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April 2, 2013

Senator Michael Roberson
Senate Chambers

Dear Senator Roberson:

You have asked this office to prepare an expedited and brief opinion on whether state executive branch officers have the authority to declare that the Legislature may not propose and pass a competing legislative measure under Article 19, Section 2(3) of the Nevada Constitution.

It is well established that the judicial branch is the only department of state government with the authority to declare that the Legislature may not pass a legislative measure. See Galloway v. Truesdell, 83 Nev. 13, 20-21 (1967); State ex rel. White v. Dickerson, 33 Nev. 540, 560-63 (1910). It is also well established that every legislative measure passed by the Legislature is presumed to be constitutional. Nevadans for Nev. v. Beers, 122 Nev. 930, 939 (2006). Because of the presumption of validity, "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of [the measure], and courts will interfere only when the Constitution is clearly violated." List v. Whisler, 99 Nev. 133, 137 (1983). The presumption of validity may be overcome only by proving unconstitutionality "beyond a reasonable doubt." Cauble v. Beemer, 64 Nev. 77, 101 (1947); State v. Doron, 5 Nev. 399, 408 (1870).

Based on the presumption of validity, if the Legislature proposes and passes a competing legislative measure under Article 19, Section 2(3), all state executive branch officers must presume that the competing measure is constitutional, they must treat it as a valid legislative measure, and they must perform their constitutional and statutory duties based on that presumption unless and until the judicial branch declares otherwise. See State ex rel. White v. Dickerson, 33 Nev. 540, 560-63 (1910); 16 Am.Jur.2d Constitutional Law § 109 (2009). As explained by one legal treatise:

> The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution. The oath of office "to obey the Constitution" means to obey the constitution, not as the officer decides, but as judicially determined, for every law found on the statute books is presumptively constitutional until declared otherwise by the court. Thus, except in carefully circumscribed situations authorized by state law or court decisions, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he or she will be injured in person, property, or rights by its enforcement.

16 Am.Jur.2d Constitutional Law § 109 (2009) (footnotes omitted); see also Bd. of Comm'rs v. A. C. Davis & Sons, 86 P.2d 782, 783 (Okla. 1939) ("The presumption is that a law is constitutional until its unconstitutionality is judicially established, and the board of county commissioners was entitled to rely on that statute as authority for its official acts until such time as the statute was declared unconstitutional.") (citations omitted).

Furthermore, state executive branch officers may not rely on an opinion of the Attorney General to declare that the Legislature may not propose and pass a competing legislative measure under Article 19, Section 2(3). Because an opinion of the Attorney General does not have the force or effect of law, the mere fact that the Attorney General has concluded that an act or practice is unconstitutional does not mean that the act or practice is, in fact, unconstitutional.

In Nevada, the powers and duties of the Attorney General are "found only in legislative enactment. They are not found anywhere in the Constitution of our State." Ryan v. Eighth Jud. Dist. Ct., 88 Nev. 638, 642 (1972). By legislative enactment, the Attorney General has been designated as the legal adviser on all matters arising within the Executive Department of the State Government. NRS 228.110. As the legal adviser to the Executive Department, the Attorney General is required by statute to issue an opinion upon any question of law when such an opinion is requested by certain officers and agencies within the Executive Department of State Government. NRS 228.150.

Although the Attorney General is authorized to issue an opinion upon any question of law, the Nevada Supreme Court has repeatedly held that an opinion of the Attorney General does not constitute binding legal authority or precedent. See Univ. & Cmty. College Sys. of Nev. v. DR Partners, 117 Nev. 195, 203 (2001); Blackjack Bonding v. City of Las Vegas Mun. Ct., 116 Nev. 1213, 1218 (2000); Goldman v. Bryan, 106 Nev. 30, 42 (1990). Based on such holdings, the Federal District Court for Nevada has concluded that an opinion of the Attorney General is entitled only to such persuasive weight as the court thinks proper based on the reasoning and citation to authority that supports the opinion:

> In Nevada an opinion of the Attorney General is given whatever weight the Court thinks it deserves when the issue on which the opinion bears is before the Court for determination. . . .It is only in unusual circumstances that an Attorney General's opinion will control the outcome of a case.

Tahoe Reg'l Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D. Nev. 1984) (emphasis added), aff'd, 769 F.2d 534 (9th Cir. 1985). Indeed, throughout Nevada's history, the Attorney General has acknowledged that an opinion of the Attorney General is advisory only and that such an opinion is not binding on any state officer. See, e.g., Op. Nev. Att'y Gen. No. 1911-15 (Apr. 27, 1911).

Thus, an opinion of the Attorney General does not have the force or effect of law, and it is not binding on any state officer. Rather, such an opinion is merely advisory, and it is entitled only to such persuasive weight as the court thinks proper based on the reasoning and citation to authority that supports the opinion.

For example, the Nevada Supreme Court rejected an opinion of the Attorney General which interpreted Nevada's constitutional debt limitations because the opinion was based on a narrow and artificial interpretation of the constitutional provision, and such an interpretation had been rejected by a majority of courts in other jurisdictions that had considered similar constitutional issues. See Employers Ins. Co. of Nev. v. State Bd. of Exam'rs, 117 Nev. 249, 257-58 (2001). The court also concluded that the State Board of Examiners "manifestly abused its discretion" by relying on the opinion of the Attorney General because the opinion "was based on an incorrect analysis of the scope of Nevada's constitutional debt limitations." Id. at 253. Consequently, the mere fact that the Attorney General has concluded that an act or practice is unconstitutional does not mean that the act or practice is, in fact, unconstitutional.

The Legislative Counsel has been designated by statute as the legal adviser on all matters arising within the Legislative Department of the State Government. See NRS 218F.710 & 218F.720. As the legal adviser to the Legislative Department, the Legislative Counsel is required by statute to issue an opinion upon any question of law when such an opinion is requested by any member or committee of the Legislature or the Legislative Commission. NRS 218F.710. The Attorney General has acknowledged that the office of the Attorney General is not statutorily authorized to render an opinion to a member of the Legislature, and that the duty to provide a legal opinion to a member of the Legislature falls upon the Legislative Counsel. See Op. Nev. Att'y Gen. No. 2002-36 (Oct. 4, 2002).

Because the Attorney General and the Legislative Counsel are each statutorily authorized to render opinions on questions of law, courts have recognized that an opinion of the Attorney General and an opinion of the Legislative Counsel are each entitled to

weight as persuasive authority. See Cable v. State ex rel. EICON, 122 Nev. 120, 126-27 (2006); Cal. Ass'n of Psychology Providers v. Rank, 793 P.2d 2, 11 (Cal. 1990). Although neither opinion constitutes binding legal authority or precedent, the judicial branch determines the persuasive weight to be given each opinion based on the soundness of its legal reasoning and the citation to authority that supports the opinion. See Cable, 122 Nev. at 127; Tahoe Reg'l Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D. Nev. 1984); Santa Clara County Local Transp. Auth. v. Guardino, 902 P.2d 225, 236 (Cal. 1995); Grupe Dev. Co. v. Superior Ct., 844 P.2d 545, 551 (Cal. 1993). Furthermore, the Nevada Supreme Court has held that when the meaning of a provision affecting legislative procedure is in doubt or subject to uncertainty, the Legislature is entitled to follow an opinion of the Legislative Counsel which interprets the provision and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 540 (2001).

Thus, even if there were some uncertainty, ambiguity or doubt regarding the meaning of the term "reject" in Article 19, Section 2(3), that uncertainty, ambiguity or doubt would have to be resolved in favor of the Legislature. When the Nevada Constitution imposes limitations upon the Legislature's power, those limitations "are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question." In re Platz, 60 Nev. 296, 308 (1940) (quoting Baldwin v. State, 3 S.W. 109, 111 (Tex. Ct. App. 1886)). Consequently, if the language of a constitutional provision is uncertain, ambiguous or doubtful, "[t]he language must be strictly construed in favor of the power of the legislature to enact the legislation under it." Id.

Moreover, a reasonable construction of a constitutional provision by the legislative branch should be given great weight and deference by the courts, especially when the constitutional provision involves legislative procedure. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). Thus, the Legislature's reasonable construction of a constitutional provision involving legislative procedure should be "treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 400 (1876).

Therefore, because an interpretation of Article 19, Section 2(3) involves legislative procedure, the language of the constitutional provision must be strictly construed in favor of the power of the Legislature to propose competing measures under it, and any uncertainty, ambiguity or doubt regarding the meaning of the constitutional provision must be resolved in favor of the Legislature. Moreover, in the three prior instances in which the Legislature has rejected statutory initiatives and thereafter passed competing measures, the Legislature has rejected each statutory initiative in a different manner by using a variety of

methods and procedures. This legislative construction of the term "reject" in Article 19, Section 2(3) should be given great weight and deference by the courts, so that if there is any reasonable doubt as to the meaning of the term "reject," the construction given to it by the Legislature should prevail. Lastly, because this issue involves the interpretation of a constitutional provision affecting legislative procedure, the Legislature is entitled to follow an opinion of the Legislative Counsel which interprets the constitutional provision, and the judiciary will typically afford the Legislature deference in its counseled selection of that interpretation.

Accordingly, if the Legislature proposes and passes a competing legislative measure under Article 19, Section 2(3), all state executive branch officers must presume that the competing measure is constitutional, they must treat it as a valid legislative measure, and they must perform their constitutional and statutory duties based on that presumption unless and until the judicial branch declares otherwise.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By_____
Kevin C. Powers
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