

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-01 OPEN MEETING LAW; BOARDS & COMMISSIONS; MEETINGS: If a person has requested notice of meetings, the Open Meeting Law requires the public body to mail a copy of the notice and agenda to the requestor at least three working days before the meeting. Sending the notice by e-mail to the requestor does not satisfy the requirements of the statute. However, a person may waive the right to notice by regular mail and instead receive three days notice by e-mail, so long as the waiver is informed, intelligent, and voluntary.

Carson City, January 25, 2001

Donald L. Soderberg, Chairman, Public Utilities Commission of Nevada,
1150 East William Street, Carson City, Nevada 89701-3109

Dear Mr. Soderberg:

You have asked this office for an opinion regarding the use of communication sent via the Internet (e-mail) to provide an individual with notice of a public meeting.

BACKGROUND

The Open Meeting Law (OML) requires that all meetings of public bodies be open and public, except as otherwise provided by specific statute. NRS 241.020(1). Written notice must be given at least three working days before the meeting. NRS 241.020(2). The notice must include the time, place, and location of the meeting, a list of the locations where the notice has been posted, and an agenda consisting of a statement of the topics to be considered, the items on which action may be taken, and a period devoted to comments by the public. *Id.* At a minimum, the public body is required to provide notice of a meeting by posting a copy of the notice and agenda at its principal office and at three or more prominent places not later than 9 a.m. of the third working day before the meeting. NRS 241.020(3)(a).

Minimum notice by the public body also consists of “[m]ailing a copy of the notice to any person who has requested notice of the meetings of the body . . .” NRS 241.020(3)(b). This personal notice “must be delivered to the postal service used by the body not later than 9 a.m. of the third working day before the meeting.” *Id.* An individual’s request for personal notice of public meetings lapses six months after it is made, and the public body is required to inform requestors of that fact upon the first notice sent. *Id.*

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QUESTION

May a public body satisfy the requirements of the Open Meeting Law by sending e-mail to an individual who has requested personal notice of public meetings pursuant to NRS 241.020(3)(b)?

ANALYSIS

By its express terms, NRS 241.020(3)(b) obligates a public body to give personal notice of its meetings to all persons who request it, concurrently granting a statutory right to such requestors to receive notice as provided therein. The question is whether the statute can be interpreted to permit satisfaction of its requirements by e-mail.

The public body must give personal notice by “mailing a copy of the notice” to the requestor by delivering it “to the postal service used by the body.” NRS 241.020(3)(b). When a statute uses words that have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended. *State of Nevada Employees Ass’n, Inc. v. Lau*, 110 Nev. 715, 717, 877 P.2d 531, 533 (1994). If language is plain and unambiguous, the statute must be interpreted so the language is given effect. *Id.* Applying the plain meaning rule, it appears that providing notice by e-mail would not comply with the statute because it clearly contemplates mailing of a hard copy of the notice by traditional means, such as the U.S. Postal Service. Moreover, this office has previously interpreted the “postal service” referred to in NRS 241.020(3)(b) to mean the U.S. Post Office or other “entity who is actually going to deliver the notice to the addressee.” *See OML Ltr. Op. Nev. Att’y Gen. (Sept. 22, 1998).*

The communication by e-mail that we take for granted today was unheard of in 1977, when the Legislature enacted the personal notice requirement at NRS 241.020(3)(b). However, the Legislature has amended the section five times since 1979 without expanding the method by which a public body may give personal notice beyond mailing the notice through a postal service. Had the Legislature intended for e-mail to be an option for providing personal notice under the Open Meeting Law, it would have specifically so provided by language to that effect. *See Clark County Sports Enter., Inc. v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 174 (1980).

This office has previously considered whether notice by other means can satisfy a provision of the Open Meeting Law requiring personal delivery of written notice. *See OML Ltr. Op. Nev. Att’y Gen. (Sept. 29, 2000).* When a statute requires that written notice be personally delivered, an alternate method of notice “is not a substitute.” *Id.* at 2. The postmarked date on

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written notice protects both parties when there is a dispute as to whether a person receives notice in accordance with the controlling statute. *Id.* “We must assume that the legislature, when it enacted [the] statute, was aware of the various policy considerations and purposely drafted the statute to read as it does.” *Rondono v. CUNA Mut. Ins. Group*, 106 Nev. 371, 375, 793 P.2d 1324, 1327 (1990).

Nevertheless, the conclusion that notice by e-mail does not satisfy NRS 241.020(3)(b) does not mean that individuals may not elect to waive their statutory right to personal notice by regular mail and instead affirmatively choose to be notified by e-mail. Waiver is defined as “an intentional relinquishment or abandonment of a known right or privilege.” *Barker v. Wingo*, 407 U.S. 514, 525 (1972), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984). For the waiver to be valid, there must be both knowledge of the right and an intent to relinquish. *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1295 (9th Cir. 1983); *State Bd. of Psychological Examiners v. Norman*, 100 Nev. 241, 244, 679 P.2d 1263, 1265 (1984). In order for a waiver to be effective, it must occur with full knowledge of all material facts. *Thompson v. City of No. Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992). A clear and unambiguous agreement to waive a known statutory right will be given its intended force and effect. *Royal Palm Sav. Ass’n v. Pine Trace Corp.*, 716 F. Supp. 1416, 1419 (M.D. Fla. 1989). Therefore, the public body could provide notice by e-mail to persons who would prefer it, so long as requestors execute a knowing, intelligent, and voluntary waiver of their statutory right to receive a copy of the notice by regular mail.

However, waiver of the statutory *method* of transmitting notice does not constitute waiver of the right to *timely* notice as required by the statute. Waiver must not be assumed and every reasonable presumption against it must be indulged. See, e.g., *Barker*, 407 U.S. at 525-26. The right of citizens to attend meetings of public bodies is greatly diminished if they do not receive advance notice of the time and place of meetings and the subjects to be considered. Nevada’s Open Meeting Law is to be broadly interpreted to promote openness in government and any exceptions thereto should be strictly construed. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986). Therefore, the notice should be e-mailed to requestors “not later than 9 a.m. of the third working day before the meeting” in accordance with NRS 241.020(3)(b).

We recommend that the public body which desires to accommodate requests for notice by e-mail prepare a waiver form expressing the requestor’s knowledge of the statutory right to personal notice by mail pursuant to

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NRS 241.020(3)(b), the voluntary nature of the waiver, and the requestor's clear intent to relinquish that right in lieu of receiving notice by e-mail. The public body should implement internal record keeping procedures to keep track of those who submit waivers and alternative requests for notice, just as they currently manage the list of those requesting personal notice by mail. In keeping with the statute's requirements that a request for notice lapses six months after it is made, and that the public body must inform requestors of this fact upon the first notice sent, the public body should provide the same information in the first notice sent to requestors by e-mail. Of course, individuals could withdraw their waiver at any time and would be entitled to receive notification by mail for six months from the date of such withdrawal and submission of a new request for notice. In addition, the public body should maintain records documenting its notice by e-mail, a simple matter of printing out the properties of the transmissions. As discussed above, documentation of the time and manner of notice protects both parties when there is a dispute as to whether a person receives notice in accordance with the controlling statute.

CONCLUSION

A public body may not satisfy the requirements of the Open Meeting Law by sending e-mail notice to a person who has requested personal notice of public meetings pursuant to NRS 241.020(3)(b). However, a person may waive the statutory right to personal notice by regular mail and instead elect to receive timely notice by e-mail, so long as that waiver is informed, intelligent, and voluntary.

FRANKIE SUE DEL PAPA
Attorney General

By: RONDA L. MOORE
Deputy Attorney General

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AGO 2001-02 CITY: POWER GENERATING PLANT; BUSINESS ENTITY; REVENUE; SALE OF POWER: The City of Mesquite is not prohibited by NEV. CONST. ART. 8, § 10, from participating in the development a power generating plant, provided the city does not extend its credit or act as surety. NRS chapter 266 provides the City of Mesquite with the statutory authority to develop a power generating plant. The City of Mesquite may lease city owned property, provided the City receives at least fair market value. The City of Mesquite may form a non-profit corporation to facilitate the development of the proposed power generating plant. Power from the power generating plant may be sold to a utility or purchasers outside the boundaries of the city. Prior to generating or selling electricity, there must be compliance with all applicable statutes and regulations.

Carson City, February 1, 2001

Terrance P. Marren, City Attorney, City of Mesquite, 10 East Mesquite Boulevard, Mesquite, Nevada 89027

Dear Mr. Marren:

You sought the opinion of this office on three questions relating to a proposed plan for the development, construction, and operation of an electric power generating plant in the City of Mesquite (City), in which the City would participate. As part of our review process, you provided us with a draft copy of the proposed development agreement and proposed articles of incorporation.

As we understand the proposal, the City has been approached by a private developer of electric power generating plants with a proposal to construct an electric power generating plant on property owned by the City. The proposal calls for the City to form an independent Nevada non-profit corporation to be known as the Mesquite Power Company (Company). The Company would be the legal owner and operator of the electric power generating plant. The City would then lease its property, upon which the power generating plant would be constructed, to the Company for a period of at least 30 years.

It is contemplated that the private developer is responsible for establishing and obtaining the financing necessary to complete the project on City property. The developer is also responsible for negotiating contracts on behalf of the Company with other entities for the purchase of the electricity produced by the proposed power plant. The gross revenue from the sale of electricity will be first used to pay all of the debts owed by the Company, including a reserve established for payment of amortized indebtedness, depreciation, and expenses of operating the power generating plant and for contingencies. You

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have not provided the methodology for calculation of the above-referenced reserves. This analysis and opinion is based in part on the understanding that the base fair market value lease payment to the City is a primary debt of the Company that must be paid from gross revenue or the established reserve prior to determining profit. The remaining profit will be transferred to the City to the credit of the City's general fund. It is not clear from your inquiry what the consideration is for the City to obtain the "remaining profit" other than that the City is allowing the power generating plant to be developed and operated on City owned leased property. This analysis and opinion is based, in part, on the understanding that the payment to the City's general fund of "remaining profit" will be paid as additional lease payment, above the fair market value base lease payment, based on a formula whereby the more remaining profit made by the Company, the higher the lease payment to the City. You have not provided the formula or methodology for calculating the additional lease payment. The City anticipates benefiting from the proposal by receiving a significant income stream over the life of the project.

Based on the limited information your letter provided, this response is limited to the questions specifically addressed. We understand that there is not yet an approved development agreement between the Company and the developer, nor are there approved articles of incorporation for the Company. We have not reviewed contracts, leases, and agreements necessary for the project.

QUESTION ONE

Does NEV. CONST. ART. 8, § 10 and Nevada Revised Statutes (NRS) chapters 266 and 268 permit the City of Mesquite (City) to participate in the creation of an independent Nevada non-profit corporation which would enter into an agreement for the construction and operation of an electric power generating plant and for the City to lease City-owned real property to the Mesquite Power Company (Company) for such purposes?

ANALYSIS

Your question calls for an analysis of the possible application to the proposal of NEV. CONST. ART. 8, § 10 and various sections of the NRS.

A political subdivision of the State, such as a city or a county, can only exercise such powers as are expressly granted by the Legislature or such powers as are necessarily implied to carry out the express powers so granted. *See City of Reno v. Sam Saibini*, 83 Nev. 315, 429 P.2d 559 (1967); Op. Nev. Att'y Gen. No. 99-24 (July 20, 1999). The City's authority to construct utility facilities is governed by NRS chapter 266. NRS 266.285 provides in part that "The city council may: 1. Provide, by contract, franchise or public enterprise,

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for any utility to be furnished to the city for the residents thereof; 2. Provide for the construction of any facility necessary for the provision of such utility.” NRS 266.290 mandates the procedure the City must follow for the acquisition or establishment of a municipal utility.

NRS 266.300 provides in part that:

Franchises for certain public purposes

1. The city council shall have the power:

....

(b) To contract with, authorize or grant any person, company or association a franchise to construct, maintain and operate gas, electric or other lighting works in the city, and to give such person, company or association the privilege of furnishing light for the public buildings, streets, sidewalks and alleys of the city.

Accordingly, the provisions of NRS 266 provide the City with the statutory authority to develop an electric power generating plant.

NEV. CONST. ART. 8, § 10 provides in pertinent part that “[n]o . . . city . . . shall become a stockholder in any joint stock company, corporation or association whatever, or loan its credit in aid of any such company, corporation or association, except, rail-road corporations, . . .” Accordingly, this constitutional provision prohibits a city from loaning its credit to a private company or where the city would become a stockholder in a private company. The proposal under consideration by the City contemplates forming a non-profit corporation. A non-profit corporation does not issue stock and there is no shareholder ownership of a non-profit corporation. *See* NRS 82.134. As such, the City would not be violating the prohibition in NEV. CONST. ART. 8, § 10 of becoming a stockholder in a private company by forming and contracting with a non-profit corporation.

The phrase “loan its credit” in our State Constitution means assuming the obligation to pay with public money the debts of private companies and associations. *See Gibson v. Mason*, 5 Nev. 283 (1869). The Constitution prohibits government entities from acting as sureties or guarantors of the collateral obligations of private parties. *See State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977); *Allen v. County of Tooele*, 455 P.2d 994 (Utah 1968). If the City’s only obligation is to lease City-owned property to the power company and it is clearly established that any financial obligations of the City are to be paid only from the earnings of the utility, then such obligations will not create a debt against the City. *See Ronnow v. City of*

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Las Vegas, 57 Nev. 332, 65 P.2d 133 (1937) (general obligation bonds create a debt against the city, whereas bonds payable wholly from the earnings of a public utility do not). To avoid the prohibition embodied in NEV. CONST. ART. 8, § 10, the final and approved development agreements and related contracts *must* provide that the City has *no liability* for payments of any kind.

While there is no specific express statutory provision granting a city the authority to form a non-profit corporation, a city does have the implied power to carry out the express powers so granted. *See City of Reno v. Sam Saibini*, 83 Nev. 315, 429 P.2d 559 (1967); Op. Nev. Att’y Gen. No. 99-24 (July 20, 1999). Absent any constitutional, statutory or regulatory prohibition, a city should be free to choose, and to participate in the formation of, the form of business entity best suited for conducting business. Therefore, with implied authorization, the City should be permitted to participate in the formation of a non-profit corporation to facilitate its ability to develop an electric generating power plant, pursuant to the express grant of authority of NRS 266.

CONCLUSION TO QUESTION ONE

The NEV. CONST. ART. 8, § 10 does not prohibit the City of Mesquite (City) from forming a non-profit corporation or from contracting with the non-profit corporation for the development and operation of an electric power generating plant on City-owned leased property, providing the City does not extend its credit or act as a surety for the non-profit corporation or for the development and operation of the electric generating power plant. The statutory grants of authority embodied in NRS chapters 266 and 268 permit the City to participate in the creation of an independent Nevada non-profit corporation, which would enter into an agreement for the construction and operation of an electric power generating plant, and for the City to lease City-owned real property to the non-profit corporation for such purposes.

QUESTION TWO

Is it permissible for the City of Mesquite to receive a lease payment and other revenue?

ANALYSIS

The authority of the City of Mesquite (City) to lease property for the benefit of the City is found in NRS 266.265. NRS 266.265 provides:

1. The city council may:

....

(c) Purchase, receive, hold, sell, lease, convey and dispose of property, real and personal, for the benefit of the

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city, both within and without the city boundaries; improve and protect such property, and do all other things in relation thereto which natural persons might do.

NRS 266.267 mandates the requirements for the sale, lease, or exchange of real property. The requirements include an appraisal and that the lease amount must be made at or above the current appraised value of the real property as determined by the appraiser.

CONCLUSION TO QUESTION TWO

It is permissible for the City of Mesquite to receive a lease payment and revenue provided that the lease amount is at or above the current appraised value of the real property as determined by the appraiser.

QUESTION THREE

Is there any prohibition under Nevada law which would prohibit the City of Mesquite (City) from leasing City-owned real property to the Mesquite Power Company, which will then sell generated electric power to a power company or to purchasers outside the city rather than directly to retail customers within the City?

ANALYSIS

NRS 266.300(b) provides the city council with the authority to: contract with, authorize, or grant any person, company, or association a franchise to construct, maintain, and operate gas, electric, or other lighting works in the city and to give such person, company, or association the privilege of furnishing light for the public buildings, streets, sidewalks, and alleys of the city.

It is a reasonable construction of NRS 266.300 that a city is thereby empowered to contract with, authorize, or grant any person, company, or association a franchise to construct, maintain, and operate gas, electric, or other lighting works in the city and *not* to give such person, company, or association the privilege of furnishing light for the public buildings, streets, sidewalks, and alleys of the city. Given that authority, a city would be empowered to provide for the development of an electric power generating plant and to either give such person, company, or association the privilege of furnishing light for the public buildings, streets, sidewalks, and alleys of the city or not.

There is no language in NRS 266.300(b) that would prohibit a person, company, or association authorized by the city to construct, maintain, and

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operate electric works in the city from selling the power generated within a city to a power company or to purchasers outside the geographic limits of the city.

In a prior attorney general opinion, an analogous issue was addressed. In that opinion, the issue was whether NRS 266.285, which authorizes the city to purchase and maintain a water supply system, would prohibit the supplying of water outside the boundaries of a city. The opinion found that: "NRS 266.285 does not prohibit the supplying of water outside boundaries of city, and the ownership and purpose of use is not confined within the municipal limits by Constitution or statute." Op. Nev. Att'y Gen. No. 353 (August 29, 1946).

CONCLUSION TO QUESTION THREE

There is no prohibition under Nevada law that would prohibit the City of Mesquite (City) from leasing city-owned real property to the non-profit corporation (Mesquite Power Company), which will then sell generated electric power to a power company or to purchasers outside the boundaries of the City rather than directly to consumers within the City. This opinion does not and should not be construed to address any statutes or regulations that must be satisfied prior to any entity generating or selling electricity.

FRANKIE SUE DEL PAPA
Attorney General

By: PATRICK O. KING
Senior Deputy Attorney General

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AGO 2001-03 ECONOMIC DEVELOPMENT; LABOR; LABOR COMMISSIONER; LOCAL GOVERNMENT; REDEVELOPMENT AGENCIES; WAGES: Redevelopment projects that involve the public provision of property below market value, or financial incentives with a value in excess of \$100,000, must be undertaken pursuant to an agreement between a redevelopment agency and developer that incorporates the provisions of NRS 338.010 to 338.090. This includes the requirement of paying prevailing wages. A failure to memorialize the legal relationship between the redevelopment agency and the developer would be an improper and ineffective attempt to circumvent the express provisions and application of NRS 279.500 and NRS 338.010 to 338.090.

Carson City, February 16, 2001

Terry Johnson, Nevada Labor Commissioner, Office of the Labor Commissioner, 555 E. Washington Ave., Suite 4100, Las Vegas, Nevada 89101

Dear Mr. Johnson:

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

QUESTION

Whether the lack of an express written “contract” between a public redevelopment agency and a developer negates the application of either NRS 338.020 or NRS 279.500?

FACTUAL BACKGROUND

NRS 279.500 provides, in part, that if a redevelopment agency provides property for redevelopment at less than the fair market value of the property, or provides financial incentives to the developer with a value of more than \$100,000, the agency “must provide in the agreement with the developer that the development project is subject to the provisions of NRS 338.010 to NRS 338.090, inclusive, to the same extent as if the agency had awarded the contract for the project.” Pursuant to NRS 338.020 to 338.080, prevailing wages are mandatory on public works projects valued in excess of \$100,000. With regard to projects undertaken pursuant to an agreement with a redevelopment agency, NRS 279.500 provides that prevailing wages apply only to the project covered by the agreement between the agency and the developer. Prevailing wage laws do not apply to future development of the property unless additional financial incentives with a value of more than \$100,000 are provided to the developer.

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Inasmuch as NRS 279.500 does not explicitly state that the redevelopment agency “must” enter into a contract with the developer, one might conclude that the parties may elect not to enter into a written agreement and thus avoid application of NRS chapter 338. Under such a scenario, the developer would benefit by receiving financial incentives from a redevelopment agency without adhering to, among other things, the statutory requirement of paying prevailing wages to workers.

ANALYSIS

NRS 279.500 does not specifically mandate that redevelopment agencies and developers enter into a written agreement. However, NRS 279.500 does contemplate such an agreement and does specifically mandate that “the agreement with the developer” incorporate the public works provisions of NRS 338.010 to 338.090, inclusive, which include the requirement to pay prevailing wages.

When the meaning of a statutory provision is doubtful or ambiguous, courts should endeavor to discover the meaning intended by the legislature, give consideration to the effect or consequences of the proposed construction, and avoid construing the statute in a manner that would lead to an unreasonable result. *School Trustees v. Bray*, 60 Nev. 345, 354-55, 109 P.2d 274, 278 (1941). *See also Lynip v. Buckner*, 22 Nev. 426, 439-40, 41 P. 762, 765 (1895) (laws are also to be construed according to their spirit and meaning, and not merely according to their letter); *State ex rel. Pac Reclamation Co. v. Ducker*, 35 Nev. 214, 223, 127 P. 990, 993 (1912) (when the legislative intent can be ascertained, that must govern, and all rules of construction are but mere aids in the ascertainment of such intent) Furthermore, the Nevada Supreme Court has on more than one occasion stated:

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 should always be construed so as to avoid absurd results.

Advanced Sports Information, Inc. v. Novotnak, 114 Nev. 336, 340, 956 P.2d 806, 808-809 (1998) (citations omitted); *State, Dep’t Ins. v. Humana Health Ins.*, 112 Nev. 356, 360, 914 P.2d 627, 629-630 (1996) (citations omitted).

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“Statutes should be interpreted, so far as practicable, to carry out the purposes of the legislation and to effectuate the benefits intended to be obtained.” *Alper v. State ex rel. Dep’t Hwys*, 96 Nev. 925, 928, 621 P.2d 492, 494 (1980). Courts “must also consider the effect or consequences of proposed interpretations. An unreasonable result produced by one interpretation is reason for rejecting it in favor of another interpretation which would produce a reasonable result.” *Alper*, 96 Nev. at 930, 621 P.2d at 495 (citations omitted). The intent of Nevada’s prevailing wage law may be determined from the legislative history of the federal prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 276a (1989), which served as a model for NRS chapter 338.¹ In *Building & Constr. Trades Dept. v. United States Dept. of Labor Wage Appeals Bd.*, 932 F.2d 985, 986 (D.C. Cir. 1991), the purpose of the Davis-Bacon Act is explained: Congress enacted the Davis-Bacon Act to protect local contractors from being underbid on federally funded construction projects by government contractors who based their bids on imported labor who would work for cheaper wages than those prevailing in the area. See 74 Cong. Rec. 6510 (1931)(statement by Rep. Bacon); *Universities Research Ass’n v. Coutu*, 450 U.S. 754, 773-74, 67 L. Ed. 2d 662, 101 S. Ct. 1451 (1981).

The Act’s intent was “to protect the employees of government contractors from substandard earnings and to preserve local wage standards. The employees, not the contractor or its assignee, are the beneficiaries of the Act.” *Unity Bank & Trust Co. v. United States*, 756 F.2d 870, 873 (Fed. Cir. 1985) (citations omitted); see also *Walsh v. Schlecht*, 429 U.S. 401, 411 (1977); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 176-77 (1954); *Independent Roofing Contractors v. Department of Industrial Relations*, 28 Cal. Rptr. 2d 550, 557 (Cal. Ct. App. 1994).

NRS chapter 279 was amended by the 1991 Nevada Legislature, adding the language of NRS 279.500 discussed above. The Legislative Counsel Bureau’s research division prepared a *Summary of Legislation* for the 1991 session, and the following are excerpts from page 2 of the Summary:

Assembly Bill 580 requires the payment of the prevailing wage rate on certain development projects. The measure provides that the existing prevailing wage requirements for public works projects also apply to contracts awarded on or after January 1, 1992, by municipalities for urban renewal projects.

¹ Chapter 338 was enacted by Act of March 24, 1937, ch. 139, § 1-11 1937 Nev. Stat. 305-07. There is no legislative history available to assist us in determining the Nevada Legislature’s intent when it passed this act.

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The bill clarifies that this requirement also applies to contracts, financial incentives and certain property transactions which are executed after October 1, 1991, between a community redevelopment agency and a developer. This provision affects financial incentives or property transactions in excess of \$100,000. Prevailing wage requirements would not apply to any future development, unless the agency provides additional financial incentives in excess of \$100,000.

The legislation also provides that on or after January 1, 1992, prevailing wage statutes apply to city and county projects financed by economic development revenue bonds and programs financed by State industrial development revenue bonds. . . .

. . . .

This bill was requested to clarify the intent of the Legislature with regard to economic development and urban renewal projects using public funds. When the package of economic development legislation was enacted in previous sessions, the members of the Legislature understood that projects financed by public funds would be subject to prevailing wage requirements. . . .

Assemblyman Bob Price sponsored A.B. 580 and explained “at the time he chaired the committee for the establishment of urban renewal, it never occurred to him there would be the necessity for additional language to clarify the fact that urban renewal should be under the prevailing wage, as had been the standard for many years on public jobs. He explained this bill clarified what was currently the policy.” *Hearing on A.B. 580 Before the Assembly Committee on Labor and Management*, 1991 Leg., 66th Sess. 6 (May 14, 1991).

Chairman Giunchigliani explained: “The key to the issue was with the financial incentives paid to these redevelopers” and also “expressed frustration with developers who received additional incentives objecting to paying their labor a decent wage for the area in which they live.” *Hearing on A.B. 580 Before the Assembly Committee on Labor and Management*, 1991 Leg., 66th Sess. 9 (May 30, 1991).

The above excerpts from the legislative history reveal clearly that the Legislature’s intention in enacting NRS 279.500 was to provide workers employed on publicly funded redevelopment projects with prevailing wages as delineated in NRS 338.020 to 338.040.

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We note also that NRS 338.080(3) provides that prevailing wage laws set forth in NRS 338.020 to 338.090 do not apply to “[a]ny contract for a public work whose cost is less than \$100,000. A unit of the project must not be separated from the total project, even if that unit is to be completed at a later time, in order to lower the cost of the project below \$100,000.” NRS 338.080(3) clearly and plainly rejects attempts to circumvent application of prevailing wage laws by “breaking up” a project to keep various portions under the \$100,000 limit. This provision is further evidence of the Legislature’s intent that parties to a public works or redevelopment project should not be permitted to circumvent application of prevailing wage laws.

In summary, the Legislature’s intent and the history behind adoption of NRS 279.500 make it clear that all redevelopment projects that involve the public provision of property below market value, or financial incentives with a value in excess of \$100,000, must be undertaken pursuant to an agreement between a redevelopment agency and developer that incorporates the provisions of NRS 338.010 to 338.090. This includes the requirement of paying prevailing wages to the respective classes of mechanics and workers. A failure to memorialize the legal relationship between the redevelopment agency and the developer would be an improper and ineffective attempt to circumvent the express provisions and application of NRS 279.500 and NRS 338.010 to 338.090.

CONCLUSION

NRS 279.500 does not specifically mandate that a redevelopment agency enter into a written agreement with a developer on a redevelopment project. The statute does, however, contemplate that such an agreement will exist. Moreover, the clear intent of the Legislature in enacting NRS 279.500 was to protect workers employed on redevelopment projects. Consequently, a failure to memorialize the legal relationship between the redevelopment agency and the developer would be an improper and ineffective attempt to circumvent the express provisions and application of NRS 279.500 and NRS 338.010 to 338.090. To conclude otherwise would thwart the clearly expressed intent of the Legislature, the spirit of the law, and would impermissibly place the form of the transaction, or the lack thereof, over its substance.

FRANKIE SUE DEL PAPA
Attorney General

By: THOMAS M. PATTON
First Assistant Attorney General

DIANNA HEGEDUIS
Deputy Attorney General

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AGO 2001-04 CAMPAIGNS; CANDIDATES; ELECTIONS: Federal election law preempts state election law, therefore, certain state officials are not prohibited from soliciting or accepting monetary contributions for a campaign for federal office before, during, or after a regular or special session of the Legislature.

Carson City, March 12, 2001

Susan Morandi, Deputy Secretary for Elections, Secretary of State's Office,
101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Ms. Morandi:

You have requested an opinion from this office regarding the applicability of a Nevada Campaign Practices statute to an election campaign for a federal office.

QUESTION

May a member of the Legislature, the lieutenant governor, lieutenant governor-elect, governor, or governor-elect solicit or accept monetary contributions for a campaign for federal office during the time beginning 30 days before the start of a regular session of the Legislature and ending 30 days after the final adjournment of a regular session or from the day after the governor's proclamation calling for a special session and ending 15 days after a special session of the Legislature?

ANALYSIS

NRS 294A.300(1) states:

It is unlawful for a member of the legislature, the lieutenant governor, the lieutenant governor-elect, the governor or the governor-elect to solicit or accept any monetary contribution, or solicit or accept a commitment to make such a contribution for any political purpose during the period beginning:

- (a) Thirty days before a regular session of the legislature and ending 30 days after the final adjournment of a regular session of the legislature; or
- (b) The day after the governor issues a proclamation calling for a special session of the legislature and ending 15 days after the final adjournment of a special session of the legislature.

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Specifically, your question is whether the prohibitions in NRS 294A.300(1) apply to the state officials delineated in NRS 294A.300(1) if these state officials are candidates for a federal office.¹ Thus the relevant inquiry is whether being a candidate for federal office is a political purpose as such term is contemplated in NRS 294A.300(1). The Legislature did not discuss federal candidacy when NRS 294A.300 was originally enacted in 1991, so the legislative history does not provide guidance.

Based upon the foregoing, even though NRS 294A.300(1) does not specifically refer to candidacy, certainly being a candidate for federal office would fall within the ordinary meaning of the phrase “political purpose” used in the statute. Therefore, the prohibitions purport to apply to the state officials listed in NRS 294A.300(1) during the specified times if these people are candidates for federal office. Our analysis does not conclude here, however, because federal law governs candidates for federal office and thus federal election law must also be examined.

The applicable federal election law is 2 U.S.C. § 453 (2000), which states: “The provisions of [the Federal Election Campaign] Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.” The rules prescribed under the Federal Election Campaign Act provide in relevant part:

(a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.

(b) Federal law supersedes State law concerning the --

....

(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

11 C.F.R. § 108.7 (2001).

In 1996, the United States Court of Appeals for the Eleventh Circuit examined a Georgia statute that prohibited a member of the legislature from accepting campaign contributions during any legislative session. The legislator was contemplating a campaign for federal office. *Teper v. Miller*, 82 F.3d 989, 992 (11th Cir. 1996). The court examined the preemption doctrine and explained that the “doctrine is rooted in the Supremacy Clause [of the United States Constitution] and grows from the premise that when state

¹ “Candidate” is defined in NRS 294A.005 as “[A]ny person: 1. Who files a declaration of candidacy; 2. Who files an acceptance of candidacy; 3. Whose name appears on an official ballot at any election; or 4. Who has received contributions in excess of \$100.

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law conflicts or interferes with federal law, state law must give way.” *Id.* at 993.

In addition, the court analyzed several Federal Election Commission (FEC) advisory opinions, including an opinion directly dealing with the Georgia statute, in which the FEC concluded, “Under the broad preemptive powers of [FECA], only Federal law could limit the time during which a contribution may be made to the Federal election campaign of a State legislator.” *Id.* at 998, *citing* Op. FEC 1995-48.

In view of the persuasive reasoning of the *Teper* court and the advisory opinions issued by the Federal Election Commission, this office concludes that the prohibitions stated in NRS 294A.300 are inapplicable to a candidate for federal office because a candidate’s ability to seek contributions for federal office is governed by federal law and the applicable federal law contains no prohibition similar to those found in NRS 294A.300(1). We respectfully request that the 2001 Legislature amend NRS 294A.300 to include an exception from the statutory prohibitions found in NRS 294A.300(1) for candidates for federal office.

CONCLUSION

The Federal Election Campaign Act preempts NRS 294A.300. Consequently, a member of the Legislature, the lieutenant governor, lieutenant governor-elect, governor, or governor-elect is not prohibited from soliciting or accepting monetary contributions for a campaign for federal office before, during, or after a regular or special session of the Legislature.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

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AGO 2001-05 OPEN MEETING LAW; BOARDS AND COMMISSIONS; MEETINGS: Whenever a quorum of the Churchill County Board of Commissioners gathers and discusses, decides, gathers information, or otherwise deliberates on matters over which the commissioners have supervision, control, jurisdiction, or advisory power a meeting of that board within the meaning of NRS 241.015(2) takes place. Any such meeting must be conducted in accordance with the Open Meeting Law and noticed as a meeting of the county, even if the meeting is publicly noticed as a meeting of another public body. The commissioners may attend purely social gatherings or gatherings which only provide general information of interest to all public officials if the commissioners do not receive information about or otherwise deliberate on matters over which they have supervision, control, jurisdiction, or advisory power.

Carson City, March 14, 2001

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

Dear Mr. Mallory:

You have asked the opinion of this office regarding the following question:

QUESTION

Is it a violation of Nevada's Open Meeting Law, NRS chapter 241, for a Churchill County Commissioner to attend a meeting and comment, or otherwise participate, in the decision making process of a board, commission, or other organization if another Churchill County Commissioner is a member of that body and the meeting is not publicly noticed as a meeting of the Churchill County Board of Commissioners?

STATEMENT OF FACTS

You have presented the following facts:

The Churchill County Board of Commissioners (Board) is composed of three commissioners. Two commissioners constitute a quorum.

Commissioner Washburn has been appointed by the Governor to the Indigent Accident Fund, the Carson-Truckee Water Conservation District, the Nevada Rural Housing Authority, and the State Land Use Planning Advisory Committee. You have asked us to assume that each of the meetings of these committees would be properly noticed as an open meeting of that committee.

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Commissioner Washburn has been appointed by the Board to be a member of the Carson Water Subconservancy District, the Western Nevada Resource Conservation and Development Committee, the Western Nevada Development District, the Nevada Association of Counties Board, the Lahontan Valley Environmental Alliance, the Churchill Economic Development Board of Directors, and the Churchill County Regional Transportations Committee. Commissioner Washburn is also a member of the Newlands Field Station Strategic Planning Committee. Commissioner Frey would like to attend the meetings, make comments, and otherwise participate in the meetings of the above-named boards and committees.

Commissioner Frey is a member of the Lahontan Conservation District Board. Your letter states that prior to voting, Commissioner Washburn would like to attend the meetings of the Lahontan Conservation District Board. We are assuming that you are referring to Commissioner Washburn voting as a Churchill County Commissioner on business which comes before the Board. In addition to the above-named boards and commissions, both commissioners are members of the Farm Bureau of Churchill County, the local Navy League, and the Churchill County Arts Council.

ANALYSIS

The Open Meeting Law requires a public body to provide the public with notice of its meetings. NRS 241.020(2). NRS 241.015(2) defines a meeting as “the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.” A quorum is defined as “a simple majority of the constituent membership of a public body or another proportion established by law.” NRS 241.015(4). “The constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.” *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998).

We have previously considered the situation in which a quorum of a board of county commissioners attends the county convention of a political party. Letter Opinion to Steven G. McGuire dated July 2, 1984. We concluded that if a quorum of the board in attendance at the convention deliberates on resolutions concerning subjects over which the board has supervision, control, jurisdiction, or advisory power the board may be engaging in the type of collective acquisition or exchange of facts which would make the gathering a meeting as defined by the Open Meeting Law. *Id.* at 2. Thus the key to this analysis is whether two commissioners, at a meeting of a body other than the Board, will be deliberating on subjects over which the Board has supervision, control, jurisdiction, or advisory power.

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To “deliberate” means to examine and consult to form an opinion and to weigh arguments for and against a proposed course of action. *Neese v. The Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990). In the context of open meeting laws, deliberation includes the mere attendance at a meeting resulting in the receipt of information. *Wisconsin ex. rel. Badke v. Village Board of the Village of Greendale*, 494 N.W.2d 408 (Wis. 1993), *McComas v. Board of Education of Fayette County*, 475 S.E.2d 280, 291 (W.Va. Ct. App. 1996).

In *Badke*, the Supreme Court of Wisconsin considered the question of whether the village board violated the open meeting law when a quorum of the board attended a meeting of the plan commission without providing notice of a village board meeting. The meetings of the plan commission were noticed in accordance with the state’s open meeting law. Two of the members of the plan commission were trustees on the village board. Other trustees of the village board stated that they attended meetings of the plan commission as interested observers and citizens. The plan commission considered matters that would ultimately be acted upon by the village board.

The court found that the first question to consider is whether there was a purpose to engage in governmental business by discussion, decision, or information gathering. *Id.* at 415. Interaction between members of the governmental body is not necessary for a meeting to take place. *Id.* “Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body’s decisionmaking.” *Id.* The court found that the possibility that a decision of the board could be influenced dictates compliance with the open meeting law. *Id.* Therefore, the court concluded that the village board violated the open meeting law when a quorum of the board attended a meeting of the plan commission.

The *Badke* court rejected the argument that public notice of the plan commission meeting was sufficient to put the public on notice of a meeting.

The notice of the Plan Commission meeting alone does not alert the public of the importance of the meeting because it does not notify the public that a quorum of the Village Board will also be present to gather information upon which they will base their final vote. If the public knows that the Village Board’s trustees are going to the Plan Commission meeting they will likely realize that the meeting is important and that the proposal discussed is probably something over which the Village Board will ultimately exercise final decisionmaking authority. Notice of a Village Board meeting alerts the public that what might otherwise be a relatively innocuous meeting of the Plan Commission might

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be more than that. Notice that a quorum of the Village Board will attend informs the public that it can go to the meeting and obtain the same information upon which the Village Board may be basing its decision. Accordingly, notice of the Plan Commission meeting alone is not enough to satisfy the requirements of the open meeting law.

Id. at 417.

The *Badke* court distinguished a case in which a quorum of a local school board attended a meeting of another local school board without violating the open meeting law. In *Paulton v. Volkman*, 415 N.W.2d 528 (Wis. Ct. App. 1987), the court found that a quorum of a school board did not engage in discussion or gather information on a subject for the purpose of exercising the responsibilities, authority, power, or duties of the board and therefore did not violate the open meeting law. The court in *Badke* found that the holdings were consistent because in *Paulton*, the quorum did not engage in information gathering which had the possibility of influencing a decision of the board. *Badke*, 494 N.W.2d at 418.¹

Although we cannot reach a specific conclusion as to the propriety of the attendance of the commissioners at meetings of each body listed in your letter without further information, it appears that many, if not all, of these bodies consider matters that may come within the supervision, control, jurisdiction, or advisory power of the Board. Whether or not a specific gathering of two or more commissioners constitutes a meeting as defined in NRS 241.015(2) depends on the topics which will be considered and the information that will be presented at each meeting. We suggest that if the commissioners have any doubts about whether their attendance at a gathering will constitute a meeting of the Board, they either not attend the meeting or publicly notice the meeting, pursuant to the Open Meeting Law, as a meeting of the Churchill County Board of Commissioners.

The bodies listed in your letter appear to deal with matters of local or regional interest and importance and thus most likely address matters which may come before the Board. For instance, you state that Commissioner Washburn is a member of the Churchill Economic Development Board of Directors and the Churchill County Regional Transportation Committee, both of which are county committees. In addition, the County appointed

¹ The definition of "meeting" considered by the Wisconsin courts is substantially similar to the definition of "meeting" in the Nevada Open Meeting Law. Wis. Stat. §19.82(2). However, the Wisconsin definition also includes a rebuttable presumption that if one-half or more of the members of a board are gathered then it is for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the board and an exception for social or chance gatherings. *Badke*, 494 N.W.2d at 414.

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Commissioner Washburn to numerous regional committees, including the Lahontan Valley Environmental Alliance, the Western Nevada Resource Conservation and Development Committee, and the Western Nevada Development District.

Each of these bodies appears to address matters directly related to the business of the Board. The fact that the Board appoints county commissioners to these bodies further suggests that the matters which come before these bodies are matters which are within the supervision, control, jurisdiction, or advisory power of the Board. The mere presence of a quorum of the Board receiving information that may influence a decision of that board brings the meeting within the scope of the Open Meeting Law. In fact, you state that Commissioner Washburn would like to attend meetings of the Lahontan Conservation District Board prior to voting. Therefore, it appears that the purpose of the attendance of the commissioner, who is not a member of that body, at the meeting is to gather information and participate in discussions on matters that may come before the Board. It appears that statewide agencies also may consider matters which are likely to come before the Board.

Although it is commendable that the commissioners want to be completely informed prior to making decisions, this type of information gathering and participation in discussions implicates the Open Meeting Law and the public's right to observe the deliberations of the Board. Therefore, if two commissioners are in attendance at a gathering to deliberate, including the mere receipt of information, on a subject which is within the supervision, control, jurisdiction, or advisory power of the Board, then the gathering must be publicly noticed as a meeting of the Board.

The fact that the meeting may be publicly noticed by another public body does not alert the public that the Board will deliberate on a particular topic at that meeting. Members of the public would not have advance notice that a quorum of the Board will be attending any given meeting if only one member of the public body is a commissioner and the second commissioner attends the meeting but is not a member of that body.² This leads to the danger that the public may be excluded from observing and participating in deliberations because the commissioners might not, and probably cannot, repeat the deliberations they have already undertaken, at a meeting of another body, before taking action on a matter in a meeting of the Board. Members of the public would have no way of knowing which of the meetings of other public bodies a quorum of the Board will attend and deliberate on matters within its supervision, control, jurisdiction, or advisory power. Thus members of the

² A different question is presented if both commissioners are members of the other public body. That does not appear to be the case with any of the bodies that are listed in your letter.

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public could not determine whether they should attend such meetings in order to observe and participate in the deliberations of the Board.

The Legislature was aware of the heavy burden that the definitions of “meeting” and “quorum” in the Open Meeting Law place on public officials in small communities. The current definitions of “meeting” and “quorum” contained in the Open Meeting Law originated in 1977. The definition of “meeting” enacted in 1977 is the same as the current version, except that the current version contains the phrase “to take action” in place of “to make a decision.” Assemblyman Murphy commented that “the intent of the bill is not to have people dragged out of a cocktail lounge for simple conversation but the intent is when public business is discussed by a quorum of a public body, then that should be a public meeting.” *Hearing on A.B. 437 Before the Assembly Committee on Government Affairs*, 1977 Legislative Session, 5 (March 16, 1977). A question was raised regarding the definition of a quorum because it would hinder small communities which only have three members on a public body. Senator Gojack responded that she understood the problem but felt that it would be difficult to prevent abuses any other way. She agreed that it would be difficult to change the wording to help the small communities and still prevent the abuses. *Hearing on A.B. 437 Before the Senate Committee on Government Affairs*, 1977 Legislative Session, 2 (May 5, 1977).

Other states have resolved the issue of a quorum of one public body being present at the meeting of other bodies with exceptions to their open meeting laws. For instance, Connecticut law provides that the term “meeting” does not include a “quorum of the members of a public agency who are present at any event which has been noticed and conducted as a meeting of another public agency” under Connecticut’s open meeting law. Conn. Gen. Stat. § 1-200 (1999). California provides a number of exceptions to the definition of “meeting” for a quorum of local public bodies to attend certain conferences, committees, social gatherings, and publicly noticed meetings of other bodies which address topics of local concern if the members do not discuss business of a specific nature among themselves or if the members attend solely as observers. Cal. Gov. Code § 54952.2 (2001).

Our opinion should not be construed to mean that two commissioners (quorum) can never gather in the same location without publicly noticing the gathering as a meeting of the Board. This may be the case with some of the meetings of the bodies listed in your letter. To the extent that Commissioners Frey and Washburn simultaneously attend gatherings that are purely social or only concern general information that is of interest to all public officials, the Open Meeting Law is not implicated if they do not deliberate on matters within the supervision, control, jurisdiction, or advisory power of the Board. We have advised that the Open Meeting Law does not regulate or restrict the

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attendance of members of a public body at a purely social function. Open Meeting Law Manual §5.03 (8th ed. 2000). However, a “quorum may not, as a group, discuss or receive information on official business in any setting under the guise of a private social gathering.” *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

We have also advised that a quorum of a public body may attend a state or national seminar, conference, or convention to hear speakers on general subjects of interest to public officials without violating the Open Meeting Law if the purpose is for general education and social interaction and the members of the public body do not deliberate on matters within their supervision, control, jurisdiction, or advisory power. Nevada Open Meeting Law Manual § 5.04 (8th ed. 2000). Attorney general opinions from other jurisdictions have concluded that the gathering of a quorum of a public body at a conference or convention is not a meeting within those states’ open meeting laws if the members do not discuss matters directly affecting the business of that public body. *See* Op. Ky. Att’y. Gen. No. 95-OMD-136 (October 11, 1995) (conference or convention of the Kentucky League of Cities or the Kentucky Association of Counties); Op. Kan. Att’y. Gen. No. 82-133 (June 17, 1982) (annual conventions of the League of Kansas Municipalities); Op. Md. Att’y. Gen. 95-058 (December 20, 1995) (training session aimed at improving interpersonal relations and team-building skills not subject to open meetings act but continuing education sessions conducted by the state association of counties may contain matters involving public business of the board and may require public notice); and Op. Fla. Att’y. Gen. No. 92-79 (November 2, 1992) (attendance by public officials at a luncheon meeting held by a private organization not subject to the sunshine law if there is no discussion on matters relating to public business). Thus if a quorum of the Board meets for purely social reasons or attends a conference or seminar that only provides general information of interest to all public officials, such a gathering is not subject to the Open Meeting Law if the commissioners do not deliberate on matters within their supervision, control, jurisdiction, or advisory power. However, we would caution you that if there is doubt as to the nature, purpose, or topics to be considered or the information to be presented at the gathering, the commissioners should keep in mind the purpose behind the Open Meeting Law and not attend the gathering unless it is properly noticed as a meeting of the Board.

CONCLUSION

Whenever a quorum of the Churchill County Board of Commissioners (Board) gathers and discusses, decides, gathers information, or otherwise deliberates on matters over which the commissioners have supervision, control, jurisdiction, or advisory power, a meeting of that Board within the meaning of NRS 241.015(2) takes place. Any such meeting must be

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conducted in accordance with the Open Meeting Law and noticed as a meeting of the Board, even if the meeting is publicly noticed as a meeting of another public body. The commissioners may attend purely social gatherings or gatherings which only provide general information of interest to all public officials if the commissioners do not receive information about or otherwise deliberate on matters over which they have supervision, control, jurisdiction, or advisory power.

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

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AGO 2001-06 TAXATION; CONTROLLED SUBSTANCES: Whether the assessment of a controlled substance tax pursuant to NRS chapter 372 violates the Double Jeopardy Clause depends on when the tax is assessed in relation to any criminal prosecution for the same conduct. Where tax was assessed and judgments have already been filed, the Department of Taxation (Department) may continue to collect if the judgment was filed prior to any criminal prosecution. However, where it is determined that the tax assessments were reduced to judgment after a criminal prosecution, the Department should discontinue collecting on these judgments, as the tax would be unconstitutional under such circumstances, and taxpayers would be eligible to seek refunds.

Carson City, March 30, 2001

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 requested an opinion from this office concerning the constitutionality of chapter 372A of the Nevada Revised Statutes, Nevada's controlled substance tax. Specifically, you have asked the following questions:

QUESTION ONE

Did the United States Supreme Court issue a decision making the collection of a controlled substance tax unconstitutional?

ANALYSIS

Chapter 372A of the Nevada Revised Statutes (NRS) authorizes the taxation of illegal controlled substances. Section 372A.070 provides in pertinent part:

1. A person shall not sell, offer to sell or possess with the intent to sell a controlled substance unless he first:
 - (a) Registers with the department as a dealer in controlled substances and pays an annual fee of \$ 250; and
 - (b) Pays a tax on:
 - (1) Each gram of marihuana, or portion thereof, of \$100;
 - (2) Each gram of any other controlled substance, or portion thereof, of \$1,000; and

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(3) Each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, of \$2,000.

....

3. The department shall not require a registered dealer to give his name, address, social security number, or other identifying information on any return submitted with the tax.

4. Any person who violates subsection 1 is subject to a civil penalty of 100 percent of the tax in addition to the tax imposed by subsection 1. Any civil penalty imposed pursuant to this subsection must be collected as part of the tax.

5. The district attorney of any county in which a dealer resides may institute and conduct the prosecution of any action for violation of subsection 1.

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969).

The United States Supreme Court has examined the constitutionality of a tax statute similar to Nevada’s statute in the case of *Department of Revenue v. Kurth Ranch, et al.*, 511 U.S. 767, 114 S.Ct. 1937 (1994). The issue in *Kurth Ranch* was whether Montana’s controlled substance tax contained punitive characteristics that subjected it to the constraints of the Double Jeopardy Clause, such that a subsequent criminal prosecution for the same activity being taxed would violate the constitutional prohibition against successive punishments for the same offense. Montana law enforcement officials raided a farm where a family of farmers was growing marijuana. After prosecuting the family members, the State of Montana attempted to collect a tax of \$100 per ounce for possession and storage of dangerous drugs. The family declared bankruptcy, and the bankruptcy court denied the state’s claim for the tax on double jeopardy grounds. The state appealed the decision to the district court, the U.S. Court of Appeals for the Ninth Circuit, and finally the U.S. Supreme Court.

The Supreme Court examined four factors in concluding that Montana’s tax statute was primarily designed to punish, rather than to raise revenue, and that prosecution for its violation constituted jeopardy for double jeopardy purposes. Those factors were: (1) the high rate of taxation; (2) the deterrent

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purpose (rather than revenue-raising purpose); (3) the prerequisite of commission of a crime before assessment; and (4) the imposition of the tax upon goods which, at the time, were neither owned nor possessed by the taxpayer. *Id.* at 780-84, 114 S.Ct. at 1946-48. In analyzing these four factors, the Court determined that Montana's controlled substance tax, taken as a whole, was a "concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Id.* at 783, 114 S.Ct. at 1948.

Shortly after *Kurth Ranch* was decided, the Nevada Supreme Court was faced with a double jeopardy challenge to NRS chapter 372A, Nevada's controlled substance tax. *See Desimone v. State*, 111 Nev. 1221, 904 P.2d 1 (1995) (*Desimone I*). Corky Desimone was arrested for possession and sale of methamphetamine. Pursuant to NRS chapter 372A, Desimone was assessed a tax and penalties in the amount of \$166,000 for possessing the controlled substance. After the tax was reduced to judgment, Desimone was convicted of one count of possessing a trafficking quantity of a controlled substance.

Employing the factors identified in *Kurth Ranch*, the Nevada Supreme Court noted that NRS chapter 372A was very similar to Montana's controlled substance tax:

First, Nevada law imposes a \$1,000 per-gram fee for methamphetamine (and a \$100 per-gram fee for marijuana). *See* NRS 372A.070. This amount far exceeds the high rate of taxation condemned in *Kurth Ranch*. *See* NRS 372A.070.

Second, potential tax proceeds are earmarked to pay for anti-crime measures, as were the proceeds of the tax analyzed in *Kurth Ranch*. *See* NRS 372A.110.

Third, the tax is designed to punish criminal activity. As Desimone points out, pharmaceutical companies, pharmacists, and medical practitioners are exempt from the tax. *See* NRS 453.226. Thus, although criminal activity is not strictly required before the tax is imposed, the non-criminal possession and sale of controlled substances by legitimate manufacturers, distributors, and ultimate users fall outside the scope of the tax. *See* NRS 372A.060(1). In fact, legislators contemplating initial passage of NRS chapter 372A "seriously doubted" whether any drug dealer would actually register under the statute. Minutes of the Senate Taxation Committee, 64th Sess. 3 (March 12, 1987). The sponsor of the legislation agreed, adding that the "intent was to use the proposed law as a way to gain an advantage over drug dealers." *Id.* The retroactive use of the tax to

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punish, rather than to seek registration of controlled substances, is the manifest intent of NRS chapter 372A.

Fourth, the methamphetamine confiscated by the state, like the marijuana confiscated in *Kurth Ranch*, was not in the possession or ownership of the defendant when the tax was imposed.

Desimone I, 111 Nev. at 1227, 904 P.2d at 10-11. Given these factors, the court concluded that the payment of a tax pursuant to NRS chapter 372A constitutes punishment, triggering the protections of the Double Jeopardy Clause. *Id.*

The United States Supreme Court subsequently vacated the decision in *Desimone I* and remanded the case to the Nevada Supreme Court with instructions to reconsider the matter in light of *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135 (1996). See *Nevada v. Desimone*, 518 U.S. 1030, 116 S.Ct. 2576 (1996).

On February 23, 2000, the Nevada Supreme Court issued its decision in *Desimone v. State*, 116 Nev. Adv. Op. No. 20, 996 P.2d 405 (2000) (*Desimone II*). Noting that it had reconsidered its prior decision in light of *Ursery*, as well as the U.S. Supreme Court's subsequent holding in *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488 (1997), the Nevada Supreme Court again concluded that Desimone's criminal conviction violates the Double Jeopardy Clause and must be vacated. *Desimone II*, 116 Nev. at ___, 996 P.2d at 406. The Court stated that after the decision in *Desimone I*, "the Supreme Court issued two decisions significantly clarifying the proper analysis for determining whether a civil forfeiture or penalty constitutes punishment for double jeopardy purposes." *Id.* 116 Nev. at ___, 996 P.2d at 406 citing *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135 (1996) (addressing civil in rem forfeiture proceedings); *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488 (1997) (addressing administrative proceedings involving imposition of monetary penalties and occupational debarment). The Nevada Supreme Court found, however, that "[n]either *Ursery* nor *Hudson* specifically call into question the holding or double jeopardy analysis applied in *Kurth Ranch* in the tax context." *Id.*, 116 Nev. at ___, 996 P.2d at 407. The court concluded:

The tax imposed against Desimone by a final judgment pursuant to NRS chapter 372A is the functional equivalent of a criminal prosecution. Where, as here, the tax has been reduced to judgment before a criminal judgment of conviction is entered for engaging in the same unlawful conduct, the conviction violates the Double Jeopardy Clause and cannot stand. See *Desimone I*, 111 Nev. at 1229-30,

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904 P.2d at 6-7 (citations omitted). Accordingly, we reverse and vacate Desimone's criminal conviction.

Id., 116 Nev. at ___, 996 P.2d at 411-12.

In *Desimone II*, it was the criminal conviction that was found to violate the Double Jeopardy Clause. This was because the conviction occurred after the imposition of the tax pursuant to NRS chapter 372A, and because the Nevada Supreme Court found that the tax is the functional equivalent of a criminal punishment. The reverse must also be true, then, that if the tax were reduced to judgment after the criminal conviction, the assessment of the tax would be unconstitutional under the Double Jeopardy Clause.

Accordingly, whether the assessment of a tax pursuant to NRS chapter 372A is a violation of the Double Jeopardy Clause depends upon the time frame under which the tax is assessed. If the tax is assessed after a criminal prosecution that is based upon the same unlawful conduct, the tax would violate the Double Jeopardy Clause. However, if the tax is assessed in the same proceeding as the criminal prosecution, or if the tax assessment is reduced to judgment before the criminal prosecution, the tax would not be invalidated on double jeopardy grounds. See *Kurth Ranch*, 511 U.S. at 778; *United States v. Halper*, 490 U.S. 435, 450, 109 S.Ct. 1892 (1989); *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673 (1983).

CONCLUSION TO QUESTION ONE

Whether the assessment of tax pursuant to NRS chapter 372A is unconstitutional because it violates the Double Jeopardy Clause depends upon when the tax is assessed in relation to any criminal prosecution for the same conduct as that being taxed. As long as the tax is assessed in the same proceeding as the criminal prosecution, or is reduced to judgment prior to the criminal prosecution, the tax would not violate the Double Jeopardy Clause.

QUESTION TWO

If the controlled substance tax is unconstitutional, should the Department of Taxation (Department) stop collecting the tax, including collecting from individuals who have entered into payment agreements with the Department?

ANALYSIS

Because the tax at issue can be applied in a manner that does not violate the Double Jeopardy Clause, the tax could be collected in new cases following the requirements outlined above, that the tax be imposed prior to or in the same proceeding as a criminal prosecution. The ability of the Department to

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continue to collect tax due under judgments filed on prior cases will be affected by the circumstances of each individual case.

In a situation where there has been only an assessment of tax pursuant to NRS chapter 372A which has been reduced to judgment and there has been no criminal prosecution, there are no double jeopardy implications. In such a situation, the Double Jeopardy Clause would not prevent the Department from continuing to collect the tax from an individual against whom the Department has imposed a tax pursuant to a judgment, an administrative lien, or agreement.

In situations where such a tax assessment has been imposed prior to a criminal prosecution, then the tax assessment would be valid and the subsequent criminal prosecution would violate the Double Jeopardy Clause. This was the case in *Desimone II*. In other words, for double jeopardy purposes, the first event would be valid and the second would violate the Double Jeopardy Clause.

For cases where the taxpayer first faced a criminal prosecution, and thereafter was assessed an NRS chapter 372A tax which was reduced to judgment, the analysis is more complex. *Desimone II*, which was decided on February 23, 2000, clearly applies prospectively. Therefore, an NRS chapter 372A tax assessment, which follows a criminal prosecution, would be unconstitutional under the Double Jeopardy Clause if it was reduced to judgment after February 23, 2000. Whether *Desimone II* applies retroactively, however, is less clear.

The Indiana Supreme Court refused to retroactively apply its prior holding (similar to *Desimone II*) that Indiana's controlled substance tax is a punishment for double jeopardy purposes to a defendant seeking post-conviction relief. *State v. Mohler*, 694 N.E.2d 1129, 1131 (Ind. 1998). The defendant was assessed a controlled substance excise tax and was subsequently criminally prosecuted for possession and dealing in marijuana based on the same set of facts. The Indiana Supreme Court applied a principle it extracted from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), "that new rules of criminal procedure do not apply retroactively to cases that became final before the new rule was announced, unless the new rule: (a)(1) places certain 'primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;' or (a)(2) prohibits a particular punishment for a class of defendants based on their status or offense; or (b) is a 'watershed rule[] of criminal procedure . . . central to an accurate determination of innocence or guilt.'" *Mohler*, 694 N.E.2d at 1133 (citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *Teague*, 489 U.S. at 307, 311, 313). The Indiana Supreme Court found that the facts of the case did not fit within the exceptions to the non-retroactivity rule. Accordingly, the Indiana

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Supreme Court upheld the defendant's conviction and sentence for possession of and dealing in marijuana.

It would seem that the principles the Indiana Supreme Court in *Mohler* extracted from the U.S. Supreme Court's opinion in *Teague* could be applied to *Desimone II*. However, the Nevada Supreme Court has not expressly adopted the non-retroactivity rule set forth in *Teague v. Lane*. Even if it had, the situation addressed here is one where a taxpayer would be seeking a tax refund and not the overturning of a criminal conviction. The Nevada Supreme Court has specifically ruled on whether a taxpayer may seek a refund of an unconstitutional tax.

In *State v. Scotsman Mfg.*, 109 Nev. 252, 849 P.2d 317 (1993) ("Scotsman II"), Scotsman Manufacturing Co. requested a refund of tax payments it had made under protest. The request was based upon the Nevada Supreme Court's earlier decision in *Scotsman Mfg. v. State*, 107 Nev. 127, 808 P.2d 517 (1991), *cert. denied*, 502 U.S. 1100 (1992) ("Scotsman I"), in which the court held the taxes were exacted in violation of the Supremacy Clause of the United States Constitution. The State opposed the request on the basis that the district court lacked jurisdiction to award a refund because Scotsman had failed to timely comply with statutory refund claim procedures. *Scotsman II*, 109 Nev. at 253-254, 849 P.2d at 318.

The Nevada Supreme Court found that the State could not procedurally bar Scotsman from obtaining a refund of unlawfully exacted taxes. In so holding, the court relied upon the U.S. Supreme Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990):

If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. 496 U.S. at 31 (footnotes omitted).

Scotsman II, 109 Nev. at 255.

In *Metropolitan Water District v. State*, 99 Nev. 506, 665 P.2d 262 (1983), the water district filed a complaint seeking recovery of *ad valorem* property taxes it had paid from May 29, 1941 to fiscal year 1978-79, which were based on a discriminatory method of assessment when compared with similar entities owning similar property in the state. The water district first learned of the discriminatory method of assessment in August, 1979.

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The State argued that the water district's action was barred by NRS 361.420(3), the statute of limitations dealing with suits for recovery of taxes brought under NRS chapter 361. *Id.* at 509, 665 P.2d at 264. The Water District argued that the discriminatory method of assessment deprived it of equal protection of the law. Rejecting the State's argument, the Court stated:

We have previously held that a county's claims statutes should not apply where to do so would deny property owners due process rights. *See Alper v. Clark County*, 93 Nev. 569, 571 P.2d 810 (1977), *cert. denied*, 436 U.S. 905 (1978). Similar reasoning requires that the three month statutory period of limitations specified in NRS 361.420(3) should not be held to apply where to do so would deprive the Water District of a fundamental constitutional right, that of equal protection under the law.

Id.

Based on the Nevada Supreme Court's rulings in *Scotsman II* and *Metropolitan*, we conclude that any time a tax is found to be unconstitutional, the taxpayer has a right to seek a refund, regardless of the normal statute of limitations for seeking tax refunds. Accordingly, because the Nevada Supreme Court has found the controlled substance tax unconstitutional when it is imposed subsequent to a criminal prosecution based on the same set of facts, even taxpayers against whom the tax was imposed and reduced to judgment prior to the *Desimone II* decision would be entitled to seek a refund.

CONCLUSION TO QUESTION TWO

The Nevada Supreme Court's holding in *Desimone II* indicates that a tax assessed pursuant to NRS chapter 372A is a violation of the Double Jeopardy Clause only if the tax is assessed after a criminal prosecution based upon the same set of facts regarding controlled substance as that upon which the tax was assessed. Therefore, the Department of Taxation could still collect the tax in new cases if the tax assessment is reduced to judgment prior to or in the same proceeding as a criminal prosecution.

With respect to existing cases, the Department still has the ability to collect the tax imposed in cases where the judgment was filed prior to or in the same proceeding as a criminal prosecution. Where it is determined that the

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tax assessments were reduced to judgment after a criminal prosecution, the Department should discontinue collecting on these judgments as the tax would be unconstitutional under such circumstances, and, under *Metropolitan Water* and *Scotsman*, the taxpayers would be eligible to seek refunds.

FRANKIE SUE DEL PAPA
Attorney General

By: GREGORY A. ROSSITER
Deputy Attorney General

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AGO 2001-09 TAXATION; PROPERTY: The calculation of taxable value of the beneficial use of otherwise tax-exempt property, pursuant to NRS 361.157, 361.159 and 361.227(3), does not require a reduction of the taxable value based upon the days of the fiscal year that the property is not actually utilized by the taxpayer if the property is in the possession and control of the taxpayer and available for use by the taxpayer for the entire fiscal year.

Carson City, April 24, 2001

Stewart L. Bell, Clark County District Attorney, 500 S. Grand Central Parkway, P.O. Box 552215, Las Vegas, Nevada 89155-2215; Robert S. Beckett, Nye County District Attorney, P.O. Box 593, Tonopah, Nevada 89049

Dear Messrs. Bell and Beckett:

You have asked an opinion from this office concerning calculation of the reduction of the taxable value of certain property being put to a beneficial use, where the reduction is to be based upon the percentage of time that the property is not actually utilized by the taxpayer during the fiscal year.

QUESTION

Do the provisions of NRS 361.157, 361.159, and 361.227(3) require the reduction of the taxable value of certain property to be calculated upon the days of the fiscal year that the property is not actually utilized by the taxpayer?

FACTUAL BACKGROUND

The question arose in relation to a taxpayer (Taxpayer) that is a private corporation operating in, and under the laws of, Nevada. Taxpayer has entered into a multi-year contract with a federal agency. Under the essential terms of the contract, Taxpayer is to perform certain services for the agency in connection with the operation and maintenance of a federally owned facility. In performing the contract, Taxpayer utilizes its own personnel, including supervisory personnel. All real and personal property necessary to the performance of the contract is federally owned and provided to Taxpayer by the agency. Taxpayer is paid by the agency on a cost-plus basis.

Typically, the federally owned property, real and personal, provided to Taxpayer for the performance of the contract remains in the custody of Taxpayer for the duration of the contract and is used by Taxpayer to perform Taxpayer's obligations under the contract. The property remains in Taxpayer's custody year-to-year unless specifically reassigned by the agency

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to another contractor or assigned by Taxpayer for the use of Taxpayer's subcontractor(s).

You assert that it has been judicially determined that Taxpayer's use of the federally owned property is a "beneficial use" subject to local taxation under NRS 361.157 and 361.159. *United States v. Nye County*, 957 F. Supp. 1172, 1181-1184 (D. Nev. 1997), *aff'd*, *United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999).

ANALYSIS

NRS 361.157 provides, in applicable part:

1. When any real estate or portion of real estate which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a natural person, association, partnership or corporation in connection with a business conducted for profit or as a residence, or both, the leasehold interest, possessory interest, beneficial interest or beneficial use of the lessee or user of the property is subject to taxation to the extent the:

- (a) Portion of the property leased or used; and
- (b) Percentage of time during the fiscal year that the property is leased by the lessee or used by the user, can be segregated and identified. The taxable value of the interest or use must be determined in the manner provided in subsection 3 of NRS 361.227.

NRS 361.159 has an almost identical provision regarding the extent to which the beneficial use of otherwise exempt personal property is taxable. NRS 361.227(3) provides:

3. The taxable value of a leasehold interest, possessory interest, beneficial interest or beneficial use for the purpose of NRS 361.157 or 361.159 must be determined in the same manner as the taxable value of the property would otherwise be determined if the lessee or user of the property was the owner of the property and it was not exempt from taxation, except that the taxable value so determined must be reduced by a percentage of the taxable value that is equal to the:

- (a) Percentage of the property that is not actually leased by the lessee or used by the user during the fiscal year; and
- (b) Percentage of time that the property is not actually leased by the lessee or used by the user during the fiscal year.

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A literal interpretation of NRS 361.227(3) could lead to a conclusion that Taxpayer is entitled to a percentage reduction for those increments of time that the property is not actually in use by the Taxpayer, and the county assessors are dependent on Taxpayer to accurately predict and report the hourly, daily, weekly or monthly use of any particular piece of real or personal property.

However, the spirit and intent of the statutes at issue would not be served by such an interpretation. Statutes must be construed in light of their purpose as a whole. *Hampton v. Brewer*, 103 Nev. 73, 74, 733 P.2d 852, 853 (1987), *cert. denied*, 482 U.S. 915 (1987). To determine the meaning of specific provisions, the act should be read as a whole. *See McCrackin v. Elko County School Dist.*, 103 Nev. 655, 658, 747 P.2d 1373, 1375 (1987); *Nevada Tax Comm'n v. Bernhard*, 100 Nev. 348, 351, 683 P.2d 21, 23 (1984). Additionally, constructions of statutes that produce an absurd result should be avoided. *Id.* Reading the statutes as a whole, the intent was to tax the leasehold, possessory or beneficial interest or use in or of property for the period the property was in the lessee's or user's possession and control. For example, a lessee's leasehold interest may be reduced by the period of time the property is not actually leased. However, the taxable value of a lessee's interest is not reduced by the number of days the lessee is not putting the leased property to use, because the property is available to the lessee for its use and it is under the lessee's control, to the extent of the terms of the lease. A parallel analysis can be applied to the beneficial user's use. If the property is in the user's possession and control, it is available for the user's use, and the beneficial use the user derives from the property is at the discretion and under the control of the user. Therefore, the user's beneficial use should be taxed based on the percentage of time the property is available for use.

If the statutes were to be interpreted that the tax on the lessee's leasehold interest is based on the entire term of the lease, while the beneficial user's use is taxed only on the amount of time the user is actually operating the property, even though the property is available for use the same amount of time leased property would be available to a lessee, the result is an unequal tax burden between the lessee and the beneficial user. Such an interpretation would cause a violation of Nevada's Constitution, which requires uniform and equal taxation. NEV. CONST. art. 10, § 1, subsection 1.

A statute must provide for an equal and uniform rate of assessment and taxation of all property of the same class. It also must not result in a taxpayer receiving a tax advantage or benefit that is not available to other taxpayers with the same type of property. *See Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 167, 390 P.2d 225, 228 (1964); *State of Nevada v. Eastabrook*, 3 Nev. 173, 179-180 (1867). An interpretation rendering a statute constitutional is favored over one finding it unconstitutional. *See Sheriff, Washoe County v.*

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Wu, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985). Accordingly, the statutes should not be construed to result in unequal taxation that would violate Nevada's Constitution.

Furthermore, property that is on hand when needed and is available for use at any time, even if temporarily out of use, has been held to come within the meaning of an "actual use." See *Kaletta v. Merchants Mut. Ins. Co.*, 31 A.D.2d 689, 690 (N.Y. App. Div. 1968); *Southern California Tel. Co. v. County of Los Angeles*, 298 P. 9, 11 (Cal. 1931); *Seaside Home v. State Board of Taxes & Assessment*, 118 A. 704, 705 (N.J. Super. Ct. App. Div. 1922). Therefore, the statutes should not be construed to reduce the taxable value of Taxpayer's beneficial use of the subject property based on the number of days Taxpayer actually has the property in use. Instead, any reduction for the time the property is not used should be based on time that the property is not in the possession and control of Taxpayer, such as when the agency might transfer the property to some other facility.¹

CONCLUSION

The provisions of NRS 361.157, 361.159, and 361.227(3) do not require a reduction of the taxable value of property being put to a beneficial use, as contemplated by these statutes, based upon the days of the fiscal year that the property is not actually utilized by the beneficial user. If the property is in the possession and control of the beneficial user, and available for use by the beneficial user for the entire fiscal year, then no reduction is required for the percentage of time the property is not actually being utilized by the beneficial user.

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Deputy Attorney General

¹ This opinion addresses the specific facts regarding a particular taxpayer. However, if the owner of the property being put to a beneficial use by someone else has such control over the operations of the beneficial user so that the equipment is not made available for use all year at the discretion of the user, and the owner actually controls how and when the equipment will be used, it is possible that the taxable value of the beneficial interest or use would have to be limited to only the percentage of time the owner makes the property available to the beneficial user. This interpretation is consistent with the definition of "actual use" discussed above, where the property must be available for use when needed to be considered in "actual use."

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AGO 2001-10 ADMINISTRATIVE REGULATIONS: PERSONNEL:
CLASSIFIED EMPLOYEES: FIRST AMENDMENT ACTIVITIES:
SEXUAL HARASSMENT: The State of Nevada, as an employer, may adopt a regulation that requires State employees in a supervisory/subordinate relationship to report to their agency head when they are involved in a dating relationship.

Carson City, April 23, 2001

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

Dear Ms. Greene:

You have asked the following question:

QUESTION

May the State of Nevada, as an employer, adopt a regulation that requires State employees in a supervisor/subordinate relationship to report to their agency head when they are involved in a dating relationship?

ANALYSIS

You have related a situation at a State agency where a supervisor and his subordinate entered into a consensual sexual relationship, which later broke up. The subordinate is a probationary employee who is failing to meet the standards of performance established for her position, and the agency is considering rejecting her during her probationary period. However, the agency has expressed concern that the subordinate may subsequently file a claim of sexual harassment, claiming that her termination was a retaliatory act. The goal of the subject regulation would be to alert management to the fact of a supervisor/subordinate intimate relationship in the workplace so that management could act to avoid charges of sexual harassment, conflicts of interest, and allegations of favoritism.

Cases addressing this kind of issue have generally focused on whether a policy prohibiting dating between supervisors and subordinates violates a right of privacy of the employees or is an unlawful form of gender discrimination. The courts have applied different standards in analyzing the rights of public, as opposed to private, employees. In *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993), Sarsha was a high level manager with Sears. Sarsha's supervisor learned that Sarsha was in a dating relationship with a female subordinate of Sarsha and warned Sarsha to cease the dating relationship, citing a Sears policy that prohibited managers from dating co-workers.

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Nonetheless, Sarsha continued to date his subordinate and was subsequently fired for willful violation of the Sears anti-dating policy. Sarsha's subordinate was not fired or otherwise disciplined.

Sarsha challenged his termination under 42 U.S.C. § 2000e, *et seq.* (1999) (Title VII), as an adverse employment action based on gender. Sarsha pointed out that he was fired, but the female subordinate was not fired or disciplined, therefore constituting proof of unequal treatment based on gender according to Sarsha. The court rejected Sarsha's contention, stating:

We need not tarry over this claim. Sears is entitled to enforce a no-dating policy . . . against supervisors, who by virtue of their management positions are expected to know better, rather than subordinates. . . . [U]nless Sarsha's gender mattered to Sears—that is, unless, under the circumstances, he would have been kept on in a management position if he were a woman—he is not entitled to relief under Title VII.

Id. at 1042.

In *Sears v. Ryder Truck Rental, Inc.*, 596 F. Supp. 1001 (E.D. Mich. 1984), a Ryder company policy prohibited co-employee dating. The plaintiff had a dating relationship with another employee, and they were both warned by Ryder to cease their dating or one of them would be fired. The plaintiff, who was female and the lower paid of the two, resigned and brought suit claiming that the dating relationship was akin to a marriage relationship and should be protected under a Michigan statute (the Elliot-Larsen Act (Act)), which prohibited discriminatory employment practices based on marital status. The court rejected the plaintiff's contention, stating:

Here, plaintiff asks the Court to expand the marital status prohibition to the situation where there is no marital relationship. The Court finds no basis for such an expansive reading of the [Act]. There are strong policy provisions for protecting the marital relationship and marital status. Such policy considerations do not apply to a mere dating situation, and should not be written into law by a court. Presumably, the Legislature considered such matters when it enacted the Act and chose to protect the marital status, but not mere social relationships.

Id. at 1005.

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The *Sarsha* and *Sears* cases demonstrate that anti-dating policies have been upheld in workplaces in the private sector. The United States Supreme Court has held that a state has more latitude in controlling the activities of its employees than it does over state citizens in general. *Kelley v. Johnson*, 425 U.S. 238, 245 (1976). This was noted in *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983), *Whisenhunt v. Spradlin*, cert. denied, 464 U.S. 965 (1983). In *Shawgo*, patrolwoman Shawgo and Sergeant Whisenhunt were unmarried police officers who worked different shifts and who were not in a supervisory/subordinate relationship. Whisenhunt advised his immediate supervisor, a lieutenant, that he had been dating Shawgo and that he intended to sleep with her. Whisenhunt's supervisor told him "that would probably be fine, [but] that I didn't want the two of them setting up housekeeping." *Id.* at 472.

Later, the chief of police heard rumors that Shawgo and Whisenhunt were living together. The chief ordered detectives to conduct a surveillance of the off-duty activities of Shawgo and Whisenhunt. For a period of 16 days the detectives observed Shawgo's entrances to and exits from Whisenhunt's residence, confirming that she often slept there overnight. The detectives also confirmed that Shawgo was at the time maintaining a separate residence. Based on Shawgo's "cohabitation" outside of marriage, the chief instituted disciplinary action against Shawgo for violating a regulation of the police department that prohibited conduct which could result in "unfavorable criticism of that member or the department." *Id.* Shawgo was ultimately suspended for 12 days. Similarly, Whisenhunt was suspended for 12 days and also demoted to patrolman. Subsequently, both Shawgo and Whisenhunt resigned from the department and were later married.

As part of their challenge to her disciplinary action, Shawgo and Whisenhunt claimed a violation of their right to privacy under U.S. CONST. amend. I (First Amendment) and XIV (Fourteenth Amendment) due to the application of the "anti-cohabitation" regulation to them. Citing to well-established authorities that set forth the limits of constitutional privacy protection, the court stated:

The fourteenth amendment "protects substantive aspects of liberty"—including freedom of choice with respect to certain basic matters of procreation; marriage and family life. . . . The first amendment additionally imbues the right to privacy to include protected forms of 'association' for social as well as political reasons.

Shawgo, 701 F.2d at 482 (citations omitted).

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The plaintiff police officers, who were found to have violated police and state rules of conduct by reason of their personal, off-duty association that led to their marriage, contend that the state may not regulate these private activities. This argument fails to take into account the fact that the right to privacy is not unqualified, . . . and that the state has “more interest in regulating the activities of its employees than the activities of the population at large.”

Id. at 482-483 (citations omitted). The court continued, setting forth the standard of review to be applied in determining whether the subject regulation was an improper infringement on the privacy rights of Shawgo and Whisenhunt:

To sustain the attack on these police personnel regulations, the plaintiff officers must “demonstrate that there is *no rational connection* between the regulation, based as it is on the county’s method of organizing its police force, and the *promotion of safety of persons and property*.” . . . In this case we do not attempt to outline all the contours of a police department’s scope of regulation of the off-duty activities of its employees, for we can ascertain a rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit. [Emphasis added.]

Id. at 483 (citation omitted).

Shawgo illustrates the majority view that a public employer may regulate the off-duty dating or other social activity of an employee without infringing on the employee’s constitutional rights as long as there is a *rational basis* between the regulation and some legitimate governmental interest. In *Shawgo*, that interest was the “promotion of safety of persons and property.” Would the prevention of sexual harassment claims be a legitimate government interest for the adoption of a regulation requiring the reporting to management of the fact of an intimate relationship between employees in a supervisory/subordinate relationship? The answer appears to be “yes.” One writer explains the dynamic between co-employee dating and possible employer liability this way:

Perhaps the largest area of potential employer liability for co-employee dating is with respect to sexual harassment. If an employer does not promulgate standards that govern romantic involvement in the workplace, the employer may

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be charged with ignoring or even condoning inappropriate behavior that occurs after a consensual relationship between employees ends. Behavior that might have been acceptable in the context of a consensual relationship between employees can become harassing behavior if one party to the relationship no longer welcomes such conduct.

Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 Columbia L. J. & Soc. Problems 435, 436 (1993) (citations omitted). Hallinan describes other detrimental consequences of not regulating co-employee dating:

An employer's failure to institute a policy governing co-worker dating also can have deleterious effects on office productivity and morale. Morale will suffer if employees perceive favoritism and unfair treatment resulting from romantic alliances between co-workers.

Id. (citations omitted). We note that favoritism caused by co-employee romances may involve more than poor morale of other employees. 29 C.F.R. § 1604.11 (2000) sets forth employer liability for various kinds of conduct, providing in relevant part:

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against *other persons who were qualified for but denied that employment opportunity or benefit*. [Emphasis added.]

This provision holds the employer liable when the co-employee dating relationship results in an unmerited benefit to one of the dating employees, to the detriment of other, non-dating employees who are deserving of the benefit. A concrete example of this kind of liability is found in *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1986). King offered proof that a woman who was promoted in her place was involved in a sexual relationship with a manager who was partly responsible for making promotions. King further produced proof that she was better qualified than the woman who was promoted. The court held that King had met her Title VII burden of proof to show that the reasons proffered by the defendant for hiring the other woman were pretextual and ruled in favor of King.

Other scholars have raised the same warning as Hallinan:

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[C]onsensual sexual relationships between supervisors and their subordinates raise concerns for employers. These relationships raise productivity concerns when they demoralize other employees in the work group and undermine efficiency. They raise legal concerns with respect to possible claims of favoritism by disadvantaged co-workers and claims of sexual harassment by the subordinate, should the romance end.

BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW*, 421 (1979) (citations omitted).

Hallinan's recommendations for dealing with dating between supervisors and subordinates goes further than the requirement that the dating employees make a report of their personal relationship to their agency head, as contemplated in your question. Hallinan offers the following suggestions:

As a general rule, employers should specifically regulate dating between supervisors and their direct subordinates. If a dating relationship does develop between supervisor and subordinate, the employees involved should be required to notify the employer of the situation. If possible, at least one of the employees then should be transferred within the organization to remove the direct supervisor-subordinate relationship. This solution will work best in a hierarchical organization where subordinates could be put under the supervision of managers with whom they are not romantically involved.

If the structure of the organization makes such intra-office transfer unworkable, the employees should be put on notice that the employer does not condone the existence of dating relationships between supervisors and their subordinates. The employees then should be given the option to either terminate the relationship or to continue it, at which point one employee will be required to resign.

Hallinan, *supra*, at 458-459. Hallinan then proposes that violations of the above rule be handled by demoting the supervisory employee to end the supervisor/subordinate relationship and that a supervisor who has had a dating relationship in the past with a subordinate should never be given influence over the subordinate's promotions, raises, or other benefits or penalties relating to employment.

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The above authorities support the proposition that the State may, and in fact should, adopt a regulation that requires that employees in a supervisor/subordinate employment relationship to report to their agency head when they are involved in a dating relationship. We assume that since you, as Director of the Department of Personnel, have asked the question as to the State's authority to adopt such a regulation, it would be your intent to adopt it. If this is the case, we note that the Director's authority to adopt regulations is generally limited to regulations for the classified service. NRS 284.155. Therefore, the application of the policy set forth in the regulation to unclassified employees or others would have to be performed by some other mechanism. Accordingly, we are providing a copy of this opinion to the Governor for his review and for possible future discussion.

CONCLUSION

The State of Nevada, as an employer, may adopt a regulation that requires State employees in a supervisory/subordinate relationship to report to their agency head when they are involved in a dating relationship.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2001-11 SEX OFFENDER; JURISDICTION; VENUE: Jurisdiction and venue for a Nevada sex offender's out-of-state violation of a condition of lifetime supervision is most logically with the original sentencing court. Jurisdiction resides in the courts of the county where the crime is committed. 21 AM. JUR. 2D *Criminal Law* § 487 (1998). The venue for prosecution of a crime is generally and usually the site of the crime. 21 AM. JUR. 2D *Criminal Law* § 503 (1998). It is the district attorney in the county of the original sentencing court who is the prosecuting agency for a Nevada sex offender's out-of-state violation of a condition of lifetime supervision.

Carson City, May 21, 2001

Richard Kirkland, Director, Department of Motor Vehicles and Public Safety,
555 Wright Way, Carson City, Nevada 89711-0900; R. Warren Lutzow,
Chief, Division of Parole and Probation, Central Administrative Office,
1445 Hot Springs Road, Suite 104 West, Carson City, Nevada 89706

Dear Messrs. Kirkland and Lutzow:

You have requested an opinion from this office regarding the question: who is the prosecuting agency for a Nevada sex offender's out-of-state violation of a condition of a program of lifetime supervision? Appropriate and equally important initial questions are: which court has jurisdiction and where is the venue of prosecution?

QUESTIONS ONE AND TWO

Which court has jurisdiction over a Nevada sex offender's out-of-state violation of a condition of a program of lifetime supervision? Where is the venue for such a prosecution?

ANALYSIS

If a defendant is convicted of a sexual offense¹, the court shall include in sentencing, in addition to any other penalties provided by law, a special sentence of lifetime supervision. NRS 176.0931(1). The special sentence of lifetime supervision commences after any period of probation or any term of imprisonment and any period of release on parole. NRS 176.0931(2).

At least 120 days before the first day of the month in which a sex offender who has been sentenced to a special sentence of lifetime supervision is scheduled to be released from an institution or facility of the Nevada

¹ "Sexual offense" is defined in NRS 176.0931(5)(b).

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Department of Corrections (Department), the Department shall provide written notification to the Division of Parole and Probation (Division) of the date the sex offender is scheduled to be released. NAC 213.290(1).

At least 90 days before the first day of the month in which a sex offender who has been sentenced to a special sentence of lifetime supervision is scheduled to complete a term of parole or probation or is scheduled to be released from an institution or facility of the Department, the Division shall provide written notification to the State Board of Parole Commissioners (Parole Board) of the date the sex offender is scheduled to complete a term of parole or probation or be released from an institution or facility of the Department. NAC 213.290(2).

Upon receipt of the written notification of NAC 213.290(2), the Parole Board shall schedule a hearing to establish the conditions of lifetime supervision for the sex offender. NAC 213.290(3). The Parole Board will determine an appropriate location for the hearing that may include, without limitation, the institution or facility at which the sex offender is housed or an office of the Parole Board. NAC 213.290(3)(a).

At least 30 days before the date on which a hearing is scheduled pursuant to NAC 213.290(3), the Division must provide to the Parole Board a report on the status of the sex offender who is the subject of the hearing. NAC 213.290(4). The report must include, without limitation, a summary of the progress of the sex offender while on parole or probation or in an institution or facility of the Department, as applicable, and recommendations for conditions of lifetime supervision for the sex offender. NAC 213.290(4)(a) and (b).

Thus it is the sentencing court that imposes a special sentence of lifetime supervision and the Parole Board that establishes and imposes the conditions of that sentence.²

NRS 213.1243(3) provides:

A person who violates a condition imposed on him pursuant to the program of lifetime supervision is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.

² A standard Lifetime Supervision Agreement is attached.

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Jurisdiction is the power of a court to try a case and venue relates to the locale where that power may be exercised. 21 AM. JUR. 2D *Criminal Law* § 503 (1998).

Generally, jurisdiction resides in the courts of the state where the crime is committed. However, an individual does not have to be physically present in a state to be deemed guilty of an offense there. A court is not necessarily deprived of jurisdiction by the mere absence of the defendant from the state at the time the offense was committed. Acts performed outside a state, but intending to produce or producing detrimental effects within it, justify that state in prosecuting the accused as if he had been present at the commission of the offense. 21 AM. JUR. 2D *Criminal Law* §§ 487, 490 (1998).

Generally, venue, as applied to criminal cases, relates to and defines the particular county or territorial area within a state in which a prosecution is to be brought and tried. Venue determines which of the many courts having jurisdiction is the proper forum for trial. At common law, the proper venue to try an offense is the county where the offense was committed. The venue for prosecution of a crime is generally and usually the site of the crime. However, the place where an offense has an effect is also a proper venue. 21 AM. JUR. 2D *Criminal Law* §§ 503, 506 (1998).

The scenario presented by the Division is a Nevada sex offender violating a condition of lifetime supervision while physically present in another state. The exceptions to the general rules of jurisdiction and venue apply. Acts performed outside a state, but intending to produce or producing detrimental effects within it, justify that state in prosecuting the accused as if he had been present at the commission of the offense. 21 AM. JUR. 2D *Criminal Law* § 490 (1998). The place where an offense has an effect is a proper venue. 21 AM. JUR. 2D *Criminal Law* § 506 (1998). Without question, the State of Nevada has an interest in lifetime supervision of sex offenders. Accordingly, a violation of a condition of a program of lifetime supervision, and the resulting criminal violation, produce detrimental effects within the State of Nevada.

The Nevada Revised Statutes and Nevada Administrative Code scheme give rise to three possible jurisdictions and venues: (1) the sentencing court; (2) the court where the Parole Board holds its NAC 213.290(3) hearing and imposes the conditions of lifetime supervision; and (3) any court within the State of Nevada.

It is respectfully submitted there must be some connection between the sex offender and the location of the prosecution of the violation of the condition of lifetime supervision. Thus finding jurisdiction and venue in any court within the State of Nevada is inappropriate.

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The NAC 213.290(3) hearing will most likely be in the location of the probationer or parolee's residence just prior to expiration of probation or parole. That location provides an easily identifiable site for the sex offender as being the physical location where the sex offender is informed of the conditions of lifetime supervision. However, finding jurisdiction and venue in that location just because that is where the sex offender resided just prior to expiring probation or parole is tenuous.

A location easily identifiable for both the sex offender and the State is the sentencing court which imposed the special sentence of lifetime supervision. NRS 176.0931(1). The Parole Board could not impose the conditions of lifetime supervision but for the sentencing court imposing this special sentence of lifetime supervision. A sentencing court would deem a violation of a condition of lifetime supervision to be a violation of the special sentence imposed by the sentencing court. It is that court, the district attorney of that county, and the citizens of that county which would have the most interest in the sex offender.

The Parole Board has jurisdiction over the conditions of lifetime supervision, and lifetime supervision is deemed a form of parole for the limited purposes of NRS 213.1076, NRS 213.1095(9), NRS 213.1096, and NRS 213.110(2). NRS 213.1076 concerns a fee to defray costs of supervision. NRS 213.1095(9) requires the Division to furnish to each person supervised a written statement of the conditions, to instruct regarding those conditions, and to advise the Parole Board or the court of any violations of the conditions. NRS 213.1096 concerns the powers and duties of assistant parole and probation officers. NRS 213.110(2) allows the Parole Board to suspend supervision to permit induction into and during active military service.

The Parole Board has jurisdiction over parolees. NRS 213.1099, *et seq.* Notably, a sex offender in a program of lifetime supervision is not a traditional parolee on a traditional form of parole with an underlying unexpired prison term remaining to be served. A traditional parolee on traditional parole can be brought before the Parole Board and have parole revoked for violating conditions of parole. NRS 213.150. However, because "lifetime supervision" cannot be revoked and the sex offender returned to custody of the Department to serve the remainder of a prison term, a violation of a condition of lifetime supervision is not a violation of parole. Accordingly, there is no need to bring such a sex offender before the Parole Board.

A violation of a condition of lifetime supervision is a new crime in and of itself that is to be prosecuted. Given the imposition of lifetime supervision by the sentencing court and the interests of the sentencing court, the district

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attorney and citizens of that county, a finding of jurisdiction and venue in the sentencing court for a prosecution of a violation of a condition of lifetime supervision is most logical. There is a clear and logical connection between the sentencing court, its imposition of the special sentence of lifetime supervision, the sex offender, and any subsequent allegation of violation of a condition of the special sentence of lifetime supervision.

CONCLUSION TO QUESTIONS ONE AND TWO

Jurisdiction and venue for a Nevada sex offender's out-of-state violation of a condition of lifetime supervision is most logically with the original sentencing court.

It should be noted that the general rules of jurisdiction apply for violation of conditions of lifetime supervision occurring within the State of Nevada. Jurisdiction resides in the courts of the county where the crime is committed. 21 AM. JUR. 2D *Criminal Law* § 487 (1998). Venue defines the particular county or territorial area within a state in which a prosecution is to be brought and tried. The venue for prosecution of a crime is generally and usually the site of the crime. 21 AM. JUR. 2D *Criminal Law* § 503 (1998).

QUESTION THREE

Who is the prosecuting agency for such a prosecution?

ANALYSIS

The general duties of a district attorney are set forth in NRS 252.110. In addition, the district attorney of each county is the public prosecutor therein. NRS 252.080. Pursuant to NRS 173.045 and 252.110, the matter of prosecution of any criminal case is within the entire control of the district attorney. *Cairns v. Sheriff, Clark County*, 89 Nev. 113, 508 P.2d 1015 (1973), cited in *Lane v. Second Judicial Dist. Court*, 104 Nev. 427, at 456, 760 P.2d 1245 (1988); *Junior v. State*, 107 Nev. 72 at 77, 807 P.2d 205 (1991).

The general duties of the attorney general are set forth in NRS 228.110. The prosecution powers of the attorney general are set forth in and limited by NRS 228.120. The attorney general may file an information only when acting pursuant to a specific statute. NRS 173.045(1). NRS 173.045 does not generally empower the attorney general to initiate a prosecution independent of the district attorney. See, e.g., *Ryan v. Eighth Judicial Dist. Court*, 88 Nev. 638, 503 P.2d 842 (1972).

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NRS 213.1243 does not identify the appropriate prosecuting agency. Accordingly, it does not qualify as a “specific statute” authorizing the attorney general’s exercise of prosecutorial powers and it is the district attorney of the county where jurisdiction and venue are proper who is authorized to prosecute violations of NRS 213.1243(3).

CONCLUSION TO QUESTION THREE

It is the district attorney in the county of the original sentencing court who is the prosecuting agency for a Nevada sex offender’s out-of-state violation of a condition of lifetime supervision.

FRANKIE SUE DEL PAPA
Attorney General

By: DANIEL WONG
Deputy Attorney General

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AGO 2001-12 MEDICAID; HEALTH; CHILDREN: Nevada Medicaid has complete discretion to permit or deny coverage for transplants both to adults and children, but if provided, it cannot discriminate based upon age. Under the early and periodic screening, diagnostic, and treatment services program, Nevada Medicaid is required to provide all services allowed by federal law even if not included in Nevada's State Medicaid Plan.

Carson City, June 1, 2001

Ms. Charlotte Crawford, Director, Department of Human Resources, 505 East King Street, Kinkead Building, Room 600, Carson City, Nevada 89701

Dear Ms. Crawford:

You have requested answers to two questions from the Office of the Attorney General pertaining to the types of services for which Medicaid must provide funding pursuant to its early and periodic screening, diagnostic, and treatment services (EPSDT) program. Prior to addressing these questions, some background information is helpful.

BACKGROUND

1. Medicaid Act

The federal Medicaid statutes establish the Medicaid Act (Act) through which participating states establish a medical assistance program financed jointly by the states and the federal government. *See generally* 42 U.S.C. § 1396 (2001), *et seq.* A state is not required to participate in Medicaid, but once it elects to do so, it must establish a state Medicaid plan that comports with federal statutory and regulatory requirements. 42 U.S.C. § 1396a(a)(10) requires a state Medicaid plan to provide eligible individuals with financial assistance in a minimum of eleven general categories of medical treatment found in 42 U.S.C. §§ 1396d(a)(1)-(5), (17), and (21).

The eleven mandatory services found in 42 U.S.C. §§ 1396d(a)(1)-(5), (17), and (21) include, generally, (i) inpatient hospital services, (ii) outpatient hospital services, (iii) rural health clinic services and federally qualified health clinics, (iv) laboratory and x-ray services, (v) nursing facility services, (vi) early and periodic screening, diagnostic, and treatment services, (vii) family planning services and supplies, (viii) physicians' services furnished by a physician, (ix) medical and surgical service of a dentist, (x) nurse midwife services, and (xi) services furnished by a certified pediatric nurse practitioner or certified family nurse practitioner. In addition to the eleven mandatory services, a state can offer additional optional services and place restrictions on the mandatory services at its discretion. Nevada offers 28 additional optional services over and above the mandatory services.

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The United States Supreme Court has held that the Medicaid Act does not require states to fund every medical procedure within the eleven categories. “But nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care.” *Beal v. Doe*, 432 U.S. 438, 444 (1977). Furthermore, the Supreme Court has stated “. . . absent an indication of contrary legislative intent by a subsequent Congress, Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable.” *Harris v. McRae*, 448 U.S. 297, 309 (1980). However, participating states are required to establish state Medicaid plans that “. . . include reasonable standards . . . for determining eligibility for and extent of medical assistance under the plan which . . . are consistent with the objective of [the Medicaid Act].” 42 U.S.C. § 1396a(a)(17).

The Medicaid Act further requires that each medical service provided by a state “shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual” 42 U.S.C. § 1396a(a)(10)(B)(i). Further, the service must be “sufficient in amount, duration, and scope to reasonably achieve its purpose.” 42 C.F.R. § 440.230(b). The Medicaid Act also authorizes participating states to establish “procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care” 42 U.S.C. § 1396a(a)(30).

2. Early and Periodic Screening, Diagnostic, and Treatment Services Under Medicaid

“The EPSDT benefit is, in effect, the nation’s largest preventive health program for children.” H.R. CONF. REP. NO. 247, 101st Cong., 1st Sess. 3 (1989) *reprinted in* 1989 U.S.C.C.A.N. 2124. EPSDT is a preventative health care program, the goal of which is to provide to Medicaid-eligible children under the age of 21 the most effective, preventative health care through the use of periodic examinations, standard immunizations, diagnostic services, and treatment services which are medically necessary and designed to correct or ameliorate defects in physical or mental illnesses or conditions. 42 U.S.C. § 1396d(a)(4)(B). These services include: “(1) Screening services . . . , (2) Vision services . . . , (3) Dental services . . . , (4) Hearing services . . . , and . . . (5) Such other necessary health care, diagnostic services, treatment, and other measures described in . . . [42 U.S.C. § 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 U.S.C. § 1396d(r)(1)-(5).

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Under current law, States are required to offer early and periodic screening, diagnostic, and treatment (EPSDT) services to children under age 21. States are required to inform all Medicaid-eligible children of the availability of EPSDT services, to provide (or arrange for the provision of) screening services in all cases when they are requested, and, to arrange for (directly or through referral to appropriate agencies or providers) corrective treatment for which the child health screening indicates a need.

H.R. CONF. REP. NO. 247, 101st Cong., 1st Sess. 3 (1989) *reprinted in* 1989 U.S.C.C.A.N. 2124.

Subsection (5) of 42 U.S.C. § 1396d(r) is commonly referred to as the “Catchall Provision.” It explicitly requires state Medicaid plans to provide all of the federally allowable services enumerated in 42 U.S.C. § 1396d(a) to children under EPSDT, regardless of whether the state Medicaid plan has adopted such service as an optional service. However, as quoted above in *Harris*, the Supreme Court has held that absent an indication of contrary legislative intent by a subsequent congress, the Medicaid Act does not obligate a participating state to pay for those medical services for which federal reimbursement is unavailable.

In addition to the mandated services required to be provided by a state Medicaid plan, the federally allowable services which must be provided under EPSDT, regardless of whether they are part of a particular state’s Medicaid plan, include, but are not limited to, home health services, private duty nursing, dental services, physical therapy, prescribed drugs, prosthetic devices, services in an intermediate care facility for the mentally retarded, hospice care, case management services, respiratory care services, and any other diagnostic, screening, preventive, and rehabilitative services recommended by a physician and recognized by state law, provided those services meet EPSDT criteria.

3. Provisions for Transplant Coverage Under Medicaid

The Medicaid Act, as originally enacted, did not reference organ transplants. However, subsequent amendments to the Act added specific references to transplants. 42 U.S.C. § 1396b(i), provides that:

(i) Payment for organ transplants; item or service furnished by excluded individual, entity, or physicians; other restrictions. Payment under the preceding provisions of this section shall not be made –

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(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that –

(A) similarly situated individuals are treated alike;

and

(B) any restriction, on the facilities or practitioners

which

may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan; . . .

These amendments to the Medicaid Act allowed a state Medicaid plan to provide an additional service to recipients and still receive federal matching funds. What is interesting is that Congress did not add this provision to 42 U.S.C. § 1396d(a) where all of the federally mandated and optional allowable types of “medical assistance” are listed. In other words, Congress segregated the procedure for allowing state Medicaid plans to provide transplants from the federally mandated and optional allowable types of “medical assistance.” Therefore, had Congress intended to include transplants as an itemized service, to be covered under EPSDT, they would have added this provision to 42 U.S.C. § 1396d(a) and not created an entirely new subsection in a different statute. See 42 U.S.C. § 1396b(i).

QUESTION ONE

Does EPSDT require Medicaid to provide funding for organ transplants to children? If so, are there any limitations on that requirement?

ANALYSIS

The Eighth and Ninth Circuits have consistently held that states have complete discretion to choose what kind of transplants, *if any*, they will fund. The Eighth Circuit was the first circuit to address the issue. In *Ellis by Ellis v. Patterson*, 859 F.2d 52 (8th Cir. 1988), the plaintiff, Brandy Ellis, sued the State of Arkansas seeking a determination that the Arkansas Medicaid plan must pay for her liver transplant. Brandy was a ten month old baby girl suffering from a fatal liver condition. It was estimated that if she were to receive a liver transplant, she would have a 90% chance to live an active and normal life for the next five years. However, without it, her life expectancy was two months. Arkansas, at the time, did not provide for the funding of liver transplants under its Medicaid program.

The court rejected the plaintiff’s claim that Arkansas cannot discriminate against her on the basis of her diagnosis or illness, and to do otherwise would be to deny her a medically necessary service on the basis of her illness. This

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altered a previous Eighth Circuit decision which had stated that “a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the ‘diagnosis, type of illness, or condition.’” *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980).

The court agreed with Arkansas’ assertion that organ transplants are a special situation, and that it was the intent of Congress that states could choose not to fund transplants. The *Ellis* court stated: “Allowing the states some discretion in the funding of medical procedures is, after all, consistent with the policy behind the Medicaid Act.” *Ellis*, 859 F.2d at 55. It also noted that other limitations on medically necessary services have been permitted as reasonable. The court thus concluded that the plaintiff’s claim was:

. . . unrealistic . . . [since organ transplants are] exotic surgeries which, while they might be the individual patient’s only hope for survival, would also have a small chance of success and carry an enormous price tag. Medicaid was not designed to fund risky, unproven procedures, but to provide the largest number of necessary medical services to the greatest number of needy people. Thus, we hold the State of Arkansas is not required to fund organ transplants under Medicaid, and that it may choose which kinds of organ transplants, if any, to cover.

Id. at 55.

The court took note of the fact that Congress’ amendment to the Medicaid statutes to add sections governing payments for organ transplants merely laid out additional standards the states must meet to receive federal funds for transplants. They also recognized that the legislative history of the provision reveals that Congress intended the states to have discretion whether to include organ transplants in their Medicaid plan. The House Report on the provision states:

To assure that State coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations, section 9507 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 99-272, requires that a State which covers organ transplant procedures set forth under its Medicaid plan contain written standards respecting the coverage of such procedures. Under these standards, similarly situated individuals must be treated alike.

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H.R. CONF. REP. NO. 391, 100th Cong., 1st Sess. 4 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-352.

Further, the Conference Report states: “(e) Organ Transplant Technical. – States which choose to cover organ transplant procedures may restrict the facilities or practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care, and so long as similarly situated individuals are treated alike.” H.R. CONF. REP. NO. 495, 100th Cong., 1st Sess. 4 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1502.

In 1990 the Eighth Circuit revisited the issue of state responsibility for the provision of Medicaid funds for organ transplants and reaffirmed its view that states have complete discretion to permit or deny Medicaid coverage for transplants. *Meusberger v. Palmer*, 900 F.2d 1280 (8th Cir. 1990). The plaintiff, Susan Meusberger, required a pancreas transplant because the amount of insulin she required at any given time could not be predicted. The majority did conclude that Medicaid should fund the plaintiff’s pancreas transplant. However, the court’s decision was based on Iowa’s voluntarily enacted state plan that elected to cover nonexperimental transplants and a finding that this particular pancreas transplant procedure was not experimental, and thus covered by the plan.

For these reasons we find that the district court did not err in its finding that it was the policy of the IDHS to fund all nonexperimental transplants. Having found that to be the policy, we do not find that the district court’s determination that pancreas transplant procedures are nonexperimental to be clearly erroneous.

Id. at 1283-1284.

However, the Court reaffirmed the caveat found in *Ellis*, reiterating that states may elect which, if any, organ transplants to cover. “However, once a state has adopted a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient.” *Id.* at 1282.

In 1992, the Ninth Circuit adopted and extended the holdings of *Ellis* and *Meusberger* in *Dexter v. Kirschner*, 972 F.2d 1113, 1117 (9th Cir), *modified*, 984 F.2d 979 (9th Cir. 1992). In *Dexter*, Arizona denied Medicaid funding for an allogenic bone marrow transplant to treat the plaintiff’s leukemia, upholding Arizona’s exclusion of these types of transplants from its state Medicaid plan.

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The court considered 42 U.S.C. § 1396a(a)(10)(A), and followed the Eighth Circuit's analysis and holdings pertaining to the section. "The Eighth Circuit specifically held that organ transplants are excepted from Medicaid funding even when they are medically necessary because they are not among the listed required services." *Dexter*, 984 F.2d. at 983. The court, following *Ellis*, relied heavily on the legislative history of the 1987 amendment to 42 U.S.C. § 1396b, which resulted in the current version of subsection (i) pertaining to transplants, and found that Congress intended organ transplant funding to be discretionary.

The court stated that the provision "does not make payments mandatory. Section 1396b(i) states only what must occur in the event a state should decide, in its discretion, to pay for organ transplants" *Dexter*, 984 F.2d at 983. Similarly, the court also rejected the plaintiff's argument that Arizona's decision to fund autologous bone marrow transplants but not allogenic bone marrow transplants violated the "similarly situated" requirement of 42 U.S.C. § 1396b(i). "We conclude that 'similarly situated' means all patients who can be treated effectively by the same organ transplant procedure." *Dexter*, 984 F.2d at 986. "These cancer patients are not similarly situated; they need different transplants." *Id.* at 986. 42 U.S.C. § 1396b(i)(1) only requires similar treatment of patients who could be treated by the same transplant procedure, not any type of appropriate transplant procedure for patients with similar diseases. "The meaning the district court attributed to 'similarly situated' would lead to Medicaid funding of almost all organ transplants." *Dexter*, 984 F.2d at 986.

In a similar case, the Supreme Court of Arizona interpreted the meaning of "similarly situated" when it decided the issue of whether the federal Medicaid statutes permitted Arizona to provide federally funded organ transplants specifically to minors under EPSDT, while excluding adult patients from the same treatment. *Salgado v. Krischner*, 878 P.2d 659 (Ariz. 1994). The court ruled that Ariz. Rev. Stat. Ann. § 2907(A)(11), which permitted organ transplant coverage only for persons under 21 years of age pursuant to EPSDT, did not comply with the requirements of Title XIX of the Social Security Act because the statute failed the reasonableness and the "similarly situated" tests of 42 U.S.C. § 1396b(i) of the federal Medicaid statutes. *Salgado*, 878 P.2d at 665.

The plaintiff was a 41-year old Medicaid recipient who required a liver transplant. In addition to arguing medical necessity, the plaintiff argued that even if a state may deny transplant coverage entirely, once the state elects to fund a particular type of a transplant, 42 U.S.C. § 1396b(i) requires the state to fund all transplants of the same type regardless of age. *Salgado*, 878 P.2d at 662. Arizona argued that the Arizona statute, which limits liver transplant coverage to minors, was authorized as part of EPSDT. The EPSDT Catchall

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Provision at 42 U.S.C. § 1396d(r)(5), it was argued, allowed greater care to be provided to children under age 21, and therefore the Arizona statute was authorized as part of EPSDT. *Salgado*, 878 P.2d at 662-663.

However, the court interpreted the Catchall Provision as including only the measures described in 42 U.S.C. § 1396d(a), which, at that time, included a list of 24 specific service categories. The court noted that nowhere in 42 U.S.C. § 1396d(a) is there any reference made to organ transplants, and therefore concluded that EPSDT's Catchall Provision neither requires a state to provide organ transplants, nor authorizes a state to provide organ transplants to children but not to adults. *Salgado*, 878 P.2d at 663. "In contrast, § 1396b(i) specifically addresses organ transplants, and therefore controls this case." *Id.* at 663.

Thus the court adopted the Ninth Circuit's interpretation of "similarly situated" and reiterated the language in *Dexter* by stating: "It is axiomatic that Arizona would not cover transplants if the federal share would not be paid under § 1396b(i). But the federal share will only be paid if Arizona's plan provides that similarly situated individuals are treated alike, and if the plan is otherwise reasonable." *Id.* at 663-664. At the same time, the court rejected the argument that EPSDT's Catchall Provision covered organ transplants for individuals under the age of 21.

Based upon the above authorities, it is this office's opinion that if a state provides funding for a transplant procedure in its state Medicaid plan, it must make the procedure available to all participants in the plan, not just those under 21 years of age pursuant to EPSDT.

CONCLUSION TO QUESTION ONE

The Eighth and Ninth Circuits have consistently held that states have complete discretion to permit or deny, across the board, Medicaid coverage for transplants. Furthermore, organ transplants are not a mandated service under EPSDT due to the fact that organ transplants are provided for by 42 U.S.C. § 1396b(i), not in the optionally allowed EPSDT services found in 42 U.S.C. § 1396d(a). However, it is the opinion of this office that if a state provides funding for a particular transplant procedure in its state Medicaid plan, it must make the procedure available to all "similarly situated" participants in the plan, and, notwithstanding the provisions of EPSDT, may not discriminate based upon age.

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QUESTION TWO

What medical services are required to be provided pursuant to EPSDT?

ANALYSIS

As currently codified, state Medicaid plans provide EPSDT services for individuals who are eligible under the plan and are under the age of 21. 42 U.S.C. § 1396d(a)(4)(B). The goal of EPSDT is to provide to Medicaid-eligible children under the age of 21 the most effective and preventative health care services through the use of periodic examinations, standard immunizations, diagnostic and treatment services which are medically necessary to correct or ameliorate defects in physical and mental illness and conditions. As previously noted, these services include: “(1) Screening services . . . , (2) Vision services . . . , (3) Dental services . . . , (4) Hearing services . . . , and . . . (5) Such other necessary health care, diagnostic services, treatment, and other measures described in . . . [42 U.S.C. § 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 U.S.C. § 1396d(r)(1)-(5). Subsection (5) is commonly referred to as the “Catchall Provision.” It explicitly requires state plans for Medicaid to provide all of the federally allowable services enumerated in 42 U.S.C. § 1396d(a) under EPSDT, regardless of whether the state plan for Medicaid has adopted such service as an optional service.

Due to 42 U.S.C. § 1396d(r)(5), the “Catchall Provision,” courts have consistently held that states are also required to provide all other services provided by Medicaid under federal law found in 42 U.S.C. § 1396d(a), even if not included in that particular state’s Medicaid plan. However, it is clear that a state may deny services or equipment proposed to be covered by EPSDT if it finds that (i) the condition is not discovered through a proper screening process, (ii) the service is not “medically necessary,” or (iii) the service does not “correct or ameliorate” defects and physical and mental illnesses and conditions discovered by the screening procedures. 42 U.S.C. § 1396d(r)(1)-(5).

Although Nevada Medicaid’s written description of its policy pertaining to “medical necessity” has evolved with the adoption and amendment to various chapters of Nevada’s Medicaid Services Manual (MSM), the most recent embodiment of this policy is articulated in MSM Chapter 35, § 3502:

To be considered medically necessary items and services must have been established as safe and effective as determined by Nevada Medicaid. The items and services must be:

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- Consistent with the symptoms or diagnosis of the illness or injury under treatment.
- Necessary and consistent with generally accepted professional medical standards.
- Not furnished primarily for the convenience of the patient or the recipient's family, the attending physician, the caregiver, or to the physician supplier.
- Furnished at the most appropriate level, which can be provided safely and effectively to the patient. Medicaid will only cover items and services, which are reasonable and necessary for the diagnosis or treatment of an illness or an injury or to improve the functioning of a malformed body part.

This policy directly reflects the regulatory standard in 42 C.F.R. § 440.230(d).

The United States Supreme Court has repeatedly upheld the authority of each state to set reasonable limitations on sub-services provided within that state's covered services. In other words, the state may determine what are medically necessary services. For example, as quoted above in *Beal*, 432 U.S. at 444, the Supreme Court stated the following:

But nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care. Indeed, the statute expressly provides:

A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title] . . . 42 U.S.C. § 1396a(a)(17).

The Court concluded that “[t]his language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be ‘reasonable’ and ‘consistent with the objectives’ of the Act.” *Id.*

Subsequently, in *Alexander v. Choate*, 469 U.S. 287, 303 (1985), the Supreme Court confronted a challenge to Tennessee's 14-day-per-recipient annual durational limit on Medicaid payment for inpatient hospital services, which durational limit was claimed inadequate to meet the needs of some handicapped recipients of assistance. In the context of ruling on the certified question of whether § 504 of the Rehabilitation Act precluded the State of

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Tennessee from adopting the challenged Medicaid durational limit, the Court ruled:

Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered--not "adequate health care."

Id.

The applicable lower court authority is generally in accord. For instance, in *Curtis v. Taylor*, 625 F.2d 645, 652 (5th Cir. 1980), the court upheld a limitation on the amount of covered physician visits to three visits per month even when additional visits could be considered medically necessary, ruling that "[t]he district court's reading of the regulations is persuasive but it reads into the regulations a limitation that appears to us to render meaningless the power given the states to define the scope of service so long as what is provided is sufficient to reasonably achieve its purpose." The court further stated:

The rationale adopted by the courts that have considered the meaning of the applicable regulations permits the state to place at least one type of limitation on its provision of required services: it may limit those services in a manner based upon a judgment of degree of medical necessity so long as it does not discriminate on the basis of the kind of medical condition that occasions the need.

Id.

In addressing the issue of transplants, the Seventh Circuit stated that the federal Medicaid law affords the states discretion in making their assessment, just as it vests the states generally with at least "some flexibility in determining which procedures are medically necessary for recipients for EPSDT services." *Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir.1993). Similarly, "the Medicaid statutes and regulations permit a state to define medical necessity in a way tailored to the requirements of its own Medicaid program." *Rush v. Parham*, 625 F.2d 1150, 1155 (5th Cir. 1980). This is essentially a restatement of the regulations that explicitly allow the states to "place appropriate limits on a service based on such criteria as medical necessity or on utilization controls." 42 C.F.R. § 440.230(d). The states thus

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have “significant discretion to decide which treatments to cover.” *Miller*, 10 F.3d at 1321.

Therefore, the Medicaid Act permits a state not only to determine what services are provided under EPSDT, but also allows a state to exercise its discretion in defining and determining whether such services are medically necessary in any particular instance. In other words, a physician may determine what treatments may be necessary in a particular situation. However, it is still the state’s prerogative to overrule a physician’s determination of medical necessity in any particular instance and not provide the service based upon this determination, provided it can articulate legitimate reasons for doing so, e.g., experimental nature, utilization control, lack of appropriate medical documentation, etc.

The EPSDT Catchall Provision, although limited by the criteria of requiring that the service be medically necessary and that it correct or ameliorate a physical or mental condition, is not limited by the services provided by a state’s Medicaid plan. In other words, any condition that is identified through a screening, for which the prescribed treatment procedure is proven to be medically necessary and such procedure corrects or ameliorates a physical or mental condition, must be provided by Medicaid even if it is a coverage category that is *not* in the State plan, so long as the category is a permissive category of service under 42 U.S.C. § 1396d(a). Thus for Medicaid payment to be proper under EPSDT, the item of services furnished must be *both* covered under federal law and medically necessary. Payment would not be appropriate for a medically necessary item that is not covered. *See Alexander*, 469 U.S. at 303 (“ . . . the benefit provided remains the [package of] individual services offered -- not ‘adequate health care.’”).

Not surprisingly, the legislative history is consistent with the case law. “While States may use prior authorization and other utilization controls to ensure that treatment services are medically necessary, these controls must be consistent with the preventive thrust of the EPSDT benefit.” H.R. CONF. REP. NO. 239, 101st Cong., 1st Sess. 3 (1989) *reprinted in* 1989 U.S.C.C.A.N. 2125. Also, consistent with federal statute, the legislative history states, “(a) *Coverage of medically necessary services for children*. —Under current law, States may impose reasonable limits on the amount, duration, and scope of covered services.” *Id.* at 2127.

Finally, there are a number of problems with the terminology utilized in the EPSDT statute as a matter of public policy. By its nature, “medical necessity” is a vague term because there is no absolute definition. What is necessary to preserve life is different from what is necessary to prevent deterioration of one’s health, which is certainly different than what is necessary to “correct or ameliorate” a physical or mental condition or illness.

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The definition of “correct” is “to remove, remedy, or counteract.” The definition of “ameliorate” is “to make or become better: IMPROVE.” WEBSTER’S II NEW COLLEGE DICTIONARY 35 (1995). Thus EPSDT is limited to a certain type of medical necessity; a type that is only found to remedy or improve a physical or mental condition or illness.

CONCLUSION TO QUESTION TWO

Under Medicaid’s early and periodic screening, diagnostic and treatment services (EPSDT) program, states are required to provide all the EPSDT services codified in 42 U.S.C. § 1396d(r)(1)-(5). Pursuant to EPSDT’s Catchall Provision in subsection (5), states are also required to provide all other services provided by Medicaid under federal law in 42 U.S.C. § 1396d(a), even if not included in that particular state’s Medicaid plan. In order to cover a service or equipment proposed to be covered under EPSDT, a state must conclude that (i) the condition was discovered through a proper screening process, (ii) the service or equipment prescribed is “medically necessary,” (iii) the service or equipment must “correct or ameliorate” the defect, or the physical or mental illnesses or condition discovered by the screening procedures. These determinations must be made on a case-by-case basis.

FRANKIE SUE DEL PAPA
Attorney General

By: DAVID F. GROVE
Deputy Attorney General

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AGO 2001-13 OPEN MEETING LAW; PUBLIC BODIES; MUNICIPAL CORPORATIONS: The mayor of Fernley may meet with two city council members outside of a public meeting because a quorum of the city council can only be established by the presence of three city council members. The fact that the mayor may later be called upon to cast a tie-breaking vote with those two members cannot create a quorum where one does not otherwise exist. However, if the mayor meets with two city council members and then meets with one or more of the remaining members, a quorum by serial communications may be gathered and the Open Meeting Law may be implicated.

Carson City, June 1, 2001

Rebecca Ann Harold, Fernley Town Attorney, P.O. Box 1362, Fernley, Nevada 89408

Dear Ms. Howard:

You have asked the opinion of this office regarding the following question:

QUESTION

Is it a violation of Nevada's Open Meeting Law, NRS chapter 241, for the mayor of Fernley to meet with two of the five city council members outside of a public meeting and thereafter cast a tie-breaking vote on a matter before the city council?

ANALYSIS

You have advised us that Fernley is in the process of incorporating pursuant to NRS chapter 266. Fernley has a mayor and five city council members. You have advised us that because the mayor may vote on a matter before the city council in the case of a tie, it is possible that a motion may be passed by the city council on the affirmative votes of two city council members and the mayor.

The Open Meeting Law requires a public body to provide the public with notice of its meetings. NRS 241.020(2). NRS 241.015(2) defines a meeting as "the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power."¹ "The

¹ Assembly Bill 225 (A.B. 225) amends NRS 241.015. As of the date of this letter, A.B. 225 has been delivered to the Governor. The reader is advised to consult A.B. 225 for its impact, if any, on the analysis in this opinion, if and when A.B. 225 becomes effective.

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constraints of the Open Meeting Law apply only where a quorum of a public body, in its official capacity as a body, deliberates toward a decision or makes a decision.” *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778-779 (1998). A quorum is defined as “a simple majority of the constituent membership of a public body or another proportion established by law.” NRS 241.015(4).

NRS 266.235 defines a quorum of the city council. It provides that “[a] majority of all members of the council shall constitute a quorum to do business, but a less number may meet and adjourn from time to time and may compel the attendance of absentees under such penalties as may be prescribed by ordinance.” NRS 266.235. NRS 266.220 contemplates a three or five member city council for second or third class cities. Fernley has a five member city council and thus three members constitute a quorum. NRS 266.235. Therefore, the critical question is whether the mayor may be considered a member of the city council for purposes of determining a quorum if the mayor may be required to cast a vote.

NRS 266.200 sets forth the duties and responsibilities of the mayor as the presiding officer of the city council. The mayor is required to preside over the city council when it is in session and is required to preserve order and decorum among the members. NRS 266.200(1)(a). The mayor is required to enforce the rules of the city council and determine the order of business, subject to those rules and appeal to the city council. *Id.* The mayor is not entitled to a vote except in the case of a tie or as otherwise expressly provided in NRS chapter 266. NRS 266.200(1)(b). The mayor may exercise the right of veto upon all matters passed by the city council. NRS 266.200(2). In the case of a five member city council, a four-fifths vote of the whole city council will override the mayor’s veto. *Id.*

Three city council members constitute a quorum and trigger the application of the Open Meeting Law. NRS 266.220, NRS 266.235, and NRS 241.015. Although the mayor of a city incorporated pursuant to NRS chapter 266 is entitled to vote on matters before the city council in certain instances, the mayor is not a member of the city council and thus cannot be counted to determine the presence of a quorum of the city council.² The general powers and duties of a mayor, as set forth in NRS chapter 266, are separate and distinct from the powers and duties of members of the city council and, thus, the mayor cannot be considered a member of the city council. See Letter Opinion to Mariah L. Sugden dated March 24, 1992; compare NRS 266.165–200 (creating office of mayor as chief executive

² Whether the mayor of a city created by special law pursuant to Article 8, Section 1 of the Nevada Constitution is a member of the city council may depend on the language of the city charter.

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officer of city) with NRS 266.215–.255 (creating city council). The language and organization of the statutes governing the creation and powers of the mayor and city council leave little doubt that the mayor is not a member of the city council. *Id.* For instance, NRS 255.200(2), which requires a four-fifths vote of the whole council to override a veto, makes little sense if the mayor is counted as a member of the council, making the whole council a six person council. See also NRS 266.225 (vacancy in city council is filled by the “mayor and city council”).

Other states have concluded that the mayor is not a member of the city council and thus is not counted to determine the presence of a quorum unless a statute specifically provides that the mayor is a member of the city council. See *Patterson v. Cooper*, 682 A.2d 266, 269 (N.J. Super. Ct. Law Div. 1994) (where statute establishes quorum as a majority of the whole number of city council, mayor is not counted to determine presence of a quorum even if another statute provides that the mayor may vote in the case of a tie); *Mayor of the City of Hagerstown v. Lyon*, 203 A.2d 260, 264 (Md. 1964) (even though statutes provide that the mayor shall preside over meetings of the city council and cast tie-breaking votes, the mayor is not a member of the city council).

The presence of the mayor at a meeting with two city council members cannot establish a quorum of the city council. Therefore, the mayor may meet with two city council members without triggering the requirements of the Open Meeting Law. This result does not change simply because the mayor may be called upon to cast the tie-breaking vote on a matter before the city council because a quorum of the city council still must be present in order for that vote to be taken. See *Patterson*, 682 A.2d at 269.

Although it is our opinion that the mayor may meet with two city council members outside of an open meeting because no quorum is present, we must caution you that if a quorum is gathered by the use of serial communications, a violation of the Open Meeting Law may occur. *Del Papa v. Board of Regents*, 114 Nev. at 400. If the mayor meets with two city council members and then meets with one or more of the remaining members, a quorum of the city council may be deliberating or taking action on matters within the supervision, control, jurisdiction, or advisory power of the city council outside of a public meeting and thus may be violating the Open Meeting Law. *Id.*

CONCLUSION

The mayor of Fernley may meet with two city council members outside of a public meeting because a quorum of the city council can only be established by the presence of three city council members. The fact that the mayor may later be called upon to cast a tie-breaking vote with those two members cannot

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create a quorum where one does not otherwise exist. However, if the mayor meets with two city council members and then meets with one or more of the remaining members, a quorum by serial communications may be gathered and the Open Meeting Law may be implicated.

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

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AGO 2001-14 CONSTITUTIONAL LAW; GOVERNOR; LEGISLATURE; REAPPORTIONMENT: Legislation passed after 12:00 a.m. June 5, 2001, is arguably void and a revote during a special session on specific legislation identified by the Governor is recommended to clearly establish such legislation's validity. The Governor possesses extraordinary, exclusive, and discretionary power to convene a special session and to specify the subject or subjects for consideration. The Governor's discretionary power to issue a proclamation convening a special session includes the power to revoke, amend, or specify the time period such proclamation shall be in effect. Nevada Legislature had a duty to enact a valid plan of reapportionment during the 2001 regular legislative session, and the Governor possesses discretionary authority to convene a special session for such purpose following the Legislature's failure to do so.

Carson City, June 12, 2001

Honorable Governor Kenny Guinn, Capitol Complex, Carson City, Nevada
89710

Dear Governor Guinn:

You have requested an opinion from this office concerning various issues relating to adjournment of the 2001 legislative session and the convening and conduct of a special legislative session.

QUESTION ONE

What is the constitutionally required date and time by which the 2001 session of the Nevada Legislature was required to adjourn?

ANALYSIS

Article IV, Section 2, Subsections 1 and 2 of the Nevada Constitution provide as follows:

1. The sessions of the Legislature shall be biennial, and shall commence on the 1st Monday of February following the election of members of the Assembly, unless the Governor of the State shall, in the interim, convene the Legislature by proclamation.
2. The Legislature shall adjourn sine die each regular session not later than midnight Pacific standard time 120 calendar days following its commencement. Any legislative action taken after midnight Pacific standard time on the

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120th calendar day is void, unless the legislative action is conducted during a special session convened by the Governor.

Pursuant to Article IV, Section 2, Subsection 1, the 2001 legislative session commenced on Monday, February 5, 2001. Accordingly, the 120th day of the session fell on Monday, June 4, 2001, and the end of that day was commonly understood to constitute the day and time upon which the Legislature must adjourn sine die. However, Article IV, Section 2, Subsection 2 specifies that the Legislature shall adjourn sine die not later than midnight Pacific standard time 120 days *following* its commencement.

Because the Nevada Constitution mandates adjournment 120 calendar days *following* the regular session's commencement, it is the opinion of this office that the first day of the session, February 5, is not to be counted in determining the specific date that falls 120 calendar days *after* the session commenced. This position is consistent with the reasoning articulated by the Alaska Supreme Court in *Alaska Christian Bible Inst. v. State*, 772 P.2d 1079, 1080-1081 (Alaska 1989). In that opinion, the Alaska Supreme Court analyzed the pertinent provision in the Alaska Constitution which is substantially similar to Article IV, Section 2, Subsection 2 of the Nevada Constitution, and concluded that, pursuant to the common law time calculation rule that is codified in Alaska's rules of civil, criminal and appellate procedure, the first date of an event is not included when counting *from* such date. Similarly, the common law rule has been adopted by the Nevada Supreme Court in promulgating rules of procedure. Those rules, which have been held to be applicable and controlling for purposes of computing statutory limitations periods, specify that "the day of the act, event or default from which the designated period of time begins to run shall not be included." Nev. R. Civ. P. 6(a); Nev. R. App. P. 26(a). *See also, e.g., Nyberg v. Nev. Indus. Comm'n*, 100 Nev. 322, 683 P.2d 3 (1984); *Rogers v. State*, 85 Nev. 361, 455 P.2d 172 (1969). Consequently, it is our opinion that the 120th day *following* commencement of the 2001 regular legislative session fell on Tuesday, June 5, 2001, and the Legislature was thus constitutionally mandated to adjourn sine die not later than midnight, Pacific standard time, June 5, 2001.

This conclusion, however, only leads to the next question, which is: When was midnight, Pacific standard time, on Tuesday, June 5, 2001? Put another way, the inquiry requires a definition of the term "midnight" and a determination whether midnight Pacific standard time was at 12:00 a.m. when the first stroke of June 5 fell, or was it 24 hours later when the last second of the day elapsed and the first stroke of June 6 was sounded? Not surprisingly, at least one court has concluded "the word 'midnight' is ambiguous" and, citing to the WORLD BOOK ENCYCLOPEDIA, noted that there are, in fact, two

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midnights in each day, one at the beginning and one at the end. *Leatherby Ins. Co. v. Villafana*, 368 N.Y.S.2d 102, 104 (N.Y. Sup. Ct. 1975). Similarly, WEBSTER does not try to define midnight as denoting solely either the beginning or the ending of a day, defining the term as “1: the middle of the night; *specif*: 12:00 o’clock at night 2: deep or extended darkness or gloom.” (WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, 1985). Subsequent editions have not attempted to put any finer point on the term.

The Nevada Constitution, Article IV, Section 2, Subsection 2, specifies that “[a]ny legislative action taken after midnight Pacific standard time on the 120th calendar day is void.” As discussed, there is an ambiguity as to whether, for purposes of the 2001 legislative session, “midnight, Pacific standard time” means 12:00 a.m. June 5, 2001, or 12:00 a.m. June 6, 2001, and the question has never been addressed by the Nevada Supreme Court. Because the question is unsettled, interpreting the phrase as having authorized the 2001 Legislature to act until the stroke of 12:00 a.m. June 6, 2001, could result in a myriad of legislative actions taken after 12:00 a.m. on June 5 later being judicially declared void. Consequently, prudence dictates that the most conservative interpretation be utilized, and that 12:00 a.m. on June 5 should be deemed the time the Legislature was required to adjourn sine die.

The last inquiry in this area concerns the use of the term “Pacific standard time” in Article IV, Section 2, Subsection 2. Because Nevada observes daylight saving time from the first Sunday in April to the last Sunday in October, an argument can be made that 12:00 a.m. Pacific standard time on June 5, 2001, was equivalent to 1:00 a.m. Pacific daylight saving time, and that the Nevada Legislature was thus authorized to act until the clock struck 1:00 a.m. This seemingly logical and appealing argument, however, is cast into serious doubt by the provisions of 15 U.S.C. § 260a, entitled “Advancement of time or changeover dates.” Subsection (a) of 15 U.S.C. § 260a provides as follows:

(a) Duration of period; State exemption. During the period commencing at 2 o’clock antemeridian on the first Sunday of April of each year and ending at 2 o’clock antemeridian on the last Sunday of October of each year, the standard time of each zone established by the Act of March 19, 1918 (15 U.S.C. 261-264), as modified by the Act of March 4, 1921 (15 U.S.C. 265), shall be advanced one hour and *such time as so advanced shall* for the purposes of such Act of March 19, 1918, as so modified, *be the standard time of such zone during such period*; however, (1) any State that lies entirely within one time zone may by law exempt itself from the provisions of this subsection providing for the advancement of time, but only if that law provides that the

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entire State (including all political subdivisions thereof) shall observe the standard time otherwise applicable during that period, and (2) any State with parts thereof in more than one time zone may by law exempt either the entire State as provided in (1) or may exempt the entire area of the State lying within any time zone. [Emphasis added.]

The text of 15 U.S.C. § 260a(a) italicized above clearly provides that, during the period that Nevada observes daylight saving time, such time *becomes the standard time* in this zone and State, and thus advancement of the clock constitutes a change in the “standard time” of this time zone.

We are mindful that a variety of arguments can be made to support a conclusion that the language of the Nevada Constitution is intended to provide authority for the Legislature to act until 1:00 a.m. daylight saving time on the 120th day of the session. Again, however, the question is unsettled and we are thus unable to conclude with certainty that “midnight, Pacific standard time” is intended in the Nevada Constitution to be the equivalent of 1:00 a.m. daylight saving time. Accordingly, in order to avoid possible challenges concerning the validity of a host of legislation passed after 12:00 a.m. on June 5, 2001, we once again advise that prudence dictates that the latest time by which the Legislature should be deemed to have been required to adjourn the 2001 legislative session was 12:00 a.m. on June 5, 2001.

CONCLUSION TO QUESTION ONE

Article IV, Section 2, Subsection 2 of the Nevada Constitution requires the Nevada Legislature to adjourn sine die each regular session “not later than midnight Pacific standard time 120 calendar days following its commencement,” and any action taken thereafter is declared void. The term “midnight” is ambiguous. In addition, the provisions of 15 U.S.C. § 260a(a) make it doubtful that 1:00 a.m. Pacific daylight saving time may be treated as the equivalent of “midnight Pacific standard time.” Accordingly, because a court could conclude that the Legislature was required to adjourn not later than 12:00 a.m. on June 5, 2001, and in order to avoid potential challenges to and litigation over the numerous bills passed by the Nevada Legislature after 12:00 a.m. on June 5, 2001, it would be prudent to request a revote during a duly convened special session on each such individual piece of legislation the Governor may identify in his message or messages in order to clearly establish its validity.

QUESTION TWO

What are the Governor’s powers with regard to the convening of a special legislative session?

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ANALYSIS

A. Power to convene a special session and designate subject matter to be considered.

Article V, Section 9 of the Nevada Constitution provides that:

Special sessions of legislature; business at special session.

The Governor may on extraordinary occasions, convene the Legislature by Proclamation and shall state to both houses when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business, except for which they were specially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in Session.

The Governor possesses “extraordinary” and “exclusive” power to convene a special session, to determine what occasion shall warrant the convening of a special session, and to designate the subject or subjects of legislative business that may be conducted at such session. *In re Platz*, 60 Nev. 296, 307 (1940) (citing *In re. Governor’s Proclamation*, 19 Colo. 333, 35 P. 530 (Colo. 1894). “[I]t is the purpose of the Constitution to forbid consideration of any but such business as the Governor may deem necessary to be transacted at such sessions.” *In re Platz*, 60 Nev. at 308 (quoting *Jones v. Theall*, 3 Nev. 233, 236 (1867)).

B. Determining whether an extraordinary occasion exists pursuant to the Nevada Constitution, Article V, Section 9, which warrants the convening of a special session.

It is the urgent character of proposed legislation that authorizes the Governor to invoke a special session. However, once in special session, other legislative business the Governor might deem proper to call to the Legislature’s attention need not be so characterized.” *In re. Platz*, 60 Nev. at 308 (citing *Jones v. Theall*, 3 Nev. 233).

It is entirely within the Governor’s discretion to determine whether an extraordinary occasion exists which warrants the convening of a special session, and such discretionary determination is not subject to challenge or review. *In re Platz*, 60 Nev. at 307 (“As to the urgency of the legislation, we think it was to be determined solely by the governor.”). *See also, e.g., Farrelly v. Cole*, 56 P. 492, 499-500 (Kan. 1899) (“It is obvious that the question is addressed exclusively to the executive judgment, and neither the legislative nor the judicial department can interfere or compel action”); and *Op. Nev. Att’y Gen. No. 622* (May 21, 1948) (“It is generally held that

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the exercise of power by the Governor to convene the Legislature in special session will not be reviewed by the courts. If he is convinced of the existence of an ‘extraordinary occasion,’ it follows that he should act with appropriate speed.”).

C. Notice requirements

There is no constitutional or statutory provision that specifies a time period to be allowed by the Governor in giving notice of the convening of a special session to the assemblyman and senators. “It follows that the Governor’s proclamation may convene the Legislature to meet at so early a date as he thinks advisable.” Op. Att’y Gen. No. 622 (May 21, 1948). Reason dictates, however, that as a practical matter sufficient notice needs to be provided to enable the members of the Legislature to return to Carson City and assemble before the business specified by the Governor can be attended to.

D. Duration

Until 1958, a 20-day time limit on special sessions and a 60-day limit on regular sessions were provided for in Article IV, Section 29 of the Nevada Constitution. According to DON W. DRIGGS AND LEONARD E. GOODALL, NEVADA POLITICS & GOVERNMENT 80-81 (1996), that provision, however, was repealed by vote of the people in the 1958 general election as a result, in part, of the Legislature’s previous failure to adhere to the 60-day limit on regular sessions. During the post-World War II period, the Legislature avoided the constitutional limitation by “stopping the clock” at 11:59 p.m. on the sixtieth day, and then conducting business, sometimes for several days. *Id.*

To remedy this situation, two measures were undertaken. The time limitations in the constitution were repealed and annual sessions were enacted. Only one annual session was held as a result, in 1960, but there were no time limitations on regular sessions until 1998 when, following approval in the 1995 and 1997 legislative sessions and a vote of the people in 1998, regular sessions were limited to 120 days. NEV. CONST. art. IV, § 2. The constitutional time limitation on special sessions has never been reenacted.

There is no controlling case law in Nevada that addresses whether the Governor may specify a durational time limit upon a special session. We have thus turned to a review of judicial decisions from other jurisdictions, where the question has been debated with conflicting results.

In specifically ruling that the Governor possesses authority to limit the duration of a special session, a majority of justices of the Florida Supreme Court held that “the calling of the extra session is an exercise of executive

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discretion, and if in the exercise of such discretion [the Governor] determines that an extra session of less than twenty days is in the public interest, he has the power to make the call and fix the shorter time. The wisdom of the Governor in fixing a lesser time is not a matter of judicial concern as we are involved here only with his power to do so.” *In re Advisory Opinion to the Governor*, 206 So.2d 212, 214 (Fla. 1968). Two dissenting justices argued that the constitutional provision granting the Governor power to convene a special session and state the purpose for which it was convened could not reasonably be read to encompass the power to limit the call to a specific number of days. *Id.* at 216 (dissenting opinion). In that opinion, the dissenting justices cite the Nevada Supreme Court’s opinion in *In re Platz*, *supra*, as providing authority for the proposition that the executive proclamation may not restrict the manner, method, or means of legislative action pursuant thereto. *Id.* In our opinion, however, that is a misstatement of the holding in *In re Platz*.¹

The Florida Supreme Court reaffirmed its holding in *Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982), and again emphasized that in exercising discretionary power to convene a special session, that discretionary power necessarily included the power to impose a durational time limit that was shorter than the constitutionally mandated 20-day limit. However, in convening a non-discretionary, constitutionally mandated special session to consider reapportionment, the court held that the Governor did not have the authority to specify a time limit less than the 30-day limit provided for in the Florida Constitution. Obviously, the latter part of the court’s holding is inapplicable to Nevada’s circumstance as the Nevada Constitution contains no such expressed time limitation.

Another approach to the question is found in *State, ex rel. Distilled Spirits Institute v. Kinnear*, 492 P.2d 1012 (Wash. 1972). In *Kinnear*, the Washington Supreme Court was asked to decide whether a constitutional 60-day limitation on regular sessions should be held applicable to special sessions called by the Governor. The court concluded that the limitation should not be held applicable to a special session, stating that: “It would seem safe to surmise that, if the framers had intended to limit the length of the [special] session provided for in this article, they would have mentioned that limitation

¹ In *In re Platz*, the Nevada Supreme Court noted that: “Legislative power, except when the constitution has imposed limits upon it, is practically absolute; and, when limitations upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question.” *Id.*, 60 Nev. at 308 (quoting *Baldwin v. State*, 3 S.W. 109, 111 (Tex. Ct. App. 1886)). Nowhere in the opinion did the Nevada Supreme Court opine that the Governor’s extraordinary, exclusive, and discretionary power to convene a special session does not include the power to specify a durational time limit.

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in the section wherein they set forth the power of the Governor to convene the legislature.” *Id.*, 492 P.2d at 1022.

In addition, we note that at least one court has held that a governor vested with discretionary authority to issue a proclamation convening a special session can, by virtue of that same power and discretion, revoke the proclamation. *People ex rel. Tennant v. Parker*, 3 Neb. 409 (Neb. 1873). There, Justice Crounse concluded that: “His proclamation is no deed or instrument conveying any right to the legislators which when once issued, is irrevocable.” *Id.* at 420. In his separate concurring opinion, Justice Lake likewise similarly concluded that:

With the exercise of this discretion up to the time of convening the legislature no one can interfere. The whole matter is left entirely to the will of him who for the time being, is invested with the executive authority of the state. But if, for any good and sufficient reason, the executive shall become satisfied that the necessity which induced the call has passed, or that it was unadvisedly made, it is not only his right, but his duty to revoke the same, that the people may be saved the expense which would otherwise be laid upon them.

Id. at 422-423.

Based on the foregoing, it is our opinion that a Nevada governor’s exercise of extraordinary, exclusive, and discretionary power to convene a special session and to specify the subjects for consideration at such session necessarily includes the discretionary authority to revoke or amend a proclamation convening such special session. Included within such power to revoke would be the authority to specify within the proclamation a specific time period during which the proclamation shall remain in force and effect. Accordingly, it is our opinion that the Governor possesses authority to specify a durational time limit for such special session.

Finally, we observe that Article V, Section 11 of the Nevada Constitution provides that: “In case of a disagreement between the two Houses with respect to the time for adjournment, the Governor shall have power to adjourn the Legislature to such time as he may think proper; Provided, it is not beyond the time fixed for the meeting of the next Legislature.” Research has failed to uncover any Nevada Supreme Court opinions addressing this provision.

In our opinion, the conclusion that the Governor may revoke or amend a proclamation convening a special session, or may specify the time period during which such proclamation shall remain in effect, is not at odds with this

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constitutional provision. To the contrary, the Legislature retains authority to decide upon its own time for adjournment at any point prior to the maximum time period specified by law. At the same time, the Governor retains control over his executive proclamation convening a special session, which includes the power to withdraw or amend the proclamation or to specify a durational time period during which the proclamation shall be in effect.

E. Special session subject matter limitations

As is previously discussed in section 2(A) above, the Governor has extraordinary and exclusive power to determine “what occasion shall warrant the convening of the legislature in special session and to designate what subject of legislative business shall be transacted.” *In re Platz*, 60 Nev. at 307. Thus, at a special session, the Legislature is strictly limited to such subject or subjects for which it was convened by the Governor and to such other business as the Governor may call to its attention. *In re Platz*, 60 Nev. 296, 307-308 (1940); *Jones v. Theall*, 3 Nev. at 235-236.

In its opinions on this topic, the Nevada Supreme Court has stated that: “We are confirmed in the opinion that it is the purpose of the Constitution to forbid consideration of any but such business as the Governor may deem necessary to be transacted at such sessions.” “The powers of the Legislature at its special sessions are expressly and clearly limited to the transaction of the business for which it may be convened, or such other business as the Executive may call to its attention whilst it is in session”” *In re Platz*, 60 Nev. at 308 (quoting *Jones v. Theall*, 3 Nev. 233, 236 (1867)). “Legislation enacted under the latter clause of the section of the constitution need not be the same general nature or have any relation to the type of legislation for which the legislature was especially convened.”² *In re Platz*, 60 Nev. at 309. In addition, the Court has ruled that transmission of vetoed bills by the Secretary of State to the Legislature cannot be considered an act or message from the Governor which would empower the Legislature to consider such bills at a special session, unless specifically so directed by the Governor. *Jones v. Theall*, 3 Nev. at 238.

Based on the above and similar cited authority, this office has previously issued opinions concluding that the Legislature acted in excess of the scope of authority provided by virtue of a Governor’s proclamation convening a special session or a subsequent message from the Governor designating a subject matter to be considered during such session.

² Referencing NEV. CONST., art. V, § 9 (“such other legislative business as the Governor may call to the attention of the Legislature while in Session.”).

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In one such opinion, this office addressed the validity of Assembly Bill 19, passed on May 17, 1966, during the Twelfth Special Session held from May 9 to May 26, 1966. Op. Nev. Att'y Gen. No. 338 (May 18, 1966). A.B. 19 purported to increase gambling taxes and the question was whether the Governor had authorized the Legislature to consider and take such action. Our opinion examined and reproduced the relevant portion of the Governor's message of May 9, 1966, to the Legislature,³ which stated in pertinent part that: "I have been guided in my recommendations by the need of responsible management of financial resources of our State under its present tax structure and the need to limit requests to those which are of an emergency nature." (*Id.*, emphasis in original opinion.)

Observing that the Governor's message contained no directive to increase taxes in the area of gaming or in any other field, and that the message therefore could not reasonably be interpreted as having authorized the Legislature to enact such legislation, this office concluded that the bill was passed in contravention of Article V, Section 9 of the Nevada Constitution and therefore void. The bill subsequently died in the Legislature on May 24, 1966.

There are many reported decisions addressing a governor's call to business during a special legislative session and whether a legislative act fell within the scope of the subject matter identified in the governor's call. Numerous cases illustrate the rule that an act is void which is not within the specific purposes for which the Legislature was called into a special session. *State ex rel. Rice v. Edwards*, 241 S.W. 945 (Mo. 1922) (a law regarding 'districts for justices of the peace' was not within the subject of 'districts for constables'); *Davidson v. Moorman*, 49 Tenn. 575 (1871), cited in *The Denver and Rio Grande Railroad Company v. Moss*, 115 P. 696 (Colo. 1911) (a law regarding the redemption of real estate sold under judicial process was not within the range of the proclamation to legislate upon military matters within the state); *State ex rel. National Conservation Exposition Co. v. Woolen*, 161 S.W. 1006 (Tenn. 1913) (an appropriation for an agricultural exposition was not within the call to make appropriations necessary to maintain the state's institutions, offices and departments); *Wells v. Missouri Pacific Railway Co.*, 19 S.W. 530 (Mo. 1892) (law requiring protection around hazardous facilities of railroads and other companies was not within the governor's call to consider a law to correct abuses, prevent unjust enrichment and extortion and to fix rates); *Sims v. Weldon*, 263 S.W. 42 (Ark. 1924) (a law imposing a tax on cigars and cigarettes was not authorized under a proclamation calling for a tax on

³ The Governor's original and four subsequent messages to the Twelfth Special Session of the Nevada Legislature identified some 37 specific subject matters upon which the Governor requested that the Legislature take action. None of the specifically mentioned subject categories included any reference to taxes on gaming. See Dean Heller, Sec. of State, *Political History of Nevada*, 200-201 (10th Ed. 1996).

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individual incomes); *In Re Interrogatories of the Senate Concerning the Constitutionality of House Bill No. 45*, 29 P 2d 705 (Colo. 1934) (even though minor revenues from liquor taxes were authorized for welfare relief, the liquor control code was void as not being within the proclamation to provide revenue for the relief of the unemployed, destitute, and suffering); *cf. Jaksha v. State of Nebraska*, 385 N.W.2d 295 (Neb. 1986) (governor may issue an amended proclamation to include a new subject; therefore, challenged law was valid under amended proclamation but would have been void as not being within the scope of the original proclamation).

Based on *In re Platz*, *Jones v. Theall*, and the above-cited opinions from this office and other jurisdictions, it is clear that, when the Governor exercises his extraordinary and exclusive power to convene a special legislative session and power to designate the subject or subjects for consideration, he may narrowly specify and limit the subject matter of the special session and any legislative action exceeding such stated limitation is void.

We are informed that there were 23 separate bills and 5 concurrent or joint resolutions that were voted on and passed by the Legislature after expiration of the 12:00 a.m. deadline on June 5, 2001.⁴ It is thus apparent that with regard to such legislation, the Legislature has previously fully considered, debated, offered, and included such amendments it deemed appropriate and ultimately voted upon the various matters. The only remaining and unattended legislative business yet to be accomplished with regard to the subject legislation is therefore the final legislative act of voting on the legislation within a clearly valid time period.

The Governor's call to convene a special session and to consider a specified subject would activate the Legislature's authority to assemble and to exercise its inherent power to open such subject up for hearing, debate, and amendment. However, the bills and resolutions voted on after 12:00 a.m. on June 5, 2001, have already been fully heard, debated, and subjected to the amendment process. The Legislature has thus already fully exercised its inherent power over the subject legislation. It is thus our opinion that the Governor possesses authority under Article V, Section 9, of the Nevada Constitution to convene a special session and specify as the limited subject for consideration the narrow question of whether, with regard to the particular bill or resolution reportedly passed after 12:00 a.m. on June 5, 2001, and

⁴ According to a report addressed to Governor Guinn and dated June 8, 2001, from Legislative Counsel Director Lorne Malkiewich, the list of bills and resolutions receiving approval between 12:00 and 1:00 a.m. on June 5, 2001, is as follows: 1) S.B. 109; 2) S.B. 148; 3) S.B. 193; 4) S.B. 303; 5) S.B. 366; 6) S.B. 445; 7) S.B. 518; 8) S.B. 588; 9) A.B. 94; 10) A.B. 122; 11) A.B. 133; 12) A.B. 232; 13) A.B. 271; 14) A.B. 343; 15) A.B. 405; 16) A.B. 424; 17) A.B. 460; 18) A.B. 483; 19) A.B. 615; 20) A.B. 653; 21) A.B. 661; 22) A.B. 666; 23) A.B. 669; 24) A.C.R. 3; 25) A.C.R. 21; 26) A.C.R. 42; 27) A.J.R. 14; 28) S.J.R. 20* (of the 70th Session).

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specifically identified by the Governor, the Nevada Senate and Assembly desire to again vote and to thereby ratify or disavow the final vote or votes previously taken. It should be stressed that such a limitation applies only to those bills and resolutions reportedly voted on after 12:00 a.m. on June 5, 2001.

CONCLUSION TO QUESTION TWO

Pursuant to Article V, Section 9 of the Nevada Constitution and Nevada Supreme Court decisions interpreting that clause, the Governor is vested with extraordinary, exclusive, and discretionary authority to convene a special session of the Nevada Legislature and to specify the subject matter to be considered. The Governor's determination whether an "extraordinary occasion" exists which warrants the convening of a special session involves an exercise of discretion that is not subject to review by the legislative or judicial branches of government. No specified notice requirements exist prior to convening a special session, although as a practical matter some reasonable amount of notice is necessary in order to afford the Legislature time to assemble.

The Governor's power and discretion to convene a special session by proclamation necessarily include the power to revoke or amend such proclamation and, consequently, the authority to specify a time period during which the proclamation shall be in effect. The Governor may strictly limit the subject matter that may be considered during a special legislative session. Certain actions taken by the 2001 Nevada Legislature created a circumstance where numerous bills that previously had been heard, debated, and subject to amendment were ultimately voted upon at a time when the Legislature's constitutional authority to act had arguably expired. Accordingly, because the Legislature has already been afforded the opportunity to fully exercise its power over such legislation, it is our opinion that the Governor may elect in a special session to identify as the subject matter for consideration the simple issue of whether the members of the Legislature wish to recast their votes for or against such previously voted upon bills as the Governor specifies.

QUESTION THREE

May the Governor call upon the Legislature to take up the issue of reapportionment during a special session?

ANALYSIS

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Article IV, Section 5 of the Nevada Constitution provides as follows:

Number of senators and assemblymen; apportionment.

Senators and members of the assembly shall be duly qualified electors in the respective counties and districts which they represent, and the number of senators shall not be less than one-third nor more than one-half of that of the members of the assembly.

It shall be the mandatory duty of the legislature at its first session after the taking of the decennial census of the United States in the year 1950, and after each subsequent decennial census, to fix by law the number of senators and assemblymen, and apportion them among the several counties of the state, or among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.

The 2001 legislative session was the first session following the 2000 decennial census of the United States. We are informed that detailed census data sufficient to proceed with reapportionment was made available to the Legislative Counsel Bureau during mid-March of 2001. The Nevada Legislature thus had a mandatory duty under article IV, section 5 of the Nevada Constitution to enact reapportionment legislation during the 2001 regular legislative session, but proved unable to do so within the 120-day time period provided pursuant to article IV, section 2 of the Nevada Constitution. See Op. Nev. Att’y Gen. No. 18 (March 15, 1971) and cases cited therein.

While Article IV, Section 5 imposes a mandatory duty upon the Legislature, it does not impose a limitation such that reapportionment can only be accomplished during the first session following a decennial census, and it does not suggest that reapportionment need no longer be considered if the Legislature does not fulfill its duty. To the contrary, apportionment is not only required pursuant to the Nevada Constitution but is mandated by the Equal Protection Clause as well as the Fifteenth and Nineteenth Amendments to the United States Constitution. *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Dungan v. Sawyer*, 250 F.Supp. 480 (D. Nev. 1965). Consequently, if the Nevada Legislature fails to discharge its duty under Article IV, Section 5 of the Nevada Constitution, the Nevada Supreme Court or the federal court could exercise jurisdiction to see that it is done and, if he has not already done so, the Governor of the State can be judicially directed to call a special session of the Nevada Legislature for such purpose. See *Dungan, supra*.

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As detailed in *Dungan v. Sawyer, supra*, Nevada has experienced this precise series of events. Specifically, after the 1965 Nevada Legislature failed to adopt a valid plan of reapportionment, a three-judge federal district court panel issued its order on September 23, 1965, directing then-Governor Grant Sawyer to convene within 37 days a special session for purposes of enacting a plan of reapportionment, and directing the Legislature to submit for judicial approval not later than 20 days thereafter “duly enacted and approved legislation creating a constitutionally valid reapportionment and redistricting plan.” *Dungan*, 250 F.Supp. at 490. In light of this history, it is apparent that the Governor may be directed to convene a special session to enact a plan of redistricting and reapportionment, that the Legislature may be compelled to enact such a plan at a special session, and that if the Legislature should fail to timely do so, the Nevada Supreme Court or the federal court could assert jurisdiction to establish a plan for reapportionment on its own or direct that all elected legislators be elected at large pending a valid reapportionment by the Nevada Legislature. *Id.*

In light of the foregoing, it is our opinion that, in order to ensure the requirements under the United States and Nevada Constitutions relating to reapportionment are fulfilled, the Governor has the discretionary authority to call the Nevada Legislature into special session for purposes of enacting a valid plan of reapportionment. In our opinion, unless and until a court asserts jurisdiction and intervenes in the matter by asserting procedural control, the analysis in section 2 of this opinion remains applicable and the Governor retains the discretionary power to revoke an executive proclamation convening a special session for purposes of enacting a plan of reapportionment, and the discretionary authority to specify a time period during which his executive proclamation shall be in effect.

CONCLUSION TO QUESTION THREE

The United States and Nevada Constitutions mandate that the Nevada Legislature enact a valid plan of reapportionment and redistricting following each decennial census. Although the Legislature had a duty under Article IV, Section 5 of the Nevada Constitution to enact such legislation during the 2001 regular legislative session, the Legislature’s inability to perform that duty does not extinguish the obligation to enact a valid plan of reapportionment, which can and should be enacted during a special session. The Governor thus has discretionary authority to convene a special session for such purposes and, unless and until a court of competent jurisdiction intervenes and directs otherwise, the Governor possesses the discretionary authority to revoke his proclamation convening such special session and thus the related discretionary

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authority to specify a time period during which his executive proclamation shall be in effect.

FRANKIE SUE DEL PAPA
Attorney General

By: THOMAS M. PATTON
First Assistant Attorney General

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AGO 2001-15 TORT CLAIMS; FUNDS; ATTORNEYS GENERAL; BOARD OF EXAMINERS; RISK MANAGEMENT: Tort claims and civil actions against individuals entitled to indemnification are broad categories for which expenditures from the fund for insurance premiums in NRS 331.187 may be made. Expenditures from the fund may not be made for actions for affirmative relief, contract actions, real property takings, or other actions for which specific funding is authorized elsewhere in statute. Clarification should be obtained as to which types of expenses related to tort claims and civil actions may be paid from the fund and legislation should be sought to clarify what funding is available when affirmative relief is sought on behalf of the State or its employees.

Carson City, June 20, 2001

John P. Comeaux, Director, Department of Administration, 209 East Musser Street, Room 200, Carson City, Nevada 89701-4298

Dear Mr. Comeaux:

You have requested an opinion from this office regarding the State fund for insurance premiums created pursuant to NRS 331.187. The fund is commonly referred to as the Tort Claims Fund. Specifically, you have asked what expenditures may lawfully be made from this fund and what administrative procedures are applicable to the fund. In your request, you questioned whether payments could be made from the fund for indemnification or defense in a situation involving a county employee and in another situation involving the State as a plaintiff and not involving a tort.

QUESTION ONE

What expenses may properly be paid from the proceeds of the fund for insurance premiums established in NRS 331.187?

ANALYSIS

The fund for insurance premiums is established in chapter 331 of NRS concerning state buildings, grounds, and properties and within the statutes governing the state risk management division. NRS 331.187.¹ State agencies

¹ The statute provides as follows:

1. There is created in the state treasury the fund for insurance premiums as an internal service fund to be maintained for use by the risk management division of the department of administration and the attorney general.
2. Each state agency shall deposit in the fund:
 - (a) An amount equal to its insurance premium and other charges for potential liability, self-insured claims, other than self-insured tort claims,

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are to deposit in the fund amounts to cover insurance premiums, potential liability, and administrative expenses, as well as an amount for self-insured tort claims and expenses related to those claims. Use of the fund is granted to the risk management division and the attorney general, and expenditures from the fund must be made to an insurer for state agency premiums or for deductibles, self-insured property, and tort claims or claims pursuant to NRS 41.0349. Other statutes reference the duties of the state risk manager and set forth specifics as to the types of insurance to obtain, premiums to pay, deductibles to select, and when to provide self-insurance. NRS 331.184, 331.186. Additionally, section 331.187 references another statute, NRS 41.0349,² which is a part of Nevada's statutes in chapter 41 concerning actions or tort claims against the State and its employees and the attendant duties of the attorney general.

When construing statutes, generally we must not look beyond the plain meaning of the statutes if they are clear and unambiguous. See *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 797 P.2d 946 (1990), *overruled in part on other grounds*, *Calloway v. City of Reno*, 116 Nev. Adv. Op. 24, 993 P.2d 1259, 1269-70 (2000). Several statutes are involved in determining what insurance premiums and deductibles are referenced or what "claims" are covered. Accordingly, we must examine these words in the context of the entire subject matter and the policy of the law. *Cragun v. Nevada Pub. Employees' Ret. Bd.*, 92 Nev. 202, 205, 547 P.2d 1356, 1358 (1976). As will

(..continued)

and administrative expenses, as determined by the risk management division; and

(b) An amount for self-insured tort claims and expenses related to those claims, as determined by the attorney general.

3. Expenditures from the fund must be made by the risk management division or the attorney general to an insurer for premiums of state agencies as they become due or for deductibles, self-insured property and tort claims or claims pursuant to NRS 41.0349. If the money in the fund is insufficient to pay a tort claim, it must be paid from the reserve for statutory contingency account.

NRS 331.187.

² NRS 41.0349 states:

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

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

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be discussed below, all of these statutes are part of a comprehensive approach to what is briefly mentioned in the statute under consideration, NRS 331.187. As such, these statutes must be read together. All statutes relating to a subject must be construed to render them compatible and to give effect to the legislative intent of each, if possible. *State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830, 836 (1977). The primary focus in construing our statutes is to give effect to the legislative intent. *Roberts v. State, Univ. of Nevada System*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988). A review of legislative history would not be appropriate if, reviewing all of the statutes together, the plain meaning of the statutes is clear and unambiguous.³ The analysis below will address allowable expenditures from the fund under consideration here according to the different types of expenses.

A. Insurance Premiums or Deductibles.

Section 331.187 of NRS does not state what kind of premiums or deductibles can be obtained. This is better defined in sections 331.184 and 331.186 of our statutes. These statutes appear to be sufficiently specific for purposes of describing expenses which can be paid from the fund for premiums, deductibles, and insurance or self-insurance. The latter statute also describes what the risk manager must consider in determining the need for, the form, and the amount of insurance coverages. As such, the focus can now turn to other expenses which can be paid from the fund.

B. Expenditures for “Tort Claims.”

This analysis starts with the directive in NRS 331.187 that expenditures are to be made from the fund for “tort claims.” A tort is generally considered to be “a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.” *K Mart Corp. v. Ponsock*, 103 Nev. 39, 46, 732 P.2d 1364, 1368 (1987), citing BLACK’S LAW DICTIONARY at 1335 (5th ed. 1979). With the reference in section 331.187 to chapter 41, and in the context involved here, it is evident that the Legislature has recognized some of the various types of torts. For instance, NRS 41.0385 requires the attorney general to compile summaries of all claims made against state agencies and also requires the claims in the summaries to be “arranged by category of wrong alleged, such as battery, false arrest, negligent injury, wrongful death, and the like” NRS 41.0385. Some other torts typically encountered would be negligent infliction of emotional distress, interference with property (such as trespass or conversion) and, perhaps, slander or defamation. See generally PROSSER ON TORTS at 10-11 (West 1971).

³ Although reference to legislative history is not always appropriate, we have reviewed the legislative history regarding the fund for insurance premiums in NRS 331.187. Unfortunately, it does not shed light on the issues involved here.

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The word “claim” is a broad term with different meanings in different contexts. It can mean to demand or to assert, and can mean “a cause of action.” BLACK’S LAW DICTIONARY 247 (6th ed. 1990). It may be considered, in the context of chapter 41, as an administrative assertion by an individual rather than as a court filing or “action.” For instance, the attorney general has authority to review and approve or recommend approval of administrative tort claims against the State or its employees. NRS 41.036. And “any claim or action” against the State or its employees may also be approved, settled, or denied by the state Board of Examiners. NRS 41.037(1). Court rules in this State, however, certainly use the term “claim” as part of a court action when requiring that a plaintiff plead in his complaint “a claim for relief.” Nev. R. Civ. P. 8 (a).

Based upon the analysis here, the term “tort claims,” as used in section 331.187, would appear to be a reference to the amounts paid to resolve an assertion of civil wrongdoing against the State or its employees by way of the administrative tort claims system set forth in chapter 41. The claims for numerous “torts” referenced above may be processed through the administrative system. Thus, expenditures from the “Tort Claims Fund” pursuant to section 331.187 would be appropriate when paying the amounts determined to be owed to one who has filed an administrative tort claim against the State.

C. Expenditures for Indemnifications in Civil Actions.

Section 331.187 also authorizes expenditures for “claims pursuant to NRS 41.0349.” Section 41.0349 provides generally that employees of the State or local governments, as well as legislators and “immune contractors,” are entitled to be indemnified by the State or political subdivision in “any civil action” brought against those employees and other individuals listed in the statute and related to their public duty or employment. The analysis here must now turn to a determination of the meaning of “civil action.”

It is not clear why NRS 331.187 uses the term “claims” while section 41.0349 uses the term “civil action.” Other statutes in chapter 41 use both of these terms, and other terms, and reference tort claims or actions against the State, as well as the duties of the attorney general. Interestingly, these statutes use either the terms “tort claim” or “claim” used in section 331.187, or the term “civil action” or a variance thereof. *See, e.g.*, NRS 41.0349 (“civil action”), NRS 41.036 (“claim against the state arising out of a tort”), NRS 41.037 (“claim or action”), NRS 41.0385 (“claims . . . for tortious conduct”), NRS 41.039 (“action” or “claim”). Moreover, state and local governments are authorized to insure themselves against “any liability arising under NRS 41.031.” NRS 41.038(1)(a). Section 41.031 of our statutes is the State’s waiver of immunity from “liability and action” in accordance with the

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provisions of chapter 41. A related statute requires the official attorney⁴ to “provide for the defense, including the defense of cross-claims and counterclaims,” of the qualified individuals⁵ “in any civil action” relating to their employment if they timely request a defense. NRS 41.0339.

The term “civil action” is very broad and typically includes any personal action to protect a right or redress or prevent a wrong, and is other than a criminal action. *See* BLACK’S LAW DICTIONARY at 245 (6th ed. 1990). This clearly encompasses an action filed in court or an administrative action filed pursuant to chapter 41. There are a multitude of “civil actions” which have historically been brought against current or former state or local government employees, board members, and immune contractors. These range from federal constitutional or civil rights actions⁶ in state or federal courts to simple tort actions, of the kind noted above, filed in state courts pursuant to the requirements of chapter 41 of our statutes.⁷ Accordingly, the “Tort Claim Fund” may properly be used to pay for these kinds of claims or actions.

D. Types of Costs and Expenses Payable From the Fund.

Up to this point, the discussion has focused on the statutory language of NRS 331.187(3) that expenditures from the fund may be made for “tort claims or claims pursuant to NRS 41.0349.” As noted above, however, this explains only the payments for the amount of the claims or civil actions themselves—that is, the amount of the damages—but not the other expenses which may be

⁴ The attorney general is generally the “official attorney” for the State for the individuals qualified to receive indemnity. *See* NRS 41.0338.

⁵ At times, it may be questionable whether a qualified individual is an employee of the State or county government. A resolution of this issue would be important in determining which entity will indemnify the individual. If the State will indemnify, the fund for insurance premiums would apply. In the recent legislative session, NRS 331.187 was amended to hold counties responsible for the costs of defense of court employees. S.B. 568 (2001).

⁶ Actions in federal courts for civil rights violations are filed under various federal statutes including 42 U.S.C. § 1983 (constitutional violations) and 42 U.S.C. § 2000e-2 (Title VII unlawful employment acts). Notably, these actions are not subject to the tort cap in State statute. These violations are often referred to as constitutional or civil rights torts. D. Dobbs, *THE LAW OF TORTS* at 81-82 (West 2001). Additionally, section 1983 civil rights actions in federal court are generally brought against named state employees acting under color of law rather than against the State of Nevada itself. This is largely due to the Eleventh Amendment bar of actions against the State for money damages.

⁷ Actions in state court must follow the procedures and restrictions found in chapter 41. These include a limit on the amount of an award or a “tort cap” (NRS 41.035), a proscription against judgments against the State or its agencies for acts or omissions by an employee outside the course and scope of his employment (NRS 41.03475), and discretionary immunity (NRS 41.032). In contrast to federal civil rights actions filed pursuant to 42 U.S.C. § 1983, tort actions in State courts typically name the State of Nevada itself, as required by statute. NRS 41.031(2).

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involved in claims or civil actions. There are typically a variety of expenses involved with the defense of tort claims and the indemnification of a qualified individual. These may include, in addition to the judgments or settlements, such expenses as costs for witnesses, consultants and expert witnesses, investigative costs, costs for discovery, and attorney's fees.

Unfortunately, NRS 331.187(3) does not specify the types of expenses allowable. In contrast, NRS 331.187(2) requires state agencies to deposit into the fund an "amount for self-insured tort claims *and expenses related to those claims*, as determined by the attorney general." [Emphasis added.] NRS 331.187 does not provide any indication of a cap or ceiling on the amount of costs and expenses related to tort claims or civil actions which may be paid, as there is on tort claims themselves. *See* NRS 41.035(1). Additionally, the Legislature has provided another funding source when special counsel must be employed by the attorney general or when the official attorney has not provided for the defense of a qualified individual. Such payments are made from the reserve for statutory contingency account. NRS 353.264 (authorizing payment of claims per NRS 41.03435 and 41.0347).

Based upon the absence of specific language providing for payment of expenses related to tort claims or claims under section 41.0349, one might conclude that the Legislature intended that expenses not be paid from the fund. But the long history of payments from this fund clearly includes these types of expenses.⁸ Deference is to be given to an agency's interpretation of a statute when it is within the language of the statute. *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). It is reasonable to conclude that the Legislature intended to have state agencies pay into the fund for the types of expenses that would be paid from the fund. Moreover, whenever there is litigation, these types of expenses inevitably are incurred in relation to the claim, judgment or settlement itself, beyond the usual attorney hours incurred by the attorney general or expenses covered by a state agency.⁹

⁸ This history includes the payments for related expenses made by the department of administration before responsibility for this part of the fund shifted to the attorney general. Additionally, for many years, the State has obtained an independent actuarial report that projects the costs of claims for future budgeting and for charging agencies pursuant to NRS 331.187(2). These reports show projected loss adjustment expenses that include indirect expenses to settle claims or litigation.

⁹ The expenses discussed here are those which are beyond the hours expended by the attorney general for the investigation of a claim or defense of a qualified individual. The costs for services of the attorney general are paid by state agencies in the cost allocation plan or charged to the agency by the attorney general. NRS 228.113. Additionally, the practice of the attorney general and the directive from the department of administration is that a state agency is responsible for the expenses related to legal action initiated against that agency for specific agency activity or responsibility. This includes legal and court expenses and travel expenses incurred by the attorney general related to the specific case. *See* Memorandum to Marietta Grass, Att'y Gen. Chief Financial Officer, from Don Hataway, Chief Assistant, Dep't of Admin. Budget Division

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Reading section 331.187 as a whole and in light of the other statutes discussed here, the intent of the Legislature appears to have been to authorize expenditures from the fund for costs or expenses of litigation against those entitled to a defense by the State and for any administrative claim of asserted liability against those same individuals or the State, other than expenses normally incurred by the Attorney General or expenses which are the responsibility of a state agency. Because no limit on the amount of expenses is stated in applicable statutes, this is a matter left to the discretion of the Attorney General and, ultimately, the Board of Examiners or the Legislature.

E. Actions By the State vs. Actions Against the State or its Employees.

What has not been discussed to this point are actions or claims by the State as an entity or by the listed individuals against others, as opposed to assertions of liability against, or the defense of, the State or the listed individuals. None of the statutes referenced above include language indicating that the fund for insurance premiums may be used proactively to recover money or property or for other relief. For instance, state property may be damaged or state employees may be harmed by the actions of others that might amount to a tort. The State may also wish to pursue against others civil actions not involving a tort. Examples may be eminent domain actions to obtain property for state uses, breach of contract actions, collections of debts, and declaratory judgment actions, just to name a few. Of course, the Attorney General does have specific authority to initiate civil actions, as well as criminal prosecutions, of many different types. *See* NRS 228.140 (actions in supreme court) and NRS 228.170 (actions necessary to protect and secure interest of State). This does not mean that expenditures for those actions are to be paid from the fund for insurance premiums in NRS 331.187. Usually, separate funds or budgets are available for these specific matters.¹⁰

Had the Legislature contemplated use of the fund for actions initiated by the State, the Legislature could have easily provided for it. The failure to so provide indicates legislative intent that the fund may not be used in this manner.¹¹ As a matter of fact, specific authority is provided to agencies and

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(May 9, 1996). The discussion in the text focuses, then, on expenses beyond those covered by a state agency.

¹⁰ Some expenses related to litigation are unexpected and require prompt payment before usual processing can occur. The Legislature has provided a revolving account for the Attorney General for this purpose, but only in the relatively small amount of \$5,000. NRS 228.099(1). Payments from this account must be promptly reimbursed from any legislative appropriation to the Attorney General for special litigation. NRS 228.099(4).

¹¹ The Legislature could have authorized use of the fund, for instance, by including a provision that expenses for actions or claims for the recovery of property or damages may be paid from the fund.

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the Attorney General to initiate actions to collect debts owed to the State. NRS 353C.140–.180. The Legislature could have specifically designated, but did not, these collection actions or other similar actions when stating the proper uses of the fund for insurance in NRS 331.187. Based on the analysis provided above, the fund for insurance premiums may not be used for the prosecution of any claims or litigation the State may pursue against other entities or individuals.¹²

F. Other Types of Claims or Civil Actions.

Another area of concern is claims or litigation against the State or its personnel for such things as breach of contract, contract claims by contractors for additional payments, or a constitutional claim for a taking of real property without just compensation. The latter is typically a claim based on the state or federal constitution. Only certain state agencies are authorized to acquire real property and those agencies should have funds authorized for real property acquisitions.¹³ Similarly, contracts are entered into by state agencies under separate authority and those agencies should have the funds allocated for those purposes. No authority has been found construing a contract administrative claim or contract cause of action by or against the State or its employees as a tort or civil action as described in the text above.¹⁴ As noted above, a breach of contract claim is not considered to be a “tort claim” and there is no indication in chapters 41 or 331 that it is intended to be. Similarly, because a state agency, rather than a state officer or employee, is the contracting party, a contract action is filed in court naming the involved state agency and not an

(..continued)

¹² Similarly, the Legislature also did not specifically allow use of the fund when the official attorney, while defending an action in litigation, is filing a cross-claim or counterclaim to recover damages or obtain other affirmative relief. Often, this can be a matter of strategy in defending an action, but such action may also be required in order to preserve the claim. *See Nev. R. Civ. P. 13(a), (g)* (compulsory counterclaims and cross-claims). This is largely a matter of judgment by the official attorney in representing the client and the expenses for such litigation could reasonably be considered as a necessary part of the defense or indemnification of a qualified person. The Board of Examiners should address this situation and clarify by regulation the extent to which the fund may be used for these purposes.

¹³ Nevada law authorizes the Division of State Lands, the Department of Transportation, the University System, and the Legislature to acquire and own property in the name of the State. *See NRS 321.001*. Any other acquisition, intended or unintended, would be *ultra vires*. Asserted claims or actions for the taking or “conversion” of personal property would be in the nature of a constitutional claim or a tort action. Either of these would be within the broad parameters of appropriate uses of the fund as discussed above.

¹⁴ On the contrary, chapter 41 authorizes a court action to be filed against the State when a claim has been denied for services or advances for which an appropriation was made. Any judgment is to be paid by a warrant from the state controller. NRS 41.010–.030. This kind of claim and action could include a contract claim. *See Op. Nev. Att’y Gen. 200 (Jan. 11, 1961)*.

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individual who would be entitled to indemnification under NRS 41.0349. Furthermore, other Nevada statutes address contract claims. For instance, the duty is given to the state Board of Examiners (Board) to examine “all claims arising out of contract . . . against the state presented to the board by petition, for which no appropriation has been made and which require action by the legislature.” NRS 353.085(1)(a). The Board, then, is to provide its opinion, on the merits, to the Legislature at its next session. *Id.* 353.085(2). State agencies are also given specific authority to expend monies for certain contract work and expenses which typically include contract claims.¹⁵

On these bases, use of the fund for these purposes would not be appropriate. It is conceivable that an action against the State or one of the individuals authorized to be indemnified could contain a mixture of claims, the expenses for some of which may or may not be payable from the fund. In addition, the amount of costs or expenditures attributable to each claim may not be easily ascertained. In this situation, reason would suggest that a determination be made by the Attorney General, and ultimately the Board of Examiners, in allocating expenses fairly attributable to each.

CONCLUSION TO QUESTION ONE

There are many claims and expenses that may be properly paid from the fund for insurance premiums pursuant to NRS 331.187. The obvious ones are listed more specifically in the statute regarding insurance coverages, premiums, deductibles, and administrative expenses. Tort claims and civil actions against qualified individuals are broad categories covering personal injury and property damage assertions in either an administrative or litigation setting. Also included are actions filed in federal court for “constitutional torts” or similar violations.

Proper use of the fund does not include the prosecution of personal injury, property damage, or federal actions, or any other affirmative relief on behalf of the State or its employees. Expenses from the fund would be appropriate for pursuing counterclaims and cross-claims necessary to the defense or indemnification of a qualified person, but regulations addressing the parameters of these expenses should be considered. Claims and expenses from the fund are also not proper for assertions of breach of contract or the prosecution thereof. Similarly, constitutional real property takings claims and related expenses are not properly paid from the fund.

¹⁵ For instance, the state public works board obtains funding in its approved budget for capital construction, *see* NRS 341.146, 341.149, and can approve claims and, for projects financed in part by federal funds, temporarily obtain state general fund money to cover the claim. NRS 341.095. The department of transportation utilizes the highway fund for highway construction which is typically used for construction claims, judgments, and settlements. *See* NRS 408.235.

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QUESTION TWO

What are the procedures for making expenditures from the fund for insurance premiums pursuant to NRS 331.187 and what, if any, procedural, regulatory or statutory changes should be made to either procedures or statutes for clarification purposes?

ANALYSIS

Based upon concerns expressed regarding whether expenditures from the fund are or have been proper, it is appropriate to review the applicable procedures for expenditures. You have also asked for any suggested changes to procedures or statutes in order to clarify what expenditures may properly be made from the fund.

A. Procedures for Making Expenditures from the Fund.

As noted above, Nevada statutes in chapter 331 adequately describe the duties of the state risk manager and the factors for determining the need for, and amount of, insurance premiums. Based on the analysis above, however, it is clear that some clarification is needed regarding claims and litigation involving the State. Regulations or written procedures have not been found which clarify the types of expenditures that can be made from the fund for these purposes.¹⁶

Within the Attorney General's Office, there are general procedures for the handling of claims and actions against the State. An administrative claim begins when a claim form is submitted to the Attorney General pursuant to NRS 41.036. Pursuant to that statute, the tort claims manager for the Attorney General causes an investigation to be conducted either by himself, a tort claims adjuster within the office, an independent adjusting company, an investigator or deputy attorney general, or another state agency. Upon completion of the investigation, a written report with a recommendation to deny or pay the claim is submitted to the tort claims manager for review and is then approved by the Attorney General through the solicitor general. The

¹⁶ There are no regulations for NRS chapter 331 describing the risk manager's duties. Additional requirements for insurance and risk management for the State are found in administrative procedures. State Admin. Manual §§ 0502.0 to 0524.0 (1999). There are regulations adopted by the Board of Examiners which set forth how claims for compensation must be submitted and how they may be paid, but they do not address what types of expenditures can be made from the fund. Nev. Admin. Code §§ 41.100 to .130 (2001). Similarly, the administrative procedures are only short references to statutes or directives to employees as to what to do in the event of an automobile accident or claim. State Admin. Manual §§ 2901.0 to 2909.0 (1999).

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Board of Examiners has given authority to the Attorney General to approve, deny, or settle claims “[b]ased on the best interest of the state, as determined by the attorney general” for an aggregate amount less than the maximum allowable award set forth in NRS 41.035. Nev. Admin. Code §41.130. If the amount is more than the maximum allowed, the Board of Examiners determines whether to approve, deny or settle. NRS 41.036(5), 41.037(1). *See also* NRS 353.090 (every claim for payment from the state treasury pursuant to legislative authorization to be presented to board of examiners). When a claim or action is initiated against the State by litigation, the Attorney General or official attorney under chapter 41 handles the resolution of the litigation and recommendation for paying any settlement or judgment. While procedures for handling these claims and actions exist, we have not found any procedures for determining the types of expenses that may be made from the fund for insurance premiums when the expenses are related to claims or civil actions.

B. Suggestions for Clarification.

Nevada law specifically states that it is unlawful for any state officer or employee “to expend more money than the sum specifically appropriated by law” for any office or department and every “claim allowed in violation of the provisions of this [statute] shall be void.” NRS 353.260(1) and (3). Violation of this statute constitutes malfeasance and is a misdemeanor. Sums appropriated to state agencies must also be applied solely to the objects for which they are made and violations of this law are punishable by a fine of \$500. NRS 353.255. It is important, then, that those state officials administering the fund for insurance premiums understand just what expenses related to tort claims and civil actions can or cannot be paid from the fund.

Due to the lack of specifics in statute or regulation regarding the types of expenses related to tort claims or civil actions that can be paid from the fund, it is suggested that several clarifications be made.¹⁷ These suggestions emanate from the discussion above and are outlined here:

1. Identify more clearly what a tort claim is and what a civil action is for which a qualified individual may be indemnified by the State, the expenditures for both of which may be paid from the fund for insurance premiums. The latter should include almost any litigation against a named individual in either state or federal court. Both

¹⁷ Some of these clarifications would properly be the subject of regulations adopted by the Board of Examiners pursuant to chapter 41 of NRS or a procedure within the Attorney General’s Office, while others will require legislative action. The Board of Examiners has the authority to adopt regulations regarding the types of claims the Attorney General is required to approve, settle, or deny and the procedure to be used by the Attorney General. NRS 41.036(6). *See* NRS 353.040.

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should preclude such actions as breach of contract or others for which specific legislative authorization for funding is provided elsewhere.

2. Outline what types of expenses are appropriately related to a tort claim or a civil action. This will largely be a matter of judgment by the Attorney General, who should determine what expenses are related to the claims or actions.
3. Pursue legislative authorization for the payment of expenses related to actions by the State for the recovery of personal property, damages, or other relief, or by the State when pursuing counterclaims and cross-claims, which is not otherwise provided.
4. Define the procedures to be used for determining how expenditures can be allocated when a claim or action involves a mixture of proper and improper expenses. This also will largely be a matter of judgment by the Attorney General.
5. Provide a combined procedure describing the source and purpose of all available funding for the various claims, judgments, and expenses that can be incurred by the Attorney General or State.

CONCLUSION TO QUESTION TWO

Adequate statutes and procedures exist for determining the proper expenditures from the fund for insurance premiums in NRS 331.187 as they relate to insurance. General procedures exist for handling claims or actions generally, but there are no regulations or procedures for determining what types of expenses related to tort claims or civil actions can be paid from the fund. Because State law prohibits expenditures beyond what is specifically appropriated or authorized by the Legislature, it is suggested that clarification

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by procedure, regulation, or statute be obtained as to what expenses are appropriately paid from the Tort Claims Fund.

FRANKIE SUE DEL PAPA
Attorney General

By: BRIAN HUTCHINS
Chief Deputy Attorney General

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AGO 2001-16 TAXATION; SALES; USE TAX: Only retailers are granted a collection allowance for the taxes they collect, and only for their collection of sales and use tax from purchasers. The collection allowance does not apply to use tax remitted by the consumer of the property.

Carson City, June 26, 2001

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

Dear Mr. Pursell:

You have requested an opinion from this office on the issue of the tax collection allowance credit authorized by NRS 372.370.¹

QUESTION

Is the collection allowance credit authorized by NRS 372.370 available to any taxpayer liable for use tax under NRS chapter 372?

ANALYSIS

NRS 372.370 provides:

The taxpayer shall deduct and withhold from the taxes otherwise due from him 1.25 percent of it to reimburse himself for the cost of collecting the tax.

This office has issued three prior opinions on the application of the collection allowance. In Attorney General's Opinion No. 478, dated January 8, 1968, it was stated: "The discount should be computed on all taxes collected by the retailer pursuant to Chapter 372 of NRS."

In Attorney General's Opinion No. 547, dated November 27, 1968, it was stated:

When a retailer personally uses or consumes his inventory, he must collect and remit a sales tax and should be allowed a collection allowance.

When a retailer uses his inventory in furtherance of his business, a use tax is due from the retailer directly to the

¹ The analysis and opinion set forth are also applicable to the collection allowance provisions of NRS 374.375, which is identical to NRS 372.370.

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State, no costs of collection are incurred, and no deduction is allowed.

In Attorney General's Opinion No. 132, dated June 1, 1973, it was stated:

All persons liable for a tax under NRS Chapter 372, whether retailers, users or consumers, may deduct and withhold from the taxes otherwise due the "collection allowance" credit authorized by NRS 372.370.

This opinion was requested because the prior opinions appear to be inconsistent. It is clear from the foregoing that the statute is susceptible to more than one interpretation. Therefore, rules of statutory interpretation require that the legislative intent be ascertained. *See Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994); *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). At the time the prior opinions were written, the legislative history from the original enactment of the collection allowance was not available. However, the statute at issue has been amended three times since the prior opinions were rendered, and some legislative history is available regarding those amendments, from which legislative intent regarding this statute may be gleaned. In 1979, the amendment was part of an extensive amendment to the tax code, and the legislative history does not contain anything relevant to the particular provision on the collection allowance. When the statute was amended in 1981 and 1991, though, in both instances the legislative history indicates that the legislature intended the collection allowance to apply only to retailers and the references are solely to the collection of sales tax.

In 1981, the statute was amended to reduce the percentage of the amount collected that could be withheld as a collection allowance. The discussion held before the Joint Committees on Taxation regarding this amendment focused solely on retailers and the sales tax they collected.

The fee *retailers* are permitted to keep for collecting the *sales* tax was discussed. The *retailers* are presently allowed to keep 1.375 cents of the tax they collect. Assemblyman Price moved that Assembly Bill No. 369 be amended to allow *retailers* to keep two percent of the *sales* tax collected. Assemblyman Cafferata seconded the motion. The motion failed after the following discussion. . . .

. . . .

Assemblyman Rusk stated the *retailers* would receive an increase without the amendment because an increased *sales*

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tax would result in an increase of revenue generated by the percentage fee.

Assemblyman Craddock stated the *sales* tax should be determined prior to deciding whether the *retailers'* collection fee should be increased.

Mr. Nickson stated a five-cent *sales* tax would result in the retailers retaining \$3.5 million.

....

Senator Glaser moved that the *retailers* be allowed to keep 1.5 percent of the *sales* tax collected. Senator Getto seconded the motion. The motion carried after the following discussion. . . .

Hearing on A.B. 369 Before the Joint Committees on Taxation, 1981 Leg. Sess. 12 (April 14, 1981) (emphasis added).

Additionally, during the Senate Committee on Taxation's consideration of the 1981 amendment, they requested a study on *retailers' sales* tax collection costs to study the impact of the amendment to the collection allowance. *Hearing on A.B. 369 Before the Senate Committee on Taxation*, 1981 Leg. Sess..2 (April 23, 1981).

In 1991, section 2 of Assembly Bill 295 (A.B. 295) was explained by Mr. Ted Zuend, Deputy Fiscal Analyst for the Legislative Counsel Bureau, as the part of the bill dealing with the collection allowance that "reduced the discount kept by taxpayers who collected *sales* tax from 1.5 to 1.25 percent." *Hearing on A.B. 295 Before the Assembly Committee on Taxation*, 1991 Leg. Sess..2 (June 18, 1991) (emphasis added). Additional references during that hearing were again to retailers and sales tax:

Mr. Bergevin asked Mr. Zuend to explain the rationale in discounting the . . . fee . . . for collecting *sales* tax.

....

Mr. Zuend referenced commissions on *sales* tax and explained in 1981 the *sales* tax was raised from 3.5 to 5.75 percent. At that point the commission was reduced from 2 to 1.5 percent which remained unchanged since 1981. Local *sales* taxes increased which provided additional revenue to *retailers* without additional cost. If AB 295 were enacted with the 75 percent increase, additional revenue would be produced to *retailers* with no additional cost of collecting the tax.

Id. at 3 (emphasis added).

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The legislative histories from 1981 and 1991 indicate that the Nevada Legislature regarded this collection allowance as being for retailers only. Additionally, all references to taxes were to sales tax, and no references to use tax were found in relation to the collection allowance. However, throughout the legislative histories for both A.B. 369 in 1981 and A.B. 295 in 1991, there are references to the increase in sales tax, when the increase was to both sales tax and use tax. This indicates a possibility that references solely to sales tax may not have been intended to exclude use tax.

When interpreting a statute susceptible to more than one interpretation, legislative intent can also be determined by looking at the entire act and construing the statute in light of its purpose. *Hotel Employees & Restaurant Employees Int'l Union v. State ex rel. Nevada Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987). Additionally, the statute should be construed in line with what reason and public policy would indicate the Legislature intended. *Polson v. State*, 108 Nev. 1044, 1047, 843 P.2d 825, 827 (1992).

The provision regarding the collection allowance was originally enacted in 1955, when Nevada first enacted its Sales and Use Tax Act. The Sales and Use Tax Act imposed an obligation upon retailers to collect sales and use tax from purchasers. This obligation essentially made the retailers tax collectors for the State. It is the retailers that must pay the sales tax for the privilege of selling tangible personal property in the State of Nevada, and it is the retailers that owe the use tax debt to the State of Nevada. NRS 372.105 imposes the sales tax on the retailers:

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

NRS 372.195 imposes the obligation on the retailers to also collect use tax from purchasers, where sales tax is not applicable:

Every retailer maintaining a place of business in this state and making sales of tangible personal property for storage, use or other consumption in this state, not exempted under NRS 372.260 to 372.350, inclusive, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give

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to the purchaser a receipt therefor in the manner and form prescribed by the tax commission.

NRS 372.200 makes the use tax obligation a debt owed by the retailer:

The tax required to be collected by the retailer constitutes a debt owed by the retailer to this state.

From the plain language of the statute and the legislative history, it appears that the collection allowance was contemplated as an incentive to retailers to be the State's tax collector. The statute clearly grants an allowance to retailers for their costs of collecting sales tax.

Attorney General's Opinion No. 132, dated June 1, 1973, focused on the fact that NRS 372.370 used the term "taxpayer" instead of retailer, and as users or consumers are potential "taxpayers" they should be included in the collection allowance. However, consumers and users are not required to "collect" tax, just to pay the tax. They are not acting in the capacity of the State's tax collector.

Looking at the legislative histories of the amendments in 1981 and 1991, and at the Sales and Use Tax Act as a whole, it is logical to conclude that the collection allowance was not intended to apply to all consumers and users. The legislative intent was to allow only retailers the collection allowance because they are the ones collecting the tax on behalf of the State. Such an interpretation corresponds with the reasoning used by courts in other jurisdictions. The reasoning is that the retailer acts as an agent for the State for the collection of the State's taxes and that is the reason for granting a collection allowance to the retailer. See *Monroe v. Harco, Inc.*, 762 So.2d 828, 832 (Ala. 2000); *Davis v. Texas*, 904 S.W.2d 946, 952 (Tex. Ct. App. 1995).

The question remains whether retailers are granted a collection allowance for the collection of use tax on purchases from the retailer where use tax instead of sales tax would be due to the State of Nevada. In the case of retailers who collect use tax from persons who use, store, or otherwise consume tangible personal property in Nevada, the retailers are performing the duty of collecting tax for the State of Nevada, the same as they would for sales tax. Logically, the collection allowance should also apply to such retailers.

This interpretation is supported by case law from another jurisdiction that has a statute identical to NRS 372.370. In *Marcum v. Louisville Municipal Housing Commission*, 374 S.W.2d 865, 869 (Ky. Ct. App. 1963), the Kentucky Court of Appeals stated that the taxes contemplated by Kentucky's statute were both sales taxes and use taxes. Because use taxes must be

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collected by the retailer from the user and they become a debt owed by the retailer to the state, the court found that the retailer is granted a collection allowance on use tax as well as sales tax.

Because some retailers act as the State's agent for collecting use tax due in the situation where a retailer with an out-of-state location collects and remits use tax due from Nevada residents who make out-of-state purchases from the retailer, that retailer is "collecting" use tax. Logic dictates that such collection of use tax should be treated the same as the collection of sales tax because the retailer is acting as a tax collector for the State of Nevada. However, as stated in Attorney General Opinion No. 547, dated November 27, 1968, when a retailer uses his inventory in furtherance of his business, a use tax is due from the retailer directly to the State, no costs of collection are incurred, and no collection allowance is authorized in that situation. The retailer in that instance is the same as any other consumer or user and is not acting as the State's tax collector.

CONCLUSION

The provisions of NRS 372.370 apply only to retailers and only to their collection of sales and use tax from purchasers. To the extent Attorney General Opinions No. 478, dated January 8, No. 547, dated November 27, 1968, and No. 132, dated June 1, 1973, are inconsistent with this opinion, they are hereby modified.

FRANKIE SUE DEL PAPA
Attorney General

By: ELAINE S. GUENAGA
Senior Deputy Attorney General

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AGO 2001-17 TRUCKEE MEADOWS REGIONAL PLANNING AGENCY; STATUTES: The requirement for a regional plan to be updated not less than every five years means it is to be updated within five years from the date of the last update. The failure to complete the update within that time frame does not void the existing plan, and the regional planning commission should continue to proceed with completing the update as soon as is practicable.

Carson City, June 27, 2001

Emily Braswell, Director, Truckee Meadows Regional Planning Agency, One East First Street, Suite 900, Reno, Nevada 89501-1625

Dear Ms. Braswell:

On June 8, 2001, you requested an opinion from this office on issues involving the 2001 Regional Plan Update per NRS 278.0272.

QUESTION

What is the deadline for the five-year regional plan update required under NRS 278.0272, and what is the effect if the update is not completed by that date?

ANALYSIS

In 1989, the Nevada Legislature enacted legislation authorizing the creation of a regional planning commission for counties with populations over 100,000 but under 400,000. This legislation thus authorized the creation of the Truckee Meadows Regional Planning Commission (TMRPC), formerly the Washoe County Regional Planning Commission. NRS 278.0262; NRS 278.0272; *Serpa v. County of Washoe*, 111 Nev. 1081, 1082, 901 P.2d 690, 691 (1995). Additionally, the statute required the development of a comprehensive regional plan for the physical development and orderly management of the region's growth for a twenty-year period. NRS 278.0272(1).

The statute also provided the directive for reviewing and updating the regional plan and provides the following:

The regional planning commission shall review the plan annually, update it not less than every 5 years, and forward its recommendations regarding proposed amendments to the plan to the governing board for adoption. Amendments to the comprehensive regional plan may be proposed only by

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the regional planning commission, the governing board or a local governing body. Except as otherwise provided in subsection 8, all requests for amendments to the plan must be studied and considered at public hearings held annually by the commission.

NRS. 278.0272(7).

Thus the TMRPC is required to review the Truckee Meadows Regional Plan (Plan) annually to determine if amendments are necessary to effectuate the goals of the Plan and to update the Plan at least every five years. The review process should be a continual course of action and the TMRPC may forward recommendations for proposed amendments to the Plan at any time.

The original directive from the Nevada Legislature was for the TMRPC to develop and approve a regional plan and transmit it to the regional governing board, formerly the Washoe County Regional Governing Board, now the Truckee Meadows Regional Governing Board (Governing Board), within 18 months after the effective date of the act creating the regional planning commission. Section 25 of chapter 370, Statutes of Nevada 1989, at page 769. The act was effective upon passage, which was June 17, 1989. The original regional plan was originally adopted by the TMRPC on January 15, 1991. The Governing Board reviewed the plan, referred amendments to the TMRPC, and the plan was adopted by the Governing Board on March 21, 1991. The regional plan was revised and re-adopted on June 10, 1993. The first five-year update was adopted on June 13, 1996.

From the plain language of the statute, the Plan was to be updated at least every five years. The five years would be calculated from the date of the last update, as there is no set cycle for the timing of the updates other than the five-year requirement. Therefore, the statutory deadline by which the TMRPC was obligated to submit its update recommendations was June 13, 2001.

When the TMRPC fails to meet that deadline, the effect of that failure is not specified by statute. When a statute is silent as to the consequences of failure to meet a statutory deadline, a question exists as to whether the deadline is directory or mandatory. See *Castorena v. City of Los Angeles*, 34 Cal. App. 3d 901 (1973); *Gowanlock v. Turner*, 267 P.2d 310, 312 (Cal. App. 1954). While the statute uses the word “shall,” that word is only presumptively mandatory and interpretations must look to legislative intent to determine whether that construction is correct pursuant to legislative intent. *State of Nevada v. American Bankers Ins.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990); *Waite v. Burgess*, 69 Nev. 230, 233, 245 P.2d 994, 996 (1952). “[T]he first great object of the courts in interpreting statutes, [is] to place such

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construction upon them as will carry out the manifest purpose of the legislature, and this has been done in opposition to the very words of an act.” *Gibson v. Mason*, 5 Nev. 283, 311 (1869). “Every statute must be construed in the light of its purpose.” *Berney v. Highway Department*, 42 Nev. 423, 427, 178 P. 978, 979 (1919).

In 1999, the Nevada Legislature amended certain provisions affecting the TMRPC and regional planning. At that time, a section was added to state the legislative intent regarding regional planning in a county with a population of more than 100,000 but less than 400,000. The legislature specifically stated the intent was to ensure that comprehensive planning would be carried out with respect to population, conservation, land use and transportation, public facilities and services, annexation, and intergovernmental coordination. *See* NRS 278.0261. The intent that planning for the region be comprehensive, with consideration of the many various concerns, is strong support for a conclusion that if the TMRPC fails to meet the five-year deadline, it still should proceed to complete the update as soon as possible. The TMRPC has the authority to bring forward amendments to the Plan at any time and is required to review it annually to see if amendments are necessary. Additionally, the statute itself evidences the intent that the Plan may be updated sooner than every five years. Five years should be the maximum time between updates. A comprehensive update on a five-year cycle is to allow many different aspects to be considered on a regional basis, while annual amendments are more in the nature of looking at specific areas. Accordingly, it appears the legislative intent is that the deadline is directory, and the failure to meet the deadline does not prevent the TMRPC from proceeding to complete the update as soon as practicable.

Additionally, when the creation of the regional planning commission was originally authorized and the commission was directed to adopt a regional plan, the legislation expressly stated that the regional plan in existence on the effective date of the act was to remain in effect until a new land use and transportation portion of a comprehensive regional plan was adopted. Section 26 of chapter 370, Statutes of Nevada 1989, at page 769. It would be consistent to conclude that the now existing regional plan will remain in effect until the update is completed.

This office has opined, in the context of the deadline for a county board of equalization to finish its business, that a statutory deadline, even where the word “shall” was used, was directory not mandatory. *See* Op. Nev. Att’y Gen. 94 (August 12, 1955). It was the opinion of the Attorney General’s Office that the deadline for finishing business that is before a board, where the time constraints will make it impossible to fully hear the cases before the board, is directory and not mandatory. The purpose of the statute is to have the business completed, and failure to meet the deadline should not prevent the

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completion of that business. Additionally, in other jurisdictions, courts have held that where the law is silent as to what happens if there is a failure to act within the set time limits, and the purpose of the law would be frustrated by prohibiting action after the deadline, the deadline must be directory and the public body must be allowed to continue to act past that deadline. *See Castorena v. City of Los Angeles*, 34 Cal. App.3d at 908 (redistricting was allowed even though it was past the deadline); *O'Connor v. Board of Comm'rs*, 142 N.E. 858, 862 (1924) (board allowed to relet contracts where failure to relet would result in construction of highways being thwarted).

In other jurisdictions, courts have found statutory deadlines to be mandatory when the deadline is part "of the essence of the thing to be done." *Beaver County v. Utah Tax Commission and Union Pacific Railroad Co.*, 919 P.2d 547, 552 (Utah 1996). Such deadlines are also mandatory if they are for the protection of members of the public and especially where there are negative words in the statute that the act shall not be done at any other time. *City of Yakutat v. Ryman*, 654 P.2d 785, 790 (Alaska 1982). However, a time frame is merely directory if it is given with a view to the proper, orderly, and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute. *Beaver County v. Utah Tax Commission and Union Pacific Railroad Co.*, at 552. This is especially true "where there are no negative words in the statute that the act shall not be done at any other time." *City of Yakutat v. Ryman*, at 790.

Here, the deadline is mostly for the prompt and orderly conduct of the business of the TMRPC. There is no language prohibiting the TMRPC from acting to update the Plan after the five-year deadline and no language imposing consequences for the failure to timely update the Plan. While the TMRPC should make every effort to timely complete updates, the language of the statute does not prevent the TMRPC from continuing with completion of the update.

Additionally, the Nevada Supreme Court has held that the word "shall" can be construed as directory when otherwise a hardship and inconvenience may occur. *See State ex rel. Dangberg v. Board of County Comm'rs*, 27 Nev. 469, 472, 77 P. 984,986 (1904). Here, the deadline is designed to have the region update its comprehensive plan in a comprehensive manner, instead of on a piece meal basis. This intent is shown by the fact that the annual amendments are allowed, but the update is to be of a more comprehensive nature. To prohibit the regional planning commission from proceeding with a comprehensive update would work a hardship on all interested parties by requiring a case-by-case amendment to the regional plan instead of allowing some overall planning decisions to take place. Such a prohibition would actually defeat the purpose of requiring a five-year update of the plan.

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Accordingly, the TMRPC should proceed to complete the update that is currently in process.

Furthermore, while the TMRPC proceeds to complete the update process, the current Plan remains in effect. In another jurisdiction, under a similar law that required a regional plan to be amended or readopted every five years, the court found that the mere fact that the plan had not been updated did not invalidate the plan or make the county's reliance upon it arbitrary. *Gramex Corp. v. Lexington-Fayette Urban Appellees County Gov't*, 973 S.W.2d 75 (Ky. Ct. App. 1998). This reasoning should also apply to this situation. The Plan is not invalid because the update has not been timely completed. The TMRPC may continue to act using the current Plan and retains the authority to amend the Plan, pursuant to its authority under NRS 278.0272. Until such time as the update is completed, the TMRPC should continue using the Plan that is currently in place.

CONCLUSION

The deadline for completing the five-year update to the Truckee Meadows Regional Plan (Plan) was June 13, 2001, five years from the date of the last update. However, the failure to timely complete the update does not prevent the Truckee Meadows Regional Planning Commission from completing the update in the near future. Additionally, the Plan will continue to be in effect until the update is completed. Until that time, amendments to the Plan may still be made pursuant to NRS 278.0272.

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Chief Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-18 LAW ENFORCEMENT; JURISDICTION: Capitol Police Division has broad law enforcement authority on state property.

Carson City, July 5, 2001

Richard Kirkland, Director, Department of Motor Vehicles and Public Safety,
555 Wright Way, Carson City, Nevada 89711-0900

Dear Director Kirkland:

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

QUESTION

What is the authority and jurisdiction of the Capitol Police Division on and off state property?

ANALYSIS

As a division of a state agency created by the Legislature pursuant to NRS chapter 481, the functions and responsibilities of the Capitol Police Division (Division) are expressly set forth by NRS 481.0475(2)(h). This Division has no general or common law powers, but only such powers which have been conferred by law expressly or implicitly. *See, generally, Andrews v. Nev. St. Bd. Cosmetology*, 86 Nev. 207, 467 P.2d 96 (1970). Under state law, the Division has broad law enforcement authority, but its jurisdiction is expressly limited to state property.

In reviewing the applicable provisions with respect to the authority of the Division, NRS 481.0475(2)(h) states: “The capitol police division shall assist the chief of the buildings and grounds division of the department of administration in the enforcement of subsection 1 of NRS 331.140.”

Subsection 1 of NRS 331.140 confers broad law enforcement authority on the Division as follows: “The chief [of the buildings and grounds division] shall take proper care *to prevent any unlawful activity on or damage to any state property under his supervision and control, and to protect the safety of any persons on that property.* [Emphasis added.] Notably, this statute only gives broad authority on state property.

It is a fundamental rule of statutory construction that “[w]hen a statute uses words which have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended.” *State v. State, Employees Assoc.*, 102 Nev. 287, 289, 720 P.2d 697, 699

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(1986). It is clear from the plain language of the relevant statutory provisions that the Division has broad law enforcement authority to prevent any unlawful activity on state property including the prevention of property damage and the protection of the safety of persons on state property.

The general provisions governing peace officers are set forth in NRS chapter 289. The relevant provision also references NRS 331.140: “Category II peace officer’ means: The personnel of the capitol police division of the department of motor vehicles and public safety appointed pursuant to subsection 2 of NRS 331.140.” NRS 289.470(16). Clearly, the Legislature chose to grant the Division broad law enforcement authority, but only on state property.

Additional authority for the Division is found in NRS 487.230, which provides for the removal of an abandoned vehicle. The statute authorizes the personnel of the Division, and other peace officers, to remove such vehicles abandoned on property in their jurisdiction. While this provision does not expressly refer to state property, equally fundamental is the rule of statutory construction that legislative acts be harmoniously construed. *First Am. Title Co. v. State of Nevada*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975). Accordingly, this provision must be construed to include only those vehicles abandoned on state property.

While the Division has broad law enforcement authority, the Legislature apparently chose to specifically limit its jurisdiction to state property as set forth by NRS 331.140. See NRS 481.0475(2)(h). For purposes of NRS chapter 331, “state property” includes all state buildings and grounds. NRS 331.070(1). “State property” also includes any buildings or “parts thereof owned by or leased to the state and occupied by such officers, departments, boards, commissions or agencies.” NRS 331.070(3).

Further indication of the Legislature’s intent to limit the jurisdiction of the Division is the language providing for the payment out of the buildings and grounds operating budget for the expenses and salaries of Division personnel for securities services on state property:

The director of the department of motor vehicles and public safety shall appoint to the capitol police division of that department such personnel as may be necessary to assist the chief of the buildings and grounds division in the enforcement of subsection 1. The salaries and expenses of the personnel appointed pursuant to this subsection must,

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within the limits of legislative authorization, be paid out of the buildings and grounds operating fund.

NRS 331.140(2).

There are a number of other statutory provisions showing the intent of the Legislature to limit the jurisdiction of the Division.¹ Without exception, these provisions limit the jurisdiction to state property. Further, there appears to be no legislative intent, express or implied, to confer in the Division jurisdiction in areas outside state property. Had the Legislature so intended, language to that effect could have been easily included in the applicable statutes. *See State, Dep't Mtr. Vehicles v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988). The Legislature apparently chose not to do so. The jurisdiction of the Division is expressly limited to state property.

CONCLUSION

The Capitol Police Division has broad law enforcement authority limited to the jurisdiction of state property.

FRANKIE SUE DEL PAPA
Attorney General

By: MARIAH L. SUGDEN
Assistant Chief Deputy Attorney General

¹ NRS 284.174 Contracts for security services when personnel of capitol police division not available.

1. If personnel of the capitol police division of the department of motor vehicles and public safety are not available to provide security services for a building, office or other facility of a state agency, the state agency may, pursuant to NRS 284.173, contract with one or more independent contractors to provide such services.

NRS 289.270 Director and employees of the department of motor vehicles and public safety; Nevada highway patrol; state disaster identification team.

1. The following persons have the powers of a peace officer:

....

(e) The personnel of the capitol police division of the department of motor vehicles and public safety appointed pursuant to subsection 2 of NRS 331.140.

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AGO 2001-19 COUNTIES: COMMISSIONERS: CONTRACTS:
CONFLICT OF INTEREST: A board of commissioners is not prohibited from contracting with a surveying business that is owned in part by one of the commissioners if the commissioner-partner abstains from the vote to approve the contract. However, under Nevada law, such a contract would subject the commissioner-partner to misdemeanor charges and removal from office pursuant to NRS 332.155, and the commissioner-partner would be in violation of NRS 281.230 and NRS 281.505.

Carson City, July 5, 2001

Philip H. Dunleavy, District Attorney, Office of the Lincoln County District Attorney, P.O. Box 60, Pioche, Nevada 89043

Dear Mr. Dunleavy:

You have requested an opinion from this office concerning the authority of the Lincoln County Board of Commissioners (Board) to enter into a certain contract.

QUESTION

May the Board contract with a surveying business that is owned in part by one of the commissioners if the commissioner-partner abstains from the vote to approve the contract?

ANALYSIS

The Board determined a need to survey a portion of the Town of Pioche in preparation of major road improvements. Lincoln County only has one surveying business, owned by a partnership. The surveying business has done substantial work for the county in this particular area of Pioche. However, since the business last performed work for the county, one of the business's partners has been elected to the Board. The Board would like to continue to contract with the local surveying business and is questioning whether the Board could legally approve the contract by means of a vote wherein the commissioner-partner abstains. It is clear that if the Board approves a contract with the surveying business, the commissioner-partner would have a direct pecuniary interest in the contract.

At common law and under some statutory provisions, a public contract in which an officer of the public body has a personal pecuniary interest would be void. 64 C.J.S. *Municipal Corporations* § 906 (1999). Under other statutes, an officer may cure a conflict of interest by declaring his interest prior to consideration of the contract, and by not voting on the matter and not

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performing under the contract. *Id.* Some authorities have permitted a contract, even where a voting member of the public body has a pecuniary interest in the contract in violation of a statute, so long as a disinterested majority of the body approves the contract. *Id.* at § 908. However, in Nevada, the sort of contracting contemplated by the Board is controlled by the Local Government Purchasing Act (Act), NRS 332.005 through .225, inclusive. Also in Nevada, the prohibition against entering into a contract where a commissioner has a pecuniary interest is against the interested commissioner and not against the board of commissioners.

The Board is a “governing body” for purposes of the Act. NRS 332.025(3). NRS 332.155 provides in relevant part:

1. No member of the governing body may be interested, directly or indirectly, in any contract entered into by the governing body . . .

. . . .

4. A violation of this section is a misdemeanor and, in the case of a member of a governing body, cause for removal from office.

While the Board itself is not specifically precluded from approving the proposed contract by a vote not including the commissioner-partner, its approval would place the commissioner-partner in violation of NRS 332.155, subjecting him to removal from office. This office has on two occasions considered the effect of predecessor statutes which were substantively identical to NRS 332.155. In *Op. Nev. Att’y Gen. No. 231* (March 30, 1926), the wife of a county commissioner placed a bid on a contract with the county to manage the county hospital. Her husband did not participate in the voting, and she was awarded the contract as best bidder. Citing § 1522 of *Revised Laws of Nevada* (1912), we opined, “[W]here the wife of a member of a Board of County Commissioners is awarded a contract by the County Commissioners, such contract would be in derogation of the statute . . .” due to the commissioner’s interest in the contract through his wife.

In 1948, we cited *Op. Nev. Att’y Gen. No. 231* (March 30, 1926) with approval and addressed the following facts. A Mr. Florio had for some time been contracting to sell water to Eureka County. Mr. Florio then became a candidate for the office of county commissioner. Asked whether Mr. Florio might lawfully continue his contract to sell water to the county and still retain his right to hold office, we referred to a predecessor statute of NRS 332.155, § 1955 of *Nevada Compiled Laws* (1929), and opined as to the effect of the statute:

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The answer is in the negative. He would be eligible for election but, if elected, would be prohibited from entering into or continuing such a contract. This prohibition could be enforced by injunction or removal from office.

Op. Nev. Att’y Gen. No. 652 (July 21, 1948).

Finally, we note that if the commissioner-partner enjoyed a profit or compensation flowing from the contract, he would also be in violation of NRS 281.230(1) (prohibiting public employees and officers from directly or indirectly receiving a profit or compensation from a contract in which he is in any way interested) and NRS 281.505(1) (prohibiting a public officer or employee from entering into a contract between a governmental agency and a business in which he has a significant pecuniary interest).

In the instant case, the commissioner-partner would have two options available to avoid removal. First, he could convince the other partner or partners of the surveying business not to bid on the proposed contract with the Board, thereby preventing the formation of the contract with the Board. Second, he could divest himself of all interest in the surveying business to prevent his interest in the proposed contract should it be awarded to the business. Under NRS 332.155 and the above authorities, if the Board approved a contract with the surveying business while the commissioner-partner was a commissioner, it would subject the commissioner-partner to misdemeanor charges and removal from office.

CONCLUSION

The Board is not prohibited from contracting with a surveying business that is owned in part by one of the commissioners if the commissioner-partner abstains from the vote to approve the contract. However, under Nevada law, such a contract would subject the commissioner-partner to misdemeanor charges and removal from office pursuant to NRS 332.155, and the commissioner-partner would be in violation of NRS 281.230 and NRS 281.505.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-20 MILITARY; PERSONNEL; COMPENSATION:
NRS 281.145 requires a city to pay an employee his regular compensation while he is under orders as a member of the reserves or National Guard for not more than fifteen days in a calendar year and does not allow for any reductions to the employee's regular compensation. Thus, a city is prohibited by NRS 281.145 from requiring the employee to return an amount equal to the employee's military pay.

Carson City, July 11, 2001

Terrance P. Marren, Office of the City Attorney, City of Mesquite, 10 East Mesquite Boulevard, Mesquite, Nevada 89027

Dear Mr. Marren:

You have asked our opinion regarding the following question:

QUESTION

Does NRS 281.145 prevent the City of Mesquite (City) from requiring an employee to return to the City an amount equal to the military pay, exclusive of travel, housing, and meal allowances, that the employee receives while under orders from the reserves or National Guard if that employee is receiving his or her full salary from the City during the time that the employee is on military leave?

ANALYSIS

NRS 281.145 provides:

Any public officer or employee of the state or any agency thereof, or of a political subdivision or an agency of a political subdivision, who is an active member of the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Air Force Reserve, or the Nevada National Guard must be relieved from his duties, upon his request, to serve under orders *without loss of his regular compensation* for a period of not more than 15 working days in any 1 calendar year. No such absence may be a part of the employee's annual vacation provided for by law. [Emphasis added.]

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The plain language of NRS 281.145 requires the employer to relieve the employee from his duties, without loss of his regular compensation, for a period of not more than 15 working days in any one calendar year, when that employee is under orders as an active member of the reserves or National Guard. The term “regular compensation” as used in NRS 281.145 can only be read to mean the salary and benefits which the public employer regularly pays to the employee as compensation for his services as an employee. The plain language of NRS 281.145 does not allow for any reductions by the employer in the amount of the regular compensation.

If the employer requires the employee to return to the employer an amount equal to the amount of military pay that the employee has received, then the employee is not receiving his regular compensation. If the Legislature had intended the employee to receive from the employer the difference between his regular compensation and his military pay, rather than his regular compensation, the Legislature would have so stated by authorizing the appropriate offset or reduction to the employee’s regular compensation. Thus the employer would be in violation of the plain and clear language of NRS 281.145 if it required the employee to return to the employer an amount equal to the amount the employee received as military pay.

When a statute is clear, as we believe NRS 281.145 is, it is not necessary to look to the legislative history for guidance. *See Cirac v. Lander*, 95 Nev. 723, 729, 602 P.2d 723 (1979). However, it is worth noting that the legislative history supports our opinion as to the meaning of NRS 281.145.

NRS 281.145 was enacted to take the place of two separate statutes regarding military leave so that all public employees would be treated uniformly. *Hearing on A.B. 161 before the Assembly Committee on Government Affairs*, 1981 Leg. Sess. 6-7 (February 26, 1981). Assemblyman Robinson introduced the proposed legislation, A.B. 161, so that all public employees would be treated equally when taking military leave. *Id.* at 7.

When the Assembly Committee on Government Affairs heard A.B. 161 on February 26, 1981, the proposed legislation contained a provision that would have required an employer to pay to the employee his regular compensation only to the extent that the employee’s regular compensation exceeded his military pay, contrary to the intent of Assemblyman Robinson. *Id.* at 6. When originally printed, subsection 1 of A.B. 161 contained language identical to NRS 281.145, quoted above. Subsection 2 of A.B. 161, as originally printed, provided as follows: “The officer or employee is not entitled to his regular compensation in the training period, if his military pay for the service exceeds his regular compensation. If his military pay does not exceed his regular compensation, his regular compensation for that period must be reduced by an amount equal to his military pay for the period.”

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Assemblyman Robinson stated that the bill, as originally printed, did the exact opposite of what he was trying to do. *Id.* Instead of requesting a new bill, Assemblyman Robinson requested an amendment deleting the language, contained in subsection 2, which would have allowed the employer to pay only that compensation that exceeds the employee's military pay. *Id.* at 6-7. Assemblyman Robinson testified before the Assembly Committee on Government Affairs that "[w]e subscribe to the idea that we want to encourage public employees to belong to the guard and reserve and we knowingly allow them to get a double pay, their reservist pay and their state, city, county, or school district pay." *Id.* at 7.

William Engel, then Adjutant General of the State of Nevada, testified in favor of Assemblyman Robinson's amendment deleting proposed subsection 2 of A.B. 161.

This [the proposed amendment deleting subsection 2] would eliminate that provision that is currently built into the proposed legislation where the member of the guard would only receive that amount of his salary as a state, county or city employee that exceeds what he gets from the National Guard or reserve. If an individual, an average enlisted man in the National Guard, receives about \$36.00 a day, during his 10 days of annual training, he would receive \$360.00. That amount of money would then be deducted from his salary as an employee of one of the governmental entities. We feel that one of the advantages that the current law provides as an incentive for membership in the Guard is the fact that the money he does receive during annual training is in addition to his salary.

Id. at 6.

A.B. 161 was passed as amended. The language in the proposed legislation requiring the employer to reduce the employee's regular compensation by the amount equal to the military pay received by the employee was deleted. *Id.* at 9. A.B. 161, as passed, requires the employer to pay the employee his regular compensation and does not allow for any reduction for military pay received by the employee. Therefore, the legislative history supports our opinion that the plain and clear language of NRS 281.145 shows that the Legislature intended for a public employee to receive both his regular compensation and his military pay, while under orders from the reserves or National Guard, for not more than 15 days in a calendar year.

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CONCLUSION

NRS 281.145 requires the City of Mesquite (City) to pay an employee his regular compensation while he is under orders as a member of the reserves or National Guard for not more than 15 days in a calendar year and does not allow for any reductions to the employee's regular compensation. Thus the City is prohibited by NRS 281.145 from requiring the employee to return to the City an amount equal to the employee's military pay.

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-21 REGIONAL PLANNING; CITIES AND TOWNS; LOCAL GOVERNMENT: Property that is contiguous to a city's incorporated boundaries may be annexed into that city without being within that city's sphere of influence. In addition to the express requirements mandated by NRS 268.670, the city must make a finding that the annexation conforms to the master plan of that particular local government and to the Truckee Meadows Regional Plan. Property that is not contiguous and is not in the sphere of influence cannot be voluntarily annexed.

Carson City, July 12, 2001

Ms. Emily Braswell, Truckee Meadows Regional Planning Agency, Chamber Tower, One East First Street, Suite 900, Reno, Nevada 89501

Dear Ms. Braswell:

You have requested an opinion from this office on whether a property owner whose property lies contiguous to a city's incorporated boundaries may voluntarily annex into that city without being within that city's sphere of influence. Secondly, you have inquired whether a property owner whose property is not contiguous to the city's boundary and not within the sphere of influence may be voluntarily annexed into that city.

QUESTION ONE

May a property owner whose property is contiguous to a city's incorporated boundaries voluntarily annex into that city without being within that city's sphere of influence?

ANALYSIS

A city located in a county whose population is 100,000 or more, but less than 400,000, that has adopted a comprehensive regional plan pursuant to NRS 278.026 to NRS 278.029 is required to adopt a program of annexation. *See* NRS 268.625. Pursuant to NRS 268.625, the program must identify any sphere of influence of the city to be considered for annexation within the next seven years. *Id.* Additionally, the city cannot consider the annexation of any area that is not within the designated sphere and is not included in its program of annexation. *Id.* In order to be within the designated sphere of influence, the property must be in an area into which a city plans to expand as designated in a comprehensive regional plan adopted pursuant to NRS 278.026 to 278.029, inclusive, within the time designated in the comprehensive regional plan. *See* NRS 268.623. Thus it appears from NRS 268.265 that a city may never annex any area that is not within the designated sphere of influence and is not included in its program of annexation.

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The Nevada Legislature has provided an alternative to the procedures for the initiation of annexation process set forth in NRS 268.610 to NRS 268.668, inclusive. The alternative procedure is set forth in NRS 268.670 and allows for the initiation of annexation of contiguous territory when 100 percent of the owners of land within such area sign a petition requesting the governing body to annex such area to the city. Specifically, NRS 268.670 reads:

NRS 268.670 Annexation of contiguous territory owned by city or upon petition of all owners of real property: Alternative procedures.

1. As an alternative to the procedures for initiation of annexation proceedings set forth in *NRS 268.610 to 268.668*, inclusive, the governing body of a city may, subject to the provisions of *NRS 268.663* and after notifying the board of county commissioners of the county in which the city lies of its intention, annex:

(a) Contiguous territory owned in fee by the city.

(b) *Other contiguous territory if 100 percent of the owners of record of individual lots or parcels of land within such area sign a petition requesting the governing body to annex such area to the city.* If such petition is received and accepted by the governing body, the governing body may proceed to adopt an ordinance annexing such area and to take such other action as is necessary and appropriate to accomplish such annexation.

2. For the purposes of this section, “contiguous” means either abutting directly on the boundary of the annexing municipality or separated from the boundary thereof by a street, alley, public right of way, creek, river or the right of way of a railroad or other public service corporation, or by lands owned by the annexing municipality, by some other political subdivision of the state or by the State of Nevada.

(Added to NRS by 1967, 1626; A 1969, 642; 1975, 537; 1977, 676) [Emphasis added.]

Unlike NRS 268.625, this statute does not require the sphere of influence to be a factor in the determination. When this statute was passed in 1967, the Legislature intended to create a procedure for private owners of land to petition for annexation. The requirements under NRS 268.670 are that the property to be annexed is contiguous territory and that 100 percent of the owners of record of lots or parcels within the territory area sign a petition requesting annexation.

Accordingly, the first step of annexation under NRS 268.670 requires that a local governing body determine that a petition to annex property fulfills the

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requirements that it is a contiguous territory and owned in fee by the city, or that it is contiguous territory and 100 percent of the owners of record of individual lots or parcels of land within such area signed a petition requesting the governing body to annex such area to the city. If the first requirement is fulfilled, the second step towards annexation allows the governing body to adopt an ordinance annexing such area and requires the governing body to take such action as is necessary and appropriate to accomplish such annexation. *See* NRS 268.670(1)(b).

If the governing body proceeds to adopt an ordinance or take any action for the proposed annexation, the local governing body must make a finding that the ordinance or action conforms to the master plan and to the Truckee Meadows Regional Plan (Regional Plan). Specifically, under NRS 278.0284, an ordinance or any action pertaining to development, zoning, the subdivision of land, or capital improvements requires a finding by the local governing body that the ordinance or action conforms to the master plan. NRS 278.0284 reads in pertinent part:

Any action of a local government relating to development, zoning, the subdivision of land or capital improvements must conform to the master plan of the local government. In adopting any ordinance or regulation relating to development, zoning, the subdivision of land or capital improvements, the local government shall make a specific finding that the ordinance conforms to the master plan. . . . If any provision of the master plan is inconsistent with any regulation relating to land development, the provision of the master plan governs any action taken in regard to an application for development. [Emphasis added.]

Thus prior to adopting an ordinance or taking any other action in furtherance of the decision to annex, the local government must make a specific finding that the ordinance or action conforms to the master plan. *See* NRS 278.0284.

Additionally, NRS 278.02788 requires that the master plan and any ordinance required by the master plan must be consistent with the comprehensive Regional Plan.¹ Therefore, the local government must also

¹ The policy behind this requirement is related to the overall goals and objectives of regional planning. The process of regional planning ensures that comprehensive planning will be carried out with respect to population, conservation, land use and transportation, public facilities and services, *annexation* and intergovernmental coordination. *See* NRS 278.0261. To facilitate these goals, the Legislature created a regional planning commission and a governing board. *See* NRS 278.0262 and NRS 278.0264. The governing board is the final decision maker on administrative decisions within the scope of chapter 278 of the Nevada Revised Statutes. *See*

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make a finding on whether the ordinance or action for the proposed annexation is consistent with the Regional Plan.

For example, if a designated suburban community sought to be annexed to Reno or Sparks, the local government receiving the annexation application must review: (1) whether the territory is contiguous and owned in fee by the city, or whether it is contiguous territory and 100 percent of the owners of record of individual lots or parcels of land signed a petition requesting annexation; and (2) whether its action, by ordinance or otherwise, conforms to the master plan and to the Regional Plan. In its review of whether the annexation conforms to the Regional Plan, the local government should address whether the annexation is consistent with the Goals and Policies of the Regional Plan. One of the goals and policies specific to annexation is in Section IV, subsection 2(n) of the Regional Plan, which reads in pertinent part:

Designated suburban communities should retain distinct identities and shall not be annexed to Reno or Sparks. They shall be served by Washoe County or other designated service providers with centralized water sewer service as described in the Public Facilities and Services Element of the Regional Plan.

Prior to allowing the annexation of a designated suburban community, a local governing body would be required to make a finding on whether or not the annexation is consistent with subsection 2(n) of the Goals and Policies of the Regional Plan and any other relevant section of the Regional Plan.

Hence, if the governing body finds that the proposed action or ordinance does not conform to the master plan and the Regional Plan, the governing body cannot proceed with any action or ordinance until such time as the master plan and Regional Plan are amended to assert the finding of conformity. The amendment process to the master plan is set forth in NRS 278.0282. It requires that prior to amending any master plan, the governing body shall submit the proposed amendment to the Regional Planning Commission (RPC) to review the plan at one or more public hearings. The RPC must determine whether the proposed plan or amendment conforms to the comprehensive regional plan. *See* NRS 278.0282. Again, the local body may appeal the RPC's determination of nonconformance to the governing board. *See* NRS 278.0282(5).

(..continued)

generally NRS 278.028. The regional planning commission is responsible for developing a comprehensive regional plan for the physical development and orderly management of growth of the region. *See* NRS 278.0272. The governing board adopts the plan approved by the regional planning commission with any amendments it deems necessary. *See* NRS 278.0276.

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To amend the Regional Plan, an amendment may be proposed by a local government, the RPC, or the Regional Plan Governing Board (RPGB). Furthermore, the Regional Plan must be approved by the RPC and adopted by the RPGB.² See NRS 278.0272 and NRS 278.0276.

Alternatively, if the governing body finds that the proposed ordinance conforms to the master plan and to the Regional Plan, RPC review is not required as a condition to the granting of an annexation application under NRS 268.670. Appendix F of the Truckee Meadows Regional Plan, amended June 13, 1996, specifically addresses a “Proposal for Annexation of Territory by Alternative Procedure.” See *Truckee Meadows Regional Plan*, Appendix F, section VII, p. F-7 (amended June 13, 1996). It provides that “RPC review is not required for annexation proposals initiated pursuant to NRS 268.670, Alternative procedures.” *Id.* While this statement recognizes that the alternative annexation procedure does not mandate RPC pre-approval, there are circumstances where RPC review can properly be initiated in an NRS 268.670 annexation. Moreover, Appendix F, section VII, p. F-7 of the Truckee Meadows Regional Plan does not emasculate the statutory mandate of NRS 278.0284, which requires local government actions to “conform” to the Regional Plan.

RPC involvement and review may be initiated pursuant to section IV, subsections 32(j) and (k) of the Goals and Procedures of the Truckee Meadow Regional Plan, amended June 13, 1996. Under subsection 32(j), local governments are required to evaluate development applications to determine whether they conform to the local master plan and to the Regional Plan. Under subsection 32(k), “if a state or regional entity, local government or other affected entity believes that a governmental discretionary decision on a project is inconsistent with this Element, they may request within 30 days of the decision a review of the decision by the RPC.” See section IV, subsection 32(k) of the Goals and Procedures of the Truckee Meadow Regional Plan, amended June 13, 1996. RPC’s focus is solely on the conformance of the decision with the policies of the Regional Plan. *Id.* Thus RPC may review an annexation proposal pursuant to NRS 268.670 and local government action made in furtherance thereof in cases where another entity (local government) believes the decision to annex is inconsistent with the Regional Plan. Although not specifically set forth in this subsection, any decision of the RPC may be appealed to the RPGB. See generally NRS 278.028. See Section III,

² We have found no statutory prohibition that would prevent the simultaneous amendment of the master plan and the Regional Plan.

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Roles and Responsibilities of the Truckee Meadows Regional Plan, adopted June 13, 1996.³

In summary, the determination of a local governing body on the issue of whether to allow a voluntary annexation is not limited to fulfilling the requirements of NRS 268.670, but also requires a finding by the local governing body that the annexation will conform to the master plan and to the Regional Plan, which may be subject to RPC and RPGB review.

CONCLUSION TO QUESTION ONE

A property owner whose property is contiguous to a city's incorporated boundaries may voluntarily annex into that city without being within that city's sphere of influence, subject to the limitations set forth in this opinion.

QUESTION TWO

May a property owner whose property is not contiguous to the city's boundary and is not within the sphere of influence be voluntarily annexed?

ANALYSIS

Under the program of annexation, the city may only annex territory that is in the sphere of influence. *See* NRS 268.625. Property not within the sphere of influence does not fulfill the requirements of NRS 268.625 and cannot be annexed under the program of annexation.

Under the alternative annexation procedure of NRS 268.670, the city may only annex contiguous territory if requested by 100 percent of the owners of the land. NRS 268.670(2) specifically defines "contiguous" as:

. . . either abutting directly on the boundary of the annexing municipality or separated from the boundary thereof by a street, alley, public right of way, creek, river or the right of way of a railroad or other public service corporation, or by lands owned by the annexing municipality, by some other political subdivision of the state or by the State of Nevada.

³ On Page II-2 of the Truckee Meadows Regional Plan, it reads: "Another important function of the RPGB is to hear appeals of RPC actions on proposed plan amendments, Projects of Regional Significance, local government actions within spheres of influence, master plan conformance and *other matters*." [Emphasis added.]

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Therefore, a property that is not contiguous does not fulfill the requirements of NRS 268.670 and cannot be annexed under this alternative annexation procedure.

CONCLUSION TO QUESTION TWO

Property that is not contiguous and is not in the sphere of influence cannot be voluntarily annexed.

CONCLUSION

Based upon the foregoing, property that is contiguous to a city's incorporated boundaries may be annexed into that city without being within that city's sphere of influence. In addition to the express requirements mandated by NRS 268.670, the city must make a finding that the annexation conforms to the master plan of that particular local government and to the Truckee Meadows Regional Plan. Property that is not contiguous and is not in the sphere of influence cannot be voluntarily annexed.

FRANKIE SUE DEL PAPA
Attorney General

By: NORMAN J. AZEVEDO
Chief Deputy Attorney General

SONIA E. TAGGART
Senior Deputy Attorney General

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AGO 2001-22 PAROLE AND PROBATION; FEES; JUDGMENTS:

Probationers and parolees should be given written notice that any delinquent supervision fees remain due and owing and the Division of Parole and Probation will take the necessary steps to collect them pursuant to P&P Policy No. 4.1 should they be granted a subsequent parole. Probationers and parolees who are about to be discharged and are delinquent in the payment of supervision fees should be given written notice that the Division of Parole and Probation will take the necessary steps to collect the fees, including obtaining and collecting on a civil judgment.

Carson City, July 23, 2001

R. Warren Lutzow, Chief, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104 West, Carson City, Nevada 89706

Dear Mr. Lutzow:

You have requested an opinion from this office regarding the collection of delinquent supervision fees from an offender whose probation has been revoked or who has been discharged, but returns to the supervision of the Division of Parole and Probation (P&P) upon parole or a new conviction, respectively.

You have presented three scenarios that occur frequently:

Example 1. A probationer has been under the supervision of P&P for one (1) year and is five (5) months delinquent in fees. The probationer has several other violations and a violation report is submitted to the court recommending revocation. Among the violations listed are the delinquent fees. The court revokes the offender's probation and orders the underlying sentence. The offender goes to prison and then is released on parole one (1) year later. Does P&P have the authority to collect the delinquent fees which existed prior to revocation of the offender's parole?

Example 2. Same as Example 1, except it is a parolee who is delinquent in fees, is taken back by the Parole Board, parole is revoked for six (6) months, and then the parolee is placed back on parole.

Example 3. An offender is either discharged or revoked on Case No. 1. The offender has outstanding fees owed to the State for delinquent supervision fees. One (1) year passes and the offender is again under supervision with P&P for Case No. 2. Does P&P have the authority to collect the delinquent fees which exist from the prior unrelated case?

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QUESTION ONE

Is P&P allowed to collect delinquent supervision fees from an offender whose probation has been revoked but returns to the supervision of P&P upon being paroled?

QUESTION TWO

Is P&P allowed to collect delinquent supervision fees from an offender who has been discharged but returns to the supervision of P&P upon a new conviction?

QUESTION THREE¹

If nonpayment of supervision fees was cited as a violation of probation/parole and served as part of the basis of a violation report, and the probationer or parolee was in fact revoked, can P&P collect delinquent supervision fees upon the offender being paroled and again coming under the supervision of P&P? Are there any double jeopardy implications?

ANALYSIS OF QUESTION ONE

P&P is entitled to collect supervision fees from probationers and parolees pursuant to NRS 213.1076² and NAC 213.230³. The legislative history of

¹ This question was not set forth in your informal opinion request letter dated May 4, 2001; however, it was asked in our telephone conversation of June 13, 2001.

² NRS 213.1076, entitled "Fee to defray costs of supervision; regulations; waiver" provides:

1. The division shall:

(a) Except as otherwise provided in this section, charge each parolee, probationer or person supervised by the division through residential confinement a fee to defray the cost of his supervision.

(b) Adopt by regulation a schedule of fees to defray the costs of supervision of a parolee, probationer or person supervised by the division through residential confinement. The regulation must provide for a monthly fee of at least \$30.

2. The chief may waive the fee to defray the cost of supervision, in whole or in part, if he determines that payment of the fee would create an economic hardship on the parolee, probationer or person supervised by the division through residential confinement.

3. Unless waived pursuant to subsection 2, the payment by a parolee, probationer or person supervised by the division through residential confinement of a fee charged pursuant to subsection 1 is a condition of his parole, probation or residential confinement.

³ NAC 213.230 entitled "Fee required; amount; exception" provides:

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NRS 213.1076 and its precursor NRS 13.10973 establishes the Nevada Legislature's intent to establish "a fee to defray the cost of supervising parolees and probationers" and "to defray the on-going costs of supervision being generated by Department [of Parole and Probation]." *Hearing on SB 42 before the Senate Committee on Judiciary*, 1983 Leg. Sess. (January 31, 1983).

There are similar supervision fees in other states, and their courts have found them to be civil fees intended to reimburse the state for costs associated with probationary services. *See Glaspie v. Little*, 564 N.W. 2d 651 (N.D. 1997); *Taylor v. State of Rhode Island Department of Corrections*, 101 F.3d 780 (1st Cir. 1996); *Frazier v. Montana State Department of Corrections*, 920 P.2d 93 (Mont. 1996).

It would be unreasonable to conclude P&P has no authority to collect the supervision fee required by NRS 213.1076 and NAC 213.230. Indeed, P&P is impliedly clothed with the power to construe the statutes under which it operates. *See Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983). Statutes must be given reasonable construction with a view to promoting, rather than defeating, legislative policy. *State, Dept. of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, 762 P.2d 882 (1988). Wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied. *Checker, Inc. v. Public Service Commission*, 84 Nev. 623, 629-30, 446 P.2d 981, 985-86, (1968). Accordingly, P&P has the implied power to take any necessary steps to collect delinquent supervision fees. It may charge and collect delinquent supervision fees from an offender whose probation has been revoked but returns to the supervision of the P&P upon being paroled.

ANALYSIS OF QUESTION TWO

Based on the above analysis, P&P may collect delinquent supervision fees from an offender who has been discharged but returns to the supervision of P&P upon a new conviction. However, P&P should use the collection procedures set forth at NRS 176.064, as analyzed and opined in Op. Nev. Att'y Gen. No. 99-05 (AGO 99-05), dated February 2, 1999, to collect those delinquent supervision fees. P&P may charge and collect supervision fees in the normal course of business for the probation attributable to the new conviction of a former parolee, i.e., pursuant to P&P Policy No. 4.1.

(..continued)

Each parolee or probationer shall, during the term of his parole or probation, pay a monthly fee of \$20 to the division of parole and probation of the department of motor vehicles and public safety to help defray the cost of his supervision unless he receives a waiver as provided in NAC 213.240.

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ANALYSIS OF QUESTION THREE

In issuing an order granting probation, the court may fix the terms and conditions thereof. NRS 176A.400. Historically, courts do not specifically impose payment of supervision fees as a specific court-ordered or special condition of probation. The State Board of Parole Commissioners (Parole Board) may, as a condition of releasing a prisoner on parole, impose any reasonable conditions on the parolee to protect the health, safety and welfare of the community. NRS 213.12175. Customarily, the Parole Board does not specifically impose payment of supervision fees as a specific Parole Board-ordered or special condition of parole.

As stated above, P&P is entitled to collect supervision fees from probationers and parolees pursuant to NRS 213.1076 and NAC 213.230. In all appropriate cases, failure to pay supervision fees is a violation of Inmate/Parole/Probation conditions and will be charged as a Laws and Conduct violation if a violation report is prepared. P&P Policy No. 4.1, section IV.A.5.

There are cases in which nonpayment of supervision fees has been cited as a violation of probation/parole and served as part of the basis of a violation report. However, experience establishes that it is rarely the primary basis for revocation of probation or parole. The degree to which it serves as a basis for a court or the Parole Board to revoke is rarely stated. The efficient use of prison bed space dictates that delinquency of supervision fees should rarely, if ever, be the primary basis for revocation of probation or parole.

The Fifth Amendment guarantee against double jeopardy has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *Mange v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed 615 (1998).

The first two protections are clearly inapplicable. The third protection is also inapplicable because supervision fees are not “punishment.” Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. See *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), citing *Helvering v. Mitchell*, 303 U.S. 391, at 399, 58 S. Ct. 630, 82 L. Ed. 917. The United States Supreme Court developed a two-part analysis for determining whether a civil sanction or penalty is punishment so as to violate the double jeopardy clause in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2536, 65 L. Ed. 2d 742 (1980). This two-part analysis was reaffirmed in *Hudson*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

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A court must first ask whether the Legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other [civil or criminal]." *Hudson*, 522 U.S. at 99 *citing Ward*, 448 U.S. at 248. Where the Legislature has indicated an intention to establish a civil penalty, the next inquiry is whether the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 248 *citing Ward*, 448 U.S. at 248-249 and *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219, 100 L. Ed. 149 (1956).

The Nevada Legislature did not expressly indicate a preference for the label of criminal or civil in enacting NRS 213.1076 and the supervision fee therein. However, the Legislature clearly did not put NRS 213.1076 in Title 15 governing "Crimes and Punishment." The legislative history, the specific wording of the title of NRS 213.1076, and the wording in the body of NRS 213.1076, to wit: "fee to defray costs of supervision" clearly establish a recuperative intent rather than a punitive intent. That full recovery of costs of supervision is not intended is further evidence of the lack of punitive intent. Accordingly, there is the implication the supervision fee is civilly recuperative rather than criminally punitive in nature.

There is no evidence the Nevada Legislature intended a civil *penalty*. The supervision fees are not a civil monetary penalty above and beyond any fines that may be imposed as punishment. Accordingly, there is no need to inquire whether the statutory scheme is so punitive, either in purpose or effect, as to transform what is clearly intended as a civil remedy into a criminal penalty. Even if such an inquiry were to occur, the supervision fees cannot be said to be punitive in purpose or effect. They are similar to Rhode Island's probation supervision fee (\$15 in 1994) that the United States Court of Appeals for the First Circuit found in *Taylor*, 101 F.3d at 783, to be a "modest fee authorized by the statute compris[ing] no part of any sentence imposed for the crimes committed by the offenders." Our courts do not order payment of supervision fees as part of an offender's sentence. The First Circuit also ruled, "In our judgment, so modest a cost-based supervisory fee reasonably cannot be deemed punitive in purpose, especially since any conceivable retributive or deterrent effect could only be inconsequential." *Taylor*, 101 F.3d at 783-4.

CONCLUSION

It is the opinion of this office that where nonpayment of supervision fees was cited as a violation of probation/parole and served as part of the basis of a violation report, and the probationer or parolee was in fact revoked, the Division of Parole and Probation (P&P) can collect delinquent supervision fees from the offender being paroled and again coming under the supervision of P&P. There is no double jeopardy violation.

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For offenders given parole or returned to parole, P&P may charge and collect supervision fees for the previous probation or parole in the normal course of business, i.e., pursuant to P&P Policy No. 4.1. For offenders under probation for a new conviction, P&P should use the collection procedures set forth at NRS 176.064, as analyzed and opined in Attorney General Opinion No. 99-05 dated February 2, 1999, to collect those delinquent supervision fees.

Our office strongly recommends that probationers and parolees who are revoked be given written notice that any delinquent supervision fees remain due and owing, and the Division of Parole and Probation will take the necessary steps to collect them pursuant to P&P Policy No. 4.1 should they be granted a subsequent parole. Probationers and parolees who are about to be discharged and are delinquent in supervision fees should be given written notice that the Division of Parole and Probation will take the necessary steps to collect the fees, including obtaining and collecting on a civil judgment.

FRANKIE SUE DEL PAPA
Attorney General

By: DANIEL WONG
Deputy Attorney General

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AGO 2001-23 LEGISLATURE; BUDGET; STATE AGENCIES: Generally, letters of intent are negotiating tools having no contractually binding effect. Nothing commits a state executive agency to abide by one, except a desire to succeed with future budget requests. Legislators' use of letters of intent does not violate the separation of powers provision of the Nevada Constitution. Legislators could always point out to their colleagues the extent of an agency's compliance with a letter of intent, perhaps affecting the degree of budgetary success that agency achieves. Generally, however, the effect of a letter of intent is limited to the budgetary period for which it was issued.

Carson City, August 3, 2001

Jackie Crawford, Director, Nevada Department of Corrections, 5500 Snyder Avenue, Carson City, Nevada 89702

Dear Ms. Crawford:

You have asked this office for an opinion addressing the following questions:

1. What legal authority supports the use of a legislative "letter of intent" and commits a state department to follow one?
2. Does the Legislature's practice of using a "letter of intent" violate the separation of powers concept by permitting the Legislature to control decision-making by the executive branch of state government?
3. If a "letter of intent" is tied to a biennial budget approval, does the "letter of intent" carry any binding authority or commitment once that budgetary period is over?

Thank you for providing a sample of such a legislative letter of intent. The letter you provided is from the Co-Chairmen of the Assembly Committee on Ways and Means and the Chairman of the Senate Committee on Finance to the former Director of the Nevada Department of Prisons, currently the Nevada Department of Corrections (NDOC), and is dated July 20, 1995. It expresses these legislators' intent that they believed NDOC "should" do certain things during the 1995-97 biennium.

QUESTION ONE

What legal authority supports the use of letters of intent and commits a state department to follow one?

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ANALYSIS

Letters of intent are recognized by the courts and legislators in this country generally as negotiating tools. In *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309 (9th Cir. 1996), our Ninth Circuit Court of Appeals determined that, despite the execution of a letter of intent and a ceremonial handshake, the parties intended not to be bound until a subsequent agreement was made and approved by the boards of directors. *Id.* at 316. The letter of intent, according to the court, was merely an expression of intent to perhaps agree in the future. The *Rennick* court added:

It is a basic tenet of contract law that creation of a valid contract requires mutual assent. *Kruse v. Bank of America*, 202 Cal. App. 3d 38, 248 Cal. Rptr. 217, 229 (Ct. App. 1988); John D. Calamari and Joseph M. Perillo, *The Law of Contracts* §§ 11-12 (1970). “A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.” Restatement (Second) of Contracts § 26 (1981). Parties must communicate their mutual consent to enter into a contract.

Id. at 315.

Commonly, a letter of intent is used so that people who are negotiating can get their preliminary inclinations down on paper without committing themselves. *See id.* This does not mean that a letter of intent cannot result in the formation of a contract. The Restatement (Second) of Contracts points out that assent may be manifested by conduct as well as words. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981). A letter of intent containing the necessary elements of a contract can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances. *See California Food Service Corp. v. Great Amer. Ins. Co.* 130 Cal. App.3d 892, 897, 182 Cal. Rptr. 2d 67 (1982). Although Nevada Supreme Court opinions reference letters of intent, none of the cases refer specifically to legislative letters of intent. In *Smith v. Crown Financial*, 111 Nev. 277, 279, 890 P.2d 769, 771 (1995) the letter of intent was found to be a non-binding “agreement to agree.”

“Letters of Intent” are explained at 1 CORBIN ON CONTRACTS § 1.16 (2001) as follows:

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Some unknown, unheralded genius invented the “Letter of Intent.” Despite the intrinsic intelligence and utility of the device, in the hands of many entrepreneurs and corporate officers, and even members of the bar, it has led to much misunderstanding, litigation and commercial chaos. Properly used, the letter of intent is an outline of a not yet finalized agreement, a road-map leading perhaps to a contract. Once executed, each party can be relatively certain that the other has a good faith desire to continue negotiations to achieve goals stated in the letter. . . . It is not a useless document, but it is not, in principle, a contract, except perhaps a contract to continue bargaining in good faith. Nonetheless, there are times when letters of intent are signed with the belief that they are letters of commitment. If this belief is shared, or if one party is aware of the other's belief, the letter is a memorial of a contract. At other times, the parties impatiently proceed to perform the terms of the letter without finalizing their agreement in a further writing. In such cases, other principles come into play. [Footnotes omitted.]

Nevada's legislators are not the only elected representatives who use the letter of intent as a negotiating tool. Professor Alan B. Rosenthal, Director of Eagleton Institute of Politics and Professor of Political Science at Rutgers University spent the spring of 1986 in Tallahassee observing the Florida Legislature at close hand. According to him, “Power is one of the most intriguing features of the legislative process. Of special interest is the exercise of power by the legislature vis-a-vis the governor and executive branch, and the distribution of power within the legislature among leaders, committees, and members.” Alan B. Rosenthal, *The State of the Florida Legislature*, 14 FLA. S. U.L. REV. 399, 417 (Fall 1986). The Florida governor and the executive branch of government had “three main priorities: ‘budget, budget, budget.’ Yet, the governor's budgetary priorities . . . were generally disregarded by lawmakers.” *Id.* at 420 (footnote omitted). Professor Rosenthal observed, “The legislature has several devices for exerting control over executive branch operations through the budget. For example, the ‘letter of intent’ that accompanies the appropriations bill directs agencies in the spending of appropriated funds.” *Id.*

Nevada legislators, like the Florida legislators, may use a letter of intent to persuade executive agencies to accomplish certain things. However, as the Alaska attorney general advised the governor, a legislative letter of intent does not have the force of law. See *Alaska Housing Finance Corp. v. Alaska State Employees Ass'n/AFSCME Local 52*, 923 P.2d 18, 24 (Alaska 1996).

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Legislative letters of intent may also help decipher legislative intent behind related laws. In *Chiropractors for Justice v. State of Alaska*, 895 P.2d 962 (Alaska 1995), the Supreme Court of Alaska noted that legislative intent may be bolstered by a legislative letter of intent. *Id.* at n. 10. In *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 378, 853 P.2d 496, 504, 20 Cal. Rptr. 2d 330 (Cal. 1993) the California Supreme Court also acknowledged that legislative letters of intent can help determine legislative intent. Also, the Court of Appeals of Florida, First District, concluded that legislative letters of intent are “entitled to substantial weight in ascertaining the Legislature’s will. That is so for precisely the reason that the Legislature has directed its appropriations committee chairmen to issue such letter. Moreover, the budget request presented to the Legislature is to be considered in arriving at any interpretation of an appropriations bill.” *United Faculty of Florida v. Board of Regents*, 365 So. 2d 1073, 1076 (Fla. Ct. App. 1979).

Analyzing the sample letter of intent referenced above, the signatory members of the Assembly Committee on Ways and Means and the Senate Committee on Finance did not manifest an intent that their letter become contractually binding. The letter is merely an expression of their intent that NDOC “should” do certain things during the 1995-97 biennium. It is neither signed by NDOC nor a majority of Nevada’s legislators. No contractual obligation resulted from such letter. Even so, if the recipient of such letter disregards it, the Legislature may be less inclined to favorably address that agency’s future budget requests.

CONCLUSION

Generally, letters of intent are negotiating tools having no contractually binding effect. Nothing commits a state executive agency to abide by one, except a desire to succeed with future budget requests.

QUESTION TWO

Does the Legislature’s practice of using letters of intent violate the separation of powers concept by permitting the Legislature to control decision-making by the executive branch of state government?

ANALYSIS

Section 1 of Article 3 of the Nevada Constitution provides in pertinent part as follows:

The powers of the Government of the State of Nevada shall be divided into three separate departments, -- the Legislative, -- the Executive and the Judicial; and no

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persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted in this constitution.

NEV. CONST. art. III, § 1.

Our Nevada Supreme Court has stated, “It is well established that the power of controlling the public purse lies within legislative, not executive authority.” *State of Nevada Employees Association, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992). However, the Legislature can only act in a bicameral fashion. Any law passed or policy set by the Legislature must be accomplished by it and not by a few of its members. A letter of intent is neither legislative action nor an expression of the Legislature’s intent. It is merely the unofficial statement of some legislators. As for the sample letter of intent you provided, it shows that the writers believed NDOC “should” privatize medical services and consolidate information services into one functional area. Any legislator can express his or her goals and legislation can address them.

The Legislature’s control over money naturally results in the exertion of influence by legislators over executive agencies. However, even without letters of intent, legislators communicate their wishes and desires to executive agencies. Whether the expressions of such are verbal or in writing, they are not conditions precedent to budget approvals. If all the letter of intent writers’ goals were met, fiscal constraints could still prevent executive bodies from getting everything sought in their budgets. Regardless, executive agencies’ good faith, bona fide efforts to address legislators’ concerns will likely result in a more favorable reception. The Legislature is like the father who tells his son, who is like the executive agency, “Son, the decision is yours. But, if I were you I would stay in school.” If the son decides to stay in school, he will stand a much better chance of getting the keys to the car, pocket money, and an overall warmer and more favorable reception.

As discussed above, letters of intent do not generally result in contractually binding relationships. Although the Legislature’s control of the public purse can result in strong influence over executive agencies’ decisions, it must not cross the separation of powers line. *See* NEV. CONST. art. III, § 1. For example, the Legislature cannot place legislators on executive committees to make decisions on allocation of funds nor can it require executive agencies to obtain approval from certain legislators before changing the scope or design of a project authorized by the Legislature. Legislators can legislate and exert influence, but they cannot wear executive decision-making hats.

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CONCLUSION TO QUESTION TWO

Legislators' use of letters of intent does not violate the separation of powers provision of the Nevada Constitution.

QUESTION THREE

If a letter of intent is tied to a biennial budget approval, does the letter of intent carry any binding authority or commitment once that budgetary period is over?

ANALYSIS

As analyzed and concluded above, legislators' letters of intent are not binding and do not result in contractual relationships. Accomplishing legislators' goals, expressed verbally or in such a letter, is not the same as meeting conditions precedent that trigger contractual performance. Granting some legislators' wishes would not necessarily guarantee budget success. Also, not paying heed to such desires would not necessarily make that agency *persona non grata* with the Legislature. Authors of a letter of intent might attempt to tie the fulfillment of their goals as conditions to a biennial budget approval and, regardless of the passage of time, could always point out the extent of the recipient agency's compliance. A letter of intent, however, is generally limited to the budgetary period for which it was issued.

CONCLUSION TO QUESTION THREE

Legislators could always point out to their colleagues the extent of an agency's compliance with a letter of intent, perhaps affecting the degree of budgetary success that agency achieves. Generally, however, the effect of a letter of intent is limited to the budgetary period for which it was issued.

FRANKIE SUE DEL PAPA
Attorney General

By: JOE WARD, JR.
Senior Deputy Attorney General

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OPINION NO. 2001-24 EDUCATION; PERSONNEL; LICENSES: The *Clark County School District v. Riley*, 116 Nev. ____, 14 P.3d 22 (2000) decision by the Nevada Supreme Court requires a public school district to follow the procedures outlined in NRS 391.317–391.3194 before the termination of a teacher, whether or not that teacher is properly licensed. However, a school district is also prohibited by law from paying a person to teach if he is not properly licensed. Therefore, a school district must begin the termination process in sufficient time to complete the process prior to the license becoming invalid.

Carson City, August 2, 2001

Skip Wenda, Ph.D., Commission on Professional Standards in Education,
1820 East Sahara, Suite 205, Las Vegas, Nevada 89104

Dear Dr. Wenda:

You have requested an opinion from this office regarding the application of *Clark County School District v. Riley*, 116 Nev. ____, 14 P.3d 22 (2000) by public school districts. We have interpreted this request as asking for an opinion on the following question:

Whether the public school districts in Nevada can comply with the *Riley* decision by following the procedures contained in NRS 391.317 before terminating a teacher whose provisional license to teach is no longer valid without violating other provisions of NRS chapter 391?

ANALYSIS

The Commission on Professional Standards in Education has adopted regulations, pursuant to NRS 391.032, providing for the issuance of provisional licenses before the completion of all requirements for a license to teach in this state. *See* NAC 391.054–391.058. A person who is issued a provisional license must satisfy all requirements for licensure within three years after the date on which the provisional license is issued. NRS 391.032(2). We understand that a provisional license contains the date by which the provisions must be satisfied. If the provisions are not satisfied by that date, the provisional license automatically becomes invalid. *Id.* Once the provisional license is no longer valid, the teacher is no longer qualified to teach in a public school district in Nevada. If the provisions are satisfied by the specified date, the teacher is fully licensed and that license remains effective until the expiration date of the license.

On December 5, 2000, the Nevada Supreme Court published its opinion in *Clark County School District v. Riley*, 116 Nev. ____, 14 P.3d 22 (2000). In

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Riley, the Court considered whether the Clark County School District had properly terminated John Riley after his provisional license was no longer valid. Mr. Riley had been issued a provisional license which required him to satisfy certain provisions on or before November 18, 1995. Once the provisions were satisfied, Mr. Riley's license would remain in effect until July, 1999. The Clark County School District hired Mr. Riley as a probationary teacher for the 1993-1994 school year. Thereafter, Mr. Riley was employed as a postprobationary teacher. *Id.* at 23.

On November 17, 1995, the Clark County School District notified Mr. Riley that the provisions on his license had not been satisfied and therefore he was no longer qualified to teach in public schools in Nevada. Mr. Riley was notified that he would be removed from his assignment on November 21, 1995, and his resignation submitted as of that date, if the district had not been notified of the clearance of Mr. Riley's license by the Department of Education. *Id.* Mr. Riley did not satisfy the provisions by the specified date and was terminated. Mr. Riley was rehired as a probationary teacher after he satisfied the provisions. *Id.*

The Court concluded that Mr. Riley was employed as a postprobationary teacher and thus was entitled to the statutory rights and protections afforded to that position regardless of whether he was properly licensed. *Id.* at 24. The Court concluded that, pursuant to NRS 391.317, Mr. Riley was entitled to a 15-day notice prior to termination and was entitled to receive notice of his right to a hearing. *Id.* The Court held that because Mr. Riley was not given this notice, the termination was invalid. *Id.* Therefore, Mr. Riley was entitled to retain his status as a postprobationary teacher.

In *Riley*, the Court did not look past NRS 391.317 because it concluded that Mr. Riley was not afforded the procedures provided for in that particular statute. Thus the Court did not consider the application of NRS 391.318 through 391.3194, which set forth the procedures for a hearing and board action regarding the recommendations of the superintendent and hearing officer for the termination of a licensed employee. The Court also did not consider the application of other statutes contained in NRS chapter 391 pertaining to the employment and compensation of unlicensed teachers. It is our understanding that you would like this office to give you guidance as to how the public school districts can comply with the holding in *Riley* without violating other provisions of NRS chapter 391.

The Legislature has declared that the purpose of licensing teachers is to protect the general welfare of the people of this State. NRS 391.051. Clearly the school districts have a duty to place only duly licensed teachers in the classroom. For instance, NRS 391.120(3) provides that it is "unlawful for the board of trustees of any school district to employ any teacher who is not

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legally qualified to teach all of the grades which the teacher is engaged to teach.” NRS 391.170(1)(b) provides that a teacher is not entitled to receive any portion of public money for schools as compensation for services rendered unless he has a license authorizing him to teach or perform other educational functions at the level and in the field for which he is employed. Therefore, we believe that the school district has a duty to remove an employee from a teaching assignment once that person no longer holds a valid license to teach. However, the school district must do so in a manner which does not conflict with the holding in *Riley*, but which also does not violate the prohibition against the use of public money to compensate an unlicensed teacher.

The *Riley* decision clearly requires a school district to follow the procedures contained in NRS 391.317 before terminating a postprobationary teacher, even if the basis of the termination is that the teacher does not hold a valid license to teach. Thus the statutes regarding the hearing process may also apply to the termination of an unlicensed, postprobationary teacher. We use the term “teacher” because that is the term used in the *Riley* decision even when the Court was referring to an unlicensed person. However, we note that for the purposes of NRS 391.311–NRS 391.3197, the term “teacher” is defined to be a “licensed employee the majority of whose working time is devoted to the rendering of direct educational service to pupils of a school district.” NRS 391.311(8). We also note that probationary and postprobationary employees are defined to be administrators or teachers, both of which are defined to be persons who hold licenses. NRS 391.311.

NRS 391.317(1) requires the school district to give at least a 15-day notice to a probationary or postprobationary employee of the superintendent’s intention to recommend the termination of the employee. The notice must advise the employee of the grounds for the recommendation, of his right to request a hearing before a hearing officer, and of his right to request an appointment of a hearing officer from a specified list. NRS 391.317(2). The notice must also refer to NRS chapter 391. If a hearing is requested by the employee, the report of the hearing officer must be completed before a decision is made by the board of trustees on the recommendation. NRS 391.3194. We understand this process could take three months or longer.

We believe that in order to be in full compliance with NRS chapter 391 and the *Riley* decision, a public school district must begin the termination process outlined in NRS 391.317–391.3194 in sufficient time to complete the full hearing process before the provisional license becomes invalid by operation of law. The statutes which provide for the hearing process repeatedly refer to “the licensed employee.” For instance, NRS 391.3192(3) provides that “[t]he licensed employee and superintendent are entitled to be

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heard, to be represented by an attorney and to call witnesses in their behalf.” NRS 391.3194(4) provides that the “licensed employee” may appeal the decision of the board of trustees to the district court. Therefore, we believe that if a hearing is requested, it should take place prior to the date on which the teacher’s license becomes invalid. If the notice of termination is given in sufficient time for the hearing process to be completed prior to the date upon which the license becomes invalid, the school district should be able to avoid any conflict with NRS 391.170(1)(b), which prohibits payment of the employee once his license is no longer valid. Otherwise, the school district runs the risk of violating NRS 391.170 by paying an unlicensed teacher or of violating the *Riley* decision by terminating the teacher’s compensation before he has been afforded the processes set forth in NRS 391.317–391.3194.

We recognize that harmonizing the *Riley* decision with other provisions of NRS chapter 391 puts the school district in a dilemma. Complying with NRS 391.317–391.3194 when terminating a person who is no longer licensed by the Department of Education to teach is cumbersome and not practical considering the principles and prohibitions contained in NRS chapter 391 as a whole. The school district must remove an unlicensed person from a teaching assignment. The school district cannot pay a person for teaching if he is not duly licensed to teach. Therefore, the school district has no alternative but to terminate a person once his license is no longer valid. The hearing process cannot change this result because the school district does not have the authority to pass on the validity of a teaching license or validate such a license. Because of the interaction between the *Riley* decision and NRS 391.170, the school district must be able to complete the termination process before the employee’s license is actually invalidated. This puts the school district in the position of starting the termination process before the actual grounds for termination exist. Those grounds might never come into existence if the provisions on the license are satisfied sometime between the notice and the end of the process, thereby leading to unnecessary proceedings and expense.

We suggest that this process be addressed legislatively so that the school district is able to remove an unlicensed person from a teaching assignment once he no longer has a valid license to teach without going through a process not designed to effectively address the dilemma of an unlicensed employee in a teaching assignment.

CONCLUSION

The *Clark County School District v. Riley*, 116 Nev. ___, 14 P.3d 22 (2000) decision by the Nevada Supreme Court requires a public school district to follow the procedures outlined in NRS 391.317–391.3194 before the termination of a teacher, whether or not that teacher is properly licensed.

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However, a school district is also prohibited by law from paying a person to teach if he is not properly licensed. Therefore, a school district must begin the termination process in sufficient time to complete the process prior to the license becoming invalid.

FRANKIE SUE DEL PAPA
Attorney General

By: TINA M. LEISS
Senior Deputy Attorney General

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AGO 2001-25 OPEN MEETING LAW; REGIONAL PLANNING AGENCIES; ELECTED OFFICIALS: Public bodies that are required to be composed solely of elected officials may take action only by a vote of a majority of all members.

Carson City, September 6, 2001

Patricia A. Lynch, Reno City Attorney, Office of the City Attorney, P.O. Box 1900, Reno, Nevada 89505

Dear Ms. Lynch:

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

QUESTION

Do the amendments to NRS chapter 241 pursuant to 2001 Senate Bill 329 sections 1 and 2, effective July 1, 2001, apply to the Truckee Meadows Regional Planning Governing Board?

ANALYSIS

Senate Bill 329 (S.B. 329) provides in pertinent part as follows:

Section 1. Chapter 241 of NRS is hereby amended by adding thereto a new section to read as follows:

A public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action. For purposes of this section, a public body may not count an abstention as a vote in favor of an action.

Section 2. NRS 241.015 is hereby amended to read as follows:

241.015 As used in this chapter, unless the context otherwise requires:

1. "Action" means:

(a) A decision made by a majority of the members present during a meeting of a public body;

(b) A commitment or promise made by a majority of the members present during a meeting of a public body;

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(c) *If a public body may have a member who is not an elected official*, an affirmative vote taken by a majority of the members present during a meeting of the public body; or

(d) *If all the members of a public body must be elected officials*, an affirmative vote taken by a majority of all the members of the public body. [Emphasis added.]

Truckee Meadows Regional Planning Governing Board is created pursuant to NRS 278.0264. NRS 278.0264 provides in pertinent part as follows:

**NRS 278.0264 Governing board for regional planning:
Creation; membership; chairman; compensation;
operational needs; authority to sue and be sued; budget.**

1. There is hereby created in each county whose population is 100,000 or more but less than 400,000, a governing board for regional planning consisting of:

(a) Three representatives appointed by the board of county commissioners, at least two of whom must represent or reside within unincorporated areas of the county. *If the representative is:*

(1) A county commissioner, his district must be one of the two districts in the county with the highest percentage of unincorporated area.

(2) *Not a county commissioner*, he must reside within an unincorporated area of the county.

(b) Four representatives appointed by the governing body of the largest incorporated city in the county.

(c) Three representatives appointed by the governing body of every other incorporated city in the county whose population is 40,000 or more.

(d) One representative appointed by the governing body of each incorporated city in the county whose population is less than 40,000.

....

3. *The governing bodies may appoint representatives to the governing board from within their respective memberships.* A member of a local governing body who is so appointed and who subsequently ceases to be a member of that body, automatically ceases to be a member of the governing board. The governing body may also appoint alternative representatives who may act in the respective absences of the principal appointees.

....

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5. A member of the governing board who is also a member of the governing body, which appointed him, shall serve without additional compensation. All other members must be compensated at the rate of \$40 per meeting or \$200 per month, whichever is less. [Emphasis added.]

NRS 278.0264(1)(a)(1) and (2) indicate that a representative appointed by the board of county commissioners need not be a county commissioner. NRS 278.0264(3) indicates that governing bodies *may* appoint a representative from within their membership. If a representative need not be a county commissioner and governing bodies are not required to appoint a representative from within their membership, then the Truckee Meadows Regional Planning Governing Board may have one or more representatives who are not elected officials.

The amendments to NRS chapter 241, pursuant to S.B. 329 section 1, provide that “[a] public body that is *required to be composed of elected officials only* may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action.” [Emphasis added.] This language is further clarified by language in section 2 of S.B. 329 which amends the term “action” to address the new voting requirement for a public body required to be composed solely of elected officials. Section 2 of S.B. 329 provides that “[a]ction means: . . . (c) If a public body *may have a member who is not an elected official*, an affirmative vote taken by a majority of the members present during a meeting of the public body: or (d) If *all* the members of a public body *must be elected officials*, an affirmative vote taken by a majority of all the members of the public body.” [Emphasis added.] It is apparent from this language that if a public body must be composed of *all* elected officials, then action must be taken by a vote of a majority of all members.

The full legislative history of S.B. 329 is not yet completed by the Legislative Council Bureau; however, from the limited legislative history that is available, it is apparent from the comments of Senator Care, the bill’s sponsor, that the amendment to the open meeting law, NRS chapter 241, was intended to apply only to elected boards. Although appointed boards were originally included in the bill, they were later deleted. *Hearing on S.B. 329 Before the Assembly Committee on Government Affairs, 2001 Leg. Sess. (April 30, 2001)*. It is further evident from the comments of the joint sponsor of the bill, Assemblyman Parks, that it was the purpose of the bill to prevent a minority of an elected body from taking official action. It was Assemblyman Parks’ opinion that such action promotes skepticism and negativity towards elected officials. Mr. Parks explained that the bill originated as a result of an incident that occurred in Clark County relating to the passage of an ordinance. An ordinance was being considered for “big box” stores. “The seven member

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board had four [members] in attendance, making a quorum. One abstained from the vote, one voted no and two voted yes to pass the ordinance. Two people were able to speak for a seven member board.” *Id.*¹

The elected boards that were intended to be affected by the bill were listed in Exhibit E that was submitted at the hearing before the Assembly Committee on Government Affairs on April 30, 2001. *Id.* A copy of Exhibit E is attached hereto. The Truckee Meadows Regional Planning Governing Board is not listed on Exhibit E.

It is clear that the amendment to NRS chapter 241 by section 1 of S.B. 329 applies only to public bodies that are required to be composed solely of elected officials. Additionally, section 2 of S.B. 329 makes it clear that the more stringent voting requirement provided for in the bill applies only to public bodies whose members must *all* be elected officials. The law remains unchanged as to a public body that may have an individual member who is not an elected official. Accordingly, if a public body may have a member who is not an elected official, then action may be taken by a vote of a majority of the members present at a meeting, provided a quorum attended the meeting. S.B. 329 section 2(1)(c). However, with regard to a public body required to be solely comprised of elected officials, the law has been amended and action by such a public body may only be taken by affirmative vote of a majority of all members of the public body.

In the case of Truckee Meadows Regional Planning Governing Board, it is the opinion of this office that even though the Governing Board currently consists entirely of elected officials appointed by their respective local governments, the statutory right to have a non-elected member serve on the board is the determining factor in our analysis. The fact that the Governing Board may have a member who is not an elected official allows the Governing Board to take action with an affirmative vote of the majority of the members present at a meeting, provided such members constitute a quorum, and the higher standards delineated in section 2 of S.B. 329 are not applicable.

CONCLUSION

The language of S.B. 329 is clear. The 2001 amendment to NRS chapter 241 changing the definition of “action” from a vote of a majority of the members present at a meeting to a majority of all members of the public body only applies to those public bodies whose members are all required to be elected officials. The Truckee Meadows Regional Planning Governing Board is a public body, but not all members are required to be elected officials.

¹ We express no opinion whether such statement accurately observed that action had been effectively taken to pass the ordinance in question.

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Accordingly, Truckee Meadows Regional Planning Governing Board can take action with an affirmative vote taken by a majority of the members present during the meeting of the public body, provided such members constitute a quorum.

FRANKIE SUE DEL PAPA
Attorney General

By: CHARLOTTE MATANANE BIBLE
Assistant Chief Deputy Attorney General

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SB 329

Summary of BDR 19-640

BDR SECTION	AGENCY
1	New section
2	241.015--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 which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, without limitation, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation and a university foundation. Does not include the legislature.
3	241A.050--Advisory Council for Prosecuting Attorneys
4	205A.050--Advisory Board for the Nevada Task Force for Technological Crime
5	228.470--Committee on Domestic Violence
6	231.050--Commission on Economic Development
7	232.306--Commission on Mental Health and Developmental Services
8	232.580--Advisory Council within the Division of Industrial Relations
9	233A.050--Nevada Indian Commission
10	233C.060--State Arts Council
11	233I.050--Nevada Commission for Women
12	244.060--Board of County Commissioners
13	244.30791--County Park and Recreation Commission
14	244.3089--County Park Commission
15	244.345--County License Boards
16	244A.613--County Fair and Recreation Boards
17	266.235--City Council
18	266.250--City Council
19	269.025--Town Board or Board of County Commissioners
20	278-349--City Council or other legislative body of the city or the Board of County Commissioners, or, in Carson City, the Board of Supervisors
21	278.804--Governing Body of the Nevada Tahoe Regional Planning Agency
22	278.808--Advisory Planning Commission to the Nevada Tahoe Regional Planning Agency
23	280.150--Metropolitan Police Committee on Fiscal Affairs
24	281.1574--Commission to Review Compensation
25	284.055--Personnel Commission
26	287.0415--Board of the Public Employees' Benefits Program
27	309.120--Board of Directors of Local Improvement Districts
28	315.977--Nevada Rural Housing Authority
29	320.090--Board of Directors of a District for the Maintenance of Roads
30	321.5967--Board of Review of the Division of State Lands
31	327.130--Nevada State Board on Geographic Names
32	353.015--State Board of Examiners
33	353.227--Economic Forum

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ASSEMBLY GOVERNMENT AFFAIRS

DATE: 4/30/01 ROOM: 3142 EXHIBIT E

SUBMITTED BY: Jerry Care

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	34	353.229--Economic Forum
	35	360.080--Nevada Tax Commission
	36	361.340--County Boards of Equalization
	37	361.375--State Board of Equalization
	38	380.080--Board of Law Library Trustees
	39	384.060--Comstock Historic District Commission
	40	391.017--Commission on Professional Standards in Education
	41	394.385--Commission on Postsecondary Education
d/2	42	403.040--Board of County Highway Commissioners
	43	417.180--Nevada Veterans' Services Commission
	44	422.110--State Welfare Board
	45	427A.034--Nevada Commission on Aging
	46	428A.030--Board to Distribute Money to Organization Providing Emergency Shelter for Homeless Nevadans
	47	439.060--State Board of Health
	48	439.610--Board of Trustees of the Trust Fund for Public Health
	49	442.365--Advisory Subcommittee on Fetal Alcohol Syndrome
	50	445B.200--State Environmental Commission
f/3	51	450.140--Board of Hospital Trustees or Board of County Commissioners
	52	458.390--Commission on Substance Abuse Education, Prevention, Enforcement and Treatment
	53	463.110--State Gaming Control Board
	54	467.020--Nevada Athletic Commission
	55	501.177--Board of Wildlife Commissioners
	56	513.053--Commission on Mineral Resources
	57	534.035--Ground Water Boards
	58	538.131--Colorado River Commission
d/4	59	539.095--Board of Directors of an Irrigation District
	60	540.111--Advisory Board on Water Resources Planning and Development
	61	541.120--Board of Directors of a Water Conservancy District
	62	548.150--State Conservation Commission
f/5	63	548.305--Board of Supervisors of Conservation Districts
	64	561.095--State Board of Agriculture
	65	563.300--Rangeland Resources Commission
	66	568.090--State Grazing Boards
	67	584.440--State Dairy Commission
	68	616B.551--Board for the Administration of the Subsequent Injury Fund for Self-Insured Employers
	69	616B.572--Board for the Administration of the Subsequent Injury Fund for Associations of Self-Insured Public or Private Employers
	70	616B.767--Appeals Panel for Industrial Insurance
	71	618.585--Occupational Safety and Health Review Board
	72	623.140--State Board of Architecture, Interior Design and Residential Design
	73	6274.090--State Contractors' Board
	74	625.460--State Board of Professional Engineers and Land Surveyors

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75	625A.040--Board of Registered Environmental Health Specialists
76	628.100--Nevada State Board of Accountancy
77	630.100--Board of Medical Examiners
78	630A.150--Board of Homeopathic Medical Examiners
79	633.231--State Board of Osteopathic Medicine
80	637A.040--Board of Hearing Aid Specialists
81	637B.120--Board of Examiners for Audiology and Speech Pathology
82	641B.120--Board of Examiners for Social Workers
83	641C.160--Board of Examiners for Alcohol and Drug Abuse Counselors
84	642.050--State Board of Funeral Directors, Embalmers and Operators of Cemeteries and Crematories
85	645.160--Real Estate Commission
86	645B.865--Advisory Council on Mortgage Investments and Mortgage Lending
87	649.047--Collection Agency Advisory Board
88	654.100--Nevada State Board of Examiners for Administrators of Facilities for Long-Term Care
{ 16 89	Caliente City Council
{ 17 90	Carlin City Council
{ 18 91	Board of Supervisors of Carson City
{ 19 92	Board of Supervisors of Elko
{ 20 93	Board of Councilmen of Gabbs
{ 21 94	Henderson City Council
{ 22 95	Las Vegas City Council
{ 23 96	North Las Vegas City Council
{ 24 97	Reno City Council
{ 25 98	Sparks City Council
{ 26 99	Board of Councilmen of Wells
{ 27 100	Yerington City Council
	101 Board of Directors of the Las Vegas Sewage District
	102 Board of Directors of the Las Vegas Valley Water District
	103 Board of Directors of the Central Nevada Resource Development Authority
	104 A Commission appointed by the governing body on behalf and in the name of the county for administration of airport facilities, recreational facilities or combined facilities
	105 Board of Commissioners of the Elko City-County Civic Auditorium Authority
	106 Board of Trustees of the Washoe County Airport Authority
{ 30 107	Board of Trustees of the Airport Authority of Lander County
{ 31 108	Governing Board of the Moapa Valley Water District
{ 32 109	Governing Board of the Moapa Valley Water District
	110 Governing Board of the Virgin Valley Water District
	111 Governing Board of the Southern Nevada Regional Planning Coalition

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AGO 2001-26 FIREMEN; EMERGENCY; GOVERNOR: State and local officials may only exercise powers expressly delegated by the Legislature. Authority to order mandatory evacuation of residents during an emergency or disaster has been delegated only to the Governor in NRS chapter 414. Local firefighting agencies do not have authority to order mandatory evacuations.

Carson City, September 25, 2001

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

Dear Mr. Doyle:

You have asked whether firefighters and fire scene commanders have authority to order mandatory evacuations in advance of a wildland fire.

BACKGROUND

In 1996 this office released a memorandum regarding the authority of firefighting and law enforcement personnel to evacuate homeowners whenever there is a threat to life and safety. In the memorandum, we concluded there was authority to order evacuations that ultimately rests upon the police power of the State as delegated by the Legislature. We noted express delegations of the police power for limited evacuations at the scene of the fire, as well as delegation of authority to remove individuals who were engaging in conduct that constituted interference with extinguishment of the fire. The 1996 memorandum also stated that evacuation of entire neighborhoods was permissible where authorities acted reasonably under the circumstances to protect the public health, safety, morals, or general welfare.

You have asked that we reconsider our 1996 memorandum insofar as it recognizes firefighters' authority to order mandatory evacuations, and you note that this construction of the memorandum seems to be in conflict with NRS chapter 414, Emergency Management, which expressly gives that authority only to the Governor. This opinion supersedes the memorandum issued by this office in 1996, and to the extent that memorandum conflicts with the conclusions in this opinion, it is overruled.

QUESTION

Whether law enforcement and firefighting officials have authority to order mandatory evacuations of property owners in advance of a wildland fire.

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ANALYSIS

This opinion addresses the specific authority of law enforcement and firefighting officials to order mandatory evacuations of property owners in advance of a wildland fire. As a preface to this analysis, we assume that mandatory evacuation means ordering individuals from their homes with authority to compel compliance with the order.

A. Statutory Powers.

All state and local officials are limited to the exercise of powers which are expressly delegated by the Legislature or which are necessarily implied in order to permit the exercise of expressly delegated authority. *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 96-97 (1970) (state agency has only those powers which have been expressly or impliedly granted by law); Op. Nev. Att’y Gen. No. 95-03 (March, 1995) (county possesses only such powers as are specially provided for by law).

This is also true of firefighting officials in state and local governments. Although firefighting is a vital function that falls within the state or local government’s police powers, it is no different from other government functions in being limited to those powers expressly or impliedly delegated to the responsible officials.

The Legislature may delegate the State’s police power for the “preservation of the public health, safety, morals, or general welfare” of the citizenry. *Zale-Las Vegas v. Bulova Watch Co.*, 80 Nev. 483, 498, 396 P.2d 683, 691 (1964) (quoting *Remington Arms Co. v. Skaggs*, 55 Wash. 2d 1, 345 P.2d 1085 (1959); *State v. Eighth Judicial Dist. Court*, 101 Nev. 658, 708 P.2d 1022 (1985)). Authority relevant to evacuation by firefighters exists at NRS 475.070, which makes it unlawful for any person to interfere with a peace officer or fireman who is engaged in extinguishing a fire, or to engage in conduct likely to interfere with the fire’s extinguishment. Property owners who attempt to assist firefighters without benefit of breathing apparatus, protective clothing, and—most importantly—training, may in fact hamper efforts by the firefighters. This type of conduct could constitute “interference with the extinguishment of the fire” and may serve as the basis for arrest or citation. However, this standard for individual behavior cannot justify mandatory evacuation of entire neighborhoods.

Nor does the similar standard for individual behavior set forth in regulation justify large-scale mandatory evacuation. The State Fire Marshal’s Office has adopted the 1997 Uniform Fire Code, which by law sets minimum standards for any fire department operating in Nevada. NAC 477.281. *See also* NRS 477.030(c) (regulations of the state fire marshal apply throughout the state, but his authority to enforce them does not extend to counties with a population of

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50,000 or more). Section 104 of the 1997 Uniform Fire Code gives the officer in charge at the scene of a fire or emergency authority “to remove or cause to be removed or kept away from the scene . . . any person not actually and usefully employed in the extinguishing of such fire or in the preservation of property in the vicinity thereof.” This authority provides a basis for the removal of interfering individuals at an actual fire scene, as well as authority to recommend voluntary evacuation and to restrict anyone attempting to enter the scene who is not already present. We do not, however, construe it to permit mandatory evacuation of large numbers of persons as a preventative measure in anticipation of a fire emergency.

The Legislature has demonstrated its ability to delegate emergency authority, including the power to compel evacuation, to officers and in circumstances it deems proper. In particular, it has conferred such authority upon the Governor. The Governor may exercise special powers following a declaration of disaster or an emergency. *See* NRS 414.0335, 414.0345. Among these powers are authority to compel evacuation of all or part of the population from a stricken or threatened area within the State. NRS 414.070(4). The Governor may also delegate this authority. NRS 414.060(3)(f).

In other states, legislative acts also independently authorize evacuations by other state and local officials. *See, e.g.,* CAL. PENAL CODE § 409.5 (West 1999), Authority of peace officers, firefighters, and others to close disaster area to unauthorized entry; OR. REV. STAT. § 131.725 (1999), Exclusion from public property. Whether such authority should be conferred upon other state and local officials is a policy matter within the province of the legislature to decide. In Nevada, no such delegation has been made.

Additional examples of legislative delegations exist in Georgia and Alabama. In Georgia, the Director of the Georgia Emergency Management Agency asked whether local officials could require mandatory evacuations. 1983 Op. Att’y Gen. Ga. 138 (September 1, 1983). It was the Georgia attorney general’s opinion that designated local officials have authority to require evacuation of citizens during a local emergency pursuant to express delegation by the legislature contained in GA. CODE ANN. §§ 38-3-27 and 38-3-3(1). Opinion at 2.

In Alabama, the Director of the Emergency Management Agency asked the attorney general whether the governing body of the political subdivision in which a disaster occurs has the power to order mandatory evacuations of citizens of the political subdivision threatened by the disaster event. 193 Op. Att’y Gen. Ala. 25 (November 17, 1983). The attorney general first identified express statutory authority for the governor to compel evacuations during emergency situations. ALA. CODE § 31-9-8. He also identified a provision authorizing governing bodies of political subdivisions to implement plans for

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civil defense, ALA. CODE § 31-9-10(b)(1), including planning evacuation of persons within the political subdivision. However, final authority to order mandatory evacuations rests with the governor, except where regulations pertaining to a local, state, or federal evacuation plan otherwise provide for local evacuations when the governor is unable to communicate with the stricken area, and are effective only until communication with the governor is reestablished.

Finally, counties in home rule states may possess an inherent authority to evacuate which is not available to counties in non-home rule states such as Nevada. In a 1996 opinion, the Oregon attorney general was asked whether existing authority would authorize state, county, or city police or fire officials to order mandatory evacuation of an area due to imminent threat of fire causing human death or injury. 48 Op. Att’y Gen. Or. 27 (April 3, 1996). The opinion concluded that the governor has such power, as delegated by the legislature in OR. REV. STAT. § 401.055. 48 Op. Att’y Gen. Or. 1 (April 3, 1996).

The opinion further concluded that local governments also have power to order mandatory evacuations pursuant to specific ordinances adopted during a fire emergency. Local governments in Oregon have this authority because the Oregon Constitution’s “home rule” provisions are “broad enough to adopt ordinances ordering evacuations of an area if a fire threatens public safety.” Opinion at 8.

Finally, the 1996 Oregon attorney general opinion also examined the authority of police and fire officials to order mandatory evacuations. It concluded that no independent authority exists to authorize a sheriff or any officer of a political subdivision to order mandatory evacuations, but they may carry out orders issued by the governor for the mandatory evacuation of threatened areas. Opinion at 12.

Nevada’s Constitution does not contain home rule provisions, thus Nevada’s counties have no authority to enact mandatory evacuation ordinances. In Nevada, local governments, law enforcement agencies, and firefighters may only enforce mandatory evacuation orders if specifically authorized to do so by the Governor under his powers pursuant to NRS chapter 414.

The opinions from other jurisdictions discussed above are consistent with our conclusion that authority to compel evacuations in a non-home rule state, such as Nevada, must rest upon express statutory authority. In Nevada, that authority rests exclusively with the Governor, but it is delegable by the Governor during an emergency or following a declaration of disaster.

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B. Constitutional Issues.

Exercise of properly delegated authority to order evacuation would, when reasonably conducted, withstand constitutional scrutiny.

The Fourteenth Amendment protects individuals from state action that would deprive them of life, liberty, or property without due process of law. However, it is well settled that “[s]ummary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process.” *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 299-300 (1981); *North American Cold Storage v. Chicago*, 211 U.S. 306, 319-20 (1908). As the Court in *Hodel* stated, “deprivation of property to protect the public health and safety ‘is [one] of the oldest examples’ of permissive summary action.” *Hodel*, 452 U.S. at 300, citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950). The Oregon attorney general, in the opinion described above, declared that the governor’s power to order evacuation from areas covered by an emergency is consistent with long-standing legal principles concerning emergency governmental action and that summary governmental action is well settled in Anglo-American law. Opinion at 7. The Oregon attorney general further extrapolated this principle to conclude that if the government has authority to destroy real and personal property to prevent the spread of fire, then it surely has the lesser authority to compel evacuations to protect public safety and prevent the spread of fire. Opinion at 7-8. *Cf. Miller v. Campbell County*, 722 F. Supp. 687, 692-93 (D. Wyo. 1989) (local government has delegated power to order evacuations of neighborhood threatened by lethal gases). Thus mandatory evacuation in a proper case would not violate constitutional limits, whether ordered by the governor or by officials to whom he has delegated his authority. Opinion at 7-8.

The same would be true of an order by Nevada’s Governor issued pursuant to NRS 414.070 or an order issued by the Governor’s designee under authority of NRS 414.060(3).²

CONCLUSION

Recognizing that critical decisions often must be made with little time for deliberation or due consideration, firefighters and other emergency personnel will often have to use their best judgment in assessing any individual situation. Firefighting agencies in Nevada should, and routinely do, issue advisory

² The Fourth Amendment also imposes no barrier to emergency firefighting actions. In *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1950 (1978), the court stated that “[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry ‘reasonable.’ Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze.” *Accord United States v. Hoffman*, 607 F.2d 280, 283 (9th Cir. 1979); *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971).

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evacuation notices in advance of an approaching fire in order to warn inhabitants; they may control ingress to a fire scene under existing express and implied authorities; but they currently have no inherent or independent delegated authority to enforce the residents' mandatory evacuation from their habitations. In Nevada, only the Governor has authority to order compulsory evacuations during a declaration of disaster or the existence of a state of emergency, as those terms are defined in NRS chapter 414.

However, in accord with the opinion of the Alabama attorney general described above, we also conclude that local governments may, by cooperative development of emergency plans with the Division of Emergency Management pursuant to NRS 414.040(4), and based upon limited authority derived from the Governor's own authority under NRS 414.070(4), provide for local evacuation orders when, and if, the Governor is unable to communicate with the stricken area.

This issue is of such great public importance that the Legislature may wish to revisit this area of the law to further clarify it and address the authority of local government entities.

FRANKIE SUE DEL PAPA
Attorney General

By: GEORGE TAYLOR
Deputy Attorney General

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AGO 2001-27 SCHOOL DISTRICT; RELIGION; FIRST AMENDMENT ACTIVITIES: Clark County School District Regulation 6113.2(VI), which authorizes student-initiated school prayer at commencement exercises, violates the First Amendment of the United States Constitution.

Carson City, September 26, 2001

Stewart L. Bell, Office of the District Attorney, Clark County, P. O. Box 552215, Las Vegas, NV 89155-2215

Dear Mr. Bell:

You have asked this office for an opinion of the Attorney General concerning a regulation of the Clark County School District.

QUESTION

Does the portion of Clark County School District Regulation 6113.2, which authorizes student-initiated school prayer at commencement exercises, violate the First Amendment of the United States Constitution?

ANALYSIS

Clark County School District Regulation 6113.2, entitled "Sectarianism, Religious Free Speech and Religious Holidays," authorizes student-initiated benediction or invocation at high school graduation exercises. Section VI provides as follows:

VI. High school commencement exercises may include an invocation and/or benediction under the following conditions:

a. The decision to include an invocation and/or benediction at a high school graduation exercise must be voluntarily agreed upon by a majority of the graduating senior class, with the advice and counsel of the school principal.

b. The invocation, benediction, if used, shall be given by a student volunteer.

We have carefully examined the jurisprudence relevant to this important area of constitutional law and agree with the well-researched and well-reasoned conclusion of your Deputy District Attorney Ann Bersi, which we reiterate in part. Ms. Bersi concluded the Clark County School District Regulation 6113.2 (VI) violates the Establishment Clause of the United States Constitution.

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The Establishment Clause of the First Amendment of the United States Constitution commands, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This clause requires that the government maintain benevolent neutrality and avoid an endorsement of religious activities on the part of governmental actors such as school districts. Clark County School District Regulation 6113.2 violates the establishment clause if it permits the school district to sponsor a religious message in the schools. *Santa Fe Indep. Sch. Dist. v. Doe, et. al.*, 530 U.S. 290, 309 (2000) (Rehnquist C.J., dissenting, with whom Scalia, J. and Thomas, J., join).

Our research shows a split in the federal circuit courts on the question presented, but the rule in the Ninth Circuit Court of Appeals is clear and was recently confirmed by the United States Supreme Court in *Santa Fe*.

In the case of *Lee v. Weisman*, 505 U.S. 577 (1992), the United States Supreme Court affirmed a Rhode Island district court judgment that held it is inconsistent with the Establishment Clause for a school district to include a nonsectarian, nonproselytizing prayer by clergy as part of an official school graduation ceremony. The prayer bore the imprint of the state because the school principal decided an invocation should be given, chose the rabbi, and gave him guidelines for the prayer. The school controlled the contents and timing of the graduation program, graduation speeches, the dress code, and decorum of the students. The court noted that the singular importance of a high school graduation as a once in a lifetime event, and the susceptibility of adolescents to peer and social pressure, left a dissenting student with the dilemma of participating in the prayer against her conscience or missing her own high school graduation. *Id.* at 592-96. By including a prayer, even a nonsectarian, nonproselytizing one, in the graduation exercises, the Court concluded that the school's practice compelled a student to participate in an explicit religious exercise. *Id.* at 598. See also *Collins v. Chandler Unified Sch. Dist.*, 644 F. 2d 759, 762 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (school practice of commencing assemblies with a prayer by the student council while objecting students were allowed to report to study hall violated the Establishment Clause).

The recent Supreme Court decision in *Santa Fe* is instructive in regard to the Clark County School District Regulation. In *Santa Fe*, the district policy allowing student-initiated prayer at football games was similar to Clark County School District Regulation 6113.2 in that it provided for a majority of the students to determine by election whether “invocations” or “messages” should be delivered at school football games and for an election to select the

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spokesperson to deliver them from a list of student volunteers.¹ The Court found that the election constituted a decision by the state rather than expression of the students' private speech:

The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," . . . the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State, . . ."

Santa Fe, 530 U.S. at 311, citing *Lee*, 505 U.S. at 587.

The Supreme Court found the school sponsorship of a religious message is impermissible because not only did the district authorize the invocation through its policy and allow the invocation to be held at the school sponsored and school related event, the school district also exercised control over the invocation by placing restrictions on its content and broadcasting it.

[It] is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 688 (1984) (O'Connor, J., concurring). The delivery of such a message -- over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy the explicitly and implicitly encourages public prayer -- is not properly characterized as "private" speech.

Santa Fe, 530 U.S. at 309-310.

Subsequent to the *Santa Fe* decision, the Ninth Circuit recently affirmed the dismissal of a student's free speech claims on finding that the actions of

¹ The Court indicated that "invocation" is a term that primarily describes an appeal for divine assistance. See, e.g. *Santa Fe*, 530 U.S. at 306-07.

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the defendant school district officials to prevent the student from giving sectarian graduation valedictory and invocation speeches were reasonably taken to avoid violating the Establishment Clause, specifically citing the teachings of *Santa Fe* and *Lee*. *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied* (student's sectarian invocation would have caused an even more serious Establishment Clause violation than in *Santa Fe*, because in *Santa Fe* the invocation was required to be “nonsectarian and nonproselytizing”).²

As in the Ninth Circuit and Supreme Court cases cited above with similar backgrounds, Clark County School District regulation 6113.2(VI) provides for the majority of the senior class to decide by election whether to include an invocation or benediction in the graduation program.

Further, the regulation provides that the school principal will advise and counsel on the issue. The times for the graduation ceremonies are set by the school administrators and the bills for the graduation, including the costs of the facilities, sound systems, support staff, and liability insurance, are paid by the school district from public funds. In our opinion, this regulation opens the door to the Clark County School District's entanglement in the students' forced choice between attending their own graduation and offending their consciences. The regulation does not pass constitutional muster.

CONCLUSION

Clark County School District Regulation 6113.2(VI), which authorizes student-initiated school prayer at commencement exercises, violates the

² Following the *Santa Fe* decision, the Supreme Court vacated and remanded *Adler v. Duval County Sch. Bd.*, 531 U.S. 801 (2000) to the Eleventh Circuit for a decision in light of *Santa Fe*. The Duval County School District policy permitted a graduating student, elected by the senior class, to deliver at graduation an unrestricted message of his or her choice. On remand, the Eleventh Circuit held that the policy did not violate the Establishment Clause. *Adler v. Duval County Sch. Bd. v. Doe*, 250 F.3d 1330 (11th Cir. 2001).

However, this decision is contrary to the rule in the Ninth Circuit and our reading of *Santa Fe*. See *Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000) *cert. denied*. It is not persuasive for Nevada school districts.

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Establishment Clause of the First Amendment of the United States
Constitution.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Senior Deputy Attorney General

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AGO 2001-28 COUNTIES: SCHOOL DISTRICT: DISTRICT ATTORNEYS: Nevada's anti-nepotism statute, NRS 281.210, does not prohibit the Board of Trustees of the Lincoln County School District (Board) from appointing an individual to the Board who is within the third degree of consanguinity or affinity to an existing school district employee. An appointment to fill a vacancy on a school board of trustees is a matter within the remaining Board members' discretion, subject to applicable qualification or other restraints imposed by law. The Board is not bound to follow its counsel's advice or judgment concerning the appropriateness of a proposed appointment, but should give serious attention to heeding counsel's advice when it relates to the legality of a proposed appointment.

Carson City, September 26, 2001

Philip H. Dunleavy, District Attorney, Office of the Lincoln County District Attorney, P.O. Box 60, Pioche, Nevada 89043

Dear Mr. Dunleavy:

You have asked two questions concerning the authority of the Board of Trustees of the Lincoln County School District (Board) to fill vacancies on the Board.

QUESTION ONE

Does Nevada's anti-nepotism statute, NRS 281.210, prohibit the Board from appointing an individual to the Board who is within the third degree of consanguinity or affinity to existing school district employees?

ANALYSIS

You have provided the following facts. There are currently two vacancies on the Board and four qualified applicants for the two vacancies. The applicants are all currently employed by, or are related to persons who are employed by, the Lincoln County School District. NRS 386.270(1) provides that appointments to fill vacancies on a board of school trustees must be made by "the remaining members of such board" at a public meeting after complying with certain notice requirements.

NRS 281.210 provides in relevant part:

1. Except as otherwise provided in this section, it is unlawful for any person acting as a school trustee . . . *to employ* in any capacity on behalf of the . . . school district . . . any relative of . . . any member of such a board . . . who

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is within the third degree of consanguinity or affinity.¹
[Emphasis added.]

This office has consistently interpreted the term “to employ” to mean the initial hiring of a person and not to the continuing employment of an already-hired employee. In Op. Nev. Att’y Gen. No. 178 (August 31, 1960), we considered whether the anti-nepotism statute would be violated where the nephew of the existing county road superintendent was appointed to the office of county commissioner, thereby placing the nephew in the role of hiring authority over his uncle. Adopting the holding of *Backman v. Bateman*, 263 P.2d 561 (Utah 1953), which struck down a Utah anti-nepotism statute that made it unlawful for a hiring authority to “retain in employment” his relative, we opined:

The phrase “to employ” in the context used in NRS 281.210, supra, is susceptible of both a narrow and broad construction. The statute might be construed to prohibit only the act of hiring relatives within the class described or it might in addition make retaining such relatives in public employment unlawful. . . .

....

The [Utah Supreme] Court in a divided opinion held the statute unconstitutional when it was invoked in an attempt to terminate the employment of the plaintiff, a high school principal who had served for 27 years and whose brother became a member of the Board of Education after the plaintiff was hired.

The adoption of a broad construction of our antinepotism statute would in many instances deprive a public servant of long standing of his job merely because his relative assumes a position on the appointing board years after his appointment. It would work a hardship not only on the government employee but upon the agency or political subdivision employing him. The difficulty involved in replacing tested, experienced public employees is common

¹ While not relevant to the analysis of this question, we note the exception at NRS 281.210(2), which provides in relevant part:

2. This section does not apply:

(a) To school districts, when the teacher or other school employee is not related to more than one of the trustees . . . by consanguinity or affinity and receives a unanimous vote of all members of the board of trustees and approval by the state department of education.

Accordingly, the Nevada Legislature has provided an exception to the general prohibition against the hiring of a relative of a board member when certain conditions are met.

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knowledge. The majority opinion in the Backman case, supra, suggests that the denial of employment under such circumstances constitutes a deprivation of the employee's constitutional rights.

Referring to the underlying purpose of anti-nepotism statutes, we summarized as follows:

Construing the cited statute in a manner to prohibit only the act of hiring relatives within the proscribed class does not do violence to the general purpose of antinepotism legislation as expressed in the decided cases, which is to prevent the evil of selecting public employees on the basis of kinship rather than merit.

Since NRS 281.210 only prohibits the hiring of a relative of a Board member and does not prevent the continued employment of an existing school district employee where his relative is appointed to the Board, we must answer your question in the negative.

CONCLUSION TO QUESTION ONE

Nevada's anti-nepotism statute, NRS 281.210, does not prohibit the Board of Trustees of the Lincoln County School District (Board) from appointing an individual to the Board who is within the third degree of consanguinity or affinity to an existing school district employee.

QUESTION TWO

Must the Board of Trustees of the Lincoln County School District (Board) follow the opinions and advice of its legal counsel when appointing persons to fill vacancies on the Board pursuant to NRS 386.270(1)?

ANALYSIS

You have pointed out that because of the existing familial relationships between the four candidates for appointment to the Board, the appointment of any of the four qualified candidates might result in a potential conflict of interest or create an appearance of impropriety. Further, you have warned that an appointment of any of the four might possibly result in uneasiness among the residents of the school district or in resentment to the school district. However, you have also acknowledged that because of the sparse population of Lincoln County, "it has been difficult to find potential appointees to the Lincoln County School Board that do not have any relatives currently employed by the Lincoln County School District."

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NRS 386.270(1) vests the “remaining members” of the Board with broad authority to fill vacancies on the Board. Accordingly, we agree with your statement that the decision to appoint a particular candidate “ultimately rests with the School Board.” Recognizing the difficulty in finding applicants for the Board who do not share some sort of familial relationship with one or more school district employees, it would appear that at times the need to perform the mission of the Board must prevail and that a candidate with known familial ties to a person employed by the school district may be the only remaining option open to the remaining Board members. Under such circumstances, the Board should become fully advised as to the relationship and should, with the District Attorney’s assistance, become familiar with what actions the related Board member should take if, in fact, a conflict does arise. In this regard you have pointed out several ways for a Board member to handle a conflict situation. For instance, he may refuse to vote on a matter before the Board in which he has a pecuniary interest, NRS 281.501(2), or he may vote or abstain after making a disclosure of information concerning his interest, NRS 281.501(3)(c). We note that in close cases the Nevada Commission on Ethics may, on request of a public officer, issue an opinion as to the propriety of a public officer’s proposed conduct. NRS 281.511.

Finally, we note that your concerns generally revolve around the propriety of the Board appointing candidates who are related to a Board member and whether such an appointment may create a potential conflict or appearance of impropriety. These are matters of judgment over which reasonable persons may differ. Our conclusion is that it is the Board’s, and not the District Attorney’s, province to exercise its judgment to make the ultimate choice in such appointments. We caution that where the District Attorney’s advice relates to the legality of an action, such as whether proper notice of the appointment has been performed, the Board would be well advised to heed that advice to avoid possible criminal or other charges.

CONCLUSION TO QUESTION TWO

An appointment to fill a vacancy on a school board of trustees is a matter within the remaining board members’ discretion, subject to applicable qualification or other restraints imposed by law. The board is not bound to follow its counsel’s advice or judgment concerning the appropriateness of a

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proposed appointment, but should give serious attention to heeding counsel's advice when it relates to the legality of a proposed appointment.

FRANKIE SUE DEL PAPA
Attorney General

By: JAMES T. SPENCER
Senior Deputy Attorney General

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AGO 2001-29 COUNTIES; HEALTH; REGULATIONS; SEWAGE SYSTEMS: Washoe County District Health Department has promulgated regulations under NRS 444.650, therefore the individual sewage disposal system regulations need not be approved by the State Board of Health to become effective.

Carson City, October 4, 2001

Yvonne Sylva, Administrator, Department of Human Resources, Health Division, 505 East King Street, Room 201, Carson City, Nevada 89701

Dear Ms. Sylva:

On behalf of your agency's Bureau of Health Protection Services, you have requested an opinion from this office regarding the authority of the State Board of Health (SBOH) to approve the regulations of a health district that solely involve individual systems for disposal of sewage. Your question arises in the context of an authority statute allegedly requiring SBOH "approval" of Washoe County District Health Department's promulgated individual sewage disposal system regulations.

QUESTION

Are sewage disposal regulations, adopted by a health district under NRS 444.650, required to be approved by the SBOH under NRS 439.410(3) before they become effective?

ANALYSIS

Washoe County District Health Department is a "health authority" as defined under NRS 439.005(4). It is also a "health district" as defined by NRS 439.370 to 439.410, inclusive. The Nevada Revised Statutes state:

In addition to any other powers, duties and authority conferred on a *district board of health* by this section, the district board of health may by affirmative vote of a majority of all the members of the board *adopt regulations* consistent with law, which must *take effect immediately on their approval by the state board of health*, to:

- (a) Prevent and control nuisances;
- (b) Regulate sanitation and sanitary practices in the interests of the public health;
- (c) Provide for the sanitary protection of water and food supplies; and

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(d) Protect and promote the public health generally in the geographical area subject to the jurisdiction of the health district.

NRS 439.410(3); Act of April 10, 1973, ch. 251, § 1, 1973 Nev. Stat. 314 (emphasis added). This SBOH and health district general authority statute was first codified in 1973 in its current form.

NRS 439.410(3) provides for the general authority of a health district to promulgate regulations regarding the general topics set forth in subparagraphs (a) through (d), inclusive. This general authority statute also makes the promulgation of such regulations subject to prior approval by the SBOH. Such “approval” by the SBOH is further recognition of the general authority of the SBOH as the supreme health authority in “all nonadministrative health matters” in the state. *See* NRS 439.150 (setting forth the general powers and duties of the State Board of Health). This “approval” authority by the supreme health authority is a general discretionary power granted by the Legislature to the SBOH in oversight of a health district’s regulations not otherwise exempted from such “approval.” However, in this case, the general authority of the SBOH regarding a health district’s regulations appears to conflict with the specific authority of a health district to promulgate individual sewage disposal system regulations. *See* NRS 444.650. This statute states:

1. The state board of health shall adopt regulations to control the use of an individual system for disposal of sewage in this state. *Those regulations are effective except in health districts in which a district board of health has adopted regulations to control the use of an individual system for disposal of sewage in that district.*

2. A board which adopts such regulations shall consider and take into account the geological, hydrological and topographical characteristics of the area within its jurisdiction.

3. The regulations adopted pursuant to this section must not conflict with the provisions of NRS 445A.300 to 445A.730, inclusive, and any regulations adopted pursuant to those provisions.

NRS 444.650; Act of April 14, 1983, ch. 138, § 1, 1983 Nev. Stat. 328 (emphasis added). This SBOH and health district specific authority statute was first codified in 1983 in its current form.

As a general rule of statutory construction, a specific authority statute, codified later in time after the codification of a general authority statute regarding the same topic, would take precedence over the general authority

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granted. *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P. 2d 56, 57 (1979) (provision specifically applying to situation takes precedence over one applying generally); see *Laird v. Nevada Pub. Employees Retirement Bd.*, 98 Nev. 42, 45, 639 P. 2d 1171, 1173 (1982) (“Where a general and special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls. [Citations omitted.] Additionally, when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment.”) [Citations omitted.]

NRS 444.650 is the “specific” statute codified later in time in 1983. It is controlling over the 1973 codified general authority “approval” statute of the SBOH. Further, in comparing subsection 1 of NRS 444.650, which gives general authority to the SBOH to promulgate regulations regarding “individual systems for disposal of sewage” for non-health district areas of the State of Nevada, with the expressed exceptions to its regulation adoption authority under NRS 439.200(1)(e), the intent of the Legislature is manifestly clear. The statute states:

1. The *state board of health* may by affirmative vote of a majority of its members *adopt*, amend and enforce reasonable *regulations* consistent with law:

....

(e) To govern and define the powers and duties of local boards of health and health officers, *except* with respect to the provisions of NRS 444.440 to 444.620, inclusive, 444.650, 445A.170 to 445A.955, inclusive, and chapter 445B of the NRS. [Emphasis added.]

NRS 439.200(1)(e).

CONCLUSION

The Legislature has clearly provided general authority to the State Board of Health to approve the regulations of a health district except where such regulations, such as those for individual systems for disposal of sewage under NRS 444.650, are exempted from that general authority by a specific authority statute granted to the health district. Because the Washoe County District Health Department has promulgated regulations under NRS 444.650, they

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need not be “approved” by the State Board of Health under subsection 3 of NRS 439.410 to become effective.

FRANKIE SUE DEL PAPA
Attorney General

By: RANDAL R. MUNN
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-30 ELECTIONS; LOCAL GOVERNMENT; PUBLIC OFFICERS: The term limitation provision in the Nevada Constitution applies to the Winnemucca mayor.

Carson City, October 4, 2001

O. Kent Maher, Winnemucca City Attorney, P.O. Box 351, Winnemucca, Nevada 89446

Dear Mr. Maher:

You have requested an opinion from this office regarding whether term limits apply to the mayor of Winnemucca.

QUESTION

Does the term limitation provision in the Nevada Constitution apply to the office of mayor of the City of Winnemucca?

ANALYSIS

In 1996 the voters of Nevada enacted limitations on the number of terms certain elected officials may serve. These new limitations are found in article 4, sections 3 and 4; article 5, section 19; and article 15, section 3 of the Nevada Constitution. The provision that applies specifically to members of local governing bodies is article 15, section 3, paragraph 2 which states:

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

The Attorney General issued an opinion in 1996 clarifying these term limit provisions. Op. Nev. Att'y Gen. No. 96-23 (August 1996). One of the issues we analyzed was whether the officer of mayor was included within term limitations:

Mayors have both executive and legislative duties. *Cf.* NRS 266.165; 266.190; and 266.200. An examination of the instrument creating each city is necessary before a conclusion can be reached as to whether a mayor would be subject to term limits or not. If the creating instrument indicates the mayor's main function is to be an administrator for the city, and the mayor does not exercise legislative

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power as a member of the city council, then the mayor would not be subject to term limits. If, on the other hand, the mayor functions as a member of the city council, a governing body, then term limits would apply to that position as well as to the other members of the city council.

Id. at 6. We also explained how cities are created, either by special charter or by general law, and describe the impact that a city manager may have. *Id.* We concluded that term limits will “apply to city councils and to mayors in general law cities where city managers have been appointed, but not to mayors in general law cities where no city manager has been appointed and the mayor exercises only executive functions.” *Id.* at 8.

According to the information you supplied to this office, Winnemucca is a general law city with an elected mayor and an appointed city manager. The powers granted to the mayor are enumerated in Chapter 2 of the Winnemucca Municipal Code (WMC) and in the Nevada Revised Statutes 266.200. The mayor may exercise the following limited legislative functions: presiding over the city council when it is in session (WMC Ch. 2.08.020(A)); preserving order and decorum at meetings (WMC Ch. 2.08.020(B)); enforcing the rules of the council (WMC Ch. 2.08.020(C)); discussing or debating a question before the city council (WMC Ch. 2.08.030); casting the deciding vote in the case of a tie (WMC Ch. 2.08.040); vetoing resolutions (WMC Ch. 2.08.050); and approving ordinances, resolutions, and contracts requiring the expenditure of money (WMC Ch. 2.08.060).

The United States Court of Appeals for the Fourth Circuit affirmed the United States District Court’s holding that “a legislative body’s discipline of one of its members is a core legislative act.” *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997). This was a legislative immunity case in which one member of a county board of supervisors sued other members of the board after they disciplined him. The other members of the board claimed legislative immunity and the Court of Appeals agreed, applying the principles of legislative immunity. The Court concluded the board had the “power to regulate uncivil behavior, even though it did not occur during an official meeting.” *Id.* at 745. The Court continued, “Because we conclude that the [board] acted in a legislative capacity when it voted to discipline [one member], its action is protected by absolute legislative immunity.” *Id.*

According to the *Whitener* court, regulating uncivil behavior during an official city council meeting is a legislative function. The mayor of Winnemucca has the authority to regulate such behavior and when the mayor does exercise this authority, the mayor would be performing a legislative function.

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Legislative speech, that is discussing or debating an issue, is also protected by immunity from judicial interference. *Id.* at 744. The mayor of Winnemucca has the authority to participate in such legislative speech.

Also, while the mayor of Winnemucca does not have the authority to vote on every measure that comes before the city council, the mayor does have the authority to vote in the case of a tie. “Acts such as voting . . . are generally deemed legislative.” *Yeldell v. Cooper Green Hospital*, 956 F.2d 1056, 1062 (11th Cir. 1992). This case also involves county commissioners claiming legislative immunity for acts done within the realm of their legislative duties. In its analysis of legislative immunity the Court stated, “It is the nature of the act which determines whether legislative immunity shields the individual from suit.” *Id.* Voting is generally deemed legislative and voting in the case of a tie is certainly voting. It is easy to envision controversial issues where the tie-breaking member votes on almost every issue.

The veto power is also considered to be a legislative function. *Four Maple Drive Realty v. Abrams*, 153 N.Y.S.2d 747 (1956) (governor’s veto is legislative function). *Edwards v. United States*, 286 U.S. 482 (1932) (presidential veto is a legislative act).

Even though the mayor of Winnemucca is not a member of the city council, the mayor has the authority to perform many legislative acts. Therefore, under the analysis in the 1996 Attorney General Opinion, the mayor of Winnemucca is subject to term limits.

CONCLUSION

The term limitation provision in the Nevada Constitution applies to the office of mayor of the City of Winnemucca.

FRANKIE SUE DEL PAPA
Attorney General

By: KATERI CAVIN
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-31 DOMESTIC VIOLENCE; LAW ENFORCEMENT; POLICE:

A law enforcement officer may inform the adverse party of the terms and conditions of a protection order against domestic violence, and related notices, by providing documents to the adverse party that contain the terms and conditions and notices; if provided in writing, an officer need not orally recite them. A temporary protection order issued pursuant to NRS 33.020 must be personally served upon the adverse party; subsequent orders extending a temporary protection order may be served by mail to the adverse party's last known address. An officer is legally required to arrest the adverse party for violation of an extended order served by mail when there is probable cause to believe the order has been violated.

Carson City, October 12, 2001

Richard Kirkland, Director, Department of Motor Vehicles, 555 Wright Way,
Carson City, Nevada 89711

Dear Director Kirkland:

In Op. Nev. Att'y Gen. No. 2000-02 (January 12, 2000), (AGO 2000-02), this office addressed several questions concerning the meaning of NRS 33.070, particularly as it relates to implementation of the Protection Order File¹ within the Nevada Criminal Justice Information System (NCJIS) network. You have requested further clarification of how to accomplish the goals of NRS 33.070 and the NCJIS Protection Order File.

Your request notes that the development of the Protection Order File was one of the first parts of the overall redesign of NCJIS. The Protection Order File was designed, programmed, and tested in close collaboration with the DMV Information Technology Division, the DMV Records and Identification Division of the Nevada Highway Patrol, the Administrative Office of the Courts, and the Attorney General's Office. Following considerable testing and training, the file was implemented (i.e., went "live" for law enforcement) in the fall of 2000.

¹ In 1997, the Legislature passed NRS 179A.350 which created a repository for information concerning orders for protection against domestic violence within the central repository for Nevada records of criminal history. The repository contains a complete and systematic record of all temporary and extended orders for protection against domestic violence issued or registered in Nevada. NRS 179A.350(2). The Protection Order File refers to the electronic database which contains the information submitted to the repository. Law enforcement officers have access to the Protection Order File in order to obtain information from the repository.

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QUESTION ONE

Is it necessary to read the contents of a protection order to an adverse party or can an appropriate hard copy containing the terms and conditions of the order be handed to the adverse party? Also, must an officer read any or all of the notices to the adverse party or may the officer simply hand the adverse party a copy of the notices?

ANALYSIS

In June 2000, the Nevada Supreme Court adopted seven standardized protection order forms for mandatory use by the courts.² The development and ultimate adoption of statewide standardized protection order forms enabled the electronic Protection Order File to be programmed and created. The Protection Order File allows law enforcement to have virtually instantaneous access to information concerning active protection orders throughout the State of Nevada. An officer can act on the information in the file, specifically by arresting an adverse party who is in violation of an order. An officer also has a duty to inform the adverse party of the terms and conditions of the order if the officer determines that the order has not been served. NRS 33.070.

AGO 2000-02 did not consider that hard copy versions of the standardized protection orders would be available to officers. Instead, AGO 2000-02 presumed that officers would be receiving information from the Protection Order File by radio dispatch. The officer on the scene would then orally relay the contents of the protection order to the adverse party.

Since AGO 2000-02 was issued, law enforcement agencies have developed forms which contain the standard language of the actual protection order forms. These forms can be used by an officer on the scene to check off the terms and conditions of the protection order that dispatch relays to the officer. The forms also contain the information required to be provided to the adverse party under NRS 33.070(2).³ Previously, an officer could orally

² An additional five forms were adopted and approved for voluntary use by the courts. These additional forms are expected to be tested by the courts. They will eventually be reviewed and revised in light of their utilization, and then ultimately adopted by the Nevada Supreme Court for mandatory statewide use. *In the Matter of: Adoption of Standardized Forms for Protection Orders in Cases of Domestic Violence*, ADKT No. 269 (June 7, 2000).

³ NRS 33.070(2) provides that “[i]f 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 terms and conditions of the order; (b) Inform the adverse party that he now has notice of the terms and conditions 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.”

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notify the adverse party. The development of these hard copy versions of the standardized forms now provides another way for an officer to fulfill his duty under NRS 33.070(2)—the duty to inform the adverse party of the terms and conditions of the order. The officer can now provide a document to the adverse party which contains the terms and conditions of the order. However, nothing in this opinion precludes an officer from orally notifying the adverse party of the terms and conditions of the order in the manner described in AGO 2000-02.

Law enforcement agencies have also developed forms containing the standard notices to the defendant contained in every protection order. These standard notices are a subset of the standard forms adopted by the Nevada Supreme Court.

AGO 2000-02 stated that officers should be familiar with the contents of these notices and use a standard set of phrases to orally convey the contents of each one to the adverse party. (*See Conclusion to Question Two in AGO 2000-02.*) The creation of forms that contain the standard notices now makes it appropriate and acceptable for officers to provide copies of the forms to the adverse party without having to read them. The officer's duties under NRS 33.070 are fulfilled by giving the adverse party a copy of the form *so long as it includes a notice informing the adverse party that a violation of the terms and conditions of the order will result in arrest.*

CONCLUSION TO QUESTION ONE

The development of hard copy versions of the standardized protection order forms allows an officer another way to fulfill his duty under NRS 33.070(2). The officer can inform the adverse party of the terms and conditions of the order by providing a document which contains them without having to orally recite the contents of the order. The creation of forms that contain the standard notices also makes it appropriate and acceptable for an officer to provide a copy of these forms to the adverse party without having to read them. The officer's duties under NRS 33.070 are fulfilled by giving the adverse party a copy of the form, so long as it includes a notice informing the adverse party that a violation of the terms and conditions of the order will result in arrest. This opinion does not preclude an officer from orally notifying the adverse party of the terms and conditions of the order in the manner described in AGO 2000-02.

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QUESTION TWO

If an extended order has been served by mail, is there any reason why an officer should not arrest the adverse party for violation of the order based on that service?

ANALYSIS

NRS 33.070(1) provides that, “[e]very 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.” The standard protection order forms that the Nevada Supreme Court adopted in June 2000 for mandatory statewide use contain this required provision. This required provision creates a mandatory obligation that compels law enforcement officers to arrest an adverse party if there is probable cause to believe that the adverse party has violated any provision of the order.

There is only one qualification to the mandatory arrest requirement in NRS 33.070(1). Subsection 2 of the same statute implies that the protection order must have been “served” before an officer can arrest. NRS 33.070(2) provides that:

[I]f 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.

A recent legislative change to NRS 33.060 has codified previous statewide practice that temporary orders are personally served on the adverse party.⁴ However, this amendment does not specify whether the personal service requirement is pursuant to the Nevada Rules of Civil Procedure (NRCP). The only express reference to the Nevada Rules of Civil Procedure in Chapter 33 is later in the same statute, at NRS 33.060(2): “[s]ervice of an application for

⁴ During the 2001 legislative session, NRS 33.060(2) was amended to provide that “the court shall order law enforcement to serve, without charge, the adverse party personally with the temporary order.” NRS 33.060(2).

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an extended order and the notice of hearing thereon must be served upon the adverse party pursuant to the Nevada Rules of Civil Procedure.”

Personal service is required under NRCP 4 only when an action is commenced by filing a complaint. While Rule 4 may suggest that temporary protection orders should be personally served, Rule 4 should not apply to service of an extended order application and the notice of hearing because neither of these pleadings is an initial summons or complaint. Nonetheless, NRS 33.060 has been construed in practice throughout the State to mean that the application (or motion) for an extended order and the notice of hearing must be personally served on the adverse party.

Because the temporary protection order and the application/motion for an extended protection order, along with the notice of hearing, are served personally, then certainly *any subsequent orders or pleadings may be properly served by mail*, pursuant to NRCP 5. Rule 5(b) provides for service of all pleadings subsequent to the original complaint, written motions and notices, and other papers. These are to be served either by delivering a copy to the party or by mailing it to the party at the last known address. Under Rule 5(b), service by mail is complete upon mailing in most circumstances.⁵

“Service” does not mean “receipt.” Service by mail is complete regardless of whether the document is received by the addressee. *See Luc v. Oceanic Steamship Co.*, 84 Nev. 576, 445 P.2d 870 (1968) (proof of actual receipt of a properly mailed motion is not necessary before a court has jurisdiction to rule on the motion). Thus to comply with NRS 33.070, as clarified by AGO 2000-02, an officer must arrest an adverse party who has violated the terms and conditions of an extended order *if the order was served by mail sent to the adverse party’s last known address*. As explained above, this is because an extended order would have been entered only if the court was satisfied that the temporary protection order was personally served and notice of the extended order hearing was provided to the adverse party.

Law enforcement officers have expressed some reluctance to arrest an adverse party for violation of an extended order if that order was served on the adverse party by mail. Although mailing satisfies the legal requirements for service pursuant to the NRCP, many law enforcement agencies are doubtful that the adverse party is criminally liable for violating an extended order that may not have actually been received. However, it is our opinion that an officer is legally required to arrest an adverse party for violation of an

⁵ Rule 5 provides that “[s]ervice by mail is complete upon mailing; provided, however, a motion, answer or other document constituting the initial appearance of a party must also, if served by mail, be filed within the time allowed for service; and provided further that after such initial appearance, service by mail be made only by mailing from a point within the State of Nevada. NRCP 5(b).

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extended order if the order was served by mail. NRS 33.070, when read with NRCP 4 and 5, requires this.

Although arrest is mandatory for a violation of an extended order served by mail, there are ways that an officer can confirm that there was actual notice of the mailed order.

First, the Protection Order File “hit” reveals whether the adverse party was present during the extended order hearing when the judge, master, or commissioner entered the order. If the hit indicates that the adverse party was present at the hearing, then this confirms that the adverse party is actually aware of the terms and conditions of the extended order.

Second, current law and previous practice in all jurisdictions requires that the adverse party must be personally served with a copy of the temporary protection order in order for it to be extended. This means that the adverse party has notice of the existence of an order against him and of the initial terms and conditions of the order.

Similarly, for an extended order to be entered, the court must be satisfied that there was notice to the adverse party. NRS 33.020(3). The Notice of Hearing and Order for Hearing (standard forms adopted by the Nevada Supreme Court for mandatory statewide use) both contain an admonition that, “at this hearing, an order may be entered which may be served by mailing a copy to your last known address.” After being served with this notice (in practice, by personal service), the adverse party can and should notify the court of any change in address in order to receive future orders or other correspondence from the court. If the adverse party chooses not to provide the court with a current address, then that person may be presumed to be attempting to avoid service and notice of future court proceedings. Such irresponsibility or willful ignorance should not protect the adverse party. Instead, in these circumstances, the adverse party has at least constructive knowledge of the terms and conditions of the order entered after the hearing.

An adverse party is subject to the terms and conditions of an extended order entered after a hearing, whether or not the adverse party chooses to attend the hearing. The adverse party is criminally liable for violations even if the adverse party chooses not to attend the hearing and chooses to remain ignorant of the outcome of the hearing.

NRS 33.070 provides that the adverse party must be arrested for any violation of a protection order that has been served. Under NRCP 5(b), mailing the extended order to the last known address of the adverse party constitutes service. It does not matter whether the extended order was

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received by the adverse party. It does not matter why it may not have been received.

This opinion is consistent with another similarly worded Nevada law regarding driving with a revoked license, NRS 483.560. *See Zamarripa v. District Court*, 103 Nev. 638, 747 P.2d 1386 (1987) (conviction of driving with a revoked license based on notice of revocation mailed to defendant's last known address did not violate defendant's due process rights). In *Zamarripa*, the statute in question included a phrase that raised a presumption that the notice was received.⁶ The Nevada Supreme Court noted that NRS 47.250(13) makes it a disputable presumption that "a letter duly directed and mailed was received in the regular course of mail" and concluded that the Legislature intended to require actual or constructive notice of the revocation order, or else "there would be no need to allow the receipt of notice to be disputed." *Id.* at 643. The Court then concluded that the defendant received sufficient notice by having been mailed the notice of revocation to his last known address. The statute addressed in this opinion does not even contain reference to a presumption of receipt, which further bolsters the Attorney General's opinion that actual receipt of an extended order is not required. Even assuming that actual notice of the extended order were required, *Zamarripa* concludes that mailing to the last known address satisfies such requirement.

Finally, we recognize that one of the concerns of law enforcement is to consider whether the adverse party who violated the protection order will be convicted. Working toward an ultimately successful prosecution is certainly a goal for law enforcement. However, determining whether to file a formal complaint after an arrest and obtaining a conviction are ultimately the responsibilities of the prosecutor. A law enforcement officer's primary duty is to arrest if there is probable cause pursuant to NRS 171.1231. Probable cause requires only that there be some evidence that a crime was committed by the adverse party. A law enforcement officer need not have proof beyond a reasonable doubt that the adverse party committed a crime. This determination is to be made by the trial court or jury. NRS 175.201.

The arrest required by NRS 33.070 is intended to protect a domestic violence victim's safety. A violation of a protection order places a victim in fear and at risk of harm, whether it is "merely" a telephone call, driving within 100 yards of the victim's home, or showing up at the victim's place of

⁶ NRS 484.385(4), which was the subject of discussion in *Zamarripa*, provides: "Notice of an order of revocation . . . is sufficient if it is mailed to the person's last known address as shown by any application for a license. The date of mailing may be proved by the certificate of any officer or employee of the department, specifying the time of mailing the notice. *The notice is presumed to have been received upon the expiration of five days after it is deposited, postage prepaid, in the United States mail.*" [Emphasis added.]

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employment. Domestic violence tends to escalate, and all violations of a protection order should be regarded as serious. Any violation of a protection order is at least an indirect threat of harm and, all too frequently, a direct threat of harm.

Abusers typically know how to create fear in their victims while misleading others that their behavior is entirely innocent. An adverse party who violates a protection order with even a minor infraction demonstrates willingness to ignore a court order. There is strong evidence that an abuser who is not stopped or hindered when committing a minor violation will be emboldened to commit a more serious violation. Domestic violence intervention by arrest can be homicide prevention.

CONCLUSION TO QUESTION TWO

A temporary protection order issued pursuant to NRS 33.020 must be personally served upon the adverse party. Subsequent orders extending a temporary protection order may be served by mail to the adverse party's last known address. An officer is legally required to arrest the adverse party for violation of an extended order served by mail when there is probable cause to believe the order has been violated.

FRANKIE SUE DEL PAPA
Attorney General

By: NANCY E. HART
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-32 EXTRADITION; GOVERNOR; SIGNATURES: The governor, when within the state, may use a facsimile signature when signing Requisition Demands and Executive Warrants.

Carson City, October 19, 2001

Honorable Governor Kenny C. Guinn, Keith Munro, General Counsel, 101 N. Carson Street, Carson City, Nevada 89701

Dear Governor Guinn and Mr. Munro:

You have asked this office for an opinion as to whether Requisition Demands and Executive Warrants can be endorsed by the governor using an automated signature.

QUESTION

Can Requisition Demands and Executive Warrants be endorsed by the governor using an automated signature?

ANALYSIS

Under the Nevada Constitution, the governor is vested with the supreme executive authority, is charged with transacting all executive business, and is also responsible for seeing that the laws of the state are faithfully executed. NEV. CONST. art 5, §§ 1, 6 and 7.

Pursuant to the Uniform Criminal Extradition Act, enacted under NRS 179.177–179.235, the governor has the duty “to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.” NRS 179.181. The Nevada Supreme Court has stated, “the ‘executive authority’ of a state is the governor or person performing the functions of governor.” *Director, Nev. Dep’t of Prisons v. Blum*, 98 Nev. 40, 42, 639 P.2d 559, 560 (1982). Therefore, it is the governor who has the authority and duty to act in extradition matters.

Next, it is necessary to determine whether the applicable statute or regulation carries any express requirement for an original signature. No such requirement exists. Nevada’s codification of the Uniform Criminal Extradition Act requires that the governor “shall sign a warrant of arrest.” However, the applicable statute does not specifically call for an original signature. NRS 179.191(1). Nor is there a statutory prohibition on the practice of using facsimile signatures. *Id.*

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As defined by Black's Law Dictionary, to "sign" means "to attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper." BLACK'S LAW DICTIONARY, 1239 (5th ed. 1979). Under NRS 422.520, a statute dealing with the administration of welfare programs, "[s]ign" means to affix a signature directly or indirectly by means of handwriting, typewriter, stamp, computer impulse or other means." These broad definitions show that the use of facsimile signatures or other means of affixing a signature can be an accepted practice within those areas where the practice is expressly authorized.

In Nevada, use of facsimile signatures by public officials is authorized by statute in a number of areas. For example, under the Uniform Facsimile Signatures of Public Officials Act, any authorized public official may use a facsimile signature in lieu of a manual signature on public securities or instruments of payment. NRS 351.010. Similar legislation has been passed in California and Idaho. CAL. GOV'T CODE §§ 5500-5506 (Deering 2001) and IDAHO CODE § 59-1019 (2000).

Nevada Supreme Court justices and district court judges are authorized to use facsimile signatures under NRS 2.195 and NRS 3.155. Magistrates may use facsimile signatures when issuing judicial arrest warrants. *See* NRS 171.108 and *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983). Op. Nev. Att'y Gen. No. 90-16 (October, 1990), on the issue of the acceptability of boat registration applications and signatures transmitted via facsimile, concluded that acceptance of such documents did not present statutory or evidentiary problems.

Some states have passed statutes specifically granting their governor authority to use a facsimile of the governor's signature when signing extradition warrants. Under Arizona's version of the Uniform Criminal Extradition Act, "a facsimile of the signature of the governor that is applied at his discretion and under his supervision is deemed to be the authorized signature of the governor." Arizona Revised Statutes § 13-3870.01. Other states grant their governors authority to appoint an "authenticating officer" to sign for the governor or use the governor's facsimile signature. TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 2.24. However, Nevada is not such a state.

North Carolina has adopted a different solution by executive order allowing for the use of facsimile signatures while the governor is within the state. In North Carolina, the governor has given written authority by executive order to his legal counsel to assist the governor in carrying out extradition duties. The governor's legal counsel then authorizes the use of the governor's facsimile signature by North Carolina's extradition office. State of North Carolina Exec. Order No. 99.

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A governor's authority to issue executive orders varies from state to state. This is particularly important in Nevada where the governor is not expressly granted authority to issue executive orders by the State Constitution, and the governor's power to issue executive orders has not been addressed by the Nevada Supreme Court. The use of executive orders has increased along with the complexities of the administrative structure of state governments. In response, state governors have consolidated administrative power in order to function more efficiently. 2000 WIS. L. REV. 1323, 1324-1325. One suggested analytical framework based upon a three-pronged test for determining the constitutional validity of executive orders would indicate that an executive order similar to the one issued in North Carolina would pass muster. This test suggests that when an executive order is (1) non-legislative, (2) issued pursuant to constitutional authority, and (3) consonant with existing law, the order is constitutionally valid. *Id.* at 1327-1328. It is our opinion that the governor has authority to issue a similar executive order by the powers granted under the Nevada Constitution. NEV. CONST. art 5, §§ 1, 6 and 7. We believe so because such an executive order would not be legislative in nature and would be consonant with existing Nevada law concerning extradition warrants. Finally, although the Nevada Constitution is silent as to the governor's power to issue executive orders, it does not prohibit such orders.

However, use of a facsimile signature while Nevada's governor is out of the state presents a problem because under the Nevada Constitution, during the governor's "absence from the State, the powers and duties of the Office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease." NEV. CONST. art 5, § 18. Therefore, an extradition warrant signed by facsimile signature while the governor is out of Nevada might be subject to attack because the governor has no authority to act in that capacity when out of the state.

CONCLUSION

The governor is not prohibited from using a facsimile signature when signing Requisition Demands and Executive Warrants. In the absence of explicit legislative authority to do so, issuance of an executive order may be an appropriate means of allowing the governor, when within the state, to use a facsimile or automated signature on Requisition Demands and Executive Warrants.

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN WARWICK
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-33 REGIONAL PLANNING: The roles and responsibilities of the Truckee Meadows Regional Planning Governing Board, Truckee Meadow Regional Planning Commission, Truckee Meadows Regional Planning Agency and staff of local governments are interdependent with regard to the regional planning process and how it is carried out pursuant to NRS chapter 278.

Carson City, October 31, 2001

Emily Braswell, Director, Truckee Meadows Regional Planning Agency, One East First Street, Suite 900, Reno, Nevada 89501-1625

Dear Ms. Braswell:

By letter of June 21, 2001, you have requested an opinion from this office clarifying the roles and responsibilities of the regional planning entities in Washoe County and the staff of local governments in relation to regional planning.

QUESTION

What are the roles and responsibilities of the Truckee Meadows Regional Planning Governing Board (RPGGB), the Truckee Meadows Regional Planning Commission (TMRPC), the Truckee Meadows Regional Planning Agency (TMRPA), and the staff of local governments in relation to regional planning?

ANALYSIS

It is important to premise this opinion on the fact that NRS chapter 278 is straightforward and methodically sets forth the procedures and duties of how a regional planning agency and its entities should conduct their affairs. When applying Nevada rules of statutory construction, the words of a statute “should be given their plain meaning unless this violates the spirit of the [statute].” *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 440 (1986). When the language of a statute is clear on its face, its intention must be deduced from the language. *Cleghorn v. Hess*, 109 Nev. 544, 853 P.2d 1260 (1993). Plain and unambiguous language must be given effect. *State v. State, Employees Assoc.*, 102 Nev. 287, 720 P.2d 697 (1986).

A. Truckee Meadows Regional Planning Governing Board

NRS 278.0264 sets forth the authority for the creation and operational needs of the RPGGB. The RPGGB’s roles and responsibilities are more specifically illustrated in NRS 278.0265 as follows:

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The governing board:

1. Shall adopt such regulations as are necessary to carry out its specific powers and duties.
2. Shall prescribe an appropriate course of at least 12 hours of training in land use planning for the members of the regional planning commission. The course of training must include, without limitation, training relating to:
 - (a) State statutes and regulations and local ordinances, resolutions and regulations concerning land use planning; and
 - (b) The provisions of chapter 241 of NRS.
3. May establish and collect reasonable fees for the provision of any service that is authorized pursuant to the provisions of NRS 278.026 to 278.029, inclusive.

The RPGB is composed of ten members. The Washoe County Commission appoints three members, two of whom must reside in or represent the unincorporated area, the Reno City Council appoints four members, and the Sparks City Council appoints three members. The members serve three-year terms and may be reappointed. NRS 278.0264; *See also Hearing on A.B. 424 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 12 (March 19, 1999).

Furthermore, the RPGB appoints the director of the TMRPA. NRS 278.0266. Additionally, the RPGB may appoint employees for work it deems necessary and may contract with city planners, engineers, architects, and other consultants. NRS 278.0264(6). Should any litigation matter arise, it is possible for the RPGB to sue and be sued in any court of competent jurisdiction. NRS 278.0264(8).

The main purpose of the RPGB is to adopt the comprehensive regional plan and any amendments to it. The RPGB also oversees the process of approval, amendment, and updating of the plan. NRS 278.0276. The plan is developed by the TMRPC. NRS 278.0272. The TMRPC also determines whether other plans and projects are in conformance with the regional plan. NRS 278.0278. However, the TMRPC's decisions and determinations are reviewable by the RPGB. *Id.* The RPGB also has an oversight function as to the TMRPC. The RPGB makes the decision whether to adopt the comprehensive regional plan developed by the TMRPC, and any amendments to that plan. NRS 278.220. The RPGB also acts as an appellate body for decisions of the TMRPC as to whether a local plan or project is in conformance with the regional plan. NRS 278.0282 and NRS 278.0284. The RPGB has the additional responsibility of being the entity that must implement a land use planning course of at least 12 hours for the members of

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the TMRPC. NRS 278.0265. These express statutory responsibilities demonstrate the RPGB's oversight over the TMRPC.

Additionally, legislative history demonstrates that the Nevada Legislature intended the RPGB to fulfill this oversight role, and intended that the TMRPC answer to the RPGB. *See Hearing on A.B. 424 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 14 (March 19, 1999).

The RPGB's duties are further enumerated in NRS 278.0265 whereby it must adopt regulations that are necessary to carry out its specific powers and duties. In addition, the RPGB may collect reasonable fees for the provision of any service that is authorized pursuant to NRS 278.026-.029, inclusive. As for the RPGB's relation with local governments, the RPGB must prepare an annual budget and transmit it as a recommendation for funding to each of the local governments.

B. Truckee Meadows Regional Planning Commission

NRS 278.100-.130 sets forth membership, composition, functions, and duties of the TMRPC.

The TMRPC has nine members, which is an allowable number pursuant to NRS 278.100. Three are from the Reno, Sparks, and Washoe County local planning commissions. The members serve three-year terms and may be reappointed. NRS 278.100; *See also Hearing on A.B. 424 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 12 (March 19, 1999). The TMRPC elects a chairperson from among its members to serve a one-year term pursuant to NRS 278.110. This position rotates annually among the three jurisdictions.

The TMRPC is given the duty of developing a comprehensive regional plan pursuant to NRS 278.0272. The primary role of the TMRPC is to develop a comprehensive regional plan and determine whether the local governments' and affected entities' plans and projects are in conformity with that plan. NRS 278.0278. The TMRPC must develop a comprehensive regional plan reflecting the physical development and management of growth of the region for the next 20 years. NRS 278.0272. The layout and contents of this plan are described in NRS 278.0272(2) and NRS 278.0274, respectively. Prior to approval of the plan, the TMRPC must hold a public hearing on the proposed plan in Reno and Sparks, and in the unincorporated

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areas of Washoe County.¹ Notice of the time and place of all hearings in this section must be given by publication in a newspaper of general circulation at least ten days before the day of the hearing. In addition, one public hearing must be held at a location in Washoe County prior to amending the plan. The plan must be approved or amended by at least a two-thirds vote of the TMRPC's total membership. NRS 278.0272.

The plan must be reviewed by the TMRPC annually, and updated not less than every five years. NRS 278.0272. A proposed amendment will be considered by the TMRPC, which will then determine whether it is necessary to the health and welfare of the community or substantially benefits the community in general. Recommendations regarding proposed amendments must be forwarded to the RPGB for adoption. NRS 278.0276.

The TMRPC does have some autonomous authority given to it in state law which it may exercise without oversight from the RPGB or any of the local entities. *See Hearing on A.B. 424 Before the Assembly Committee on Government Affairs*, 1999 Legislative Session, 15 (March 19, 1999). For example, it is the TMRPC's duty to adopt guidelines and procedures for the review of a proposal to a city or county regarding land use. NRS 278.0277. In addition, the TMRPC is the sole entity that *develops* the comprehensive regional plan. NRS 278.0272.

It should be noted that, pursuant to NRS 278.130, should the TMRPC's duties parallel those of the Washoe, Reno, or Sparks planning commissions, the city and county planning commissions will be responsible for decisions relating to planning that have a local effect and the TMRPC will be responsible for making decisions affecting regional or intergovernmental affairs.

C. Truckee Meadows Regional Planning Agency

While there is no specific statutory section in NRS chapter 278 addressing the agency's role, each division's duty represents a collective part of the agency's role and responsibility. As the legislative history indicates, the TMRPA's focus should remain on managing growth in the Truckee Meadows area by way of the regional plan. *See Hearing on A.B. 424 Before the Senate Committee on Government Affairs*, 1999 Legislative Session, 18 (May 13, 1999).

¹ As to meetings of state and local agencies, *see* NRS chapter 241.

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The TMRPA appears to be doing this by providing a forum for collaboration and communication on a number of topics relating to the Truckee Meadows area. The Executive Director and staff provide support to the RPGB's fiscal working group, the System Dynamics Modeling Project, Truckee Meadows Tomorrow, the Regional Law Enforcement Task Force, the Truckee River Advisory Board, and other groups. Focus is placed on the quality of life indicators and a wide range of groups throughout the region are served by the TMRPA.

D. Local Governments

Pursuant to NRS 278.0264(7), the local governments' role in relation to the RPGB is set forth as follows:

The local governments represented on the governing board shall provide the necessary facilities, equipment, staff, supplies and other usual operating expenses necessary to enable the governing board to carry out its functions. The local governments shall enter into an agreement whereby those costs are shared by the local governments in proportion to the number of members that each appoints to the governing board. The agreement must also contain a provision specifying the responsibility of each local government, respectively, of paying for legal services needed by the governing board or by the regional planning commission.

The local governments' role with regard to the comprehensive regional plan is set forth in NRS 278.028–.286. NRS 278.028 requires each local planning commission to review and amend, if necessary, the local government's master plan, facilities plan, and other similar plans to ensure their conformance with the provisions of the comprehensive regional plan. Each local planning commission must also prepare and submit an annual report relating to proposed actions concerning regional planning to the TMRPC, pursuant to NRS 278.0286. NRS 278.0282 requires a review by the TMRPC before the adoption or amendment of a local government's master plan, facilities plan, or other similar plan. The TMRPC makes a determination whether such plans or amendments are in conformance with the comprehensive regional plan before the local government may adopt or amend such plans. A determination of the TMRPC as to conformity or nonconformity may be appealed to the RPGB, pursuant to NRS 278.0282(5). Additionally, local ordinances and regulations regarding development, zoning, the subdivision of land, or capital improvements must conform to the local government's master plan, pursuant to NRS 278.0284. Because the master plan of each local government must be in conformance with the

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comprehensive regional plan, the RPGB would have the final say as to conformance with the comprehensive regional plan before such plan or amendment could be adopted by the local government.

The local governments also are required to obtain a determination by the TMRPC as to conformance with the regional plan for any project of regional significance before the local government can approve such a project. NRS 278.0278. If the TMRPC determines that the project is not in conformance with the regional plan, the determination may be appealed to the RPGB. Again, it is the RPGB that has the final say, if the TMRPC's determination is appealed, as to conformance of the project with the regional plan before the project could be approved by the local government.

NRS chapter 278 does not expressly set forth specific roles and responsibilities to be carried out by the staff of the local governments. However, legislative history suggests that under existing statutes, local governments in northern Nevada have the right to run their own land-use planning processes with the additional duty of submitting their master plan, facilities plans and amendments, and projects of regional significance to the TMRPC and RPGB for conformance review. *See Hearing on A.B. 424 Before the Senate Committee on Government Affairs*, 1999 Leg. Sess. 17 (May 13, 1999). The relationship between the RPGB, TMRPC, and the local governing boards occurs when the local government amends its master plan or a facilities plan, or approves a project of regional significance. Such actions would have to come before the TMRPC, and the RPGB if appealed, for conformance review before the actions could become effective.

CONCLUSION

Pursuant to NRS chapter 278, the roles and responsibilities of the Truckee Meadows Regional Planning Governing Board, Truckee Meadows Regional Planning Commission, Truckee Meadows Regional Planning Agency, and staff of local governments involve a cooperative effort necessary to create and carry out the Truckee Meadows Regional Plan. With respect to the comprehensive regional plan, the Truckee Meadows Regional Planning Commission develops the plan, and the Truckee Meadows Regional Planning Governing Board adopts the plan and makes the final decision.

All of the entities are dependent upon each other with regard to the whole regional planning process and how it is carried out. They all carry out separate functions, with the Truckee Meadows Regional Planning

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Commission and Truckee Meadows Regional Planning Governing Board having oversight authority as to conformance with the regional plan. In sum, the intent of NRS chapter 278 is to promote harmony between the entities for regional planning purposes.

FRANKIE SUE DEL PAPA
Attorney General

By: HENNA RASUL
Deputy Attorney General

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AGO 2001-34 PARKS; COUNTIES; TAXES: The Lyon County Commissioners may impose a residential construction tax for the purpose of raising revenue for parks within Lyon County pursuant to NRS 278.4983, but must apply the tax to all of Lyon County, as set forth in the statute.

Carson City, November 15, 2001

Leon Aberasturi, Lyon County District Attorney, 31 South Main Street,
Yerington, Nevada 89447

Dear Mr. Aberasturi:

On behalf of Central Lyon Parks and Recreation, you have requested an opinion from this office concerning the imposition of the residential construction tax by counties within the State for the construction and maintenance of parks

QUESTION

Can the Lyon County Commissioners (Commissioners) impose the residential construction tax for parks pursuant to NRS 278.4983 in the central Lyon County (County) corridor only or must the tax be county-wide?

ANALYSIS

The issue of whether the Commissioners may limit imposition of the residential construction tax to certain portions of the County may be answered by reviewing the enabling legislation and its history and applying relevant rules of statutory construction. As stated in your letter of September 7, 2001, you have requested an opinion on this issue based upon the rapid growth of central Lyon County and the desire of the Central Lyon County Parks Director to request the Commissioners to implement the residential construction tax for parks in that corridor only. Your office has opined that any tax imposed pursuant to NRS 278.4983 must be imposed county-wide. After thorough review of the legal issues involved herein, this office supports that opinion.

First, the County has no inherent authority to tax. The Legislature may delegate its taxing power to local governments so long as the statutory grant is not exceeded and the powers delegated are constitutionally permissible. In this case, pursuant to NRS 278.497–278.4987, inclusive, the Legislature has specifically granted to the cities and counties the authority to impose the residential construction tax on the privilege of *constructing apartments, residential homes*, and mobile homes and lots for the limited purpose of

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raising revenue to provide neighborhood parks and related facilities. NRS 278.4983(1) states that:

The city council of any city or the board of county commissioners of any county which has adopted a master plan and recreation plan, . . . which includes, as part of the plan, future or present sites for neighborhood parks may, by ordinance, impose a residential construction tax pursuant to this section.

Accordingly, the County may enact an ordinance to impose the residential construction tax pursuant to the Legislature's express grant of authority.

If the County chooses to impose the residential construction tax it must do so pursuant to the guidelines set by the Legislature. The ordinance which the County may adopt pursuant to subsection 1 of NRS 278.4983 must "establish the procedures for collecting the tax, set its rate, and determine the purposes for which the tax is to be used, subject to the restrictions and standards provided in this chapter." NRS 278.4983(4). The language clearly limits the County's discretion with regard to imposing the tax to establishing procedures for collection, setting the rate of the tax, and determining the objectives for expenditure of the tax as specified by NRS 278.4983. Thus the County is charged with imposing and administering the tax, but is not imparted with the power to make distinctions within the County regarding whether the tax should be imposed. The County is not permitted to exceed the statute's grant of authority and may not act outside the intent of the Legislature. Since the Legislature did not specifically grant the County the ability to limit its application of the tax, the tax must be imposed county-wide if it is imposed at all.

Secondly, "[w]hen determining how to give effect to a statute, a court should look first to its plain language." *Smith v. Crown Fin. Servs. of America*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995). The plain language of NRS 278.4983 indicates that the tax must be imposed on the privilege of constructing residential units in the respective cities and counties which adopt a master plan with sites for neighborhood parks. "[W]hen statutory language is clear on its face, its intention must be deduced from such language." *Worldcorp. v. State, Dep't of Taxation*, 113 Nev. 1032, 1035 -1036, 944 P.2d 824, 826, (1997). There is no language which would permit imposing the tax on a portion of a city or county, and the language of the statute clearly does not contemplate such an interpretation. Therefore, the clear language of the statute must be applied.

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In addition, a court is to give effect to the clear intention of the Legislature and construe the language of a statute so as to encourage its manifest purpose. *Nevada Dep't of Prisons v. Bowen*, 103 Nev. 477, 745 P.2d 697 (1987). The position that the tax must be imposed county-wide is supported by the Legislative history which, although failing to address the issue specifically, contains statements regarding the need for parks for everyone in the State, including small towns and with regard to further growth over time. *Hearing on A.B. 241 Before the Assembly Committee on Government Affairs*, 7 and 17 (March 5 and 6, 1973). The purpose of the statute is to provide parks throughout the State to benefit the residents of cities and counties. NRS 278.4983(3). There is no indication whatsoever that the tax may be applied non-uniformly at the discretion of the local governments. Instead, the language clearly states that if the tax is imposed by a city or county, it must be imposed on the specific construction in those respective cities or counties. NRS 278.4983(2). The statute simply does not contemplate giving the cities and counties discretion over where to impose the tax, and such authority may not be implied in the absence of express legislative mandate. Thus the argument cannot be sustained that the Legislature intended to permit counties to impose the residential construction tax in a geographic area constituting less than the entire county.

Finally, equal protection considerations may be raised should the Commissioners impose the residential construction tax upon only a portion of the County. Your letter of September 7, 2001, did not provide enough information regarding the purpose for imposing the tax only upon the central corridor. Thus there is no basis to adequately ascertain whether the Commissioners could justify any disproportionate actions taken within the County. Nevertheless, the plain language of the statute and the legislative objectives clearly support imposition of the tax only on a city-wide or county-wide basis.

CONCLUSION

The Lyon County Commissioners may impose a residential construction tax for the purpose of raising revenue for parks within Lyon County pursuant to NRS 278.4983, but must apply the tax to all of Lyon County as set forth in the statute.

FRANKIE SUE DEL PAPA
Attorney General

By: DARLENE BARRIER
Deputy Attorney General

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AGO 2001-35 PAROLE AND PROBATION; SEARCH; OFFICERS: The parole board and the district courts may grant authority to search to a traditional law enforcement officer, such as a police officer or deputy sheriff, pursuant to their authority to impose any reasonable conditions of parole or probation to protect the health, safety or welfare of the community.

Carson City, November 16, 2001

R. Warren Lutzow, Chief, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104, Carson City, Nevada 89706

Dear Chief Lutzow:

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

QUESTION

May the parole board or a district court extend the authority of search from a parole and probation officer to include traditional law enforcement officers, i.e., police officer, sheriff's deputy, etc.?

ANALYSIS

The parole board may, as a condition of releasing a prisoner on parole, impose any reasonable conditions on the parolee to protect the health, safety and welfare of the community. NRS 213.12175.¹

The general statutory grant of authority to district courts to fashion and impose probation conditions is broad. *Igbinovia v. State*, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995). The *Igbinovia* court reviewed NRS 176.185,

¹ NRS 213.12175 provides in full that:

The board may, as a condition of releasing a prisoner on parole, impose any reasonable conditions on the parolee to protect the health, safety and welfare of the community, including, without limitation:

1. Requiring the parolee to remain in this state or a certain county within this state;
2. Prohibiting the parolee from contacting or attempting to contact a specific person or from causing or attempting to cause another person to contact that person on his behalf;
3. Prohibiting the parolee from entering a certain geographic area; and
4. Prohibiting the parolee from engaging in specific conduct that may be harmful to his own health, safety or welfare, or the health, safety or welfare of another person.

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NRS 176.1853 and NRS 176.205, which are the predecessors to NRS 176A.100, NRS 176A.400 and NRS 176A.450, respectively, and noted that they “have been held to accord to district court judges a broad power to impose conditions of probation.” *Igbinovia*, 111 Nev. at 708, 895 P.2d at 1309-10 (*citing Creps v. State*, 94 Nev. 351, 581 P.2d 842 (1978) (court was authorized to order short-term incarceration in county jail as condition of probation, even absent express statutory authority)).

NRS 176A.100 provides, in relevant part:

Authority and discretion of court to suspend sentence and grant probation; . . .

1. Except as otherwise provided in this section and NRS 176A.110 and 176A.120, if a person is found guilty in a district court upon verdict or plea of:

. . . .

(b) A category E felony, except as otherwise provided in this paragraph, the court shall suspend the execution of the sentence imposed and grant probation to the person. . . .

(c) Another felony, a gross misdemeanor or a misdemeanor, the court may suspend the execution of the sentence imposed and grant probation as the court deems advisable.

NRS 176A.400 provides, in relevant part:

1. In issuing an order granting probation, the court may fix the terms and conditions thereof, including, without limitation:

. . . .

(c) Any reasonable conditions to protect the health, safety or welfare of the community . . . ;

. . . .

4. In placing any defendant on probation or in granting a defendant a suspended sentence, the court shall direct that he be placed under the supervision of the chief parole and probation officer.

NRS 176A.450 provides, in relevant part:

1. Except as otherwise provided in this section, by order duly entered, the court may impose . . . any conditions of probation or suspension of sentence.

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Accordingly, the parole board and the district courts have broad authority to impose any reasonable conditions to protect the health, safety or welfare of the community.

“Probation is an integral part of the penal system, calculated to provide a period of grace in order to assist in the rehabilitation of an eligible offender.” *Seim v. State*, 95 Nev. 89, 93, 590 P.2d 1152, 1154 (1979). “The broad objective of probation is rehabilitation with incidental public safety,” and “the conditions of probation should provide this objective.” *Id.* (citing *People v. Mason*, 488 P.2d 630 (Cal. 1971), *cert. denied*, 405 U.S. 1016 (1972); *Logan v. People*, 332 P.2d 897 (Colo. 1958)). “Nevada’s legislation relating to probation confers an authority commensurate with its objectives and empowers our parole and probation officers, *inter alia*, to ‘keep informed concerning the conduct and condition of all persons under their supervision and use all suitable methods to aid and encourage them . . . to bring about improvement in their conduct and conditions.’” *Seim*, 95 Nev. at 93, 590 P.2d at 1154 (quoting NRS 213.1096).

“In Nevada, as elsewhere, probation officers have long enjoyed extensive powers to search probationers under their supervision.”² *Seim*, 95 Nev. at 93-4, 590 P.2d at 1154. *See also Himmage v. State*, 88 Nev. 296, 496 P.2d 763 (1972). The question here is whether the parole board or a district court can extend or grant that power to traditional law enforcement officers such as police officers and deputy sheriffs.

Under the authority of the parole board and the district courts to impose any reasonable conditions to protect the health, safety, or welfare of the community, it is the opinion of this office that the parole board and the district courts may grant the authority to search to a traditional law enforcement officer such as a police officer or deputy sheriff.

In *Seim*, the probationer challenged the reasonableness of a search conducted outside of his and his probation officer’s presence. A police officer and a probation officer familiar with the probationer, but not his assigned probation officer, did the search. The court ruled the fact that neither appellant nor his probation officer was present at the time of the search of the storage unit was not decisive. *Seim*, 95 Nev. at 95, 590 P.2d at 1155. The court noted a condition of appellant’s probation read that “he *shall submit to a search* of his person, vehicle or residence *without a warrant, by any parole, probation or peace officer* to detect the presence of stolen property.” *Id.*, 95 Nev. at 95, Nev. 590 P.2d at 1155 (emphasis in original). The court ruled:

² You have not asked for and this opinion does not address whether there are any limitations on the parole board’s or a district court’s authority to impose a search condition for a parolee or probationer, respectively.

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Here, the search condition contemplated the prospective involvement of any peace officer, there was probable cause to search, and appellant's probation officer had been consulted respecting appellant's alleged violative conduct prior to the search. Although the search could have been conducted by any peace officer, a probation officer did participate and it is clear that the police did not initiate, but rather joined to expedite the search.

Id.

Accordingly, *Seim* is an example of a case where a district court granted authority to search to “any peace officer,” a peace officer conducted a search, and the search was upheld.

CONCLUSION

The parole board and the district courts may grant authority to search to a traditional law enforcement officer such as a police officer or deputy sheriff pursuant to their authority to impose any reasonable conditions of parole or probation to protect the health, safety or welfare of the community.

FRANKIE SUE DEL PAPA
Attorney General

By: DANIEL WONG
Deputy Attorney General

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AGO 2001-36 DRIVING UNDER THE INFLUENCE (DUI); LAW ENFORCEMENT; VEHICLES; A violation of 49 CFR § 383.51 by the driver of a commercial motor vehicle constitutes a criminal offense. Such a violation cannot be used for enhancement purposes under NRS 484.3792.

Carson City, December 28, 2001

Richard A. Gammick, Washoe County District Attorney, 75 Court Street,
P. O. Box 30083, Reno, Nevada 89520-3083

Dear Mr. Gammick:

You have recently requested an opinion from this office regarding the charging of violations of 49 C.F.R. § 383.51 for operating a commercial vehicle with a .04 blood alcohol concentration.

QUESTION ONE

Does a violation of 49 C.F.R. § 383.51 by the driver of a commercial motor vehicle constitute a criminal offense under the regulation?

ANALYSIS

The answer to your first question requires analysis of the regulatory authority given to the Transportation Services Authority (Authority) and the Department of Motor Vehicles (Department) pursuant to NRS chapter 706. NRS chapter 706 gives the Authority and the Department power to adopt regulations related to the operation of motor carriers in the State. In that regard, NRS 706.171 reads in relevant part:

1. The authority and the department may:

(a) Make necessary and reasonable regulations governing the administration and enforcement of the provisions of this chapter for which they are each responsible.

(b) Adopt by reference any appropriate rule or regulation, as it exists at the time of adoption, issued by the United States Department of Transportation, the Surface Transportation Board, any other agency of the Federal Government, or the National Association of Regulatory Utility Commissioners.

Additionally, NRS 706.173(1) provides: “The authority or the department may, by regulation applicable to common, contract and private motor carriers

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of passengers and property, adopt standards for safety for drivers and vehicles.”

Pursuant to the above statutes, the Department and the Authority have adopted by reference certain federal regulations related to the safety of drivers of commercial vehicles. In NAC 706.247, the Department and the Authority have adopted by reference federal regulations covering safety standards relevant to your first question.¹ Those federal regulations are found in

¹ NAC 706.247 reads in relevant part as follows:

1. The department and the transportation services authority hereby adopt by reference the regulations contained in 49 C.F.R. Parts 382, 383, 387, 390 to 393, inclusive, 395, 396 and 397, and appendices B and G of 49 C.F.R. Ch. III, Subch. B, as those regulations existed on November 1, 1998, with the following exceptions:

(a) References to the Department of Transportation, the Federal Highway Administration and the Office of Motor Carrier Safety are amended to refer to the department and the transportation services authority.

(b) References to the Federal Highway Administrator and to the Director are amended to refer to the director of the department and the chairman.

(c) Section 391.11(b)(1) applies only to drivers of commercial motor vehicles who:

(1) Operate in interstate transportation;

(2) Transport passengers intrastate; or

(3) Transport hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with 49 C.F.R. §§ 172.300 and 172.500.

(d) References to special agents in appendix B of 49 C.F.R. Ch. III, Subch. B are amended to include personnel of the department and the transportation services authority.

(e) The definition of “motor carrier” in 49 C.F.R. § 390.5 is amended to read:

“Motor carrier” includes, without limitation, interstate and intrastate common, contract and private carriers of property and passengers, including, without limitation, their agents, officers and representatives.

(f) The definition of “commercial motor vehicle” in 49 C.F.R. § 390.5 is amended to read:

“Commercial motor vehicle” means any self-propelled or towed vehicle used on public highways in:

1. Interstate commerce to transport passengers or property if the vehicle:

(a) Is designed to transport more than 15 passengers, including, without limitation, the driver;

(b) Is used in the transportation of hazardous materials in a quantity requiring placarding under the regulations issued by the Secretary pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101 et seq.; or

(c) Has a gross vehicle weight rating, gross combination weight rating or gross vehicle weight of 10,001 or more pounds, whichever is greater.

2. Intrastate commerce to transport passengers or property if the vehicle:

(a) Is one described in paragraph (a) or (b) of subsection 1;

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49 C.F.R. §§ 382 and 383. Pursuant to 49 C.F.R. § 382.201, a driver is prohibited from reporting or remaining on duty requiring the performance of safety sensitive functions while having an alcohol concentration of .04 or greater. “Safety sensitive functions” include all time spent at the driving controls of a commercial motor vehicle in operation. Additionally, 49 C.F.R. § 383.51 sets out offenses which disqualify a driver from operating a commercial vehicle, in pertinent part, as follows:

(1) General rule. A driver who is convicted of a disqualifying offense specified in paragraph (b)(2) of this section, is disqualified for the period of time specified in paragraph (b)(3) of this section, if the offense was committed while operating a commercial motor vehicle.

(2) Disqualifying offenses. The following offenses are disqualifying offenses:

(i) Driving a commercial motor vehicle while under the influence of alcohol. This shall include:

(A) Driving a commercial motor vehicle while the person’s alcohol concentration is 0.04 percent or more;

Finally, NRS 706.756 establishes the criminal penalties for a violation of the federal regulations the Department and the Authority have adopted.² A violation of the regulations is a misdemeanor punishable by a fine of not less

(..continued)

(b) Has a gross vehicle weight rating, gross combination weight rating or gross vehicle weight of 26,001 or more pounds, whichever is greater; or

(c) Is owned or operated by a motor carrier subject to the jurisdiction of the transportation services authority, except that any vehicle so owned or operated is subject only to the provisions of 49 C.F.R. §§ 391.51, 392.2, 392.4, 392.5, 392.9 and 396.3(b)(2) and 49 C.F.R. Parts 382, 390, 393 and 397 if the vehicle is not one described in paragraph (a) or (b).

2. To enforce these regulations, enforcement officers of the department and the transportation services authority may, during regular business hours, enter the property of a carrier to inspect its records, facilities and vehicles, including, without limitation, space for cargo and warehouses.

² NRS 706.756 reads in relevant part as follows:

1. Except as otherwise provided in subsection 2, any person who:

. . . .

(d) Fails to obey any order, decision or regulation of the authority or the department;

. . . .

is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for not more than 6 months, or by both fine and imprisonment. [Emphasis added.]

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than \$100 nor more than \$1,000, or by imprisonment in the county jail for not more than six months, or by both a fine and imprisonment.

Based on the above statutory analysis, driving a commercial vehicle with a blood alcohol concentration of .04 or more is a misdemeanor criminal offense. Additionally, the Department adopted NAC 483.802 pursuant to the authority granted to it in NRS 483.908. Through NAC 482.802, the Department adopted by reference 49 C.F.R. § 383.51. That section provides for the revocation of a commercial vehicle driver's license for operating a commercial vehicle with an alcohol concentration of .04 or greater.

QUESTION TWO

Can the above-described criminal violation be used for enhancement purposes pursuant to NRS 484.3792?

ANALYSIS

Your second question can be answered through a review of the plain language of NRS 484.3792.³

³ NRS 484.3792 reads in relevant part:

1. A person who violates the provisions of NRS 484.379:

(a) For the first offense within 7 years, is guilty of a misdemeanor. Unless he is allowed to undergo treatment as provided in NRS 484.37937, the court shall:

....

(b) For a second offense within 7 years, is guilty of a misdemeanor. Unless the sentence is reduced pursuant to NRS 484.3794, the court:

....

(c) For a third or subsequent offense within 7 years, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and shall be further punished by a fine of not less than \$2,000 nor more than \$5,000. . .

2. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

....

8. As used in this section, unless the context otherwise requires "offense" means:

(a) A violation of NRS 484.379 or 484.3795;

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The first section of NRS 484.3792 specifically states the enhancement statute applies to a violation of NRS 484.379. NRS 484.3792(2) and (8) clarify what is meant by the word “offense” as used in the statute. Subsection 2 references a “principal offense” and a “prior offense” for purposes of penalty enhancement. NRS 484.3792(8) defines an “offense” as: (1) A violation of NRS 484.379 or 484.3795; (2) A homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or resulting from any other conduct prohibited by NRS 484.379 or 484.3795; or (3) A violation of a law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a) or (b). Reading the words of the statute in context and giving them their plain and ordinary meaning, it becomes clear that the primary offense, the offense for which the person is being charged, is a violation of NRS 484.379. The “offenses” defined in NRS 484.3792(8) refer to “prior offenses” that can be used to enhance the penalty for a violation of NRS 484.379.

The criminal offense of driving a commercial vehicle with a blood alcohol level of .04 or more does not constitute a violation of NRS 484.379, and is therefore not a primary offense under the above statute. Additionally, such criminal offense does not meet any of the three definitions of “offense” contained in NRS 484.3792(8). Clearly, a violation of NRS 706.756, discussed above, does not constitute a violation of NRS 484.379 or 484.3792, or a homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor, a controlled substance, or resulting from any other conduct prohibited by NRS 484.379 or 484.3795. The final type of “prior offense” involves a violation of a *law of any other jurisdiction* that prohibits the same or similar conduct. The criminal offense created by NRS 706.756 does not involve a *law of another jurisdiction* prohibiting the same or similar conduct. Since the criminal violation described in the first question is created by a state statute, NRS 706.756, a violation of that statute would not involve a violation of a law of another jurisdiction.

Based on the above analysis, it is the opinion of this office that the criminal offense of driving a commercial vehicle with a blood alcohol level of

(..continued)

- (b) A homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or resulting from any other conduct prohibited by NRS 484.379 or 484.3795; or
- (c) A violation of a law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a) or (b).

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.04 or more cannot be used for enhancement purposes pursuant to NRS 484.3792.

CONCLUSION TO QUESTIONS ONE AND TWO

Pursuant to the authority in NRS chapter 706, the Department of Motor Vehicles and the Transportation Services Authority have adopted by reference several federal regulations related to the operation of commercial motor vehicles, including the prohibition against operating a commercial motor vehicle with a blood alcohol concentration of .04 or more. The Legislature, through NRS 706.756, has made a violation of those regulations a misdemeanor criminal offense. Additionally, an analysis of the plain language of NRS 484.3792 indicates that a violation of the regulation is not an “offense” for purposes of enhancing the penalty for a violation of NRS 484.379.

FRANKIE SUE DEL PAPA
Attorney General

By: MICHAEL D. JENSEN
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-37 PAROLE AND PROBATION; DISCOVERY; CONFIDENTIALITY: Internal reports produced by a Division of Parole and Probation employee for upper administration review in the ordinary course of business are discoverable in a lawsuit. Internal reports produced by a Division of Parole and Probation employee for upper administration review in anticipation of litigation can be deemed confidential and are not discoverable, unless the requesting party establishes to a court there is a substantial need in the preparation of its case and it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

Carson City, December 31, 2001

R. Warren Lutzow, Chief, Division of Parole and Probation, 1445 Hot Springs Road, Suite 104 West, Carson City, Nevada 89706

Dear Chief Lutzow:

You have requested an opinion from this office regarding the confidentiality and discoverability of internal reports prepared for upper administration review.

QUESTION

Are internal reports produced by a Division of Parole and Probation (Division) employee for upper administration review confidential such that they need not be produced in discovery in any subsequently filed lawsuit?

ANALYSIS

Nevada Rule of Civil Procedure (NRCP) 26(b)(1) provides:

Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. [Emphasis added.]

Federal Rule of Civil Procedure (FRCP) 26(b)(1) provides:

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Parties may obtain discovery regarding any matter, *not privileged*, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. [Emphasis added.]

NRCP 34 and FRCP 34 are entitled “Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.” Their subsections (a) provide:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on [his/the requestor's¹] behalf, to inspect and copy, *any* designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample *any* tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b). [Emphasis added.]

Rule 34 “is in all respects an essential part of a liberal and integrated scheme for the full disclosure of relevant information between parties that will facilitate the prompt and just disposition of their litigation.” 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2206 (2d ed. 1987). Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947). To that end, either party may compel the other to disgorge or disclose whatever facts he has in his possession. *Id.* at 507. NRCP 34(a) and FRCP 34(a) authorize the broadest sweep of access, inspection, examination, testing, copying, and photographing of documents or

¹ The Nevada Rules of Civil Procedure uses the first and the Federal Rules of Civil Procedure uses the second designation.

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objects in the possession or control of another party. 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2206 (2d ed. 1987).

The scope of discovery permissible under Rule 34 is defined by Rule 26. 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2206 (2d ed. 1987). NRCP 26(b)(3) and FRCP 26(b)(3) provide in pertinent part:

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and *prepared in anticipation of litigation or for trial* by or for another party or by or for that other party's representative (including [his/the other party's²] attorney, consultant, surety, indemnitor, insurer, or agent) *only upon a showing* that the party seeking discovery has substantial need of the materials in the preparation of [his/the party's] case and that [he/the party] is unable without undue hardship to obtain the substantial equivalent of the materials by other means. [Emphasis added.]

Accordingly, the determining factor concerning the confidentiality and discoverability of internal reports produced by a Division employee for upper administration review is whether it was prepared in the ordinary course of business or in anticipation of litigation or trial. The former is discoverable because there is no basis to assert the privilege of work product. The latter is not discoverable because it is privileged work product. However, even reports prepared in anticipation of litigation or trial are discoverable if it is shown that there is substantial need there for in the preparation of the party's case and the requesting party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. In disputes, the court will decide the issues of substantial need, undue hardship, and substantial equivalent.

There is no general policy in the Division's Policy and Procedure Manual regarding "internal reports." However, Policy Number 1.17 has the purpose of establishing guidelines for the handling of critical incidents involving serious injury or death inflicted by or upon employees of the Division in the exercise of their duties. The procedures outlined therein are to be implemented upon the occurrence of a critical incident, or may be invoked on an optional basis upon the occurrence of any sensitive or critical event

² The Nevada Rules of Civil Procedure uses the first and the Federal Rules of Civil Procedure uses the second designation.

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involving a member of the Division which may have possible administrative concerns, civil liability, or criminal culpability. The pertinent report-writing requirements of this policy include the on-scene supervisor completing an internal memo outlining the details of the occurrence and forwarding it to the district administrator. The district administrator is required to complete an internal memo outlining the details of the occurrence, attach all applicable reports, memos, etc., and forward it to the Division's Chief. Accordingly, such internal memos or reports are prepared in the ordinary course of business and are discoverable because they are prepared pursuant to policy. This is true even if it was readily apparent that the event would result in litigation.

The following provides some guidance as to what constitutes a report or other writing "in anticipation of litigation" and is therefore privileged work product:

Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2024 (2d ed. 1987).

This "because of" test has been cited in numerous cases by several circuit courts of appeal. See *U.S. v. Adlman*, 134 F.3d 1194 (2nd Cir. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798 (3rd Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir.), *cert. denied*, 484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987); and *Senate of Puerto Rico v. United States Dep't of Justice*, 262 U.S. App. D.C. 166, 823 F.2d 574 (D.C. Cir. 1987). A "special" internal memo or report requested by the chief of the Division, other upper administration personnel, or the Division's attorney in anticipation of litigation can be deemed confidential and not discoverable in a subsequent lawsuit absent the showing of substantial need pursuant to Rule 26(b)(3). Such a report is privileged work product.

CONCLUSION

Internal reports produced by a Division of Parole and Probation employee for upper administration review in the ordinary course of business are discoverable in a lawsuit. Internal reports produced by a Division of Parole and Probation employee for upper administration review in anticipation of

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litigation can be deemed confidential and are not discoverable, unless the requesting party establishes to a court there is a substantial need in the preparation of its case and it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

FRANKIE SUE DEL PAPA
Attorney General

By: DAN WONG
Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-38 CONTROLLER: COLORADO RIVER COMISSION: Nevada law provides the Colorado River Commission with the capacity to have a name; the ability to be sued; and the authority to purchase, sell, and finance property pursuant to NRS 538.166. For the Controller's financial reporting purposes, the Colorado River Commission is legally separate from the State as defined by the specific criteria set forth in the Government Accounting Standards Board Statement No. 14.

Carson City, December 31, 2001

Kathy Augustine, Controller, Office of the State Controller, 101 North Carson Street, Carson City, Nevada 89701-4786

Dear Ms. Augustine:

You have requested an opinion from this office regarding the application of Government Accounting Standards Board Statement No. 14 as it relates to the Colorado River Commission for the Controller's financial reporting purposes.

QUESTION

Whether the Colorado River Commission (CRC) is legally separate from the State as defined by Government Accounting Standards Board Statement No. 14 (GASB 14).

ANALYSIS

GASB 14 establishes standards for defining and reporting on governmental financial reporting entities. The requirements of GASB 14 are a part of the generally accepted accounting principles that apply to financial reporting for all levels of state and local government. GASB 14, paragraph 15 provides in pertinent part that:

An organization has separate legal standing if it . . . possesses the corporate powers that would distinguish it as being legally separate from the primary government. Generally, corporate powers give an organization the capacity to have a name; the right to sue and be sued in its own name without recourse to a state or local governmental unit; and the right to buy, sell, lease, and mortgage property in its own name.

The CRC is a statutorily created and named commission that consists of seven appointed members. NRS 538.051.

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The general powers of the CRC are enumerated in chapter 538 of the Nevada Revised Statutes. NRS 538.166. Although no explicit statutory provision authorizes the CRC to sue and be sued, NRS 538.166(1)(f) provides, in part, that the CRC may:

Perform all other lawful acts it considers necessary or desirable to carry out the purposes and provisions of any law relating to the powers, functions and duties of the commission.

In carrying out its powers, functions, and duties the CRC has exercised the right to sue and be sued in its own name. *See State Gen. Obligation Bond v. Koontz*, 84 Nev. 130, 437 P.2d 72 (1968) (CRC successfully sought writs of mandate in the Nevada Supreme Court); *see also, Southern Cal. Edison Co. v. United States*, 43 Fed. Cl. 107 (1999), and *Southern Cal. Edison Co. v. United States*, 226 F.3d 1349 (Fed.Cir. 2000) (CRC, along with other private and public entities named as third-party defendants, defended against federal litigation involving a rebate methodology adopted by the Western Area Power Authority).

Additionally, the powers enumerated in NRS 538.166 explicitly grant the CRC the authority to purchase, sell, and finance property. For example, in accordance with NRS 538.166, the CRC has the authority to:

. . . [a]cquire and perfect any interest in supplemental water . . . [a]cquire an interest in, finance, construct, reconstruct, operate, maintain, repair and dispose of any facility for water or power, including, without limitation, a facility for the storage or conveyance of water and a facility for the generation or transmission of electricity . . . [b]orrow money and . . . [i]ssue . . . [g]eneral obligation securities [or] [s]ecurities constituting special obligations . . . or [a]ny combination of those securities.

See NRS 538.166(1)(a)–(e).

CONCLUSION

Based upon the foregoing analysis, it is the opinion of this office that the applicable law provides the Colorado River Commission with: (1) the capacity to have a name; (2) the ability to sue and be sued; and (3) the authority to purchase, sell, and finance property. Accordingly, for the Controller's

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financial reporting purposes, the Colorado River Commission is legally separate from the State as defined by the specific criteria set forth in the Government Accounting Standards Board Statement No. 14.

FRANKIE SUE DEL PAPA
Attorney General

By: DARRELL FAIRCLOTH
Deputy Attorney General

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AGO 2001-39 PUBLIC EMPLOYEES RETIREMENT BOARD;
COMPENSATION; OVERTIME: The appropriate classification for pay received by employees of local agencies who are called back to duty with less than 12 hours notice, whether or not they are on standby status, is call-back pay upon which contributions are due.

Carson City, December 31, 2001

George Pyne, Executive Officer, Public Employees' Retirement System,
693 West Nye Lane, Carson City, Nevada 89703

Dear Mr. Pyne:

You have asked this office for an opinion on the following question:

QUESTION

If an employee of a local agency is on standby status and is called back to duty with less than 12 hours notice, is the pay received by the employee classified as call-back pay or overtime pay?

BACKGROUND

It has come to the attention of the internal audit division of the Public Employees' Retirement System (System) that there are discrepancies with regard to how certain public employers are classifying pay earned when an employee is recalled to work while on standby status. Certain public employers are classifying pay earned when an employee is recalled to work with less than 12 hours notice as overtime pay, while other public employers are classifying this pay as call-back pay. Each of the public employers in question is a local agency not subject to the provisions of NRS chapter 284.

ANALYSIS

Contributions are made to the System based on the member's compensation. "Compensation" is defined in NRS 286.025 as follows:

1. Except as otherwise provided by specific statute, "compensation" is the salary paid to a member by his principal public employer.
2. The term includes:
 - (a) Base pay, which is the monthly rate of pay excluding all fringe benefits.
 - (b) Additional payment for longevity, shift differential, hazardous duty, work performed on a holiday if it does not

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exceed the working hours of the normal work week or pay period for that employee, holding oneself ready for duty while off duty and *returning to duty after one's regular working hours*.

(c) Payment for extra duty assignments if it is the standard practice of the public employer to include such pay in the employment contract or official job description for the calendar or academic year in which it is paid and such pay is specifically included in the member's employment contract or official job description.

(d) The aggregate compensation paid by two separate public employers if one member is employed half time or more by one, and half time or less by the other, if the total does not exceed full-time employment, if the duties of both positions are similar and if the employment is pursuant to a continuing relationship between the employers.

3. The term does not include any type of payment not specifically described in subsection 2. [Emphasis added.]

"Returning to duty after one's regular working hours" is commonly referred to as call-back pay. Attorney General, letter opinion from William E. Isaeff, Chief Deputy Attorney General, to Lawrence B. Grissom, Assistant Executive Director, Public Employees Retirement System (February 6, 1984) (on file at Office of the Attorney General). Call-back normally entails an employee being released from duty for a period of time and then being called back to duty. *Id.* However, overtime does not necessarily have a component of the employee being released from duty. *Id.*

Call-back pay is included in the definition of compensation. NRS 286.025(2)(b). However, overtime pay is excluded from the definition of compensation. NRS 286.025(3), Attorney General letter opinion from William E. Isaeff, Chief Deputy Attorney General, to Lawrence B. Grissom, Assistant Executive Director, Public Employees Retirement System (February 6, 1984). Therefore, call-back pay is subject to contribution, whereas overtime pay is not subject to contribution. The Retirement Act, NRS chapter 286, does not define call-back pay or overtime pay.

The Public Employees' Retirement Board (Retirement Board) may, subject to the Retirement Act, establish rules and regulations for the administration of the System. NRS 286.200; Attorney General letter opinion from William E. Isaeff, Chief Deputy Attorney General, to Roy A. Woofter, City Attorney of North Las Vegas (November 17, 1986) (on file at Office of the Attorney General). The official policies of the Retirement Board are adopted after notice and public hearing and are the regulations which govern

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the administration of the System. *Id.* The Retirement Board has defined call-back pay and overtime pay in the official policies of the System.

“Call-back pay” is defined as follows:

Except as it may conflict with the Nevada Administrative Code at 284.214, call-back pay is defined as compensation earned for returning to duty after a member has completed his regular shift, is off duty for any period of time, and is requested to return to duty with less than [sic] 12 hours notice.

Section 1.10, Official Policies Of the Public Employees’ Retirement System of Nevada (2000).

“Overtime pay” is defined as follows:

Except as it may conflict with the Nevada Revised Statutes at 284.180 and the Nevada Administrative Code at 284.250, overtime pay is defined as additional compensation earned by a member who is held over on his regular shift or is requested to return to duty at a time that is more than 12 hours after notice is given.

Section 1.33, Official Policies Of the Public Employees’ Retirement System of Nevada (2000).

Pursuant to the Retirement Board’s definitions of call-back and overtime pay, whether an employee of a local agency is on standby status or volunteers for extra duty has no bearing on whether or not the pay is classified as compensation. The determinative factors are whether the employee was held over at the end of his regular shift and, if not, how much notice the employee was given to return to duty.

If an employee of a local agency is released from his regular shift, is off-duty for any period of time, and then is called back to work with less than 12 hours notice, the pay he receives is classified as call-back pay. If an employee of a local agency is held over on his regular shift, then the pay he receives is classified as overtime pay. If an employee of a local agency returns to work with more than 12 hours notice, then the pay he receives is classified as overtime pay.¹ Call-back pay is included in the definition of compensation

¹ Because the definitions of overtime and call-back pay are limited to those instances in which they do not conflict with the provisions of NRS chapter 284 and NAC chapter 284, this result may be different when applied to employees of state agencies subject to NRS chapter 284.

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and overtime pay is excluded from the definition of compensation. Therefore, the appropriate classification for pay received by employees of local agencies who are called back to duty with less than 12 hours notice, whether or not they are on standby status, is call-back pay upon which contributions are due.

CONCLUSION

For the purposes of NRS chapter 286, pay received by an employee of a local agency for returning to duty with less than 12 hours notice after having been off-duty for any period of time is classified as call-back pay and is included in the definition of compensation. Pay received by an employee of a local agency who is held over for duty after his regular shift has ended is classified as overtime pay and is excluded from the definition of compensation. Pay received by an employee of a local agency for returning to duty with more than 12 hours notice is classified as overtime pay and is excluded from the definition of compensation. Therefore, the appropriate classification for pay received by employees of local agencies who are called back to duty with less than 12 hours notice, whether or not they are on standby status, is call-back pay upon which contributions are due.

FRANKIE SUE DEL PAPA
Attorney General

TINA M. LEISS
Senior Deputy Attorney General

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2001-40 PUBLIC EMPLOYEES RETIREMENT BOARD;
RETIREMENT: Except for limited exceptions that do not apply in this situation, the Retirement Act prohibits a public employee from receiving a retirement allowance while maintaining employment with a public employer in a position eligible to participate in the Public Employees' Retirement System. This result does not change even if simultaneous contributions for that employee holding a volunteer fireman position and another position are authorized by the Retirement Act.

Carson City, December 31, 2001

George Pyne, Executive Officer, Public Employees' Retirement System,
693 West Nye Lane, Carson City, Nevada 89703

Dear Mr. Pyne:

You have asked this office for an opinion on the following question:

QUESTION

Is a person who is a member of the Public Employees' Retirement System (System) as a volunteer fireman and as a regular member employed by another public agency prohibited under NRS 286.520 from receiving a retirement allowance as a result of service in one of those positions while still serving in the other position?

BACKGROUND

You have informed us that the City of Winnemucca (City) has asked if the Public Employees' Retirement Board (Retirement Board) has any authority to allow a member to collect a retirement allowance as a result of service in one position while still active in a second position. Specifically, the most senior member of the Winnemucca Volunteer Fire Department is also a state employee and a regular member of the System. He would like to retire from his state position and receive the resulting retirement allowance while remaining an active member of the System as a volunteer fireman. The City would like to retain his expertise in the position of volunteer fireman, which will not be possible if he cannot receive a retirement allowance as a result of his state employment while still serving as a volunteer fireman. In addition, an elected official in the City is a retired volunteer fireman who would like to receive a retirement allowance as a result of service in that position while still holding a position with a public employer.

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ANALYSIS

Generally, members of the System are not eligible to contribute simultaneously on two or more eligible positions. *See generally* NRS 286.025(2)(d), Section 1.21, Official Policies Of the Public Employees' Retirement System of Nevada (2000). An exception to this general rule has been made for volunteer firemen such that contributions may be received for the same employee in both a regular position and in the capacity of a volunteer fireman. NRS 286.367(4). NRS 286.367(4) provides a method by which to calculate the average compensation of a volunteer fireman who has other covered employment. However, neither this statute, nor any other, provides an exception to the prohibition on being a member of the System and receiving a retirement allowance at the same time.

Except as specifically provided by statute, a retired employee receiving an allowance from the System may not accept employment in a position eligible to participate in the System. NRS 286.520. Exceptions to this prohibition may be found in NRS 286.520(4), (5), and (6) and NRS 286.525, none of which apply to volunteer firemen or otherwise to this situation.¹ If a retired employee accepts employment in a position eligible for membership in the System, he forfeits all retirement allowances for the duration of that employment. NRS 286.520. Therefore, NRS 286.520 prohibits a retired employee from being employed in a position eligible to participate in the System without loss of his retirement allowance, even if contributions were authorized simultaneously on two eligible positions for that employee. NRS 286.520 applies to volunteer firemen positions because those positions are not specifically excluded. Presumably, had the Legislature intended to exclude volunteer firemen positions from the application of NRS 286.520, it would have done so.

NRS 286.520(4) provides an exception to the general rule of NRS 286.520 for retired employees elected or appointed to public office. Such a person may retain his retirement allowance unless he is serving in the same office in which he served and for which he received service credit as a member. In this case, the elected official, who is a retired volunteer fireman, accrued service credit as a member for the same office which he currently holds and also held prior to his retirement as a volunteer fireman. Therefore, even if this exception otherwise applied, it does not allow for the elected official in this case to receive a retirement allowance while in his current elective public office.

¹ NRS 286.520(4) does relate to an elected official but, as will be discussed, does not apply in this situation to allow the volunteer fireman's retirement allowance to be paid while this employee is holding his current elective office.

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Assembly Bill 555 (A.B. 555), passed by the 2001 Legislature, also provides a limited exception to the prohibition against receiving a retirement allowance and being employed in a position eligible for membership in the System. We assume that this exception would not apply to the positions addressed in this opinion. However, with respect to volunteer firemen positions, there might be circumstances under which the local government could consider the application of A.B. 555 in order to employ retired workers in these positions.

NRS 286.520 speaks to a retired employee who accepts employment with a public employer. Clearly the intent and effect of this statute, with limited exceptions, is to prohibit a public employee from receiving an allowance from the System while he is receiving compensation for employment with a public employer. As noted above, NRS 286.367(4) provides for simultaneous contributions on two eligible positions if one position is a volunteer fireman position. However, neither NRS 286.520 nor NRS 286.367(4) provide for the receipt of a retirement allowance from one position while contributions are being made on the second position, even in the case of a volunteer fireman. Reading these statutes together, our conclusion is that neither of the employees, either as a retired volunteer fireman or as a retiree from a regular position, may collect a retirement allowance while still employed in a position eligible for membership in the System. In addition, other provisions of NRS chapter 286 (the Retirement Act) prohibit the receipt of a retirement allowance from one position while still employed in the second position.

Except as otherwise provided by the Retirement Act, all public employers shall participate in the System and all of their employees shall be members of the System. NRS 286.290. There is no provision in the Retirement Act that would exclude the positions in question from the application of NRS 286.290. Therefore, each of the employees in question must be a member of the System as long as he is employed as either a volunteer fireman or in another eligible position. A "member" is defined to include a person who is employed by a participating public employer and who is contributing to the System. NRS 286.050(1). NRS 286.401 sets forth the circumstances in which an employee's membership in the System is terminated.

NRS 286.401 provides as follows:

Membership of an employee in the system terminates upon:

1. The death of a member.
2. The withdrawal of contributions from a member's account.
3. *Receipt of retirement allowances by a member.*
4. Receipt of disability allowances by a member.

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A retired employee is not entitled to any right conferred by this chapter upon a member unless the provision conferring that right expressly states that it is conferred upon a retired employee. [Emphasis added.]

If the employees in question were to receive retirement allowances for either a volunteer fireman position or a regular position, their membership in the System would be terminated. NRS 268.401(3). However, as set forth above, in order to maintain employment in a second position, the employees must be members of the System. NRS 286.290. Therefore, the only way to read the provisions of the Retirement Act is to conclude that the employees, under the present circumstances, cannot receive a retirement allowance for any position while they are employed in any eligible position. Because this result is mandated by applicable statutes, the Retirement Board does not have the authority to change this result. Any such change must come from the Legislature.

CONCLUSION

Except for limited exceptions that do not apply in this situation, the Retirement Act prohibits a public employee from receiving a retirement allowance while maintaining employment with a public employer in a position eligible to participate in the Public Employees' Retirement System. This result does not change even if simultaneous contributions for that employee holding a volunteer fireman position and another position are authorized by the Retirement Act.

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