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March 26, 2013

OPINION NO. 2013-01

TAXATION; LOCAL GOVERNMENT; FINANCIAL EMERGENCY: The Department of Taxation, in response to the finding a local government is experiencing a severe financial emergency, does not have the authority to suspend, break, or alter collective bargaining agreements. A property tax increase in response to a severe financial emergency is exempt from partial abatements pursuant to NRS 361.471 *et seq.*

Mr. Christopher G. Nielsen, Executive Director
State of Nevada
Department of Taxation
1550 College Parkway, Suite No. 115
Carson City, NV 89706

Dear Mr. Nielsen:

You have requested an opinion from this office regarding the powers of the Department of Taxation (Department) in the event it takes over the management of a local government in response to a severe financial emergency.

QUESTION ONE

In a severe financial emergency, can the Department—on behalf of the local government—suspend, break, or otherwise alter existing collective bargaining

agreements pursuant to NRS 354.695 or any other applicable law?

ANALYSIS

Administrative agencies are creatures of statute, and their authority to act is limited to those powers delegated or implied by statute. *City of Henderson v. Kilgore,* 122 Nev. 331, 131 P.3d 11 (2006). The Department can only exercise the specific powers enumerated in statute. NRS 354.695(1) spells out the powers of Department when it takes over the management of a local government. For the purposes of your questions, the pertinent provisions are as follows:

> 1. As soon as practicable after taking over the management of a local government, the Department shall, with the approval of the Committee.
>
> . . .
>
> (g) Negotiate and approve all collective bargaining contracts to be entered into by the local government, except issues submitted to a fact finder whose findings and recommendations are final and binding pursuant to the provisions of the Local Government Employee-Management Relations Act;
>
> . . .
>
> (n) Take any other actions necessary to ensure that the local government provides the basic services for which it was created in the most economical and efficient manner possible.

NRS 354.695(1)(g) specifically addresses the Department's power in relation to collective bargaining agreements. The Department can negotiate and approve all collective bargaining to be entered into, but the Legislature did not authorize the Department to suspend, break, or otherwise alter collective bargaining agreements already in existence.

NRS 288.150 identifies terms that must be the subject of mandatory bargaining between a local government employer and an employee organization. NRS 288.150 (2)(w) states:

> 2. The scope of mandatory bargaining is limited to:
>
> . . .
>
> (w) Procedures and requirements for the reopening of collective bargaining agreements that exceed 1 year in duration for additional, further, new or supplementary negotiations during periods of fiscal emergency. The requirements for reopening a collective bargaining agreement must include, without limitation, measures of revenue shortfalls or reductions relative to economic indicators such as the Consumer Price Index, as agreed upon by both parties.

If the Department takes over the management of a local government and the collective bargaining agreements entered into by the local government include a term as provided for in NRS 288.150(2)(w) for reopening the agreements in the case of fiscal emergency, the Department could reopen the agreements pursuant to those terms.[1]

Although subsection (2)(n) acts as a catchall provision that allows the Department to take any other actions necessary to ensure a local government provides basic services, this general provision does not prevail over the more specific provisions relating to collective bargaining agreements. *Mineral County v. State, Bd. Equalization*, 121 Nev. 533, 119 P.3d 706, 710 (2005) (Hardesty, dissenting) ("That rule of statutory construction provides that a special provision dealing with a particular subject is controlling and preferred to a provision relating only in general terms to the same subject.") (footnote omitted).

CONCLUSION TO QUESTION ONE

When the Department takes over the management of a local government because of a severe financial emergency, the Department does not have authority to suspend, break, or otherwise alter collective bargaining agreements. The Department could reopen a collective bargaining agreement pursuant to the terms of that agreement if the agreement included a term consistent with NRS 288.150(2)(w).

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[1] Although NRS 288.150(4) permits a local government employer to suspend collective bargaining agreements in emergencies such as military action, natural disaster or civil disorder, it does not include fiscal emergencies that are specifically addressed in NRS 288.150(2)(w).

QUESTION TWO

In a severe financial emergency, if the Nevada Tax Commission raises the property tax rate of the local government pursuant to NRS 354.705(2), do the partial tax abatements contained in NRS 361.471 *et seq.* apply?

ANALYSIS

If, after the Department takes over the management of a local government, the Executive Director determines that the available revenue is not sufficient to provide for the payment of required debt service and operating expenses, the Executive Director may submit his or her findings to the Committee on Local Government Finance (Committee). NRS 354.705(2). If the Committee determines that additional revenue is needed, it must prepare a recommendation to the Nevada Tax Commission as to which one or more taxes should be imposed by the local government. *Id.* The taxes that can be imposed by the local government include "[t]he levy of a property tax up to a rate which when combined with all other overlapping rates levied in the State does not exceed $4.50 on each $100 of assessed valuation." NRS 354.705(2)(a).

NRS 361.471 *et seq.* directs that a partial abatement for property owners be instituted so that assessments are capped from one year to the next. For example, for an owner-occupied single family residence, the property tax bill is capped at an annual increase of 3 percent. NRS 361.4723. The question then is whether the partial abatement applies if the increase in property tax imposed by the local government in a severe financial emergency exceeds the cap.

NRS 361.4726 provides for certain exemptions from the partial abatement of property taxes:

> 1. Except as otherwise provided by specific statute, if any legislative act which becomes effective after April 6, 2005, imposes a duty on a taxing entity to levy a new ad valorem tax or to increase the rate of an existing ad valorem tax, the amount of the new tax or increase in the rate of the existing tax is exempt from each partial abatement from taxation provided pursuant to NRS 361.4722, 361.4723, and 361.4724.
> 2. For the purposes of this section, "taxing entity" does not include the State.

When a local government is experiencing a severe financial emergency, the Legislature has granted authority to the Nevada Tax Commission to require the local government to increase property taxes to raise revenue. NRS 354.705. The legislative act granting this authority to increase the rate of the existing property tax does not become effective until certain conditions are met.[2]

The conditions that must be met are articulated in NRS 354.705. As noted above, if the revenue is not sufficient, the Committee must prepare a recommendation to the Nevada Tax Commission for additional revenue that may include the levy of a property tax. Prior to adopting a proposed plan for additional revenue, the Nevada Tax Commission must hold a public hearing in a location within the boundaries of the local government and notice of the hearing must be provided to the governing body of each local government that overlaps with the jurisdiction of the local government in which the severe financial emergency exists. NRS 354.705(3). After the public hearing is conducted, the Nevada Tax Commission may adopt the plan. The plan must include the duration for collection of the new taxes which may not exceed five years. NRS 354.705(4).

Once the plan is adopted by the Nevada Tax Commission, the legislative grant of authority to raise property tax becomes effective and the local government must impose the additional taxes according to the plan. NRS 354.705(5). The effective date of the legislative act permitting the increase in property taxes is the date the conditions in NRS 354.705 are met, which is necessarily after April 6, 2005. The increase in property tax in response to a severe financial emergency is therefore exempt from the partial abatement of property taxes pursuant to NRS 361.4726.

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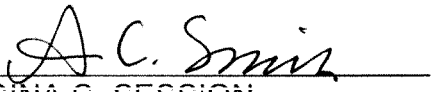
[2] In an early case, the Nevada Supreme Court ruled on similar legislation wherein the legislative act imposing a duty to impose a tax was not effective until a condition was met. In 1915, the condition was the existence of a high school in a county. *See State ex rel. Reno Sch. Dist. No. 10 v. Board of Cnty. Comm'rs. of Washoe Cnty.*, 38 Nev. 269, 149 P. 191 (1915).

CONCLUSION TO QUESTION TWO

Because the legislative act imposing a duty on the local government to collect additional ad valorem taxes becomes effective once certain conditions are met pursuant to NRS 354.705, which is necessarily after April 6, 2005, the property tax increase in response to a severe financial emergency is exempt from the partial abatements in NRS Chapter 361. NRS 361.4726.

CATHERINE CORTEZ MASTO
Attorney General

By: 
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March 28, 2013

OPINION NO. 2013-02

INSURANCE; TAXATION; DESK AUDIT PROGRAM (DAP); INSURANCE PREMIUM TAX (IPT). Legislature tasked Division of Insurance (DOI) with implementing a Desk Audit Program (DAP) to audit payment of the Insurance Premium Tax. A proceeding to recover a deficiency discovered through the DAP is commenced by the Commissioner of Insurance pursuant to NRS 679B.227. Accordingly, the limitation period in NRS 679.227 applies to the finding of a deficiency in the DAP. Further, DOI can initiate proceedings to recover a deficiency arising from the failure by TP to request a refund or credit carry-forward of an overpayment of taxes within one year of when the tax was due as long as the Commissioner complies with NRS 679B.227. TP will have the right to raise affirmative and equitable defenses in response to DOI's attempt to recover any deficiency

Mr. Christopher Nielsen, Executive Director
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Dear Mr. Nielsen:

The Department of Taxation (Department), along with the Division of Insurance (Division), seeks a joint opinion regarding implementation of the Desk Audit Program

for insurance premium tax. Act of March 12, 2010, ch. 10, § 65, 2010 Nev. Stat. 53 (A.B. 6, § 65), passed during the 2010 Special Session of the Nevada Legislature, mandates that the Division implement the Desk Audit Program to audit insurance premium tax returns to ensure compliance with the provisions of NRS 680B.027 which requires an insurer to pay a tax "upon his or her direct premiums and net direct considerations written at the rate of 3.5 percent." The Desk Audit Program raises questions with respect to the joint responsibilities of the two agencies regarding application of the statute of limitations and other administrative matters related to the insurance premium tax.

QUESTION ONE

What statute of limitations should the Insurance Commissioner apply when seeking recovery of a deficiency in insurance premium tax owed under NRS 680B.027 discovered through the Desk Audit Program?

ANALYSIS

Under NRS 680B.027, "for the privilege of transacting business in [Nevada], each insurer shall pay to the Department of Taxation a tax upon his or her net direct premiums and net direct considerations written at the rate of 3.5 percent." In the absence of a waiver signed by the taxpayer, a failure to file timely returns, or the commission of fraud, NRS 360.355 gives the Department three years to notify a taxpayer the Department is not satisfied with the taxpayer's return or the amount of tax paid. In contrast, NRS 679B.227 gives the Insurance Commissioner seven years to begin proceedings to collect premium tax, in certain cases. Thus, whether the statute of limitations governing the Department (NRS 360.355) or the statute of limitations governing the Insurance Commissioner[1] (NRS 679B.227) controls the collection of a deficiency discovered through the Division's Desk Audit Program is a question of statutory interpretation.

Statutes are to be read based upon their plain meaning, and legislative history may only be relied upon in interpreting a statute when the statute is susceptible to two or more reasonable interpretations. *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); *State Div. of Ins. V. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). Also, statutes must be read in harmony with each other whenever possible; however, in the event of an irreconcilable conflict between a general statute and a specific statute, the specific statute provides the controlling authority for those cases within the scope of the specific statute. *Nev.*

[1] The Insurance Commissioner is the "chief officer of the Division." NRS 679B.020(1).

Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Finally, it is presumed that the Legislature is aware of the existing state of the law when it enacts new legislation. *Nevada-Douglas Consol. Copper Co. v. Berryhill*, 58 Nev. 261, 75 P.2d 992 (1938).

Under NRS 360.300, the Department holds authority to determine that tax is due upon review of a return or when a taxpayer fails to file a return. With limited exceptions, if the Department determines that a deficiency exists regarding the amount of tax paid, the Department must personally serve or mail a "notice of the determination of a deficiency . . . within 3 years after the last day of the calendar month following the period for which the amount is proposed to be determined or within 3 years after the return is filed, whichever period expires later." NRS 360.355.

Through NRS 679B.227, the Nevada Legislature specifically gave the insurance Commissioner authority to initiate proceedings for collection of insurance premium tax. In particular, NRS 679B.227 states:

> The Commissioner has 7 years in which to begin proceedings to collect the premium tax and associated penalties and fines imposed pursuant to NRS 680B.027 . . . where the tax has been unreported or has been concealed by error or omission, and where the amount of the tax is known or through reasonable diligence should have been known.

NRS 679B.227.

During the 2010 Special Session, the Nevada Legislature enacted Assembly Bill 6. Section 65 of A.B. 6 provides:

> Sec. 65: 1. The Division of Insurance of the Department of Business and Industry shall, not later than July 1, 2010, implement a desk audit program to audit insurance premium tax returns to ensure that insurers are complying with the provisions of NRS 680B.027.
> 2. The Commissioner of Insurance shall submit to the Fiscal Analysis Division of the Legislative Counsel Bureau, not later than June 1, 2010, a report detailing the implementation plan for the desk audit program required pursuant to subsection 1. The plan must include information

> regarding the staff needed to implement the program, the insurers to be audited, and the manner in which the amount of unpaid taxes due to the state and the results of efforts to recover unpaid taxes and penalties will be reported to the Legislature. The Commissioner must submit with the plan any requests for work program revisions or allocations from the Interim Finance Committee's Contingency Fund that are required to implement the plan.

Act of March 12, 2010, ch. 20, § 65, 2010 Nev. Stat. 97.

Accordingly, based upon the plain language of the A.B. 6, § 65, the Division, and not the Department, is charged with implementing and conducting the Desk Audit Program. The Legislature specifically tasked the Division with implementing and conducting the Desk Audit Program, and NRS 679B.227 specifically grants the Insurance Commissioner authority to initiate proceedings to collect the premium tax and any related penalties within seven years. Accordingly, the limitation periods governing the Department and the Insurance Commissioner are independent of, and can be effectuated in harmony with, each other. However, to the extent any conflict exists between the two limitations periods, NRS 679B.227 controls because it specifically authorizes the Insurance Commissioner to initiate proceedings to collect the specific tax in question, while NRS 360.355 provides a general statute of limitations for the Department. *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 989 P.2d 870 (1999).

Similarly, the presumption that the Legislature knows the state of the law supports the conclusion that the Insurance Commissioner should apply the statute of limitations in NRS 679B.227 when the Division discovers a deficiency through the Desk Audit Program. It is presumed the Legislature knew when it enacted A.B. 6 § 65 that the Department's ability to collect a deficiency was limited to three years under NRS 360.200, while the Insurance Commissioner is given seven years to initiate proceedings to recover a deficiency under NRS 679B.227. Application of this presumption leads to the conclusion that, by selecting the Division to implement and conduct the Desk Audit Program, the Legislature intended for the Insurance Commissioner–as the chief officer of the Division–to apply NRS 679B.227 in recovering deficiencies the Division discovers through the Desk Audit Program.

Finally, the conclusion that the Insurance Commissioner should apply the seven-year statute of limitations in NRS 679B.227 is consistent with relevant legislative history. In 1993, the Nevada Legislature passed Assembly Bill 782 which resulted in an extensive reorganization of Nevada's executive branch. Act of July 9, 1993, ch. 466, 1993 Nev. Stat. 1479. Assembly Bill 782 included a provision amending

NRS 680B.027, changing the recipient of the insurance premium tax from the Insurance Commissioner to the Department. Act of July 9, 1993, ch. 466, 1993 Nev. Stat. 1479. Despite this change, in 1995 the Insurance Commissioner sought enactment of the seven-year limitations' period "to begin proceedings to collect the premium tax . . . ." Hearing on A.B. 475 Before the Senate Committee on Commerce and Labor, 1995 Leg., 68th Sess. 22 (June 27, 1995). The minutes from the Senate Committee on Commerce and Labor's June 27, 1995, hearing on A.B. 475 memorialize the following exchange between Senator Randolph Townsend and Insurance Commissioner Alice Molasky:

> Senator Townsend questioned the provision in Section 12 on page 2 of the bill. He asked why the commissioner needs 7 years to begin proceedings to collect the premium tax and penalties imposed.
>
> Ms. Molasky explained the requirement affects the statute of limitations. She stated the Division of Insurance examines insurers every 3 years. She stated by the time an insurer is examined it may have been 4 years since the problem occurred. She stated by the existing statute of limitations the division cannot enforce or collect the tax. She explained if the tax problem is not discovered for 7 years, this bill will allow the division to collect the tax.

Id.

That the Legislature created the seven-year statute of limitations in NRS 679B.227, after the Legislature amended NRS 680B.027 to require payment of the insurance premium tax to the Department, demonstrates that the Legislature intended for the Insurance Commissioner's authority under 679B.227 to operate independently of the Department's role as the payee of the insurance premium tax and the Department's three-year statute of limitations under NRS 360.355.

CONCLUSION TO QUESTION ONE

The Nevada Legislature mandated that the Division implement and conduct the Desk Audit Program to ensure payment of insurance premium taxes under NRS 680B.027. Because the Legislature tasked the Division with implementing the Desk Audit Program, and the Insurance Commissioner is the chief officer of the Division, any attempt to recover a deficiency discovered through the Desk Audit Program is a proceeding initiated by the Insurance Commissioner under

NRS 679B.227. Accordingly, the Commissioner should apply the limitation period in NRS 679B.227 when a deficiency is discovered through the Desk Audit Program.

QUESTION TWO

If a taxpayer is unable to provide documentation for which the taxpayer requested a carry-forward[2] for years prior to the issuance of an informal 2008 Attorney General Opinion which said that a taxpayer must request a refund or a credit carry-forward within one year of when the tax was due, can the Division initiate proceedings to collect the amount of the "variance"[3] applied as a "carry-forward"?

ANALYSIS

As is noted above, a variance is the difference between the amount of tax paid and the amount the Division identifies is due through the Desk Audit Program. Prior to 2008, the Department did not object when a taxpayer took a credit carry-forward regardless of whether the taxpayer specifically requested the carry-forward. However, in March of 2008, the Attorney General issued an informal opinion stating NRS 680B.120(3) requires a taxpayer to request a refund or credit carry-forward of any overpayment of taxes within one year of when the tax was due. In some cases, during an audit conducted through the Desk Audit Program, the insurer is unable to provide documentation proving the taxpayer requested a carry-forward of the overpayment as a credit "against the premium tax payable by it under NRS 680B.027 in the next following calendar year." In that case, the Division disallows any credit the insurer took, which results in an amount due.

As is laid out above, an attempt to recover a deficiency in the tax owed under NRS 680B.027 that is discovered through the Desk Audit Program is a proceeding initiated by the Insurance Commissioner under NRS 697B.227. Accordingly, provided the Insurance Commissioner abides by the seven-year statute of limitations, deficiencies resulting from disallowance of a credit carry-forward may be pursued for collection. However, the Division should take into account that a the taxpayer will have the opportunity to request a hearing in order to present affirmative defenses to the Division's actions, and to seek judicial review of an order issued on the hearing, the refusal or failure to hold a hearing, or the refusal or failure to issue an order on the

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[2] A "carry-forward" occurs when an overpayment of taxes is applied as a credit toward the amount the taxpayer owes in the next calendar year. *See* NRS 680B.120(3).

[3] A "variance" is the difference between the amount of taxes paid, and the amount the Division identifies as due through the Desk Audit Program.

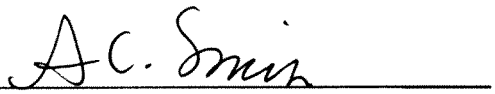
hearing under NRS Chapter 233B. *See* NRS 679B.310; NRS 679B.370; *see also* NRCP 8(c) (identifying various affirmative defenses).[4]

CONCLUSION TO QUESTION TWO

Up until the issuance of an informal AGO in 2008, establishing that a taxpayer who overpays the amount of tax owed must–within one year–request either a refund or a carry-forward, the Department did not object to a taxpayer using credit for the overpayment as a carry-forward regardless of whether the taxpayer specifically requested the carry-forward. The Division–through its chief officer, the Insurance Commissioner–can initiate proceedings to recover the deficiency arising from the application of the carry-forward with a prior request for the carry-forward, including for years prior to the 2008 informal AGO, provided the Insurance Commissioner's actions are in compliance with NRS 679B.227. However, the Division and the Insurance Commissioner should be aware that taxpayers have the ability to raise affirmative and equitable defenses in response to the Division's attempt to recover any deficiencies.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 
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cc: Scott Kipper, Commissioner, Division of Insurance

[4] Because it is the policy of the Attorney General not to speculate about what litigation strategies an opposing party might use, this opinion will not address what affirmative defenses the Division should expect when considering whether collection of the amount due is appropriate.

STATE OF NEVADA

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April 18, 2013

OPINION NO. 2013-03

TAXATION; WAGES; EMPLOYEE LEASING COMPANIES (ELCs): The payroll paid by the ELCs to leased employees in accordance with Chapter 616B of the NRS constitutes wages paid by an employer subject to imposition of the Modified Business Tax (MBT) pursuant to NRS 363B.110. Even if employees are co-employed by ELCs and client companies, the sum of the wages paid by the ELCs are subject to the MBT because the ELCs are the employer paying the wages.

Christopher G. Nielsen, Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. Nielsen:

By letter dated May 1, 2012, you have requested the opinion of this Office regarding whether the payroll of an Employee Leasing Company is subject to the Modified Business Tax and whether a co-employed status would allow for calculating the tax as if it were applicable to the client companies.

QUESTION ONE

Does the payroll of Employee Leasing Companies (ELCs) paid to leased employees in accordance with Chapter 616B of the NRS constitute wages paid by an employer subject to imposition of the Modified Business Tax (MBT) pursuant to NRS 363B.110?

ANALYSIS

The MBT was enacted in 2003. The MBT imposes an excise tax on employers based on the sum of wages paid by the employer. During the 2011 Legislative Session, the Legislature adopted the version of NRS 363B.110 that became effective on July 1, 2011 which states, in pertinent part:

> There is hereby imposed an excise tax on each *employer* at the rate of 1.17 percent of the amount by which the sum of all the *wages, as defined in NRS 612.190, paid by the employer* during a calendar quarter with respect to employment in connection with the business activities of the employer exceeds $62,500.

Act of June 16, 2011, ch. 476, § 4, 2011 Nev. Stat. 2891 (A.B. 561) (emphasis added). Pursuant to the current version of the statute, the first $62,500 in wages paid per quarter is not subject to the MBT (the exclusion).

ELCs are defined in NRS 616B.670(3) as follows:

> "Employee leasing company" means a company which, pursuant to a written or oral agreement:
> (a) Places any of the regular, full-time employees of a client company on its payroll and, for a fee, leases them to the client company on a regular basis without any limitation on the duration of their employment; or
> (b) Leases to a client company:
> (1) Five or more part-time or full-time employees; or
> (2) Ten percent or more of the total number of employees within a classification of risk established by the Commissioner.

For the purposes of imposing the MBT, the question is whether the tax is imposed on the sum of the wages paid by the ELCs or the amount of wages that would have otherwise been paid by the individual client companies.

The plain language of NRS 363B.110 imposes the MBT on "each *employer* at the rate of 1.17 percent of the amount by which the sum of all the *wages . . . paid by the employer* . . . exceeds $62,500." (emphasis added). Because the ELCs, and not the client companies, pay the wages of the employees, the tax is properly imposed on the sum of all wages paid by the ELCs.

In addition, the wages paid to the employees of an ELC are paid "with respect to employment in connection with the business activities of the employer . . ." because the ELC is in the business of leasing employees. NRS 363B.110(1). NRS 616B.691(1) also states that it is the ELC and not the client company that is the employer of the leased employees. Consequently, the ELCs are the employers paying the wages and only the first $62,500.00 in total wages paid by the ELCs are excluded from application of the MBT.

Even though the meaning is plain and statutory construction is not required, the legislative history for A.B. 561 lends further support to the conclusion that the MBT is imposed on the sum of the wages paid by the ELCs. A.B. 561 was amended before it was passed. As "introduced," A.B. 561 included Section 3 which stated:

> 1. The amount of the tax imposed by NRS 363B.110 on an employee leasing company for each calendar quarter must be calculated by:
> (a) Determining separately for each client company to whom the employee leasing company leases employees the amount of the tax based upon the sum of all the wages paid by the employee leasing company during that calendar quarter with respect to the employment of its employees for the purpose of leasing those employees to that client company; and
> (b) Determining separately the amount of the tax based upon the sum of all the wages paid by the employee leasing company during that calendar quarter with respect to the employment of its employees in connection with its business activities for any purpose other than the leasing of those employees to a client company.

As a result of amendments adopted on June 5, 2011, Section 3 was deleted from the Bill.

The Legislative minutes explain the issue and why Section 3 was removed from the bill. Helen Foley, representing the ELCs, requested that Section 3 not be eliminated. Hearing on A.B. 561 Before the Assembly Committee on Ways and Means, 2011 Leg., 76th Sess. 29 (May 25, 2011). Ms. Foley argued, "Section 3 allowed each individual business to be considered separately and then pay that amount of tax instead of being treated differently from any other business in Nevada." *Id.* Responding to questioning regarding Section 3, Russell Guindon, Principal Deputy Fiscal Analyst stated:

> We were directed that those provisions be removed under the understanding the Modified Business Tax (MBT) is tied

> to wages paid by an employer to the employees. The MBT is tied to *Nevada Revised Statutes (NRS) 612. The employer reporting those wages for those employees is the employee leasing company.* There is consistency in regard to the administration of the MBT. *For the Department of Taxation, the wages reported are for the employees of the employee leasing company, which is consistent with NRS 612. The provisions were removed to keep consistency with the MBT.*

Hearing on A.B. 561 Before the Senate Committee on Revenue, 2011 Leg., 76th Sess. 2 (June 6, 2011) (emphasis added). Shortly after Mr. Guindon's comments were made, the motion to pass carried. *Id.* at p. 3. According to the legislative history, the ELCs are the employers paying wages to all the employees on their payroll for purposes of the MBT.

CONCLUSION TO QUESTION ONE

The payroll paid by the ELCs to leased employees in accordance with Chapter 616B of the NRS constitutes wages paid by an employer subject to imposition of the MBT pursuant to NRS 363B.110.[1]

QUESTION TWO

Does the analysis regarding payment of the MBT change if employees are co-employed by ELCs and the client companies?

ANALYSIS

Whether the leased employees are co-employed by the ELC and the client company does not change the answer to Question One. As stated above, NRS 363B.110 imposes the MBT on the employer who pays the wages. Therefore, even if it could be determined that the leased employees are "co-employed," the ELC is the employer who pays the wages as set forth in the analysis section regarding Question One above.

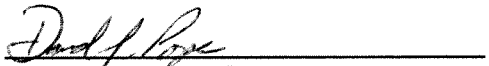
[1] Only the first $62,500.00 of the total wages paid by the ELC is excluded from application of the MBT. NRS 363B.110.

CONCLUSION TO QUESTION TWO

Even if employees are co-employed by ELCs and client companies, the sum of the wages paid by the ELCs are subject to the MBT because the ELCs are the employer paying the wages.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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April 25, 2013

OPINION NO. 2013-04

TAXATION; RED-DYED DIESEL FUEL; EXEMPTION; SALES / USE TAX. Opinion is another in a line of opinions since 1955 analyzing issues related to red-dyed diesel fuel. Fuel is exempt from sales and use tax pursuant to NRS 372.275 if it is a kind used in internal-combustion or diesel engines to propel a motor on the highway; and it is actually used in an internal-combustion or diesel engine. Red-dyed diesel burned in a diesel-powered generator to produce electricity for commercial use is exempt from sales and use tax; red-dyed diesel used in an open burner is not exempt from sales and use tax. The Department of Taxation can deny the exemption to retailers that do not provide sufficient documentation to prove the red-dyed diesel was sold for use in an internal-combustion or diesel engine.

Christopher G. Nielsen, Executive Director
State of Nevada, Department of Taxation
1550 College Parkway, Suite No. 115
Carson City, NV 89706

Dear Mr. Nielsen:

You have requested an opinion from this Office regarding the application of sales and use tax to red-dyed diesel fuel in Nevada. This Opinion will address the two different scenarios presented and the documentation necessary to support the exemption in NRS 372.275.

QUESTION ONE

Is red-dyed diesel fuel used to run a diesel-powered generator for commercial use exempt from sales and use tax pursuant to NRS 372.275?

ANALYSIS

Red-dyed diesel fuel refers to dyed special fuel defined in NRS Chapter 366, the special fuels chapter enforced by the Department of Motor Vehicles. The Department of Motor Vehicles collects taxes on special fuels. Dyed special fuel is defined as "special fuel which, in accordance with subsection 1 of NRS 366.203, must be dyed before it is removed for distribution from the rack." NRS 366.0255. The fuel is dyed so that it is easily identified as exempt from taxation by the Department of Motor Vehicles under NRS Chapter 366. NRS 366.203. There are exempt uses for dyed special fuel on and off the public highways. NRS 366.200.

The Department of Taxation is responsible for the collection and distribution of sales and use tax. NRS Chapters 372 and 374.[1] Generally, sales and use taxes do not apply to fuels that are subject to the fuel taxes enforced by the Department of Motor Vehicles. The statute exempting fuel from sales and use tax administered by the Department of Taxation does not make any specific reference to red-dyed diesel fuel or dyed special fuel. NRS 372.275 states:

> There are exempted from the taxes imposed by this chapter the gross receipts from the sale and distribution of, and the storage, use or other consumption in this State of, any combustible gas, liquid or material of a kind used in an internal or combustion or diesel engine for the generation of power to propel a motor vehicle on the highways.

Red-dyed diesel fuel is fuel of a kind used in diesel engines to propel a motor vehicle on the highway. For purposes of the exemption in NRS 372.275, red-dyed diesel fuel and diesel fuel that has not been dyed are treated the same.

Questions regarding the application of the exemption for combustible gas, liquid, or material (hereafter "fuel") pursuant to NRS 372.275 have been previously addressed

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[1] NRS Chapter 372 imposes a state-wide sales and use tax which goes into the state's general fund. NRS Chapter 374, which imposes a state-wide county sales and use tax to support local schools, is in all relevant respects identical to NRS Chapter 372. NRS 372.275 and NRS 374.280 which reference the fuel exemption are notable exceptions that will be more fully addressed below. Unless specifically noted, all further references to NRS Chapter 372 should be construed as references to corresponding provisions of NRS Chapter 374 as well.

by several Attorney General Opinions ("AGOs") issued by this Office. Op. Nev. Att'y Gen. No. 1955-53 (April 29, 1955) concludes that the exemption applies more broadly than just to fuel "used in an internal or combustion or diesel engine for the generation of power to propel a motor vehicle on the highways." Because the exemption uses the language "of a kind," the exemption applies to any fuel of the same class, grade, or sort as that used to propel a motor vehicle on the highways, regardless of whether such fuel actually is used to propel a motor vehicle on the highway. *Id.*

Op. Nev. Att'y Gen. No. 1955-53 (April 29, 1955) is clarified in Op. Nev. Att'y Gen. No. 1955-61 (May 16, 1995) issued one month later. The Nevada Tax Commission requested further analysis regarding the uses of fuel that qualify for the exemption in NRS 372.275. The conclusion of the subsequent opinion is that the fuel must not only be "of a kind" used in an internal combustion or diesel engine, the fuel must also actually be used in an internal combustion or diesel engine.

Op. Nev. Att'y Gen. No. 1970-667 (May 22, 1970) revisits the fuel exemption in NRS 372.275. The opinion notes that there is a slight difference in wording between exemption for fuel in NRS 372.275 and the corresponding provision in NRS 374.280. NRS 372.275 refers to "an internal or combustion or diesel engine" whereas NRS 374.280 specifies "an internal-combustion or diesel engine." The opinion sought to harmonize the different wording in the two statutes. Since the previous AGOs concluded that to be exempt the fuel had to be actually used in an engine, this opinion clarified that the language used in NRS 374.280 was the most recently added and that the legislature intended the exemption be applied to fuel used in an internal-combustion engine or diesel engine.

To summarize the previous AGOs that have been issued, fuel is exempt from sales and use tax pursuant to NRS 372.275 if:

1. It is of a kind used in internal-combustion or diesel engines to propel a motor vehicle on the highway; and

2. It is actually used in an internal-combustion or diesel engine.

Question One pertains to red-dyed diesel fuel used in a diesel-powered generator. The generator uses a diesel engine to produce electricity for commercial use. The red-dyed diesel fuel is fuel of a kind that is used to propel a motor vehicle on the highway and it is actually used in a diesel engine. Thus, both criteria are satisfied. The red-dyed diesel fuel, in this instance, is exempt from sales and use tax pursuant to NRS 372.275 even though the diesel engine is used to power a generator and not to propel a motor vehicle on the highway.

CONCLUSION TO QUESTION ONE

Red-dyed diesel fuel that is used in a diesel-powered generator to produce electricity for commercial use is exempt from sales and use tax pursuant to NRS 372.275.

QUESTION TWO

Is red-dyed diesel fuel purchased for use in an open burner exempt from sales and use tax pursuant to NRS 372.275?

ANALYSIS

The same analysis from Question One applies to Question Two, but with a different result. The red-dyed diesel fuel in this example is burned in an open burner and not in an internal-combustion or diesel engine. So even though the red-dyed diesel fuel in this scenario is also fuel of a kind used in internal-combustion or diesel engines to propel a motor vehicle on the highway, it is not actually used in an internal-combustion or diesel engine.

CONCLUSION TO QUESTION TWO

Red-dyed diesel fuel that is used in an open burner is not exempt from sales and use tax because it is not actually used in an internal-combustion or diesel engine.

QUESTION THREE

Can the Department deny the exemption on retail sales of red-dyed diesel fuel to retailers who do not possess the necessary documentation to verify the exemption?

ANALYSIS

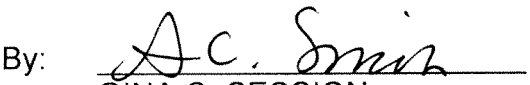
Exemptions from taxation are narrowly construed in favor of taxation. *Sierra Pac. Power Co. v. Dep't of Taxation,* 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980). "Exemptions, no matter how meritorious, are of grace and must be strictly construed . . . [and] embrace only what is strictly within their terms." *Dep't of Taxation v. DaimlerChrysler Serv. North America, LLC*, 121 Nev. 541, 545, 119 P.3d 135, 137 (2005). A taxpayer has the burden to prove that he or she qualifies for a statutory exemption from taxation. Based on the analysis above, a taxpayer wishing to be exempt from taxation pursuant to NRS 372.275 must prove that the red-dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

NRS 366.733(2) requires a purchaser of dyed special fuel to provide to the retailer a written statement of acknowledgment and intended use of the fuel on a form provided by the Department of Motor Vehicles. The retailer is required to keep the written statement on file. NRS 366.733(3). Although this documentation is required for the administration of Chapter 366, it may also provide support for a claim for exemption pursuant to NRS Chapter 372. A retailer that is not able to produce the documentation required by NRS 366.733 may nevertheless qualify for the exemption in NRS 372.275 if he or she produces some other form of documentation proving that the dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

CONCLUSION TO QUESTION THREE

The Department of Taxation can deny the exemption on retail sales of red-dyed diesel fuel to retailers who do not provide documentation proving that the red-dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

CATHERINE CORTEZ MASTO
Attorney General

By: 
GINA C. SESSION
Chief Deputy Attorney General
Bureau of Government Affairs
Business and Taxation Division

GCS/AKG

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July 24, 2013

OPINION NO. 2013-05

BAIL; BONDS; FEES: Nevada law does not allow bail agents to collect renewal premiums for bonds held open by a court for more than one year.

Scott Kipper, Commissioner of Insurance
Department of Business & Industry
Division of Insurance
1818 East College Pkwy, Suite 103
Carson City, Nevada 89706

Dear Commissioner Kipper:

You have requested an opinion from the Attorney General's Office regarding the legality of charging annual renewal premiums for bail bonds in Nevada.

QUESTION

Does Nevada law allow bail agents to collect renewal premiums for bonds held open by a court for more than one year?

ANALYSIS

Bail is regulated by the Division of Insurance pursuant to the provisions of chapter 697 of the Nevada Revised Statutes (NRS), corresponding regulations, and other applicable law. NRS 697.300 addresses the charges and collections that a Nevada bail agent is permitted to make. NRS 697.300(1)(a) provides:

> 1. A bail agent shall not, in any bail transaction or in connection therewith, directly or indirectly, charge or collect money or other valuable consideration from any person except for the following purposes:

> (a) To pay the premium at the rates established by the insurer, in accordance with chapter 686B of NRS, or to pay the charges for the bail bond filed in connection with the transaction at the rates filed in accordance with the provisions of this Code. *The rates must be 15 percent of the amount of the bond* or $50, whichever is greater.

NRS 697.300(1)(a) (emphasis added).[1, 2]

It is a basic tenet of the law of statutory construction that when a statute's language is plain and unambiguous and "the statute's meaning clear and unmistakable, the courts are not permitted to look beyond the statute for a different or expansive meaning or construction." *See DeStefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1239–1240 (2005). It is unequivocal that the language of NRS 697.300(1)(a) references 15 percent as a fixed percentage of the *amount of the bond*; there is no reference to a term or duration. "[W]hen the Legislature chooses one option and not another, it is presumed that the Legislature did so purposely." *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 541 n.27, 26 P.3d 753, 759 n.27 (2001) citing *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Pursuant to NRS 178.502, the amount of the bond is determined by the magistrate, judge or justice, and the bond "[r]emains in effect until exonerated by the court." NRS 178.502(2)(b). Any charge for premium on the same bond in addition to the amount expressly provided would violate NRS 697.300(1)(a) and NRS 697.310.[3]

It appears from your letter that some sureties and bail agents improperly include a provision for annual bond renewal in the contracts signed by consumers; however, it is well settled that contracts made in violation of a regulatory statute are illegal contracts, and have been expressly denounced by the courts and declared void. "*If a contract . . . is at variance with the statutory requirement, it is against public policy and void.*" *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 484, 488 P.2d. 1151, 1154 (1971) (emphasis added).[4]

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[1] Although referenced in the above statute, in 2003, the Nevada Legislature amended NRS 686B.030 making NRS 686B.010–.1799 inapplicable to surety insurance. *See* NRS 686B.030(1)(h).

[2] "Premium" means the consideration for insurance, by whatever name called. The term includes any "assessment," or any "membership," "policy," "survey," "inspection," "service" or similar fee or other charge assessed or collected by the insurer or an agent of the insurer in consideration for an insurance contract or its procurement. NRS 679A.015.

[3] NRS 697.310 also provides: "Except to the extent permitted by paragraphs (c) and (d) of subsection 1 and subsection 2 of NRS 697.300, a licensee shall not make any charge for the services of the licensee in a bail transaction in addition to the premium or the charge for a bail bond at the rates filed in accordance with the provisions of this Code."

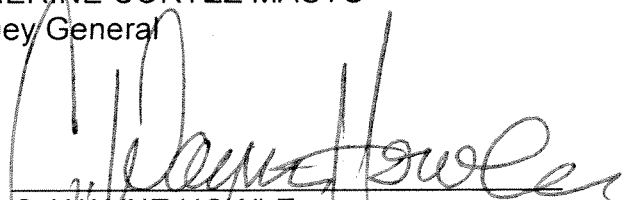
[4] A contract may or may not survive when an invalid term is severed from the contract. Some contracts may expressly address severability; each contract from which an invalid term is severed will require individual evaluation. *See generally Dredge Corp. v. Wells Cargo, Inc.*, 82 Nev. 69, 73, 410 P.2d 751,

CONCLUSION

Nevada law does not allow bail agents to collect renewal premiums for bonds held open by a court for more than one year.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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754 (1966) (recognizing the severability doctrine but noting that "the words used and the subject matter involved show the intention of the parties").

STATE OF NEVADA

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GREGORY M. SMITH
Chief of Staff

August 15, 2013

OPINION NO. 2013-06

CITIZENS; PUBLICATION; DELINQUENCY: The City may if it chooses publish names of municipal utilities customers who are delinquent in their payments. There is a strong governmental purpose in collecting delinquent payments, and any counter-vailing privacy interest does not outweigh the government's purpose. The City may not, however, disclose the customers' account numbers, which are protected by express statutory provision.

Kevin R. Briggs, Esq.
Ely City Attorney
501 Mill Street
Ely, Nevada 89301

Dear Mr. Briggs:

This letter is in response to your inquiry regarding the public nature of municipal utility customers' personal information.

QUESTION

Whether a delinquent municipal utility customer's personal information is per se a public record or should a balancing test be applied to protect his/her personal information?

ANALYSIS

You indicate in your letter that the Ely City Council is considering the publication of the names, addresses, and account numbers of persons who are delinquent, or "in

arrears," in their municipal utility payments. You ask if "this list is per se public or whether a balancing test should be applied to protect the privacy interests of our citizens?" Your opinion request notes that persons who are delinquent in payment of their property taxes have their names published in the local newspaper annually. You inquire whether publication of delinquent public utility customers could be similarly treated.

As an initial matter, publication of tax delinquencies is mandated by NRS 361.565(1) which provides: "Except as otherwise provided in subsection 3, if the tax remains delinquent 30 days after the first Monday in April of each year, the tax receiver of the county shall cause notice of the delinquency to be published." NRS 361.565(1). There is no such corollary provision with regard to delinquent public utility customers. Therefore, the fact that delinquent taxpayers' names are published in the local newspaper offers no applicable precedent for publishing the personal information of delinquent municipal public utility customers.

The next sources of statutory authority to review in reference to your question are NRS Chapter 239, Public Records and NRS Chapter 239B, Disclosure of Personal Information to Governmental Agencies. NRS 239.010(1) provides that all records of a governmental entity that are not confidential are open to "any person" for inspection and copying. It goes further to state that an "abstract" may be prepared from the public records and may be used to the advantage of the governmental entity.

> 1. Except as otherwise provided in subsection 3, all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. . . .

NRS 239.010(1).

Thus, NRS 239.010 makes disclosure of all public records a matter of legislative mandate upon request. Without more, all the records of a municipal utility, including personal customer information, would be public records unless declared by law to be confidential. However, decisions by the Nevada Supreme Court have

imposed limits on NRS 239.010 by requiring application of a balancing test. Recently, in *Reno Newspapers Inc. v. Gibbons*, 127 Nev.___, 266 P.3d 623 (Adv. Op. 79, December 15, 2011), the Court in line with its previous holdings stated:[1]

> We also reiterated that when the requested record is not explicitly made confidential by a statute, the balancing test set forth in *Bradshaw* must be employed, explaining that "[i]n *Bradshaw* this court, at least by implication, recognized that any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or 'weighing' of the interests of non-disclosure against the general policy in favor of open government."

Id. 127 Nev. at ___, 266 P.3d at 627.

Certain personal information is made confidential by statute. NRS 239B.030(2) makes confidential personal information submitted to a governmental agency on or after January 1, 2007. NRS 239B.030(7) defines "personal information" by cross-reference to NRS 603A.040.

NRS 603A.040 defines "personal information" as follows:

> "Personal information" means a natural person's first name or first initial and last name in combination with any one or more of the following data elements, when the name and data elements are not encrypted:
> 1. Social security number.
> 2. Driver's license number or identification card number.
> 3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.
>
> The term does not include the last four digits of a social security number, the last four digits of a driver's license number or the last four digits of an identification card

[1] *See, Donrey of Nevada v. Bradshaw,* 106 Nev. 630, 798 P.2d 144 (1990); *DR Partners v. Bd. of County Comm'rs,* 116 Nev. 616, 6 P.3d 465 (2000); and *Reno Newspapers v. Sheriff,* 126 Nev. ___, 234 P.3d 922 (Adv. Op. 23, July 1, 2010). These decisions are relevant even though they involve claims made by parties requesting public records as compared to your question about a voluntary governmental publication of records.

> number or publicly available information that is lawfully made available to the general public.

NRS 603A.040.

Therefore, disclosure of delinquent municipal customer's name and account number is prohibited by law.

There is no express statutory protection for information other than an account number. Therefore, the remainder of the City's records regarding its customers' delinquency must be considered under the framework supplied in *Donrey* and succeeding decisions. "[O]pen records are the rule, and any nondisclosure of records is the exception." *Reno Newspapers, Inc. v. Gibbons,* 266 P.3d at 627 (internal quotation and citations omitted).

> In the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access.

Id. (citations omitted).

The government's interest in the circumstances here supports openness; after all, it is the government's interest in collecting delinquent payments that motivates it to publish delinquent customer's names. This is a widely recognized governmental purpose. As one court has stated, "[i]t is an appropriate exercise of the police power to require the publication of a list of persons who have not complied with their legal obligations under appropriate circumstances." *Jackel v. Green,* 2013 WL 2394855 at *5 (Ky. App. 2013) (unpublished).

Also in the circumstances, there is no compelling, competing privacy interest of delinquent customers. *See e.g., Attorney General v. Collector of Lynn,* 385 N.E.2d 505 (Mass. 1979):

> Public disclosure of the lists of tax delinquents does involve some invasion of personal privacy. Publication of one's name on such a list would certainly result in personal embarrassment. . . . However, we cannot say that disclosure publicized intimate details of a highly personal nature. . . . While [a tax delinquent] may have some

> expectation of privacy in real estate tax records, he does not have the same expectation of privacy concerning his legal obligation as he has in his private financial affairs.

Id. at 508-09. *See also Sully Equipment Rentals, Inc. v. Does 1 through 100,* 554 F. Supp. 141, 144 (C.D. Cal. 1982) (Pension trustees' publication of name on delinquency list was lawful because delinquent party was legally obligated to make contributions to fund and was in fact delinquent).[2]

Therefore, balancing performed under the Nevada Supreme Court's public records precedents supports the City's desire to publish names of municipal utilities customers who are delinquent in their payments.

CONCLUSION

The City may if it chooses publish names of municipal utilities customers who are delinquent in their payments. There is a strong governmental purpose in collecting delinquent payments, and any countervailing privacy interest does not outweigh the government's purpose. The City may not, however, disclose the customers' account numbers, which are protected by express statutory provision.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By:

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SSC/SLG

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[2] Regarding privacy interest, see generally Annotation, *Public disclosure of person's indebtedness as invasion of privacy,* 33 A.L.R.3d 154 (1970). Also note that publication for improper purposes may support a tort cause of action, *Humphers v. First Interstate Bank of Oregon,* 696 P.2d 527, 532 (Or. 1985) ("[d]eliberately harassing debt collection methods may be tortious [even] without publicity or invasion of privacy"), as may publication of false information. *Ag-Chem Equipment Co, Inc. v. Hahn, Inc.,* 480 F.2d 482, 491 (8th Cir. 1973) ("Minnesota law recognizes that a false statement of an overdue account, as alleged here, may be defamatory per se. . . .")

STATE OF NEVADA

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September 23, 2013

OPINION NO. 2013-07

BONDS; ELKO COUNTY; IMPROVEMENT DISTRICTS. Elko County cannot create a Special Improvement District (SID) under NRS chapter 271 and issue bonds for the creation of infrastructure improvements that are owned and operated by for-profit companies.

Mark Torvinen, Elko County District Attorney
Office of the Elko County District Attorney
540 Court Street, Second Floor
Elko, Nevada 89801-3515

Dear Mr. Torvinen:

You have asked this office for an opinion regarding the ability of Elko County to issue local government bonds for improvements under NRS Chapter 271 where the improved property is owned and operated by a for-profit corporation.

QUESTION ONE

Can Elko County create a Special Improvement District (SID) under NRS Chapter 271 and issue bonds for the creation of infrastructure improvements, including the creation and operation of a sewer system and a natural gas pipeline, both owned and operated by for-profit companies?

ANALYSIS

Elko County is home to approximately 50,000 Nevadans, approximately 18,000 of whom live in the Elko suburbs of Spring Creek, Lamoille, and South Fork. In conjunction with development of the land in that area, a developer has asked Elko County to create a SID and issue development bonds, under NRS Chapter 271, in an approximate amount of $7.5 million in order to assist the financing of a residential development in Spring Creek, Lamoille, and South Fork. The bonds would assist in financing the infrastructure development required for additional phases of development of private property into residences for the expanding population in Elko County. The parcel of property to be developed is wholly owned by the developer, who would sell the subdivided parcels to the property owners. As part of the sales, parcel owners would pay to connect into the infrastructure services financed by the bonds. These payments would be applied to payment of the bonds' financing obligations.

The proposed infrastructure improvements include, but are not limited to, a roundabout on a state highway at the entrance of the residential development; partial pavement of various streets within the SID; construction of gravel roads with the intention to pave at a later date; construction of curbs, gutters, and sidewalks within the residential development; construction of a sewer treatment facility; construction of approximately one mile of sewer main line; and construction of six miles of natural gas pipeline.

Once constructed, operation of the sewer treatment facility would be conducted by a private for-profit water company, regulated by the Public Utilities Commission of Nevada (PUC). Similarly, once constructed, the natural gas pipeline would be turned over to the natural gas purveyor in Elko, which is a private, for-profit company, regulated by the Nevada PUC.

Several legal authorities are relevant to the analysis at the outset. A county in Nevada is a "creature of the legislature," whose power is exclusively derived from the Legislature. *Pershing County v. Sixth Jud. Dist. Ct.*, 43 Nev. 78, 84, 181 P. 960, 961 (1919). "Under traditional legal principles, the scope and extent of a county's authority to act is contained within, and limited by, it's [sic] enabling statutes." Op. Nev. Att'y Gen. No. 95-03 (March 13, 1995); *see also* Op. Nev. Att'y Gen. No. 2000-10 (March 8, 2000). "In short, [a county] can exercise only those powers that are expressly granted to it by law, or by such implication as are reasonably necessary to carry out the express powers." Op. Nev. Att'y Gen. No. 95-03 (March 13, 1995), citing Op. Nev. Att'y Gen. No. 874 (February 21, 1950).

The Consolidated Local Improvements Law, codified at NRS Chapter 271, provides municipalities the authority to fund acquisition, improvement, maintenance, and operation of a project that is in the public interest. NRS 271.020(2). "Municipalities" are defined as "any county, unincorporated town or city in the State." NRS 271.145(1). Elko County is thus a municipality for purposes of Chapter 271. Further, a project is defined as "any structure, facility, undertaking or system which a municipality is herein authorized to acquire, improve, equip, maintain or operate." NRS 271.175.

Generally under the Consolidated Local Improvements Law, municipalities, such as Elko County, are authorized to engage in projects as set forth in NRS 271.265. This power is expanded by the collateral powers expressed in NRS 271.270. However, the exercise of powers under Chapter 271 must be in conformity with the constitutional requirements for distribution of public funds and the expressed legislative intent that the action be in the public interest.

The Legislature has the power to appropriate money as it sees fit, except as limited by Nevada's Constitution including, Article 8, § 9. *State ex rel. Ash v. Parkinson*, 5 Nev. 15, 27 (1869).

Pursuant to the express language of the Nevada Constitution, the State is prohibited from donating money to companies, associations, or corporations. Specifically, "[T]he State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." NEV. CONST. art. 8 § 9. This prohibition, however, does not apply to spending by cities, counties, municipal corporations, or other governmental entities. *Gibson v. Mason*, 5 Nev. 283, 301 (1869). Limits on political subdivisions are contained in Article 8, §10 which states: "[n]o county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation or association whatever; or loan its credit in aid of any such company, corporation or association, except railroad corporations, companies or associations." NEV. CONST. art. 8, § 10. The omission from Article 8, § 10, of a prohibition against donations such as that contained in Article 8, § 9, leads to the conclusion that it was not intended to prohibit such donations by political subdivisions. *Gibson*, 5 Nev. at 301 (1869); Op. Nev. Att'y Gen. No. 1995-15 (August 11, 1995).

However, the counties' discretionary authority to grant sums of money is still subject to constitutional restraints. *See State of Nevada ex. rel. Brennan v. Bowman*, 89 Nev. 330, 332, 512 P.2d 1321, 1322 (1973) ("Public funds may not be spent for private purposes . . . if the County were to levy a tax to retire the bonds and if the purpose of the bond issue was private rather than public in nature, the law would be

struck down." (internal citations omitted). The constitutional restraint in this instance is the public purpose doctrine, requiring that expenditure of public funds be made in the furtherance of a public purpose.

As a general proposition, "[t]he issue of public bonds that must be paid for by public funds raised by the process of taxation must be for a public purpose." 64 Am. Jur. 2d Public Securities and Obligations § 88 (2013). This rule is constitutionally based:

> It has been recognized in several cases that state power to issue state bonds to be paid by raising money through taxation is subject to the limitation upon state power created through the Due Process Clause of the 14th Amendment to the Federal Constitution, for it is settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes.
>
> Even as to revenue bonds, a municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function that is not in a legal sense public in nature.

Id. See also Potter v. Judge, 444 N.E.2d 821, 823 (Ill. App. 1983) ("The 'public purpose' analysis rests, in part, upon the long-settled principle that the imposition of taxes for non-public purposes contravenes due process of law.") (citing *Green v. Frazier*, 253 U.S. 233 (1920)). *Brown v. Longiotti*, 420 So.2d 71, 72 (Ala. 1982) ("[t]he limitation that public money and credit can only be used for 'public purposes' is a matter of due process and implicit in the [state's] Constitution" and overall, "the premise that all appropriations or expenditures of public money . . . must be for public purpose as opposed to a private purpose" is widely held.) *Citing* 15 McQuillin, Mun. Cor. § 39.19 (3d Ed.)).

The court will determine what are constitutionally permissible public purposes, but the question in the first instance is for the legislature to determine and its opinion must be given great weight by the court. *Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424, 433-34 (Wis. 1996).

For a project to be properly within the Consolidated Local Improvements Law, it must conform to the public purpose doctrine. In the circumstances here, there is no predominant public purpose or close relationship to the public welfare.

It is axiomatic in Nevada law that a political subdivision cannot engage in a for-profit enterprise. Public funds may not be spent for private purposes. *State ex rel. Brennan*, 89 Nev. at 332, 512 P.2d at 1322. Where public funds are spent, there is close scrutiny to ensure there is a public benefit generated by the expenditure. *See Clark County v. Lewis*, 88 Nev. 354, 357, 498 P.2d 363, 365 (1972). These principles are similarly present when evaluating the requirements for development bonding under NRS Chapter 271. NRS 271.335(11) requires that the advantages resulting from the creation of a SID be to the municipality and the public:

> It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state . . . must have primarily a public rather than a private purpose. A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002) (quoting *Idaho Water Res. Bd. v. Kramer*, 548 P.2d 35, 59 (Idaho 1976). Compare *Everett v. County of Clinton*, 282 S.W.2d 30, 39 (Mo. 1955) (upholding county operation of rock quarry, where "[T]he record . . . satisfactorily refutes the theory that the county was engaging in a commercial enterprise. It was not a business venture for profit.")).

Development of private property for the pecuniary benefit of developers and non-governmental utility operators does not fulfill the public purpose requirement. Review of the public purpose requirement demonstrates that there is "no authority which would dignify that objective, standing alone, as a public purpose." Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002) (*citing City of Corbin v. Kentucky Util. Co.*, 447 S.W.2d 356, 358 (Ky. 1969)). The determination of public purpose is based upon the activity as a whole, and must demonstrate "a predominance of a public purpose [or a] close relationship to the public welfare . . . ." *City of Corbin*, 447 S.W.2d at 359.

While public purpose law and its interpretation have evolved, they do not appear to have moved to a point where a county may provide project funding to private entities for development of residential real estate for the primary benefit of the developer and the third party utility service operators. For the funding of a SID under NRS Chapter 271 to be permissible, it must have a predominantly "public purpose" or maintain such a close relationship to the public welfare to consist of a permissible use of county bonding authority. Op. Nev. Att'y. Gen. 2002-15 (March 20, 2002); *Siegel v. City of Branson*, 952 S.W.2d 294, 297 (Mo. App. 1997) ("No hard and fast rules exist for determining whether specific uses and purposes are public or private . . . [t]he concept is elastic and

keeps pace with changing conditions.") No such connection exists here, and therefore the public purpose is not served by the issuance of the development bonds.

As part of your opinion request, you indicated your belief that the competitive bidding process for contracts for public work set forth in NRS Chapter 338 is applicable to a project undertaken to create a SID and issue public financing based on the facts set forth above. We agree. Pursuant to the requirements for the creation of a SID the anticipated improvements must be carried out either through: (i) municipally owned or leased equipment and officers; or (ii) by an independent contractor operating under an approved contract with the SID. NRS Chapter 338 sets out the applicable requirements for approval of a contract between a SID and an independent contractor. It is our understanding that the County will not provide municipally owned or leased equipment, and the developer is not associated with the County; therefore, the competitive bidding requirements of NRS Chapter 338 are applicable, requiring that the project be competitively bid.

Additionally, the express statutory language of NRS 271.335 provides that any project undertaken pursuant to NRS Chapter 271 must be subject to the competitive bid process of NRS Chapter 338. NRS 271.335(3); *see also Carson-Tahoe Hospital v. Bldg. & Constr. Trades Council of N. Nevada*, 122 Nev. 218, 128 P.3d 1065 (2006).

In *Carson-Tahoe Hospital*, the court considered whether NRS 244A.763(5) required workers to be paid prevailing wages for a private project funded through public economic development bonds. *Id.* at 219, 128 P.3d at 1066. The court held that the requirements of the prevailing wage laws apply only to those projects mandated to pay prevailing wages. Special Improvement Districts created under NRS Chapter 271 are expressly required to pay prevailing wages pursuant to NRS Chapter 338, unless limited statutory exceptions apply. While *Carson-Tahoe Hospital* dealt with the narrow issue of prevailing wages, the applicability of the legislative scheme set forth in Chapter 338, and therefore the applicability of Chapter 338 as a whole was expressly affirmed by the court. Additional statutory requirements, such as competitive bidding, are similarly required where private project funding is to be made through economic development bonds. After review of the facts as presented and the statutory exceptions, the exceptions are inapplicable in this instance. If a SID were created to implement the request of the developer as set forth above, it would be subject to the requirements of NRS Chapter 338, including the competitive bidding process.

CONCLUSION TO QUESTION ONE

Counties, as subdivisions of the State, derive their powers exclusively from legislative delegation. There is no provision of Nevada law that, either expressly or

by implication, permits the formation of a SID and distribution of municipal funds for the enhancement of private property, where the property remains in the hands of private for-profit entities, and is operated by private for-profit entities. While Nevada law authorizes municipal governments to undertake projects intended to fulfill various public purposes, there is no indication that the intended SID satisfies the requirements of NRS Chapter 271 specifically or the policy of the State of Nevada generally. The creation of a SID and the funding of a project with municipal funds pursuant to NRS Chapter 271 for the purpose of providing financing for the construction of infrastructure improvements relating to private for-profit development of a residential community, followed by operation of such infrastructure by for-profit entities for the benefit of those entities, is contrary to the public purpose doctrine. Therefore, while not violating the constitutional prohibitions against extension of municipal funds, the creation of such a SID would violate Nevada law, as well as the stated policy for creation of such districts, and is therefore impermissible.

QUESTION TWO

Can Elko County create a SID under NRS Chapter 271 and issue bonds to finance the creation of a natural gas pipeline owned and operated by a for-profit company?

ANALYSIS

There is no express authorization within NRS Chapter 271 for the creation of a SID or the extension of municipal funds for the purpose of installing a natural gas pipeline. Elko County lacks such authority under Nevada law.

NRS 271.265 sets forth projects for which bonding under NRS Chapter 271 are available. There is no provision for creation of natural gas pipelines within NRS 271.265. The specificity with which the Legislature defined and authorized the general powers of counties, cities, and towns should be construed consistently with the legal maxim "expressio unius est exclusio alterius," which means "the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). *See also Ronnow v. City of Las Vegas*, 57 Nev. 332, 342, 65 P.2d 133, 136 (1937) (strict construction applied to legislative grant of powers to municipality); *Clark Co. Sports Ent., Inc., v. City of Las Vegas*, 96 Nev. 167, 174, 606 P.2d 171, 176 (1980) (Legislature would have provided language of inclusion if it intended it); *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1060, 944 P.2d 835, 842 (1997) (court is reluctant to imply a right not granted by the Legislature in NRS 533.040 because of the maxim "expressio unius est exclusio alterius").

CONCLUSION TO QUESTION TWO

Without the specific determination by the Legislature that a natural gas pipeline project is within the powers conveyed by Chapter 271, Elko County cannot issue bonds to provide financing under the Consolidated Local Improvements law.

Sincerely,

CATHERINE CORTEZ MASTO
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By:

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December 27, 2013

OPINION NO. 2013-08

MEDICAL EXAMINERS; CONFIDENTIALITY; JUDGMENTS: Reports submitted pursuant to NRS 630.3067, 630.3068, and 690B.250, are public records within the meaning of NRS 239.010 and must be open to public inspection. The report submitted pursuant to NRS 630.260, is a public record within the meaning of NRS 239.010, and the Commissioner of Insurance is prohibited from making the information contained in that report confidential pursuant to NRS 679B.190 due to the plain reading of NRS 690B.260. The reports received from the National Practitioner Data Bank are deemed confidential by federal law and are not public records within the meaning of NRS 239.010.

Edward O. Cousineau, Esq.
Deputy Executive Director
Nevada State Board of Medical Examiners
1105 Terminal Way, Suite 301
Reno, Nevada 89502

Dear Mr. Cousineau:

You have asked this office for its opinion on the following question.

QUESTION

May the Board of Medical Examiners (Board) publicize confidential civil malpractice settlement amounts, which are provided to the Board pursuant to various state and federal statutes governing reporting of malpractice settlements?

ANALYSIS

Actions for medical malpractice are often settled before or during a trial. Some of the settlements render the amount of the settlement confidential. However, practitioners and insurers are required to report settlements to the Board and the Commissioner of Insurance (Commissioner) pursuant to both state and federal law. The question thus arises whether settlement amounts are public records or, alternatively, whether they may be kept confidential.

Reports Required by the Board's Governing Statutes

The Board is created by statute to enforce the provisions of Chapter 630 of Nevada Revised Statute (NRS) and the regulations adopted pursuant thereto. NRS 630.050, 630.130. It receives information regarding settlement agreements in actions for malpractice pursuant to NRS 630.3067 and 630.3068. The former requires an insurer of a physician licensed in this State to report to the Board "[a]ny settlement, award, judgment or other disposition of any action or claim [for malpractice] not later than 45 days after the settlement, award, judgment or other disposition . . . ." The language of the statute is clear: an insurer must provide a report to the Board indicating that settlement has occurred.[1] The statute, however, does not specifically require that the insurer report the amount of any settlement, award, judgment, or other disposition.

In addition to the insurer's report, the Board also receives a report from the physician regarding any settlement agreement in a malpractice action. NRS 630.3068 requires a physician to report to the Board "[a]ny settlement, award, judgment or other disposition of any action or claim [for malpractice] not later than 45 days after the settlement, award, judgment or other disposition . . . ." NRS 630.3068(1)(c). Such reports are expressly made public records. NRS 630.3068(3). However, as with NRS 630.3067, NRS 630.3068 does not specifically require that the amount of any settlement, award, judgment, or other disposition be included in the report.

It should be noted, however, that the Board has not adopted any regulations that set forth the information that must be provided in such reports. Pursuant to NRS 630.130 the Board is authorized to "[a]dopt such regulations as are necessary or desirable to enable it to carry out the provisions of this chapter." As such, the Board is within its authority to adopt a regulation, which sets forth the information an insurer of a physician or a physician is required to include in the reports submitted pursuant to NRS 630.3067 and 630.3068, respectively, that includes the amount of the settlement, award, judgment, or other disposition of any action or claim for malpractice.

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[1] Generally, when the words of a statute have a "definite and ordinary meaning," it is not necessary to "look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 641-42, 1 P.3d 532, 534 (2003).

Reports Required by the Commissioner of Insurance Statutes

Title 57 of the Nevada Revised Statutes governs the insurance industry. Within Title 57, Chapter 690B controls casualty insurance, which includes medical malpractice insurance. Two relevant reporting requirements exist in this Chapter.

NRS 690B.250 requires an insurer's report to the Board; NRS 690B.260 requires an insurer's report to the Commissioner of Insurance. The required report to the Board is of "each settlement or award made or judgment rendered by reason of a claim, if the settlement, award, or judgment is for more than $5,000 . . . ." NRS 690B.250(1). This report is expressly made a public record and must be made available for public inspection. NRS 690B.250(3). As with previously discussed reporting requirements, however, the amount of the settlement is not a specific requirement of the report.

NRS 690B.260 requires an insurer's report to the Commissioner every calendar quarter. Here exists a specific requirement for the amount of settlement. The report must identify each claim that was closed during that calendar quarter, and "any change during that calendar quarter to any claim under such a policy of insurance issued by the insurer that was closed during a previous calendar quarter." NRS 690B.260(1). The legislature has expressly required inclusion of "[i]nformation indicating whether any payment was made on a claim *and the amount of the payment, if any.*" NRS 690B.260(1)(c) (emphasis added).

This report in the hands of the Commissioner is a public record. Except for certain exceptions, the papers and records of the Division of Insurance must be open to public inspection. NRS 679B.190(2). One exception found in NRS 679B.190 authorizes the Commissioner to classify as confidential "[d]ocuments obtained or received from other sources upon the express condition that they remain confidential." NRS 679B.190(5)(b). It is then within the Commissioner's discretion whether to classify the documents as confidential. *Id.*

We do not read this provision to permit confidential classification of settlement amounts. The reference in NRS 679B.190(5)(b), is to documents received *upon the express condition* that they remain confidential. The statute requiring settlement amounts to be reported to the Commissioner, NRS 690B.260(1)(c), does not admit any limitations, *i.e.*, conditions. Reporting is mandatory. The Commissioner's discretionary authority to classify documents as confidential does not extend to settlement amounts.

Provision is made in NRS 690B.310, that certain information in a medical malpractice settlement cannot be made confidential: (1) the names of the parties; (2) the date of the incident or event giving rise to the claim or action; (3) the nature of the claim as set forth in the complaint and answer that is filed in district court; and (4) the effective date of the agreement. Since the amount of a settlement is not included in this list, and based upon the maxim *expressio unius est exclusio alterius*, an argument could be posited that the Legislature intended that parties may classify the amount of

settlement as confidential information. However, we believe that our conclusion is more in line with the Legislature's intent as expressed in the Public Records Act, NRS Chapter 239, that "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly . . . ." NRS 239.001(3).

Reports From the National Practitioner Data Bank

In addition to the reports submitted pursuant to the previously mentioned state statutes, insurance companies are also required to submit reports to the National Practitioner Data Bank regarding the medical malpractice payments pursuant to 42 U.S.C. § 11131. Insurance companies are required to report the following information: (1) the name of the physician or licensed health care practitioner for whose benefit the payment was made; (2) the amount of the payment; (3) the name of any hospital with which the physician or health care practitioner is affiliated with; (4) a description of the circumstances upon which the action or claim was based; and (5) any other information required. 42 U.S.C. § 11131.

The information reported to the National Practitioner Data Bank is confidential and may only be disclosed in certain circumstances. The information, if received, must be used solely for the purpose for which it was provided. 42 U.S.C. § 11137, 45 C.F.R. § 60.20. Thus, if the Board receives a report from the National Practitioner Data Bank regarding an applicant for licensure or a physician licensed by the Board, the Board may only use the information contained in the report for the purpose of determining the applicant's eligibility for licensure or for investigating a licensee to determine if disciplinary action is warranted. The information contained in such a report would not be considered to be a public record within the meaning of NRS 239.010 since pursuant to 42 U.S.C. § 11137 it is declared by law to be confidential.

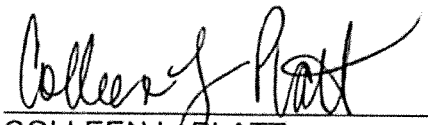
CONCLUSION

In conclusion, it is the opinion of this Office that the reports submitted pursuant to NRS 630.3067, 630.3068, and 690B.250, which do not specifically require the amount of any settlement, award, judgment or other disposition to be reported, are public records within the meaning of NRS 239.010 and must be open to public inspection. It is also the opinion of this Office that the report submitted pursuant to NRS 630.260, which requires the amount of the settlement be included in the report submitted to the Commissioner of Insurance, is a public record within the meaning of NRS 239.010. The Commissioner is prohibited from making the information contained in the report confidential pursuant to NRS 679B.190 due to the plain reading of NRS 690B.260, which makes reporting mandatory and provides no limitations or conditions regarding that reporting. Lastly, it is the opinion of this Office that the reports received from the

National Practitioner Data Bank are deemed confidential by federal law and are not public records within the meaning of NRS 239.010, thus the Board is prohibited from making information contained in the reports public.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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