex rel. Lewis v. Doron, 5 Nev. 399 (1870). Therefore, we turn now to the constitutions of the other states that provide for recall of public officers. Of particular importance to us in our comparison are those states which use the term “public officer” in their amendments to their constitutions providing for recall, that ratified those amendments at the same time or prior to November 1912, the date art. 2, sec. 9 was ratified by the people of Nevada. These states include Arizona, Colorado, Idaho, Oregon and Washington, all western neighbors of Nevada. Two of these states, Idaho and Washington, expressly except judicial officers from recall.

For purposes of comparison, the pertinent language in the constitutions of Idaho and Washington is set forth below:

Every public officer, excepting the judicial officers, is subject to recall by the legal voters of the state or of the electoral district from which he is elected.

Idaho Const. art. 6, sec. 6, proposed in 1911 and ratified at the general election November, 1912.

Every elective public officer of the state of Washington except [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected. . . .

Wash. Const. art. I, sec. 33 proposed in 1911 and ratified at the general election November, 1912.

Unlike the constitutions of Idaho and Washington, no qualifying language expressly excepting judicial officers from recall appears in art. 2, sec. 9. The Nevada Supreme Court has held that words used in the constitution must be given their ordinary and usual meaning, unless so qualified by accompanying language as to alter such meaning. State ex rel. Clark v. Irwin, 5 Nev. 111 (1869), cited in Goldfield Consol. Mines Co. v. State, 35 Nev. 178, at 183, 127 Pac. 77 (1912). More recently in Robison v. District Court, 73 Nev. 169, 313 P.2d 436 (1957), the Nevada Supreme Court rejected the argument that the impeachment provisions of Nev. Const. art. 7, sec. 2 only applied to constitutional officers or elective state officers and not appointive state officers, where no such restrictive language appeared in the constitution and “not the slightest mention or reference to any such possible distinction was made in the lengthy constitutional debates on the subject.” Id. at 174.

Since no qualifying or restrictive language is used in art. 2, sec. 9, we are of the opinion that if the people of Nevada had intended to exclude judges from the recall provision of art. 2, sec. 9, express language excepting judicial officers would have been used as in the Idaho or Washington Constitutions, or appropriate modifying language would have been used as it appears in other portions of the Nevada Constitution. See Article 7, section 2; Article 15, section 2 and see generally *State ex rel. Kendall v. Cole*, [38 Nev. 215](#), 148 P. 551 (1915).

Our review of the constitutions of the remaining three states, Arizona, Colorado and Oregon, that ratified an amendment providing for recall of public officers at approximately the same time as Nevada, reveals that the following language was used in their constitutions:

Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office.

Ariz. Const. art. VIII, sec. 1, approved and ratified at the general election November 1912.

Every elective public officer of the state of Colorado may be recalled from office at any time by the electors entitled to vote for a successor of such incumbent through the procedure and in the manner herein provided for, which procedure shall be known as recall. . . .

Colo. Const. art. XXI, sec. 1, approved and ratified at the general election November 1912.

Every public officer in Oregon is subject, as herein provided, to recall by electors of the state or of the electoral district from which the public officer is elected.

Ore. Const. art. II, sec. 18(1) adopted by the people June 1, 1908.

The language used in each of the constitutions of these three states is very similar to that used in Nevada. Unlike Nevada, in Arizona, Colorado, and Oregon, their recall provisions have been subjected to judicial scrutiny. In all three of the states, the courts have held that judges are public officers subject to recall pursuant to their constitution. *Abbey v. Green*, 235 P. 150 (Ariz. 1925); *Marians v. People ex rel. Hines*, 169 P. 155 (Colo. 1917); *State ex rel. Clark v. Harris*, 144 P. 109 (Ore. 1914).

The Nevada Supreme Court has held that, where the meaning of a word or paragraph used in a constitution has been determined by judicial decision and long acquiesced in by courts and people of the state, such meaning should not be disturbed. *Mack v. Torreyson*, [21 Nev. 517](#), 523, 34 P. 870 (1893). Although the courts of this state have not had an opportunity to judicially determine whether a judge may be recalled pursuant to art. 2, sec. 9, it is noteworthy to recognize that the political scientists of this state have been teaching the students of Nevada Constitution that judges may be recalled by the people of Nevada. Judge A. J. Maestretti and Charles Roger Hicks, *The Constitution of the State of Nevada, Its Formation and Interpretation* (1940) at 43; Don W. Driggs, *The Constitution of the State of Nevada A Commentary* (1961) at 29-30; and Eleanore Bushnell with Don W. Driggs, *The Nevada Constitution: Origin and Growth*, (5th ed. 1980) at 123.

In addition, many other authorities throughout the years have read the plain language of Nevada's recall provision and determined that, in Nevada, judges are subject to recall. *Shartel, Retirement and Removal of Judges*, 20 *Journal of the American Judicature Society* 133, 148, n.

73 (1936-37); Fordham, Utah Recall Proposal, Utah L. Rev. 29, 35, n. 28 (1976); Douglas, Arizona's New Judicial Article, 2 Ariz. L. Rev. 159 (1960); Nugent, Removal of Judges by Legislative Action, 6 Journal of Legislation 140, 141, (1979); Moser, Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State, 66 Marquette Law Review 1, 37, n. 256 (1982); Fossey, Meiners v. Bering Strait School District and the Recall of Public Officers: A Proposal For Legislative Reform, 2 Alaska L. Rev. 41, 43, n. 17 (1985); and the Council of State Governments, The Book of The States, Vol. 26, (1986-87) at 167 and 217.

We are aware of Nev. [Const. art. 6, sec. 21](#) providing for judicial discipline. However, we are of the opinion that Nev. [Const. art. 6, sec. 21](#) is not applicable to our analysis of whether a district judge is a public officer subject to recall, since the provisions of art. 2, sec. 9 and art. 6, sec. 21 are not inconsistent. See Rea v. City of Reno, et al., [76 Nev. 483](#), 488, 357 P.2d 585 (1960). In contrast to a disciplinary action, there need not exist a good reason for recall of a public officer, nor is there a requirement that cause be shown. The merit of the recall petition is for the people to decide. Batchelor v. Eighth Judicial Dist. Court, [81 Nev. 629](#), 408 P.2d 239 (1965).

Given the plain language of the constitution, the political climate of Nevada during the time period art. II, sec. 9 was approved by the legislature and ratified by the people, and the long acceptance of its meaning by a great many authorities, we are unwilling to narrowly construe it to avoid subjecting judges to recall by the people. To do so, we think, would be to exclude the main object and intention of its framers. See State ex rel. Torreyson v. Grey, [21 Nev. 378](#), 32 P. 190 (1893).

CONCLUSION

A district judge is a "public officer" within the context of Nev. [Const. art. 2, sec. 9](#) and [NRS 306.020](#) and, therefore, is subject to recall by the registered voters of the district from which he was elected.

Sincerely,

BRIAN McKAY
Attorney General

By: Jennifer Stern
Deputy Attorney General

OPINION NO. 87-8 TAXATION--APPRAISAL THEORY: The subdivision analysis theory of property appraisal should be considered by the Department of Taxation, the State Board of Equalization, county assessors and local boards of equalization when appraising staged developments for tax purposes.

Carson City, April 15, 1987

Mr. John P. Comeaux, Executive Director, Department of Taxation, Carson City, Nevada 89710

Dear Mr. Comeaux:

You have requested an opinion of this office as to the applicability of the theory of subdivision analysis based on the following comments and observations:

1. [NRS 361.320](#) provides that all property used directly in the operation of certain companies can be appraised as a collective unit. Cannot this same concept of a flexible appraisal unit be applied in analyzing and appraising a subdivision?
2. If the concept of an appraisal unit is flexible, can it not be the responsibility of the appraiser to define that unit? That is, is it statutorily or constitutionally required that an appraisal unit be confined to a single parcel?
3. If, for example, there is a large subdivision containing many lots, only one or a few of which have sold, cannot the remaining lots under the one ownership be considered an appraisal unit? That is, would not the appraisal of the remaining lots, each individually, according to the market value established by the sale of the first lot or lots, be violative of the statutory prohibition against an appraisal value exceeding market value, since the remaining lots cannot be sold immediately?
4. General appraisal theory, as well as the state constitution, dictates that all property is to be valued uniformly, and the concepts in the assessment system itself do provide for uniformity. In the appraisal of real property, we recognize stages of production in both real and personal property. This is to say, we recognize values as they pertain to raw land approved for a subdivision, a lot value in the hands of the developer, and a lot value in the hands of the consumer. We recognize values in possessory interest based on time and terms of contracts. Assume all lots in a subdivision are very similar, a small portion of them are in the hands of “consumers” and the bulk of the lots still in the hands of the “retailer.” Must we not then recognize the fact that full cash value would be exceeded for the developer if we do not acknowledge that such considerations as marketing and carrying costs to the developer and time required for sale could result in different appraisal values as between consumers and developers?

QUESTION

May the Nevada Department of Taxation and State Board of Equalization, as well as the county assessors and local boards of equalization, utilize the concepts set forth in the subdivision analysis theory of appraisal when appraising and equalizing property in Nevada?

ANALYSIS

Article 10, Section 1, of the Nevada Constitution provides that “[t]he legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory. . . .”

The legislature enacted a method for determining taxable value of real property in [NRS 361.227](#) which provides in pertinent part:

1. Any person determining the taxable value of real property shall appraise:
 - (a) the full case value of:
 - (1) Vacant land by considering the uses to which it may lawfully be put, any legal or physical restrictions upon those uses, the character of the terrain and

the uses of other land in the vicinity.

(2) Improved land consistently with the use to which the improvements are being put. . . .

(4) The computed taxable value of any property must not exceed its full cash value. Each person determining the taxable value of property shall reduce it if necessary to comply with this requirement. (Emphasis added.)

Full cash value is defined as “the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.” [NRS 361.025](#). The Nevada Supreme Court long ago discussed the meaning of “full cash value” and held that “it is fair to presume that property to be taken in payment of a just debt from a solvent debtor would be appraised at what it is reasonably worth in the market - at what it would probably bring.” The State of Nevada v. The Virginia & Truckee Railroad Co., [23 Nev. 283](#), 46 P. 723 (1896). Thus, the statutes and case law provide that property is to be appraised at market value and that taxable value must not exceed the market value.

A hypothetical factual situation will facilitate discussion of the theory and method of appraisal suggested by your question. Assume that the property being considered consists of a fairly large subdivision containing many lots of residential property, only one or a few of which have been sold. Also assume there is a \$25,000 asking price on each lot and that there is a projected sell-out time of five years on the entire subdivision.

The question then becomes whether the \$25,000 selling price for the single lot already sold should be multiplied by the number of remaining lots in the subdivision to come up with the aggregate figure for the market value of the remainder of the subdivision. The answer to this question is “No.” A single-lot owner, by paying \$25,000 for his lot, has established his own market value; he should be prepared to pay taxes on that figure, and he derives benefit from the services he is provided by paying those taxes. However, the present value of a lot which is not to be sold for another four or five years is today worth nowhere near the future sales price of \$25,000. Factors such as the absorption rate of the lots, the carrying costs and the annual cash flow of the development must be taken into consideration. The appraiser, whether for fee or tax purposes, must distinguish between gross sell-out, which is the aggregate of individual retail lot prices, and the discounted or wholesale value, which is market value. “Subdivision Analysis: An Educational Memorandum of The American Institute of Real Estate Appraisers,” National Association of Realtors (January 1984). Thus, taxing the subdivision owner today on the gross sell-out figure would be taxing him in contravention to the statute which prohibits taxable value from exceeding full cash value. [NRS 361.227](#).

This theory of Discounted Cash Flow Analysis is now an important portion of the 8th edition of the *Appraisal of Real Estate*, a handbook published by the American Institute of Real Estate Appraisers in 1983. This publication suggests that money to be received at a specific future time be discounted from that time to the present at a given rate of interest. In other words, the appraiser must consider the present value of future receipts when determining today’s market value. This concept is included in the comparative sales and capitalization of income approaches to appraisal, which are found in [NRS 361.227](#)(4)(a), as suggested considerations in determining whether taxable value exceeds full cash value.

Not only is the use of this method suggested by most appraisal manuals, the Federal Government has also now stepped into the picture. The Federal Home Loan Bank Board is responsible for the administration and enforcement of the Federal Home Loan Bank Act, the Home Owners’ Loan Act of 1933, and Title IV of the National Housing Act. Members of the Board constitute the Board of Directors of the Federal Home Loan Mortgage Corporation. The

Board supervises the Federal Home Loan Bank and issues regulations and orders for carrying out the purposes of the provisions of the Federal Home Loan Bank Act. Federal savings and loan associations are eligible to become members of a Federal Home Loan Bank. One of the functions of the Board with respect to the banks and their members is to prescribe the conditions upon which a Federal Home Loan Bank is authorized to make advances to its members and to nonmember borrowers. The Board is authorized to promulgate such rules and regulations as it may prescribe to provide for the organization, incorporation, examination, operation, and regulation of Federal savings and loan associations. Under this authority, the Board may, in addition to many other functions, regulate the lending and investment powers of the savings and loan associations. 12 CFR §§500.1 through 500.3 (1985).

A memorandum, No. R-41c, regarding appraisal guidelines to be followed when considering loans, was sent by Mr. Francis M. Passarelli, Director of the Office of Examinations and Supervision of the Federal Home Loan Bank Board, to his professional appraisal staff on September 11, 1986. The memorandum was issued to the appraisers for the purpose of establishing appropriate guidelines which would ensure acceptable appraisal procedures in the current market. To this end, an appraisal of a proposed project was to contain information as to the scope and character of the project, the probable time of completion, evidence supporting development costs, anticipated rent levels or per unit sales levels and occupancy projections, and all value changes projected to occur from the conception of a project to its completion. Also to be included was an explanation of how discount and capitalization rates were used in generating the present value estimate of the project. In other words, the appraisal staff of the savings and loan associations must consider the subdivision analysis theory before granting a loan.

Although no case law was found which discussed this specific appraisal technique, many cases have held that any method for determining full cash value of property for purposes of taxation which is recognized as accurate and reasonably related to fair market valuation is an acceptable indicator of full cash value. Community Associates v. Meridian Charter Township, 314 N.W.2d 490 (Mich. App. 1981); Board of Assessors of Sandwich v. Commissioner of Revenue, 472 N.E.2d 658 (Mass. 1984); Riha Farms, Inc. v. County of Sarpy, 322 N.W.2d 797 (Neb. 1982). Accord Columbus Board of Education v. Fountain Square Associates, Ltd., 459 N.E.2d 894 (Ohio 1984).

In implementing the technique, the appraiser must be given a certain amount of flexibility in describing the appraisal unit. This unit appraisal concept is already being used here in Nevada in certain instances. NRS 361.320 provides that all property used directly in the operation of certain companies, primarily utilities, be appraised as a collective unit. That is, all of a company's property throughout the state, real or personal, is lumped together and appraised as a unit without regard to land parcelling or lots.

In California, the theory has been used at the appraisal level for some time.¹ There, the economic theories of "trade level" and "stage of production" are used to describe the process. At each stage or level of production, a measurable amount of utility is added to the property. A form of consumption occurs when the lot is improved, passing through the hands of a wholesaler, a retailer, and finally, the consumer. The land has different values in the hands of each of these parties. For example, land being developed for subdivision use will pass through various stages of production as the bare land is converted into residential sites. Finding the appraisal unit is the key to establishing the trade level for real property. When the appraiser makes a decision regarding the unit to be appraised, the proper trade level should already be reflected in the unit. Once the unit to be appraised is defined, the stage of production governs what level of market data is relevant in determining the final value estimate. See "Assessors' Handbook: General

Appraisal Manual,” California State Board of Equalization, Assessment Standards Division, Property Taxes Department, March, 1975, revised September 1982.

It has been suggested that the parcelling system provided for in [NRS 361.189, et seq.](#), might prevent a flexible approach at defining the appraisal unit. These statutes are, however, simply methods for legally describing land for purposes of assessment.

¹ A survey of western states done by the Department of Taxation has revealed that the theory is also used in Oregon, Idaho, Utah, New Mexico and Arizona.

There is no statutory prohibition against county assessors more flexibly describing the units of land they are appraising. [Boyne v. State of Nevada](#), [80 Nev. 160](#), 390 P.2d 225 (1964) is Nevada’s leading case on equity in property taxation. In [Boyne](#) the Nevada Supreme Court considered the constitutionality of a law that would have permitted taxation of property used for agriculture on the basis of its value for agricultural use only and not on the basis of the highest and best use, the basis on which other vacant land is valued. The court stated:

It is self-evident under Nevada law that no special laws can be passed ‘for the assessment and collection of taxes for state, county and township purposes’ (Article IV, Section 20); that ‘all laws shall be general and of uniform operation throughout the State’ (Article IV, Section 21); that the ‘Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property’ (Article X, Section 1); that ‘all ad valorem taxes should be of a uniform rate or percentage’ (State v. Eastabrook, [3 Nev. 173](#), 177); and that as a proposition of general rule of law, a partial exemption is not to be favored (State Tax Commission v. Wakefield (Md.), 161 A.2d 676). Therefore, in deciding the constitutionality of [NRS 361.313-314](#), the ancient principles of uniformity, equality, justness and fairness permeate the law, principles which cannot now be ignored. Applying those precepts, it is eminently clear that the owners of agricultural property have been given a distinct tax advantage over other real property owners, something which I do not believe was contemplated by the framers of our Constitution. On the other hand, there is a clear constitutional mandate [that the legislature provide a uniform and equal rate of assessment and taxation and secure a just valuation for taxation of all property].

80 Nev. at 166.

No special laws for implementing this system would be necessary because it is already considered to be part of the comparative sales approach to valuation which is specifically provided for in [NRS 361.227\(4\)\(a\)](#). Further, the use of the system would result in equalization in that similar appraisal units would then be compared to and equalized with each other.

An excellent example of the need for implementing the system can be found in a case recently heard by the State Board of Equalization. The property involved was a commercial subdivision near the airport in Reno from which only a few lots had been sold. The Washoe County Assessor had determined that the taxable value of the property was more than

\$20,000,000 and had it on the roll for that figure. The property had been privately appraised, using the subdivision analysis theory, in early 1985 for approximately \$11,000,000 and sold at the end of 1985 for approximately \$12,000,000. It has long been held that the best evidence of full cash value of property for tax purposes is an actual, recent sale of the property in question in an arms-length transaction. Consolidated Aluminum Corporation v. Monroe County Board of Revision, 423 N.E.2d 75 (Ohio 1981); Healey-Ostenfeld Realty Corporation v. Grain, 476 N.Y.S.2d 183 (A.D.2 Dept. 1984); Arlington County Board v. Ginsberg, 325 S.E.2d 348 (Va. 1985); Board of Supervisors of Fairfax County v. Donatelli & Klein, Inc., 325 S.E.2d 342 (Va. 1985). After carefully considering the testimony of members of the assessor's office and of state personnel who explained further the use of the subdivision analysis theory, the State Board of Equalization found the value to be that for which the property had been purchased, approximately \$12,000,000. In reaching this decision, the Board had concluded that the value placed on the property by the assessor greatly exceeded fair market value, a result specifically prohibited by statute. [NRS 361.227](#); [NRS 361.357](#).

CONCLUSION

The concepts of subdivision or development analysis have wide applicability. In addition to the customary residential subdivision, the theory may be applied to recreational and other mass merchandising land development projects, industrial and office subdivisions, and staged developments of all types. The primary concern is that the taxpayer should not pay taxes on the aggregate of individual retail lot prices. Using the gross sell-out figure would result in the taxable value greatly exceeding market value, a result specifically prohibited by statute.

Thus, the ancient principles of uniformity, equality, justness and fairness which permeate the law dictate that, not only may the Department of Taxation, the State Board of Equalization and county assessors and local boards utilize the subdivision analysis theory or appraisal, but they should do so on many occasions.

Sincerely,

BRIAN McKAY
Attorney General

By: Illyssa I. Fogel
Deputy Attorney General

ADDENDUM TO OPINION 87-8

[After this opinion was issued, the 1987 Nevada Legislature amended [NRS 361.227](#) to expressly approve the use of subdivision analysis as a method of appraisal for property tax purposes for those parcels that qualify pursuant to the regulations promulgated by the Nevada Tax Commission. See [NRS 361.227\(2\)\(b\)](#) and [361.227\(6\)\(c\)](#).

The 1987 legislature also changed the definition of "full case value" contained in [NRS 361.025](#) to mean "the most probable price which property would bring in a competitive and open market under all conditions requisite to a fair sale."]

OPINION NO. 87-9 ADMINISTRATIVE LAW--PRACTICE OF LAW: A nonlawyer state employee may not represent a state agency in proceedings brought pursuant to [NRS 284.390](#).

Carson City, May 11, 1987

Mr. Glenn B. Rock, Director
Department of Personnel
Blasdel Building, Capitol Complex
Carson City, Nevada 89710

Dear Mr. Rock:

By letter dated April 9, 1987, your predecessor in office asked this office the following:

QUESTION

May a nonlawyer state employee represent a state agency in proceedings brought pursuant to [NRS 284.390](#)?

ANALYSIS

The above question arose when a state agency's nonlawyer personnel representative attempted to represent the agency before a hearing officer in a disciplinary appeal filed pursuant to [NRS 284.390](#). The subject hearing officer is appointed by the personnel commission and his duties include the determination of employee appeals of disciplinary dismissals, demotions or suspensions. [NRS 284.091](#) and [284.390](#). The hearing officer was concerned whether the appearance of the personnel representative at the hearing would constitute the unauthorized practice of law, a misdemeanor offense under [NRS 7.285](#).

Courts are reluctant to formulate a definition of the practice of law since such a definition may "be more likely to invite criticism than to achieve clarity." Shortz v. Farrel, 193 A. 20, 21 (Pa. 1937). However, in reviewing cases concerning representation of the rights of others before administrative bodies, some guidelines can be discerned. Generally, one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising, and assisting him in connection with these rights and duties is engaged in the practice of law. Hofmeister v. Tod, 349 S.W.2d 5 (Mo. 1961); Lukas v. Bar Ass'n of Montgomery County, Md. Inc., 371 A.2d 669 (Md. Ct. Spec. App. 1977). The authorities are in agreement that it is the character of the act performed which is determinative of whether the act constitutes the practice of law and not the forum where the act is done. Therefore, if the activity requires the application of legal knowledge and technique, the activity probably constitutes the practice of law even though performed before an administrative tribunal. See 7 Am. Jur. 2d, Attorneys at Law, § 107; Annotation, What Amounts to the Practice of Law, 111 A.L.R. 32; 7 C.J.S., Attorney and Client, § 36.

In Lukas v. Bar Ass'n of Montgomery County, Md. Inc., *supra*, the court found the appellant to be engaging in the unauthorized practice of law where appellant, self-styled as a "Personnel-Business Consultant," had represented county employees in dealings with the county personnel board. His activities included interpretation of personnel regulations and preparation of legal memoranda for the board. The court discussed cases dealing with perfunctory form

filing, an activity which does not constitute the practice of law, stating:

Lukas's dealings with the Personnel Board, while not amounting to the filing of pleadings in the trial of a contested case, were something more than the mere mechanical filling out of forms. In this regard, the general rule is:

'Where trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law. . . .' (Citations omitted.)

Id. at 673.

In Florez v. City of Glendale, 463 P.2d 67 (Ariz. 1969), a nonlawyer labor union employee sought to represent the interests of a discharged city employee before the city personnel board. In holding that the representation of another before the personnel board did constitute the practice of law, requiring that the representative be a licensed attorney, the court affirmed its earlier adoption of the definition of the practice of law:

[T]he preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. (Citation omitted.)

Id. at 68.

One also practices law before an administrative tribunal when he:

[I]nstructs and advises another in regard to the applicable law on an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations . . . [or] prepares for another . . . procedural papers requiring legal knowledge and technique . . . [or] examines and cross-examines witnesses and makes objections or resists objections to the introduction of testimony

Denver Bar Ass'n v. Public Util. Comm'n, 391 P.2d 467, 471 (Colo. 1964). See, also, Kyle v. Beco Corp., 707 P.2d 378, 382 (Idaho 1985), ("[R]epresentation of another person before a public agency . . . constitutes the unauthorized practice of law, where the proceedings . . . are held for purposes of adjudicating the legal rights or duties of a party.")

With the above guidelines in mind, we now turn our attention to the nature of the [NRS 284.390](#) hearing procedures. The hearing officer may issue subpoenas to compel attendance of witnesses and order discovery procedures. [NRS 284.391](#). The hearing officer determines relevancy of various kinds of evidence sought to be introduced by parties and makes rulings on any objections to the introduction of evidence which may be raised. [NAC 284.788](#) to [284.794](#), inclusive. Each party presents an opening statement, may conduct direct and cross-examination of witnesses and gives closing argument. [NAC 284.814](#). The rights which are determined at the hearing are in every case very substantial rights, having to do with the dismissal, demotion or suspension of a permanent classified employee. [NRS 284.385](#) and [284.390](#). The reasonableness of the discipline imposed is determined primarily by reference to facts adduced by the parties at the hearing and personnel regulations which define just cause for the imposition of discipline. [NAC 284.638](#) to [284.646](#), inclusive. The procedure is formal, adversarial and determinative of important legal rights.

In applying the various factors which define the “practice of law” as set forth in the above-referenced authorities, it becomes clear that the performance of most, if not all, of the acts required in representing a state agency in [NRS 284.390](#) proceedings come well within those standards. We therefore conclude that such a representation is the practice of law which must be performed by a licensed Nevada attorney.

In addition to the substantial case law already referenced, there are very good practical reasons cited by the courts for not allowing lay representation before adjudicative administrative boards. As indicated by the Nevada Supreme Court in [Pioneer Title v. State Bar](#), [74 Nev. 186](#), 326 P.2d 408 (1958), the reason the practice of law by other than members of the State Bar of Nevada is forbidden by statute is not for the protection of the lawyer against lay competition, but the protection of the public.

It is to meet the requirements of public interest that high standards of training and competence are fixed for those who would practice law and that they practice under a strict code of professional ethics and are made answerable to the courts as court officers for the manner in which they meet their professional obligations. The legal profession has, through acceptance of its obligations, traditionally become imbued with a spirit of public service.

The bench and bar may not lightly disregard these public obligations. Nor, in default of duty, may they casually permit the public to be led to rely upon the counselling, in matters of law, of persons not subject to the standards and discipline of the attorney as imposed by law for the public protection.

Id. at 190.

Finally, we point out that the Nevada legislature has spoken definitively as to how state agencies may be represented in legal controversies which arise within the executive branch. [NRS 228.110](#) provides in pertinent part:

1. The attorney general and his duly appointed deputies shall be the legal advisers on all state matters arising in the executive department of the state government. . . .

That provision removes all doubt that the legislature wants the legal rights of executive state agencies to be protected by licensed legal counsel.

CONCLUSION

A nonlawyer state employee may not represent a state agency in proceedings brought pursuant to [NRS 284.390](#).

Very truly yours,

BRIAN McKAY
Attorney General

By: James T. Spencer
Deputy Attorney General

OPINION NO. 87-10 COURT CLERKS--FILING FEES: Filing fee of \$32 imposed by NRS 19.030 must be paid in probate cases and remitted to the State. Nev. Op. Att’y Gen. No. 482 (July 1, 1947) is overruled.

Carson City, May 18, 1987

The Honorable Richard A. Wagner, District Attorney of Pershing County, Post Office Box 299,
Lovelock, Nevada 89419

Dear Mr. Wagner:

You have sought our advice in response to the following:

QUESTION

Are the civil fees which county clerks may collect pursuant to section 19.030 of the Nevada Revised Statutes in addition to the fees they are empowered to charge in civil actions by section 19.013?

ANALYSIS

You have advised us that your opinion request is based upon your belief that some counties in the state are not charging in probate cases the fees provided for in Nev. Rev. Stat. § 19.030, but only the basic fees listed in Nev. Rev. Stat. § 19.013. For example, in counties which charge only the fees listed in Nev. Rev. Stat. § 19.013, it costs \$65.00 to commence a probate or guardianship action where the estate has a value of more than \$1,000.00. In counties which also charge the \$32.00 fee provided for in Nev. Rev. Stat. § 19.030, it costs \$97.00 to commence such an action.

Section 19.013 of the Nevada Revised Statutes sets out the basic fees which county clerks are required to charge. At the “filing of a petition for letters testamentary, letters of administration, setting aside an estate without administration, or a guardianship,” the clerk charges a fee of \$65.00 when the stated value of the estate is over \$1,000.00. The fees collected pursuant to this statute are deposited with the county treasurer on a monthly basis. Nev. Rev. Stat. § 19.013(5).

There are several statutes in Chapter 19 which prescribe fees that are not credited to the county treasury. The pertinent statute to our analysis is Nev. Rev. Stat. § 19.030, entitled “Additional fees in civil actions; State general fund.” It provides:

On the commencement of any civil action or proceeding in the district court, other than the commencement of a proceeding for an adoption, the county clerk of each county, in addition to any other fees now provided by law, shall charge and collect \$32 from the party commencing the action or proceeding.

On or before the 1st Monday of each month, the county clerk shall pay over to the county treasurer an amount equal to \$32 per civil case commenced as provided in subsection 1, for the preceding calendar month, and the county treasurer shall

place the same to the credit of the state fund. The county treasurer shall remit quarterly all such fees turned over to him by the county clerk to the state treasurer, to be placed by the state treasurer in the state general fund.

Nev. Rev. Stat. § 19.030(1), (2).

In 1947, this office authored an opinion which construed the predecessor statute to Nev. Rev. Stat. § 19.030 and concluded that the additional civil fee for state purposes was not applicable to probate matters. See Op. Att’y Gen. No. 482 (Nev. July 1, 1947). The basis for that opinion was a technical distinction between “civil actions and proceedings” and “civil cases” which existed at that time as a result of the merging of jurisdiction over common law, chancery and probate matters in state district courts. This opinion may be the reason that some counties in the state do not charge the \$32.00 fee in estate matters.

Any remaining distinction between “proceedings,” “actions” and “cases” relied upon in the 1947 opinion was eliminated by Nevada’s adoption of the Rules of Civil Procedure in 1952. Rule 2 provides that “[t]here shall be one form of action to be known as ‘civil action.’ ” Nevada’s Rules of Civil Procedure are substantially based on the Federal Rules of Civil Procedure and our Rule 2 is identical to Rule 2 of the Federal Rules. In substance, the rule provides for “a single action and mode of procedure, with abolition of forms of action and procedural distinctions.” Fed. R. Civ. P. 2 Advisory Committee Note 3. Probate proceedings have not been excepted from the application of the rules. Therefore, we now overrule our earlier opinion on this issue and examine the question presented in light of the law as it exists today.

When presented with a question of statutory interpretation, the intent of the legislature is the controlling factor; and, if the statute under consideration is clear and plain on its face, its intention must be deduced from such language. City of Las Vegas v. Macchiaverna, 99 Nev. 256, 258, 661 P.2d 879 (1983); Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957 (1983); Cirac v. Lander County, 95 Nev. 723, 729, 602 P.2d 1012 (1979). We believe the language of Nev. Rev. Stat. § 19.030 is clear. The title speaks of additional civil fees. Subsection one mandates that the county clerk upon commencement of any civil action, except an adoption proceeding, collect an additional \$32.00 fee beyond any other fees required by law. Therefore, in your example, the correct fee to be imposed for commencing a probate or guardianship action where the value of the estate is over \$1,000.00 is \$97.00. This sum represents the \$65.00 filing fee authorized by Nev. Rev. Stat. § 19.013, which goes to the county treasury, and the additional \$32.00 fee mandated by Nev. Rev. Stat. § 19.030, which is credited to the state general fund.

CONCLUSION

The civil fee set by Nev. Rev. Stat. § 19.030 of the Nevada Revised Statutes is in addition to the fees which county clerks are empowered to charge in civil actions by Nev. Rev. Stat. § 19.013. Both fees must be charged and collected in all appropriate cases. Besides these two fees, additional fees are also required [in] some counties by NRS 19.031 and 19.033. Nev. Op. Att’y Gen. No. 482 (July 1, 1947) is overruled.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 87-11 CRIMINAL LAW--CHILD PORNOGRAPHY: [NRS 200.730](#), prohibiting possession of child pornography, is constitutional.

Carson City, June 1, 1987

The Honorable Mills Lane, Washoe County District Attorney, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Lane:

Recently, you requested an opinion of this office regarding the following:

QUESTION

Are the provisions of section 200.730 of the Nevada Revised Statutes, making the possession of visual presentations depicting sexual conduct of minors a criminal offense, constitutional?

ANALYSIS

Section 200.730 of our statutes prohibits the knowing and willful possession of any visual depiction of a minor engaging in or simulating sexual conduct. The term "sexual conduct" is also specifically defined in section 200.700(3). Some individuals may believe that the resolution of the constitutionality of these provisions is controlled by the United States Supreme Court case of Stanley v. Georgia, 394 U.S. 557 (1969). That case, however, concerned pornographic depictions involving adults, and the Court held that the states cannot criminalize the mere private possession of obscene materials stating that "mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments." Id. at 565. The State of Georgia had asserted that exposure to obscene materials may lead to deviate sexual behavior or crimes of sexual violence, but the Court found there was little empirical basis for this assertion. There was clearly no indication that the private possession of this pornographic material had any effect outside the private home.

It should be noted that the Stanley opinion has been limited to what was described as pornography involving adults. The Court stated that the opinion in no way infringed upon the power of the states "to make possession of other items, such as narcotics, firearms, or stolen goods, a crime." The Court also stated that it did not express an opinion regarding the outlawing of the criminal possession of "other types of printed, filmed, or recorded materials." Id. at 568 n.11. On the other hand, section 200.730 outlaws the possession of visual depictions of sexual conduct of juveniles and mentions nothing about "pornography" or "obscenity." Cf. Nev. Rev. Stat. §§ 201.235-.254 (1985) (defining and outlawing "obscenity"). The Stanley case itself has been limited and clearly did not create any right to distribute or deliver obscene matters involving adults even for private possession. See United States v. 12 200-foot Reels of Super 8 mm. Film, 413 U.S. 123 (1973) (importation of obscenity); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (exhibition of obscenity in theaters); United States v. Orito, 413 U.S. 39 (1973) (prohibition of transportation of obscenity in interstate commerce).

Completely different from the question of obscene pornographic materials involving adults are those visual depictions of juveniles involved in sexual conduct as defined in Nevada statutes. The Supreme Court recognized in New York v. Ferber, 458 U.S. 747 (1982), that the constitutionality of a ban on the distribution of these types of material does not depend upon whether or not they can be categorized as “obscene.” The Court stated that states “are entitled to greater leeway in the regulation of pornographic depictions of children.” Id. at 756. The reasons stated were: (1) a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling,’ ” and legislation aimed at protecting the well-being of minors has been upheld even “in the sensitive area of constitutionally protected rights,” id. at 756-57; (2) distribution of this material is intrinsically related to sexual abuse of children by creating a permanent record of the child’s participation and encouraging further sexual exploitation of children, id. at 759; (3) advertising and selling child “pornography” provides an economic motive for the production of such materials, id. at 761; (4) the value of permitting performances of children engaged in sexual conduct “is exceedingly modest, if not de minimis,” id. at 762; and (5) classifying child “pornography” as outside the protection of the Constitution is not inconsistent with earlier decisions, id. at 763. The Court stated that child “pornography” can be regulated and is not protected by the first amendment if adequately defined. Nevada law presently defines this child “pornography” with adequate specificity.

Notably, the Ferber decision did not specifically discuss any privacy rights, as the defendant was convicted of knowingly promoting sexual performances of children by distributing material. And, federal law banning the receipt or distribution of such material has been upheld. See United States v. Andersson, 803 F.2d 903 (7th Cir. 1986); United States v. Miller, 776 F.2d 978 (11th Cir. 1985); 18 U.S.C. § 2252(a)(2). Importantly, the federal statute prohibits the receipt or distribution of this material which has been transported or shipped in interstate or foreign commerce or mailed. Congress cannot regulate the mere possession of such material, as congressional regulation must be derived from constitutional authority--in this case, constitutional authority to regulate mail and interstate and foreign commerce. See United States v. Orito, 413 U.S. at 143. Nevertheless, even federal courts have noted that the Constitution may not protect the private possession of child “pornography.” See United States v. Andersson, 803 F.2d at 907 n.3 (“Drying up the market may be the only way to effectively combat the production. . . . Therefore, the state’s interests in regulating pedophilic pornography may well extend into the private home.”).

More recently, a United States Supreme Court ruling has suggested that Stanley did not create a privacy right for the private possession of obscenity or child pornography. In Bowers v. Hardwick, ___ U.S. ___, 106 S.Ct. 2841 (1986), the Court suggested that the Stanley opinion was firmly grounded in the first amendment free speech right and “otherwise illegal conduct is not always immunized whenever it occurs in the home.” Id. at ___, 106 S.Ct. at 2846. The Court again pointed out that the Constitution does not protect the private possession and use of such matters as illegal drugs, firearms or stolen goods. The issue in Bowers was whether a state could criminalize sodomy committed by consenting homosexuals in the privacy of the home. The Court upheld the state ban on such conduct and pointed out that the right of privacy only includes child rearing and education; family relationships; and procreation, marriage, contraception and abortion. None of these was said to bear any resemblance to a claimed right of homosexuals to engage in sodomy and, similarly, it is clear they do not bear any resemblance to a claimed right to possess child “pornography.”

From a review of the above authority, it is quite obvious that the first amendment does not protect visual depictions of the sexual conduct of minors as defined by Nevada statutes. Secondly, any right of privacy under the Constitution does not authorize the possession of this

child “pornography.” Unlike adult pornography which may even be obscene, even the mere possession of child pornography may have ramifications outside the home regardless of whether or not the material may be deemed obscene. This is exactly what the Ohio Supreme Court recently determined in State v. Meadows, 503 N.E.2d 697 (Ohio 1986). There, a legislative and judicial finding was made that the state was not only concerned with the effect of child pornography as a visual stimulus on the possessor. Rather, private possession was said to create and maintain a market for the child pornography and guarantee victimization of the child participants. The court also found, as stated in Ferber, that the eradication of child pornography accomplished a number of important and legitimate state objectives concerning the welfare of children. Unlike the situation involving adult pornography (which may also be obscene), the interests of the state, based upon these findings, clearly outweighs any limited privacy rights of individuals desiring to possess these materials. It is apparent that, in order to eradicate child pornography effectively, a state would have to regulate all levels of the chain including production, distribution, receipt and possession. The situation is very similar to the problems with illegal drugs, illegal weapons and stolen merchandise.

On March 23, 1987, the United States Supreme Court decided not to review the Ohio Supreme Court decision in State v. Meadows. See Meadows v. Ohio, ___ U.S. ___, 107 S.Ct. 1581 (1987) (certiorari denied). This decision has no precedential value, but it may be an indication that the Supreme Court feels there are no significant, unanswered constitutional issues involved. We would agree with that conclusion. The legislatures of other states also apparently agree, having outlawed possession of child pornography. See, e.g., Ala. Code §13A-12-192(b) (1986); Fla. Stat. § 827.071(5) (1986); Ill. Stat., ch. 38 § 11-20.1(a)(2) (1986); Kan. Stat. Ann. § 21-3516(1)(b) (Supp. 1986).

CONCLUSION

For the reasons stated above, we believe that section 200.730 of the Nevada Revised Statutes, prohibiting the possession of visual depictions of the sexual conduct of minors, is constitutional. Child “pornography,” as specifically defined by Nevada law, is quite distinct from adult pornography, and even the mere possession of child pornography has an effect beyond the confines of the private home. It is this distinction which demonstrates why a ban on the possession of child pornography does not violate any constitutional privacy rights, while such a ban on the private possession of adult pornography, even if such pornography is obscene, does. Additionally, it is obvious that such a ban does not infringe on first amendment rights as stated in Ferber.

Sincerely,

BRIAN McKAY
Attorney General

By: Brian Randall Hutchins
Chief Deputy Attorney General
Criminal Division

OPINION NO. 87-12 CITIES AND COUNTIES: Residential construction taxes are to be used for neighborhood and existing parks required by residents of new housing construction in park districts where such construction occurs.

Carson City, July 8, 1987

The Honorable Patricia Lynch, City Attorney of Reno, City Hall, Post Office Box 1900, Reno,
NV 89503

Dear Ms. Lynch:

Your predecessor in office requested an opinion of the attorney general as to the permissible uses of revenue collected pursuant to the residential construction tax authorized by [NRS 278.497](#), et seq. We have delayed responding to the request until now because the 1987 Nevada legislature was considering A.B. 7, a bill which would amend parts of the law relating to said tax. The legislature having approved A.B. 7 and the governor having signed it into law, the provisions of the bill are effective on and after July 1, 1987, and are controlling as to all cities and counties in our state. What follows is our opinion on the questions asked by your predecessor, taking into account the language found in A.B. 7.

QUESTION NO. 1

Does [NRS 278.4983](#)(3) limit expenditures of residential construction taxes for parks required by the residents of the apartment houses, mobile homes and residences that have generated such funds?

ANALYSIS

A.B. 7 amended [NRS 278.4983](#)(3) to further explain the original legislative purpose behind the residential construction tax, first authorized for Nevada cities and counties in 1973. The law now clearly declares: "The purpose of the tax is to raise revenue to enable the cities and counties to provide neighborhood parks and facilities for parks which are required by the residents of those apartment houses, mobile homes and residences" for the construction of which the tax is levied in [NRS 278.4983](#)(1). While the public parks must, of course, be open for use and enjoyment by all members of the public, the legislative history of the residential construction tax and the language of the statute itself make it clear that the parks to be constructed and equipped with residential construction tax revenues are intended to meet the new and increased demand for parks and related facilities which naturally occurs when large numbers of people occupy new housing developments. See [NRS 278.4983](#)(3) ("required by the residents of those apartment houses, mobile homes and residences") and [NRS 278.4983](#)(5), as amended by A.B. 7 ("money in the fund must be expended for the benefit of the neighborhood from which it was collected.")

CONCLUSION

[NRS 278.4983](#)(3) limits expenditure of residential construction taxes to parks and related facilities required by residents of new housing construction in our cities and counties. Subsection 5 of [NRS 278.4983](#) allows use of residential construction taxes for improvements to existing parks when the need for such improvements results from new housing construction in the neighborhood. Improvements in existing parks not required as the result of new housing construction, in our opinion, would have to be financed from some other revenue source.

QUESTION NO. 2

Are expenditures of residential construction taxes limited to parks contained within a particular park district?

ANALYSIS

Prior to the enactment of A.B. 7, [NRS 278.4983\(5\)](#) appeared to allow some flexibility in the expenditure of residential construction tax revenues outside the park district of origination. The law declared that money in the special park tax fund was to be expended “insofar as it is practicable and feasible to do so” for the benefit of the immediate area from which the taxes were collected. The language just quoted implied that, if it were shown to be impracticable and infeasible to spend all the money raised in the same area or a park district, the city or county could spend such taxes in another area or park district where a demonstrated need existed. However, A.B. 7 deletes from [NRS 278.4983\(5\)](#) the language quoted above. We must interpret such a change as being intentional and designed to remove that option. Also, the language in [NRS 278.4983\(6\)](#), which requires a 100% refund, plus interest, of all money paid by a subdivider or developer if a park has not been developed or expanded within three years after 75% of the dwelling units are occupied, lends support to our interpretation.

CONCLUSION

Revenue construction taxes must be spent to construct new neighborhood parks or expand existing parks in the park district in which the residential dwelling units that generated the revenues are located. They may not be spent in other park districts. A failure to spend the taxes for a proper purpose within the time allowed by law requires a refund of all money collected, plus interest, to the lot owners at time of reversion whose lots initially generated such revenues.

QUESTION NO. 3

May a city expend funds from the residential construction tax on recreational facilities and may such facilities be classed as “regional facilities”?

ANALYSIS

As noted above, A.B. 7 now clearly limits expenditure of residential construction taxes to the acquisition, improvement or expansion of neighborhood parks or the installation of facilities in existing or neighborhood parks. A.B. 7 defines “neighborhood park” to mean “a site not exceeding 25 acres, designed to serve the recreational and outdoor needs of natural persons, families and small groups.” The term “facilities” is defined in A.B. 7 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.”

From these definitions, we believe the legislature primarily had in mind providing park areas suitable for recreational play and picnicking by individuals, families, social clubs, churches, et cetera. The emphasis on playing fields and areas, playground equipment, picnic areas, horseshoe pits, et cetera, connotes recreational facilities open to and used by the average citizen for his or her own personal pleasure.

As previously noted, residential 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.

CONCLUSION

Residential construction tax money may be spent only for the acquisition and construction of new neighborhood parks or the installation of facilities, as defined in A.B. 7, in existing parks. With respect to existing parks, the need for such facilities must be reasonably related to new, nearby housing construction from which residential construction taxes have been received.

QUESTION NO. 4

May residential construction taxes be spent for improvements to Moana Municipal Stadium in Reno?

ANALYSIS

It is our understanding that Moana Municipal Stadium is owned by the City of Reno. It is a paid admission baseball stadium used predominantly by a professional baseball team, the University of Nevada-Reno baseball team and certain amateur baseball teams. Occasionally, dog shows or other special events are held in the stadium. It is our further understanding that Moana Municipal Stadium does not contain, and was not intended to contain, picnic areas, playground equipment, horseshoe pits, et cetera.

In view of the restrictions found in A.B. 7 regarding the purpose and use of residential construction tax revenues, and especially the strong emphasis on meeting the needs for parks and play areas required by the new residents of new neighborhoods, we can find nothing in [NRS 278.4983](#), as amended, to support expenditure of residential construction tax money for improvements to Moana Municipal Stadium such as new seats, better lighting, additional toilets, et cetera. Moana Municipal Stadium most certainly is not a “neighborhood park” with “facilities” of the type contemplated by A.B. 7. Nor does Moana Municipal Stadium appear to be an “existing park” in which residential construction taxes may be spent for new “facilities” as defined in A.B. 7. In fact, Moana Municipal Stadium seems at best to be only a special, single-use facility for adult baseball.

CONCLUSION

Residential construction tax revenues may not be spent for improvements to Moana Municipal Stadium. Such improvements appear unrelated to any new residential construction in the neighborhoods near the stadium. Assuming arguendo that such new growth exists and that Moana Municipal Stadium may be classified as an “existing park,” residential construction taxes may only be expended for the type of “facilities” defined in A.B. 7 with regard to existing parks.

Sincerely,

BRIAN McKAY

Attorney General

By: William E. Isaeff
Chief Deputy Attorney General

OPINION NO. 87-13 JUSTICES OF THE PEACE; ELECTIONS; NEV. CONST. ART. 2 § 1; NRS 4.010; 281.050 AND 293.1755: A justice of the peace must meet the qualifications of an elector as set forth in Nev. Const. art. 2 § 1. An applicant for appointment to the office of justice of the peace need not be a resident of the township to which the office pertains, but a candidate for election to that office must be a resident of the township for at least 30 days prior to the close of filing declarations of candidacy.

Carson City, July 30, 1987

The Honorable Mills Lane, Washoe County District Attorney, Washoe County Courthouse, Post Office Box 11130, Reno, Nevada 89520

Attention: William A. Baker, Deputy District Attorney

Dear Mr. Baker:

You have requested advice from this office regarding the following:

QUESTION

Must an applicant for appointment or a candidate for election to the office of justice of the peace reside within the township to which the office pertains?

ANALYSIS

In general, every holder of a public office must be a qualified elector under the Nevada Constitution. Nev. Const., art. 15, § 3. The qualifications of an elector are set forth in Nev. Const. art. 2, § 1 as follows:

1. U.S. citizen;
2. 18 years of age or older;
3. active, as opposed to constructive, residence within the state six months, and in the district or county thirty days next preceding any election;¹
4. not convicted of treason or a felony in any state or territory of the United States, unless restored to civil rights; and
5. not an idiot or an insane person.

More specifically, as to the qualifications for the office of justice of the peace, Nev. Const. art. 6, § 8 grants to the legislature the power to determine the number of justices of the peace to be elected in each city and township of the state, and to fix by law their qualifications. Pursuant to this power, the legislature enacted NRS 4.010 which prescribes that a justice of the peace must meet the general qualifications for public office as set forth in the Nev. Const. art. 2, § 1.

In the case of Schur ex rel. v. Payne, [57 Nev. 286](#), 62 P.2d 921 (1937), the Nevada

¹ The six month residency requirement within the state, as set forth in Nev. [Const. art. 2, § 1](#), is no longer enforced as a requirement to be qualified as an elector as it has been held to be in violation of the 14th Amendment to the United States Constitution. Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). See also Nev. Op. Att’y Gen. No. 85 (June 19, 1972).

Supreme Court decided the issue of whether a candidate for the office of justice of the peace must be a resident of the township to which the office pertains. A resident of Las Vegas Township filed a declaration of candidacy for the office of justice of the peace of Nelson Township. The court reviewed the applicable constitutional and statutory provisions set forth in Nev. [Const. art. 2, § 1](#); art. 15, § 3; and 4766 N.C.L., (now cited as [NRS 281.040](#)) and held that, in the absence of a constitutional or statutory provision requiring it, residence within the township over which jurisdiction of the justice of the peace extends is unnecessary to eligibility for the office. Id. at 291 and 300.

Subsequent to the Payne decision in 1937, however, the legislature enacted [NRS 293.1755](#)(1) and 281.050(2), two statutory provisions which would apply to a candidate for election to the office of justice of the peace. [NRS 293.1755](#)(1) provides:

In addition to any other requirement provided by law, no person may be a candidate for any office unless, for at least 30 days before the close of filing of declarations of candidacy for the office which he seeks, he has been a legal resident of the state, district, county, township, city or other area prescribed by law to which the office pertains, and, if elected, over which he will have jurisdiction or which he will represent.

We recognize that a justice of the peace has limited statutory powers that extend outside the township from which he is elected. [NRS 4.310](#) and [4.370](#). However, we are of the opinion that, since a justice of the peace is to be elected in each township of the state by the qualified electors of the township to serve the township, the office of justice of the peace pertains to the township and comes within the definition of a “township officer” pursuant to [NRS 293.117](#). Nev. [Const. art. 6, § 8](#), [NRS 4.020](#) and [4.170](#). Therefore, for the purposes of chapter 293 of the Nevada Revised Statutes, a justice of the peace is considered to be a township officer. See also [NRS 293.193](#)(1).

Clearly, as a result of the legislative enactment of [NRS 293.1755](#)(1), an additional qualification to those set forth in Nev. [Const. art. 2, § 1](#), is required of a candidate for the office of justice of the peace. A candidate for the office of justice of the peace must be a legal resident of the particular township to which the office pertains for at least 30 days before the close of filing of declarations of candidacy for that office. If the candidate moves from the township subsequent to filing his declaration of candidacy, a vacancy is created. [NRS 281.050](#)(2).

When a vacancy occurs in the office of justice of the peace, the board of county commissioners has the option of:

- (a) Appoint[ing] some suitable person to fill the vacancy until the ensuing biennial election; or
- (b) Provid[ing] by resolution for an election procedure to fill the vacancy for the remainder of the unexpired term.

[NRS 4.150](#)(1)(a) and (b).

If the board of county commissioners chooses to fill the vacancy by appointment rather than election, the residency restriction set forth in [NRS 293.1755](#)(1) and 281.050(2), by their own terms, do not apply to applicants for appointment, but only to candidates for election. The board of county commissioners need only appoint a “suitable person.” [NRS 4.150](#) and [245.170](#). A “suitable person” is one who is a qualified elector, meeting the qualifications as set forth in Nev. [Const. art. 2, § 1](#). See [NRS 4.010](#).

Unlike a person appointed to the office of public administrator, a person appointed to the office of the justice of the peace need not qualify in the same manner as if elected to that office. Cf. [NRS 253.030](#)(2). Absent a constitutional or statutory provision requiring it, residence within the township over which jurisdiction of the justice of the peace extends is unnecessary to eligibility for appointment to that office. See *Schur ex rel. v. Payne*, [57 Nev. 286](#), 291, 300, 62 P.2d 921 (1937). Cf. Nev. Op. Att’y Gen. No. 674 (July 14, 1970).

CONCLUSION

A candidate for election to the office of justice of the peace, in addition to the qualifications set forth in Nev. [Const. art. 2, § 1](#), must be a resident of the township to which the office pertains for at least 30 days before the close of filing declarations of candidacy.

An applicant for appointment to the office of justice of the peace need not be a resident of the township to which the office pertains, but must be a “suitable person” for that office and must meet the qualifications set forth in Nev. [Const. art. 2, § 1](#).

Sincerely,

BRIAN McKAY
Attorney General

By: Jennifer Stern
Deputy Attorney General

OPINION NO. 87-14 BOARDS AND COMMISSIONS; BUDGET; INDEPENDENT CONTRACT: The provisions of [NRS 353.150](#) to [NRS 353.246](#) (the State Budget Act) and [NRS 284.173](#) (regarding independent contracts) apply to occupational and professional licensing boards.

Carson City, September 3, 1987

Mr. William A. Bible, Director
Department of Administration
Blasdel Building, Capitol Complex
Carson City, Nevada 89710

Dear Mr. Bible:

You have asked for an opinion concerning two aspects of occupational and professional licensing boards.

QUESTION I

Do the provisions of [NRS 353.150](#) to [NRS 353.246](#) (the State Budget Act) apply to occupational and professional licensing boards?

ANALYSIS

Occupational and professional licensing boards cover a variety of subjects, ranging from cosmetology to the practice of oriental medicine. See e.g., [NRS ch. 644](#); [NRS ch. 634A](#). Typically, a board pays all of its salaries and expenses out of collected fees and other receipts which are deposited in and drawn from an account at a bank or savings and loan association in this state. See e.g., [NRS 644.170](#); [NRS 634A.080](#).

The separate existence of revenue collection and expense payment mechanisms for the boards has, from time to time, generated a theory that the boards are not subject to the provisions of the State Budget Act. Yet a separate source of revenue and a separate account for payment of salaries and expenses has never resulted in the exemption of a board from the Act. In contrast to the theory of a separate and exempt existence, both the legislature and this office have repeatedly indicated that occupational and professional licensing boards are subject to the provisions of the State Budget Act.

The most recent reiteration of that position is set forth in 1987 Nev. Stat. ch. 746, which, among other things, authorizes the expenditure of revenues collected by the various occupational and professional licensing boards. Section 1 provides:

Expenditure of the following sums not appropriated from the state general fund or the state highway fund is hereby authorized . . . by the various officers, departments, boards, agencies, commissions and institutions of the state government mentioned in this act

At the end of § 1, each of the pertinent boards is listed alongside specific dollar amounts authorized for expenditure by each board in fiscal years 1987-88 and 1988-89. Section 3 states the conditions under which the money collected by the boards and authorized for expenditure in certain amounts in § 1 may be expended by the boards:

The money authorized to be expended by the provisions of sections 1 and 2 of this act (except the legislative fund and judicial agencies) must be expended in accordance with the allotment transfer, work-program and budget provisions of [NRS 353.150](#) to [353.245](#), inclusive, and transfers to and from salary allotments, travel allotments, operating expense allotments, equipment allotments and other allotments must be allowed and made in accordance with the provisions of [NRS 353.215](#) to [353.225](#), inclusive, and after separate consideration of the merits of each request.

The conditions for expenditure are unmistakable. An occupational or professional licensing

board may expend money only in accordance with the State Budget Act. Further, § 4 provides the chief of the budget division with the power to augment or to reduce the amount of a board's authorized expenditure. That power, in turn, derives from the budget revision provisions of [NRS 353.220](#).

Similar provisions have been included in other acts authorizing expenditures by occupational and professional licensing boards for over three decades. See e.g., 1953 Nev. Stat. ch. 287 §§ 39 and 40; 1963 Nev. Stat. ch. 474 §§ 3 and 4; 1973 Nev. Stat. ch. 743 §§ 3 and 5. The purpose of provisions requiring application of the State Budget Act to the boards' non-general fund expenditures has been previously explained:

The legislature, by Chapter 287, Statutes of 1953, indicated a policy to further control the expenditures by various departments, boards, commissions and agencies of the State Government, when it provided for expenditures of moneys not appropriated from the General Fund. The various departments are named and the amount of money authorized to be expended is set out under each title, and the expenditures are in association with the Budget Act.

Nev. Op. Att'y Gen. No. 339 (July 2, 1954) (State Budget Act applies to Fish and Game Commission). The exercise of control over the expenditures of the boards also advances the larger goals of the State Budget Act:

The requirements of the State Budget Act are for the purpose not only of obtaining the information from which expenditure requirements of the State Agencies are to be determined, but also to provide information from which the Legislature and Governor may determine future policy in the control and operation of the State Government.

Nev. Op. Att'y Gen. No. 251 (April 27, 1953) (State Budget Act applies to federally funded Employment Security Department).

One final indication of the legislature's intent to place the budgetary functions of occupational and professional licensing boards within the State Budget Act is the proportional assessment to each board for the "total salary and operating costs of an employee of the budget division who is responsible for monitoring compliance by such boards with the allotment, transfer, work program and budget provisions of [NRS 353.150](#) to [353.245](#), inclusive." 1987 Nev. Stat. ch. 746 § 10.

Simply put, to accept the theory that occupational and professional licensing boards are not subject to the provisions of the State Budget Act is to reject the plain language of the legislature's previous and present enactments on the subject and previous interpretations by this office. That rejection would contravene basic rules of statutory construction:

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 (1983) (citations

omitted). The provisions of 1987 Nev. Stat. ch. 746 cannot and should not be rendered meaningless. They unequivocally require all occupational and professional licensing boards to comply with the State Budget Act.

CONCLUSION

The State Budget Act, [NRS 353.150](#)-353.246, applies to occupational and professional licensing boards, and those boards must comply with the requirements of the Act.

QUESTION II

Does [NRS 284.173](#) apply to occupational and professional licensing boards?

ANALYSIS

[NRS 284.173](#)(1) states:

Elective officers and heads of departments, boards, commissions or institutions may contract for the services of persons as independent contractors.

The language of the statute is plain and unambiguous and not subject to construction. Nevada Power Co. v. Public Serv. Comm'n, [102 Nev. 1](#), 4, 711 P.2d 867 (1986). Boards are specifically designated in the statute. There is no exception for occupational and professional licensing boards. The legislature's intent--the controlling factor in interpreting a statute--was to place all boards within the provisions of [NRS 284.173](#). Robert E. v. Justice Court, [99 Nev. 442](#), 445, 664 P.2d 957 (1983). Moreover, the precept that "[i]f a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent" applies here. Thompson v. First Judicial Dist. Court, [100 Nev. 352](#), 354, 683 P.2d 17 (1984). The statute is clear on its face. It applies to all boards, including occupational and professional licensing boards.

CONCLUSION

[NRS 284.173](#), relating to the services of independent contractors, applies to all occupational and professional licensing boards of the State of Nevada.

Very truly yours,

BRIAN McKAY
Attorney General

By: Brian Chally
Deputy Attorney General

OPINION NO. 87-15 ELECTIONS; REGISTRATION; CONSTITUTIONAL LAW; NRS 293.517(4): A registered voter may vote in the ensuing election when the voter changed his name prior to the close of registration for the ensuing election and failed to register his change of name until after the close of registration.

Carson City, September 9, 1987

The Honorable Frankie Sue Del Papa,
Secretary of State, Capitol Building
Carson City, Nevada 89710

Dear Ms. Del Papa:

You have requested advice regarding the following:

QUESTION

May a registered voter cast a ballot in the ensuing election if the voter changed his name prior to the close of registration for the ensuing election and failed to register his change of name until after the close of registration?

ANALYSIS

[NRS 293.540](#)(6) requires the county clerk to cancel an affidavit of registration “[u]pon the request of any registered voter who has changed his name, if such voter satisfies the registrar that such change has been legally effected.” The elector may reregister immediately. [NRS 293.543](#)(1). However, [NRS 293.517](#)(4), which governs the eligibility of the elector to vote at the ensuing election, does not expressly address the situation of a person changing his or her name prior to the close of registration but not reregistering until after the close of registration. [NRS 293.517](#)(4) provides:

Any elector who changes his name by marriage, or otherwise, is not eligible to vote unless he reregisters. If any change of name occurs after the close of registration, the elector may vote at the ensuing election upon satisfactory proof of registration and subsequent change of name.

If the words of a statute are clear, we should not add to or alter them to accomplish a purpose not on the face of the statute. *Cirac v. Lander County*, [95 Nev. 723](#), 602 P.2d 1012 (1979). On its face, [NRS 293.517](#)(4) implies that unless the change of name occurred after the close of registration, the elector is ineligible to vote at the ensuing election. [NRS 293.517](#)(4) does not expressly state that a registered voter is ineligible to vote in the ensuing election if he reregisters under his changed name after the close of registration for the ensuing election. The Nevada Supreme Court has stated that “the right to vote should not be taken away due to a doubtful statutory construction or ‘mere technicality.’” *Id.* at 730.

The legislature may prescribe laws necessary to test the qualifications of an elector. *State ex rel. Whitney v. Findley*, [20 Nev. 198](#), 202, 19 P. 241, 243 (1888). However, those laws must not directly or indirectly operate to deny or abridge the constitutional right of citizens to vote, or unnecessarily impede its exercise. *Id.* at 202. The legislature “also has the power to adopt such reasonable regulations of the constitutional rights of a voter as may be deemed necessary to preserve order at elections, to guard against fraud, undue influence or oppression, and to preserve the purity of the ballot box. ‘All regulations of the elective franchise, however, must be reasonable, uniform and impartial.’” *Id.* [at] 202.

We believe that construing [NRS 293.517](#)(4) to absolutely prohibit a registered voter from voting due to his failure to register his change of name until after the close of registration would not result in a reasonable, uniform and impartial interpretation of the election laws of this state.

For instance, in the case of a change of the residence address within the same county, [NRS 293.525](#) provides that an elector who has changed his residence within the same county subsequent to the last preceding general election is not eligible to vote unless he submits to the county clerk, before the close of registration, a written and signed request that the county clerk transfer his registration to the new address. However, there does not exist an absolute prohibition against voting by such a person. Special polling places are provided for those persons successfully challenged on the ground of changed residency within the county so that persons who have changed their residence address may vote for candidates for those offices for which they are still eligible to vote on the date of the election. See [NRS 293.304](#)(2).

No special polling places are provided for those persons who change their name. Therefore, to construe [NRS 293.517](#)(4) to prohibit a voter, who is otherwise registered to vote at that election, from voting due to the fact that the voter registered his change of name after the close of registration would result in depriving the voter of “a fundamental political right, . . . preservative of all rights.” [Dunn v. Blumstein](#), 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Such a construction is constitutionally suspect.

We recognize that western culture encourages the practice of women changing their surnames to that of their husband’s after marriage, and [NRS 293.517](#)(4), as construed in the preceding paragraph, may have a greater impact on women exercising their constitutional right to cast a ballot. [NRS 293.517](#)(4), if strictly construed, would tend more often to deny women the right to vote after marriage, unless they registered their name change prior to the close of registration for the ensuing election. As a general matter, before the right to vote may be restricted, “the purpose of the restrictions and the assertedly overriding interests served by it must meet close constitutional scrutiny.” See [Dunn v. Blumstein](#), *supra*, at p. 336.

We are not aware of any substantial interest of the state which would necessitate an absolute prohibition on voting under these circumstances. Protection against any potential fraud and insuring the purity of the ballot box may be accomplished by implementing the challenge procedure set forth in [NRS 293.303](#). Identification of the voter may be challenged upon the ground that he is not the person named in the election board register and entitled to vote as claimed. [NRS 293.303](#)(1). In such a case, the voter may be required to present satisfactory evidence of current identification to the election board.

A liberal interpretation of [NRS 293.517](#)(4) is necessary to preserve one of our most precious freedoms protected by the First and Fourteenth Amendments to the Constitution of the United States, the right to vote. [Long v. Swackhamer](#), [91 Nev. 498](#), 538 P.2d 587 (1975). Such a construction is consistent with the direction, for liberal construction of our election laws, given us by our legislature in [NRS 293.127](#). As the Nevada Supreme Court stated in [Springer v. Mount](#), [86 Nev. 806](#), 809, 477 P.2d 159 (1970), “we believe the people when engaging in political processes should be allowed reasonable latitude in complying with uncertain statutory directions as here.”

CONCLUSION

A registered voter may vote in the ensuing election when the voter changed his name prior to the close of registration for the ensuing election and failed to register his change of name until after the close of registration. Any administrative problems that may arise at the polling place due to a different name appearing on the list of registered voters may be resolved through the challenge procedure set forth in [NRS 293.303](#).

Sincerely,

BRIAN McKAY
Attorney General

By: Jennifer Stern
Deputy Attorney General

OPINION NO. 87-16 CONSTITUTIONAL LAW, CRIMINAL LAW, STATUTES: The sliding scale of administrative assessment fees imposed upon individuals convicted of misdemeanors does not violate equal protection and due process standards. The statute establishing the sliding scale may be imposed prospectively only. [NRS 176.059](#).

Carson City, October 7, 1987

The Honorable Noel S. Waters, Carson City District Attorney, 208 North Carson Street, Carson City, Nevada 89701

Dear Mr. Waters:

During the 1987 session, the Nevada Legislature amended section 176.059 of the Nevada Revised Statutes (NRS) and established a sliding scale of administrative assessments to be imposed along with any fine levied upon an individual convicted of a misdemeanor. See 1987 Nev. Stat. ch. 585, at 1417-1419 (A.B. 579). With regard to this amendment, you have requested the opinion of this office as to the following:

QUESTION

Does [NRS 176.059](#), as amended by Assembly Bill 579, satisfy constitutional requirements?

ANALYSIS

[NRS 176.059](#), as amended, provides for imposition of an administrative assessment upon nearly all misdemeanor defendants who are adjudged guilty. The assessment varies from ten dollars to one hundred dollars depending upon the amount of the fine levied against the defendant. Moneys collected from the administrative assessment are used to finance, in part, municipal, justice and juvenile courts, the victims of crime fund, continuing judicial education, and training for peace officers.

The constitutionality of this statute has apparently never been addressed by Nevada courts. Cf. Board of County Commissioners Clark County v. White, 102 Nev. ____, 729 P.2d 1347 (Adv. Op. No. 130, 1986) (discussing character and disposition of assessment funds). It must be noted, however, that many other states have enacted similar statutes imposing additional assessments upon individuals convicted of felonies or misdemeanors or both. See Ariz. Rev. Stat. Ann. § 41-2403 (1985 & Supp. 1986) (37.5% of fine); Cal. Penal Code § 1464 (West 1982 & Supp. 1987) (50% of fine); Colo. Rev. Stat. § 24-4.2-104 (Supp. 1986) (37% of fine); Or. Rev. Stat. § 137.015 (1985) (\$3.00 to \$30.00); Utah Code Ann. § 63-63-9 (1986) (25% of fine); Wash. Rev. Code Ann. § 7.68.035 (Supp. 1986) (\$45.00/misdemeanor - \$70.00/felony and gross

misdemeanor).

Despite the widespread existence of these laws, the constitutionality of such assessments has been addressed only by the courts of California, where it has been consistently held that statutes such as [NRS 176.059](#) are constitutional. In Hensley v. Peace Officers Training Fund, 22 Cal. App. 3d 933, 99 Cal. Rptr. 728 (1972), a California appellate court held that the legislature did have the power to impose assessments in addition to the maximum fine authorized by penal statutes. Id. at 938, 99 Cal. Rptr. at 731. The reasoning applied in Hensley has continued to be cited with favor by other California courts. See People v. Long, 164 Cal. App. 3d 820, 210 Cal. Rptr. 745 (1985). The California Attorney General also found such assessments to be constitutional. See 62 Cal. Op. Att’y Gen. No. 13 (1979). The conclusions common to both court decisions and the attorney general’s opinion are (1) no constitutional provision is violated per se by the imposition of assessments on fines, penalties and forfeitures, (2) the classification for imposing the assessment is rationally based, and (3) the imposition of the assessment can properly be in addition to the fine or penalty directly imposed by a penal statute.

Although the cases noted above address the constitutionality of the statutes in an equal protection context, it is also clear that the imposition of the assessments provided for in [NRS 176.059](#) satisfies substantive due process standards. The due process clause found in the fourteenth amendment to the United States Constitution requires generally that laws be fundamentally fair and not shocking to the universal sense of justice. Betts v. Brady, 316 U.S. 455, 462 (1942). It has long been recognized that it is within the inherent power of the state to impose fines and penalties for the violation of its statutory requirements. Missouri Pacific Railway Company v. Humes, 115 U.S. 512, 523 (1885). This is, in essence, what the legislature has done in enacting [NRS 176.059](#).

In imposing the administrative assessments, the legislature is requiring offenders to contribute a nominal amount to help offset some of the costs which the offenders’ conduct has helped create. As noted above, among the groups benefited by the provisions contained in [NRS 176.059](#) are the juvenile, justice and municipal courts, the supreme court, and the department of motor vehicles. The assessment fee also helps support judicial education, police officers’ training, victims of crime and the state’s repository for records of criminal history. These are all costs which are reasonably connected to the type of conduct which results in misdemeanor convictions. Notably, the Constitution does not prohibit a requirement that a convicted defendant pay the costs of prosecution. See Fuller v. Oregon, 417 U.S. 40 (1974); United States v. Patel, 762 F.2d 784 (9th Cir. 1985); United States v. Chavez, 627 F.2d 953 (9th Cir. 1980).

Also, with regard to fundamental fairness, you have noted that [NRS 176.059](#) seemingly encourages law enforcement agencies to “stack” offenses in a traffic citation, as the agency might ultimately derive a financial benefit from the assessment imposed upon each separate count. In a previous opinion, this office concluded that [NRS 176.059](#) requires that an assessment be imposed upon each misdemeanor conviction, regardless of the number of charging documents used in bringing the matter before the court. See Nev. Op. Att’y Gen. No. 83-10 (Aug. 30, 1983). There would seem to be nothing fundamentally unfair about this practice, providing, of course, that each separate count is legally justified by the facts of the particular case. It is certainly not shocking to the “universal sense of justice” that an offender be convicted of each offense of which he is guilty.

Finally, any procedural due process requirements would be satisfied by the fact that, in order for the assessment to be imposed, an individual first must be found guilty of a misdemeanor. An assessment, therefore, cannot be imposed unless all the procedures necessary

to obtain a misdemeanor conviction have been followed.

You have also raised a concern as to whether the increased assessments provided for in Assembly Bill 579 could be imposed for offenses committed prior to July 1, 1987, without violating the prohibition against ex post facto laws which is contained in art. I, § 10 of the United States Constitution. An ex post facto analysis is not necessary in this case, however, as the general principles of statutory interpretation prohibit the retrospective application of Assembly Bill 579.

It is well established in Nevada that statutes are to be applied prospectively only, unless a contrary legislative intent appears plainly on the face of the statute. Clark County School District v. Beebe, [91 Nev. 165](#), 170, 533 P.2d 161, 164 (1975). Nowhere in Assembly Bill 579 does it appear that the legislature intended that the increased assessment fees be applied retrospectively. It must, therefore, be concluded that they may be applied prospectively only.

CONCLUSION

Although some persons may question the wisdom of an administrative assessment scheme which uses a variable schedule, such policy choices are for the legislature to make. Neither this office nor the courts may question the wisdom of a statute which otherwise meets constitutional standards. SIIS v. Conner, 102 Nev. ____, 721 P.2d 384 (1986); Anthony v. State, [94 Nev. 337](#), 580 P.2d 939 (1978).

[NRS 176.059](#), as amended by Assembly Bill 579, satisfies constitutional requirements. The amended statute cannot, however, be applied to individuals convicted of misdemeanor offenses which were committed prior to July 1, 1987.

Sincerely,

BRIAN McKAY
Attorney General

By: John H. Cary
Deputy Attorney General

OPINION NO. 87-17 ELECTIONS; VOTING; CITIES AND TOWNS; CLERKS; [NRS 266.016 TO 266.050, INCLUSIVE](#): The number of signatures required on a petition for incorporation of a city is a number equal to one-third of the registered voters who resided in the area proposed to be incorporated on January 1 following the general election. A registered voter of the state who is a resident of the area to be included in the proposed city is eligible to vote at the special election on the question of incorporation.

Carson City, October 29, 1987

The Honorable Brent T. Kolvet, Douglas County District Attorney, Judicial and Law Enforcement Center, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Kolvet:

You have requested advice regarding the following:

QUESTION ONE

What constitutes the “last official registration lists,” as set forth in [NRS 266.016](#), for purposes of verifying the sufficiency of the number of signatures on a petition for incorporation to ascertain if at least one-third of the qualified electors within the boundaries of the city proposed to be incorporated have signed the petition?

ANALYSIS

The 1987 Legislature passed Assembly Bill 508, now [NRS 266.016](#) to [266.050](#), inclusive, setting forth a new procedure for incorporation of a city. To initiate the incorporation of a city, a committee of five qualified electors must file a notice to incorporate with the county clerk of the county in which the city proposed to be incorporated is located. [NRS 266.018](#). After filing the notice of incorporation, a petition for incorporation may be circulated. The petition must be filed with the county clerk within 90 days after the notice to incorporate is filed. [NRS 266.022](#)(3). The petition for incorporation must contain a number of signatures equal to at least one-third of the qualified electors within the boundaries of the city proposed to be incorporated. [NRS 266.022](#)(2).

[NRS 266.016](#) defines a “ ‘qualified elector’ [as] a person who is registered to vote in this state and is a resident of the area to be included in the proposed city, as shown by the last official registration lists.” It fails to state as of what date the last official registration list should be determined. You correctly point out that the official registration list may be changing daily as persons register to vote or change their residence address. Therefore, the number of persons necessary to sign a petition for incorporation will vary dependent upon the date selected as the date of the last official registration list.

Where words of a statute are doubtful, rules of statutory construction require that we determine the intent of the legislature and adopt a construction which will give effect to that legislative intent. [Cirac v. Lander County, 95 Nev. 723](#), 602 P.2d 1012 (1979). Legislative intent may be ascertained by examining the face of the statute and by considering extrinsic aids such as the legislative history or committee reports. *Id.* at 729.

Throughout the legislative history of Assembly Bill 508, it is made clear that of prime concern to the legislature was to provide to the people who would be residing within the boundaries of the proposed city the opportunity to decide whether they want to be residents of the proposed city or whether they want to remain residents of an unincorporated area of the county. [Minutes, Assembly Committee on Government Affairs](#), April 25, 1987, pp. 2, 3, 5, 9, 16; April 28, 1987, p. 2; [Minutes, Senate Committee on Government Affairs](#), June 8, 1987, pp. 8, 9.

The former law, repealed by section 97 of chapter 712 of the 1987 Statutes of Nevada, did not afford the people who would be affected by incorporation the opportunity to vote on the question of incorporation. Only qualified electors who were owners of real property within the limits of the proposed city were qualified to sign a petition for incorporation.

The purpose of the 1987 legislation was to provide an opportunity to those persons affected by incorporation to be heard at every step of the process of incorporation. Construing the term, “last official registration lists,” to constitute the list of registered voters on a date where fewer persons’ names appear on the list would result in a lesser number of persons being required

to sign the petition before the question of incorporation is brought to vote of the people. This construction is consistent with the stated legislative intent that generally governs elections in this state, to liberally construe election statutes to the end that electors shall have the opportunity to participate in election and that the real will of the electors not be defeated by any informality or failure to substantially comply with the election statutes. See [NRS 293.127](#).

Additionally, this construction is consistent with Nevada Supreme Court cases holding that statutes governing petitions must be liberally construed with a view toward promoting the purpose for which they are enacted. [Cirac v. Lander County](#), [95 Nev. 723](#), 602 P.2d 1012 (1979) (petition by electors to place a ballot question on a special election ballot); [Cleland v. District Court](#), [92 Nev. 454](#), 552 P.2d 448 (1976) (recall petition); [Reed v. State](#), [91 Nev. 498](#), 538 P.2d 587 (1975) (petition to qualify a political party); [Springer v. Mount](#), [86 Nev. 806](#), 477 P.2d 159 (1970) (petition for independent candidacy).

Now we turn to the election statutes to determine on which date the official registration list would contain the fewest number of registered voters. To aid us in our determination of which dates may be considered as “official,” we have consulted [Webster’s New World Dictionary of the American Language, Second Edition](#), to ascertain what is the generally accepted definition of the term, “official.” See [State v. Webster](#), [102 Nev. 450](#), 726 P.2d 831 (1986). “Official” is defined, within the context set forth here, as “formally set or prescribed [the official date of publication].” [Id.](#) at 520.

Chapter 293 of the Nevada Revised Statutes, which governs voter registration, sets forth numerous dates where the voter registration list is formally set or prescribed for one purpose or another. [NRS 293.133\(2\)](#) provides that county clerks must determine the number of registered voters of each party in each precinct and notify the secretary of state of these numbers as of the first Monday in January of each year in which a convention is held. [NRS 293.560](#) sets forth the close of registration for the primary and general elections. [NRS 293.567](#) requires that county clerks must determine the number of registered voters by precinct, district and political affiliation, and notify the secretary of state of these numbers after the close of registration but prior to the primary and general elections. However, the date on which the list of registered voters contains the fewest number of names is January 1 following a general election. This is due to the provisions of [NRS 293.545\(2\)](#) which require the county clerk to purge the voter registration list of all persons who failed to vote at the general election. Therefore, on January 1 following a general election, the official registration list contains the names of only those persons who voted at the last preceding general election.

Construing the term, “last official registration lists,” to refer to the list of registered voters as of January 1 following a general election, results in fewer persons being required to sign a petition to constitute one-third of the qualified electors of the area proposed to be incorporated. This will result in questions of incorporation more frequently being put to the vote of the people, which furthers the apparent intent of the 1987 Legislature.

Additionally, a review of other procedures governing election petitions reveals that the people in this state, through the Nevada Constitution or through the legislature, have invariably adopted a petition sufficiency requirement based upon a percentage of the number of registered voters who actually voted at the last preceding general election. Nev. [Const. art. 2 sec. 9](#) (recall petition); Nev. [Const. art. 19 secs. 1](#) and 2 (referendum and initiative petitions); [NRS 293 \(qualification of minor and “major” political parties and independent candidate petitions\)](#). Construing “last official registration lists” to refer to the list as constituted on January 1 following a general election would result in a sufficient number of persons having signed the

petition for incorporation if it were signed by a number equal to or greater than one-third of the number of voters who reside in the area proposed to be incorporated who actually voted in the last preceding general election. [NRS 266.022](#)(2) and [NRS 293.545](#).

We are not saying that only those persons who have voted in the last preceding general election are eligible to sign the petition for incorporation; nor are we saying that in order to be eligible to sign the petition a person must have been a qualified elector residing in the area proposed to be incorporated on January 1 following a general election. *See Nev. Op. Att’y Gen. No. 80-4* (February 26, 1980). We are merely stating that for purposes of determining the necessary number of signatures on a petition for incorporation, the clerk should require the number of signatures equal to one-third of the number of persons who resided in the area proposed to be incorporated who actually voted in the last preceding general election. This construction is consistent with the legislative intent of encouraging voter participation with regard to questions of incorporation; it is consistent with case law requiring liberal construction of uncertain statutory directions in elections statutes; and it is consistent with existing procedures regarding election petitions.

CONCLUSION

For the purpose of determining the sufficiency of the number of signatures on a petition for incorporation, the clerk should require the number of signatures equal to one-third of the number of registered voters who resided in the area proposed to be incorporated on January 1 following a general election.

QUESTION TWO

Who is eligible to vote on the question of incorporation, the qualified electors of the county or the qualified electors of the area proposed to be incorporated?

ANALYSIS

The term, “qualified elector,” is defined in [NRS 266.016](#) as “a person who is registered to vote in this state and is a resident of the area to be included in the proposed city, as shown by the last official registration lists.” However, the provisions of chapter 266 which govern the special election held to determine if the proposed city should be incorporated, [NRS 266.029](#) to [266.037](#), inclusive, use the term, “voter,” rather than “qualified elector.” You indicate that the failure of the legislature to consistently use the term, “qualified elector,” in the provisions regarding the special election gives rise to an ambiguity in the law regarding who is eligible to vote at the election held to determine whether a proposed city should be incorporated.

It is well established that if the language of a statute is plain and unambiguous, there is no room for construction by the court. *Nevada Power Co. v. Public Serv. Comm’n.*, [102 Nev. 1](#), 711 P.2d 867 (1986). However, if there exists an ambiguity in the language of the statute, the courts must adopt a construction of the statute that best reflects the intent of the legislature. *Id.*

Rules of the statutory construction dictate that statutes should be construed in order to validate each provision of the statute. *Sheriff v. Morris*, [99 Nev. 109](#), 659 P.2d 852 (1983). [NRS 266.016](#) contemplates that the term “qualified elector,” which requires a person to be a registered voter and resident of the area to be included in the proposed city, be used in [NRS 266.016](#) to [266.050](#), which necessarily includes the election provisions set forth in [NRS 266.029](#) to [266.037](#). Another section of chapter 266 describes the form of the petition for incorporation which states

in pertinent part that:

the undersigned qualified electors of the State of Nevada respectfully petition the board of county commissioners to submit a proposal to incorporate as a city certain unincorporated contiguous area located within . . . a county namely, . . . (describe area to be incorporated) to the qualified electors who reside within the area to be incorporated, for their approval or disapproval at a special election to be held for that purpose.

[NRS 266.019](#)(2). (Emphasis added.) [NRS 266.016](#) and [266.019](#) must be construed to harmonize with the use of the term, “voter,” in [NRS 266.029](#) and [266.037](#), inclusive, which govern the special election, to effect the intent of the legislature. See Acklin v. McCarthy, [96 Nev. 520](#), 612 P.2d 219 (1980).

The Nevada Supreme Court has stated that “ ‘qualified elector’ and ‘qualified voter’ are not necessarily synonymous. . . . ‘The voter is the elector who votes--the elector in the exercise of his franchise or privilege of voting--and not he who does not vote.’ ” Caton et al. v. Frank, [56 Nev. 56](#), 44 P.2d 521 (1935). It is our opinion that the legislature used the term, “voter,” in [NRS 266.029](#) to [266.037](#), inclusive, in a context consistent with the Caton decision. The term, “voter,” refers to that person who is not only a qualified elector pursuant to [NRS 266.016](#), but a qualified elector who is exercising his franchise or privilege of voting in the special election.

We have stated in our analysis of Question One, supra, that our review of the legislative history indicates that the intent of the legislature in passing Assembly Bill 508 was to provide to the people who would be residing within the boundaries of the proposed city the opportunity to decide whether they want to be residents of the proposed city or whether they want to remain residents of an unincorporated area of the county. Construing “voter” to refer to a person who is a qualified elector exercising his right to vote gives meaning to each section of the statute, and is consistent with the evident intent of the legislature to allow the people who will be affected by incorporation to decide the fate of the proposed city. See, Nevada Tax Comm’n. v. Bernhard, [100 Nev. 348](#), 683 P.2d 21 (1984).

CONCLUSION

A registered voter of the state who is a resident of the area to be included in the proposed city is eligible to vote at the special election on the question of incorporation.

Sincerely yours,

BRIAN McKAY
Attorney General

By: Jennifer Stern
Deputy Attorney General

OPINION NO. 87-18 PRISONS: CONFIDENTIALITY OF MEDICAL INFORMATION CONCERNING AIDS--The provisions of [NRS 441.210](#) are controlling with respect to disclosure of medical information concerning those persons who are infected with the sexually transmitted disease of AIDS.

Carson City, November 6, 1987

Mr. George Sumner, Director, Nevada Department of Prisons, P. O. Box 7001, Carson City, Nevada 89702

Dear Mr. Sumner:

You have requested legal advice from our office concerning the promulgation of proposed policies and practices designed to address the numerous issues emanating from the appearance of the Acquired Immune Deficiency Syndrome virus ("AIDS") within the inmate population of our prisons. The specific questions posed are as follows:

QUESTIONS PRESENTED

1. Does the Department of Prisons have the authority to disclose to correctional officers the names of those inmates who are either infected with the AIDS virus but are asymptomatic or those who have been diagnosed as having either ARC or AIDS?
2. Does the Department of Prisons have the authority to disclose the above-noted information to the Department of Parole and Probation?

PREVAILING MEDICAL COMMUNITY OPINION CONCERNING THE INFECTIOUSNESS OF AIDS

Consideration of prevailing medical opinion is particularly warranted because the questions posed necessarily require a careful examination and resolution of numerous medical issues. For example, there clearly exists a need to define the magnitude of any health risks associated with casual occupational contact with infected inmates as well as to ascertain an appropriate medical response in the form of necessary safety precaution protocols suitable for the workplace.

The general body of medical knowledge concerning the spread of AIDS is continuously evolving through ongoing research and clinical experience. Because the study of the disease is still in its infancy, there exists a plethora of diverse expert opinion and personal views concerning such issues as modes and ease of transmission. The meritorious desire to find quick and easy answers is heightened by the grim outlook of those already infected with the virus, particularly those who are AIDS symptomatic.

This academic environment, where there exists many more questions than answers, is unsettling to the general public, which has grown accustomed to the unparalleled ability and resourcefulness of the medical community to respond quickly and decisively to society's medical needs. Unfortunately, this atmosphere can lend itself to the genesis of fears and anxiety, which then become the rule of the day. In response to this climate, it has become apparent to many key leaders in our country that the three most effective weapons to combat this situation, besides behavior modification, are education, education and more education. It is essential that the formulation of responsible governmental health protection policy be founded upon the most current medical information available. It is with this objective in mind that the following discussion of prevailing medical opinion is proffered.

AIDS, or Acquired Immune Deficiency Syndrome, is caused by a virus called either Human Immunodeficiency Virus (HIV), Human T-Lymphotropic Virus Type III (HTLV-III) or

Lymphodemopathy [Lymphadenopathy] Associated Virus (LAV).¹ The disease, first identified in 1981, is now generally recognized in the medical community as being transmitted by sexual contact (homosexual or heterosexual); parenteral inoculation of blood (intravenous drug abuse, accidental IV injection, transfusion and, with less certainty, blood transfer through open wounds); and perinatally from an infected woman to her fetus or newborn infant.

The Center for Disease Control (CDC) has opined that the HIV virus is transmitted exclusively through exposure to contaminated

¹Unless otherwise indicated, the medical information noted herein is taken in part from the September 16, 1987 report entitled Nevada AIDS Task Force's Report to Governor Bryan and the State Board of Health.

blood and semen. They have stated that the HIV virus is difficult to transmit, not very hardy when outside of the body, and susceptible to such things as heat, common household disinfectants and detergents. There is no evidence that AIDS is acquired by casual contact. A study of 101 family members and others living in the same household with AIDS patients revealed no cases of AIDS or ARC and only one case of HIV seropositivity which involved a young child probably infected at or before birth. Epidemiological studies to date have not demonstrated that health professional or household contacts with AIDS patients result in infection from saliva, tears, or eating food or drinking beverages prepared or served by infected persons. A recent study conducted by the National Institute of Justice found that there were no known cases of AIDS, ARC or HIV seropositivity among correctional institution staff as a result of contact with inmates. Actual exposure to contaminated blood in health care settings has proven to be a very low risk for transmission of the virus. CDC has identified 1,498 health-care workers with all kinds of direct exposure to the blood and other body fluids of AIDS patients. Of these, 666 had actual blood to blood contact through needlesticks or other sharp instrument injuries. Twenty-six (or four percent) of this group later tested HIV positive (seroconverted). However, 23 of the 26 were already in high risk groups. Thus, only three U.S. health-care workers (.005 percent of 666 persons) who were not in a high risk group tested positive for the HIV antibody after direct blood to blood contact. In two of these cases, it is unclear whether the workplace exposure caused the seroconversion because a prior negative test result was not available.² AIDS is not known to be transmitted by any of the following situations: skin contact with clothing of criminal suspects or by routine patdown searches; by fingerprinting, handcuffing, or interrogating a suspect; by riding in the same car with an infected person; through bites of an infected person; through coughing, sneezing or spitting; or, by being around someone with the disease on a daily basis or over a long period of time.³

A person infected with the virus may show no clinical symptoms for months or years. When a person has been infected with the AIDS virus, the body produces antibodies unsuccessfully (apparently) trying to protect certain white blood cells called T-Lymphocytes which are attacked by HIV. The currently available blood tests identify the presence of the HIV antibody. Because the virus can be isolated from most persons testing positive for the presence of the HIV antibody, during this asymptomatic period the infected person must be presumed capable of infecting others.

The blood test for the HIV antibody most

²AIDS in Correctional Facilities: Issues and Options, National Institute of Justice, Second Edition, May 1987.

³Acquired Immune Deficiency Syndrome, 100 Questions and Answers, booklet adapted by the National Sheriffs' Association from a publication of the New York State Dept. of Health, October 1987.

frequently includes a combination of a screening test and a supplementary (or confirmatory) test. The most commonly used test is the Enzyme-Linked Immunosorbent Assay (ELISA or EIA), which was developed to screen blood products. It is now used also for epidemiological studies and clinical purposes. The EIA is marketed by seven manufacturers. It is a highly "sensitive" test, with a greater than 99 percent reliability of not yielding a "false negative" result. Few persons who have the HIV antibody present will be identified as uninfected. The EIA can incorrectly identify someone as "positive" for the HIV antibody when used in large populations which are not likely to be at risk. Because this can happen as much as five to ten percent of the time, a second test to confirm positive results was developed. The Western Blot test is a highly "specific" test, with a greater than 99 percent reliability of not yielding "false positive" results for the presence of the HIV antibody.

The results of the HIV antibody test are not conclusive as to whether the person tested has in fact been infected. It can take anywhere from two weeks to six months or longer for the body to produce the HIV antibody which the test is designed to detect. In other words, a negative HIV antibody test is not conclusive as to whether the person tested is not infected. It only indicates at that point in time that the body does not reflect the presence of HIV antibodies.

ANALYSIS

We are of the opinion that [NRS 441.210](#) is dispositive of the issue whether HIV test results can be disclosed to correctional officers or the Department of Parole and Probation. This conclusion is based upon our determination that the plain and unambiguous provisions of Nevada's venereal disease statute codified at chapter 441 of the Nevada Revised Statutes apply to AIDS.⁴

Venereal disease is defined at [NRS 441.050](#) as any disease which can be sexually transmitted. As noted previously, the medical community is in absolute agreement that AIDS is primarily a sexually transmitted disease. However, can a person who tests HIV seropositive be considered a diseased person under the provisions of chapter 441 of the Nevada Revised Statutes? We are of the opinion that the answer to this question can be made in the affirmative, based upon the plain language of [NRS 441.030](#) and the concerted medical opinion of the Nevada AIDS Advisory Task Force of the State Board of Health.

[NRS 441.030](#) defines a "diseased person" as any person infected with any sexually transmitted disease (venereal disease). In its September 16, 1987 published Policy Recommendations to the Governor and the State Board of Health, the AIDS Advisory Task Force at page 8 addressed the issue of whether an HIV seropositive test result indicates that the person is infected with

⁴A statute which is plain and unambiguous is not subject to statutory construction. National Tow and Road Service, Inc. v. Integrity Insurance Co., 102 Nev. Adv. Opn. 44, 717 P.2d 581 (1986).

the AIDS virus. The Task Force stated:

A person infected with the virus may show no clinical symptoms for months or years. When a person has been infected with the AIDS virus, the body produces antibodies unsuccessfully (apparently) trying to protect certain white blood cells called T-Lymphocytes which are attacked by HIV. The currently available blood tests identify the presence of the HIV antibody. Since the virus can be isolated from most persons testing positive for the presence of the HIV antibody, during this asymptomatic period the infected person must be presumed capable of infecting others.

Additionally, at its October 16, 1987 meeting, the AIDS Advisory Task Force rendered an advisory administrative interpretation concerning the applicability of Nevada's venereal disease statute to the disease of AIDS. The AIDS Advisory Task Force opined that since AIDS is indeed a sexually transmitted disease, it falls within the definition of venereal disease as defined by [NRS 441.050](#). The Task Force further concluded that the definition of venereal disease includes persons who have been confirmed as being HIV seropositive, because they are infected with a sexually transmitted disease. This medical opinion is consistent with the CDC position that a positive test for HIV serum antigen is laboratory evidence of HIV infection. (See Appendix I of March 6, 1987 memo from CDC entitled Revised Case Definition For AIDS Surveillance.) Thus, a seropositive HIV test result is indicative of a person who has been infected with the AIDS virus as evidenced by the presence of the antibody.

The applicability of chapter 441 of the Nevada Revised Statutes is of great consequence to a resolution of the issues of confidentiality you have raised because [NRS 441.210](#) prohibits the disclosure of the names and addresses of any diseased person except in five specific situations. This statute provides:

The disclosure to any person of the name or address of any diseased person is unlawful except:

1. Where the disclosure is authorized or required by this chapter.
2. In prosecutions for violations of this chapter.
3. In mandamus proceedings authorized by this chapter.
4. In reporting an apparently abused or neglected child, but no other information may be disclosed.
5. Where the disclosure is made to the welfare division of the department of human resources and the diseased person:
 - (a) has been diagnosed as having acquired immune deficiency syndrome or acquired immune deficiency related complex; and
 - (b) Is a recipient of assistance to the medically indigent.

It should be noted that the fifth exception was enacted in the 1987 legislative session as a result of our previous oral opinion issued to the director of the Department of Human Resources in December of 1986. Our opinion concluded that the provisions of [NRS 441.210](#) prohibited disclosure to the Welfare Division of the names of persons infected with the AIDS virus which

are in possession of the Health Division. It is apparent, by the enactment of this fifth new nondisclosure exception, that the legislature likewise concluded that the provisions of chapter 441 apply to information pertaining to persons infected with the AIDS virus.

Accordingly, we must conclude that the provisions of [NRS 441.210](#) are controlling with respect to permissible disclosure of the names of persons infected with the AIDS virus. This statutorily created list of exceptions to the general rule of nondisclosure does not include disclosures to all correctional officers or individuals employed by the Department of Parole and Probation. Therefore, only those governmental officers and employees acting in concert with the Health Division in efforts to control the spread of AIDS, should have access to the names of inmates who have tested seropositive for the HIV antibody. [NRS 441.060\(2\)](#) specifically provides for such cooperation between the Health Division and penal institutions with respect to the control of venereal disease. Access to the information must be limited to those officers and employees who have a legitimate medical need to know in connection with the prevention and control of AIDS. Certainly, the director, wardens and certain members of the medical staff have a medical need to know to provide proper medical care. However, all correctional officers in general and all employees of the Department of Parole and Probation would not fall within this select group.

The expedient promulgation of regulations addressing a confidentiality protocol is necessary to limit potential liability exposure for improper or unauthorized disclosure of medical information. A Florida case is presently pending alleging the improper disclosure of antibody test results by the correctional department.⁵ Because of the substantial social stigma attached to a medical finding that a person has AIDS or is HIV seropositive, a blossoming body of law is developing permitting monetary recovery based upon theories of invasion of privacy for unauthorized disclosure of confidential medical information and public disclosure of private facts.⁶ Additionally, [NRS 441.290\(2\)](#) provides for criminal penalties for the unauthorized disclosure of the name of a person infected with venereal disease. Two-thirds of state and federal correctional institution systems and 91 percent of responding city and county systems have general or specific confidentiality policies covering AIDS-related medical information.⁷

⁵[Niosy v. Bowles](#), (no citation) cited in [AIDS in Correctional Facilities](#), Id. p. XXV.

⁶See [Logan v. District of Columbia](#), 447 F. Supp. 1328 (D. D.C. 1987); [Horne v. Patton](#), 287 So. 2d 824 (1973); [Employment Testing](#), Vol. 1, Number 11, July 15, 1987); [Employment Law Revisited](#), Arthur S. Leonard, Hofstra Law Review, Vol. 14:11, p. 49 (Fall 1985).

⁷[AIDS in Correctional Facilities](#), Id. p. 55.

Because of these confidentiality concerns, it is our recommendation that the Department of Prisons and the Health Division together develop appropriate protocols in the form of promulgated regulations which address not only the methodology for disclosure of confidential information to those who have a medical need to know, but also establish appropriate protocols with respect to infectious disease control precautions to protect everyone in the correctional institution setting. These regulations should be reviewed frequently and revised as necessary to conform to current medical knowledge. A program of continuing education with respect to the modes of transmission of the HIV virus in conjunction with instruction concerning appropriate

safety precautions should also be implemented for the benefit of all correctional officers.⁸ The curriculum

⁸Such a program will undoubtedly emphasize the recommendations of CDC with respect to workplace precautions for those who come in contact with infected persons. CDC recommends that the only safe course of action for such workers is to assume that all are HIV infected. This recommendation is based in part upon the fact that an HIV negative test result is not conclusive as to whether a person is not infected. Such a result can suggest that the antibody has not yet been produced in response to the presence of the HIV virus. Additionally, inmates who may not be infected when tested upon entry could conceivably contract the disease while in prison, yet not appear on a list as they are not again tested until release. Thus, a list of inmates who have tested positive will not represent an accurate and complete list

for this training should be developed in concert with the Health Division and the AIDS Advisory Task Force of the State Board of Health to derive maximum benefit from their cumulative expertise.

The prevention and control of AIDS in society in general and in our prisons raises numerous weighty medical, legal and social issues that are oftentimes irreconcilable. Our primary concern and the focus of our energies should be directed toward the protection of correctional personnel from inadvertent, accidental or purposeful exposure to this disease. The medical community is in general agreement that until either a vaccine or a definitive treatment is developed, education and behavioral modification are the requisite preliminary steps toward prevention and control of AIDS in our nation and the world. The CDC has been instrumental in developing interim medical protocols for the protection of those in the workplace who are in daily contact with those who are infected with the HIV. These occupational safety precautions are based upon a foundational assumption, that it is impossible to identify with any degree of medical certainty, the entire pool of infected persons at any given point in time. Therefore, in certain occupations where frequent contact with HIV seropositive

of the pool of those infected. In fact, such a list may indeed create additional risk to correctional officers because of the misleading nature of the information which may result in an intentional disregard for prescribed safety precautions through a false sense of security.

individuals is necessary, the employee must assume that all persons with whom he comes in contact are infected. The medical community has not recognized as either medically necessary or advisable the unbridled disclosure of the names of HIV seropositive individuals premised upon a theory of protection of the public health. Dissemination of the names of inmates who are HIV seropositive will be controlled by the existing provisions of chapter 441 of the Nevada Revised Statutes until our legislature determines sound public policy is best served by a change in the confidentiality provisions.

CONCLUSION

Nevada's venereal disease statutes, codified in chapter 441 of the Nevada Revised Statutes, are applicable to the sexually transmitted disease of AIDS. This conclusion is based not only upon the plain language of the statute, but also upon the administrative interpretation of the AIDS Advisory Task Force of the State Board of Health. Accordingly, the confidentiality provisions of the venereal disease statute, set forth at [NRS 441.210](#), are controlling with respect to who may have lawful access to the names and addresses of persons who have AIDS, ARC or who are confirmed as being HIV seropositive.

These provisions do not permit a wholesale disclosure of names of inmates who are HIV seropositive to all correctional officers or all employees of the Department of Parole and Probation. Only those officers and employees specifically designated by the director of the Department of Prisons, in conjunction with the Health Division and the AIDS Advisory Task Force of the State Board of Health, as having a legitimate medical need to know to prevent and control the spread of AIDS would have access to such names.

Sincerely,

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