STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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January 25, 2011

OPINION NO. 2011-01

GUZZLERS, STATE ENGINEER; WATER: Water rights holders who can show that their adjudicated, pre-statutory vested, or permitted water rights cannot be satisfied because excessive precipitation is being intercepted by guzzlers should petition the State Engineer to stop the capture of precipitation to the extent necessary to protect the senior water rights.

Ramona Morrison, Vice Chairman
Nevada Board of Agriculture
405 South 21st Street
Sparks, Nevada 89431

Dear Ms. Morrison:

You have asked for an opinion from this Office based on the following question: Does the State Engineer have the authority to allow Nevada Department of Wildlife, Bureau of Land Management, or United States Forest Service to install rainwater catchments commonly known as guzzlers without a water right permit?

Peter G. Morros, State Engineer, wrote a letter to both the Nevada Department of Wildlife and the Bureau of Land Management on July 23, 1982, in which he stated, "the placement of guzzlers as watering sources for wildlife only falls within the authority of NRS 533.367 and therefore need not comply with the statutory requirement of appropriation of public waters under the provisions of NRS Chapter 533." (Emphasis in original.)

Interpretation of Nevada's water law by the State Engineer, the official with the authority to administer the provisions of the law, is entitled to deference. *See Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). The impact of guzzlers on existing water rights is important to the analysis of this question. The 345 large guzzlers in Nevada average 32 by 40 feet square.[1] The 1,269 small guzzlers average eight by twelve feet. All together the guzzlers cover approximately thirteen acres. The average precipitation at the sites averages less than one foot per year.[2] The average infiltration rate to aquifers is about three percent of the precipitation. Thus, cumulatively, the guzzlers intercept about thirteen acre feet of precipitation, but capture only about four-tenth's of an acre foot of potential groundwater recharge per year.[3] Hydrologists with the Nevada Division of Water Resources believe that this amount is too small to be measured in most hydrographic basins in Nevada.

The question you posed should be analyzed as two separate and distinct questions.

QUESTION ONE

Does the State Engineer have authority to allow the Nevada Department of Wildlife; the United States Department of the Interior, Bureau of Land Management; or, the United States Department of Agriculture, Forest Service to adversely affect pre-statutory vested water rights and State permitted water rights by allowing the capture of precipitation for wildlife?

ANALYSIS

The State Engineer does not have authority to allow capture of water with guzzlers for use by wildlife in a way that would impact existing water rights. NRS 533.370. However, the facts presented with this opinion contain no indication that the pre-statutory vested water rights or permitted water rights in the area are not being satisfied. The State Engineer has consistently ruled that junior water right users interfere with senior rights when the senior right cannot be served because of the water use by the junior user. *See* State Engineer Ruling 5875, p. 22 (reversed on other grounds).

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[1] Data obtained from the Nevada Department of Wildlife.

[2] Data obtained from the Nevada State Engineer.

[3] Any rainwater catchment of any kind that also intercepts surface water would require a permit from the State Engineer.

CONCLUSION TO QUESTION ONE

If it can be shown factually that vested water rights or state permitted water rights cannot be served because precipitation is being captured by guzzlers, the water right holder should petition the State Engineer to take action to enforce the vested or permitted water right.

QUESTION TWO

Does Nevada recognize the general legality of capturing rainwater in any form?

ANALYSIS

The capture of rainwater for use on the capture site is not addressed by Nevada's current water law. *See* NRS Chapters 533 and 534. The topic of rainwater catchments, including guzzlers and the related topic of rainwater harvesting, has been gaining interest around the world.[4] In the United States, some states regulate the capture and use of rainwater in any form[5] while other states allow for or encourage rainwater harvesting.[6]

The Nevada Legislature has declared that the "water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025. The Legislature has not extended the jurisdiction of the State Engineer to include precipitation captured directly from a structure that has been legally emplaced, whether a building or a guzzler. The Legislature has the authority to enact laws to prevent, control, or regulate the capture of precipitation for use under the Legislature's police power to protect the health and welfare of the people of this State because water is vital to the health of Nevada.

CONCLUSION TO QUESTION TWO

The practice of capturing precipitation from legitimate structures is not prohibited under current Nevada Law.

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[4] *See generally* Critchley, Will; Klaus Siegert, *Water harvesting: A Manual for the Design and Construction of Water Harvesting Schemes for Plant Production,* Food and Agriculture Organization of the United Nations, Rome, 1991.

[5] *See* 2010 Utah Senate Bill 32 at http://le.utah.gov/~2010/bills/sbillenr/sb0032.pdf

[6] *See* The Texas Manual on Rainwater Harvesting at http://www.twdb.state.tx.us/publications/reports/rainwaterharvestingmanual_3rdedition.pdf

CONCLUSION

Water rights holders who can show that their adjudicated, pre-statutory vested, or permitted water rights cannot be satisfied because excessive precipitation is being intercepted by guzzlers should petition the State Engineer to stop the capture of precipitation to the extent necessary to protect the senior water rights.

CATHERINE CORTEZ MASTO
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By: _____
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February 22, 2011

OPINION NO. 2011-02

CHILD ABUSE AND NEGLECT; CHILDREN; WELFARE: A finding by the court in the child protection case that the child was in need of protection at the time of removal will provide the agency with sufficient credible evidence to support a substantiated finding of child abuse or neglect but the child welfare agency must make its own finding to enter such a report in the Central Registry.

Diane Comeaux, Administrator
Division of Child and Family Services
4126 Technology Way
Carson City, NV 89706

Dear Ms. Comeaux:

You requested an opinion from the Office of the Attorney General regarding the effect on the child welfare agency's[1] decision to substantiate a report of child abuse or neglect of a court order related to either criminal allegations of abuse or neglect of a child or a petition that a child is in need of protection.

QUESTION ONE

Is a child welfare agency required to change its substantiation of a report of child abuse or neglect to match a court's determination on the same allegations of abuse or neglect in either a criminal matter or in a proceeding for a child in need of protection under Chapter 432B of the Nevada Revised Statutes?

[1] Child welfare agency refers to the agency which provides child welfare services as defined in NRS 432B.030.

RELATED QUESTION

When a child welfare agency makes a substantiated finding of child abuse or neglect, does the person found responsible for the child abuse or neglect have the right to bring in evidence of a court order rendered in either a criminal matter or in any NRS 432B proceeding for any appeal brought under NAC 432B.170?

ANALYSIS

Allegations of child abuse and neglect can trigger three separate legal proceedings: (1) the child welfare agency may substantiate the report of abuse or neglect of the child and enter the substantiated report to the Collection of Information Concerning the Abuse or Neglect of a Child (hereinafter the "Central Registry") as provided in NRS 432.100; (2) a petition may be filed alleging that the child is in need of protection under NRS 432B.510; and (3) the prosecution and conviction may be pursued of any person for violation of NRS 200.508 or other crimes related to the abuse or neglect of a child. These proceedings are independent determinations and each contains its own protection of due process in an appeal process.

In order to address your question about how the NRS 432B and criminal proceedings impact the substantiation by a child welfare agency, we first review the statutory and any regulatory requirements for these three types of proceedings. Then we must consider whether a court judgment in the criminal or child in need of protection proceedings creates a legal binding effect on the child welfare agency.

A. Substantiation of Abuse or Neglect by a Child Welfare Agency.

Upon receipt of a report of possible abuse or neglect, the child welfare agency must determine if the report indicates circumstances that mandate an investigation. NRS 432B.260; NAC 432B.140. If the child welfare agency conducts an investigation, the agency must determine whether there is reasonable cause to believe that a child is abused or neglected or threatened with abuse or neglect; the nature and extent of injuries, abuse or neglect; and finally, who is responsible for the abuse and neglect. NRS 432B.300; NAC 432B.150. A report of child abuse or neglect may be substantiated if the child welfare agency finds credible evidence that the abuse or neglect occurred. NAC 432B.170.

NAC 432B.170 states the following:

> 1. After the investigation of a report of the abuse or neglect of a child, an agency which provides child welfare services shall determine its case findings based on whether

there is reasonable cause to believe a child is abused or neglected, or threatened with abuse or neglect, and whether there is credible evidence of alleged abuse or neglect of the child. The agency shall make one of the following findings:

(a) The allegation of abuse or neglect is substantiated; or

(b) The allegation of abuse or neglect is unsubstantiated.

2. The agency which provides child welfare services shall enter the findings of the investigation in the central registry established pursuant to NRS 432.100.

3. When a finding of confirmed abuse or neglect of a child by the person responsible for the welfare of the child has been made, the agency which provides child welfare services shall:

(a) Provide written notification to the person concerning his right to appeal the finding; and

(b) Provide information on the appeals process.

4. A request for an appeal must be made in writing to the agency within 15 days after the date on which the written notification is sent.

5. A hearing that is held pursuant to this section must be conducted in accordance with chapter 233B of NRS.

6. A communication or request relating to information contained in the central registry established pursuant to NRS 432.100 must be retained in the manner set forth in chapter 239 of NAC.

7. As used in this section:

(a) "Substantiated" means that a report made pursuant to NRS 432B.220 was investigated and that credible evidence of the abuse or neglect exists.

(b) "Unsubstantiated" means that a report made pursuant to NRS 432B.220 was investigated and that no credible evidence of the abuse or neglect exists. The term includes efforts made by an agency which provides child welfare services to prove or disprove an allegation of abuse or neglect that the agency is unable to prove because it was unable to locate the child or the person responsible for the welfare of the child.

NAC 432B.170.

The substantiated or unsubstantiated finding of child abuse or neglect is an internal administrative decision by the child welfare agency that must be made for purposes of maintaining information regarding child abuse and neglect reports in the Central Registry. NRS 432B.310. The Central Registry is maintained by the Division of Child and Family Services (Division) and provides statistical information on reports of abuse and neglect. NRS 432.100. In addition, the Division provides information about substantiated reports to some employers who conduct background checks for employment purposes. *See* NRS 432A.170 (Bureau of Services for Child Care of the Division required to request information from the Central Registry concerning every applicant, licensee or employee of an applicant or licensee of a child care facility).

Therefore, the agency must notify the person found responsible for the abuse or neglect in its findings if the agency substantiates the report. The person then has fifteen days to appeal the substantiated finding by the agency. NAC 432B.170(4). A hearing is conducted in accordance with Chapter 233B. NAC 432B.170(5). The administrative hearing officer determines whether the agency decision is based on substantial evidence. NRS 233B.121(8). The decision of the hearing officer can be appealed to the district court through a petition for judicial review. NRS 233B.130. An aggrieved party can then file an appeal of the final district court decision with the Nevada Supreme Court. NRS 233B.150. Through this process, a court may review the determination by the child welfare agency and issue an order which directs the child welfare agency to reverse the finding of a substantiation of child abuse or neglect.

B. NRS 432B Proceedings for a Child in Need of Protection.

At the same time the agency is determining whether to substantiate a report to enter in the Central Registry, the agency may also be making an important decision regarding the child's safety. Once the agency has determined whether there is reasonable cause to believe that a child is abused or neglected, the agency must take additional steps to protect the child, which may include removal of the child from the parent or guardian, and recommendation that the District Attorney file a petition pursuant to NRS 432B.490. NRS 432B.340; NRS432B.380; NRS 432B.390. NRS 432B.330 specifies that a child is in need of protection under the following conditions:

> 1. A child is in need of protection if:
> (a) The child has been abandoned by a person responsible for the welfare of the child;
> (b) The child has been subjected to abuse or neglect by a person responsible for the welfare of the child;

> (c) The child is in the care of a person responsible for the welfare of the child and another child has died as a result of abuse or neglect by that person;
> (d) The child has been placed for care or adoption in violation of law; or
> (e) The child has been delivered to a provider of emergency services pursuant to NRS 432B.630.
> 2. A child may be in need of protection if the person responsible for the welfare of the child:
> (a) Is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity;
> (b) Fails, although the person is financially able to do so or has been offered financial or other means to do so, to provide for the following needs of the child:
> (1) Food, clothing or shelter necessary for the child's health or safety;
> (2) Education as required by law; or
> (3) Adequate medical care; or
> (c) Has been responsible for the abuse or neglect of a child who has resided with that person.
> 3. A child may be in need of protection if the death of a parent of the child is or may be the result of an act by the other parent that constitutes domestic violence pursuant to NRS 33.018.
> 4. A child may be in need of protection if the child is identified as being affected by prenatal illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure.

If a petition is filed alleging a child is in need of protection, a court will determine whether grounds exist under NRS 432B.330, which may include whether a child was abused or neglected. NRS 432B.330(1)(6). Further, NRS 432B.530(5) states in relevant part:

> 5. *If the court finds by a preponderance of the evidence that the child was in need of protection at the time of the removal of the child from the home, it shall record its findings of fact and may proceed immediately or at another hearing held within 15 working days, to make a proper disposition of the case. If the court finds that the allegations in the petition have not been established, it shall dismiss*

> *the petition and, if the child is in protective custody, order the immediate release of the child.*

NRS 432B.530(5) (emphasis added). The court that hears the child protection matter determines whether there is a preponderance of the evidence that the child was in need of protection at the time of removal, but does not make a direct finding regarding the agency substantiation of abuse and neglect.

C. Criminal Proceedings.

A criminal investigation can occur simultaneously with a child welfare investigation or the child welfare agency may make a referral to the district attorney for criminal prosecution. NRS 432B.380. If a person is charged with the violation of NRS 200.508 or other crimes related to abuse or neglect of a child, a judge or jury may either convict or find the parent or other responsible person not guilty of child abuse or neglect. The judge or jury in a criminal case makes a finding of guilt using the beyond-a-reasonable-doubt standard. *Jackson v. Virginia,* 443 U.S. 307, 317–18 (1979) ("[In re] *Winship* (397 U.S. 358, 90 S.Ct. 1068 (1970) [ ] established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, . . ."); *Mitchell v. State,* 124 Nev. ___, 192 P.3d 721, 727 (Adv. Op. 70, Sept. 18, 2008). Again, the judge or jury does not make a finding regarding whether the agency should substantiate a report of child abuse or neglect. This is not the purpose of the criminal hearing nor is the same standard used for the criminal case and the agency decision.

D. Impact of NRS 432B or criminal proceedings on an agency substantiation.

The child welfare agency has a strong interest in having accurate information in the Central Registry. The findings from the child protection or criminal case will be relevant to the administrative hearing officer decision in determining whether there is substantial evidence to support a finding of child abuse or neglect. If the findings of the court in the child protection or criminal proceedings, including factual and legal findings, are identical to the substantiated finding, the agency may be precluded from making a decision contrary to the prior court's decision. *See Kahn v. Morse & Mowbray,* 121 Nev. 464, 474, 117 P.3d 227, 234–235 (2005) (footnote omitted) (holding that when an issue of fact or law is litigated in a prior proceeding a party may be precluded from litigating the issues previously addressed by the prior court). The legal doctrine of issue preclusion may apply in administrative hearings. *State, University and Community College System v. Sutton,* 120 Nev. 972, 983, 103 P.3d 8, 16 (2004) (footnote omitted). The issues in an agency substantiation of child abuse or neglect are not always identical to the child protection or criminal court findings but a prior court's findings will at minimum either lend support to or refute the findings of a

child welfare agency if the allegations in either the criminal matter or the 432B proceedings are similar.

For example, if a court finds that a child's injuries were caused by a medical condition, the child welfare agency may be legally precluded at the administrative hearing from claiming that the child's injuries not caused by a medical condition. On the other hand, if a jury finds a parent guilty of child abuse upon evidence beyond a reasonable doubt, the agency would appear to have sufficient evidence to meet the lower credible evidence standard to substantiate the report and the agency could argue issue preclusion to prevent the parent from arguing otherwise. As a result, it would be unlikely that the person responsible for the child abuse would appeal the agency finding.

The agency should make its decision regarding whether to substantiate a report of abuse or neglect based on all the available evidence including evidence that is revealed after the agency has concluded its investigation. The criminal and civil hearings may provide evidence which support a substantiated finding. However, if evidence is revealed during a criminal or child protection court hearing which disproves that the child was abused, the agency may choose to reverse a substantiated finding of child abuse or neglect for purpose of the Central Registry.

The agency is not prohibited by regulation or statute from waiting to make a final finding regarding the report of child abuse or neglect until the conclusion of the related criminal or child protection cases. The agency can also enter its finding and agree to stay the administrative appeal hearing until the conclusion of the criminal or civil matter. Finally, if the agency denies a request to consider additional information which was not available at the time of the initial administrative hearing, the agency can provide a limited hearing to ensure that the information contained in the Central Registry is accurate.

CONCLUSION TO QUESTION ONE AND RELATED QUESTION

The child welfare agency is not required to change its substantiated findings entered in the Central Registry unless the substantiation is reversed through the Chapter 233B administrative hearing process. The child welfare agency should make its decision on whether or not to substantiate a report of abuse or neglect by considering all available evidence including findings made by a court in a related criminal or child protection matter. As a result, the agency should make its decision to substantiate a report or to conduct the administrative appeal hearing after the completion of all criminal or civil hearings regarding the abuse or neglect when possible. If information from a criminal or NRS 432B proceeding is not available at the initial administrative hearing and the child welfare agency does not agree to change

the substantiated finding, the agency should proceed with a limited hearing so that a hearing officer can ultimately determine whether the findings of such a court are relevant to a substantiation of child abuse and neglect by a child welfare agency.

QUESTION TWO

Does a court order finding that the allegations in a petition for a child in need of protection at the time of removal pursuant to NRS 432B.530 are true mean that the allegations of abuse or neglect are substantiated?

ANALYSIS

As already explained above, the decision to substantiate a report of abuse or neglect is solely an agency determination made pursuant to NAC 432B.170. The court in the child protection hearing makes a decision regarding whether the child should have been removed from his parent or guardian's care. NRS 432B.530. The child welfare agency can use the court's findings in the child protection case to support their case during any appeal of a substantiated finding of a report of child abuse or neglect.

CONCLUSION TO QUESTION TWO

A finding by the court in the child protection case that the child was in need of protection at the time of removal will provide the agency with sufficient credible evidence to support a substantiated finding of child abuse or neglect but the child welfare agency must make its own finding to enter such a report in the Central Registry.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

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March 1, 2011

OPINION NO. 2011-03

EXECUTIVE DIRECTOR; FUNDS; VETERANS: Nevada Office of Veterans Services is authorized to utilize funds from the Gift Account for Veterans, as administered by the Executive Director, for the design and remodel project at the Nevada State Veterans Home in Boulder City.

Caleb Cage, Executive Director
Nevada Office of Veterans Services
5460 Reno Corporate Dr., #131
Reno, Nevada 89511

Dear Mr. Cage:

Your office has requested an opinion concerning the Executive Director's authority over the Gift Account for Veterans (Account) as delineated in NRS 417.145(8), and whether or not the Nevada Office of Veterans Services (NOVS) is allowed to use these funds for a design and remodel project at the Nevada State Veterans Home in Boulder City.

QUESTION ONE

Does NRS 417.145(8) designate the NOVS Executive Director as the person responsible for making decisions relative to how the money in this Account will be spent?

ANALYSIS

The NOVS Executive Director serves as the Director of the Office of Veterans' Services and is responsible for the performance of duties imposed upon the Office, and for such other duties as may be prescribed by NRS Chapter 417. NRS 417.020(3). One of the Executive Director's duties is to administer the accounts referenced in NRS 417.145. NRS 417.145 sets forth the administration of the Veterans' Home Account, the Gift Account for Veterans' Homes and the Gift Account for Veterans. NRS 417.145(8) reads, in pertinent part:

> The Gift Account for Veterans is hereby created in the State General Fund. The Executive Director shall administer the Gift Account for Veterans. The money deposited in the Gift Account for Veterans pursuant to NRS 482.3764 may only be used for the support of outreach programs and services for veterans and their families. . . .

The Nevada Supreme Court has stated that when "the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). The Court has further opined, "We have stated that 'words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute's language to consider legislative intent.'" *Meridian Gold Co. v. State ex. Rel. Dep't of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003), (quoting *Pellegrini v. State,* 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001)).

It is clear from the plain meaning of the statute that the Executive Director administers the Account. Chapter 417 dictates that the Executive Director is tasked with the duty to assist veterans and their dependants, as well as those currently serving in the military and naval forces of the United States who are residents of the State of Nevada. Administering the Account is within the sole purview of the Executive Director.

CONCLUSION TO QUESTION ONE

Pursuant to NRS 417.145(8), the NOVS Executive Director is the person responsible for making decisions relative to how the money in the Account will be spent.

QUESTION TWO

Does NRS 417.145(8) limit NOVS's ability to utilize funds from the Account for a design and remodel project at the Nevada State Veterans Home in Boulder City in any way?

ANALYSIS

The pertinent section of NRS 417.145(8) reads as follows: "The money deposited in the Gift Account for Veterans pursuant to NRS 482.3764 may only be used for the support of outreach programs and services for veterans and their families."

Because NRS 417.145(8) does not specifically define what fits within the realm of "outreach programs and services for veterans and their families," the statute is subject to more than one interpretation and may be considered ambiguous. *UMC Physicians' Barg. Unit of Nev. Serv. Employees Union v. Nev. Serv. Employees Union*, 124 Nev. _____,178 P.3d 709, 712 (2008).

NRS 417.145(8) states that the money deposited in the Account pursuant to NRS 482.3764 may only be used for the "support of outreach programs and services for veterans and their families."[1] Monies deposited into the Account pursuant to NRS 482.3764 are from veteran's license plate money collected by the Department of Motor Vehicles. NRS 482.3764(1)(a)(1) specifically states that the special fee collected for these license plates will be used for "the support of outreach programs and services for veterans and their families . . . ." The Account has been in existence in Nevada since 2007. Act of May 30, 2007, ch. 209, § 1, 2007 Nev. Stat. 669, (S.B. 219).

In his letter addressed to this office, Mr. Timothy Tetz, former Executive Director to NOVS, states that the use of the words "outreach programs and services" in the legislation was intended to cover all business conducted by the agency. According to Mr. Tetz, NOVS has consistently marketed its three programs as the Veterans Service Officer "program," Veterans Memorial Cemetery "program," and State Veterans Home "program." NOVS's services also include veterans' advocacy and benefits assistance, burial assistance, and nursing home care.

Mr. Tetz's letter further states that the NOVS Budget Analyst is now concerned that NOVS's use of the Account funds for a design and remodel project at the Nevada State Veterans Home in Boulder City may not be authorized by NRS 417.145(8). Mr. Tetz believes this project will enhance the services NOVS provides to Nevada veterans, spouses of veterans, and their families.

The Nevada Supreme Court has stated: "If the statutory language is ambiguous or does not address the issue before us, we must discern the Legislature's intent and construe the statute according to that which 'reason and public policy would indicate the legislature intended.'" *Sandoval v. Bd. of Regents*, 119 Nev. 148, 153, 67 P.3d 902, 905 (2003) (quoting *State, Dept. of Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986)). In another case, the Court opined: "If a statute is ambiguous, the plain meaning rule of statutory construction is inapplicable, and the drafter's intent becomes the controlling factor in statutory construction. An ambiguous statutory

[1] It is important to note, however, that money from other sources is also deposited into the account. These monies come from donations by individuals and organizations.

provision should also be interpreted in accordance with what reason and public policy would indicate the legislature intended." *Harris Associates*, 119 Nev. at 642, 81 P.3d at 534 (internal quotations and citations omitted).

The Court gives deference to administrative agencies' interpretations of their own statutes.

> [T]his court will not readily disturb an administrative interpretation of statutory language. This court has held that [a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference should be given to the agency's interpretation when it is within the language of the statute.

City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002). "[G]reat deference should be given to the [administrative] agency's interpretation when it is within the language of the statute. While the agency's interpretation is not controlling, it is persuasive." *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (internal quotations and citations omitted).

Mr. Tetz testified that the bill accomplished three tasks: (1) it creates a gift account for veterans, which is only used for the support of outreach programs and services for veterans and their families; (2) it corrects a portion of the NRS and deposits all veterans license plate money into this gift account for veterans; and (3) it corrects the issue that veterans have with the license plate money reverting into the General Fund. *Hearing on S.B. 219 Before the Senate Committee on Human Resources and Education,* 2007 Leg., 74th Sess. 24 (March 16, 2007). Mr. Tetz later testified that in supporting this bill, NOVS envisioned payment for various services it was unable to pay for with its current limited budgets. This included pre-deployment briefings and support for Nevada National Guard, family support while they were being deployed, post-deployment briefings and support, women's veteran outreach, rural veterans outreach, and homeless veterans outreach. *Hearing on S.B. 219 Before the Assembly Committee on Government Affairs,* 2007 Leg., 74th Sess. 3 (April 19, 2007).

NRS 417.145(8) gives the Executive Director the duty to assist veterans and their families who are residents of the State of Nevada by administering an Account used for the support of outreach programs and services. Consistent with that duty, it is within the discretion of the Executive Director, as administrator of this Account pursuant to NRS 417.145(8), to expend funds in the Account for designing and remodeling the Boulder City Nevada State Veterans Home.

CONCLUSION TO QUESTION TWO

The Executive Director is designated by statute to administer the Account funds. The Account funds, by statute, may only be used for support of outreach programs and services for veterans and their families.

The State Veterans Home is a program marketed by NOVS to further its mission to benefit veterans. Accordingly, NOVS is authorized to utilize funds from the Gift Account for Veterans, as administered by the Executive Director, for the design and remodel project at the Nevada State Veterans Home in Boulder City.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

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HR:LW

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April 15, 2011

OPINION NO. 2011-04

CLARK COUNTY; FUNDS; POLICE: The number of police officers funded by sources other than the revenue received under the Act must be at least the same number of officers as were funded and supported prior to the time that the Act became effective on October 1, 2005.

Nicholas G. Vaskov, Acting City Attorney
City of North Las Vegas
2200 Civic Center Drive, Suite 110
North Las Vegas, NV 89030

Dear Mr. Vaskov:

By letter dated June 14, 2010, you have requested an opinion regarding Sections 13 and 13.5 of the Clark County Sales and Use Tax Act of 2005, as amended in 2007 (Act).

BACKGROUND

Because of increased population and rising crime, the voters of Clark County were asked to approve an advisory question in November 2004 which asked "[d]o you support an increase in sales and use tax in Clark County of up to one-half of one percent for the purpose of hiring and equipping more police officers to protect the citizens of Clark County?" General Election Ballot, Question No. 9 - Advisory - 2004 Public Safety. The advisory question passed by an overall margin of approximately three percent. *Hearing on A.B. 418 Before the Senate Committee on Taxation*, 2005 Leg., 73rd Sess. 13 (May 3, 2005).

During the legislative hearings, a presentation and exhibits provided the legislators with information illustrating how the funding would increase the ratio of police officers to citizens in each of the five police departments over the first ten years of the increased sales tax. *Hearing on A.B. 418 Before the Assembly Committee on Growth and Infrastructure*, 2005 Leg., 73rd Sess. 3 (April 5, 2005), Exhibit B. In order to ensure that the overall number of police would not be reduced, the legislation included the statement that the "proposed use will not replace or supplant existing funding for the police department." Act of June 3, 2005, ch. 249, § 13(1)(b), 2005 Nev. Stat. 915 (A.B. 418).

As a result, during the 2005 Legislative session, A.B. 418 was enacted as the Clark County Sales and Use Tax of 2005. The funds raised through the additional sales tax were to be allocated to the police departments in Clark County[1] in the same ratio that the population served by each police department bears to the total population of the county. Act of June 3, 2005, ch. 249, § 9, 2005 Nev. Stat. 914.

To prevent the funds raised through the tax from being diverted to another use, the Legislature declared that 80 percent of any additional police officers employed and equipped pursuant to this Act were to be assigned to uniform operations in marked patrol units in order to deter crime by showing an increased presence in the community. Act of June 3, 2005, ch. 249, § 2(5), 2005 Nev. Stat. 913. The Act additionally requires that all funds raised through the sales tax shall only be used as approved pursuant to section 13 of the Act. *Id.* at § 9(3)(b), 2005 Nev. Stat. 914. Section 13 of the Act requires that the proposed use of the money conform to all provisions of the Act and that the proposed use will not replace or supplant existing funding for the police department. *Id.* at § 13(1), 2005 Nev. Stat. 915.

In 2007, some legislators were concerned that the money collected through the increased sales tax was not being used to increase the police presence on the streets. Act of June 3, 2005, ch. 545, § 13.5, 2007 Nev. Stat. 3422. The Legislature amended the Act with Section 13.5 which requires "any governing body that received such revenue to provide a report to the director of the Legislative Counsel Bureau for transmission to members of the Legislature" in order to make sure that the funds were not being diverted to other uses. *Hearing on A.B. 461 Before the Assembly Committee on Taxation*, 2007 Leg., 74th Sess. 25–30 (April 10, 2007). The legislation sunsets in 2025.

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[1] Boulder City, Mesquite, North Las Vegas, Henderson, and the Las Vegas Metropolitan Police Department.

QUESTION ONE

What constitutes "supplanting" under the Act?

ANALYSIS

When the plain language of the statute is clear and unambiguous on its face, it is not necessary to go beyond the language in determining the legislative intent. *City of N. Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1197, 1205, 147 P.3d 1109, 1115 (2006).

Pursuant to the plain language of the Act, supplantation does not occur when:

> the amount approved for expenditure by the body for the fiscal year for the support of the police department, not including any money received or expended pursuant to this Act, is equal to or greater than the amount approved for expenditure in the immediately preceding fiscal year for the support of the police department.

Act of June 3, 2005, ch. 249, § 13(3), 2005 Nev. Stat. 915.

CONCLUSION TO QUESTION ONE

Supplantation occurs under the Act when a police department reduces its budget to less than the amount approved for expenditure for support of the police department in the preceding fiscal year. For comparison purposes, the measure of the expenditure for the immediately preceding fiscal year does not include funds received pursuant to the Act.

QUESTION TWO

What constitutes the base year for the determination required under Sections 13(1)(b), 13(3), and 13.5(3)?

ANALYSIS

"When a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." *Building and Constr. Trades Council of N. Nev. v. State of Nev., ex rel. Pub. Works Bd.*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992).

Section 13(1)(b) of the Act states that "[t]he proposed use will not replace or supplant existing funding for the police department." Act of June 3, 2005, ch. 249, § 13(1)(b), 2005 Nev. Stat. 915. Section 13(3) provides the method to determine whether supplantation has taken place under the Act, which is by comparison of the funding for the present fiscal year to the prior fiscal year. Act of June 3, 2005, ch. 249, § 13(3), 2005 Nev. Stat. 915. Thus Section 13 of the Act provides a clear and unambiguous statement that the base year to be used to determine whether the proposed use will replace or supplant existing funding is the prior fiscal year.

Section 13.5 was added to the Act in 2007 and requires each police department receiving funds under the Clark County Sales and Use Tax Act of 2005 to submit a report quarterly to the Legislative Counsel Bureau. The report allows the Legislature to ensure that the funds made possible by A.B. 418 will not be diverted to other uses. *Hearing on A.B. 461 Before the Assembly Committee on Taxation*, 2007 Leg., 74th Sess. 25 (April 10, 2007). Thus Section 13 and 13.5 of the Act are separate and independent provisions. Section 13 of the Act addresses the approval of the expenditure of the proceeds from the tax while Section 13.5 addresses the information that must be reported to the Legislature on a quarterly basis.

CONCLUSION TO QUESTION TWO

The base year to be used to determine whether the expenditure for the proceeds from the sales tax raised through the Act complies with Section 13(1)(b) and Section 13(3) of the Act is the immediately preceding fiscal year, and the base year to be used in order to comply with the quarterly reporting required pursuant to Section 13.5 of the Act is the most recent fiscal year prior to October 1, 2005.

QUESTION THREE

If a local government budgeted additional funding in support of the police department after the 2005 budget year (not including monies received under the Act), is a new base year established pursuant to the Act for purposes of supplantation?

CONCLUSION TO QUESTION THREE

Our resolution to Questions One and Two also answer Question Three.

QUESTION FOUR

What effect did Assembly Bill 461 (2007) have in terms of defining the base year for purposes of determining supplantation?

CONCLUSION TO QUESTION FOUR

Our resolution to Question Two also answers Question Four.

QUESTION FIVE

Are there any metrics or measurements other than "existing funding for the police department" used to determine whether supplantation occurs under the Act?

ANALYSIS

When the plain language of the statute is clear and unambiguous on its face, it is not necessary to go beyond the language in determining the legislative intent. *City of N. Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1197, 1205, 147 P.3d 1109, 1115 (2006). Section 13(1)(b) of the Act clearly and unambiguously states: "The proposed use of the funds will not replace or supplant existing funding for the police department." Act of June 3, 2005, ch. 249, § 13(1)(b), 2005 Nev. Stat. 915.

CONCLUSION TO QUESTION FIVE

The only metric or measurement identified by the Legislature to determine whether supplantation occurs under the Act is the "existing funding for the police department" and no additional metrics or measurements are specified.

QUESTION SIX

Does the Act require local governments to maintain a minimum number of police officers funded and supported by revenue other than revenue received under the Act?

ANALYSIS

"When construing a specific portion of a statute, the statue should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts." *Bldg. and Constr. Trades Council of N. Nev. v. State of Nevada, ex rel. Pub. Works Bd.*, 108 Nev.605, 610, 836 P.2d 633, 636 (1992).

Section 9 of the Act requires that the money be used in accordance with Section 13 of the Act in order to employ and equip "additional" police officers. Act of June 3, 2005, ch. 249, § 9, 2005 Nev. Stat. 914. Section 13(1)(b) of the Act prohibits supplanting, which places the various police departments on notice that a reduction in the expenditure to support a police department for a given fiscal year, as compared to the immediately preceding fiscal year, would violate the Act. Act of June 3, 2005, ch. 249, § 13(1)(b), 2005 Nev. Stat. 915. Thus in order to comply with all sections of the

Act, a department must maintain at least the same number of officers funded through revenue not received under the Act that the department employed in the fiscal year prior to October 1, 2005.

CONCLUSION TO QUESTION SIX

The number of police officers funded by sources other than the revenue received under the Act must be at least the same number of officers as were funded and supported prior to the time that the Act became effective on October 1, 2005.[2]

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

VIVIENNE RAKOWSKY
Deputy Attorney General
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VR:TAP

[2] It should be noted that the Act does not contemplate a fiscal crisis and the resulting budget cuts which could reduce funding from sources other than the Act to below the pre-2005 levels. The decrease in funding and the resulting decrease in the number of police officers funded by sources other than the Act to less than the pre-2005 levels could constitute supplantation. This possibility could be addressed by the Legislature through statutory amendment.

STATE OF NEVADA

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May 2, 2011

OPINION NO. 2011-05

COUNTIES; SEWER; UTILITIES; WATER: Nevada law expressly gives counties authority to purchase a water and sewer system within an unincorporated town where the town has no involvement in the transaction.

Michelle M. Jones, Esq.
Deputy District Attorney
Nye County District Attorney's Office
Post Office Box 39
Pahrump, Nevada 89041

Dear Ms. Jones:

You have requested an opinion from this office on behalf of the District Attorney of Nye County, Nevada, concerning the authority of the county to purchase, own, and operate a water/sewer utility.

BACKGROUND

It is our understanding that currently there is a proposed purchase by Nye County of a privately-owned water and sewer utility in Pahrump, Nevada. Nye County would hire the corporate owner to manage the facility under a proposed professional services agreement rather than having Nye County Public Works manage the utility.

QUESTION ONE

May the county purchase a water and sewer system pursuant to NRS 710.410 within an unincorporated town with an elected town board form of government, where the town has no involvement in the transaction, i.e., it will not be purchased on behalf of the town?

ANALYSIS

As the question concerns the purchase of a water and sewer system by Nye County, we begin with the principle that county commissions are administrative agencies of the state and are required to perform such duties as are prescribed by law under NEV. CONST. art. 4, § 26. *State ex rel Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923); *City of Las Vegas v. Mack*, 87 Nev. 105, 481 P.2d 396 (1971). Their powers are derived exclusively from legislative acts. Op. Nev. Att'y Gen. No. 19 (June 2, 1997), Op. Nev. Att'y Gen. No. 88 (November 12, 1963). "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State ex rel. King v. Lothrop*, 55 Nev. 405, 408, 36 P.2d 355, 357 (1934). Therefore, we look to state statutes to determine whether the Nevada Legislature has authorized counties to enter into agreements such as those considered herein.

Your request asks specifically if Nye County can purchase a water and sewer system, pursuant to NRS 710.410, within an unincorporated town where the town has no involvement in the transaction. NRS 710.410 authorizes the purchase and construction of, among other things, water and sewage systems by county commissions of unincorporated towns. However, NRS 710.410 applies to the purchase of water and sewage systems by boards of county commissioners acting with regard to the management of the affairs of any unincorporated town within their respective counties rather than the purchase of water and sewage systems by the county. In other words, the county can make the purchase on behalf of the town. Thus as the request contemplates Nye County purchasing the water and sewage system, or its own without benefit to the town, NRS 710.410 is not applicable to the analysis.

Chapter 244 of the Nevada Revised Statutes provides for the governance of counties in Nevada. Several provisions within Chapter 244 are relevant to this analysis. Chapter 244 of the NRS confers upon a board of county commissioners the power to "expend money for any purpose which will provide a substantial benefit to the inhabitants of the county." NRS 244.1505(1). Next, NRS 244.195 broadly authorizes the board of county commissioners "to do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and

jurisdiction conferred on the board." NRS 244.187 authorizes a board of county commissioners to provide adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of the inhabitants, displace or limit competition in the area of water and sewage treatment. Further, NRS 244.157 provides "[t]he board of county commissioners of any county of this state may exercise any of the powers in any unincorporated area within its county that a board of trustees of any general improvement district, if organized, would be permitted to exercise pursuant to the provisions of chapter 318 of NRS." NRS 244.157(1). In addition, a board of county commissioners may exercise these powers only upon compliance with the same procedures a board of trustees of a general improvement district would be required to follow for the same class of improvements within an improvement district. NRS 244.157(2).

In accordance with NRS 244.157, we now turn to Chapter 318 of the NRS to determine what powers a board of trustees of a general improvement district is permitted to exercise in order to determine the scope of the board of county commissioners' authority. NRS 318.116 sets forth the basic powers that may be granted to a general improvement district. NRS 318.116(11) specifically provides that a district may furnish sanitary facilities for sewage as provided in NRS 318.140, and NRS 318.116(15) specifically provides that a district may furnish facilities for water as provided in NRS 318.144. Further, NRS 318.140(1)(a) provides, among other things, that a board of trustees of a general improvement district may "[c]onstruct, reconstruct, improve or extend the sanitary sewer system or any part thereof, including, without limitation, mains, laterals, wyes, tees, meters and collection, treatment and disposal plants." Next, turning to NRS 318.144(1), a board of trustees of a general improvement district "may acquire, construct, reconstruct, improve, extend or better a works, system or facilities for the supply, storage and distribution of water for private and public purposes." Clearly, as demonstrated above, the Nevada Revised Statutes contain several provisions that authorize a county to purchase a water and sewer system within an unincorporated town.

CONCLUSION TO QUESTION ONE

Counties, as agencies of the State, derive their powers exclusively from legislative acts. Nevada law expressly gives counties authority to purchase a water and sewer system within an unincorporated town where the town has no involvement in the transaction.

QUESTION TWO

Can the Board of County Commissioners charge utility customers a fee to support a professional services agreement for the management of such a utility?

ANALYSIS

The analysis you submitted with question two references NRS 710.590 and concludes that charging customers a contract management fee would be considered "further compensation" in violation of NRS 710.590. NRS 710.590 provides "[t]he county commissioners and the county treasurers of the several counties shall perform all the duties required of them under the provisions of NRS 710.400–.580, inclusive, without further compensation as required by law."

The language "without further compensation as required by law" is subject to more than one interpretation and may be considered ambiguous. It is therefore appropriate to turn to the principles of statutory construction to render a determination of the meaning of NRS 710.590. A primary tenet of statutory construction holds that words in a statute are to be given their plain meaning unless this violates the spirit of the act. *Anthony Lee R. v. State,* 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997). Courts will look to a dictionary to ascertain the plain meaning ascribed to a word. See *generally Whealon v. Sterling*, 121 Nev. 662, 119 P.3d 1241 (2005).

The word "compensate" is defined as, "[t]o make payment or reparation to." Webster's II New College Dictionary (1999). Thus giving the words in NRS 710.590 their plain meaning, the county commissioners must perform all the duties required under NRS 710.400–.580 without further payment as required by law. The act of charging utility customers a fee to support a professional services agreement for the management of the utility by the board of county commissioners does not equate to the board of county commissioners receiving compensation outside of what is required by the law. The additional fee would compensate the contractor rather than the county commission. Thus NRS 710.590 is not applicable to the circumstances as presented.

As discussed above, NRS 244.157 authorizes a board of county commissioners to exercise any of the powers in any unincorporated areas within its county that a board of trustees of any general improvement district is permitted to exercise pursuant to the provisions of Chapter 318 of the Nevada Revised Statutes. Consequently, the board of county commissioners has the power to furnish facilities for sewage and water in any unincorporated area within the county. *See* NRS 318.116(11) and (15), NRS 318.140(a), and NRS 318.144(1). Furthermore, pursuant to NRS 318.197(1), the board of county commissioners may fix the rates, tolls, or charges for services

furnished. Thus Chapter 318 of the Nevada Revised Statutes authorizes the board of county of commissioners to charge fees for the services it furnishes.

CONCLUSION TO QUESTION TWO

The board of county commissioners may charge utility customers a fee to support a professional services agreement for the management of the utility.

Sincerely,

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May 31, 2011

OPINION NO. 2011-06

AGREEMENTS; COLLECTIVE BARGAINING; PUBLIC WORKS: The City may not require a local preference for City residents for all public works projects in excess of $100,000 since the City lacks legislative authority to do so.

Elizabeth M. Quillin, City Attorney
City of Henderson
P. O. Box 95050
Henderson, NV 89009

Dear Ms. Quillin:

In a letter dated February 10, 2011, you requested an Attorney General Opinion as to whether the City of Henderson (City) may require a Project Labor Agreement for construction with the Southern Nevada Building Construction Trades Council for all City public works projects that are in excess of $100,000. You further asked whether such an Agreement may impose a local hiring preference for City residents.

QUESTION ONE

Are there any legal impediments that would prohibit the City from requiring a Project Labor Agreement for construction with the Southern Nevada Building Construction Trades Council for all City public works projects that are in excess of $100,000?

ANALYSIS

I. Background of Project Labor Agreements.

A Project Labor Agreement (PLA), also referred to as a Community Workforce Agreement, is a form of master agreement which serves as a pre-hire collective

bargaining agreement. *See Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382, 388 (2002), citing *U.S. Gen. Accounting Office*, Pub. No. GAO/GGD–98–82, Project Labor Agreements: The Extent of Their Use and Related Information at 1 (1998) (GAO Report). A PLA is an agreement between a construction project owner and a labor union that a contractor must sign in order to perform work on the project. *Associated Builders & Contractors, Inc. v. S. Nev. Water Auth.*, 115 Nev. 151, 979 P.2d 224 (1999). The union is designated the collective bargaining representative for all employees on the project and agrees that no labor strikes or disputes will disrupt the project. The contractor must abide by certain union conditions, such as hiring through union hiring halls and complying with union wage rules.

A PLA serves as a pre-hire agreement because it "can be negotiated before employees vote on union representation or before the contractor hires any workers" and typically "provides that only contractors and subcontractors who sign [the] pre-negotiated agreement with the union can perform project work." *Master Builders of* Iowa, 653 N.W.2d at 388. When utilized, a PLA is incorporated into every contract entered into for a project. PLAs are comprehensive in their coverage of contractor/labor issues in that they generally:

> (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the signatory unions as the sole bargaining representatives for covered workers, whether or not the workers are union members; (3) supersede all other collective bargaining agreements; (4) prohibit strikes and lockouts; (5) require hiring through union referral systems; (6) require all subcontractors to become signatory to the agreement; (7) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (8) prescribe craft wages, either in the body of the agreement or in an appendix or attachment.

Id. at 389.

PLAs have been utilized because of "the short-term nature of employment which makes post hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass. R.I., Inc.*, 507 U.S. 218, 231 (1993); 29 U.S.C. § 158(f). "PLAs have been used on public projects dating back to at least 1938." *Id.* At 388, citing GAO Report at 4.

Although they offer certain advantages, PLAs have often been disfavored as they may: (1) negate the competitive labor rate advantage of non-union contractors over union contractors; (2) lessen competition in that they do not encourage free, open and competitive bidding; (3) raise the overall cost of the project; (4) fail to advance the interests underlying competitive bidding statutes; and (5) effectively discriminate against prospective employees based on their union membership. *See New York State Chapter, Inc. v. New York State Thruway Auth.*, 666 N.E.2d 185 (1996); *George Harms Const. Co., Inc. v. New Jersey Turnpike Authority*, 644 A.2d 76 (1994).

II. Legal Arguments.

Your opinion request is broad in scope, and consequently the analysis and answer cover a wide range of law. This opinion first considers potential federal constitutional challenges; next, it considers arguments that federal statutes preempt any extant state or local authorities; and it concludes with examination of the authority actually provided by state law.

A. Constitutional Provisions.

1. Due Process.

The United States Constitution provides, "no state [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382 (2002), it was argued that the adoption of a PLA resulted in denial of due process for taxpayers who were deprived without sufficient notice or opportunity to be heard of a property right in receiving the lowest possible price for a project. The court identified a two-step inquiry to determine whether a protected liberty or property interest was involved, and then what process was due before a deprivation of that interest. *Id.* at 397–98. The court assumed *arguendo*, without deciding, that a taxpayer has a property interest in receiving the lowest possible price on a public contract. Because extensive opportunities were offered to the taxpayers to be heard before and after the adoption of the PLA, the court determined there had been no deprivation of due process rights. *Id.*

Consistent with due process principles and *Master Builders,* when adopting and implementing a PLA ordinance, notice and an opportunity to be heard are necessary. They should also be accorded prior to entry into any particular PLA.

2. Equal Protection.

The United States Constitution prohibits states from denying to "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The purpose of equal protection is to ensure that similarly situated persons are treated the same. *Master Builders*, 653 N.W.2d at 398. An issue may arise under this provision regarding whether a PLA operates to discriminate against non-union contractors.

In *Master Builders*, plaintiffs argued that the public entity's use of a PLA operated to discriminate against non-union contractors due to allegedly pro-union provisions. The court first determined that construction industry members are not a protected class under equal protection principles nor is a fundamental right involved, thus justifying examination under rational basis scrutiny. *Id.* Under that test, a public entity's action, even if it discriminates, need only be rationally related to a legitimate governmental interest.

In sum, a local government using PLAs is subject to the provisions of the Fourteenth Amendment's equal protection requirement. But under the applicable test, even if there were some disparate impact—found absent in *Master Builders*—the local government's action need only be rationally related to a legitimate governmental interest such as procuring best value for the tax payers.

3. Free Association.

It has been asserted in some cases that a PLA forces non-union contractors to affiliate with union contractors in contravention of the non-union contractors' First Amendment right to not associate with particular persons. U.S. CONST. amend. I; *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "One of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982). Recognition of this right encompasses the combination of individual workers together in order to better assert their lawful rights. *See, e.g.*, *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5–6 (1964).

The adoption of a PLA does not impinge on free association rights. *Master Builders*, 653 N.W.2d at 399. A PLA may constitute "union practices." However, a PLA does not prevent construction industry members "from freely expressing . . . their opposition to unions, nor does it coerce 'pro-union' expressions or association." *Id.*, citing *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 981 P.2d 499 (1999). Contractor members of the construction industry may be disinclined to bid or do work under the provisions of the PLA, but "the First Amendment does not oblige the government to minimize the financial repercussions of such a choice." *Id.*,

citing *Lyng v. Int'l Union, U. Auto., Aerospace, & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 368 (1988).

B. Preemption by Federal Statute.

1. Preemption under the National Labor Relations Act.

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–187, generally governs labor relations. *See Weber v. Anheuser–Busch, Inc.*, 348 U.S. 468, 480 (1955). After the NLRA's enactment, the National Labor Relations Board (NLRB) determined that pre-hire agreements were illegal because they designate an exclusive union representative for employees before an election is held. However, to address the impact this decision had on the construction industry, Congress added section 8(f) to the NLRA in 1959, which provides, in relevant part:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . or (2) such agreement requires as a condition of employment, membership in such labor organization . . . .

29 U.S.C.A. § 158(f). *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265 (1983). With this amendment, Congress authorized employers and unions engaged primarily in the building and construction industry to enter into pre-hire agreements. *Id.*

Even though allowed generally, PLAs may be preempted by federal law when used by state or local governments. However, such preemption only occurs in limited circumstances. In 1993, the United States Supreme Court specifically determined that a PLA is not preempted under the NLRA unless the governmental entity owning the project acts in a regulatory capacity in its utilization of the PLA. *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I.*, Inc., 507 U.S. 218, 227 (1993) (*Boston Harbor* case). This can occur in two types of cases: when needed to protect the authority of the NLRB, and to protect operation of the free enterprise system. *See generally Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60, 65 (2008).[1]

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[1] The two types of federal pre-emption are "Garmon pre-emption, *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), which forbids state and local regulation of activities that are "protected by § 7 (which establishes the right of employees to organize, bargain collectively, and engage in peaceful picketing and strikes) or constitute an unfair labor practice under § 8." "Machinists pre-

In the seminal *Boston Harbor case,* a public entity required that all bidders on the Boston harbor clean-up project adhere to a PLA. The contractors association argued that the NLRA preempted states from enacting or enforcing laws which attempted to regulate labor relations. However, the Court concluded that the PLA in question was not a government regulation at all. *Bldg. & Constr. Trades Council,* 507 U.S. at 232. Its determination was based upon the distinction between a public entity which acts like a regulator and one which acts like any other participant in the market, and which happens to have the economic power to exact the provisions it desires when it contracts. *Id.* at 231–32.

While it has been argued that public entities' adoption of a PLA is a regulatory action, courts have refused to search for a regulatory motive if the ultimate action of the governmental entity is proprietary, as is the case here in the "contracting for services on a specific project." *See Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631, 634 (1966); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1335–36 (D.C.Cir.1996); *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 237 (S.D.N.Y. 2000).

In accordance with *Boston Harbor*, federal labor law does not prohibit a public entity entering the construction market from using the same construction-industry exception regarding PLAs that private purchasers of construction labor use. If the state is intervening only in the labor relations of firms from which it buys services, and it is doing so in order to reduce the cost or increase the quality of those services rather than to displace the authority of the NLRA and the NLRB, there is no preemption.

2. Preemption Under the Employee Retirement Income Security Act

Employee benefit plans are regulated by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. Pursuant to 29 U.S.C. § 1144(a), ERISA provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." A state law under ERISA "includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . ." 29 U.S.C. § 1144(c)(1). Considering whether PLAs are preempted by ERISA, the issue is whether the PLAs constitute State law in the sense that they are "rules, regulations, or other . . . action having the effect of law. . . ."

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emption," *see Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976), prohibits state and municipal regulation of areas that have been left "'to be controlled by the free play of economic forces.'" *Building & Constr. Trades Council of the Metro. Dist. v. Associated Bldrs. & Contrs. of Mass./R.I.*, Inc., 507 U.S. 218, 226–229 (1993) (known as the "*Boston Harbor*" case).

Generally, negotiated contract provisions demanded for certain contracts do not implicate ERISA. *Associated Gen. Contractors v. Metro. Water Dist.,* 159 F.3d 1178, 1183 (9th Cir.1998).

> The definition of state laws excludes state action which does not have the effect of law, and ERISA therefore does not preempt state action which relates to an ERISA plan so long as the state action does not have the effect of law. This distinction indicates that where the state merely acts as any private party might act, instead of in areas where it exercises lawmaking or law enforcement authority, ERISA preemption does not come into play.

Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis, 825 F. Supp. 238, 243 (D.Minn.1993). Private parties may require that contractors on a construction project enter into a similar pre-hire agreement to protect against work stoppages. *Id.* The Court further explained:

> ERISA does not provide any express or implied indication that a state may not act as a private party would be permitted to with respect to its property. To the contrary, ERISA's definition of state law preserves this distinction by only including state action that has the effect of law.

Id.

The relevant distinction is between a public entity acting as a private party could, and an entity which acts in a more general regulatory capacity, the same market participant/regulator distinction drawn by the Supreme Court in *Boston Harbor* in the labor relations area. *See Bldg. & Constr. Trades Council,* 507 U.S. 221. ERISA itself distinguishes between state action in general and state action which has the effect of law.

The *Boston Harbor* court rejected the argument that, because a contract is legal and enforceable, it has the effect of law of a state. It cited *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n. 5 (1995) which provides that language such as "law, rule, regulation . . . connotes official government-imposed policies, not the terms of a private contract." In this case, the City's requirement is created by ordinance, but it only requires PLAs for City projects; it does not purport to establish the requirement for private construction projects. *Cf. Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 492–94, 50 P.3d 546, 548–50 (2002), overruled in part on other grounds by *Garvin v. Dist. Ct.*, 118 Nev. 749, 59 P.3d 1180 (2002) ("[t]o determine whether a municipal ordinance is legislative or administrative, . . . [ask whether] an ordinance originat[es] or

enact[s] a permanent law or lay[s] down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents") (internal quotations and citations omitted).

Thus while the ordinance might superficially appear to be regulation and thus preempted by ERISA, it is by operation not a law and not preempted. *Accord, Associated. Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1184 (1998) (public entity had "not enacted a law, issued a decision, or adopted a rule or regulation, or taken any other action which can be said to have the effect of a law of the State"). The City's ordinance is analogous to a corporation's by-law controlling the purchase of construction services. Thus consistent with the Machinists exemption found in *Boston Harbor,* the ordinance governs the public entity as a market participant and proprietor—as opposed to a regulator—and the *Boston Harbor* reasoning validating PLAs applies.

C. Invalidation by State Statute.

Even if PLAs are constitutionally permissible and are not preempted by federal law, they may be challenged under state law. The most common such challenges are based on labor statutes (right to work, freedom of association) and competitive bidding requirements for public contracts.

1. Challenge under right to work laws.

Nevada's right to work law was passed in 1953. NRS 613.230–.300.[2] The principal provision states:

> No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall the state, or any subdivision thereof or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization.

NRS 613.250.

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[2] The Labor Management Relations (Taft–Hartley) Act, ch. 120, 61 Stat. 136 (1947), was enacted in 1947, regulating labor and limiting states' authority to do so in certain respects. However, Congress refrained from preempting state laws that protected the "right to work." *See* H.R.Rep. No. 80–510 (1947), reprinted in 1947 U.S.C.C.A.N. 1135, 1166. Subsequently, the United States Supreme Court, in companion cases, upheld three states' right-to-work laws against challenges by unions and union members that such laws "denie[d] them freedom of speech, assembly or petition, impair[ed] the obligation of their contracts, or depriv[ed] them of due process of law." *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Lincoln Fed. Labor Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949).

Right to work laws were enacted for the express purpose of guaranteeing the right to work for a given employer regardless of whether the worker belongs to a union. *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 998 P.2d 1178 (2000). "An agreement by an employer to hire only union employees has been declared by the people of this state to be an unlawful objective." *Associated Builders*, 115 Nev. at 160, 979 P.2d at 230.

Therefore, in order to be lawful pursuant to right-to-work statutes, a PLA must not mandate union membership as a condition of employment on the project, and must allow non-union members to be hired. As with the PLA considered in *Associated Builders*, however, this prohibition does not preclude exclusive reliance on a union to represent all workers on a specific project, so long as workers are not forced to join the union. *Id.,* 115 Nev. at 161.

2. Challenge under freedom of association statutes.

NRS 614.100 provides that employers must recognize representatives chosen by their employees in a labor dispute. NRS 614.090(1) declares the public policy of the state:

> It is necessary that the individual worker have full freedom of association, self-organization, and designation of representatives of the worker's own choosing to negotiate the terms and conditions of his or her employment, and that the worker shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

NRS 614.090(1).

In *Associated Builders*, the PLA provided for a union to be the sole and exclusive bargaining representative of all employees working on the project. *Id.*, 115 Nev. at 161. Nonetheless, since no employee was required to join the union or pay union dues, and thus could work on the project for a non-union contractor without joining the union, the PLA did not interfere with employees' freedom of association. *Id.,* 115 Nev. at 161.

3. Challenge under competitive bidding statutes.

Project labor agreements in connection with public contracts have been challenged in numerous jurisdictions on the basis that they are contrary to the pertinent state's competitive bidding requirements for public contracts.[3]

Nevada's law encourages competitive bidding on public contracts at all levels of government. "A public body shall not draft or cause to be drafted specifications for bids, in connection with a public work: (a) In such a manner as to limit the bidding, directly or indirectly, to any one specific concern." NRS 338.140(1)(a).

NRS 338.147(1) provides, in relevant part that, "a local government or its authorized representative shall award a contract for a public work for which the estimated cost exceeds $250,000 to the contractor who submits the best bid."

The Nevada Supreme Court has identified the purposes supporting competitive bidding requirements to be to "save public funds, and to guard against favoritism, improvidence and corruption. Such statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good." *Associated Builders*, 115 Nev. at 158, 979 P.2d at 229.

These purposes, however, do not necessarily preclude use of PLAs. In *Associated Builders*, the Southern Nevada Water Authority (SNWA) entered into a PLA for preparation and implementation of its thirty-year capital improvements plan to develop a municipal water system. The PLA was upheld against challenge even though the lowest bidder for one project was disqualified because he would not agree to abide by the PLA.

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[3] Courts have considered and upheld PLAs under their state's competitive bidding statute. *See Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 981 P.2d 499, 506–07 (Cal. 1999); *John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 961–62 (Mass. 1999); *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 378 (Minn. Ct. App. 1999); *N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth.*, 666 N.E.2d 185, 190–192 (N.Y. 1996) (upholding one of two challenged PLAs under the state law); *State ex rel. Assoc. Builders & Contractors v. Jefferson County Bd. Of Comm'rs*, 665 N.E.2d 723, 727 (Ohio Ct. App. 1995); *A. Pickett Constr., Inc. v. Luzerne County Convention Ctr. Auth.*, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999); *Assoc. Builders & Contractors of Rhode Island, Inc. v. Department of Admin.*, 787 A.2d 1179, 1189–90 (R.I. 2002).

Courts have also invalidated PLAs for violating a state's competitive bidding laws: *Tormee Constr., Inc. v. Mercer County Improvement Auth.*, 669 A.2d 1369, 1372 (1995); *George Harms Constr. Co., Inc. v. N.J. Tpk. Auth.*, 644 A.2d 76, 95 (N.J. 1994); *N.Y. State Chapter, Inc.*, 666 N.E.2d 185 (N.Y. 1996) (striking one of two challenged PLAs under the state law).

Before implementing the PLA, SNWA had adopted a list of goals and objectives for it including prohibiting labor disruptions; naming the national unions as sole and exclusive bargaining representatives of all craft employees; setting uniform work hours and overtime rates; and providing access to projects to both union and non-union contractors. *Id.,* 115 Nev. at 155, 979 P.2d at 227. Although the PLA required hiring to be supervised out of the union hall, it did not require individuals to join a union to work on projects. *Id.* In addition, the SNWA required periodic evaluation of the PLA to determine whether the anticipated benefits of using a PLA had been realized. *Id.,* 115 Nev. at 151, 979 P.2d at 224.

The Court considered whether the PLA transgressed the policies underlying competitive bidding requirements. It also observed that the PLA provided equal access to projects to both union and non-union contractors; and it discerned that employees were not required to join the representative union.

The Court concluded that the PLA maintained competition. *Id.*, 115 Nev. at 159, 979 P.2d at 229. Since labor strikes were an issue that could affect public funds, the concern was sufficient to support the PLA. The PLA maintained competition among bidders, guarded against favoritism and did not violate Nevada's competitive bidding statutes. *Id.*[4]

CONCLUSION

While PLAs are lawful in Nevada, each proposed PLA should be analyzed individually. An assessment should be performed before entering into a PLA to identify specific project requirements that support using the PLA, and whether the PLA

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[4] In *New York State Chapter Inc. v. New York State Thruway Authority*, the Court of Appeals of New York, in consolidated cases, looked to the "advancement of competitive bidding interests" to (1) uphold one project labor agreement and (2) invalidate another project labor agreement. *New York State Chapter, Inc. v. New York State Thruway Authority*, 666 N.E.2d 185 (1996). The record supporting a determination by a public benefit corporation, New York State Thruway Authority, to enter into a PLA in connection with a bridge improvement project established that a PLA was justified by the interests underlying the competitive bidding laws and, therefore, the determination is sustained. The public entity had assessed specific project needs and demonstrated that a PLA was directly tied to competitive bidding goals. The PLA did not serve to promote favoritism or cronyism as the PLA was found to apply whether the successful bidder was a union or nonunion contractor. *Id.*

In a companion case, a PLA was deemed impermissible. The Dormitory Authority of the State of New York (DASNY), a public benefit corporation, entered into a PLA in connection with a project for the modernization of the Roswell Park Cancer Institute, which is operated by the Department of Health. DASNY failed to show that its decision had as its purpose the advancement of the interests underlying the competitive bidding statutes. DASNY failed to contemporaneously project cost savings before proposing the PLA or consider any unique feature of the project to necessitate a PLA; DASNY also failed to demonstrate labor unrest threatening the project. DASNY's goals of promoting women and minority hiring through the PLA did not support its adoption of the PLA for this project consistent with the state's competitive bidding requirements.

maintains competitive bidding. Important to this latter objective, consideration should be given to whether the PLA is for the benefit of taxpayers; provides equal access to projects to both union and non-union contractors, at no disadvantage to non-union contractors; and whether employees are required to join the representative union under the PLA.

QUESTION TWO

May the City require a local preference for City residents for all public works projects in excess of $100,000? Stated another way, is a residency preference lawful?[5]

ANALYSIS

I. Delegated Authority: Dillon's Rule.

Dillon's Rule, a common law rule of statutory construction, limits the powers of local government. 2 *McQuillin Mun. Corp.* § 4:11 (3rd ed.). Under Dillon's Rule, a local government is authorized to exercise only those powers which are: (1) expressly granted; (2) necessarily or fairly implied in or incident to the powers expressly granted; or (3) essential to the accomplishment of the declared purposes of the local government. Nevada courts have applied Dillon's Rule. *See Ronnow v. City of Las Vegas*, 57 Nev. 332, 342–43, 65 P.2d 133, 136 (1937). Under existing law, a city government is authorized to exercise only those powers expressly granted by the charter or laws creating the city, and the necessary means of employing those powers. *Tucker v. Mayor of Virginia City*, 4 Nev. 20, 26 (1868).

NRS 338 provides the statutory framework for public works contracts. NRS 338.1385(5) states that: "Except as otherwise provided in subsection 6 and NRS 338.1389, a public body or its authorized representative shall award a contract to the lowest responsive and responsible bidder." An exception to this requirement exists to authorize rejection of a bid if "[t]he public interest would be served by such a rejection." NRS 338.1385(6)(d).

The government entity must adopt statutorily specified criteria for determining whether an applicant for a contract for a public work is qualified. NRS 338.1377. "The local government shall not use any criteria other than the criteria described in NRS 338.1377 in determining whether to approve or deny an application [to qualify a bidder]." NRS 338.1379(6).

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[5] A threshold question which is not opined on herein is the definitional scope of "resident."

Thus Nevada statutory authority does not expressly authorize local governments to establish local hiring preferences. Rather, local governments must adhere to specific enumerated criteria in qualifying bidders for public works projects. Neither is authority to impose a local preference necessarily or fairly implied in, or incident to, the express power given to enter into contracts. Lastly, preference is not essential to the accomplishment of the declared purposes of the local government.

Because the City has not been empowered by the Legislature to employ new or different selection criteria, the City is prohibited from imposing a local hiring preference.[6]

CONCLUSION

The City may not require a local preference for City residents for all public works projects in excess of $100,000 since the City lacks legislative authority to do so.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
ANN McDERMOTT
Chief Deputy Attorney General
Bureau of Litigation – Personnel Division

AM:JM

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[6] A.B. 144 became effective April 27, 2011, giving priority in bidding on state and local public works projects to Nevada businesses that employ Nevada workers. Act of April 27, 2011, ch. 20, 2011 Nev. Stat. ___.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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GREGORY M. SMITH
Chief of Staff

June 16, 2011

OPINION NO. 2011-07

DOMESTIC VIOLENCE; PROTECTION ORDERS; THREAT: NRS 33.020 extends to all victims of domestic violence regardless of whether there has been actual physical contact by the alleged perpetrator.

Janette Speer, Deputy City Attorney
City of Henderson
Post Office Box 95050
Henderson, NV 89009

Dear Ms. Speer:

Your office has requested an opinion regarding the interpretation of NRS 33.020 extending protections to all victims of domestic violence regardless of whether there has been actual physical contact by the alleged perpetrator.

QUESTION

Does NRS 33.020 extend to all victims of domestic violence regardless of whether or not there has been actual physical contact by the alleged perpetrator?

ANALYSIS

Requirements for issuing temporary and extended orders in domestic violence matters are set forth in NRS 33.020. NRS 33.020(1) reads, in pertinent part, "If it appears to the satisfaction of the court from specific facts shown by a verified application that an act of domestic violence has occurred *or* there exists a threat of

domestic violence, the court may grant a temporary or extended order." NRS 33.020(1) (emphasis added).

The Nevada Supreme Court has stated that when "the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 641–642, 81 P.3d 532, 534 (2003). The court has further opined, "We have stated that 'words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute's language to consider legislative intent.'" *Meridian Gold Co. v. State ex. rel. Dep't of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003) [quoting *Pellegrini v. State*, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001).

It is clear from the plain meaning of the statute that a court may issue temporary or extended orders in circumstances where there is an act of actual domestic violence *or* there exists a threat of domestic violence. An act which constitutes domestic violence is defined in NRS 33.018(1), which reads, in pertinent part:

> Domestic violence occurs when a person commits *one of the following acts* against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person is or was actually residing, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:
> (a) A battery.
> (b) An assault.
> (c) Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.
> (d) A sexual assault.
> (e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:

> (1) Stalking.
> (2) Arson.
> (3) Trespassing.
> (4) Larceny.
> (5) Destruction of private property.
> (6) Carrying a concealed weapon without a permit.
> (7) Injuring or killing an animal.
> (f) A false imprisonment.
> (g) Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.

NRS 33.018(1) (emphasis added).

Based on the aforementioned statute, victims of domestic violence entitled to temporary protection orders as described in NRS 33.020 are victims of at least one of the many acts described in NRS 33.018(1)(a)–(g). NRS 33.020 further extends temporary protection orders to victims who only need be threatened with any of the foregoing acts of domestic violence.

CONCLUSION

NRS 33.020 extends to persons who are not only victims of actual acts of domestic violence as described in NRS 33.018, but also to victims who are in situations where only a threat of domestic violence exists. Consequently, NRS 33.020 extends to all victims of domestic violence regardless of whether there has been actual physical contact by the alleged perpetrator.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
HENNA RASUL
Deputy Attorney General
Boards and Licensing Division

HR:LW

STATE OF NEVADA

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June 23, 2011

OPINION NO. 2011-08

CITY COUNCILS; COMPENSATION; MAYORS: The application of NRS 266.230 is not limited to instances when the individual was reelected and/or did not vote for the raise in compensation. The plain reading of NRS 266.230 supports the conclusion that the statute applies generally without any exceptions.

Cheryl Truman Hunt, Esq.
City Attorney
10 East Mesquite Boulevard
Mesquite, Nevada 89027

Dear Ms. Hunt:

You requested an opinion as to whether NRS 266.230 applies to a member of a city council who is subsequently elected to the position of mayor, if the city council raised the compensation for the mayor to be effective in the next term of the office, and if that individual member was on the city council but did not vote for the raise in compensation.

BACKGROUND

On July 1, 2005, Susan M. Holecheck was elected as one of the five members of the Mesquite City Council. The term was four years, which started on July 1, 2005, and ended on June 30, 2009. *See* Mesquite Ordinance (Ordinance) 1-8-2. On July 1, 2007, in the middle of her city council term, Ms. Holecheck ran for and was elected to the office of Mayor. The term for Mayor commenced on July 1, 2007, and will end on June 30, 2011. *See* Ordinance 1-5-1.

While Ms. Holecheck was a member of the City Council, on May 1, 2007, the City Council passed Ordinance 1-7-2, which among other things, increased the pay for the office of Mayor. Ms. Holecheck voted against Ordinance 1-7-2; however, the Ordinance was passed with three council members voting in favor of it. Although Ordinance 1-7-2 was passed on May 1, 2007, the effective date of the increase in compensation was July 1, 2007, which was the same date that Ms. Holecheck took office for the first time as Mayor.

QUESTION

Whether NRS 266.230 applies to a member of a city council if the city council raised the compensation for the mayor to be effective in the next term of the office, if that individual city council member did not vote for the raise in compensation?[1]

ANALYSIS

NRS 266.230 states:

> No member of any city council shall, during the term for which the council member was elected and for 1 year after the expiration of such term, hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased, while he or she was such member.

NRS 266.230.

You suggest that two factors make NRS 266.230 inapplicable. The two factors are: (1) Ms. Holecheck did not vote for the raise in compensation while she was a city council member; and (2) Ms. Holecheck was newly elected to Mayor in 2007, and was not reelected.

A plain reading of NRS 266.230, however, does not support the suggestion that the two factors above limit the applicability of the statute. In Op. Nev. Att'y Gen. No. 99-27 (August 5, 1999) (AGO 99-27), this Office explained that in statutory construction:

> Courts must construe statutes and ordinances to give meaning to all of their parts and language. . . . The Court should read each sentence, phrase, and word to render it

[1] It should be noted that although the office of Mayor is a separate office, the Mayor presides over city council meetings, and among other things, may cast a vote to break a tie or exercise the right of veto over legislative actions of the city council. Ordinance 1-5-3.

> meaningful within the context of the purpose of the legislation. . . . A reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation, should be avoided. (August 5, 1999)

Op. Nev. Att'y Gen. No. 99-27 citing *Board of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). *See also Tomlinson v. State*, 110 Nev. 757, 761, 878 P.2d 311, 313 (1994). Moreover, when construing specific portions of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give plain meaning to all of its parts. *Building Constr. Trades v. Public Works,* 108 Nev. 605, 610, 836 P.2d 633 (1992). Statutes must be construed in light of their purpose as a whole. *Hampton v. Brewer*, 103 Nev. 73, 74, 733 P.2d 852 (1987), cert. denied, 482 U.S. 915 (1987).

Limiting the applicability of NRS 266.230 only to instances when the individual city council member voted for the raise in compensation and/or was reelected to the office does not comport with the rules of statutory construction. A plain reading of NRS 266.230 does not support the proposition that the direction of the vote cast by a member of the council would affect the application of NRS 266.230.

In AGO 99-27, this Office opined that NRS 266.230 plainly applies to individuals who "hold" an office. This Office concluded that "if a city council increases the salaries for elected offices or for newly created offices, the restrictions in NRS 266.230 apply." *Id.* This Office noted that policy considerations such as contractual obligations and prevention of using the influence of the office for salary increases, combined with the "express language in the law" support application of the statute to individuals who hold offices. *Id.*

Although the policy considerations expressed in AGO 99-27 may not be present in this scenario, the express language remains in effect. Accordingly, the applicability of NRS 266.230 is not restricted to individual city council members who were reelected and/or voted for the increase in compensation.

CONCLUSION

The application of NRS 266.230 is not limited to instances when the individual was reelected and/or did not vote for the raise in compensation. The plain reading of NRS 266.230 supports the conclusion that the statute applies generally without any exceptions. Therefore, the statute applies to Ms. Holecheck in the circumstances described.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
NHU Q. NGUYEN
Senior Deputy Attorney General
Government & Natural Resources

NQN/RMH

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June 23, 2011

OPINION NO. 2011-09

INDIAN RESERVATION; TAXATION: Land acquired in fee title by a tribe does not become part of an Indian reservation or Indian colony under NRS 372.805 and NRS 374.805 and, therefore, the exemption from sales and use tax in those provisions does not apply. When and if the land is subsequently conveyed by the tribe to the United States to hold in trust for the tribe, the exemption would apply.

Christopher G. Nielsen, Interim Executive Director
Nevada Department of Taxation
1550 North College Parkway, Suite 115
Carson City, Nevada 89706

Dear Mr. Nielsen:

You have requested an opinion from the Office of the Attorney General concerning whether land acquired in fee title by an Indian tribe is reservation or colony land for the purpose of the tax exemptions found in NRS 372.805 and NRS 374.805.

QUESTION

Does acquisition by a tribe of fee title to land make the land "on an Indian reservation or Indian colony" for purposes of the tax exemptions available to tribes and colonies pursuant to NRS 372.805 and NRS 374.805?

ANALYSIS

As background, NRS Title 32 imposes taxes on the privilege of selling tangible personal property at retail and on the storage, use, or other consumption in this State of

tangible personal property purchased from a retailer (sales and use taxes).[1] NRS Title 32 limits the reach of these taxes with respect to Indian colonies and reservations as follows:

> The Department of Taxation shall not collect the tax imposed by this chapter on the sale of tangible personal property on an Indian reservation or Indian colony on which a tax has been imposed pursuant to NRS 372.800 if:
> 1. The tax is equal to or greater than the tax imposed by this chapter; and
> 2. A copy of an approved tribal tax ordinance imposing the tax has been filed with the Department of Taxation.

NRS 372.805.[2]

Determining the issue of whether the foregoing exemption applies to transactions occurring on land to which fee title is acquired by a tribe depends first on what is the meaning of the phrase "on an Indian reservation or Indian colony."

NRS 372.805 was created in 1989. Act of June 26, 1989, ch. 525, §§ 2, 3, and 4, 1989 Nev. Stat. 1109. The exemption is the result of the enactment of NRS 372.805. NRS 372.805 does not expressly define "on an Indian reservation or Indian colony." *See Hearing on A.B. 877 Before the Assembly Committee on Taxation,* 1989 Leg., 65th Sess. 5 (June 26, 1989). However, the failure to define these terms may itself signify an intent that they carry the same meaning established under federal law. "Generally, when a legislature uses a term of art in a statute, it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature intended it to be interpreted in the same fashion." *Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1139-1140 (2004).

"Indian reservation" has been authoritatively defined as a "part of public domain set aside by proper authority for use and occupation of tribe or tribes of Indians. . . . An Indian reservation consists of lands validly set apart for use of Indians under superintendence of the government which retains title to the land." BLACK'S LAW DICTIONARY 694 (5th ed. 1979).

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[1] The specific provisions imposing taxes are NRS 372.105, NRS 372.185, NRS 374.110, NRS 374.190, NRS 377.040, NRS 377A.030, and NRS 377B.110.

[2] The same exemption is applicable to NRS Chapter 374 and in turn applicable to other taxes on sales and use found in NRS Title 32. *See* NRS 374.805, NRS 377.040, NRS 377A.030, and NRS 377B.110.

The status of a location as a reservation or a colony is a matter of federal law. *See, e.g., Snooks v. Ninth Jud. Dist. Court*, 112 Nev. 798, 800 n.1, 919 P.2d 1064, 1065 n.1 (1986). (Indian country defined by 18 U.S.C. § 1154) and Op. Nev. Att'y Gen. No. 89-2 (March 13, 1989) (AGO 89-2). Indian reservations and colonies exist by virtue of federal treaties and statutes. *See, e.g., DeCoteau v. Dist. County Court,* 420 U.S. 425 (1975) (termination of reservation must be by clear expression of Congress); *U.S. v. McGowan*, 302 U.S. 535 (1938) (federal law created Reno Colony as Indian Country).

The role of the federal government as sole creator of reservations and colonies arises from the United States Constitution, which "vests the federal government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 764 (1985).

Therefore, the phrases "Indian reservation" and "Indian colony" in NRS 372.805 and NRS 374.805 plainly derive their meaning from federal law, and a reference to activity on an Indian reservation or colony means activity on land considered under federal law to be within the reservation or colony.

Turning to the legislative history of NRS 372.805, it does not appear that the Legislature intended to enlarge upon what constitutes "Indian country" under federal law to include land acquired in fee title, i.e., without federal superintendence. The minutes reflect the purpose of the statute as follows:

> [Executive Director Comeaux] said his department basically supported the bill, mainly because the state was not collecting anything in sales tax on those transactions that are completed on tribal lands. Also, tax was not being collected on transactions completed by the Indian operated stores off reservation. By basically giving up the assumed ability to require the tribal governments to collect and remit tax transactions on their reservations, they would agree to collect and submit state tax for transactions off the reservation.

Hearing on A.B. 877 Before the Assembly Committee on Taxation, 1989 Leg., 65th Sess. 5 (June 8, 1989).

The foregoing legislative history reflects an intention to limit exercise of state taxing authority over sales to non-tribal members occurring on the reservation. The legislative history of NRS 372.805 does not reflect an intention to change the law concerning how land could be added to a reservation, but rather to recognize tribes' sovereign power to tax on-reservation transactions and to address the issue of "dual

taxation" for such transactions. *Id.* at Exhibit F (written testimony of Joseph Ely, Chairman, Pyramid Lake Paiute Tribe).

This office has previously analyzed federal law to address the question presented herein, i.e., whether "a tribal government [can] extend the boundary of a reservation or colony simply by purchasing or leasing property in its own name." AGO 89-2, p. 2. That opinion concluded that "(a) tribal government cannot extend the boundary of its reservation or Indian trust lands without the consent of Congress and without taking title to the land in the name of the United States in trust for the Indian tribe." *Id.*

Court decisions since AGO 89-2 do not undercut this conclusion. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511 (1991), the United States Supreme Court held that land that was held in trust by the federal government on behalf of a tribe had sovereign immunity even if the land is outside the formally constituted reservation, if it met the requirement that the land was validly set aside under the federal government's superintendence. The United States Court of Appeals for the Tenth Circuit has held that acquisition of land in fee by a tribe did not make the land "Indian country" for purposes of immunity from state jurisdiction, even though the tribe's charter made any alienation of land subject to approval of the Secretary of the Interior. *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993).

CONCLUSION

Land acquired in fee title by a tribe does not become part of an Indian reservation or Indian colony under NRS 372.805 and NRS 374.805 and, therefore, the exemption from sales and use tax in those provisions does not apply. When and if the land is subsequently conveyed by the tribe to the United States to hold in trust for the tribe, the exemption would apply.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
Division of Business and Taxation

DLB:SB

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August 31, 2011

OPINION NO. 2011-10

BONDS; REDEVELOPMENT AGENCY; TAX ALLOCATION: The property tax revenue increment due to a redevelopment agency is the amount remaining after the tax base is paid and carve-outs subtracted; and redevelopment agencies created prior to July 1, 1987 are also entitled to a set amount of revenue obligated for the repayment of debt not otherwise tied to assessed value or tax rate.

Christopher G. Nielsen, Interim Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Dear Mr. Nielsen:

You have requested an opinion from the Office of the Attorney General regarding the proper methodology for calculating the amount of property taxes due to a redevelopment agency.

QUESTION ONE

What is the appropriate method for calculation of the total amount of taxes due to a redevelopment agency generally and specifically a redevelopment agency formed prior to July 1, 1987?

ANALYSIS

The methodology for the calculation of taxes due to a redevelopment agency is set out in NRS 279.676. NRS 279.676(1)(a) provides the means for calculating the amount of taxes that will continue to be paid to taxing agencies located in the same

area after the creation of the redevelopment agency. The portion of the taxes allocated to the taxing agencies is commonly referred to as the "tax base".

NRS 279.676(1)(b) provides for the calculation of the amount of taxes that are allocated to the redevelopment agency after the base has been subtracted from the total amount of the taxes collected. This portion of the taxes allocated to the redevelopment agency is commonly referred to as the "tax increment". NRS 279.676(1)(c)–(d) then refers to additional amounts of tax collected for a dedicated purpose that is subtracted from the increment. The amounts subtracted from the increment are commonly referred to as "carve-outs."

NRS 279.676(3) provides for an additional amount that must be paid to redevelopment agencies in existence and receiving payments prior to July 1, 1987. If the redevelopment agency, in reliance on payments being made to it by taxing agencies prior to July 1, 1987 became obligated prior to July 1, 1987, for the repayment of any bond, loan, money advanced or any other indebtedness, whether funded, refunded, assumed or otherwise incurred, the redevelopment agency is entitled to receive from the taxing agencies an amount of money in addition to the tax increment. *Id.*

In order to answer the question regarding the proper methodology for calculating the total amount due to a redevelopment agency, we must analyze how the tax base, the tax increment, the carve-outs, and the amount due the redevelopment agency formed prior to July 1, 1987, pursuant to NRS 279.676(3), interact.

NRS 279.676(1)(a) provides that the tax base is calculated by taking "the total sum of the assessed value of the taxable property in the redevelopment area" prior to the effective date of the ordinance creating the redevelopment agency and applying the tax rate of the taxing agencies each year. This is referred to as the tax base because the assessed value is fixed prior to the creation of the redevelopment agency. The portion of the tax paid to the taxing agencies as the tax base can vary from year to year depending on the tax rate applied to the fixed assessed value.

The tax base impacts the portion of the taxes paid to the redevelopment agency. The tax increment is calculated pursuant to NRS 279.676(1)(b). The tax increment is any portion of "the levied taxes each year in excess of the amount" paid to the taxing agencies pursuant to NRS 279.676(1)(a) as the tax base. Once the assessed value for the redevelopment area is determined and the tax rate for that tax year is applied, the increment is any amount that remains after the tax base is paid to the taxing agencies and the carve-outs are subtracted. The tax increment varies from year to year. In some years there may not be any excess taxes after the tax base is paid and the carve-outs subtracted, therefore, no portion of the taxes collected would go to the redevelopment agency.

Redevelopment agencies created prior to July 1, 1987, that in anticipation of receiving any sums became obligated for the repayment of debt, are also entitled to receive money pursuant to NRS 279.676(3). Unlike the methodology for the calculation of the tax base and the tax increment, the amount to be paid to the redevelopment agency pursuant to NRS 279.676(3) is not tied to the application of a tax rate to the assessed value. NRS 279.676(3) states: "The taxing agencies shall continue to pay to a redevelopment agency *any amount* which was being paid before July 1, 1987, . . ." NRS 279.676(3) (emphasis added).

The plain language of the statute refers to a set amount that was being paid to a redevelopment agency prior to July 1, 1987. There is no language to suggest that this amount changes from year to year based on assessed value or tax rates. When the language of the statute is clear on its face, there is no need to look further than the plain language of the statute. *Washoe Med. Ctr. v. The Second Jud. Dist. Ct.,*122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006) ("When a statute is clear on its face, we will not look beyond the statute's plain language") (footnote omitted).

The specific language in NRS 279.676(1)(a) referencing the assessed value in the redevelopment area and the application of the tax rate in the calculation of the tax base, and the absence of such language in NRS 279.676(3), indicate an intent by the Legislature that the amount to be paid under subsection (3) was a set amount based on the amount paid prior to July 1, 1987, that would not be tied to the assessed value or a tax rate. A rule of statutory construction is that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

CONCLUSION TO QUESTION ONE

The appropriate method for calculation of the total amount of taxes due to a redevelopment agency is to first apply the current tax rate to the fixed assessed value determined prior to the ordinance creating the redevelopment agency to determine the amount of the tax base.

If, after subtracting the tax base and the carve-outs from the amount of taxes collected based on the assessed value of the property in the redevelopment area and applying the current tax rate, there is additional tax money collected, that portion of the taxes should be paid to the redevelopment agency as the tax increment.

Independent of the calculation of the assessed value and application of the tax rate, a redevelopment agency created prior to July 1, 1987 is entitled to an amount equal to the amount which was being paid prior to July 1, 1987 to the redevelopment agency and relied upon by the redevelopment agency for the repayment of debt.

QUESTION TWO

If application of the method identified in the answer to Question One results in actual tax dollars paid before July 1, 1987, does "amount paid" pursuant to NRS 279.676(3) mean property taxes paid into separate redevelopment agency funds, e.g. the Debt Service Fund, the Capital Projects Fund and the Special Revenue Fund?

ANALYSIS

NRS 279.676(3) states:

> The taxing agencies shall continue to pay to a redevelopment agency any amount which was being paid before July 1, 1987, and in anticipation of which the agency became obligated before July 1, 1987, to repay any bond, loan, money advanced or any other indebtedness, whether funded, refunded, assumed or otherwise incurred.

NRS 279.676(3). The language in NRS 279.676(3) is broad and does not make reference to any specific funds. It only specifies that it must be money relied upon for the repayment of debt.

This is distinguishable, for example, from money received by a redevelopment agency for administrative expenses. NRS 279.614 directs that money received for administrative expenses of the agency be kept "in a special fund to be known as the community redevelopment agency administrative fund, . . ." Money received by the redevelopment agency for administrative expenses would not be included in the calculation of the money due pursuant to NRS 279.676(3), since it is not money received for repayment of debt. A redevelopment agency that was receiving money from taxing agencies prior to July 1, 1987, is entitled to continue to receive the actual amount of money the agency relied upon to repay any type of indebtedness, regardless of the fund into which the money was paid.

CONCLUSION TO QUESTION TWO

Pursuant to NRS 279.676(3), a redevelopment agency that received payments from taxing agencies prior to July 1, 1987 is entitled to continue to receive any amount "in anticipation of which the agency became obligated . . . to repay any bond, loan, money advanced or any other indebtedness, whether funded, refunded, assumed or otherwise incurred." It does not matter what fund the money was paid into, as long as the redevelopment agency relied upon the money for the repayment of debt.

QUESTION THREE

Does NRS 279.676(3) apply to a bond that is originally issued prior to July 1, 1987, but is subsequently refinanced one or more times in future years?

ANALYSIS

NRS 279.676(3) sets the amount of money a redevelopment agency is entitled to receive in addition to the tax increment at the amount it was being paid prior to July 1, 1987 that the agency relied upon for the repayment of debt. There is no language in NRS 279.676(3) indicating that this amount will vary or be reduced based upon future events. The refinancing of a bond subsequent to July 1, 1987 has no bearing on the amount due to a redevelopment agency pursuant to NRS 279.676(3).

CONCLUSION TO QUESTION THREE

NRS 279.676(3) sets the amount due to a redevelopment agency in addition to the tax increment by reference to payments relied upon by the agency for the repayment of debt prior to July 1, 1987. The amount due to a redevelopment agency pursuant to NRS 279.676(3) is not changed based on subsequent refinancing of a bond that was originally issued prior to July 1, 1987.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:
GINA C. SESSION
Chief Deputy Attorney General

GCS:SKJ

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September 29, 2011

OPINION NO. 2011-11

HISTORICAL COMMISSION; MINING; STATUTES: The Comstock Historical District Commission's authority is limited by NRS 384.110(2) to "preventing the erection, reconstruction, restoration, alteration, moving or razing of buildings" inconsistent with the district's historic appeal. Therefore, the relevant statutes do not grant the Commission the authority to regulate activities, including mining, that may impact the broader landscape of the district.

Michael A. Bedeau, District Administrator
Comstock Historical District Commission
Post Office Box 128, 20 North "E" Street
Virginia City, Nevada 89440

Dear Mr. Bedeau:

You have requested an opinion from this Office regarding the Comstock Historical District Commission's ability to regulate activities that may impact the broader landscape of the District; namely, mining operations.

QUESTION

Does NRS 384.020 provide the Comstock Historical District Commission with statutory authority to regulate mining and other activities that may impact the broader landscape contained within district boundaries?

ANALYSIS

The Comstock Historical District Commission (Commission) is governed by NRS/NAC Chapter 384, and the Commission's objectives are set forth in NRS 384.020:

> It is hereby declared to be the public policy of the State of Nevada to promote the educational, cultural, economic and general welfare and the safety of the public through the preservation and protection of structures, sites and areas of historic interest and scenic beauty, through the maintenance of such landmarks in the history of architecture, and the history of the District, State and Nation, and through the development of appropriate settings for such structures, sites and District.

To this end, Nevada law empowers the Commission to prepare, make available, evaluate, and ultimately grant or deny applications for a "certificate of appropriateness." NRS 384.110-384.150, inclusive; and NAC 384.160–170, inclusive. Pursuant to NRS 384.110, "No structure may be erected, reconstructed, altered, restored, moved or demolished within the historic district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to and approved by the Commission, ..." NRS 384.110(1). Further, the statute defines the parameters of the Commission's authority:

> *In its deliberations under the provisions of [the Comstock Historical District Act], the Commission and its staff . . . shall take no action under [the Comstock Historical District Act], except for the purpose of preventing the erection, reconstruction, restoration, alteration, moving or razing of buildings in the district obviously incongruous with the historic aspects of the district.*

NRS 384.110(2) (emphasis added).

In this instance, a constituent property owner claims that NRS 384.020 obligates the Commission to regulate activities that impact the historic landscape and scenic beauty of the district. The constituent asserts that the Commission possesses the mandate and statutory authority to protect these features in the same manner that it exercises its authority to preserve the historical integrity and exterior architectural style of structures within its jurisdiction.

However, the applicable law (NRS/NAC 384) lacks reference to the Commission's purported ability to regulate the broader landscape contained in the district. While it is replete with specific references to the Commission's ability to

regulate (through certificates of appropriateness) the erection, reconstruction, restoration, alteration, moving, or razing of buildings in the district, it fails to contemplate the broader, surrounding landscape.

In *Harris Associates v. Clark County School District*, 119 Nev. 638, 641-42, 81 P.3d 352, 354 (2003), the Nevada Supreme Court held that when "the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." In *Meridian Gold Company*, the Court elaborated: "[W]ords in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute's language to consider legislative intent." *Meridian Gold Co. v. State ex. rel. Dep't of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003) (quoting *Pellegrini v. State,* 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001)).

In this case, NRS 384.020 sets forth an aspirational policy statement. The statutes that follow delineate the Commission's composition and jurisdiction, and clearly and unambiguously define the scope of its authority and responsibilities; namely, its ability to issue and deny certificates of appropriateness as they pertain to the erection, reconstruction, restoration, alteration, moving, or razing of buildings in the district.

CONCLUSION

The Comstock Historical District Commission's authority is limited by NRS 384.110(2) to "preventing the erection, reconstruction, restoration, alteration, moving or razing of buildings" inconsistent with the district's historic appeal. Therefore, the relevant statutes do not grant the Commission the authority to regulate activities, including mining, that may impact the broader landscape of the district.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:
KRISTEN R. GEDDES
Deputy Attorney General
Government and Natural Resources

KRG/KLS

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October 10, 2011

OPINION NO. 2011-12

INDIAN TRIBES; PREEMPTION; TIRE FEE: NRS 444A.090 does not exempt from the new tire fee sales of tires made by a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800.

Christopher G. Nielsen, Deputy Director
Nevada Department of Taxation
1550 North College Parkway, Suite 115
Carson City, Nevada 89706

Dear Mr. Nielsen:

You have requested an opinion from the Office of the Attorney General as a result of it coming to your attention that businesses located on Indian reservation or colony land are selling tires and failing to collect and remit the fee on the sale of new tires.

QUESTION ONE

Is a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800–.805 exempt from the fee on new tire sales imposed by NRS 444A.090?

ANALYSIS

NRS 444A.090, which imposes a fee of $1 per new tire sold at retail, provides in pertinent part as follows:

> 1. A person who sells a new tire for a vehicle to a customer for any purpose other than for resale by the customer in the ordinary course of business *shall collect from the purchaser*

> *at the time the person collects the applicable sales taxes* for the sale a fee of $1 per tire. A person who did not pay the fee imposed by this section at the time of purchase because he or she purchased the new tire for resale and who then makes any use of that tire other than to resell it in the ordinary course of business, shall pay the fee imposed by this section to the Department of Taxation at the time of the first use of that tire for a purpose other than holding it for resale.
>
> 2. The seller shall account separately for all money received pursuant to subsection 1 as a deposit to be held in trust for the State. In accordance with the regulations adopted pursuant to subsection 3, the seller shall transmit 95 percent of the money held in trust pursuant to this section to the Department of Taxation for deposit with the State Treasurer for credit to the Solid Waste Management Account in the State General Fund. The remaining 5 percent and all interest and income which accrued on the money while in trust with the seller become the property of the seller on the day the balance for the month is transmitted to the Department of Taxation and may be retained by the seller to cover his or her related administrative costs.
>
> 3. The Director of the Department of Taxation shall adopt regulations establishing acceptable methods for accounting for and transmitting to the Department money collected or required to be paid by retailers pursuant to subsection 1. The regulations must include a designation of the persons responsible for payment. The regulations must, in appropriate situations, allow for the transmission of that money together with the payment of the applicable sales and use taxes.
>
> 4. In collecting the fee, the Department of Taxation may employ any administrative and legal powers conferred upon it for the collection of the sales and use taxes by chapters 360 and 372 of NRS.
>
> . . . .

NRS 444A.090 (emphasis added).

A business making retail sales of new tires operating on Indian colony land in Reno contends that because it remits its sales taxes to the Indian governing body pursuant to NRS 372.800–.805, it never remits "applicable sales taxes" as set forth in

NRS 444A.090(1), and is, therefore, exempt from the tire tax fee imposed by that provision. The business, therefore, puts in question the meaning of the statute.

An investigation of legislative intent requires looking first to the plain meaning of the law. *Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004). A statute does not have a plain meaning with respect to a given subject if it has more than one reasonable interpretation or has internal conflict. *Orion Portfolio Services 2 LLC v. Clark County*, 126 Nev. ____, 245 P.3d 527, 531 (Adv. Op. 39, October 14, 2010).

The phrase "applicable sales taxes" is not defined in the statute. However, it is plain that for taxes instituted by an Indian governing body to qualify under NRS 372.800, they must, by definition, be sales taxes (i.e., "a tax on the privilege of selling tangible personal property at retail"). Insofar as the taxes apply to a transaction in which a tire is sold, it is an applicable tax. Thus, in circumstances where a retailer remits tax to a tribal governing body based on a tax ordinance implemented by the body pursuant to NRS 372.800, there is an "applicable sales tax" within the meaning of NRS 444A.090.

Further, to interpret the provision "collect from the purchaser at the time the person collects the applicable sales taxes" any other way would run against the presumption against exemptions. "There is a presumption that the state does not intend to exempt goods or transactions from taxation. Thus, the one claiming exemption must demonstrate clearly an intent to exempt." *Sierra Pac. Power Co. v. Dep't of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980). Said provision is better read as language of timing, i.e., prescribing when in time the tire fee must be paid, rather than language conditioning the payment of the tire fee.

CONCLUSION TO QUESTION ONE

NRS 444A.090 does not exempt from the new tire fee sales of tires made by a business remitting sales taxes to a governing body of an Indian tribe or colony pursuant to NRS 372.800.

QUESTION TWO

Is the State of Nevada preempted by federal law from requiring a retailer making sales of new tires on reservation or colony land to collect the fee imposed by NRS 444A.090 on those sales from its purchasers, both tribal or nontribal members?

ANALYSIS

Federal preemption of state jurisdiction to tax reservations, colonies and persons residing or conducting business thereon can depend on specific statutes and treaty provisions. *See generally McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164

(1973). Nevada has within its borders twenty-six recognized tribal entities, which creates the possibility of variation. Bearing that in mind, certain conclusions may nevertheless be reached.

First, a state may generally not impose a tax[1] the legal incidence of which falls on the tribe, its members living on the reservation, or persons trading with the tribe or its members on the reservation. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This limitation is present unless a federal statute authorizes such taxation by a state. *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980).

In the subject circumstances, the legal incidence of the new tire fee falls on the purchaser of the new tires, given that, under NRS 444A.090, the retailer is required to collect the tax from the buyer and is compensated for its role as collector. *Chickasaw Nation*, 515 U.S. at 461–62.

Therefore, a retailer of new tires selling on reservation or colony land may not be required to collect the tire fee from members of the reservation or colony, unless a federal statute so authorizes.

A different analysis is undertaken where the incidence of taxation falls on a person who is not a member of the tribe. "(W)here . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," in the absence of a preempting statute, the courts have applied an interest-balancing test for determining whether the assertion is preempted by federal law. *Bracker*, 448 U.S. at 144. That analysis involves making a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145 ("the *Bracker* test").

Under the *Bracker* test, the courts have found implied preemption where the tax involved an area of tribal activity in which there was pervasive federal regulation of the tribe. *Id.* at 148 (harvesting timber on reservation land); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (construction of a tribal school). On the other hand, where no such federal involvement exists and the "taxation is directed at off-reservation value," for example, items imported to the reservation and sold to the non-members without change, the courts have found no such implied

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[1] The fee is an involuntary exaction used to fund waste management programs, as well as public education, provided by the State and health districts. NRS 444.616. As such, it is analyzed as a tax, not a user fee. *Nat'l Cable Television Ass'n, Inc. v. U.S.*, 415 U.S. 336, 341 (1974); *In re Lorber Indus. of Cal. Inc.*, 675 F.2d 1062, 1067 (9th Cir. 1982).

preemption. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 147 (1980); *see also Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

At this point, we have no indication that the activity of selling new tires to tribes is in an area of pervasive federal regulation, or that the tires themselves derive any value from the colony. Therefore, we have no basis for concluding that application of NRS 444A.090 to sales to non-tribal members is preempted.

CONCLUSION TO QUESTION TWO

Absent a federal statutory or treaty provision to the contrary, a retailer of new tires on a reservation or colony may not be required to collect the new tire fee from a member of that reservation or colony but may be required to collect the fee from non-reservation or colony members.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
Division of Business and Taxation

DLB:SB

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November 18, 2011

OPINION NO. 2011-13

CLARK COUNTY; COMMISSIONS; ELECTION: The Clark County Board of Commissioners must appoint a replacement for the balance of the unexpired term.

Mary-Anne Miller, Esq.
Office of the District Attorney
Clark County
500 South Grand Central Parkway
Las Vegas, Nevada 89155-2215

Dear Ms. Miller:

I have reviewed your November 9, 2011 request for an opinion. I have reviewed your analysis, the statutes, and case law, and I agree with your analysis and conclusions. For clarity, the questions and the conclusions are restated below:

QUESTION ONE

Must the Clark County Board of Commissioners appoint a replacement for Mr. Roger for the balance of his unexpired term, or may they appoint a replacement to serve until a successor is chosen at the next biennial election?

CONCLUSION TO QUESTION ONE

The Clark County Board of Commissioners must appoint a replacement for the balance of the unexpired term. NRS 252.060 is a specific statute providing for the appointment of replacements when there is a vacancy in the office of district attorney. NRS 252.060(5) provides that the person appointed to replace the district attorney serves the remainder of the unexpired term.

QUESTION TWO

May the Commissioners appoint a replacement who agrees to serve only until a successor is elected at the next biennial election?

CONCLUSION TO QUESTION TWO

No. The Commissioners cannot appoint a person to serve only until a successor is elected at the next biennial (2012) election. Nothing in NRS 252.060 or the election laws provides for an election for that office in 2012. Interested parties cannot alter the election laws by agreement.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
KEVIN BENSON
Deputy Attorney General
Government & Natural Resources
Division

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November 18, 2011

OPINION NO. 2011-14

CRIMINAL; NEVADA TRANSPORTATION AUTHORITY; PARKING: Private party booting of vehicles is illegal pursuant to NRS 205.274 and NRS 205.0832.

Andrew J. MacKay, Chairman
Nevada Transportation Authority
1755 East Plumb Lane, Suite 216
Reno, Nevada 89502

Dear Chairman MacKay:

You have requested an opinion from the Attorney General's Office regarding the legality of private parties booting vehicles on private property. The Opinion Request specifically exempted from review those county or municipal entities which have specifically authorized booting and set up a regulatory structure to govern said activity. There are four specific questions asked regarding the legality of private parties booting vehicles on private property in jurisdictions where county or municipal entities have not specifically authorized booting.

QUESTION ONE

Does a non-governmental, non-law enforcement person or entity commit a violation of NRS 205.274 (Injuring or Tampering with a Vehicle) by immobilizing another person's vehicle through booting?[1]

[1] "Booting" a vehicle means placing a device on a tire of the vehicle that renders the vehicle inoperable. A "boot" has two primary parts—an "arm" and a "jaw." Those two parts are bolted together, and a lock is placed to prevent the two parts from being unbolted. The jaw fits around the wheel of a vehicle. There is a plate attached to the arm which covers the hub and lug nuts of the vehicle to prevent removal of the wheel once the boot is in place. *Thomas v. U.S.*, 985 A.2d 409, 410 (D.C. Cir. 2009).

ANALYSIS

NRS 205.274, entitled "Injuring or tampering with vehicle; penalties," states:

> 1. Any person who shall individually or in association with one or more other persons willfully break, injure, tamper with or remove any part or parts of any vehicle for the purpose of injuring, defacing or destroying such vehicle, or temporarily or permanently preventing its useful operation, or for any purpose against the will or without the consent of the owner of such vehicle, or who shall in any manner willfully or maliciously interfere with or prevent the running or operation of such vehicle, shall be guilty of a public offense proportionate to the value of the loss resulting therefrom.

NRS 205.274(1). Tamper" is defined as "to meddle so as to alter a thing, especially to make illegal, corrupting or perverting changes." BLACKS LAW DICTIONARY 1456 (6th ed. 1990).[2]

The placing of a boot on a vehicle is done to temporarily prevent its useful operation against the will and without the consent of its owner. There is no legal authority approving such conduct by non-governmental or non-law enforcement persons or entities. Therefore, booting is a violation of NRS 205.274.

CONCLUSION TO QUESTION ONE

A non-governmental, non-law enforcement person or entity commits a violation of NRS 205.274 (Injuring or Tampering with a Vehicle) by immobilizing another person's vehicle through booting.

QUESTION TWO

Does a non-governmental, non-law enforcement person or entity commit a violation of NRS 205.0832 (Theft) by immobilizing another person's vehicle through booting, with the intent to restore the owner's right to use of the vehicle only upon the payment of compensation?

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[2] There is no definition of "tamper" contained in the Nevada Revised Statutes.

ANALYSIS

NRS 205.0832, entitled "Actions which constitute theft" states:

> 1. Except as otherwise provided in subsection 2, a person commits theft if, without lawful authority, the person knowingly:
> (a) Controls any property of another person with the intent to deprive that person of the property.
> (b) Converts, makes an unauthorized transfer of an interest in, or without authorization controls any property of another person, or uses the services or property of another person entrusted to him or her or placed in his or her possession for a limited, authorized period of determined or prescribed duration or for a limited use.

NRS 205.0832. There are two definitions which are important to understanding the foregoing statute. NRS 205.0823 defines "Control" to mean an "act so as to prevent a person from using his or her own property except on the actor's terms." NRS 205.0824 defines "Deprive" as:

> [A] means to withhold a property interest of another person permanently or for so long a time that a substantial portion of its value, usefulness or enjoyment is lost, or to *withhold it with the intent to restore it only upon the payment of a reward or other compensation,* or to transfer or dispose of it so that it is unlikely to be recovered.

NRS 205.0824 (emphasis added).

The booting of a vehicle by a non-governmental, non-law enforcement person or entity is theft in violation of NRS 205.0832, as the person performing the action knowingly controls the property of another and deprives them of the use of that property until such time as some sort of payment is made or other compensation exchanged without any legal authority approving such conduct.

CONCLUSION TO QUESTION TWO

A non-governmental, non-law enforcement person or entity commits a violation of NRS 205.0832 (Theft) by immobilizing another person's vehicle through booting, with the intent to restore the owner's right to use of the vehicle only upon the payment of compensation.

QUESTION THREE

If private party booting of vehicles would generally constitute a violation of NRS 205.274 and/or NRS 205.0832, is such conduct nonetheless lawful due to specific authorization under NRS 487.038?

ANALYSIS

NRS 487.038 provides authority for an owner or person in lawful possession of real property to have an unauthorized vehicle parked thereon to be towed therefrom under certain circumstances. It provides in the pertinent sections:

> 1. Except as otherwise provided in subsections 3 and 4, the owner or person in lawful possession of any real property may, after giving notice pursuant to subsection 2, utilize the services of any tow car operator subject to the jurisdiction of the Nevada Transportation Authority to remove any vehicle parked in an unauthorized manner on that property to the nearest public garage or storage yard if:
> (a) A sign is displayed in plain view on the property declaring public parking to be prohibited or restricted in a certain manner; and
> (b) The sign shows the telephone number of the police department or sheriff's office.
> . . . .
> 6. The provisions of this section do not limit or affect any rights or remedies which the owner or person in lawful possession of real property may have by virtue of other provisions of the law authorizing the removal of a vehicle parked on that property.

NRS 487.038(1) and (6). This is the only statutory authority granting a private party authority to act regarding unauthorized vehicles parked on private property.[3] There are no Nevada statutes or regulations authorizing or regulating the booting of vehicles. "The maxim 'expressio Unius Est Exclusio Alterius'," meaning that "the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Accordingly, the procedures outlined in NRS 487.038 are the only ones available to a private property owner or the person in lawful possession thereof regarding removal of a vehicle parked thereon in an unauthorized manner.

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[3] NRS 116.3102 allows common interest communities to remove unauthorized vehicles parked on property under their control pursuant to NRS 487.038.

CONCLUSION TO QUESTION THREE

Private party booting of vehicles constitutes violations of NRS 205.274 and NRS 205.0832, and said violations are not cured by any authorization under NRS 487.038.

QUESTION FOUR

In light of the answers to the preceding three questions, is private party booting of vehicles illegal?

ANALYSIS

The Legislature carved out exceptions to NRS 205.274 and NRS 205.0832 in NRS 487.038 by allowing for the removal of unauthorized vehicles by tow car operators licensed and regulated pursuant to NRS Chapter 706, thereby exempting such activity from being classified as tampering or theft. "A specific statute takes precedence over a general statute." *Maxwell v. State Indus. Ins. Sys.,* 109 Nev. 327, 330, 849 P.2d 267, 270 (1993). No similar carve-out exists in Nevada law to authorize booting of vehicles.[4] Therefore, the booting of a vehicle by a private party is illegal pursuant to NRS 205.274 and NRS 205.0832.

CONCLUSION TO QUESTION FOUR

Private party booting of vehicles is illegal pursuant to NRS 205.274 and NRS 205.0832.

Sincerely,

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DWN/DW

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[4] The Office of the Attorney General for the State of California examined the question of private-party booting and found it to be contrary to the laws of that state. *See* Op. Cal. Att'y Gen. No. 03-1204 (August 12, 2004).