

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1989

OPINION NO. 89-1 PUBLIC RECORDS; COMPUTER PROGRAMS; WILDLIFE: A balancing test should be used to determine if Nevada Department of Wildlife records are public records and reasonable rules and regulations which allow inspection are permissible; computer programs are intellectual property owned by the state and are not public records.

Carson City, February 6, 1989

Mr. William A. Molini, Director, Department of Wildlife, Post Office Box 10678, Reno, Nevada 89520

Dear Mr. Molini:

You have requested an opinion on several aspects of [NRS ch. 239](#), Nevada's public records statute. The questions you have asked are discussed below.

QUESTION ONE

How does the Nevada Department of Wildlife (NDOW) determine which of its records are public records?

ANALYSIS

"Public records" is an undefined term. [NRS 239.010](#); Nev. Op. Att'y Gen. 86-7 at 21 (May 12, 1986). Because it is an undefined term and because most records have not been specifically designated as being either public or confidential, this office has set forth consistent guidelines for the application of [NRS 239.010](#) by state agencies. *See* Nev. Op. Att'y

Gen. 87-5 (January 26, 1987); Nev. Op. Att'y Gen. 86-7 (May 12, 1986).

The three most critical aspects of those guidelines have been simply stated. The first aspect is that "in keeping with the spirit and intent of Nevada's Public Record Law, we are of the opinion that Nevada's statute should be construed in favor of the inspection whenever there is insufficient justification to maintain the document as confidential." *Id.* at 23.

The second aspect is:

Such a construction is not absolute and does not require that every document in the custody of a public agency be deemed a "public record." Relevant considerations on a case-by-case basis 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; and (3) the extent of the interest or need of the public in reviewing the document.

Performance of the balancing test analysis described in the preceding paragraph is a

task that needs to be undertaken only in those instances when the legislature has not specified a particular record to be “public” or “confidential.”

Id. at 23-24. The third aspect is:

The flexible nature of this test indicates to us that this analysis should be done by legal counsel in full consultation with the agency. The agency staff should not attempt this balancing of potentially competing interests in the absence of advice from its official legal advisor. While this approach lacks a certain degree of definiteness, we

feel that this disadvantage is more than offset by the more precise evaluation of the public’s right to know versus the agency’s need to maintain confidentiality.

Id. at 24.

From a practical standpoint, our experience with this process is that it is expeditious and simple in application. Further, the vast majority of records present no difficult questions of interpretation and are easily determined to be public records open to inspection.

CONCLUSION

When a particular record has not been designated as either confidential or public, a balancing test, applied in consultation with legal counsel, should be used to determine if the record is a public record which should be made available for inspection. In making that determination, a construction favoring inspection will be applied, and doubtful cases will be resolved in favor of public inspection.

QUESTION TWO

May NDOW implement procedures for the inspection of records by members of the public?

ANALYSIS

[NRS 239.010](#)(1) provides a right to inspect public records during office hours. While the right to inspect is unqualified, the exercise of the right has long been subject to the qualification of inspection “pursuant to reasonable regulations and supervision for the protection of the records.” Nev. Op. Att’y Gen. No. B-89 at 339 (March 26, 1942), quoting Nev. Op. Att’y Gen. No. 283 at 76-77 (July 26, 1939); *see also Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979). The public interest in not

having the process of government unduly disrupted also underlies the qualification of reasonable regulation. Nev. Op. Att’y Gen. 86-7 at 21 (May 12, 1986); *see also* [NRS 203.119](#) and *State ex rel. Stephan v. Harder*, 641 P.2d 366, 379 (Kan. 1982) (“[A]nd we further hold that the agency shall have a reasonable time to furnish the requested information so that its everyday functions are not impeded or disrupted.”).

Balancing the interests in inspecting public records, in preserving the records, and in presenting the records for inspection with minimal disruption can be accomplished under a precept allowing reasonable rules or regulations. The purpose of each rule or regulation must be to balance these occasionally divergent interests. The purpose or effect of the rule or regulation

should not be to impede inspection or to tip the balance in favor of any one interest. *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979). Thus, basic procedures which do not unreasonably interfere with the right to inspect may be adopted. For example, these could include providing for an inspection area away from traffic areas in the building, in order to avoid confusion in the presentation of records for inspection and disruption of other agency business; providing a sign-in procedure for the inspection area as a measure of protection for the records; providing document request forms to ensure accurate, speedy provision of documents and an indication of their safe return; and providing for appointments where the documents cannot be located or presented on the day of the request. Again, these provisions should allow for inspection while protecting records and avoiding undue disruption of the government's business.

CONCLUSION

Reasonable rules and regulations which allow inspection and preserve the records and the order of the agency are permissible.

QUESTION THREE

Are proprietary or custom-designed computer programs used by NDOW public records?

ANALYSIS

Initially, the distinction between programs and information stored on computer tapes or disks must be emphasized. The tape or disk information is the equivalent of information preserved on the more familiar paper or microfilm or microfiche. *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. Dist. Ct. App. 1982); [NRS 239.051](#); see also *State ex rel. Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982) (“[I]t is common knowledge that in many instances the only record maintained is that stored within the computer.”) and *Menge v. City of Manchester*, 311 A.2d 116, 119 (N.H. 1973) (reproduction of computer tape at citizen's expense allowed).

If particular tape or disk-stored information (or the comparable record) has been declared a public record, it will be open for inspection. If particular information has been declared a confidential record, it will not be available for inspection. If the particular information has not been designated as either public or confidential, then the balancing test previously discussed may be applied to the information stored on a tape or a disk. In any case, allowing inspection of tape or disk-stored information does not impose a duty upon a state agency to create a new record from the stored information for inspection. *Kryston v. Bd. of Educ., East Ramapo Cent. School Dist.*, 420 N.Y.S.2d 688, 689 (N.Y. App. Div. 1980); see also *Wallon Lake Water Sys. v. Melrose Township*, 415 N.W.2d 292, 295 (Mich. Ct. App. 1987) (open records law does not impose duty to “prepare or maintain a public record or writing independent from requirements imposed by other statutes”).

A computer program, on the other hand, does not involve the sort of usual statistical, financial, identification, or personal information that is collected and placed or stored on a tape or disk (or paper, microfilm, or microfiche) by a state agency in the course of performing its statutory functions. Rather, a computer program is the electronic equivalent of the mechanical means (such as an engine-driven file carousel or a human manually filing records in a file cabinet) of placing and retrieving information on a tape or disk. Statutory definitions repeatedly recognize this principle:

“Program” means an ordered set of data representing coded instructions or

statements which can be executed by a computer and cause the computer to perform one or more tasks.

[NRS 205.475](#);

“Program” means a series of statements or instructions in words, numbers or other symbols which are used or to be used directly or indirectly in a computer to bring about an intended result. The term includes the statements or instructions of a program in a form acceptable to a computer or a representation of the statements or instructions in any other form, including the charts and documents used in the design and writing of the program.

[NRS 603.030](#); and

A computer program is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

17 U.S.C. § 101; *see also* Hardy, *Six Copyright Theories for the Protection of Computer Object Programs*, 26 Ariz. L. Rev. 845, 846-47 (1984) and E. Kintner & J. Lahr, *An Intellectual Property Law Primer*, 363 (2d ed. 1982).

In this sense, a computer program is not a record at all. It is, however, a piece of property. U.S. Const. art. I, § 8; Menell, *Tailoring Legal Protection for Computer Software*, 39 Stan. L. Rev. 1329, 1330 (1987); *see* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.03[A] (intellectual property occupies same status as other forms of personal property). In particular, a computer program is a commodity with an inherent value that is subject to diminishment or destruction by the simple act of copying. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1245 (3rd Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); R. Raysman & P. Brown, *Computer Law: Drafting and Negotiation Forms and Agreements* § 5.01 (1988); Hardy; *supra*, at 845.

The Nevada legislature has recognized the precarious nature of computer programs by extending trade secret, unfair trade practice, and penal protection against their misuse or misappropriation. *See* [NRS ch. 600A](#); [NRS ch. 603](#); [NRS 205.473-477](#). Congress has similarly provided protection to computer programs under the Copyright Act. *See* 17 U.S.C. §§ 101-810. Thus, computer programs are forms of property which are entitled to a substantial amount of protection under existing law and which are not public records within the meaning of [NRS 239.010](#).

CONCLUSION

Computer programs are intellectual property owned or licensed by the State and are not public records. Although most information stored by computer will, as with other forms of agency records, consist of public

records, public inspection of particular information will still be subject to the case-by-case analysis discussed in our answer to Question One.

Sincerely,

BRIAN McKAY
Attorney General

By: Brian Chally
Deputy Attorney General

OPINION NO. 89-2 TAXATION; INDIANS: A tribal government cannot extend boundary of its reservation or trust lands without consent of Congress. Tribally owned businesses operating outside recognized boundaries of reservation or trust lands are subject to all state tax laws, absent express federal law to contrary. Tribal businesses operating on the reservation of trust lands selling products which have been imported for sale or manufactured off the reservation and which are generally available from non-Indian businesses are subject to state taxes on sale of those products to non-Indians or non-reservation Indians. State may impose sales and use taxes on transactions in which contractors, retained by an Indian tribe to construct improvements on the Indian reservation, purchase materials for consumption in constructing improvements.

Carson City, March 13, 1989

Mr. John P. Comeaux, Executive Director, Department of Taxation, 1340 South Curry Street,
Carson City, Nevada 89710

Dear Mr. Comeaux:

You have requested an opinion from this office regarding the taxable status of tribal governments or tribal corporations operating retail sales and service businesses at locations outside the boundaries of designated Indian reservations or trust lands. These businesses serve primarily non-Indian customers.

Since July 30, 1988, the Reno-Sparks Indian Colony has been operating a "tribal smoke shop" at 401 Golden Street, Reno, Nevada, on land that the tribe acquired from a bank and two individuals. The deed, dated March 12, 1984, clearly indicates that title to the property on which the tribal smoke shop sits was taken in the name of the Reno-Sparks Indian Colony. This property has not been deeded to the United States in trust for the colony, nor has the property been annexed or incorporated by Congress within the recognized boundaries of the Reno-Sparks Indian Colony. The tribal smoke shop sells cigarettes and other products primarily to non-Indians, is not registered as a retailer with the Department of Taxation, and is not charging, collecting or forwarding state cigarette excise or state sales taxes on its sales to non-Indians or non-tribal members.

The colony has also leased space outside the reservation from which it has been operating a retail printing service under the trade name of "Sierra Press." All of the printing and preparation of the finished product is apparently performed on the leased premises. Sales and deliveries of the finished product are completed, at least part of the time, from a business office on the reservation. Sales by Sierra Press are primarily to non-colony Indians. While Sierra Press apparently has a business license, it is not registered with the Department of Taxation and does not collect or remit state sales taxes on its sales, nor does the tribe pay sales or use tax on its printing equipment or materials.

QUESTION ONE

Can a tribal government extend the boundary of a reservation or colony simply by purchasing or leasing property in its own name?

ANALYSIS

This question was answered in a recent published attorney general opinion. *See Nev. Op. Att'y Gen. No. 88-19* (December 30, 1988). An Indian tribe has no authority to unilaterally extend the boundaries of a recognized Indian reservation. *Board of Equalization v. Alaska Native Brotherhood*, 666 P.2d 1015 (Alaska 1983). The consent of Congress is required, and the property must be acquired in the name of the United

States, in trust for the Indian tribe. *See 25 C.F.R. § 120a.3* (1981). The only exception to this rule is in the case where a tribe leases land from the United States. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed.2d 114 (1973).

CONCLUSION

A tribal government cannot extend the boundary of its reservation or Indian trust lands without the consent of Congress and without taking title to the land in the name of the United States in trust for the Indian tribe.

QUESTION TWO

If the response to Question One is negative, can the department require the tribe's compliance with all of the provisions of Title 32 of NRS in connection with tribally-owned and operated businesses operating from an off-reservation location?

ANALYSIS

The United States Supreme Court summarized the guiding principle in the area of state taxation of off-reservation Indian activity in *Mescalero Apache Tribe*, at 145:

Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. *See, e.g., Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968); *Organized Village of Kake, supra*, [369 U.S. 60] at 75-76; *Tulee v. Washington*, 315 U.S. 681, 683 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896). That principle

is as relevant to a state's tax laws as it is to state criminal laws *Mescalero Apache Tribe*, at 148-149.

We are unaware of any express federal law that would insulate the off-reservation business activities of either the Reno-Sparks Indian Colony's tribal smoke shop or Sierra Press from the state tax laws set forth in Title 32 of NRS.

The same is true to some extent in the event the tribal-operated business is located on trust land acquired by the tribe with the consent of Congress under the provisions of the Indian Reorganization Act, 25 U.S.C. § 465 *et seq.*, and the regulations promulgated thereunder. *See 25*

C.F.R. 120a, *et seq.* The Supreme Court has held that while such trust lands and improvements are exempt under 25 U.S.C. § 465 from state and local property taxes, including “use” taxes applied to personal property which constitutes a permanent improvement to the land, § 465 does not bar a state from requiring the tribal enterprise from collecting and remitting gross receipts taxes, and presumably sales taxes as well. *Mescalero Apache Tribe*, at 157-159.

It is possible that the land on which the tribal smoke shop is operating may in the future be converted to trust land status under the Indian Reorganization Act. If so, the tribal operation would still be subject to the requirement to collect and remit state cigarette excise and sales taxes. *See Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007, 1009 (10th Cir. 1978), *cert. denied*, 99 S. Ct. 452 (1978).

An additional factor appears in the case of the Sierra Press operation. While the creation of the product Sierra Press sells occurs on the leased site off the reservation, at least some of the business operations take place on the reservation. We are not aware of any cases which have considered the

taxability of a tribal business entity with both on and off reservation operations. However, assuming that Sierra Press’s sales and deliveries occur on the reservation, under our analysis of Supreme Court precedent in this area it is our opinion that any sales to non-Indians or non-reservation Indians are subject to state taxation.

The first key inquiry when considering whether a state tax may validly be applied to a sales transaction occurring on a reservation involving a reservation Indian is to determine the party who bears the legal incidence of the tax. The phrase “legal incidence of the tax” refers to the party or parties bearing the ultimate burden for paying the tax. *See Moe v. Salish & Kootnai Tribes*, 425 U.S. 463, 482-483, 96 S. Ct. 1634, 40 L. Ed.2d 96 (1976); *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 106 S. Ct. 289, 88 L. Ed.2d 9 (1985).

In chapter 372 of NRS on sales and use taxes, [NRS 372.105](#) states:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

[NRS 372.110](#) requires the retailer to pass the tax through to the consumer: “The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.” [NRS 374.110](#) and [374.115](#) are essentially identical to [NRS 372.105](#) and [372.110](#). Under the provisions of [NRS 372.120](#) and its companion [NRS 374.120](#), and the regulations promulgated thereunder, the tax “collected by the retailer from the consumer *in reimbursement* of the tax [is to] be

displayed separately from” the purchase or list price of the item sold. Therefore, the effect of these statutes is that unless the purchaser is exempt or gives the retailer a resale certificate ([NRS 372.155](#)), the ultimate burden for Nevada’s sales and use tax falls on the purchaser.

As to Nevada’s cigarette excise tax, codified in chapter 370 of NRS, [NRS 370.077](#) states in part: “All taxes paid under the provisions of this chapter are direct taxes upon the consumer and are precollected for convenience only”

Nevada generally requires cigarette retailers (dealers) to “precollect” the cigarette excise taxes by purchasing and affixing tax stamps to the cigarettes, although in-state wholesalers generally do the stamping. *See* [NRS 370.165](#) to [370.220](#). This requirement may be avoided by an on-reservation retailer as to cigarettes to be sold to reservation Indians who are members of the tribe. *See* [NAC 370.040](#) to [370.080](#). The precollection requirement has been upheld as a valid tax collection device from an on-reservation Indian retailer. *Moe*, at 482.

In *Washington v. Confederate Tribes of the Coleville Indian Reservation*, 447 U.S. 134, 100

S. Ct. 2069, 65 L. Ed.2d 10 (1980), the Supreme Court upheld the imposition of Washington state sales and cigarette excise taxes applied to on-reservation Indian retail sales of cigarettes and other tobacco products to non-Indians and non-member Indians. The Washington sales and cigarette excise tax statutes at issue are very similar to Nevada's sales tax statutes. In upholding the imposition of these taxes, the Court emphasized several key points. Initially, the Court noted that it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant

interest." *Id.*, at 155, 100 S. Ct. at 2082. The value that was marketed, which was not available from non-tribal vendors, was the claimed exemption from state taxes. *Id.* The Court then stated, "We do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* In support of this principle, the Court noted that the state taxes were "assessed against non-members of the tribes and concern transactions in personality with no substantial connection to the reservation lands." *Id.*, at 156, 100 S. Ct. at 2082. The state taxes were directed at cigarette and tobacco products that were simply imported onto the reservations for resale; thus, the underlying "product" of value was the claimed tax exemption, for this was the only thing which attracted non-reservation Indian customers who would normally buy their cigarettes elsewhere.

Although *Confederated Tribes* specifically dealt only with state excise and sales taxes on on-reservation sales of cigarettes, the Court clearly indicated that the principles enunciated in *Confederated Tribes* would be applied to any product or goods merely imported onto the reservation for resale to non-members, regardless of whether the tribe charged its own tax on the transaction:

The tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods at deep discounts and drawing customers from surrounding areas.

Id. at 155.

In the case of Sierra Press, the Reno-Sparks Indian Colony is operating a printing business. The creation of the product sold is performed in a plant located outside the colony's boundaries. Therefore, even though reservation Indians are performing the work and creating a valuable product, they are doing so off the reservation. Furthermore, even though the tribal business is creating the product, the product is not so unique or substantially connected to the reservation as to avoid the argument that a significant incentive to contract the Sierra Press is its claimed ability to market a sales tax exemption. Unlike the recreation afforded by the tribal high stakes bingo game discussed in *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), which is created, sold, and *consumed* entirely on the reservation, and which is not readily available anywhere else in the state, *id.* at 986, the printing product sold by Sierra Press is consumed off the reservation and is readily available from any number of other printers in the Reno-Sparks area. It is clearly an attraction for a non-Indian to purchase Sierra Press's product due to the fact that the state sales taxes are not being charged on the sale, whereas taxes would be charged if the same product were purchased from a non-Indian printer.

Having determined that the operations of both the Reno-Sparks Indian Colony's "tribal smoke shop" and Sierra Press are subject to state taxation, a question remains as to what measures the state can use to enforce its tax laws against the colony's business operations.

The Supreme Court has not fully addressed this issue, although the Court has sanctioned a state's seizure of unstamped cigarettes bound for the reservation as a method the state could use to enforce Indian compliance with its cigarette excise and sales tax laws. *See Confederate Tribes, supra*, at 161-162. In that case, the state also claimed it had the authority to seize property *on the reservation* in

order to enforce its tax laws. *Id.* Although the Court did not reach this issue, it indicated that such a claim presented different issues from off-reservation seizures of contraband cigarettes bound for the reservation. *Id.* at 162.

The main argument against seizing tribal property on or off the reservation or trust lands is that it can be analogized to the prohibition against seizure of governmental property. Such a seizure would clearly infringe on tribal sovereign immunity. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F. Supp. 55 (N.D. Cal. 1979), *aff'd* in relevant part, *rev'd* in part on other grounds, 757 F.2d 1047 (9th Cir. 1985); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986).

In *Chemehuevi Indian Tribe*, the district court held that the state could not seize tribal assets to satisfy a cigarette excise and sales tax deficiency arising from on-reservation sales absent an express waiver of sovereign immunity by the tribe. Consequently, the state could not sue the tribe in state or federal court for taxes owed, *id.* at 58-59, or to enjoin the tribe from doing business without collecting or remitting taxes. *Chemehuevi Indian Tribe*, at 60-61; *Squaxin Island Tribe*, at 723. However, presumably there would be no restrictions or governmental enforcement of its tax laws against Indian-owned businesses not directly connected with a tribal government.

CONCLUSION

Business operations of an Indian tribe conducted off the Indian colony, reservation, or trust lands are subject to the nondiscriminatory imposition of state tax laws under Title 32 of NRS. Business operations of an Indian tribe that take place on the Indian colony, reservation, or trust lands involving Indian

sales to non-Indians or non-member Indians may be subject to state excise and sales taxes, particularly if the products sold are purchased or manufactured off the reservation for resale on the reservation or trust lands. However, those portions of Title 32 which pertain to methods of enforcing the state's tax laws are generally invalid as applied to an Indian tribe or tribally-owned business, due to the tribe's sovereign immunity from suit for deficient taxes or actions to seize tribal property located on or off the reservation or trust lands, absent an express waiver of that immunity. Indirect enforcement methods are appropriate and valid as a means to obtain cooperation from the tribes.

QUESTION THREE

Is a construction firm owned by non-tribal Indians or non-Indians exempt from the payment of sales and use taxes on materials purchased and consumed on an Indian reservation in the performance of a construction contract with the tribe?

ANALYSIS

You have also discovered that in at least two cases, outside contractors have been retained by a reservation tribal housing authority to construct housing on Indian reservations in the state. The outside contractors are both Native American owned; however, they are not connected with the Indian reservations for whom they are doing the construction work. Both contractors are

nonresident corporations.

The department has sought to impose sales and use taxes on the materials which these contractors have purchased and consumed in the furtherance of their construction contracts with the tribal housing authorities. In some cases the materials have been purchased in-state; in others, out-of-state. Both of the contractors are claiming that their purchases are tax exempt.

According to [NAC 372.200](#):

1. A construction contractor is the consumer of all the tangible personal property purchased for use in improving real property pursuant to a construction contract for improvement to real property and the tax applies to the total sales price of the property to the contractors.
2. If any such purchase is made and the sales tax is not paid because the vendor did not have a valid Nevada seller's permit, or because a resale certificate was properly given, or for any other reason, the use tax applies based upon the sales price of the property to the contractor.
3. Any tangible personal property purchased by a construction contractor for use in the performance of a construction contract for improvement to real property shall be deemed to have been purchased for use in improving real property.
4. If a construction contract for improvement to real property requires the construction contractor to perform repairs or improvements on real property, the tax applies pursuant to the provisions of this section and 372.390 or 372.400.

Therefore, if the purchase occurs in Nevada, the vendor should charge sales tax on the transaction. If the purchase occurs out-of-state and the purchased materials are shipped in, use tax would have to be paid by the contractor based on the sales price of the materials.

The contractors are claiming that their purchase of materials for their use or consumption in connection with completing their construction contracts with the tribal housing authorities is exempt on the basis of federal preemption. In support of their claim, the contractors have cited primarily to *Ramah Navajo*

School Board v. Bureau of Revenue, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed.2d 1174 (1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed.2d 665 (1980).

In *Ramah*, the United States Supreme Court invalidated New Mexico's imposition of a gross receipts tax on a contractor hired by a tribal school board to construct a school on the Navajo Indian reservation. The measure of the tax was based on the gross receipts received by the contractor under its contract with the tribal school board. Thus, the State of New Mexico was attempting to tax a transaction between the contractor and the tribe. The contract between the tribal school board and the contractor specifically provided that any gross receipts taxes paid by the contractor on its transaction with the tribe would be reimbursed by the tribe. Therefore, even though the "legal incidence" of the tax was imposed on the contractor, the economic burden was directly imposed on the tribe. The Court also relied on its decision in *Bracker*, by indicating that the federal government was extensively involved in promoting the construction of schools on the Indian reservations and imposition of the tax on the transaction between the tribal school board and the contractor would unjustifiably burden the comprehensive federal scheme regulating the provision of educational facilities for the tribe by depleting the funds available to build schools. *Ramah*, at 839-842.

The *Ramah* case appears to be substantially distinguishable from the situation the Department of Taxation is dealing with. In *Ramah*, the state sought to tax a transaction between a non-tribal contractor and the tribe. Even though the legal incidence of the tax was on the contractor, there

were express pass-through provisions in the contract that caused the direct economic burden of the tax to be borne by the tribe. In the situation at hand, the department seeks to impose the tax on transactions between the

contractor and its suppliers. While the addition of a sales or use tax on the cost of materials used by the contractor may cause the contractor to increase its bid on the project, the tax would constitute no more than one of the contractor's other costs of doing business which are built into the bid price. There are no pass-through provisions in the tax statutes which would cause a direct economic burden on the tribe.

It may be that the Supreme Court would find substantial federal involvement in promoting the provision of low income housing on the state's Indian reservations and invalidate a tax measured by the contract price between the contractor and the tribe upon the same reasoning as in *Ramah*. However, the transaction being taxed here does not involve the tribe as a party and is not measured by the contract price between the contractor and the tribe.

In the *Bracker* case, the Supreme Court invalidated the imposition of Arizona's use fuel and motor carrier license taxes on a non-Indian logging contractor's logging operations which were conducted solely on the reservation. The basis for this decision was that the federal government has preempted the imposition of state taxes on the logging operation, due to the pervasive federal regulation of the logging operations and the lack of any state interest in excess of a general interest in raising revenues. *Bracker*, at 148-149, 151. The taxes sought to be imposed in *Bracker* were designed to compensate the state for travel on state public highways. *Bracker*, at 139-140. Under the facts of that case, the non-Indian contractor confined its hauling activities primarily to private tribal and Bureau of Indian Affairs maintained roads on the reservation. It was conceded that the contractor was liable to pay fuel taxes for its use of state maintained roads within the Indian reservation. *Bracker*, at 154-156 (Stevens, J., dissenting). Therefore, the opinion of the Court was directed solely at the state's attempt to assess use

fuel taxes and motor carrier license taxes on the contractor for its use of tribal and BIA maintained roads in which the state concededly had no particular interest. *Bracker*, at 150.

The principles in *Bracker* would not seem to apply to Nevada's assessment of sales or use taxes on a transaction between two non-tribal parties. Since such transactions do not directly involve or affect the tribe, the federal government's interest in promoting and regulating low income reservation housing is more remote. The fact that the materials purchased may be delivered to the reservation job site should not make any difference.

In another case involving New Mexico's gross receipts tax, the Tenth Circuit Court of Appeals upheld the imposition of the state's gross receipts tax on contractors hired by the Mescalero Apache Tribe to construct a resort on the reservation. *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 450 U.S. 959, 100 S. Ct. 1417, 67 L. Ed.2d 383 (1981). In this case, the Court found that the legal incidence of the tax fell on the non-Indian contractor, and that while the amount of the tax was passed on to the tribe, the tribe could recoup this from the operations of the resort. The extent to which the reasoning of this case survives *Ramah* is unclear, as the case was never mentioned in the *Ramah* decision. However, as noted above, we believe the transaction which New Mexico sought to tax in *Ramah* can be readily distinguished from the transactions the state seeks to tax here.

On the other hand, if the contractor is acting as a procuring agent for the tribe in purchasing materials for a reservation construction project, those transactions would be exempt from sales or use tax. *Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, 1070-1071 (D.N.M. 1977).

CONCLUSION

The department can assess sales or use taxes on transactions between a contractor retained by an Indian tribal authority to construct housing on an Indian reservation and a supplier of any materials that the contractor will be using or consuming in the completion of its construction contract with the tribal authority, at least so long as the contractor is not purchasing the materials for the tribe as its procuring agent.

Sincerely,

BRIAN McKAY
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 89-3 TREASURER; INVESTMENTS: The investment of state money in repurchase agreements is not specifically authorized by statute. The investment of local government money in repurchase agreements is authorized by [NRS 355.172](#). Repurchase agreements are buy-sell transactions that do not violate the constitutional prohibition against the loan of state money.

Carson City, April 11, 1989

The Honorable Ken Santor, Nevada State Treasurer, Capitol Building, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Santor:

You have recently requested an opinion from this office regarding the use of repurchase agreements for investments of state money by your office.

For the purposes of this opinion, it is our understanding that a repurchase agreement is basically a financial transaction wherein a governmental entity transfers cash to a broker-dealer or financial institution in exchange for the transfer of securities and a promise to repay the cash plus interest in exchange for the return of the same securities. (Governmental Accounting and Financial Reporting Standards, (2nd ed. 1987), § 150.131) (hereinafter GA & FRS)..The purpose of the transaction is to permit short-term (generally overnight) investment of money that would otherwise sit idle, while allowing a liquidity not available in other types of investments.

It is our further understanding that when the financial institution with whom the governmental institution is dealing is adequately capitalized and highly creditworthy; when the underlying securities are authorized investments, have a market value that exceeds the repurchase price, and are held by the governmental entity or a custodial bank; and when the transaction is made pursuant to a properly executed master repurchase agreement, repurchase agreements are generally viewed as a safe and prudent investment.

QUESTION ONE

Are repurchase agreements an authorized investment of state money by the state treasurer?

ANALYSIS

Chapter 355 of NRS specifies the types of investments in which the state treasurer is authorized to invest state money. Repurchase agreements are not among the types of investments specified, although the securities which constitute the typical repurchase agreement are authorized. See [NRS 355.140](#). Local governments are authorized to invest in repurchase agreements by [NRS 355.172](#), and such investment of local government funds may be made by the state treasurer pursuant to [NRS 355.167\(3\)](#).

CONCLUSION

The state treasurer is not specifically authorized to invest state money in repurchase agreements. The state treasurer may invest local government money in repurchase agreements pursuant to [NRS 355.167\(3\)](#).

QUESTION TWO

Does the investment of state money in repurchase agreements violate art. 8, § 9 of the Nevada Constitution?

ANALYSIS

Art. 8, § 9 of the Nevada Constitution states:

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

The issue here is whether repurchase agreements are borrow-lend type transactions which might violate art. 8, § 9, or buy-sell type transactions which would be permitted.

For accounting purposes, repurchase agreements can be viewed as collateralized loans (GA & FRS, § 150.135) or buy-sell transactions involving the temporary ownership of the transferred securities (GA & FRS, § 150.137).

The Federal Bankruptcy Code (11 U.S.C. § 101(41)) defines “repurchase agreement” as “an agreement . . . which provides for the transfer of . . . securities . . . against the transfer of funds by the transferee . . . with a simultaneous agreement by such transferee to transfer to the transferor thereof . . . securities . . . at a date certain . . . against the transfer of funds.” Black’s Law Dictionary (p. 1669) (Rev. 4th ed. (1968)), defines “transfer” as “an act . . . by which the title of property is conveyed . . .” This suggests that repurchase agreements are sales.

Repurchase agreements are typically made pursuant to standardized Master Repurchase Agreements which specifically refer to the parties as “Seller” and “Buyer” and which state that the parties intend that the transaction be sales and purchases and not loans.

The limited case law in this area does little to resolve the issue. Of the eight cases found which discuss the nature of repurchase agreements, three found them to be sales (*City of Harrisburg v. Bradford Trust Co.*, 621 F. Supp. 463 (D.C. Pa. 1985); *Citizens National Bank of Waco v. The United States*, 551 F.2d 832 (1977); and *First National Bank v. Estate of Russell*, 656 F.2d 668 (1981)), three found them to be loans (*Matter of Legal, Braswell Government Securities*, 648 F.2d 321 (1981); *United States v. Erickson*, 601 F.2d 296 (1979); and *Securities*

and *Exchange Commission v. Miller*, 495 F. Supp. 465 (D.C. S.D. N.Y. 1980)), and two discussed and distinguished the nature of repurchase agreements without actually

coming to a conclusion (*Manufacturers Hanover Trust v. Drysdale Securities Corp.*, 801 F.2d 13 (2d Cir. 1986); *Securities and Exchange Commission v. Drysdale Securities Corp.*, 785 F.2d 38 (2d Cir. 1986)). In each of the cases where the court concluded that repurchase agreements were sales or loans, it appears to have made that decision based on the result it sought to achieve in that particular case. None of those cases addressed the issue of whether repurchase agreements might violate constitutional prohibitions against the loan of money.

A majority of the states provide statutory authorization for the investment of state moneys in repurchase agreements although most of those states, like Nevada, have constitutional prohibitions against the loan of state money or credit. The inference, of course, is that investments in repurchase agreements are not loans which would violate those constitutional prohibitions.

New York, like Nevada, has a constitutional ban against the loan of both money and credit (N.Y. Constitution, art. 7 § 8). However, New York law provides for the investment of certain state money in repurchase agreements (Codified Laws of N.Y., tit. 1, art. 11, § 508(14)).

The Louisiana Constitution prohibits loans (art. 7, § 14), yet state law authorizes state money investments in repurchase agreements (L.R.S. 17:671).

The Alabama Constitution prohibits the loan of money or credit for “internal improvements” (Amendment No. 58), but state law authorizes state money investments in repurchase agreements (Code of Alabama § 41-14-31, 41-14-32).

The California Constitution prohibits the appropriation of money for private use (art. 16, § 3) and the lending of credit (art. 16, § 6), yet state law allows state money investments in repurchase agreements (Cal. Health and Safety Code, § 51003) (West 1986).

The Ohio Constitution prohibits the loan of credit (art. VIII, § 4), but state law authorizes repurchase agreement investment of state money (Ohio Rev. Code Ann. § 135.14) (Anderson 1984). In *State v. Bland*, 197 N.E.2d 328 (1964), the Supreme Court of Ohio held that the word “credit” as used in art. VIII, § 4, included a “loan of money.”

Similarly, the Massachusetts Constitution prohibits the loaning of credit (art. LXII), but state money investment in repurchase agreements is permitted (Mass. Gen. Law. Ann. ch. 29 § 38) (Lawyer’s Co-Operative Publishing Company 1983). In *Opinion of the Justices*, 268 N.E.2d 149 (1971), the Supreme Judicial Court of Massachusetts held that the issuance of bonds by the state and then the lending by the state of the money raised on the bonds would violate article LXII.

The Supreme Court of Minnesota reached a similar decision in *Dearing and Co. v. Peterson*, 77 N.W. 568 (1899). Minnesota, like Massachusetts, prohibits the giving or loaning of credit (Minn. [Const. art. 11, § 2](#)), but allows state money investment in repurchase agreements (Minn. Stat. Ann. § 11A.24) (West 1988).

It appears clear from the decisions of the Ohio, Massachusetts, and Minnesota Supreme Courts that a prohibition against the loan of credit is also a prohibition against the loan of money, but those states nevertheless authorize investments in repurchase agreements.

Numerous other states have similar constitutional prohibitions against the loaning of credit, while authorizing the investment of state money in repurchase agreements. *See* Iowa (art. VII, § 1; Iowa Code Ann. § 452.10) (West 1971); Arkansas (art. 16, § 1; Ark. Stat. Ann. § 6-81-122, 19-3-307 (Miche 1987)); Florida (art. 7, § 10; Fla. Stat. Ann. § 18.10) (West 1988); Idaho (art. 8, § 2; Idaho Code 50-1013, 67-1210); Maryland (art. III, § 34; Md. Ann. Code St. Finance & Procurement) (Miche 1988); Missouri (art. 3,

§ 38, 39; Mo. Ann. Stat. § 20.260) (West 1969); New Mexico (art. VIII, § 4, art. IX, § 14; N.M. Stat. Ann. § 6-18-19) (Miche 1987); North Carolina (art. 5, § 3, N.C. Gen. Stat. § 147-69.1)

(Miche 1987); Oklahoma (art. 10, § 15; Okla. Stat. Ann. tit. 62, § 89.2) (West 1989); Tennessee (art. 2, § 31; Tenn. Code Ann. § 9-4-602) (Miche 1987); Texas (art. 3, § 50; Tex. Code Ann., Title 4, § 404.024) (Vernon 1986); Virginia (art. X, § 10; Va. Code Ann. § 2.1-328.8) (Miche 1987); West Virginia (art. 10, § 6; W. Va. Code, § 12-6-5) (Miche 1985); Washington (art. 8, § 5; Op. Atty. Gen. 1986, No. 5).

While there is some disagreement in the accounting and legal fields over whether repurchase agreements are buy-sell or borrow-loan transactions, the widespread statutory authority for such investments from other jurisdictions (despite those jurisdictions' constitutional prohibition against the loan of state money and/or credit) clearly implies that repurchase agreements are not loan transactions that would violate art. 8, § 9 of the Nevada Constitution, but rather are sales that would be permitted.

CONCLUSION

Repurchase agreements are buy-sell type transactions, and therefore the investment of state money in repurchase agreements would not violate the art. 8, § 9 constitutional prohibition against the loan of state money and credit.

Sincerely,

BRIAN McKAY
Attorney General

By: Jonathan L. Andrews
Deputy Attorney General

OPINION NO. 89-4 VETERANS' EXEMPTION: The Coast Guard is considered part of the Armed Forces at all times, whereas the National Guard and Merchant Marines are only considered part of the Armed Forces when called to active duty during time of war or national emergency. Veterans of these units who otherwise qualify under [NRS 361.090](#) and [371.103](#) are entitled to the veterans' tax exemption.

Carson City, April 21, 1989

Mr. John P. Comeaux, Executive Director, Department of Taxation, Capitol Complex, Carson City, Nevada 89710-0003

Dear Mr. Comeaux:

You have requested an opinion from this office regarding the eligibility for tax exemptions of certain veterans.

BACKGROUND

County assessors are being questioned as to the eligibility of Coast Guard, National Guard, and Merchant Marine veterans to receive certain tax exemptions allowable under [NRS 361.090](#) and [371.103](#). These statutes provide for a \$1,000 exemption on property or vehicles to any

Nevada resident¹ who was a member of the Armed Forces of the United States, was assigned to active duty during certain specified time

periods, and received an honorable discharge upon severance from service. Active duty is defined as “full-time duty in the Armed Forces, other than active duty for training[.]” 38 U.S.C. § 101(21)(A) (1982). There is concern as to whether the Coast Guard, National Guard, and Merchant Marine are classified as part of the Armed Forces for purposes of this exemption.

QUESTION ONE

Does the term “Armed Forces of the United States” in [NRS 361.090](#) and [371.103](#) apply to the Merchant Marine, Coast Guard, and National Guard?

ANALYSIS

It is clear that the National Guard is not considered part of the Armed Forces of the United States unless called to active duty pursuant to federal legislation. Nev. Op. Att’y Gen. No. 647 (March 10, 1970), states:

This office has been advised that if the National Guard is called to active duty in their status as units of the Army or Air National Guard pursuant to emergency legislation such as was enacted at the time of the Berlin wall or Cuban missile crises, and service was for 90 days or more on such duty, benefits would accrue.

Consequently, this office concluded that honorably discharged veterans of the National Guard were not entitled to the exemption unless called to active duty for ninety days or more during the time periods specified in the statutes. The opinion concludes:

It is therefore the opinion of this office that members of the National Guard, or Air National Guard, not called to duty pursuant to national legislation as hereinbefore

prescribed, but assigned to training duty for a period of time constituting 90 or more days, are not entitled to the veterans’ exemption set forth in [NRS 361.090](#).

Id. at 1.

It continues to be the position of this office that honorably discharged veterans of the National Guard are not entitled to a tax exemption unless called to active duty for at least ninety days during the time periods specified in [NRS 361.090](#) and [371.103](#).

In our analysis of the Coast Guard’s inclusion as part of the Armed Forces of the United States, 14 U.S.C. § 1 (1982) provides for the establishment of a Coast Guard as follows:

The Coast Guard as established January 28, 1915, shall be a military service and a branch of the *Armed Forces of the United States* at all times. The Coast Guard shall be a service in the Department of Transportation, except when operating as a service in the Navy. (Emphasis added.)

¹ The requirement limiting the exemption to veterans who were Nevada residents for a period of more than three years before December 31, 1963, was declared unconstitutional in light of United States Supreme Court’s decision in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), by Nev. Op. Att’y Gen. No. 86-3 (January 24, 1986).

Clearly, as defined in the United States Code, the Coast Guard is part of the Armed Forces of the United States, making those veterans of the Coast Guard eligible for the veterans' exemption if they meet all the conditions set forth in [NRS 361.090](#) or 371.103.

The Merchant Marine is described in 46 U.S.C. § 1101 (1982):

It is necessary for the national defense and domestic commerce that the U. S. shall have a merchant marine . . . (b) capable of serving as a naval and military auxiliary in time of war or national emergency.

The United States Code provides a clear guide for including the Merchant Marine in the Armed Forces during time of war or national emergency. This position was previously taken in Nev. Op. Att'y Gen. No. 261 (January 21, 1946), which stated that war-time Merchant Marines were to be considered as members of the Armed Forces for purposes of the veterans' tax exemption.

CONCLUSION

By virtue of provisions in the United States Code, the Coast Guard is part of the Armed Forces of the United States at all times. The National Guard and Merchant Marine are viewed differently than the Coast Guard. The National Guard is considered part of the Armed Forces of the United States only when called into active duty for a minimum of ninety days. Members of the Merchant Marine are considered part of the Armed Forces only when serving in time of war or national emergency.

QUESTION TWO

If the Merchant Marine, Coast Guard, and National Guard are part of the Armed Forces of the United States, are they entitled to the tax exemption prescribed by [NRS 361.090](#) and [371.103](#)?

ANALYSIS

[NRS 361.090](#), the veterans' exemption statute, provides in pertinent part:

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

(a) Has served a minimum of 90 days on active duty, who was assigned to active duty at some time between April 21, 1898, and June 15, 1903, or between April 6, 1917, and November 11, 1918, or between December 7, 1941, and December 31, 1946, or between June 25, 1950, and January 31, 1955; or

(b) Has served a minimum of 90 continuous days on active duty none of which was for training purposes, who was assigned to active duty at some time between January 1, 1961, and May 7, 1975, and who received, upon severance from service, an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or who, having so served, is still serving in the Armed Forces of the United States, is exempt from taxation.

[NRS 371.103](#) provides, in pertinent part:

1. Vehicles, to the extent of \$1,000 determined valuation, registered by any actual bona fide resident of the State of Nevada who:

(a) Has served a minimum of 90 days on active duty, who was assigned to active duty at some time between April 21, 1898, and June 15, 1903, or between April 6, 1917, and November 11, 1918, or between December 7, 1941, and December 31, 1946, or between June 25, 1950, and January 31, 1955; or

(b) Has served a minimum of 90 continuous days on active duty none of which was for training purposes, who was assigned to active duty at some time between January 1, 1961, and May 7, 1975, and who received, upon severance from service, an honorable discharge or certificate of satisfactory service from the Armed Forces of the United States, or who, having so served, is still serving in the Armed Forces of the United States, is exempt from taxation.

With regard to the National Guard's status as part of the Armed Forces, 32 U.S.C. § 102 (1982) states in part:

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times. Whenever Congress determines that more units and organizations are needed in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed.

When the National Guard is called to active duty and all the other criteria of [NRS 361.090](#) and [371.103](#) are met, then its veterans are entitled to the tax exemption.

With respect to the Coast Guard, its definition in the United States Code establishes it as part of the Armed Forces. Therefore, veterans of the Coast Guard who otherwise meet the criteria established in [NRS 361.090](#) and [371.103](#) are entitled to the tax exemption.

Members of the Merchant Marine are only part of the Armed Forces in time of war or national emergency. Those who have served during World War II are eligible for VA benefits. In 1988 the Secretary of the Air Force, the authorized official for this decision, determined "that service in the Merchant Marine in

ocean-going service from Pearl Harbor to VJ Day was active duty for purposes of VA benefits," *WWII Merchant Marine Given Active-Duty Designation for VA Benefits*, 16 Mil. L. Rev. 1012 (1988). In Op. Nev. Att'y Gen. No. 261 (January 21, 1946), this office stated that Merchant Marines who served in time of war and who received honorable discharges from the Merchant Marine Service of the United States were eligible to claim the veterans' tax exemption. In view of the fact that the Merchant Marines are considered part of the Armed Forces, not only in time of war but also during a national emergency, any honorably discharged Merchant Marine who served in time of war or national emergency is eligible to claim the veterans' exemption if otherwise qualified under [NRS 361.090](#) and [371.103](#).

CONCLUSION

This office is still of the opinion that, in order to qualify for the veterans' exemption set forth in [NRS 361.090](#) and [371.103](#), veterans of the National Guard must have been called to active

duty during the statutorily enumerated period of time pursuant to federal legislation. Consequently, veterans of the National Guard would only be eligible for this veterans' exemption if called to active duty for a minimum of ninety days during one of the time periods set forth in the statute.

The Coast Guard, by virtue of its definition in the United States Code, is considered to be part of the Armed Forces of the United States at all times. Therefore, veterans of this unit are eligible for the veterans' exemptions set forth in [NRS 361.090](#) and [371.103](#) if they otherwise qualify under the statutes.

Members of the Merchant Marine are considered part of the Armed Forces only when serving in time of war or national emergency. Veterans of this unit are

eligible for the veterans' exemption set forth in [NRS 361.090](#) and [371.103](#) if they served during the statutorily specified time periods and otherwise qualify under the statutes.

Sincerely,

BRIAN McKAY
Attorney General

By: Kateri Cavin
Deputy Attorney General

OPINION NO. 89-5 HOUSING; MANUFACTURED HOUSING; MOBILE HOMES: The federal Fair Housing Amendments Act prohibits discrimination in housing based on familial status and nullifies state law provisions which allow mobile home park landlords to restrict tenancy to persons 18 years of age or older. Qualified "housing for older persons" is exempt from the familial status provision of the federal Act.

Carson City, May 2, 1989

Mr. Donald G. Morse, Investigator, Manufactured Housing Division, Department of Commerce, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Morse:

You have sought the advice of this office regarding the effect of the Fair Housing Amendments Act of 1988 on chapter 118B of the Nevada Revised Statutes.

QUESTION ONE

Does the federal Fair Housing Amendments Act of 1988 nullify the age restrictions for mobile home park tenants contained in [NRS 118B.130\(1\)](#)?

ANALYSIS

[NRS 118B.130\(1\)](#) allows the landlord of a mobile home park to "restrict all or part of a . . . park to adult tenants who are at least 18 years old or to older tenants who are at least 55 years old" The statute also imposes certain affirmative obligations upon landlords who change the age

makeup of the tenants in their parks.

The federal Fair Housing Amendments Act, which became effective March 12, 1989, amended Title VIII of the Civil Rights Act, codified as 42 U.S.C. §§ 3600-3620. The Amendments Act applies to mobile home

parks, 54 Fed. Reg. 3,252 (1989), and expands Title VIII coverage to prohibit discriminatory housing practices based on handicap and familial status, as well as race, color, religion, sex, or national origin. 42 U.S.C. § 3604. Familial status is defined in the Act to mean:

One or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person.

42 U.S.C. § 3602(k); 24 C.F.R. § 100.20. The Act contains an exemption from the familial status provision for “housing for older persons” 62 or older, 55 or older or “elderly persons” within the meaning of certain government programs, provided certain criteria are met. 42 U.S.C. § 3607(b).

Pursuant to the Supremacy Clause of the United States Constitution, Congress’ enactment of the Fair Housing Amendments Act in 1988 supersedes the Nevada Legislature’s enactment of [NRS 118.130](#) if the two are in conflict, since the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof Shall be the supreme Law of the Land” U.S. Const. art. VI. When the relevant provisions of the federal Act and its regulations are compared to [NRS 118.130\(1\)](#), it is clear that a landlord may no longer simply restrict tenancy in a mobile home park to persons 18 years of age or older; to do so is to discriminate based on familial status. In the view of the United States Department of Housing and Urban Development, a landlord may restrict tenancy in a park to tenants who are at least 55 years old, however:

A housing provider may use any non-discriminatory method of qualifying for the exemption that comports with applicable State and local laws. Since the Fair Housing Amendments Act does not prohibit discrimination because of age, nothing in the Act prohibits a housing provider seeking to qualify for the exemption for ‘>55 or over’ housing from setting age restrictions that are more stringent than those set forth in the Act. Thus, a housing provider may, for example, require that all residents be 55 years of age or older, provided that such a rule is consistent with applicable State and local law.

54 Fed. Reg. 3,254 (1989). Such a 55 years of age or older rule is consistent with state law in Nevada, and, since it is not contrary to the terms of the federal Fair Housing Amendments Act, is still permissible.

The specific requirements of the exemption for “housing for older persons” are detailed at 24 C.F.R. §§ 100.302, 100.303, and 100.304. 24 C.F.R. § 100.302 exempts housing “provided under any Federal or State program that the Secretary [of Housing and Urban Development] determines is specifically designed and operated to assist elderly persons, as defined in the State or Federal program” from the familial status provisions.

Housing intended for the use of and solely occupied by persons 62 years of age and older is exempt from the familial status provisions under 24 C.F.R. § 100.303. The requirements of this section are met and the housing is exempt even though:

(1) There are persons residing in such housing on September 13, 1988 who are under 62 years of age, provided that all new occupants are persons 62 years of age

or older;

(2) There are unoccupied units, provided that such units are reserved for occupancy by persons 62 years of age or over;

(3) There are units occupied by employees of the housing and family members residing in the same unit who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

24 C.F.R. § 100.303(a).

Finally, a landlord may choose to comply with 24 C.F.R. § 100.304, which provides:

(a) The provisions regarding familial status shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit. *Provided* that the housing satisfies the requirements of § 100.304(b)(1) *or* (b)(2) *and* the requirements of § 100.304(c).

(b)(1) The housing facility has significant facilities and services specifically designed to meet the physical or social needs of older persons . . . or

(2) It is not practicable to provide significant facilities and services designed to meet the physical or social needs of older persons *and* the housing facility is necessary to provide important housing opportunities for older persons

(c)(1) At least 80% of the units in the housing facility are occupied by at least one person 55 years of age or older per unit *except that* a newly constructed housing facility for first occupancy after March 12, 1989 need not comply with this paragraph (c)(1) of this section until 25% of the units in the facility are occupied; and

(2) The owner or manager of a housing facility publishes and adheres to policies

and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older

The requirements of this subsection are satisfied if 80% of the occupied units on September 13, 1988, were occupied by at least one person 55 years of age or older per unit, so long as at least 80% of the units newly occupied after that date are occupied by at least one person 55 or older; if there are unoccupied units, 80% of the units are reserved for occupancy by at least one person 55 years of age or older; and if there are units occupied by employees under 55 years of age, such employees perform substantial duties which relate to the management or maintenance of the housing. 24 C.F.R. § 100.304(d).

It is our opinion that the passage of the federal Fair Housing Amendments Act of 1988 totally nullifies the 18 or older age limit for tenancy in a mobile home park which is contained in [NRS 118B.130](#)(1). The 55 years of age or older requirement contained in that same statute is still valid and is one of the ways a mobile home park may meet the “housing for older persons” exemption from the familial status provisions of the Act. A park may also qualify for that exemption if it meets the criteria of either 24 C.F.R. §§ 100.302, 100.303, or 100.304.

We would also direct your attention to 24 C.F.R. § 100.70(c)(4). Pursuant to this regulation, it is unlawful to assign any person “to a particular section of a community, neighborhood or development, or to a particular floor of a building, because of . . . familial status” It is the position of the United States Department of Housing and Urban Development that dual purpose housing facilities, where certain units are reserved for occupancy by older persons while the rest of the units are available to all other tenants, discriminate based on familial status and are

unlawful pursuant to 24 C.F.R. § 100.70(c)(4). *See* 54 Fed. Reg. 3,252-53 (1989).

Therefore, we must advise you that a landlord may no longer divide his park into sections under [NRS 118B.130](#) in order to separate older persons or families with children from other tenants without violating the Fair Housing Amendments Act and possibly subjecting himself to the sanctions imposed by the Act.

CONCLUSION

The federal Fair Housing Amendments Act of 1988 nullifies those portions of [NRS 118B.030](#)(1) which allow a landlord to restrict tenancy in a mobile home park to persons 18 years of age and older and to divide a park into different sections by type of tenant. The 55 years of age or older requirement allowed by [NRS 118B.030](#)(1) is still valid, provided the park meets the federal criteria for “housing for older persons,” detailed at 24 C.F.R. §§ 100.302, 100.303, or 100.304.

QUESTION TWO

After the passage of the federal Fair Housing Amendments Act is a landlord still obligated by [NRS 118B.130](#)(1) to pay the moving expenses of a tenant who wishes to move because the mobile home park may no longer restrict tenancy to persons 18 years of age or older?

ANALYSIS

[NRS 118.130](#)(1) imposes certain affirmative obligations on landlords who seek to change the age makeup of the tenants in their mobile home parks:

(a) The landlord may not change an existing park to an adult park or park for older persons unless the tenants who do not meet those restrictions are given the option of remaining in the park or moving to parks within 20 miles at the expense of the landlord.

(b) The landlord may not change an existing park to a park in which certain areas are restricted to adults or older persons unless the tenants who do not meet the restrictions are given the option of remaining in their spaces or moving to unrestricted areas of the park or to parks within 20 miles at the expense of the landlord.

(c) The landlord may not change the restriction of a park or an area of a park which is restricted to adults or older persons unless the tenants who meet the restriction are given the option of remaining in their spaces or moving to parks within 20 miles at the expense of the landlord.

In light of our conclusion to question one, it is clear that a landlord may no longer simply restrict tenancy in a park or any part of a park to adults. The only exception is a park which qualifies as “housing for older persons.” If an adults-only restriction is now unlawful, it would seem that any obligation imposed on a landlord which furthers illegal activity in contravention of law is unlawful as well.

Following the enactment of the federal Fair Housing Amendments Act of 1988, landlords of mobile home parks which previously restricted tenancy to persons 18 years of age or older are required to change the character of their parks by renting to families with children. Their doing so is not a voluntary act, but one mandated by law with sanctions attached for non-compliance. It

would be inequitable and illogical to penalize landlords for complying with the new federal law by enforcing the portions of [NRS 118.130\(1\)](#), which would require them to pay to move tenants who wish to leave the park. It is our

opinion, therefore, that subsequent to the passage of the federal Act, a mobile home park landlord is no longer obligated by state law to pay the moving expenses of a tenant who decides to move from the park because of its change in character.

We recognize that there are individuals who, of their own choosing, will move out of a mobile home park once families with children move in. This is a personal decision which those people are entitled to make. Since the basis for the decision to move is discriminatory, however, it should remain a personal decision in which state law plays no part.

CONCLUSION

After the passage of the federal Fair Housing Amendments Act of 1988, a mobile home park landlord is no longer obligated by [NRS 118B.130\(1\)](#) to pay the moving expenses of a tenant who wishes to move because the park may no longer lawfully restrict tenancy to persons 18 years of age or older.

Sincerely,
BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 89-6 MORTGAGE COMPANIES; ESCROW AGENTS: Mortgage companies may not act as escrow agents or otherwise control funds which are the subject of completed construction loans. Such funds must be disbursed to an escrow agent independent of the mortgage company, or to the borrower or his designee.

Carson City, May 15, 1989

Mr. Burns Baker, Deputy Administrator, Financial Institutions Division, 406 E. Second Street,
Carson City, Nevada 89710

Dear Mr. Baker:

As the result of a recent examination, the Financial Institutions Division (“Division”) has discovered a practice by some mortgage companies licensed under [NRS ch. 645B](#) of maintaining special accounts for the disbursement of loan proceeds used for construction. Although the loan documentation has been completed and security instruments recorded, the mortgage company holds the proceeds and disburses the money in increments to fund the construction for which the loan was made. You have asked the following with respect to this practice:

QUESTION

Is a mortgage company authorized to act as an escrow agent or construction control with

respect to the proceeds of a completed construction loan?

ANALYSIS

[NRS ch. 645B](#) governs the licensing and regulation of mortgage companies in Nevada. With certain exceptions not applicable here, a mortgage company includes any person who acts as an agent of a lender or borrower with respect to a loan secured by a lien on real property or who makes such a loan himself. [NRS 645B.010](#)(3).

[NRS ch. 645A](#) governs the licensing and regulation of independent escrow agents, those who are not employed as escrow officers for title insurers or agents. See [NRS 645A.010](#); [645A.015](#)(1); [692A.128](#). The provisions of [NRS ch. 645A](#) do not apply to “[a]ny firm or corporation which lends money on real or personal property and is subject to licensing, supervision or auditing by an agency of the United States or of this state.” [NRS 645A.015](#)(3). Because they are subject to licensing, supervision and auditing by the Financial Institutions Division, we believe mortgage companies are exempt from the licensing requirements of [NRS ch. 645A](#).

Since your inquiry relates specifically to the holding of funds for construction, it is necessary to examine the provisions of [NRS ch. 627](#), the Construction Control Law, which imposes bonding and other requirements on persons engaged in the control or disbursement of funds to be used for construction. See [NRS 627.050](#), [627.180](#), and [627.190](#).

A “construction control” is any person that engages in the control or disbursement of any funds payable or paid to laborers, materialmen, material suppliers, contractors, subcontractors, architects, engineers or others, for the purpose of satisfying bills incurred in construction, repair, alteration or improvement of any premises or that engages in the processing or approval of any mechanic’s lien release, voucher or authorization for payment of a labor bill, or material bill where such bill is incurred in the construction, repair, alteration or improvement of any premises.

[NRS 627.050](#). A mortgage company that disburses loan proceeds in increments to pay bills incurred in the

construction to which the loan relates appears to act as a construction control as defined in [NRS 627.050](#). We note, however, that a “lender” under [NRS ch. 627](#) includes “any person doing business in the State of Nevada, providing moneys to be used in the payment of bills incurred in the construction, repair, alteration or improvement of any premises.” [NRS 627.100](#). The Construction Control Law does not apply to “[a] lender of construction loan moneys, provided that he disburses the funds directly to a contractor authorized by the borrower to do the work, or disburses the funds directly to the owner of the premises.” [NRS 627.210](#)(4). We conclude, therefore, that a mortgage company disbursing construction loan proceeds in increments to the contractor or owner of the premises is exempt from the provisions of [NRS ch. 627](#).

It appears that mortgage companies doing business in Nevada are not prohibited by any provision of chapters 627 or 645A of NRS from maintaining construction control or escrow accounts that disburse funds for construction to the contractor or owner of the premises. The question remains, however, whether the practice is authorized by the license issued under [NRS ch. 645B](#).

A mortgage company license entitles its holder to engage in the activities authorized in [NRS ch. 645B](#). [NRS 645B.020](#)(3). [NRS 645B.175](#)(1) provides in part:

1. All money received by a mortgage company from a person to acquire ownership of or a beneficial interest in a loan secured by a lien on real property, must:

(a) Be deposited in:

(1) An insured depository financial institution; or

(2) An escrow account which is controlled by a person who is independent of the parties and subject to instructions regarding the account which are approved by the parties.

Funds held in trust pursuant to this section must be released:

(a) Upon completion of the loan, including proper recordation of the respective interests or release, or upon completion of the transfer of the ownership or beneficial interest therein, to the debtor or his designee less that amount due the mortgage company for the payment of any fee or service charge;

(b) If the loan or the transfer thereof is not consummated, to the person who furnished the money held in trust; or

(c) Pursuant to any instructions regarding the escrow account.

[NRS 645B.172](#)(2). Subsections 3 and 4 of this statute impose similar requirements on the handling of funds paid to the mortgage company in payment of the loan. Licensees must submit to the commissioner of the Division (“commissioner”) an audited financial statement within 60 days after the close of their latest fiscal year if they maintain any accounts described in [NRS 645B.175](#)(1), [NRS 645.050](#)(2) and (3).

We note that your question does not concern the practice of a mortgage company holding funds pending the completion, or closing, of the loan itself. We believe that [NRS 645B.175](#)(1)(a)(1), authorizing the company to deposit funds to be used in making loans in an insured depository financial institution until the completion or transfer of the loan as described in subsection (2)(a) of that statute, permits a mortgage company to hold funds not yet subject to a particular, completed loan, subject to the time limitation described in subsection (6) of the statute. Alternatively, the company may deposit such funds directly into “[a]n escrow account which is controlled by a person who is independent of the parties and subject to instructions regarding the account which are approved by the parties.” [NRS 645B.175](#)(1)(a)(2).

Upon completion of the loan, however, the mortgage company’s obligation changes. At that point, the funds must be “released . . . to the debtor or his designee . . .” or “[p]ursuant to any instructions regarding the escrow account.” [NRS 645B.175](#)(2)(a) and (c). We believe that the escrow account described in subsection (2)(c) refers to the escrow account into which funds were initially deposited pursuant to subsection (a)(1) and (2) of the statute. These two sections, when read together, authorize the loan proceeds to be released pursuant to escrow instructions only if they were initially deposited into an escrow account established pursuant to subsection (1)(a)(2) of [NRS 645B.175](#). If the funds were initially held by the mortgage company in an insured depository financial institution pursuant to subsection (1)(a)(1) of the statute, they must be released upon completion or transfer of the loan “to the debtor or his designee.” [NRS 645B.175](#)(2)(a).

Although we believe this conclusion is compelled by the plain language of the statute, it does not end our inquiry. The question remains whether the mortgage company may be considered “a person who is independent of the parties” as described in [NRS 645B.175](#)(1)(a)(2). If so, the company may act as escrow agent and control the disbursement of funds in the account described in that section “subject to instructions regarding the account which are approved by the parties.”

In addition, the question arises whether a mortgage company may properly be deemed a designee of the borrower under [NRS 645B.175\(2\)\(a\)](#) authorized to hold funds on the borrower's behalf after completion of the loan. To resolve these issues, we refer to several accepted rules of statutory construction.

The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. *McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 650, 730 P.2d 438 (1986). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the

legislature's intent. *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17, 19 (1984). Where a statute is capable of being understood in two or more senses by reasonably informed persons, it is ambiguous and should be construed "in line with what reason and public policy would indicate the legislature intended." *Robert E. v. Justice Court*, [99 Nev. 443](#), 445, 664 P.2d 957 (1983).

Where a statute is ambiguous, the meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it. *McKay*, at 650-51. The entire subject matter and policy of the law may be involved as an interpretive aid. *Id.* Words in a statute having a well-defined meaning at common law are presumed to be used in their common law sense, unless it clearly appears that another meaning was intended. *Moser v. State*, [91 Nev. 809](#), 544 P.2d 424 (1975). Statutes should always be construed to avoid an absurd result. *State v. Webster*, [102 Nev. 450](#), 726 P.2d 831 (1986).

Applying these rules to the question posed, we conclude that a mortgage company may not properly be viewed as "a person who is independent of the parties" as required by [NRS 645B.175\(1\)\(a\)\(2\)](#). In those situations where the mortgage company acts as the lender, it could not, by the plain language of the statute, be considered "independent of the parties." Where the mortgage company acts only as the agent of the lender or borrower, it is also not independent. At common law, an escrow did not exist if the object purportedly held in escrow was delivered to an agent of the intended recipient. *See State, By Pai v. Thom*, 563 P.2d 982, 987 (Haw. 1977); *see also*, Nev. Op. Att'y Gen. No. 84 (October 24, 1963). We can discern no intent to change this aspect of the common law definition of escrow. We conclude, therefore, that a mortgage company may not control the escrow account described in [NRS 645B.175\(1\)\(a\)\(2\)](#) and (2)(c). If funds received by a mortgage company are to be

deposited into escrow pursuant to this statute, the account must be controlled by an escrow agent who is independent of the mortgage company whether it is a direct party to the loan or an agent of one of the parties.

We also conclude that a mortgage company may not act as the debtor's designated recipient of the loan proceeds under subsection (2)(a) of [NRS 645B.175](#). Such an interpretation may be permitted by the literal language of the statute; however, we believe it produces an absurd result not intended by the legislature.

The legislature intended to limit the circumstances under which mortgage companies may hold money belonging to others and to require strict accountability for money so held. Money held for making loans must be kept separate from money belonging to the mortgage company and money received in payment of loans. [NRS 645B.175\(1\)\(b\)](#). Money received for the payment of taxes and insurance on property securing loans made by the company must be kept separate from all other funds held by the company. [NRS 645B.170](#); [645B.180](#). Where the legislature intended to authorize a mortgage company to hold money belonging to others, it did so expressly and included a requirement that the company be fully accountable to the commissioner for the money so held.

The legislature in [NRS 645B.175\(1\)](#) and (2) specifically limited the circumstances under which a mortgage company may hold funds received for making loans in a non-escrow trust

account to the time pending completion or transfer of the loan. Moreover, funds may be held in that status for no more than 45 days. If, within this period, the loan is not consummated or an escrow account opened in connection with the loan, the money must be returned to the investor within 24 hours. [NRS 645B.175\(6\)](#). Funds so held must be reflected in an annual, audited financial

statement, a copy of which is submitted to the commissioner at the same time it is delivered to the company. [NRS 645B.050\(2\)\(3\)](#).

We conclude that by specifically limiting the circumstances under which a mortgage company may hold funds received for making loans in a non-escrow trust account to the time pending completion of the loan, and by establishing strict accounting procedure with respect to money so held, the legislature intended to prohibit a mortgage company from controlling the funds after completion of the loan. Had the legislature intended to authorize a mortgage company to maintain a special account for the disbursal of a completed construction loan, an account not subject to the strict accounting procedures established for other types of accounts regulated by the statute, it would have done so expressly.

CONCLUSION

Although not prohibited by any provision of the Independent Escrow Agent's Act, [NRS ch. 645A](#), or the Construction Control Law, [NRS ch. 627](#), from maintaining a construction control or escrow account to disburse the funds of a completed construction loan, mortgage companies may not engage in such activity unless it is authorized by the mortgage company license issued to them under [NRS ch. 645B](#). Pursuant to [NRS 645B.175\(1\)](#) and (2), mortgage companies may not act as escrow agents or otherwise control funds which are the subject of completed construction loans. If the proceeds of completed loans are disbursed pursuant to escrow instructions, the escrow must be administered by an escrow agent who is independent of the mortgage company. In addition, a mortgage company may not control such funds by being designated as the recipient of the loan proceeds by the debtor, as such an interpretation would defeat the

legislature's intent to limit the circumstances under which a mortgage company may hold funds belonging to others and to require strict accountability as to funds so held.

Sincerely,

BRIAN McKAY
Attorney General

By: Douglas E. Walther
Deputy Attorney General

OPINION NO. 89-7 FIRE MARSHAL; LICENSES; COUNTIES: Geographic restrictions contained in [NRS 477.030](#) do not limit the authority of the State Fire Marshal to enforce his regulations governing fire protection and equipment licensing. The State Fire Marshal may initiate a licensing investigation in a jurisdiction in a county with a population over 25,000 on his own initiative or in response to a citizen complaint without a request for assistance from the chief officer of the fire department.

Carson City, May 31, 1989

Mr. Rex Jordan, State Fire Marshal, Department of Commerce, Capitol Complex, Carson City,
Nevada 89710

Dear Mr. Jordan:

You have sought our advice in response to several issues which have arisen regarding the authority of your office to enforce its licensing regulations throughout the state.

QUESTION ONE

Do the geographic restrictions contained in [NRS 477.030](#) limit the authority of the State Fire Marshal to enforce his regulations governing fire protection and equipment licensing which were promulgated pursuant to [NRS 477.033](#)?

ANALYSIS

The State Fire Marshal, pursuant to his authority under [NRS 477.033](#), issues licenses for the maintenance, installation or sale of fire extinguishers, fire alarm systems or fire sprinkler systems; the use of explosives in commercial construction; and commercial firework displays.
NRS

477.033(1). Subsection three of the statute authorizes the fire marshal to conduct inspections, examinations and hearings prior to issuing a license. The State Fire Marshal has promulgated licensing regulations pursuant to [NRS 477.033](#).

You are concerned that your office's ability to fulfill the licensing obligations under [NRS 477.033](#) and the regulations promulgated pursuant thereto may be diminished by [NRS 477.030](#)(1). That statute states:

Except as provided in this section, the state fire marshal shall enforce all laws and adopt regulations relating to:

- (a) The prevention of fire.
- (b) The storage and use of combustibles, flammables and fireworks.
- (c) The storage and use of explosives in any commercial construction, but not in mining or the control of avalanches.
- (d) The safety, access, means and adequacy of exit in case of fire from mental and penal institutions, facilities for the care of children, foster homes, residential facilities for groups, facilities for intermediate care, nursing homes, hospitals, schools, all buildings, except private residences, which are occupied for sleeping purposes, buildings used for public assembly and all other buildings where large numbers of persons work, live or congregate from time to time for any purpose
- (e) The suppression and punishment of arson and fraudulent claims or practices in connection with fire losses.

The regulations of the state fire marshal apply throughout the state, but, except with respect to state-owned or state-occupied buildings, his authority to enforce them or conduct investigations under this chapter is limited to those counties whose population is less than 25,000, except in those local

jurisdictions in other counties where he is requested to exercise that authority by the chief officer of the organized fire department of that jurisdiction.

Subsection (6) of [NRS 477.030](#) gives the State Fire Marshal primary authority to investigate fires in counties of less than 25,000 if a death results or the fire is of a suspicious nature, and secondary authority to conduct such investigations in counties with populations over 25,000.

The licensing functions enumerated in [NRS 477.033](#) are within the exclusive authority of the State Fire Marshal, while the enforcement of regulations enacted by the fire marshal pursuant to [NRS 477.030](#) is shared by the State Fire Marshal and the organized fire departments of jurisdictions in counties with populations over 25,000. By the terms of the applicable statutes, as well as general principles of administrative law, the fire marshal's duties in the area of licensing are not delegable. See *Kerr-McGee Nuclear Corporation v. New Mexico Environmental Improvement Board*, 637 P.2d 38 (N.M. 1981); *Anderson v. Grand River Dam Authority*, 446 P.2d 814 (Okla. 1968). Thus, it would appear that the organized fire departments of jurisdictions in counties with populations over 25,000 may not perform the State Fire Marshal's responsibilities for licensing under [NRS 477.033](#) and its supporting regulations.

Because of the ambiguity and possible conflict between the two statutes, we have reviewed the available legislative history of pertinent amendments to them. See *Baliotis v. Clark County*, [102 Nev. 568](#), 570, 792 P.2d 1338 (1986). The history does not support an argument that the geographic restriction contained in [NRS 477.030](#) is a limitation of the State Fire Marshal's licensing authority. In 1987, that restriction was changed from counties with populations of less than 100,000 to counties with populations of less than 25,000. In 1987 Nev. Stat. ch. 816 § 1. In

committee testimony on the amendment, those supporting it spoke at length regarding how the change would prevent duplicative plan checks and building inspections of fire safety systems in counties with populations over 25,000. *S.B. 62: Hearing Before the Senate Committee on Human Resources and Facilities*, 64th Sess. of the Nev. Legis. (1987). There is no discussion in the record which evidences an intent to limit the State Fire Marshal's licensing authority. In fact, the only reference made during the hearing to the State Fire Marshal's licensing function was a passing remark made by the fire marshal himself regarding the impact of the amendment on his ability to check plans for sprinklers and alarm systems, both regulated industries. *Id.*

Our conclusion that [NRS 477.030](#)(1) does not limit the State Fire Marshal's licensing authority is supported by the terms of [NRS 477.033](#)(3), which authorize the State Fire Marshal to conduct an inspection before issuing a license. Such an inspection, as part of a licensing investigation, is precluded by [NRS 477.030](#)(1) if its geographic restrictions are deemed to limit the fire marshal in the exercise of his licensing authority. This reading of the statutory provisions fails to give full effect to [NRS 477.033](#)(3), and violates a basic tenet of statutory construction that statutes in the same area should be harmonized whenever possible. *Accord First American Title Co. v. State*, [92 Nev. 804](#), 806, 543 P.2d 1344 (1975).

There are areas of overlap in subject matter between [NRS 477.030](#) and [477.033](#), most notably regarding the use of explosives in commercial construction and the use of fireworks for commercial displays, as well as in the general area of "fire prevention." Thus, it is possible that a situation could arise where both the State Fire Marshal and an organized fire department in a county with a population of more than 25,000 would be interested in a certain incident. The State Fire Marshal's

involvement would be with an eye toward possible discipline of a licensee, while the fire department would be investigating to determine if there was a violation of the regulations promulgated pursuant to [NRS 477.030](#). Provided the State Fire Marshal remains cognizant of the limitations to his authority in counties with populations of more than 25,000 and confines himself strictly to those matters which involve his licensing function, his activities do not violate the geographic restrictions contained in [NRS 477.030](#) and infringe on the authority granted local fire departments in large counties.

CONCLUSION

The geographic restrictions contained in [NRS 477.030](#) do not limit the authority of the State Fire Marshal to enforce his regulations governing fire protection and equipment licensing.

QUESTION TWO

Is a request for assistance from the chief officer of an organized fire department of a jurisdiction in a county with a population over 25,000 a prerequisite to the initiation of a licensing investigation by the State Fire Marshal in that jurisdiction?

ANALYSIS

As discussed in the analysis of question one, licensing is a non-delegable function which is within the exclusive statutory authority of the State Fire Marshal. Therefore, it is our opinion that a request for assistance to the State Fire Marshal from a local fire chief in a large county is not necessary for the State Fire Marshal to begin an investigation of a licensee. This is so regardless of whether the State Fire Marshal is acting on a citizen complaint or on his own volition. We would caution you again, however, that your activities in counties with populations over 25,000 must be limited strictly to

licensing concerns in order not to encroach impermissibly on the authority of the local organized fire department of a particular jurisdiction.

CONCLUSION

A request for assistance from the chief officer of an organized fire department of a jurisdiction in a county with a population over 25,000 is not a prerequisite to the initiation of a licensing investigation by the State Fire Marshal in that jurisdiction.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 89-8 SCHOOL DISTRICT; SCHOOL ADMINISTRATOR; POST-PROBATIONARY STATUS; COLLECTIVE BARGAINING: A change of administrative position of a school administrator within the same school district does not alter his postprobationary status. An administrator's postprobationary status is not subject to modification by collective bargaining.

Carson City, May 10, 1989

Dr. Robert E. Wentz, Superintendent of Schools, Clark County School District, 2832 East

Flamingo Road, Las Vegas, Nevada 89121

Dear Mr. Wentz:

You have asked this office for an opinion relating to the probationary and postprobationary status of administrators in your school district. Questions have arisen relating to administrative employees who perform satisfactorily the required probationary period and are then transferred or promoted to different positions in the administrative ranks. The past practice of your school district is to treat the administrative employment subsequent to the probationary period as postprobationary regardless of the administrative position assigned.

QUESTION ONE

Does a school district administrator have to serve a probationary employment period each time he or she is placed in a different administrative position within the same school district?

ANALYSIS

The statutory scheme relating to the employment of school administrators and teachers makes a distinction between a probationary employee and a postprobationary employee. During the first year of employment, the

administrator has probationary status and no right to subsequent employment. [NRS 391.3197\(1\)](#). Thereafter, pursuant to subsection 3 of [NRS 391.3197](#), “[a] probationary employee who has received a notice of reemployment from the school district is entitled to be a postprobationary employee in the ensuing year of employment.” Your question addresses the hypothetical circumstance where the offer of reemployment is to an administrator in the same school district but in a different administrative position from the one he or she had. For example, a successful probationary employee is employed as an assistant principal of school “A” and is offered reemployment in the ensuing year as principal of school “A” or is offered reemployment as principal of school “B” within the same school district.

The employing authority of a school district is the local board of trustees. [NRS 391.100](#) and [NRS 391.120](#). The board both hires and designates the capacity of employment. Subsection 3 of [NRS 391.3197](#) does not limit the board’s offer of reemployment to a probationary employee to the duties performed in the probationary status. Moreover, subsection 6 of [NRS 391.3197](#) provides that the probationary employee who is an administrator and not reemployed in that capacity may accept a contract as a teacher for the ensuing year.

In the absence of language of limitation in the statute and the absence of any regulations to the contrary, the administrator is not required to serve an additional probationary employment period each time his or her assignment as an administrator changes, provided that employment continues in the same school district.

We note that [NRS 391.31965](#) provides that, “[a]ny postprobationary employee of a school district of Nevada who is employed by another school district shall serve the probationary period required by

subsection 1 of [NRS 391.3197](#).” In limiting the requirement of serving a second probationary requirement only to employees who change school districts, the legislature has provided evidence of its intent that employees who do not change school districts are not required to serve a second probationary period. “[W]hen the legislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates . . .” *Ex Parte Arascada*, [44 Nev. 30](#), 189 P. 619 (1920). The legislature is currently considering

A.B. 517 which would allow a postprobationary employee of any school district of Nevada to continue in that status when employed by another school district.

CONCLUSION

The offer of reemployment required by [NRS 391.3197\(3\)](#) as a condition to achieving postprobationary status by an administrator may be in any administrative capacity and is not limited to the same duties held in the probationary period. A change in administrative duties or administrative positions subsequent to achieving postprobationary status does not result in the loss of that status, provided that the subsequent position is with the same school district.

QUESTION TWO

Is the postprobationary administrator's status as such subject to modification by collective bargaining?

ANALYSIS

Before addressing the question, a distinction must be made between the moment the employee has completed the probationary period and is offered reemployment and any time after he has achieved and is maintaining postprobationary status. With these distinctions in mind, we can examine [NRS 391.3116](#), which provides:

The provisions of [NRS 391.311](#) to [391.3197](#), inclusive, do not apply to a teacher, administrator, or other licensed employee who has entered into a contract with the board negotiated pursuant to chapter 288 of NRS if the contract contains separate provisions relating to the board's right to dismiss or refuse to reemploy the employee or demote an administrator.

An employee can either be postprobationary or probationary. See [NRS 391.311](#). If the contract, bargained for pursuant to chapter 288 of NRS, relates to the board's right to dismiss or refuse to reemploy the employee or demote the administrator, that contract modifies and supersedes the statutory provision of [NRS 391.3197](#). Pursuant to [NRS 391.3197\(1\)](#), the board has an unfettered right to refuse to reemploy the probationary employee. [NRS 391.3116](#) permits this right to be superseded by a collective bargaining agreement entered into pursuant to chapter 288 of NRS.

It is a more difficult analysis to decide whether the bargained for agreement can supersede [NRS 391.3197\(3\)](#) as it relates to changing the status of the administrator *from* postprobationary *to* probationary. Since such a change in status is neither a dismissal nor a refusal to reemploy, we must examine whether it is a demotion of an administrator.

[NRS 391.311\(3\)](#) defines "demotion" to mean the demotion of an administrator to a position of lesser rank, responsibility or pay and does not include transfer or reassignment for the purpose of an administrative reorganization.

The terms "probationary" and "postprobationary" denote the status of the employee, without regard to the position, responsibility or pay of the employee. For example, if a postprobationary principal is reassigned to assistant principal, his status as a

postprobationary employee does not change. Since a change from postprobationary to probationary status would not constitute a "demotion" as that term is used in [NRS 391.311\(3\)](#), the language of [NRS 391.3116](#) does not authorize the modification of postprobationary status of an administrator by collective bargaining.

CONCLUSION

The statutorily unfettered right of the board to refuse to reemploy a probationary employee may be superseded by a collective bargaining agreement pursuant to [NRS 391.3116](#). However, the postprobationary status of an administrator is not subject to modification by collective bargaining, provided that the administrator continues to be employed in an administrative position by the same school district.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie M. Crossley
Deputy Attorney General

OPINION NO. 89-9 SECURITIES; SECRETARY OF STATE: The term “securities exchange” in [NRS 78.521](#) does not include stock traded over the counter.

Carson City, June 27, 1989

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

Dear Ms. Del Papa:

This is in response to your request for an opinion from this office concerning the statutory provision governing the appraisal rights of certain shareholders under [NRS 78.521](#).

FACTS

According to the facts provided to us, a mining corporation, incorporated under Nevada law, is proposing a statutory merger under which it will be the surviving corporation. The corporation has approximately 14,850,000 common shares issued and outstanding and 9,900 record shareholders. Apparently a small percentage of the shares are what is known as “restricted securities.” This means that certain restrictions are placed on downstream resales of these securities because they have been issued pursuant to the private placement exemption from registration under the Securities Act of 1933. *See* 15 U.S.C.A. § 77d(2) and 17 C.F.R. § 230.144. The remaining, and majority of, shares are traded in the over the counter market through a computerized price quotation system developed by the National Association of Securities Dealers, Inc. (“NASD”), known as “NASDAQ.” The company seeks an exemption from the appraisal requirements of [NRS 78.521](#) based on the fact that its shares are traded through the National Market System and NASDAQ.

QUESTION

Does the term “securities exchange,” as used in [NRS 78.521](#), include the National Market System and NASDAQ?

ANALYSIS

The term “securities exchange” is not defined in chapter 78 of NRS, which governs private, for profit corporations. [NRS 78.521](#) was enacted by the Nevada Legislature in 1969. 1969 Nev. Stat. ch. 538 § 1. The NASD did not introduce the NASDAQ system until 1971. Moreover, the National Market System (“NMS”), discussed below, was not introduced until 1982. Given these facts it would be difficult, if not impossible, to argue that the legislature considered either NASDAQ or NMS a securities exchange when it enacted [NRS 78.521](#) in 1969.

Essentially, there are two types of stock markets operating in the United States. The “exchange” market and the “over-the-counter” (“OTC”) market. NASDAQ and NMS are components of the OTC market which is not a traditional securities exchange. The OTC market is a nationwide network of securities brokers and dealers who buy and sell securities which, for the most part, are not listed on a securities exchange, for instance the New York Stock Exchange or the Pacific Stock Exchange. The OTC market has no centralized trading floor as do the exchanges. It is comprised primarily of securities dealers, someone buying or selling securities for his or her own account, who buy and sell on a stock inventory basis. Prior to 1971, a broker who received a customer order would “shop the street” to find the best price quotation for his or her customer. This was usually done by calling dealers making a market in a particular stock or by referring to printed price quotation sheets, for instance the “pink sheets.” As one can imagine, this was not the most efficient system. The NASDAQ system was introduced in 1971 to provide up-to-the-minute stock price quotations. A trader can call the

quotes for a particular issue on a computer terminal, determine the most favorable quote, call that dealer, and execute the trade.

The NMS is composed of the most active stocks in the NASDAQ system. The listing criteria for NMS stocks is more stringent than it is for other NASDAQ stocks, but still less stringent than those on the New York Stock Exchange.

The definition of the term “exchange” in the Securities and Exchange Act of 1934 does not include the OTC market. *See* 15 U.S.C.A. § 78c(a)(1); *see also* *LTV, Fed. Credit Union v. UMIC Gov’t Sec., Inc.*, 523 F. Supp. 819 (1981), *aff’d*, 704 F.2d 199 (5th Cir.), *cert. denied*, 464 U.S. 852 (1983). Moreover, an exchange, as the name implies, is a central clearinghouse for the trading of its securities.

Legal resolution of this issue turns on the rules of statutory construction. The leading rule of statutory construction looks to the intent of the legislature in enacting the statute. *McKay v. Bd. of Supervisors*, [102 Nev. 644](#), 650, 730 P.2d 438 (1986). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature’s intent. *Thompson v. District Court*, [100 Nev. 352](#), 354, 683 P.2d 17 (1984). Where a statute is capable of being understood in two or more senses by reasonably informed persons, it is ambiguous and should be construed “in line with what reason and public policy would indicate the legislature intended.” *Robert E. v. Justice Court*, [99 Nev. 443](#), 445, 664 P.2d 957 (1983). When a statute is ambiguous, the meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it. *McKay*, 102 Nev. at 650-51. The entire subject matter and policy of the law may be involved as an interpretive aid. *Id.*

Applying these rules to the question posed, we conclude that the term “securities exchange” does not include NMS or NASDAQ. When the legislature enacted [NRS 78.521](#), neither one existed. Further, both are merely components of the OTC market which is not an exchange.

CONCLUSION

The term "securities exchange," as used in [NRS 78.521](#), does not include stocks listed in the NMS or traded through NASDAQ.

Finally, you have asked an additional question; however, it is predicated on this office reaching the opposite conclusion above. Consequently, we need not address it.

Sincerely,

BRIAN McKAY
Attorney General

By: J. KENNETH CREIGHTON
Deputy Attorney General

OPINION NO. 89-10 EDUCATION; PUBLIC SCHOOLS; SCHOOL DISTRICTS: Local Boards of School Trustees may designate parent as administrator of proficiency examination and home as the site of the examination given for the purpose of qualifying a child for exemption from compulsory school attendance, provided certain conditions are met. A child is not excused from attendance at public school until he takes the examination.

Carson City, July 28, 1989

Mr. Thomas J. Moore, Esq., Board Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89121

Dear Mr. Moore:

You have asked our opinion concerning implementation of the amended regulations concerning children who are excused from compulsory attendance at public schools.

BACKGROUND

The regulations relating to children who are exempted from compulsory school attendance and taught at home were amended effective March 10, 1989. The responsibility for implementation lies with the local school boards of trustees. You have sought our advice, on behalf of the Board of School Trustees of Clark County School District, regarding the administration of tests of educational progress required of children excused from compulsory attendance at public schools. The previous practice in the Clark County School District has been to mail the proficiency tests to the parent for administration, in the home, without supervision by the district.

QUESTION ONE

May a parent be designated as the “administrator of the examination” and the home be the “location” where the examination is to be given in order to comply with [NAC 392.065\(5\)](#)?

ANALYSIS

[NAC 392.065\(3\)](#) provides that “[t]he board of trustees of the county school district shall require proof of reasonable educational progress as a condition for renewing the grant of excuse from compulsory attendance at public school.” Subsection (4) specifies that the proof of progress must be in the form of proficiency and achievement examinations as delineated in [NRS 389.015](#). [NAC 392.065\(5\)](#), as amended, requires that:

Any examination given pursuant to this section must be administered in the manner generally prescribed for examinations of the kind, without regard to the fact that the student being tested is excused or seeks to be excused from compulsory attendance. The board of trustees of the district shall select the administrator of the examination and the location where the examination is to be given, giving consideration to the recommendations of its staff and a representative of parents whose children are excused from attendance under the provisions of [NAC 392.015](#) to [392.075](#), inclusive (emphasis added).

The students to be tested include students at the elementary and secondary levels. The tests used necessarily vary in subject, complexity, and time. If the language of a statute or regulation is plain and unambiguous, it is not subject to construction. *Nevada Power Co. v. Public Serv. Comm’n*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). The plain language of the regulation states that the decision as to who will

administer the examination and where it shall be given shall be made by the local board of school trustees, giving consideration to the recommendations of the board’s staff and a representative of “home school” parents. However, the choice of the local school trustees is not without limitation.

Though flexibility is inherent in the prerogative of the local school board, its decision must be guided by the requirement in [NAC 392.065\(5\)](#) that “the examination be administered in the manner generally prescribed for examinations of the kind, without regard to the fact that the student being tested is excused or seeks to be excused from compulsory attendance,” and by [NRS 389.015](#), which is referenced in subsection 4 of [NAC 392.065](#). Subsection 4 of [NRS 389.015](#) requires that the test and answers are to be kept confidential and disclosed only to the extent necessary for administering and evaluating the examination.

These kinds of examinations are generally administered in the public schools by licensed teachers or school administrators and staff who have received specific training in the proper administration of tests. Such training is inherent in the training required to qualify as a licensed teacher in Nevada. Though the test given may vary according to the age or grade of the student, and in some cases necessarily must be given in subparts over several days, all the tests have specific instructions for the administrator to follow, and specific times to complete the test. The plain language of the regulation does not allow the manner prescribed for the administration of these kinds of examinations to be altered merely because the student is taught at home.

In our opinion, the local school board trustees may allow a parent to administer the examination only if the parent is formally trained in the administration of tests *and* there are additional precautions to protect the integrity and security of the tests and

the results. If a parent formally trained in test procedures were designated the administrator of the test, this would require, at the minimum, that school district personnel control the environment and the integrity of the test by personal delivery and return pickup of the test and full observation

of the test-taking process.

Applying the same standards of flexibility and assurance of the security and integrity of the test to the question of the location of the test, the local school trustees are not prohibited from designating the home as the location provided that there are safeguards.

CONCLUSION

A parent may be designated the administrator of the examination only if the parent is formally trained in test administration *and* the school district personnel control the test-taking process with close custody of the test and the answers before, during and after the examination. The home may be designated the location if there are safeguards to maintain the integrity and security of the examination during the examination.

QUESTION TWO

What are the outer limits of [NAC 392.065\(5\)](#) regarding who the board can designate as the “administrator” and what place the board can designate as the “location” for purposes of compliance with examination requirements of that subsection?

ANALYSIS AND CONCLUSION

It is not possible for this office to speculate on all possible arrangements that school trustees may wish to designate for the implementation of [NAC 392.065\(5\)](#). However, in our opinion, the intention of the regulation to allow the maximum flexibility consistent with the security and integrity of the test

and test results, and the requirement that the administration of the tests be “in the manner generally prescribed for examinations of the kind, *without regard* to the fact that the student being tested is excused or seeks to be excused from compulsory attendance” (emphasis added), [NAC 392.065\(5\)](#), precludes permitting a return to the previous practice of Clark County School District of sending the test to the home and allowing the parent to administer the test without any control by the school district.

In order that the provisions of the regulation be implemented properly, the school district could institute some kind of training program for parents who may be designated the administrators of the examination. This training would have to be completed before the parents could be designated formally as administrators of the examination. Furthermore, these parents would work with school district personnel to ensure that the safeguards to maintain the integrity and security of the examination are accomplished.

QUESTION THREE

What will be the effect on the students, if any, if the school district does not administer, by the beginning of the 1989-90 school year, examinations required under [NAC 392.065](#) to those students seeking an exemption from compulsory public school attendance?

ANALYSIS

“The grant of an excuse from compulsory attendance at public school is effective for one school year.” [NAC 392.065\(1\)](#). Proof of reasonable educational progress is a required condition of renewing the excuse. [NAC 392.065\(3\)](#). The proof shall be in the form of proficiency examinations. See [NAC 392.065\(4\)](#) and [NRS 389.015](#).

A child seeking the grant of an excuse for the first time must be tested before the excuse may be granted. [NAC 392.065](#)(2). It is a rule of statutory construction that “shall” is mandatory language unless a different construction is needed to carry out the intent. *Givens v. State*, [99 Nev. 50](#), 54, 657 P.2d 97 (1983). The regulation is unequivocal in setting the condition for the exemption from compulsory public school attendance. If a child fails to be tested pursuant to the regulation, he or she is not exempt and must attend public school until legally excused.

The failure of the school district to administer the tests prior to the beginning of the school year does not waive the condition precedent to the grant of the excuse nor waive the statutory requirement that school age students be attending public school unless legally excused.

CONCLUSION

If students seeking to be excused from compulsory school attendance do not take the examinations required under [NAC 392.065](#) prior to the beginning of the school year, they are not excused from attendance at public school and must attend until they have taken the examination which discloses that they are making reasonable educational progress.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie M. Crossley
Deputy Attorney General

OPINION NO. 89-11 SALES; TAXATION: Department of Taxation may not credit or refund sales tax overpayments to retailer who collects tax from customers, since retailer does not bear economic burden of tax. Question 2(b) of Nev. Op. Att’y Gen. No. 61 (June 5, 1959) is overruled.

Carson City, August 28, 1989

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

Dear Mr. Comeaux:

You have requested our assistance in resolving certain questions which have arisen regarding credits and refunds of the sales tax.

BACKGROUND

A large national corporation collected sales tax on the sale of computer software to their Nevada customers for a year and a half, during which time it was appealing the assessment of taxes on those sales by the Department of Taxation. The final decision of the department regarding the taxability of software was favorable to the corporation. Therefore, the corporation

has filed a claim for credit or refund of the tax paid during the year and a half. You have advised us in your opinion request that you believe the decision of the Nevada Supreme Court in *State v. Obexer & Son, Inc.*, [99 Nev. 233](#), 660 P.2d 981 (1983), controls in this situation, but because you believe that decision conflicts with a 1959 opinion from this office, you have sought our assistance in resolving the matter.

QUESTION

May the Department of Taxation credit or refund erroneously or illegally collected overpayments of the sales tax to a retailer who collects the tax from his customer, and transmits the money to the department,

but who does not bear any of the economic burden of the tax?

ANALYSIS

Refunds of overpayments of the sales and use tax are statutorily dealt with by [NRS 372.630](#), which provides:

1. If the department determines that any amount, penalty or interest has been paid more than once or has been erroneously or illegally collected or computed, the department shall set forth that fact in the records of the department and certify to the state board of examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom paid. If approved by the state board of examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person, or his successors, administrators or executors.

2. Any overpayment of the use tax by a purchaser to a retailer who is required to collect the tax and who gives the purchaser a receipt therefor pursuant to sections 34 to 38, inclusive, of the Sales and Use Tax Act (chapter 397, Statutes of Nevada 1955) and [NRS 372.210](#) to [372.225](#), inclusive, must be credited or refunded by the state to the purchaser.

In *State v. Obexer & Son, Inc.*, [99 Nev. 233](#), 660 P.2d 981 (1983), the court considered a claim for refund of overpayments of the use tax by an out-of-state corporation, for sales to Nevada customers, during a time period when Nevada did not participate in the Multi-State Tax Compact. Noting that Nevada has obviated the common law defense of voluntary payment by the enactment of [NRS 372.630](#), the supreme court found that the refund statute permitted recovery “only

where the taxpayer himself has borne the financial burden of the tax. If the taxpayer making the claim has collected the tax from his customers, he has suffered no loss or injury, and is not entitled to a credit or refund even if the tax was paid erroneously.” 99 Nev. at 238 (citations omitted). Going on to discuss the factual situation before it, the court stated that “Obexer was merely a conduit for the revenue and would be unjustly enriched if the State were forced to return to it all of the taxes that it collected from its Nevada customers.” *Id.*

Because *Obexer* dealt with a refund of use tax overpayments, rather than sales tax overpayments, its holding does not strictly control the situation at hand. The general principle upon which that decision is based, however, is as applicable to sales tax refunds as it is to use tax refunds. Therefore, a retailer who has collected sales tax from his customers, but who has not

borne the economic burden of the tax himself is not entitled to a refund or credit pursuant to [NRS 372.630](#). Other courts which have considered the same issue have reached a similar result, concluding that absent loss or injury, a taxpayer lacks standing to seek a refund. *Washington Plaza Associates v. State Board of Assessment Appeals*, 620 P.2d 52, 53 (Colo. Ct. App. 1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So. 2d 529, 532 (Fla. 1974); *W.F. Monroe Cigar Co. v. Department of Revenue*, 365 N.E.2d 574, 574 (Ill. Ct. App. 1977); *GTE Communication Systems Corp. v. Department of Revenue*, 744 P.2d 638, 640 (Wash. Ct. App. 1987).

In your opinion request letter, you question whether the issuance of a receipt by the retailer to the customer for the sales tax paid affects the retailer's right to a refund. The issuance of a receipt is an important part of the assessment and payment of the use tax. See 1955 Nev. Stat. ch. 397 § 36; [NRS 372.215](#), [372.630](#)(2); 99 Nev. at 236. It is not so important to a sales tax refund analysis though. The dispositive point in determining whether a retailer or his customer is entitled to a refund of

sales tax erroneously or illegally paid is ascertaining which party bore the economic burden of the tax. In a normal situation, the customer will have borne the burden. In audit situation where the department has made a deficiency assessment against a retailer, it is the retailer who has actually paid the tax and borne the economic burden and therefore is entitled to the refund.

As already mentioned, you expressed a concern that the result reached by the Nevada Supreme Court in *State v. Obexer & Son, Inc.* was in conflict with an official opinion of this office that was issued in 1959. See Nev. Op. Att'y Gen. No. 61 (June 5, 1959). We have reviewed that opinion and now expressly overrule our conclusion to question 2(b), insofar as it may have survived the supreme court's enunciation in *Obexer* of the principle that tax refunds under Nevada law are permitted "only where the taxpayer himself has borne the financial burden of the tax." 99 Nev. at 238.

CONCLUSION

The Department of Taxation may not credit or refund sales tax overpayments to a retailer who collected the tax from his customers and transmitted the money to the department since the retailer merely acted as a conduit for the revenue and did not assume any of the economic burden of the tax. Question 2(b) of Nev. Op. Att'y Gen. No. 61 (June 5, 1959), which opined that a retailer was entitled to a refund of taxes actually paid by his customers, is overruled.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 89-12 LOCAL GOVERNMENT; SALES; TAXATION: Retailer may not deduct "port fees" paid to local government authority for privilege of doing business from gross receipts for sale of taxable tangible personal property.

Carson City, August 28, 1989

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

Dear Mr. Comeaux:

You have sought our advice in response to the following:

QUESTION

May a retailer deduct “port fees” paid to a local government authority for the privilege of doing business from the gross receipts for its sale of taxable, tangible personal property?

ANALYSIS

The Department of Taxation has recently made audit deficiency assessments against two retailers who provide prepared meals to airlines which operate out of a Nevada airport. The local airport authority charges these retailers an 8.8 percent port fee for the nonexclusive privilege of providing in-flight catering services to air carriers at the airport. The retailers have passed the cost of the fee on to the airlines by separately billing them for the 8.8 percent. The retailers have not included this amount in the gross receipts upon which their tax liability is computed, however, and dispute the department’s audit deficiency assessments which were made on that basis.

“Gross receipts” is defined in the Sales and Use Tax Act to mean:

[T]he total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

- (a) The cost of the property sold
- (b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.
- (c) The cost of transportation of the property prior to its sale to the purchaser.

1955 Nev. Stat. ch. 397 § 12.¹ Services that are part of the sale; all receipts, cash, credits and property of any kind; and any amount for which credit is allowed by the seller to the purchaser are included in the total amount of the sale or lease or rental price. *Id.* “Gross receipts” does not include:

- (a) Cash discounts allowed and taken on sales.
- (b) Sale price of property returned by customers when the full sale price is refunded either in cash or credit; but this exclusion shall not apply in any instance

when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

- (c) The price received for labor or services used in installing or applying the property sold.

¹ Your opinion request letter asked that we opine on the inclusion of port fees in gross receipts pursuant to the Sales and Use Tax Act and chapters 374 and 377 of the Nevada Revised Statutes. Because the pertinent provisions of the Act and of the two chapters are substantially identical, we have confined our discussion here to the Sales and Use Tax Act in the interest of brevity. Our conclusions are equally applicable to chapters 374 and 377, however.

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

Id.

The gross receipts from a variety of sales are statutorily exempted from tax computation pursuant to the Sales and Use Tax Act. Included among these exemptions are sales of mine proceeds, motor vehicle fuel, animals and plants intended for human consumption, gas, electricity, water, domestic fuel, newspapers, and aircraft. *See* 1955 Nev. Stat. ch. 397 §§ 52, 55, 56, 59, 61, as amended. Sales to the United States, the State of Nevada, any county, city or political subdivision of this state and any not-for-profit religious, charitable or eleemosynary organization are exempted as well. *Id.* at §§ 49-50. There is not an exemption in the Act for the sorts of fees we are discussing here.

As noted above, there is not an exemption in the Sales and Use Tax Act for expenses like port fees. Therefore, one cannot be implied. Further, port fees do not fall into any of the items which are excluded from the definition of gross receipts by section 12 of the Act. Rather, they appear to us to simply be one of the costs of doing business and, as such, are includable in the retailer's gross receipts pursuant to 1955 Nev. Stat. ch. 397 § 12 as "any other expense."

Court decisions in this area support our conclusion. A claim of exemption from taxation must be clear beyond a reasonable doubt. If any ambiguity arises as to the legislature's intent, it must be resolved in favor of the state. *Hoge v. Railroad Co.*, 99 U.S. 348, 355 (1879); *Clark County Sports Enterprises, Inc. v. City of Las Vegas*, [96 Nev. 167](#), 174, 606 P.2d 171 (1980). Similarly, the right to a deduction must be set forth within the expressed letter of necessary scope of the statute. *McKee v. Bureau of Revenue*, 315 P.2d 832, 835 (N.M. 1957).

In our research, we have reviewed a series of cases involving similar situations to the one at hand, where retailers resisted attempts to include such items as soft drink taxes, municipal taxes, stamp taxes and severance taxes, which had been charged to and paid by customers, in the gross receipts upon which the retailers' tax liability was calculated. In analyzing these situations, the reviewing courts looked first to see where the legal incidence of the included tax lay--on the retailer or on the customer. If legal responsibility for payment fell on the retailer, it was found to be includable in the seller's gross receipts since it was deemed to simply be part of the price paid to get the goods. *See Lash Products Co. v. United States*, 278 U.S. 175 (1929); *Merchants Cigar & Candy Co. v. City of Birmingham*, 18 So. 2d 137 (Ala. 1944); *State Tax Commission v. Quebedeaux Chevrolet*, 226 P.2d 549 (Ariz. 1951); *Sullivan v. Commonwealth Edison Co.*, 450 N.E.2d 1191 (Ill. App. Ct. 1983); *United Nuclear Corp. v. Revenue Division*, 648 P.2d 335 (N.M. Ct. App. 1982); *South Central Bell Telephone Co. v. Olsen*, 669 S.W.2d 649 (Tenn. 1984). How the included tax was billed to the customer was considered to be irrelevant to the question of whether it was includable in the retailer's gross receipts. *Pure Oil Co. v. State*, 12 So. 2d 861, 863 (Ala. 1943).

The port fees assessed the retailers in your fact situation are analogous to the included taxes at issue in these cases. Responsibility for the payment of the

port fees falls on the retailers alone, not on their customers. The fact that the retailers pass them on to their customers by means of a separate billing has no bearing on their includability in the retailers' gross receipts. "Invoices or bookkeeping cannot change the fact that the purchaser is paying the sale price fixed by the seller, nothing more or less." *Id.* The actual sales price of the catered meals the retailers provide here is the cost of the meals *plus* the 8.8 percent port fees which the retailer bills separately. Like rent, utilities and wages, the fees are part and parcel of the cost of operation of the retailers' businesses.

CONCLUSION

A retailer may not deduct “port fees” paid to a local government authority for the privilege of doing business from the gross receipts for its sale of taxable tangible personal property. Payment of such fees is the legal responsibility of the retailer; therefore, the fees are simply part of the cost of doing business.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Foster
Deputy Attorney General

OPINION NO. 89-13 COUNTY CLERK; LICENSES; MARRIAGE; MINISTERS: The county clerk cannot deny a minister’s certificate for a gross misdemeanor conviction. Licensure may be denied for applicants receiving parole, probation or sentencing for felony convictions.

Carson City, September 22, 1989

The Honorable Virgil A. Bucchianeri, District Attorney, Storey County Courthouse, Virginia City, Nevada 89440

Dear Mr. Bucchianeri:

You have requested an opinion from this office concerning whether an applicant may be denied a minister’s certificate as a result of a gross misdemeanor conviction.

QUESTION ONE

Do the provisions of [NRS 122.064](#)(3)(c) preclude the county clerk from issuing a minister’s certificate if the applicant has been convicted of a gross misdemeanor?

ANALYSIS

[NRS 122.064](#) provides in pertinent part that:

1. A certificate of permission may be obtained only from the county clerk of the county in which the minister resides, after the filing of a proper application
3. In addition to the requirement of good standing, the county clerk shall before approving an initial application satisfy himself that:
.

(c) *The applicant has not been convicted of a felony, released from confinement or completed his parole or probation, whichever occurs later, within 10 years before the date of application* (emphasis added).

[NRS 122.064](#) was enacted during the 1967 legislative session and was amended twice, first in 1969, then again in 1977. In 1967, Senate Bill No. 66 amended chapter 122 of the NRS by adding, in part, the following language: “In addition to the requirement of good standing, the county clerk shall before approving an application satisfy himself that . . . [t]he applicant has never been convicted of a felony *or of any crime of which moral turpitude is an element*” (emphasis added). See 1967 Nev. Stat. ch. 487 § 3. This language indicates the legislature’s intent to include a broad range of crimes as opposed to the more restrictive language of today’s statute.

The language of [NRS 122.064\(3\)\(c\)](#) was not changed in the 1969 legislative session. The current language of [NRS 122.064\(3\)](#) was drafted in 1977, when the statute was amended to read: “In addition to the requirement of good standing, the county clerk shall before approving an application satisfy himself that . . . *[t]he applicant has not been convicted of a felony, released from confinement or completed his parole or probation, whichever occurs later, within 10 years before the date of application*” (emphasis added). 1977 Nev. Stat. ch. 259 § 1.

In reviewing the legislative history, this office determined that the intent behind the amendment was to relax the ministerial licensing requirements. Specifically, “AB 342 [r]elaxes requirements for certificates of permission to perform marriages and repeals county clerk’s authority to prescribe additional regulations . . . [t]his alteration would put the ministerial prerequisite for the permission more in line with physicians, physical therapists,

attorneys, etc.” Hearing on AB 342 before the Senate Judiciary Committee, 59th Session (1977) (statement of George Flanda of the Wedding Chapels). Further, the legislative history of the Assembly reflects that they concur with the Senate in lessening the requirements for licensure. See Hearing on AB 342 before the Assembly Committee on Judiciary 59th Session (1977).

Had the legislature intended to specifically include gross misdemeanors in [NRS 122.064\(3\)\(c\)](#), it would have been a simple matter to do so. See *Penrose v. Whitacre*, [62 Nev. 239](#), 243, 147 P.2d 887 (1944). It is unreasonable to think that the legislature would seek to include the broad category of gross misdemeanor, when their intent was to repeal language in 1977 regarding crimes of moral turpitude in order to create less restrictive licensing requirements. AB 342 changed the existing statute by “reducing the control or prohibition of ministers obtaining their permits to perform marriages.” See Hearing on AB 342. In *NL Industries, Inc. v. Eisenman Chemical Company*, [98 Nev. 253](#), 260, 645 P.2d 976 (1982), the Nevada Supreme Court decided that, “[w]e will not construe statutes in a manner which will bring about an unreasonable result, or a result contrary to the legislature’s purpose.” See also, *State Bar of Nevada v. List*, [97 Nev. 367](#), 369, 632 P.2d 341 (1981) (where statutes are construed in light of their purpose). Therefore, to deny an applicant a minister’s certificate based on a conviction of gross misdemeanor would undermine the legislative intent of [NRS 122.064\(3\)\(c\)](#).

CONCLUSION

It is the opinion of this office that it was not the intention of the legislature to include gross misdemeanors in [NRS 122.064\(3\)\(c\)](#). This statute went through major revisions in 1977 in order to relax the requirements for obtaining a minister’s certificate. Interpreting the existing language to include gross misdemeanors would work against this legislative

purpose. Therefore, the county clerk cannot deny an applicant a minister’s certificate solely on the basis that he has been convicted of a gross misdemeanor.

QUESTION TWO

Do the provisions of [NRS 122.064\(3\)\(c\)](#) apply to releases from confinement or completion of paroles or probations on gross misdemeanor charges?

ANALYSIS

As noted above, the language of [NRS 122.064\(3\)\(c\)](#) does not apply to gross misdemeanors; therefore, any reference to releases from confinement, parole or probation would only apply to felony charges.

CONCLUSION

This office is of the opinion that it was not the intention of the legislature to deny an applicant a minister's certificate on the basis of a gross misdemeanor conviction. Therefore, the reference to confinement, parole and probation in [NRS 122.064\(3\)\(c\)](#) would refer solely to felony convictions and would not apply to gross misdemeanor convictions.

Sincerely,

BRIAN McKAY
Attorney General

By: Darcy Coss
Deputy Attorney General

OPINION NO. 89-14 PUBLIC OFFICERS; CONFLICT OF INTEREST; ETHICS IN GOVERNMENT LAW: The county engineer cannot represent private clients before the county commission or regional planning commission without violating [NRS 281.491](#).

Carson City, September 26, 1989

The Honorable Dan L. Papez, White Pine County District Attorney, White Pine County Courthouse, Post Office Box 240, Ely, Nevada 89301

Dear Mr. Papez:

You have requested an opinion of this office on the following:

QUESTION

May the county engineer of White Pine County accept private employment from a client and represent this client before the Regional Planning Commission and the Board of County Commissioners on matters dealing with zoning, planning or other matters when the engineer, as part of his public duties, advises or assists both commissions in matters dealing with zoning, land use planning and other land use matters?

FACTS

Mr. Richard Forman is the appointed county engineer in White Pine County. He provides his services to the county on a part-time, job-by-job basis. He maintains a full-time private practice as an engineer as well. As county engineer, Mr. Forman is responsible to the Regional Planning Commission, advising them on zoning and land use planning, as well as policy formulation and construction standards for roads and subdivisions. As a private engineer, Mr. Forman assists clients in parceling land, preparing subdivision maps, and in obtaining zoning and use permits, requiring Mr. Forman to appear before both commissions in his private capacity on behalf of his clients.

ANALYSIS

Chapter 281 of the Nevada Revised Statutes addresses ethical prohibitions and considerations for state and local elected or appointed officials. The county engineer of White Pine County is a public officer within the definition found in [NRS 281.4365](#). Public officers are held to the high ethical standards embodied in [NRS 281.481](#) and [281.491](#). Specifically, [NRS 281.491](#) states:

1. No member of the executive branch or public employee of the executive branch may accept compensation from any private person to represent or counsel him on any issue pending before the agency in which that officer or employee serves, if the agency makes decisions. No such officer or employee who leaves the service of the agency may represent or counsel a private person upon any issue which was under consideration by the agency during his service.
2. A member of the legislative branch, or a member of the executive branch or public branch or public employee whose public service requires less than half of his time, may represent or counsel a private person before an agency in which he *does not serve* (emphasis added).

The provisions quoted above set forth ethical guidelines which a public officer must use in determining the nature and extent of private employment. The facts, as related to this office, indicate the county engineer of White Pine County is currently representing private clients before the Board of County Commissioners and the Regional Planning Commission. The county commission is the agency which appointed the county engineer. [NRS 254.010](#). We presume the county engineer is advising the Regional Planning Agency pursuant to a cooperative

agreement between the Board of County Commissioners and the Regional Planning Commission. [NRS 278.070](#) and [277.045](#). Thus, the county engineer is acting in his official capacity serving both boards. The prohibitions set forth in [NRS 281.491](#) clearly apply. Even though the county engineer is employed on a part-time, piecemeal basis, he enjoys a relationship with the board which no other private engineer enjoys. While there may not be any grant of unwarranted consideration to the county engineer or his clients, the potential for such consideration exists.

Further, the county engineer could obtain information in his official capacity that no other engineer has access to, thus giving an advantage to the county engineer in serving his private clients. A public officer may not use any information which by law or practice is not at the time available to people generally, and he may not use the information to further the pecuniary interests of himself or any other person or business entity. [NRS 281.481](#)(6).

The county engineer holds a position of public trust. To represent private clients before the agencies who employ him and rely on his advice in formulating policy, violates this trust. A

public officer must avoid even the appearance of impropriety in order to assure the public, to which he is accountable, is properly served.

This office, in Nev. Op. Att'y Gen. No. 94 (8-21-72), concluded that county engineers may not submit subdivision plot maps commissioned by private clients to his county employer's planning commission for approval. While the analysis in that opinion relied on [NRS 281.230](#), a statute which has since been repealed in favor of the ethics code found currently in chapter 281 of NRS, the conclusion in that opinion is still correct based on the current codification of ethical standards.

CONCLUSION

It is a violation of [NRS 281.491](#) for a county engineer to represent private clients before the county commission or regional planning commission. This opinion does not specifically address the code of conduct provisions of the State Board of Registered Professional Engineers and Land Surveyors. It may be appropriate for Mr. Forman to seek guidance from that board as to other ethical considerations.

Sincerely,

BRIAN McKAY
Attorney General

By: DANA K. SAMMONS
Deputy Attorney General

OPINION NO. 89-15 PUBLIC OFFICERS; LEGISLATURE; RETIREMENT: The benefit formula enacted by the 65th session of the Nevada Legislature for the Legislators' Retirement System exceeds the maximum benefit limitations contained in 26 U.S.C. § 415 (1983). There are a number of alternatives available to correct this situation.

Carson City, October 30, 1989

Mr. Wilbur Keating, Executive Officer, Public Employees' Retirement System, 693 West Nye Lane, Carson City, Nevada 89703

Dear Mr. Keating:

You have requested our opinion concerning the Legislators' Retirement System.

QUESTION

Is the benefit formula currently codified in the Legislators' Retirement System in compliance with the Internal Revenue Code?

BACKGROUND FACTS

From its inception in 1967 until 1989, the Legislators' Retirement System relied exclusively

on a level dollar benefit formula. From 1967 to 1975 that formula was \$20.00 per month for each year of service with eight years of service required to vest the minimum benefit. Act of April 20, 1967, ch. 454, 1967 Nev. Stat. 1217. In 1975 the level dollar amount paid per month was increased to \$25.00 for each year of service. Act of May 19, 1975, ch. 575, 1975 Nev. Stat. 1027. The years of service required to vest the minimum benefit was increased from eight to ten years in 1985. However, this increased service or vesting requirement does not apply to legislators with service credit predating July 1, 1985. Act of June 7, 1985, ch. 560, 1985 Nev. Stat. 1709. A significant change in this benefit formula was passed in 1989.

In 1989, the Legislature added an alternative benefit formula to the one described in the preceding paragraph. This new formula employs a percentage factor, years of service and an adjusted average compensation to determine the benefit that is payable. The retirement system is required to compute a retired legislator's benefit under both the level dollar formula described in the preceding paragraph as well as the new formula described in this paragraph and pay pursuant to the formula that provides the greatest monthly benefit amount for the retired legislator. Act effective June 23, 1989, ch. 481, 1989 Nev. Stat. 1023.

The newly enacted benefit formula described in the preceding paragraph embodies a benefit computation concept that is common to many defined benefit plans. A similar concept has been used to determine benefits for members of the Public Employees' Retirement System since that system's creation in 1947. There is nothing inherently illegal or improper in using a defined benefit computed through the use of a service credit percentage factor, years of service and some form of final, average or adjusted compensation. In fact, this type of benefit formula has the advantage of adjusting benefit amounts to increases in compensation paid to public officers without the need for statutory amendment to the pension laws. The level dollar benefit formula does not enjoy this flexibility and needs to be adjusted periodically if retirement allowances are to continue to bear the same proportionate relationship to compensation currently being paid to public officers. In the case of legislators, the adjustment made to retirement allowances in 1975 is indicative of the inflexibility just described.

It is the particular elements employed in the new 1989 formula for legislators that prompts your concern and your request for this opinion.

ANALYSIS

The enclosure with your opinion request focused on certain limitations regarding benefits that may be paid under applicable provisions codified in the United States Code. We will focus our analysis on the concern raised by that enclosure.

Section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA) defines a pension plan as any plan, fund or program maintained by an employer or employee organization which: (a) provides retirement income to employees or (b) results in deferral of income by employees for periods extending to termination of employment or beyond. 29 U.S.C. § 1002(2)(A) (1983). Section 3(34) of ERISA characterizes a defined contribution plan as a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, losses and forfeitures of accounts of other participants which may be allocated to such participant's account. 29 U.S.C. § 1002(34) (1983).

Defined contribution plans include profit-sharing plans, savings plans, stock bonus plans and employee stock ownership plans. Section 3(35) of ERISA defines a defined benefit plan as a pension plan other than a defined contribution plan. 29 U.S.C. § 1002(35) (1983). Thus, a defined benefit plan provides a participant with a benefit amount generally payable in the form of a life annuity commencing at a specified age which is a flat amount or an amount determined in

accordance with a formula based on the participant's earnings and years of employment. The Legislators' Retirement System is a defined benefit pension plan as those plans are characterized by this federal legislation. [NRS 218.239](#), Act effective June 23, 1989 Nev. Stat. ch. 481 § 15.

A qualified employee benefit plan is, in general terms, a pension, profit-sharing or stock bonus plan which meets the requirements for qualification under section 401(a) of the Internal Revenue Code of 1986. 26 U.S.C. § 401(a) (1986). A qualified employee benefit plan must satisfy a number of requirements which include: coverage (26 U.S.C. § 410(b) (1983)), nondiscrimination (26 U.S.C. § 401(a)(4) (1983)), eligibility standards (26 U.S.C. § 410(a) (1983)), vesting (26 U.S.C. § 411(a) (1983)), accrual (26 U.S.C. § 411(b) (1983)), benefit limitations (26 U.S.C. § 415 (1983)), and other restrictions under 26 U.S.C. § 401(a) (1983). These other restrictions just mentioned include, for example, joint and survivor annuity rules and restrictions as to distributions.

There is no requirement for an employee benefit plan to obtain a determination letter on plan qualification from the Internal Revenue Service. It is our understanding that neither the Public Employees' Retirement System (which administers the Legislators' Retirement System) nor the Legislators' Retirement System (a separate plan created pursuant to chapter 218 of NRS) have obtained these determination letters on plan qualification from the Internal Revenue Service. Nevertheless, it is our understanding that for many years prior to the passage of the 1989 amendments to the Legislators' Retirement System benefit formula, both plans have been administered in a manner which corresponds to the operations of qualified employee benefit plans.

There are a number of advantages to administering a qualified employee benefit plan or administering an employee benefit plan as though it were qualified. These benefits of qualification include: deductibility of contributions (26 U.S.C. § 404) (1983), tax free status of the trust (26 U.S.C. § 501(a) (1983)), deferral of tax on participants until distribution and special tax rules on distribution (26

U.S.C. § 402 (1983)), as well as having employee contributions "picked up" by the employer (available only to qualified employee benefit plans) (26 U.S.C. § 414 (h) (1983)).

For purposes of section 401(a) of the Internal Revenue Code of 1986 (26 U.S.C. § 401(a) (1986)), a pension plan is a plan established and maintained by an employer primarily to provide for the systematic payment of definitely determinable benefits to employees over a period of years after retirement, usually for life. The determination of the amount of participants' retirement benefits and the employer's contributions to provide these benefits are not based on profits. A plan will be considered a pension plan if the employer contributions can be actuarially determined. 26 C.F.R. § 1.401-1(b)(1)(i) (1989). The Legislators' Retirement System satisfies this definition of a pension plan. [NRS 218.2372](#)(3), 218.2373, 218.2375, and 218.23781.

The Internal Revenue Code employs a "carrot and stick" approach to regulating employee benefit plans. The "stick" is the qualification requirements imposed on the plan. The "carrot" is the benefit that flows from administration of a plan in conformity with these qualification requirements. For purposes of this opinion, the "stick" is the benefit limitations contained in 26 U.S.C. § 415 (1983). At stake is the "carrot" of not having the members of the Legislators' Retirement System taxed immediately on the State of Nevada's contributions to their retirement system until the members' actual receipt of benefits as well as the tax exempt status enjoyed by the trust fund for the Legislators' Retirement System during the period of asset accumulation prior to commencing the payment of benefits.

Internal Revenue Code section 415 was added by ERISA and significantly changed by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). Other important changes were made by the Tax Reform Act of

1986. This section of the Code sets out limitations on contributions and benefits which apply to individuals covered under qualified plans and plans administered as qualified plans. The effect of this section is to disqualify the plan's trust if the benefits or contributions exceed the limits provided in the Code.

Under 26 U.S.C. § 415(b) (1983), the basic rule is that the annual benefit which may be paid to any individual by a defined benefit plan may not at anytime during the limitation year exceed the *lesser* of (a) \$90,000.00 (the dollar amount limitation), or (b) 100% of the participant's average compensation for his high three years of service (the percentage of compensation limitation). These limitations are indexed. However, the indexing does not affect our analysis of your request. Due to the nature of the alternative benefit formula enacted for retiring legislators and their current daily rate of pay, only the percentage of compensation limitation merits detailed consideration in this circumstance. However, before this benefit formula can be evaluated in light of this tax code limitation, several terms in the limitation must be explained and other adjustments to the benefit payment should be explained.

The "annual benefit" in 26 U.S.C. § 415 (1983) refers to a benefit payable annually in the form of a straight life annuity. 26 U.S.C. § 415(b)(2)(A) (1983); 26 C.F.R. § 1.415-3(b)(1) (1989).

The "limitation year" means the calendar year unless the employer elects another 12-month period. 26 C.F.R. § 1.415-2(b) (1989). Both the employer (The State of Nevada) and the Legislators' Retirement System operate on a fiscal year commencing on the first day of July of each year. Nev. [Const. art. 9 § 1](#).

In general, "compensation" includes total fees received for services actually rendered. Compensation is determined on a cash basis unless the employer

elects to use an accrual method. 26 C.F.R. § 1-415-2(d) (1989). Some people may contend that the new alternative benefit formula does not implicate the benefit limitations of 26 U.S.C. § 415(b) (1983) because the "adjusted" average compensation defined in the 1989 amendments serves as the correct measure of "compensation" for Internal Revenue Code purposes. Act effective June 23, 1989, 1989 Nev. Stat. 1023, ch. 481 § 15(2). We cannot adopt this view. The "adjusted" average compensation specified in the provision just cited is an extrapolation of what the current daily rate of pay would be if it was paid throughout the year for full-time employment. It bears no actual relationship to the fees received by legislators on a cash basis. Consequently, the "adjusted" average compensation contained in state law is not synonymous with the definition of "compensation" provided in 26 C.F.R. § 1-415-2(d) (1989). Associating numbers with the observations made in this paragraph shows that under state statute, a legislator has an "adjusted" average compensation of the \$33,800 expressed in terms of an annual salary. The same legislator's average annual compensation for federal benefit limitation purposes is currently \$5,200. Both figures assume only the current daily rate of pay of \$130 payable during the first 60 days of the session.

An adjustment must be made under particular circumstances for the form of the benefit. If a defined benefit plan provides a benefit in a form other than a straight life annuity, the plan benefit must be adjusted to a straight life annuity of equivalent actuarial value. However, if the plan benefit is paid in the form of a qualified joint and survivor annuity (as defined in 26 U.S.C. § 417(b)), no adjustment of this kind is required. 26 U.S.C. § 415(b)(2)(B) (1983); 26 C.F.R. § 1.415-3(c) (1989). A qualified joint and survivor annuity is an annuity: (1) For the life of the participant with a survivor annuity for the life of the spouse which is not less than 50% of, and is not greater than 100% of, the amount of the annuity payable to the participant during their joint lives, (2) which is the actuarial

equivalent of a single life annuity for the participant, and (3) which is payable immediately. 26 U.S.C. § 417(b) (1983); 26 C.F.R. § 1.417(e)-1(b)(1) (1989). The benefits payable under [NRS](#)

[218.239](#) and [218.2391](#) are either a straight life annuity or a qualified joint and survivor annuity. Therefore no adjustment for actuarial equivalency is required because of the form of the benefit.

An adjustment must also be made if the plan has employee contributions as a feature. If a defined benefit plan provides for mandatory employee contributions (as defined in 26 U.S.C. § 411(c)(2)(C) (1983)) the plan benefit based on these contributions is adjusted to eliminate the benefits attributable to the contributions using the factors set out in 26 U.S.C. § 411(c)(2)(B) (1983). A plan providing for mandatory contributions has those contributions considered a separate defined contribution plan for the purpose of the limitations contained in 26 U.S.C. § 415 (1983). 26 C.F.R. § 1-415-3(d) (1989).

The basic rule under 26 U.S.C. § 415(e) (1983) is if an individual participates in a defined benefit plan, and also participates in a defined contribution plan maintained by the same employer, the sum of the defined benefit plan fraction and the defined contribution plan fraction for the individual for any limitation year cannot exceed 1.0.

An individual's "defined benefit plan fraction" for a limitation year is a fraction the numerator of which is the individual's projected annual benefit under the defined benefit plan determined as of the last day of the limitation year in question. The denominator of this fraction is the *lesser* of 1.25 multiplied by the dollar limitation in effect for that year or 1.4 multiplied by the applicable compensation limitation. 26 U.S.C. § 415(e)(2) (1983). An individual's projected annual benefit is the straight life annuity or the qualified joint and survivor annuity defined previously. This projected annual benefit is

determined under the plan provisions using the following assumptions: (a) the individual will continue in employment until normal retirement age or current age, if that age is later; (b) the individual's compensation for the limitation year will remain the same until the age specified in (a) is reached; (c) all other factors used in determining plan benefits will remain the same for future limitation years. 26 C.F.R. § 1.415-7(b)(3) (1989).

The basic rule for limitation of defined contribution plans is set out in 26 U.S.C. § 415(c) (1983). Under that section of the code the annual additions that may be made to an individual's account under a defined contribution plan for the limitation year may not exceed the *lesser* of: (a) \$30,000.00 (or, if greater, one-fourth of a defined benefit plan dollar limitation), or (b) 25% of the individual's compensation for the limitation year. As used in part (b) of the preceding sentence, "compensation" equates to an individual's compensation reported on his W-2 form. "Annual additions" include the amount of the individual's entire after-tax contribution. 26 C.F.R. § 1.415-6(b)(1) (1989).

An individual's "defined contribution plan fraction" for a limitation year is a fraction. The numerator of this fraction is the sum of the annual additions (in this case the legislator's after-tax contribution made in accord with [NRS 218.2387](#)(1)) credited to the individual's account for the current limitation year and for all prior limitation years. The denominator of this fraction is the *lesser* of 1.25 multiplied by the dollar limitation in effect for each year or 1.4 multiplied by the compensation limitation for each year (for the current limitation year and for all prior limitation years of the individual's service with the employer). 26 U.S.C. § 415(e)(3) (1983); 26 C.F.R. § 1.415-7(c) (1989).

To show the interplay of the formulae for "defined benefit plan fractions" and "defined contribution plan

fractions," it is useful to consider a simplified hypothetical situation. Assume an assemblyman is elected initially in the general election of 1978 and is reelected in the succeeding general elections of 1980, 1982, 1984, 1986, and 1988. Our hypothetical legislator served in the 1979, 1981, 1983, 1985, 1987, and 1989 regular sessions of the Legislature. For the sake of simplicity, we will omit the special session in 1984, although that compensation must be considered in an actual situation. In addition, we will simplify this hypothetical by considering only the 60-day

salary paid to legislators. In reality, legislators receive several other categories of payment which are reported on their W-2 forms and increase their compensation. These amounts in other categories vary from legislator to legislator, and we will omit them from this hypothetical for the sake of simplicity. Assume that our hypothetical assemblyman resigns in November, 1989, with 11 years of service credit and retires having reached 60 years of age before his retirement.

During the 11-year-period of this hypothetical legislator's service, his service, salary, and employee contributions can be tabulated as follows:

<u>YEAR</u>	<u>60-DAY SALARY</u>	<u>EMPLOYEE'S CONTRIBUTION</u>
1979	\$4,800.00	\$ 720.00
1981	4,800.00	720.00
1983	6,240.00	936.00
1985	6,240.00	936.00
1987	7,800.00	1,170.00
1989	7,800.00	1,170.00

Under the salary history just stated, our hypothetical legislator's three high years of service are 1987 (\$7,800.00), 1988 (zero dollars) and 1989 (\$7,800.00) yielding an average compensation under federal law of \$5,200.00.

We must now compute the retirement benefit under the alternative benefit formulae contained in the Legislators' Retirement Act. Under the level dollar amount formula, our legislator is entitled to a monthly service allowance equal to \$25.00 for each of his 11 years of service or \$275.00 per month. Under the newly enacted formula, the \$130.00 daily rate of pay for 1989 (cumulated for 60 days in the table above) is multiplied by 260, the product equalling \$33,800.00. Division of the product by 12 yields a quotient of \$2,816.67 (rounded). This quotient is the legislator's "average compensation" for purposes of benefit computation. The "average compensation" is then multiplied by 0.3905 (the product of the statutory service credit factor multiplied by years of service) which yields a monthly benefit of \$1,099.91 (rounded). Since the new benefit formula produces a larger monthly allowance amount than the level dollar formula, the retirement system would be required to pay our hypothetical legislator under the newly enacted formula the amount of \$1,099.91 per month or \$13,198.92 per year.

Now we must compute the defined benefit plan fraction, the defined contribution plan fraction, express both fractions as decimal equivalents, add the equivalents together, and determine whether the sum exceeds 1.0. The formulae for both fractions will be restated briefly for a clearer understanding of the computations that follow.

DEFINED BENEFIT PLAN FRACTION

$$\frac{\text{PROJECTED ANNUAL BENEFIT}}{1.4 \text{ (applicable compensation limitation)}} = \text{DEFINED BENEFIT PLAN FRACTION}$$

Applying numbers from our hypothetical, the annual figure of \$13,198.92 is reduced by a percentage which, for our legislator's age, results in a figure of \$12,011.02. The actual fraction is computed as follows:

$$\frac{\$12,011.02}{1.4 \text{ } (\$5,200)} = \frac{\$12,011.02}{\$ 7,280} = 1.6499$$

1.6499 is the defined benefit plan fraction. It exceeds 1.0. However, we will also compute the defined contribution plan fraction and complete the maximum benefit amount computation.

DEFINED CONTRIBUTION PLAN FRACTION

$$\frac{\text{SUM OF THE ANNUAL ADDITIONS}}{1.4 \text{ (applicable compensation limitation for each year)}} = \text{DEFINED CONTRIBUTION PLAN FRACTION}$$

Applying numbers from our hypothetical, the actual fraction is computed as follows:

$$\frac{\$5,652}{1.4 (\$1,200 + \$1,200 + \$1,560 + \$1,560 + \$1,950 + \$1,950)} =$$

$$\frac{\$5,652}{\$1,680 + \$1,680 + \$2,184 + \$2,184 + \$2,730 + \$2,730} =$$

$$\frac{\$ 5,652}{\$13,188} = 0.4286 \text{ (rounded)}$$

0.4286 is the defined contribution plan fraction.

Addition of the decimal equivalents of both fractions (1.6499 + 0.4286) yields the sum of 2.0785. This sum exceeds the limitation of 1.0 specified in 26 U.S.C. § 415(e) (1983) referred to previously.

It is our opinion that the newly enacted benefit formula exceeds the limitations contained in federal law for two primary reasons. First, the statutorily prescribed service credit percentage factor of 3.55 percent per year of service is simply too generous. Second, the extrapolation of a legislator’s actual salary to the “adjusted average compensation” defined by section 15(2) of the Act effective June 23, 1989, ch. 481, 1989 Nev. Stat. 1030 bears insufficient relationship to the manner in which “compensation” or “average compensation” is defined by federal law for purposes of computing the maximum benefit limitations.

Hindsight is always perfect, and this situation is no different. When the new benefit formula was initially drafted, it contained a more modest service credit percentage factor of 1.775 percent for each year of service. Bill Draft 23-1522, 65th Leg., § 15(1)(b). Before this legislation’s formal introduction, the service credit percentage factor was doubled to 3.55 percent for each year of service. A.B. 820, 65th Leg., § 15(1)(b). The higher service credit percentage factor was the provision which was enacted. Act effective June 23, 1989, 1989 Nev. Stat. 1030 ch. 481 § 15(1)(b). Enactment of the more modest service credit percentage factor proposed initially would have helped alleviate concern regarding compliance with the maximum benefit limitations.

We also note that legislation was introduced during the 65th session of the Nevada Legislature which would have increased the compensation actually paid to legislators for their public service. S.B. 9, 65th Leg. This bill and the attendant increases in compensation were the product of the study conducted by the Blue Ribbon Commission on the legislative process. Unfortunately this bill was never passed out of the Assembly Committee on legislative functions and “died” with final adjournment of the Legislature. *Senate History*, 65th Leg. (final ed.) 14. Had the salary concept embodied in S.B. 9 been passed and approved, it would have helped to mitigate the difference between “compensation” or “average compensation” for state law retirement purposes

and federal tax law definitions.

It is our opinion that had the Legislature pursued a balanced approach of enacting a more modest adjustment in this retirement benefit formula and directly adjusting the actual compensation paid to its members through passage of a reasonable increase, this entire situation could have been avoided. As it is now, the single-minded approach of greatly enhancing deferred compensation in the form of the new

retirement benefit formula places the plan in the position of paying benefits that exceed the limitations contained in 26 U.S.C. § 415 (1983). In our estimation, this legislative action was precipitous, to say the least, because it potentially exposes the Legislators' Retirement System and its members to the adverse income tax consequences described earlier.

CONCLUSION

The benefits payable under the new benefit formula, enacted in 1989, do not comply with provisions of the Internal Revenue Code because these retirement allowances exceed the limitations contained in 26 U.S.C. § 415 (1983). We reach this conclusion for two reasons. First, the statutory service credit percentage factor is too generous. Second, the statutory definition of "average compensation" used for computing a retirement benefit bears insufficient relationship to the "compensation" actually received by legislators, let alone the federal definitions attached to "compensation" and "average compensation" contained in applicable portions of the United States Code and Code of Federal Regulations. This situation could have been avoided had the Legislature employed a balanced approach of making more modest adjustments in their retirement plan benefits and enacting reasonable increases in their actual compensation. As it is, the rather radical adjustments made solely in the retirement plan benefit formula potentially expose the plan's trust fund and the plan's members to certain adverse income tax consequences.

QUESTION

What alternatives are available to the Legislators' Retirement System to return the plan to the operational status of a qualified plan?

ANALYSIS

In responding to this question, we recognize that our answer must touch on matters of policy. It is a long-standing practice of this office not to attempt to control matters of policy through the opinion writing exercise. Nev. Op. Att'y Gen. No. 299 (May 1, 1946). Therefore, what follows is a list of suggestions with some observations about each suggestion. Our list of ideas is not necessarily all-inclusive. The suggestions may not be consistent with one another. There may be other alternatives. We recommend the suggestions as a starting point for further study, discussion, and action by the staff of the retirement system, the retirement board, the system's actuary, the interim retirement committee and the legislature.

One alternative is to do nothing at all. Individuals adopting this view may justify it for at least two different reasons. The first justification is there is nothing necessarily illegal under federal law about administering this defined benefit plan while paying benefits in excess of limitations contained in 26 U.S.C. § 415 (1983). The only disadvantage is an economic one, the potential for adverse income tax consequences that affect the finances of the trust as well as the taxation of plan members and beneficiaries. The second justification for this view is that the limitations of 26 U.S.C. § 415 (1983) are simply not intended to apply to a governmental plan like the Legislators' Retirement System. Proponents of this argument may muster support for their

position from the text of the code (26 U.S.C. § 115 (1983)) as well as the legislative history surrounding the initial enactment of 26 U.S.C. § 415 in 1974. *See* H.R. Rep. No. 807, 93rd Cong., 2d Sess. _____, *Reprinted in 1974 U.S. Code Cong. & Admin. News*, 4777-4778; S. Rep. No. 383, 93rd Cong., 2d Sess. _____, *Reprinted in 1974 U.S. Code Cong. & Admin. News*, 5005-5006 (it is appropriate to prevent the accumulation of corporate pensions out of tax-sheltered dollars which are swollen completely out of proportion to the reasonable needs of individuals for a dignified level of retirement income).

A second alternative is to seek congressional amendment to the existing provisions of 26 U.S.C. § 415 (1983) to expressly remove the maximum benefit limitations from certain government plans, like the Legislators' Retirement System. Plans like the one under consideration have certain features that make them unique. Active membership is limited by statute or constitution only to legislators and is usually very small. In many jurisdictions, like Nevada, state legislators are compensated directly at a rate that is lower than that paid to other elected officers. Limited membership and lower rates of direct compensation are disadvantages for a legislators' retirement plan that is making an effort to create a livable retirement benefit and still comply with the limits specified in 26 U.S.C. § 415 (1983) which were initially enacted and directed at certain highly compensated individuals employed by private corporations.

A third alternative is to amend the plan and move from attempting to fund the plan on an actuarial reserve basis to operating the plan on a "pay-as-you-go" basis. The "pay-as-you-go" method merely recognizes the cost of each year's benefits as they are paid. This method is not really an actuarial method used to allocate a pension plan's ultimate cost to the present year, to prior years or to future years. We are not actuaries; however, it is our understanding that actuarial techniques can be employed to project future benefit payments and, therefore, to project "pay-as-you-go" contributions. Justices of the Supreme Court, their surviving spouses and children as well as district judges and their surviving spouses or children, have their pensions funded in this manner if they are not members of the Public Employees' Retirement System. [NRS 2.060 to 2.070](#) and 3.090 to 3.097. A change to this method of funding is not acceptable for determining contributions under ERISA. 29 U.S.C. § 1002(31) (1983). However, government plans are exempt from many ERISA requirements such as this one concerning funding. 29 U.S.C. § 1003(b)(1) (1983).

A fourth alternative is to amend the plan to provide that only benefits up to the limitations prescribed in 26 U.S.C. § 415 (1983) will be paid out of the existing plan. Any benefits payable under existing benefit formulae that exceed section 415 limitations would be payable out of what is commonly known as an "excess benefit plan." This may be a permissible alternative. 29 U.S.C. § 1002(36) (1983); 29 U.S.C. § 1003(b)(1) (1983).

A fifth alternative is to "cap" existing plan benefits at the limitations prescribed in 26 U.S.C. § 415 and establish a deferred compensation plan pursuant to 26 U.S.C. § 457 (1983) (known as a section "457" plan) for legislators. Some factors to consider in evaluating this alternative are that under existing Nevada law the retirement benefit would be computed through the use of "average compensation" that is unreduced by the amount deferred into the section 457 plan. [NRS 287.360](#). However, "average compensation" for federal purposes is reduced by the annual amount deferred. This tends to exacerbate the existing tension between these two concepts that was discussed in greater detail in our analysis of your first question. Moreover, under a section 457 plan, a participant can only defer the *lesser* of \$7,500.00 or 25% of compensation in any plan year unless certain "catch-up" provisions are invoked in the final three years immediately preceding actual retirement. What this means is that under most circumstances a legislator could only defer up to \$1,950.00 per year of their current 60-day salary which totals \$7,800.00.

A sixth alternative is to simply repeal the 1989 amendments to the benefit formula. This would happen in at least one of two ways. First, the referendum effort currently under way could

culminate in a vote to that effect in the 1990 general election. Second, the legislature could pass legislation to that effect.

A factor that merits consideration here is the potential applicability of what has come to be known as the limited vesting theory or contract rights doctrine of pension benefits. Nevada adopts what is known as the reasonable modification approach to this judicially created theory or doctrine. Under existing Nevada case law, prior to absolute vesting, pension rights are subject to reasonable modification in order to keep the system flexible to meet changing conditions and to maintain the actuarial soundness of the system. *Public Employees' Retirement Board v. Washoe County*, [96 Nev. 718](#), 722, 615 P.2d 972 (1980). It is speculative and premature at this point to predict, if, or to what extent, this doctrine has applicability in a contingency of this nature. We merely point out the doctrine for informational purposes at this time. We also make the observation that this doctrine may be of concern in the consideration of the third, fourth, and fifth alternatives discussed in the preceding paragraphs.

CONCLUSION

There are a number of alternatives that may be considered in this circumstance. All merit study which transcends an opinion of this nature. Some of these alternatives are mentioned in this opinion. Additional study by the system may disclose other alternatives.

Sincerely,

BRIAN McKAY
Attorney General

By: SCOTT W. DOYLE
Chief Deputy Attorney General

OPINION NO. 89-16 EMPLOYEES; AGRICULTURE; SALARIES: The position of director of the division of plant industry is in the classified service.

Carson City, November 6, 1989

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

Dear Mr. Rock:

You have asked a question concerning a position within the department of agriculture.

QUESTION

Is the position of the director of the division of plant industry in the classified service or is it in the unclassified service?

ANALYSIS

The department of agriculture is currently conducting a recruitment to fill the vacant position of director of the division of plant industry. The status of the position is important because the recruitment methods available will be different, depending on whether the position is in the classified or unclassified service.

The reason for your question becomes apparent when we review two legislative enactments. [NRS 561.214](#) provides:

The director of the division of plant industry must be appointed on the basis of merit and is in the *classified* service. He must be a graduate of an accredited college or university with a major in one of the agricultural sciences, and have at least 5 years' experience in official agricultural regulatory work (emphasis added).

That section was last amended in 1985. 1985 Nev. Stat. ch. 114 § 161.

The second relevant enactment is 1989 Nev. Stat. ch. 612, commonly known as the "unclassified pay bill," which provides in pertinent part at section 1:

The following state officers and employees in the *unclassified service* of the State of Nevada are entitled to receive annual salaries of not more than the approximate maximum amounts set forth following their specified titles or positions:

Director, plant industry program . . . 51,200 (emphasis added).

The unclassified pay bill is typically reenacted every legislative session to adjust salaries of employees in the unclassified service. *See, for example*, 1987 Nev. Stat. ch. 787 and 1985 Nev. Stat. ch. 498.

As can be seen by comparing the two provisions, the enactment in chapter 561 of NRS requires the subject position to be in the classified service whereas the 1989 unclassified pay bill treats the position as if it were in the unclassified service. Before proceeding, we note that analogous situations have occurred in the past. During the 1981 legislative session, the position of chief of the personnel division (now department) was placed in the 1981 unclassified pay bill despite the fact that a statute required the position to be in the classified service. 1981 Nev. Stat. ch. 693, 1981 Nev. Stat. ch. 589, and [NRS 232.200](#). In the face of the apparent inconsistency between the two enactments, we recognize our obligation to render an interpretation which effects the intent of the legislature in enacting them. *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court*, [104 Nev. 508](#), 509, 761 P.2d 1151 (1988). In attempting to ascertain legislative intent in this case, we are confronted with a host of time-honored tenets of statutory construction which, if applied individually, would compel different interpretations. At the outset, we are advised by the legislative counsel that due to the process by which the unclassified pay bill is created, no minutes of committee meetings are available as an aid to determining legislative intent. *See Baliotis v. Clark County*, [102 Nev. 568](#), 570, 729 P.2d 1338 (1986) (limited resort to legislative committee hearings is appropriate to clarify or interpret legislation of doubtful import or effect).

One rule of construction requires that where two statutory provisions are in conflict, the one later enacted controls. *Laird v. Nevada Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982). Another rule which might be applied is that the legislature is presumed to intend to change the law when it adds or deletes language in an existing area of law. *McKay v. Board of Supervisors*, [102 Nev. 644](#), 650, 730 P.2d 438 (1986). These two rules of construction complement one another and might require us to declare the position to be in the unclassified service since the unclassified pay bill was enacted later than the last amendment to [NRS 561.214](#) and treats the subject position as if it were in the unclassified service.

First, although the legislature is presumed to act with knowledge of statutes relating to the same subject, *City of Boulder v. General Sales Drivers*, [101 Nev. 117](#), 118-19, 694 P.2d 498 (1985), here the position in question, it did not amend [NRS 561.214](#) to clarify that the position is in the unclassified service. Since the legislature could have easily amended [NRS 561.214](#) to conform to its treatment of the subject position as an unclassified position in the unclassified pay bill, but chose not to, it may be presumed that the legislature intended no change to the requirement in [NRS 561.214](#) that the position be in the classified service. *State, Dep't of Motor*

Vehicles & Pub. Safety v. Brown, [104 Nev. 524](#), 526, 762 P.2d 882 (1988). Finally, unclassified pay bills have historically been treated as transitory in nature, lasting only for two years. In this regard, an analogy can be drawn to appropriation bills, the nature of which was discussed in *Abel v. Eggers*, [36 Nev. 372](#), 136 P. 100 (1913):

These appropriation bills, as indicated by the titles, are passed for the support of the state government, and are not legislative acts changing the substantive or general laws of the state It is not expected that changes and amendments in the general laws of the state will be made in general appropriation bills, and the life of such acts is only two years.

Id. at 375. Application of the above tenets of statutory construction and the analysis used in the *Abel* case would lead us to conclude that the language of [NRS 561.214](#) which discusses the subject position controls over that found in the unclassified pay bill.

Over the years, several of the above analyses have been relied on by this office and by the legislative counsel to reach a variety of results in situations similar to the one under consideration. In reviewing those approaches, we recognize that in some cases yet other tenets of statutory construction were overlooked. Our disposition of the instant matter will rely heavily on these other rules of statutory construction.

When confronted with conflicting statutory provisions, it is our responsibility to render them compatible when possible. *Weston v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982). Further, it is our duty to consider the effect that different interpretations may have, *Nevada Tax Comm'n v. Bernhard*, [100 Nev. 348](#), 351, 683 P.2d 21 (1984), and to choose a reasonable result which promotes

rather than defeats the legislative purpose behind the enactments. *Brown*, 104 Nev. at 526. In this case, we believe that the most reasonable result is one which gives some effect to both enactments. Since the express purpose of the unclassified pay bill is to set maximum salaries for various positions in state government, the subject position should have the \$51,200 figure listed in the unclassified pay bill as its approximate maximum salary. However, since the legislature has not amended [NRS 561.214](#) to make clear its intent that the position be in the unclassified service, we must give effect to the current language of that section which requires that the position be classified. To accomplish both these ends, the position of the director of the division of plant industry should be assigned a classification grade which allows at its highest step a salary which approximates, but does not exceed, the \$51,200 figure set forth in the unclassified pay bill.

Finally, as noted earlier, this kind of situation has occurred more than once during previous legislative sessions. Because of the fact that salary bills are traditionally put together during the hectic waning days of the session, a time when there is little opportunity to perform an investigation as to advisable amendments to substantive law, it is quite possible that a situation such as the one dealt with in this opinion will reoccur. We would welcome statutory guidance during the 1991 legislative session as to how the legislature would intend similar employee position status questions should be answered in the future.

CONCLUSION

The position of the director of the division of plant industry is in the classified service of the state but is to be classified at a grade which allows

at its highest step a salary which approximates, but does not exceed, the \$51,200 figure set forth in the unclassified pay bill.

Sincerely,

BRIAN McKAY
Attorney General

By: James T. Spencer
Deputy Attorney General

OPINION NO. 89-17 TAXATION: A taxpayer in the rental business is not entitled to a credit or refund of Nevada use taxes merely because its election to collect and remit use taxes measured by the gross rental receipts on property it rents resulted in the payment of more tax than that which would have been paid had the taxpayer elected to pay use tax measured by the purchase price of the property.

Carson City, November 8, 1989

Mr. John P. Comeaux, Executive Director, Nevada Department of Taxation, Capitol Complex,
Carson City, Nevada 89710-0003

Dear Mr. Comeaux:

You have requested an opinion from this office regarding a recent claim for a tax credit made by a taxpayer in the business of renting tangible personal property in this state. It has been the practice of this taxpayer to purchase the goods it rents from its vendor ex tax, and then to calculate and remit Nevada use tax measured by the gross rental receipts it receives from its rental customers. The taxpayer did not collect use taxes from its rental customers. Purchasing tangible personal property "ex tax" means purchasing the property without paying Nevada sales tax on the purchase. This occurs legally either by purchasing the property out of state from a vendor not registered in this state or by giving the vendor a resale certificate at the time of purchase. Under Nevada law, that taxpayer had the option of paying Nevada use tax measured by the purchase price it paid for the goods it then placed in the rental business. The taxpayer has now realized that it has remitted far more in taxes measured by the rental receipts than it would have had to pay or report had it paid the tax initially measured by the purchase price from its vendor, and now seeks to revoke its election in order to claim a credit for the difference.

Based on these facts, you have asked us to respond to the following questions:

QUESTION ONE

When must a taxpayer in the business of leasing or renting tangible personal property in Nevada make an election on how it will pay Nevada use taxes on its ex tax purchase of the tangible personal property?

ANALYSIS

Under Nevada law, when tangible personal property is sold in Nevada it is presumed that all gross receipts from the sale are subject to Nevada sales tax. [NRS 372.155](#), [374.160](#). The burden of proof that the sale is not a retail sale is on the vendor unless he takes a resale certificate in good faith from a person who is engaged in the business of selling tangible personal property, and who, at the time of purchase, intends to sell the property in the regular course of his business or is then unable to ascertain whether the property will be resold or used to some other purpose. [NRS 372.155](#), [372.160](#), [374.160](#), [374.165](#).

If the purchaser gives a resale certificate to the vendor and:

[M]akes any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the use is taxable to the purchaser *as of the time the property is first so used by him*, and the sales price . . . is the measure of the tax. . . . If the sole use of the property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the sale price of the property to him (emphasis added).

[NRS 372.170](#), [374.175](#). The language of this statute clearly indicates that the purchaser who buys tangible personal property in Nevada for purposes of renting or leasing it must make the choice on how he will pay Nevada use tax on that property at the time he purchases the property and places it in his rental inventory. This is because the use tax is due at the time the purchaser begins to use the property in its rental business unless the election to collect and remit use tax measured by the gross rental receipts is made at that time. *Id.*

When tangible personal property is purchased ex tax out of state and then brought into Nevada for use in a rental business the result is the same. See [NRS 372.225](#), [372.230](#), [372.240](#), [374.230](#), [374.235](#), [374.245](#).

CONCLUSION

A taxpayer who purchases tangible personal property ex tax for the purpose of renting or leasing the property in Nevada must make the election on how and by what measure he will pay Nevada use tax on that property at the time it is first placed in the rental inventory of the rental business.

QUESTION TWO

Is this election revocable at a later time after the tangible personal property has been placed in service and Nevada use taxes paid?

ANALYSIS

Once a taxpayer has made the election on how it is going to pay Nevada use tax on the tangible personal property it is renting or leasing, and he has paid Nevada use tax measured

either by the purchase price of the property, or by the gross rental receipts, the taxpayer may not thereafter revoke his choice as to that property.

There are several reasons for the conclusion stated in the preceding paragraph. First, while [NRS 372.170](#), [372.240](#), 374.175, and 374.245 provide an option on the measure a taxpayer may use to pay Nevada use tax, neither these statutes nor any other provision in chapters 372 or 374 permit a taxpayer to later revoke his election, at least for purposes of seeking a credit or refund. Taxpayers may seek a refund or credit only of taxes erroneously or illegally collected or computed, or paid more than once. [NRS 372.630](#), [374.635](#). “Erroneous” is defined as “involving error, deviating from the law.” *Black’s Law Dictionary* 486 (5th ed. 1979). An “erroneous or illegal tax” is defined as “one levied without statutory authority, or upon property not subject to taxation, or by some officer having no authority to levy the tax, or one which in some other similar respect is illegal.” *Id.* Since [NRS 372.170](#), [372.240](#), 374.175, and 374.245 authorize a taxpayer in the rental business to use either the two possible measures to fulfill its obligation to pay use taxes, it follows that the fact that one option is chosen over another does not make the taxes paid erroneous or illegal merely because the tax remitted under one measure may turn out to be greater than the tax that would have been remitted under the other. Cf., *Vinson Supply Co. v. Oklahoma Tax Comm’n*, 767 P.2d 406, 408 (Okla. 1989) (mistake of fact by taxpayer in calculating tax constitutes erroneous payment of tax entitled to refund; however, mischaracterizing use tax as sales tax not error inducing erroneous payment); *Community Federal Savings & Loan Ass’n v. Director of Revenue*, 752 S.W.2d 794, 797-798 (Mo. 1988) (en banc) (refund available for tax properly calculated and remitted but tax later found unconstitutional). The fact that the taxpayer failed to collect the properly calculated use tax from his rental customers as authorized by [NAC 372.080](#)(4)(b) does not constitute an erroneous payment of tax either. The use tax is imposed on the taxpayer’s use of tangible personal property in his rental business. See [NRS 372.185](#), [372.190](#), 374.190, and 374.195. The purpose of [NAC 372.080](#)(4)(b) is to

allow the taxpayer to reimburse himself from his rental customers. However, a taxpayer may elect to change his method of measuring and paying Nevada use tax as to tangible personal property to be purchased and placed in service in the future.

Further, if a taxpayer were permitted to receive a refund or credit equal to the difference between the tax remitted under one measure and that which would have been remitted under another, the State’s revenue projections would be subject to great uncertainty. Such a right would also tend to eliminate any incentive to pay the use tax measured by the purchase price up front. This is because such a policy would effectively establish a maximum amount of use tax, measured by the purchase price of the property, that could legally be collected from customers of the rental business on the rental of any item of tangible personal property and remitted to the department, even though the item of personal property continued to have a useful life as a rental. This would result in the election provided by [NRS 372.170](#), [372.240](#), 374.175, and 374.245 being no more than a right to defer the payment of use taxes measured by the purchase price over an indefinite period of time without the necessity of paying interest. If the legislature had intended taxpayers to enjoy an interest free tax deferral, or to be able to claim a refund or credit on this basis, it surely would have specifically provided for it. *Penrose v. Whitacre*, [62 Nev. 239](#), 243, 147 P.2d 887 (1944).

CONCLUSION

A taxpayer cannot revoke its choice of a measure for paying Nevada use tax on tangible personal property it purchased for use in its rental or leasing business once the property has been placed in the rental inventory and use taxes have been paid on the purchase price of that property

or calculated or collected and remitted on the gross rental receipts of that property. Consequently, a taxpayer is not

entitled to a credit or refund of use taxes merely because its choice resulted in a greater remittance of taxes to the state than the alternative choice would have produced. As to property to be acquired for rental purposes in the future, the taxpayer may continue to choose either measure of use tax authorized by [NRS 372.170](#), [372.240](#), 374.175 and 374.245.

Sincerely,

BRIAN McKAY
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 89-18 PUBLIC RECORD, PRIVACY, PERSONNEL: Whether the application for the position of Director of Maintenance for the Reno Housing Authority is public record turns on balancing of the public and private interests. Evaluation of legitimate expectation of privacy depends on the nature and context of information sought.

Carson City, November 30, 1989

Mr. Peter B. Holden, Attorney for the Housing Authority of the City of Reno, Post Office Box 2936, Reno, Nevada 89505

Dear Mr. Holden:

As general counsel to the Housing Authority of the City of Reno, a public body formed pursuant to chapter 315 of the Nevada Revised Statutes, you have asked for the Attorney General's opinion related to the application of the successful candidate for the position of director of maintenance for the Housing Authority of the City of Reno.

QUESTION

Is the application for employment of the successful candidate for director of maintenance for the Housing Authority of the City of Reno, together with the information gathered as part of the interview process, a public record and open to inspection pursuant to [NRS 239.010](#)?

BACKGROUND

The Reno Housing Authority is a municipal corporation which derives its funding from federal grants from the Department of Housing and Urban Development (HUD) and rents from dwellings it owns. The standard practice of the Reno Housing Authority to fill its middle management positions is to advertise

and receive applications. The applications are then reviewed by the executive director, or personnel staff, and those deemed qualified are orally interviewed by a panel. The panel consists

of the executive director and three citizens of the community chosen because of peculiar expertise and management skills relevant to the position to be filled. The panel determines the one or more qualified applicants and makes its recommendation to the executive director. This is the procedure that was recently utilized to fill the director of maintenance position. In this particular instance the panel recommended one candidate as the most qualified. That person did not fill the position and ultimately the position was readvertised. The successful candidate was selected from those applicants who responded to the second advertisement. As part of the process, the applicants for director of maintenance were sent a supplemental questionnaire asking specific questions about their maintenance skills and supervisory capabilities.

The written application submitted by the successful applicant contains his name, address, prior experience, reasons for leaving prior employment, and salary history. It also asks whether there is any physical, medical, or mental reason why the applicant would be unable to perform the job and, if the answer is yes, the applicant is asked to describe the condition or reason. Information regarding the applicant's military history and whether he has ever been convicted of a felony is also sought. In addition to the initial application, those candidates who were selected for review by the panel were asked to fill out a supplemental questionnaire. This questionnaire asks the applicant to evaluate his skills and give specific examples illustrating the skills and achievements.

A person who applied for the position in response to the first advertisement and who was interviewed by the panel but was not the successful applicant, and did not apply in response to the second advertisement,

has asked to be provided with all pertinent information related to the successful applicant's application and selection.

ANALYSIS

Section 239.010(1) of the Nevada Revised Statutes states that:

All public books and public records of . . . city, . . . governmental subdivision and quasi-municipal corporation officers and offices of this 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. . . .

There is no provision in local regulations or in statutory law which expressly declares personnel records or applications for a position to be confidential. Neither the Federal Freedom of Information Act nor city ordinances are applicable.

It is important to note that [NRS 239.010](#)(1) mandates disclosure of "public" records without defining the term. Since the legislature has not designated the application or personnel records of the City of Reno or the Reno Housing Authority as either confidential or public, some form of analysis is necessary to determine the status of the records of the successful applicant.

In a formal opinion issued in May, 1986, we expressed our belief that the spirit and intent of Nevada's public record 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 this 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. An 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. Our opinion of May, 1986, indicates that it is the responsibility of an agency and its counsel to make the case-by-case evaluation of the facts which may or may not justify nondisclosure. Moreover, it is the long-standing policy of this office to refrain from rendering an opinion on a question of facts. However, case law would indicate the following salient features should be considered. This research is illustrative and not intended to be exhaustive.

Application of the balancing test starts first with an evaluation of the content and function of the application and supplemental questionnaire. The applicant is specifically asked for a detailed medical history and, in the supplemental questionnaire, to reveal both objective and subjective information.

The New Jersey Supreme Court concluded that confidentiality of information gathered during a pre-appointment investigation served the public interest by encouraging candidness. *Cf. Nero v. Hyland*, 386 A.2d 846 (1978). However, because the application for director of maintenance and other documents in his file contain personal or sensitive information, counsel must also determine whether the applicant’s right to privacy is endangered by public inspection. *See Trahan v. Larivee*, 365 So. 2d 294 (La. Ct. App. 1978) *cert. denied*, 366 So. 2d 564 (1979) (performance evaluation reports fell within the broad definition of public records but disclosure would constitute an invasion of the constitutional right of privacy and thus they were not subject to disclosure).

An essential requirement for a constitutional claim of a right of privacy is a legitimate expectation of privacy. *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 458 (1977). In *Byron v. State*, 360 So. 2d 83 (Fla. Dist. Ct. App., 1978) an expectation of privacy was found for the application of prospective applicants for the position of managing director of the Public Electric Authority. This expectation was clearly subjectively present because the applicants had requested and been assured confidentiality. However, the court also found the expectation of privacy present by an objective standard. The test articulated by the Florida Court of Appeal is whether the information that would be revealed is highly personal and sensitive, such that its disclosure would be objectionable to a reasonable person of ordinary sensibilities. *Id.* at 95; *See also id.* at 97 (personal information divulged by applicants for position of managing director of a public agency protected in spite of state law mandating disclosure); *but see, Board of Education v. Memphis Publishing Company*, 585 S.W.2d 629 (Tenn. Ct. App. 1979), *cert. denied*, 585 S.W.2d 629 (1979) (applicants’ files for School Superintendent position were public records and subject to disclosure since applicants sought employment with a public body and the information was received officially). Only a compelling state interest can override a legitimate privacy interest of constitutional dimensions. *Byron v. State*, 360 So. 2d at 97.

In some cases the dilemma between public inspection of public records and a constitutional right to privacy was resolved by excluding only the confidential information from public inspection. In *Tew v. City of Topeka Police and Fire Civil Serv. Comm’n*, 697 P.2d 1279 (Kan. 1985), the court determined that the personnel files of applicants for the job of city firefighter were open to inspection by an applicant who claimed his rejection was improper. However, this inspection was allowed excluding confidential information that was in the file.

CONCLUSION

Whether the application file of the applicant is a public record and open to inspection turns on a balancing of public interests and private interests. Whether the applicant has a legitimate expectation of privacy for such information, as well as other information in his application file, turns on the nature of the information sought in the application process and the context in which that information would be viewed. The Reno Housing Authority must make this evaluation.

Sincerely,

BRIAN McKAY
Attorney General

By: Melanie Meehan Crossley
Deputy Attorney General

OPINION NO. 89-19 BOARDS AND COMMISSIONS: The individual representatives on the Nevada State Board on Geographic Names are accountable to the agencies designating them to act in their behalf, and the Board, as a whole, is accountable to the Nevada State Legislature. The authority of the Board to act is set forth and limited by the statutes creating and empowering it. The Legislature's directive that the Board cooperate with the United States board anticipates that Board actions will be consistent with the policies and principles established by the United States Board on Geographic Names. The Attorney General is the legal counsel for the Board, and the Board can request legal opinions of the Attorney General.

Carson City, December 31, 1989

Mr. Terrill J. Kramer, Executive Secretary, Nevada State Board on Geographic Names,
Department of Geography, University of Nevada, Reno, Nevada 89557

Dear Mr. Kramer:

You requested an opinion of this office on behalf of the Nevada State Board on Geographic Names (Board) regarding its accountability, the scope and extent of its authority, whether the Board has legal counsel, and whether Board members can be named as defendants in actions brought to challenge Board decisions. The specific questions you have asked are discussed below.

QUESTION ONE

To whom or what is the Nevada State Board on Geographic Names accountable?

ANALYSIS

The Nevada State Board on Geographic Names was created by the Legislature in 1985. [NRS 327.120](#) establishes the composition of the Board which consists of representatives of various state and federal agencies and organizations:

The board consists of:

1. One representative of each of the following agencies or organizations:
 - (a) Bureau of mines and geology of the State of Nevada.
 - (b) Faculty of the University of Nevada, Reno.
 - (c) Faculty of the University of Nevada, Las Vegas.

- (d) State library and archives.
- (e) Department of transportation of the state.
- (f) State department of conservation and natural resources.
- (g) Nevada historical society.
- (h) United States Bureau of Land Management.
- (i) United States Forest Service.

Each agency or organization shall designate a representative and one alternative representative for this purpose.

2. An executive secretary who is a nonvoting member of the board. The state resident cartographer shall serve in this position. If there is not such a cartographer, the voting members of the board shall select the executive secretary.

The agencies and organizations listed in [NRS 327.120](#) are the “members” of the Board. Each agency or organization designates one representative and one alternative representative to serve on the Board. The *Random House Dictionary of the English Language* 1635 (2nd ed. 1987) defines “representative” in part, as “a person or thing that represents another or others” and “an agent or deputy.” *Black’s Law Dictionary* 1170 (5th ed. 1979) defines “representative” in part, as “[o]ne who represents or stands in the place of another,” and “[o]ne who represents others or another in a special capacity, as an agent, and term is interchangeable with >agent.” Because the individual representatives are merely the agents of the members

of the Board, the individual representatives are accountable to the agencies or organizations designating them to act in their behalf.

The Board as a whole is accountable to the Legislature in that the Legislature can abolish the Board by legislative fiat. As stated by the Nevada Supreme Court in *Shamberger v. Ferrari*, [73 Nev. 201](#), 208, 314 P.2d 384 (1957), “It is uniformly held that the power to modify the nature or the duties of an office or to abolish it entirely or to consolidate it with another office is coincident with the legislative power to create the office in the first place.” In addition, art. 15, § 11, of the Nevada Constitution provides that, where no term of office is provided for by law, as with the Board, the office “shall be held during the pleasure of the authority making the appointment . . .” which in this instance is the Legislature.

CONCLUSION

Members of the Nevada State Board on Geographic Names are the agencies or organizations listed in [NRS 327.120](#). The individual representatives, as the agents of the members of the Board, are accountable to the agencies or organizations designating them to act in their behalf. The Board, as a whole, is accountable to the Nevada State Legislature in that the Legislature can abolish the Board by legislative fiat.

QUESTION TWO

What is the scope and extent of the Board’s authority?

ANALYSIS

The authority of the Board to act is set forth in [NRS 327.100](#) to [327.150](#). It is axiomatic that the scope and extent of the board’s authority is set forth

in and limited by the statutes creating and empowering the Board. *Andrews v. Nev. St. Bd. of Cosmetology*, [86 Nev. 207](#), 208, 467 P.2d 96 (1970).

Public officers may exercise only that power which is conferred upon them by law. In general, the powers and duties of officers are prescribed by the constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. Public officers have only those powers expressly granted or necessarily implied by statute. . . .

63A Am. Jur. 2d, Public Officers and Employees, § 300, pp. 882-83.

In discussing the scope and extent of the Board's authority, we keep in mind a fundamental rule of statutory construction that when a statute is clear and unambiguous on its face, there is no room for construction. *Roberts v. State, University*, [104 Nev. 33](#), 752 P.2d 221, 223 (1988).

[NRS 327.110](#) expresses the Legislature's purpose in establishing the Board:

The Nevada state board on geographic names is hereby created to coordinate and approve geographic names within the state for official recommendation to the United States Board on Geographic Names.

In coordinating and approving geographic names within the state for official recommendation to the United States Board on Geographic Names, the Board has been granted certain powers by the Legislature. [NRS 327.130](#), among other things, describes how the Board shall manage itself and limits the Board to no more than four meetings each year. [NRS 327.140](#) specifically sets forth the duties and powers of the Board:

1. The board shall:

(a) Receive and evaluate all proposals for changes in or additions to names of geographic features and places in the state to determine the most appropriate and acceptable names for use in maps and official documents of all levels of government.

(b) Make official recommendations on behalf of the state and with respect to each proposal.

(c) Assist and cooperate with the United States Board and Geographic Names in matters relating to names of geographic features and places in Nevada.

(d) Maintain a list of advisers who have special knowledge of or expertise in Nevada history, geography or culture and consult with those advisers on a regular basis in the course of its work.

2. The board may:

(a) Adopt regulations to assist in carrying out the functions and duties assigned to it by law.

(b) Initiate proposals for changes in or additions to geographic names in the state. Any proposal initiated by the board must be evaluated in accordance with the same procedures prescribed for the consideration of other proposals.

The language of this provision is unequivocal. The Board must receive and evaluate proposals, make official recommendations, assist and cooperate with the United States Board on Geographic Names, and maintain a list of advisers. The Board may adopt regulations and initiate proposals. The Board has no authority under this provision to make name change decisions unilaterally.

The authority of the Board is further limited by [NRS 327.150](#) which establishes specific

procedural guidelines the Board must follow before it can take final action on a proposal:

1. Any person, group or agency of federal, state or local government may propose a change in or the addition of any geographic name within the state by submitting it to the Board for evaluation and recommendation.
2. Upon receipt of any such proposal, together with sufficient supporting information, the board shall:
 - (a) Place the proposal on the agenda for preliminary consideration at its next meeting.
 - (b) Give appropriate notice to persons and groups who are affected by the proposal or might have an interest in it.
 - (c) Provide opportunities for public comment.
 - (d) Conduct such research and field investigations as it deems necessary.
3. The Board may not take final action on any proposal until it has been given preliminary consideration at one or more previous meetings.
4. Whenever the Board takes final action on a proposal, it shall notify the person, group or agency who submitted the proposal and shall transmit the official recommendation to the United States Board on Geographic Names.

CONCLUSION

The scope and extent of the Board's authority is contained in the statutes creating and empowering it. The Board was created to coordinate and approve geographic names within the state for official recommendation to the United States Board on Geographic Names. The Board must receive and evaluate proposals, make official recommendations, assist and cooperate with the United States Board on Geographic Names, and maintain a list of advisers. The Board may adopt regulations and initiate proposals. In

evaluating proposals and making recommendations, the Board must follow the procedural guidelines set forth in [NRS 327.150](#). The Board has no powers beyond those granted by the Legislature.

QUESTION THREE

What authority does the Nevada Board of Geographic Names have in making a name change decision if "places," as that word is used in [NRS 327.140](#), were construed to include political names, for example, the names of counties, cities, and towns, and to whom would "official recommendations" be made?

ANALYSIS

Although the word "places" does encompass within its definition cities, towns, villages, and regions or areas such as counties (*Random House Dictionary of the English Language, supra* at 1478; *Black's Law Dictionary, supra*, at 1034), this definition does not broaden the authority of the Board to act because [NRS 327.110](#) to [327.150](#) have unequivocally delineated and circumscribed the powers of the Board. The Board's purpose and principal function is to evaluate geographic names and make official recommendations to the United States Board on Geographic Names. The Board is directed to cooperate with the United States board. These provisions neither expressly nor impliedly authorize the Board to do more.

The Legislature's directive to "cooperate" with the United States board anticipates that Board

actions will be consistent with the policies and principles established by the United States Board on Geographic Names. The policies of the United States board as to the naming of counties, cities, and towns express, as a general rule, deference to the decisions of political subdivisions. For example, in *Guidelines for Preparing and Submitting Proposals Regarding Domestic Geographic Names 2* (1967), prepared by the Domestic Names Committee of the Board on Geographic Names, Principle 15 provides:

Acts of State legislatures, municipal councils, and other local governing bodies regarding geographic names are usually accepted unless application of the names would be in conflict with naming principles followed by the Board.

Principle IV in D. Orth, *Principles, Policies, and Procedures: Domestic Geographic Names*, 8 (1987) provides:

Names Established by Other Authorities--The U.S. Board on Geographic Names normally accepts as official the names of political subdivisions, bounded areas of administration, structures, and establishments in the United States and its territories, as determined by the appropriate responsible public or private authorities

....

Board actions as to place names should be consistent with these policies and principles.

It is instructive to apply these conclusions to the controversial proposal to change the name of "Stateline, Nevada," to "Lake Tahoe, Nevada," which was recently before the Board. The Legislature made no distinction in [NRS 327.150](#) between the Board's evaluation and recommendation of proposals regarding geographic features and the Board's evaluation and recommendation of proposals regarding places. The Board must evaluate all proposals pursuant to the same criteria, including the pertinent policies and principles of the United States board. The Board would have accepted as official the decision of the local governing body to change the name of "Stateline, Nevada," to "Lake Tahoe, Nevada," unless application of the name would have conflicted with the naming principles followed by the United States board. Whether the Board decided to approve or disapprove the proposal after a noticed public hearing and

appropriate research as provided by [NRS 327.150](#), the Board would have been required to notify the person, group or agency who submitted the proposal of its decision. If the proposal was approved, the Board would have been required to transmit its official recommendation of approval to the United States Board on Geographic Names.

CONCLUSION

The Board's authority with respect to place names is identical to its authority as to geographic features. However, the Legislature's directive to "cooperate" with the United States board anticipates that Board actions will be consistent with the policies and principles established by the United States Board on Geographic Names. As to place names, these policies and principles require the Board to accept as official the decisions of local governing bodies unless application of the names would conflict with the naming principles followed by the United States board. Whether the Board decides to approve or disapprove a proposal after a noticed public hearing and appropriate research as provided by [NRS 327.150](#), the Board must notify the person, group or agency submitting the proposal of its decision and, in the event of approval, transmit its official recommendation of approval to the United States Board on Geographic Names.

QUESTION FOUR

Who is the legal counsel for the Nevada State Board on Geographic Names, and to what degree are individual Board members a party to a legal action brought to challenge a Board decision?

ANALYSIS

The Attorney General is the legal counsel for most purposes for the Nevada State Board on Geographic Names. The Board may consult the Attorney General regarding legal questions relating to the Board. [NRS 228.150](#) provides in part:

1. When requested, the attorney general shall give his opinion, in writing, upon any question of law, . . . to the head of any state department, agency, board or commission, . . . upon any question of law relating to their respective offices, departments, agencies, boards or commissions

In addition to providing legal opinions to the Board, the Attorney General shall defend the Board and its members under certain circumstances in actions arising out of acts or omissions relating to the Board's public duties. [NRS 41.0338](#) provides in part:

As used in [NRS 41.0339](#) to [41.0349](#), inclusive, "official attorney" means:

1. The attorney general, in an action which involves a present or former legislator, officer or employee of this state, immune contractor or *a member of a state board or commission* . . . (emphasis added).

[NRS 41.0339](#) provides in part:

The official attorney shall provide for the defense, including the defense of cross-claims and counterclaims, of *any present or former officer or employee of the state* . . . in any civil action brought against that person based on any alleged act or omission relating to his public duties if:

1. Within 15 days after service of a copy of the summons and complaint or other legal document commencing the action, he submits a written request for defense:
 - (a) To the official attorney; or
 - (b) If the officer, employee or immune contractor has an administrative superior, to the administrator of his agency and the official attorney; and

2. The official attorney has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment and appears to have been performed or omitted in good faith (emphasis added).

For purposes of [NRS 41.031](#) to [41.039](#), "public officer" or "officer" includes members of part-time or full-time boards, commissions or similar bodies of the state. [NRS 41.0307](#)(4)(a).

Based on the foregoing provisions, the Nevada State Board on Geographic Names can request legal opinions of the Attorney General and can anticipate that the Attorney General will defend the Board in actions based on acts or omissions relating to its public duties performed or omitted in good faith.

The question as to the degree to which individual Board members can be made parties to legal actions brought to challenge board decisions is answered in part by noting that, although the State of Nevada has waived its immunity from liability and action for some purposes and actions may be brought under [NRS 41.031](#) against the State of Nevada, any agencies of the state, or any political subdivisions of the state, actions may not be brought against state officers or employees based upon the exercise or failure to exercise discretionary functions or duties. [NRS 41.032](#) provides:

Except as provided in [NRS 278.0233](#) no action may be brought under [NRS 41.031](#) or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the

statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Personal deliberation, decision, and judgment are requirements of a discretionary act. *Parker v. Mineral County*, [102 Nev. 593](#), 595, 729 P.2d 491 (1986). Clearly, the evaluation of name proposals pursuant to [NRS 327.150](#) resulting in recommendations to the United States Board on Geographic Names involves the exercise of discretion.

Assuming a civil action could be brought against the Board's members arising out of the exercise of its duties in good faith, the Attorney General would defend the Board and its members as discussed above. In addition, the State of Nevada would indemnify the Board's members for any judgment entered against them as provided in [NRS 41.0349](#):

In any civil action brought against any present or former officer, employee, immune contractor, member or a board or commission of the state or a political subdivision or state legislator, in which a judgment is entered against the defendant based on any act or omission relating to his public duty or employment, the state or political subdivision shall indemnify him unless:

1. The person failed to submit a timely request for defense;
2. The person failed to cooperate in good faith in the defense of the action;
3. The act or omission of the person was not within the scope of his public duty or employment; or
4. The act or omission of the person was wanton or malicious.

CONCLUSION

The Attorney General is the legal counsel for the Nevada State Board on Geographic Names and the Board can request legal opinions of the Attorney General. Although the State of Nevada has waived its immunity for some purposes, actions may not be brought against state officers or employees based upon the exercise or failure to exercise discretionary functions or duties. In the event a civil action is brought against the Board or its members arising out of the exercise of its duties in good faith, the Attorney General would defend the Board and its members. In addition,

the State of Nevada would indemnify the Board's members for any judgment entered against them to the extent provided by [NRS 41.0349](#).

Sincerely,

BRIAN McKAY
Attorney General

By: P. Mark Ghan
Deputy Attorney General
