

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1993

See *State v. Granite Constr. Co.*, 118 Nev. Adv. Op. No. 9, 40 P.3d 423 (2002), decided February 13, 2002.

OPINION NO. 93-1 LABOR; PUBLIC WORKS; PREVAILING WAGE: Truck drivers are entitled to prevailing wage when physically on site and necessary to work being performed.

Carson City, March 16, 1993

Mr. Frank T. MacDonald, Labor Commissioner, 1445 Hot Springs Road, Suite 108, Carson City, Nevada 89710

Dear Mr. MacDonald:

You have asked this office whether certain truck drivers who deliver materials to the site of Nevada public works should be paid the prevailing wage when they are delivering materials to Nevada public works projects. The brief answer is that under some circumstances, such truck drivers should be paid the prevailing wage.

QUESTION

Are employees who drive trucks to the site of prevailing wage projects to deliver materials for immediate use at the site entitled to payment of the prevailing wage under [NRS 338.020](#)?

ANALYSIS

[NRS 338.020](#) provides that for every contract for public work requiring the employment of skilled or semiskilled mechanics or workmen, the employees must be paid the prevailing wage for that class or category of work that the employees perform. [NRS 338.040](#) provides the only geographical limitation on those employees who are entitled to receive the prevailing wage, and provides: "Workmen employed by contractors or subcontractors or by public bodies *at the site of the work and necessary in the execution of any contract* for public works are deemed to be employed on public works." [Emphasis added.]

As we have discussed, your question concerns situations in which an employee of either the general contractor or a subcontractor drives materials deliveries onto the site of a public work project to deliver materials that will be immediately and readily used on site. Your examples include employees who deliver gravel on road projects, asphalt on road projects, and ready-mixed concrete on construction projects. As you have pointed out, some of these delivery drivers may be on site for hours at a time, depending on the course of construction and the type of delivery. Two intertwining questions arise regarding the Nevada statutory scheme: (1) are there some truck drivers who are entitled to receive the prevailing wage in Nevada; and (2) if so, when are they entitled to the prevailing wage? Regarding the first question, [NRS 338.020](#)(1) makes it clear that every employee who performs labor "in the performance of a public work" must be paid the prevailing wage. [NRS 338.040](#) "deems" all workmen employed "at the site of the work and necessary in the execution of any contract for public works" to be due the prevailing wage. The two-part test created in [NRS 338.040](#) has elements of both physical location (at the site of the work) and time of the work (necessary in the execution of the work). Thus, regarding the second

question, if a materials delivery truck driver fulfills both parts of the test in [NRS 338.040](#), he or she must be paid the prevailing wage.

Several scenarios will illustrate when a truck driver would satisfy the test in [NRS 338.040](#). A driver of a ready-mix cement truck who drives the truck on-site and then pours his load directly onto the construction site as directed is both "at the site of the work" and "necessary in the execution of" the work. He or she must be paid the prevailing wage. Similarly, a driver of an asphalt truck or gravel truck delivering materials to a road construction site where the gravel or asphalt will be placed directly on or near the ongoing construction is both "at the site of the work" and "necessary in the execution of" the work.

For contrast, the truck driver who hauls road materials (gravel, rock, sand) to a storage lot or facility might still be considered "at the site of the work," but his delivery itself would not then be "necessary in the execution of" the work. Similarly, an employee fabricating materials off-site that are customized solely for use at the public work would be performing work "necessary in the execution of" the work, but would not be employed "at the site of the work." In both these cases, the prevailing wage would not be due the employee because he or she failed to satisfy both parts of the test provided in [NRS 338.040](#).

In your letter, you indicate a knowledge of and concern for the impact of the "Midway" case, as you refer to it. Our analysis above is harmonious not only with the "Midway" case, but with a second and longer line of authority.

The "Midway" case is the recent District of Columbia Circuit Court of Appeals decision of *Building & Const. Trades Dep't v. Dep't of Labor*, 932 F.2d 985 (D.C. Cir. 1991). In the "Midway" case, the prime contractor, Midway Excavators, Inc., through a wholly-owned subcontractor, hired some employees as "over-the-road" truck drivers for materials delivery from and to the job site. The truck drivers were not on site more than ten minutes at a time. The federal Wage and Hour Division of the Department of Labor determined that the truck drivers were employees on the site of the work pursuant to a federal regulation, 29 C.F.R. § 5.2 (1983), and that they were owed the prevailing wage. The district court affirmed the holding of the Wage and Hour Division.

The D.C. Circuit Court of Appeals determined that 29 C.F.R. § 5.2 (1983) was invalid as exceeding the scope of the plain language of the Davis-Bacon Act which the regulation purportedly interpreted. In particular, the regulation allowed Davis-Bacon coverage to employees who worked off-site in "fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc." The court ultimately held this regulation to exceed the plain language of the Davis-Bacon Act, stating as follows:

In sum, we find, not surprisingly, that Congress intended the ordinary meaning of its words; the phrase "mechanics and laborers employed directly upon the site of the work" restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed. Material delivery truckdrivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor.

Building & Const. Trades Dep't, 932 F.2d at 992. Thus the "Midway" rule under the specific language of the Davis-Bacon Act is that only employees physically on-site are entitled to payment of the prevailing wage. The question of whether truck drivers would need to be paid the prevailing wage for the periods of time they were actually physically on-site was specifically *not* addressed in the "Midway" decision. *Id.* at 989, n.5.

A second line of authority, all preexisting the "Midway" decision, has a history stretching back to 1965, when the United States Court of Claims issued its opinion in *H.B. Zachry Co. v. United*

States, 344 F.2d 352 (Cl. Ct. 1965). In this case, the prime contractor hired several independent contractors to haul materials to the job site. The Court of Claims ultimately decided that the independent contractors were materialmen and that materialmen were not intended to be covered by the Davis-Bacon Act (40 U.S.C. § 276a-7). *H.B. Zachry Co.* 344 F.2d at 361. The Court of Claims left open the question of whether employees of the prime contractor itself would be exempted, since those employees would likely not be materialmen. *Id.*

The *H.B. Zachry* opinion was widely cited and followed by the federal Wage and Hour Division of the Department of Labor. See *Matter of Schiavone Constr. Co.*, 145 WH ¶ 31,744 (June 6, 1989); *Matter of Ames Constr., Inc.*, 222 WH ¶ 31,996 (August 24, 1990); *Matter of Ball, Ball & Brosamer, Inc.*, 222 WH ¶ 32,000 (November 29, 1990). In each of these cases, the administrative law judges ruled that materials supplying truck drivers were entitled to payment of the prevailing wage based upon the *H.B. Zachry* analysis and 29 C.F.R. § 5 (1983).

Two regional supreme courts (Washington and California) have examined their specific prevailing wage acts and have come to conclusions similar to the federal Wage and Hour interpretations. In *Everett Concrete Prod., Inc. v. Dep't of Labor & Indust.*, 748 P.2d 1112 (Wash. 1988), the issue was whether, in the construction of a tunnel, the employees of a subcontractor manufacturing concrete tunnel liners off-site were entitled to receive the prevailing wage. The Washington code (Wash. Rev. Code 39.12.020) provided that "[t]he hourly wages to be paid to laborers, workmen or mechanics, upon all public works" shall be the prevailing wage. Following a "nexus" approach taken from other cases, the court stated that the relevant factors to determine whether a sufficient nexus exists between off-site work and the site of the public work include "physical location of the project site, the nature of the relationship between the parties performing the work, and the characteristics of the product itself." *Everett Concrete*, 748 P.2d at 1113-14.

In *O.G. Sansone Co. v. Dep't of Transp.*, 127 Cal. Rptr. 799 (Cal. Ct. App. 1976), the issue before the California Court of Appeals was whether, on a highway construction project, subcontractors who hauled gravel from an off-site pit to the job site had to pay their employees the prevailing wage. The subcontractors hauled "Class 3 aggregate subbase materials from locations not on the project site, but located adjacent to and established exclusively to serve the project site pursuant to private borrow agreements. . . ." The Cal. Labor Code § 1772 (West 1989) provided: "Workmen employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

The court ultimately determined that the truckers were public works subcontractors because their work was integral to the completion of the public work. The court reasoned as follows:

In the case presently before this court plaintiffs contracted to furnish the subbase material. In order to fulfill the contract, plaintiffs entered into private borrow agreements with third parties so as to obtain borrow sites designed to supply the project site exclusively with subbase materials and plaintiffs contracted with Wright to haul the material to the adjacent project site. Wright and Heck were not materialmen or employees of materialmen. Rather, plaintiffs contracted with Wright to perform an integral part of plaintiffs obligation under the prime contract. The trial court properly determined that under the circumstances of the instant case Wright and Heck were subcontractors.

O.G. Sansone Co., 55 Cal. App. 3d at 445.

Thus the approach of recent sister-state courts has been to examine closely the language of each's particular prevailing wage statute to discern the state legislature's intent. In the sister-state cases, the courts have consistently held that some off-site work *can* be required to be paid at the prevailing wage where the connection between the off-site work and the on-site work is sufficiently compelling.

Our analysis regarding [NRS 338.040](#) is harmonious with both lines of authority discussed above. The "Midway" case mandates acknowledgement of a narrow spatial definition of "site of the work." Our analysis incorporates this same narrow spatial definition. Our analysis also acknowledges that while a truck driver is physically performing necessary work on a public work, he will be paid the prevailing wage. Similar to the *Everett Concrete* and *O.G. Sansone* cases, the within analysis takes into account the particular language of the Nevada statute.

CONCLUSION

A truck driver who delivers materials to a Nevada public work must be paid the prevailing wage for any time that his or her work satisfies the two-part test set out in [NRS 338.040](#), that is that he or she is both physically on the public work site and that the delivery is necessary in time to the public work.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: LOUIS LING
Deputy Attorney General

OPINION NO. 93-2 CONSTITUTIONAL LAW; PUBLIC SCHOOLS; RELIGION: The Nevada Constitution does not prohibit religious worship at public school facilities established as limited public forums provided use is temporary and not at taxpayer expense.

Carson City, March 16, 1993

Ms. Johnnie B. Rawlinson, Chief Deputy District Attorney, 225 East Bridger Avenue, Eighth Floor, Las Vegas, Nevada 89155

Dear Ms. Rawlinson:

You have asked for the opinion of the Attorney General on the following question:

QUESTION

Does the Constitution of the State of Nevada as interpreted in Op. Nev. Att'y Gen. No. 316 (Feb. 19, 1954) prohibit Clark County School District (CCSD) from opening its limited public forum facilities to sectarian groups for religious teaching or purpose?

ANALYSIS

In 1954 this office opined that school trustees have no authority under the Nevada Constitution to let school buildings for religious purposes, with or without rent for the premises. *Id.* This opinion was based upon Nev. [Const. art. 1, § 4](#), and Nev. [Const. art. 11, §§ 2, 9 and 10](#), and the First Amendment of the United States Constitution. In a subsequent opinion, the Attorney General clarified that the constitutional restrictions do not prevent the rental of a school gymnasium or auditorium to a religious group for purposes of an exhibition or show open to the general public which does not attempt to impart, promulgate, or disseminate religious teaching or doctrine. Op. Nev. Att'y Gen. No. 14 (Feb. 23, 1955).

Pursuant to [NRS 393.071](#), "a school trustee *may* grant the use of school buildings and grounds for meetings of literary, scientific, recreational, educational or of general public interest." [Emphasis added.] We note that while [NRS 393.071](#) allows a school district to open schools to non-student groups, it does not *require* that school districts open their facilities to the public even for limited use. *See also Wallace v. Washoe County School Dist.*, 701 F. Supp. 187, 189 (D. Nev. 1988) (McKibben, J., denying plaintiff's application for an order for preliminary injunction). You have advised us that currently CCSD's Administrative Regulation (AR) No. 1231 permits the use of school facilities by non-school groups.¹ Some uses are permitted free of charge and other permitted uses require the payment of a fee. The regulation lists prohibited uses and provides that use "is prohibited by any sponsor when the purpose of the use is to promote religious sectarianism." AR 1231(IV)(B)(1). Doubt concerning the requirement of the prohibition against use for religious sectarian purposes arises from a December 9, 1991, unpublished decision and Order on Summary Judgment Motions of the Honorable Bruce Thompson of the United States District Court for the District of Nevada in *Wallace v. Washoe County School Dist.*, Case No. CV-N-88-302-BRT.² The plaintiff, a church, sought to hold Easter Sunday worship services at a school in the Washoe County School District (WCSD). In his decision, Judge Thompson extensively reviewed the federal decisions relating to the First Amendment of the United States Constitution. In resolving the conflict between the Free Speech Clause and the Exercise and Establishment Clauses of the First Amendment of the United States Constitution, Judge Thompson noted that the federal courts have utilized a forum analysis test. In his opinion, he concluded that "neither state law nor the WCSD regulations expressly excludes religious use of public school facilities."³ (Order on Summary Judgment Motions, p. 9, n.2.) Judge Thompson considered [NRS 393.071](#) and the school district's community use policy in AR 1330(c)(4), but he did not expressly consider Nev. [Const. art. 11, §§ 9](#) and 10, nor did he refer to [NRS 388.150](#). You are concerned that the Nevada Constitution may not permit the school district to open its limited public forum to religious worship on school premises after school hours.

Our analysis begins with an explanation of the "forum test." Because religious worship is a form of speech protected by the First Amendment, the kind of forum is indicative of the level of protection afforded the speech. *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that the Free Speech Clause prohibits exclusion of a religious group from a public forum on a university campus). The United States Supreme Court has categorized forums as "traditional public forums" such as sidewalks and parks, "non-public forums" such as military bases and prisons, and "limited public forums." *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985). You have advised us that you consider the CCSD to be in the limited public forum category.

A limited public forum is created by the government intentionally designating a non-traditional public forum for public discourse. *Id.* at 802. Though the designation of a limited public forum is revocable, the government is subject to the same compelling state interest requirement if it wishes to constrain speech within the group to whom access is allowed. Though a compelling state interest is necessary to constrain speakers *within* the category of specified uses, the government facility remains a *non-public* forum as to all unspecified uses and exclusion of those uses, even if based upon subject matter or the speaker's identity, and need only be reasonable and viewpoint-neutral to pass constitutional muster. *Lamb's Chapel v. Center Moriches Union Free School Dist.*,

¹ Your question and this analysis does not involve the application of the federal Equal Access Act, 20 U.S.C. § 4071 (1984). The Equal Access Act grants certain rights to *student* groups for the use of school facilities including religious use.

² This case is the same case as *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187 (D. Nev. 1988). Judge McKibben denied plaintiff's motion for preliminary injunction primarily because plaintiff sought the permanent use of the school site for worship. Thereafter, the plaintiff submitted another application for a one-time use and the school district approved it in an attempt to settle the case. After a series of other procedural steps the school district moved for summary judgment, asserting that it had not created an *open forum*. Plaintiff filed a cross-motion for summary judgment and Judge Thompson granted the cross-motion.

³ The WCSD regulations did not contain an express prohibition against use for religious purposes though the district maintained that it was required to apply the regulations with that limitation because of the Nevada and United States Constitutions.

770 F. Supp. 91, 97 (E.D. N.Y. 1991).

Under the forum test applicable to the First Amendment, exclusion of religious groups who wish to use the CCSD facilities, a limited public forum, for worship must be based upon a compelling state interest. However, while the Free Speech Clause of the First Amendment favors permitting worship services in the limited public forum, the Establishment Clause may pose a barrier to permitting it. *See Resnick v. East Brunswick Township Bd. of Educ.*, 389 A.2d 944 (N.J. 1978) (school board's regulation permitting use of school facility after normal school hours by religious group resulted in too much entanglement of school in religious program). The test to determine if a permitted use by a sectarian group for worship violates the establishment clause is the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). First, the state action must have a secular purpose; second, the primary effect must be one that neither advances nor inhibits religion; and third, the action must not result in excessive entanglement of the government with religion. Judge Thompson in the Order on Summary Judgment Motions in the *Wallace* decision found that the three prongs were met, especially since the church did not seek a permanent site for worship but only an occasional use, the same as non-religious group use. Order on Summary Judgment Motions, p. 10. Judge Thompson found no compelling state interest in excluding use of the WCSD forum by a group with a religious message.

While use of the school district facility for worship after normal school hours by a non-student group may not violate the Establishment Clause of the United States Constitution, we must determine whether the Nevada Constitution prohibits such use. If the Nevada Constitution does not allow the use of school facilities for worship, upholding the state constitution may constitute a compelling state interest necessary for such a restriction to avoid conflict with the free speech right of the sectarian group.

We now turn to the prohibitions expressed in the Nevada Constitution: "No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution." Nev. [Const. art. 11, § 9](#).

"No public funds of any kind or character whatsoever, State, County or Municipal, shall be used for sectarian purpose." Nev. [Const. art. 11, § 10](#).

The public schools in the State of Nevada are established pursuant to the state constitution. *See* Nev. [Const. art. 11, § 2](#). We can glean from the Debates and Proceedings of the Constitutional Convention of 1864 that by the adoption of article 11, § 9 the concern addressed was that "there should not be in the common school the inculcation of any sectarian doctrines upon the infant minds of pupils." Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada Assembled at Carson City July 4, 1864, to Form A Constitution and State Government* (1866) at 660.

The CCSD facility serves two functions; one as a school and place of instruction, and the other as a limited public forum authorized by statute and the school board of trustees. We note that the request received by the CCSD is for Easter Sunday worship service after normal school hours. The use at issue can be accommodated as part of the limited public forum as long as it does not constitute sectarian *instruction imparted or tolerated in any school*. If the occasional worship service is held on a non-school day or after normal school hours, it is our opinion that it is not sectarian instruction of pupils taking place in the school setting and therefore there is no affront to article 11, § 9, of the Nevada Constitution.

It is noteworthy that the worship proposed for the CCSD facility is for a one-time use for Easter Sunday worship. An infrequent use of the school facility is on a different constitutional footing than regular use, both in relation to the Nevada Constitution and the United States Constitution. A regular or permanent use brings the sectarian activity closer to being integral to the public school. Moreover, the frequent, permanent use for worship is an important factor in whether

the Establishment Clause of the United States Constitution is offended. The line of cases which permitted use of public school facilities by sectarian groups for religious purpose during non-school time are grounded upon statutory authority allowing the school board the authority to grant public use and the religious use being infrequent or on a temporary basis. See Annotation, *Schools - Use for Religious Purpose* 79 A.L.R.2d 1148, § 4 at 1163 (1961); *Resnick*; *Southside Estates Baptist Church v. Bd. of Trustees*, 115 So. 2d 697 (Fla. 1959). Having reached the conclusion that a one-time, after normal hours, use of the school facility for worship does not constitute sectarian instruction imparted or tolerated in a school, we must now address the prohibition of Nev. [Const. art. 11, § 10](#).

Op. Nev. Att'y Gen. No. 316 (Feb. 19, 1954) concluded that the Nevada Constitution was a barrier to sectarian meetings in school facilities whether or not the group paid for the use of the facility. However, Nev. [Const. art. 11, § 10](#) does not require that strictness. It requires that no public funds be used for sectarian purposes. If worship services were permitted in the limited public forum free of charge, Nev. [Const. art. 11, § 10](#) would clearly be violated. However, if the use of the facility was conditioned upon a rental fee reflecting the cost to the school district for the proposed use, no public funds would be expended for the sectarian purpose. In *Resnick*, the New Jersey Supreme Court found that the school board's rules, pursuant to statute, which permitted rental of school facilities after hours to sectarian groups as well as other non-profit social, civic, recreational, and charitable groups, were in compliance with state and federal constitutions provided that the use was temporary and the school board was reimbursed for out-of-pocket expenses so that no taxpayer funds were expended for the benefit of sectarian groups. At least one court rejected an argument that the mere cost of wear and tear on the school facility was an indirect expenditure of public funds in aid of the sectarian activity. See *Southside Estates Baptist Church*.

CONCLUSION

The Nevada Constitution does not prohibit the use of a school facility by sectarian groups for occasional worship services outside of normal school hours if the school board of trustees has created a limited public forum and the cost associated with the use is reimbursed to the school district. While it is our conclusion that the Nevada Constitution does not prohibit occasional sectarian use of public school facilities, this conclusion does not require school boards of trustees to create a limited public forum or permit sectarian activity.

This opinion reverses Op. Nev. Att'y Gen. No. 316 (Feb. 19, 1954) insofar as it prohibited use of school facilities for a sectarian purpose with or without the payment of a rental fee.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN CROSSLEY
Deputy Attorney General

OPINION NO. 93-3 LOCKSMITHS: A county ordinance requiring locksmiths to have a physical business location of a certain size and further requiring an inventory of sale items on premises does not amount to an improper displacement of competition.

Carson City, March 19, 1993

Mr. S. Mahlon Edwards, County Counsel, Clark County District Attorney's Office, 225 East
Bridger Avenue, Eighth Floor, Las Vegas, Nevada 89155

Dear Mr. Edwards:

You have asked a question regarding the legality of a county ordinance that regulates the locksmith trade.

QUESTION

Does Clark County Ordinance 6.12.450, which in part requires locksmiths to have a physical location of a certain size and further requires an inventory of sale items on premises, amount to a restraint of trade in violation of [NRS 244.187](#)?

ANALYSIS

In your opinion request, you concluded that ordinance 6.12.450 was constitutionally sound and did not displace competition in violation of [NRS 244.187](#). We agree with that conclusion.

The power to regulate the locksmith trade has been delegated to the county commission by the legislature. Pursuant to [NRS 655.070](#):

1. Every person who wishes to operate as a locksmith or safe mechanic shall obtain a permit from the sheriff of the county in which his principal place of business is located.
2. The sheriff of a county shall investigate each applicant and shall issue a permit to each applicant *who qualifies under any ordinance adopted by the board of county commissioners of the county which regulates the occupation of locksmiths and who is found by the board of county commissioners to be suitable.* [Emphasis added.]

Pursuant to the delegation of police power set forth above, Clark County enacted Ordinance 6.12.450. This ordinance, enacted in order to promote the public welfare, is entitled to a presumption of validity. *See Koscot Interplanetary, Inc. v. Draney*, [90 Nev. 450](#), 530 P.2d 108 (1974).

Ordinance 6.12.450 sets forth in part:

(5) No such locksmith license shall be issued to:

.....

(b) Any applicant, unless the applicant:

- (i) Has a physical location of at least three hundred square feet;
- (ii) Has an inventory for retail sale to the public of safes, high security locks, electronic access control equipment, security hardware and exit hardware and the ability to provide services for rekeying and master keying.

These ordinance provisions preclude the licensing of "mobile locksmiths" who might use a mailbox as a business address. Opponents of the ordinance suggest that such a prohibition amounts to granting of improper exclusive franchise to fixed location locksmiths in violation of [NRS 244.187](#).

We disagree with the assertion that the ordinance amounts to improper granting of an exclusive franchise. We read the ordinance provisions restricting the location and types of locksmith establishments as a reasonable means of controlling a trade in order to protect the public welfare.

As stated in 51 Am. Jur. 2d *Licenses and Permits* § 19 (1970) at 27:

Although the requirement of any license or the enforcement of any regulation on business

is, to some extent, necessarily in restraint of trade, not all such restraint is unlawful. In general, the state may restrain trade through licensing regulations under the police power, if the restraint is reasonable and is a necessary result of the enforcement of valid regulatory measures. [Footnotes omitted.]

In the present situation, the county has provided a rational basis for requiring locksmiths to work out of a fixed location containing a specific size and inventory. The county notes that because locksmiths have unlimited access to homes and businesses due to the ability to penetrate locked doors, county officials wish to have the ability to trace the locksmith to a specific location and to inspect the articles used in conjunction with the trade. We find that these ordinance requirements are rationally related to a legitimate governmental purpose of protecting the public. See *Edwards v. City of Reno*, [103 Nev. 347](#), 742 P.2d 486 (1987); *State ex rel. Grimes v. Bd. of Comm'rs of Las Vegas*, [53 Nev. 364](#), 1 P.2d 570 (1931).

CONCLUSION

Clark County Ordinance 6.12.450 does not violate the provisions of [NRS 244.187](#).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Deputy Attorney General

OPINION NO. 93-4 TAXATION; CIGARETTES; INDIANS: Nevada may regulate the wholesale price of cigarettes sold on an Indian reservation or colony by licensed non-tribal Nevada cigarette wholesalers to tribal retailers under [NRS 370.371](#), but only to the extent of those cigarettes destined for resale to non-tribal consumers. However, under [NRS 370.005](#) and [370.373](#), the state may not regulate the wholesale price of cigarettes sold out of state by an unlicensed Nevada cigarette wholesaler to a licensed Nevada cigarette wholesaler, who in turn transports the cigarettes into Nevada for resale pursuant to [NRS 370.055](#)(3).

Carson City, March 22, 1993

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

Dear Mr. Comeaux:

In 1989, legislation was enacted to regulate the wholesale price of cigarettes sold for consumption in Nevada.⁴ You have requested an opinion from this office concerning the application of this legislation to cigarette sales made on an Indian reservation or colony, as well as sales made out of state. In view of the foregoing, you have specifically presented this office with the following questions and facts:

QUESTION ONE

May the State of Nevada regulate the wholesale price of cigarettes sold on an Indian reservation or colony by a licensed non-tribal Nevada cigarette wholesaler to a tribal smokeshop?

⁴ See 1989 Nev. Stat. ch. 661.

BACKGROUND

It has recently come to the attention of the Nevada Department of Taxation (Department) that a Nevada Indian tribe operating a smokeshop on a reservation is purchasing cigarettes for retail sale from an out-of-state licensed, Nevada cigarette wholesaler. The cigarettes are transported through interstate commerce. Title to the cigarettes, presumably, passes to the tribe upon delivery to the Indian reservation in Nevada.

ANALYSIS

Chapter 370 of the Nevada Revised Statutes is entitled: "Tobacco Licenses and Taxes," and provides for the regulation, licensing and taxation of cigarettes⁵ and other tobacco products⁶ which are distributed and sold in the State of Nevada. Under [NRS 360.200](#), [370.257](#) and [370.3715](#), the Department is charged with the duty of administering chapter 370 of NRS.

[NRS 370.371](#) sets forth Nevada's prohibition against a wholesaler⁷ selling⁸ cigarettes to a retailer,⁹ at below wholesale costs, as follows:

1. A wholesale dealer shall not, with intent to injure competitors or destroy or lessen competition substantially:

(a) Advertise, offer to sell or sell at wholesale, cigarettes at less than the cost to the wholesale dealer; or

(b) Offer any rebate or concession in price or give any rebate or concession in price in connection with the sale of cigarettes.

2. A retail dealer shall not:

(a) Induce, attempt to induce, procure or attempt to procure the purchase of cigarettes at a price less than the cost to the wholesale dealer; or

(b) Induce, attempt to induce, procure or attempt to procure any rebate or concession in connection with the purchase of cigarettes.

3. A person who violates the provisions of this section shall be punished by a fine of not more than \$50 for each offense.

4. Evidence of:

(a) An advertisement, an offer to sell or the sale of cigarettes by a wholesale dealer at less than the cost to him;

(b) An offer of a rebate in price, the giving of a rebate in price, an offer of a concession or the giving of a concession in connection with the sale of cigarettes; or

(c) The inducement, attempt to induce, procurement or attempt to procure the purchase of

⁵ NRS 370.010 defines "cigarette" to mean "all rolled tobacco or substitutes therefor wrapped in paper or any substitute other than tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated or mixed with any other ingredient."

⁶ NRS 370.440 through 370.503 governs the licensing and taxation of products made from tobacco, other than cigarettes. *See also* NAC 370.140-.160.

⁷ NRS 370.055 defines "wholesale dealer" to mean:

1. Any person who brings or causes to be brought into this state unstamped cigarettes purchased from a manufacturer or another wholesaler, and who stores, sells or otherwise disposes of them within the state.

2. Any person who manufactures or produces cigarettes within this state and who sells or distributes them within the state.

3. Any person who acquires cigarettes solely for the purpose of a bona fide resale to retail dealers or to other persons for the purpose of resale only.

⁸ NRS 370.037 defines a "sale at wholesale" to mean "a bona fide transfer of title to cigarettes for valuable consideration, made in the ordinary course of trade or in the usual conduct of the wholesale dealer's business, to a retail dealer for the purpose of resale." *See also* NRS 370.035 (defining the terms "sale" and "to sell").

⁹ NRS 370.033 defines "retail dealer" to mean "any person who offers to sell cigarettes at retail or who is engaged in selling cigarettes at retail."

cigarettes at a price less than the cost to the wholesale dealer, is prima facie evidence of intent and likelihood to injure competition and to destroy or lessen competition substantially.

[NRS 370.027](#) defines the "cost to the wholesale dealer" to mean:

[T]he basic cost of cigarettes¹⁰ to the wholesale dealer plus the cost of doing business by the wholesale dealer as evidenced by the standards and methods of accounting regularly employed by the wholesale dealer in the determination of costs for the purpose of reporting federal income tax for the total operation of his establishment, and includes costs for labor, salaries of executives and officers, rent, depreciation, sales, maintenance of equipment, delivery, interest payable, licenses, taxes, insurance and advertising, expressed as a percentage of and applied to the basic cost of cigarettes.

However, a wholesaler who sells cigarettes to another wholesaler is not required to charge wholesale cost, "but the sales price must not be less than the basic cost of cigarettes." [NRS 370.373](#). The purpose¹¹ of this legislation is clearly to prevent unfair wholesale price competition between wholesalers by prohibiting the wholesale price of cigarettes from being less than the cost of those cigarettes to the wholesaler.¹²

A. An Overview Of The Doctrine Of Tribal Sovereign Immunity And Federal Preemption.

Any application of state regulatory law to an Indian tribe must be analyzed in light of the tribe's right of sovereign immunity, as well as the intertwined doctrine of federal preemption.¹³ The United States Supreme Court originally enunciated the doctrine of tribal sovereign immunity in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25 (1831), cited by *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). The Court has long held that Indian tribes are domestic dependent nations which exercise inherent sovereign authority over their members and territories. *Id.*

There are two fundamental principles which govern the regulatory authority of states with respect to tribes or their members. The first principle is that, absent express congressional authorization, states possess no power to regulate Indian tribes or tribal members on the reservation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-71 (1973). The second principle is that, "[a]bsent 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." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). *See also* Op. Nev. Att'y Gen. No. 89-2 (March 13, 1989).

¹⁰ NRS 370.005 defines the "basic cost of cigarettes" to mean:

[T]he invoice or replacement cost of cigarettes to the wholesale dealer in the quantity last purchased, whichever is lower, plus the full value of any cigarette revenue stamps that are affixed to the packages, packets or containers of cigarettes, if not included in the invoice cost, less all trade discounts, except cash discounts.

¹¹ In Nevada a person may simultaneously hold licenses as both a cigarette wholesaler and retailer. NRS 370.080, 370.100, 370.140 and 370.150. *See also* Op. Nev. Att'y Gen. No. 474 (June 19, 1947). Obviously, a wholesaler/retailer can purchase cigarettes from a manufacturer at the same wholesale price as an ordinary wholesaler. However, unlike the ordinary wholesaler who must realize a profit on the sale of cigarettes to retailers or other wholesalers, a wholesaler/retailer can sell cigarettes at below his wholesale costs, as a "leader item," for the sole purpose of attracting more customers to his retail establishment. *See* 65th Nev. Legislature, *Minutes of March 13, 1991, hearing on A.B. 287, Assembly Commerce Comm.*, at pp. 618-19. *See also* 65th Nev. Legislature, *Minutes of April 11, 1991, hearing on A.B. 287, Senate Taxation Comm.*, at pp. 576-77.

¹² The rules of statutory construction provide that if the language of a statute is plain and unambiguous a court may not go beyond that language in an attempt to determine legislative intent. *Roberts v. State, Univ. of Nev. Sys.*, 104 Nev. 33, 37, 752 P.2d 221, 225 (1988); *State, Dep't of Motor Vehicles v. McGuire*, 108 Nev. 182, 184, 827 P.2d 821, 822 (1992).

¹³ *See* U.S. Const. art. VI, cl. 2.

Although the idea of tribal immunity was initially founded upon the concept of sovereignty, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward a reliance on federal pre-emption." *McClanahan*, 411 U.S. at 172. In *Rice v. Rehner*, 463 U.S. 713 (1983), Justice O'Connor delivered the opinion of the Court concerning the application of a state regulatory law to a tribal retailer, as analyzed under the veil of tribal sovereignty and federal preemption. *Id.* at 716. Though the right of tribal self-government is dependent on and subordinate to only the federal government, the Court will "employ *the tradition of Indian sovereignty* as a 'backdrop' against which the applicable treaties and federal statutes must be read" in a preemption analysis. *Id.* at 719 (emphasis added).

The issue in *Rice* concerned whether the State of California could require a federally licensed Indian trader, operating an on-reservation general store, to obtain a state liquor license in order to sell liquor for off-premises consumption. *Id.* at 716. Therefore, the "backdrop" in *Rice* concerns the licensing and distribution of alcoholic beverages, and the Court must determine whether there is a tradition of Indian sovereignty in this area which may be repealed only by an act of Congress. *Id.* at 720. The court held that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Id.* at 722. If there is any interest in tribal sovereignty affected by California's alcoholic beverage regulation, it is only to the extent that the state attempts to regulate on-reservation liquor sales to tribal members. *Id.* at 721.

The final step of the O'Connor analysis is to determine if the presumed state regulatory authority over the conduct of non-tribal members engaged in on-reservation activities is preempted by federal law. *Id.* at 725. As Justice Marshall noted in the companion case of *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983): "State jurisdiction over non-Indians acting on the tribal reservations is preempted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless state interests at stake are sufficient to justify assertion of state authority." *Id.* at 334.

Therefore, "a particularized inquiry must be made into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in a specific context, the exercise of state authority would violate federal law" and be preempted. *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

B. *Moe And Confederated Tribes Of Colville Establish That Cigarette Sales To Non-Tribal Members Are Not Inherently A Part Of Tribal Sovereignty.*

In the seminal case of *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the Court was confronted with the issue of whether the State of Montana could impose its cigarette tax upon on-reservation cigarette sales by requiring the tribal retailer to precollect the tax. *Id.* at 468. The Court held that the state could impose its cigarette tax only on non-Indian purchases from tribal retailers because the tax was a direct tax on the retail consumer rather than the tribe. *Id.* at 482. Furthermore, the Court held that the state could place minimal burdens upon the tribal retailer to aid in collecting this lawful state tax. *Id.* at 483. The application of Montana's precollection statute to tribal smokeshops is designed to avoid the likelihood that non-Indian purchasers could evade a lawful state cigarette tax by purchasing cigarettes from a tribal retailer. *Id.*

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court reaffirmed and even expanded upon its decision in *Moe*. The issues before the Court in *Confederated Tribes of Colville* concerned: (1) whether the State of Washington could impose a cigarette tax upon on-reservation purchases by non-tribal members rather than just non-Indian purchases as in *Moe*; (2) whether Washington could require a tribal retailer to keep detailed records of exempt and non-exempt purchases, in addition to simply precollecting the tax as authorized by

Moe; and (3) whether Washington had the power to seize shipments of unstamped cigarettes enroute to the reservation retailer. *Id.* at 151-52.

The Court held that on-reservation cigarette sales to non-tribal members are subject to Washington's cigarette tax. *Id.* at 156. The fact that the tribe already imposes its own tax upon cigarettes purchased by non-tribal members does not preempt the state from also taxing the same transaction. *Id.* at 155. Such a tax may be valid even if it seriously disadvantages or eliminates a tribal retailer's business with non-tribal members. *Id.* at 151. The Court pointed out that the value marketed by tribal smokeshops to non-tribal members is not based upon on-reservation services received by the non-tribal member for which the tribe has an interest, rather the value is based solely upon an exemption from state taxation. *Id.* at 155. As the Court stated "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, 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.* (emphasis added). Therefore, since Washington's cigarette tax was valid as applied to non-tribal members, the state could require tribal smokeshops to affix Washington cigarette revenue stamps to individual cigarette packages prior to resale to non-tribal members. *Id.* at 159. The Court in *Confederated Tribes of Colville* even held that the tribal retailer is bound by the state's recordkeeping requirements as part of aiding the state in collecting this valid tax and as a reasonable means of preventing fraudulent transactions that seek to avoid the state's cigarette tax. *Id.* at 160. Washington's interest in enforcing this valid tax also justified the state's seizure of unstamped cigarette shipments enroute to the reservation. *Id.* at 161-62.

Clearly, the Supreme Court's decisions in *Moe* and *Confederated Tribes of Colville* establish that cigarette sales to non-tribal members are not inherently a part of tribal sovereignty. Thus states such as Nevada may regulate the wholesale price of cigarettes sold to tribal retailers, at least to the extent of those cigarettes destined for resale to non-tribal consumers.¹⁴ Here, Nevada is *not* directly regulating the retail price of cigarettes sold by the tribal retailers, nor is the state disadvantaging the tribe in a manner any different than that of other retailers throughout the state. The economic impact of the state's prohibition against selling cigarettes at below wholesale cost falls directly upon the non-tribal consumer who pays a higher retail price including the corresponding state or tribal taxes. [NRS 370.077](#).¹⁵

C. The Indian Trader Statutes, Codified At 25 U.S.C. §§ 261-264 (1983), Do Not Preempt Nevada's Regulation Of The Wholesale Price Of Cigarettes Sold To Tribal Retailers, At Least To The Extent Of Those Cigarettes Destined For Resale To Non-Tribal Members.

As noted by Justice O'Connor in *Rice*, if the area in which the state asserts regulatory power does not fall within the parameters of traditional tribal sovereignty, is the presumed regulatory authority preempted by federal law? *Id.* at 725. There is no express federal statute which governs the question at hand except the Indian Trader Statutes, codified at 25 U.S.C. §§ 261-264 (1983). The Indian Trader Statutes provide that the Commissioner of Indian Affairs is responsible for regulating trade with the Indian tribes, including the power to appoint and license traders with the various tribes. 25 U.S.C. § 261 (1983). *See also* 25 C.F.R. §§ 140.1-.26 (1992). The fundamental purpose of this legislation is to protect Indians from fraudulent dealings and unethical exploitation as a result of being an essentially captive consumer market. *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 165 (1980).

¹⁴ NRS 370.020 defines "consumer" to mean "any person who comes into possession of cigarettes in this state as a final user for any purpose other than offering them for sale as a wholesale or retail dealer."

¹⁵ *See also California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1980), the Court, relying on its prior holdings in *Moe* and *Confederated Tribes of Colville*, held that California had the right to collect an excise tax on cigarettes sold by the tribe to non-tribal purchasers even though the statute did not expressly require that the tax be passed through to the ultimate purchasers where the legal incidence of the tax fell. *Id.* 474 U.S. at 11-12. However, Nevada specifically provides in NRS 370.077 that all taxes paid in chapter 370 are "direct taxes upon the consumer."

In *Confederated Tribes of Colville*, 447 U.S. 134, the Court gave a broad reading to several federal statutes, including the Indian Trader Statutes, and found no evidence that indicated Congress intended to provide Indian tribes with the power to preempt the levy or regulation of state cigarette taxes to on-reservation cigarette purchases by non-tribal members. *Id.* at 155-56. Clearly, the Indian Trader Statutes do not preempt Nevada's regulation of the wholesale price of cigarettes sold to tribal retailers, at least to the extent of those cigarettes destined for resale to non-tribal members. Furthermore, a balance of tribal or federal interests versus state interests does not preempt Nevada from enforcing its wholesale pricing statutes. There is simply no significant tribal or federal interest which would be impaired. However, Nevada has a substantial interest in ensuring that wholesalers and retailers do not injure competitors or destroy the open market for cigarette trade among other cigarette wholesalers and retailers throughout the state. If tribal retailers are permitted to buy cigarettes at wholesale cheaper than other retailers, they can undercut non-tribal retailers who must also compete in the same market but under the applicable regulatory provisions of Nevada's wholesale pricing statutes. As Justice Marshall noted in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 336, "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." *Id.*, at 336.

D. Enforcement Of NRS 370.371.

The State of Nevada may regulate the wholesale price of cigarettes sold on an Indian reservation or colony by licensed non-tribal Nevada cigarette wholesalers to tribal retailers, but only to the extent of those cigarettes which are intended for resale to non-tribal consumers. Therefore, the question is how may the state enforce its regulatory authority over such transactions? Pursuant to [NRS 370.250\(2\)](#), the Department may temporarily suspend or permanently revoke the license of any Nevada cigarette wholesaler who violates the provisions of [NRS 370.001](#) through 370.430, including [NRS 370.371](#), the prohibition against selling cigarettes at below wholesale cost.

With regard to the tribal retailer the state may, as set forth in *Moe* and *Confederated Tribes of Colville*, place minimal burdens upon the tribal smokeshops to aid in enforcing the state's valid wholesale pricing statutes. This means that Nevada can require a tribal retailer to segregate shipments of cigarettes, by invoice or other documented means, indicating that part of the shipment is intended for tribal and non-tribal consumption, and the corresponding wholesale price paid by the tribal smokeshop. This same burden may also be placed upon the non-tribal wholesaler. The state may also require, as in *Confederated Tribes of Colville*, that the tribal retailer keep detailed records of those cigarettes sold to non-tribal members in an attempt to verify the amount of cigarettes originally segregated for tribal and non-tribal resale and to ensure that nonexempt cigarettes are not escaping state taxation¹⁶ or being sold at below wholesale costs.

In addition, [NRS 370.025](#) defines "contraband cigarettes" as "any cigarettes exported from or imported into this state by any person in violation of any of the provisions of . . . chapter" 370. Pursuant to [NRS 370.345](#), "the State of Nevada *shall* seize any contraband cigarettes found or located in the [s]tate." [Emphasis added.] Therefore, if the tribal retailers or non-tribal wholesalers refuse to comply¹⁷ with Nevada's wholesale cigarette pricing statutes, shipments of cigarettes enroute to the reservation will be considered contraband and shall be subject to seizure by the state,

¹⁶ In 1991, the legislature enacted NRS 370.515 which prohibited the state from collecting a tax upon on-reservation cigarette sales to non-tribal consumers *if* the tribe has imposed its own cigarette tax that was at least equal to the tax imposed by the state under chapter 370 of NRS.

¹⁷ See n.8. The Department has entered into intergovernmental agreements with several Nevada Indian tribes and colonies. The tribes and colonies have agreed to comply with Department regulations, as well as provisions of chapter 370 of NRS, in exchange for the Department's promise not to levy or collect a cigarette tax upon on-reservation cigarette sales to non-tribal members *if* the tribe imposes its own tax that is at least equal to or greater than the state's tax imposed under chapter 370.

as in *Confederated Tribes of Colville*.

These measures ensure that Nevada's statutory prohibition against selling cigarettes at below wholesale cost is being enforced and will not "abridge the rights of any Indian, individual or tribe, to infringe upon the sovereignty of any Indian tribe." [NRS 370.520](#).

CONCLUSION TO QUESTION ONE

Nevada may regulate the wholesale price of cigarettes sold on an Indian reservation or colony by licensed non-tribal Nevada cigarette wholesalers to tribal smokeshops, but only to the extent of those cigarettes destined for resale to non-tribal members. The state may enforce its regulatory authority, in this context, by: (1) temporarily suspending or permanently revoking the license of the non-tribal Nevada cigarette wholesaler under [NRS 370.250\(2\)](#); (2) requiring both the tribal retailer and non-tribal Nevada wholesaler to keep detailed records of those cigarettes intended for and actually resold to tribal and non-tribal members, including the corresponding wholesale price paid by the tribal retailer; and (3) seizing shipments of cigarettes enroute to the reservation under [NRS 370.025](#) and [370.345](#) when tribal retailers and non-tribal wholesalers refuse to comply with Nevada's wholesale pricing statutes.

QUESTION TWO

Is Nevada permitted to regulate the wholesale price of cigarettes sold out of state by an unlicensed Nevada cigarette wholesaler to a licensed Nevada cigarette wholesaler who in turn transports the cigarettes to Nevada for resale?

BACKGROUND

It has also come to the attention of the Department that an unlicensed Nevada cigarette wholesaler licensed in the State of Arizona, has been selling to a licensed Nevada cigarette wholesaler in Arizona, where title passes. The Arizona wholesaler has no place of business in Nevada and distributes from the State of Arizona. The Nevada wholesaler affixes Nevada cigarette tax [revenue] stamps in Arizona, where he in turn transports his own product into Nevada for resale to licensed Nevada cigarette retailers or other licensed Nevada cigarette wholesalers.

ANALYSIS

Here, the facts concern the sale of cigarettes between wholesalers, which is governed by [NRS 370.373](#). Specifically, [NRS 370.373](#) does not require a wholesaler selling cigarettes to another wholesaler to charge wholesale cost, "but the sale price must not be less than the basic cost of cigarettes." [NRS 370.005](#) defines the "basic cost of cigarettes" to mean the invoice or replacement cost to the wholesaler, plus the value of any revenue stamps that are affixed, less all trade discounts except cash discounts.

The typical situation which may arise is where a wholesaler purchases cigarettes from the manufacturer at \$15.00 per carton. The manufacturer gives a \$.50 per carton *trade discount* for the volume of the purchase, and a \$.50 per carton *cash discount* for paying the account receivable within 10 days of shipment. The wholesaler has, after the discounts, realized a cost of \$14.00 per carton. However, pursuant to [NRS 370.005](#), this hypothetical wholesaler could *not* resell the cigarettes at \$14.00 per carton in Nevada because the price would include the \$.50 per carton cash discount, which is disallowed in Nevada. This particular wholesaler would have to resell the cigarettes at no less than \$14.50 per carton, adding back in the manufacturer's cash discount, which would correctly reflect this wholesaler's basic cost of cigarettes under [NRS 370.005](#).

Theoretically this hypothetical situation makes sense, but in reality it is untenable. The

problem arises when a licensed Nevada cigarette wholesaler goes out-of-state to purchase cigarettes from another cigarette wholesaler who is not licensed in Nevada. The Nevada wholesaler has no way of knowing whether his invoice price from the out of state wholesaler includes the cash discount given by the manufacturer. Furthermore, Nevada has no authority or means by which to regulate the wholesale price of cigarettes sold out of state by an unlicensed Nevada cigarette wholesaler. Nevada may regulate the wholesale price of cigarettes sold in state, or as applied to the above hypothetical situation Nevada can regulate the wholesale price that the licensed Nevada wholesaler charges upon resale.¹⁸ Clearly, Nevada may also regulate the wholesale price of cigarettes sold out of state by a licensed Nevada wholesaler, since the cigarette license of the Nevada wholesaler may be subject to temporary suspension or permanent revocation by the Department for violations of chapter 370 of NRS. [NRS 370.250\(2\)](#).

To further complicate this matter, there is a loophole in Nevada's definition of the "basic cost of cigarettes." That is to say, [NRS 370.005](#) defines the basic cost of cigarettes to "mean *the invoice or replacement cost to the wholesaler.*" [Emphasis added.] To apply this literally to the above hypothetical situation, if the licensed Nevada wholesaler purchases cigarettes out of state at \$14.00 per carton from the non-Nevada wholesaler, that is the Nevada wholesaler's invoice or replacement cost of those cigarettes. The licensed Nevada wholesaler could legally transport this product back to Nevada and resell at \$14.00 per carton, plus the value of any revenue stamps he has affixed,¹⁹ even though he has indirectly benefited from the manufacturer's cash discount given to the out-of-state wholesaler. In order to close this loophole, [NRS 370.005](#) would have to be amended to reflect the manufacturer's sales price, plus some percentage for any possible cash discounts, rather than using the wholesaler's invoice or replacement cost in determining the basic cost of cigarettes. The wholesaler's invoice price may or may not reflect a manufacturer's cash discount, depending on whether the wholesaler has purchased directly from the manufacturer or another wholesaler.

CONCLUSION TO QUESTION TWO

Nevada may not regulate the wholesale price of cigarettes sold out of state by an unlicensed Nevada cigarette wholesaler to a licensed Nevada cigarette wholesaler, who in turn transports the cigarettes to Nevada for resale.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JEFFREY R. RODEFER
Deputy Attorney General

OPINION NO. 93-5 TAXATION; PROPERTY; CONSTITUTIONAL LAW; DISABLED VETERANS: Nevada residents, who have been honorably discharged from the United States Armed Forces and who suffer from a permanent service-connected disability of less than 60 percent, are not entitled to a property tax exemption under [NRS 361.091](#). This classification of disabled veterans does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

¹⁸ Pursuant to NRS 370.055(3), a "wholesale dealer" is also defined to include "[a]ny person who acquires cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purpose of resale only."

¹⁹ Pursuant to NRS 370.170, it is unlawful for any person to either give or sell cigarettes within this state, unless there is affixed to each package of cigarettes a Nevada revenue stamp. Only a licensed Nevada cigarette wholesaler or a licensed Nevada cigarette wholesaler/retailer may affix revenue stamps using a Department-approved metered stamping machine. NRS 370.190 and NAC 370.030.

Carson City, March 22, 1993

Major General Drennan A. Clark, The Adjutant General, State of Nevada Military Department,
2525 South Carson Street, Carson City, Nevada 89701-5502

Dear General Clark:

In 1973, the Nevada State Legislature enacted a property tax exemption for disabled veterans. *See* Act of March 29, 1973, ch. 170, § 1, 1973 Nev. Stat. 226. This legislation has been amended several times in the intervening years. You have requested an opinion from this office concerning the interpretation and application of this property tax exemption, codified in § 361.091 of the NRS. In view of the foregoing, you have specifically presented this office with the following question:

QUESTION

Are Nevada residents, who have been honorably discharged from the United States Armed Forces and who suffer from a permanent service-connected disability of less than 60 percent, entitled to a property tax exemption under [NRS 361.091](#)?

ANALYSIS

The question presented concerns the State of Nevada's classification of honorably discharged, disabled veterans,²⁰ pursuant to the percentage of their respective permanent service-connected²¹ disabilities, for purposes of property tax relief under chapter 361 of NRS. [NRS 361.091](#) provides in relevant part as follows:

1. An actual bona fide resident of the State of Nevada who has incurred a permanent service-connected disability and has been honorably discharged from the Armed Forces²² of the United States, or his surviving spouse, is entitled to a disabled veteran's exemption.

2. The amount of exemption is based on the total percentage of permanent service-connected disability. The maximum allowable exemption for total permanent disability is the first \$10,000 assessed valuation. A person with a permanent service-connected disability of:

(a) Eighty to 99 percent, inclusive, is entitled to an exemption of \$7,500 assessed value.

(b) Sixty to 79 percent, inclusive, is entitled to an exemption of \$5,000 assessed value.

For the purposes of this section, any property in which an applicant has any interest is deemed to be the property of the applicant. [Footnote added.]

Subsection (1) of the statute sets forth the legislature's intent to confer a property tax exemption upon the disabled veterans residing in Nevada,²³ while subsection (2) sets forth the amount of exemption a qualifying veteran is entitled to received. Both of these subsections must be read and construed together in order to give meaning to all parts of the statute. *KJB, Inc. v. Second Judicial Dist. Ct.*, [103 Nev. 473](#), 476, 745 P.2d 700 (1987). Clearly, subsection (2) of [NRS 361.091](#) is intended to limit the class of disabled veterans entitled to an exemption under subsection (1) to those disabled veterans who have been certified as having at least a 60 percent permanent disability.

In 1977, the legislature amended [NRS 361.091](#) to add the limitation that the exemption be restricted to those veterans suffering from a permanent service-related disability of 60 percent or more.²⁴ Upon review of the legislative history it appears that the legislature chose the 60 percent disability cutoff based upon testimony and information received from the Veterans' Administration, that a person with a 60 percent permanent disability is considered unemployable.²⁵ Pursuant to § 4.16 of the Code of Federal Regulations (C.F.R.), the Department of Veteran Affairs considers a disabled veteran unemployable, for purposes of compensation, if he is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities: *Provided That . . . [the] disability shall be ratable at 60 percent or more.*"²⁶

The language of [NRS 361.091](#) is clear and unambiguous in expressing its intent to restrict the exemption to those residents who have permanent service-connected disabilities of at least 60 percent. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988). The analysis then turns on whether Nevada's classification of disabled veterans is constitutional.

²⁰ 38 U.S.C. § 101(2) (1991), defines the term "veteran" to mean "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."

²¹ 38 U.S.C. § 101(16) (1991), defines "service-connected" to mean "with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in the line of duty in the active military, naval, or air service."

²² 38 U.S.C. § 101(10) (1991), defines "Armed Forces" to mean "the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including the reserve components thereof."

²³ See 57th Nev. Legislature, *Minutes of February 12, 1973, hearing on S.B. 106 before the Senate Taxation Comm.* at 7-8.

²⁴ See 1977 Nev. Stat. ch. 500, § 1. Act of May 13, 1977 ch. 500, § 1, 1977 Nev. Stat. 1032.

²⁵ See 59th Nev. Legislature, *Minutes of April 12, 1977, hearing on A.B. 622 before the Assembly Comm. on Taxation*, at 400-08.

²⁶ 38 U.S.C. § 501 (1991), provides the congressional authorization to the Secretary of the Department of Veteran Affairs to adopt regulations necessary to administer Title 38 of U.S.C. See also 38 U.S.C. § 101(1) (1991) (defining the terms "Secretary" and "Department").

"When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment" to the United States Constitution.²⁷ *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). "The Equal Protection Clause does *not* forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (emphasis added). Generally, a law will survive constitutional scrutiny under the Fourteenth Amendment if the distinction or classification made by the law is *rationally related to a legitimate state purpose*. *Hooper*, 472 U.S. at 618. Therefore, a "rational basis test" will be utilized to determine whether a state law passes constitutional muster, unless a suspect classification²⁸ or a fundamental right²⁹ is involved.³⁰ *Nordlinger*, 112 S. Ct. 2326 (1992).

In *McDowell v. Borough of Pine Hill*, 736 F. Supp. 1313 (D.N.J. 1990), *aff'd* 919 F.2d 731 (9th Cir. 1990), a disabled veteran brought an action against the borough seeking to challenge the constitutionality of a New Jersey statute granting veterans a homestead exemption from property taxes if the Veterans' Administration declares the veteran to be totally or permanently disabled, but also giving the borough the discretion to grant retroactive application of the exemption. *Id.* at 1314, 1319. The plaintiff/veteran was objecting to the borough's practice of uniformly denying retroactive applications of the homestead exemptions. *Id.* The borough had no discretion regarding prospective application of the statute once the Veterans' Administration had made its determination of disability. *Id.* at 1319.

The plaintiff/veteran argued that the denial of retroactive benefits to totally disabled veterans whose determinations are delayed by the Veterans' Administration, as distinguished from those veterans whose disability determinations were quickly made and received the mandatory homestead exemptions, violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* The court held that the classification of veterans and the decision to deny retroactive benefits served a legitimate state purpose of allowing the local governments sufficient flexibility to budget and spend tax revenues. *Id.* at 1320.

Justice Stevens' writing for the dissent³¹ in *Hooper* held that "the State's resources are not infinite. The need to budget for the future is itself a valid reason for concluding that a limit should be placed on the size of the class of potential beneficiaries."³² *Id.* at 627.

²⁷ U.S. Const. amend. XIV, § 1.

²⁸ Classifications such as race, national origin and alienage are inherently suspect and subject to strict judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

²⁹ State interference with fundamental rights requires strict judicial scrutiny. See *Roe v. Wade*, 410 U.S. 113, 152, 155 (1973) (right of a uniquely private nature); *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968) (rights guaranteed by the First Amendment to the United States Constitution); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to marriage and procreation).

³⁰ In the absence of the involvement of a suspect class or an interference with a fundamental right, the validity of a statutory or legislative classification is presumed reasonable and constitutional. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). This presumption is overcome by the challenging party showing that the classification is not rationally related to a legitimate state purpose. *Nordlinger*, 112 S. Ct. 2326 (1992). However, the burden of proof shifts to the state to show that the statute serves a compelling governmental interest where a suspect class or fundamental right is involved. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

³¹ Justices Rehnquist and O'Connor joined in the dissent. *Hooper*, 472 U.S. at 624.

³² The majority (Chief Justice Burger joined by Justices Brennan, White, Marshall and Blackmun) in *Hooper*, held that a New Mexico statute exempting property of honorably discharged Vietnam veterans from taxation, if they were residents of the state before May 8, 1976, to be a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 622-23. The Court, relying upon the rational basis test, found that New Mexico's

Here, the State of Nevada has decided to limit the property tax exemption set forth in [NRS 361.091](#) to those resident disabled veterans who are unemployable as a result of their service disabilities. Pursuant to regulations promulgated by the Secretary for the Department of Veteran Affairs, a disabled veteran is considered unemployable if he has a permanent disability of at least 60 percent. 38 C.F.R. § 4.16 (1992). Therefore, Nevada certainly has a legitimate interest in rewarding its residents who are honorably discharged from the United States Armed Forces and are unable to obtain gainful employment as a result of their permanent service-connected disabilities. The United States Supreme Court has stated many times that states have a "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Nordlinger*, 112 S. Ct. 2326 (1992). Certainly, Nevada's decision to draw the line at a 60 percent permanent disability is discretionary, but rationally related to a legitimate state interest in providing property tax relief to unemployable disabled veterans residing in the state. As noted by the Supreme Court, "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 541 (1983) (citing *Hooper*, 472 U.S. at 620). [NRS 361.091](#), clearly, does not violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Nevada residents who have been honorably discharged from the United States Armed Forces and who suffer from a permanent service-connected disability of less than 60 percent are not entitled to a property tax exemption under [NRS 361.091](#). This classification of disabled veterans does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JEFFREY R. RODEFER
Deputy Attorney General

OPINION NO. 93-6 FINES; JUDGMENTS; JUDGES: Court-ordered donations to charities in lieu of criminal fines are generally improper; failure of court to enforce criminal fines may be improper.

Carson City, April 9, 1993

Mr. Guy Shipler, Chairman, Nevada Commission on Judicial Discipline, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Shipler:

The question which has arisen concerns the authority of a justice of the peace to order a

preference of established veteran residents over newcomer veteran residents was not rationally related to any legitimate state purpose. *Id.* at 622-23. The statute was not rationally related to New Mexico's objective of encouraging Vietnam veterans to move to the state, nor rationally related to New Mexico's interest in rewarding its Vietnam veterans residing in the state before May 8, 1976, since newcomer veterans, who establish residency, may not be discriminated against solely on the basis of their date of arrival in the state. *Id.* at 619, 623.

Here, NRS 361.091 contains no residency restriction, unlike the New Mexico statute in *Hooper*.

donation to charity in lieu of fining a misdemeanor. Apparently, in some counties, judges are directing convicted offenders to make donations to charity in lieu of imposition of fines. I have been asked to consider whether such practices violate the Code of Judicial Conduct. Another concern which has arisen is whether, and to what extent, a judge is required to take appropriate action to collect fines or penalties which have been imposed.

QUESTION ONE

Does a judge in a criminal case have authority to order a donation to charity in lieu of a fine or penalty?

ANALYSIS

The specific section of the Code of Judicial Conduct which addresses solicitation of donations to charities is set forth below:

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

.....
(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

.....
(i) shall not personally participate in the solicitation of funds, or other fund-raising activities

.....
(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Code of Judicial Conduct, Canon 4C(3)(b) (1992).

This canon evinces the clear intent that judges not be involved in direct solicitation of funds for charities. The rationale for this prohibition is that the person(s) directly solicited would feel coerced by virtue of the station and authority of the judge. However, by its own terms, Canon 4 apparently applies to "extra-judicial activities."

Other canons may prohibit the conduct we are reviewing. Canon 1 provides that:

A judge shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Code of Judicial Conduct, Canon 1A (1992).

In Canon 2, it is provided that:

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office

to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. Code of Judicial Conduct, Canon 2 (1992).

The act of recommending donations to specific charities may violate these provisions of both Canons 1 and 2, since such activities may adversely affect the independence and integrity of the judiciary, may have the appearance of impropriety and may advance the private interests of the judge or others.

We have also researched the legal authority of a judge to order charitable contributions in criminal cases. No Nevada case authority directly addressing the issue of court-ordered donations in criminal cases was found. However, there are cases which address the authority of federal judges and state district judges in sentencing.

In the federal courts, it is generally held that a judge has no authority to order donations to charity because the Federal Probation Act, 18 U.S.C. § 3651 (1982), defines the limits of appropriate restitution. Although Nevada does not have a state probation act similar to the federal act, the federal cases are illustrative of the problems associated with court-ordered donations to charity in criminal cases.

It is also generally stated in federal cases that conditions of probation must be designed to meet the goals of rehabilitation and protection of the public. *See United States v. Blue Mountain Bottling Co.*, 929 F.2d 526 (9th Cir. 1991). In that case, the Ninth Circuit ruled that court-ordered monetary donations to a local substance abuse organization were not within the permissible limits of restitution under § 3651 and not reasonably related to rehabilitation or protection of the public. *See also United States v. Higdon*, 627 F.2d 893 (9th Cir. 1980) (forfeiting of home and all assets, and agreeing to work for charity for three years without pay were not reasonably related to rehabilitation or protection of the public); *United States v. Haile*, 795 F.2d 489 (5th Cir. 1986) (court offer to reduce fine if defendant chooses to contribute part of fine to charity was transparent device for imposing condition in violation of Probation Act); *United States v. Prescon Corp.*, 695 F.2d 1236 (10th Cir. 1982) (Probation Act does not authorize judge to permit corporation, as alternative to payment of fine to make contribution to person or group not aggrieved by crime); *United States v. Wright Contracting Co.*, 728 F.2d 648 (4th Cir. 1984) (general sentencing discretion does not include authority to impose charitable contributions).

In *United States v. Blue Mountain Bottling Co.*, the Ninth Circuit rejected a condition of probation imposed on a corporate defendant convicted of antitrust crimes, which required the company to make monetary payments to local substance abuse organizations, saying:

Because no ascertainable standards have been enunciated to determine how district courts should decide which individuals or organizations should receive these funds, the judiciary should not take upon itself the role of selecting beneficiaries of defendants' crimes. Though fines and prison terms are both within the broad discretion of the sentencing judge (at least as to crimes committed before the effective date of the Sentencing Guidelines), maximums have been set for both of those types of penalties. By contrast, there was no statutory limit to the assessment imposed by the district court here.

"The involvement of the courts in the selection of the recipients of such benefits raises, additionally, the prospect of conflicts of interest and unnecessary criticism of the courts." *Missouri Valley*, 741 F.2d at 1544; *see also United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984).

Blue Mountain Bottling Co., at 529.

In the *Wright Contracting Co.* case listed above, the Fourth Circuit described the problems with this type of sentencing:

Creative sentencing of the kind here undertaken, for example, necessarily involves the court in selecting particular third persons to become beneficiaries of the probationer's assets--presumably acting in some way as "surrogates" for the public as the actually "aggrieved party." Such selections of course carry financial benefits for which there may be quite legitimate rival claimants among potential "surrogates," whether known or unknown to the court. Where the sums imposed for payment are also fixed by the court without reference to any measurable losses or damage, the court exposes itself to possibly justifiable and unanswerable criticisms both in respect of the particular beneficiaries selected and the specific sums awarded them. The danger thereby created, without compensating benefit, for unnecessary involvement of the criminal justice system in peripheral controversy is obvious.

Wright Contracting Co., at 653.

The articulate reasoning of the Ninth and Fourth Circuits lends further support to the conclusion that court-ordered charitable contributions may violate Canons 1 and 2 of the Code of Judicial Conduct. However, if such sentencing practices would be considered legal, i.e., within the sentencing discretion of the judge in the State of Nevada, then they cannot also be considered violations of the Code of Judicial Conduct.

The prescribed punishments for misdemeanors in Nevada are found at [NRS 193.150](#). A misdemeanor may be punished by six months in the county jail, up to \$1,000 fine and/or "a fixed period of work for the benefit of the community pursuant to the conditions prescribed in [NRS 176.087](#)." In addition, under [NRS 4.373](#), the sentence for a misdemeanor may be suspended. A justice of the peace may order the defendant to:

1. pay restitution;
2. participate in community service;
3. participate in professional counseling;
4. abstain from use of alcohol or controlled substances;
5. refrain from criminal activity;
6. engage in or refrain from engaging in any other conduct deemed appropriate.

See also [NRS 5.055](#) (suspension of sentence by municipal court); [NRS 4.3762](#) (residential confinement); [NRS 5.055](#) (residential confinement). Therefore, we do not believe monetary donations to charity are included in the prescribed punishments for misdemeanors in Nevada.

Similarly, the punishments for gross misdemeanors and felonies are generally fines and/or periods of confinement in county jail or state prison. The sentences for these offenses may also be suspended and the offender placed on probation. See generally [NRS 176.175](#). The court is given authority to set terms and conditions of probation under [NRS 176.1853](#), which may include a requirement for restitution. Restitution is limited to payments to persons who are victims. See [NRS 176.033](#); [NRS 176.189](#). Supervised community service may also be imposed pursuant to [NRS 176.087](#). These statutes governing sentencing do not provide for payments to charities in lieu of fines or as restitution.

The Nevada Supreme Court has interpreted the authority of a court to order restitution in *Erickson v. State*, [107 Nev. 864](#), 866, 821 P.2d 1042, 1043 (1991). In *Erickson*, the trial court ordered the defendant, who plead guilty to stealing a car, to pay \$16,000 in restitution to victims of other offenses which were not part of the plea negotiation. The Nevada Supreme Court invalidated the restitution order and adopted the majority rule that a defendant may be ordered to pay restitution only when:

1. The defendant has admitted committing the crime;
2. The defendant has been found guilty of the offense; or
3. The defendant has agreed to pay restitution to victim(s).

Cf. Korby v. State, [93 Nev. 326](#), 327, 565 P.2d 1006, 1007 (1977) (where offender entered plea to lesser charge, court was without authority to require payment of jury costs as restitution). These cases reflect a strict interpretation of the sentencing authority given to judges under Nevada statute. A donation to charity could not be considered "restitution" unless the charitable organization was the actual victim of the offense. Thus we believe a court does not have authority to order donations to charity as "restitution." The punishments for misdemeanors, gross misdemeanors and felonies in Nevada do not include monetary donations to charity; nor can such donations be considered restitution since they are not payment to "victims" or fines. *Erickson*, at 866.

We must also consider whether court-ordered donations to charity could otherwise be considered a proper condition of probation. Although the Nevada Supreme Court has addressed the broad authority of courts to structure the terms of probation, the question of monetary donations to charity as a condition of probation apparently has not arisen. *See Creps v. State*, [94 Nev. 351](#), 360-63, 581 P.2d 842, 851 (1978) (trial court's discretion in suspending sentences and granting probation is broad and virtually unlimited; imposition of jail time as condition of probation did not conflict with rehabilitative goals of probation statutes). However, other states have ruled that donations to charity were not proper conditions of probation since the payments were not to "victims," nor were they fines. *See State v. Theroff*, 657 P.2d 800 (Wash. Ct. App. 1983) (court has no authority to order donations to charity as part of probation); *State v. Evans*, 796 P.2d 178 (Kan. 1990) (conditions of probation must bear reasonable relationship to rehabilitation, protection of public and offense). *Cf. People v. Lybarger*, 790 P.2d 855 (Colo. Ct. App. 1989) (condition of probation, to refrain from proselytizing during community service, was not reasonably related to rehabilitative purposes of probation). There is also authority upholding donations to charity where the donations appear reasonably related to rehabilitation and the general purpose of probation. *See People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986) (probation requirement that defendant make \$5,000 charitable donation to drug treatment program was reasonably related to rehabilitation); *Campbell v. State*, 551 N.E.2d 1164 (Ind. Ct. App. 1990) (the condition of probation which allowed a \$40,000 donation to the university as an alternative to a \$50,000 fine was within the court's discretion).

Although the causes served by a particular charitable organization are laudable, we believe that a judge does not have unlimited discretion to order donations to charity as a condition of probation since generally such donations cannot be considered to be reasonably related to rehabilitation or protection of the public. *Cf. Creps*, 94 Nev. at 360-63. A court-ordered donation to charity may be a proper condition of probation only in cases where there is a nexus to the facts and circumstances of the particular case and thus, the condition appears to be reasonably related to rehabilitation of the defendant. *Id.* In addition, as stated above, the Nevada Code of Judicial Conduct may be violated by judges who improperly order donations to charity. We recognize, however, that the legislature could provide specific statutory authority for court-ordered donations as a proper criminal penalty.

CONCLUSION TO QUESTION ONE

The act of directing a criminal defendant to make a monetary donation to charity appears generally to be outside the reach of permissible punishments for criminal offenses in Nevada and may also violate Canons 1 and 2 of the Nevada Code of Judicial Conduct. However, a judge may have discretion to order a donation to charity as a condition of probation if this requirement appears reasonably related to the rehabilitative purposes of probation.

QUESTION TWO

To what extent are judges required to take action to enforce the fines or penalties imposed in criminal cases?

ANALYSIS

As discussed above, penalties for criminal offenses in Nevada include imposition of a fine. There is no doubt that a judge has inherent authority to enforce judgments of the court. *Galloway v. Truesdell*, [83 Nev. 13](#), 20, 422 P.2d 237 (1967); *Goldberg v. Eighth Jud. Dist. Ct.*, [93 Nev. 614](#), 617, 572 P.2d 521 (1977); *Azbarea v. City of N. Las Vegas*, [95 Nev. 109](#), 111, 590 P.2d 161 (1979).

Although judges are not generally required by law to take independent action to collect criminal fines, the courts play an important role in collection of fines and distribution of this revenue to appropriate government entities. Nevertheless, it has been estimated that more than \$2 billion in fines and other payments go uncollected in this country each year. Jonathan P. Nase, *The Revenue Agent Role of State Courts: Implications for Administration and Adjudication*, 76 JUDICATURE 195 (Dec.-Jan. 1993). The failure of courts to enforce criminal judgments by taking action to collect fines seriously undermines public confidence in the criminal justice system. Cole, *Fines Can Be Fine--and Collected*, THE JUDGE JOURNAL, Winter 1989 at 7-8.

As stated above, Nevada law does not generally mandate fine collection by judges. A notable exception is found in [NRS 484.757](#), which sets forth the fines for operating an overweight vehicle on Nevada highways. It is provided that, "[t]he fines provided in this section are mandatory, must be collected immediately upon a determination of guilt, and must not be reduced under any circumstances by the court." This statute (and any others with identical statutory language) clearly requires the court to collect the fine contemporaneously with imposition of judgment. A failure or refusal by the court to collect the fine in these cases could constitute an act of nonfeasance or malfeasance subjecting the judge to removal. See Nev. [Const. art. 6, § 21](#); Nev. [Const. art. 7, § 4](#); [NRS 1.440](#). The refusal or failure to enforce this statute would also constitute a violation of the Code of Judicial Conduct, Canons 2A and 3B which require judges to comply with statutes.

Nevada statutes do provide several different methods for enforcement or collection of fines. For example, imprisonment for nonpayment of a fine is a statutorily authorized method of collection. See *City of Las Vegas v. District Court*, [107 Nev. 885](#), 886, 822 P.2d 115 (1991) (quoting *Williams v. Illinois*, 399 U.S. 235, 240 (1970) ("commitment for failure to pay . . . has been viewed as a method of enabling the court to enforce collection of money that a convicted defendant was obligated by sentence to pay")). In accordance with [NRS 176.065](#) and [176.075](#), if a non-indigent criminal defendant is sentenced to pay a fine, then he or she *must* serve one additional day for every \$25 of the fine in order to satisfy the judgment. However, an application must be made to the court which imposed the fine and a hearing must be held before one can be imprisoned for nonpayment. *Gilbert v. State*, [99 Nev. 702](#), 708, 669 P.2d 699 (1983); Op. Nev. Att'y Gen. No. 87-4 (Jan. 21, 1987). If the proper application is made by the prosecutor to have a fine converted into imprisonment and if the defendant is not indigent, then a court is obligated to enforce the criminal judgment as provided by law. Failure or refusal by the judge to convert the fine to imprisonment in such a case could subject the judge to discipline or removal.

Under [NRS 176.085](#), a judge may reduce a fine or allow installment payments if the defendant is financially unable to pay. In lieu of a fine for a misdemeanor or as a condition of probation, the criminal defendant may also be ordered to perform community service under [NRS 176.087](#). These two statutes are discretionary.

Although judges generally are not specifically required to attempt to collect criminal fines, they are also not prohibited from making efforts to collect these criminal penalties. Many courts utilize innovative methods to collect fines which include installment payments, credit card payments, computerized record keeping, and the use of telemarketing and collection agencies. Cole, *supra*, at 7-9. The Nevada Legislature could pass legislation requiring courts and others, e.g. judges,

prosecutors, clerks, etc., to take action to collect criminal fines and authorizing use of other methods of collection such as those outlined above. Such legislation could include mandatory collection of fines at the time of sentencing in some cases, as well as periodic review of outstanding fines. We recognize that courts and other law enforcement agencies are not presently staffed to engage in significant collection efforts and that any legislative proposals must also address funding for an appropriate collections infrastructure.

CONCLUSION TO QUESTION TWO

Nevada law does not generally require judges independently to take action to collect criminal fines. However, failure or refusal of a judge to enforce Nevada statutes relating to conversion of fines to terms of imprisonment in appropriate cases, or the failure to collect a fine where collection is mandated at the time of sentencing, could subject the judge to discipline or removal from office.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BROOKE A. NIELSEN
Deputy Attorney General

OPINION NO. 93-7 BONDS; COUNTIES; ECONOMIC DEVELOPMENT: Counties may issue bonds pursuant to [NRS 244A.669](#) to [244A.763](#), inclusive, to finance qualified projects which are located only partially within the county.

Carson City, April 27, 1993

Mr. Larry D. Struve, Director, Department of Commerce, 1665 Hot Springs Road, Carson City, Nevada 89710

Dear Mr. Struve:

You have advised that the Board of County Commissioners for Nye County is considering requesting you to issue special obligation revenue bonds pursuant to [NRS 244A.720](#) for the construction of a not-for-profit hospital to be financed on behalf of Nye County. The project would involve the construction of a full service hospital in the unincorporated area of Clark County and an outpatient clinic in Pahrump, which is in Nye County. You have requested our opinion on the following question.

QUESTION

Is a board of county commissioners in one county authorized to seek the issuance of special obligation revenue bonds pursuant to the County Economic Development Revenue Bond Law, [NRS 244A.669](#)—[.763](#), inclusive (hereinafter "Bond Law"), with respect to the financing of a qualified project which is located, in part, in another county?

ANALYSIS

We believe your question may be answered by reference to the statutes contained in the Bond Law. The legislature, in [NRS 244A.695](#), has expressed its intent in this area as follows:

It is the intent of the legislature to authorize counties to finance, acquire, own, lease

improve and dispose of properties to:

....
4. Promote the health of residents of *the county* by enabling a private enterprise to acquire, develop, expand and maintain health and care facilities and supplemental facilities for health and care facilities which will provide services of high quality *to those residents* at reasonable rates. [Emphasis added.]

A "health and care facility" is defined as "a hospital, facility for intermediate care, facility for skilled nursing or facility for the care of adults during the day, as those terms are defined in chapter 449 of NRS." [NRS 244A.682](#). A "supplemental facility for a health and care facility" includes "a clinic, facility for outpatients, and any other structure or facility directly related to the operation of a health and care facility." [NRS 244A.692](#). We shall assume for purposes of this opinion that the hospital in Clark County will constitute a health and care facility within the meaning of the statute and that the outpatient clinic in Pahrump will constitute a supplemental facility for a health and care facility.

We note that the Bond Law provides separate definitions for hospital and outpatient facilities. Thus either one alone would constitute a "project" as defined in [NRS 244A.689](#)(1). By definition, however, a supplemental facility for a health and care facility must exist in relation to the operation of a health and care facility.

The legislature apparently intended to limit a county's authority to issue bonds for projects that will benefit its residents. It does not follow, however, that the qualified project must be physically located exclusively within the county. A health care facility may provide services that would benefit the residents of other counties. In addition, the legislature has specifically addressed the issue of location of projects financed pursuant to the Bond Law.

While [NRS 244A.695](#) contains an expression of legislative intent, [NRS 244A.696](#) provides in full:

1. Each county is vested with all the powers necessary to accomplish the purposes set forth in [NRS 244A.695](#), but these powers must be exercised for the health, safety and welfare of the inhabitants of this *state*.
2. [NRS 244A.669](#) to [244A.763](#), inclusive, must be liberally construed in conformity with the purposes set forth in [NRS 244A.695](#). [Emphasis added.]

[NRS 244A.697](#) provides in part:

In addition to any other powers, each county has the following powers:

1. To finance or acquire, whether by construction, purchase, gift, devise, lease or sublease or any one or more of such methods, and to improve and equip *one or more projects or parts thereof, which except as otherwise provided in this subsection must be located within this state, and which may be located within or partially within that county*. [Emphasis added.]

The legislature has thus expressly authorized a county to finance a project that may only partially be located within its borders. Since the project under discussion provides for the construction of a qualified supplemental facility for a health and care facility located in Nye County, the county is authorized to issue bonds to finance the project pursuant to the provisions of [NRS 244A.669](#)—[.763](#), inclusive.

CONCLUSION

Nye County is authorized to issue special obligation revenue bonds pursuant to the provisions of [NRS 244A.669](#)—.763, inclusive, to finance the construction of a qualified hospital facility in Clark County and an outpatient facility in Pahrump.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E. WALTHER
Senior Deputy Attorney General

OPINION NO. 93-8 PROBATION; RESTITUTION; BANKRUPTCY: Dischargeability of restitution ordered as a condition of probation.

Carson City, April 27, 1993

Mr. Pete English, Deputy Chief, Department of Parole and Probation, 1445 Hot Springs Road, S104 W., Carson City, Nevada 89710

Dear Mr. English:

This letter is in response to the recurring issue concerning the authority of the Department of Parole and Probation (Department) to take action to enforce an order of restitution included in a sentence on the probationer's conviction of a crime.

QUESTION

Can the Department recommend the revocation of probation when the probationer fails to comply with the condition of restitution included in the sentence on the conviction of a crime if the probationer files a bankruptcy petition under Chapter 7 or Chapter 13 of the Bankruptcy Code?

ANALYSIS

The United States Supreme Court addressed dischargeability of restitution owing as a condition of probation in *Kelly v. Robinson*, 479 U.S. 36 (1986). Robinson, after pleading guilty to larceny based upon wrongful receipt of welfare funds, was sentenced on November 14, 1980, to not less than one year nor more than three years. She was placed on probation for five years with the condition that she pay restitution at the rate of \$100 per month continuing until the end of her probation.

On February 5, 1981, Robinson filed a petition under Chapter 7 and listed the restitution obligation as a debt. The Bankruptcy Court notified appropriate state agencies of the petition and informed them April 27, 1981, was the deadline for filing objections to discharge. The agencies did not file proofs of claim or objections to discharge.

Robinson received her discharge in Bankruptcy Court. On May 20, 1981, her attorney wrote the probation office that she believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution and she made no further payments.

The probation office did not respond until February 1984, when it informed Robinson that it

considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court. The matter was ultimately presented to the United States Supreme Court.

In formulating its opinion, the Court noted that the present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978 to replace the Bankruptcy Act of 1898. It further noted:

Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders

Kelly, 479 U.S. at 46. It stated:

Our interpretation of the Code . . . must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy court should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971).

Kelly, 479 U.S. at 47.

The Supreme Court, in noting that the Seventh Circuit found that the restitution obligation was a debt, stated that anomalies might result from a conclusion that such an obligation is not a debt including that nondebt status would deprive a state of the opportunity to participate in the distribution of the debtor's estate. *Id.* at 42. The court of appeals found support for its holding that state officials probably could have ensured continued enforcement of their court's criminal judgment against the debtor had they objected to discharge under § 523(c). The Supreme Court said:

Although this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long-prevailing view that "fines and penalties are not affected by a discharge." 1A Collier on Bankruptcy ¶ 17.13, p. 1610 (14th ed. 1978).

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would require state prosecutors to defend particular state criminal judgments before federal bankruptcy courts. As Justice BRENNAN has noted, federal adjudication of matters already at issue in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process." *Perez v. Ledesma*, 401 U.S. 82, 121, 91 S.Ct. 674, 695, 27 L.Ed.2d 701 (1971) (opinion concurring in part and dissenting in part).

....
[S]ome restitution orders would not be protected from discharge even if the State did appear and enter an objection to discharge It is not clear that such a restitution order would fit the terms of any of the exceptions to discharge listed in § 523 other than § 523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. In some cases, it could lead to federal remission of judgments imposed by state criminal judges.

This prospect, in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems. We do not think Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges.

....
[W]e hold that § 523(a)(7) . . . protects from discharge any debt "to the extent such debt is

for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

Kelly, 479 U.S. at 48-50 (footnotes omitted).

In applying this holding to a restitution obligation, the Court addressed the fact that Congress had included two qualifying phrases: one, that the fines must be both "to and for the benefit of a governmental unit"; the other, "not compensation for actual pecuniary loss." It noted that § 523(a)(7) protects traditional criminal fines and codifies the judicially created exception to discharge for fines. *Id.* at 50. The Court held:

In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B.R., at 133.

Kelly, 479 U.S. at 52.

While *Kelly* does not require that the statute authorizing restitution meet any specific requirement, the Court noted that the Connecticut statute permitting restitution illustrated the point that restitution was for the benefit of the state in that it authorized the judge to impose any of eight specified conditions of probation as well as any other condition reasonably related to his rehabilitation. In reference to restitution, the Court noted:

The [Connecticut] statute authorizes a judge to . . . require that the defendant "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

Id.

The Connecticut statute authorizing the court to impose a requirement for restitution as a condition of probation is similar to the authorization in Nevada. [NRS 176.1853](#)(1) provides:

In issuing an order granting probation, the court may fix the terms and conditions thereof, including a requirement for restitution or an order that the probationer dispose of all the weapons he possesses.

[NRS 176.189](#) provides in part:

1. The court shall order as a condition of probation or suspension of sentence, in appropriate circumstances, that the defendant make full or partial restitution to the person or persons named in the order, at the times and in the amounts specified in the order unless the court finds that restitution is impracticable. Such an order may require payment for medical or psychological treatment of any person whom the defendant has injured.

2. All money received by the department for restitution for:
 - (a) One victim may; and
 - (b) More than one victim must, be deposited with the state treasurer for credit to the restitution trust fund. All payments from the fund must be paid as other claims against the state are paid.

Therefore, although *Kelly* does not require that the statutes authorizing restitution meet any specific requirement, if a requirement were found, the Nevada statutes would meet the requirement. Restitution is not mandatory and if it is ordered, the amount of restitution does not have to equal the amount of harm caused. In Nevada, the district court may fix the amount and the manner of performance.

Kelly makes it clear that restitution ordered as a condition of probation is not dischargeable under Chapter 7. It also makes it clear that the department is not required to file a claim or take any action to avoid a discharge under Chapter 7. The department should, however, advise a probationer claiming a right to discharge under Chapter 7 that (1) the claim is not dischargeable; and (2) that the department will take appropriate action if the probationer violates the restitution condition of his probation.

The Supreme Court in 1990 made an abrupt change regarding the discharge of restitution ordered as a condition of probation when the probationer sought discharge under Chapter 13 of the Bankruptcy Code. In *Pennsylvania Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 564 (1990), the Court held that "[r]estitution obligations constitute debts within the meaning of § 101(11) [definition of debt] of the Bankruptcy Code and are therefore dischargeable under Chapter 13." It found that the § 523(a)(7) exception to discharge relied on in *Kelly* did not extend to Chapter 13. *Davenport*, 495 U.S. at 555. The Court based its holding on statutory construction. It stated:

We are unwilling to revisit *Kelly's* determination that § 523(a)(7) "protects traditional *criminal* fines [by] codif[y]ing the judicially created exception to discharge for fines."

Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in § 523(a)(7). Given *Kelly's* interpretation of § 523(a)(7), then it would be anomalous to construe "debt" narrowly so as to exclude criminal restitution orders. . . .

Moreover, in locating Congress's policy choice regarding the dischargeability of restitution orders in § 523(a)(7), *Kelly* is faithful to the language and structure of the Code: Congress defined "debt" broadly and took care to except particular debts from discharge where policy considerations so warranted. Accordingly, Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 proceedings some, but not all, of § 523(a)'s exceptions to discharge. See 5 Collier on Bankruptcy ¶ 1328.01[1][c] (15th ed. 1986) ("[T]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives") (footnote omitted). Among those exceptions that Congress chose *not* to extend to Chapter 13 proceedings is § 523(a)(7)'s exception for debts arising from a "fine, penalty, or forfeiture." Thus, to construe "debt" narrowly in this context would be to override the balance Congress struck in crafting the appropriate discharge exceptions for Chapter 7 and Chapter 13 debtors.

Our refusal to carve out a broad judicial exception to discharge for restitution orders does not signal a retreat from the principles applied in *Kelly*. We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended

such a departure. . . .

Davenport, 497 U.S. at 562-63 (emphasis in original; citations omitted).

The Court noted that the pre-Code practice was the basis for its conclusion in *Kelly* that § 523(a)(7) applies to all penal sanctions, including criminal fines. However, it distinguished the situation under Chapter 13, stating:

[T]he statutory language plainly reveals Congress' intent not to except restitution orders from discharge in certain Chapter 13 proceedings. This intent is clear from Congress' decision to limit the exceptions to discharge applicable to Chapter 13, § 1328(a), as well as its adoption of the "broadest possible" definition of "debt" in § 101(11).

Davenport, 495 U.S. at 563-64. Based upon this statutory construction referencing § 1328(a), which did not exclude restitution from discharge and § 101(11), which defined debt, the Court held: "Restitution obligations constitute debts within the meaning of § 101(11) of the Bankruptcy Code and are therefore dischargeable under Chapter 13." *Davenport*, 495 U.S. at 564. It found the meaning of debt (§ 101(11)) and claim (§ 101(4)(A)), respectively, to be coextensive. *Id.* at 558.

After *Davenport*, Congress amended § 1328(a), thus superseding *Davenport* and eliminating the basis for the *Davenport* opinion. The amendment to § 1328(a) specifically excepted criminal restitution from discharge under Chapter 13. *In re Drimmel*, 143 B.R. 249, 251 (Bankr. D. Mont. 1992). 11 U.S.C. § 1328 became effective on enactment (Nov. 15, 1990) and provides in part:

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter [11 USCS §§ 1301 et seq.], the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title [11 USCS § 502], except any debt--

....
(3) for restitution included in a sentence on the debtor's conviction of a crime.

Since *Davenport* was based upon statutory construction, specifically "Congress' intent not to except restitution orders from discharge in . . . Chapter 13 proceedings," found to be "clear from Congress' decision to limit the exception to discharge applicable to Chapter 13, § 1328(a)," the amendment of § 1328(a)(3) supersedes *Davenport*. *Davenport*, 495 U.S. at 563. Further, because the holding in *Davenport* was based on Congress's intent not to except restitution from discharge due to Congress' failure to list it in Chapter 13 § 1328(a), the amendment of § 1328(a) automatically restores the applicability of § 523(a)(7) under the rationale in *Kelly* described above.

The application of § 523(a)(7) to all restitution orders is critical for both practical and economic reasons. The Court noted: "It is not clear that [a specific type of] restitution order would fit the terms of any of the exceptions to discharge listed in § 523 other than § 523(a)(7)." *Kelly*, 479 U.S. at 48-49. Further, if restitution were found to fall under § 523(a), paragraphs (2), (4) or (6) instead of (7), a complaint would have to be filed to avoid discharge. The anomalies and problems of having a prosecutor appear and object to discharge discussed in *Kelly* would apply. These problems would place significant additional costs on the state because probationers are often supervised in foreign states under the Interstate Compact Agreement for the Supervision of Parolees and Probationers. They often file their bankruptcy petitions in the states where they are supervised. Probation and parole supervisory agencies would face costly options; they would have to hire local counsel, or deputy attorneys general and county prosecutors would have to secure admission to practice before the bar in the foreign state and would have to travel to that state to seek discharge, to attend meetings of creditors, and to argue motions.

In many cases, the costs of preventing the discharge of restitution would be greater than the restitution ordered. Further, the cost to the state would not be offset by the restitution because it would ultimately go to the victim. Therefore, it is reasonable to conclude that the amendment to § 1328(a) to except restitution restores the pre-*Davenport* application of § 523(a)(7). Consequently, the department need not take any action to avoid discharge under a Chapter 13 petition. It should, however, file a claim in Chapter 13 cases.

The automatic stay provision (11 U.S.C. § 362(b)) found in *Davenport* to be applicable to Chapter 13 proceedings probably still applies. The Court noted: "Section 362(b)(1) exempts from the stay `the commencement or continuation of a criminal action or proceeding against the debtor.'" *Davenport*, 495 U.S. at 560. However, it also noted that it "does not . . . explicitly exempt governmental efforts to collect restitution obligations from a debtor . . . [and found] no inconsistency in these provisions." *Id.* The Court held:

We find no inconsistency in these provisions. Section 362(b)(1) ensures that the automatic stay provision is not construed to bar federal or state prosecution of alleged criminal offenses. It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13. Congress could well have concluded that maintaining criminal prosecution during bankruptcy proceedings is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in the Chapter 13 plan.

Id. at 560-61.

Although the restitution debt cannot be discharged, the debtor and society have an interest in having the debtor pay off the obligations owed to other members of society as well as the restitution. Therefore, the rationale of *Davenport* still applies to the stay. The state can collect restitution under the plan by merely filing a claim and after the plan is complete, it can take action to collect whatever is still owing on the restitution.

The holding in *Davenport* addressed Chapter 13 petitions but did not address Chapter 7 provisions. Therefore, the law stated in *Kelly* is still applicable. The department may take action to revoke probation to enforce a sentence that orders restitution as a condition of probation without taking any action regarding a Chapter 7 bankruptcy petition. The automatic stay, however, prevents the department from executing on the property of the estate to collect restitution.

If the department is notified of a Chapter 7 petition, it should notify the probationer that Chapter 7 does not permit discharge of restitution and advise him that the department intends to enforce all conditions of probation notwithstanding his Chapter 7 bankruptcy petition.

If the department is advised of the filing of a Chapter 13 bankruptcy petition, it should file a claim but should also notify the probationer that his Chapter 13 petition will not discharge the restitution obligation. The probationer should also be notified that the full amount of payments directed in the order granting probation will be required upon completion of the plan.

There may be some post-*Davenport*, pre-amendment Chapter 13 cases that require special treatment. Restitution debts may be dischargeable under Chapter 13 petitions filed between the date of *Davenport* (May 29, 1990) and the amendment of 11 U.S.C. § 1328 (Nov. 15, 1990). Questions concerning dischargeability under specific petitions filed between those dates should be directed to this office.

CONCLUSION

The department may take action to enforce probation conditions requiring restitution notwithstanding the filing of a Chapter 7 bankruptcy petition. The automatic stay does, however, prevent the department from executing against the property of the bankruptcy estate to collect restitution. The department should advise the probationer in writing that the petition will not result in discharge of the restitution ordered as a condition of his probation. It should also notify him that the department may recommend revocation if he fails to comply with all the conditions of his probation.

The department should file a claim if a probationer files a Chapter 13 petition. The automatic stay provision applies and the department should not recommend revocation of probation for failure to pay restitution prior to completion of the plan. If the entire amount of restitution is not paid under the plan and the probationer fails to make the full payments after completion of the plan, the department may recommend revocation of probation.

Special assistance should be sought from this office concerning Chapter 13 petitions filed between May 29, 1990, and November 15, 1990.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN E. SIMMONS
Deputy Attorney General

OPINION NO. 93-9 CONSTITUTIONAL LAW; HIGHWAYS; REGISTRATION FEES: The \$6 registration fee transferred to the Nevada Highway Patrol should be counted as "total proceeds" collected by the Department of Motor Vehicles and Public Safety for purposes of [NRS 408.235\(4\)](#). This fee, however, is not part of the administrative costs for the collection of highway fund proceeds which costs must be limited to 22 percent of total proceeds.

Carson City, May 14, 1993

Mr. James P. Weller, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Weller:

You have asked us to provide an opinion on the interpretation of [NRS 408.235\(4\)](#). Our response is as follows:

QUESTION

Whether the amount of \$6 per registered vehicle transferred to the highway patrol special account under [NRS 481.145\(3\)](#) is to be counted as highway fund "total proceeds so collected" for purposes of [NRS 408.235\(4\)](#) from which 22 percent may be expended for costs of administration by the Department of Motor Vehicles and Public Safety (DMV/PS).

BACKGROUND

The formulation of this complicated question anticipates a somewhat complex answer. The resolution requires an analysis of the statutory scheme surrounding the state highway fund and the highway patrol special account together with the manner in which fund proceeds and the special account have been administered by the executive branch and treated by the legislature.

The State of Nevada has created a "state highway fund." [NRS 408.235](#)(1). As the statute states, in part:

2. The proceeds from the imposition of any license or registration fee and other charges with respect to the operation of any motor vehicle upon any public highway, city, town or county road, street, alley or highway in this state and the proceeds from the imposition of any excise tax on gasoline or other motor vehicle fuel must be deposited in the state highway fund and must, except for costs of administering the collection thereof, be used exclusively for administration, construction, reconstruction, improvement and maintenance of highways as provided for in this chapter.

...
4. Costs of administration for the collection of the proceeds for any license or registration fees and other charges with respect to the operation of any motor vehicle must be limited to a sum not to exceed 22 percent of the total proceeds so collected.

[NRS 408.235](#)(2), (4). See Nev. [Const. art. 9, § 5](#). State law provides for the collection of many fees which are deposited in the highway fund. See, e.g., [NRS 365.540](#); 366.700; 371.230; 482.480-.515; 483.410; 706.211.³³

One Nevada statute dictates that certain monies will go into a special account for the highway patrol.

The department shall transfer biweekly \$6 for every motor vehicle registered during the next preceding 2 weeks pursuant to the provisions of chapter 482 of NRS or [NRS 706.801](#) to [706.861](#), inclusive, to the highway patrol special account, which is hereby created in the state general fund. The money in the account must be used only for the purpose specified in subsection 1.

Act of June 30, 1989, ch. 622, § 25, 1989 Nev. Stat. 1421 (codified at [NRS 481.145](#)(3)). At first glance, this statute appears to conflict with [NRS 408.235](#) which requires that all registration money goes to the highway fund. Consistency might be achieved, however, if it is determined that the money first goes to the highway fund before disbursement to the highway patrol special account. This may be appropriate if support of the highway patrol from this \$6 registration money is a legitimate expense of the highway fund. It must also be determined whether the \$6 amount must be included in the 22 percent administrative cap found in [NRS 408.235](#)(4). This difficulty appears to be the crux of your request for an opinion.

ANALYSIS

We start with the basic premise that statutes, clear and unambiguous on their face, cannot be construed otherwise from external evidence. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221, 223 (1988). We must also attempt to construe two or more statutes relating to the same subject, or *in pari materia*, so that each is given effect or so they are harmonized. See *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830, 836 (1977); *City of Carson v. County Comm'rs*, [47 Nev. 415](#), 422, 224 P. 615, 617 (1924). The statutes quoted above present a difficult task.

³³ Although the funds collected by DMV/PS immediately are deposited in the "motor vehicle fund," the required proceeds and interest are eventually deposited in the highway fund. [NRS 482.180](#)(1)(2).

A. Biweekly Transfer of \$6 Per Vehicle Registered.

[NRS 481.145](#) contemplates the biweekly transfer of \$6 for every motor vehicle registered under chapter 482 of NRS. The statute does not say *from where* these funds are to be transferred. We do know, however, that all registration fees must first go to the highway fund, so the "transfer" must be from that fund.³⁴ There is also to be a transfer for vehicles registered under [NRS 706.801-.861](#). But these latter statutes are for the registration of interstate carriers under an apportionment formula which we have been informed does not provide Nevada with at least \$6 for every such carrier registered. In fact, for every interstate carrier registered, more money (\$6) is transferred to the highway patrol special account than would be obtained by the highway fund in the first instance for the registration.

We note that, under a former Nevada statute, [NRS 482.480\(4\)](#), the law provided that an *additional* fee of \$5 for each registration of every motor vehicle was to be accounted for in the highway patrol special fund which was created as a special revenue fund. The money in this fund was to be used only for augmentation of the Nevada Highway Patrol for supplementary troopers as provided for in [NRS 481.145](#). This former statute creating the "highway patrol special fund" was repealed in 1989. Act of June 30, 1989, ch. 622, § 30, 1989 Nev. Stat. 1423 (amending [NRS 482.480](#)). In its place, the legislature enacted the present [NRS 481.145\(3\)](#) which references the special account. The effect of repealing [NRS 482.480\(4\)](#), which provided for *an additional fee*, and enacting a statute which requires that \$6 for every motor vehicle registered be transferred into the highway patrol special account, apparently was to reduce the monies collected for the highway fund and to increase the monies to be transferred from the highway fund.³⁵

B. Twenty-Two Percent Cap.

[NRS 408.235\(4\)](#) clearly limits the costs of administration "for the collection of the proceeds for any license or registration fees and other charges with respect to the operation of any motor vehicle" to 22 percent of the proceeds collected under subsection (2). According to the plain language of subsection (2), the \$6 amount per registered vehicle eventually transferred under [NRS 481.145](#) must necessarily be included as part of these collected proceeds. But we have been informed that DMV/PS does not include the \$6 per vehicle amount in the 22 percent calculation. As noted previously, this amount is deducted and sent to the highway patrol special account before the 22 percent calculation is made.

An argument asserted for not including the \$6 per-vehicle amount in the 22 percent calculation is that this would constitute a "double-charging" of the highway fund for DMV/PS and highway patrol expenses. In other words, the underlying premise here is that the highway patrol is an "administrative cost" subject to the 22 percent rule and to include the \$6 amount in the calculation would be to allow DMV/PS to obtain its percentage from a higher amount but then to allow DMV/PS and its highway patrol division to take the flat \$6 per vehicle amount after that, thus getting paid twice for administrative costs.

³⁴ It is questionable whether this \$6 for every vehicle registered is actually ever deposited in the state highway fund. Physically, all registration money is deposited by DMV/PS with the state treasurer in the motor vehicle fund as referenced above and parceled out shortly thereafter to its ultimate destination. The \$6 amount is simply taken from the motor vehicle fund and credited to the highway patrol special account. On paper, the first line item of DMV/PS revenue estimates reflect registration fees collected. The department then simply multiplies the number of vehicles registered by \$6 and transfers biweekly this amount to the highway patrol special account. The remaining total proceeds are then placed in the highway fund.

³⁵ Unfortunately, a review of the legislative history regarding the adoption of [NRS 481.145\(3\)](#) reveals absolutely no discussion regarding this reduction of fees collected and increase in monies transferred. In addition, there was no discussion regarding whether the \$6 should be transferred before or after administrative costs were assessed up to the allowable 22 percent.

The \$6 amount is going toward the payment of highway patrol supplementary troopers under [NRS 481.145](#). The application of this money under [NRS 408.235\(4\)](#) toward the 22 percent for costs of administration "for the *collection of the proceeds . . . and other charges*" would not be appropriate. [NRS 408.235\(4\)](#) (emphasis added). The highway patrol is not involved with collection of the enumerated fees.³⁶ But the use of highway funds for the highway patrol would be appropriate if the function of the highway patrol is considered to fall under the *general* administration of the highways as stated in [NRS 408.235\(2\)](#) and the Nevada Constitution. There appears to be no maximum amount allowed under Nevada law for these purposes.³⁷

C. Resolution.

In the absence of legislative intent to the contrary, the statutes must be interpreted according to their plain meaning. *Nevada Power Co. v. Public Serv. Comm'n*, [102 Nev. 1](#), 4, 711 P.2d 867, 869 (1986). According to the court in *One 1978 Chevrolet Van v. County of Churchill*, [97 Nev. 510](#), 512, 634 P.2d 1208, 1209 (1981), no part of a statute should be rendered nugatory and no language should be turned to mere surplusage. [NRS 408.235\(2\)](#) specifically states that "[t]he proceeds from the imposition of *any* license or registration fee and *other charges . . . must be deposited in the state highway fund and must, except for costs of administering the collection thereof, be used exclusively for . . . highways . . .*" [emphasis added.] This much is clear. Accordingly, DMV/PS must deposit all of these proceeds in the highway fund even if the amount of \$6 per vehicle is eventually used for the highway patrol. To conclude otherwise would be to ignore the requirements of this statute.³⁸

The next question is whether the \$6 per vehicle for the highway patrol is to be calculated somehow as a part of the 22 percent for administrative costs. But section (4) states that "[c]osts of administration for the collection of the proceeds for any license or registration fees and other charges . . . must be limited to a sum not to exceed 22 percent of the *total* proceeds so collected." [NRS 408.235\(4\)](#) (emphasis added). The highway patrol does not collect the proceeds and, thus, is not subject to this statutory limitation.

Regardless of the method of transfer, the highway patrol receives the same amount of monies (\$6 per registered vehicle) and is not affected by including the monies under [NRS 408.235](#). The manner in which the collected monies are divided, however, is very important to the DMV/PS and has a significant impact on the highway fund. Currently, the DMV/PS receives its portion for administrative costs of not more than 22 percent *after* the NHP fees are deducted. When the statutes are interpreted as set forth above, it is clear that the DMV/PS must include the \$6 fee in counting the total proceeds collected. Therefore, the amount which will be available to defray costs of collection is increased. To this date, DMV/PS and the legislature, for some reason, have incorrectly not included this \$6 fee in the total proceeds collected even though the statute is clear. If the legislative intent is not to give DMV/PS as much money as it would receive based upon the higher total, then the legislature should budget less than the 22 percent or change the law to require a lesser percentage.

³⁶ We have been informed that the legislature and the executive branch historically have not included the highway patrol in the calculation of administrative costs for the collection of motor vehicle user revenue.

³⁷ We state no opinion here as to the constitutionality of the use of highway fund monies for the highway patrol. See generally *Op. Nev. Att'y Gen. No. 38* (April 12, 1955).

³⁸ We have been informed that the interest earned on the money deposited in the highway patrol special account is credited to the state general fund. Indeed, section 481.145(3) states that the special account is "created in the state general fund." If the support of the highway patrol is a legitimate use of highway funds, such placement of the interest outside the highway fund violates the state constitution which requires that "proceeds" from licensing and registration fees and fuel excise taxes be used "exclusively" for public highways. Nev. Const. art. 9, § 5. This would be the same as using highway funds to purchase equipment and then allowing proceeds from the later sale of this equipment to be directed to an account or entity outside of the highway fund. See *Op. Nev. Att'y Gen. No. 38*. The statute itself limits the use of the money in the account to the highway patrol.

We also conclude that the \$6 fee transferred to the highway patrol special account cannot be derived from the 22 percent total for administrative costs as these "costs" are only those which are reasonably associated with the fee collection activity. The highway patrol does not engage in that activity. To this date, DMV/PS and the legislature correctly have not taken the \$6 amount out of the 22 percent which is allowed for administrative costs *for collection of fees*.

CONCLUSION

The \$6 per registered vehicle which, statutorily, are transferred to the highway patrol special account are "proceeds" from the imposition of a registration fee. Under the state constitution, these proceeds can only be used for highway purposes. Pursuant to a state statute, these collected proceeds must be deposited in the highway fund. These are then part of the "total proceeds" collected from which 22 percent may be used for administrative costs *associated with collection of fees*. However, the \$6 amount then transferred to the highway patrol is not itself an administrative cost "for the collection of the proceeds for any license or registration fees and other charges" and, thus, may not be taken from the 22 percent allocated statutorily for those costs.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BRIAN RANDALL HUTCHINS
Chief Deputy Attorney General

OPINION NO. 93-10 CONTRACTS: An owner of a public works project is not liable to a general contractor for the defective performance or nonperformance of an owner-designated subcontractor/supplier.

Carson City, May 26, 1993

Mr. Paul D. Johnson, Deputy District Attorney, Clark County District Attorney's Office, 225 East Bridger Avenue - Eighth Floor, Las Vegas, Nevada 89155

Dear Mr. Johnson:

You have requested an opinion from our office on the following:

QUESTION

Does the owner of a public works project have any liability to a general contractor for damages or delay caused by an owner-designated subcontractor/supplier?

FACTS

Your opinion request assumes the following facts:

Pursuant to [NRS 332.115](#) and [338.140](#), public works contracts are sometimes let to general contractors requiring specified suppliers/subcontractors to perform certain aspects of the job where appropriate, i.e., when only the specified supplier is capable of producing the desired result due to patent, trade secret or other cause. The general contract language requires the general contractor to be accountable for the performance of its subcontractors. One or more owner-designated

subcontractors fails to perform, performs in a defective or untimely manner, or refuses to perform, causing delay and/or additional costs to the general contractor. All owner-designated subcontractors/suppliers are capable of performing the work specified.

ANALYSIS

Your request observes that there are no reported Nevada cases on point, and there are a limited number of reported cases from other jurisdictions.

In the case of *Edward M. Crough, Inc. v. Department of Gen. Serv. of the District of Columbia*, 572 A.2d 457 (D.C. Ct. App. 1990), the court concluded that specifying a product by name in a government bid amounts to a warranty to the bidders that the product is commercially available. The court went on to limit the impact of this warranty by stating that "it does not relieve the contractor of any of the usual risks of nonperformance stemming from the contractor's relationship with subcontractors." *Id.* at 463. The court then explained its holding at some length, citing the leading authorities:

As it was put in *General Ship Corp. v. United States*, 634 F. Supp. 868 (D. Mass. 1986),

Designating a particular subcontractor in the contract between [the government] and the prime contractor does not . . . shift the entire risk of the subcontractor's non-performance, defective performance, or untimely performance to [the government]. The prime contractor bids on and enters the contract, knowing and accepting the designation of the subcontractor. In its subcontract it provides whatever measure of protection it thinks it needs. *Id.* at 869.

Thus, the warranty of commercial availability is a limited one. The warranty means that the sole-source supplier is capable of providing the specified product. *Interstate Coatings, Inc. v. United States*, 7 Cl.Ct. 259, 261 (1985); *Franklin E. Penny Co. v. United States*, 207 Ct.Cl. 842, 524 F.2d 668, 674-75 (1975); *Cascade Elec. Co.*, ASBCA No. 28674, 84-1 B.C.A. ¶ 17, 219 (1984). It does not extend to the willingness of a supplier to provide the specified product "within the time period specified by the contract." *Franklin E. Penny Co.*, *supra*, 524 F.2d at 675. Similarly, "the unexcused performance failure by a Government directed sole-source supplier does not relieve the contractor from its obligation to complete performance within the time period specified in the contract." *Cascade Elec. Co.*, *supra*, 84-1 B.C.A. ¶ 17,210 at 85,683. Nor does the warranty extend to "the terms and conditions insisted upon by a supplier." *Bogue Elec. Mfg. Co.*, ASBCA Nos. 25184, 29606, 86-2 B.C.A. ¶ 18,925 at 95,480 (1986), or the price. *Arnold M. Diamond, Inc.*, ABSCA No. 22733, 78-2 B.C.A. ¶ 13,477 at 65,720 (1978). Moreover there is no warranty that the sole-source supplier will perform whatever subcontract it enters into with the contractor. *General Ship Corp. v. United States*, 634 F. Supp. 868, 870 (D. Mass. 1986). *See also Paccon, Inc. v. United States*, 185 Ct.Cl. 24, 399 F.2d 162, 168 (1968) (a warranty that would impose upon the government the burden of guaranteeing the performance of third parties without regard to any fault of its own is an unusual assumption of responsibility that "should not be inferred from ambiguous, inconclusive, or general discussions").

Edward M. Crough, Inc., 572 A.2d 957.

Since a general contractor makes its bid and enters into a contract with the owner with the knowledge and understanding that a specified subcontract/supplier is to be used, the general contractor accepts that condition as part of its contract. Presumably, the bid of a prudent general contractor is calculated to include any risk associated with using a specified subcontractor/supplier. It is the general contractor's responsibility to ensure that

its agreement with the subcontractor/supplier provides adequate remedies for defective or nonperformance of an owner-designated subcontractor/supplier.

While the unique circumstances of a specific case might give rise to liability, we believe that the general and correct rule of law is that an owner is not liable to a general contractor for the defective performance or nonperformance of an owner-designated subcontractor/supplier.

CONCLUSION

An owner of a public works project is not liable to a general contractor for the defective performance or nonperformance of an owner-designated subcontractor/supplier.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JONATHAN L. ANDREWS
Chief Deputy Attorney General

OPINION NO. 93-11 SHERIFFS: The undersheriff, or any other deputy sheriff, upon assignment by the sheriff, may attend, participate and vote in the sheriff's membership position at county liquor board meetings.

Carson City, May 26, 1993

Mr. William E. Schaeffer, Eureka County District Attorney, Post Office Box 190, Eureka, Nevada 89316

Dear Mr. Schaeffer:

You have requested a legal opinion from our office concerning the sheriff's duties as a member of the County Liquor Board.

QUESTION

[NRS 244.350](#) designates the sheriff as a member of the county liquor board. If the sheriff is going to be absent from a liquor board meeting, may he assign the undersheriff to attend, participate and vote in his place regarding liquor board matters?

ANALYSIS

The power to regulate and license liquor businesses initially rests with the state legislature. The legislature has in turn delegated this power to county liquor boards and has described the membership of said boards. See [NRS 244.350](#); *Kochendorfer v. Board of County Comm'rs*, [93 Nev. 419](#), 566 P.2d 1131 (1977). In a county whose population is less than 400,000 persons the board of county commissioners and the sheriff of that county constitute the liquor board. The liquor board must perform certain delineated statutory duties. See [NRS 244.350\(2\)](#).

The legislature has also specified by statute when a deputy appointed by a sheriff may act in his stead. Pursuant to [NRS 248.040\(1\)\(a\)](#): "[E]ach sheriff may: (a) Appoint, in writing signed by him, one or more deputies, who may perform *all* the duties devolving on the sheriff of the county. . . ." [Emphasis added.]

Under this statute the deputy is authorized to act for and in the place of the sheriff. *See Allen v. Ingalls*, [33 Nev. 281](#), 111 P. 416 (1910); Eugene McQuillin, *Municipal Corporations* § 12.33 (3d ed. 1990). In making the sheriff a member of the liquor board we must assume that the legislature was also cognizant of its other enactment allowing for deputies to exercise *all* of the duties of the sheriff. Thus we believe that the undersheriff, as one of the sheriff's deputies, has the authority to attend, participate and vote in the sheriff's stead at liquor board meetings. *See, e.g., Policemen's Pension Fund Bd. v. Frey*, 113 A.2d 232 (Pa. 1955) (deputy controller could perform duties and functions of city controller with respect to controller's membership on pension board).

CONCLUSION

The undersheriff, upon assignment by the sheriff, may attend, participate and vote in the sheriff's membership position at county liquor board meetings.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Deputy Attorney General

OPINION NO. 93-12 MARRIAGE; VOTING; CLERKS: A woman's surname does not automatically change upon marriage thus requiring a reregistration to vote.

Carson City, May 26, 1993

The Honorable William E. Schaeffer, Eureka County District Attorney, Post Office Box 190, Eureka, Nevada 89316

Dear Mr. Schaeffer:

You have posed the following question regarding the county clerk's attempt to preclude a married woman from voting under her maiden surname.

QUESTION

Does a woman's surname, upon marriage, change by operation of law thus requiring her to reregister to vote under her "married" name?

ANALYSIS

You have provided us with the following set of facts.

Christine Smith has married Mr. Brown. Christine has retained her birth surname of Smith. She consistently uses her maiden surname and is still known as Christine Smith.

The county clerk has stated an intent to remove Christine Smith's name from the voter registration rolls. The clerk asserts a belief that, pursuant to [NRS 293.517](#) and Op. Nev. Att'y Gen. No. 311 (March 15, 1966), Christine Smith must change her surname to Brown and must reregister to vote under that surname.

You have concluded that Christine Smith has a legal right to retain her maiden surname and to vote under her current registration. We agree with that conclusion.

Nevada's marriage laws are contained in [NRS chapter 122](#) and there is no statute contained within that chapter which would require a woman to change her surname upon marriage.

In Nevada's divorce laws, [NRS 125.130\(3\)](#) sets forth in part that: "the court may, for just and reasonable cause and by an appropriate order embodied in its decree, change the name of the wife to any former name which she has legally borne." This provision does not mandate that the marriage automatically change the wife's surname. On the contrary, it illustrates Nevada's policy of recognizing an adult person's right to the surname of choice.

With no reservations or restrictions as to gender, [NRS 41.270-.290](#) provide that any person may apply for a change of name by petitioning the district court. Once the petitioner demonstrates to the court that there are satisfactory reasons for the change of name, the court may so order the change.

There is no language contained within [NRS 41.270-.290](#) making those provisions the exclusive method for effecting name changes in Nevada; nor are there situations listed, such as marriage, which would demand a name change.

Under principles of common law a man may change his name at will, by usage, and may sue or be sued in any name by which he is known and recognized. *See Emery v. Kipp*, 97 P. 17, 19 (Cal. 1908). We conclude that this common law right, which allows a person to use any name that he or she sees fit as long as it is not done for any fraudulent purpose, applies to the surnames of married women as well. *See Malone v. Sullivan*, 605 P.2d 447 (Ariz. 1980); *Doe v. Dunning*, 549 P.2d 1 (Wash. 1976).

As pointed out in the *Malone* case, it was a historical *custom* for a woman, upon her marriage, to take her husband's surname. The woman was not required by common law, statute or rule to so change her name. *Malone*, 605 P.2d at 450.

Turning now to our election statutes, we note that [NRS 293.517\(1\)](#) states:

1. Any elector residing within the county may register:
 - (a) By appearing before the county clerk or deputy registrar, completing the affidavit of registration and giving true and satisfactory answers to all questions relevant to his identity and right to vote;
 - (b) By completing and mailing or personally delivering to the county clerk, an application to register to vote pursuant to [NRS 293.5235](#); or
 - (c) Pursuant to the provisions of [NRS 293.524](#) . . . [motor-voter registration].

Pursuant to [NRS 293.517\(2\)](#), the elector verifies his or her identity under penalty of perjury.

Under [NRS 293.517\(4\)](#), any person who is registered and changes his name must register under the new name. There is absolutely no language contained within this subsection of the statute which suggests that marriage automatically effects a change of surname for a married woman.

At the time that Op. Nev. Att'y Gen. No. 311 was written, there was language in the statute which suggested the possibility that marriage could be a condition which might result in a surname change. As stated in that opinion, [NRS 293.517\(4\)](#) read in part:

Any elector who changes his or her name by marriage, or otherwise, shall not be eligible to vote unless he or she reregisters

By legislative amendment in 1991, the phrase "by marriage or otherwise" was deleted from [NRS 293.517\(4\)](#).

In the present case, Christine Smith has not, by statutory procedure or by common usage, changed her surname. The affidavit she filed with the registrar in order to vote contains her correct legal identity. Thus the provision within [NRS 293.517\(4\)](#) requiring a reregistration upon a name change does not apply to Christine Smith. See *Stuart v. Board of Supervisors of Elections*, 295 A.2d 223 (Md. Ct. App. 1972).

CONCLUSION

Christine Smith's surname did not automatically change by operation of law upon her marriage. She had a legal right to retain her maiden name.

The reregistration voting provision contained within [NRS 293.517\(4\)](#) does not apply in the present case. Here, Christine Smith's surname for voting purposes prior to marriage and after marriage has remained the same. Since she has not chosen to change her surname, there is no need for her to reregister.

To the extent that Op. Nev. Att'y Gen. No. 311 is inconsistent with this opinion, it is hereby rescinded.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Deputy Attorney General

OPINION NO. 93-13 NOTARIES PUBLIC: A notary public's surety bond can be canceled after it has been filed with the county clerk, in which case the public is no longer protected against a notary's misconduct. If a notary unknowingly notarizes a document that has been forged or in which the signature is forged, he has not committed a crime. A notary can refuse to notarize a signature if he knows the transaction is unlawful, if the person who requests the act does not produce satisfactory evidence of identification, or if the person requesting the act refuses to tender the appropriate fee.

Carson City, June 21, 1993

The Honorable Cheryl A. Lau, Secretary of State, Capitol Building, Carson City, Nevada 89710

Dear Secretary Lau:

This letter is in response to some recurring issues regarding notaries public.

QUESTION ONE

Can a surety bond be canceled after it has been filed with the county clerk and, if so, what is the effect of such a cancellation?

ANALYSIS

Chapter 240 of the NRS governs notaries public and provides for the appointment of notaries public by the secretary of state. [NRS 240.030](#) specifically states the requirements for applying for appointment as a notary public and states: "Each person applying for appointment as a notary public shall: (c) Enter into a bond to the State of Nevada in the sum of \$10,000, to be approved by the clerk of the county in which the applicant resides." [NRS 240.030\(1\)](#). "[T]he bond, together with the oath, must be filed and recorded in the office of the county clerk of the county in which the applicant resides when he applies for his appointment." [NRS 240.030\(3\)](#).

The notary public statutes do not elaborate further concerning the bond. No mention is made of the terms of the bond or of notice of cancellation or termination.

It is possible that a notary public's bond could, by its terms, allow for termination or cancellation especially since the statutes do not prohibit this. Approval of the bond rests with the clerk of the county in which the applicant resides, [NRS 240.030\(1\)\(c\)](#), although no guidelines are provided to the county clerks as to what the terms of the bonds should be.

This office recommends proposing a statutory amendment to specify the terms of the bond and to provide that notice of termination or cancellation be given to the appropriate government agency. Other agencies that require bonds before licensure have statutes that do this and these could be a guide. These changes could also be accomplished pursuant to the regulatory authority in [NRS 240.017](#) which states: "[T]he secretary of state may adopt regulations prescribing the procedure for the appointment of a notary public." As to the effect of cancellation, again the statutes do not address this issue and statutory change or regulation may be used to remedy this.

If a person holds a commission as a notary public, acts as one, and has the reputation of being one, he may be a notary public under the principle of law of officers de facto, even without the requisites of the *de jure* officer. 58 Am. Jur. 2d *Notaries Public* § 10 (1989). The acts of such a notary public are as valid as those of a *de facto* notary public. *Id.* § 11.

Although Nevada's notary public statutes do not specifically state what the purpose of the bond is, it "may be generally described as being to assure the faithful performance of duties, and to compensate any person who may suffer a loss as a result of the notary's misconduct." Wesley Gilmer, Jr., *Anderson's Manual for Notaries Public* 7 (5th ed. 1977). If a bond has been canceled or terminated, then the public is not protected against a notary's misconduct. It is our suggestion that this oversight be corrected by statute or regulation.

CONCLUSION TO QUESTION ONE

A notary public's surety bond can be canceled after it has been filed with the county clerk and the effect of such a cancellation is that the public is no longer protected against a notary's misconduct. This oversight should be corrected by statute or regulation.

QUESTION TWO

Who is held liable for damages if the signature on a document that has been notarized is found to be a forgery?

ANALYSIS

The standards of practice for notaries public in Nevada are found in [NRS 240.071](#) which states:

1. In taking an acknowledgment, a notary public shall determine, from personal knowledge or from other satisfactory evidence, that the person making the acknowledgment is the person whose signature is on the instrument.
2. In taking a verification upon oath or affirmation, a notary public shall determine, from

personal knowledge or from other satisfactory evidence, that the person making the verification is the person whose signature is on the verified statement.

3. In witnessing or attesting a signature, a notary public shall determine, from personal knowledge or from other satisfactory evidence, that the signature is that of the person appearing before him.

4. In certifying or attesting a copy of a document or other item, a notary public shall determine that the proffered copy is a complete, accurate and authentic transcription or reproduction of that which was copied.

5. In making or noting a protest of a negotiable instrument, a notary public shall verify compliance with the provisions of subsection 2 of [NRS 104.3509](#).

6. A notary public has satisfactory evidence that a person is the person whose signature is on a document if that person:

- (a) Is personally known to the notary public;
- (b) Is identified upon the oath or affirmation of a credible witness personally known to the notary public; or
- (c) Is identified on the basis of an identification document.

If a person presents apparently satisfactory evidence of identification to a notary public and it turns out later that the evidence was forged, the person who forged the documents may be guilty of forgery, a crime under [NRS 205.085](#)-217. In that circumstance, the notary public would probably not have any liability.

If the notary public himself forges a signature or a document, he may be guilty of forgery. In addition, [NRS 205.120](#) states:

Every person authorized to take a proof or acknowledgment of an instrument which by law may be recorded, who shall willfully certify falsely that the execution of such instrument was acknowledged by any party thereto, or that the execution thereof was proved, shall be guilty of a felony, and shall be punished the same as persons who are guilty of forgery.

In these circumstances a notary public may have committed a crime.

Liability for damages would be determined by a civil lawsuit and would depend on the particular facts of each specific case.

CONCLUSION TO QUESTION TWO

A notary public may be guilty of forgery if he intentionally participated in the forgery. If a notary public unknowingly notarizes a document that has been forged or in which the signature is forged, he has not committed a crime. Liability for damages would depend on the particular facts of each specific case.

QUESTION THREE

Can a notary public refuse to notarize a signature, and if so, under what circumstances?

ANALYSIS

[NRS 240.060](#)(2) states that "[a] notary public shall perform notarial acts in lawful transactions for a person who requests the act and tenders the appropriate fee." A notary public may refuse to perform notarial acts if he knows the transaction is unlawful, the person who requests the act does not produce satisfactory evidence of identification pursuant to [NRS 240.071](#)(6), or the person requesting the act refuses to tender the appropriate fee.

According to rules of statutory construction, the word "shall" in a statute "is construed as

mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *Givens v. State*, [99 Nev. 50](#), 54, 657 P.2d 97 (1983) (citations omitted). "[S]hall' is presumptively imperative, and operates to create a duty rather than confer discretion." *Id.* at 54. Therefore, a notary public has a duty to perform notarial acts unless he knows the transaction is unlawful, the person requesting the act does not produce satisfactory evidence of identification, or the person who requests the act refuses to tender the appropriate fee.

CONCLUSION TO QUESTION THREE

A notary public can refuse to notarize a signature if he knows the transaction is unlawful, if the person who requests the act does not produce satisfactory evidence of identification, or if the person requesting the act refuses to tender the appropriate fee.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

OPINION NO. 93-14 CRIMINAL LAW; FIREARMS; WEAPONS: The language of [NRS 205.350](#) would be narrowly construed to include only those concealed weapons which are actually on the person or in a container carried by the person.

Carson City, June 21, 1993

Mr. Ben Graham, Deputy District Attorney, Clark County District, Attorney's Office, 200 S. Third Street - Seventh Floor, Las Vegas, Nevada 89155

Dear Mr. Graham:

This is in response to your opinion request regarding construction of Nevada's concealed weapon statute.

QUESTION

What constitutes carrying a concealed weapon?

[NRS 202.350](#) states in part:

1. It is unlawful for any person within this state to:

.....

(b) Carry concealed upon his person any:

- (1) Explosive substance, other than ammunition or any components thereof;
- (2) Dirk, dagger or dangerous knife;
- (3) Pistol, revolver or other firearm, or other dangerous or deadly weapon; or
- (4) Knife which is made an integral part of a belt buckle.

FACTS

The language of your opinion request suggests that your main inquiry deals with the proximity of the weapon to the person. Your letter states:

A weapon carried on the person is obvious. The question gets more complicated with a weapon in a purse, briefcase, carry-on luggage and such when it is in fact carried by an individual. Place those containers on the floor next to the person. Put the same container in the passenger portion of a vehicle, the weapon in the glove box, console, under the seat?

Your letter refers to several different scenarios and situations regarding the proximity of the weapon under which application of [NRS 205.350](#) might be urged.

ANALYSIS

Our research has not revealed any case in which the Nevada Supreme Court has interpreted the precise language of [NRS 202.350](#). However, as noted below, that language would have to be strictly construed. If the legislature's desire is to expand the statute to cover circumstances where a concealed weapon is immediately accessible, the language, such as "concealed on or about his person" would be required.

Penal statutes are subject to strict construction, *Sheriff v. Smith*, [91 Nev. 729](#), 542 P.2d 440 (1975), and "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Sheriff v. Lugman*, [101 Nev. 149](#), 155, 697 P.2d 107 (1985) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). See *Bradvice v. State*, [104 Nev. 475](#), 477, 760 P.2d 139 (1988).

Thus a narrow interpretation of the applicable language of [NRS 205.350](#) is appropriate. *People v. Pugach*, 204 N.E.2d 176 (N.Y. Ct. App. 1964). A gun discovered in a briefcase being carried by a defendant was "concealed upon the person" and was within a statute proscribing carrying weapons concealed upon the person. A hand gun concealed in a suitcase and carried by a man is sufficiently "upon his person" to constitute a violation under a statute making it a misdemeanor to carry a concealed weapon on the person. *People v. Dunn*, 132 Cal. Rptr. 921, 922 (Cal. Ct. App. 1976). The phrase "upon the person" means that an article is either in contact with a person, or is carried in the clothing. *Commonwealth v. Linzetti*, 97 Pa. Super. 126 (1929). The word "upon" signifies close contact. A loaded revolver underneath a cushion in the rear seat of an automobile on which the defendant was sitting was not "upon the person," so defendant's conduct was not within the meaning of an act prohibiting carrying a deadly weapon concealed "upon the person." *Id.* Thus the phrases "concealed upon person," "upon his person," and "upon the person" have been interpreted to include weapons that are in contact with the individual or are being carried within a container by an individual.

On the other hand, language such as "concealed on or about person" or "concealed on or about his person" has been interpreted to extend the proximity of the weapon necessary to constitute a violation of the statute. In *State v. Scanlan*, 273 S.W. 1062 (Mo. 1925), where the indictment charged the defendant with carrying a weapon concealed about his person, the jury was permitted to find him guilty if he carried the deadly weapon concealed upon his person since the word "about" includes everything included in the word "upon" and may, in addition, include much more. The words "on or about the person" have been applied to weapons concealed in such proximity to the person so as to be convenient to access and within immediate physical reach. *Hampton v. Commonwealth*, 78 S.W.2d 748, 749 (Ky. 1934). See also *Prelo v. State*, 168 N.E. 135, 137 (Oh. 1929); *Collier v. Commonwealth Ky.*, 453 S.W.2d 600, 601 (Ky. 1970). A loaded pistol locked in a glove compartment of an automobile which the defendant owned and was driving was "concealed on or about the person" of the defendant as defined by a concealed weapon statute. *State v. Goodwin*, 169 N.W.2d 270, 273 (Neb. 1969). It does not appear that the word "about" is always interchangeable with "on." See W. M. Moldoff, Annotation, *Offense of Carrying a Concealed Weapon as Effected by Manner of Carrying or Place of Concealment*, 43 A.L.R.2d 492, § 4(d)

(1955). To violate a statute prohibiting carrying firearms "concealed on or about the person," the weapon must be actually concealed on the person or in such close proximity that it can be readily used as though on the person, without appreciable change in his position. *See People v. Liss*, 94 N.E.2d 320, 322-23 (Ill. 1950).

Obviously, each factual situation will be different and may be interpreted differently according to language used in the statute. It seems relatively clear that the use of the words "on or about his person" extends the area from which the defendant could obtain the weapon. However, this language has limitations as well. In one case, the evidence showed that the defendant was riding in a wagon in which there were two other persons. A quarrel arose between the defendant and one of the others. The defendant took a pistol from a satchel under the seat. These facts were not sufficient to warrant a conviction of carrying a pistol "concealed on or about his person." *Commonwealth v. Sturgeon*, 37 S.W. 680 (Ky. 1896). There was no evidence as to whom the satchel belonged. There was no evidence as to who placed it in the wagon, or to whom the wagon belonged. *Id.* Obviously, various other factors need to be considered in determining whether a concealed weapon is "about" a person. However, that inquiry is beyond the scope of this opinion.

CONCLUSION

It is our opinion that the language of [NRS 202.350](#) would be narrowly construed to include only those concealed weapons which are actually on the person or in a container carried by the person.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT E. WIELAND
Deputy Attorney General

OPINION NO. 93-15 AIDS; SEARCHES AND SEIZURES: Whether municipal court can order mandatory HIV testing of person arrested for violent crimes.

Carson City, June 24, 1993

Mr. William L. Gardner, Chief Criminal Deputy City Attorney, Office of the Reno City Attorney, Post Office Box 1900, Reno, Nevada 89505-1900

Dear Mr. Gardner:

You have requested an opinion from this office on whether a municipal court judge, in circumstances other than those specified in [NRS 201.356](#) and [NRS 441A.320](#), has the authority to order a defendant to submit to a blood test to detect the presence of the human immunodeficiency virus (HIV) when the victim of a violent offense fears he may have been exposed to the virus during an altercation with the defendant.

QUESTION

Does a municipal court judge have the power to order a defendant to submit to a blood test to determine the presence of the HIV virus?

ANALYSIS

Nevada law currently allows for mandatory HIV testing of criminal defendants in two situations. [NRS 201.356](#) gives the court the power to compel HIV testing of persons arrested for illegally engaging in prostitution or soliciting for prostitution, and [NRS 441A.320](#) authorizes testing of persons who have been arrested for the commission of crimes which involved sexual penetration of the victim's body.

In circumstances other than the two identified above, a municipal court lacks jurisdiction to order a defendant to submit to a blood test to detect the presence of HIV. The jurisdiction of the municipal court is defined by the Nevada Constitution and [NRS 5.050](#). The Nev. [Const. art. 6, § 1](#), provides that: "[T]he Judicial power of this State shall be vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns."

Nev. [Const. art. 6, § 9](#), provides:

Provision shall be made by law prescribing the powers[,] duties and responsibilities of any Municipal Court that may be established in pursuance of Section One, of this Article; and also fixing by law the jurisdiction of said Court so as not to conflict with that of the several courts of Record.

[NRS 5.050](#) confines a municipal court's jurisdiction to the following: violations of local ordinances, abatement of nuisances, misdemeanors committed in violation of the ordinances of their respective cities, actions for the collection of taxes or assessments levied for city purposes, actions to foreclose liens in the name of the city for the nonpayment of those taxes, actions for the breach of any bond given by any officer or person to or for the use or benefit of the city, actions for the recovery of personal property belonging to the city, and actions by the city for the collection of any damages, debts or other obligations when the amount claimed does not exceed \$2,500.

A municipal court has only that authority given to it by statute. *McKay v. City of Las Vegas*, [106 Nev. 203](#), 789 P.2d 584 (1990). Its jurisdiction cannot be given by implication. *Id.* at 206 (citing *A.B. Paul & Co. v. W.H. Beegan & Co.*, [1 Nev. 327](#), 330 (1865)). Thus, without a statutory change, an order compelling a defendant to submit to a blood test to detect the presence of HIV would exceed the purview of the powers granted to a municipal court judge.

The enactment of statutes authorizing testing in other circumstances raises constitutional questions including the Fourth Amendment right against unreasonable searches and seizures and the right of privacy. Courts in other jurisdictions, in considering the constitutionality of their statutes and regulations which authorize nonconsensual HIV testing, have consistently held that the compelled HIV testing must be supported by a legitimate, compelling state interest. In *State v. Farmer*, 805 P.2d 200 (Wash. 1991), the court found no legitimate compelling state interest in ordering a nonconsensual HIV test of a criminal defendant over his claim of a right to privacy where the defendant had been found guilty of soliciting the services of two juvenile prostitutes because expert testimony established that the results of the test could relate back to time of the alleged crimes to show that the defendant had an HIV infection at the time of the incident. In *Glover v. Eastern Neb. Comm'n Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir. 1989), *cert. denied*, 493 U.S. 932 (1989), the Court struck down an employment policy which required all employees of a community-based residential program for the mentally retarded to be tested for HIV. Under these circumstances, the court reasoned that the privacy interest of the employees outweighed the government's interest because the policy required testing for all employees and the risk of transmission for most of the employees who were providing custodial care was minimal.

A California law enacted in November 1988, which allows for mandatory HIV testing of

persons charged with interfering in the official duties of public safety employees where there is probable cause to believe the person's bodily fluids have mingled with those of the public safety employee, has been held to be constitutional. The California court concluded that the law did not violate the Fourth Amendment or constitute a violation of a right to privacy because the statute provided for particularized, rather than random, testing of only those persons formally accused of assaults against public safety employees and the contact involved transfer of bodily fluids. *Johnetta J. v. Municipal Court of San Francisco*, 267 Cal. Rptr. 666, 218 (Cal. Ct. App. 1990). Additionally, the law had strict confidentiality and nondisclosure provisions. *Id.* Similarly, nonconsensual HIV testing of inmates has also been upheld based upon the prison's substantial interest in treating those infected with disease and in taking steps to prevent further transmission to other inmates. *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989). A statute could be drafted to authorize testing of criminal defendants where the criminal incident involved transfer of bodily fluids and there is an indication that the defendant is infected.

However, any statute authorizing involuntary testing must be narrow in its scope, testing only those persons who were involved in activities which present a medically-recognized risk of HIV transmission and must include specific confidentiality provisions. It should be noted that HIV is transmitted through the exchange of semen or cervical or vaginal secretions during sexual contact, from the transfusion of or contact with blood or blood products that have been contaminated with the virus, by the shared use of hypodermic needles that have been contaminated, and between an infected pregnant woman and her fetus. See *Johnetta J.*, 267 Cal. Rptr. 666, (citing U.S. Dep't of Human Health Serv. Center for Disease Control, *Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis-B Virus to Health-Care and Public-Safety Workers* (Feb. 1989)).

It also bears pointing out that a court-ordered test immediately following a criminal incident may not serve a compelling state interest because the test may not be conclusive. When a person becomes infected with HIV, the body eventually manufactures antibodies. It is these antibodies that the AIDS blood test is designed to detect. Because it takes several months before the body manufactures the antibodies, a person may carry the virus for several months without showing up as HIV positive in a blood test, thus, a negative blood test does not necessarily indicate the absence of the virus.

Finally, in response to the immediate concern of the victim, in the absence of statutory authority under [NRS 441A.160](#), the Washoe County Health Officer has the power to "order any person whom he reasonably suspects has a communicable disease in an infectious state to submit to any medical examination or test which he believes is necessary to verify the presence of the disease." Consultation with the county health officer might be appropriate, particularly since the health officer possesses both the medical expertise to determine whether the incident involved a risk of transmission and he also has the statutory authority to order the testing, if such is warranted.

CONCLUSION

A municipal court judge lacks the authority under current law to order a defendant to submit to a blood test to detect the presence of HIV because the jurisdiction of the municipal court is limited to that authority granted by statute. The enactment of a new statute giving the municipal court the authority to order HIV testing could raise constitutional challenges, including the Fourth Amendment proscription against unreasonable searches and seizures and the right to privacy. The adoption of any new legislation should be carefully evaluated in light of the constitutional questions.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: PAGE UNDERWOOD
Deputy Attorney General

OPINION NO. 93-16 HOUSING; FEDERAL FUNDS: Authority for city of Reno to participate in Housing and Urban Development Section 108 Loan Guarantee Program.

Carson City, June 30, 1993

The Honorable Patricia A. Lynch, Reno City Attorney, Post Office Box 1900, Reno, Nevada 89505

Dear Ms. Lynch:

You have asked several questions of this office regarding the propriety of the use of future Community Development Block Grant Funds (CDBG funds) as a pledge for certain loans from the private sector, or otherwise, under a program commonly referred to as the Department of Housing and Urban Development (HUD) Section 108 Loan Guarantee Program (Program). Your questions arise from provisions of the Nevada Revised Statutes which restrict certain financial arrangements for local governments, as well as the Nevada Constitution.

FACTS

The city of Reno has been approached by the Community Services Agency (CSA), a non-profit corporation engaging in social services within the northern Nevada region, to participate in the Program for the purpose of providing 28 first time home buyers affordable housing units in northwest Reno. Reno has never used the Program for the financing of projects. After research, it is apparent that this Program has not been utilized by any agency within the State of Nevada.

The process of utilizing the Program as set forth in 24 C.F.R. pt. M (1991), and as applicable to this opinion request, requires Reno to complete an application for a commercial loan, which is transmitted to the HUD office in Washington, D.C. Program administrators review the application of Reno in light of appropriate federal regulations, to be discussed below, and determine whether HUD will issue a guarantee based upon the loan application. HUD does not review and approve the loan application, but instead determines that all of the requirements of the Program have been met. When HUD has made this determination, the loan application package is transmitted to a commercial bank for loan review and approval, with the HUD guarantee attached to the application. The commercial institution, in conjunction with HUD, finances the loan through a taxable public offering. Thereafter, the commercial institution works directly with Reno concerning the loan requirements.

In exchange for the HUD guarantee, which is backed by the full faith and credit of the United States government, Reno must pledge, as repayment, its future CDBG funds. HUD reserves the right to require additional security, usually when the amortization schedule of the loan is over ten years in length. *See* 24 C.F.R. §§ 570.704—705 (1991); 42 U.S.C. § 5308 (1974). Reno is an entitlement agency for the receipt of federal CDBG funds within the purview of HUD regulations. The amount being requested for use by CSA (approximately \$600,000) is less than one year's CDBG entitlement for Reno. The details of any arrangement for the use of the funds obtained under this Program is entirely up to Reno. HUD requires that the use of the proceeds of the loan comply with the Section 108 requirements, but does not review the documents governing any proposed relationship between Reno and a non-profit corporation, such as the CSA, for the use of the funds. Ultimately, Reno is the loan recipient and is responsible for repayment of the loan.

How Reno chooses to structure its relationship with CSA is subject only to negotiations between the parties.

In the event of a default by Reno on its debt service (regardless of its arrangements with the non-profit corporation), HUD will be notified by the commercial lender originating the loan, who will receive payment from HUD under the guarantee agreement. HUD, in turn, will receive payment from the United States treasury by virtue of those federal CDBG funds pledged by Reno, and Reno will forfeit the use of the future CDBG funds in the amount of the guarantee paid by HUD. This method of repayment was created as part of a 1977 amendment to the Housing and Community Development Act of 1974, which provided that entitlement entities such as Reno were not required to pledge their full faith and credit to obtain the loan guarantee. 42 U.S.C. § 5308 (1974), *amended by* Pub. L. No. 95-128 §§ 108(1), (3) (1977).

QUESTION ONE

Whether Nevada state law prohibits Reno from entering into the above-described financing?

ANALYSIS

You have indicated to this office that there are no local ordinances governing this potential transaction and thus, the only issues involved are those of state law. Specifically, you cite the provisions on [NRS chapter 268](#) (community development statutes) for guidance as well as the provisions of [NRS chapter 354](#) (local financial administration statutes).

[NRS 268.747](#) states the purpose of the Nevada Community Development Program Law:

It is the purpose of the Nevada Community Development Program Law to provide for municipal participation in the federal program of community development block grants, under the Housing and Community Development Act of 1974 . . . and to vest in Nevada cities *all powers necessary or appropriate to enable the cities to participate fully in such federal program and similar programs and to authorize the cities to perform services, activities, planning and other functions related to community development programs.* [Emphasis added.]

Other pertinent provisions of chapter 268 include [NRS 268.753](#), which provides that a city may set its long term goals and short term objectives, and devise activities to meet its goals and objectives. [NRS 268.753](#)(2)(b), (c). [NRS 268.755](#) allows a city to acquire real property by purchase, lease, donation or otherwise, and finally, [NRS 268.757](#) allows a city to provide for the financing of the rehabilitation of privately owned properties through the use of grants, direct loans, loan guarantees or other means. *See generally* [NRS 268.755](#); [NRS 268.757](#)(6), (7).

As can be observed from the above-related provisions, the community development statutes are written broadly to permit cities wide discretion in carrying out the mandates of the chapter. The creation of the federal CDBG program forms the basis of the state community development statutes. The Program has been a part of the federal act since its inception in 1974. The expansive statutory language of [NRS chapter 268](#) provides the basis for such participation, and no statutory language in chapter 268 restricts Reno's ability to assist CSA in the manner described in the opinion request. The legislature is presumed to have fully investigated the facts upon which the statute is based. *Reid v. Woofter*, [88 Nev. 378](#), 381, 498 P.2d 361 (1972). It is clear that the Nevada Legislature desired participation in the federal CDBG program by all those entities eligible to receive CDBG funds. Based upon the facts before it, the legislature gave local governments almost complete discretion in Community Development Program participation.

The federal statutes and the federal regulations are also written expansively to foster participation in the program. Reviewing the federal statutes governing the CDBG program, a 1990

amendment to the federal statutes reemphasized the purpose of the law and sheds additional light on the broad nature of the use of CDBG funds by local governments. Section 910(a) of Pub. L. No. 101-625, regarding Community Development Loan Guarantees states in pertinent part:

(1) Purposes.--The purpose of the amendments . . . are--

(A) to reaffirm the commitment of the Federal Government to assist local governments in their efforts in stimulating economic and community development activities needed to combat severe economic distress and to help in promoting economic development activities needed to aid in economic recovery; and

(B) to promote revitalization and development projects undertaken by local governments that principally benefit persons of low and moderate income, the elimination of slums and blight, and to meet urgent community needs, with special priority for projects located in areas designated as enterprise zones by the Federal Government or by any State.

42 U.S.C. § 5308 (1974), *amended by* Pub. L. No. 101-625 § 910(a) (1990).

Additionally, the objectives of the Program were amended to include the following:

(A) encouraging local governments to establish public-private partnerships;

(B) preserving housing affordable for persons of low and moderate income; and

(C) creating permanent employment opportunities, primarily for persons of low and moderate income.

Id. This office can only conclude there are no statutory obstacles to the use of Reno's future CDBG funds in the Program.

You also requested analysis of the short term finance provisions of [NRS chapter 354](#) and the potential impact of that chapter on the proposed financing. We do not believe the provisions of [NRS chapter 354](#) apply to the facts presented to this office for analysis. [NRS 354.618](#) contemplates a municipality's available means to finance its own infrastructure or other needs. It has never been contemplated for use under the provisions of the community development statutes of this state and certainly not in conjunction with a federally-financed program. *See generally* [NRS 268.618-.626](#).

CONCLUSION TO QUESTION ONE

Reno may participate in the Section 108 Loan Guarantee Program of the Housing and Community Development Act of 1974 as amended, if Reno elects to fund the project under review in this opinion. Any additional security requirement of the Program may be satisfied through negotiation and does not require a pledge of the full faith and credit of Reno. No prohibition exists within the NRS which prevents Reno's participation.

QUESTION TWO

Does the Article 8, Section 10, of the Nevada Constitution prohibit participation in the Program by Reno?

ANALYSIS

Nev. [Const. art. 8, § 10](#), of the Nevada Constitution states: "No county, city, town or other municipal corporation shall become a stockholder in any joint stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except rail-road corporations [,] companies, or associations."

The key phrase for analysis in this instance is found in the second clause of the section,

referencing the loan of credit in aid of a company, corporation or association. No distinction is drawn between "non-profit" and "for profit" corporations in the constitution, so no distinction will be drawn in this opinion.

On its face, the proposed transaction between Reno and CSA appears to violate the above-stated constitutional prohibition. Reno is obtaining a loan, the proceeds of which will be used on behalf of a private corporation. What removes the transaction from the constitutional prohibition is the source of repayment of funds or other security for the loan. When originally passed in 1974, the Housing and Community Development Act of 1974 carried with it a requirement in section 108 that a city or other entitlement entity pledge its full faith and credit for repayment of any loan guarantee. In 1977, Congress amended this section to provide for other types of additional security for repayment of any loan guarantee and deleted any pledge of an entitlement entity's full faith and credit. 42 U.S.C. § 5308 (1974), *amended by* Pub. L. No. 95-128 § 108(1), (3) (1977), and Pub. L. No. 101-625, § 910(a) (1990). Pursuant to the 1990 amendments, HUD engaged in amending the Code of Federal Regulations governing the Program. After receiving comments from the general public on the proposed regulatory language, HUD responded as follows:

The Department agrees with the commenter's observation that additional security must be *acceptable to the public entity and its designated public agency, if any*. The nature and form of additional security are matters that will be determined through negotiation among the parties involved (including the State or public entity, where appropriate) and specified in the contract required under § 570.705(b)(1). The *loan guarantee* cannot be provided unless the public entity agrees to the additional security requirements. No change [in the final regulations] is required to ensure that additional security requirements are acceptable to the public entity.

56 Fed. Reg. 56, 901-01 (1991) (to be codified at 24 C.F.R. pt. 570) (emphasis added).

The final regulation governing additional security requirements states in pertinent part:

(b) Security requirements. To assure the repayment of notes or other obligations and charges incurred under this subpart and as a condition for receiving *loan guarantee* assistance, the public entity (and State or designated public agency, where appropriate) shall:

(1) Enter into a contract with HUD, in a form acceptable to HUD, for repayment of notes or other obligations guaranteed hereunder;

(2) Pledge all grants made or for which the public entity or State may become eligible under this part; and

(3) Furnish, at the discretion of HUD, such other security as may be deemed appropriate by HUD in making such guarantees. Other security shall be required for all loans with repayment periods of ten years or longer. Such other security shall be specified in the contract entered into pursuant to § 570.705(b)(1). *Examples of other security HUD may require are:*

(i) program income as defined in § 570.500(a);

(ii) liens on real and personal property;

(iii) debt service reserves; and

(iv) increments in local tax receipts generated by activities carried out with the guaranteed loan funds.

24 C.F.R. § 570.705 (1991) (emphasis added).

Other states have reviewed constitutional prohibitions similar to the one set forth at Article 8, Section 10, of the Nevada Constitution and have determined that the Program does not conflict with such a prohibition. In *Kradjian v. City of Binghamton*, 104 A.2d 16 (N.Y. 1984), the Supreme

Court, Appellate Division for the State of New York, reviewing a similar question stated:

Thus, the city is participating in a Federal program, created by Federal statute, administered by a Federal agency and funded by Federal sources. The city's participation, authorized by State statute (General Municipal Law § 99-h, subd. 2), is intended to promote urban expansion and growth so as to attract investments and create permanent job opportunities for low and moderate income persons. *Under these circumstances, we see no gift or loan of municipal funds in violation of section 1 of article VIII of the State Constitution.* (See *Murphy v. Erie County*, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771).

Id. at 18 (emphasis added). The New York court also addressed the specific issue of the requirement of additional security of the federal law should HUD choose to impose such a requirement:

The Federal statute does not, however, require the city to guarantee the loan by pledging its full faith and credit. Rather, the record establishes that the required security will be limited to future federal grants under the Housing and Community Development Act of 1974, proceeds from foreclosure sale of the property and, if necessary, certain other funds generated by Federal grant programs. Accordingly, there has been no extension of municipal credit in violation of section 1 of article VIII of the State Constitution.

Id.

Another distinction which can be applied to the analysis at hand was carefully examined by the Supreme Court of Utah in the case of *Utah Technology Fin. Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986). In *Utah Technology*, the court attempts to define what is the lending of Municipal credit. The court reviews cases from around the nation dealing with similar constitutional provisions prohibiting the lending of credit. Great deference is given to the legislative enactment challenged pursuant to the prohibitions of the constitution.

The legislature in rather lengthy findings has determined that the aiding of emerging high-tech businesses will foster the growth of the state's economy and assist in creating employment for the citizens of the state. These findings are entitled to respect and weight by the judiciary and should not be overturned unless palpably erroneous "Acts of the Legislature are presumed constitutional, especially when dealing with economic matters based on factual assumptions." It is only when a legislative determination of public purpose is so clearly in error as to be capricious and arbitrary that the judiciary should upset it.

Id. at 412 (citation omitted).

The public purpose stated within the Community Development Program statute clearly falls within the generally accepted use for public funds. We conclude the weight of authority indicates no violation of Article 8, Section 10, of the Nevada Constitution by Reno's participation in the Program.

CONCLUSION TO QUESTION TWO

The Nevada constitutional provision contained in art. 8, § 10, does not prohibit the type of activity embodied in the Program. The overriding public purpose of the use of CDBG funds and the source and regulation of the Program at the federal level, leads this office to conclude that the Program falls outside the prohibition of the Nevada Constitution.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DANA K. SAMMONS
Deputy Attorney General

OPINION NO. 93-17 FINES; JUDGMENTS; JUDGES: Dual authority to collect court-imposed fines does not violate Nevada's separation of powers provision; county is not empowered to require district courts to cooperate with it; county may not charge state for collection efforts, without permission, if it is already obligated by law to collect and pay without charge.

Carson City, July 2, 1993

The Honorable Dorothy Nash Holmes, Washoe County District Attorney, Post Office Box 11130,
Reno, Nevada 89520-0027

Dear Ms. Holmes:

You have asked for an opinion on the constitutionality of Nevada Revised Statute 244.207(1)(f) and Washoe County Code (WCC) 15.191. The statute and corresponding ordinance provide counties the authority to collect court-imposed fees and monetary sanctions. The extent and constitutionality of the authority conveyed by the statute and ordinance is the subject of this opinion.

QUESTION ONE

Is the amendment to [NRS 244.207](#) an unconstitutional conveyance of judicial power to a county commission?

ANALYSIS

A. Courts Are Required To Collect Most Fees And Monetary Sanctions They Impose.

Several of the Nevada Revised Statutes, including but not limited to [NRS 4.060](#), [4.063](#), 4.065, 4.100, 176.059, 176.062, 176.265, 176.285, 178.3975, 178.518, 249.085, 269.165(2), 453.575 and 484.757, *inter alia*, empower and obligate courts to impose, cashier, distribute and account for certain of the fines, fees, bail and forfeitures they collect. It should be noted, however, that courts are not generally mandated by statute to collect the fines they impose as criminal penalties. *See, e.g.* [NRS 176.265](#); 176.285; Op. Nev. Att'y Gen. No. 93-6 at 7-8 (April 9, 1993).

The fines, fees, bail and forfeitures that are imposed by the courts ultimately are payable, in certain instances, from the courts not only to the county, but also to the state. For example, administrative assessments for misdemeanor violations, which are imposed and collected pursuant to [NRS 176.059](#), are required to be paid under subpart (6) by the courts to the county treasurer. A certain portion of the assessment designated by statute must then be distributed to the state treasurer by the county treasurer.

On the other hand, certain fees a justice court is obligated to collect and cashier are required to be distributed directly to the state treasurer, *not* the county treasurer. For example, pursuant to [NRS 4.060](#)(4), one-half of the bond filing fees imposed and collected in justice court are required to be distributed directly to the state treasurer by the justice court without first going through the county treasurer. The other half of the collected fees are distributed by the justice court to the

county through the county treasurer.

B. [NRS 244.207\(1\)\(f\) Does Not Obviate The Courts' Collection And Distribution Responsibilities Nor Does It Empower The County To Cashier Or Distribute Monetary Sanctions Imposed By The Courts.](#)

[NRS 244.207](#)(1) reads as follows: "Notwithstanding any other provision of law . . . counties may establish by ordinance central receiving and disbursing systems for the handling of county money and money held in trust by the county or by any of its elected or appointed officers."

Specifically, the statutory amendment, adding subparagraph (f), allows for the "centralization of part or all of the billing and collection aspects of any fine, fee, bail or forfeiture imposed by a court and any payment ordered by a court pursuant to [NRS 178.3975](#)" that is county money, or money held in trust by the county or its elected or appointed officers. [NRS 244.207](#)(1)(f). The centralization of the cashiering or disbursing of these monies, however, is not provided for under [NRS 244.207](#)(1)(f). The collected monies remain payable first to the court that imposed the sanction. Once the collected monies are cashiered by the court, however, the county is authorized to disburse the funds through a centralized system, "if the accounting system employed supplies full information concerning the disposition of the money." [NRS 244.207](#)(1)(d).

[NRS 244.207](#) does not obviate the courts' responsibility to cashier and turn over the collected monies to the appropriate treasurer, whether they have been collected by the courts themselves, or through a centralized county collection system, and to account for and direct the distribution of the collected funds to the appropriate accounts. There is no provision under [NRS 244.207](#) that hands over the courts' payment and distribution responsibilities to a county collections division.

A county's authority to establish an ordinance to provide for billing and collection of monies imposed by the courts does not include the power to immediately cashier those collected monies. They remain payable to the courts, which remain responsible for the appropriate distribution of the money to the various statutorily designated accounts. In other words, regardless of whether the monies are "collected" by the district court or justice court clerk, or the county collection division, the monies remain payable from the person upon whom they are imposed to the court that imposed the fine, fee, bail or forfeiture; which in turn is responsible for getting the money to the appropriate treasurer.

It would be a stretch to say that the county collection agency assumes the same duties and responsibilities that the courts have with regard to cashiering court-imposed fees and monetary sanctions, when its duties and obligations are not expressly stated as such anywhere. And, more importantly, there is no provision that absolves the courts of their responsibilities for the cashiering and distribution of monies payable to them, if those monies are actually "collected" by the county collection agency. In fact, the courts' reporting responsibilities are affirmed at [NRS 244.207](#)(3).

C. [NRS 244.207 Does Not Violate Nevada's Separation Of Powers Provision.](#)

The judicial department of state government is established in the Nev. [Const. art. 6, § 1](#) thereof provides that the judicial power of the state is vested in a court system comprised of the supreme court, district courts and justices of the peace.

The jurisdiction of the justices of the peace is set forth in the Nev. [Const. art. 6, § 8](#), as follows:

The Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State, and shall fix by law their qualifications, their terms of office and the limits of their civil and criminal jurisdiction, according to the amount in controversy, the nature of the case, the penalty provided, or any combination of these.

[NRS 244.207\(1\)\(f\)](#) is not, on its face, in conflict with Nev. [Const. art. 6, § 8](#), since there is nothing in this section concerning billing and collecting for payments imposed by the justice courts. The justice courts are courts of limited jurisdiction. It would be inappropriate to infer a power to bill and collect for fines, fees, and other ordered payments from the constitution, because the powers of the justices' courts must be derived from specific grants of authority. See *Paul v. Armstrong*, [1 Nev. 82](#), 99-100 (1865). Also, in *A.B. Paul & Co. v. W.H. Beegan & Co.*, [1 Nev. 327](#), 330 (1865), the Nevada Supreme Court held that the constitution conferred no jurisdiction on the justices of the peace (leaving the entire matter to the legislature in art. 6, § 8, of the Nevada Constitution) and the justices' courts could not take jurisdiction by implication.

The three separate departments of government of the State of Nevada are set forth in the Nev. [Const. art. 3, § 1](#), which provides that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted." The separation of powers doctrine has been interpreted so as to allow one branch of government to perform a function not expressly or impliedly placed upon either of the other two branches of government by the constitution. *Sawyer v. Dooley*, [21 Nev. 390](#), 32 P. 437 (1893). Since the Nev. [Const. art. 6, § 8](#), does not expressly confer jurisdiction for billing and collection of such payments in the justice courts and jurisdiction of the justice court cannot be implied, [NRS 244.207\(1\)\(f\)](#) does not violate the separation of powers doctrine.

Inherent judicial powers include the power to enforce judgments and orders. *Galloway v. Truesdale*, [83 Nev. 13](#), 422 P.2d 237 (1967). District courts possess inherent powers under the Nev. [Const. art. 6 § 1](#). It is not, per se, a violation of Nevada's separation of powers provision for the legislature to have dually allocated the courts' collection authority. See, e.g., *Creps v. State*, [94 Nev. 351](#), 357-58, 581 P.2d 842 (1978) (a fine imposed by a sentencing court may be alleviated at any time either by the court or the pardons board). In creating the dual authority, however, the legislature may not direct, control or impede the judiciary in the exercise of its functions. *Galloway*, 83 Nev.

The kind of function being performed is a key element in analyzing whether the separation of powers doctrine is being violated. [NRS 244.207\(1\)\(f\)](#) does not grant the county authority to modify, forgive or amend the court-imposed payments, which are judicial functions. On the contrary, the statute only permits the county to centralize billing and collection of such payments, which is an integral part of the financial administration and accounting of county government, an executive function.

An examination of [NRS 178.3975](#) illustrates the point. This statute allows the court to order payment by a defendant of expenses incurred by a county, city or state in providing the defendant with an attorney. Depending upon the defendant's ability to pay, the statute also authorizes the court to modify its order. Subsection (4) provides that money recovered must be paid over to the city, county or public defender's office which bore the expense. However, there is nothing in this statute which authorizes or provides for a billing and collection process for such court-ordered payments. Therefore, the county's performance of the billing and collection service pursuant to [NRS 244.207\(1\)\(f\)](#) would be in harmony with the provisions of [NRS 178.3975](#), not in conflict with them.

Under [NRS 244.207\(1\)\(f\)](#), after the due date of the fine ordered by a court has passed, the county technically does have authority to commence collection proceedings because the fine has become due and payable to the court and the county collection power exists "notwithstanding any other provision of the law." [NRS 244.207\(1\)](#). Even if the collection procedures are commenced, it does not preclude the court from later exercising its statutory authority to alleviate the fine it has imposed, and obviously, the county collection agency cannot proceed to collect monetary sanctions

that are no longer imposed by the court. To the extent the court's statutory authority to modify an ordered payment plan overlaps with the county's statutory authority to collect the court-ordered payments, perhaps under a modified payment schedule, this "dual authority" does not interfere with the court's inherent judicial power to enforce its judgments. This is consistent with the legislative history of this statutory amendment.

Assembly Bill 280, 1991 Legislative Session, originally included the following language for what eventually became [NRS 244.207\(1\)\(f\)](#): "Any fine, fee, bail forfeiture imposed by a court and any payment ordered by a court pursuant to [NRS 178.3975](#), *if the fine, fee, bail, forfeiture or payment is not paid within the time ordered by the court*" [emphasis added]. The legislative history of A.B. 280 reflects that, in response to input received from Washoe County district judges, the final phrase of the above-referenced amendment was eliminated. All collection efforts can, of course, be deferred by the court, but the legislative intent is clearly not to impede collection efforts pending court rulings at any level, and does not hinder or impede the court in the exercise of its inherent judicial power.

Whenever possible, statutes are to be construed plainly and in a manner that gives them constitutionality. *Orr Ditch Co. v. District Ct.*, [64 Nev. 138](#), 178 P.2d 558 (1947); *see also McKay v. Board of Supervisors*, [102 Nev. 644](#), 645, 710 P.2d 438 (1986).

The amended statute simply provides for more efficient collection of monies payable to the courts that are ultimately due or owing to the county, by centralizing the collection efforts of the courts. The plain meaning of the statute is not that the amendment wrests power or responsibility from the court concerning monies that are initially payable to the court. The legislature has amended the statute to allow the counties to provide assistance to the courts in the collections of delinquent accounts.³⁹

D. [NRS 244.207\(1\)](#) Applies To Monies That Are Ultimately Owed To The County Or That Are Ultimately To Be Held In Trust By The County.

As explained above, a court is obligated by a variety of statutes to collect statutory fees and other monies, and regularly to turn the monies it collects over to the county treasurer, and to designate the monies to the appropriate accounts (e.g., state fines, civil fees, county forfeitures). It has also been suggested that these monies are not county monies or monies held in trust, and are, therefore, not within the purview of [NRS 244.207](#) until they are actually collected by the court.

The legislature could not have intended to authorize a county to only utilize collection procedures against a justice court, for example, that already faces criminal penalties if it does not regularly turn over collected monies to the county treasurer. This interpretation would render as the sole purpose of [NRS 244.207\(1\)\(f\)](#) the collection of monies from the justice court itself and would render much of the statute meaningless. Statutes are to be construed together in a way that gives all provisions meaning. *Orr Ditch Co.*, [64 Nev. 138](#).

CONCLUSION TO QUESTION ONE

[NRS 244.207](#), which authorizes counties to establish a collection division to collect fees and monetary sanctions imposed by courts that are ultimately owed to the county when collected, does not violate Nevada's separation of powers provision. Although all collection efforts can be deferred by the courts, the legislative intent underlying [NRS 244.207\(1\)\(f\)](#) is to not impede collection efforts pending court rulings at any level. There is nothing in this statutory provision

³⁹ The courts are without power to authorize or delegate to the county their enforcement power, as county authority is derived strictly from the legislature. *State ex rel. King v. Lothrop*, 55 Nev. 405, 36 P.2d 355 (1934). Thus, in order for the courts to obtain assistance in the collection of court-imposed monies from the county, the legislature has to enact a statute empowering the county commission to do so.

which impedes the courts in the exercise of their inherent judicial power to enforce their judgments and orders. Therefore, [NRS 244.207](#) is constitutional.

QUESTION TWO

Does Washoe County's "central cashing ordinance," as amended in 1992, exceed the scope of power authorized by [NRS 244.207](#)?

ANALYSIS

WCC 15.191 Is Overbroad To The Extent It Conditions The Collection Of State Or Municipal Monies Upon The Payment Of A Fee By The State Or Municipality, When Justice Courts Are Already Obligated By Statute To Collect And Distribute Those Monies At Their Cost, And Obligates District Courts To Cooperate With The County.

The amended ordinance, at WCC 15.191(1), designates a county "collections division" responsible for the centralized billing and collection of "monies owed or due Washoe County" and at subparagraph (2)(b) calls for the "centralization of part or all of billing and collection aspects of any fine, fee, bail or forfeiture imposed by a court." The amended ordinance, in conformance with the statutory amendment to [NRS 244.207](#), does not provide for the county to cashier these collected monies or disburse them before they have been cashed by the court. WCC 15.191(2)(b) also mirrors [NRS 244.207](#)(f) in terms of delineating the court-imposed monetary fees and sanctions that the county collections division may pursue and collect; it applies to the monies ultimately owed the county and the monies ultimately due the county as trustee.

As noted above, the legislature's dual authorization of the collection function of the court with the executive branch does not violate Nevada's separation of powers doctrine. *Creps*, 94 Nev. at 357-58. To that extent, the ordinance enables the county to carry out a function which the legislature has allowed under [NRS 244.207](#), and thus, it is not unconstitutional.

Concerns do exist, however, concerning the "duty to cooperate" provision (WCC 15.191(4)) and the provision addressing the collection of state or municipal monies (WCC 15.191(5)). The courts are obligated under WCC 15.191(4) to cooperate fully with the county's collection arm and its collection efforts. Because it is the courts and not the county that determine when court-imposed monetary sanctions are due or payable to them, and then ultimately collectible, therefore the cooperation requirement would not necessarily interfere with the courts' inherent and statutory powers, duties and obligations discussed above. However, [NRS 244.207](#) does not expressly authorize a county to empower itself to require the courts, particularly district courts, to cooperate with it in the collection of court-imposed monies that are to be paid to the county once they are collected.

As to WCC 15.191(5), courts are already obligated to distribute the proceeds from certain monetary sanctions imposed to the state and the municipalities at their cost. *See, e.g., NRS 176.059*(6). As to those monies, the legislature did not contemplate the courts making money for the county by delegating these collection efforts to a county collection agency without the agreement of the impacted municipality or the state, that would in turn charge the state or municipality for its efforts. This portion of the ordinance is also beyond the scope of power authorized by [NRS 244.207](#).

CONCLUSION TO QUESTION TWO

WCC 15.191(5) allows for the county collection agency to collect monies due the state or municipality, but only upon the payment to the county of the cost of the collection effort. This is not authorized by the enabling provisions of [NRS 244.207](#), nor does the statute enable a county to pass an ordinance (WCC 15.191(4)) requiring district courts to cooperate with the county in the

collection of monies imposed by the court.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: BROOKE A. NIELSEN
Assistant Attorney General

OPINION NO. 93-18 TAXATION; MOTOR VEHICLE FUEL: A job-ber/broker or wholesaler of Nevada tax-paid motor vehicle fuel falls within the definition of a dealer under [NRS 365.020\(1\)\(d\)](#), thus requiring him to be licensed as such and remit monthly fuel transaction reports pursuant to [NRS 365.170](#) and [365.280](#). However, according to [NRS 365.080](#), a gas station retailer who also buys Nevada tax-paid fuel and resells to consumers is, by definition, not a dealer for purposes of chapter 365, and cannot be licensed as such unless that person falls within the definitions of a dealer under [NRS 365.020](#). Nor may a retailer be required to remit monthly fuel transaction reports, unless provided for in the future by legislative enactment or through proper adoption of a regulation pursuant to [NRS 365.110](#) and 233B.040.

Carson City, July 19, 1993

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

Dear Mr. Comeaux:

An issue has recently arisen over the question of whether a "jobber/broker" or a motor vehicle fuel wholesaler, who buys from major manufacturers and resells tax-paid fuel to a gas station retailer, as well as the retailer himself, should be required to register with the Nevada Department of Taxation (Department) as a "dealer" under [NRS 365.020](#) and [365.280](#), and submit monthly fuel transaction reports to the Department pursuant to [NRS 365.170](#). Despite [NRS 365.020\(e\)](#), the Department historically has never required a person who buys and sells only Nevada tax-paid fuel, but does not manufacture, refine or import fuel into the State of Nevada, to be registered as a dealer; Nor has the Department required a gas station retailer to register as a dealer under [NRS 365.020](#), since the responsibilities of a retailer are provided for separately in [NRS 365.080](#) and [365.205](#).

In view of the foregoing, you have requested an opinion from this office on the following question:

QUESTION

Does a jobber/broker and motor vehicle fuel retailer, who buys and sells only Nevada tax-paid fuel fall within the definition of a dealer under [NRS 365.020](#), thus requiring him to register as a dealer and remit monthly fuel transaction reports to the Department pursuant to [NRS 365.170](#) and [365.280](#)?

ANALYSIS

Chapter 365 of the NRS is entitled Taxes on Fuels, and provides for the regulation, licensing and taxation of motor vehicle⁴⁰ fuel,⁴¹ including jet and turbine-powered aircraft fuel.⁴² Under [NRS 365.100](#), the Department is charged with the duty of administering [NRS chapter 365](#). [NRS 365.020](#) specifically defines a "dealer" of fuel as follows:

1. "Dealer" means every person who:

(a) Refines, manufactures, compounds or otherwise produces motor vehicle fuel or fuel for jet or turbine-powered aircraft and sells or distributes⁴³ the same in this state.

(b) Refines, manufactures, compounds or otherwise produces ethyl alcohol for use in a petroleum-ethanol mixture⁴⁴ and sells or distributes the same in this state.

(c) Imports motor vehicle fuel or fuel for jet or turbine-powered aircraft into this state and sells or distributes it therein, whether in the original package or container in which it is imported or otherwise, or who uses the motor vehicle fuel or fuel for jet or turbine-powered aircraft in this state after having imported the fuel.

(d) Having acquired motor vehicle fuel or fuel for jet or turbine-powered aircraft in this state in the original package or container, distributes or sells it in the original package or container or otherwise, or in any manner uses the fuel.

(e) Otherwise acquires in this state for sale, use or distribution in this state motor vehicle fuel or fuel for jet or turbine-powered aircraft with respect to which there has been no prior taxable sale, use or distribution.

2. "Dealer" does *not* include any person who imports into this state motor vehicle fuel, fuel for jet or turbine-powered aircraft, or ethyl alcohol in quantities of 500 gallons or less purchased from a supplier who is licensed as a dealer under this chapter and who assumes liability for the collection and remittance of the applicable excise tax to this state. [Emphasis added.]

⁴⁰ NRS 365.050 defines "motor vehicle" as "every self-propelled motor vehicle, including tractors, operated on a surface highway." In addition, NRS 365.040 defines "highway" as "every way or place of whatever nature open to the use of the public for purposes of surface traffic, including highways under construction."

⁴¹ NRS 365.060 defines "motor vehicle fuel" as:

[G]asoline, natural gasoline, casing-head gasoline and any other inflammable or combustible liquid, by whatever name such liquid may be known or sold, the chief use of which in this state is for the propulsion of motor vehicles, motorboats or aircraft other than jet or turbine-powered aircraft. *Kerosene, gas oil, fuel oil, fuel for jet or turbine-powered aircraft, diesel fuel and liquefied petroleum gas are not considered motor vehicle fuel for the purposes of this chapter.* [Emphasis added.]

See also NRS 366.060 (defining the term "special fuel").

⁴² NRS 365.035 defines "fuel for jet or turbine-powered aircraft" as "any inflammable liquid other than aviation fuel used for the propulsion of aircraft having jet or turbine type engines." However, NRS 365.015 defines "aviation fuel" to mean "motor vehicle fuel specially refined for use in the propulsion of aircraft, *but does not include fuel for jet or turbine-powered aircraft.*" [Emphasis added.]

⁴³ NRS 365.085 defines the act of distributing fuel for purposes of chapter 365 as follows:

All motor vehicle fuel and fuel for jet or turbine-powered aircraft which is sold, donated, consigned for sale, bartered, used or in any way voluntarily disposed of so as to terminate the ownership and possession thereof by the dealer or any other person who imports such fuel owned by him shall be deemed to be distributed under this chapter.

⁴⁴ NRS 365.072 defines "petroleum-ethanol mixture" to mean "a fuel containing a minimum of 10 percent by volume of ethyl alcohol derived from agricultural products."

Since the legislative history provides very little guidance in further clarifying the intent behind this statute, we must therefore start with the basic premise that this legislation is plain and unambiguous on its face and cannot be construed from any external evidence. *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988). The statute clearly sets forth the parameters of the legislature's definition of a dealer under [NRS chapter 365](#). Subsections (1)(a) through (c) apply to anyone who refines, manufactures, produces or imports motor vehicle fuel for sale in this state. Subsection (1)(d) applies to a wholesaler who purchases fuel in this state for resale distribution or personal use in this state. Subsection (1)(e) is essentially a catch-all for everyone else who acquires and sells fuel on which Nevada fuel tax has *not* been paid. Subsection (2) excludes from the definition of a dealer anyone importing Nevada tax-paid fuel in quantities of less than 500 gallons purchased from a licensed Nevada fuel dealer.

All persons meeting the definition of a dealer under [NRS 365.020](#), and who desire to engage in the business as such, must obtain a valid dealer's license from the Department pursuant to [NRS 365.280](#). Certainly, a jobber/broker or wholesaler of tax-paid fuel would fall within the definition of a dealer under [NRS 365.020](#)(1)(d), thus requiring him to be a licensed dealer and remit monthly fuel transaction reports to the Department pursuant to [NRS 365.170](#) and [365.280](#). However, the same is not true for a gas station retailer who purchases only tax-paid fuel.

[NRS 365.080](#) specifically defines a "retailer" as "every person, *other than a dealer as defined in [NRS 365.020](#)*." [Emphasis added.] Therefore, by definition, a gas station retailer is not a dealer and cannot be licensed and regulated as such *unless that person falls within the definitions of a dealer in [NRS 365.020](#)*.

Nevertheless, the Department may still satisfy its objective of requiring a gas station retailer to remit monthly fuel transaction reports to the Department by way of statutory amendment or the adoption of a regulation. [NRS 365.510](#), which mandates that a retailer keep detailed records for 3 years, could be amended to require the retailer to remit monthly fuel transaction reports to the Department. Or in the alternative, the Department could provide for the remittance of monthly fuel transaction reports by a retailer through the proper adoption of a regulation. See [NRS 233B.040](#). Pursuant to [NRS 365.110](#), the legislature has vested the Department with the "power to make all necessary rules and regulations . . . for the purpose of" administering [NRS chapter 365](#). However, since the legislature did not provide in the enabling statutes⁴⁵ of the Department or Nevada Tax Commission for separate agency licensing authority, the licensure of a gas station retailer may *not* be established through agency regulation. See Op. Nev. Att'y Gen. No. 169 (June 11, 1974).

CONCLUSION

Pursuant to [NRS 365.020](#)(1)(d), a jobber/broker meets the definition of a motor vehicle fuel dealer. Therefore, the Department may require a jobber/broker or wholesaler of Nevada tax-paid fuel to obtain a valid dealer's license and remit monthly fuel transaction reports to the Department under [NRS 365.170](#) and [365.280](#). However, according to [NRS 365.080](#), a gas station retailer who buys and sells Nevada tax-paid fuel to consumers is by definition *not* a dealer for purposes of chapter 365, and cannot be licensed as such. Nor may a retailer be required to remit monthly fuel transaction reports, unless provided for in the future by legislative enactment or through the proper adoption of a regulation pursuant to [NRS 365.110](#) and [233B.040](#).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

⁴⁵ See [NRS 360.010](#), [360.120](#) and [360.130](#).

By: JEFFREY R. RODEFER
Deputy Attorney General

OPINION NO. 93-19 BONDS; COUNTIES; ECONOMIC DEVELOPMENT: For purposes of determining a county's powers under [NRS 244A.697](#) to issue economic development bonds, the term "project" may not be construed to include things other than that which is being financed with the bond proceeds. A county may not issue economic development revenue bonds to finance a health care facility that is located entirely outside its boundaries.

Carson City, August 10, 1993

Mr. Larry D. Struve, Director, Department of Commerce, 1665 Hot Springs Road, Carson City, Nevada 89710

Dear Mr. Struve:

You recently requested our opinion regarding the authority of a county to issue bonds pursuant to the County Economic Development Revenue Bond Law (Bond Law) to finance a project that will be located only partially within the county. In Op. Nev. Att'y. Gen. No. 93-7 (April 27, 1993) we concluded that Nye County was authorized to issue special obligation revenue bonds to finance the construction of a qualified hospital facility in Clark County and an outpatient facility in Pahrump which is located in Nye County.

You have now been informed that none of the bond proceeds will be spent to construct the outpatient facility in Nye County. The proceeds of the bonds will enable Cambridge Health Systems (Cambridge) to build a full service hospital in Clark County. Cambridge is also negotiating with Nye County to operate a supplemental health care facility in Pahrump located in an existing building to be leased by a private party and equipped and expanded by the county in connection with this hospital. Although it appears that construction of the hospital in Clark County will benefit residents of Nye County by providing residents of Pahrump with a more accessible, full-service hospital facility, you have asked us to assume that none of the bond proceeds will be used to pay for staffing or other operating expenses related to the outpatient facility in Pahrump. These newly-discovered circumstances have raised the following questions.

QUESTION ONE

For the purposes of determining a county's powers under [NRS 244A.697](#) to issue economic development bonds, may the term "project" be construed to include things other than that which is being financed with the bond proceeds?

ANALYSIS

In Op. Nev. Att'y. Gen. No. 93-7, we construed the term "project" to include both the hospital in Clark County and the outpatient facility in Nye County since we understood that a single bond issue would finance the cost of both facilities. Since [NRS 244A.697](#) authorizes a county to finance a project "located within or partially within that county," we concluded that Nye County was authorized to issue the bonds. Although it now appears Nye County is requesting you to approve issuance of bonds to finance something located entirely outside its boundaries, it has been suggested that you may nevertheless approve financing if you consider the portion of the development plan that includes the establishment of an outpatient clinic in Pahrump as part of the "project."

As we noted in our previous opinion, either a hospital or an outpatient facility standing alone may constitute a "project" suitable for financing by issuance of economic development bonds. Although we could have viewed them as two separate projects financed by the same bond issue, we

considered them as one in concluding that part of the project was located in Nye County. We believe this is a reasonable construction when a county is using its bonding authority in part to finance a facility that will be located within its boundaries.⁴⁶ Where, as here, none of the bond proceeds are intended to enable a private enterprise to acquire, develop, expand or maintain a facility located in the county, we believe a different conclusion must be reached.

Our task in interpreting the Bond Law is to ascertain the intention of the legislature in enacting it. In construing a particular statute, we should not view it in isolation, but should consider it in light of and in the context and purpose of the entire law of which it is a part. *White v. Warden*, [96 Nev. 634](#), 636, 614 P.2d 536 (1980). We believe that a consideration of the term "project" as it is used throughout the Bond Law, requires the conclusion that it was intended to include only those things that are to be financed with the proceeds of the bonds to be issued.

The Bond Law is intended:

[T]o authorize counties to finance, acquire, own, lease, improve and dispose of properties to:

....
4. Promote the health of residents of the county by enabling a *private enterprise to acquire, develop, expand and maintain* health and care facilities and supplemental facilities for health and care facilities which will provide services of high quality to those residents at reasonable rates.

[NRS 244A.695](#) (emphasis added). Nye County's investment in equipment and improvements to a privately-owned facility in Pahrump to encourage Cambridge to operate a health clinic there will certainly promote the health of its residents. It is apparently not intended, however, to enable Cambridge to "acquire, develop, expand and maintain" the facility. The Bond Law as a whole is intended to permit counties to accomplish the purposes listed by the issuance of bonds. The issuance of bonds in this case is intended to enable Cambridge to build a hospital in Clark County. While this may benefit residents of Nye County by shortening the distance required of them to travel to a full-service hospital, Nye County's efforts to encourage a private enterprise to operate a supplemental health care facility within its borders may not, in our opinion, be considered a qualified project or part thereof for purposes of authorizing the issuance of bonds to finance a hospital located entirely outside its boundaries. Its efforts in that respect appear more intended to bring it within the authorization of the statute than as an activity related to the purposes of the Bond Law.

Although the county is authorized by [NRS 244A.697](#)(1) to "improve and equip one or more projects or parts thereof . . . which may be located within or partially within" its boundaries, this authority is intended to be exercised in conjunction with the primary purpose of the Bond Law--to issue bonds. [NRS 244A.739](#) provides that:

1. *No county shall have the power to pay out of its general fund or otherwise contribute any part of the costs of acquiring, improving and equipping a project* and shall not have the power to use land already owned by the county, or in which the county has an equity (unless specifically acquired for uses of the character herein described or unless the land is determined by the board to be no longer necessary for other county purposes), for the construction thereon of a project or any part thereof.

2. *The entire cost of acquiring, improving and equipping any project must be paid out of the proceeds from the sale of the bonds*, but this provision shall not be construed to prevent

⁴⁶ Our opinion should not be read as permitting a developer to "create" authority for a county to issue bonds by proposing to spend a small percentage of the proceeds within the county. We believe there must be a logical relationship between the parts of the project located within and without the county and more than a *de-minimus* expenditure on that part of the project located within the county issuing the bonds.

a county from accepting donations of property to be used as part of any project or money to be used for defraying any part of the cost of any project, including the completion of the project by the lessee, purchaser or obligor without any cost or liability to the county. [Emphasis added.]

We believe the legislature intended this statute to restrict the power of counties to contribute directly to the costs of acquiring facilities by private enterprises beyond the proceeds of the sale of the bonds while at the same time authorizing the consideration of an obligor's or purchaser's equity position in the enterprise. It would be inconsistent with this statute, in our opinion, to consider Nye County's efforts with respect to the Pahrump facility as being a part of the hospital bond issue solely for the purpose of permitting the conclusion that the bond issue relates to a project located partially within the county.⁴⁷

CONCLUSION TO QUESTION ONE

For the purposes of determining a county's powers under [NRS 244A.697](#) to issue economic development bonds, the term "project" may not, in our opinion, be construed to include things other than that which is being financed with the bond proceeds. Nye County's acquisition, improvement and operation of a supplemental health care facility in Pahrump, and the bond obligor's operation of that facility by means other than the sale of bonds may not be considered a part of the project to finance the hospital in Clark County.

QUESTION TWO

May a county issue economic development bonds to finance a health care facility located entirely outside the county?

ANALYSIS

A county is authorized by [NRS 244A.697](#)(1) to "finance . . . and to improve and equip one or more projects or parts thereof, which . . . *must* be located within this state, and which *may* be located . . . within or partially within that county." [Emphasis added.] It has been suggested that the legislature's use of the word "may" in this grant of authority evidences a legislative intent to grant a county discretion to finance a project located entirely outside the boundaries of that county. We do not believe the statute may be construed in this manner.

Had the legislature intended to permit counties to issue bonds to finance projects located in other counties, it could have ended the phrase quoted above after the word "state." Had it done so, the only restriction on location of the project would be that, with narrow exceptions not applicable here, it be located within the state. The legislature instead inserted a reference to projects located within or partially within the county. A construction that would render a part of the statute meaningless or redundant should be avoided. *Board of County Comm'rs v. CMC of Nev.*, [99 Nev. 739](#), 744, 670 P.2d 102 (1983). We must ascertain the legislature's intent in describing a county's authority in this manner.

The legislature has clearly expressed itself in other areas with respect to projects, or parts

⁴⁷ Although for purposes of considering whether a project, or part thereof, is located within a county, one must consider only things financed with bond proceeds, it does not follow that it is appropriate to issue bonds to finance one hundred percent of the costs of a facility. In the situation you have described, for example, those parts of the development located in Clark County are irrelevant to our inquiry. Those parts of the hospital financed with the developer's or obligor's equity may therefore be properly viewed as part of the "project" since they are not located within the county whose authority to issue bonds is in question. Even if the term "project" were construed for all purposes to include only those things financed with bond proceeds, it would be reasonable and prudent to require the developer or obligor to contribute a portion of its equity to some part of the overall development plan as a condition for issuance of the bonds.

thereof, which may be located wholly outside the county. When considering a project for the generation and transmission of electricity, a county is authorized:

To acquire or develop fuel or water or rights thereto, or to transport fuel or water from outside the county or state, the necessary facilities, fuel, water or rights thereto may be located *wholly outside the county or outside the state*.

Any water rights for such a project to be obtained by appropriation may only be appropriated within the boundaries of the county within which the generating facility is located, unless the board of county commissioners of another county approves the appropriation within its boundaries for that purpose.

[NRS 244A.697\(1\)\(b\)](#) (emphasis added).

The legislature was clearly not unmindful of the effects on a county not involved in the financing of facilities that might be located entirely within their county. The legislature similarly intended that the residents of the county considering the financing of a project located within or partially within their boundaries be afforded the opportunity to participate in the process by which that decision is made by requiring notice and a public hearing in that county. [NRS 244A.707](#).

The multi-million dollar hospital project under consideration will undoubtedly have a major impact on the residents of Clark County; however, Nye County wishes to finance the project using an interpretation of the Bond Law that would not require a consideration of those views. We believe such a result is inconsistent with the Bond Law. By its reference to projects located only partially within a county, the legislature intended, in our opinion, to clarify that a project located partially outside the county would not necessarily disqualify it from consideration. Where it intended to authorize a county to finance projects located entirely outside its boundaries, it provided so expressly. *See State, Dep't of Motor Vehicles & Pub. Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882 (1988) (where legislature could easily have inserted a reference to intoxication as condition rendering one incapable of refusing consent to a blood alcohol test, court would not create one).

CONCLUSION TO QUESTION TWO

A county is not authorized to issue economic development revenue bonds to finance a health care facility that is located entirely outside its boundaries.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E. WALTHER
Senior Deputy Attorney General

OPINION NO. 93-20 FINANCIAL INSTITUTIONS; LOANS; MORTGAGES: Provisions of [NRS 106.300](#)-400, inclusive, governing future advances apply at the option of parties to the transaction. If applicable, notice of termination given pursuant to [NRS 106.380](#) is effective only with respect to future advances unrelated to previous advances of principal. If parties elect not to be governed by statute, future advances lender is obligated to make will be secured with priority dating from the date the original security instrument was recorded.

Carson City, September 13, 1993

Mr. Burns Baker, Deputy Commissioner, Financial Institutions Division, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Baker:

You recently requested our opinion regarding the applicability of certain statutory provisions to the HUD-insured Home Equity Conversion Mortgage Program (HECM). This program permits a person, usually a senior citizen with limited means of making repayment, to obtain the use of the equity in his or her home by the issuance of what is known as a "reverse mortgage."

With a reverse mortgage, principal is advanced to the borrower (1) in fixed monthly payments for a term of years selected by the borrower; (2) in fixed monthly payments for as long as the borrower lives in the home; (3) at intervals selected by the borrower under a line of credit; or (4) in a combination of fixed monthly payments and line of credit draws. The balance of the loan grows over time as additional advances of principal are made to the borrower and as interest and fees are charged to the borrower's account. The entire principal loan balance is not due until the borrower no longer occupies the home as a primary residence.

Principal is advanced every month to pay interest which is added to the outstanding loan balance for the remainder of the term of the loan and accrues interest thereafter. This compounding interest feature also contributes to the growing principal balance over the life of the HECM loan, unlike a traditional forward mortgage loan wherein the principal decreases over time. Additionally, a monthly servicing fee to the loan servicer and a mortgage insurance premium (MIP) to HUD for insuring the loan will also continue to be added to the outstanding loan balance each month.

[NRS 106.300](#)-400, inclusive, govern liens on real property to secure future advances. [NRS 106.370](#) provides that lien priority for future advances dates from recordation of the security instrument, usually a mortgage or deed of trust.⁴⁸ [NRS 106.380](#) permits a borrower, by notifying the lender, to limit the security of the loan for future advances of principal to the amount outstanding at the time of the notification ("notice of termination"). Since the HECM consists of a series of future advances, these statutes have prompted you to ask the following.

QUESTION

Will advances of interest, servicing fees and mortgage insurance premiums that are added to the principal balance in a Home Equity Conversion Mortgage continue to have lien priority after the lender's receipt of a borrower's notice of termination pursuant to [NRS 106.380](#)?

ANALYSIS

At the time of entering into the transaction, Regulation Z, implementing the Federal Truth in Lending and Fair Credit Billing Acts, 15 U.S.C. § 1601 (1968), will ordinarily require the lender to disclose to the borrower in a reverse mortgage loan transaction the entire amount that he or she may borrow and the cost in interest, fees and mortgage insurance premiums of borrowing that amount. Lenders would obviously be less willing to make such loans if the borrower could, by delivering a notice of termination provide that additional amounts of interest, fees and premiums that the borrower initially agreed to pay would not, when added to the principal, be secured by the mortgage or enjoy priority over intervening liens against the home. We do not believe, however, that this result is mandated by the statutes.

[NRS 106.350](#) provides in full that "[t]he provisions of [NRS 106.300](#) to [106.400](#), inclusive,

⁴⁸ For convenience, the security instrument referred to in the HECM and this statute shall hereinafter be referred to as a "mortgage."

apply only to an instrument or supplement or amendment to an instrument that states clearly that it is to be governed by those provisions." The legislature has in this statute expressed, in clear and unambiguous language, its intention to make the statutory provisions referenced therein control only at the option of the parties to the transaction. If the loan documents do not clearly state that these statutes shall govern the making of future advances under the instrument, or if they state that such statutes shall not apply, then the statutes shall have no force or effect. Accordingly, the borrower in this situation would have no right to deliver a notice of termination as described in [NRS 106.380](#).

In the absence of these statutory provisions, we believe the priority of future advances would be governed by the so-called "California Rule." *Oaks v. Weingartner*, 234 P.2d 194, 196 (Cal. Ct. App. 1951); *Atkinson v. Foote*, 186 P. 831 (Cal. Ct. App. 1919). In *Chartz v. Cardelli*, [52 Nev. 1](#), 279 P. 761 (1929), our Supreme Court, citing with approval the *Atkinson* case, announced the following rule:

It is well settled that, where it is entirely optional with the mortgagee whether to make future advances or not, advances made after notice of a subsequent incumbrance are not superior to that of such subsequent incumbrance. The principle of the decisions is that such junior incumbrancer acquires a lien upon the property as it then is, and, as it is optional with the prior mortgagee whether he will make the advances, he is not allowed knowingly to prejudice the rights of the subsequent incumbrancer, or defeat or impair his lien, by adding voluntarily to his own incumbrance.

Id. at 9. Conversely, a lender who is *obligated* by his agreement to make future advances may do so and maintain his security and priority against intervening encumbrances. *Id.* at 8; *see also Southern Trust Mortgage Co. v. K & B Door Co.*, [104 Nev. 564](#), 566 n.1, 763 P.2d 353, 356 (1988). Since the lender in an HECM loan transaction is obligated to make advancements of principal to pay for interest and other charges that continue to accrue, such advancements would be secured and enjoy the same priority as the original mortgage.⁴⁹

Although this rule is simply stated, a lender wishing to protect the security and priority of future advances in the absence of a statute governing the issue should take care in drafting the original agreement to ensure its operation. In *Southern Trust Mortgage Co.*, the district court ruled that the lender making the future advances was not entitled to priority because the advances were not obligatory. Other issues may be raised by the use of a "dragnet clause" in a security instrument that purports to have the collateral secure all previous, present and future advances to the borrower from the lender. Although the construction of dragnet clauses has apparently not been addressed by our Supreme Court, some courts will strictly construe such clauses, placing the burden on the lender to prove that the "other debt" was intended to be secured by the dragnet clause. *Lundgren v. National Bank of Alaska*, 756 P.2d 270 (Alaska 1987).⁵⁰ Other issues may arise if the security agreement does not state the maximum amount of debt that it will secure.⁵¹

Doubts regarding the effect of future advance clauses with respect to issues of security and priority may be reduced by indicating clearly in the

⁴⁹ Under the California Rule a future advance made at the option of the lender would enjoy the same priority as the original mortgage if made without notice of an intervening encumbrance. We shall assume for purposes of our discussion that all such intervening liens will be of record.

⁵⁰ Factors that may be considered in determining whether a dragnet clause will operate to secure future advances as against another subsequent incumbrance include whether the other debt is of the same character or type as the initial debt, whether it is separately secured and whether it expressly refers back to the mortgage or deed of trust that contains the dragnet clause. *Lundgren*, 756 P.2d at 279.

⁵¹ Because a statute required the security instrument to state the maximum amount of the debt to be secured, the court in *Equitable Plan Co. v. Dix Box Co.*, 329 P.2d 921 (Cal. Ct. App. 1958), refused to enforce the instrument with respect to advances that exceeded that amount. *See also Halliburton Co. v. Jackson County Comm'rs*, 755 P.2d 1344 (Kan. Ct. App. 1988) (open-ended advance clauses that state no limit on amount of money that can be advanced are enforceable only to the amount of the original mortgage).

documents the parties' intent that such advances be covered by the mortgage. This may be done by: (1) clearly providing that future advances are obligatory and not made at the option of the lender; (2) stating in the mortgage the maximum amount that may be secured under the instrument; (3) limiting future advances to the type provided for in the original security instrument; and (4) referring to the mortgage in any subsequently executed instrument making an advance. Although we have not been provided with nor examined any of the loan documentation used in connection with the HECM, we believe a loan agreement may be drafted without much difficulty that will address these issues and resolve any ambiguity regarding the intent of the parties that the deed of trust will secure all amounts advanced to the borrower under the agreement.

Although a lender need not be bound by the provisions of [NRS 106.300-400](#), inclusive ("the statute"), we must address how they might apply to the type of future advances contemplated by the HECM in the event the parties to such a loan elect to be governed by them. [NRS 106.360](#) requires an instrument encumbering real property for future advances to state that it secures future advances and the maximum amount of principal to be secured. The maximum amount of advances of principal that may be secured may be increased or decreased by amendment to the instrument; however, pursuant to [NRS 106.370\(2\)](#), the priority of any lien for future advances which thereafter exceeds the amount of principal of the original indebtedness dates from the time the amendment to the instrument is recorded. The borrower may elect to terminate the operation of the instrument as security for future advances of principal by delivering a written notice to the lender stating such election. [NRS 106.380\(1\)](#). Upon its receipt of such a notice, the lender must, within 4 working days, record a statement in the office of the county recorder of the county where the original instrument was recorded which:

- (a) Refers to the original instrument;
- (b) Contains the legal description of the encumbered real property;
- (c) States that the notice given pursuant to subsection 1 was received by the lender, with the date of that receipt;
- (d) States the total amount of principal owed on the date of the notice on account of all outstanding debts and obligations secured by the instrument; and
- (e) States the total amount of interest accrued on the outstanding debts and obligations as of the date the statement is recorded.

[NRS 106.380\(2\)](#). Subsection (3) provides that if the lender does not record such a statement within 4 working days, the borrower may record a similar statement which will have the same effect.

The statute appears intended to modify the effect of the California Rule. Under the California Rule, future advances that the lender was not obligated to make would not be permitted to impair the lien of a subsequent encumbrancer if made with notice of the subsequent encumbrance. The statute changes two aspects of this rule: First, the mortgage is given priority with respect to optional as well as obligatory future advances. Second, rather than impose a duty on the lender to determine prior to making a future advance that no intervening liens have been recorded against the property, [NRS 106.380](#) requires the borrower to initiate the action and the delivering of the notice of termination that will place the lender on notice that future advances will not be secured.

The statute is not intended, however, to permit a borrower to defeat or impair the lender's security with respect to advances already made or obligations already incurred. [NRS 106.390](#) provides that "[r]eceipt of notice of termination by the lender does not affect the priority of any lien for any future advances previously made, obligations previously incurred or interest accrued thereon." We believe this section would prevent a borrower from defeating or impairing the lender's security with respect to advances of interest, servicing fees and mortgage insurance premiums that relate to advances previously made to the borrower. Although technically the lender in an HECM loan would be making additional advances of principal to pay accruing interest, servicing fees and mortgage insurance premiums after receipt of a notice of termination, these

advance payments would all relate to advances of principal made for the use or benefit of the borrower *before* receipt of the notice. To construe the statute otherwise would produce the absurd result of authorizing the borrower to, in effect, renege on his promise that these sums be secured by the equity in his home after having received the benefit of the principal advances to which the charges relate. This construction is neither mandated by the plain meaning of the statute nor does it further its apparent intent.

Pursuant to [NRS 106.380\(2\)\(d\)](#), the lender must, within four business days after receiving a notice of termination, record a statement of the total amount of the outstanding principal balance owed on the date of receipt of the notice. This statement is intended to notify persons who may be considering making a loan to the borrower secured by the same real property, the maximum amount of principal that will constitute a prior secured lien. Although the lender in an HECM loan may be able to state this amount, additional amounts of principal relating to previous advances of principal will continue to accrue until repayment of the loan is made in full. These additional amounts should also be secured by the original lien. Since the lender cannot accurately calculate the amount that will accrue over the remaining life of the loan, we believe the lender may substantially comply with this requirement by stating the basis upon which interest and other charges that relate to sums previously advanced will continue to accrue. Consistent with the statute's intent, this will provide any person reading the statement with a basis for making their own calculation of the total outstanding principal balance at any given point in time.

Although the notice of termination may not be used to defeat the lien or its priority with respect to interest or any other charges that relate to advances of principal previously made, it will be effective with respect to other future advances of principal. Such advances would therefore not be secured by the original mortgage. A lender may properly provide in its agreement with the borrower that it is no longer obligated to make such advances after its receipt of a notice of termination.

CONCLUSION

The parties to an HECM loan may elect not to have the transaction governed by the provisions of [NRS 106.300-400](#), inclusive, with respect to future advances, in which case future advances would be governed by the California Rule. Pursuant to the California Rule, future advances that the lender was obligated to make pursuant to the original loan agreement would be secured with priority dating from the date the original mortgage was recorded. Since the lender in an HECM loan is obligated to advance principal in amounts equal to accruing interest and other charges, such advancements would be secured with the priority dating from the date of the original recorded mortgage transaction. The lender in this situation should draft the loan agreement to clearly reflect the parties' intent that the original mortgage instrument secures all such future advances.

If the parties to an HECM loan transaction elect to have the issue of future advances governed by [NRS 106.300-400](#), inclusive, the borrower may not elect to terminate the operation of the mortgage as a security instrument by filing a notice of termination with the lender with respect to any advances of principal to pay for interest or other charges that relate to advances of principal made prior to the lender's receipt of the notice. Such a notice will be effective only with respect to future advances of principal that are unrelated to previous principal advances. The lender in an HECM loan transaction receiving a notice of termination may fulfill its obligations under [NRS 106.3809\(2\)\(d\)](#) and (e) by recording a statement which states the total amount of principal and interest outstanding on the date of the receipt of the notice an accounting of all debts and obligations secured by the mortgage, and explaining the basis upon which additional interest and charges on such amount will continue to accrue.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E. WALTHER
Senior Deputy Attorney General

OPINION NO. 93-21 PHARMACY, BOARD OF; HOMEOPATHIC MEDICAL EXAMINERS, BOARD OF; DRUGS; CONTROLLED SUBSTANCES: Amendment of [NRS 0.040](#) in 1985 allowed homeopathic physicians to be considered to be "physicians," but exclusively homeopathic practitioners may only possess, prescribe, dispense or administer those dangerous drugs and controlled substances in such manner and quantity as allowed by [NRS 630A.040](#).

Carson City, September 20, 1993

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

Dear Mr. Macdonald:

You have asked whether the amendment to [NRS 0.040](#) made by the 1985 Legislature changes the letter opinion issued on January 7, 1985, such that an exclusively homeopathic physician may not prescribe, possess, dispense, and administer controlled substances and dangerous drugs. The brief answer to your question is that an exclusively homeopathic physician may prescribe a limited group of dangerous drugs (those that are "sarcodes") to patients and may possess and administer a limited group of dangerous drugs and controlled substances, all in compliance with the statutory criteria provided in [NRS 630A.040](#).

QUESTION

Did the amendment to [NRS 0.040](#) enacted by the 1985 Legislature affect the letter opinion issued January 7, 1985, such that homeopathic physicians who are not also licensed as allopathic or osteopathic physicians may obtain a controlled substance registration or may prescribe, possess, or administer controlled substances and dangerous drugs?

ANALYSIS

Prior to the 1985 legislative session, [NRS 0.040](#) provided as follows:

1. Except as otherwise provided in subsection 2, as used in Nevada Revised Statutes, "physician" means a person who engages in the practice of medicine, including osteopathy.
2. The terms "physician," "osteopathic physician," "homeopathic physician" and "chiropractic physician" are used in chapters 630, 630A, 633, and 634 of NRS in the limited senses prescribed by those chapters respectively.

The 1985 Legislature left [NRS 0.040](#)(2) unchanged, but amended [NRS 0.040](#)(1) so that it now reads:

Except as otherwise provided in subsection 2, "physician" means a person who engages in the practice of medicine, including osteopathy *and homeopathy*. [Emphasis added.]

This office rendered a letter opinion on January 7, 1985, regarding whether a homeopathic practitioner was a "physician" under [NRS 0.040](#)(1). The letter opinion was rendered prior to the amendment to [NRS 0.040](#)(1) and, in fact, precipitated the amendment. In the letter opinion, this

office drew two conclusions: (1) that a homeopathic physician was not a "physician" for the purposes of [NRS chapters 453](#), 454, and 639; and (2) that a homeopathic physician who was also licensed in Nevada as an allopathic or osteopathic physician could write prescriptions for controlled substances and dangerous drugs, provided that the homeopathic physician did so only for legitimate allopathic or osteopathic treatment and not for homeopathic purposes.

The amendment of [NRS 0.040\(1\)](#) had the far-reaching effect of bringing homeopathic practitioners within the coverage of all the sections throughout the NRS in which reference is made to "physicians." The amendment of [NRS 0.040\(1\)](#) also changed the analysis of the January 7, 1985, letter opinion in the limited way that the question presented at that time, namely whether a homeopathic physician was a "physician" under [NRS 0.040](#), must now be answered affirmatively. The amended and present version of [NRS 0.040\(1\)](#) clearly indicates that homeopathic physicians are "physicians" as that term may be used throughout the NRS. The inquiry does not end here, though.

Subsection (2) of [NRS 0.040](#) refers inquiries regarding each of the specific practitioner groups in subsection (1) to each's specific practice act. As such, the answer to the specific question addressed in this opinion regarding the prescribing, possessing, and administering powers of exclusively homeopathic practitioners must be made by reference to various portions of the pharmacy laws and [NRS chapter 630A](#), the practice act for homeopathic practitioners.

[NRS 453.226\(1\)](#) provides the general definition of those persons who must be registered with the board of pharmacy to distribute or dispense controlled substances:

Every practitioner or other person who manufactures, *distributes or dispenses any controlled substance* within this state or who proposes to engage in the manufacture, *distribution or dispensing of any controlled substance* within this state shall obtain biennially a registration issued by the board in accordance with its regulations. [Emphasis added.]

A "practitioner" may administer controlled substances pursuant to [NRS 453.375\(1\)](#). A "practitioner," as defined in [NRS 453.126](#), includes a "physician." Any person who manufactures, distributes or dispenses a controlled substance without prior registration may be punished by imprisonment of one to six years, may be fined not more than \$2,000. [NRS 453.232](#).

Similarly, [NRS 454.213\(1\)](#) allows a "practitioner" to possess and administer dangerous drugs, and [NRS 454.215\(3\)](#) allows a "practitioner" to dispense dangerous drugs. [NRS 454.00958\(1\)](#) defines a "practitioner" to include a "physician." Any person who furnishes dangerous drugs without the valid prescription of a practitioner may be imprisoned for one to six years, may be fined not more than \$5,000, or both. [NRS 454.221\(1\)](#).

[NRS 630A.040](#) specifically defines the pharmacopoeia of medicines available for use by homeopathic physicians as follows:

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

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

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

[NRS 630A.090](#)(4) clearly distinguishes homeopathic medicine from allopathic medicine and prohibits homeopathic physicians from practicing allopathic medicine: "This chapter does not authorize a homeopathic physician to practice medicine, including allopathic medicine, except as provided in [NRS 630A.040](#)." Additionally, pursuant to [NRS 630A.230](#)(2)(c), all homeopathic physicians must be licensed as allopathic or osteopathic physicians "in any state or country, the District of Columbia or a territory or possession of the United States." Thus homeopathic practitioners can be licensed exclusively as homeopathic physicians under [NRS chapter 630A](#) or can have dual licenses as homeopathic physicians and allopathic or osteopathic physicians.

In contrast to the narrow statutory scope of the practice of homeopathy, the definition of "practice of medicine" in [NRS 630.020](#) is as follows:

1. To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by *any means or instrumentality*.
2. To apply principles or techniques of medical science in the diagnosis or the prevention of any such conditions.
3. To offer, undertake, attempt to do or hold oneself out as able to do any of the acts described in subsections 1 and 2.
4. To use in connection with a person's name the words or letters "M.D.," or any other title, word, letter or other designation intended to imply or designate him as a practitioner of medicine in any of its branches, *except in the manner authorized by [NRS 630A.220](#)*. [Emphasis added.]

The definition of "osteopathic medicine" is found in [NRS 633.081](#) and provides:

"Osteopathic medicine" or "osteopathy" means the school of medicine which:

1. Utilizes full methods of diagnosis and treatment in physical and mental health and disease, including the prescribing and administering of drugs and biologicals of all kinds, operative surgery, obstetrics, radiological and other electromagnetic emission; and
2. Places emphasis on the interrelationship of the musculoskeletal system to all other body systems. [Emphasis added.]

The legislative intent from the above definitions is clear: homeopathy is a limited practice whereas allopathy and osteopathy are general. Allopaths may use "any means or instrumentality" in their practices. Osteopaths may use "full methods of diagnosis and treatment" in their practices. Homeopaths, on the other hand, are limited to using only those medications that satisfy [NRS 630A.040](#) "in accordance with the principle that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person, resulting in the elimination and prevention of illness utilizing classical methodology and noninvasive electrodiagnosis." Furthermore, an allopathic physician may not call himself a homeopathic physician. [NRS 630.020](#)(4). It is clear that the legislature intended homeopathy to be a distinct style of medicine with a specifically defined pharmacopoeia suited to the homeopathic practice of medicine.

The question of which drugs a homeopathic practitioner can prescribe, possess, or administer is answered by the three-part test in [NRS 630A.040](#), namely that the drug must be (1) given in micro-dosage (except that sarcodes may be given in macro-dosage); (2) prepared according to homeopathic pharmacology; and (3) prescribed by homeopathic physicians according to the medicines and dosages in the Homeopathic Pharmacopoeia of the United States. Generally, the

dosages and forms of drugs maintained by Nevada pharmacies would not be in "micro-dosages," and would instead be in forms that would be deemed "macro-dosages" under [NRS 630A.040](#). Thus [NRS 630A.040](#) makes it clear that a homeopathic physician practicing homeopathically could not prescribe or administer the regular "macro-dosage" of any controlled substance or dangerous drug unless that drug were a "sarcodes." No known allopathic drugs regularly stocked by Nevada pharmacists would be "sarcodes."⁵²

A second question arises, though, as to whether a homeopathic practitioner may obtain and possess controlled substances and dangerous drugs for preparation of a homeopathic remedy therefrom. First, it seems unlikely that most of the regular stock of a Nevada pharmacy would qualify as the raw materials for the preparation of homeopathic remedies. Homeopathic remedies generally use organic materials and would not include the highly refined modern pharmaceuticals stocked by Nevada pharmacies.⁵³ Nonetheless, it may be that some pharmaceuticals, especially

⁵² A sarcodes is defined by the latest edition of the Homeopathic Pharmacopoeia of the United States (June 1991) as follows:

Sarcodes are homeopathic attenuations of wholesome organs, tissues, or metabolic factors obtained from healthy specimens.

Sarcodes are prepared according to homeopathic specifications, provided the basic substance is *not* altered and the FINAL PRODUCT is *not* adulterated by any pathogen or other deleterious substance.

Collection and preparation: refer to individual monograph.

ATTENUATION PROCEDURE

The freeze-dried organs, glands, or tissues are attenuated according to the specifications of Class F, and converted into liquid attenuations according to the specifications of Class H.

⁵³ Homeopathic remedies are identified by class. Following are the classes identified, taken from the Homeopathic Pharmacopoeia of the United States (June 1991 updated):

CLASS A - LIQUID ATTENUATIONS OF SOLUBLE SUBSTANCES

Class A attenuations are prepared by dissolving one (1) part by weight of the soluble basic substance in a sufficient quantity of purified water or other appropriate menstruum, specified in the drug monograph, to produce ten (10) parts by volume of liquid attenuation which is designated 1X.

CLASS B - LIQUID ATTENUATIONS OF SOLUBLE SUBSTANCES

Class B liquid attenuations are prepared by dissolving one (1) part by weight of the soluble basic substance in a sufficient quantity of purified water or other appropriate menstruum, specified in the drug monograph, to produce 100 parts by volume of liquid attenuation which is designated 2X or 1CH.

CLASS C - HOMOEOPATHIC TINCTURES OF BOTANICAL SUBSTANCES 1/10 (10%)

Class C Tinctures, identified by the symbols "Tr.", Ø, or MT, are prepared by maceration or percolation from crude botanical substances, fresh or dried, by the dissolving action of an alcoholic vehicle.

Class C tinctures are made to represent one (1) part by weight of dry crude material in ten (10) parts by volume of completed solution.

CLASS D - HOMOEOPATHIC TINCTURES OF BOTANICAL SUBSTANCES 1/20 (5%)

Class D Tinctures, identified by the symbols "Tr.", Ø, or MT, are prepared by maceration or percolation from crude botanical substances by the dissolving action of an alcoholic vehicle.

Class D Tinctures are made to represent one (1) part by weight of dry crude material in 20 parts by volume of completed solution.

CLASS E - HOMOEOPATHIC TINCTURES OF ZOOLOGICAL SUBSTANCES 1/20 (5%)

Class E Tinctures are prepared by maceration from zoological substances, fresh or dried, by the dissolving action of an alcoholic vehicle.

Class E Tinctures are made to represent one (1) part by weight of the crude material in 20 parts by weight of completed solution.

CLASS F - TRITURATIONS OF SOLID SUBSTANCES

Class F triturations of solid substances are prepared by triturating one (1) part by weight of the dry crude substance with nine (9) parts of

some controlled substances, may be stocked or available through Nevada pharmacies. For example, the monographs for homeopathic remedies include the following remedies that would be made from controlled substances: *anhalonium lewinii* (peyote), *cannabis indica/cannabis sativa* (marijuana), *cocainum* (cocaine), *cocainum muriaticum* (cocaine hydrochloride), *codeinum* (codeine), *datura arborea/datura metel* (datura), *morphinum* (morphine), *morphinum muriaticum* (morphine hydrochloride), and *opium* (opium). Additionally, it may be that some homeopathic remedies are fashioned from currently available dangerous drugs.

It is clear, therefore, that a homeopathic physician practicing homeopathically could legally obtain, possess, and administer some dangerous drugs and controlled substances for the manufacture of homeopathic remedies. Additionally, a homeopathic physician may also prescribe those dangerous drugs and controlled substances allowed by [NRS 630A.040](#), but as a practical matter it is unlikely that any Nevada pharmacies stock dangerous drugs or controlled substances in homeopathic dosages or know how to prepare homeopathic remedies according to homeopathic methodology. To

possess controlled substances, the homeopathic practitioner would be required to obtain a registration with the Drug Enforcement Administration (DEA) and a registration with the Nevada Board of Pharmacy pursuant to [NRS 453.226](#). Additionally, any order for a controlled substance in Schedules I and II would need to be via a DEA Form 222; any order for other controlled substances would need to be via a valid order form, and all record-keeping, storage, and security statutes and regulations would also be applicable.

Of course, possession and administration of the controlled substances and dangerous drugs obtained by a homeopathic practitioner must also comply with the terms of [NRS 630A.040](#). Administration of a controlled substance or dangerous drug in contravention to the dictates of [NRS](#)

Lactose, U.S.P., to make a 10% (1/10) trituration, which is designated 1X.

CLASS G - TRITURATION OF INSOLUBLE LIQUID SUBSTANCES

Class G triturations are prepared by triturating one (1) part by weight of insoluble liquid substance with sufficient Lactose, U.S.P., to produce a 10% (1/10) mixture by weight, which is designated the 1X trituration.

CLASS H - CONVERSION OF TRITURATIONS OF INSOLUBLE BASIC SUBSTANCES INTO LIQUID ATTENUATIONS

Class H conversions of triturations of insoluble basic substances into liquid attenuations are prepared by succussing on (1) part of the lowest soluble trituration of the substance (usually 6X) with sufficient distilled water or other appropriate menstruum to produce the next higher attenuation.

CLASS I - NOSODES

Nosodes are homeopathic attenuations of: pathological organs or tissues; causative agents such as bacteria, fungi, ova, parasites, virus particles, and yeast; disease products; excretions or secretions.

CLASS J - ALLERSODES

Allersodes are homeopathic attenuations of antigens, i.e., substances which, under suitable conditions, can induce the formation of antibodies. Antigens include toxins, ferments, percipitogens, agglutinogens, opsonogens, lysogens, venins, agglutinins, complements, opsonins, amboceptors, precipitins, and most native proteins.

CLASS K - ISOODES

Isodes, sometimes called Detoxodes, are homeopathic attenuations of botanical, zoological, or chemical substances, including drugs, excipients, or binders, which have been ingested or otherwise absorbed by the body and are believed to have produced a disease or disorder which interferes with homeostasis.

CLASS L - SARCODES

Sarcodes are homeopathic attenuations of wholesome organs, tissues, or metabolic factors obtained from healthy specimens.

[630A.040](#) would subject a homeopathic practitioner to discipline by the Board of Homeopathic Examiners pursuant to [NRS 630A.370](#)(3) and (5), and to discipline by the Board of Pharmacy pursuant to [NRS 453.241](#).

We suggest that representatives from the Boards of Pharmacy and Homeopathy meet to develop a comprehensive pharmacopoeia of drugs that Nevada pharmacists could provide to homeopathic practitioners or their patients that could be circulated among the members of the two professions. The pharmacopoeia should include at least the following categories: (1) those dangerous drugs that are "sarcodes" and could be prescribed by the homeopathic practitioner to be filled at a Nevada pharmacy; (2) those controlled substances that are in Schedules I and II that could be ordered by homeopathic practitioners from Nevada pharmacies for the manufacture of homeopathic remedies; (3) those controlled substances in Schedules III, IV, and V that could be ordered by homeopathic practitioners from Nevada pharmacies for the manufacture of homeopathic remedies; and (4) those dangerous drugs that could be ordered by homeopathic practitioners from Nevada pharmacies for the manufacture of homeopathic remedies.

The second conclusion contained in the letter opinion of January 7, 1985, remains essentially unchanged; namely that a homeopathic physician who is also licensed in Nevada as an allopathic or osteopathic physician may write prescriptions for controlled substances for allopathic or osteopathic, not homeopathic, purposes. [NRS 453.381](#)(1), the statute that is the basis of this part of the letter opinion, has not been changed in the interim since 1985. Similarly, a dangerous drug cannot legally be prescribed by a homeopathic physician except for allopathic or osteopathic, not homeopathic, purposes. See [NRS 454.211](#), [NRS 454.221](#).

Of course, the dually-licensed practitioner could also prescribe, obtain, possess, and administer those dangerous drugs and controlled substances for homeopathic purposes according to the homeopathic method as has already been discussed. In other words, when a dually-licensed practitioner is practicing allopathically or osteopathically, he could prescribe any dangerous drug or controlled substance, but when he is practicing homeopathically, he can only avail himself of the more narrow homeopathic pharmacopoeia of dangerous drugs and controlled substances.

CONCLUSION

The 1985 amendment to [NRS 0.040](#) authorizes exclusively homeopathic physicians to possess, dispense, or administer those controlled substances and dangerous drugs that are recognized by the Homeopathic Pharmacopoeia of the United States and otherwise comply with [NRS 630A.040](#). To possess, dispense, or administer any controlled substances, a homeopathic physician must obtain a federal DEA registration and a Nevada controlled substances registration. Homeopathic physicians who are also licensed in Nevada as allopathic or osteopathic physicians, in addition to the limited abilities to possess, dispense, administer, and prescribe certain dangerous drugs and controlled substances according to homeopathic practice, may also possess, dispense, prescribe, or administer controlled substances and dangerous drugs as appropriate and necessary to their allopathic or osteopathic practices.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: LOUIS LING
Deputy Attorney General

JURISDICTION; PARKS: The provision of law enforcement services within the boundaries of state parks is within the discretion of the administrator of the division. The Division of State Parks may, but has no statutory duty to, provide law enforcement services. The Las Vegas Metropolitan Police Department is concurrently responsible for providing such services to Floyd Lamb State Park. The laws that apply to a private residence situated in a state park located within the boundaries of a municipal corporation are both the general laws of the state and any local ordinances of the municipality that are not in conflict with the general laws of the state.

Carson City, September 29, 1993

Mr. Pete Morros, Director, Department of Conservation and Natural Resources, 123 West Nye Lane, Carson City, Nevada 89710

Dear Mr. Morros:

You have requested the opinion of this office regarding the jurisdiction of law enforcement agencies on, and the laws applicable to, a private residence located in a state park, specifically, Floyd Lamb State Park (Lamb Park).

FACTUAL BACKGROUND

This opinion request arises out of an incident at Lamb Park involving Park Supervisor Henry Eilers. In the early morning hours of March 8, 1993, Mr. Eilers was off duty and asleep when he was allegedly awakened by the sound of dogs barking and growling inside the fenced yard of his private residence situated on park grounds. Mr. Eilers reported that he also heard his pet goat bleating hysterically and his dog barking inside the house. According to Mr. Eilers, when he went out onto the rear porch of his residence carrying a 12 gauge shotgun, he was confronted by a large bull mastiff⁵⁴ weighing approximately 175 to 200 pounds. The dog was barking and growling and moving toward him. Feeling threatened, he fired one shot from an estimated distance of 7 to 10 yards. As the dog ran from the yard, he fired two additional shots over the fence. One dog was found dead the next morning approximately 200 to 250 yards from Mr. Eilers' residence. A second bull mastiff died from loss of blood at its owner's home. It was later confirmed that the dogs were unlicensed and running at large in apparent violation of city and county ordinances.

Floyd Lamb State Park is located within the municipal boundaries of the city of Las Vegas. The owners of the dogs reside in Clark County outside the city limits of Las Vegas. Their home is approximately one-half mile from Mr. Eilers' home.

An investigation of the destruction of the animals was conducted by a senior law enforcement specialist employed by the Division of State Parks. The investigation was prompted by the written complaint of the dogs' owners. The investigative report concluded that Mr. Eilers' was justified in shooting at the dogs.

QUESTION ONE

Which law enforcement agency or agencies have jurisdiction on a state park, specifically, Lamb Park?

ANALYSIS

We look to the NRS to determine whether the Division of State Parks is under a statutory duty

⁵⁴ The owners of the dogs identified them as English mastiffs.

to provide law enforcement services in an area that is within the boundaries of a state park. [NRS 407.065](#) provides in part:

The administrator, subject to the approval of the director, *may*:

.....

2. Protect state parks and property controlled or administered by it from misuse or damage and preserve the peace within those areas. *At the discretion of the administrator*, rangers and employees of the division have the same power to make arrests as any other peace officer for violations of law committed inside the boundaries of state parks or real property controlled or administered by the division. The administrator may appoint or designate certain employees of the division to have the general authority of peace officers. [Emphasis added.]

[NRS 407.065](#) clearly and unambiguously declares that the provision of law enforcement services by the Division of State Parks to an area inside the boundaries of a state park is within the discretion of the administrator of the division. Because the provision of law enforcement services is within the discretion of the administrator of the division, State Parks may, but has no duty to, provide such law enforcement services.

The Division of State Parks has elected to provide law enforcement services at Lamb Park. Its limited jurisdiction peace officers have the same power to make arrests as any other peace officer for violations of law committed within the boundaries of Lamb Park. This power is not exclusive, however, as general jurisdiction peace officers are not limited from making arrests within or without the boundaries of a state park. See [NRS 171.124](#).

The agency that is concurrently responsible for providing law enforcement services to the park, which is situated wholly within the boundaries of the city of Las Vegas, is the Las Vegas Metropolitan Police Department. The Clark County Sheriff's Department was merged with the police department of the city of Las Vegas to create the Las Vegas Metropolitan Police Department on July 1, 1973. See Las Vegas, Nv., Municipal Code (L.V.M.C.) § 2.24 (1981). The department has all of the powers and duties imposed by law upon the former sheriff's department, which included keeping and preserving the peace in the sheriff's respective county. See [NRS 248.090](#), and the police department. [NRS 280.280](#). The Las Vegas City Charter provides that the mayor, who has general supervision over all city departments (see L.V.M.C. § 2.04.010), "[s]hall take all proper measures for the preservation of the public peace and order and the suppression of riots, tumults, and all forms of public disturbances, for which purposes he may request assistance from the sheriff of the Las Vegas Metropolitan Police Department." Las Vegas, Nv., City Charter § 3.010(2), (3) (1986). In addition, the city council "may enact and enforce such local police ordinances as are not in conflict with the general laws of the state," and "[a]ny offense which is made a misdemeanor by the laws of the state shall also be deemed to be a misdemeanor against the city whenever that offense is committed within the city." *Id.* § 2.160.

In summary, the provision of law enforcement services within the boundaries of state parks by the Division of State Parks is within the discretion of the administrator of the division. State Parks may, but has no statutory duty to, provide law enforcement services. The Division of State Parks has elected to provide law enforcement services at Lamb Park. Its limited jurisdiction peace officers have the same power to make arrests as any other peace officer for violations of law committed within the boundaries of Lamb Park. This power is not exclusive, however, as general jurisdiction peace officers are not limited from making arrests within or without the boundaries of a state park. The Las Vegas Metropolitan Police Department, pursuant to its city charter and municipal code, is concurrently responsible with the Division of State Parks for providing law enforcement services to Lamb Park.

CONCLUSION TO QUESTION ONE

The provision of law enforcement services within the boundaries of state parks by the Division of State Parks is within the discretion of the administrator of the division. State Parks may, but has no statutory duty to, provide law enforcement services. The Las Vegas Metropolitan Police Department, pursuant to its city charter and municipal code, is concurrently responsible with the Division of State Parks for providing law enforcement services to Lamb Park.

QUESTION TWO

Which laws apply to a private residence situated on a state park, specifically, Lamb Park?

ANALYSIS

We interpret your question to mean which laws should be looked to in determining the legality of Mr. Eilers' shooting the two English mastiffs at his private residence at Lamb Park in the early morning hours of March 8, 1992.

First, we note that, because the owners of the dogs resided in Clark County outside of the city limits of Las Vegas, Clark County's animal licensing requirements, found in chapter 10 of the Clark County Code, were applicable.

Second, it is our view that the laws applicable to a private residence at Lamb Park are the pertinent general laws of the state and any appropriate ordinances of Las Vegas which do not conflict with the general laws of the state. As noted above, the Las Vegas City Council "may enact and enforce such local police ordinances as are not in conflict with the general laws of the state," and "[a]ny offense which is made a misdemeanor by the laws of the state shall also be deemed to be a misdemeanor against the city whenever that offense is committed within the city." Las Vegas, Nv., City Charter § 2.160; *see* L.V.M.C. § 10.02.010. The city's charter also gives the city council specific power to regulate or prohibit the running at large and disposal of all kinds of animals and fowl. Las Vegas, Nv., City Charter § 2.270(2).

The city's ordinances relating to the control of animals, specifically, chapter 7.36 of the municipal code, requires the owner of an animal to keep the animal restrained by a fence, cage, coop, chain, leash or other adequate means so that the animal shall not leave or escape from the premises upon which it shall be kept (§ 7.36.050) and makes the owner of an animal guilty of a misdemeanor if the animal is "at large" (§ 7.36.030). In addition, L.V.M.C. § 7.04.490 defines a vicious animal as "any animal or animals that constitute a physical threat to human beings or that have, without provocation, attacked a human being or other animal." These provisions are not in conflict with the pertinent general laws of the state. [NRS 568.370](#) provides in part:

1. It is unlawful for any person to permit a dog to chase, worry, injure or kill cattle, sheep or other domestic animals on the open range or on private property.

....

3. Any person who violates the provisions of subsection 1 is guilty of a misdemeanor.

[NRS 575.020](#) provides:

1. Every person having the care or custody of any animal known to possess any vicious or dangerous tendencies, who allows it to escape or run at large in any place or manner liable to endanger the safety of any person, is, guilty of a misdemeanor.

2. Any person may lawfully and without liability for damages kill such an animal when reasonably necessary to protect his own safety or the public safety, or if the animal chases, worries, injures or kills his livestock on the land of any person other than that of the owner of the animal.

3. Every person having the care or custody of an animal which chases, worries, injures or kills the livestock of another on land other than his own is liable to the owner of the livestock for damage to it.

4. As used in this section, "livestock" means all animals of the bovine, caprine, equine, ovine and porcine species, and all domesticated fowl and rabbits.

Accordingly, the laws that apply to a private residence situated in a state park located within the boundaries of a municipal corporation are both the general laws of the state and any local ordinances of the municipality that are not in conflict with the general laws of the state. The legality of Mr. Eilers' shooting of the two English mastiffs at his private residence at Lamb Park on March 8, 1992, can be, and apparently was, determined on the basis of the statutes and ordinances cited above.

CONCLUSION TO QUESTION TWO

The laws that apply to a private residence situated on a state park located within the boundaries of a municipal corporation are both the general laws of the state and any local ordinances of the municipality that are not in conflict with the general laws of the state.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: P. MARK GHAN
Deputy Attorney General

OPINION NO. 93-23 TAXATION; CIGARETTES; ADMINISTRATIVE LAW: The executive director of the Nevada Department of Taxation does not have the authority under [NRS 370.3715](#) to amend [NRS 370.027](#) by regulation to provide that a 3 percent cost of doing business allowance must be added to the definition of the "cost to the wholesale dealer" in order to prevent predatory pricing by cigarette wholesalers pursuant to [NRS 370.371](#).

Carson City, September 29, 1993

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

Dear Mr. Comeaux:

In 1989, legislation was enacted to regulate the wholesale price of cigarettes sold for consumption in Nevada. Act of July 2, 1989, ch. 661, § 1, 1989 Nev. Stat. 1514. In this legislation, the "basic cost of cigarettes" was defined as "the invoice or replacement cost of cigarettes to the wholesale dealer . . . plus the value of any revenue stamps that are affixed . . . if not included in the invoice cost, less all trade discounts, except cash discounts." [NRS 370.005](#) (1989). In 1993, the Nevada Legislature made significant changes to the provisions in chapter 370 of the NRS governing the regulation of the wholesale price of cigarettes. See Act of July 12, 1993, ch. 592, § 1, 1993 Nev. Stat. 2473. Specifically, [NRS 370.005](#) was substantially amended to define the basic cost of cigarettes to be the "manufacturer's invoice cost of cigarettes by carton to the wholesaler dealer . . . less all allowances in the amount not exceeding 2.5 percent of the invoice cost . . . plus the full value of any cigarette revenue stamps that are affixed to the packages . . . if not included in the invoice cost . . ." [NRS 370.005](#) (1993). See Act of July 12, 1993, ch. 592, § 1. The legislature also amended [NRS 370.027](#), defining the "cost to the wholesale dealer" as "the

basic cost of cigarettes to the wholesale dealer." See Act of July 12, 1993, § 2. Previously, [NRS 370.027](#) defined "cost to the wholesale dealer" as the basic cost of cigarettes plus an amount equal to the wholesaler's cost of doing business or overhead.

You have requested an opinion from this office concerning the interpretation and application of this new legislation, and whether the statutory definition of the wholesaler's "cost of doing business" can be amended through the adoption of a regulation under [NRS 370.3715](#), as suggested by the Nevada Association of Tobacco & Candy Wholesalers. In view of the foregoing, you have specifically presented this office with the following question:

QUESTION

Does the Executive Director of the Nevada Department of Taxation (Director) have the authority under [NRS 370.3715](#) to amend [NRS 370.027](#) by regulation to provide that a 3 percent cost of doing business allowance must be added to the definition of the "cost to the wholesale dealer" in order to prevent predatory pricing by cigarette wholesalers pursuant to [NRS 370.371](#)?

ANALYSIS

The starting point of the analysis must begin with [NRS 370.371](#), which establishes the purpose of all the regulatory provisions in chapter 370 of NRS, to prohibit a wholesale dealer from engaging in unfair predatory pricing schemes by selling cigarettes to retailers at below the "cost to the wholesale dealer." See also Act of July 12, 1993, ch. 592, § 5. During the 1993 legislative session, when the legislature amended the definitions of the "basic cost of cigarettes" under [NRS 370.005](#), and the "cost to the wholesale dealer" under [NRS 370.027](#), no provision was included to add a 3 percent cost of doing business allowance in the statute, nor was there any specific mandate from the legislature that the Director adopt such a provision by regulation. The question becomes whether the Department of Taxation may amend by regulation the statutory definition of [NRS 370.027](#) in the absence of specific statutory authority.

A regulation has been construed by the Nevada Supreme Court as "a rule, standard, directive or any statement of general applicability which effectuates or interprets policy of the agency concerned." *Public Serv. Comm'n v. Southwest Gas Corp.*, [99 Nev. 268](#), 273, 662 P.2d 624 (1983). Regulations adopted and filed in accordance with the provisions of Nevada Administrative Procedures Act, codified at chapter 233B of NRS, have the force and effect of law. *Imperial Palace, Inc. v. State, Dep't of Taxation*, [108 Nev. 1060](#), 843 P.2d 813, 816 (1992). "Administrative regulations cannot contradict or conflict with the statute they are intended to implement." *Roberts v. State, Univ. of Nev. Sys.*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988). Likewise, a regulation "may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." *Boulware v. State, Dep't of Human Resources*, [103 Nev. 218](#), 220, 737 P.2d 502 (1987). Obviously, regulations which are inconsistent or contradict statutes they were intended to implement would not have the force and effect of law. *Oliver v. Spitz*, [76 Nev. 5](#), 8, 348 P.2d 158 (1960). Therefore, an agency may only act within prescribed limits and when authorized by statute to make rules and regulations necessary to carry into effect expressed legislative intention. *Cashman Photo Concessions & Labs v. Nevada Gaming Comm'n*, [91 Nev. 424](#), 428, 538 P.2d 158 (1975). See also *Ruley v. Nevada Bd. of Prison Comm'rs*, 628 F. Supp. 108, 111 (D. Nev. 1986).

Clearly, it was not the legislature's intent that a 3 percent cost of doing business allowance be provided for in the definition of the cost to the wholesale dealer, since the previously existing statutory definition of cost to the wholesale dealer that included a provision to add overhead costs was stricken from [NRS 370.027](#). See Act of July 12, 1993, ch. 592, § 2. Therefore, any action by the Director to adopt such a provision through a regulation would be an improper attempt to circumvent the actions of the legislature in amending [NRS 370.005](#) and [370.027](#). Any such action

by the Director would be beyond the scope of his authority under [NRS 370.3715](#).

CONCLUSION

The Executive Director of the Nevada Department of Taxation does not have the authority under [NRS 370.3715](#) to amend [NRS 370.027](#) by regulation to provide that a 3 percent cost of doing business allowance must be added to the definition of the "cost to the wholesale dealer" in order to prevent predatory pricing by cigarette wholesalers pursuant to [NRS 370.371](#).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JEFFREY R. RODEFER
Deputy Attorney General

OPINION NO. 93-24 COUNTIES; COUNTY HOSPITALS: Under [NRS 450.420\(3\)](#), a county is only required to pay its county hospital for emergency treatment, and post-emergency care as determined by the board of trustees of the county hospital, rendered to indigent patients.

Carson City, October 14, 1993

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

Dear Ms. Sugden:

You have requested an opinion from this office regarding construction of the statutory language in [NRS 450.420\(3\)](#). In preparing this opinion, the opinions of the district attorneys of our state and other interested persons were solicited for consideration.

The responses received show an inconsistent construction and application that has, in some cases, caused tension between the boards of trustees of some county hospitals and their county governments.

With the apparent competing interests regarding the subject of this opinion, and a historical course of application of those interests for many years,⁵⁵ this opinion must concentrate upon the legislative history of [NRS 450.420](#) and judicial interpretation of chapter 450 of the NRS.

QUESTION

Does the term "any person," as found in [NRS 450.420\(3\)](#), refer only to indigent persons or does it also apply to any person who has incurred emergency medical care and failed to pay for those costs?

ANALYSIS

The descriptive phrase "any person" must be given its plain meaning unless it somehow is rendered ambiguous in the context of the statute. See *McKay v. Board of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438 (1986).

⁵⁵ The legislative history discloses that the NRS has substantially contained the same language since 1969. See Act of April 21, 1969, ch. 498, § 1, 1969 Nev. Stat. 875; see also NRS 450.420.

The phrase "any person" was first codified into [NRS 450.420\(3\)](#) in 1969. The amendment to the statute contained, in part, the following new language:

1. The board of county commissioners shall establish by ordinance criteria and procedures to be used in the determination of patient eligibility for medical care as medical indigents or subjects of charity.

2. . . . In fixing charges pursuant to this subsection the board of trustees shall not include, or seek to recover from *paying patients*, any portion of the expense of the hospital which is properly attributable to the care of *indigent patients*.

3. The county is chargeable with the entire cost of services rendered by the hospital and any attending staff physician or surgeon to *any person* admitted for emergency treatment, but the hospital and any such attending physician or surgeon shall use reasonable diligence to collect such charges from the emergency patient or any other person responsible for his support. Any amount so collected shall be reimbursed or credited to the county.

Act of April 21, 1969, ch. 498, § 1, 1969 Nev. Stat. 875 (emphasis added).

On its face, "any person," as used in the context of the above amendment was not ambiguous. The drafter clearly delineated a difference between a "paying patient" and an "indigent patient" in the sentence that preceded the sentence containing the words "any person."

If the legislature had intended that the county should only pay for indigent emergency care, it certainly would not have, absent a mistake, used "any person" in the context of the amendment. The legislative record shows no evidence of any mistake in drafting.⁵⁶

This construction is consistent with the legislative history. In 1975, [NRS 450.420\(3\)](#) was amended to include additional financial responsibility by the county. The new language was included as follows:

The county is chargeable with the entire cost of services rendered by the hospital and any *salaried* staff physician, surgeon *or employee* to any person admitted for emergency treatment, *including all reasonably necessary recovery, convalescent and follow-up inpatient care required for any such person as determined by the board of trustees of such hospital*, but the hospital shall use reasonable diligence to collect such charges from the emergency patient or any other person responsible for his support. Any amount so collected shall be reimbursed or credited to the county.

Act of May 21, 1975, ch. 662, § 1, 1975 Nev. Stat. 1305 (emphasis denotes new language).

The amendment added additional financial responsibility upon the county for the post-emergency necessary care of "any person" admitted to emergency treatment. The new language refers back to "any person," using the phrase "any such person." This language produced a comment by the representative of Washoe County during a meeting before the Health, Welfare and State Institutions Committee that is demonstrative of what was in the mind of the legislature. "Mr. Frank Fahrenkopf, representing Washoe County, stated that the commissioners question how much this is going to cost and where the money will come from. Also, paragraph 3 requires the county to be responsible for *emergency room care and care of indigents*." See Minutes of May 6, 1975, Hearing on S.B. 558 before the Senate Committee on Health, Welfare and State Institutions at 1 (emphasis added).

⁵⁶ This particular language regarding "any person" has survived seven subsequent amendments of NRS 450.420. See Act of May 21, 1975, ch. 662, § 1, 1975 Nev. Stat. 1305; Act of April 28, 1977, ch. 279, § 1, 1977 Nev. Stat. 480; Act of May 29, 1983, ch. 602, § 20, 1983 Nev. Stat. 1943; Act of June 4, 1985, ch. 476, § 1, 1985 Nev. Stat. 1463; Act of May 18, 1987, ch. 167, § 5, 1987 Nev. Stat. 389; Act of June 10, 1987, ch. 377, § 43, 1987 Nev. Stat. 878. See also Act of May 25, 1993, ch. 477, § 17, 1993 Nev. Stat. 1975.

Committee member, Senator Hilbrecht, made this follow-up response to Mr. Fahrenkopf's statement:

Senator Hilbrecht feels that it will cost the counties more money; however, the care should not end at the emergency room. Senator Hilbrecht asked if there is a legitimate reason, if the county is responsible for *a person in the emergency room*, why they are not responsible for the follow-up care.

Id. (emphasis added).

This legislative history demonstrates the legislature was mindful of a distinction between a "paying patient" and an "indigent patient" during the drafting of the statutory language; that "any person" was used immediately following language representative of this distinction; that the representative of Washoe County clearly stated the county is responsible for "emergency room care," and in so stating, separated it from the county's responsibility for "care of indigents"; and Senator Hilbrecht did not correct or otherwise express disagreement with Washoe County's statement, but to the contrary, asked rhetorically, why the county should not be required to pay for the follow-up emergency care.

From the sole perspective of the content of [NRS 450.420\(3\)](#) on its face and its legislative history, there exists a strong argument that "any person" was clear, unambiguous and should be given its "plain meaning." See *Application of Filippini*, [66 Nev. 17](#), 24, 202 P.2d 535 (1949); see also *Thompson v. First Jud. Dist. Ct.*, [100 Nev. 352](#), 354, 683 P.2d 17 (1984); see also *Robert E. v. Justice Ct.*, [99 Nev. 443](#), 664 P.2d 957 (1983).

However, the recent Nevada Supreme Court case of *Nye County v. Washoe Medical Ctr.*, [108 Nev. 490](#), 835 P.2d 780 (1992), made some broad statements regarding the Nevada statutory scheme regarding counties, indigent patients and [NRS chapter 450](#):

We determine that under Nevada's statutory scheme, indigency is a prerequisite to a county's obligation to provide charitable medical aid

It is difficult to imagine that the legislature intended to make county taxpayers liable for medical treatment of everyone, regardless of financial status, who becomes sick in the county and receives treatment elsewhere. [NRS chapters 450](#) and 428 deal exclusively with a county's obligation to provide no-cost aid to indigent, disabled, elderly, or otherwise needy individuals. It would be inconsistent with the surrounding statutes to interpret [NRS 450.400](#) to require a county to assume the cost of medical care for everyone falling ill within its borders irrespective of financial status.

Nye County, 108 Nev. at 492.

This broad and inclusive language by the Nevada Supreme Court regarding [NRS chapter 450](#) has rendered the meaning of "any person" under [NRS 450.420\(3\)](#) to be ambiguous.

Since "any person" can now be construed to mean two different things (e.g., "all patients" or "indigent patients") the statute has taken on an ambiguous nature, requiring the construction of the statute beyond its plain meaning. The legislative intent can thus be determined by looking at the entire act and construing the statute as a whole in light of its purpose. See *Hotel Employees v. State, Gaming Control Bd.*, [103 Nev. 588](#), 747 P.2d 878 (1987); see also *Roberts v. State*, [104 Nev. 33](#), 37, 752 P.2d 221 (1988) (where the legislative intent regarding an ambiguous statute can be derived from reason and public policy).

In construing [NRS 450.400](#) the court in *Nye County* was considering, in part, statutory

language that overlaps what is commonly understood to mean emergency treatment.⁵⁷ Washoe Medical Center tried to argue that the statutory language was enacted to allow a treating county hospital to recover the costs of medical services rendered to someone who became ill in another county, irrespective of the patient's indigency. The court said:

The controversy in this appeal centers on the interpretation of [NRS 450.400](#), which gives a county hospital (such as WMC) a legal claim to recover the costs of medical services rendered to "a resident of another county who is entitled under the laws of this state to relief, support, care, nursing, medicine, medical or surgical aid from the other country, *or to one who is injured, maimed or falls sick in the other county.*"

Nye County, 108 Nev. at 492 (emphasis added).

As is the case with the statute in question, [NRS 450.400](#) appeared, at the time of the court's construction,⁵⁸ to make separate and distinct references to two categories of patients. See [NRS 450.420\(2\)](#) (where paying patients and indigent patients are delineated); *cf.* Act of June 18, 1991, ch. 388, § 1, 1991 Nev. Stat. 1000 (where [NRS 450.400\(1\)](#) contained a category concerning qualified indigents and a category which was directed at the classic emergencies of those who were injured, maimed or fell sick).

These distinctions between patient classes notwithstanding, the court rejected Washoe Medical Center's argument and chose to make its construction of the statutory language weighted heavily toward the overall statutory scheme of [NRS chapter 450](#); that scheme being the care and maintenance of indigents only.

When the Nevada Supreme Court chooses to construe a similar statute; draw its construction from the "surrounding statutes," which include the statute in question; and specifically limits application of the statutory scheme to "indigents," the opinion of the court provides the basis for all future construction, unless the legislature chooses to avoid the meaning by changing the language so construed. See *Latterner v. Latterner*, [51 Nev. 285](#), 274 P. 194 (1929).

Finally, the legislature again amended [NRS 450.420](#) after the court's broad construction of [NRS chapter 450](#), making only minor inconsequential changes to the operative language. See Act of May 25, 1993, ch. 477, § 17, 1993, Nev. Stat. 1975 (where the legislature added, in part, a clearer reference to "otherwise" provided indigent programs).

It is a rule of statutory construction that an amendment by the legislature of a statute, previously construed by the Nevada Supreme Court and left unchanged as to that construction, shall have that construction placed upon the reenactment. See *South Pac. Co. v. Dickerson*, [80 Nev. 572](#), 580, 397 P.2d 187 (1964) (where the court stated: "under well-recognized rules of construction, the legislature in re-enacting the law . . . did so with the interpretation placed upon it by the court. . .").

⁵⁷

1. The board of county commissioners shall adopt an ordinance and any related policies which establish the standards of eligibility for medical and financial assistance to indigent persons.

....

3. A county's program of medical assistance to indigent persons must provide payment for:

(a) Emergency medical care; and

(b) All other medically necessary care rendered in a medical facility designated by the county.

NRS 428.015.

⁵⁸ See Act of June 18, 1991, ch. 388, § 1, 1991 Nev. Stat. 1000 (where the legislature amended NRS 450.400, limiting its application to "a resident of another county who is reasonably believed to be indigent").

CONCLUSION

The phrase "any person," as used in the context of [NRS chapter 450](#), has been construed by the Nevada Supreme Court to be a reference to an indigent person only. The legislature's reenactment of [NRS 450.420](#) after such a judicial construction operates to place that same construction upon the statute. Therefore, the term "any person," as found in [NRS 450.420\(3\)](#), refers only to indigent persons.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: RANDAL R. MUNN
Deputy Attorney General

OPINION NO. 93-25 INSURANCE; SELF-INSURED EMPLOYERS: The commissioner may compel a local government to pay an assessment to the insolvency fund created in [NRS 616.7925](#).

Carson City, November 15, 1993

Ms. Teresa P. Froncek Rankin, Commissioner, Division of Insurance, 1665 Hot Springs Road, Suite 152, Carson City, Nevada 89710

Dear Ms. Rankin:

This is in response to your request for an opinion of this office concerning the application of [NRS 616.2925\(1\)](#). That statute authorizes the commissioner to assess all self-insured employers to provide for claims against any insolvent self-insured employer.

QUESTION

May local governments be assessed to pay for the workers' compensation claims of an insolvent self-insured employer?

ANALYSIS

The regulation of self-insured employers that is administered by the Division of Insurance (Division) has four major legal and financial underpinnings:

1. The commissioner reviews the application for certification, verifies the administrative and financial competence of the employer, and grants a certificate to act as a self-insured employer. The financial statements are regularly reviewed and audits are performed by the Division;
2. [NRS 616.291](#) requires the self-insured employer to provide a deposit of money, evidence of excess insurance, and a bond to the Division in an amount sufficient to ensure payment of compensation;
3. [NAC 616.196](#) provides for a reserve account for insolvencies that is assessed yearly upon all self-insured employers; and
4. [NRS 616.2925\(1\)](#) and (2) provide for the creation and continuation of the insolvency fund.

This statute is invoked in the event that regulation of the self-insured employer, the excess insurance policy, the deposit, and the bond are insufficient to pay compensation claims.

The insolvency fund provides for payment of claims of an insolvent self-insured employer who has become unable to pay workers' compensation claims. The insolvency fund has been activated once in the past to pay for the claims of an insolvent self-insured employer.

Your question is whether a local government can be assessed, under [NRS 616.2925](#), to provide money to the insolvency fund. The answer is yes. Local governments that elect to self-insure their workers' compensation obligations do so pursuant to [NAC 616.275](#). They are required to meet the accounting requirements of statement number 10 of the Governmental Accounting Standards Board (GASB) or deposit money with the Division. Local governments are subject to the provisions of chapter 616 of NRS and chapter 616 of NAC. The obligations assumed by a self-insured local government include the risk that it must be assessed for the obligations of another insolvent, self-insured employer. The local governments agree to the provisions of [NRS 616.2925](#) as a condition of becoming self-insured. While it is unlikely that such an assessment may be made, the possibility exists, for example, in the event of a catastrophe. In that event, where another self-insured employer is unable to pay claims, the assessment will be enforceable against the local government. The purpose of this statute is to prevent unfunded liabilities for workers' compensation. The statute is a reasonable act of the legislature to protect the highly significant interests of injured workers.

The commissioner's assessment is in the nature of a pledge of assets and the income stream of the self-insured employer that arises from a statutory obligation. If a self-insured employer does not pay an assessment by the commissioner, the remedy would be to terminate the certificate of self-insurance and to compel the employer to return to the State Industrial Insurance System pursuant to [NRS 616.305](#). The assessment would then be collected by legal proceedings.

Your question calls for an analysis of Article 8, Section 10 of the Nevada Constitution. That provision prohibits governments from lending credit to private corporations. In Op. Nev. Att'y Gen. No. 163 (April 24, 1956), this office offered the opinion that a political subdivision may subscribe with a reciprocal insurer licensed in Nevada, as long as the policy is non-assessable and there is no statute incorporated calling for contingent liability. In the present analysis, there is contingent liability set forth in the interplay between two statutes, [NRS 616.275](#) and [NRS 616.2925](#). The distinction is that the liability for unfunded workers' compensation costs arising from an insolvent self-insured employer is borne by a state-created fund, and not by a private corporation. Under this analysis, the legislature has enacted [NRS 616.275](#) with knowledge of the prior statute, [NRS 616.2925](#), and in light of the provisions of the constitution. The construction that the assessment money is owed to a fund created and controlled by the state distinguishes the position taken in Op. Nev. Att'y Gen. No. 163.

CONCLUSION

A local government that has elected to become a self-insured employer may be assessed pursuant to [NRS 616.2925](#). If it fails to pay an assessment, the commissioner's remedy would be to terminate the certificate of self-insurance and to collect the assessed amount through litigation.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

OPINION NO. 93-26 DAIRY COMMISSION; LICENSES: License denial must be a valid exercise of police power. Interstate commerce may be burdened only incidentally.

Carson City, December 1, 1993

Mr. Bryn Armstrong, Executive Director, State of Nevada Dairy Commission, 4600 Kietzke Lane, Building I, Suite 206, Reno, Nevada 89502

Dear Mr. Armstrong:

You have requested an opinion regarding the constitutionality of [NAC 584.7011](#) and its ability to survive a legal challenge:

QUESTION

May the Nevada Dairy Commission (Commission) deny an application for a license, or an amendment to an existing license, if it finds that approval would lend to create destructive competition in a market already adequately served?

ANALYSIS

On March 1, 1980, the Commission adopted [NAC 584.7011](#), which states that it will not deny an application for a distributor's license,

[U]nless it finds, by a preponderance of evidence after due notice and opportunity to be heard has been given the applicant or licensee, one or more of the following:

....

(b) That the issuance of a license or granting of an amendment to the existing license will tend to create destructive competition in a market already adequately served

[NAC 584.7011](#)(2).

A state's police power includes the right to protect the health and welfare of its citizens. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Control and distribution of milk and other dairy products traditionally falls within the area of health and welfare. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

Under the auspices of its police power, a state may legitimately temper the rigid requirements of the Commerce Clause of the United States Constitution. This is particularly true when it comes

to the constitutionality of states' dairy statutes. A law is presumed constitutional and courts will not hold otherwise until it is proved beyond a reasonable doubt that it is unconstitutional. *Alabama Dairy Comm'n v. Food Giant, Inc.*, 357 So. 2d 139 (Ala. 1978). The dairy industry is unique because milk is so nutritionally important and dairy products are highly susceptible to contamination and rapid spoilage. *Id.* at 143.

[NRS 584.395](#)(4) states: "It is the policy of this state to promote, foster and encourage intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices and improper accounting for milk purchased from producers."

On their face, the above-cited laws are constitutionally sound. In no place is it stated that Nevada will buy from local dairies only, or place any undue restriction on the flow of interstate commerce. In practice, Nevada has not discriminated against out-of-state producers or distributors in favor of local dairies.

In *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), the U.S. Supreme Court found that a Florida statute was invalid because the regulatory scheme reserved to local producers a substantial share of the milk market. The Court relied on three prior cases: *Baldwin*, 294 U.S. 511 (1935); *H.P. Hood & Sons*, 336 U.S. 525 (1949); and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

In 1935, Justice Cardozo delivered the opinion of the *Baldwin* Court, in which it held that a state may not directly burden interstate commerce, nor place itself in a position of economic isolation. However, interstate commerce may be affected incidentally as a valid exercise of its police power. New York law fixed prices for out-of-state milk to be equal to that of the prices paid within the state.

Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. To give entrance to that excuse would be to invite a speedy end of our national solidarity.

Baldwin, 294 U.S. at 523.

The Court in *Hood* again found that the state was attempting to unduly burden interstate commerce under the guise of its police power. New York had refused to issue a license to an existing distributor for an additional receiving depot for milk to be shipped to another state. The state's rationale was that at times there had been a shortage of milk and curtailing movement of milk would ostensibly prevent any future shortages within the state. The Court rejected the rationale and held that the measure was not "supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition." *H.P. Hood & Sons*, 336 U.S. at 531.

In *Dean Milk Co.* the Court was faced with a creative variation of the same old theme. The city of Madison, Wisconsin, enacted an ordinance that prohibited the sale of pasteurized milk unless it had been bottled and pasteurized at an approved pasteurization plant located within a 5-mile radius of the city. The statute's discriminatory effect was intrastate as well as interstate. This factor did not sway the Court, who found that the municipality was primarily protecting its economic interests. If the city insisted on such superior standards of milk processing, it would have to

embrace an alternate method that did not unduly burden interstate commerce. "The importer . . . may keep his milk or drink it, but sell it he may not." *Baldwin*, 294 U.S. at 521.

The above-cited cases are representative of the past and present Supreme Court interpretations of the various states' statutes and attempts by the states to regulate and protect their individual economy. The Court discourages such activity as violative of the Commerce Clause. The Court must be convinced that any restrictions on interstate commerce are a valid exercise of a state's police power.

If a "regulation treats interstate and intrastate commerce evenhandedly in order to accomplish a legitimate local public interest and any corresponding effects on interstate commerce are incidental," there is no violation of the Commerce Clause unless the burden on commerce is excessive in relation to local benefits. *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381, 1385 (8th Cir. 1993). The Court of Appeals was reiterating the balancing test set forth in a unanimous opinion in *Great Atl. & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976). The *Cottrell* Court held that if a legitimate local purpose exists, then the degree of burden will be examined.

And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v Bruce Church, Inc.*, 397 US 137, 142, 25 L Ed 2d 174, 90 S Ct 844 (1970).

Cottrell, 424 U.S. at 372. The *Cottrell* Court struck down a Mississippi regulation that provided out-of-state milk could only be sold in Mississippi if the other state extended reciprocity. The Court could find no justification for the regulation, except economic, which is per se invalid.

The Commerce Clause has ignited much litigation but statutes will survive scrutiny if the state's hindrance to movement of goods can be justified and the burden is incidental. *Arden Farms Co. v. State Dep't of Agric.*, 420 P.2d 379 (Or. 1966), *appeal dismissed*, 386 U.S. 350 (1967), *reh'g denied*, 386 U.S. 1014; *Consumer-Farmer Milk Co-op., Inc. v. Wickham*, 25 S.2d 413 (N.Y. 1966).

Assuming [NAC 584.7011](#) passes constitutional muster, is evenhandedly applied, and the burden on interstate commerce is minimal, can an application be denied if destructive competition is a possibility or likelihood?

In *Tuscan Dairy Farms, Inc. v. Barber*, 380 N.E.2d 1979 (A.D. 1978), *appeal dismissed*, 439 U.S. 1040, the challenged statute contained the same provisions as [NAC 584.7011](#). *Tuscan Dairy* had held a wholesale license in New York for 20 years when it applied for an extension. After a hearing, the commissioner found that the market was adequately served, and issuance of an extension "would tend to a destructive competition for milk sales and as such would not be in the public interest." *Id.* at 219. On that basis, the commissioner denied the application. The determination by the commission was wholly factual and pivoted on practical matters. The applicant distributed milk on a wholesale scale and served larger-volume supermarket accounts. By entering an adequately served market, the balance would be upset. Smaller businesses and retail home delivery would inevitably suffer. The competition that would ensue, most assuredly, would claim as victims established licensees that serve consumer needs, unable to be served by the applicant. The commission was not concerned with the economic protection of the milk industry or the economic climate of the proposed area, but to maintain the balance of present milk distribution. Service to "retail home delivery routes . . . to small volume wholesale customers," the small outlets and the mom and pop stores, which individually and collectively serve consumer needs" could not be met by the applicant. *Id.* at 226. Further, it is likely that the presence of applicant would drive the small distributors out of business and some consumers would be without an adequate supply of milk.

The *Tuscan* Court expressed great frustration at the lack of judicial precedent existing to guide them. This was not a Commerce Clause question because the commission would have applied this reasoning to any large wholesale dairy within or without the state.

A seemingly opposite result was reached in *Farmland Dairies v. Commissioner of New York Dep't of Agric. & Mkts.*, 650 F. Supp. 939 (E.D. N.Y. 1987). The opinion of the Court was very personal and highly critical of the commissioner himself. The commissioner's findings made no attempt to justify denial of an out-of-state application, but stated that it was economically unsound to allow an extension. He made a conclusory finding that *Farmland's* entry in the market would "tend to a destructive competition in markets already adequately served and would not be in the public interest." *Id.* at 943. He offered no reasoning, other than economic, for denial. The record and commission report did not support the findings.

A prior determination in *Farmland Dairies v. Gerace*, 125 A.2d 899 (N.Y. 1986), defined "destructive competition in an area already adequately served." *Id.* at 900. *Farmland* contended that the commissioner must demonstrate that the competition would in fact be destroyed. The court held that the commissioner must establish "[t]hat permitting the entry of a new competitor would entail a long-term, projected risk of destabilization in the distribution structure of the market . . . or that it would potentially disturb the balanced distribution structure." *Id.* (citations omitted). Relevant factors are: 1) Whether existing enterprises are operating below capacity in a competitive market; 2) Would a new licensee depress prices, undermining existing dealers' ability to operate at a reasonable profit; 3) Birth rate declining or rising; 4) Overall milk consumption declining or rising; 5) Existing dealers have an adequate supply of milk to meet needs; and 6) Existing dealers can expand, should the need arise. *Id.* at 899-901.

The apparent tension between some of the decisions is superficial. The actual uniformity of the cases validates the supremacy of the federal scheme. Unless a legitimate local interest of sufficient importance that affects citizens' health and welfare can be demonstrated, interstate and intrastate commerce will prevail. Economic growth and movement of goods are the bases of federalism. The Commission should always be mindful of the balances and factors set forth in the case law. Any denial of an application for license, or extension of an existing license, must be justified on the record and in the findings, by a preponderance of the evidence. The cases of denial that were upheld on appeal were so decided because of the human versus economic factors. Had the humanitarian aspect been absent, the result would have been different.

CONCLUSION

Pursuant to [NAC 584.7011](#), the Nevada Dairy Commission may deny an application for a license, or an amendment to an existing license, if it finds that approval would lend to create destructive competition in a market adequately served as long as the finding is supported by substantial evidence in the record.

While the provision of [NAC 584.7011](#)(b) is presumed constitutionally valid on its face, an abuse or misjudgment in denying an application could be reversed if it is shown that the denial was a guise to protect financial interests of the state at the expense of another state or in unjustifiable interference with interstate commerce. The basis for denial must be a valid exercise of police power with only an incidental burden on interstate commerce.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: MOREEN SCULLY
Deputy Attorney General

OPINION NO. 93-27 DUI; PAROLE AND PROBATION; PRISONS: [NRS 484.3795](#) is a penal statute that must be construed in favor of the individual to permit an offender receiving a suspended sentence followed by mandatory probation to be considered for parole after the one year mandatory period of confinement is completed.

Carson City, December 31, 1993

Ms. Lupe Gunderson, Chairwoman, Board of Parole Commissioners, 5500 Snyder Avenue, Building 6, Carson City, Nevada 89710

Dear Ms. Gunderson:

This letter contains an opinion addressing parole eligibility for offenders sentenced pursuant to [NRS 484.3795](#).

QUESTION

Does [NRS 484.3795](#) preclude parole when an offender receives a suspended sentence followed by a mandatory probation period?

ANALYSIS

[NRS 484.3795](#) states in part:

1. Any person who, while under the influence of intoxicating liquor or with 0.10 percent or more by weight of alcohol in his blood, or while under the influence of a controlled substance, or under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, any person other than himself, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years and must be further punished by a fine of not less than \$2,000 nor more than \$5,000.

2. No prosecuting attorney may dismiss a charge of violating the provisions of subsection one in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial. Except as otherwise provided in subsection 3, a sentence imposed pursuant to subsection 1 may not be suspended nor may probation be granted.

3. A person convicted of violating any provision of this section may be sentenced to a specified term of imprisonment in accordance with the provisions of subsection 1. The court may order suspension of the sentence if, as a condition of the suspension, the defendant:

(a) Is imprisoned in the state prison, an institution of minimum security, a conservation camp, a restitution center or a similar facility for not less than 1 year; and

(b) Upon completion of the term of imprisonment, begins serving a period of probation not to exceed 10 years.

In *Demosthenes v. Williams*, [97 Nev. 611](#), 614, 637 P.2d 1203 (1981), the court noted: "We have repeatedly held that where there is ambiguity in the language of a penal statute, `that doubt must be resolved in favor of the individual.' *Ex parte Davis*, [33 Nev. 309](#), 318, 110 P. 1131, 1135 (1910). *Accord*, *Sheriff v. Hanks*, [91 Nev. 57](#), 530 P.2d 1191 (1975); *Labor Comm'r. v. Mapes Hotel Corp.*, [89 Nev. 21](#), 505 P.2d 288 (1973)."

[NRS 484.3795](#) is a penal statute. Subsection (1) in relevant part provides for a sentence of not less than one year nor more than 20 years. Subsection (3) in relevant part permits the court to suspend the sentence if, as a condition of the suspension, the defendant is imprisoned for not less than one year and begins a period of probation not to exceed 10 years.

Although it can be argued that the establishment of a conditioned suspension of sentence and a probation "tail" indicates an intent to preclude parole, [NRS 484.3795](#) does not specifically do so. Therefore, if [NRS 484.3795](#) is construed in favor of the defendant, it must not be found to preclude parole after the mandatory one year imprisonment. *See* letter opinion dated April 17, 1992, concerning eligibility for parole prior to completion of one year imprisonment. Consequently, [NRS 484.3795](#) does not preclude parole after the mandatory one year confinement is completed.

CONCLUSION

The fact that an offender receives a suspended sentence followed by a mandatory probation period does not preclude parole after the one year mandatory period of confinement is completed.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN E. SIMMONS
Deputy Attorney General

OPINION NO. 93-28 CRIMINAL LAW; PROBATION; POLYGRAPH EXAMINATIONS: If a sentencing court makes an independent determination that random or periodic polygraph examinations will further the goals of rehabilitation and public safety, such a condition of probation may lawfully be imposed by the court provided that the right to initiate such examinations is limited to the offender's probation officer. The results of such polygraph examinations may be considered by a court during probation revocation proceedings, but may not be relied upon as the sole evidentiary basis for an order revoking probation.

Carson City, December 31, 1993

Mr. James P. Weller, Director, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711-0900

Dear Director Weller:

You have requested an opinion regarding whether random polygraph examinations may be imposed as a special condition of probation for certain types of offenders to be determined by the Parole Board. The answer is yes, such a condition of probation may be lawfully imposed and has already been utilized in a number of other jurisdictions. This opinion briefly discusses the appellate decisions that have upheld such a condition, the limitations that have been held applicable to such a condition, and Nevada law regarding probation conditions.

QUESTION

May a probationer be required to submit to random or periodic polygraph examinations as a condition of probation?

ANALYSIS

A. Case Law Upholding Polygraph Examinations As A Condition Of Probation; Applicable Limitations

Although neither the Nevada Supreme Court nor the Nevada Legislature have addressed this issue, a number of courts in other jurisdictions have upheld the imposition of periodic or random polygraph examinations as a condition of probation. A detailed review of these cases is set forth at Anne M. Payne, Annotation, *Propriety of Conditioning Probation on Defendant's Submission to Polygraph or Other Lie Detector Testing*, 86 A.L.R.4th 709 (1991). While some of these decisions have struck down a polygraph condition of probation as overbroad or as lacking a reasonable basis related to the goals of probation, no court has yet concluded that the imposition of such a probation condition is impermissible under any circumstances. The following is a brief summary of the cases that have dealt with this issue.

Oregon appears to be the forerunner in imposing polygraph examinations as a condition of probation. In two cases involving defendants convicted of drug offenses, the Oregon Court of Appeals upheld stipulations providing for polygraph examinations as a condition of probation. *State v. Wilson*, 521 P.2d 1317 (Or. Ct. App. 1974), *cert. denied*, 420 U.S. 910,; *State v. Hovater*, 588 P.2d 56 (Or. Ct. App. 1978). In *Wilson*, the court concluded that appellant voluntarily agreed to such a condition and therefore waived her Fifth Amendment right not to incriminate herself. In *Hovater*, the court ruled that such a condition is constitutional as long as the condition is reasonably necessary to make probation effective. However, the court ruled that the trial court must determine whether such a condition was warranted and may not discharge its duty by simply adopting the parties' agreement.

In *State v. Age*, 590 P.2d 759 (Or. Ct. App. 1979), the court held that statutory authority for a polygraph condition existed by virtue of Or. Rev. Stat. § 137.540(1)(e), which required a probationer to "answer all reasonable inquiries of the probation officer," and concluded that such a condition is a permissible extension of this statutory requirement. *Age*, 590 P.2d at 763. However, the court struck down that portion of the condition which authorized the district attorney to initiate a polygraph examination. *See also State v. Behar*, 592 P.2d 1056 (Or. Ct. App. 1979). Following these decisions, the Oregon Legislature amended its probation statutes to include a provision which specifically authorizes a trial court to impose polygraph examinations as a special condition of probation. Or. Rev. Stat. § 137.540(2)(c) (1991).

The California Court of Appeal upheld the use of polygraphs as a condition of probation in *People v. Miller* (Cal. Ct. App. 1989). The case involved a probationer convicted of committing a lewd and lascivious act upon a child under the age of 14. The court found statutory authority for the polygraph condition in Cal. Penal Code § 1203.1, which grants the trial court broad discretion to impose reasonable probation conditions in order to foster rehabilitation and to protect the public. In addition, the court rejected appellant's argument that the condition infringed upon his Fifth Amendment right not to incriminate himself, noting that the condition was not imposed to gather evidence against appellant, but was to be used as a monitoring tool to determine whether appellant was in compliance with his other conditions of probation and to serve as a catalyst for further investigation. *Miller*, 256 Cal. Rptr. 587.

The Florida District Court of Appeal indicated a willingness to approve such a condition under appropriate circumstances in *Nichols v. State*, 528 So.2d 1282 (Fla. Dist. Ct. App. 1988).

However, the court struck down, as overbroad, the challenged condition which required the probationer to submit to "a lie detector test, psychological stress evaluation, and/or psychometric tests at any time, and from time to time, whenever so directed by the Probation Supervisor, or any other law enforcement officer." *Id.* at 1284.

The Georgia Court of Appeals upheld a polygraph condition of probation in *Mann v. State*, 269 S.E.2d 863 (Ga. Ct. App. 1980), noting that Georgia's probation statutes vested broad discretion in its trial judges with regard to the imposition of probation conditions. In addition, adopting the Oregon Court of Appeals' reasoning in *Age*, the court ruled that such a condition was no greater an intrusion into the area of self-incrimination than the requirement that a probationer answer all reasonable inquiries of his probation officer.

The Supreme Court of Montana ruled that a polygraph provision of probation would be constitutionally acceptable if the right to demand an examination were limited to the defendant's probation officer. *State v. Fogarty*, 610 P.2d 140 (Mont. 1980), *overruled by State v. Burke*, 766 P.2d 254 (Mont. 1988). The court then struck down as overbroad a polygraph provision which authorized an examination of defendant "at any time, upon the request of any law enforcement officer." *Fogarty*, 610 P.2d at 144. The court further ruled that prosecutors could not condition their agreement to a deferred sentence upon a defendant's willingness to accept a polygraph examination condition, and that the prosecutor may only recommend such a condition at the time of sentencing. Finally, the court ruled that adverse polygraph examination results alone are not sufficient to cause a revocation of probation, and that independent corroborating evidence of a probation violation must be shown.

B. Nevada Law Regarding Probation Conditions

Similar to the broad statutory authority noted by the California Court of Appeal in *Miller*, and by the Georgia Court of Appeals in *Mann*, Nevada's probation statutes contain general language authorizing district courts to impose appropriate conditions of probation. See [NRS 176.1853\(1\)](#) ("In issuing an order granting probation, the court may fix the terms and conditions thereof . . ."); [NRS 176.205](#) ("By order duly entered, the court may impose, and may at any time modify, any conditions of probation or suspension of sentence.") These statutes have been held to confer a "broad and virtually unlimited discretion" upon the district courts in fashioning appropriate sentencing dispositions. *Creps v. State*, [94 Nev. 351](#), 360, 581 P.2d 842, 849 (1978).

C. Permissible Uses Of Polygraph Examination Results

Although polygraph examination results are generally inadmissible in criminal or civil court proceedings, the results of a probationer's polygraph examination should be deemed admissible in subsequent probation revocation proceedings. As concluded by the Oregon Court of Appeals in *Age*, and by the Montana Supreme Court in *Fogarty*, such examinations are a permissible extension of a probation officer's authority to require a probationer to respond to all reasonable inquiries. Given this permissible extension, and because a probation officer is competent to testify at a revocation hearing to the contents of any conversations had between the officer and the probationer, it is not logical to exclude the contents and results of a polygraph examination initiated by the officer pursuant to a valid condition of probation. However, due to the reliability problems inherent in polygraph examinations, independent corroborating evidence of a probation violation should be required to support an order revoking probation.

CONCLUSION

Nevada's district courts have broad authority to impose reasonable conditions of probation that are designed to facilitate an offender's rehabilitation and to promote public safety. The imposition of such a condition has been approved in other jurisdictions with probation statutes similar to

Nevada's, and should be deemed permissible under Nevada's statutes as well. Such a condition need not be confined to a specific class of probationers; the condition may be imposed in any case where the sentencing court concludes that such a condition will facilitate a successful probation.

Because the sentencing judge must determine what conditions of probation are appropriate, a polygraph condition of probation should not be incorporated into a sentence simply because the parties have agreed to such a condition. In addition, although prosecuting authorities may recommend such a condition, they should not be permitted to condition a plea agreement upon a defendant's agreement to accept a polygraph condition of probation.

Finally, only the probation officer may be authorized to initiate a polygraph examination. Although the questions, answers and results of such examinations may be considered in probation revocation proceedings related to the offense for which such condition was imposed, the polygraph examination may not be relied upon as the sole evidentiary basis for an order revoking probation.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: THOMAS M. PATTON
Deputy Attorney General

OPINION NO. 93-29 CITIES AND TOWNS; COUNTIES; REDEVELOPMENT AGENCIES:

A redevelopment agency or legislative body, as defined in [NRS 279.396](#), may expend redevelopment revolving funds for police and fire support necessary to provide emergency medical services in a redevelopment area if there is a causal connection between the redevelopment effort and the need for the services described, the services are needed to ensure the success of the redevelopment plan and the amount of money required to provide the services is minor in comparison to the money required for the overall redevelopment plan.

Carson City, November 15, 1993

Ms. Melanie Foster, Deputy District Attorney, Washoe County District Attorney's Office, Post Office Box 11130, Reno, Nevada 89520

Dear Ms. Foster:

You have asked our opinion on the following:

QUESTION

May a redevelopment agency created under [NRS 279.382](#)-.680, inclusive, expend funds in the redevelopment revolving fund to pay for additional police and fire services necessary to the provision of emergency medical services within the redevelopment area?

ANALYSIS

The Community Redevelopment Law, set forth in [NRS 279.382](#)-.680, is intended to aid in the redevelopment of blighted areas declared by the legislature to be "inimical to the public health, safety and welfare of the people of the communities in which they exist." [NRS 279.418](#). The legislature has found that, among other things, blighted areas "contribute substantially and increasingly to the problems of, and necessitate excessive and disproportionate expenditures for . . . the preservation of the public health and safety, and the maintaining of adequate police, fire and

accident protection and other public services and facilities." [NRS 279.418\(3\)](#).

To aid in the accomplishment of its stated purposes, the law grants redevelopment agencies broad powers to plan for and achieve redevelopment through the acquisition and disposition of interests in real property. [NRS 279.620](#) authorizes the agency to establish a redevelopment revolving fund and receive public appropriations or funds from the issuance of general obligation bonds to fund its redevelopment activities.

As the result of redevelopment activities in the downtown core areas of the cities within the health district, there has been an increase in use and user population which has increased the need for emergency medical services and the police and fire support necessary to deliver those services. The District Board of Health has inquired whether a redevelopment agency or legislative body as defined in [NRS 279.396](#) may expend funds for these purposes from the redevelopment revolving fund pursuant to [NRS 279.628\(2\)](#), which provides:

By resolution of the legislative body adopted by a two-thirds vote, any money in the redevelopment revolving fund may be paid to the agency, upon such terms and conditions as the legislative body may prescribe for any of the following purposes:

- (a) Deposit in a trust fund to be expended for the acquisition of real property in any redevelopment area.
- (b) The clearance of any redevelopment area for redevelopment.
- (c) *Any expenses necessary or incidental to the carrying out of a redevelopment plan which has been approved by the legislative body.* [Emphasis added.]

We shall assume for the purposes of our discussion that the redevelopment efforts to which you refer are those affecting the downtown core areas of the cities within the health district's jurisdiction and that the corresponding need for emergency medical services relate to those same areas. With that in mind, we must determine whether the money necessary to pay for such services may be deemed to be "necessary or incidental" to carrying out the redevelopment plan.

In our attempt to ascertain the legislatures' intent in enacting this provision, we must give the phrase "necessary or incidental" its plain meaning unless this violates the spirit of the redevelopment law. See, *McKay v. Board of Supervisors*, [102 Nev. 644](#), 648, 730 P.2d 438 (1986). The dictionary defines "necessary" as "absolutely required" or "needed to bring about a certain effect or result." Webster's II Dictionary 787 (New Riverside University Ed. 1988). "Incidental" is defined as something of a "minor, casual or subordinate nature." *Id.* at 618.

Applying the plain meaning of the statute to the situation presented, we believe expenditure of funds from the redevelopment revolving funds would be authorized if there is a causal connection between the redevelopment effort and the need for the services described, the services are needed to ensure the success of the redevelopment plan and the amount of money required to provide the services is minor in comparison to the money required for the overall redevelopment plan. Under these circumstances, a redevelopment agency or legislative body would be authorized to pay for any additional fire and police services needed to provide emergency medical services in areas that, due to redevelopment efforts, have resulted in an increased need for such services, from the redevelopment revolving fund.

This interpretation is consistent with the spirit and policy of the redevelopment law. The law is intended to improve the health and safety of residents and grants redevelopment agencies and local governments broad powers in order to accomplish its objectives. Since the redevelopment law is intended to protect residents from the effects of urban blight, it should be liberally construed in order to effectuate those benefits. See *Colello v. Administrator, Real Estate Div.*, [100 Nev. 344](#), 347, 683 P.2d 15 (1984).

CONCLUSION

A redevelopment agency or legislative body, as defined in [NRS 279.396](#), may expend redevelopment revolving funds for police and fire support necessary to provide emergency medical services in a redevelopment area if there is a causal connection between the redevelopment effort and the need for the services described, the services are needed to ensure the success of the redevelopment plan and the amount of money required to provide the services is minor in comparison to the money required for the overall redevelopment plan.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: DOUGLAS E. WALTHER
Senior Deputy Attorney General

OPINION NO. 93-30 SECRETARY OF STATE; CORPORATIONS; RESIDENT AGENTS: A Nevada corporation may serve as its own resident agent pursuant to [NRS 78.090](#).

Carson City, November 16, 1993

The Honorable Cheryl A. Lau, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Secretary Lau:

You have requested an opinion from this office regarding resident agents for Nevada corporations.

QUESTION

May a Nevada corporation act as its own resident agent pursuant to [NRS 78.090](#)?

ANALYSIS

Every Nevada corporation must have a resident agent pursuant to [NRS 78.090](#)(1) which states in pertinent part: "who may be either a natural person or a corporation, resident or located in this state." [NRS 78.090](#)(2) states in pertinent part that "[t]he resident agent may be any bank or banking corporation, or other corporation, foreign or domestic, located and doing business in this state."

In 1987, a deputy attorney general wrote a memorandum to the Secretary of State which concluded that a Nevada corporation may not serve as its own resident agent. That conclusion was based upon Black's Law Dictionary's definition of agent and the implication within the definition that there be another person to act on behalf of the principal. No case law was cited nor any other legal reference.

Much of Nevada's corporate law is patterned after Delaware. Delaware law on resident agents, Del. Code Ann. tit. 8, § 132 (1953), has been addressed in *Keith v. Melvin L. Joseph Const. Co.*, 451 A.2d 842 (Del. Super. Ct. 1982). In *Keith* the issue was proper service of process pertaining to a corporation acting as its own registered agent. The court held that "where a corporate registered agent is the corporation sought to be noticed, service of process may be made by any method authorized by § 132 for service on a corporate registered agent or upon a corporation." *Id.* at 845.

"The fundamental object of all laws relating to the service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to the commencement of the proceedings against it." 19 Am. Jur. 2d *Corporations* § 2192 (1986). The legal provision that requires a corporation to have a resident agent is "based on the premise that it should be possible at all times to find a corporation and to have a person upon whom and at a place which any notice or process may be served." *Id.* § 2194. It has long been recognized in Nevada that a corporation is a person, if an artificial one, *see Edwards v. Carson Water Co.*, [21 Nev. 469](#), 479, 34 P. 381 (1893), so it follows that since service is to be made on a person and a corporation is a person, service can be made on a corporation.

Allowing a Nevada corporation to be its own resident agent, as long as that corporation has a physical address within Nevada, will accomplish the object of a corporation having a resident agent. There will be no prejudice to any potential plaintiff who will be able to find the corporation and serve any papers upon it. Although business reasons may exist for a Nevada corporation not to be its own resident agent, there are no legal impediments.

CONCLUSION

A Nevada corporation may serve as its own resident agent pursuant to [NRS 78.090](#).

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General
