OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2000-01 DRIVING UNDER THE INFLUENCE (DUI); HORSES; HIGHWAYS: It is clear from the plain language of the relevant statutory provision that the DUI Statute, NRS 484.379, does not apply to a person riding a horse on a highway.

Carson City, January 4, 2000

Ms. Marla Zlotek, Deputy District Attorney, Office of the District Attorney Nye County, Post Office Box 593, Tonopah, Nevada 89049

Dear Ms. Zlotek:

This letter is in response to your request for an opinion from this office concerning the following inquiry:

QUESTION

Does the Driving Under the Influence (DUI) Statute, Nevada Revised Statutes (NRS) 484.379, apply to a person riding a horse on a highway?

ANALYSIS

NRS 484.379 states, in pertinent part, that:

> **Driving under the influence of intoxicating liquor or controlled or prohibited substance: Unlawful acts; affirmative defense.**
> 1. It is unlawful for any person who:
> a. Is under the influence of intoxicating liquor;
> b. Has a concentration of alcohol of 0.10 or more in his blood or breath; . . .
> *to drive or be in actual physical control of a vehicle* on a highway or on premises to which the public has access. [Emphasis added.]

For purposes of NRS chapter 484, vehicle is defined as ". . . every *device* in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails." NRS 484.217 (emphasis added). *See also* NRS 84.013. The term in this provision key to answering your inquiry is "device."

"Device" is not defined for purposes of the DUI statute. It does, however, appear in certain statutes in the context of electronic or mechanical devices used in the interception of wire and oral communications. *See State v. Reyes*, 107 Nev. 191, 808 P.2d 544 (1991).[1] It further appears in the context of traffic control devices. *See Gordon v. Hurtado*, 96 Nev. 375, 609 P.2d 327 (1980).[2] Nowhere in the statutes referenced in *Reyes* or *Hurtado* is "device" construed to include an animal or, for purposes of this analysis, a horse.

It is a fundamental rule of statutory construction that a statute should be interpreted to arrive at a reasonable and common sense construction. *Sheriff v. Smith*, 91 Nev. 729, 542 P.2d 440 (1975). Moreover, statutes should be construed to ". . . avoid absurd results." *Las Vegas Sun v. District Court*, 104 Nev. 508, 511, 761 P.2d 849, 851 (1988) (citations omitted). Given that NRS 484.379 is expressly limited to driving or being in actual physical control of a vehicle which is defined as a *device* to transport a person or property, it would be a stretch under the rules of statutory construction to interpret device as meaning a horse. [Emphasis added.]

Further, our Supreme Court noted: "In construing a statute, this court must give effect to the literal meaning of its words." *Arnesano v. State, Dep't Transp.*, 113 Nev. 815, 820, 942 P.2d 139, 142 (1997) (citations omitted). A device is literally not an animal. "Device" is defined as "a thing that is made, usually for a particular working purpose; an invention or contrivance, especially a mechanical or electrical one." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE: BASED ON THE 1ST EDITION OF THE RANDOM HOUSE DICTIONARY 59 (Portland House 1989). WEBSTER'S further defines animal as:

> . . . any living thing typically having certain characteristics distinguishing it from a plant, the ability to move voluntarily, the presence of a nervous system and a greater ability to respond to stimuli, the need for complex organic materials for nourishment obtained by eating plants or other animals, and the delimitation of cells usually by a membrane rather than a cellulose wall.

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[1] The statutes referenced in *Reyes* are NRS 179.425 and 179.430.

[2] The statute referenced in *Hurtado* is NRS 484.278.

Moreover, "horse" is defined as "a large solid-hoofed, herbivorous quadraped, *Equus Caballus*, domesticated since prehistoric times, bred in a number of varieties, and used for carrying or pulling loads, for riding, etc. . . .[A]ny *animal* of the family *Equidae*, including the ass, donkey, etc." WEBSTER'S AT 685 (emphasis added). Consistent with the holding in *Arnesano* in giving literal effect to the meaning of words, a horse is not a "device."

In your inquiry, you referenced NRS 484.257. This statute appears to have no applicability here in that this provision contains the following restriction:

> **Rights and duties of person riding animal or driving vehicle drawn by animal.** Every person riding an animal or driving any animal-drawn vehicle upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle, *except those provisions which by their nature can have no application*. [Emphasis added.]

Clearly, in reviewing both the DUI statute, NRS 484.379, and the definition of "vehicle," NRS 484.217, in the narrow framing of your inquiry, NRS 484.257 does not apply. NRS 484.257 is expressly limited to those statutory provisions, "except those . . . which by their nature can have no application."

CONCLUSION

It is clear from the plain language of the relevant statutory provisions, the DUI statute, NRS 484.379, does not apply to a person riding a horse on a highway.

FRANKIE SUE DEL PAPA
Attorney General

By: MARIAH L. SUGDEN
Assistant Chief Deputy Attorney General

AGO 2000-02 DOMESTIC VIOLENCE: Service of a protection order against domestic violence – a prerequisite to criminal prosecution for violating the order – may be accomplished by delivering a written copy of the order or by a law enforcement officer orally notifying the adverse party of the order's terms and conditions. Oral notice does not require that the order be read verbatim; however, the order's complete terms and conditions must be conveyed to the adverse party to maximize the likelihood of a successful criminal prosecution.

Carson City, January 12, 2000

Colonel Michael E. Hood, Chief, Highway Patrol Division, Department of Motor Vehicles and Public Safety, 555 Wright Way, Carson City, Nevada 89711

Dear Colonel Hood:

You have asked several questions concerning the meaning of NRS 33.070, particularly as it relates to implementation of the protection order registry within the Nevada Criminal Justice Information System (NCJIS) network.

With regard to orders for protection against domestic violence, NRS 33.070 provides:

> 1. Every temporary or extended order must include a provision ordering any law enforcement officer to arrest an adverse party if the officer has probable cause to believe that the adverse party has violated any provision of the order.
> 2. If a law enforcement officer cannot verify that the adverse party was served with a copy of the application and order, he shall:
> (a) Inform the adverse party of the specific terms and conditions of the order;
> (b) Inform the adverse party that he now has notice of the provisions of the order and that a violation of the order will result in his arrest; and
> (c) Inform the adverse party of the location of the court that issued the original order and the hours during which the adverse party may obtain a copy of the order.
> 3. Information concerning the terms and conditions of the order, the date and time of the notice provided to the adverse

> party and the name and identifying number of the officer who gave the notice must be provided in writing to the applicant and noted in the records of the law enforcement agency and the court.

QUESTION ONE

NRS 33.070 refers to "notice." If an officer verbally advises the adverse party of the terms and conditions of the protection order, does this constitute notice or service? Are these terms one and the same or distinct?

ANALYSIS

NRS 33.100 makes it a crime to violate a protection order against domestic violence: "A person who violates a temporary or extended order is guilty of a misdemeanor, unless a more severe penalty is prescribed by law for the act that constitutes the violation of the order." NRS 33.100(1). That statute does not discuss whether knowledge of the order's provisions is required for a violation to be a crime.

NRS 33.070 clearly intends that a criminal violation of a protection order under NRS 33.100 requires knowledge of the order's terms and conditions. The adverse party's unknowing violation of the order cannot be criminal if the activity prohibited by the order is ordinarily legal (e.g., being in a particular location that happens to be too close to the protected party's residence or place of employment).

NRS 33.070(2) requires that criminal protection order violations be preceded by the adverse party receiving written or oral notice of the order's terms and conditions. The statute refers both to orders that are "served" and to giving "notice" of its terms and conditions.

"Service" usually requires personal delivery of the written document to the adverse party. In civil law, this "service" has far-reaching legal consequences. However, the Legislature clearly intended that "service" have a wider meaning for the criminal law provisions of NRS chapter 33—arrest and prosecution for protection order violations.

NRS 33.070(2) contemplates that "service" of an order may be effected by either delivery of a written copy of the order or by a law enforcement officer's

providing oral notice of its terms and conditions. That subsection provides that, if a law enforcement officer cannot verify that a written copy of the order was "served" by delivery to the adverse party, the officer must orally provide "notice" of the order by informing the adverse party about its terms and conditions.[1] NRS 33.070(2)(b) further specifies that, after such oral notice has been provided, the adverse party must be warned that he "*now has notice* of the provisions of the order and . . . a violation of the order *will* result in his arrest." [Emphasis added.] These provisions clearly demonstrate the legislature's intent that the violator would be subject to later arrest once verbal notification had been made.

If an officer can verify that the adverse party was served either in writing, or orally by a law enforcement officer, the officer shall arrest the adverse party (NRS 33.070(1)) for any violation of a protection order. NRS 33.100.

CONCLUSION TO QUESTION ONE

Criminal violations of a protection order (NRS 33.100) require notice of the terms and conditions of the protection order. NRS 33.070(2) contemplates that "service" of an order may be effected by either delivery of a written copy of the order or oral notification of its terms and conditions. If an officer can verify that the adverse party was served either in writing, or orally by a law enforcement officer, the officer shall arrest the adverse party for any violation of a protection order.

QUESTION TWO

[1] If "service" of an order could not be effected through the alternative means of oral notification, then law enforcement officers could never arrest a protection order violator who did not receive a written copy of the order. The officer would have a burden under NRS 33.070(2) to repeatedly verbally notify an adverse party of the terms and conditions of a protection order so long as the officer could not verify that a written order was "served" by delivery. This interpretation would work an absurd result. There is no rational reason for this tedious, redundant, and absurd burden on law enforcement officers.

When interpreting a statute, any doubt as to the Legislature's intent must be resolved in favor of what is reasonable, and against what is unreasonable, so as to avoid absurd results. *Steward v. Steward*, 111 Nev. 295, 302, 890 P.2d 777, 781 (1995). The only reasonable reading of NRS 33.070(2), to avoid this absurd result, is that service may be effected by delivery of either written or oral notice.

NRS 33.070(2)(b) provides that the officer shall advise the adverse party that a violation of the order will result in the adverse party's arrest. Does simply stating this satisfy this requirement or must the officer read verbatim the statements that appear in the "YOU ARE NOTIFIED . . ." box on the protection order?

ANALYSIS

In April 1999, the Nevada Supreme Court adopted standardized protection order forms for voluntary use by the courts. There are several notices at the top of both the standardized temporary order and the standardized extended order. One of these notices states that any violation of the order by the adverse party is a criminal violation resulting in a misdemeanor offense. Another notice states that the adverse party can be arrested even if the person who obtained the order invites or allows the adverse party to contact them.

Nothing in NRS 33.070 or other Nevada laws requires officers to read these or the other notices verbatim. However, as noted above in our response to Question One, the adverse party's criminal liability is based on the adverse party having received notice of the order's terms and conditions and that a subsequent violation of the order would result in arrest. To aid in later testimony, officers would be best advised to read the notices verbatim. At a minimum, officers should employ a standard set of phrases concerning the contents of their oral notice. They should also consider the value of videotaping the delivery of their oral notification. Any reasonable doubt about the contents of the oral notification could imperil the prosecution's possibility of obtaining a conviction.

It should be noted that, while one of the notices on the current standardized forms notifies the adverse party that any violation of the order is a criminal violation, the notice does not *expressly* state that the adverse party will be arrested. Thus, to comply with the notification statute, officers should be sure to inform the adverse party that he "now has notice of the provisions of the order and that a violation of the order will result in his arrest." NRS 33.070(2)(b).

It should also be noted that the Supreme Court Study Committee (Study Committee) appointed to develop the standardized forms is currently making changes to the forms, including rather extensive changes to the notices section. The Study Committee anticipates that the Nevada Supreme Court will adopt the

modified forms in 2000 for mandatory statewide use. Therefore, it would be wise for law enforcement officers to be familiar with the precise contents of all of these notices, including those required by NRS 33.070(2), and to orally convey each of them to adverse parties.

CONCLUSION TO QUESTION TWO

Nothing in NRS 33.070 or other Nevada laws requires officers to read the notices in a protection order verbatim. However, to aid in later testimony, officers would be best advised to read the notices verbatim. At a minimum, officers should be familiar with the precise contents of all of these notices, including those required by NRS 33.070(2), and employ a standard set of phrases which conveys the contents of each one.

QUESTION THREE

Will the abbreviated conditions presently available via the inquiry function of the protection order database satisfy the law enforcement officer's responsibility to provide "specific terms and conditions" to the adverse party per NRS 33.070?

ANALYSIS

According to your request for an opinion, upon implementation of the protection order database (file), law enforcement officers will be able to inquire about the terms and conditions of any protection order against domestic violence entered against an adverse party. That inquiry function will provide the following abbreviated conditions:

01 No threatening, physically injuring, or harassing applicant/minor child(ren)
02 No contact with applicant
03 Stay 100 yards away from applicant's residence
04 Law enforcement accompaniment to pick up belongings
05 Awarding custody of minor child(ren) to applicant
06 Custody of minor child(ren) remaining as ordered in divorce decree
07 Stay 100 yards away from minor child(ren)'s school or day care

08 Stay 100 yards away from applicant's employment
09 Stay 100 yards away from place frequented by applicant/minor child(ren)
10 Other provisions and exceptions – stay away from applicant's car.

Your request indicates that these abbreviated conditions do not include addresses or additional information that may be provided in an original protection order. Your request also indicates that a supplemental inquiry with detailed conditions is being programmed, but is not expected to be complete by the time the protection order file is implemented.

Pursuant to NRS 33.070(2), if a law enforcement officer cannot verify that the adverse party was served with a copy of the protection order application and order, he must orally inform the adverse party of its specific terms and conditions.

Nothing in NRS 33.070 or other Nevada laws requires officers to read the order verbatim. However, as noted in our responses to Question One and Question Two, the adverse party's criminal liability is based on having received notice of the order's terms and conditions and that a subsequent violation of the order will result in arrest. Hence, in order to later arrest an adverse party based on oral "service" of the order, the officer's oral notification must inform the adverse party of the specific terms and conditions of the order for which he will be held accountable.

Assuming that the inquiry function for the protection order file accurately and completely reflects the terms and conditions of the order, oral notification of the abbreviated terms and conditions will satisfy the law enforcement officer's responsibility under NRS 33.070(2)(a) and allow for subsequent arrest if the adverse party violates the order. However, if the inquiry function does not provide all of the specific terms and conditions of the order, the abbreviated information might not be sufficient for criminal liability.

For instance, if the abbreviated conditions do not include relevant addresses (assuming they have not been made confidential), the adverse party might not be held accountable for violating the order by coming too close to a protected location about which he did not have specific notice and knowledge. However, if it can be established that the adverse party actually knew where the applicant lived or worked, he can properly be arrested and charged.

Determining whether the adverse party knew the address when he came too close may turn on specific facts adduced by law enforcement officers in the field (i.e., an adverse party's admission that he was aware of the applicant's residence or workplace address, or other evidence demonstrating such actual knowledge). Similar concerns could arise with regard to condition code 10 (i.e., did the adverse party have knowledge that a specific vehicle belonged to the applicant?). Obviously the best way to avoid such issues is to notify the adverse party of the complete contents of the order's terms and conditions.

CONCLUSION TO QUESTION THREE

Assuming that the inquiry function for the protection order file accurately and completely reflects the terms and conditions of the order, oral notification of the abbreviated terms and conditions will satisfy the law enforcement officer's responsibility under NRS 33.070(2)(a) and allow for subsequent arrest if the adverse party violates the order. However, if the inquiry function does not provide all of the specific terms and conditions of the order, the abbreviated information might not be sufficient for criminal liability. Considering the potential problems identified above with certain abbreviated condition codes, it appears that law enforcement officers will not be able to fully rely on the inquiry function for purposes of notice and subsequent arrest until the order's detailed terms and conditions being programmed are on-line and available.

QUESTION FOUR

Through NCJIS, a Notice of Service function can be used by the law enforcement community to update the protection order file when an adverse party has been served. This function will automatically update the protection order file of the date and time that the order was served and the name and identification number of the officer/server. This function will also generate a notice of service with this information to the court and provide a copy back to the law enforcement agency. Will this function fulfill the requirement of the law enforcement officer to provide written notice to his agency and the court as stated on protection orders and per NRS 33.070?

ANALYSIS

NRS 33.070(3) requires that information concerning the terms and conditions of the order, the date and time of the notice provided to the adverse party, and the name and identifying number of the officer who gave the notice be provided in writing to the applicant and noted in the records of the law enforcement agency and the court. Your request states that the Notice of Service function of the protection order registry automatically updates the protection order file and generates a notice of service.

Subsection 3 does not require written notice to the law enforcement agency or to the court. It requires that the information listed in the subsection be noted in the records of these entities. Depending on what records each entity maintains, the updated protection order file itself may be sufficient to satisfy subsection 3. In other words, if the law enforcement agency and the court both have access to the protection order file, then the required information will be noted in the updated file.

Subsection 3 does, however, require that the protection order applicant be provided with such information in writing. This may be accomplished if the notice of service generated by the registry is a written document that contains information concerning: (1) the terms and conditions of the order; (2) the date and time of the notice provided to the adverse party; and (3) the name and identifying number of the officer who gave the notice.

NRS 33.070(3) does not specify whose responsibility it is to produce or convey the required information. Logically, however, if law enforcement officers are giving the oral notice to adverse parties, their agencies should be responsible for updating the protection order file with the information provided by the officers. Also, because law enforcement agencies will be generating the notice of service, they should forward a copy of the notice to the issuing court in addition to updating the protection order file. With respect to providing the written information to the applicant, law enforcement agencies and courts should establish appropriate procedures for ensuring that this requirement is fulfilled.

CONCLUSION TO QUESTION FOUR

Because the Notice of Service function of the protection order registry automatically updates the protection order file and generates a notice of service, it appears that the statute's requirements will be fulfilled if the registry is updated, a written notice of service is generated, and a copy of the written notice is provided to the applicant. Although subsection 3 does not specify whose responsibility it is to produce or convey the required information, logically, law enforcement agencies should be responsible for updating the protection order file with the information provided by the officers. Law enforcement agencies should also forward a copy of the notice of service to the issuing court. Finally, law enforcement agencies and courts should establish appropriate procedures for ensuring that the written information (notice of service) is provided to the applicant.

FRANKIE SUE DEL PAPA
Attorney General

By: NANCY E. HART
Deputy Attorney General

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AGO 2000-03 SCHOOL DISTRICTS; EDUCATION; JUVENILES: A pupil who is 17 but not yet 18 years of age is not required to enroll and attend school, but if he is enrolled, he is required to attend for as long as he is enrolled and is subject to the truancy statutes for the period he is or was enrolled.

Carson City, January 14, 2000

The Honorable Stewart Bell, District Attorney, Clark County, Post Office Box 552212, Las Vegas, Nevada 89155-2212

Dear Mr. Bell:

You have requested an opinion of the Attorney General concerning Nevada's laws related to compulsory attendance and truancy. The laws related to truancy were strengthened in 1997 and further amended in 1999 in Assembly Bill 15, Act of June 11, 1999, ch. 624, 1999 Nev. Stat. 3449, to provide a comprehensive method for school districts and law enforcement to encourage attendance. The statutory scheme defines a habitual truant and created school attendance advisory boards which, along with juvenile law enforcement authorities, can encourage attendance with meaningful sanctions. Prior to the 1999 amendments some juvenile court judges dismissed habitual truancy cases if the pupil had reached his 17th birthday on the grounds that the pupil's attendance could not be compelled. Your questions address issues that the Clark County School District and other school districts have grappled with because language added in the 1999 amendments to the truancy laws focus on pupils who are 17 but not yet 18 years of age.

QUESTION ONE

Is a child who is 17 but not yet 18 years of age (and not otherwise legally exempted) required to enroll and attend school or is the child who is 17 but not yet 18 years of age required to attend school only if enrolled?

ANALYSIS

The compulsory attendance law provides, in relevant part, as follows:

> Except as otherwise provided by law, each parent, custodial parent, guardian or other person in the State of Nevada having control or charge of any child *between the ages of 7*

> *and 17 years* shall send the child to a public school during all the time the public school is in session in the school district in which the child resides.

NRS 392.040(1) (emphasis added).

Assembly Bill 15 added the following language to NRS 392.130(6), NRS 392.140(3), and NRS 392.149(4): "Notwithstanding the provisions of NRS 392.040 to the contrary, the provisions of this section apply to all pupils who are less than 18 years of age and enrolled in public schools, including, without limitation, pupils who are 17 years of age or older but less than 18 years of age."

NRS 392.130 relates to conditions under which a pupil is deemed truant, NRS 392.140 relates to conditions under which a pupil is declared habitual truant, and NRS 392.149 addresses the process of issuance of a citation to a habitual truant. In addition, NRS 392.160 was amended to permit any peace officer or school attendance officer during school hours to take into custody without a warrant any child who is 17 years of age or older but less than 18 years of age if the child is enrolled in school and reported as absent.

There is no conflict between the compulsory attendance statute and application of the truancy laws. The plain meaning of NRS 392.040 compels the attendance of the pupil between 7 and 17 years of age. We read "17 years of age" to mean the pupil's age on his 17th birthday. He is more than 17 years of age the day after his 17th birthday and "less than 18 years of age" until the moment of his 18th birthday. If NRS 392.040 meant that a pupil was not more than 17 years of age until he reached his 18th birthday, there would be no need for the amendments to the truancy law which clarify they apply to the pupil after his 17th birthday until his 18th birthday *notwithstanding NRS 392.040*.

CONCLUSION TO QUESTION ONE

A pupil who is 17 but not yet 18 years of age is not required to enroll in school because NRS 392.040 only requires enrollment up to the 17th birthday. However, if the pupil has chosen to enroll beyond his 17th birthday, he must attend for as long as he is enrolled and is subject to the truancy statutes.

QUESTION TWO

If a student who is 17 but not yet 18 years of age is required to attend school only if enrolled, may that student voluntarily withdraw from school with parental permission to avoid possible prosecution as a habitual truant?

ANALYSIS

Because the law does not compel his attendance at public school after his 17th birthday, the pupil who is 17 but not yet 18 years of age may withdraw from school. However, his withdrawal does not mean he will avoid prosecution as a habitual truant for his unexcused absences prior to his withdrawal. The three statutes cited in the prior analysis all declare that notwithstanding that the student's age is between 17 and 18 years, he is subject to the statutes if enrolled in school.

The goal of the truancy statutes is to achieve the regular attendance of the pupil at school. Among the sanctions applicable to a habitual truant is a fine that may be waived if the pupil subsequently attends without unexcused absences. Though the habitual truant who is 17 but not yet 18 years of age who withdraws from school is no longer compelled by law to attend, he still has the choice to enroll again and regularly attend to avoid the sanction. Even if his immediate motivation is to avoid the fine, the law has achieved its goal. If he does not choose to enroll again, his choice is to suffer the fine.

CONCLUSION TO QUESTION TWO

A student who is 17 years but not yet 18 years of age who voluntarily withdraws from school does not avoid prosecution as a habitual truant for conduct that occurred when he was enrolled.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Deputy Attorney Genera

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AGO 2000-04 TAXES, PROPERTY: Improvements to real property may not be characterized and taxed as personal property based upon a mining operator's compliance with Nevada's statutory reclamation obligations under chapter 519A of the Nevada Revised Statutes.

Carson City, January 28, 2000

David P. Pursell, Nevada Department of Taxation, 1550 East College Parkway #115, Carson City, Nevada 89706-7921

Dear Mr. Pursell:

By your letter of January 12, 2000, you have asked this office for an opinion on the legal interpretation of NRS 361.035(3) as it applies to the reclamation obligations of mining operators under chapter 519A of the Nevada Revised Statutes (NRS). The issues discussed have arisen as a result of various inquiries received by the Department of Taxation (Department) from various local assessors.

FACTUAL BACKGROUND

Mining industry representatives have raised issues regarding the proper application of NRS 361.035(3) to mining operators. Mining operators are required by both federal and state statute to perform reclamation activities at mine sites both during and after the end of production of the ore. The reclamation activities mandated by federal and state law are a required obligation of all mining operators. The mining industry representatives believe that their reclamation obligations imposed under federal and state law allow or require the Department to characterize mining improvements to real property as personal property and not real property. The Department historically has never reached this legal conclusion that is now being proffered by the mining industry.

Generally, for purposes of NRS chapter 361 (commonly referred to as the property tax statutes), the statutory scheme divides property into two separate broad categories. The first category constitutes real property or real estate, which generally means "improvements built or erected upon any land." *See* NRS 361.035(1)(a). Conversely, any property that does not constitute real property is by definition personal property. *See* NRS 361.030(1)(j). Both categories of property, personal and real, are subject to the imposition of the

property tax contemplated in NRS chapter 361 unless otherwise exempted by statute.

The categorizing of property as personal property and real property does have a significant financial impact to the taxpayer, as well as the local government and the state. Personal property is subject to depreciation over a shorter useful life than its counterpart real property. *See* NRS 361.227(1)(b) and (4), and NAC 361.140, *et seq*. Personal property is subject to depreciation for an economic life ranging from 3 to 20 years. Improvements to real property are depreciated over an economic life of 50 years. The shorter the useful life of a depreciable asset the sooner the asset will be depreciated, resulting in a lower taxable value and thereby reducing the taxpayer's property tax bill.

The focus of this opinion will address the statutory reclamation obligations imposed pursuant to NRS chapter 519A and their effect upon mining operators' property tax obligations. All mine operators that engage in mining operations in the State of Nevada are required to "agree in writing to assume responsibility for the reclamation of any land damaged as a result of the mining operation." *See* NRS 519A.210(3). Accordingly, one question is whether this statutory reclamation obligation constitutes an agreement as contemplated in NRS 361.035(3). The remainder of this opinion will address the constitutional implications of the mining industry's proposed NRS 361.035(3) application, as well as whether the proposed application of NRS 361.035(3) can be harmonized with the remainder of NRS chapter 361.

QUESTION ONE

Does the statutory reclamation obligation imposed on mining operations pursuant to NRS chapter 519A, as well as by federal regulation, constitute an agreement as such term is contemplated in NRS 361.035(3)? *See* 43 C.F.R. 3809.

ANALYSIS

NRS 361.035(3) provides:

> Except as otherwise provided in NRS 361.2445, when an agreement has been entered into, whether in writing or not, or when there is sufficient reason to believe that an agreement has been entered into, for the dismantling, moving or carrying away or wrecking of the property described in subsection 1,

> the property must be classified as personal property, and not real estate.

In order to utilize subsection 3 of NRS 361.035, it is necessary for an agreement to have been entered into for dismantling, moving, carrying away, or wrecking the property described in subsection 1 of said statute. In determining whether the statutory reclamation obligations of a mining operator constitute such an agreement, it is necessary to review the express language of NRS chapter 519A. Specifically, NRS 519A.210(3) uses the word "agree" in the text of that subsection which addresses reclamation plans. Looking at NRS 519A.210(3) alone, a conclusion could be drawn that mining operators do enter into agreements with the State of Nevada to perform their statutory reclamation obligations. However, it is important to look at the statutory scheme as a whole to ascertain whether the mine operators' relationship with the State of Nevada constitutes that of an agreement or otherwise.

Neither the legislative history nor the regulations promulgated pursuant to NRS chapter 361 provide any guidance as to what the Legislature intended when the term "agreement" was incorporated into subsection 3 of NRS 361.035. It is necessary to look elsewhere to obtain a definition of "agreement." The term "agreement" has generally been defined to mean "a manifestation of mutual assent on the part of two or more persons." *Williston on Contracts*, 3d ed., § 2; Restatement (Second) of Contracts, § 3 (1981). *See also Corbit v. J. I. Case Company*, 424 P.2d 290 (Wash. 1967). The courts have defined the words "agree" or "agreement" and have stated: "The words 'agree' and 'agreement', on the other hand, ordinarily carry the connotation of a contract or express promissory covenant." *Dickey Co. v. Kanan*, 486 S.W.2d 33, 37 (Mo. Ct. App. 1972) (citations omitted).

Thus in order to characterize the reclamation obligation relationship as an agreement, the appropriate inquiry becomes whether the requisite mutual assent requirement is satisfied. In addition to the mutual assent requirement, it is necessary for there to be consideration exchanged between the two assenting parties.

The relationship between the mining operator and the State of Nevada can be best categorized as a statutory obligation with which all mining operators must comply in the event they desire to engage in mining activities within the State of Nevada. A mining operator must obtain a permit to engage in mining operations in the State of Nevada. *See* NRS 519A.080 and NRS 519A.200. No

mutual assent is present in this type of relationship, for neither party has on their own volition entered into this relationship. The Nevada Legislature has mandated that all mining operators perform reclamation functions, and the Executive Branch of the State of Nevada is statutorily bound to carry out these requirements.

In order to reach the legal conclusion that an agreement exists between the mining operator and the State of Nevada, each party must have exchanged consideration to the other. Consideration has been defined simply as "an act or a forbearance, or the creation, modification or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise." *Byerly v. Duke Power Co*., 217 F. 2d 803, 806 (4th Cir. 1954). To the extent that a party is legally bound to perform an act, the agreement to perform such act does not constitute consideration. *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co*., 395 F.2d 388, 390 (8th Cir. 1968).[1] A mining operator is legally obligated to adhere to the requirements delineated in NRS chapter 519A. Thus all acts in furtherance of the same do not constitute consideration.

To accept the mining industry's proposition that the statutory reclamation obligations constitute an agreement would lead to the conclusion that the statutory reclamation obligations necessary to obtain a mining permit are optional. A review of NRS chapter 519A does not support this conclusion. *See* NRS 519A.200, *et seq*. It is a long-standing principle in the State of Nevada that in order to determine the meaning of a specific provision, the entire act must be read as a whole and meaning given to all parts of the act. *See McCrackin v. Elko Cty. School Dist*., 103 Nev. 655, 658, 747 P.2d 1373 (1987), and *Nevada Tax Comm'n v. Bernhard*, 100 Nev. 348, 351, 683 P.2d 21 (1984). Even though NRS 519A.210(3) specifically uses the word "agree," the express and mandatory provisions of the entire NRS chapter 519A do not support the legal conclusion that the relationship between a mining operator and the State of Nevada constitutes an agreement. A mining operator must comply with the reclamation obligations as a condition of engaging in mining operations in the State of Nevada. As such, the mining industry's proposition that a mining operator enters into an "agreement" as contemplated by NRS 361.035(3) must be rejected.

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[1] The Restatement (Second) of Contracts § 73 (1981) supports this conclusion. Section 73 provides in pertinent part: "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . . ."

CONCLUSION TO QUESTION ONE

Complying with the statutory reclamation obligations imposed pursuant to NRS chapter 519A does not constitute an "agreement" within the scope of NRS 361.035(3).

QUESTION TWO

Would the mining industry's proposed application of NRS 361.035(3) satisfy the constitutional mandates delineated in Nev. Const. art. 10, § 1?

ANALYSIS

Article 10, Section 1 of the Nevada Constitution provides:

> **Uniform and equal rate of assessment and taxation; exceptions and exemptions; inheritance and income taxes prohibited.**
>
> 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, which shall be assessed and taxed only as provided in section 5 of this article.

The operative inquiry becomes what is meant by uniform and equal rate of assessment and taxation, and when will a disparate taxation of properties be deemed constitutional? The tax imposed pursuant to NRS chapter 361 is an *ad valorem* based tax. The Nevada Supreme Court, in 1997, discussed in detail the constitutional requirements that the State of Nevada and all of its counties must follow in the imposition and application of an *ad valorem* tax. In *Sun City Summerlin v. State, Dep't Tax,*, 113 Nev. 835, 840-841, 944 P.2d 234 (1997), the Supreme Court stated:

> The question before us is whether this disparate taxation of properties is constitutional. Statutes enacted by the Legislature carry a presumption of constitutional validity, and those attacking a statute must clearly show that it is unconstitutional. List v. Whisler, 99 Nev. 133, 137-38, 660 P.2d 104, 106 (1983).

> Article ten, section one of the Constitution of the State of Nevada requires the Legislature to "provide by law for a uniform and equal rate of assessment and taxation" and "prescribe such regulations as shall secure a just valuation for taxation of all property." Early in its history, this court explained that this constitutional provision requires "that all *ad valorem* taxes should be of a uniform rate or percentage. That one species of taxable property should not pay a higher rate of taxes than other kinds of property." State of Nevada v. Eastabrook, 3 Nev. 173, 177 (1867). The court concluded that a statute providing for a different tax rate for the products of mines was unconstitutional and void: "The legislature could neither make the tax greater nor less on the products of mines than on other property." *Id.* at 179. This court has reaffirmed its holding in *Eastabrook* many times. *See List*, 99 Nev. at 138, 660 P.2d at 107.
>
> In Boyne v. State ex rel. Dickinson, 80 Nev. 160, 390 P.2d 225 (1964), this court considered a statute which allowed assessment of land used for agricultural purposes based on its value for such use, rather than on its value for other purposes -- the method for assessing other lands. This court affirmed the district court's conclusion that the statute was unconstitutional because it gave the owners of agricultural property a distinct tax advantage over other landowners. *Id.* at 166-67, 390 P.2d at 228-29.
>
> Insofar as NRS 116.1105(2)(b) precludes taxation of common elements in planned communities, we conclude that it is void for violating the prescription "for a uniform and equal rate of assessment and taxation" of all property set forth in article ten, section one of our state constitution.

The constitutional requirement can be reduced to a simple inquiry. In the event the Department were to adopt the mining industry's proposed application of NRS 361.035(3), would that application result in one species of taxable property paying a higher rate of taxes than other kinds of property? The answer to this inquiry is yes.

In *Summerlin*, the Supreme Court struck down a statute which gave certain planned communities a tax exemption while denying condominium communities similar tax relief. The facts presented in this opinion are similar to the facts of

the *Summerlin* case. The proposed application of NRS 361.035(3) by the mining industry would provide a partial tax exemption to mining operators that is not available to all other taxpayers.

All taxpayers in the State of Nevada, who are not subject to the statutory reclamation obligations imposed pursuant to NRS chapter 519A, would have their improvements to real property taxed as real property. Only the mining operators would enjoy the benefits attributable to having their improvements to real property considered personal property and taxed as such. This disparate tax treatment would run afoul of the uniform and equal requirements delineated in Nev. Const. art. 10, § 1. The proposed application of NRS 361.035(3) would result in a partial exemption for the improvements to real property for only mining operators. There is no express provision in NRS chapter 361, or elsewhere, that would illustrate the Nevada Legislature's desire to grant the mining industry this unique and partial exemption.

CONCLUSION TO QUESTION TWO

To interpret and apply NRS 361.035(3), as proposed by the mining industry, would violate the uniform and equal requirements delineated in article 10, section 1 of the Nevada Constitution.

QUESTION THREE

Can the application of NRS 361.035(3), as proposed by the mining industry, be read consistently with the balance of NRS chapter 361?

ANALYSIS

As stated above, it is a long-standing principle in the State of Nevada that to determine the meaning of "specific provisions," an act should be read as a whole and meaning given to all parts of the act. *See McCrackin*, 103 Nev. at 658, 747 P.2d at 1376; *Bernhard*, 100 Nev. at 351, 683 P.2d at 25. To validate the mining industry's proposed application of NRS 361.035(3), it is necessary that such application not run afoul of the balance of NRS chapter 361.

NRS 361.310(1) provides that the assessor must value and assess property annually in a manner that is uniform and equal. The Nevada Legislature, in 1981, adopted the taxable value methodology delineated in NRS 361.227. The property tax scheme in Nevada is not a fair market value system. Thus the

Department is required to calculate the taxable value of the mining operators' improvements to real property on an annual basis. *See* NRS 362.100.

NRS 361.227(1)(a)(2) specifically states that improved land must be valued "consistently with the use to which the improvements are being put." Thus Nevada does not value land, improved or otherwise, on that improved land's highest and best use. To adopt the express mandates of NRS 361.227(1)(a)(2), the Department must value the improvements consistently to the use that they are being put for that particular tax year. Based on this express requirement, the Department values mining operator improvements to real property as real property and not personal property. The improvements to real property are being used by the mining operator as improvements to real property and thus must be valued as such pursuant to NRS 361.227(1)(a)(2). The statutory reclamation obligations do not change the actual intervening use of the improvements to the real property for that tax year even though, at some time in the future, such improvements will be demolished and removed as part of the reclamation plan. It is impossible to harmonize the statutory mandated valuation scheme for improved land delineated in NRS 361.227(1)(a)(2) with the mining industry's proposed application of NRS 361.035(3). The two statutes, based on the industry's proposed application, would be in direct conflict because, under the mining industry's application of NRS 361.035(3), any improvements to real property that are used as such during a tax year would not be valued as real property but would be valued as personal property.

NRS 361.310(2) permits the assessor to open up the roll under certain circumstances and, as delineated in subsection (2)(b), to address demolition or removal of improvements. To adopt the mining industry's proposed application of NRS 361.035(3) would render the language in NRS 361.310(2)(b) meaningless, as the only requirement to change the character of property from real to personal for property tax purposes would be the presence of an agreement, thus making the actual demolition or removal irrelevant.

NRS 361.035(3) should be read and applied by the Department with common sense. *See* NRS 360.291(1). NRS 361.035(3) provides that once a taxpayer reaches an agreement to dismantle, move, or carry away improvements to real property, such property should then be considered personal property. Pursuant to NRS chapter 361 and NRS 362.100 improvements to real property are characterized and assessed annually. NRS 361.035(3) is intended to protect those who, during the course of a tax year, will physically alter the characteristic of specific property. Thus to the extent that the dismantling or

other activities delineated in NRS 361.035(3) are to occur within that tax year, the property in question should be considered personal property for that entire tax year. To read the express language of NRS 361.035(3) to allow a taxpayer to alter the legal status of property, even though the taxpayer's use of that property may not change for many years in the future, directly contradicts the specific charge to the assessors and to the Department in NRS 361.227 to value improved land consistently to the use that improved land is being put.

CONCLUSION TO QUESTION THREE

The mining industry's proposed application of NRS 361.035(3), whereby improvements to real property would be characterized and taxed as personal property based upon a mining operator's compliance with Nevada's statutory reclamation requirements, cannot be harmonized with the balance of NRS chapter 361. Such a proposed application must be rejected.

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Senior Deputy Attorney General

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AGO 2000-05 CHIROPRACTIC; BOARDS AND COMMISSIONS: An applicant for a license to practice chiropractic is not required to graduate from an accredited college of chiropractic prior to the deadline for the examination application set forth in NRS 634.080.

Carson City, January 27, 2000

Cindy Wade, Executive Director, Chiropractic Physicians' Board of Nevada
4600 Kietzke Lane #M-245, Reno, Nevada 89502

Dear Ms. Wade:

You have requested an opinion from this office as to whether an applicant for a license to practice chiropractic must graduate from an accredited college of chiropractic prior to the application deadline set forth in NRS 634.080.

QUESTION

Is an applicant's actual graduation date required by statute to be prior to the Chiropractic Physicians' Board's (CPB) examination deadline date?

ANALYSIS

The requirements to obtain a license to practice chiropractic are found in NRS chapter 634. NRS 634.070(1) provides that: "All applicants for licenses to practice chiropractic in Nevada must pass all examinations prescribed by the board. Examinations must be held at least semiannually." NRS 634.080(1) provides that: "An *applicant for examination* must file an application *not less than 60 days before the date of the examination*." [Emphasis added.] Pursuant to NRS 634.070, the CPB holds examinations semiannually. Pursuant to NRS 634.080, the CPB has set the application deadline for each examination 60 days prior to the examination date. Currently, the CPB requires applicants to be graduates of an accredited college of chiropractic before the deadline to apply for the examination.

We are advised that the CPB accepts applicants from 17 colleges of chiropractic. These colleges have varying graduation dates resulting in graduations in virtually every month of the year. Some of the colleges have graduation dates which are before an examination but after the application deadline for the examination. We are advised that potential applicants from

these schools have asked whether they may submit applications for examination before they have graduated if they will graduate by the examination date. We are advised that the CPB has received a similar inquiry from a representative of a college of chiropractic on behalf of its students. This question is of great concern to certain applicants because if a graduate is precluded from sitting for the first examination after his graduation, then he must wait at least six months to test. To answer this question, it is necessary to look to the statutes which establish the requirements to obtain a license to practice chiropractic.

NRS 634.070(1) requires all applicants for licenses to practice chiropractic to pass all examinations prescribed by the CPB. NRS 634.080(3) sets forth the information which must be included in the application. NRS 634.080(3)(g) requires that the applicant state his "general and chiropractic education, including the schools attended and the time of attendance at each school, and *whether* he is a graduate of *any* school or schools." [Emphasis added.] The plain language of NRS 634.080 does not require an applicant to submit evidence of graduation from an accredited college of chiropractic as a part of the application for examination. It only requires that the applicant state the schools attended and whether he is a graduate of any school. Therefore, NRS 634.080 does not require an applicant to be a graduate of a college of chiropractic by the CPB's deadline of 60 days before the examination.

NRS 634.090 sets forth additional requirements which an applicant must meet in order to receive a license to practice chiropractic. NRS 634.090(1) provides, in pertinent part, as follows:

> 1. An applicant must, in addition to the requirements of NRS 634.070 and 634.080, furnish satisfactory evidence to the board that:
> (a) He is of good moral character and, if licensed to practice chiropractic in another state, possesses a good professional reputation;
> (b) He has a high school education and is a graduate from a college of chiropractic accredited by the Council on Chiropractic Education . . . .

NRS 634.090 clearly sets forth requirements for licensure which are in addition to, and different from, the examination requirements set forth in NRS 634.070 and the application requirements set forth in NRS 634.080. NRS 634.090

does not set a deadline by which an applicant must graduate from an accredited college of chiropractic, but does make licensure contingent upon such graduation.

The deadline established in NRS 634.080 cannot be read into NRS 634.090. When the Legislature intended to establish an examination application and fee payment deadline of not less than 60 days prior to the date of the examination, it clearly and specifically set forth that deadline in the statutes. NRS 634.080 and NRS 634.100.[1] NRS 634.090(1) clearly does not set forth any such deadline. When a statute is clear and unambiguous on its face, it is not necessary to look beyond the language of the statute to determine legislative intent. *Roberts v. State of Nevada*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

CONCLUSION

An applicant for a license to practice chiropractic is not required to graduate from an accredited college of chiropractic prior to the deadline for the examination application set forth in NRS 634.080.

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Deputy Attorney General

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[1] NRS 634.100(1) provides that: "An applicant for a license to practice chiropractic in this state *must* pay the required fee to the secretary of the board *not less than 60 days before the date of the examination*." [Emphasis added.]

AGO 2000-06 LAW ENFORCEMENT; FIREMEN; OVERTIME; PRISONERS: Division of Forestry employees engaged in fire protection, law enforcement, or inmate supervision are eligible under the Fair Labor Standards Act for a variable 80-hour work schedule within a biweekly pay period. Eligible employees who choose and are approved for an 80-hour variable work schedule may be assigned to shifts of more than 8 hours per day. Such employees are eligible for overtime only after working 80 hours in the biweekly period unless they are approved for overtime in excess of their daily scheduled shift.

Carson City, February 3, 2000

Pete Morros, Director, Department of Conservation and Natural Resources, 123 West Nye Lane, Room 230, Carson City, Nevada 89706-0818

Dear Mr. Morros:

This is in response to your questions concerning variable work scheduling and overtime for Division of Forestry (NDF) employees who are eligible under the federal Fair Labor Standards Act (FLSA) to work variable 80-hour work schedules within a biweekly work period.

BACKGROUND

Your questions arose as a result of the Nevada Legislature's recent amendments to NRS 284.180, the statute establishing the circumstances under which State employees become eligible to receive overtime.[1] As amended, subsection 7 of NRS 284.180 now provides:

> 7. Employees who are eligible under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq*., to work a variable 80-hour work schedule within a biweekly pay period and who choose and are approved for such a work schedule will be considered eligible for overtime only after working 80 hours biweekly, except those eligible employees who are approved for overtime in excess of one scheduled shift of 8 or more hours per day.

[1] Act of May 5, 1999, ch. 95, § 1, 1999 Nev. St at. 252 (S.B. 499).

Your questions address the three factors set forth in the amended subsection: (1) the particular employee's eligibility under the FLSA for a variable 80-hour biweekly schedule, (2) the employee's choice to work such a schedule subject to the agency head's approval, and (3) the employee's qualification for overtime for hours worked in excess of his or her daily scheduled shift subject to the agency head's approval. Determination of the circumstances under which employees become eligible to receive overtime under NRS 284.180(7) requires an analysis of each of the three factors.

QUESTION ONE

Which NDF employees are eligible under the federal FLSA to work a variable 80-hour work schedule within a biweekly work period?

ANALYSIS

Before an NDF employee's eligibility for overtime is determined under NRS 284.180(7), he or she must be eligible under the FLSA to work a variable 80-hour work schedule within a biweekly pay period. A discussion of the FLSA is therefore required.

A. Section 207(k) of the Fair Labor Standards Act

The FLSA is a federal law establishing a minimum wage and a 40-hour per week overtime standard for most employees, with specific exemptions to the overtime requirement for employees whose job duties consist of firefighting, law enforcement, providing security in correctional institutions, and a few other categories that are not applicable to NDF. States may not pass laws that are less stringent than the standards set forth in the FLSA, but they may be more generous to employees than the FLSA requires, establishing eligibility for overtime before employees have worked 40 hours in a week, for example, as is the case in Nevada. State employees who work a standard schedule of five 8-hour days a week are eligible for overtime when they work in excess of 8 hours a day, as well as when they work in excess of 40 hours in a week. NRS 284.180(3).

Section 207(k) of the FLSA provides an exemption from the 40-hour overtime rule for public employers of public safety workers, which is commonly referred to as the "7(k) exemption." Under the FLSA's 7(k) exemption, a public employer may establish a longer work period than the normal 7-day week for

purposes of computing overtime pay for employees engaged in fire protection and law enforcement, the latter of which expressly includes security personnel in correctional institutions. 29 U.S.C. § 207(k); 29 C.F.R. § 553.211(f) (1999). The 7(k) exemption allows public employers to establish a work period for such employees ranging from 7 to 28 days, and it authorizes a higher overtime threshold for such workers. If the established work period is the 14-day period referred to in NRS 284.180(7), overtime eligibility for firefighters under the FLSA begins once they work more than 106 hours in the biweekly period, and overtime eligibility for law enforcement and correctional security workers begins once they have worked 86 hours in the biweekly period. 29 C.F.R. § 553.230 (1999). As discussed above, if the State law for overtime is more stringent than the minimum required by the FLSA, the State standard applies.

B. Section 7(k) Eligibility of Law Enforcement Personnel, Rescue Service Personnel, Conservation Camp Supervisors, and Inmate Crew Supervisors

Employees qualify under the 7(k) exemption as law enforcement personnel if: (1) they are uniformed or plainclothed members of a body of officers and subordinates who are empowered by State statute to enforce laws designed to maintain public peace and order, to protect life and property from injury, and to prevent and detect crimes, (2) they have the power to arrest, and (3) they have undergone or will undergo on-the-job training or a course of study that typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid, and ethics. 29 C.F.R. § 553.211(a) (1999). Employees who meet these criteria qualify for the 7(k) exemption regardless of rank or status as trainee, probationary, or permanent, and regardless of their assignment to duties incidental to their law enforcement activities, such as equipment maintenance, lecturing, dispatching, radio operation, clerk, or custodial work. 29 C.F.R. § 553.211(b), (g) (1999). However, such incidental, nonexempt work cannot exceed 20 percent of the employee's total working time or the requirement to pay overtime after 40 hours in a week may apply. 29 C.F.R. § 553.212 (1999). This rule is commonly referred to as the "80/20 rule."

Rescue and ambulance service personnel would qualify for the 7(k) exemption if they form an "integral part of the public agency's law enforcement activities." 29 C.F.R. §§ 553.211(b), 553.215 (1999). Fire investigators with peace officer status qualify for the 7(k) exemption, as well, under the criteria in 29 C.F.R. § 553.211(a).

Employees who function as security personnel in correctional institutions are also eligible for the 7(k) exemption. 29 C.F.R. § 553.211(f) (1999). Nevada's conservation camps are minimum security correctional facilities. The inmates leave the facility each day to perform outside work in the nature of traditional "honor camps" or "honor farms." The conservation camps clearly qualify as correctional institutions as defined in the federal regulation because each is a "government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime." 29 C.F.R. § 553.211(f) (1999). "[P]rison farms" is listed as a typical example of a qualified facility. *Id.*

The State Forester operates the inmate work program of the ten conservation camps in Nevada. *See* NRS 209.231. The personnel who supervise the inmate conservation work crews are NDF employees, and the camps are their official duty stations. *See, e.g.,* NRS 209.183. NDF crew supervisors accept temporary custody of the inmates and are typically the sole personnel responsible for inmate security and safety when working in the field on conservation projects or firefighting.[2] NDF crew supervisors and camp supervisors qualify as "security personnel for purposes of the section 7(k) exemption" because they "have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution." 29 C.F.R. § 553.211(f) (1999). These employees are 7(k)-eligible regardless of rank, status as probationary, etc., and regardless of their assignment to duties incidental to the performance of their responsibilities in relation to inmates. *Id.* However, the 80/20 rule discussed above applies to such incidental duties performed by NDF crew supervisors and camp supervisors. 29 C.F.R. § 553.212 (1999).

Courts have confirmed that employees with responsibility for maintaining custody, safeguarding inmates, or supervising such functions qualify for the 7(k) exemption under 29 C.F.R. § 553.211(f), although they do not perform law enforcement functions. Personnel who are responsible for the supervision, security, and safety of inmates qualify for the exemption without meeting the

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[2] *See* Statewide Conservation Camp Policy and Procedure Manual 22-47, Nevada Division of Forestry (Nov. 1988 ed.).

"3-part law enforcement test" set forth in subsection (a) of the regulation. *McBride v. Cox*, 567 N.E.2d 130, 133 (Ind. Ct. App. 1991). The *McBride* court found that it was irrelevant that the particular employees were not officers empowered by statute to enforce laws and to prevent and detect crimes, and did not carry weapons or possess the power to arrest, as required to qualify for the 7(k) exemption under subsection (a). *Id*. The court also found it irrelevant that the employees' duties included janitorial work, building maintenance, breaking up fights, and caring for prisoners. *Id.* The court explained that because the employees were "security personnel" who worked in a "correctional institution," as defined in subsection (f) of 29 C.F.R. § 553.211, they qualified for the 7(k) exemption. *Id*. The Eleventh Circuit Federal Court of Appeals has confirmed that employees with responsibilities for the safety and security of inmates, as provided in 29 C.F.R. § 553.211(f), met one of the "alternative definitions" for the 7(k) exemption. *Avery v. City of Talladega*, 24 F.3d 1337, 1343 (11th Cir. 1994).

C. Section 7(k) Eligibility of Firefighters, Fire Protection Personnel, Paramedics, and Emergency Medical Service Personnel

Employees engaged in fire protection activities are eligible for the 7(k) exemption if they: (1) work for an organized fire department or fire protection district, (2) have been trained in accordance with state or local law, (3) have the legal authority and responsibility to engage in the prevention, control, or extinguishment of fires of any type, and (4) perform activities that are required for, and directly concerned with, the prevention, control, or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills, and inspecting homes and schools for fire hazards. 29 C.F.R. § 553.210(a) (1999). The 7(k) exemption would apply regardless of the above-described employees' status as trainee, probationary, or permanent, and regardless of "their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities. . . ." 29 C.F.R. § 553.210(a) (1999); *see also* 29 C.F.R. § 553.212(a) (1999).

The 80/20 rule applies, so support activities work such as dispatching, alarm operating, equipment repair, camp cooking, clerical work, planting trees, or other duties not related to firefighting during down time is permissible as long

as such nonexempt work does not exceed 20 percent of the total working time. 29 C.F.R. § 553.212(a) (1999).

Nevertheless, trained firefighters performing a one-year tour of duty as dispatchers may be eligible for the 7(k) exemption if they are subject to being called to fight fires. *See Schmidt v. County of Prince William*, 929 F.2d 986 (4th Cir. 1991).

Employees of forest conservation agencies charged with firefighting responsibilities and who direct or engage in fire spotting or lookout activities, fighting fires on the fireline or from aircraft, or operating tank trucks, bulldozers, and tractors for purposes of clearing fire breaks qualify for the 7(k) exemption even if they have had no prior training. 29 C.F.R. § 553.210(b) (1999). Employees who are called upon to spend at least 80 percent of their time performing such functions during emergency situations still qualify for the 7(k) exemption when they simultaneously perform such related functions as housekeeping, equipment maintenance, tower repairs, and/or the construction of fire roads. *Id.*

Paramedics and emergency medical service personnel may qualify for the 7(k) exemption if they form an integral part of the fire protection agency's activities, do work that is substantially related to fire protection work, have received training in the rescue of fire victims, and respond to fires. However, the decisions of the courts regarding paramedics and EMTs' qualification for the 7(k) exemption are very dependent on the facts and more analysis needs to be done before reaching any conclusion regarding such employees. *See Christian v. City of Gladstone,* 108 F.3d 929 (8th Cir. 1997); *but see Spires v. Ben Hill County*, 980 F.2d 683 (11th Cir. 1993).

CONCLUSION TO QUESTION ONE

NDF employees engaged in the functions of fire protection, law enforcement, inmate supervision, and rescue and emergency medical service may qualify under the FLSA for a variable 80-hour work schedule within a biweekly work period. However, employees' specific job duties must be

assessed to ensure they meet the conditions set forth in 29 C.F.R. §§ 553.210 and 553.211 and that any incidental, nonexempt job duties do not exceed more than 20 percent of their total working time.

QUESTION TWO

May 7(k)-eligible employees be scheduled to work shifts of more than 8 hours per day, assuming such employees choose and are approved for such a schedule by the State Forester?

ANALYSIS

NRS 284.100(1) provides that State employees' hours of employment are limited to not more than 8 hours a day and not more than 40 hours a week, unless otherwise provided by law. NRS 284.100(3) expressly provides that the 8 hours per day limitation does not apply to State employees who choose and are approved to work a variable 80-hour work schedule within a biweekly work period. NDF employees may choose and be approved to work such a schedule pursuant to NRS 284.180(7) if they are eligible for the 7(k) exemption. Moreover, NRS 284.180(7) recognizes that a variable 80-hour work schedule may consist of shifts "of 8 or more hours per day."

CONCLUSION TO QUESTION TWO

It is permissible for NDF employees to be scheduled for shifts of more than 8 hours a day in a variable 80-hour work schedule if the employees choose and are approved for such a schedule by the State Forester.

QUESTION THREE

May 7(k)-eligible employees qualify for overtime for hours worked prior to or subsequent to their scheduled shift if the State Forester approves them for such overtime in accordance with NRS 284.180(7)?

ANALYSIS

NRS 284.180(7) provides that 7(k)-eligible employees who choose and are approved to work a variable 80-hour work schedule within a biweekly pay period "will be considered eligible for overtime only after working 80 hours biweekly, except those eligible employees who are approved for overtime in

excess of one scheduled shift of 8 or more hours per day." By its express terms, the statute acknowledges that employees may be approved for overtime for work in excess of their daily scheduled shift even if they have not worked 80 hours in the biweekly work period.

State employees who are not 7(k)-eligible may also work nonstandard schedules. Employees may work "a variable workday" schedule if they choose and are approved for such a schedule. NRS 284.180(6). They may also work a schedule of "innovative work weeks" upon approval by the agency head and majority consent of the affected employees. NRS 284.180(8). However, both subsections provide that employees working such nonstandard schedules are eligible for overtime only after working 40 hours in their respective work weeks and neither provides for approval of overtime for work performed in excess of a scheduled daily shift, as subsection 7 does for 7(k) employees who are working variable 80-hour biweekly schedules.

The language of subsection 7 authorizing overtime for hours worked in excess of a scheduled daily shift was proposed by the Acting Director of the Department of Personnel and a representative of the Nevada Highway Patrol Association during legislative hearings on the bill amending NRS 284.180. *Hearing on S.B. 499 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 56 (April 20, 1999). As they explained to the Assembly Committee, 7(k) employees on variable 80-hour shifts were already eligible under existing State payroll procedures for overtime in excess of their daily scheduled shift, if so approved. *Id.* at Exhibits D and E. The present Department of Motor Vehicles and Public Safety's payroll procedures provide that, if approved by the agency head, the 7(k) employees qualify for overtime in excess of their daily scheduled shift, whether the hours are worked before or after their scheduled shift, for which they receive regular time.

The Committee likely took cognizance of the fact that 7(k) employees may not be required to work 80-hour variable schedules without their consent under Nevada law, although § 207(k) of the FLSA allows public employers to establish such mandatory schedules. The FLSA's 7(k) exemption from the 40-hour overtime rule reflects Congress's "recognition that public employers face special challenges in scheduling public safety employees, who often must

work long or irregular hours."[3] Having such public safety employees choose a variable 80-hour schedule with overtime for hours worked in excess of their scheduled daily shift serves the interests of both the State and the workers. If such employees choose to work a standard schedule instead, the State might incur more significant overtime costs on both a daily and a weekly basis, and this could amount to a significant reduction in the employees' retirement contributions. *See id.* at Exhibit E.

CONCLUSION TO QUESTION THREE

Division of Forestry (NDF) employees who are 7(k)-eligible and work 80-hour variable biweekly schedules pursuant to NRS 284.180(7) may qualify for overtime for the hours worked prior to or subsequent to their scheduled shift, if the State Forester approves.

FRANKIE SUE DEL PAPA
Attorney General

By: RONDA L. MOORE
Deputy Attorney General

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AGO 2000-07 Withdrawn.

AGO 2000-08 Withdrawn.

[3] *Which Workers Qualify for the FLSA's § 207(k) Exemption?*, 5 Pub. Employer's Guide to FLSA Employee Classification (Thompson Pub. Group) Issue 1 (May 1999).

AGO 2000-09 TAXATION; CIGARETTES: Nevada licensed cigarette wholesale dealers are prohibited from offering noncigarette products to retailers at a discount based on the volume of the retailer's cigarette purchases pursuant to NRS 370.371.

Carson City, February 17, 2000

David P. Pursell, Executive Director, Nevada Department of Taxation, 1550 East College Parkway, Suite 115, Carson City, Nevada 89706-7921

Dear Mr. Pursell:

You have asked the opinion of this office on the following:

QUESTION

Is a Nevada licensed cigarette wholesale dealer, who is also in the business of selling other products besides cigarettes, for example candy, prohibited from offering these other products to retailers at a discount based on the volume of the retailers' cigarette purchases?

ANALYSIS

The above question arose because of the prohibitions against predatory pricing in NRS 370.371. NRS 370.371 provides in relevant part:

> 1. A wholesale dealer shall not engage in predatory pricing with intent to injure competitors or destroy or lessen competition substantially by:
> (a) Advertising, offering to sell or selling at wholesale, cigarettes at less than the cost to the wholesale dealer; or
> (b) Offering any rebate or concession in price or giving any rebate or concession in price in connection with the sale of cigarettes.

The language of this statute is broad and appears to prohibit the type of transaction where a discount on noncigarette goods would be offered to a retailer based on the volume of cigarettes purchased by the retailer. Such a discount could be considered a rebate or concession in price, and it would

clearly be done in connection with the sale of cigarettes. If a wholesaler were allowed to offer other goods at a discount based upon the quantity of cigarettes purchased, the wholesaler is engaging in the same form of conduct that the statute seeks to prevent, namely one wholesaler being able to offer incentives for the purchase of cigarettes that other wholesalers cannot offer, and thus gaining an unfair advantage. The Nevada Legislature has expressed its intent to prohibit these types of transactions, and a federal court has found that restricting rebates offered to retailers by wholesalers is a reasonable and necessary way to ensure fair competition in the tobacco market. *See Corr-Williams Wholesale Co. v. Stacy Williams Co.*, 622 F. Supp. 156, 159 (S.D. Miss. 1985).

Some states have statutes that expressly address the use of free goods in connection with giving rebates and discounts in highly regulated industries, such as beer and other types of liquor. *See* MO. REV. STAT. § 311.332 (1999); CONN. GEN. STAT. 30-94 (1999); *see also Wine and Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416 (Mo. 1984). In New York, the Cigarette Marketing Standards Act (CMSA), while allowing manufacturers to give rebates and concessions to wholesalers, prevents wholesalers from offering rebates and concessions to retailers in attempts to circumvent the prohibitions in the CMSA. *See Jetro Cash and Carry Enters. v. State, Dep't of Taxation and Fin.*, 194 A.D.2d 171, 605 N.Y.S.2d 538 (N.Y. App. Div. 1993).

Nevada, however, has chosen to use broader language to avoid the need to change the statute to address every eventuality that may come up, and to prevent placing an extraordinary burden on the Department of Taxation (Department) in administering the statute. The general provisions of NRS 370.371 have been in place since 1989. This statute was enacted at the same time as other provisions governing the sale of cigarettes, including provisions setting a formula for determining the "basic cost" of cigarettes, which sets a price floor below which wholesalers are not allowed to sell cigarettes. *See* NRS 370.001 *et seq*. In 1993, the Nevada Legislature amended both the definition of basic cost as well as the statute on predatory pricing. The legislative history behind these amendments supports the conclusion that a discount in the price of other goods based on the volume of cigarettes purchased is prohibited.

During the 1993 Nevada Legislative Session, Assembly Bill 295 (AB 295) was proposed to amend NRS 370.005. The purpose of the amendment was to clarify the definition of the "basic cost of cigarettes," and clarify what types of discounts were allowed when determining the basic cost of cigarettes. The

reason for defining the basic cost of cigarettes and then prohibiting Nevada cigarette wholesale dealers from selling below that cost was to create a level playing field for all wholesale dealers. *See Hearing on A.B. 295 Before the Assembly Committee on Taxation*, 1993 Legislative Session, 4 (March 16, 1993); *Hearing on A.B. 295 Before the Assembly Committee on Ways & Means*, 1993 Legislative Session, 6--7 (June 28, 1993); *see also* Op. Nev. Att'y Gen. No. 93-4 (March 22, 1993).

At the time A.B. 295 was proposed, there was disagreement between Nevada wholesale dealers over whether a cash discount could be used in determining basic cost, and what constitutes a trade discount. A trade discount is supposed to be based on the volume of the purchase, and a cash discount is for paying the account receivable within so many days of delivery. *See* Op. Nev. Att'y Gen. No. 93-4 (March 22, 1993). Trade discounts were considered allowable under the original statute, but issues existed regarding other types of allowances, discounts, rebates, and concessions that were not clearly a trade discount or a cash discount. There was also a question about the legality of not allowing cash discounts. *See* Op. Nev. Att'y Gen. No. 91-10 (December 26, 1991); *see also Hearing on A.B. 295 Before the Assembly Committee on Taxation*, 1993 Legislative Session, 9, 13, Exhibit M (March 16, 1993); *Hearing on A.B. 259 Before the Assembly Committee on Ways & Means*, 1993 Legislative Session, 5-6 (June 28, 1993).

Because of the disagreements over types of discounts to be used in the computation of basic cost for cigarettes, the Department was constantly interpreting the statute as to which type of allowances were acceptable and which were not. Making these determinations regarding the distinctions between different types of discounts, rebates, and concessions was taking an inordinate amount of the Department's time. *See Hearing on A.B. 295 Before the Assembly Committee on Taxation*, 1993 Legislative Session, 4, 7 (March 16, 1993); *Hearing on A.B. 295 Before the Assembly Committee on Ways & Means*, 1993 Legislative Session, 5-6 (June 28, 1993). The amendment in A.B. 295 was intended to end the debates over what type of discounts and allowances were acceptable when determining the basic cost of cigarettes.

The wholesalers involved in the legislative process came to a resolution of these issues by deriving a formula that allowed a percentage of allowances, i.e., discounts, to be factored into the basic cost of cigarettes. Anything beyond a set allowance of 2 1/2 percent was not allowed. *See Hearing on A.B. 295 Before the Assembly Committee on Taxation*, 1993 Legislative Session, 7 (June

29, 1993). Thus by adopting A.B. 295, the Legislature expressed its intent to limit the amount of allowances that wholesalers could use to determine basic cost. This also gave relief to the Department from having to analyze each new type of allowance to see if it fit within the statute.

However, the Legislature clearly wanted to continue to prevent wholesalers from offering rebates or concessions in price in connection with the sale of cigarettes. NRS 370.371(4) provides that:

> 4. Evidence of:
> . . . .
> (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
> . . . .
> is prima facie evidence of intent and likelihood to injure competition and to destroy or lessen competition substantially.

The standard for proving intent and likelihood to injure competition and to destroy or lessen competition substantially is an easily met standard. During the 1993 Legislative Session, an amendment to A.B. 295 was proposed, which would have repealed the definition of the basic cost of cigarettes and the pricing formulas, and would have amended the provisions regarding predatory pricing. The amendments to the statute on predatory pricing would have repealed the prohibition against offering any rebates or concessions in price in connection with the sale of cigarettes, and would have required a higher standard to prove predatory pricing had occurred. However, the amendment lost before the Assembly. *See* Assembly Journal, 1592--1594 (June 25, 1993). This shows the Legislature's intent to keep the lower standard of proving predatory pricing, and also shows the Legislature's intent to retain the prohibition against rebates and concessions in price.

Another amendment to A.B. 295 was proposed after the wholesalers had met and reached an agreement regarding the language of A.B. 295. In that amendment, which became part of the final version of the bill, certain sections of the provisions in NRS 370.371 regarding predatory pricing were also amended for purposes of clarification. At that time, the Legislature could have repealed the language regarding the prohibition against rebates and concessions in price. However, the Legislature instead expressed its intent that

this prohibition remain in place, as well as its intent to keep the relatively low standard for evidence of predatory pricing.

A.B. 295 was then amended to repeal certain sections that would allow offering price concessions of other products in connection with the sale of cigarettes. *See* A.B. 295, 67th Leg., 1993 Nev. Stat. 2473 (showing repealed sections). These repealed sections allowed certain rebates or concessions, when the price of noncigarettes was combined with the price of cigarettes. These provisions allowed such transactions as long as the combined price could be broken down into a cigarette price that was not below the cost to the wholesale dealer and a price for all other articles, products, commodities, and concessions included in the transaction that was at least the invoice price of such goods. The fact these sections were repealed shows the Legislature's intent that such combined sales that involve rebates and concessions in connection with the sale of cigarettes would not be allowed, pursuant to the broad language retained in the predatory pricing prohibition statutes. The Legislature wanted to do away with the administrative burdens to the Department in regulating the pricing of cigarettes and leave in place broad language that would be less open to debate.

Based on the legislative history of the statute on predatory pricing, as well as the statutes on the requirement that wholesale dealers do not sell cigarettes below the statutorily defined "basic cost," the proper conclusion is that the Nevada Legislature intended a broad scope for the statutes which would cover all eventualities and would not leave a multitude of case-by-case situations for the Department to consider. This conclusion on breadth is supported by the fact that the Legislature repealed the provisions regarding combined prices because the statute covered both those situations where cigarettes are sold alone below basic cost, and also addressed situations where rebates or concessions in price, whether they be on cigarettes or other goods, as long as the transaction was in connection with the sale of cigarettes, were prohibited. Thus transactions where a discount is offered on goods other than cigarettes, but in connection with the sale of cigarettes and based on the volume of cigarettes purchased, are prohibited by NRS 370.371.

CONCLUSION

Offering a discount on another product based on the quantity of cigarettes purchased is clearly a price concession in connection with the sale of cigarettes. As such, it is considered prima facie evidence of intent and likelihood to injure competition and to destroy or lessen competition substantially. The Nevada Legislature has expressed its intent to prevent predatory pricing by enacting broad language that covers this type of situation. The legislative history of NRS 370.371 shows the Legislature's intent to simplify the regulation of sales of tobacco by setting a maximum allowance or discount to be used in calculating the minimum price for which wholesalers may sell cigarettes, and by prohibiting wholesalers from giving any rebates or concessions in price in connection with the sale of cigarettes. Accordingly, such a discount is prohibited pursuant to NRS 370.371.

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Deputy Attorney General

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AGO 2000-10 GRANTS; COUNTIES; WAGES; INTERLOCAL COOPERATION ACT: A county may only exercise those powers expressly granted to it by law. A county does not have general authority to enter into cooperative or interlocal agreements with nonprofit organizations or individual property owners under current law. Tahoe Bond Act projects constructed by nonprofit organizations with public money under the Tahoe Bond Act program are subject to the prevailing wage statute if the project is publicly owned. Tahoe Bond Act funds may be expended for the construction of erosion control projects which are partially on private property and partially on public property.

Carson City, March 8, 2000

Scott Doyle, District Attorney, Office of the District Attorney, Douglas County, Post Office Box 218, Minden, Nevada 89423

Dear Mr. Doyle:

BACKGROUND

This opinion request seeks to determine the legal authority counties have to enter into agreements with nonprofit organizations and/or private individuals. The context in which this request arises concerns the parameters of the grant program administered by the Nevada Division of State Lands (Division) under the 1995 Tahoe Bond Act (Act) (although one question does not arise specifically under the Tahoe Bond Act). Under the terms of that Act, the State Land Registrar may grant money to an eligible county and the Nevada Department of Transportation (NDOT) to fund the construction of erosion control projects and streamcourse restoration projects within the Lake Tahoe Basin. NDOT and the counties may then contract with other entities for the actual construction of the projects or pursue construction themselves as long as the required matching funds are produced. Review of the State Land Registrar's program files reveals that as of September 10, 1999, there have been 13 grant awards; 8 of the 13 have been sponsored by Douglas County which then passed the grants through to general improvement districts for projects within the district. Some projects are completed and some are under construction.

Materials submitted with your opinion request indicate that Douglas County tried to persuade the Legislature in 1997, and again in 1999, to amend

the Interlocal Cooperation Act (NRS 277) to give counties *general* authority to enter into cooperative agreements and interlocal contracts with nonprofit organizations or charitable entities, perhaps in an effort to broaden the range of potential project applicants. Neither attempt was successful. (S.B. 45, 69th Session (1997); *compare* Act of May 24, 1999, ch. 212, 1999 Nev. Stat. 968) (granting specific authority to enter into a cooperative agreement to create a nonprofit organization for purposes of operating a coordinated transit system at Lake Tahoe).

QUESTION ONE

Does a county have the authority to enter into a cooperative agreement or interlocal contract with a nonprofit organization or an individual property owner?

ANALYSIS

We begin our analysis by examining the nature of county government under the Nevada Constitution. In article 17, § 1, of Nevada's Constitution, counties are recognized as corporate bodies. In a decision in 1919, the Nevada Supreme Court described the corporate body of the county as a "creature of the legislature," exclusively derived from the Legislature, thus it is entirely dependent upon the Legislature for "its extent of territory, its mode and manner of government, its power and rights." *Pershing Co. v. Humboldt Co.*, 43 Nev. 78, 84, 181 P. 960, 961 (1919).

This office has previously expressed its opinion that "[u]nder traditional legal principles, the scope and extent of a county's authority to act is contained within, and limited by, its enabling statutes." Op. Nev. Att'y Gen. No. 95-03 (March 1995); *see also* Op. Nev. Att'y Gen. No. 92-01 (February 1992); and Op. Nev. Att'y Gen. No. 91-3 (April 1991). "In short, [a county] can exercise only those powers that are expressly granted to it by law, or by such implication as are reasonably necessary to carry out the express powers." Op. Nev. Att'y Gen. No. 95-03 (March 1995), *citing* Op. Nev. Att'y Gen. No. 874 (February 1950).

With these legal parameters in mind, we turn to an examination of the statutes governing county authority to contract.

Cooperative agreements are statutory creations which allow certain defined political subdivisions of the State to pay another political subdivision money, or share resources, including personnel, equipment, and property, to pursue a "governmental function." NRS 277.045(1). NRS 277 defines the subject matter for several other specific cooperative agreements which local governments are authorized to enter into with each other. NRS 277.050–0695. Interlocal agreements are defined separately and primarily allow "local governments" to consolidate services based on geographic and economic factors. NRS 277.080–.180.

The foregoing statutory agreements authorized by the Legislature for use by local governments, public agencies, and/or political subdivisions are specific as to who may become a party to such an agreement. Generally, the statutes authorizing the agreement define who may become parties. *See* NRS 277.100 (public agency defined as political subdivisions of this state, agencies of this state, federal agencies, and Indian tribes); NRS 277.045 (allows only political subdivisions to participate, including counties, incorporated and unincorporated towns and cities, school districts, and special districts); NRS 277.050 (defines public agency to include the U.S., or a department or agency of the federal government, a county, a public corporation, and a public district.)

A statute in chapter 277 allows nonprofit medical organizations to participate as a party to a cooperative agreement with a public agency to purchase insurance, establish a self-insurance reserve, or fund other specific types of coverage. NRS 277.055(2). Private individuals are not mentioned in chapter 277.

The specificity with which the Legislature defines and authorizes cooperative agreements and interlocal contracts among local governments and public agencies has always been interpreted by the Nevada Supreme Court to be an expression of the legal maxim "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS," which means "the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). *See also Ronnow v. City of Las Vegas*, 57 Nev. 332, 342-43, 65 P.2d 133, 135-36 (1937) (strict construction applied to legislative grant of powers to municipality); *Clark Co. Sports v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (Legislature would have provided language of inclusion if it intended it); *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1060, 944 P.2d 835, 842 (1997) (court is reluctant to imply a right not granted by the Legislature in NRS 533.040 because of the maxim "EXPRESSIO UNIUS EST

EXCLUSIO ALTERIUS," *citing Galloway v. Truesdell*, 83 Nev. at 26, 422 P.2d at 246).

CONCLUSION TO QUESTION ONE

The absence of general statutory authority authorizing counties to enter into cooperative agreements or interlocal contracts, without regard to subject matter, with private individuals and nonprofit organizations is representative of legislative intent to deny such authority to local governments.[1]

QUESTION TWO

Does a county have the authority to contract with a nonprofit organization or an individual property owner to construct erosion control or watercourse restoration projects?

ANALYSIS

Keeping in mind the absence of general authority which would allow counties to contract with private individuals and nonprofit organizations, we have searched the relevant statutes to locate a provision that specifically authorizes the construction projects named in your inquiry. We can find no authority for such projects except as outlined in NRS 244A, a chapter devoted to financing public improvements through the issuance of county bonds, but of course, this chapter does not implicate private individuals or nonprofit organizations. NRS 271 specifically authorizes several public improvement

[1] However, the Legislature in 1999 enabled counties to enter into cooperative agreements with any owner of any property that contains a unique historical or archeological site for its preservation, restoration, and enhancement. Act of May 29, 1999, ch. 376, § 3, 1999 Nev. Stat. 1687. The 1999 Legislature also enacted a special law enabling Douglas County to enter into contracts and agreements with public and private entities for the purposes of creating a nonprofit organization to own, operate, and maintain a coordinated transit system in the Lake Tahoe Basin. Act of May 24, 1999, ch. 212, § 2, 1999 Nev. Stat. 968. And finally, the 1999 Legislature specifically allowed counties to participate as a member of a nonprofit cooperative association or nonprofit corporation to facilitate the provision of medical services to its members. Act of May 5, 1999, ch. 87, § 1, 1999 Nev. Stat. 189. These recent specific legislative authorizations lend even more force to our conclusion that there is no legislative intent to grant general authority to counties to enter into cooperative agreements or interlocal agreements with private parties and nonprofit organizations.

projects, including water projects and drainage projects, NRS 271.265(1)(c) and (o), but this law, known as the Consolidated Local Improvements Law, requires the costs of county projects to be defrayed by special assessment against the property benefited. NRS 271.045 and 271.270. The Tahoe Bond Act program cannot be administered under either of these statutory schemes.

In the materials and draft opinion submitted in support of your request for this opinion, there is no mention or reference to either of these statutory schemes; instead, you have suggested that a county's power to contract for publicly funded construction projects is controlled by NRS 332, the Local Government Purchasing Act. In your analysis of this question under chapter 332, Douglas County acts only as an "eligible county" by passing money from the Tahoe Bond Act program through to another entity. Douglas County would not be involved in the actual bidding, construction, or maintenance of any project or the hiring of an independent contractor to perform the work. Based on our review of the program and the contractual agreements already executed between the county (as sponsor) and the project applicants with the Division, we conclude that the competitive bidding procedures in chapter 338, rather than chapter 332, are contractually mandated in the agreement with the Division. When Douglas County acts to pass grant money under the Tahoe Bond Act, chapter 332 is not controlling.

The 1995 Legislature enacted and the Governor signed A.B. 13, a bill designed to carry out projects for the control of erosion and the restoration of natural watercourses in the Lake Tahoe Basin. Act of June 26, 1995, ch. 361, 1995 Nev. Stat. 907. This bill, now known as the Tahoe Bond Act, was designed as a grant program for NDOT and three counties in Nevada in the Lake Tahoe Basin and is funded through the sale of $20,000,000 in general obligation bonds in the name of the State of Nevada. The program is administered by the State Land Registrar who is authorized under the Tahoe Bond Act to adopt regulations to carry out the program of grant awards, including the procedure for applying for a grant, the criteria for the award of a grant, and whether and in what amount the grant applicant must match any grant awarded under the program.[2]

[2] In testimony before the Assembly Committee on Government Affairs on January 26, 1995, the State Land Registrar reminded the committee that her office previously administered a $31,000,000 bond act passed by the Legislature and approved by the voters in 1986, which provided that up to one-quarter of the proceeds be spent upon erosion control in the Basin. She testified that, in fact, more than $7,000,000 was spent on

The State Land Registrar adopted regulations in 1998 that define the eligible counties as Douglas, Washoe, and Carson City. NAC 321.320. The State Land Registrar and the Nevada-Tahoe Conservation District (District) entered into a cooperative agreement in which the District agreed to provide technical assistance in evaluating the grant applicants' projects. This agreement is adopted by reference in the regulations. NAC 321.335(1).

The regulations require the State Land Registrar to periodically solicit applications from eligible counties and NDOT. NAC 321.345(1). The application form is prepared by the District, provided to applicants, and describes the procedure and criteria for an award under the program. NAC 321.345(2)(a). Before a grant may be awarded, the grant recipient and the State Land Registrar must enter into an agreement defining the terms and conditions of the grant award as well as the required match. NAC 321.360.

The criteria for the award of a grant are found in a document provided to all potential applicants called the Grant Application Packet. Appendix "C" to the Grant Application Packet incorporates a requirement of every grantee to utilize the competitive open bidding procedures found in NRS 338. Thus the ultimate recipient of a grant is obligated to bid the project in accordance with State law. Because the eligible county also enters into an agreement with the Division that specifically incorporates the Grant Application Packet (and its chapter 338 open bidding procedure), we believe that chapter 332 is not implicated. In addition, chapter 332 is not applicable because Douglas County is only acting as a "pass through" agency and is not purchasing services or goods that require the expenditure of its own money.

The Tahoe Bond Act awarded grants only to local governments and NDOT. Act of June 26, 1995, ch. 361, § 1, 1995 Nev. Stat. 907. The language of the Tahoe Bond Act omits any mention or even an implication that private

(..continued)

erosion control in the Basin under that act. *Hearing on A.B. 13 Before the Assembly Committee on Government Affairs*, 1995 Legislative Session, 153 (January 26, 1995) (statement by Pamela Wilcox, Administrator, Nevada Division of State Lands). The 1999 Legislature passed another authorization for the issuance of general obligation bonds through the year 2007 in the face amount of $56,400,000 for a program of environmental improvement projects in the Lake Tahoe Basin. A.B. 285 enacts a program similar to the 1995 Tahoe Bond Act to be administered by the State Land Registrar who will oversee the issuance of grants to local governments and state agencies. Act of June 8, 1999, ch. 514, § 3, 1999 Nev. Stat. 2626.

individuals and nonprofit organizations may be recipients directly from the program; thus they must have been intended to be excluded under an application of the previously considered legal maxim, "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS." *Galloway v. Truesdell*, 83 Nev. at 26, 422 P.2d at 246.

CONCLUSION TO QUESTION TWO

A county does not have the statutory authority to contract with a nonprofit organization or an individual property owner for the construction of erosion control or watercourse restoration projects under the grant program enacted by the Legislature and approved by the voters in 1996. Should Douglas County decide to bid a project, chapter 338, not chapter 332, would govern the bid procedures. Any entity that bid on the county project would, of course, have to meet State requirements for licensing applicable to contractors.

QUESTION THREE

Does a county have authority to provide a grant to a nonprofit organization or an individual property owner for the construction of erosion control or watercourse restoration projects with Tahoe Bond funds?

ANALYSIS

As previously detailed in our analysis to Question Two, we have determined that Tahoe Bond Act grant money is available to the three counties in the Tahoe Basin and NDOT and that the counties have acted as sponsors to "pass through" grant money to other entities.

As you pointed out in your opinion request to this office, NRS 244.1505 deals directly with the subject matter of this question. The statute was added to the NRS in 1981 and until the 1999 session provided that:

> 1. A board of county commissioners may expend money for any purpose which will provide a substantial benefit to the inhabitants of the county. The board may grant all or part of the money to a private organization, not for profit, to be expended for the selected purpose.
> 2. A grant to a private organization must be made by resolution which must specify:
> (a) The purpose of the grant;

(b) The maximum amount to be expended from the grant; and
(c) Any conditions or other limitations upon its expenditure.

During the 1999 Legislative Session, two bills were introduced which sought to amend NRS 244.1505. A.B. 318 (Act of June 11, 1999, ch. 633, § 1, 1999 Nev. Stat. 3535) and S.B. 139 (Act of May 29, 1999, ch. 361, § 4, 1999 Nev. Stat. 1643) were eventually passed by the Legislature after the Assembly Committee on Government Affairs proposed an amendment to S.B. 139 (Amendment 838) reconciling the two bills, at least as far as NRS 244.1505 was concerned. The Senate eventually concurred in the amendment. Both bills were signed by the Governor.

The first sentence in NRS 244.1505 was not amended. The second sentence in NRS 244.1505(1) was materially changed to impact and narrow the available pool of potential recipients for a grant of money from a county. The second sentence now reads: "The board may grant all or part of the money to a nonprofit organization created for religious, charitable or educational purposes to be expended for the selected purpose."

So clearly, even under the new amended version of NRS 244.1505, the county may only grant money to nonprofit organizations created for religious, charitable, or educational purposes. *Worldcorp. v. State, Dep't of Taxation*, 113 Nev. 1032, 1035-36, 944 P.2d 824, 826 (1997) ("It is well settled in Nevada that when statutory language is clear on its face, its intention must be deduced from such language.") While the statutory language is not as broad as before, still the Legislature has bestowed authority on the county to grant money to a nonprofit organization, although there is still no authority to grant money to private individuals. *See Galloway v. Truesdell*, 83 Nev. at 26, 422 P.2d at 246.

In your own analysis on this question, you have acknowledged that NRS 244.1505 contains authority to grant money to nonprofit organizations, but you express concern that the legislative intent behind the Tahoe Bond Act will suffer should grants be made by the counties under this statute. Specifically, you note that NRS 244.1505 does not contain specific statutory restraints on the use of the money by the nonprofit grantees; secondly, that there is absent any mechanism to enforce state grant requirements against individual property owner-members of the nonprofit grantee should it default upon its obligations; and finally, you believe that solicitation of applications from entities other than the counties and NDOT has created a difficult administrative problem.

Addressing your first two concerns, we reviewed the NRS for similar legislative enactments of authority for the granting of money and conclude that the language under NRS 244.1505 is similar to other statutes authorizing grants of money. *See* NRS 231.068, 349.981, 428.365, 430A.100, 433.395, 442.1194, 445B.830, 459.742, 472.040(g), 483.785, and 548.178. These statutes all provide discretionary authority to grant sums of money using roughly similar language as is contained in NRS 244.1505. Some of the grants contain no control but instead merely indicate that the grantor may place such conditions on the grant as he deems necessary, including the requirement of matching money. The terms of the Legislature's grant of money and how much control is placed on the grantee is purely up to the Legislature, subject only to constitutional restraints. *See State of Nevada ex. rel. Brennan v. Bowman*, 89 Nev. 330, 332, 512 P.2d 1321, 1322 (1973) ("Public funds may not be spent for private purposes. . . . [I]f the County were to levy a tax to retire the bonds and if the purpose of the bond issue was private rather than public in nature, the law would be struck down." Nev. Const. art. 1, § 8; *State v. Churchill County*, 43 Nev. 290, 185 P. 459 (1919)).

The Tahoe Bond Act clearly allows the State Land Registrar authority to grant money only to the eligible counties and NDOT. We are not aware of any instance in which Tahoe Bond Act money has been granted to someone other than a county or NDOT. In order to comply with the regulations requiring assurances that the completed project will receive operating and maintenance funds for at least 20 years, the county must assume that responsibility itself or pass it along to the subsequent grantee (in the case of grants under NRS 244.1505) through contractual arrangements. There are no statutory or regulatory penalties or regulatory enforcement provisions applicable to a default under a grant under the Tahoe Bond Act. Enforcement must be by contractual remedy which, from Douglas County's point of view, may be a "poor substitute for the statutory and regulatory responsibility contemplated by the sixty-eighth session of the legislature," but it is, for the time being, the county's only resort. The creation of statutory or regulatory remedies for default under the Tahoe Bond Act grant program rests with the Legislature. Your ability to enter into interlocal and cooperative agreements with General Improvement Districts (GID), of which there are many in Douglas County, means that the assurances required under the Tahoe Bond Act regulations may be assumed by the GID, although there is no absolute assurance the GID will be in existence in 20 years.

Your third concern with applying NRS 244.1505 was that the Division was creating an administrative problem by soliciting applications from entities other than the counties and NDOT. In response to this concern, the State Land Registrar has said that her agency routinely gives the Grant Application Packet to anyone who walks in, since this is a public matter and part of a public agency, and her goal is to facilitate projects to protect the lake. Regardless of who picks up an application, they are notified county sponsorship is necessary under the Tahoe Bond Act.

CONCLUSION TO QUESTION THREE

A county does have the legislative authority to grant money to nonprofit organizations formed for religious, charitable, or educational purposes. A county may not grant Tahoe Bond Act money or any other money from any other source to private individual property owners to construct erosion control projects or watercourse restoration projects.

QUESTION FOUR

Are projects constructed with Tahoe Bond funds which a county grants to a nonprofit organization subject to NRS ch. 338, the prevailing wage statute?

ANALYSIS

NRS 338.020, Nevada's prevailing wage statute, mandates that in every contract in which a public body is a party, the prevailing wage in the county in which the work is located must be paid to workmen and mechanics, both skilled and unskilled, in the performance of a public work. There is an exemption from the application of the prevailing wage statute for "[a]ny contract for a public work whose cost is less than $100,000." NRS 338.080.

NRS 338.010(10) defines a "public work"[3] as:

> [A]ny project for the new construction, repair or reconstruction of:
> (a) A project financed in whole or in part from public money for:
> (1) Public buildings;
> (2) Jails and prisons;
> (3) Public roads;
> (4) Public highways;
> (5) Public streets and alleys;
> (6) Public utilities which are financed in whole or in part by public money;
> (7) Publicly owned water mains and sewers;
> (8) Public parks and playgrounds;
> (9) Public convention facilities which are financed at least in part with public funds; and
> (10) All other publicly owned works and property whose cost as a whole exceeds $20,000. . . .

"Public body" is defined in NRS 338.010(9) to include political subdivisions of the State that sponsor or finance a public work. Political subdivisions of the State include general improvement districts. NRS 318.015. From the information provided to this office regarding projects seeking grants under the Tahoe Bond Act through June of 1999, it appears that general improvement districts have been the project proponent in all but 2 of the 13 approved or pending projects to be considered by the Nevada Tahoe Conservation District technical advisory team. It does not appear that a project application by a nonprofit organization for Tahoe Bond Act funds has even been considered by the technical advisory committee.

You have asked whether the prevailing wage statute applies to nonprofit organizations that might receive funds under the Tahoe Bond Act. In your own conclusion to this question, you have acknowledged that Tahoe Bond Act

[3] Under the federal Davis-Bacon Act, 40 U.S.C. § 276a-276a-7, the term "public work" is defined to include "building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." 29 C.F.R. § 5.2(k) (1999).

funds, which are ultimately put to use by a nonprofit organization on a Tahoe Bond Act project, may not be within the definition of a "public work" in NRS 338.010(10). However, you also conclude that because the prevailing wage statute is a remedial statute, it is entitled to a liberal construction in order to effectuate the benefits to be obtained. *Colello v. Administrator, Real Est. Div.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984).

When the project proponent for Tahoe Bond Act grant money is a nonprofit organization, the prevailing wage statute applies to any project that is a public work. NRS 338.010(10) and 338.020. Under NRS 338.010(10)(a) "public work" is defined in a list of covered projects. The common denominator of each of the ten projects on the list is the requirement that the project be publicly owned and publicly financed. For example, NRS 338.010(10)(10), the last listed project category, is a catchall category which unambiguously includes "[a]ll other publicly owned works and property" within the definition of public work. As a matter of statutory construction, when a statute is clear and unambiguous, the words in the statute should be given their plain meaning without having to consult the legislative intent behind the statute. *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994). We conclude that this statute plainly and unambiguously declares the Legislature's intention to subject only publicly financed and publicly owned projects and property to the prevailing wage statute. NRS 338.020 (applies the prevailing wage statute to every contract to which a public body is a party in the performance of public work).

Should a nonprofit organization seek county sponsorship for a Tahoe Bond Act project, the prevailing wage statute would apply if title to the project is in a public body's name or if the project is constructed on publicly owned property or on property in which a public body has acquired an interest—such as a right-of-way or easement. A project constructed on private property that will not be publicly owned is not subject to the prevailing wage statute.

CONCLUSION TO QUESTION FOUR

Nevada's prevailing wage statute, NRS 338.020, applies to Tahoe Bond Act projects constructed by nonprofit organizations only if the project is publicly owned. Projects constructed on private ground and whose title is not in a public body are not subject to the prevailing wage statute—NRS 338.020.

QUESTION FIVE

May Tahoe Bond Act funds be expended for the construction of erosion control projects that are partially on private property and partially on public property?

ANALYSIS

We assume for purposes of this answer that Tahoe Bond Act funds will be expended by the county or NDOT through the process described in NAC 321.300 *et. seq*. This means in most instances that the county acts as a "pass through" agency which monitors construction carried out by a GID. Since there is a considerable amount of private land within the basin, it is likely that projects already constructed may have been constructed wholly or partially on private land.[4]

The factual predicate for your question is based on the Tahoe Regional Planning Agency's determination that a proposed GID project (which may be eligible for the Tahoe Bond Act grant) and a nearby private development project are linked together. The private development proposes to provide the match for the GID's project should it be approved for funding under the Tahoe Bond Act. Your question presupposes that, if approved, a portion of the "linked" project would be constructed on private land and a portion on public land.

We first searched the Nevada Constitution for guidance concerning the use of public funds for private purposes. The Nevada Supreme Court considered a case in 1973 in which the plaintiff challenged the use of county issued bonds, issued under the County Economic Development Revenue Bond Act (*see* NRS 244A.669 *et. seq*.), and earmarked for the acquisition and construction of pollution control facilities on private property, as a violation of the Nevada Constitution, article 1, section 8, long considered the constitutional prohibition on using public funds for private purposes.[5] *State of Nevada ex rel. Brennan*

[4] There are approximately 205,000 acres of land in the Lake Tahoe Basin; 16 percent of the Tahoe Basin is private land, 77 percent is National Forest land, and 7 percent of the basin is State land. (Source: "Presidential Commitments, Lake Tahoe Basin," July 26, 1997, revised January 1999.)

[5] Article 1, section 8(5) says: "No person shall be deprived of life, liberty, or

v. Bowman, 89 Nev. at 332, 512 P.2d at 1322. The *Brennan* Court upheld the Revenue Bond Act as a method of encouraging industry to locate in Nevada and relieve unemployment, all of which inures to the public benefit. The law was deemed to have a public purpose so that it did not run afoul of the constitutional proscription against expending public funds for private purposes. *See also State v. Churchill County*, 43 Nev. 290, 185 P. 459 (1919); *Cauble v. Beemer*, 64 Nev. 77, 82, 177 P.2d 677, 679 (1947) (court held that proposed county hospital bond issue was for a public not a private purpose so that no taxpayer will be deprived of property without due process of law under art. 1, section 8 of the Nevada Constitution).

In *Brewery Arts Ctr. v. State Bd. of Examiners*, 108 Nev. 1050, 1055, 843 P.2d 369, 373 (1992), the court held unconstitutional a statute which authorized the issuance of general obligation bonds in the name of the State of Nevada for the purpose of the preservation of cultural resources. This case is helpful to our analysis because, even though the court declared the statute unconstitutional, it noted in its analysis that the "State does not own, or propose to own, any of the property which will benefit from the bonds." *Id.* at 1055. The fact that the State proposed to grant money to benefit non-publicly owned property was not the subject of the constitutional challenge. The constitutional issue decided in *Brewery Arts* was whether public money could be spent preserving cultural resources as opposed to natural resources under article 9, section 3 of the Nevada Constitution, which authorizes the State to enter into any and all contracts for the preservation of any of its property or natural resources.

Moreover, the use of the phrase "its property" in article 9, section 3 of the Nevada Constitution has geographical rather than proprietary connotations. *Marlette Lake Co. v. Sawyer*, 79 Nev. 334, 383 P.2d 369 (1963). "Property" means *any* property or natural resources located within the geographical limits of the State of Nevada. *Id.* Thus it seems that public money may be spent to preserve and protect the State's natural resources regardless of whether public or private land is involved. The Constitutional limitation described above

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property, without due process of law." *See* Op. Nev. Att'y Gen. No. 85-13 (September 1985) (a fundamental principle of law is that public funds may not be expended for private purposes (citations omitted)); Op. Nev. Att'y Gen. No. 79-3 (February 1979) (prohibition on the use of public funds for private purposes is based on the rationale that government cannot use its taxing power to raise revenues for the use of private enterprise; taxes may only be levied for public purposes. *State v. Churchill County*, 43 Nev. at 296, 185 P. at 461).

prohibits the use of public funds for private purposes, not the expenditure of public money on private land which furthers a public purpose.

Additionally, the State Land Registrar has said that her policy in this regard would only permit the expenditure of public funds for the construction of an erosion control project on private land if the State or county receives in return a permanent interest in the land under the project such as an easement, right-of-way, or other interest that guarantees the State access to the project.

CONCLUSION TO QUESTION FIVE

Tahoe Bond Act funds may be lawfully expended for the construction of erosion control projects that are partially on public property and partially on private property.

FRANKIE SUE DEL PAPA
Attorney General

By: GEORGE H. TAYLOR
Deputy Attorney General

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AGO 2000-11 CANDIDATES; CONSTITUTIONAL LAW; ELECTIONS; LEGISLATURE; SECRETARY OF STATE: The Congressional Term Limits Act of 1996 of the Nevada Constitution violates the United States Constitution and cannot be enforced.

Carson City, April 5, 2000

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Mr. Heller:

You have requested an opinion from this office regarding the constitutionality of the Congressional Term Limits Act of 1996 (Act), added to the Nevada Constitution in 1998.

QUESTION

Does the Act, added to the Nevada Constitution in 1998, violate the United States Constitution?

BACKGROUND

In 1996 and 1998, voters of Nevada amended the Nevada Constitution to limit the number of terms an individual may serve in the United States Congress. This amendment is designated the Act. The Act seeks to limit congressional service to three terms in the House of Representatives and two terms in the Senate. NEV. CONST. Congressional Term Limits Act of 1996. To achieve this goal, the Act orders all Nevada legislators, both state and federal, to use their authority to amend the United States Constitution to impose the term limits in section B of the Act on Congress. *Id.*

If a Nevada congressman or legislator fails to comply with this order, the Act dictates that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed next to his or her name on all ballots during the next election. *Id.* at § C(2). The Act defines a congressman who fails to comply with the instructions as one who: (a) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth when brought to a vote, or (b) fails to second it if a second is lacking, or (c) fails to propose or otherwise bring

to a vote a term limit amendment conforming with the Act, or (d) fails to vote favorably on measures to bring such a vote before committee, or (e) fails to vote against all measures to delay, table or otherwise prevent a vote by the full body, or (f) fails to vote against amendments allowing longer terms of Congressional service than the Act allows, or (g) sponsors or cosponsors any proposed constitutional amendment or law that would establish longer term limits than those in the proposed Congressional Term Limits Amendment, or (h) fails to ensure that all votes on Congressional term limits are recorded and made available to the public. *Id.* at § C(2).

The Act instructs each state legislator to use all of his or her powers to pass an Article V of the United States Constitution applicable to Congress as set forth in the Act and to ratify, if proposed, a Congressional Term Limits Amendment. The Act defines a state legislator who fails to comply with the instructions as one who: (a) fails to vote in favor of the application set forth above when brought to a vote, or (b) fails to second if it lacks for a second, or (c) fails to vote in favor of all votes bringing the application before any committee or subcommittee upon which he or she serves, or (d) fails to propose or otherwise bring to a vote of the full legislative body the application, or (e) fails to vote against any delay, table or otherwise prevent a vote by the full legislative body of the application, or (f) fails in any way to ensure that all votes on the application are recorded and made available to the public, or (g) fails to vote against any change to the application, or (h) fails to vote in favor of a Congressional Term Limit Amendment if it is sent to the states for ratification, or (i) fails to vote against any term limits amendment with longer terms if such an amendment is sent to the states for ratification. *Id.* § at E(3).

The Act requires nonincumbent candidates to take a pledge to use their authority to amend the United States Constitution to impose a Congressional Term Limit Amendment. It orders that those who do not take the pledge will have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed next to their names on the ballot. *Id.* at § D (1). To avoid being so labeled on the ballot, nonincumbent candidates must take the following pledge:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

Id. at § D(3).

For both incumbent and nonincumbent candidates, the Act requires the Secretary of State to decide whether a label will be printed on the ballot and to consider public comment in making that determination. *Id*. at § F(1)-(2). The Act allows individual voters to appeal the Secretary of State's decision not to print the label by a candidate's name directly to the Nevada Supreme Court, in which case the Secretary of State must demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in the Act and therefore should not have a label printed next to his or her name. *Id*. at § F(5). The Act also permits a candidate, whom the Secretary of State decides shall have a label appear next to his or her name on the ballot, to appeal the decision to the Nevada Supreme Court, in which case the candidate must prove by clear and convincing evidence why the label should not be placed next to his or her name on the ballot. *Id*. at § F(6). The Act automatically repeals itself if and when the United States Constitution is amended in conformance with the Act. *Id*. at § G. The Act also grants the Nevada Supreme Court original jurisdiction to hear legal challenges to the Act. *Id*. at § H. Finally, the Act contains a severability clause. *Id*. at § I.

ANALYSIS

As of this date, initiatives virtually identical to the Act have been invalidated in Missouri, Arkansas, Colorado, Idaho, Maine, Nebraska, South Dakota and California in federal and state courts on various state and federal constitutional grounds. The federal constitutional grounds include violation of Article V, the First, Fifth and Fourteenth Amendments, as well as Article I, Section 6 of the United States Constitution. State constitutional grounds include violation of free speech and speech and debate clauses.[1] Based upon

[1] *See Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999) (Missouri initiative invalidated on First Amendment, Article I, and Article V grounds); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (Nebraska initiative invalidated on Article V and right to vote grounds); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998) (South Dakota initiative invalidated on Article V, First Amendment, Speech and Debate, and Due Process grounds); *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997) (Maine initiative invalidated on Article V grounds); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied* 137 L. Ed. 2d 216, 117 S. Ct. 1081 (1997) (a pre-election challenge, Arkansas initiative invalidated on Article V grounds); *Morrissey v. Colorado*, 951 P.2d 911 (Colo.

the analysis below, we conclude that the Act violates Article V of the United States Constitution, as well as the First Amendment and Article I, Section 6 of the United States Constitution. Each area is examined in detail below.

A. Article V, United States Constitution

Article V establishes the conditions under which the United States Constitution may be amended. It provides in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

There are two methods by which an amendment to the United States Constitution may be proposed and two methods by which a proposed amendment may be ratified. An amendment may be proposed (1) by a favorable vote of two-thirds in each house of Congress, or (2) by a constitutional convention when the legislatures of two-thirds of the states apply to Congress to call such a convention. Any amendment proposed either by Congress or a constitutional convention then must be ratified, either (1) by three-fourths of the state legislatures, or (2) by conventions in three-fourths of the states, as Congress chooses.

In *Hawke v. Smith*, 253 U.S. 221, 231 (1920), the United States Supreme Court struck down an amendment to the Ohio Constitution which left the state

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1998) (Colorado initiative invalidated on Article V grounds); *Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (Idaho initiative invalidated on First Amendment, Speech and Debate Clause, and state constitutional grounds); *In re: Initiative Petition No. 364, State Question No. 673*, 930 P.2d 186 (Okla. 1996) (Oklahoma initiative invalidated on Article V and state constitutional grounds); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999) (California initiative invalidated on Article V and state initiative law grounds).

legislature's ratification power subject to referendum by the people. Supporting its holding, the *Hawke* Court explained there can be no question that the framers of the United States Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had, they were no less accurate in the use of apt phraseology to carry out such purpose. *Id.* at 228; *see also Prior v. Noland*, 188 P. 729, 731 (Colo. 1920) (explaining that "the people have no power to ratify a proposed amendment to the federal Constitution . . .").

Two years later, the Supreme Court reexamined the citizens' role in the Article V ratification process in *Leser v. Garnett*, 258 U.S. 130 (1922), and concluded that the function of a state legislature in ratifying a proposed amendment to the United States Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the United States Constitution, and it transcends any limitations sought to be imposed by the people of a state. *Id*. at 137.

The United States Supreme Court held, however, that a "nonbinding, advisory referendum" on proposed constitutional amendments does not violate Article V. *Kimble v. Swackhamer*, 439 U.S. 1385, 1388 (1978). In *Kimble*, Justice Rehnquist, sitting as Circuit Justice, had before him a Nevada statute that required submission of an "advisory question" to Nevada voters regarding whether the state legislature should vote to ratify the Equal Rights Amendment. *Id.*, at 1386. The statute expressly provided that the result of the popular referendum placed no legal requirement on the members of the legislature regarding their own votes on the amendment. *Id.* Justice Rehnquist refused to grant interim relief against the referendum, noting that he "would be most disinclined to read either *Hawke* . . . or *Leser* . . . as ruling out communication between the members of the legislature and their constituents." *Id*. at 1387-88.

Contrary to the nonbinding and advisory question presented to voters in *Kimble*, other courts have determined that citizens' initiatives designed to coerce elected officials into exercising their Article V powers are unconstitutional. In this regard, the supreme courts of California and Montana have held that initiatives that threaten to withhold compensation and/or prolong legislative sessions until lawmakers pass legislation calling for a constitutional convention violate Article V. *See American Fed'n of Labor-Congress of Indus. Org. v. March Fong Eu*, 686 P.2d 609, 622, (Cal. 1984); *Montana ex rel. Harper v. Waltermire*, 691 P.2d 826, 831 (Mont. 1984).

In *Eu*, the California Supreme Court explained that Article V provides for applications by the "Legislatures of two-thirds of the several States," not by the people through the initiative. It envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise. *Eu*, 686 P.2d at 613.

Similarly, the Montana Supreme Court explained in *Harper* that the framers of the United States Constitution could have provided the people, through direct vote, a role in the Article V application process. They chose instead to solely vest this power within deliberative bodies, the state legislatures. The people through initiative cannot affect the deliberative process. *Harper*, 691 P.2d at 831.

Recently, several courts have considered whether term limits initiatives similar to the Act at issue here violate Article V.[2] Viewing the Act as a whole, there can be little doubt as to its intent or likely consequences. By its terms, the Act instructs members of the Nevada congressional delegation and state legislators to use their legislative authority to support the specific congressional term limits proposal set forth in the Act. The mandated ballot designations for both incumbent and nonincumbent candidates who do not support the Act are worded in a manner that is plainly designed to disadvantage a candidate to whose name such a designation is attached. The controlling United States Supreme Court decisions make it clear that under Article V, the process of amending the United States Constitution has been vested in the Congress and the state legislatures acting as deliberative, representative bodies, and that the voters of a state may not, through exercise of the referendum or initiative power, thwart or mandate the operation of the federal constitutional amendment process. It is therefore apparent that the Act improperly attempts to do indirectly what Article V plainly prohibits the

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[2] *See Gwadosky*, 966 F. Supp. 52; *Donovan*, 931 S.W.2d 119, *cert. denied*, 137 L. Ed. 2d 216, 117 S. Ct. 1081 (1997); *Opinion of the Justices*, 673 A.2d 693; *In re Initiative Petition No. 364*, 930 P.2d 186; *Bramberg*, 978 P.2d 1240. In each of these cases, the court concluded that the term limits initiative violated Article V because it called for negative ballot designations designed to coerce legislators into invoking their Article V powers. *See Gwadosky*, 966 F. Supp. at 63; *Donovan*, 931 S.W.2d at 128; *Opinion of the Justices*, 673 A.2d at 697; *In re Initiative Petition No. 364*, 930 P.2d at 193; and *Bramberg*, 978 P.2d at 1250.

electorate from doing directly--that is, usurp the authority assigned to Nevada's congressional members and to its state legislators in the federal constitutional amendment process, (notwithstanding NEV. CONST. art. 1, § 10, which provides that "[t]he people shall have the right freely to assemble together . . . to *instruct* their representatives . . ." is clearly superseded by Article V). Accordingly, the Act violates Article V of the United States Constitution and cannot be enforced.

B. First Amendment, United States Constitution

The First Amendment to the United States Constitution bars not only state action which restricts free expression but also state action which compels individuals to speak or express a certain point of view.[3] Free speech is dear to every American citizen, and political speech lies at the very core of the First Amendment's protection. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Buckley v. Valeo*, 424 U.S. 1 (1976).

> Free and open speech is absolutely essential to those individuals who seek public office, as well as to those who are elected to public office. Freedom of speech and debate are essential to any democratic form of government, for it is only through vigorous discussion of conflicting ideas that sound decisions are made for the good of the country at large.

Barker, 3 F. Supp. 2d at 1096, *citing Meyer v. Grant*, 486 U.S. 414 (1988).

It is hard to imagine a more chilling impact on political speech than that created by the Act at issue here. It is also difficult to see how such a provision

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[3] *See Wooley v. Maynard*, 430 U.S. 705 (1977) (In *Wooley*, the Supreme Court invalidated the conviction of a New Hampshire couple who covered the state motto "Live Free or Die" on their license plate, concluding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, (1974); cf. *Scope Pictures v. City of Kansas City*, 140 F.3d 1201 (8th Cir. 1998); *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995). Moreover, "The burden upon freedom of expression is particularly great where, as here, the compelled speech is in the public context." *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 522 (1991).

can create any greater unfairness or unnecessary burden on the availability of political opportunity. Whatever the intention of the proponents of the Act may be, the effect of the Act is to strip state legislators, federal legislators, and candidates to these offices of all rights to free speech and debate with regard to the issue of congressional term limits. The Act compels legislators and candidates to speak about term limits. First, it attempts to force legislators and candidates to speak in favor of term limits by threatening them with the ballot label if they fail to do so. Second, if a legislator or candidate refuses to speak in favor of term limits, the label on the ballot forces him or her to speak in opposition to the Act by noting that he or she failed to follow the voters' wishes. Either way, the Act does not allow legislators or candidates to remain silent on the issue, which is precisely the type of state-compelled speech that violates the First Amendment right not to speak.

First, the Act selects the topic for public debate: term limits. Second, it chooses an approved position: favoring term limits. Third, it provides the actual words that nonincumbent candidates shall speak: the pledge. Finally, in the event its attempts to compel speech in favor of term limits fail, the Act provides a mechanism to compel candidates to speak in opposition: the ballot labels. As noted above, state and federal courts have found term limit initiatives identical to the Nevada Act violative of the First Amendment.[4]

The Act is an impermissible attempt to compel legislators and candidates to express a point of view on term limits. For this reason, the Act violates the First Amendment of the United States Constitution and cannot be enforced.

C. Article I, Section 6 (Speech and Debate Clause), United States Constitution

Another issue, which applies more appropriately to incumbent federal candidates, is whether the Act violates Article 1, Section 6, Clause 1 of the United States Constitution (the Speech and Debate Clause) which states, in relevant part: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Act contravenes this guarantee because it establishes a regime in which a state

[4] *See Gralike*, 191 F.3d 911 (Missouri initiative invalidated on First Amendment grounds); *Barker*, 3 F. Supp. 2d 1088 (South Dakota initiative invalidated on First Amendment grounds); *Simpson*, 944 P.2d 1372 (Idaho initiative invalidated on state constitutional free speech grounds).

officer, the Secretary of State, is permitted to judge and punish members of Congress for their legislative actions or positions. *See Barker*, 3 F. Supp. 2d at 1096; *Simpson*, 944 P.2d at 1375; *Gralike*, 191 F.3d at 921.

The Act specifically vests in the Nevada Secretary of State the responsibility to determine when the ballot label shall appear next to the name of an incumbent candidate. *See* NEV. CONST., Congressional Term Limits Act of 1996. In so doing, he is to accept and consider public comments. *See id.* at § F. The ballot label "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" is a pejorative label with politically damaging ramifications, which amounts to punishment. *Gralike* 191 F.3d at 918. The Act establishes a scheme by which Senators and Representatives are questioned about and can be punished for speech, debate, and actions in Congress. This scheme contradicts the protections of the Speech and Debate Clause, which is intended to allow Senators and Representatives to speak and vote their conscience without fear of retribution. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats . . . that directly impinge upon or threaten the legislative process").

Therefore, portions of the Act dealing with labeling incumbent federal candidates based on their legislative speech and actions violate the Speech and Debate Clause of the United States Constitution.

CONCLUSION

The Congressional Term Limits Act of 1996, added as part of the Nevada Constitution in 1998, is invalid under Article V, the First Amendment and Article I, Section 6 of the United States Constitution and cannot be enforced.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Deputy Attorney General

AGO 2000-12 PUBLIC RECORD; TAXATION; LOCAL GOVERNMENT: State agencies may not pass on to public records requester the full amount charged by the Department of Information Technology (DoIT) for its service. Whether the cost to produce the public record is pursuant to NRS 239.005 or NRS 239.055, ordinary overhead is not contemplated in the statute by "actual cost" or in "reasonable . . . and actually incurred" cost.

Carson City, April 6, 2000

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

Dear Ms. Lockard:

You have asked the Attorney General for an opinion related to a fee to reproduce information concerning taxpayers under Nevada public records law. In response to a reporter's request to the Department of Taxation (Taxation) for information related to taxpayers, the Department of Information Technology (DoIT) was asked by Taxation to prepare a quote of costs related to compiling specific information. The quote was provided. The Nevada Press Association and the requesting reporter have protested the amount. They contend that the quoted amount should be reduced because it impermissibly encompasses an amount for overhead. NRS 242.191 requires DoIT to bill for its services to State agencies, including overhead costs. You have asked this office for guidance.

QUESTION ONE

May Taxation charge a requester the full amount charged by DoIT to Taxation for DoIT's services in creating the specific record of taxpayer information requested under the public records law?

ANALYSIS

Taxation is a "using agency" of the services of the DoIT. *See* NRS 242.068; *see also* NRS 242.131 (a using agency that is not expressly exempt must use the services and equipment of the Department of Information Technology).

In furtherance of the NRS 242.071 legislatively declared purposes of DoIT, the Nevada Revised Statutes require in part, "Each agency using the services of the department shall pay a fee for that use to the fund, which must be set by

the director in an amount sufficient to reimburse the department for the entire cost of providing those services, *including overhead*. . . ." NRS 242.211(3) (emphasis added).

The Legislature provides mandatory guidance regarding what must be included in that overhead. NRS 242.191 provides:

> 1. Except as otherwise provided in subsection 3, the amount receivable from an agency availing itself of the services of the department must be determined by the director in each case and include:
> (a) The annual expense, including depreciation, of operating and maintaining the communication and computing division, distributed among the agencies in proportion to the services performed for each agency.
> (b) A service charge in an amount determined by distributing the monthly installment for the construction costs of the computer facility among the agencies in proportion to the services performed for each agency.
> 2. The director shall prepare and submit monthly to the agencies for which services of the department have been performed an itemized statement of the amount receivable from each agency.
> 3. The director may authorize, if in his judgment the circumstances warrant, a fixed cost billing, including a factor for depreciation, for services rendered to an agency.

The using agency is subject to mandatory law that "[u]pon the receipt of a statement submitted pursuant to subsection 2 of NRS 242.191, each agency shall authorize the state controller by transfer or warrant to draw money from the agency's account in the amount of the statement for transfer to or placement in the fund for information services." NRS 242.231.

The mandatory nature of payment for DoIT service leaves using agencies in an apparent dilemma when such services are incurred in response to a valid public records request. The question arises whether it is DoIT's charges in the normal course of state business or the "actual cost" to the using agency defined by NRS 239.005 that may be passed on to the requester. A similar dilemma may be presented if fulfilling the request requires the extraordinary use of personnel or technological services. Pursuant to NRS 239.055, the fee

charged under such circumstances must be reasonable and must be based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources. This opinion will analyze the issue of the DoIT charges from both an "actual cost" for reproduction of the public record without extraordinary use of personnel or technological resources and the "reasonable cost actually incurred" for a record that requires extraordinary use of personnel or technological resources.

A. Actual cost

"'Actual cost' means the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record." NRS 239.005(1). While from the perspective of the using agency a DoIT billing resulting directly from a public records request appears to fall within the definition of actual cost to the agency, the declared legislative purpose of DoIT would suggest otherwise. The Legislature has declared in NRS 242.071:

> 1. The legislature hereby determines and declares that the creation of the department of information technology is necessary for the coordinated, orderly and economical processing of information in state government, to ensure economical use of information systems and to prevent the unnecessary proliferation of equipment and personnel among the various state agencies.
> 2. The purposes of the department are:
> (a) To perform information services for state agencies.
> (b) To provide technical advice but not administrative control of the information systems within the state agencies, county agencies and governing bodies and agencies of incorporated cities and towns.

In the context of a public records request, DoIT's charges for overhead are in lieu of an agency's fixed costs of having its own equipment and personnel housed in the agency. Clearly, if an agency had to maintain its own computer equipment and hire programming personnel, those fixed costs could not be passed to a public records requester. This logic also holds for DoIT's overhead costs passed to the agency as part of the billing for work on a public records request.

As part of DoIT's current business model, it maintains a pool of independent contractors under a Master Services Agreement (MSA Vendor). This pool is the result of periodic publication of requests for proposal to become an authorized member of the pool. Pool members provide additional proposals at the invitation of DoIT for specific project or task work orders. "If the demand for services or use of equipment exceeds the capability of the department to provide them, the department may contract with other agencies or independent contractors to furnish the required services or use of equipment and is responsible for the administration of the contracts." NRS 242.131(4).

MSA Vendors are not entitled to any compensation until they perform work pursuant to a work order. Therefore, any work order that is executed or amended due to an agency's request for services, including those due to a public records request, will be an actual cost under the meaning of NRS 239.005.

The data processed by DoIT is the property of the using agency. DoIT's services are in lieu of maintaining duplicative agency staff and equipment throughout the various state agencies. Therefore, DoIT must provide a reasonable estimate[1] for such overhead costs so a using agency can objectively determine how much of the bill is "actual cost" that can be passed to the public records requester and how much the using agency must absorb as its share of the State's regularly incurred cost.

B. Extraordinary use of technological resources

The public records law does not require a governmental entity to create a record that does not already exist. Should an agency attempt to fulfill a customized request, the agency may consider the impact on its budget before accommodating the request including the costs that are not reimbursable. If the agency is willing to fulfill a customized request, it shall then inform the requester of the associated costs. In this case, Taxation willingly asked DoIT to create the record needed by the requester. The specific record request of the reporter was not for an existing public record, but required the creation of a customized record. The reporter's request is a customized record because it

[1] DoIT's current budget did not anticipate the breakdown to the specific items relevant to overhead cost. DoIT will propose a more detailed funding formula to the next legislative session. At which time a specific formula for determining such costs would likely be available.

cannot be fulfilled by current reports or files existing in the Taxation computer system, ACES. The reporter has requested that he be provided a file containing records made up of *active* business entities who have *active* sales tax accounts. For each of these identified accounts he requested the fictitious name of the taxpayer and all of their *active* business locations in the State of Nevada. The Standard Industry Code associated with each of these businesses was also required. Sales tax data in the ACES system is stored in a Doing Business As Relational Data Base. The data is made up of individual tables, each containing some of the requested information. This is data Taxation has no need for and consequently does not create an alphanumeric business name file for its purposes. Therefore, programmer effort and resources are required to create a customized file with the content and format fitting the requester's specific needs.

Not every customized request will require the extraordinary use of personnel or technological resources but if it does, and if a fee is charged, the fee must be both reasonable and based on the cost the governmental entity actually incurs for the extraordinary use of personnel or technological resources. NRS 239.055.

For the customized record requested by the reporter in this case, the cost that DoIT is required by law to charge Taxation is, indeed, a cost actually incurred by Taxation. However, we do not find it "reasonable" pursuant to NRS 239.055 to require the requester to pay all of that cost. The requester should not be required to pay for DoIT's overhead component in that fee for the following reasons. The requester is not a "using agency" and if it was legally possible to make the request directly to DoIT, the cost actually incurred by DoIT for the creation of a customized record would be the cost for the services of an MSA vendor referenced above or the actual programming time of DoIT staff, exclusive of all other DoIT overhead. The governmental entity's ordinary overhead is not contemplated in the cost for reproduction of the public record whether for existing records or for creation or reproduction of a customized record.

CONCLUSION

The public records law does not require a governmental entity to create a record that does not already exist. Should an agency have costs associated with a customized request that are not reimbursable, the agency may consider

the impact on its budget before deciding whether to accommodate the request and the agency should inform the requester of the costs. In this case Taxation agreed to accommodate a customized request. However, Taxation cannot charge a public records requester the full amount it is billed by DoIT to provide the requested record. It cannot pass on the overhead costs built into the mandatory fee DoIT charges using agencies. DoIT must provide a reasonable estimate for such overhead costs so a using agency can objectively determine how much of the bill is "actual cost" that can be passed to the public records requester and how much the using agency must absorb as its share of the State's regularly incurred cost. Whether the fee is "actual cost" as defined in NRS 239.005 or the "reasonable . . . and actually incurred" cost for an extraordinary use of personnel or technological resources pursuant to NRS 239.055, the ordinary overhead expenses of the governmental entity is not contemplated in the cost that can be passed on to the requester.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Deputy Attorney General

RANDAL R. MUNN
Senior Deputy Attorney General

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AGO 2000-13 SCHOOL DISTRICTS; EDUCATION; PUBLIC SCHOOLS: (1) Parent, not school district, has the duty to provide equivalent instruction through home schooling or private school for pupil who is permanently expelled as habitual disciplinary problem or for being in possession of firearm, NRS 392.466; (2) principal has authority to recommend a pupil temporarily removed from classroom pursuant to NRS 392.4645 be returned or continue in temporary alternative placement if parent refuses to attend mandatory conference; and (3) middle school attendance policy which does not distinguish between excused and unexcused absences for purposes of credit is in conflict with NRS 392.122.

Carson City, April 7, 2000

Dr. Keith Rheault, Deputy Superintendent, Instructional, Research and Evaluative Services, 700 East Fifth Street, Carson City, Nevada 89701-5096

Dear Dr. Rheault:

The Nevada Department of Education is in the process of developing proposed regulation amendments in response to recent legislation related to student safety and discipline. This has given rise to the need for an attorney general opinion on the following questions.

QUESTION ONE

Are school districts required to provide equivalent instruction to pupils who are suspended or expelled pursuant to §§ 1, 2, and 3 of NRS 392.466 in light of §§ 3(a) and (b) of NRS 392.4675, which prohibits a school district from enrolling such pupils in alternative programs of instruction?

ANALYSIS

NRS 392.4675 provides:

> 1. Except as otherwise provided in this section, a pupil who is suspended or expelled from:
>
> (a) Any public school in this state pursuant to NRS 392.466; or
>
> (b) Any school outside of this state for the commission of any act which, if committed within this state, would be a

ground for suspension or expulsion from public school pursuant to NRS 392.466,

is ineligible to attend any public school in this state during the period of that suspension or expulsion.

2. Except as otherwise provided in subsection 3, a school district *may* allow a pupil who is ineligible to attend a public school pursuant to this section to enroll in:

(a) An alternative program for the education of pupils at risk of dropping out of high school; or

(b) Any program of instruction offered pursuant to the provisions of NRS 388.550.

A school district may conduct an investigation of the background of any such pupil to determine if the educational needs of the pupil may be satisfied without undue disruption to the program. If an investigation is conducted, the board of trustees of the school district shall, based on the results of the investigation, determine if the pupil will be allowed to enroll in such a program.

3. The provisions of subsection 2 do not authorize the enrollment in such a program of a pupil who is:

(a) Expelled for a second occurrence of a violation pursuant to subsections 1 or 2 of NRS 392.466; or

(b) Suspended or expelled pursuant to subsection 3 of NRS 392.466. [Emphasis added.]

NRS 392.466 addresses suspension or expulsion of a pupil for certain specific conduct. If a pupil commits a battery on an employee of the school, sells or distributes any controlled substance, or is found in possession of a dangerous weapon while on the premises of any public school, on a school bus or at an activity sponsored by the school, the statute provides for mandatory suspension or expulsion for one semester for the first offense although the pupil may be placed in another kind of school, and permanent expulsion for the second offense. If the pupil is permanently expelled for the second occurrence, he must receive equivalent instruction pursuant to NRS 392.070(1). NRS 392.466(1).

If a pupil is deemed an habitual disciplinary problem the pupil must be suspended or expelled for at least one semester and must receive equivalent instruction pursuant to NRS 392.070(1). NRS 392.466(3).

Similarly, if a pupil is found in possession of a firearm on the premises of any public school, school bus, or at an activity sponsored by the school, the pupil must for the first occurrence be expelled for not less than one year although he may be placed in another kind of school for a period not to exceed the period of the expulsion. For a second occurrence the pupil must be permanently expelled from the school and receive equivalent instruction authorized by the state board pursuant to NRS 392.070(1). The school district superintendent may allow an exception to this expulsion requirement in a particular case. NRS 392.466(2). NRS 392.070 allows a pupil to be excused from compulsory attendance in public school if the pupil is receiving equivalent instruction at home or in some other school.

There is no conflict between NRS 392.4675(3)(a) and (b), which prohibits a pupil from enrolling in any public school, and the provisions of NRS 392.466(1), (2) and (3), which requires that a student "receive equivalent instruction authorized by the state board pursuant to NRS 392.070." The requirement that a student receive equivalent instruction does not place a duty on the school district to continue the education of the pupil. It places the burden on the parent to provide the equivalent instruction by either enrolling the child in private school or instructing their child at home. This is evident by several references in the legislative history and the reference to NRS 392.070.

NRS 392.4675, enacted in 1993, was the result of Assembly Bill 741, Act of July 12, 1993, ch. 561, 1993 Nev. Stat. 2305, which was drafted and submitted at the request of the Nevada Association of School Boards (NASB) to "eliminate a problem caused to school districts when a student who has been suspended or expelled from school in one district enrolls in another." *Hearing on A.B. 741 Before the Assembly Comm. on Education*, 1993 Legislative Session, at Ex. D, 1775 (June 14, 1993) (statement of Henry Etchemendy, lobbyist for NASB).

As Mr. Etchemendy explained,

> Today we are seeing occasions where pupils who have been suspended or expelled by a district have enrolled in another during the period of that suspension or expulsion. Two things occur. The penalties resulting from the act are mostly mitigated as far as the pupil is concerned and the problems which a district has experienced, are transferred to a new district, to its staff and, most importantly to its students. AB 741 will remedy this.

Id.

In 1997, Assembly Bill 376 amended the statute, and subsection 3 was added to section 35. Act of July 16, 1997, ch. 522, 1997 Nev. Stat. 2487. The sponsor of the bill, Assemblywoman Giunchigliani, explained that a student "lost the 'privilege' of attending a public school due to his or her behavior." *Hearing on A.B. 376 Before the Assembly Subcommittee on Education*, 1997 Legislative Session, 11 (June 19, 1997). As a consequence of the student's behavior the student is designated an "habitual discipline problem" and *parents* must home school the student or enroll the student in another program. *Hearing on A.B. 376 Before the Senate Committee on Finance*, 1997 Legislative Session, 4 (July 3, 1997).

In testimony before the Assembly Committee on Ways and Means, Assemblywoman Giunchigliani explained that:

> [A] student who had threatened, extorted, or attempted to threaten or extort another student, teacher, or other personnel or had been suspended for initiating at least two fights on school property, or had a record of five suspensions from school for any reason, could be declared a habitual discipline problem. Based on that criteria, the school would hold a hearing and the student would be required to be home-schooled [by the parent] or enrolled in another non-public school.

Hearing on A.B. 376 Before the Assembly Committee on Ways and Means, 1997 Legislative Session, 4 (July 2, 1997); *see also Hearing on A.B. 376 Before the Assembly Subcommittee on Education*, 1997 Legislative Session, 11 (June 19, 1997).

Thus it is clear from the legislative history that pupils who are ineligible to attend any public school under NRS 392.4675 are to continue their education through home schooling by the parent or enrollment in a nonpublic school, as described in NRS 392.070(1). The parent is responsible for continuing the child's education, not the school district.

CONCLUSION TO QUESTION ONE

School districts are not required to provide the equivalent instruction referenced in NRS 392.070 to students who are expelled for a second occurrence of a violation pursuant to NRS 392.466(1) or (2) or suspended or expelled pursuant to NRS 392.466(3). The law places the duty to provide equivalent instruction upon the parent or guardian either by home schooling the pupil or enrolling the pupil in private school.

QUESTION TWO

A. Does a school principal have the authority to allow a pupil who was temporarily removed from the classroom pursuant to NRS 392.4645 to return to the classroom if a parent or legal guardian refuses to attend the mandatory conference pursuant to NRS 392.4646(3) in light of NRS 392.4646(4)(a) which prohibits a student from returning to the classroom if a parent or legal guardian refuses to attend the conference?

B. If the answer to Question Two A is yes, does the written notice pursuant to NRS 392.4646(3) in and of itself convey confirmation that the parent or legal guardian has waived the right to a conference?

ANALYSIS

NRS 392.4646(4)(a) *does not* prohibit a student from returning to the classroom if a parent or legal guardian refuses to attend the conference. What will occur when a conference is not held for any of the reasons in subsection (4) is governed by NRS 392.4646(6). Subsection (6) also governs what happens with the pupil after the conference is held.

The statutory scheme related to pupil discipline enacted by the Legislature in 1999, provides that the principal of each public school shall establish a school-wide plan of progressive discipline of pupils and on-site review of disciplinary decisions. NRS 392.4644. The plan is developed with input from teachers and parents and addresses the specific disciplinary needs and concerns of each school. *Id*. The plan also must provide for the temporary removal of a pupil from a classroom in accordance with NRS 392.4645. *Id.*

> The plan established pursuant to NRS 392.4644 must provide for the temporary removal of a pupil from a classroom if, in the judgment of the teacher, the pupil has engaged in behavior that seriously interferes with the ability of the

> teacher to teach the other pupils in the classroom and with the ability of the other pupils to learn. The plan must provide that, upon the removal of a pupil from a classroom pursuant to this section, the principal . . . shall provide an explanation of the reason for the removal of the pupil to the pupil and offer the pupil an opportunity to respond to the explanation. Within 24 hours after the removal of a pupil pursuant to this section, the principal of the school shall notify the parent or legal guardian of the pupil of the removal.

NRS 392.4645(1).

The temporary removal of a pupil under the school-wide plan for progressive discipline contemplates a conference within three days with the pupil, the parent or guardian, the principal and the teacher who requested the removal. NRS 392.4646. If the school does not provide for the opportunity for a conference within three days, the pupil must be returned to the classroom. However, the statute recognizes that a parent or guardian may refuse to attend the conference, may be the cause of the failure to hold the conference, or may not be able to attend a conference on such short notice. The statute allows the parent or guardian to request postponement of the conference with the pupil continuing in the temporary alternative placement pending the conference. NRS 392.4646(4)(c). However, if the parent refuses to attend the scheduled conference, the parent waives his or her right to the conference. NRS 392.4646(3). In such instances, the principal can recommend the return of the pupil to the classroom or can continue the pupil in the temporary alternative setting. NRS 392.4646(6). The principal has these options if the parent refuses to attend a conference, if the parent or guardian is the cause of the failure to hold the conference, or if the conference has, in fact, been held.

The second part of your question concerns the notice and waiver requirements.

> If a parent or legal guardian of a pupil refuses to attend a conference, the principal of the school shall send a written notice to the parent or legal guardian confirming that the parent or legal guardian has waived the right to a conference provided by this section and authorized the principal to recommend the placement of the pupil pursuant to subsection 6.

NRS 392.4646(3).

The statute is very specific. The written notice must accomplish two things. It must confirm to the parent or legal guardian that by their refusal to attend the conference they have waived the right to a conference, and by their refusal they have authorized the principal to recommend that the pupil continue in the temporary alternative placement or be returned to the classroom.[1]

CONCLUSION TO QUESTION TWO

A principal has the authority to recommend that a pupil who was temporarily removed from the classroom pursuant to NRS 392.4645 be returned to the classroom if the parent or legal guardian refuses to attend the mandatory conference. If the parent or guardian refuses to attend the conference, the principal shall inform the parent or guardian in writing that, by their refusal to attend the conference, they have waived the right to a conference and have authorized the principal to either recommend the return of the pupil to the classroom or recommend the pupil continue in the temporary alternative placement.

QUESTION THREE

Does the written regulation of the Clark County School District which includes excused absences, whether for illness or prearranged absences requested by parents or guardians, in the total number of absences allowed during a semester for course credit violate NRS 392.122(1)?

[1] NRS 392.4647 provides that the principal shall establish a committee to review the temporary alternative placement of pupils. The committee consists of the principal and two teachers selected by a majority of the teachers employed at the school. When the principal recommends that the pupil return to the classroom and the teacher who removed the pupil from the classroom disagrees with that recommendation, the committee is convened to make the decision regarding the pupil's placement and, in some instances, recommends disciplinary action. NRS 392.4648.

ANALYSIS

NRS 392.122 sets forth guidelines for school district policy on the minimum number of days of attendance necessary for promotion to the next grade. The statute prohibits the use of absences incurred by a pupil who is physically or mentally unable to attend school, or is absent for up to ten days within one school year *with* the approval of the principal or teacher pursuant to NRS 392.130 provided the pupil has completed the coursework. NRS 392.122(1)(b).

NRS 392.122 provides, in part:

> 1. The board of trustees of each school district shall prescribe a minimum number of days that a pupil who is enrolled in a school in the district must be in attendance for the pupil to be promoted to the next higher grade. For the purposes of this subsection, the days on which a pupil is not in attendance because the pupil is:
> (a) Physically or mentally unable to attend school; or
> (b) Absent for up to 10 days within 1 school year with the approval of the teacher or principal of the school pursuant to NRS 392.130 and only if he has completed course-work requirements, must be credited towards the required days of attendance.

NRS 392.130(1) describes conditions under which a pupil is deemed truant and therefore describes the circumstances for approved and unapproved absences. Attendance may be excused either 1) because the pupil is physically or mentally unable to attend; or 2) it is an absence approved by the teacher or principal. The teacher or principal *must* approve an absence if it is prearranged by the parent or guardian or for an emergency and *may* be approved for other reasons. *Id.*

For purposes of promotion the pupil must be credited with days of attendance for those days in which the pupil is absent because he is physically or mentally unable to attend and up to ten days in which his absence was approved by the teacher or principal but only if coursework was completed. Therefore, among the ten day absences that will not count against the pupil for promotion purposes are absences due to an emergency and absences prearranged by the parent provided coursework is completed. Though the parent can prearrange for absences longer than ten days, and the pupil cannot

be considered truant for those days, school district policy can count those days as days the pupil is not in attendance for promotion purposes.

Clark County School District Attendance Regulation 5113, section III(B) states that:

> Secondary students who exceed ten (10) absences in any course will not earn credit for that course and may be retained in the current grade. . . . Excused (approved) and unexcused (unapproved) absences are counted in the total number of absences for purposes of attendance enforcement except as noted in Section III, paragraph two, i.e. partial day absences as a result of required medical or dental appointments.

Until recently, promotion to a next grade has not been part of the formal structure of high school. To complete high school a pupil earned the minimum number of credits and passed the high school proficiency examination. A pupil was considered to be in the 10th grade because the pupil was in attendance in their second year of high school. The pupil participated in the social life of high school as a member of the 10th grade. It is not unusual for some pupils in the 10th grade to be appropriately enrolled in a 9th grade class or appropriately enrolled in an 11th grade class. However, recently the State Board of Education adopted regulations that designate for the first time a minimum number of credits to be completed in order for the high school pupil to be promoted to the next grade. For example, with certain exceptions which allow the local school district superintendent to waive the requirement, in order for the pupil in 9th grade to be promoted to 10th grade, the pupil must earn 5 units of credit. To be promoted to the 11th grade, he or she must earn 11 units of credit.

The Clark County School District attendance policy prevents the pupil from earning credit for the course in which the absences occurred whether the absences were approved or unapproved. The policy is invalid pursuant to NRS 392.122 because earned course credit is necessary for promotion to the next grade in high school and the policy ignores the statutory requirement that certain absences, some of which must meet certain conditions, must be credited towards the required days in attendance for promotion purposes. The policy does not distinguish between excused and unexcused absences in its limits for course credit.

CONCLUSION TO QUESTION THREE

The provisions of Clark County School District Attendance Policy 5113, section III, which does not distinguish between excused and unexcused absences in determining whether a student will receive course credit, is invalid as it is in conflict with NRS 392.122.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Deputy Attorney General

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AGO 2000-14 GOVERNOR; MARRIAGE; VITAL STATISTICS: Nevada authorities will recognize a marriage, birth, or death certificate if the French Consulate provides evidence of its authority to perform a marriage or establish a birth or death certificate. Nevada law does not provide for any specific authority to the French Consulate to produce these records.

Carson City, April 5, 2000

Scott Scherer, Chief of Staff, Office of the Governor, 101 North Carson Street, Carson City, NV 89701

Dear Mr. Scherer:

The Office of the Governor requested an opinion concerning the competence of foreign consuls with regard to the registration of civil status. Specifically, the request referred to an inquiry by the Consulate General of France in Los Angeles in a letter dated March 24, 1999. The French Consulate states that they presently register the births, marriages, and deaths of nationals upon presentation of an American certificate. Their inquiry about whether Nevada recognizes a marriage of two French nationals residing in America does not specify where the marriage would take place. In addition, the letter does not explain the circumstance under which the French Consulate intends to establish a birth or death certificate. Attempt was made to obtain further information from the French Consulate on these issues, but they have not yet responded to my request.

QUESTION ONE

Would the authorities of Nevada recognize the marriage of two French nationals who reside on American soil by the Consuls General of France?

ANALYSIS

The letter from the French Consulate does not specify where the proposed marriage might take place. In Nevada, the bride and groom must obtain a marriage certificate from a Nevada county clerk pursuant to NRS 122.040, and the marriage must be solemnized pursuant to NRS 122.010. Licensed or ordained ministers and chaplains of the Armed Forces may obtain a certificate from the county clerk to solemnize a marriage. NRS 122.062. Solemnization of marriage may also be done by any supreme court justice, district judge, justice

of the peace, municipal judge, and commissioner and deputy commissioner of civil marriages. NRS 122.080. Foreign consuls are not specifically authorized to solemnize a marriage in Nevada under Nevada law. Therefore, a marriage of two French nationals in Nevada requires a Nevada marriage certificate and solemnization by an appropriate individual.

Nevada specifically recognizes the validity of a marriage between Indians performed by tribal custom within closed Indian reservations and Indian colonies upon filing a specific certificate of declaration. NRS 122.160. Our statutes do not specifically address the validity of a marriage conducted by a foreign consul. In their letter, the French Consulate has not described their authority for marrying two French nationals.

Pursuant to the principles of full faith and credit contained in Article IV, Section 1 of the United States Constitution, Nevada authorities recognize marriage certificates authorized by another state. I have been unable to find any specific authority granted to the French Consulate by the State of California. ALBA WITKIN, SUMMARY OF CALIFORNIA LAW (9th ed. 1999) *cites to* RESTATEMENT, (SECOND), CONFLICT OF LAWS at § 283 (1988 Revisions), which provides that "[t]he practice of United States consuls is to be present officially only at such marriages as comply with the requirements of the country where celebrated." Pursuant to Article VI of the United States Constitution, any authority of the French Consulate to marry individuals which is provided by treaty or federal law would be recognized in Nevada. Therefore, the specific circumstances and applicable authority would dictate whether the marriage could be recognized by Nevada authorities.

CONCLUSION TO QUESTION ONE

The marriage of two French nationals in Nevada requires a Nevada marriage certificate and solemnization by an appropriate individual absent some specific authority granted to the French Consulate to perform such services.

QUESTION TWO

Is a foreign consul authorized to establish a birth or death certificate for a French citizen?

ANALYSIS

In their letter, the French Consulate describes the present practice of registering births, marriages, and deaths of French nationals upon presentation of an American certificate. The letter does not explain any different practice for establishing birth or death certificates.

If a French national dies in Nevada or has a child in Nevada, Nevada issues a death or birth certificate in accordance with the provisions set forth in NRS 440. Similarly, an American certificate is produced by any state in which a birth or death occurs. Under these circumstances, an American certificate would be available regardless of whether the French Consulate issued a similar document. Again, if a federal law or treaty authorizes the French Consulate to establish a birth or death certificate, Nevada authorities would recognize the document pursuant to Article VI of the United States Constitution.

CONCLUSION

This inquiry of whether Nevada authorities recognize birth, marriage, or death certificates established by the French Consulate cannot be answered without further explanation of the location and circumstances surrounding the establishment of the certificate. Nevada law does not provide for any specific authority to the French Consulate to produce these records. Nevada authorities will recognize the document if the French Consulate provides evidence of its authority to perform a marriage or establish a birth or death certificate.

FRANKIE SUE DEL PAPA
Attorney General

By: LINDA C. ANDERSON
Deputy Attorney General

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AGO 2000-15 INSURANCE; MENTAL ILLNESS; SMALL BUSINESSES: Regulations promulgated by the federal Health Care Financing Administration requiring each health insurer in the state to offer to each small employer of 2 to 50 employees the same coverage preempts a state statute that exempts health insurers from providing mandated severe mental health coverage to employers with 2 to 25 employees.

Carson City, May 3, 2000

Ms. Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5453

Dear Ms. Molasky-Arman:

You have requested an opinion from this office regarding the following:

QUESTION

In light of a recent bulletin received by the Department of Business and Industry, Division of Insurance (Division), from the federal Health Care Financing Administration (HCFA), Department of Health and Human Resources, regarding certain federal statutes and regulations pertaining to insurers offering health insurance coverage to small employers, should Op. Nev. Att'y Gen. No. 99-34 (Oct. 1999) (AGO 99-34) be reconsidered?

ANALYSIS

In AGO 99-34, this office considered a direct conflict between several provisions of Nevada law regarding health insurance coverage for severe mental illness for small employers and determined that the more specific and later enacted section controlled.[1] In the present opinion request, the Division provided this office with a bulletin from HCFA that points out certain federal

[1] The opinion determined that a provision exempting insurers from providing severe mental health coverage in group policies to employers with 25 or fewer employees took precedence over other more general provisions that require that every policy issued to any small employer, defined as an employer with 2 to 50 employees, contain the severe mental health coverage.

statutes and regulations governing the provision of health care by insurers to small employers, which are contained within the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* 42 U.S.C. §§ 300gg to 300gg-92, inclusive. The question is whether these federal statutes and regulations conflict with the Nevada statutes and whether the federal authority would have a preemptive effect on Nevada law.

The "all products guarantee" established by HIPAA is found at 42 U.S.C. § 300gg-11(a)(1) and requires that "[E]ach health insurance issuer that offers health insurance coverage in the small group market in a State . . . must accept every small employer . . . in the State that applies for such coverage." 45 CFR § 146.150(a)(1) is the HCFA regulation that clarifies this statute and states that a health insurer offering insurance coverage in the small group market must "[o]ffer, to any small employer in the State, all products that are approved for sale in the small group market and that the issuer is actively marketing, . . ." "Small employer" is defined at 42 U.S.C. § 300gg-91(e)(4) as an employer employing 2 to 50 employees. These federal provisions appear to directly conflict with a provision of Senate Bill 557 (1999) (S.B. 557), which requires health insurers to provide coverage for certain severe mental illnesses enumerated in HIPAA but specifically exempts policies delivered or issued to employers with no more than 25 employees from this requirement. *See* §§ 2(4)(a), 3(4)(a), and 4(4)(a) of S.B. 557 now codified as NRS 689B.0359(4)(a), NRS 695B.1938(4)(a), and NRS 695C.1738(4)(a).

Whether these federal provisions preempt the provisions of S.B. 557, which exempt employers with 25 or fewer employees, depends on the application of well-established principles of federal preemption. Those principles were stated succinctly in *National State Bank, Elizabeth, N. J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980):

> Federal legislation does not preempt a field traditionally within the state's police power unless that is the clear and manifest purpose of Congress. *Rice v. Sante Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947). That purpose may be found if federal regulation is so pervasive there is no room for the state to supplement it.

With regard to the all products guarantee and accompanying regulations under HIPAA, the federal regulation in this area is so pervasive that there is no question that any state statutes in direct conflict with the federal regulation are

preempted. In the present case, the sections of S.B. 557 that exempt insurers from providing certain mental health coverage in policies for employers of 2 to 25 employees are in direct conflict with the federal regulations, which state that any health insurance carrier must offer any plan offered to any small employer to all small employers. The statute as a whole is not preempted because 42 U.S.C. § 300gg-23(a)(1) states that the all-products guarantee "shall not be construed to supercede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of . . . ." the requirement. The part of S.B. 557 that exempts insurers from providing the mandated mental health coverage in group policies to small employers of 2 to 25 is therefore the only part of S.B. 557 that would be preempted. Insurers and issuers of policies to small employers, therefore, would have to provide the coverage for severe mental illness to employers of 2 to 25 employees to comply with the federal mandates.

CONCLUSION

The sections of S.B. 557 that exempt insurers providing group coverage to employers of 2 to 25 employees from the requirement to provide coverage for the treatment of severe mental illness are preempted by the requirements of federal law under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which mandates that all small employers in the state with 2 to 50 employees be offered the same coverage. Because insurers must provide severe mental health coverage in all group policies issued, which includes small employers with 26 to 50 employees, such coverage must be contained in policies issued to employers with two to 25 employees. In light of the federal mandates under HIPAA, which conflict with Nevada law, AGO 99-34, has been reconsidered and is hereby withdrawn.

FRANKIE SUE DEL PAPA
Attorney General

By: EDWARD T. REED
Deputy Attorney General

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AGO 2000-16 INSURANCE; LICENSES; STATUTES: Under NRS 683A.260(1)(b), a person may hold a limited insurance agent's license for both credit insurance and fixed annuities.

Carson City, May 3, 2000

Ms. Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5453

Dear Ms. Molasky-Arman:

You have requested an opinion from this office regarding the following:

QUESTION

Whether NRS 683A.260(1)(b) prohibits a person from holding a license to engage in the solicitation and sale of more than one of the limited lines of insurance enumerated in paragraph (b) of section 1 of the statute?

ANALYSIS

The provisions of NRS 683A.260(1)(b) were first enacted in Senate Bill 534 (1981) (S.B. 534). This bill added credit insurance and fixed annuities as types of insurance that could be sold as part of an insurance agent's "limited" license. The statute now reads as follows:

> NRS 683A.260 Limited licenses.
> 1. The commissioner may issue a limited agent's license to an applicant qualified under this chapter:
> (a) Who represents public carriers and in the course of his representation solicits or sells insurance incidentally to the transportation of persons or to the storage or transportation of property;
> (b) Whose insurance activities are limited to the solicitation and sale of:
> (1) Credit insurance, as defined in NRS 690A.015, and credit property and casualty insurance; or
> (2) Fixed annuities; or

> (c) Who is a short-term lessor of passenger cars licensed pursuant to NRS 482.363 whose insurance activities are limited to the solicitation and sale of insurance requested by a lessee pursuant to NRS 482.3158, where the insurance is offered within an agreement to lease a vehicle as optional insurance which is in effect only during the term of the lease of the vehicle.
>
> 2. Except as otherwise provided in NRS 683A.180, the commissioner may adopt regulations which require the applicant to pass an appropriate examination before the issuance of a license pursuant to this section.
>
> 3. Except for a bank or a bank holding company, or a parent, subsidiary or affiliate of a bank that may be licensed to sell fixed and variable annuities, and credit insurance as defined in NRS 690A.015, a person to whom a license is issued pursuant to this section may not concurrently hold any other license authorized by this chapter.

The question is whether under NRS 683A.260(1)(b) a person may hold a credit insurance limited license or fixed annuity limited license, but not both, or whether the statute allows a person to sell both types of insurance under one limited license.

The first rule of statutory construction is the so-called "plain meaning rule." "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) (citation omitted). Use of the word "or" between subsections (1) and (2) of NRS 683A.260(1)(b) would appear to indicate that a person is permitted to have a limited license under only one of the two types of limited licenses listed in subsection (b). However, as you point out in your letter requesting this opinion, the Legislature by using "or" rather than "and" may have simply wanted to indicate that a person could, but did not have to, hold a limited license for both types of insurance. If the Legislature had used the word "and" as a conjunctive, it could be interpreted to require a person to hold a limited license for both types.

Due to these varying interpretations of the statute, the statute is ambiguous as to this point. Therefore, other sources such as legislative history, legislative intent, and analogous statutory provisions may be consulted. *See Moody v. Manny's Auto Repair*, 110 Nev. 320, 325, 871 P.2d 935, 938-39 (1994). A review

of the legislative history of S.B. 534 does not reveal any conclusive evidence of legislative intent regarding this issue.

Because there is nothing in the legislative history that is persuasive on this issue, we must look to whether one interpretation of the statute would produce an absurd or unreasonable result and whether the other interpretation would produce a reasonable result. A number of Nevada Supreme Court cases have held that a statute should be construed to produce a reasonable result over an unreasonable result. "We will not construe a statute to produce an unreasonable result when another interpretation will produce a reasonable result." *Breen v. Caesars Palace*, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986) (citation omitted). *See also Polson v. State*, 108 Nev. 1044, 1047, 843 P.2d 825, 826 (1992) (ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended); *Alsenz v. Clark Co. School Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993) (statutory interpretation should avoid unreasonable results).

In reviewing the legislative history of NRS 683A.260 and what it purports to accomplish, there is no apparent reason why a person should be limited to only one type of limited license under NRS 683A.260(1)(b). There is nothing apparent from the legislative history or other sources to indicate that the Legislature intended that a person should only hold a credit limited license or a fixed annuities limited license, but not both. The Legislature gave the Commissioner of Insurance (Commissioner) the discretion to adopt regulations under section 2 of the statute to require an examination, if necessary, and therefore if the Commissioner decided that having a limited license for either credit insurance or fixed annuities or both would require special knowledge, the Commissioner could require an examination. Therefore, because the most reasonable interpretation is to allow a person to hold both a credit insurance and fixed annuities limited license, this office finds that the statute allows a person to hold both a credit limited license and a fixed annuities limited license.

CONCLUSION

NRS 683A.260(1)(b) is ambiguous as to whether a person may hold only one of the types of limited licenses listed under that section. Therefore, as there is nothing in the legislative history conclusive on this issue, the statute should be construed in light of what is reasonable and avoid an unreasonable result. Because there is no apparent reason to limit a person to only one type of limited license under subsection (b), this office construes NRS 683A.260(1)(b) as

allowing a person to hold either a credit insurance limited license under NRS 683A.260(1)(b)(1), a fixed annuities limited license under NRS 683A.260(1)(b)(2), or a limited license under NRS 683A.260(1)(b) for both credit insurance and fixed annuities.

FRANKIE SUE DEL PAPA
Attorney General

By: EDWARD T. REED
Deputy Attorney General

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AGO 2000-17 SCHOOL DISTRICTS, PUBLIC SCHOOLS; TAXATION: A pupil who attends a noncharter public school of White Pine School District by telecommunication, but who lives in a county not adjoining the district, cannot be counted for basic support guarantee purposes unless the pupil fits within the exceptions referenced in NRS 392.010.

Carson City, May 25, 2000

Mary Peterson, Superintendent of Public Instruction, 700 East Fifth Street Carson City, Nevada 89701-5096

Dear Ms. Peterson:

White Pine County School District (WPSD) operates Nova Center, a computer-based program for pupils who have not completed high school. Using a variety of sources, including State Technology funds and Adult High School Diploma funds, WPSD launched the program two years ago to meet the needs of its pupils who had dropped out of high school. Nova Center is housed in a storefront in Ely and is open during nontraditional hours. A licensed teacher is available at the center to assist pupils and generally supervise, but the curriculum is individualized and delivered electronically to pupils who attend the site and, under certain criteria, to pupils who do not attend the site.

WPSD seeks to expand Nova Center statewide. They wish to provide their program electronically to pupils throughout the State of Nevada. The intent is to admit and enroll these pupils and receive funding for them through the Distributive School Account (DSA).

QUESTION

May a pupil who attends the Nova Center by telecommunication, but who lives in a county not adjoining WPSD, be "counted" by WPSD as a pupil for basic support guarantee purposes?

ANALYSIS

The count of pupils is a crucial element in determining what each district's basic support will be per pupil. The basic support per pupil is the average amount of funding for each pupil, which the State guarantees will be paid to the

school district from three sources: (1) a 25 cent per $100 assessed valuation of property tax; (2) the 2.25 cents/$1.00 sales tax for schools; and (3) the State DSA. NRS 387.1235. The count of pupils is also the data element that determines what the actual payments from the State will be for the school year.

A pupil who attends the Nova Center by telecommunication but lives in a county not adjoining WPSD may not be counted by WPSD for basic support guarantee purposes. Our analysis will demonstrate why such a pupil may not be counted by WPSD.

Private counsel for the school district contends that NRS 387.123(1) and NRS 387.1233(1)(a)(1)—(2) allow pupils from throughout the State to attend Nova Center and be "counted" by WPSD to receive payment from the DSA. First, we must emphasize that Nova Center is not a charter school. It should be noted that NRS 387.123 and NRS 387.1233 were amended in the 1997 Session of the Legislature to accommodate charter schools.[1] The amending language is what counsel and the school district focus on to assert that pupils do not have to reside in the county in which the school district is located to be counted. Their focus does not consider NRS 392.010. The amending language only applies to charter school pupils and does not change the meaning of the statutes as they relate to noncharter public schools.

NRS 387.123(1) as amended in 1997 added the language shown in italics as follows:

> The count of pupils for apportionment purposes includes all [those] *pupils* who are enrolled in programs of instruction of the school district *or pupils who reside in the county in which the school district is located and are enrolled in any charter school* for:
>
> (a) Pupils in kindergarten department.
>
> (b) Pupils in grade 1 to 12, inclusive.
>
> (c) Pupils not included under paragraph (a) or (b) who are receiving special education pursuant to the provisions of NRS 388.440 to 388.520, inclusive.

[1] NRS 387.1233(1)(a)(1)—(2), Calculation of Basic Support, provides the method of computation for basic support of each school district. In 1997 it was amended with the similar language amending NRS 387.123(1) to include "[t]he count of pupils . . . who reside in the county . . . and are enrolled in any charter school . . . ."

> (d) Children detained in detention homes, alternative programs and juvenile forestry camps receiving instruction pursuant to the provisions of NRS 388.550, 388.560 and 388.570.
>
> (e) Pupils who are enrolled in classes pursuant to subsection 4 of NRS 386.560.
>
> (f) Pupils who are enrolled in classes pursuant to subsection 3 of NRS 392.070.
>
> (g) Part-time pupils enrolled in classes and taking courses necessary to receive a high school diploma, excluding those pupils who are included in paragraphs (e) and (f).

Act of July 16, 1997, ch. 480, § 34.4, 1997 Nev. Stat. 1840 (emphasis added).

While we emphasize that Nova Center is not a charter school, it is helpful to understand the count of pupils for apportionment purposes as it relates to charter schools (which are public schools) and noncharter public schools.

Since the 1997 Legislative Session, NRS 386.580(1) provides that a pupil may enroll in any charter school regardless of the county in which he or she resides. However, for purposes of apportionment, which include the basic support guarantee, the pupils are "counted" by their school district of residence. If a pupil from one school district attends a charter school in another school district, NRS 387.123(1) provides that the charter school enrollment is reported under the school district in which the pupil resides.

The portion of the funding attributable to the charter school pupils is payable to the charter school by the school district of residence. As a matter of practice, the Nevada Department of Education transmits the funds directly to the charter school on behalf of the district. Currently there is one charter school in a school district (Churchill County School District) that has among its enrollment pupils who reside in another school district (Lyon County School District).[2]

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[2] Because the elements that make up the total basic support vary in amount among the districts, the per pupil amount is different for each school district. The lowest amount for the current school year is $4,494 and the highest amount is $10,964 (attributed to unique circumstances in Eureka County). The per pupil amount that the charter school in Churchill County School District receives for its pupils who reside in Lyon County School

The 1997 amendment to NRS 387.123(1) was necessary to address funding for charter schools precisely because NRS 386.580(1) *allowed the enrollment of pupils in a charter school who do not live in the school district which granted the charter*. However, nothing in the legislative history of the 1997 legislative amendments to NRS 387.123(1) suggests that *noncharter school* pupils can enroll in a program of instruction of a school district without regard to where the pupil resides. In addition, NRS 392.010 and NRS 392.040(1) prohibit us from concluding that the apportionment statutes imply otherwise.

First, NRS 392.040(1) states that each parent shall send the child to a public school in the school district in which the child resides. Aside from charter school pupils, NRS 392.010 provides or references to the exceptions to that rule. NRS 392.010 makes it clear that WPSD can admit certain pupils who do not reside in WPSD. WPSD can enroll pupils from an Indian reservation located in two or more counties pursuant to NRS 392.015, pupils who have been suspended or expelled pursuant to NRS 392.466, pupils who are offenders and prohibited from attending the school the victim attends pursuant to NRS 392.264, and pupils from an adjoining state or district if the superintendent of public instruction approves and there is a mutually agreed upon tuition agreement. NRS 392.010. The tuition is paid by the school district that sends the pupil to the adjoining school district. This is consistent with the apportionment statutes which "count" the pupil in the district of the pupil's residency.

NRS 392.010 is the exception to the rule that pupils must attend the district in which they reside. The statute has carefully enumerated the exceptions and the conditions for the exceptions. It demonstrates the sensitivity to the funding issues by allowing the general exception only for adjoining districts, only with permission of the state superintendent, and only with an agreement from the district that sends the pupil as to the funding. Allowing all pupils to freely enroll without regard to school district boundaries may change the equities of school financing in such a way that restructuring of the system may need to be considered. Without express exception in statute we cannot conclude that the Legislature intended that all other school districts, except adjoining districts, are not bound by the statute that requires pupils to enroll in the district where they reside.

(..continued)
District is $5,504, while the amount it receives for its pupils who are residents of Churchill County School District is $5,223.

Therefore, unless the pupil who is not a resident of WPSD satisfies one of the exceptions set forth in NRS 392.010, WPSD Nova Center cannot enroll that pupil and receive the basic support for that pupil. It is the plain meaning of NRS 387.123 that the count of pupils for apportionment purposes of all pupils who are enrolled in programs of instruction of the school district is limited to those pupils who can be lawfully enrolled in the program of instruction.[3]

CONCLUSION

In general, a pupil who attends Nova Center by telecommunication, but who lives in a county not adjoining White Pine County School District (WPSD), cannot be "counted" by WPSD as a pupil for basic support guarantee purposes. Pursuant to NRS 392.010, the pupil cannot lawfully be enrolled unless he or she fits within the exceptions referenced in NRS 392.010 and provided in NRS 392.015, NRS 392.4675, and except as otherwise provided in NRS 392.264 and NRS 392.268. If WPSD desires to expand its program to enroll pupils who do not live in adjoining school districts or otherwise do not fit within one of the exceptions in NRS 392.010, the school district should seek legislative change to allow it.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Deputy Attorney General

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[3] Our opinion does not preclude arrangements whereby a school district that is not adjoining WPSD agrees to contract with WPSD to provide services to its pupils. Such pupils would be enrolled and attending in their district of residence and WPSD would be a provider at a negotiated contract price. This opinion does not address the parameters of the services allowable or requirements for their delivery.

AGO 2000-18 OPEN MEETING LAW; PUBLIC BODIES; BALLOTS: Committees appointed pursuant to NRS 295.217 are not public bodies as defined by NRS 241.015(3) when they do not expend, disburse, or are supported, in whole or in part,, by tax revenue and when they will not give advice or make recommendations to any entity which expends or disburses, or is supported, in whole or in part, by tax revenue. Accordingly, such committees are not governed by the provisions of the Open Meeting Law.

Carson City, June 2, 2000

Bradford R. Jerbic, City Attorney, Larry G. Bettis, Deputy City Attorney City of Las Vegas, 400 East Stewart Avenue, 9th Floor, Las Vegas, Nevada 89101

Dear Messrs. Jerbic and Bettis:

You have requested an opinion from this office as to whether committees appointed pursuant to NRS 295.217 are subject to the requirements of the Nevada Open Meeting Law, chapter 241 of the Nevada Revised Statutes.[1] Specifically, the question is:

QUESTION

Is a committee appointed by the Las Vegas City Council or the City Clerk pursuant to NRS 295.217, which provides that a committee be appointed to prepare arguments advocating and opposing approval of ballot questions for a city, a "public body" as that term is defined in NRS 241.015(3), and hence governed by the Nevada Open Meeting Law?

ANALYSIS

By way of background, in 1999, legislation was passed to require that a city council appoint a committee to prepare arguments advocating and opposing approval of ballot questions that may appear on the ballot. Specifically, NRS 295.217 provides:

> 1. In a city whose population is 50,000 or more, for each initiative, referendum or other question to be placed on the ballot by the council, including, without limitation, pursuant

[1] The legislative history is silent on this issue.

to NRS 293.482 or 295.215, the council shall, in consultation with the city clerk, pursuant to subsection 2, appoint a committee of six persons, three of whom are known to favor approval by the voters of the initiative, referendum or other question and three of whom are known to oppose approval by the voters of the initiative, referendum or other question. A person may serve on more than one committee. Members of the committee serve without compensation. The term of office for each member commences upon appointment and expires upon the publication of the sample ballot containing the initiative, referendum or other question.

2. Before the council appoints a committee pursuant to subsection 1, the city clerk shall:

(a) Recommend to the council persons to be appointed to the committee; and

(b) Consider recommending pursuant to paragraph (a):

(1) Any person who has expressed an interest in serving on the committee; and

(2) A person who is a member of an organization that has expressed an interest in having a member of the organization serve on the committee.

3. If the council of a city whose population is 50,000 or more fails to appoint a committee as required by subsection 1, the city clerk shall appoint the committee.

4. A committee appointed pursuant to this section:

(a) Shall elect a chairman for the committee;

(b) Shall meet and conduct its affairs as necessary to fulfill the requirements of this section;

(c) May seek and consider comments from the general public;

(d) Shall prepare an argument advocating approval by the voters of the initiative, referendum or other question, and prepare a rebuttal to that argument;

(e) Shall prepare an argument opposing approval by the voters of the initiative, referendum or other question, and prepare a rebuttal to that argument; and

(f) Shall submit the arguments and rebuttals prepared pursuant to paragraphs (d) and (e) to the city clerk not later than the date prescribed by the city clerk pursuant to subsection 5.

5. The city clerk of a city whose population is 50,000 or more shall provide, by rule or regulation:

(a) The maximum permissible length of an argument or rebuttal prepared pursuant to this section; and

(b) The date by which an argument or rebuttal prepared pursuant to this section must be submitted by the committee to the city clerk.

6. Upon receipt of an argument or rebuttal prepared pursuant to this section, the city clerk shall reject each statement in the argument or rebuttal that he believes is libelous or factually inaccurate. Not later than 5 days after the city clerk rejects a statement pursuant to this subsection, the committee may appeal that rejection to the city attorney. The city attorney shall review the statement and the reasons for its rejection and may receive evidence, documentary or testimonial, to aid him in his decision. Not later than 3 business days after the appeal by the committee, the city attorney shall issue his decision rejecting or accepting the statement. The decision of the city attorney is a final decision for the purposes of judicial review.

7. The city clerk shall place in the sample ballot provided to the registered voters of the city each argument and rebuttal prepared pursuant to this section, containing all statements that were not rejected pursuant to subsection 6. The city clerk may revise the language submitted by the committee so that it is clear, concise and suitable for incorporation in the sample ballot, but shall not alter the meaning or effect without the consent of the committee.

8. In a city whose population is less than 50,000:

(a) The council may appoint a committee pursuant to subsection 1.

(b) If the council appoints a committee, the city clerk shall provide for rules or regulations pursuant to subsection 5.

Nevada Revised Statute 241.015(3) defines a public body as:

> Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405. "Public body" does not include the legislature of the State of Nevada.

Hence, a threshold requirement for an entity to be considered a "public body" under the Open Meeting Law is that the entity be expending, disbursing, or supported, in whole or in part, by tax revenue, or give advise or make recommendations to a public body subject to the Open Meeting Law.

You have informed us that the committees to be appointed by either the Las Vegas City Council or the city clerk pursuant to NRS 295.217 will not be expending, disbursing, or supported, in whole or in part, by tax revenue. Rather, the committees will be voluntary and self- supporting. Further, you have informed us that the committees will not give advice or make recommendations to the Las Vegas City Council, or any other public body. Rather, as set forth in the statute, each committee will submit its statement to the city clerk for acceptance or rejection. If the statement is accepted by the city clerk, the city clerk is required to place the statement in the sample ballot provided to the registered voters of the city, subject to revisions the city clerk is permitted to make in order to ensure the statement is clear, concise, and suitable for incorporation in the sample ballot. The city clerk is not a public body under the Open Meeting Law.[2] Accordingly, the committees appointed

[2] A "public body" must be a multi-member entity. *See* Op. Nev. Att'y Gen. No. 241 (August 24, 1961).

by the Las Vegas City Council or the city clerk are not, under the set of facts presented, public bodies governed by the Open Meeting Law.[3]

CONCLUSION

The committees to be appointed by the Las Vegas City Council or the city clerk are not public bodies as defined by NRS 241.015(3) because they do not expend, disburse, or will be supported, in whole or in part, by tax revenue, and because they will not give advice or make recommendations to the Las Vegas City Council or other public body. Accordingly, the committees are not governed by the provisions of the Nevada Open Meeting Law.

FRANKIE SUE DEL PAPA
Attorney General

By: VICTORIA T. OLDENBURG
Deputy Attorney General

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[3] Note that this opinion would not apply to a committee created pursuant to NRS 295.217 that expended, disbursed, or was supported, in whole or in part, by tax revenue, or that gave advise or made recommendations to a public body.

AGO 2000-19 TRAVEL EXPENSES; REIMBURSEMENT; COUNTIES: The Washoe Board of County Commissioners may not adopt a flat vehicle allowance in lieu of the cents-per-mile allowance provided in NRS 245.060 and NRS 281.160.

Carson City, June 2, 2000

Richard A. Gammick, District Attorney, Maureen Sheppard-Griswold, Deputy District Attorney, Office of the District Attorney, Washoe County Courthouse, Post Office Box 30083, Reno, Nevada 89520-3083

Dear Mr. Gammick and Ms. Sheppard-Griswold:

You have asked this office for an opinion concerning proper methods of reimbursing certain county officers for their travel by private conveyance.

QUESTION

May the Washoe Board of County Commissioners (Board) use a flat vehicle allowance in lieu of the per-mile allowance provided for in NRS 245.060 and NRS 281.160?

ANALYSIS

You have indicated that the Board and other elected county officers travel frequently in their personal vehicles, often several times per day, on county business. The trips are generally local, for attendance at a variety of meetings. The frequency of the trips generates a substantial amount of record keeping due to the county's current policy of reimbursing county officers for travel by private vehicle on a cents-per-mile basis pursuant to NRS 245.060 and NRS 281.160. The ability to pay these officers a flat travel reimbursement in lieu of the cents-per-mile reimbursement would simplify the reimbursement process and eliminate the need for this type of record keeping.

NRS 245.060 provides in relevant part: "[T]he board of county commissioners . . . may allow for traveling by private conveyance an amount not to exceed the maximum per-mile allowance for travel by private conveyance of state officers and employees specified in subsection 3 of NRS 281.160."

Until 1973, NRS 245.060 specified that reimbursement for private travel would be calculated on a cents-per-mile basis, without reference to NRS 281.160. During the 1973 Legislative Session, the Nevada Legislature amended NRS 245.060 to tie the amount of mileage reimbursement to the amount authorized for state officers and employees by NRS 281.160(3). Act of May 3, 1973, ch. 774, § 1, 1973 Nev. Stat. 1675.

NRS 281.160(3) provides in relevant part:

> The state board of examiners, on or before July 1 of each year, shall establish the rate of the allowance for travel by private conveyance. The rate must equal the standard mileage reimbursement rate for which a deduction is allowed for the purposes of federal income tax that is in effect at the time the annual rate is established.

At its January 2000 meeting the State Board of Examiners adjusted the State reimbursement rate for private conveyance to 32.5 cents per mile.

The authority of the Board is generally restricted to whatever powers it is granted by the Legislature. "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State Ex. Rel. King v. Lothrop,* 55 Nev. 405, 408, 36 P.2d 355, 358 (1934) (citation omitted). In *King*, the court held void a resolution of the Lyon County Board of Commissioners (Commissioners) which ordered the issuance of bonds for the repair of the earthquake-damaged Lyon County Courthouse. It was undisputed that the building had been rendered unsafe for its inhabitants, creating an emergency need for the repair. The Commissioners' legal basis for the resolution was a series of three statutes which, when read together, authorized the Commissioners to provide for the issuance of bonds to *build or purchase* necessary county buildings. The court pointed out a different statute which authorized the Commissioners to *repair* public buildings, but noted that no bond issuance authority accompanied that purpose. Accordingly, the court held that the Commissioners had, by passing a resolution for the issuance of bonds for repair of the building, exceeded the express statutory authority granted it to issue bonds to build or purchase county buildings.

The principle enunciated in *King* has been applied in opinions issued by this office. In 1952 Washoe County produced legal forms for the county offices

on county-owned equipment operated by county employees. This office was asked if that practice was contrary to a particular statute which stated in relevant part: "All public printing required by the various counties . . . shall be placed with some bona fide newspaper, or bona fide commercial printing establishment within the county requiring same." Op. Nev. Att'y Gen. No. 151 (March 3, 1952). In finding that Washoe County's practice of in-house printing was contrary to the statute, we referred to *King* for authority and opined:

> It is clear that no authorization either expressly or by implication is conferred by the above-quoted statute which permits the county to obtain its supply of printed matter in any other manner than by placing the job requirement with a bona fide newspaper or bona fide commercial printing establishment.

Op. Nev. Att'y Gen. No. 151 (March 3, 1952).

We have applied the principle stated in *King* when considering the authority of a board of county commissioners to provide a rate for subsistence different from the rate provided in NRS 245.060. The Lincoln County Board of Commissioners was considering a creative proposed ordinance which would reduce the salary of police officers by $5 per day, which amount would then be designated as a subsistence allowance. The intended result was to be a reduction in the federal income tax liability of the police officers. This office cited the provision which provided the sole statutory authority for living and travel expense reimbursement for county officers, NRS 245.060, and opined:

> We believe that the rate therein specified for reimbursing these particular officers and employees is exclusive and that boards of county commissioners are without authority, either express or implied, to prescribe additional or different rates. That county commissioners have no powers other than those granted by the Legislature was effectively stated in The First National Bank of San Francisco v. Nye County, 38 Nev. 123, where the court said: "It has been repeatedly decided by this court that boards of county commissioners are of special and limited jurisdiction, and that authority to do any act must have specific statutory provision therefore, or must be clearly implied from other language contained in the statute."

Op. Nev. Att'y Gen. No. 397 (July 23, 1958). We have therefore formerly opined that NRS 245.060 provides the sole rate for reimbursing county employees for travel expenses and that a board of county commissioners has no authority to prescribe different or additional rates of reimbursement.

As noted above, in 1973 NRS 245.060 was amended to adopt the NRS 281.160(3) cents-per-mile reimbursement formula fixed by the State Board of Examiners for purposes of reimbursing county officers for travel by private conveyance. In 1950 this office had occasion to consider whether the formula set forth in the predecessor statute to NRS 281.160 allowed payment of a flat monthly travel reimbursement to a State employee. The predecessor statute read essentially the same as NRS 281.160 does today but provided for a specific cents-per-mile reimbursement. During an audit, the Legislative Auditor challenged the practice of the State Planning Board in paying a fixed $40 per month reimbursement to a Planning Board employee for travel by private conveyance. Relying on the principle of law stated in the *King* case, we opined: "We cannot find any authority in the Act creating the State Planning Board for the . . . [flat monthly payment procedure]. We are of the opinion that the provisions of [the predecessor statute to NRS 281.160] control in fixing the amount of money allowed for necessary traveling by private conveyance for employees of the State Planning Board." Op. Nev. Att'y Gen. No. 869 (February 14, 1950). We have therefore formerly opined that NRS 281.160's predecessor statute provided the sole method allowed for reimbursing a State employee for travel by private conveyance and that payment of a flat monthly payment was contrary to that statute.

The statutory scheme which exists today for reimbursement of county officers for travel by private conveyance is essentially the same as that which has existed historically. NRS 245.060 refers to the cents-per-mile formula which has been adopted for State officers and employees by the State Board of Examiners pursuant to NRS 281.160(3). The only legislatively authorized method of reimbursement for travel by private conveyance is based on that cents-per-mile formula. Accordingly, under the holding of the *King* decision and our previous opinions on this subject, we conclude that the Board may not adopt a flat vehicle allowance in lieu of the cents-per-mile allowance provided in NRS 245.060 and NRS 281.160(3). To do so would be contrary to those statutory provisions.

CONCLUSION

The Washoe Board of County Commissioners may not adopt a flat vehicle allowance in lieu of the cents-per-mile allowance provided in NRS 245.060 and NRS 281.160.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2000-20 BOARDS AND COMMISSIONS; FINES; FUNDS. The effective date of the reimbursement provision of NRS 632.090(3) is October 1, 1993, and any fine money deposited by the State Board of Nursing to the State general fund pursuant to that subsection on or after that date is subject to reimbursement pursuant to that subsection. The maximum amount payable for a claim filed pursuant to NRS 632.090(3) is the sum of the attorney's fees and costs of the investigation associated with that claim or the amount of the fines credited to the State general fund, whichever is less, for that claim. Each claim must be based on allowable costs associated with a single case in which fines were imposed. Fine money collected pursuant to a section 3 claim, but not reimbursed for payment of appropriate costs, reverts to the State general fund and therefore is not available for the payment of other claims.

Carson City, June 8, 2000

Don W. Hataway. Deputy Budget Director, Department of Administration, 209 East Musser Street, Room 200, Carson City, Nevada 89701-4298

Dear Mr. Hataway:

You have asked several questions concerning the application of certain provisions of NRS 632.090.

QUESTION ONE

What is the effective date of the reimbursement provision of NRS 632.090(3) and what money may be properly reimbursed pursuant to that subsection?

ANALYSIS

Chapter 632 of NRS governs, among other things, the practice of nursing in the State of Nevada. Generally, the State Board of Nursing (Board), through its executive director, must deposit money collected by the Board under authority of chapter 632 of NRS into a bank, credit union or savings and loan association. The Board may use all the money collected to pay "all expenses incurred in the administration" of chapter 632. NRS 632.090(1). Money collected from the imposition of fines is treated specially and more narrowly. Where the Board delegates hearing authority to an independent arbiter, such as a hearing officer or panel, money collected from fines may be collected and deposited in the

same manner as in subsection 1. NRS 632.090(2). However, where an independent arbiter is not used by the Board, and fines are collected, the rule is different. NRS 632.090(3) provides:

> If a hearing officer or panel is not authorized to take disciplinary action pursuant to subsection 2 and the board deposits the money collected from the imposition of fines with the state treasurer for *credit to the state general fund*, it may present a claim to the state board of examiners for recommendation to the interim finance committee if money is needed to pay *attorney's fees or the costs of an investigation*, or both. [Emphasis added.]

We are advised that the procedure set forth in subsection 3 was established in answer to complaints that a licensee would be denied due process of law where the board which was imposing fines could keep and use the money collected, without any review or oversight by an independent reviewing entity.

Subsection 3 was added to NRS 632.090 in 1993 as part of Assembly Bill 235, later enacted into law as Act of June 25, 1993, ch. 307, § 6, 1993 Nev. Stat. 883, 885 (Act). Since no specific effective date was prescribed for the Act, its effective date was October 1, 1993. NRS 218.530. Legislative enactments have a prospective effect unless a contrary intent is clearly manifested in the statute. *Rice v. Wadkins*, 92 Nev. 631, 555 P.2d 1232 (1976). Since the first operative language of subsection 3 concerns the deposit by the Board of collected fine money, we believe that the reimbursement provision of subsection 3 is operative on any fine money deposited by the Board pursuant to subsection 3 on or after October 1, 1993.

CONCLUSION TO QUESTION ONE

The effective date of the reimbursement provision of NRS 632.090(3) is October 1, 1993, and any fine money deposited by the Board to the State general fund pursuant to that subsection on or after that date is subject to reimbursement pursuant to that subsection.

QUESTION TWO

What is the maximum amount payable to the Board for a claim filed pursuant to NRS 632.090(3)?

ANALYSIS

NRS 632.090(3) is written to refer to a single disciplinary action. "If *a* hearing officer or panel is not authorized . . ." [emphasis added], money from the imposition of fines may be collected and deposited. The reimbursement provision is also drafted to refer to a single disciplinary action, with the amount of the Board's claim limited to money needed "to pay attorney's fees or the costs of *an* investigation." [Emphasis added.] This suggests an intent to treat each disciplinary case separately for purposes of the deposit of fines and a claim for reimbursement. The language would appear to require the Board to file a claim for the cost of attorney's fees or an investigation for each case where fines are collected, with any reimbursement limited to the amount of the fines deposited or the amount of fees and investigation costs attendant with that particular case, whichever is less. Since the language of the statute on this point is not crystal clear and may be subject to another interpretation, we may refer to the legislative history of the Act to search for evidence of legislative intent. *Roberts v. State, Univ. of Nevada Sys.*, 104 Nev. 33, 752 P.2d 221 (1988). Legislators' statements are entitled to consideration in construing a statute when they are a reiteration of events leading to the adoption of proposed amendments, rather than an expression of personal opinion. *A-NLV Cab Co. v. State, Taxicab Authority*, 108 Nev. 92, 825 P.2d 585 (1992). In discussing the purpose of A.B. 235, Assemblyman Humke, then Chairman of the Assembly Committee on Commerce's Subcommittee on A.B. 235, addressed the Assembly Committee on Commerce:

> He indicated the amendment included language which resolved that concern [constitutionality of administrative hearing conducted by a board imposing a fine] and which provided an administrative board could recover amounts *equal* to the costs of its *investigation* and its processing of *an action only*, and any *amounts* [of fines] *it recovered in excess of the amounts of those costs would revert to the state's general fund* (emphasis added).

Hearing on A.B. 235 Before the Assembly Committee on Commerce, 1993 Legislative Session, 717 (May 17, 1993). Mr. Humke's comments concerning

the purpose of A.B. 235 confirms our interpretation that claims filed by the Board for reimbursement under NRS 632.090(3) must be filed for each case in which a fine is imposed and that each resulting reimbursement must be limited to the amount equal to the amount spent by the Board for attorney's fees and investigation costs, or the amount of the fines imposed, whichever is less, for that individual case. Further, Mr. Humke's testimony clarifies that fine money which is not necessary for the payment of appropriate costs reverts, on an action by action basis, to the State general fund and would therefore not be available for the payment of other reimbursement claims.

CONCLUSION TO QUESTION TWO

The maximum amount payable for a claim filed pursuant to NRS 32.090(3) is the sum of the attorney's fees and costs of the investigation associated with that claim or the amount of the fines credited to the State general fund, whichever is less, for that claim. Each claim must be based on allowable costs associated with a single case in which fines were imposed. Fine money collected pursuant to a section 3 claim, but not reimbursed for payment of appropriate costs, reverts to the State general fund and therefore is not available for the payment of other claims. Any change to these reimbursement limitations would have to be addressed by the Legislature.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2000-21 CLASSIFIED EMPLOYEES; STATUTES; PERSONNEL. An attorney employed under contract by the Employers Insurance Company of Nevada, who has never served in the classified service, is not entitled to the reemployment benefit provided in section 132 of Senate Bill 37 of the 1999 Nevada Legislature.

Carson City, June 8, 2000

Jeanne Greene, Director, Department of Personnel, 209 E. Musser Street, Room 101, Carson City, Nevada 89701-4204

Dear Ms. Greene:

You have asked our opinion as to the applicability of a certain provision of Senate Bill 37 of the 1999 Nevada Legislature to a certain contract employee of the Employers Insurance Company of Nevada (EICON).

QUESTION

Is an attorney employed under contract by EICON, but without ever having served as a classified employee, entitled to the reemployment benefit provided in section 132 of Senate Bill 37 of the 1999 Legislative Session (S.B. 37), codified as Act of May 29, 1999, ch. 388, § 132, 1999 Nev. Stat. 1756, 1840?

ANALYSIS

The subject attorney was formerly employed under contract by the State Industrial Insurance System (SIIS). Pursuant to section 129 of S.B. 37, SIIS was transformed into EICON, a private, domestic mutual insurance company, effective January 1, 2000. Act of May 29, 1999, ch. 388, § 129, 1999 Nev. Stat. 1756, 1838. The subject attorney continued under a contract of employment with EICON. The employment contract ends June 30, 2001. The subject attorney has never been employed by the State of Nevada as a classified or unclassified employee.

Three sections of S.B. 37 govern the rights of former SIIS employees to reemployment, sections 130—132. Section 130 provides certain reemployment rights to certain employees who were laid off by SIIS before January 1, 2000, providing in relevant part:

> **Sec. 130.** 1. A *classified* employee of the state industrial insurance system who:
> (a) Is employed by the system on July 1, 1999; and
> (b) Is laid off by the state industrial insurance system before January 1, 2000,
> is entitled to the rights to *reemployment* provided by chapter 284 of NRS and the regulations adopted pursuant thereto, including, without limitation, the right to be placed on an *appropriate reemployment list maintained by the department of personnel* . . . .

Act of May 29, 1999, ch. 388, § 130, 1999 Nev. Stat. 1756, 1839 (emphasis added).

Section 131 of S.B. 37 determines the reemployment rights of certain former SIIS employees who were laid off by EICON after SIIS was abolished on January 1, 2000, providing in relevant part:

> **Sec. 131.** 1. . . . [An EICON employee] who:
> (a) Is employed on January 1, 2000, by . . . [EICON];
> (b) Was employed as a *classified* employee by the state industrial insurance system on June 30, 1999; and
> (c) Is laid off by . . . [EICON] on or after January 1, 2000, but before January 1, 2003,
> is entitled to the rights to *reemployment* provided by chapter 284 of NRS and the regulations adopted pursuant thereto, including, without limitation, the right to be placed on an *appropriate reemployment list maintained by the department of personnel* . . . .

Act of May 29, 1999, ch. 388, § 131, 1999 Nev. Stat. 1756, 1840 (emphasis added). Sections 130 and 131 are therefore clearly limited in their application to former classified employees of SIIS.

The relevant provision of section 132 is subsection 2, which provides:

> **Sec. 132.** 2. If . . . [EICON] receives the assets and assumes the debts and liabilities of the state industrial [sic] system on January 1, 2000, pursuant to section 129 of this act, a *person who is employed* on January 1, 2000, by that company:

> (a) May request the department of personnel to place his name on an *appropriate reemployment list maintained by the department* and is entitled to be allowed a preference on that list. Upon receipt of such a request, the department shall maintain such an employee on the reemployment list until January 1, 2002, or until he is *reemployed* by the executive branch of state government, whichever occurs earlier.
>
> (b) Notwithstanding the provisions of chapter 284 of NRS or the regulations adopted pursuant thereto, is not subject to any probationary period otherwise applicable to his initial *reemployment to a position in the classified service* of the state.

Act of May 29, 1999, ch. 388, § 132, 1999 Nev. Stat. 1756, 1840—1841 (emphasis added).

Because sections 130 and 131 each refer specifically to a "classified employee," and since section 132 does not specifically mention a classified employee and instead refers to a "person employed by," the question is whether section 132's application extends only to persons who were formerly classified employees of SIIS, as with sections 130 and 131, or to all persons employed by EICON on January 1, 2000, including the subject contract attorney.

A. Statutory and Regulatory Framework of the Reemployment Process

To consider the meaning of the above-emphasized terms in the context of section 132 we must first examine their meaning within the context of the Nevada Revised Statutes and the Nevada Administrative Code. The general authority of the Director of the Department of Personnel (Director) to adopt regulations is set forth in NRS 284.155, which provides:

> 1. The director shall adopt a code of regulations for the *classified service* which must be approved by the [personnel] commission.
>
> 2. The code must include regulations concerning certifications and appointments for:
>
> (a) Positions in *classes* having a maximum salary of $12,500 or less as of December 31, 1980, where the regular procedures for examination and certification are impracticable; and

> (b) *Classes* where applicants for promotion are not normally available.
> These regulations may be different from the regulations concerning certifications and appointments for other positions in the *classified service*. [Emphasis added.]

The Director's authority to adopt regulations concerning appointments is therefore generally limited to the classified service.

The term "reemployment" is used in NRS 284.380 in the context of the rights of a person who is laid off for certain reasons:

> 1. In accordance with regulations, an appointing authority may lay off an employee in the *classified service* whenever he deems it necessary by reason of shortage of work or money or of the abolition of a position or of other material changes in duties or organization.
> 2. Among other factors, an appointing authority shall consider, in the manner provided by regulation, the status, seniority and service rating of employees in determining the order of layoffs.
> 3. Within a reasonable time before the effective date of a proposed layoff, the appointing authority shall give written notice thereof to the director. The director shall make such orders relating thereto as he considers necessary to secure compliance with the regulations.
> 4. The name of every regular employee so laid off must be placed on *an appropriate reemployment list.* [Emphasis added.]

NRS 284.380(1) provides for the layoff of only classified employees, and the "appropriate reemployment list" provided in NRS 284.380(4) is therefore limited only to the names of classified employees who have been laid off. Accordingly, we are advised that the Department of Personnel has never created a reemployment list for positions other than classified positions.

The term reemployment is defined in NAC 284.095 as:

> [A] noncompetitive appointment of a *current or former employee to a class for which he has reemployment rights,*

> as provided in this chapter, because of military service, layoff, a permanent disability arising from a disability related to work, seasonal separation, reallocation, or reclassification of his position to a lower grade. [Emphasis added.]

The reemployment rights referred to in NAC 284.095 are particularly set forth in NAC 284.630:

> 1. The names of *permanent* employees who have received their notices of layoff will be placed on the statewide reemployment list for the *class and option* of the position involved in the layoff, in order of seniority. If applicable, the names will be integrated with the names of employees who are eligible for reemployment pursuant to NAC 284.6014. The agency and the employee shall provide the necessary information for reemployment on the form prescribed by the department of personnel for the employee to be placed on the reemployment list.
> 2. The names of *permanent* employees who have received their notices of layoff will also be placed on the statewide reemployment list for other *classes* for which they qualify, in order of seniority, but behind those identified in subsection 1, if those *classes* do not respectively exceed the level of the *class* from which the employee was laid off. If applicable, the names will be integrated with the names of employees who are eligible for reemployment pursuant to NAC 284.6014. It is the affected employee's responsibility to demonstrate his interest in, and qualifications for, the *classes* for which reemployment is sought within 30 days after the date set for his layoff.
> 3. Part-time employees are not entitled to be reemployed in full-time positions and full-time employees are not entitled to be reemployed in part-time positions.
> 4. Seniority must be projected and counted up to the established layoff date, or transfer date if the provisions of NAC 284.390 apply. Seniority determines ranking on all reemployment lists. The amount of seniority will not be recalculated unless the holder is affected by a subsequent layoff.

> 5. Each person on the list retains eligibility for appointment there for 1 year from the date he was laid off. Except as otherwise provided in this section, reemployment rights are exhausted when a person accepts or declines an offer of employment in the *class or a comparable class* with the *same grade* from the department and geographical location from which he was laid off. Any exception to this provision may be made only if approved by the department of personnel. When a person accepts a position at a *grade* lower than that held at the time of layoff, his name will be removed from all reemployment lists that are equal to or below the *grade* accepted.
>
> 6. A *permanent* employee who has been laid off and is being reemployed in the department, *class*, and option from which he was laid off must have his permanent status restored. A *permanent* employee who is reemployed in a different *class* or in a different department than from which laid off shall serve a *new probationary period*. If the employee does not complete the probationary period his name must be restored to the appropriate reemployment list for any remaining part of the year following the date on which he was laid off. When the right to reemployment expires, the person affected retains his right to reinstatement or reappointment pursuant to NAC 284.386 or 284.404, respectively. [Emphasis added.]

NAC 284.630 therefore clearly contemplates that only classified employees be afforded reemployment rights. The section further requires that the position to which the person is reemployed be a classified position selected based on a comparison to the class, grade, and option of the employee's former classified position. *See also* NAC 284.385(3), which provides: "The grade of the class at which a person is reemployed cannot exceed the current *grade of the class he formerly held*." [Emphasis added.]

In summary, the cited statutes and regulations concerning reemployment anticipate that reemployment be made from a position formerly held in the classified service to another position in the classified service because: (1) the Department of Personnel's regulation adoption authority extends generally only to regulations for the classified service; (2) pursuant to the Department of Personnel's statutory authority, and as set forth in the Department's regulations, reemployment lists are limited to lists of positions in the classified

service; (3) an employee's placement on a reemployment list generally requires a comparison to the class, grade, and option of the classified position formerly held by the employee; and (4) the grade at which a person is reemployed cannot exceed the current grade of the class which he formerly held.

B. The Scope of the Application of Section 132 is Ambiguous

In reading section 132, we are cognizant of the tenet of statutory construction, "[w]hen the language of a statute is plain, its intention must be deduced from that language." *Hedlund v. Hedlund*, 111 Nev. 325, 328, 890 P.2d 790, 792 (1995). However, statutory language is "ambiguous if it is capable of being understood in two or more senses by reasonably informed persons." *Hager v. Nevada Medical Legal Screening Panel*, 105 Nev. 1, 3, 767 P.2d 1346, 1347 (1989). We believe that there is a conflict to be found on the face of section 132. Section 132 on the one hand speaks of reemployment rights for a "person who is employed" on January 1, 2000. Since section 132 is not limited in application to a classified employee, the language could mean that section 132 applies to persons other than classified employees, such as the subject contract attorney.

On the other hand, section 132 uses the terms "reemployed," "reemployment to a position in the classified service," and "appropriate reemployment list maintained by the department." These terms are defined and limited in the statutory and regulatory reemployment scheme to apply only to classified service. Because of the legislative references in section 132 to those technical terms, we believe the Legislature could have contemplated rights of reemployment in section 132 to be limited as set forth in chapter 284 of NRS and NAC, only to former classified employees. It is a general rule of statutory construction that, "technical words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import." *In Re Estate of Lewis*, 39 Nev. 445, 452—453, 159 P. 961, 963 (1916).

Further, "[t]he legislature is presumed to have a knowledge of the state of the law upon the subjects upon which it legislates." *Clover Valley Co. v. Lamb*, 43 Nev. 375, 383, 187 P. 723, 726 (1920). We believe this to be especially true with regard to regulations such as those in chapter 284 of NAC, which have the force and effect of law and which have been approved by the Legislative Commission as being within the statutory authority of the Department of Personnel, following a form of legislative review. NRS 233B.040(1) and .067(1). Since the Legislature chose the technical terms

referring to reemployment in sections 130 and 131, as well as in section 132, and absent any language to the contrary, one could conclude that the Legislature chose to give them their special meanings as set forth in the statutory and regulatory framework, and intended they only apply to former classified SIIS employees.

Therefore, we find a conflict on the face of section 132 as to whether the reemployment rights granted therein were intended to extend only to former classified employees of SIIS, as with the clear language of sections 130 and 131, or were intended to include all EICON employees employed on January 1, 2000, including the subject contract attorney.

C. Determination of Legislative Intent

Having determined that section 132 is ambiguous, we may turn to extrinsic aids in an effort to find what the Legislature intended in its enactment. It is appropriate to review the public legislative records on file at the Legislative Counsel Bureau for this purpose. *Hotel Employees v. State Gaming Control Bd.*, 103 Nev. 588, 747 P.2d 878 (1987). "When a statute is of doubtful import and subject to opposite meanings, limited resort may be had to testimony and committee discussions concerning the legislation in question." *Bd. of Cty.Comm'rs. v. White,* 102 Nev. 587, 590, 729 P.2d 1347, 1350 (1986). We have scoured the 285 pages of minutes of legislative committee meetings and exhibits relating to S.B. 37 to see what testimony was offered on the applicability of section 132. At only one place was section 132's applicability discussed, and it was discussed in conjunction with the intended applicability of sections 130 and 131, as well. During a presentation to the Assembly Committee on Commerce and Labor, Leonard Ormsby, General Counsel for EICON, testified:

> Mr. Ormsby continued by pointing out sections 130, 131, and 132 addressed the reemployment rights of *classified* personnel. All employees would go on the re-employment list for a maximum of 24 months. The provision would apply not only to permanent state employees, but probationary employees as well. Section 133 provided for the establishment of a fund . . . .

Hearing on S.B. 37 Before the Assembly Committee on Commerce and Labor, 1999 Legislative Session, 204 (May 12, 1999) (emphasis added). This testimony indicates the intention of S.B. 37's main proponent, EICON, was to limit the

reemployment benefits of sections 130 to 132 apply only to classified State employees. We have found no testimony throughout the legislative history of S.B. 37 which indicates an intention to provide professional contract employees any reemployment rights.

We further note that an interpretation of section 132 to provide reemployment rights to a contract employee who has performed no previous classified service would require the Department of Personnel to somehow "shoehorn" the contract employee into a classified position without statutory or regulatory guidance. As noted above, the regulations concerning reemployment require that an employee be placed on an appropriate reemployment list based on a comparison of the employee's previous class, grade, and option in his former classified position. Where a professional contract employee has no previous classified service to base such a comparison on, the Department of Personnel is left without the tools to make a comparison and would have no ability or authority to place the employee on an appropriate reemployment list. However, we further note that the Legislature has provided a mechanism whereby persons who have not had previous classified service are allowed to *transfer* into the classified service. NRS 284.3775(1) provides in relevant part:

> [E]mployees of the supreme court, employees in the unclassified service of the executive branch of the government of the State of Nevada, or employees of the legislative branch of the government of the State of Nevada who have served for 4 consecutive months or more are *entitled to transfer to a position having similar duties and compensation in the classified service on the same basis as employees may transfer within the classified service . . .* [Emphasis added.]

Transfers within the classified service are generally made from one position to another in the *same or related class*. NAC 284.390. Employees of the Supreme Court, Legislature, and employees in the unclassified service do not hold positions which are classified and therefore have no "same or related class" for purposes of comparison with a position to be transferred to in the classified service. Apparently to overcome this obstacle, the Legislature provided for the transfer of these employees to the classified service based solely on a comparison of "similar duties and compensation." This forms a basis for a comparison between positions in the Supreme Court, legislative branch, and

unclassified service with positions in the classified service. No such authorizing language was provided in section 132 to allow a comparison between the professional contract employee's position and a position in the classified service for purposes of reemployment.

In enacting NRS 284.3775, the Legislature has demonstrated an understanding that a direct comparison of positions which are not classified to positions which are classified is not possible. The Legislature provided the flexible language, "similar duties and compensation" in NRS 284.3775 to facilitate such a comparison, but failed to include similar language in section 132. If the Legislature had intended that employees other than classified employees should be entitled to the reemployment benefits of section 132, it could have easily provided clear authority and language similar to the "similar duties and compensation" language of NRS 284.3775. The Legislature's failure to provide that authority and to include that language is indicative of an intent not to afford persons other than classified employees the reemployment benefits of section 132. *See Ramacciotti v. Ramacciotti*, 106 Nev. 529, 795 P.2d 988 (1990) (if the Legislature intended to require that a motion to modify child support obligation could only be made before a child reaches 18 years, it could have included such a requirement in the statute).

For the above reasons, we conclude that an attorney employed under contract by EICON is not entitled to the reemployment benefits provided in section 132 of S.B. 37.

Finally, we are advised that you may be in possession of an opinion on this topic which was not authored by the Attorney General. We would point out that the Attorney General is the official legal adviser on State matters arising in the executive branch of State government, NRS 228.110, and further serves as official legal counsel for purposes of written opinions to executive agency heads. Good faith reliance by an executive agency head provides the agency head protection from certain kinds of damages. "[W]here government officials are entitled to rely on opinions of the state's Attorney General, and do rely in good faith, they are not responsible in damages to the governmental body they serve if the Attorney General is mistaken." *Cannon v. Taylor*, 88 Nev. 89, 91—92, 493 P.2d 1313 (1972). We point out that no such similar protection exists for State agency heads when relying on opinions authored by persons or agencies other than the Attorney General.

CONCLUSION

An attorney employed under contract by the Employers Insurance Company of Nevada, who has never served in the classified service, is not entitled to the reemployment benefit provided in section 132 of Senate Bill 37 of the 1999 Nevada Legislature.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2000-22 RESIDENCE; ZONING; IMPROVEMENT DISTRICTS: Condominium owners and tenants may file protests to inclusion in an assessment plat for a business improvement district pursuant to NRS 271.392 if the condominium unit itself is used exclusively for residential purposes; apartment owners and tenants may also file such protests if no part of the apartment building or complex is used for commercially leased space; motel owners, resident managers and persons renting motel rooms may not file such protests.

Carson City, July 7, 2000

Patricia A. Lynch, City Attorney, Michael K. Halley, Deputy City Attorney, Post Office Box 1900, Reno, Nevada 89505

Dear Ms. Lynch and Mr. Halley:

You have asked the opinion of this office on the issue of who may file a protest to inclusion in an assessment plat for a business improvement district. Your questions are based on the fact that the Downtown Reno Partnership Steering Committee is in the process of preparing a petition to the Reno City Council to establish a Business Improvement District as authorized by Senate Bill 530 of the 1999 Nevada State Legislature, now codified in chapter 271 of the Nevada Revised Statutes.

QUESTION ONE

May a condominium owner or his tenant who resides in a building that leases commercial space file a protest to the condominium's inclusion in an assessment plat for a commercial area revitalization project pursuant to NRS 271.392?

ANALYSIS

The applicable statute is NRS 271.392, which states that, "a person who owns or resides within a tract which: (a) is located within the proposed improvement district; and (b) is used exclusively for residential purposes, may file with the clerk a written protest to the inclusion of the tract in the assessment plat. . . ." Under the statute, either the owner or anyone who resides within a condominium unit could file a protest, but only if the second

condition is met. The second condition requires that the tract be used exclusively for residential purposes. A "tract" is defined as:

> . . . any tract, lot or other parcel of land for assessment purposes, whether platted or unplatted, regardless of lot or land lines. Lots, plots, blocks and other subdivisions may be designated in accordance with any recorded plat thereof; and all lands, platted and unplatted, shall be designated by a definite description. For all purposes of the Consolidated Local Improvements Law and any law amendatory thereof or supplemental thereto, any tract which is assessable property in an improvement district may be legally described pursuant to NRS 361.189.

NRS 271.235.

Section 361.189 of the Nevada Revised Statutes sets forth the requirements that all land be legally described for tax purposes by a parcel number, and requires each county to prepare and possess a complete set of maps drawn in accordance with the county's parceling system prescribed by the Department of Taxation. A county assessor has the authority to number or letter the parcels in a manner approved by the board of county commissioners, and may renumber or reletter the parcels or prepare new map pages to show combinations or divisions of parcels. NRS 361.215.

The purpose of the parceling is for the assessment of property taxes, as stated in NRS 361.189. Accordingly, the county assessors must be able to distinguish each parcel from other parcels so the correct property owner can be assessed for the parcels he owns. Large areas of land with ownership of that area being held by either one person or entity, or held jointly by more than one person or entity, such as vacant land that has never been developed, could have one parcel number. However, other large areas of land, even though owned by one person or entity, may have several parcel numbers. This could be true of the property where a hotel/casino is situated if the land was acquired from different owners for the purpose of combining the parcels for one large project

such as a hotel/casino. This could also be true for the property where a motel or apartment building is located.[1] Additionally, in certain situations such as a condominium building, the property included in one building may be divided into several parcels because of the separate ownership of each individual condominium unit.

A condominium unit itself is within the definition of a "tract." *See* NRS 271.235. The owner of a condominium unit has a separate interest in that unit, with an individual assessor's parcel number, and that unit is assessed separately from the other condominium units within the same building. *See* NRS 117.010(2). Therefore, a condominium owner is the owner of a tract within the assessment district, and if the condominium unit is used exclusively for residential purposes, the owner or tenant of that unit may file a protest pursuant to NRS 271.392. The fact that the building leases commercial space is immaterial f the condominium unit is a separate tract from the area where commercial space is leased.

CONCLUSION TO QUESTION ONE

A condominium owner or tenant who resides in a condominium unit that is a "tract" under the statute would have the right to protest the condominium's inclusion in the assessment plat, pursuant to NRS 271.392, if the unit itself is used exclusively for residential purposes.

QUESTION TWO

May an apartment owner, or his tenant, file a protest to the apartment building's inclusion in an assessment plat for a commercial area revitalization project pursuant to NRS 271.392, and does the term of a tenant's lease affect the tenant's protest rights?

ANALYSIS

The tract at issue under this question would be the entire assessor's parcel(s) containing the apartment building or complex. Therefore, the question

[1] The questions in this opinion are being answered under the assumption that if the property at issue is located on more than one parcel, all of the parcels are used for the same purpose. In the event that a different use is made of different parcels for a property at issue, the use of each parcel would have to be analyzed individually.

is whether the tract(s) containing the apartment building or complex is used exclusively for residential purposes. Zoning areas that allow apartments can be considered commercial. *See Alper v. State ex rel. Dep't of Hwys*., 95 Nev. 876, 603 P.2d 1085 (1979). The City of Reno's zoning code allows apartments in both residential and commercial areas. Under Reno Municipal Code, the term "apartment house" means the same as a multiple dwelling. *See* RENO, NEV., MUNI. CODE 18.06.030(b)(5) (2000). A multiple dwelling is "a building designed and used to house two or more families, living independently of each other, including necessary employees of each such family." RENO, NEV., MUNI. CODE 18.06.030(27)(c)(2000). Multifamily dwellings are permitted uses within both residential and commercial zoning districts. *Id*. at 18.06.140--18.06.190, 18.06.250, and 18.06.260. Based on the foregoing, an apartment building or complex could be considered residential or commercial.

Other jurisdictions have considered the specific question of whether apartment buildings can be considered as being used exclusively for residential purposes, and have reached an affirmative conclusion. *See, e.g., Zankman v. Tireno Towers*, 297 A.2d 23, 24 (N.J. 1972); *Weber v. Graner*, 291 P.2d 173, 177 (Cal. 1955); *Hamm v. Wilson*, 151 S.E. 11 (Ga. 1929). One of these courts also stated that the reason behind the statute "is one of the most certain means of establishing the true sense of the words" and that the objective and policy of the statute must not be given so restricted an interpretation by the court as to negate the reason for the language in the statute. *Zankman* at 24.

The legislative history of Senate Bill 530 (S.B. 530) would support the conclusion that apartment buildings would fit within the phrase "used exclusively for residential purposes." Certain legislators expressed concern that people residing within the proposed commercial improvement district should be able to opt out of the district. *See Hearing on S.B. 530 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 6, 8 (May 7, 1999); *Hearing on S.B. 530 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 9–11 (May 12, 1999). The situation of apartment tenants wishing to be excluded from the commercial improvement district was specifically raised by the Chairman of the Assembly Committee on Government Affairs. *See Hearing on S.B. 530 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 8 (May 7, 1999); *Hearing on S.B. 530 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 9 (May 12, 1999). The Chairman had received calls from apartment tenants worried that the creation of a business district would cause an increase in their rent, and the tenants wanted

to have the ability to be excluded from the district. While it was also stressed that residents could receive a benefit from the creation of the district, certain legislators wanted the bill amended to provide residents, specifically including apartment tenants, an option to be excluded from the district. *See Hearing on S.B. 530 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 9—11 (May 12, 1999).

The fact that the bill was amended to allow owners or tenants of tracts used exclusively for residential purposes to protest inclusion in a proposed commercial revitalization district shows the intent of the Legislature to allow residents, including apartment tenants, the opportunity to protest inclusion in the proposed district. The only limitation on that right would be that the apartment building would have to be strictly of a residential nature and could not lease commercial space, pursuant to NRS 271.392(b).

Additionally, the term of the tenant's lease would not affect the tenant's ability to file a protest. The statute does not set any length of residency requirements upon a person's ability to protest inclusion in the assessment plat.

CONCLUSION TO QUESTION TWO

If an apartment building were used exclusively for residential purposes, with no commercially leased space, the apartment owner and the tenants would be entitled to file a protest pursuant to NRS 271.392.

QUESTION THREE

May a person who owns or resides at a motel file a protest to the motel property's inclusion in an assessment plat for a commercial area revitalization project pursuant to NRS 271.392, and does the length of the rental of the room have any effect on the ability to protest?

ANALYSIS

The tract(s) on which the motel is located must be used exclusively for residential purposes for the protest provisions of NRS 271.392 to be applicable. Motels are not considered residential under Reno zoning ordinances, as shown by the fact that the zoning ordinances within the Reno Municipal Code do not allow motels as a permitted use within the residence districts. *See* RENO, NEV.,

MUNI. CODE 18.06.040--18.06.190. However, motels are permitted in areas zoned for business and commercial uses. *See* RENO, NEV. MUNI. CODE 18.06.250, 18.06.260. The Nevada Supreme Court has found that motels could properly be categorized as commercial in nature. *See Alper v. State ex rel. Dep't of Hwys*., 95 Nev. at 881, 603 P.2d at 1087, where the Nevada Supreme Court looked at the agreement between Nevada and the Secretary of Transportation which included motels in the category of "business, commerce or trade," and within the "commercial zone" exception of the Nevada Act on Highway Beautification. In another jurisdiction, motels were found to be "strictly commercial in nature." *See Traschel v. City of Tamarac*, 311 So. 2d 137, 141 (Fla. 1975). Based on the foregoing, where motels have been categorized as commercial and not residential, it would not be appropriate in this case to extend the definition of "residential purposes" to include the use of property for a motel. Therefore, motels would not meet the requirement of NRS 271.392 that the tract be used exclusively for residential purposes, and thus a motel owner or someone staying at the motel could not file a protest. This conclusion does not change even in the case of a manager residing on the premises, or in the case of renting rooms on a weekly basis.

CONCLUSION TO QUESTION THREE

A motel is generally considered to be commercial in nature. A motel owner or manager, even if residing on the premises of the motel, is not entitled to protest the motel property's inclusion in an assessment plat pursuant to NRS 271.392.

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Deputy Attorney General

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AGO 2000-23 CITY ATTORNEYS; CONFLICT OF INTEREST: NRS 7.105 prohibits a person employed as a prosecutor of municipal court offenses from defending juvenile persons accused of delinquent acts.

Carson City, July 21, 2000

Robert Goicoechea, City Attorney, Thomas J. Coyle, Jr., Esq., Goicoechea & Di Grazia, Ltd., Post Office Box 1358, Elko, Nevada 89803

Dear Messrs. Goicoechea and Coyle:

You have posed the following question.

QUESTION

May a person employed as a prosecutor of municipal court offenses represent, as defense counsel, persons accused of delinquent acts in juvenile court?

ANALYSIS

You conclude the lawyer's dual representation, as described above, is prohibited by NRS 7.105. We agree.

An adult criminal defendant has a constitutional right to effective assistance of legal counsel. No material difference exists between adult criminal proceedings and juvenile proceedings in which adjudication of delinquency is sought. Part of the juvenile's due process rights include the effective assistance of legal counsel. *Shawn M., A Minor v. State*, 105 Nev. 346, 775 P.2d 700 (1989).

The adult accused in a criminal case, and the juvenile accused of a delinquent act, are entitled to the undivided loyalty of legal counsel. If legal counsel has a conflict of interest, or even a potential conflict creating the appearance of impropriety, then appellate issues exist regarding the client's right to receive effective legal representation. When legal counsel acts as both a prosecutor and as defense counsel, the lawyer's dual roles trigger the issue of appearance of impropriety. *In Interest of Steveon R. A.*, 537 N.W.2d 142 (Wis. Ct. App. 1995); *State v. Almanza*, 910 P.2d 934 (N.M. Ct. App. 1995).

With the passage of NRS 7.105, the Legislature prohibited public prosecutors from engaging in certain legal practice involving dual representation. NRS 7.105(1) sets forth:

> 1. Except as otherwise provided in subsection 2 and NRS 7.065:
>
> (a) The attorney general and every city attorney, district attorney and the deputies and assistants of each, hired or elected to prosecute persons charged with the violation of any ordinance or any law of this state; and
>
> (b) The legislative counsel and every attorney employed in the legislative counsel bureau, without the consent of the legislative commission,
>
> shall not, during their terms of office or during the time they are so employed, in any court of this state, accept an appointment to defend, agree to defend or undertake the defense of any person charged with the violation of any ordinance or any law of this state.

The language set forth above prohibits a public prosecutor from defending a juvenile in a delinquency proceeding in exactly the same manner as it prohibits the prosecutor from undertaking the defense of an adult in a criminal proceeding. Pursuant to NRS chapter 62, district courts act as juvenile courts. NRS 62.036. With limited exceptions, juvenile courts have jurisdiction concerning any child who has committed a delinquent act. NRS 62.040. A child commits a delinquent act if he violates a county or municipal ordinance, any rule or regulation having the force of law, or an act designated a crime under the law of the State of Nevada. NRS 62.040(1)(b). Furthermore, NRS 62.020 defines the word "child" to mean a person who is less than 18 years of age, or less than 21 years of age and subject to the jurisdiction of the juvenile court for an act of delinquency committed before the person reached 18 years of age.

We conclude that the defense of a juvenile in a delinquency proceeding would amount to the defense of a person charged with the violation of any ordinance or any law of this State as set forth in NRS 7.105. In order to avoid the appearance of impropriety, we conclude that a public prosecutor, such as the one employed by the City of Wells in the present case, is prohibited from undertaking such legal representation in defense of a juvenile. This interpretation of NRS 7.105 promotes the public policy that a prosecutor must perform his job with the highest degree of integrity and impartiality. Avoiding

the appearance of impropriety, by avoiding dual roles as a prosecutor and as defense counsel, supports this public policy. *Love v. Superior Court of Sacramento County*, 168 Cal.Rptr. 577 (Cal. Ct. App. 1980).

CONCLUSION

NRS 7.105 prohibits a person employed as a prosecutor of municipal court offenses from defending juvenile persons accused of delinquent acts.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

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OPINION NO. 2000-24 SECRETARY OF STATE; ELECTIONS; INITIATIVE: The phrase "filed with the county clerk" in NRS 295.055(3) means submitted to the county clerk for signature verification in the context of the procedure for a person to remove his or her name from a statewide initiative petition.

Carson City, September 8, 2000

Susan Morandi, Deputy Secretary for Elections, Office of the Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Ms. Morandi:

You have requested an opinion from this office regarding the interpretation of an election statute relating to the removal of signatures from a statewide initiative petition.

QUESTION

What does the phrase "filed with the county clerk" in NRS 295.055(3) mean in the context of limiting a person's ability to remove his or her name from a statewide initiative petition?

ANALYSIS

The procedure for circulating a statewide initiative petition and qualifying such a petition for the ballot is found in NRS 295.015–295.061. Before a petition is circulated for signatures, it must be filed with the Secretary of State. NRS 295.015. Then, after signatures are gathered, the petition must be submitted to the county clerks/registrars of voters for signature verification and the completed petition filed with the Secretary of State. NRS 295.056(1). The signature verification process is found in NRS 293.1276–293.1279.

A procedure also exists for a person to remove his or her name from the petition. NRS 295.055(3) states: "A person who signs a petition may remove his name from it by transmitting his request in writing to the county clerk at any time before the petition is filed with the county clerk." Nowhere else in the statewide initiative petition statutes or in the signature verification statutes is there a requirement that the petition be filed with the county clerk.

Thus, the question arises, if a statewide initiative petition is not required to be filed with the county clerk/registrar of voters, what does the phrase "filed

with the county clerk," mean in NRS 295.055(3)? Rules of statutory construction help in giving the proper meaning to this phrase.

"Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act." *Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). The words "filed with the county clerk" appear to be clear until a complete reading of the signature verification statutes and the statewide initiative petition statutes reveal that statewide initiative petitions are not filed with the county clerk. They are submitted to the county clerk for signature verification and filed with the Secretary of State.

If the words of a statute are not clear or are ambiguous, the legislature's intent in enacting the statute is used to determine the meaning of the statute. *See id.*

> The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained[,] will prevail over the literal sense. The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it would always be construed so as to avoid absurd results.

Id.

The procedure to remove a person's name from an initiative petition was added to NRS 295.055 in 1985. Act of May 1, 1985, ch. 132, § 2, 1985 Nev. Stat. 550. A review of the testimony before the Assembly Committee on Elections clarifies the meaning that was intended. According to the committee minutes, Mr. Swackhamer, the Secretary of State in 1985, testified:

> Another problem . . . was people who had signed a petition and then wanted to remove their name and there was no authority for that. This would give somebody the authority to go out in the county clerk's office and remove their name

> up until such time as [the petition] was submitted to the clerks for verification and that would be the end.

Hearing on S.B. 220 Before the Assembly Committee on Elections, 1985 Legislative Session, 156 (March 28, 2985).

Clearly, the Legislature intended for the removal of signatures from an initiative petition to stop once the petition had been submitted to the county clerks for signature verification. Therefore, it is the opinion of this office that the phrase "filed with the county clerk" as found in NRS 295.055(3) means when the initiative petition is submitted to the county clerk for signature verification.

It is the suggestion of this office that the Secretary of State seek an amendment to this statute in the 2001 Legislative Session to clarify this meaning.

CONCLUSION

The phrase "filed with the county clerk" in NRS 295.055(3) means submitted to the county clerk for signature verification in the context of the procedure for a person to remove his or her name from a statewide initiative petition.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2000-25 INTERLOCAL COOPERATION ACT; AGREEMENTS; LOCAL GOVERNMENT: A contract provision for cooperative land use planning entered into by the city and county is authorized by statutes set forth in the Interlocal Cooperation Act.

Carson City, October 3, 2000

Bradford R. Jerbic, City Attorney, City of Las Vegas, 400 East Stewart, Las Vegas, Nevada 89101

Dear Mr. Jerbic:

You have informed our office that on May 17, 2000, the Las Vegas City Council approved an Interlocal Agreement (Agreement) to be entered into by and between the City of Las Vegas (City) and Clark County (County). According to your opinion request, a provision in the Agreement requires an applicant attempting to change or amend the Comprehensive Seamless Master Plan to first petition the City for an annexation of the subject property if: (1) the subject property meets all of the requirements for annexation as provided for under NRS chapter 268C; and (2) the subject property is completely dependent upon the City for sewer service. Your letter requests a legal opinion from this office regarding whether the City and County may enter into an Agreement which contains this provision. Only when a property owner files an application with the County to change or amend the adopted Comprehensive Seamless Master Plan, will the property owner be asked to first petition the City for annexation. The analysis and legal conclusions herein only apply to the provision of the Agreement described in your opinion request and the conditions contained therein.

QUESTION

May the City and the County enter into an Agreement for future planning of territories within their respective jurisdictions by mutually agreeing that the County will refrain from processing an application to change or amend the adopted Comprehensive Seamless Master Plan without first directing an applicant to petition the City for annexation if the subject property meets the requirements described above?

ANALYSIS

The City and the County may enter into an interlocal cooperative agreement with this provision, as distinguished from an interlocal contract, because the provision involves the joint exercise of powers, privileges, and authority already held by the City and the County. The cooperative activities described in this contract provision are consistent with the criteria for interlocal cooperative agreements as provided for in Nevada's Interlocal Cooperation Act.

Nevada's Interlocal Cooperation Act, NRS 277.080 –.180, gives local governments, like the City and the County, the authority to enter into interlocal contracts and interlocal cooperative agreements for the purpose set forth in NRS 277.090. Specifically, NRS 277.090 provides:

> It is the purpose of NRS 277.080 to 277.180, inclusive, to permit local governments to make the most efficient use of their powers by enabling them to cooperate with other local governments on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization which will best accord with geographic, economic, population and other factors influencing the needs and development of local communities.

You have requested an opinion on a provision contained in an interlocal agreement. However, your opinion request does not specify whether the Agreement is an interlocal cooperative agreement or an interlocal contract. Although interlocal contracts and interlocal cooperative agreements are substantially similar, Nevada's Interlocal Cooperation Act and relevant case authority support an interlocal cooperative agreement between the City and the County, as distinguished from an interlocal contract, as the appropriate mechanism for an agreement regarding the joint planning of territories within the respective jurisdictions.

Pursuant to NRS 277.110, the State and other public agencies may enter into interlocal cooperative agreements with each other for the most efficient use of governmental resources. Specifically, NRS 277.110(2) provides:

> Any two or more public agencies [which include the City and the County as defined in NRS 277.100(1)(a)] may enter

> into agreements with one another for joint or cooperative action pursuant to the provisions of NRS 277.080 to 277.170, inclusive. Those agreements become effective only upon ratification by appropriate ordinance, resolution or otherwise pursuant to law on the part of the governing bodies of the participating public agencies.

An interlocal cooperative agreement is an agreement between two or more public agencies for the joint exercise of powers, privileges and authority including, but not limited to law enforcement. NRS 277.110(1). Cooperative agreements are required to be submitted to the Attorney General, who shall determine whether it is in proper form and compatible with the laws of Nevada. NRS 277.140(1). The Agreement must thereafter be filed with the appropriate county recorder, and with the Secretary of State. NRS 277.140(2).

Interlocal contracts, as distinguished from interlocal cooperative agreements, are permitted under NRS 277.180(1). That statute provides in pertinent part:

> Any one or more public agencies [which include the City and the County as defined in NRS 277.100(1)(a)] may contract with any one or more other public agencies to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform. Such a contract must be ratified by appropriate official action of the governing body of each party to the contract as a condition precedent to its entry into force. Such a contract must set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.

State Administrative Manual § 0314.0 states: "Interlocal contracts are distinguished from cooperative agreements in that cooperative agreements are for the 'joint exercise of powers, privileges and authority' by public agencies and interlocal contracts are agreements by public agencies to 'obtain a service' from another public agency."

According to your opinion request, the Agreement and the provision at issue in the Agreement, are a cooperative effort by the City and the County for joint planning of territories within their respective jurisdictions. The provision

at issue is not an attempt by the County or the City to contract for or obtain a particular service from one or the other. NRS 277.180. Accordingly, Nevada's Interlocal Cooperation Act supports an interlocal cooperative agreement, as distinguished from an interlocal contract, as the appropriate mechanism to implement the provision at issue.

Although there are no Nevada Supreme Court decisions directly on point, the Ninth Circuit Federal Court of Appeals' broad interpretation of Nevada's Interlocal Cooperation Act supports an interlocal cooperative agreement as a valid method for the City and the County to plan for future development of territories within their respective jurisdictions. In *Ambulance Service of Reno vs. Nevada Ambulance Services, Inc.*, 819 F.2d 910, 911 (9th Cir. 1987), the Washoe County District Board of Health was created by an interlocal cooperative agreement between the County of Washoe, the City of Sparks and the City of Reno. The Circuit Court declared the following:

> The cooperative agreement was negotiated pursuant to the authority granted by the legislature of the State of Nevada in the Interlocal Cooperation Act (NRS 277.080 — 277.180). The purpose of the statute is to enable local governments to pool their powers in providing services and facilities in an enlarged geographic area. *The scope of the powers which may be delegated by an interlocal agreement is expansive*. [Emphasis added.]

The appellate court upheld the subject matter agreed to in the interlocal cooperative agreement, noting that each of the contracting parties had independent statutory authority to limit competition in the area of ambulance service. The court concluded that the parties' joint exercise of this power, in granting an exclusive franchise for ambulance service, was valid under the interlocal cooperative agreement. *Id.* at 912.

In *City of Oakland v. Williams*, 103 P.2d 168 (Cal. 1940), seven contiguous municipalities entered into an intergovernmental agreement under the California statute authorizing such cooperative action. The agreement was made to solve a common problem regarding disposal of sewage effluent. The California statute provided that municipalities may enter into agreements authorized by their legislative bodies to "jointly exercise any power or powers common to the several contracting parties."

The auditor of the City of Oakland challenged the joint agreement, asserting that the municipalities could only exercise powers in common if a statute or charter expressly authorized joint exercise in the subject matter pertinent to the agreement. In rejecting this argument, the California Supreme Court held:

> In substance, Williams, as auditor of the City of Oakland, urges that the statute above referred to authorizing the joint exercise by municipalities of powers "common" to them does not contemplate or permit the joint exercise of powers that may be separately or independently exercised by them, but only permits of the joint exercise of powers already possessed in common. Such a construction of the statute is strained and would render it meaningless. In other words, if municipalities possessed a power in common there would be no need for a statute authorizing their joint exercise. The statute means nothing if it does not mean that cities may contract in effect to delegate to one of their number the exercise of a power or the performance of an act in behalf of all of them, and which each independently could have exercised or performed. A statute thus authorizing the joint exercise of powers separately possessed by municipalities cannot be said to enlarge upon the charter provisions of said municipalities. *It grants no new powers but merely sets up a new procedure for the exercise of existing powers*.

Id. at 171, 172 (emphasis added).

In the present case, each of the contracting parties has independent authority to perform the activities described in the provision in question. The County has the authority to consider planning the zoning matters under NRS chapter 278. The City has the authority to annex certain properties under procedures set forth in NRS 268.570–.608. The City additionally has the power to provide sewer services to such annexed parcels under Las Vegas City Charter § 2.290. The purpose of the interlocal cooperative agreement is to provide a coordinated procedure in the already existing areas of authority so that the County and City may work together to serve property owners in the

most efficient manner. We believe that the Legislature intended the joint exercise of powers in such a cooperative effort.[1]

CONCLUSION

The provision for cooperative land use planning entered into by the City of Las Vegas and Clark County is authorized by statutes set forth in the Interlocal Cooperation Act.

FRANKIE SUE DEL PAPA
Attorney General

By: ROBERT L. AUER
Senior Deputy Attorney General

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[1] The Legislature has already provided for cooperative efforts in land use planning in certain counties. Pursuant to NRS 278.026–278.029, a regional planning commission coordinates land use planning in each county whose population is 100,000 or more but less than 400,000 persons. In reviewing the legislative history regarding enactment of these statutes, we found no evidence of legislative intent to preclude other counties from coordinating land use planning with cities located in such counties. We must presume that the Legislature, when enacting the regional planning statutes, had knowledge of the interlocal cooperation act statutes and their potential use in this field. *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937).

AGO 2000-26 COUNTIES; NEPOTISM: The hiring of the Churchill County Manager's daughter by the Planning Director would violate NRS 281.210.

Carson City, September 25, 2000

The Honorable Arthur E. Mallory, District Attorney, Churchill County, 365 South Maine Street, Fallon, Nevada 89406

Dear Mr. Mallory:

You have asked whether the hiring of a particular job applicant for a Churchill County position would violate NRS 281.210, Nevada's anti-nepotism statute.

QUESTION

May Churchill County's Planning Director hire the daughter of the Churchill County Manager for a county position without violating NRS 281.210?

ANALYSIS

Pursuant to NRS 244.125(1), the Churchill Board of County Commissioners (Board) appointed a County Manager. NRS 244.135(2) provides in relevant part that the County Manager may: "[W]ith the approval of the board of county commissioners, appoint such assistants and other employees as are necessary to the proper functioning of his office." Pursuant to this statutory provision, the County Manager hired a Planning Director to supervise the county's Planning Department.

The Planning Department has a position vacancy for a Mapping and CAD Technician. After interviews for the position, the outstanding candidate for the position is the daughter of the County Manager and the concern is whether the Planning Director may hire the County Manger's daughter without violating NRS 281.210(1), which provides in relevant part: "[I]t is unlawful for any person acting . . . as an employing authority . . . of . . . any . . . county. . . to employ in any capacity on behalf of . . . any county . . . any relative of such a person . . . who is within the third degree of consanguinity. . . ."

We have not previously had the opportunity to address the exact factual situation you have presented. However, based on the reasoning of two

previous opinions of this office which examined the scope of NRS 281.210, we believe that the proposed hiring is prohibited by the statute.

In 1970 we examined a situation where a state agency head, with ultimate hiring authority over hiring within the agency, delegated this authority to various department heads within the agency. The question presented was, since ultimate hiring authority resided in the agency head, would NRS 281.210 permit a department head from hiring his relative within the third degree of consanguinity? After pointing out that the evil contemplated by the Legislature in enacting NRS 281.210 was the "packing of state employment with relatives of those having the appointing power," we pointed out not too gently: "If each department head of a large state institution were permitted to hire relatives, under the subterfuge that such person was not related to the person having the ultimate power to hire and fire, the employment roster would have the appearance of a group of family reunions." Obviously, we adopted the position that a department head in a larger state agency who hires his relative within the third degree of consanguinity, even though the ultimate appointment power rests with the head of the agency, would violate NRS 281.210. We therefore established that the department head under those circumstances would be treated as an "employing authority" for purposes of NRS 281.210(1). Op. Nev. Att'y Gen. No. 656 (April 9, 1970).

In 1979 we considered a proposal to allow a board to hire a person to perform future hiring functions for the board. Would such an arrangement adequately screen the board from the hiring decision so that a relative of a board member could be hired by the delegatee without violating NRS 281.210(1)? We believe this situation very closely resembles the instant relationship between the County Manager and the Planning Director and the proposed hiring of the County Manager's daughter. We opined:

It would also be the opinion of this office that a board cannot insulate itself from the Anti-Nepotism Law by hiring an employee who would then hire all employees for the district. This is because the ultimate hiring authority would still lie with the board, which would have the right at any time to intervene in or revoke the hiring employee's powers. [1]

[1] Op. Nev. Att'y Gen. No. 79-B (April 23, 1979) (note that this Supplemental Opinion is not listed in the Syllabi of Attorney General's Opinions in the 1979 volume of the Official Opinions of the Attorney General. However, the opinion is published at page 164 of that volume).

Similarly, since the County Manager must be considered an employing authority for purposes of the Anti-Nepotism Law, and because of the continuing control the County Manager has over the Planning Director, the County Manager's delegation of hiring authority to the Planning Director does not insulate the Manager from the Anti-Nepotism Law so that the County Manager's daughter may be lawfully hired.

Our resolution of this question renders your remaining questions moot.

CONCLUSION

The hiring of the Churchill County Manager's daughter by the Planning Director would violate NRS 281.210.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2000-27 GRAND JURY; PETITIONS: A verified petition for the purposes of NRS 6.130(1) requires only that the petitioner verify the contents of the petition in the manner outlined in NRS 15.010 by affidavit, under the penalty of perjury, and that the contents of the petition are true. In the exercise of its inherent and discretionary authority, the court can impose such procedures as are reasonably necessary to determine the statutory validity and sufficiency of a petition for the summoning of a grand jury pursuant to NRS 6.130(1).

Carson City, October 12, 2000

Honorable Noel Waters, District Attorney & Honorable Alan Glover, Carson City Clerk-Recorder, 885 East Musser Street, Suite #2030, Carson City, Nevada 89701

Dear Messrs. Waters and Glover:

Due to an apparent conflict, Carson City District Attorney Noel Waters has referred a letter requesting a legal opinion from Carson City Clerk-Recorder Alan Glover to Mr. Waters, dated August 8, 2000, to this office for review. Mr. Glover's correspondence raises certain questions regarding the duties of a clerk of a district court upon the presentment of a "verified petition" for the summoning of a grand jury pursuant to NRS 6.130(1). Subsequent correspondence from Mr. Glover directed to this office, dated August 28, 2000 and September 22, 2000, indicates that a petition for a grand jury has in fact been filed with Mr. Glover's office, and Mr. Glover has presented the following additional questions for our review. What process should be used to verify the names? How much time is allowed to verify the petition? Once the petition is submitted, can the petitioner submit additional names? Can a voter have his name removed from the petition? Are the signatures on the individual petition forms valid if submitted without an "Affidavit of Circulatory"? Do any of the other provisions of the Nevada Revised Statutes dealing with similar situations apply to grand jury petitions?

In rendering an opinion in this matter, these numerous specific questions have been reduced to the following two general inquiries: (1) What is the meaning of the term "verified" as used in NRS 6.130(1); and (2) What are the duties of a clerk of the district court regarding the summoning of a grand jury?

QUESTION ONE

What does the term "verified" mean as used in NRS 6.130(1)?

ANALYSIS OF QUESTION ONE

NRS 6.130(1) provides as follows:

> The district judge shall summon a grand jury whenever a verified petition is presented to the clerk of the district court containing the signatures of registered voters equal in number to 25 percent of the number of voters voting within the county at the last preceding general election which specifically sets forth the fact or facts constituting the necessity of convening a grand jury.

Because different meanings of the term "verified," as it relates to various forms of legal petitions, exist within the Nevada Revised Statutes, the plain meaning of the term as used in NRS 6.130(1) is arguably subject to dispute. Nevertheless, utilizing recognized principals of statutory construction, the plain meaning of the term "verified" as used in NRS 6.130(1) can be determined to require simply that the petitioner affirm that the contents of the petition are true of his own knowledge, or upon information and belief. This meaning of the term "verified" is specifically set forth in NRS 15.010, which describes the process for "verification of pleadings." Several indicia of legislative intent support this construction.

As noted, an apparent ambiguity in the term "verified" arises because of two differing uses of the term in the Nevada Revised Statutes as it relates to a "circulating petition." For purposes of this opinion, a "circulating petition" is a petition that has been circulated for the procurement of a requisite number of co-petitioners' signatures, as opposed to a petition in the general sense, which may be submitted by a single petitioner. Petitions for an initiative or referendum, as set forth in NRS chapter 295, and petitions for the recall of public officers, as set forth in NRS chapter 306, are examples of "circulating petitions" requiring a requisite number of co-petitioners to sign the petition. A petition filed pursuant to NRS 6.130(1) is also a "circulating petition," requiring the signatures of registered voters equal in number to 25 percent of the number

of voters voting within the relevant county at the last preceding general election.

The first use of the term "verified" is derived from NRS 15.010, which not only applies to a circulating petition, but also can apply to any petition in a general sense. NRS 15.010 establishes the process for the verification of pleadings. Verification in this general sense is accomplished by the sworn affidavit of the petitioner that the contents of the petition are true. *See* NRS 15.010(5). In the "circulating petition" situation, verification of the petition also requires a statement that the signers are qualified to sign the petition and that the signatures are genuine. *See* NRS 266.021, 293.172(1)(b), 293.200(2), and 306.030 (all with similar requirements that each document of the petition be accompanied by a verification that the signatures contained therein are of qualified individuals and are genuine).

The second use of the term is primarily restricted to NRS 266.023, relating to petitions for the incorporation of cities and towns, and to NRS 293.1276-.1279, relating to election petitions. These statutes create a very specific "verification of signatures" process applicable only to "circulating petition" situations involving the incorporation of cities and towns and elections, respectively. Because a specific number of registered voters' signatures must be obtained for these "circulating petitions" to be valid, statutory safeguards have been provided to confirm that the signatures are of registered voters and of sufficient number. Verification in this sense is the duty of the county clerk or registrar of voters, as mandated by statute. The clerk or registrar must calculate the number of signatures required to be on the petition based upon the applicable percentage of the number of voters that voted in the relevant election. The clerk or registrar then must determine if the individual signatures are valid and from registered voters by consulting the registry of voters.

NRS 6.130(1) simply requires that a verified petition be presented to the clerk of the district court. Although this statute mandates the summoning of a grand jury only if a certain number of qualifying signatures are obtained, the language suggests that the verification must occur prior to the presentment of the petition to the clerk and therefore the statute must be referring to the verification of the petition by the person submitting the petition, i.e. verification as set forth in NRS 15.010. Obviously, verification of the signatures, incorporating the second use of the term, by the clerk cannot be performed prior to the petition being presented to the clerk of the district court by the petitioner.

The term "verified" is also used in subsection 2 of NRS 6.130 in reference to a non-circulating petition. NRS 6.130(2) only requires the "verified petition" of a single taxpayer to invoke a district court's discretionary authority to impanel a grand jury in specified circumstances. This situation obviously does not require the verification of signatures by a county clerk or registrar of voters. "Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere . . . " *National Mines Co. v. Sixth Judicial Dist. Court*, 34 Nev. 67, 78, 116 P. 996 (1911).

The term "verified," when first incorporated in 1927 in the predecessor statute to NRS 6.130, was not used in the two differing ways discussed above. The process to incorporate cities and towns did not include a petition process or any reference to a necessity for the verification of signatures. *See* Nevada Compiled Laws (NCL) §§ 1101 et al. (1929). Similarly, the statutory provisions relating to elections, specifically relating to initiative legislation and referendums, did not include any reference to a verification of signatures. *See* NCL §§ 2570-2580 (1929) (Initiative Legislation) and NCL §§ 2581-2586 (1929) (Referendums). But NCL §§ 8616-8620, relating to the verification of pleadings, are substantially similar in purpose to NRS 15.010, requiring the affidavit of a party that the contents of a pleading are true of his own knowledge. *See* NCL § 8620 (1929). The "verification of signatures" processes created by NRS 266.023, relating to petitions for the incorporation of cities and towns, and by NRS 293.1276-.1279, relating to election petitions, were not incorporated into the Nevada Revised Statutes until the mid-1980's. Therefore, at the time of the initial incorporation of the term "verified" into the statute relating to the mandatory summoning of a grand jury, no apparent ambiguity even existed. "Verified" simply meant that a party attested to the truth of the contents of the petition.

Further, 1927 Assembly Bill No. 51 amended the statute regarding the summoning of grand juries by providing that: ". . . it shall be mandatory to summon such grand jury whenever a *verified* petition is presented signed by not less than seventy-five resident taxpayers . . . ." [Emphasis added.] No reference was even made to a clerk of the district court. There was no question or any ambiguity as to the clerk's duties in regards to the summoning of a grand jury. It was clear that the statute required only the verification of the petitioner and nothing more. In making subsequent revisions to NRS 6.130(1),

the term "verified petition" has remained unchanged. In light of the above analysis of the initial meaning of the term, it should therefore be presumed that the Legislature has not changed the effect of the statute, including the meaning of the term, no intention to do so having ever been expressed. *See Hand v. Cook*, 29 Nev. 518, 534, 92 P. 3 (1907).

CONCLUSION TO QUESTION ONE

The term "verified" as used in NRS 6.130(1) requires only that the petitioner verify the contents of the petition in the manner outlined in NRS 15.010 by affidavit, under penalty of perjury, and that the contents of the petition are true.

QUESTION TWO

What are the duties of the clerk of the district court upon the presentment of a verified petition for the summoning of a grand jury pursuant to NRS 6.130(1)?

ANALYSIS OF QUESTION TWO

A primary tenet of statutory construction is that if the Legislature had intended to establish a specific procedure, or impose certain duties, as on the clerk of the district court relating to the summoning of a grand jury pursuant to the mandatory provisions of NRS 6.130(1), it would have so provided. *See State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 695 n.2, 709 P.2d 172 (1985) ("If the legislature believes some limitation is necessary, it may, of course, impose such a statute."); *Clark County Sports Enter. Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171 (1980) ("Had the legislature intended exclusion, it would have specifically so provided by language to that effect.").

With regard to a petition filed pursuant to NRS 6.130(1), however, the Nevada Legislature has not delineated any specific procedure to be followed or imposed any specific duties on the clerk of the district court relating to the processing of such a petition. Consequently, the Nevada Revised Statutes do not address your specific questions. The lack of statutory law in this area is understandable due to the supervisory role the judiciary maintains over the impaneling of a grand jury in Nevada. Grand juries are deemed to be within the control of the judiciary. *In re the Washoe County Grand Jury*, 95 Nev. 121, 126, 590 P.2d 622, 625 (1979). District court judges preside at the empanelment of grand juries pursuant to constitutional mandate. NEV. CONST., art. 6, § 5.

District courts have been granted broad discretionary power to impanel grand juries " . . . as often as the public interest may require . . ." *NRS 6.110(1).* The Supreme Court has held that policy considerations favor a construction of the phrase ". . . as often as the public interest may require . . ." to allow as many grand juries as are necessary to deal with the volume of criminal activity. *See Lera v. Sheriff*, 93 Nev. 498, 501, 568 P.2d 581, 583 (1977). The only apparent limitations on this empanelment power are (1) in counties whose population is 100,000 or more where a grand jury must be called ". . . at least once in each 4 years," and (2) the mandatory empanelment process established in NRS 6.130(1). In spite of the above limitations, our constitutional and statutory scheme contemplates reasonable judicial control of grand juries and "the trial judge should exercise his powers when appropriate." *In re the Washoe County Grand Jury*, 95 Nev. 126, 590 P.2d 625.

Nevada is one of a small number of states that allow the general public to compel the empanelment of a grand jury by citizens' petition. Kansas, Nebraska, North Dakota and Oklahoma all have similar provisions mandating the summoning of a grand jury upon the presentment of a petition bearing the signatures of a requisite number of electors.[1] Unlike Nevada, these other states each have a statutorily established "verification of signature" process to confirm whether the persons whose signatures are affixed to the petition are qualified to sign the petition. These statutory processes are highly detailed and include time limitations, instructions as to how the clerk is to verify the signatures on the petition, petition forms, and other requirements.

Obviously, the Nevada Legislature could have also established a detailed process for the "verification of signatures" on a grand jury petition. The lack of such a statutorily delineated process, however, is consistent with the unique relationship between the judiciary and the grand jury as fashioned by case law and the Nevada constitutional and statutory scheme.

Given the lack of statutorily delineated procedures, it is within the authority and sound discretion of the court to impose such procedures as are reasonably necessary to determine the statutory validity and sufficiency of a petition for the summoning of a grand jury pursuant to NRS 6.130(1). The sole duty

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[1] *See* KAN. STAT. ANN. § 22-3001 (1999); NEB. REV. STAT. §§ 29-1401-1401.02 (2000); N.D. CENT. CODE §§ 29-10.1-02, 29-10.1-04 (2000); OKL. CONST. art. II, § 18; OKLA. STAT. ANN. tit. 38, §§ 101-108.

imposed upon the clerk's office by NRS 6.130(1), however, is to accept the petition. In exercising its authority and discretion, the court can require the assistance of the clerk's office, which is clearly the most qualified entity to verify registered voters' signatures and to determine the number of voters who voted within the county at the last preceding general election. Additional sufficiency requirements, however, such as the requirement contained in numerous circulating petition statutes referenced in this opinion that each document of the petition be separately verified by the circulator, have not been statutorily provided for in NRS 6.130 and are therefore not applicable to a petition filed under that statute.

Although they are not binding on a court and do not establish a duty to be performed by the clerk's office, the Nevada Revised Statutes do contain other statutory provisions previously discussed which the court could utilize for guidance should it elect to order that the clerk's office conduct a verification of the signatures contained in a petition submitted pursuant to NRS 6.130(1), and further order that the clerk's office examine the petition to assist the court in determining whether all other statutory requirements set forth in the statute have been met. For example, NRS 266.016(2), relating to petitions for the incorporation of towns and cities, and NRS 293.1276-.1279, relating to election petitions, both establish separate and distinct procedures for the verification of signatures. Procedures for adding and removing names from petitions are set forth in NRS 266.023-.024. Specific time limits for the verification process are also set forth in other provisions.

CONCLUSION TO QUESTION TWO

NRS 6.130(1) does not impose any specific duties upon the clerk of the district court or the County Clerk/Registrar of Voters to be followed after presentment of a verified petition for the summoning of a grand jury. In the exercise of its inherent and discretionary authority, however, the court can impose such procedures as are reasonably necessary to determine the

statutory validity and sufficiency of a petition for the summoning of a grand jury pursuant to NRS 6.130(1).

FRANKIE SUE DEL PAPA
Attorney General

By: THOM GOVER
Deputy Attorney General

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AGO 2000-28 COSMETOLOGY; LICENSES: The Board of Cosmetology is not required to offer its licensing examination to prospective licensees in languages other than English.

Carson City, October 25, 2000

Mary E. Manna, Executive Secretary, State Board of Cosmetology, 1785 East Sahara Avenue, Suite 255, Las Vegas, Nevada 89104

Dear Ms. Manna:

You have requested an opinion from this office as follows:

QUESTION

Is the State Board of Cosmetology (Board) required to offer its licensing examination to prospective licensees in languages other than English?

ANALYSIS

A. The Statutes and Regulations that Regulate the Board do not Address whether the Board Should offer its Licensing Examination in languages other than English.

NRS chapter 644 and NAC chapter 644 sets forth the requirements that the Board must follow in administering its exam to prospective licensees. There is nothing in these statutes or regulations that addresses whether the Board must offer its exam in another language. Absent any statutes or regulations which are on point, the Board may choose to offer its examination in English only as long as it does not violate the Fourteenth Amendment of the United States Constitution, e.g., due process and equal protection.

B. The Board Will Not Violate An Applicant's Due Process Rights by Offering the Licensing Tests in English Only.

In analyzing whether a Spanish-speaking applicant's due process rights would be violated if the licensing examination were not offered in Spanish "'we must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property'." *Bradford v. State of Hawaii*, 846 F. Supp. 1411, 1421 (D. Haw. 1994) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 571

(1972)). We must then assess whether due process of the interest would be violated by testing in English only. *Id.*

With respect to determining whether an individual has a property interest in obtaining a license, the court in *Bradford* found the following:

> In considering property interests, the court must determine whether 'State law or any other source confers an expectation of entitlement to . . . licensing that would give rise to a property interest[.]' *Kraft v. Jacka,* 872 F.2d 862, 866 (9th Cir. 1989). Other courts, in assessing whether an entitlement to a license exists, have distinguished between holders of a license seeking renewal (or challenging suspension) and first-time applicants. The Ninth Circuit has clearly held that 'a first-time applicant has no protected property interest in a new . . . license[.]' *Kraft,* 872 F.2d at 866-67 (citing *Jacobson v. Hannifin,* 627 F.2d 177, 179 (9th Cir.1980)).

Bradford, 846 F. Supp. at 1421. Consequently, the court in *Bradford* found that a first-time applicant for a surveyor's license had no expectation of entitlement to that license and, as a new applicant, the plaintiff could not have grown to rely on the surveyor's license in pursuing his livelihood. As such, the court concluded that the plaintiff had no protected property interest in a surveyor's license until he passed the required examination.

Likewise, the court in *Smothers v. Benitez,* 806 F. Supp. 299 (D.P.R. 1992), also found that a first-time applicant for a teacher's license did not have a protected interest in a license. In its opinion, the court stated:

> While prospective employment is certainly a significant area of human activity, it has not traditionally been protected by federal due process. The Supreme Court has found that there is no fundamental right to prospective public employment, and no fundamental right to employment in the private sphere.
>
> The Supreme Court has found a property interest in government employment, but this only attaches after the person has already attained the position. The Court has also found a liberty interest in retaining a professional license, but

> again the license must first have been obtained. Plaintiff's situation, an inability to meet the qualifying criteria for prospective employment as a teacher, is not protected by the fourteenth amendment under the rubric of fundamental rights. [Citations omitted.]

Id. at 304. The court found that the plaintiff's due process claim must fail since the plaintiff was merely an applicant for a license and did not have any protectable property interests.

A first-time applicant for a cosmetology license would not have a protected property interest in obtaining a license unless that license had been previously obtained through the Board. Therefore, the due process requirements of the United States Constitution would not prohibit the Board from offering the license examinations in English only.

C. The Board Will Not Violate an Applicant's Equal Protection Rights by Offering the Licensing Examination in English Only.

The Fourteenth Amendment, through the equal protection clause, requires that similar groups be treated in a similar fashion. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

> It is designed to prevent the government from creating classifications which treat similar groups differently or different groups similarly. However, in a system where some degree of classification is a functional necessity, certain distinctions, or the absence of distinctions, must be allowable. For this reason, the equal protection clause has only been employed when 'discrete and insular' groups are threatened because those are particularly in need of 'extraordinary protection from the majoritarian political process'.

Smothers, 806 F. Supp. at 304-05 (citation omitted). In equal protection causes of action, a claim is analyzed under one of three standards: strict scrutiny, which is triggered when suspect classifications, such as race, religion or national origin are involved; heightened scrutiny, as in the case of gender-based issues; or the rational basis standard, used when a law serves to render any other type of classification. *Id.* at 304. This system balances the protection

of those groups historically most vulnerable to the prejudices of the majority with the need to ensure the smooth functioning of the government. *Id.* at 305.

The difficulty in analyzing the present issue is determining where language fits into the equal protection scheme. The Supreme Court has never addressed whether language may serve as a proxy for national origin for equal protection analysis and, hence, is subject to strict scrutiny analysis.[1] In the Ninth Circuit, some courts have discussed the issue of language but they did not specifically hold that language in general should be analyzed under a strict scrutiny standard. *See Olagues v. Russoniello,* 797 F.2d 1511 (9th Cir. 1986), *cert. granted*, 481 U.S. 1012, later proceedings, 484 U.S. 806 (1987), vacated as moot, 832 F.2d 131 (9th Cir. 1987) (finding that the general classification of English-speaking versus non-English speaking individuals was facially neutral and did not warrant strict scrutiny while a specific classification of Spanish-speaking and Chinese-speaking individuals was based on race and national origin and warranted strict scrutiny); (*Guitierrez v. Municipal Court of Southeast Judicial Dist*., 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989) (upholding the district court's issuance of a preliminary injunction to preclude an employer from enforcing its rule that employees speak English-only in the work place including in intra-employee conversations).

One case that is factually similar to the issue at hand is *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975). In *Frontera*, the court found that the Civil Service Commission of the City of Cleveland and the Commissioner of Airports did not have to offer the civil service examination in the Spanish language. The court held that the rational basis test should be applied since "[w]e are not dealing here with a suspect nationality or race." *Id.* at 1219. The court also stated in its opinion that being able to pass an examination written in the English language was a job related requirement.

Interestingly, the court agreed with the commission that it would be unreasonable for the commission to translate its examinations into "the various

[1] While the Supreme Court has not yet directly addressed the issue of classification on the basis of language group, it has touched on the problem of language. (*Hernandez v. New York*, 500 U.S. 352 (1991) finding that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."); *Espinoza v. Farah Mfg. Co*., 414 U.S. 86 (1973) (stating in dicta that a close nexus may exist between language and national origin); *Farrington v. Tokushige,* 273 U.S. 284, 298 (1927) (finding that "the Constitution protects . . . [the Japanese] as well as those who speak another tongue.").

languages prevalent in a cosmopolitan community" given the limited resources of the commission. *Id*. The Court noted:

> If Civil Service examinations are required to be conducted in Spanish to satisfy a few persons who might want to take them, what about the numerous other nationality groups which inhabit metropolitan Cleveland? These other nationality groups would have just as much right as [the plaintiff] to have their examinations conducted in their own languages. The city could not conduct examinations in Spanish and deny other nationalities the same privilege. Denial to any would be invidious discrimination.
>
> In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists to translate the tests and supervise them. This would, of course, be at the expense of the city which has severe financial problems at the present time and would ultimately be saddled upon the harried taxpayers of Cleveland.

Id. The court also justified its holding by stating that the national language of the United States is English. The court stated:

> Our laws are printed in English. Some states even designate English as the official language of the state. [Citations omitted.] Our national interest in English as the common language is exemplified by 8 U.S.C. Section 1423, which requires, in general, English language literacy as a condition to naturalization as a United States citizen.

Id. at 1220. In summary, the court found that the Commission, by offering its examination in English only, did not violate any of the plaintiff's constitutional rights since the Commission's testing policy rationally furthered a state purpose.

In analyzing the Board's testing issue in this case it appears, based on the sparse case law available, that the rational basis test should be used. Therefore, it must be decided whether the Board's policy of testing in English only is rationally related to a legitimate purpose. We believe that the Board's

policy is rationally related to protecting the public.[2] The practice of cosmetology involves the use of dangerous and harmful chemicals and one's ability to read the manufacturer's instructions and warnings. Additionally, it is highly likely that cosmetologists will be providing services to English speaking clients and in doing so the cosmetologist must be able to communicate effectively with clients. Also of note, several courts have found that being able to read and communicate English is a bona fide occupational qualification. *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375 (S.D.N.Y. 1978); *Garcia v. Rush Presbyterian-St. Luke's Medical Ctr.*, 660 F.2d 1217 (7th Cir. 1981).

Other factors that must be weighed are the cost of interpreting the examination and the question of whether the exam would lose its validity and integrity if it were translated into another language. Information obtained from the California Bureau of Barbering and Cosmetology indicates that it would cost between $25,000 and $40,000 to have the exam translated. Additionally, safeguards must be taken to ensure that the meaning of the words were not lost when an exam is translated. In summary, since there is no statutory authority that addresses the issue of language requirements for the Board's licensing examination and the scant case law available allows a test to be given in English-only, we conclude that the Board's current policy of offering the exam in English only is rationally related to its obligation to protect the public.

It must be noted that there is nothing that would prevent the Board from translating the exam to Spanish. However, if the Board does offer the examination in Spanish, it must also translate the exam into other languages if requested by prospective licensees. *See Frontera,* 522 F.2d at 1219. The problem with offering the exam in multiple languages is that the combined costs of translating the test into different languages would place a potentially enormous burden on the Board. This would, in turn, provide additional justification for the Board to not offer its tests in any language other than English.

CONCLUSION

[2] According to research provided by the Board, it appears that the majority of the cosmetology boards in the United States are in agreement with this Office's opinion since 42 of the states provide their examinations in English only. Also, in Nevada only one board offers its licensing examination in a language other than English and that is the Board of Psychological Examiners which offers its exam in English and French.

Neither the Nevada Revised Statutes nor the Nevada Administrative Code prohibits the Board from offering its licensing examination in English only. Further, based on the sparse case law available it appears that a person's due process and equal protection rights would not be violated if the exam were offered in English only. Additionally, if the Board does offer its exam in Spanish, it may also have to offer it in other languages if requested by an applicant.

FRANKIE SUE DEL PAPA
Attorney General

By: JENNIFER M. CARVALHO
Deputy Attorney General

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AGO 2000-29 CAMPAIGNS; CANDIDATES; ELECTIONS; FIRST AMENDMENT ACTIVITIES: The law that requires the media to make selected information regarding elections available for inspection is neither illegally discriminatory nor a violation of the First Amendment right of freedom of the press.

Carson City, October 17, 2000

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Mr. Heller:

You have requested an opinion from this office regarding the constitutionality of an election statute requiring disclosure of certain information by the media.

QUESTION

Are the provisions of NRS 294A.370 discriminatory and therefore a violation of the media's First Amendment rights?

ANALYSIS

The statute under analysis here, NRS 294A.370, enjoys a strong presumption of constitutionality. *Universal Elec. v. State, Office of Labor Comm'n*, 109 Nev. 127, 129, 847 P.2d 1372, 1373 (1993). ("Legislation is presumed constitutional absent a clear showing to the contrary. . . . A party attacking a statute's validity is faced with a formidable task.") *Starlets Int'l v. Christensen*, 106 Nev. 732, 735, 801 P.2d 1343, 1344 (1990). ("A legislative enactment is presumed to be constitutional absent a clear showing to the contrary.") *Wise v. Bechtel Corp.*, 104 Nev. 750, 754, 766 P.2d 1317, 1319 (1998). ("There is a strong presumption in favor of the constitutionality of statutes, which can only be overcome by clear and fundamental violations of the law.") To overcome this strong presumption, it must be shown that the statute in some way violates the United States Constitution.

NRS 294A.370 requires the media and certain other businesses to make selected information regarding elections available for inspection. The statute states:

1. A newspaper, radio broadcasting station, outdoor advertising company, television broadcasting station, direct mail advertising company, printer or other person or group of persons which accept, broadcasts, disseminates, prints or publishes:

(a) Advertising on behalf of any candidate or group of candidates;

(b) Political advertising for any person other than a candidate; or

(c) Advertising for a passage or defeat of a question or group of question son the ballot, shall make available for inspection at any reasonable time beginning at least 10 days each primary election, primary city election, general election or general city election and ending at least 30 days after the election, information setting forth the cost of all such advertisements accepted and broadcast, disseminated or published.

2. For purposes of this section the necessary cost information is made available if a copy of each bill, receipt or other evidence of payment made out for any such advertising is kept in a record or file, separate from the other business records of the enterprise and arranged alphabetically by name of the candidate or the person or group with requested the advertisement, at the principal place of business of the enterprise.

A. First Amendment, United States Constitution

The First Amendment of the United States Constitution guarantees, among other rights, the freedom of speech and of the press. U. S. CONST. amend. I. Freedom of speech and of the press is dear to every American citizen, and political speech lies at the very core of the First Amendment's protection. These rights of free speech and of the press are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment of state action.

A review of the language of NRS 294A.370 reveals the statute does not restrict free speech or free press. There is no censorship or restraint on speech, no restriction on the content of any publication, no limitation on

publishing or on distribution, and speech is not compelled or coerced. There are no time, place, or manner restrictions, and there is no interference with the news-gathering function. What this statute requires is that the media and certain other businesses make information regarding the cost of broadcasting, disseminating, or publishing certain advertisements dealing with elections available during a specific period of time just before and after elections.

In 1946, a New Hampshire statute that limited rates charged for political advertising in newspapers and on radio was challenged as being arbitrary and discriminatory because its regulations were confined to advertisements in newspapers and on radio. The challengers argued that the statute was discriminatory because it did not regulate political advertising by, and in, automotive equipment, aircraft and transportation systems, nor such advertising by job printers or billboards advertisers. The New Hampshire Supreme Court's reply to this argument was that "the State is not bound to cover the whole field of possible abuses." *Chronicle & Gazette Publishing Co. v. Attorney General*, 48 A.2d 478, 481 (N.H. 1946), *reh'g denied*, 329 U.S. 835 (1947) (citations omitted).

The court also found that the rate regulation did not abridge any freedom of the press.

> It cannot be successfully argued that freedom of the press is abridged. We do not have here a statute imposing a license tax on newspapers as in *Grosjean v. American Press Co.*, 297 U. S. 233. Neither does the statute suppress or censor newspapers as was attempted in *Near v. Minnesota*, 283 U.S. 697. The statute does not directly or indirectly exercise any previous restraint on the publication of news by newspapers. Freedom of the press is not an absolute right.

Id. [Citation omitted.] The regulation was found to be a legitimate exercise of the state's police power. *Id.* at 482.

An example of a statute that was found to abridge the freedom of the press was a statute in Florida which granted a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper. In *Miami Herald Publishing Co. v. Tornillo*, 481 U.S. 241, 257 (1974), the Supreme Court held that the statute was unconstitutional because it violated the First Amendment guarantee of a free press. NRS 294A.370 does not require a

newspaper to publish any political advertisement, nor is there any intrusion into the function of editors.

It should also be noted that Federal Communications Commission regulations require all broadcast licensees to keep and permit public inspection of a complete and orderly record of all requests for broadcast time made by or on behalf of a candidate for public office. Records must include the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased. *See* 47 C.F.R. § 73.1943 (2000). It does not appear that this regulation has ever been challenged in federal court.

NRS 294.A370 requires information setting forth the cost of political advertisements to be made available for public inspection immediately before and after elections. The disclosure of this information is also required by candidates (NRS 294A.125 and 294A.200), those who make independent expenditures (NRS 294A.210), those who make independent expenditures for or against ballot questions (NRS 294A.220), and recall committees (NRS 294A.280). The form to report campaign expenses requires the inclusion of categories of expenditures for expenses related to advertising such as television, newspapers, radio, billboards, printed signs, posters, fliers, brochures, and direct mail. NRS 294A.365(2)(d).

In the seminal campaign financing case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court analyzed disclosure requirements in relation to the First Amendment rights of free speech and association. *Id.* at 64-68. The Court explained why a statute requiring disclosure would have to survive "exacting scrutiny" by a reviewing court. *Id.* at 64-65. That is, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 64 (footnote omitted). The Court noted, "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

> The strict test . . . is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of

> infringement, particularly when the "free functioning of our national institutions" is involved. . . .
>
> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude.

Id. a 66 (citation omitted).

The Court then described the three categories of governmental interest: "First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent . . .'" *Id*. at 66. "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id*. at 67. "Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . . ." *Id*. at 67-68

The Court went on to examine the extent of the burden these substantial governmental interests place on individual rights and concluded "that disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption . . ." *Id. at 68*.

We are of the opinion that this statute is simply commercial regulation, requiring a business to make its charges for certain services rendered during certain periods of time, and that no First Amendment rights are implicated. Assuming, for sake of argument, that a First Amendment right is implicated, the statute survives "exacting scrutiny" under *Buckley* because of the substantial government interest involved.

B. Fourteenth Amendment, United States Constitution

The United States Supreme Court in a 1996 decision recognized that "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). The Court went on to state, "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so

long as it bears a rational relation to some legitimate end." *Id.* [Citation omitted.] If a statute applies only to a suspect class, the statute must be narrowly tailored to advance a compelling state interest, the strict scrutiny test. "Suspect classifications deserving of strict scrutiny include those based on race or national origin, religion, alienage, nonresidency (at least in some instances), and wealth." 16B AM. JUR. 2d *Constitutional Law* § 817 (1998).

As previously discussed, it is our opinion that NRS 294A.370 does not burden fundamental rights of free speech or free press. It merely requires disclosure of certain costs for services. Even if free speech or free press rights were deemed to be implicated by the statute, the burdens imposed are minimal and pass constitutional muster. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The media and other business entities are not a suspect class, and Nevada's important interest in informing the public as to the cost of political advertisements just before and after an election justifies this statute. This is a reasonable requirement and is not discriminatory, in that it includes newspapers, radio broadcasting stations, outdoor advertising companies, television broadcasting stations, direct mail advertising companies, printers, and others that provide similar services. NRS 294A.370(1).

Ordinarily, classifications are to be set aside as violative of equal protection only if they are based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be conceived to justify them. The Court has stated:

> The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.

Clements v. Fashing, 457 U.S. 957, 962-63 (1982), *reh'g denied*, 458 U.S. 1133 (1982).

Nevada has chosen to apply this statute only to businesses that advertise political ads because of the public's interest in knowing what these political advertisements cost and who requested the advertisement. There is no violation of the Equal Protection Clause by NRS 294A.370.

CONCLUSION

NRS 294A.370 is neither illegally discriminatory nor a violation of the First Amendment right of freedom of the press.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

_____

AGO 2000-30 TAXATION; PROPERTY; TREASURER: The Allodial Title Program is constitutional on its face, and must be applied in a way that prevents shortages in the trust fund created for a property owner in order to avoid an unconstitutional application. The State Treasurer must take into consideration the fact that the assessed valuation of the subject property may increase or decrease. Adding or deleting a person on the title will trigger a recalculation of the future tax liability. If an applicant elects to make installment payments, the State Treasurer may include a projected increase in the property's assessed valuation during the payment period.

Carson City, October 26, 2000

The Honorable Brian K Krolicki, Nevada State Treasurer, Capitol Building,Carson City, Nevada 89701

Dear Mr. Krolicki:

You have asked an opinion from this office on issues regarding the Allodial Title Program to be administered by your office.

QUESTION ONE

Does the Allodial Title Program (Program) create any conflict with the Nevada Constitution's provision of "fair and equitable" taxation because only single-family dwelling owners who hold title free and clear of all encumbrances may apply for the program?

ANALYSIS

The Allodial Title Program was enacted in 1997 by the Nevada Legislature, when Senate Bill 403 was passed (as the Act of July 17, 1997, ch. 685, §§ 1 -12, 1997 Nev. Stat. 3407 Program). Under the Program, certain property owners can prepay at a present value discount the real estate taxes for certain types of property. A trust fund is set up and administered by the State Treasurer from which all future property taxes on the subject property are to be paid, for the remainder of the property owner's life.

The Program was intended to protect families from losing family homes because of tax liens. *See Hearing on S.B. 403 Before the Senate Comm. on Taxation*, 1997 Legislative Sess., 3 (June 5, 1997). Therefore, the Program was

limited to owners of single-family dwellings, occupied by the applicants. Additionally, because the Program further protects the property from other types of liens and judgments, pursuant to NRS 21.090, 31.045 and 115.010, the property must be free and clear of all encumbrances to be eligible for the Program. [1] The statute provides:

> A person who owns and occupies a single-family dwelling, its appurtenances and the land on which it is located, free and clear of all encumbrances, except any unpaid assessment for a public assessment, may apply to the county assessor to establish allodial title to the dwelling, its appurtenances and the land on which it is located. One or more person who own such a home in any form of joint ownership may apply for the allodial title jointly if the swelling is occupied by each person included in the application.

NRS 361.900(1) (emphasis added).

The State Treasurer is charged with the duty of calculating, to the best of his ability, the amount to be prepaid for each application to ensure that the amount, with the earnings on that amount, will be adequate to pay all future tax liability for the subject property. The applicable statutory provision states:

> Upon receipt of an application from a county assessor, the state treasurer shall determine the amount of money that would be required to be paid by the owner of the property to establish allodial title to the property using a tax rate of $5 for each $100 of assessed valuation on the date of the application. The amount must be separately calculated to produce an alternative for payment in a lump sum and an alternative for the payment of installments over a payment period of not more than 10 years. The amounts must be

[1] The statute does not provide a definition of the term "encumbrances," and this term could be interpreted to mean any right to, or interest in the land which would include easements or rights-of-way, which are likely to be found on most property. However, the rules of statutory construction would in this case allow construction of the definition of the term "encumbrance" from the overall policy intent of the statute to avoid the absurd result of limiting the Program to only those rare parcels of property without any type of encumbrance such as easements.

> calculated to the best ability of the state treasurer so that the money paid plus the interest or other income earned on that money will be adequate to pay all future tax liability of the property for a period equal to the life expectance of the youngest titleholder of the property. The state treasurer shall make a written record of the calculations upon which the amount was determined. The record must include an annual projection of the estimated interest and income that will be earned on the money.

NRS 361.900(3).

For the statute to meet the requirements of the Nevada Constitution's "fair and equitable" provisions, each taxpayer must be provided uniform and equal taxation, and just valuation of all property for taxation purposes. The Nevada Constitution specifically required that:

> The legislature shall provide by law a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, which shall be assessed and taxed only as provided in section 5 of this article.

NEV. CONST. art. 10, § 1, subsection 1.

Analysis of the constitutionally of the Program must start with the presumption that statutes enacted by the Legislature are constitutionally valid. *See Sun City Summerlin v. State, Dep't Tax*, 113 Nev. 835, 841, 944 P.2d 234, 238; *List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983). On its face, the Program does not change the rate of assessment or tax for the property subject to the Program, nor does it provide for the property to be valued in a manner different from other property. Participants in the Program do not directly pay taxes but instead have a trust fund set up for that purpose and pay money into that trust fund. It is the State Treasurer who will ultimately make the tax payments, which will be for assessments and taxes at the same rate as for other property that is not part of the Program. Therefore, the statute setting up the Program is constitutional on its face because it does not require the subject property to be assessed and taxed at a rate that is not uniform and equal to the rate of assessment and taxation of other property.

While the Program requires the State Treasurer to determine the prepaid amount using a higher tax rate than what might exist in the county where the property is located, that rate is only for purposes of an actuarial calculation. The property will still be assessed at the rate existing in the county where it is located and the State Treasurer will pay that amount out of the trust fund set up for that property. The Program requires the county assessor to notify the State Treasurer of the annual taxes due based on the date of the certificate of alloidial title, and the State Treasurer must pay the amounts due for taxes pursuant to NRS chapter 361, which governs property taxes. *See* NRS 361.905. The subject property itself is bearing the same rate of tax; the tax is just being paid out of a fund administered by the State Treasurer instead of coming directly from the property owner. This is comparable to any fund or investment that a property owner could set up for the payment of future property taxes.

Additionally, the person availing himself of the Program is not going to pay higher taxes than other property owners, nor will the property be valued by a different methodology. If there is a situation where there is more money in the trust fund at the end of the period for which the allodial title exists, the Program makes provisions to ensure the return of all unused or excess prepaid taxes, and their earnings, through a future trust fund refunding process to the allodial title holder or the respective estate. In the event of relinquishment of allodial title by the homeowner, death of the homeowner, sale, lease, or other transfer or encumbrance, the Program requires a calculation be made by the State Treasurer to identify and return with earnings the unused portion of the title holder's portion of the trust fund. *See* NRS 361.915. Therefore, there can never be an overpayment of taxes or payment of a higher rate of taxes under the Program because any payment or overpayment of money to the trust fund is not a direct payment of taxes.

Instead, any possible constitutional problem would lie in the application of the Program in a situation where the funds in the trust fund, and the stabilization fund, are not sufficient to cover the property taxes assessed by the county. If the State Treasurer's calculations cause a shortfall by overestimating the assumed earnings or underestimating the true life expectancy of the youngest title holder, the State Treasurer is still required to make tax payments to the county. The funds would first come from the account of the property, and when those are not sufficient, then funds must come from excess earnings over initial estimates of income and earnings on the prepayment (the allodial account for stabilization). In the event that all of these

funds are exhausted prematurely, the State and the county must absorb the tax collection loss at the same rate as they would have shared in the tax collection. *See* NRS 361.905(4); *see also* NRS 115.010(4). Therefore, the allodial titleholder is released from liability on the future taxes and ultimately the rest of the taxpayers must bear the tax payment shortfall.

It is clear that a statute must provide for an equal and uniform rate of assessment and taxation to all property of the same class. However, a statute also must not cause a result whereby a taxpayer is receiving a tax advantage or benefit that is not available to other taxpayers with the same type of property. In *Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 390 P.2d 225 (1964), a statute was found unconstitutional because it allowed assessment of land used for agricultural purposes to be based on its value for such use, rather than on its value for other purposes. The rate of assessment was the same, but the valuation of the land was different which resulted in owners of agricultural property receiving a distinct tax advantage over other landowners. *See id*. at 166-167.

In *State of Nevada v. Eastabrook*, 3 Nev. 173 (1867), the Nevada Supreme Court found that where there was an equal rate of assessment, but a different method of assessing property for the proceeds of a mine, the statute was unconstitutional. The result under the statute was that one type of property was assuming more of a tax burden than another type of property. The purpose of the constitutional provision is that all property share the burden equally. *See id*. at 177-178.

While case law does not address unequal tax collection, the implication from the other cases is that any inequality in the sharing of the tax burden is not permissible. Normally, if a taxpayer does not have sufficient funds to pay his property taxes, the property is subject to seizure and foreclosure and sold in a tax sale. *See* NRS 361.5648—361.595. Therefore, all properties will ultimately pay the same tax, whether by direct payment of taxes as they become due or through a tax sale of the property. However, that type of sale cannot happen to someone who has a certificate for allodial title. NRS 361.905. If the State Treasurer does not accurately anticipate the present value discount prepayment of taxes, the State and county may not look to the individual taxpayer or the allodial property for any shortfall. See *id*. This event could eventually cause the accrual of unpaid tax liability upon which there will exist an unenforceable tax lien as a matter of law under the Program. The end result would be that the other taxpayers in the county end up sharing a larger burden

and share of the tax burden to make up for the taxes lost because there were insufficient funds in the trust fund for this property. This application of the statute would violate the Nevada Constitution, and therefore, this application must be avoided to prevent constitutional challenges.

CONCLUSION TO QUESTION ONE

The Program is not unconstitutional on its face and a constitutional challenge to the application of the statute may be avoided as long as the actuarial assumptions made by the State Treasurer are done appropriately so as to ensure that the trust fund has sufficient money to pay the property taxes as they come due during the term of the allodial title.

QUESTION TWO

In calculating the cost of the allodial title certificate, must the State Treasurer forecast an increasing assessed valuation for the actuarial period?

ANALYSIS

The statute provides that the State Treasurer shall determine the amount of money required to establish allodial title using a tax rate of $5 for each $100 of "assessed valuation on the date of the application." NRS 361.900(3) (emphasis added). Accordingly, while the State Treasurer must take into consideration the fact that the assessed valuation may increase when making his overall calculations, the assessed value that must be used for applying the $5 tax rate is that value existing on the date of the property owner's application for allodial title. The State Treasurer does have some leeway if the applicant chooses to make installment payments, because the last installment payment must reflect any increase, or decrease, in the assessed valuation of the property since the date of the application. NRS 361.900(8). Again, however, there is a set date for determining the assessed valuation to be used for applying the $5 tax rate.

During one of the hearings on S.B. 403, the Senate Committee on Taxation considered the question of what would happen in the case of a property owner making improvements to his home, and whether that would trigger a reassessment of the valuation at that time. Senator Rawson replied that a reassessment could occur but that there were some restrictions on reassessments. *See Hearing on S.B. 403 Before the Senate Committee on Taxation*, 1997 Legislative Session, 3 (June 5, 1997). After that hearing, the bill

was amended. In the original version of S. B. 403, in Section 3(2), it stated that the county assessor would collect no further taxes, whether the assessed valuation increased, or not. In the enrolled version, that provision was removed. However, no new provision was added to address what happens in the case of a substantial increase or decrease in the assessed value of the property attributable to such things as new improvements, destruction of improvements, obsolescence, or contamination on the land.

Instead, at the hearing on S.B. 403 before the Assembly Committee on Taxation, Senator Rawson stated that the intent was to have the State Treasurer calculate the amount of money necessary to guarantee that under all eventualities the property taxes would be paid from that property's trust fund. *See Hearing on S.B. 403 Before the Assembly Committee on Taxation*, 1997 Legislative Session, 4 (June 28, 1997). Additionally, Senator Rawson explained that the interest income on the large amount of money necessary to establish the trust fund, and the $5 tax rate, were intended to build in a cushion to cover such eventualities. *See id.* at 6. These statements indicate the Legislature's intent that the actuarial assumption would take into account the possibility of assessed value increases, but that such a possibility would be covered by income interest and the $5 tax rate. Accordingly, if the property's assessed valuation does increase during the term of a certificate of allodial title, the State Treasurer cannot make a recalculation. The State Treasurer also cannot apply the $5 tax rate to an assessed value other than that in existence either at the time of the application, when calculating a lump-sum payment, or that value existing at the time of the last payment under an installment plan.

CONCLUSION TO QUESTION TWO

The assessed valuation on which the tax rate of $5 for each $100 will be applied is that existing as of the date of the application, when the applicant is paying one lump sum, or as of the date of the last installment payment in the case of installment payments. The State Treasurer must take the possibility of increasing or decreasing assessed valuations, because of such things as construction or destruction of improvements, into consideration when making

the calculations of return and on life expectancy to determine the proper amount to be paid for the allodial title.

QUESTION THREE

May a titleholder add, or delete, any person on this title without triggering a recalculation of the future tax liability, or, may the State Treasurer adopt regulations to provide for a recalculation, pursuant to NRS 361.920(4)?

ANALYSIS

This very question was of concern to the Nevada Legislature when the bill was being heard in committees. The conclusion was that the addition or deletion of a titleholder would be considered a "transfer of the property" pursuant to NRS 361.915.[2] Any such transfer results in the relinquishment of the allodial title. *See id.* However, pursuant to NRS 361.915(6), application may be made to the county treasurer to delete or add a person as an additional allodial titleholder. Accordingly, a transfer of interest that is merely an addition or deletion of a person as a titleholder would not necessitate a refund and the reapplication for allodial title. Instead, the titleholders must make an application to the county treasurer, and may have to pay a fee for the application. The State Treasurer should then be notified and will recalculate the actuarial amount based on the change in titleholders, and determine if any additional amount needs to be paid to the trust fund for that property.

During review of S.B. 403 by the Assembly Committee on Taxation, Senator Rawson stated that the bill was originally drafted to allow names to be added to the title; however, the bill was amended so that the subject property would have to be reassessed and the title re-filed to add a person. The reassessment would mean the State Treasurer would then have to make another calculation, addressing new actuarial assumptions at that time, if necessary. Senator Rawson felt that these types of situations would be able to be covered by regulations adopted by the State Treasurer. *See Hearing on S.B. 403 Before the Assembly Committee on Taxation*, 1997 Legislative Session 4 (June 28, 1997).

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[2] A deletion solely through the death of a titleholder without transfer of that person's interest to a new person, such as in the case of joint tenants with survivorship rights, should not be considered a transfer of interest. Under common law, no interest passes on a joint tenant's death under the theory that the decedent's interest vanishes at death and the survivor's ownership of the whole continues without the decedent's participation. *See, e.g., Kleemann v. Sheridan*, 256 P.2d 553, 555 (Ariz. 1953); 51 A.L.R. 4th 906. Regulations can also address this type of situation, indicating that a recalculation does not have to be done under these types of circumstances.

Accordingly, it was the intent of the Legislature that the addition or deletion of a titleholder would result in a recalculation of the actuarial. The statute grants the authority for recalculation pursuant to NRS 361.915(1)(a). If the State Treasurer wishes to adopt a regulation that addresses how such situations will be handled, the State Treasurer may do so as long as the scope of the regulation is within the scope of the statute.[3]

CONCLUSION TO QUESTION THREE

The addition or deletion of a titleholder, where there is a transfer of interest other than to a joint tenant, would be cause for a recalculation of the allodial title pursuant to NRS 361.915(1)(a). As the statute does not specifically address how recalculation for additions or deletions of titleholders should be done, a regulation addressing the procedure would be proper.

QUESTION FOUR

If an applicant elects to make installment payments, may the State Treasurer calculate increasing annual installments so that the balance of the account at the final installment is sufficient to cover the cost of the certificate based on the assessed valuation on the issue date of the certificate, and could this be included as a regulation?

ANALYSIS

The statute authorizes the State Treasurer to recalculate the amount due based on the assessed valuation as of the date of the last payment, where the allodial title applicant elects to make installment payments. *See* NRS 361.900(8). Therefore, if during the payment period the assessed valuation has increased, the State Treasurer may take that into account before determining the amount of the last installment payment. It is possible that if the assessed valuation has significantly increased, the last installment payment could be extraordinarily high as compared to the other installment payments. Therefore, it seems reasonable that the State Treasurer could calculate the installment payments

[3] You had also inquired if the recalculation of the actuarial amount in the circumstances where the person deleted is an older person and the person added is a younger person, would be considered age discrimination. However, the amount would be recalculated in any addition or deletion of a titleholder where there is a transfer of interest, regardless of the age of the person being deleted or added.

based on a projected increase in valuation of the property, where appropriate, and that the method for doing so could be included as a regulation.

A disclaimer should be added to any installment payment statement to explain that the final installment payment will be adjusted to reflect any increase or decrease in the assessed valuation of the property since the date of the application, pursuant to NRS 361.900(8). That way, if the projections for the assessed valuations during the payment period are not correct, the property owner has notice that the final payment will be adjusted to take this fact into consideration.

CONCLUSION TO QUESTION FOUR

The State Treasurer has the authority to include a projected increase in the property assessed valuation during the payment period pursuant to the section of the statute that requires that the final installment payment must reflect any increase or decrease in the assessed valuation of the property since the date of the valuation. It appears advisable that the installment payments be set to take possible valuation changes into consideration so the property owner does not have one final payment greatly out of proportion to the other payments. However, the property owner should be made aware that the last installment payment is subject to adjustment to take into account any changes in the assessed valuation of the property during the payment period prior to the last payment being made.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Senior Deputy Attorney General

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AGO 2000-31 INSURANCE; RECORDS; LEGISLATURE: The National Council on Compensation Insurance must reimburse Employers Insurance Company of Nevada for the actual cost of reproducing and delivering certain records and data.

Carson City, November 17, 2000

Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5433

Dear Ms. Molasky-Arman:

This is in response to your request for an opinion of this office concerning a dispute between the former State Industrial Insurance System (SIIS), presently known as Employers Insurance Company of Nevada, a mutual insurance company (EICON), and the advisory organization for industrial insurance, the National Council on Compensation Insurance (NCCI), over the payment of the actual cost of reproducing and delivering records and data.

QUESTION ONE

Is the 1995 law (Act of July 5, 1995, ch. 580, § 194, 1995 Nev. Stat. 2060) requiring the advisory organization to reimburse the system still in effect?

ANALYSIS

The 1995 Nevada Legislature addressed the transformation of the market for industrial insurance in Nevada from the state fund known as SIIS to a market that allows private insurance companies to compete for the sale of industrial insurance, as defined in NRS 686B.1757. The Commissioner of Insurance selected NCCI to serve as the advisory organization for industrial insurance and to act as statistical agent. NCCI also assists the Commissioner in developing a statistical plan, and has formulated a manual of rules and a uniform system of classifications required by the provisions of NRS 686B.1764. As an aspect of the 1995 legislation, the Legislature mandated that SIIS would reproduce and deliver to NCCI, records of accidents and loss experience, records concerning the system of classification of risks, and any other data requested by the advisory organization, in order to prepare the filings required by the Act. The data and records that were thereafter transferred from SIIS to NCCI, served as a basis for a plan for rating development, based upon the loss

experience of Nevada employers. This was a substantial undertaking for SIIS. The scope of the statute included computer programs. *See* Op. Nev. Att'y Gen. No. 89-1 (February 6, 1989). The data was essential for NCCI to prepare rates for all employers in Nevada that purchase industrial insurance. The Legislature imposed upon SIIS the legal duty to deliver the records and data to NCCI. Conversely, the Legislature imposed a legal duty upon NCCI to pay the "actual cost" of producing and delivering the documents and data referenced in Act of July 5, 1995, ch. 580, §194, 1995 Nev. Stat. 2060. That statute provides as follows:

> Within a reasonable time after the passage and approval of this act, the state industrial insurance system shall provide the following records of the system and the Nevada industrial commission to the advisory organization designated by the commissioner of insurance:
>
> 1. Records of accidents and loss experience;
>
> 2. Records concerning the system of classification of risks; and
>
> 3. Any other data requested by the advisory organization to prepare the filings required by this act.
>
> The advisory organization shall reimburse the system for the actual cost of reproducing and delivering of those records and data.

NCCI refused to pay the bill submitted by SIIS on the grounds that the billing did not have sufficient detail to allow payment, and on the grounds that it held a fiduciary relationship with other insurance companies that would use the rates, and should be assessed a share of the bill. Resolution of the dispute over payment of the actual cost of producing the data has occupied both parties, as well as the Commissioner of Insurance, for the past five years. A brief chronology may prove instructive.

1. Section 194 became effective on July 1, 1995.

2. SIIS produced the documents required by the statute.

3. SIIS presented a bill to NCCI in the amount of $554,813.00. NCCI refused to pay the bill and sought an administrative ruling from the Commissioner.

4. The Commissioner held a hearing on the Transition Fee Plan on October 22, 1998.

5. In *National Council on Compensation Insurance, Inc.*, Division of Insurance Cause No. 98.165, the Commissioner entered an order on December 11, 1998, regarding the Transition Fee Plan and Plan to Reimburse Costs of EICON. The proposed plan was attached as Exhibit "3" to the order. However, the Commissioner specifically refused to make a ruling concerning the fairness or adequacy of the amount of money charged by SIIS to NCCI.

6. SIIS filed suit in Department I of the First Judicial District Court on December 18, 1998, to recover the actual costs expended in complying with Section 194.

7. The court, on NCCI's motion, dismissed the judicial proceeding on September 28, 1999, based on the doctrine of administrative res judicata.

8. On January 1, 2000, SIIS was transformed into EICON, a Nevada domestic mutual insurance company.

The records and data have been produced and delivered to NCCI. NCCI has used the records and data to perform its duties as an advisory organization, and has performed its duties to the Commissioner, based upon the SIIS data. The duty to pay for the actual cost of reproducing and delivering the data rests upon NCCI, which owes money to EICON as the successor to SIIS.

The duty to pay has not been diminished by the passage of time; otherwise, NCCI would have no incentive to pay the claim of SIIS/EICON, and would have the benefit of the data assembled and produced by SIIS/EICON at no cost. Insurance companies writing industrial insurance in Nevada would have the benefit of the SIIS data without paying for the benefit. This result would not meet the plain intent of the Legislature. This is a remedial statute and should be liberally construed to meet the objective of the Legislature, which was to facilitate the transition from a monopolistic state workers' compensation system to a private system.

CONCLUSION TO QUESTION ONE

Based upon the foregoing, it is the opinion of this office that the statutory duty imposed upon NCCI to pay EICON, the successor to SIIS, is in effect, and that NCCI must pay EICON for the actual cost incurred in complying with the statute. The money due should be paid to EICON, the successor to SIIS.

QUESTION TWO

Prior to privatization, does the term "actual costs" include the use of internal resources, i.e., hours billed for state employees involved on the transition project?

Employees of SIIS and EICON, received pay whether working on the "transition project" or doing other work for the State agency. Should such wages be reimbursed in accordance with the law?

ANALYSIS

The response to the second question requires an analysis of the term "actual cost" as used in Section 194. While the Legislature did not define "actual cost" in Section 194, it gave a clear idea about how the duty imposed upon SIIS would be performed. The term "actual cost" is well recognized in Nevada law, and has been defined in construction contracts, in condemnation proceedings, in tax cases, and in insurance. The Supreme Court has applied the term "actual cost" to various fact patterns since the early days of the State. *Sutro v. Segregated Belcher Mining Company*, 19 Nev. 121, 7 P. 271 (1885). A useful construction is found in *Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994), where the court found that a review of NRS 18.005 (pertaining to court costs) specifically defines the term "costs" to include "reasonable costs" for photocopies, long distance telephone calls, and postage. The court reasoned that ". . . A strict construction of the statute, however, requires that the phrase 'reasonable costs' be interpreted to mean actual costs that are also reasonable, rather than a reasonable estimate or calculation of such costs based upon administrative convenience." *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540 (1994). Thus, the Court concluded that the lower court erred in awarding respondents an estimate to cover all photocopying, telephone and postage expenses, without requiring respondents to show actual expenses incurred. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "actual cost" as a "cost based on the most factual allocation of historical cost factors—compare ESTIMATED COST , STANDARD COST ."

Interestingly, the Legislature enacted statutes that would have clarified this point in the 1997 session. In that session, following the enactment of Section 194, the Legislature defined "actual cost" as ". . . the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record." Act of July 5, 1995, ch. 580, § 194, 1995 Nev. Stat. 2060. "Extraordinary cost" was further defined in the 1997 session in NRS 239.055. This statute was part of a revision of the public records law that allowed for the recapture of extraordinary expenses incurred in producing government records. NRS 239.005(i) addresses direct costs. NRS 239.055 addresses the costs of the extraordinary use of State personnel or resources. Had NRS 239.005(i) and NRS 239.055 been enacted in 1995, the resolution to the instant question would be greatly simplified. The Legislature recognized, in the above statutes, that the government maintains records that may have value, and that the compilation and analysis of government records may take a great deal of personnel time and agency resources. Accordingly, the Legislature provided in NRS 239.055(1) that ". . . . if a request for a copy of a public record would require a governmental entity to make extraordinary use of its personnel or technological resources, the governmental entity may, in addition to any other fee authorized pursuant to this chapter, charge a fee for such extraordinary use." Even more significant, the statute provides that:

> Upon receiving such a request, the governmental entity shall inform the requester of the amount of the fee before preparing the requested information. The fee charged by the governmental entity must be reasonable and must be *based on the cost that the governmental entity actually incurs for the extraordinary use of its personnel or technological resources*. [Emphasis added.]

It necessarily follows that missing in the instant question was an assessment of the proposed cost of providing the records prior to undertaking the reproduction and delivery required by Section 194, and an agreement between the parties as to the amount of money involved in complying with Section 194. Reasoning by analogy to NRS 239.055, the meaning of the term "actual cost" as used by the Legislature in 1995 would include the procedures contained in NRS 239.055 for extraordinary costs. These procedures would have allowed the parties to agree upon the scope of the document and data request and upon the reasonableness of the charges. While it is impossible to turn back the clock, it is possible for NCCI to review the bill from EICON to

determine the cost of personnel and resources expended on its behalf in complying with the mandate of the Legislature in Section 194, and to pay that sum promptly. Compliance with the mandate of Section 194 involved substantial resources of SIIS. Because of the nature of the records and data, this was an extraordinary use of SIIS employees and resources. The cost of personnel and resources are a part of the "actual cost" of complying with this mandate. The EICON claim included a description of actual cost of reproducing records and data that included personnel time and resources expended. NCCI was required to pay actual costs of producing the data. The Legislature mandated two corresponding duties: SIIS's duty to copy and deliver complex data and records, and NCCI's duty to pay for the actual cost of that production.

You have further requested a review of legislation enacted in 1997 and 1999 to determine whether the Legislature modified the nature of the mandate created by Section 194. A review of the statutes has uncovered no intent to eliminate, waive, or modify the mandate set forth in Section 194.

It has come to the attention of this office that EICON has recently provided NCCI with a description of the nature of the costs incurred in complying with the provisions of Section 194. A review of the costs should be undertaken in light of the Commissioner's 1998 order. If this is the case, and if NCCI adopts a reasonable posture toward completing this transaction, the matter may be moot.

On the other hand, if the parties do not resolve this matter, the Commissioner may again seek to resolve the question in proceedings similar to those discontinued after EICON filed suit against NCCI in December 1998. This matter is addressed in *National Council on Compensation Insurance, Inc.*, Findings of Fact, Conclusions of Law and Order as to the Transition Fee Plan and Plan to Reimburse Costs of EICON (Exhibit "3"), dated December 11, 1998, Division of Insurance Cause No. 98.165.

CONCLUSION TO QUESTION TWO

NCCI has received the documents and data from SIIS and has a duty to pay SIIS the actual cost incurred by SIIS in complying with Section 194. NCCI may request a reasonable explanation of the "actual cost" incurred by SIIS, the predecessor of EICON. Reasoning by analogy to NRS 239.055, a later adopted statute, the actual cost incurred would include the extraordinary costs of

personnel and resources expended in meeting the Legislature's mandate to produce records and data.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES C. SMITH
Deputy Attorney General

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AGO 2000-32 INSURANCE; CLAIMS; INTEREST: Health insurers and health maintenance organizations may contract with providers for zero interest on late claim payments, which constitutes a "different rate of interest" and a valid exemption to the statutory requirement to pay interest. Contracting for zero interest has no effect on statutory penalty provisions for late payments, which are still applicable.

Carson City, December 1, 2000

Ms. Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5453

Dear Ms. Molasky-Arman:

You have requested an opinion from this office regarding the following:

QUESTION ONE

Does a Sierra Health Services (SHS) contract, in which affiliates of SHS set the terms of claims payments to medical providers, and which states that no interest will be paid when a "clean claim" is not paid within 30 days of receipt, meet the statutory standard of "a different rate of interest . . . established pursuant to an express written contract between the insurer and a provider of health care," thus allowing SHS to avoid paying interest on late claims?

ANALYSIS

Senate Bill 145 (1999) (S.B. 145), Act of May 29, 1999, ch. 362, 1999 Nev. Stat. 1646 *et seq*., among other provisions relating to contracts between health insurers and medical providers, added a provision to several chapters of the Nevada Revised Statutes that allows insurers and medical providers to agree on a different rate of interest than that which is otherwise statutorily required to be paid on claims that are not paid within certain periods of time. Specifically, your opinion request refers to two such provisions codified at NRS 689B.255, pertaining to group health insurers, and NRS 695C.185, relating to health maintenance organizations (HMOs). In both of these sections, the words "unless a different rate of interest is established pursuant to an express written contract between the . . . [health insurer or HMO] . . . and the provider of health care" were added pursuant to S.B. 145 and provide an exception to the

statutory requirement to pay interest pursuant to NRS 99.040 on an approved claim not paid within 30 days of approval. You question whether language in the SHS contracts with providers, in which SHS amended their contracts to add language to the effect that there would be no payment of interest on "clean claims" (properly submitted, uncontested claims) that are not paid within the required period under the contract, constitutes a valid "different rate of interest" under the amendments in S.B. 145. The SHS contract requires such claims be processed *and paid* to providers within 30 days of receipt by SHS, which standard is more stringent than that required under NRS 689B.255 or NRS 695C.185.

In the SHS contracts, the parties have mutually established a rate of zero interest. Because the Legislature did not establish a minimum rate of interest in S.B. 145, the contractually established zero interest rate qualifies as a statutorily valid "different rate of interest." There is no Nevada authority that a "different rate of interest" cannot be zero interest or a waiver of interest. *Cf. Jacobson v. Best Brands, Inc.*, 97 Nev. 390, 393-94, 632 P.2d 1150, 1152 (1981) (When contractual parties specifically deleted reference to interest in a contract, they intended no interest be charged. Therefore, the provision of NRS 99.040 requiring a certain rate would not apply). Further, our review of the legislative history of S.B. 145 did not reveal evidence that the Legislature intended to prohibit parties from contracting for a zero rate of interest.

The fact that the SHS requirement to process and pay a claim within 30 days is more stringent than the statutory requirement to approve or deny a claim within 30 days and to pay an approved claim within 30 days after approval does not impact this opinion. Interest at the statutory rate would be payable on these contracts 30 days after approval of the claim if the parties had not stipulated to no interest.

CONCLUSION TO QUESTION ONE

The SHS provider contract amendments, which provide that no interest shall be paid on claims not paid in a timely manner pursuant to the terms of the contract, provide for a valid "different rate of interest" that is sufficient to exempt SHS from the statutory requirement to pay interest on late claims pursuant to NRS 99.040.

QUESTION TWO

In view of the fact that the SHS contract amendments do provide for a valid "different rate of interest," is the insurer or HMO still subject to fines when claims are not paid within statutory time frames?

ANALYSIS

NRS 680A.200, in the case of an insurer, and NRS 695C.330, in the case of an HMO, are the statutory provisions that provide for a penalty for violation by an insurer or HMO of the time frames for approval or denial and payment of claims. These statutes are completely independent of the provisions requiring the payment of interest on claims not paid within these time frames. There is no language in NRS 680A.200, NRS 689B.255, NRS 695C.185, NRS 695C.330, or any other statute or regulation that ties these penalty provisions for violation of the statutory time limits with the applicability of the interest provision. Therefore, because the penalty provisions are independent of the interest provisions, these penalty provisions are still applicable regardless of whether the parties contractually modify the rate of interest on late claims.

CONCLUSION TO QUESTION TWO

A contract between an insurer or HMO and a provider for a different rate of interest for late payment of claims has no impact on the statutory penalty provisions for late payment. Notwithstanding such a contract, the statutory penalty provisions remain in effect.

FRANKIE SUE DEL PAPA
Attorney General

By: EDWARD T. REED
Deputy Attorney General

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AGO 2000-33 NDOP; BLOOD TESTS; EMPLOYEES; POLICE: When a Nevada Department of Prisons (NDOP) "police officer" employee with a documented exposure to a contagious disease is voluntarily or involuntarily terminated, NDOP must provide that employee blood tests to screen for contagious diseases, including, without limitation, hepatitis A, B, C, tuberculosis, and human immunodeficiency virus. NDOP must pay all associated costs.

Carson City, November 30, 2000

Jackie Crawford, Director, Nevada Department of Prisons, 5500 Snyder Avenue, Carson City, Nevada 89702

Dear Ms. Crawford:

On behalf of the Nevada Department of Prisons, you asked this office for an opinion addressing the following question.

QUESTION

Is the Nevada Department of Prisons (NDOP) required to pay all costs associated with blood tests for its voluntarily or involuntarily terminated "police officer" employees who have no documented exposure to a contagious disease?

ANALYSIS

The statute addressing NDOP's requirement to pay for such blood testing is NRS 616C.052. This new law pertains to "police officers." *See* NRS 616A.283, which refers to NRS 617.135. A "police officer," as defined in NRS 617.135, includes "7. A: (a) Uniformed employee of; or (b) Forensic specialist employed by, the department of prisons whose position requires regular and frequent contact with the offenders imprisoned and subjects the employee to recall in emergencies." NRS 617.135(7). Thus, for purposes of interpreting and applying the Nevada Industrial Insurance Act (NRS chapters 616A to 616D, inclusive) and the Nevada Occupational Diseases Act (NRS chapter 617), NDOP correctional officers and its uniformed doctors and nurses who have regular and frequent contact with prisoners and who are subject to recall in emergencies are "police officers." Likewise, an NDOP forensic

specialist whose position requires regular and frequent contact with prisoners and who is subject to recall in emergencies is a "police officer."

The 1999 bill you refer to, Senate Bill 132 (S.B. 132), amended the pertinent statute NRS 616C.052 and other portions of NRS 616A—NRS 616D. It also amended NRS 617.[1] This recent legislation revised, among other things, provisions governing benefits for industrial insurance for NDOP "police officers." According to Walter Tarantino, counsel for the Nevada Correctional Association, the proponent of the bill, the purpose of S.B. 132 was as follows:

> The genesis of the legislation was to define in statute that state correctional officers, who were engaged in the normal course of their duties and were contaminated by bodily fluids or contracted a contagious disease, would not only be covered but also be able to obtain the chemistry panels to ascertain whether or not the correctional officer did contract a contagious disease.

Hearing on S.B. 132 Before the Assembly Comm. on Commerce and Labor, 1999 Legislative Session, 1 (May 3, 1999). Mr. Tarantino explained that the intent was to cover actual traumatic events and pointed out that the language in Section 4 of the bill remained part thereof and "required documentation by the public entity noting an exposure." *Id.* Section 4 of S.B. 132 amended NRS 616A.265(2) to broaden the Industrial Insurance Act's definition of "injury" and "personal injury" to include as follows:

> (c) The exposure to a contagious disease of a police officer or a salaried or volunteer fireman who was exposed to the contagious disease:
>
> (1) Upon battery by an offender; or
>
> (2) While performing the duties of a police officer or fireman, shall be deemed to be an injury by accident sustained by the police officer or fireman arising out of and in the course of his employment if the exposure is documented by the creation and maintenance of a report concerning the exposure pursuant to subsection 1 of NRS 616C.052.
>
> . . . .

To be deemed an injury by accident arising out of and in the course of employment, this language requires that an incident involving exposure to a

contagious disease be documented. NDOP's obligation to document the incident pursuant to NRS 616C.052(1) arises if an employee reports such an accident or if NDOP otherwise learns of the accident. *See* NRS 616C.010(1). Harmoniously reading the "injury" definition (NRS 616A.265(2)(c)) with the statutory requirement that NDOP pay "all the costs associated with providing blood tests" (NRS 616C.052(2)), it is clear that NDOP documentation of the "police officer" employee's exposure must occur before NDOP becomes obligated to pay for the former employee's blood testing. This conclusion is further supported by the statute defining "accident benefits," NRS 616A.035(2)(c), which also requires documentation of the "police officer" employee's exposure to a contagious disease.

The foregoing analysis is consistent with the intent of S.B. 132, as explained by counsel for the Nevada Correctional Association in the legislative history of this bill, that "if there was an actual *documented* incident, the person would be covered for preventive measures, and if the disease was contracted, for further care." *Hearing on S.B. 132 Before the Assembly Committee on Commerce and Labor*, 1999 Legislative Session, 3 (May 3, 1999).

Although not a part of your inquiry, we also note that a current NDOP "police officer" employee with a documented exposure to a contagious disease has a covered "accident benefit" and is thus entitled, among other things, to preventive treatment. *See* NRS 616A.035. Early blood testing, as described in NRS 616C.052(2), is necessary in order to achieve early detection and thus preventive treatment. Furthermore, a current NDOP employee who has been exposed to a contagious disease while performing his official duties can petition a "court for an order requiring the testing of a person for exposure to the human immunodeficiency virus [HIV] and the hepatitis B surface antigen." NRS 441A.195(1). The court can order this testing to be done at NDOP's or its insurer's expense. NRS 441A.195(4).

CONCLUSION

The Nevada Department of Prisons (NDOP) is required to document a "police officer" employee's exposure to a contagious disease, whenever such incident is reported by the employee or NDOP otherwise learns of it. When an NDOP "police officer" employee with a documented exposure to a contagious disease is voluntarily or involuntarily terminated, NDOP must provide that employee blood tests to screen for contagious diseases, including, without limitation, hepatitis A, B and C, tuberculosis and human immunodeficiency

virus. Such tests shall occur at the time the employment relationship ceases and 6 and 12 months thereafter. NDOP must pay all associated costs. A current NDOP "police officer" employee with a documented exposure to a contagious disease can obtain such testing as a covered "accident benefit" under the Nevada Industrial Insurance Act.

FRANKIE SUE DEL PAPA
Attorney General

By: JOE WARD, JR.
Senior Deputy Attorney General

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AGO 2000-34 JOINT POWERS AGREEMENT; NEVADA PUBLIC UTILITIES COMMISSION: The Joint Powers Agreement contemplated by Washoe County and the Cities of Reno and Sparks would constitute a municipality and is exempt from requiring a certificate of public convenience from the Nevada Public Utilities Commission.

Carson City, December 5, 2000

Richard A. Gammick, Washoe County District Attorney, Washoe County Court House, P. O. Box 30038, Reno, Nevada 89520-3083

Dear Mr. Gammick:

Washoe County and the Cities of Reno and Sparks (the Local Governments) recently submitted a joint non-binding bid to purchase the water system owned by Sierra Pacific Resources (Sierra). At this time, the Local Governments anticipate forming a Joint Powers Authority (JPA) pursuant to Nevada Revised Statute (NRS) 277.110, which would be the purchaser and owner of the water system. NRS 277.110 allows two or more public agencies to enter into cooperative agreements with one another. Our office has received the JPA and will be making a determination upon the same as required by statute.

Bond counsel for the Local Governments has indicated that prior to issuing bonds to finance the purchase of Sierra's water business, the JPA must get an Attorney General's opinion stating that the JPA will not be required to obtain a certificate of public convenience or necessity (CPC) from the Nevada Public Utilities Commission (Commission). As a result, the Local Governments have formally requested an Attorney General's opinion (AGO) regarding whether the JPA would be a public utility and thus required to acquire such a CPC from the Commission.[1]

[1] This opinion addresses only the issue of whether the JPA formed by the Local Governments must obtain a CPC in order to purchase Sierra's water utility assets. This opinion does not consider Sierra's statutory responsibilities as the seller in this transaction. Indeed, it appears that NRS 704.390 would require Sierra to receive formal approval from the Commission prior to transferring control of its utility assets to the Local Governments.

QUESTION

Whether a JPA, created under NRS 277.110 to purchase and operate the water system currently owned by Sierra, must or is required to obtain a CPC from the Commission?

ANALYSIS

A. Generally

NRS 704.330(1) addresses the issue as to what entities must obtain a CPC and under what circumstances a CPC is required. NRS 704.330(1) provides that:

> Every public utility owning, controlling, operating or maintaining or having any contemplation of owning, controlling or operating any public utility shall, before beginning such operation . . . , obtain from the commission a certificate that the present or future public convenience or necessity requires or will require such continued operation or commencement of operations or construction.
>
> Thus, according to NRS 704.330(1) only public utilities are required to obtain a CPC. NRS 704.020 defines the terms "public utility" or "utility" to include "any plant or equipment used to furnish water for business, manufacturing, agricultural or household use . . . ." In defining public utility, it is necessary to review NRS 704.340 as this statute limits the scope of NRS 704.020 by expressly exempting municipalities and certain trusts from having to obtain a CPC from the Commission. Thus, unless the JPA falls within the term "municipality" as contemplated in NRS 704.340, the JPA would be required to obtain a CPC.

B. Municipality Defined

NRS chapter 704 does not provide a definition of the term "municipalities." Likewise, NRS chapter 277A, under which the JPA would be created, does not expressly address whether an entity created under those provisions would constitute a "municipality." Thus it is necessary to consult other legal

authority to determine whether the JPA contemplated in your request would fall within the exemption for "municipalities" under NRS 704.340.

Several Nevada statutes have defined the term "municipality" to include cities, counties and other *governmental entities*. For example, NRS 445A.375 describes a municipality to mean, "Any city, town, county, district, association or other public body created by or pursuant to the laws of this state and having jurisdiction over disposal of sewage, industrial wastes or other wastes." Pursuant to NRS 43.080, the term "municipality" includes:

> [T]he State of Nevada, or any corporation, instrumentality or other agency thereof, or any incorporated city, any unincorporated town, or any county, school district, conservancy district, drainage district, irrigation district, general improvement district, other corporate district constituting a political subdivision of this state, housing authority, urban renewal authority, other type of authority, the University and Community College System of Nevada, the board of regents of the University of Nevada, or any other body corporate and politic of the State of Nevada, but excluding the Federal Government.

Another definition, found at NRS 244A.037, defines municipality to include a ". . . water authority organized as a political subdivision created by cooperative agreement whose members include at least the two largest municipal retail water purveyors in the county." [2]

These statutes demonstrate the Legislature's willingness to broadly define "municipalities" to include cities, counties, and other government entities. Moreover, a review of the applicable legislative histories show that the Legislature did not intend to exclude JPA's from the definition of municipalities as contemplated in NRS 704.340. Thus it is reasonable to conclude that the Nevada Legislature intended to extend similar definitional latitude to the term "municipalities" in NRS 704.340. Support for our legal conclusion can be found in a related statute. First, NRS 704.030(3) provides that a person who furnishes water as an accommodation in an area where water is not available from a

[2] NRS chapter 244A addresses bond financing of county projects.

"public utility, cooperative corporations, and associations or political subdivisions" engaged in the business of selling water to persons within the political subdivision is not a *public utility or utility*. Second, NRS 704.030(4) states that a person *is not a public utility or a utility* if the person sells energy to "public utilities, cities, counties or other entities" which are reselling the energy to the public. Because NRS 704.030 distinguishes public utilities from cities, counties and political subdivisions, it is reasonable to conclude that the term "municipalities" found in NRS 704.340 is likewise applicable to a broad range of governmental entities. Thus it is reasonable to conclude that the JPA would fall within the term "municipalities" as is contemplated in NRS 704.340.

Our legal conclusion that the term municipalities would include a JPA is supported by the language in NRS 277.110, which states that any power, privilege or authority capable of exercise by a public agency of this State may be exercised jointly by any other public agency of this State. It is clear the Legislature intended that any entity created by a cooperative agreement under NRS 277.110 would possess the same legal rights and privileges of each of the combining agencies. Because each of the forming agencies would be exempt from Commission regulation under NRS 704.340, it necessarily follows that the JPA would enjoy that same exempt status.

The only case interpreting NRS 704.340(1) is *White Pine Power Dis. No. 9 v. Public Service Comm'n*, 76 Nev. 497, 358 P.2d 118 (1969). In that case, the court held that a municipal power district was not a municipality under NRS 312.040 and thus was not exempt from the requirements of NRS 704.330. However, it is important to note that the court's analysis focused on provisions contained in NRS chapter 312, which has since been repealed. In particular, the court examined the following definitions:

> Municipal power district, 'power district' or 'district' means a municipal power district organized under this chapter, either as originally organized or as the same may be from time to time altered or amended.
>
> Municipality for the purposes of this chapter, shall include any city or town, incorporated or unincorporated, and any school district.

Based on the above definitions, the court determined that a municipal power district could not be considered a municipality. The court did not address whether cities, counties or other governmental entities, such as a JPA would

constitute a municipality exempt from Commission regulation. Thus the *White Pine* analysis and decision is not applicable to the question discussed in this opinion.

This office has previously examined the scope of the exemption language in NRS 704.330. In AGO 58-1963, this office concluded that the definition of "municipality" in NRS 704.330 must be limited to include only cities. Op. Nev. Att'y Gen. No. 58 (August 1, 1963). However, that legal conclusion was premised upon the reconciliation of NRS 704.330 with a provision of NRS chapter 311 which expressly stated that water and sanitation districts were subject to the jurisdiction of the then Public Service Commission. That section of NRS chapter 311 has since been repealed. Moreover, there are no statutory provisions stating that JPAs are jurisdictional to the Commission. Thus reliance upon Op. Nev. Att'y Gen. No. 58 for purposes of this opinion is not appropriate.

In Op. Nev. Att'y Gen. No. 79-23, the Attorney General was asked whether a utility formed under a general improvement district was within the definition of "public utilities" and thus required to pay interest on deposits pursuant to NRS 704.671. This office provided the following analysis:

> However, this office has long held that the definitions of public utilities as stated in NRS 704.020 do not include municipally owned utilities. Attorney General's Opinion 732, March 11, 1949; Attorney General's Opinion 187, July 17, 1952; Attorney General's Opinion 99, December 12, 1963.
>
> Specifically, in Attorney General's Opinion 732, March 11, 1949 the question of whether or not the Public Service Commission of Nevada had jurisdiction over Lincoln County Power District No. 1 was addressed. This office reasoned that the definition of public utility contained in section 6106, N.C.L. 1926 did not include municipal corporations. The same is true today. NRS 704.020. Furthermore section 137, N.C.L. 1929 provided that a municipality was not required to obtain a certificate of public convenience when operating or maintaining a public utility. The same is true today. NRS 704.340. Since a general improvement district is quasi-municipal pursuant to NRS 318.015, it would also follow under this reasoning that a utility owned by a general improvement district is outside the scope of NRS 704.020.

Based on the foregoing analysis, the Attorney General concluded that, "Since a general improvement district is quasi-municipal pursuant to NRS 318.015, it would also follow under this reasoning that a utility owned by a general improvement district is outside the scope of NRS 704.020." Op. Nev. Att'y Gen. No. 79-23 (Oct. 29, 1979) at p. 129.

Based on the above legal analysis, it is reasonable to conclude the term "municipalities" as used in NRS 704.340 encompasses a broad range of governmental entities including cities and counties. It is likewise logical to conclude that the JPA contemplated by the Local Governments would fall within the definition of "municipalities."

CONCLUSION

The Joint Powers Agreement (JPA) contemplated by Washoe County and the cities of Reno and Sparks would constitute a municipality exempt from the Nevada Public Utilities Commission regulation pursuant to NRS 704.330. As a result, the JPA would not be required to obtain a certificate of public convenience or necessity from the Nevada Public Utilities Commission in order to purchase and operate Sierra Pacific Resources' water system.

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Chief Deputy Attorney General

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AGO 2000-35 BOARDS AND COMMISSIONS; INDIAN COMMISSION: The Nevada Indian Commission is a stand-alone entity over which the Department of Human Resources has no supervisory authority. Among its statutorily authorized functions, the Commission may study and make recommendations on subjects pertaining to tribes, including (1) assistance to tribes and individual Indians, (2) building government-to-government relationships, and (3) addressing matters as requested by tribal, state, and federal agencies. In only the most limited sense may the Commission "coordinate tribal-state relationships" by studying and making recommendations relating to those relationships.

Carson City, December 13, 2000

Charlotte Crawford, Director, Department of Human Resources, 505 E. King Street, Room 600, Carson City, Nevada 89701-3708; Richard Harjo, Chairman, Nevada Indian Commission, 4600 Kietzke Lane, Building A, Suite 101, Reno, Nevada 89502

Dear Ms. Crawford and Mr. Harjo:

You have asked this office for an opinion regarding the organization and authority of the Nevada Indian Commission (Commission). Specifically, you have asked:

1. To whom is the Commission required by law to report, and are any legal authorities exceeded by a Governor's requirement that the Commission's executive director report to, and be subject to supervision by, the Director of the Department of Human Resources?

2. May the Commission, within its statutorily defined authority, engage in activities to: (a) assist tribes and individual Indians; (b) coordinate tribal-state relationships; (c) build government-to-government relationships; and (d) address matters as requested by tribal, state and federal agencies?

BACKGROUND

The Nevada Indian Commission is a creation of the Nevada Legislature, established in 1965. It is a five-member body whose members are appointed by the Governor. NRS 233A.020. Three members must be Indians, and two are

appointed as representatives of the general public. NRS 233A.030.

The executive director of the Commission is a full-time employee in the unclassified service, appointed by the Governor upon recommendation of the Commission. NRS 233A.055. The Commission was originally established as a stand-alone entity, with its executive director directly responsible to both the Governor and the Commission. NRS 233A.065(1). The executive director's responsibilities include "conduct of the administrative functions of the commission office," NRS 233A.065(4), leaving to the Commission responsibility for establishing policy. *Id.*

The purpose of the Commission is "to study matters affecting the social and economic welfare and well-being of American Indians residing in Nevada . . . ." NRS 233A.090. Matters which it is to study include, but are not limited to, "matters and problems relating to Indian affairs and to federal and state control, responsibility, policy and operations affecting such Indians." *Id.*

In addition to studying those matters identified, the Commission is also charged to recommend "action, policy and legislation or revision of legislation and administrative agency regulations . . ." *id.*, pertaining to the State's Indians. Its findings and recommendations are to be reported regularly, and in any event biennially, to the Legislature, the Governor, and the public. *Id.*

In order to carry out its purpose, the Commission is expressly granted certain powers. Among these, it may "[c]ooperate with and secure the cooperation of state, county, city and other agencies, including Indian tribes, bands, colonies and groups and intertribal organizations in connection with its study or investigation of any matter within the scope of . . ." NRS chapter 233A or NRS 383.150 to 383.190 . . . (pertaining to protection of Indian burial sites). NRS 233A.100.

QUESTION ONE

To whom is the Commission required by law to report, and are any legal authorities exceeded by a Governor's requirement that the Commission's executive director report to, and be subject to supervision by, the Director of the Department of Human Resources?

ANALYSIS

This question regarding the Commission's chain of command arises due to the manner in which the Commission was addressed in the reorganization of state government that occurred in 1993. Assembly Bill 782, Act of July 9, 1993, ch. 466, 1993 Nev. Stat. 1479, embodied the Governor's plan for restructuring many state agencies, boards and commissions. The position of the Indian Commission in the state's table of organization was expressly considered by the Legislature before it enacted this bill into law.

The Director of the Department of Administration, Judy Matteucci, testified before the Legislature that the Governor's plan was begun in March 1992 when "Governor [Miller] announced he would formulate a review committee headed by Kenny Gwynn [sic] to evaluate the organization of the state's government." *Hearing on Proposed Reorganization and the Executive Budget, Before the Joint Meeting of Assembly Committee on Ways and Means and Senate Committee on Finance*, 67th Legislative Session, 2 (January 21, 1993). At this hearing, Matteucci provided a "Proposed Reorganization Chart," *id*., and in relation thereto indicated that the "Nevada Indian Commission would become a section under the proposed Department of Education, Health & Human (EHH) Services . . ." *Id*. at 4.

Additionally, on May 6, at a budget hearing, a legislative fiscal analyst explained that the "Governor recommended including [the Commission] within the Department of Human Resources." *Hearing on the Executive Budget, Before the Assembly Committee on Ways and Means*, 67th Legislative Session, 14 (May 6, 1993).

The plan to merge the Commission with another, larger agency met with strong opposition from Nevada's tribes. In a hearing before the Senate Committee on Finance on March 8, a heated debate occurred about the wisdom of placing the Commission within a larger department. Senators Raggio, Coffin, and Jacobsen, in particular, challenged the plan, based upon the perception of tribes that the move—including a physical move of the Commission office to Carson City—would reduce tribes' access to the Governor. Director Matteucci, speaking for the Governor, identified the countervailing positive results of the move, primarily due to the administrative support which the larger agency could provide to the Commission. *Hearing on the Executive Budget, Before the Senate Committee on Finance*, 67th Legislative Session, 11-15 (March 8, 1993).

The tribal opposition to the plan was also described in a budget hearing before the Assembly Committee on Ways and Means. *Hearing on the*

Executive Budget, Before the Assembly Committee on Ways and Means, 67th Legislative Session, 13 (March 19, 1993).

In its final form, the Governor's reorganization plan, embodied in A.B. 782, did not address the Commission. It made no change in the Commission's statutes at NRS chapter 233A, and it did not amend the law to grant the Director of Human Resources with authority to supervise the execution of the provisions of NRS chapter 233A. *See* A.B. 782, secs. 29[1] and 30.[2]

Nonetheless, the Governor's Executive Budget for fiscal years 1993-94 and 1994-95 depicts the Commission as a part of the proposed Department of Education, Health and Human Services.[3] However, the Department's limited control over the Commission is expressly acknowledged with a footnoted comment that it "will receive administrative support and will participate in the budgeting process within this Department." *See e.g.* page 2 of the chart entitled, "Department of Education, Health & Human Services, Operation Organization."

The 1995 and subsequent Executive Budgets, presented to the Legislature and approved as amended, also depict the Commission as an agency within the Department of Human Resources, but contain no similar footnoted reference to the limited authority of the Department. Thus the narrative description of the Department in the Executive Budget states unqualifiedly that it "consists of the Director's Office and the Divisions of Mental Health and Mental Retardation, Welfare, Health, Aging Services, Children and Family Services, the Indian Commission, and the Office of the Public Defender." Executive Budget for Fiscal Years 1995-96 and 1996-97, at 987.

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[1] Section 29 sets forth the divisions which comprise the Department of Human Resources: (1) the aging services division; (2) the health division; (3) the division of mental hygiene and mental retardation; (4) the welfare division; and (5) the division of child and family services. The Indian Commission does not appear among these.

[2] Section 30 requires that the director of the Department of Human Resources "shall administer, through the divisions of the department," specified chapters of the Nevada Revised Statutes. chapter 233A, the Commission's chapter, is not among them.

[3] The proposed Department of Education, Health and Human Services was approved as the Department of Human Resources.

In view of this legislative history, it is apparent that the Governor proposed to the Legislature to incorporate the Commission into a larger department in 1993. Because A.B. 782 did not provide the Director of the Department with administrative authority over the Commission as with other divisions, it is apparent that the Legislature considered and rejected the proposal, and that the Commission continues to exist as a stand-alone body not subject to substantive supervision by the Director of the Department of Human Resources. At most, the Legislature assented only to the Commission's association with the Department of Human Resources for the limited purpose of providing the Commission with administrative and budgeting support, signified by the footnoted reference in the 1993 Executive Budget. No significance attaches to the subsequent unrestricted descriptions of Department authority over the Commission in later executive budgets, even though the Legislature enacted them into law. Uncodified "appropriation bills . . . are not legislative acts changing the substantive or general laws of the state. . . . It is not expected that changes and amendments in the general laws of the state will be made in general appropriation bills, and the life of such acts is only two years." *Nevada ex rel. Abel v. Eggers*, 36 Nev. 372, 375, 136 P. 100 (1913). Legislative approval of the executive budget thus cannot be relied upon to signal reorganization of the Commission. *Cf. Orr v. Trask*, 464 So. 2d 131, 135 (Fla. 1985) ("we hold . . . that the legislature cannot abolish a statutory office through an appropriations act which amends or nullifies substantive law").

Having determined there was no statutory reorganization placing the Commission within a department, there remains a question whether the Governor has authority to administratively effectuate such change in the absence of legislative action. It is the opinion of this office that he does not, beyond providing for mere administrative assistance to the Commission.

To begin, the authority of the Governor is limited to that given by constitutional and statutory provision. The Office of Governor is not recognized in common law, and thus "the governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional grant or by statutory grant." 81A C.J.S. *States* § 130 (1977).

In states where reorganization authority is recognized to exist in the Office of Governor, it is expressly set forth in the positive law of the state. *See e.g., Straus v. Governor*, 592 N.W.2d 53, 57 n.3 (Mich. 1999) (describing governor's authority to reorganize under MICH. CONST. 1963, art. 5, § 2, cl. 2), *Van Sickle v.*

Shanahan, 511 P.2d 223 (Kan. 1973) (KAN. CONST. art. 1, sec. 6, authorizes Governor to execute transmittal to the Legislature of reorganization orders which the Legislature may veto, otherwise order becomes a general law to be published with statutes of the state), *In re Opinion of the Justices*, 203 N.W.2d 526 (S.D. 1973) (describing statutory authority for governor to reorganize pursuant to executive order). Where such authority is absent, it is held that "[e]ven though the Governor has the supreme executive power of the [state], he cannot transfer the functions of an existing, legislatively-created executive agency or department to another without legislative authority." *Legislative Research Commission by Prather v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984).

Nevada's Governor does not possess authority under the positive law of the State to reorganize the executive branch. The Governor is the "Chief Magistrate" in whom the "supreme executive power of this State" is vested. NEV. CONST. art. 5, § 1. The authorities and duties of the Governor are further defined at NRS 223.010–223.240. In neither the statutes nor in the State constitution, however, is the Governor authorized to reorganize the executive department of the State. The Legislature has retained for itself the power and authority to reorganize agencies and commissions, and in 1993 exercised its authority to do so with A.B. 782.

The Governor is responsible to "see that the laws are faithfully executed." NEV. CONST. art. 5, § 7. Thus it is "even more incumbent upon [the governor] than upon ordinary citizens to yield obedience to" the statutory law of the State. *State v. Dickerson*, 33 Nev. 540, 561, 113 P. 105, 111 (1910). There is no authority for the proposition that "the supreme executive power of the State of Nevada includes the power to disregard acts of the legislature." *State of Nevada Employees Association, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992). This office concludes, therefore, that the Governor is constrained to acknowledge the organization of the executive branch which the Legislature sets forth in the codified statutory law of the State, and is limited to suggestions for legislative change in the event he deems reorganization to be necessary or desirable.

CONCLUSION TO QUESTION ONE

Although the Governor proposed in 1993 to combine the Nevada Indian Commission with the proposed Department of Education, Health and Human Services (which was created as the Department of Human Resources), the

Legislature did not approve the proposal. Therefore the Commission remains a stand-alone entity over whom the Department of Human Resources has no supervisory authority. No lawful authority exists to administratively place the Commission under the supervision of the Department when the Legislature declined to do so by legislative enactment.

QUESTION TWO

May the Commission, within its statutorily defined authorities, engage in activities to (1) assist tribes and individual Indians, (2) coordinate tribal-state relationships, (3) build government-to-government relationships, and (4) address matters as requested by tribal, state and federal agencies?

ANALYSIS

Just as the Governor is constrained by statutory law and legislative intent, so too is the Commission. An administrative agency has only those powers expressly granted by the Legislature and those necessarily implied. *Andrews v. State, Board of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970). Furthermore, the rule that "changes and amendments in the general laws of the state will [not] be made in general appropriation bills," *Nevada ex rel. Abel v. Eggers*, 36 Nev. 372, 375, 136 P. 100, 101 (1913), applicable to the question of reorganization as set forth above, is equally applicable to the scope of the Commission's authorities. Therefore any representation made in a legislative budget hearing about Commission authority which is broader than that defined in the codified law will not justify a conclusion that the codified law is amended by subsequent passage of the appropriations measure being considered.

As discussed above, the Commission's purpose is to study and recommend: it is "to study matters affecting the social and economic welfare and well-being of American Indians residing in Nevada . . . ." NRS 233A.090; and it is to recommend "action, policy and legislation or revision of legislation and administrative agency regulations" pertaining to the state's Indians. *Id.*

To carry out its purpose, the Commission is expressly granted certain powers. Among these, it may "[c]ooperate with and secure the cooperation of state, county, city and other agencies, including Indian tribes, bands, colonies and groups and intertribal organizations in connection with its study or investigation of any matter within the scope of . . ." NRS chapter 233A or NRS 383.150–383.190. NRS 233A.100. The Commission also has, as do all agencies,

any reasonably necessary implied powers which arise from its express powers and duties. *Andrews v. Nevada State Bd. Of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970).

The specific Commission actions about which you inquire must be assessed in light of this statutorily defined authority. Due to the brevity and generality of the description of each activity, only general conclusions may be offered in response.

With regard to whether the Commission may "assist tribes and individual Indians," the answer is in the affirmative, to the extent that such action involves examination into a tribe's or individual Indian's "social and economic welfare and well-being," and the assistance which is rendered is confined to recommending "action, policy and legislation or revision of legislation and administrative agency regulations." The statutes do not contemplate direct, substantive assistance to tribes or individuals.

With regard to whether the Commission may "coordinate tribal-state relationships," the answer is that coordination of tribal-state relationships in the sense of making state policy for dealings with tribes is not among the Commission's authorities. The Commission, in other words, does not possess the equivalent of a diplomatic portfolio. While the Commission may address–by study and recommendations for policy, law, and action–relationships between tribes and the State, the Commission has no authority to itself formulate the rules for interplay between the State and tribes. Thus, for instance, the Commission may conduct meetings, conferences, or workshops at which personnel from tribes and state agencies discuss relations between tribes and the State. However, the Commission's result should be in the form of a recommendation to the Governor, the Legislature, or the public, and cannot result in implementation of the Commission's own policy for structuring those relations.

In response to whether the Commission may "build government-to-government relationships," a similar conclusion is drawn. Clearly the Commission is authorized to interact with tribes as well as state agencies and other governmental entities in the performance of its studies and investigations, and in the preparation of its recommendations. To the extent that it does so, it serves as a representative for the State, and it may and should strive to build amicable and beneficial relationships between the State and non-

state entities. It also may formulate its recommendations for "action, policy, and legislation" in a manner designed to foster improved relationships. However, the Commission 's authority does not empower it on its own to forge broad government-to-government relationships; rather, its authority is to propose such relationships in its recommendations to the Governor and the Legislature, which then may accept, reject, or modify the recommendations as each deems appropriate and as their own authorities permit.

Finally, you ask whether the Commission may "address matters as requested by tribal, state, and federal agencies." It is the opinion of this office that the Commission may address, through its investigations and recommendations, any issue brought to it, so long as the subject of the inquiry falls within the ambit of the statutory charge at NRS 233A.090. However, the Commission may not assume for itself, on the basis of another agency's request, powers that exceed those granted to it by the Legislature. It may not administer, for instance, a program for distribution of funds made available to tribes from a federal source, unless authorized by the Legislature to do so.

All of the foregoing analysis concerning the Commission's authority to act is subject to the Governor's authority over the administration of the Commission, pursuant to the express provisions of NRS 233A.065. As set forth in the first part of this opinion, the statutorily established chain of command creates a direct line of authority between the Commission and the Governor. Nothing herein is intended to signify a limitation of the Governor's own authority.

CONCLUSION TO QUESTION TWO

The Nevada Indian Commission may perform those functions which the Legislature has expressly authorized it to do, and those which are necessarily implied. The Commission may, therefore, by study and recommendation, endeavor to: (1) assist tribes and individual Indians; (2) build government-to-government relationships; and (3) address matters as requested by tribal, state, and federal agencies. In only the most limited sense may the Commission "coordinate tribal-state relationships" by studying and making recommendations relating to those relationships.

FRANKIE SUE DEL PAPA
Attorney General

By: C. WAYNE HOWLE
Senior Deputy Attorney General

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AGO 2000-36 INSURANCE; MENTAL ILLNESS; PSYCHIATRY: The 1999 Legislature's enactment of NRS 695C.1738, requiring HMOs to provide severe mental illness coverage, did not abrogate previous requirements of HMOs to provide general mental health coverage. Severe mental illness coverage is a separate legal requirement of HMOs that HMOs must provide in addition to coverage for general mental health.

Carson City, December 29, 2000

Ms. Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5453

Dear Ms. Molasky-Arman:

You have requested an opinion relating to legislation passed in 1999 which requires health maintenance organizations (HMOs) to provide so-called severe mental health coverage and how such legislation impacts existing Nevada statutes which require more comprehensive mental health coverage.

QUESTION ONE

Since there is now a defined benefit for severe mental illness that, by its specific benefits, may satisfy and define "comprehensive" coverage for psychiatric care required by NRS 695C.030, would carriers also have to offer general mental health benefits?

ANALYSIS

Your letter references several statutes, including NRS 695C.1738, relating to HMOs, which were enacted in the 1999 Legislature and which require certain policies of health insurance to include coverage for "severe mental illness." Your question is whether an HMO must continue to provide general mental health coverage, or whether the severe mental illness coverage requirement satisfies the requirement under NRS 695C.060 to provide "comprehensive" coverage for psychiatric care.

NRS 695C.060(2) requires an HMO to provide "comprehensive health care services." "Comprehensive health care services" is defined in NRS 695C.030(1) as "medical services, dentistry, drugs, psychiatric and optometric and all other care necessary for the delivery of services to the consumer." While

"psychiatric" is not defined in chapter 695C of NRS or in the Nevada Revised Statutes, the common meaning of the word in conjunction with "all other care necessary for the delivery of services to the consumer" would include general mental health benefits.[1]

The "severe mental illness" coverage required under NRS 695C.1738 is a particular type of mental health benefit that is clearly narrower in scope than general mental health coverage. The definition of "severe mental illness" in NRS 695C.1738(8) does not generally purport to define psychiatric care in the context of comprehensive health care services. There is no reason to define "psychiatric" as only severe mental illness coverage. *See* footnote 1. If the Division of Insurance has defined this benefit in the past as a general mental health benefit, there is no reason now to define it more narrowly simply because of the passage of NRS 695C.1738.[2]

Therefore, because the passage of NRS 695C.1738 did not change any previous requirement of HMOs to provide general mental health benefits under chapter 695C of NRS, HMOs still have to offer the same general mental health benefits as before the enactment of NRS 695C.1738.

CONCLUSION TO QUESTION ONE

The enactment of NRS 695C.1738, which requires that HMOs provide severe mental illness coverage, did not change or abrogate any existing requirement under NRS chapter 695C to provide general mental health benefits. Therefore, HMOs still must offer any general mental health benefits required before the enactment of NRS 695C.1738.

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[1] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1961) defines "psychiatric" and "psychiatry" as follows. "Psychiatric: Pertaining to, or of concern to, psychiatry." "Psychiatry: the medical specialty that deals with mental disorders, esp. with the psychoses, but also with the neuroses." It should also be noted that the Legislature has defined "person professionally qualified in the field of psychiatric mental health" as including a licensed psychiatrist, psychologist, and clinical social worker. *See* NRS 433.209, NRS 433A.018, and NRS 433B.090.

[2] *See also*, NRS 695C.070(1), which subjects chapter 695C of NRS to the provisions of NRS 689B.600, which mandates that health insurance for groups larger than 51 contain the same aggregate lifetime and annual limits for medical and surgical benefits as for mental health benefits. "Mental health benefits" is defined broadly under NRS 689B.600(6)(d) as "services relating to mental health."

QUESTION TWO

When an insured uses, as treatment for a general mental health condition under his HMO plan, a portion or all of the newly mandated severe mental illness benefit, which allows 40 days of inpatient hospitalization and 40 outpatient treatment visits per year, would the severe mental illness mandate benefit under NRS 695C.1738 still require that the HMO provide 40 additional days of inpatient hospitalization and 40 additional outpatient visits for treatment of one of the six conditions comprising severe mental illness under NRS 695C.1738(8)?

ANALYSIS

NRS 695C.1738(1) requires that every HMO provide severe mental illness coverage apart from any other general mental health coverage provided in the HMO's plan. Because the severe mental illness benefit is a separate legal requirement of an HMO, if an individual uses general mental health benefits (other than for severe mental illness) in an HMO plan, that individual must also receive the severe mental illness coverage if he or she then requires such treatment.

The extent to which the provision of severe mental illness coverage satisfies in full or, in part, the psychiatric or general mental health requirements of a particular HMO's plan depends on the plan itself and may depend on which benefit is used first. If coverage for severe mental illness, as defined in NRS 695C.1738(8), could also be considered general mental health coverage if so defined under an HMO's plan, and a person used the severe mental illness benefit first, the severe mental illness benefit could completely satisfy a plan's requirement for general mental health coverage. For example, if an HMO's plan provided for 40 outpatient visits per year for general mental health and an individual used those 40 visits for a severe mental illness, these outpatient visits would satisfy the requirement under NRS 695C.1738(2)(a) as to 40 outpatient treatment visits for severe mental illness per year as well as the general mental health requirement under the HMO's plan. If a person then sought treatment during the same year for non-severe mental illness through, for example, psychological counseling visits covered under the plan, under this example that individual would not be eligible for those additional visits because

the individual would have used his 40 outpatient mental health visits allotted per year.

However, if an individual first uses general mental health coverage included in the plan that would not be included within the definition of severe mental illness, then the general mental health coverage could not be counted as satisfying the severe mental illness benefit. An HMO's plan must be structured so as to include both general mental health coverage and severe mental health coverage. While the provision of severe mental illness coverage could satisfy the broader general mental health coverage requirement depending on the plan, the general mental health benefit for coverage other than severe mental illness cannot satisfy the mandated severe mental illness coverage requirement.

CONCLUSION TO QUESTION TWO

The severe mental illness coverage requirement pertaining to HMOs is a requirement that must be satisfied apart from any other general mental health coverage requirement. If an individual under an HMO's plan uses a general mental health benefit under the plan that is not considered treatment for severe mental illness and then requires treatment for severe mental illness, that individual must still receive this treatment for severe mental illness apart from any more general mental health requirement under the plan.

FRANKIE SUE DEL PAPA
Attorney General

By: EDWARD T. REED
Deputy Attorney General

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OPINION 2000-37 Withdrawn

AGO 2000-38 GAMING CONTROL BOARD; NEVADA GAMING COMMISSION; GAMING; INTERNET: No wager exists where a gaming licensee offers promotional gaming on the Internet in which "play credits" with no cash redemption value are given free of charge and where patrons, in turn, accumulate "casino points" based upon such factors as merely visiting the website or time spent at the website, rather than the outcome of a virtual game. In the absence of a wager, no gaming activity is taking place that requires prior approval of the underlying game by the Nevada Gaming Commission. However, pursuant to NRS 463.0182 and 463.01962, a wager does exist where "tickets" redeemable for cash and non-cash prizes, are awarded based upon the winning outcome of the game being played. Patrons are risking non-negotiable play credits, at least in part, upon the uncertainty of a winning outcome that entitles them to receive redeemable tickets. As such, an Internet game involving such a wager must receive approval from the Nevada Gaming Commission pursuant to its Regulations 14.230 –14.250, before being exposed for play to the public, albeit on the Internet.

Carson City, December 29, 2000

Steve DuCharme, Chairman, State Gaming Control Board, 555 E. Washington Avenue, Suite 2600, Las Vegas, Nevada 89101

Dear Chairman DuCharme:

On November 27, 2000, a meeting was conducted between yourself, undersigned counsel, Deputy Attorney General Antonia Z. Cowan and representatives from the MGM Mirage (MGM) and Silicon Gaming and its subsidiary, WagerWorks, Inc. (WagerWorks). Following the meeting, this office was asked to analyze promotional gaming activity proposed for MGM's various Internet websites. To further clarify the proposed operation, a conference call was held with Paul Matthews of Silicon Gaming on November 29, 2000. A subsequent conference call was held with representatives of WagerWorks on December 4, 2000, who characterized the proposal as a "rewards based scheme." Thereafter, on December 11, 2000, WagerWorks provided this office with an updated spreadsheet outlining the play and prize structure of the proposed activity, which is summarized below. Finally, on December 14, 2000, WagerWorks provided a demonstration of the proposed MGM website.

At the outset, it should be noted that this opinion analyzes the proposed operation under Nevada law, but does not analyze the effect, if any, that federal law may have on the MGM's desired Internet activity, including the Wire Act of 1961 or any pending Congressional legislation, such as the Internet Gambling Prohibition Act of 1999, commonly referred to as "The Kyl Bill." *See* 18 U.S.C. § 1084; *see also* S. 692, 106th Cong., 1st Sess. (1999).

FACTUAL BACKGROUND

The MGM, a publicly traded company registered with the Nevada Gaming Commission (Commission) pursuant to NRS 463.635(1)(b), has entered into a contractual relationship with WagerWorks to design a corporate Internet website for the MGM. The intent is to attract a certain class of patrons to the MGM's gaming properties by marketing brand-name recognition through an interactive website. The Internet website would provide incentives consisting of items of value designed to encourage patrons to visit the various MGM gaming properties. Patrons who visit the website will accumulate incentives by: (a) exploring the website for corporate information; (b) participating in promotions; and (c) playing free games that mimic actual casino games both in operation and game outcome.

OPERATIONS

The current proposal uses a complex operational system consisting of the following types of incentives or mechanisms to support the interactive nature of the site: play credits, casino points, tickets, instant win awards and instant sweepstakes qualification. Different incentives would be offered for different types of activities including: visiting the website; responding to marketing inquiries; participating in promotions; and for the play and outcome of the free games as detailed below.

It is important to note that WagerWorks has not established a specific timetable for the implementation of the proposals detailed below. During conference calls, representatives of WagerWorks indicated that it anticipates implementing the proposals in phases over time. The first step and the only aspects of the proposal that WagerWorks is prepared to make operational in the near future are the "play credits" and "casino points" that are not dependent upon game outcome.

1. Play Credits

Non-redeemable, numerical "play credits" would be issued at no cost to individual patrons visiting the website. The patrons, in turn, would use the credits to play the free casino games available on the website, and may play one of the offered games by playing from one to five play credits. Play credits would have no value beyond their use for playing the games. In this circumstance, the patron would be issued and reissued credits at no cost as he or she lost them.

2. Casino Points

Patrons would accumulate, free of charge, "casino points" redeemable for awards consisting of room, entertainment, food, merchandise, airline miles, cash or prize packages. Points would be given for visiting the website, as well as for time spent playing a game (e.g., ten casino points accumulated for each minute of play). However, according to WagerWorks, points are not awarded based upon the outcome of any virtual game that may be played. Furthermore, casino points are never at risk of being lost.

3. Tickets

Patrons would accumulate "tickets" to be redeemed for prizes or awards just like casino points through the same type of activities, except that game outcome is determinative of the award. The number of tickets that may be awarded for a winning outcome on a game (e.g., a royal flush) is dependent upon the number of play credits bet by the patron (from one play credit to a maximum of five play credits). Tickets would also be used to participate in sweepstakes, drawings and contests. It is anticipated that the tickets will be implemented in two phases. In Phase 1, tickets would be redeemable for items of value, but the scheme would not utilize the incentive based options of sweepstakes, drawings and contests. Phase 2, however, will incorporate these incentives. Either WagerWorks will operate the sweepstakes or drawings, or a third party under contract to WagerWorks will conduct the activity. It should be noted that during the December 4, 2000 conference call, this office was informed that tickets would not be part of the initial program that is offered and there are no specific plans to implement the tickets in the immediate future.

4. Instant Incentives

Patrons would be eligible for instant wins and entry into contests, sweepstakes and drawings based on the same type of activities that earn casino points, rather than game outcome. Instant wins and entries would also be randomly allocated among website patrons.

QUESTION ONE

May the MGM, without first seeking prior approval of the underlying game pursuant to Commission Regulations 14.230–14.250, offer promotional gaming on its various Internet websites, in which "play credits" with no cash redemption value are given free of charge for use in playing a virtual game and where patrons, in turn, accumulate redeemable "casino points" based on such factors as merely visiting the website or time spent at the website?

ANALYSIS

"A licensee shall not offer a new game for play unless the new game has been approved by the commission." Nev. Gaming Comm'n Reg. 14.230(1). NRS 463.0152 defines a "game" or "gambling game" to mean:

> [*A]ny game played with* cards, dice *equipment* or any mechanical, electromechanical *or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting* the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage *game or any other game or device approved by the commission*, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the board pursuant to the provisions of NRS 463.409.

NRS 463.0152 (emphasis added). "Gaming" or "gambling" generally means to expose for play any game defined in NRS 463.0152. *See* NRS 463.0153.

In order to find gaming or gambling activity, a wager must be made. A "wager" is defined as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain." NRS 463.01962. A "representative of value" means, "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

The Nevada Supreme Court has distinguished between gambling transactions in which a wager is present and simple contracts involving a prize. In *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), a public offer was made to pay $5,000 to any person having paid 50 cents who shoots a hole in one at a golf course. "[G]enerally . . . the offer of a prize to a contestant who performs a specified act is not invalid as being a gambling transaction." *Gibson*, 77 Nev. at 27. The offer to pay upon performance of the specified act is a promise and the performance of the requested act constitutes acceptance and consideration that gives rise to a legally enforceable contract. *Id.* at 28. The court held that a prize differs from a wager because, if he abides by the offer, the person offering the prize has no chance to gain back the thing being offered. On the other hand, each party to a wager has a chance of gain and a risk of loss. *Id.*

In *State, Gaming Comm'n v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992), the Supreme Court revisited its decision in *Gibson* and again held that a wager requires at least two parties, who each have a risk of loss and a chance of gain. *GNLV Corp.*, 108 Nev. at 457-458. In so holding, the court found that 50 cent tickets that were automatically awarded for every 75th dollar wagered were not the result of a legitimate wager. The tickets, which the patrons used to purchase certificates that could, in turn, be redeemed for cash and non-cash items, were merely prizes offered by the casino which it had no chance to win back. The award of tickets was mandated by the terms of the slot club contract and not by the uncertain outcome of a game.

Here, the Internet games will be available without charge to patrons. Although the outcome of a particular game played may be uncertain, the awarding of redeemable casino points is not. The MGM has no ability to win back the cash or non-cash prizes, since these items are offered to the patrons by virtue of visiting the website or time spent at the website playing a particular game. Therefore, no wager exists. If a wager is absent, then no gaming transaction can occur. As such, no game or gambling game is being exposed for play by the MGM on its Internet websites which would require prior

approval of the Commission pursuant to its Regulations 14.230–14.250. Like the scheme in *Gibson* or the slot club in *GNLV Corp*., the MGM is merely offering to the public a prize or casino points that are redeemable for cash and non-cash rewards.

CONCLUSION TO QUESTION ONE

Under the scenario described above, a wager does not occur. The visitor to the Internet website who chooses to play a game does so for entertainment purposes, and the MGM has utilized another vehicle in which to market its brand name and properties. The mere act of visiting a website or time spent at a particular website entitles the visitor or patron to accumulate redeemable "casino points." The MGM cannot win back these casino points by the very nature of its offer. *See Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 28-29, 359 P.2d 85 (1961). Moreover, the casino points are not awarded based upon the uncertain outcome of a game. *See* NRS 463.01962 (defining "wager"); *see also* NRS 463.01862 (defining "representative of value"). As such, no "game" or "gambling game" is being operated. *See* NRS 463.0152 (defining "game" or "gambling game"). If no game or gambling game is being operated or exposed to the public for play, then the MGM is certainly not engaged in "gaming" or "gambling" activity on the Internet in which the underlying game or games would require prior approval of the Commission pursuant to its Regulations 14.230–14.250. *See* NRS 463.0153 (defining "gaming" or "gambling").

QUESTION TWO

Under the same facts outlined in Question One, may the MGM also award redeemable "tickets" based upon the patron achieving a winning outcome of his or her use of play credits without first seeking prior approval of the underlying game pursuant to Commission Regulations 14.230–14.250?

ANALYSIS

Our analysis must start with the initial inquiry of whether a "wager" exists. In 1997, the Legislature adopted a new definition of "wager" to include not only sums of money "risked on an occurrence for which the outcome is uncertain," but also "representatives of value." NRS 463.01962; *see also* Act of July 17, 1997, ch. 689, § 4, 1997 Nev. Stat. 3497. A "representative of value" means, "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

Prior to 1997, a wager in Nevada required a sum of money or something of value to be risked by the patron. In *Harrah's Club v. State, Gaming Comm'n*, 99 Nev. 158, 659 P.2d 883 (1983), the court held that promotional activities, such as free slot play or lucky bucks, etc. did not create wagering transactions, because "[t]he casino patron has no 'stake' at risk in these promotional 'wagers,' as they cost the patron nothing." *Harrah's Club,* 99 Nev. at 160. Therefore, non-negotiable items such as chips, tokens or coupons that are given free of charge to the patron to induce gambling, which could not be redeemed for cash, did not create a wager when presented for play. *Id.* at 160-161. Since the patron had not risked anything to play the game, the Supreme Court held that no legitimate wager could be found.

The legislative change in 1997, which was urged by the Nevada Resort Association, was significant because it was a substantial and fundamental departure from our traditional tenets of gaming and, specifically, the basic conceptual elements of a gambling transaction or event in Nevada. No longer did a patron have to risk a sum of money or other thing of value to create a gaming contract or, more accurately, a wager. As long as the casino was willing to accept the item for play, even non-negotiable or no cash redemption value items, a wager could be created. This change revolutionized our understanding of what constitutes a wager and directly impacted the determination of a licensee's gross gaming revenue that is subject to taxation under NRS 463.370.

The new definition of wager was sought, in part, based upon a bankruptcy decision in 1995. Specifically, the Sixth Circuit Court of Appeals held that a wager exists even if there is no cash redemption value in the thing being played, because it nevertheless has "wagering value" as evidenced by the legally enforceable contract rights that arise from the casino's acceptance. *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995); *see also* Minutes of May 20, 1997, hearing on A.B. 419 before the Assembly Committee on Judiciary at Exhibits B, E.

Play credits, like non-negotiable chips or tokens, have value, since they constitute representatives of value or instrumentalities used by the patron that are accepted by the MGM. *See id.*; *see also* NRS 463.01862. Given this factual wrinkle, a patron who plays the Internet games offered does so, at least in part, by risking play credits upon the chance or uncertain occurrence of a winning outcome that would entitle him or her to receive a ticket redeemable for cash and non-cash rewards. As such, a wager would exist. *See* NRS 463.01962.

Thus, the activity of playing an Internet game would constitute gaming or gambling. That is to say, the MGM would be exposing for play a game as provided for in NRS 463.0152. *See* NRS 463.0153. Consequently, the Internet game, whatever it might be, would require prior approval of the Commission before being offered to the public for play pursuant to Nevada Gaming Commission Regulations 14.230–14.250.

Alternatively, the MGM could seek to have the proposed scheme administratively approved as a "promotional device" if the MGM were to reconfigure the ticket aspect of the games. The award of tickets would have to comply with the provisions of Commission Regulation 14.210 governing promotional devices.

A "promotional device" is merely some sort of contrivance that possesses the attributes of a gaming device or a slot machine, but "(a) Is playable without a wager being made; or (b) Always pays out an amount in either cash or prizes that is equal to or greater than the wager made." Nev. Gaming Comm'n Reg. 14.210(1). A "gaming device" is "*any equipment* or mechanical, electromechanical *or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game which affects the outcome of a wager by determining win or loss*, including a slot machine." NRS 463.0155 (emphasis added); *see also* NRS 463.0191 (defining "slot machine").

Here, the equipment, presumably a computer and/or a file server or other related components, which are used to produce, operate and maintain the MGM's Internet websites certainly constitute electronic equipment that is being used in connection with a game, such as virtual blackjack, roulette or some other traditional casino game identified in NRS 463.0152. It is this equipment that determines the win or loss of any given game being played and, in turn, awards tickets accordingly (depending upon the number of play credits wagered). Since the play credits have no value except for wagering purposes, the redeemable tickets that will be awarded will always be equal to or greater than the value of the play credits being wagered at any one time. As long as tickets are always paid out, then the related electronic or computer equipment may be administratively approved pursuant to the conditions that the Board Chairman deems appropriate or necessary. *See* Nev. Gaming Comm'n Reg. 14.210(1).

CONCLUSION TO QUESTION TWO

Non-negotiable or non-redeemable "play credits," like nonnegotiable chips, tokens, etc. given free of charge in a casino, have value. They constitute a representative of value or an instrumentality used by the patron, which is accepted by the MGM. *See* NRS 463.01962; *see also* NRS 463.01862. Under these factual circumstances, play credits could be risked, at least in part, upon the uncertainty of a winning outcome that would entitle the patron to receive a redeemable "ticket." Therefore, a wager would exist and the activity of playing a game, albeit on the Internet, would constitute gaming or gambling. *See* NRS 463.01962; *see also* NRS 463.0153. As such, the underlying game itself, whether it is virtual blackjack, poker, roulette or any other game provided for in NRS 463.0152, requires prior approval of the Commission before being offered to the public for play. *See* Nev. Gaming Comm'n Regs. 14.230–14.250.

Alternatively, the MGM could seek to have the proposed scheme administratively approved as a "promotional device" if the MGM were to reconfigure the ticket aspect of the games. Instead of tickets being awarded on a game outcome determinative basis or upon a winning outcome, the tickets would need to be distributed on each and every play in an amount that is equal to or greater than the free credits being wagered by the patron. *See* Nev. Gaming Comm'n Reg. 14.210(1).

QUESTION THREE

Under the same facts outlined in Question Two, except that accumulated, redeemable "tickets" also entitle the patron to an equal number of chances in a sweepstakes or drawing, would such a proposal constitute a permissible "promotional scheme" that is conducted by the MGM in connection with a licensed gaming activity pursuant to NRS 462.105(2)?

ANALYSIS AND CONCLUSION TO QUESTION THREE

The noted exceptions to Nevada's prohibition on lotteries are those prize distribution schemes conducted by charitable or nonprofit organizations or those "conducted by a licensed gaming establishment in direct association with a licensed gaming activity. . . ." NRS 462.105(2); *see also* NRS 462.105(1); NEV. CONST. art. 4, § 24. In the latter, the prize distribution offered by a licensed

gaming establishment does not constitute a lottery, but rather a "promotional scheme." *See* NRS 462.105(2).

Here, the analysis turns on the simple inquiry of whether the proposed promotion will be offered by the MGM in direct association with licensed gaming activity. As discussed fully in Question Two, the Commission does not currently license the Internet gaming activity that is directly connected to the proposed promotion. Until such time as the Commission licenses the Internet games, any drawing, sweepstakes or related prize distribution associated therewith is impermissible as a matter of law. Furthermore, if approved someday, any person or entity hired by the MGM to operate the contest would have to be registered with the Board pursuant to NRS 463.0169.

QUESTION FOUR

May the MGM award prizes or entries into sweepstakes or drawings on a random basis to patrons as "instant incentives" or instant wins, rather than as a factor of game outcome?

ANALYSIS AND CONCLUSION TO QUESTION FOUR

Unlike the tickets described in Question Two, or the related contest set forth in Question Three, the "instant incentives," which entitle the patron to receive a prize or entry into a sweepstakes or drawing, are randomly awarded rather than based upon the uncertain outcome of a gambling game. Therefore, instant incentives are not the product of a wagering activity. *See* NRS 463.01962. As fully discussed above, if a wager is absent, then no gambling is taking place nor is a gambling game being exposed for play. *See* NRS 463.0153; *see also* NRS 463.0152. Likewise, the instant incentive

program would not qualify as a "promotional scheme" under NRS 462.105(2) since it not being conducted in direct association with gaming activity, licensed or otherwise.

FRANKIE SUE DEL PAPA
Attorney General

By: JEFFREY R. RODEFER
Senior Deputy Attorney General

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AGO 2000-39 PUBLIC CONTRACTS; PUBLIC FINANCE; LEASE PURCHASE: Absent specific legislative authority to enter into the proposed lease purchase agreement, under current Nevada law the agreement appears to create public debt in violation of NEV. CONST., art. 9 sec. 3, and appears to result in a lending of the state's credit in violation of NEV. CONST. art. 8, sec. 9.

Carson City, December 22, 2000

Governor Kenny C. Guinn, Chairman, State Board of Examiners, Capitol Building, Carson City, Nevada 89710

Dear Governor Guinn:

Our office has been consulted as to the constitutionality of a specific proposed lease purchase agreement (Agreement) of land and improvements (Property) between Employers Insurance Company of Nevada (EICON) as Lessor and the State of Nevada, Department of Administration, Division of Buildings and Grounds (State) as Lessee, for occupancy by the Department of Conservation and Natural Resources. The Agreement has been presented for formal approval by the State Board of Examiners (Board). The critical inquiry surrounding this transaction is whether the Agreement creates public debt in violation of article 9, section 3 of the Nevada Constitution, and whether the Agreement results in a lending of the State's credit in violation of article 8, section 9 of the Nevada Constitution.

CAVEAT

Initially it should be pointed out that the Board regularly approves long-term real property leases (term-of-years beyond a biennium) that have non-appropriation clauses. This office has routinely approved these leases. Such straight leases (not involving installment purchases) are current revenue obligations that are not debts within the meaning of the Nevada Constitution.

THE PROPOSED LEASE PURCHASE AGREEMENT

By the terms of the Agreement, the State agrees to lease the Property from EICON for a term of 20 years. The rental payments made by the State are applied to the purchase price of the Property. The Base Rent Schedule B in the Agreement sets forth each rent installment as having an interest portion in semi-annual amounts with ascending interest rates over time and principal amount retirements in even thousand dollar amounts, in the serial municipal bond tradition, as contrasted to even monthly rent payments in character with

real estate lease tradition.[1] It is intended that the "interest" portion of rents be exempted from federal income taxes. At the end of the lease term the State acquires title to the Property without paying a material additional consideration (as contrasted to fair market value, or fair market value as restrained by optional extended term with appropriately reduced rentals if exercised or even a fixed price purchase option that has some professional basis as being realistic compared to "residual" value of the aging facility 20 years from now).

It is intended that the Agreement be characterized as a private sector "purchase-money installment debt" rather than a "true lease." True leases have important distinguishing indicia of the lessor's continued ownership and interest in residuals beyond the 20-year lease term.

Pursuant to Section 21(c) of the Agreement, EICON represents an intention to assign its rights, title and interest in and to the Base Rent payable under the Agreement to a trustee to facilitate the issuance of Certificates of Participation (COPs). In connection with any such issuance, the State is required to make any financial disclosure necessary to comply with Rule 15c2-12 of the Securities and Exchange Commission.

The State Treasurer has confirmed that the transaction will be financed by the sale of COPs secured by an assignment of all Base Rents to a trustee for payment to the purchasers of the public securities. Upon assignment of all Base Rents due under the Agreement to the trustee, the trustee will execute, deliver, and publicly offer COPs evidencing proportional interest in the rental payments. The proceeds from the sale of the COPs will be held by the trustee and used to acquire the Property and pay administrative and transaction costs. The State Treasurer also confirms that the State's financial condition is material to investors in the COPs, and an event of non-appropriation of funds to pay future Base Rents could negatively affect the State's credit rating.

Section 6 of the Agreement contains a provision for termination in the event of non-appropriation of funds sufficient to make all required Lease Payments. In addition, Section 35 provides that the State's obligations under the Agreement are subject to legislative appropriation and that no provision of the Agreement obligates the Nevada Legislature to make any appropriation.

[1] It could be argued that the Base Rent Schedule B in the Agreement creates a "debt" within the meaning of the Nevada Constitution.

HISTORICAL BACKGROUND

Former State Treasurer Bob Seale entered into a lease purchase of computer equipment that obligated the state beyond the relevant legislative biennial appropriation to his office. Upon advice of this office that his lease purchase contract could be construed by a court to be an unconstitutional state debt in violation of article 9, section 3 of the Nevada Constitution, Mr. Seale refused to make the first lease purchase installment payment. His refusal to pay resulted in a Writ of Mandamus issued by the Nevada Supreme Court in *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 953 P.2d 13 (1998).

The Nevada Supreme Court held in *Business Computer Rentals* that a lease purchase of equipment, which is subject to a non-appropriation clause and a resulting exclusive remedy to repossess, is not "debt" within the meaning of the Nevada Constitution. In *Business Computer Rentals*, the Court stated in pertinent part:

> We previously considered the Nevada Constitution's public debt limitation in *State ex rel. Nevada Building Authority v. Hancock*, 86 Nev. 310, 468 P.2d 333 (1970). *Hancock* addressed the constitutionality of a statutory financing scheme, which used legislative appropriations to pay rent on state buildings, where the rent was used to pay off bonds sold to finance the building's construction. Specifically, the legislature created the Nevada Building Authority and directed the Authority to build facilities for state use. The Authority then declared, by resolution, its intention to construct buildings and athletic facilities on the University of Nevada campuses. The Authority's resolution explained the bonds would be issued to pay for the construction, and that payments on the bonds would be made solely from the Authority's income, which would be derived from fees and rent for the use of the buildings and facilities. The state would pay these fees and rent, since it would use the constructed facilities. Additionally, the resolution provided that the bonds would not 'constitute an obligation of the State of Nevada.' *Id*. at 312, 468 P.2d at 335.

Business Computer Rentals, 114 Nev. at 67-68, 953 P.2d at 16.

In essence, the Court in *Business Computer Rentals* was prepared to apply two tests to determine whether the lease purchase agreement for equipment was a current revenue obligation or an unconstitutional pledge of state debt. Those tests could be characterized as the "fungible" test and the "realism" test. The Court stated:

> We agree with BCR [Business Computer Rentals] and the State Treasurer that the lease's non-appropriation provisions bring it outside the scope of Nevada's Constitution article 9, section 3. *The agreement's subject matter is fungible equipment, susceptible to repossession*. Further, the contract clearly provides that payments are contingent on funds being appropriated by the legislature. The agreement automatically terminates if the legislature fails to appropriate sufficient funds for the payments, and in such a situation, BCR is entitled to repossess the equipment. Under the current revenue doctrine, no constitutionally proscribed public debt is created. Unlike the situation in *Hancock*, *realism* does not demand that 'indebtedness . . . is immediately created for the aggregate amount required by the period of the pledge.' *Hancock*, 86 Nev. at 316, 468 P.2d at 337. Here, the legislature is not compelled to appropriate money in the future.

Business Computer Rentals, 114 Nev. at 69-70, 953 P.2d at 17 (emphasis added).

Business Computer Rentals focused on the lease purchased asset being "fungible" whereas *Hancock* looked to the "realism" of the obligation created by the lease purchase transaction. In the absence of the "fungible" nature of the asset to be repossessed, the court is apparently suggesting that it will look with "realism" on the underlying nature of the transaction and will not put form over substance.

The Nevada Supreme Court's willingness to look beyond the form of an obligation to find "debt" is among a minority of jurisdictions. *See Anzai v. State of Hawaii*, 939 P.2d 637, 641 (Haw. 1997) (for a list of majority holdings and the court's recognition of the *Hancock* rationale among a minority of jurisdictions). A majority of jurisdictions ignore substance and moral

obligations and do not look beyond the enforceable "legal" obligation assumed by the state.

Since the Nevada Supreme Court declined to abandon its minority position in *Business Computer Rentals*, and absent specific legislative authorization for this proposed form of lease purchase financing, our advice focuses upon the Court's current construction of the Nevada Constitution.[2]

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[2] Many jurisdictions that invalidated financing schemes similar to *Hancock* have subsequently distinguished their *Hancock*-like decision and found lease purchase agreements with non-appropriation clauses constitutional. Washington is one such jurisdiction. *State ex. rel. Washington State Building Financing Authority v. Yelle,* 289 P.2d 355 (Wash. 1955), contains facts very similar to those in *Hancock*. In *Yelle*, the Legislature created a building authority to finance the construction of buildings that would be leased to state agencies. Those agencies would pay rent to the authority. The authority had the power to issue bonds and to pledge its revenues as security for its obligations. The Washington Supreme Court declared that the financing scheme violated the constitutional debt limit on the basis that the authority was a state agency and thus any obligation of the authority to pay the bondholders was, in reality, an obligation of the state.

However, when the Washington Supreme Court reviewed the facts in *Department of Ecology v. State Finance Committee*, 804 P.2d 1241 (Wash. 1991) it upheld as constitutional the lease purchase entered into by the state, relying in part on an amendment to the Washington Constitution and passage of a related statute subsequent to *Yelle*. The lease purchase agreement expressly made the Department of Ecology's (DOE) obligation subject to termination without penalty if sufficient funds were not appropriated by the Washington Legislature or upon executive order to DOE to cut its budget. Under the terms of the lease, if DOE terminated its lease it must vacate the building. The trustee could then take possession of the building and relet the property for the benefit of the COP holders. Any payments received by the trustee on reletting of the building were to be used to pay the COP holders. This was the COP holders' only remedy against the State. Moreover, the actual COPs included a paragraph warning the holders of the limited nature of the State's obligation:

> THIS CERTIFICATE IS NOT A GENERAL OBLIGATION OF THE STATE OF WASHINGTON AND THE FULL FAITH AND CREDIT OF THE STATE ARE NOT PLEDGED TO THE REPAYMENT OF THIS CERTIFICATE . . . THE OBLIGATION OF THE DEPARTMENT OF ECOLOGY TO MAKE PAYMENTS UNDER SAID LEASE AGREEMENT IS SUBJECT TO APPROPRIATION BY THE STATE LEGISLATURE. . . NOTHING IN THIS CERTIFICATE OR IN THE LEASE AGREEMENT SHOULD BE CONSIDERED AS OR IMPLY A MORAL OBLIGATION ON THE PART OF THE STATE OF WASHINGTON OR THE DEPARTMENT OF ECOLOGY TO MAKE PAYMENTS HEREUNDER OR THEREUNDER.

THE NATURE OF THE LEASE PURCHASE ASSET

The Court's use of the phrase "fungible equipment, susceptible to repossession," describing Business Computer Rentals' lease purchase to the state of a GATEWAY™ personal computer (commonly referred to as an IBM™ clone), recognized that such equipment (assuming similar component parts) is "fungible" within the normal usage of the word. Repossession of this asset merely requires the simple act of unplugging the computer and handing it over.

An IBM clone personal computer was perceived by the Court to be an asset that can be easily recovered, leaving the transfer of such between the parties a simple matter. The Court found this to be a reasonable bargained-for exclusive remedy for the lender's assumed risk of a non-appropriation by the legislature. *See Business Computer Rentals*, 114 Nev. at 70, 953 P.2d at 17 (citing *State ex rel. Kane v. Goldschmidt*, 783 P. 2d 988, 994-995 (Or. 1989), the Nevada Supreme Court acknowledged that this was a risk assumed by lease purchase lenders).

The Nevada Supreme Court may be looking for a specific set of favorable facts with respect to the nature of the lease purchase asset and the

(..continued)

The *Department of Ecology* transaction is somewhat similar to the Agreement between EICON and the State in that the purchase would be financed by the issuance of COPs with a bank as trustee. Like the state agency in *Department of Ecology*, if the State makes all required lease payments, the State receives title to the property in 20 years.

However this case is distinguishable for three important reasons. First, the *Yelle* court did not adopt a realism test and therefore did not have to apply a realism test to the transaction in *Department of Ecology*. Second, the transaction in *Yelle* did not contain a non-appropriation clause, whereas the Court in *Department of Ecology* specifically relied upon a non-appropriation clause when it found the lease purchase agreement constitutional.

Third, the Court in *Department of Ecology* relied upon a Washington statute and an amendment to the Washington Constitution. The constitutional amendment defined debt as borrowed money that is either secured by the full faith and credit of the state, or that is required to be repaid out of the general revenue. From the statute, the Court found that the Washington Legislature expressly declared that this type of financing plan does not constitute debt within the meaning of the Washington Constitution. Thus the Court found the people spoke through two vehicles and it was not within the Court's prerogative to set aside the will of the people.

resulting remedies available to the lease purchase lender in the event of non-appropriation. A partial list of possibly favorable facts regarding the nature of the asset might include the following:

1. Equipment that can be removed from its location and put in use at another location inexpensively (as contrasted to expensive and semi-destructive disassembling and reassembling).

2. Real property that is substantially general purpose, without expensive special features unlikely to be of value to alternative private sector users (*e.g.,* a prison); and modest in size compared to the market in which it is located (a small office building in Carson City vs. a vast facility in a small market).

3. Equipment or real property that is not specialized in purpose or location, such that the state virtually must have its use indefinitely and/or others are unlikely to have a use for it (*e.g.,* software specialized for government needs or a science laboratory at a university).

Each possible transaction should be looked at carefully with the assistance of qualified experts to increase the likelihood that the court makes favorable findings of fact. With regard to the lease purchase of real property, the use of appraisers and engineers, who could expressly comment on: (1) fair market value; (2) the relationship of the proposed "rents" with fair market rents as well as discussing the marketplace for alternative users; and, (3) the presence or absence of impediments to surrendering the assent (such as high level need by the state, inconvenience or cost of alternatives to the state, as well as technological changes that may argue for or against continued use) will enhance the possibility that the court will make favorable findings of fact.

THE REALITY OF THE LEASE PURCHASE OBLIGATION

However, based upon the court's binding precedent, any proposed lease purchase transaction must be evaluated in part under the *Hancock* analysis that puts *substance over form* in finding an unconstitutional state pledge of "debt." *See Nevada Building Authority v. Hancock*, 86 Nev. at 316-317, 468 P.2d at 337 (1970). The Court will look with "realism" on the underlying nature of the transaction and not necessarily put form over substance.

A. Pledging State Debt

In *Hancock*, the court looked at the "basic character" of the intended goal of the Legislature rather than the specific legal language used. That goal was to create long-term state capital improvement projects for use by renting state agencies, financed by the sale of public securities. The sale of such securities and the construction of the facility for state use as rentals was to be accomplished by an entity the court found to be an "agency" of the state.[3]

Realism would not allow the court to focus merely on the "permissive" language of the scheme. It looked beyond the language ("may" as a form of non-appropriation clause) to the reality of what would support the sale of public securities for construction of the public facility. There are pure "revenue bonds" that, notwithstanding being issued by the state, or a political subdivision or agency of the state, do not use the credit of the state (or any of its political subdivisions or agencies). This is not the situation before us, and is distinguished in *Hancock*, wherein the court concluded as follows:

> Thus, the bonds contemplated are not general obligation bonds of the State to which is pledged the full taxing power. Instead, the debts to be incurred are for self-liquidating projects to be serviced as to principal and interest entirely from revenues generated by the project itself.
>
> Sec. 8 provides, however, that rentals payable from a state agency may be derived from legislative appropriations made in each biennium, or the legislature may pledge itself to make future appropriations for rent, either in full or to the extent not defrayed by revenues. These provisions are the essence of the financing scheme. The permissive word 'may,' used with regard to legislative appropriations for rent, cannot serve to disguise the basic character of the scheme. Without question the legislature will appropriate the needed funds. If it did not do so, the contemplated public construction for state agency use could not proceed.

Hancock, 86 Nev. at 314, 468 P.2d at 336.

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[3] A clear implication of *Hancock* weighing in favor of any proposed transaction is that the issuer/lessor/owner is not a state agency. (We do not regard a trustee or a special purpose bankrupcy-remote entity currently favored by institutional lenders as a problem.)

In the current instance, the Court could likewise conclude that without the "understood" current "pledge" of future rents due under the Agreement the sale of public securities could not proceed. Similar to *Hancock*, the Court may find that the Legislature does not have discretion to not appropriate funds because realism demands it and the good faith of Nevada requires it.

The COPs are defined as municipal securities by the Securities and Exchange Commission, requiring full disclosure of the financial status of the State. Investors will generally rely upon the solvency of the State in determining whether it will appropriate funds in the future. Additionally, in the event the Legislature chose not to appropriate lease payments for the future, an event of non-appropriation may negatively affect the State's credit rating. Hence, it is possible that the Court's realism and the good faith of Nevada demand that the Legislature appropriate future debt despite a non-appropriation provision.

B. Lending State Credit

The Nevada Constitution states: "The state shall not loan money, or its credit, subscribe to or be, interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." NEV. CONST. art. 8, § 9. The Nevada Supreme Court has not had an opportunity to interpret the meaning of this proscription under the same facts as the Agreement presented for Board approval. However, in *State ex rel. Kane v. Goldschmidt*, 783 P.2d 988, 994-995 (Or. 1989), which was cited by the Nevada Supreme Court in *Business Computer Rentals*, *supra*, the Supreme Court of Oregon construed their similar constitutional proscription for the lending of state credit. They stated:

> By forbidding the state to 'lend' and local governments to 'loan' their credit, as well as to hold stock in or raise money for a corporation, Article XI covers transactions in which government does not itself raise and transfer funds but places its credit behind the corporation's ability to borrow money or obtain goods on credit. The obvious example is an outright guarantee made directly to a creditor to pay another's debt.

Goldschmit at 998, *citing DeFazio v. WPPSS*, 679 P.2d 1316 (Or. 1984).

Despite the presence of non-appropriation provisions, realism suggests that the court will look past the written terms of the contract to the "essence of the scheme." Any State involvement in the creation of a contract that produces a sale of public securities may trigger the court's willingness to look with realism at the essence and basic character of the financing scheme. It is the State's involvement that brings the scheme market value for public investment.

The court could reasonably conclude that within this financing scheme the State has placed its credit behind EICON's ability to obtain COP financing for the sale of the Property by lease purchase, unless the facts dictate otherwise.

This risk notwithstanding, if a fair and accurate description of the facts, as fortified by expert opinion, demonstrated it was possible that: (1) the Department of Conservation and Natural Resources might not require the Property for 20 years and therefore might not seek appropriations for the full 20 years; and (2) the amount of space could likely be absorbed by the private sector and/or other government agencies at rents sufficient to make the investment viable, this might tip the court's scales favorably towards constitutionality on the "fungible" and "realism" aspects of this specific transaction.

In the absence of the above, the financing contemplated in the Agreement would appear to fall within the proscribed conduct in *Hancock*.[4] The "understood" need for future appropriations by the Nevada Legislature to use the Base Rent as installment payments on the long-term real estate lease purchase could constitute an unconstitutional pledge of future rents under *Hancock*. Furthermore, there appears to be a possible unconstitutional lending of the State's credit to EICON to permit financing for the lease purchase transaction. Therefore, we could not recommend approval of the same by the Board.

CONCLUSION

[4] Furthermore, the State Treasurer represents that bond counsel will not issue an unqualified opinion as to the legality of the proposed transaction without further clarification of *Hancock* from the Nevada Supreme Court.

A lease purchase agreement for real estate and improvements containing an exclusive remedy of repossession upon default caused by a legislative non-appropriation of payments does not guarantee a finding of a current revenue obligation rather than debt under the rationale and holding in *Business Computer Rentals v. State Treasurer,* 114 Nev. 63, 953 P.2d 13 (1998). The involvement of the State in the creation of a contract that results in the issuance of public securities could cause the Nevada Supreme Court to exercise its discretion and apply its realism test found in *Nevada Building Authority v. Hancock,* 86 Nev. 310, 468 P.2d 333 (1970). Under the same realism test, the necessity of State involvement could violate the constitutional prohibition upon lending State credit to a private entity. There was no such State involvement in *Business Computer Rentals*. This is basically a fact-driven issue.

Therefore, absent specific legislative authorization for this proposed form of lease purchase financing, or a compelling description of the facts that illuminate the fungible and realism tests are met, this office would be compelled by its duty to the Nevada Constitution and the best interests of the State of Nevada to advise that the Board of Examiners not approve the Agreement to lease purchase the Property.

There are experts available to assist the State with respect to lease purchase agreements and net leases without nominal price purchase options that are different from the terms set forth in the Agreement. This might make future possible agreements more attractive for the parties and provide them with a better orientation for presentation to the Nevada Supreme Court under the current circumstances, where Nevada does not have specific statutory authorization for such agreements and the electorate soundly defeated a legislative joint resolution in 1994 that would have enabled their use.

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