

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.  
DEPARTMENT OF TAXATION;  
THE HONORABLE DAN  
SCHWARTZ, in his official capacity  
as TREASURER OF THE STATE OF  
NEVADA; and THE LEGISLATURE  
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

**JOINT APPENDIX**

**VOLUME 20 PART 4**

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County. *See* State's Opposition, at 4:27-5:5. In making this unfounded charge, the State overlooks, and does not dispute, Fernley's evidence that it has unsuccessfully sought to effectuate a cooperative or interlocal agreement with Lyon County to obtain a more favorable redistribution of C-Tax revenue. *See* Exhibit 3, at 59:14-25. This undisputed evidence establishes that Fernley sought a 10 percent redistribution of Lyon County's C-Tax revenue on one occasion, and a \$200,000 redistribution on another, with the intent to use the additional funds to, among other things, undertake necessary road repairs, upgrade city parks, and provide more police services. *See id.*; *see also* Exhibit 29. The State has not disputed the opinions of Fernley's designated expert witnesses which establish that Fernley's roads and parks remain desperately in need of improvement because of Fernley's low C-Tax revenue base. *See* Exhibit 31. Thus, it is undisputed that Fernley had diligently tried to obtain a cooperative or interlocal agreement with Lyon County, but Lyon County was not amenable to sharing its C-Tax revenue.

**D. The State Confirms That Few C-Tax Recipients Enter Into Cooperative Or Interlocal Agreements For The Reallocation Of C-Tax Revenue.**

At the same time it erroneously blames Fernley for not having entered into a cooperative or interlocal agreement with Lyon County, and implies that it was not difficult for Fernley to effectuate such an agreement, the State essentially confirms that there have been no meaningful cooperative or interlocal agreements for the redistribution of C-Tax revenue since the system was adopted in 1997. *See* State's Opposition, at 5:6-11. The only "cooperative local agreement" cited by the State was the agreement, discussed in Fernley's motion at page 14, lines 18-23, which Clark County had entered into with its five incorporated cities to resolve temporarily an error in the allocation of C-Tax revenue until the Legislature could address the issue – which did not concern any sharing of services. *See also* Exhibit 7, at 30:6-16, Exhibit 11, at 40:16-42:12. The State has submitted no evidence of any other cooperative or interlocal agreement, or any evidence of a governmental entity assuming responsibility for services provided by another government entity in exchange for a redistribution of C-Tax revenue.

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1 E. All Facts That Remain Uncontroverted By The State Should Be Adjudicated  
2 In Fernley's Favor.

3 The State has made no attempt to controvert many of the facts set forth in Fernley's  
4 motion. For example, the State does not dispute Fernley's explanation of how the C-Tax system  
5 operates, Fernley's complaint that its C-Tax distributions are only a fraction of the C-Tax  
6 revenues received by comparably sized Nevada cities, Fernley's assertion that Lyon County  
7 rebuffed its efforts to effectuate an interlocal or cooperative agreement for the redistribution of C-  
8 Tax revenue, Fernley's account of the Legislature's unwillingness to grant it relief, or Fernley's  
9 assertions regarding the impacts on its public safety service levels, roads, and public works that  
10 have resulted from artificially low C-Tax distributions. The Court should adjudicate all such  
11 undisputed facts in Fernley's favor.

12 III. ARGUMENT.

13 A. The State's Asserted Defenses Do Not Preclude The Entry Of Summary  
14 Judgment In Fernley's Favor.

15 None of the State's asserted defenses to liability — sovereign immunity, statute of  
16 limitations, and laches — applies in this case. Because these defenses therefore do not preclude  
17 the relief sought by Fernley, the Court should enter summary judgment in Fernley's favor, and  
18 against the State, as a matter of law.

19 1. Fernley's Claims Are Not Barred By Sovereign Immunity.

20 a. The State Has Not Asserted Immunity With Respect To Fernley's  
21 Claims For Declaratory And Injunctive Relief.

22 The State has previously asserted immunity only with respect to Fernley's claims for  
23 money damages, and it does not suggest otherwise in its opposition. *See* Exhibit 34, at 24-25, 27-  
24 30; Exhibit 35, at 14-17; *see also* State's Opposition, at 7:8-10:19. In addition to claims for  
25 money damages, however, Fernley has stated claims for declaratory relief (sixth claim for relief)  
26 and injunctive relief (seventh claim for relief), which are claims commonly asserted to challenge  
27 the constitutionality of legislative enactments. *See* Exhibit 2, at 8:25-10:23; ~~*see also* Clean Water~~  
28 *Coal. v. The M Resort, LLC*, 127 Nev.Adv.Op. 24, 255 P.3d 247 (2011) (declaratory and

1 injunctive relief claims challenging the constitutionality of an assembly bill enacted by the state  
2 legislature); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 217 P.3d 546 (2009)  
3 (declaratory and injunctive relief claims challenging the constitutional validity of a statute); *Clark*  
4 *Cnty. v. City of Las Vegas*, 97 Nev. 260, 628 P.2d 1120 (1981) (declaratory relief claim  
5 challenging the constitutionality of a chapter of the Nevada Revised Statutes, including a  
6 statutory funding formula).

7 It is self-evident that constitutional challenges could and would never be possible if they  
8 could not be pursued through claims for declaratory and injunctive relief. Because the State has  
9 not asserted immunity with respect to Fernley's claims for declaratory and injunctive relief  
10 claims, and Fernley has properly brought these claims to challenge the constitutionality of the C-  
11 Tax, these claims are sustainable even if the Court decides that the State has immunity with  
12 respect to money damages.

13 *b. The State Has Not Proven That Sovereign Immunity Applies As A*  
14 *Matter Of Law.*

15 A fundamental erroneous premise of the State's opposition is that Fernley must plead and  
16 prove that its claims are not barred by sovereign immunity. The opposite is true. The State has  
17 the burden to prove the applicability of each and every one of its defenses, and it has failed to  
18 establish that sovereign immunity shields it from liability as a matter of law. As a result, the  
19 Court should reject the State's sovereign immunity defense in its entirety.

20 (1) NRS 41.032(1).

21 Although the State recognizes that immunity is available under NRS 41.032(1) *only* if the  
22 government officer, employee, or contractor is "exercising *due care*, in the execution of a statute  
23 or regulation," it makes no attempt to establish that any government officer, employee, or  
24 contractor acted with "due care" in the execution of the C-Tax. *See* NRS 41.032(1) (emphasis  
25 added); *see also* State's Opposition, at 8:15-27. This omission is fatal to the State's immunity  
26 defense because "the official seeking absolute immunity bears the burden of showing that such  
27 immunity is justified for the function in question." *See State v. Second Judicial Dist. Court*, 118  
28 Nev. 609, 617, 55 P.3d 420, 425 (2002); *see also Pope v. Motel 6*, 121 Nev. 307, 318-19, 114



1 P.3d 277, 284-85 (2005) (defendant has "the burden of alleging and proving the existence of the  
2 privilege"). In other words, Fernley has no duty to allege that the Department "acted improperly,"  
3 as the State misguidedly asserts, but rather it is the State's sole burden to prove that it acted with  
4 the statutorily required "due care." *See* State's Opposition, at 8:15-16. Not only has the State  
5 failed to satisfy that burden, "it is well-settled that a 'claim of privilege will not prevent an adverse  
6 finding or even summary judgment if the litigant does not present sufficient evidence to satisfy  
7 the usual evidentiary burdens in the litigation.'" *See Francis v. Wynn Las Vegas, LLC*, 127  
8 Nev.Adv.Op. 60 slip op., at 9, 262 P.3d 705, 711 (2011); *see also Bonnell v. Lawrence*, 128  
9 Nev.Adv.Op. 37 slip op., at 9, 282 P.3d 712, 716 (2012) (characterizing immunity as a "privilege  
10 defense"). Given the State's failure to produce any evidence to support its claim of immunity  
11 based on NRS 41.032(1), the Court should entirely reject that defense and enter summary  
12 judgment in Fernley's favor.

13 Further precluding the State's immunity defense under NRS 41.032(1) is the undisputed  
14 evidence establishing that the State has not acted with "due care" in the execution of the C-Tax.  
15 Nowhere in the C-Tax did the Legislature mandate a reduction in the revenue base of a recipient  
16 that has experienced both a drop in population and a decline in the assessed value of taxable  
17 property. The Legislature instead provided in the C-Tax that the Department's Executive  
18 Director, the CLGF, and the Commission may decide whether to cut the revenue base of a  
19 recipient whose population and assessed value of taxable property have decreased in the  
20 immediately preceding three fiscal years. *See* NRS 360.695; Exhibit 7, at 59:24-63:15; Exhibit  
21 15, at 109:3-10, 122:22-123:2; Exhibit 16, at 91:23-94:20. In exercising this authority, the  
22 Department's Executive Director has decided not to change the C-Tax bases of several local  
23 governments that have met the criteria for a reduction, including Mesquite and Boulder City. *See*  
24 Exhibit 7, at 59:24-63:15; *see also* Exhibit 15, at 139:12-140:20.

25 When a city like Fernley has been repeatedly denied a needed increase in its C-Tax base,  
26 such decisions confirm that the State has not exercised "due care" in the execution of the C-Tax.  
27 The State has not even attempted to controvert this evidence which ~~unmistakably establishes the~~  
28 lack of due care. For these reasons, the State's assertion of immunity under NRS 41.032(1) is

1 unsustainable as a matter of law.

2 (2) NRS 41.032(2).

3 Equally unsustainable is the State's notion that it is immune from liability under NRS  
4 41.032(2), which "grants the State and its political subdivisions sovereign immunity from civil  
5 liability when the challenged act was discretionary in nature." *See Ransdell v. Clark County*, 124  
6 Nev. 847, 854, 192 P.3d 756, 761 (2008). For such immunity to apply, the government's actions  
7 must "(1) involve an element of individual judgment or choice and (2) be based on considerations  
8 of social, economic, or political policy." *See Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168  
9 P.3d 720, 729 (2007). Like its defense under NRS 41.032(1), however, the State provides no  
10 evidence to support the application of NRS 41.032(2) here. Instead, the State merely argues that  
11 "[i]n this case any decisions the Department made concerning the C-Tax would also be entitled to  
12 discretionary immunity." *See State's Opposition*, at 9:26-27. Not only should the State's  
13 unsubstantiated assertion of immunity be denied on this basis alone because of its total failure to  
14 satisfy its burden of proof, the State has maintained in this litigation that its execution of the C-  
15 Tax has been ministerial rather than discretionary in nature. *See Fernley's Motion*, Section III(I).  
16 The State does not even cite a single example to support its speculative notion that it acted with  
17 discretion with respect to the execution of the C-Tax. *See State's Opposition*, at 9:1-10:19.

18 In sum, NRS 41.032(2) does not apply because, as the Legislature concedes, the  
19 administration and execution of the C-Tax involves no exercise of discretion. *See Butler ex rel.*  
20 *Biller v. Bayer*, 123 Nev. 450, 465, 168 P.3d 1055, 1066 (2007) ("NRS 41.032(2) generally  
21 precludes maintenance of a suit based in state law against the State, its employees, or any  
22 agencies or subdivisions that are 'discretionary' in nature"). Sovereign immunity therefore does  
23 not bar Fernley's claims against the State for the violation of its state constitutional rights in the  
24 execution of the C-Tax.

25 **2. Fernley's Claims Are Not Barred By A Statute of Limitations.**

26 The statute of limitations is an affirmative, non-jurisdictional defense which the State and  
27 the Legislature, as defendants, have the burden of pleading and proving. *See NRCP 8(c), Dozier*  
28 *v. State*, 124 Nev. 125, 129, 178 P.3d 149, 152-53 (2008); *see also Adobe Sys. Inc. v. Christenson*,

1 No. 2:10-cv-00422-LRH-GWF, 2011 WL 540278, at \*2 (D. Nev. 2011) ("a plaintiff need not  
2 affirmatively plead facts showing the absence of such a defense in order to state a claim").  
3 Because "the averments of an affirmative defense are taken as denied or avoided, each element of  
4 the defense must be affirmatively proved." *See Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591  
5 P.2d 1137, 1140 n.2 (1979) (citations omitted). The State therefore is only entitled to summary  
6 judgment if it can prove that the statute of limitations had run by the time Fernley filed its  
7 complaint. *See Chachas v. City of Ely*, 615 F.Supp.2d 1193, 1203 (D. Nev. 2009) ("[d]efendants  
8 carry the burden of establishing a failure to comply with the statute of limitations"). The State  
9 has not made such a showing, however, as a matter of law.

10 The State erroneously maintains that Fernley's claims are barred by a statute of limitations  
11 that has neither been legislatively nor judicially determined. The State assumes that either a two  
12 or four-year statute of limitations governs this case even though it acknowledges that the Nevada  
13 Supreme Court has not yet identified a limitations period that would apply to Fernley's state  
14 constitutional claims. *See State's Opposition*, at 11:2-8. In doing so, the State mistakenly  
15 suggests that these are the only two possible limitations periods applicable here. Not only could  
16 the Nevada Supreme Court conclude that the claims at issue are not subject to a statute of  
17 limitations of any kind, the Legislature's premise that the four-year statute of limitations set forth  
18 in NRS 11.220 is the greatest limitations period that could possibly apply to a state constitutional  
19 claim is unfounded. The Nevada Supreme Court's holding that a 15-year statute of limitations  
20 governs claims arising under the Takings Clause of the Nevada Constitution alone confirms that  
21 such a notion lacks merit. *See White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 779, 801  
22 P.2d 1370, 1371 (1990). With the State unable to refer the Court to a statute of limitations that  
23 indisputably bars Fernley's claims, they have failed to satisfy their burden of proof on this  
24 affirmative defense as a matter of law.

25 Even if the Court were to conclude that one of the statutes of limitations cited by the State  
26 applies here (which it should not), neither limitations period has expired as a matter of law.  
27 Nevada courts apply the "continuing violations doctrine" to determine whether a statute of  
28 limitations for state constitutional claims has run. *See Chachas*, 615 F.Supp.2d at 1203. The

1 State mistakenly ignores the legal significance of this doctrine when it suggests that Fernley could  
2 have filed suit after it incorporated as a city in 2001. *See* State's Opposition, at 11:9-17. Under  
3 the continuing violations doctrine, a "systematic policy" of unlawful conduct "is actionable even  
4 if some or all of the events evidencing its inception occurred prior to the limitations period." *See*  
5 *Chachas*, 615 F.Supp.2d at 1203; *see also Pruet v. Hooligan*, No. 3:07-cv-00217-LRH (RAM),  
6 2008 WL 2954750, at \*5 (D. Nev. July 29, 2008) (stating that a "consequence" of the doctrine is  
7 that "a defendant cannot insulate itself from liability by engaging in a series of related violations  
8 . . . asserting that the statute of limitations has run for all violations as soon as the limitations  
9 period has run for the first violation in the series; an "important purpose" of the doctrine is to  
10 prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct  
11 of the same sort"). Thus, if an unlawful act "takes place within the limitations period and that act  
12 is 'related and similar to' acts that took place outside the limitations period, all the related acts –  
13 including the earlier acts – are actionable as part of a continuing violation." *See O'Loughlin v.*  
14 *Cnty. of Orange*, 229 F.3d 871, 875 (9th Cir. 2000).

15 Once again, the State has failed to satisfy its burden of proof on its statute of limitations  
16 defense. Not only has the State been unable to demonstrate that a statute of limitations even  
17 governs Fernley's claims, it has established no legal or evidentiary basis for the Court to conclude  
18 that the continuing violations doctrine does not apply here. It is not surprising that the State has  
19 not even made a meaningful attempt to dispute the applicability of the continuing violations  
20 doctrine in this case, where violations of the Nevada Constitution have indisputably occurred, and  
21 Fernley's state constitutional rights have indisputably been infringed, each and every time the  
22 State has collected and distributed C-Tax revenue since Fernley incorporated in 2001 (and even  
23 since the 1997 enactment date of the C-Tax). *See Chachas*, 615 F.Supp.2d at 1204 (applying the  
24 continuing violations doctrine to allow a challenge to utility fees that began outside the statute of  
25 limitations because the charges continued within the limitations period). Because the C-Tax  
26 system results in systematic and repeated constitutional violations with every dollar collected and  
27 distributed under its provisions, both the 1997 date of the C-Tax's enactment and the 2001 date of  
28 Fernley's incorporation are irrelevant for purposes of a statute of limitations analysis. As a result,

1 the continuing violations doctrine permits Fernley to bring its claims that have arisen since at  
2 least its incorporation in 2001. On this basis, Fernley is entitled to summary judgment as a matter  
3 of law.

4 Finally, Fernley is entitled to recover on its claims even if the Court adopts a two or four-  
5 year statute of limitations and concludes that the continuing violations doctrine is inapplicable  
6 (which it should not). A statute of limitations does not begin to run until a wrong occurs and a  
7 party sustains injuries for which it may seek relief. *See Petersen v. Bruen*, 106 Nev. 271, 274,  
8 792 P.2d 18, 20 (1990). Fernley therefore is at least entitled to compensation for the damages it  
9 has sustained during the current limitations period as well as an award of injunctive relief from  
10 further constitutional violations. On these various grounds, the State's statute of limitations  
11 defense lacks merit and should be denied in its entirety.

### 12 3. Fernley's Claims Are Not Barred By Laches.

13 Although laches may apply to constitutional claims, "[e]specially strong circumstances  
14 must exist" to sustain the defense when, as in this case, the statute of limitations has not run. *See*  
15 *Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966). To determine whether laches bars a  
16 claim, a court must consider: "(1) whether the party inexcusably delayed bringing the challenge,  
17 (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is  
18 challenging, and (3) whether the inexcusable delay was prejudicial to others." *See Miller v. Burk*,  
19 124 Nev. 579, 598, 188 P.3d. 1112, 1125 (2008). Laches requires more than simply a delay in  
20 bringing a legal challenge – i.e., the delay must disadvantage another party. *See Home Sav. Ass'n*  
21 *v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). The party asserting laches therefore  
22 "must show that the delay caused actual prejudice" and that "granting relief to the delaying party  
23 would be inequitable." *See Besnilian v. Wilkinson*, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001);  
24 *see also Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Mem'l Gardens, Inc.*, 88 Nev. 1, 4,  
25 492 P.2d 123, 125 (1972) ("[t]he alleged prejudice cannot be prospective or illusory"). It is well-  
26 settled that the "applicability of the doctrine of laches turns upon the peculiar facts of each case."  
27 *See id.*; *see also Widdis v. Second Judicial Dist. Court*, 114 Nev. 1224, 1228, 968 P.2d 1165,  
28 1167 (1998) (holding that laches was inapplicable where there was no evidence that the delay in

1 filing a writ petition was inexcusable, demonstrated acquiescence, or caused undue prejudice).

2 No legal or factual basis exists for applying the doctrine of laches here. Most notably,  
3 there has been no delay by Fernley in filing suit because the administration and execution of the  
4 C-Tax has indisputably resulted in the continuing violation of its rights under the Nevada  
5 Constitution since its incorporation in 2001. *See Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th  
6 Cir. 2014) (the same principles that govern a statutes of limitations defense apply to laches).  
7 Even if the Court were to disregard the continuing nature of the constitutional violations at issue  
8 here (which it should not), Fernley indisputably filed suit only as a last resort, after having first  
9 diligently sought to find an amicable solution for its grossly inequitable treatment under the C-  
10 Tax system. Specifically, Fernley unsuccessfully lobbied for relief from the Legislature,  
11 requested assistance from the Department, and pursued adjustments from Lyon County before  
12 commencing this action. *See Exhibit 3*, at 59:14-25, 62:6-63:8, 75:18-23; *Exhibit 29*; *Exhibit 30*,  
13 at 1-2, 13-34. As a result, Fernley has neither delayed in its efforts to seek relief nor acquiesced  
14 in its condition. Fernley has instead taken every reasonable step possible to remedy its substantial  
15 C-Tax shortfall without having to seek relief from this Court.

16 Finally, it is equally indisputable that the timing of Fernley's commencement of this  
17 lawsuit did not prejudice the State, the Legislature, or any other participant in the C-Tax system.  
18 When compared to similarly situated Nevada cities, Fernley has plainly received a  
19 disproportionately small share of C-Tax distributions. *See Exhibit 1*. Other participants in the C-  
20 Tax system therefore necessarily have received a disproportionately large share of C-Tax  
21 distributions. Any purported delay by Fernley in bringing this action consequently was  
22 beneficial, not prejudicial, to other C-Tax participants because it allowed them to receive more C-  
23 Tax revenues than they otherwise were entitled to under the C-Tax formula. In any event, the  
24 Court should not permit constitutional violations to continue in perpetuity, as the State  
25 misguidedly suggests it should do with respect to the C-Tax, simply because it would somehow  
26 disrupt the "settled expectations of the other participants in the C-Tax system and the State." *See*  
27 *State's Opposition*, at 12:8-11. Under these circumstances, laches does not bar any of Fernley's  
28 claims as a matter of law.

1           B.     The C-Tax Violates The Separation Of Powers Clause Of The Nevada  
2                 Constitution As A Matter Of Law.

3                 1.     **Fernley Has Standing To Bring A Separation Of Powers Claim**  
4                         **Against the State.**

5           The State erroneously asserts that Fernley lacks standing to maintain a separation of  
6 powers claim. *See State's Opposition*, at 12:16-13:23. Not only do the cases cited by the State  
7 provide no support for their proposition, it is widely recognized that local governments have  
8 standing to state such a claim. *See City of Austin v. Quick*, 930 S.W.2d 678, 683-84 (Tex.App.  
9 1996); *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987); *see also* John  
10 Martinez, *Local Government Law*, Pt. I, Ch.3, § 3.2 ("local government units are held to have  
11 standing to invoke the following state constitutional provisions against the state: . . . (3)  
12 separation of powers"). Here, the basis of Fernley's separation of powers claim is that the  
13 Legislative Branch unconstitutionally delegated its authority to appropriate funds to the Executive  
14 Branch. *See Exhibit 2*, at 6:1-22. Fernley therefore has stated a classic separation of powers  
15 claim – it alleges that the C-Tax violates the separation of powers of the Executive and  
16 Legislative Branches, two of the three branches of our state government. *See id.*

17           The mistaken premise of the State's standing challenge is that only the three branches of  
18 government may assert violations of the separation of powers clause. *See State's Opposition*, at  
19 13:4-11. The separation of powers clause does not only protect the rights of the three branches of  
20 government, as the State inaccurately maintains. *See id.* The United States Supreme Court has  
21 observed, for example, that "the claims of individuals—not of Government departments—have  
22 been the principal source of judicial decisions concerning separation of powers and checks and  
23 balances." *See Bond v. United States*, 131 S.Ct. 2355, 2365 (2011) (further pointing out that  
24 "individuals, too, are protected by the operations of separation of powers and checks and  
25 balances"). Fernley has standing to maintain this claim because, just as its rights under Article 4,  
26 Section 20 and 21 of the Nevada Constitution have been violated by the C-Tax, it has  
27 indisputably suffered injury to its constitutional rights because of the separation of powers  
28 violation that resulted from the enactment and enforcement of the C-Tax. *See Citizens for Cold*

1 *Springs v. City of Reno*, 125 Nev. 625, 632, 218 P.3d 847, 851-52 (2009); *Cohen v. Mirage*  
2 *Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003); *see also Clinton v. City of New York*, 524  
3 U.S. 417, 434-35 (1998) ("[o]nce it is determined that a particular plaintiff is harmed by the  
4 defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has  
5 standing – regardless of whether there are others who would also have standing to sue").

6 In sum, the State has cited no legal support for its notion a local government cannot allege  
7 that the state government is acting beyond its constitutional authority. That omission is not  
8 surprising because no such authority exists. Fernley has standing to bring a claim pursuant to  
9 Article 3, Section 1, as a matter of law.

10 **2. The Legislature Has Violated The Separation Of Powers Clause By**  
11 **Relinquishing Its Authority To Collect And Appropriate C-Tax**  
**Revenues To The Executive Branch.**

12 The State obscures the role played by the Executive Branch in the execution of the C-Tax  
13 in an effort to conceal the law's constitutional infirmities, including its violation of the separation  
14 of powers clause of the Nevada Constitution. The Court should reject the State's theory for the  
15 reasons set forth in Fernley's motion, and for two additional reasons:

16 -- *First*, the State overlooks the unique nature of the C-Tax system, which requires the  
17 Department to collect revenue from the subject taxes, deposit such revenue into a segregated State  
18 account called the Local Government Tax Distribution Account ("C-Tax Account"), and then  
19 distribute the revenue from the C-Tax Account to the designated recipients without any  
20 involvement by the Legislature and without any determination that the Legislature's objectives are  
21 being fulfilled. *See* NRS 360.660 *et. seq.*; *see also* Exhibit 6, at 1077; Exhibit 20, at 144:22-  
22 145:18. The State does not dispute that the Legislature cannot delegate its power to make  
23 appropriations, yet that is precisely the effect of this statutory scheme. The absence of any  
24 legislative participation or oversight has left the Executive Branch, acting through the  
25 Department, solely responsible for the collection and appropriation of C-Tax revenues. The result  
26 is the clear and unmistakable violation of the separation of powers clause of the Nevada  
27 Constitution as a matter of law. *See* Nev. Const., art. 3, § 1. The State's characterization of the

28 ///



1 Department as merely the "administrator" of funds already appropriated by the Legislature  
2 therefore is patently erroneous.

3       -- *Second*, contrary to the State's notion otherwise, the Executive Branch is not merely  
4 "administering" appropriated funds in accordance with its constitutional authority. *See* State's  
5 Opposition, at 14:14-24. Even if the State's characterization were correct (which it is not),  
6 however, the Executive Branch may not administer appropriated funds in a manner that conflicts  
7 with the legislative purpose. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty.*  
8 *Comm'rs*, 129 Nev.Adv.Op. 72 slip op., at 10-11, 310 P.3d 583, 589 (2013) (the Executive  
9 Branch has a "general power" to "administer appropriated funds, so long as doing so does not  
10 conflict with legislative purpose"). That is precisely what the Executive Branch would be doing  
11 here under the State's theory, where the stated legislative purpose underlying the C-Tax was to  
12 direct revenue to areas experiencing growth while Fernley is the prime example of revenue  
13 distribution not following growth.

14       In sum, because the Legislature has indisputably abdicated its exclusive constitutional  
15 authority over the collection and appropriation of C-Tax revenues to the Executive Branch, the  
16 Court should hold that the C-Tax violates Article 3, Section 1, of the Nevada Constitution as a  
17 matter of law.

18       **C. The C-Tax Is A Local Or Special Law In Violation Of The Nevada**  
19       **Constitution As A Matter Of Law.**

20       By its plain terms, the C-Tax violates Article 4, Section 20, of the Nevada Constitution  
21 because it is a local or special law that involves "the assessment and collection of taxes for state,  
22 county, and township purposes." *See* Nev. Const., art. 4, § 20; *Attorney General v. Gypsum Res.,*  
23 *LLC*, 129 Nev.Adv.Op. 4, slip op. at 9-10, 294 P.3d 404, 409 (2013). The State mistakenly  
24 disputes that a violation of Article 4, Section 20, has occurred, claiming that the C-Tax is broadly  
25 applicable and does not single out Fernley in any way. In doing so, the State overlooks that a law  
26 (like the C-Tax) is local or special, and accordingly violates Article 4, Section 20, even though it  
27 has broad applicability when it has the effect of burdening a particular locality, such as Fernley.  
28 *See, e.g., Clean Water Coal.*, 127 Nev.Adv.Op. 24, slip op. at 15-18, 255 P.3d at 255-56. It is

1 undisputed that the C-Tax burdens no other Nevada city like it burdens Fernley, as the only city  
2 to have incorporated in this State since the C-Tax was adopted. To illustrate this burden, if  
3 Fernley rapidly grew to become the largest city in Nevada by population, it would continue to  
4 receive only a fraction of the C-Tax revenue appropriated to Las Vegas, or even Boulder City and  
5 Mesquite. Under these circumstances, it is untenable for the State to maintain that the C-Tax is  
6 not a local or special law that contravenes Article 4, Section 20.

7 To advance its subjective litigation interests, the State exacerbates its error by further  
8 inaccurately contending that Article 4, Section 20, is not implicated here because Fernley's claims  
9 relate to the distribution of taxes rather than to the assessment and collection of taxes. *See* State's  
10 Opposition, at 16:26-17:17:8. The State cannot avoid that the collection and distribution of C-  
11 Tax revenue are inextricably intertwined. The Court has to look no further than the name of the  
12 segregated State account used for the deposit of the revenue *collected* pursuant to the C-Tax – the  
13 Local Government Tax *Distribution* Account – to reach this conclusion. The State disregards  
14 that C-Tax revenue is collected and then deposited into this segregated account, which the  
15 Department's Executive Director administers, instead of the state general fund, which the  
16 Legislature appropriates every biennium.<sup>1</sup> *See* NRS 360.605; NRS 360.660; NRS 360.680.  
17 Because the collection and distribution of C-Tax revenue function together in this manner, it is  
18 impossible to isolate the collection of C-Tax revenue from the distribution of such revenue. Thus,  
19 by definition, the C-Tax is a local or special law that violates Article 4, Section 20, as a matter of  
20 law.

21 **D. The C-Tax Violates The General And Uniform Clause Of The Nevada**  
22 **Constitution As A Matter Of Law.**

23 The State understandably ignores Fernley's extensive analysis of *Anthony v. State*, 94 Nev.  
24 338, 580 P.2d 939 (1978), which is directly on point and compels the conclusion that the C-Tax  
25 violates Article 4, Section 21, of the Nevada Constitution. *See* Fernley's Motion, at 28:6-23. The  
26 State cannot avoid the impact of *Anthony* on the constitutionality of the C-Tax, however, by

27  
28 <sup>1</sup> For this reason, the State's reliance on cases like *Damus v. Clark County*, 93 Nev. 512, 569 P.2d 933 (1977), which  
involved the issuance of special obligations bonds, is misplaced. *See* State's Opposition, at 18:3-13.

1 failing to acknowledge its precedential effect. Simply stated, the C-Tax does not survive scrutiny  
2 under Article 4, Section 21, of the Nevada Constitution for the same reasons that the statutes at  
3 issue in *Anthony* were held unconstitutional – the C-Tax continues to perpetuate the status quo of  
4 1997 to protect the fiscal policy of participants in the system at that time while depriving  
5 subsequently established local governments, such as Fernley, of its benefits. Based on *Anthony*  
6 alone, the Court should summarily hold that the C-Tax violates the general and uniform clause of  
7 the Nevada Constitution as a matter of law.

8 Equally unavailing to the State is its conclusory assertion that the C-Tax must be upheld  
9 because a general law cannot be made applicable. *See* State's Opposition, at 19:23-27. As  
10 Fernley pointed out in its motion, and as the State again disregards, the Legislature readily could  
11 have enacted a general law relating to the collection and appropriation of the six taxes that  
12 comprise the C-Tax. Specifically, the C-Tax could have required that the taxes be collected,  
13 deposited into a fund segregated for local governments, and appropriated biennially by the  
14 Legislature after a careful review of local government budgets. *See* Fernley's Motion, at 27:18-  
15 22. Despite the Legislature's stated goal of directing tax dollars to higher growth areas through  
16 the C-Tax, it is undisputed that the Legislature does not review how recipients spend the C-Tax  
17 revenue distributed to them, and that the Department does not assess whether the C-Tax functions  
18 correctly or fulfills legislative objectives. *See* Exhibit 5, at 90:7-18; Exhibit 7, at 37:11-38:8,  
19 42:7-22, 56:23-57:1, 58:8-16, 59:4-19; Exhibit 15, at 72:16-20.

20 Finally, the State's contention that Fernley receives smaller C-Tax distributions than  
21 comparably sized Nevada cities because it does not provide "similar services and functions" (*i.e.*,  
22 its own police department) is untenable. Undermining such a notion is the State's own discovery  
23 responses in this action, which confirm that law enforcement and other government services are  
24 not determinative of Fernley's C-Tax distributions. For example:

25 **INTERROGATORY NO. 19:** If you are claiming that C-Tax distributions to  
26 Fernley, Nevada are based in any way on the provision of public safety or other  
27 government services, please set forth in detail each and every fact which supports  
such a claim.

28 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 19:** *C-Tax  
distributions to Fernley, Nevada are not based on the provision of public safety*

1 *or other government services.* However, it is possible that the City of Fernley  
2 could seek additional C-Tax revenue pursuant to NRS 360.730 and/or 354.598747  
3 via cooperative agreement with other local governments and/or by assuming the  
functions of another local government or district.

4 *See Exhibit 19, at 2:14-21 (emphasis added).* In addition, it is undisputed that the Legislature  
5 does not require a reduction in the revenue base of a C-Tax recipient that stops providing a  
6 service, including law enforcement, regardless of the cost savings. *See, e.g., NRS Ch. 360; see*  
7 *also Exhibit 4, at 82:3-14; Exhibit 15, at 138:6-139:11.* The only reasonable conclusion that can  
8 be reached based on such evidence is that the nature and cost of services provided by a C-Tax  
9 recipient is inconsequential to the amount of its C-Tax distribution. Under these circumstances,  
10 the State is merely aiding the Legislature's attempt to perpetuate the status quo of 1997 at  
11 Fernley's expense and in contravention of the mandate of Article 4, Section 21, of the Nevada  
12 Constitution.

13 **IV. CONCLUSION.**

14 For the foregoing reasons, and the reasons set forth in its moving papers, Fernley  
15 respectfully requests that the Court grant this motion in its entirety and enter summary judgment  
16 in its favor, granting declaratory, injunctive, and monetary relief to Fernley so that past and future  
17 C-Tax distributions meet constitutional standards.

18 DATED this 25<sup>th</sup> day of July, 2014.

19 BROWNSTEIN HYATT FARBER SCHRECK, LLP

20  
21 By: 

22 Joshua J. Hicks, Nevada Bar No. 6679  
23 50 West Liberty Street, Suite 1030  
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27  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 25<sup>th</sup> day of July, 2014, I caused to be served via hand delivery, a true and correct copy of the above foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER** properly addressed to the following:

Andrea Nichols, Esq.  
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Carson City, Nevada 89701

  
Employee of Brownstein Hyatt Farber Schreck, LLP

DECLARATION OF JOSHUA J. HICKS, ESQ.

I, Joshua J. Hicks, Esq., hereby declare as follows:


1. I am an attorney at the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel of record for Plaintiff City of Fernley, Nevada in Case No. 12 OC 00168 1B, currently pending before the First Judicial District Court, Carson City, Nevada. I submit this declaration in support of the Reply In Support Of Plaintiff's Motion For Summary Judgment Against Defendants Nevada Department Of Taxation And Nevada Treasurer. I have personal knowledge of the facts set forth herein, and if called upon to do so, am competent to testify thereto.

2. A true and correct copy of excerpts from the "Petition For Writ Of Mandamus" filed in *State of Nevada ex rel. The Nevada Department of Taxation, et al. v. The First Judicial District Court, et al.*, Nevada Supreme Court Case No. 62050, which has been maintained within my office's files, is attached hereto as Exhibit "34."

3. A true and correct copy of excerpts from the "Petitioner's Reply Brief" filed in *State of Nevada ex rel. The Nevada Department of Taxation, et al. v. The First Judicial District Court, et al.*, Nevada Supreme Court Case No. 62050, which has been maintained within my office's files, is attached hereto as Exhibit "35."

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of July, 2014, in Reno, Nevada.

  
JOSHUA J. HICKS, ESQ.

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,  
Plaintiff,

v.

STATE OF NEVADA ex rel. THE NEVADA DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her official capacity as TREASURER OF THE STATE  
OF NEVADA; and DOES 1-20, inclusive,  
Defendants,

NEVADA LEGISLATURE,  
Intervenor

Case No.: 12 OC 00168 1B  
Dept. No.: I

**INDEX OF EXHIBITS TO THE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AGAINST DEFENDANTS NEVADA DEPARTMENT OF  
TAXATION AND NEVADA TREASURER**

<b>Exhibit No.</b>	<b>Description</b>	<b>Pages</b>
34	Excerpts of the Petition for Writ of Mandamus Jointly Filed by Taxation and Legislature	7
35	Excerpts of the Reply Brief Jointly Filed by Taxation and Legislature	5

# EXHIBIT 34

# EXHIBIT 34



IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, ex rel. THE  
NEVADA DEPARTMENT OF  
TAXATION; THE HONORABLE  
KATE MARSHALL, in her  
official capacity as TREASURER OF  
THE STATE OF NEVADA; and THE  
LEGISLATURE OF THE STATE OF  
NEVADA,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, in and for CARSON CITY;  
and THE HONORABLE JAMES  
TODD RUSSELL, District Judge,

Respondents, and

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Real Party in Interest.

Electronically Filed  
Nov 05 2012 03:34 p.m.  
Tracie K. Linderman  
Clerk of Supreme Court

Supreme Court Case No.

Original Action for Writ to  
First Judicial District Court,  
Carson City, Nevada,  
Case No. 12 OC 00168 IB

PETITION FOR WRIT OF MANDAMUS

plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its constitutional claims. Heller v. Legislature, 120 Nev. 436, 460-62 (2004).

Finally, a defendant is also entitled to a dismissal when the allegations in the complaint, even if true, are insufficient to establish the elements of a claim for relief as a matter of law. Stockmeier v. State Dep't of Corr., 124 Nev. 313, 316 (2008). A defendant is also entitled to a summary judgment "when there is no genuine issue of material fact and the [defendant] is entitled to judgment as a matter of law." Ozawa, 125 Nev. at 560.

Under these standards, the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's claims.

**III. Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity.**

The Court has granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were barred by sovereign immunity as a matter of law. County of Washoe, 98 Nev. at 457. The Court grants writ petitions in such circumstances because "[a]bsolute immunity is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally." State v. Dist. Ct., 118 Nev. 609, 615 (2002). Even in the context of qualified immunity, it is not merely a defense to liability, it is "an entitlement not to stand trial or face the other burdens of litigation. Accordingly, a

defense of qualified immunity should be resolved at the earliest possible stage in litigation." Butler v. Bayer, 123 Nev. 450, 458 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 200 (2001)) (internal quotations and footnotes omitted).

In this case, Fernley asked for money damages on its federal and state constitutional claims. (PA1:10-11.) However, when the Legislature raised the defense of absolute immunity from money damages under 42 U.S.C. §1983 and NRS 41.032(1), Fernley did not offer any opposition to the Legislature's argument and authority. (PA4:625-27.) This is not surprising because the State is absolutely immune from money damages on Fernley's constitutional claims under federal and state law. Therefore, because the State is entitled to the defense of absolute sovereign immunity as a matter of federal and state law, the remedy of mandamus is appropriate to compel the district court to rule properly and dismiss Fernley's constitutional claims for money damages based on sovereign immunity.

#### A. Federal law.

To bring a cause of action for a federal constitutional violation, a plaintiff must plead a civil rights claim under 42 U.S.C. §1983 (section 1983). Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) ("a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. §1983."); Martinez v. Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998); Azul-Pacifico, Inc.

officials acting in their official capacities, "the complaint fails to state an actionable claim." N. Nev. Ass'n Injured Workers, 107 Nev. at 114.<sup>6</sup>

In this case, Fernley's complaint alleged federal constitutional violations and asked for money damages from the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity. Because the State and its agencies and officials acting in their official capacities are absolutely immune from money damages under section 1983, the district court was obligated to dismiss or grant summary judgment to the State on Fernley's federal constitutional claims for money damages as a matter of law.

**B. State law:**

A plaintiff may bring a state-law claim for money damages against the State and its agencies and officials acting in their official capacities only to the extent authorized by Nevada's conditional waiver of its sovereign immunity, NRS 41.031 et seq.; Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 601-04 (1977). Nevada's conditional waiver of its sovereign immunity is expressly limited by NRS 41.032, which provides in relevant part:

---

<sup>6</sup> Although section 1983 bars claims for money damages against the State and its agencies and officials acting in their official capacities, it does not bar claims for prospective declaratory or injunctive relief against state officials acting in their official capacities. N. Nev. Ass'n Injured Workers, 107 Nev. at 115-16 (citing Will, 491 U.S. at 71 n.10).

[N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom, 93 Nev. at 603-05. Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. Hagblom, 93 Nev. at 603-04.

In its state constitutional claims, Feraley alleged that the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity violated the Nevada Constitution in their execution and administration of the C-Tax system under NRS 360.600-360.740. Because those statutory provisions have not been declared invalid by a court of competent jurisdiction, the State and its agencies and officials acting in their official capacities enjoy absolute immunity from money damages under NRS 41.032(1) based on any acts or omissions in their

execution and administration of the C-Tax system. Furthermore, Fernley did not offer any opposition in the district court to this argument and authority. (P44:625-27.) Therefore, based on NRS 41.032(1), the district court was obligated to dismiss or grant summary judgment to the State on Fernley's state constitutional claims for money damages as a matter of law.

Even though sovereign immunity under NRS 41.032(1) is sufficient by itself to require dismissal of Fernley's state constitutional claims for money damages, those claims are also barred as a matter of law by sovereign immunity under NRS 41.032(2). Under that provision, the State and its agencies and officials acting in their official capacities are absolutely immune from money damages when their actions are based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or execution of social, economic or political policy. Martinez v. Maruszczyk, 123 Nev. 433, 445-47 (2007); Scott v. Dep't of Commerce, 104 Nev. 580, 583-86 (1988). As a general rule, this test is met when state agencies and officials are performing official duties to execute or carry out the policy of a statutory scheme. See Boulder Excavating, 124 Nev. at 757-60. Thus, state agencies and officials are entitled to sovereign immunity under NRS 41.032(2) whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez, 123 Nev. at 446.

In this case, the alleged injury-producing conduct arises from the performance of official duties by the named state agencies and officials to execute and carry out the social, economic and political policy of the C-Tax statutes which are an integral part of governmental policy-making or planning. Even though the state agencies and officials must perform their official duties within clearly defined statutory parameters, they still must exercise official discretion and judgment within those statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. Under such circumstances, the state agencies and officials are entitled to sovereign immunity from money damages under NRS 41.032(2). Therefore, based on NRS 41.032(2), the district court was obligated to dismiss or grant summary judgment to the State on Feruley's state constitutional claims for money damages as a matter of law.

**IV. Feruley's Fourteenth Amendment claims are barred as a matter of law by Feruley's lack of standing to bring the claims.**

The Court has considered writ petitions when the issue was whether the plaintiff lacked standing to bring its claims. D.R. Horton, 125 Nev. at 453-54. The Court considers writ petitions in such circumstances because when the plaintiff lacks standing to bring its claims, the plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its claims. Heller, 120 Nev. at 460-62.

# EXHIBIT 35

# EXHIBIT 35



IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. THE  
NEVADA DEPARTMENT OF  
TAXATION; THE HONORABLE  
KATE MARSHALL, in her  
official capacity as TREASURER OF  
THE STATE OF NEVADA; and THE  
LEGISLATURE OF THE STATE OF  
NEVADA,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, in and for CARSON CITY;  
and THE HONORABLE JAMES  
TODD RUSSELL, District Judge,

Respondents, and

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Real Party in Interest.

Electronically Filed  
Dec 18 2012 08:51 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Supreme Court Case No. 62050

Original Action for Writ to  
First Judicial District Court,  
Carson City, Nevada,  
Case No. 12 OC 00168 1B

PETITIONERS' REPLY BRIEF

consideration of such legislation would be impacted by the Court's resolution of the legal issues in the mandamus petition. And as explained in the Petitioners' supplement to their mandamus petition, under the proposed deadline calendar for the 2013 legislative session, the sooner the Court is able to conclusively resolve the issues in the mandamus petition, the more time there will be available during the 2013 legislative session for committees in both Houses and the Houses themselves to consider legislation pertaining to the C-Tax system in light of the Court's determination of whether Fernley's constitutional challenges are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers.

Therefore, Fernley's constitutional challenges to the C-Tax system raise important and urgent issues of law that need clarification, and it would be in the best interests of the State and its local governments for the Court to conclusively resolve the issues in the mandamus petition as soon as is reasonably possible before the important deadlines in the 2013 legislative session.

**F. Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity.**

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law by the State's sovereign immunity. In its answering brief, Fernley fails to make any argument or cite any authority to refute the Petitioners' argument and authority. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the

Petitioners' argument and authority, Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law. See Polk v. State, 126 Nev. Adv. Op. 19, 233 P.3d 357, 360 (2010) ("a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal").

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its state constitutional claims are barred as a matter of law by the State's sovereign immunity under subsection 1 *and* subsection 2 of NRS 41.032. Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 603-05 (1977).

In its answering brief, although Fernley makes an argument and cites authority regarding sovereign immunity under subsection 2 of NRS 41.032, Fernley does not make any argument or cite any authority regarding sovereign immunity under subsection 1 of NRS 41.032. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the Petitioners' argument and authority regarding sovereign immunity under subsection 1 of NRS 41.032, Fernley's claims for money damages on its state constitutional claims are barred as a matter of law.

In addition, Fernley's state constitutional claims for money damages are also barred as a matter of law by sovereign immunity under subsection 2 of

NRS 41.032. Fernley contends that such sovereign immunity is not available because the act of administering the C-Tax system does not require the performance of official duties which involve an element of official discretion or judgment or which are grounded in the creation or execution of social, economic or political policy. (Ans. Br. 16-18.) Fernley's contention is wrong as a matter of law.

Under subsection 2 of NRS 41.032, state agencies and officials are entitled to sovereign immunity whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez v. Maruszczak, 123 Nev. 433, 446 (2007). In this case, the alleged injury-producing conduct arises from the performance of official duties by state agencies and officials to execute and carry out the social, economic and political policy of the C-Tax statutes which are an integral part of governmental policy-making or planning. Even though the state agencies and officials must perform their official duties within clearly defined statutory parameters, they still must exercise official discretion and judgment within those statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. Under such circumstances, the state agencies and officials are entitled to sovereign immunity under subsection 2 of NRS 41.032.

Finally, Fernley contends that issues of sovereign immunity under NRS 41.032 are mixed questions of law and fact which should not be summarily

adjudicated at the motion-to-dismiss stage. (Ans. Br. 17-18.) However, when it is apparent from the face of the complaint that the defendants are entitled to sovereign immunity under NRS 41.032 as a matter of law, dismissal is required.<sup>3</sup>

G. Fernley's Fourteenth Amendment claims are barred as a matter of law by Fernley's lack of standing to bring the claims.

In its answering brief, Fernley acknowledges the existence of the doctrine precluding political subdivisions from bringing Fourteenth Amendment claims against the State. Fernley contends, however, that courts in other jurisdictions have found limited exceptions which allow political subdivisions to bring Fourteenth Amendment claims against the State. In particular, Fernley contends that courts have recognized limited exceptions when the legislation being challenged: (1) adversely affects a municipality's proprietary interest in a specific fund of moneys; or (2) involves issues concerning taxation that are of great public interest. (Ans. Br. 21-24.) The Court should reject Fernley's contentions because the limited exceptions advocated by Fernley should not be applied to this case.

Fernley cites City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995), for the proposition that a political subdivision may bring Fourteenth Amendment

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<sup>3</sup> See, e.g., Foster v. Washoe County, 114 Nev. 936, 941-43 (1998); Nev. Power v. Clark County, 107 Nev. 428, 428-30 (1991); Ramirez v. Harris, 105 Nev. 219, 220 (1989); Scott v. Dep't of Commerce, 104 Nev. 580, 583-85 (1988); Hagblom, 93 Nev. at 599-605.

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.  
DEPARTMENT OF TAXATION;  
THE HONORABLE DAN  
SCHWARTZ, in his official capacity  
as TREASURER OF THE STATE OF  
NEVADA; and THE LEGISLATURE  
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

**JOINT APPENDIX**

**VOLUME 20 PART 3**

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# EXHIBIT 34

# EXHIBIT 34

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. THE  
NEVADA DEPARTMENT OF  
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KATE MARSHALL, in her  
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PETITION FOR WRIT OF MANDAMUS

plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its constitutional claims. Heller v. Legislature, 120 Nev. 456, 460-62 (2004).

Finally, a defendant is also entitled to a dismissal when the allegations in the complaint, even if true, are insufficient to establish the elements of a claim for relief as a matter of law. Stockmeier v. State Dep't of Corr., 124 Nev. 313, 316 (2008). A defendant is also entitled to a summary judgment "when there is no genuine issue of material fact and the [defendant] is entitled to judgment as a matter of law." Ozawa, 125 Nev. at 560.

Under these standards, the district court was obligated to dismiss or grant summary judgment to the State on all of Fernley's claims.

**III. Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity.**

The Court has granted writ petitions when the district court was obligated to dismiss an action because the plaintiff's claims were barred by sovereign immunity as a matter of law. County of Washoe, 98 Nev. at 457. The Court grants writ petitions in such circumstances because "[a]bsolute immunity is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally." State v. Dist. Ct., 118 Nev. 609, 615 (2002). Even in the context of qualified immunity, it is not merely a defense to liability, it is "an entitlement not to stand trial or face the other burdens of litigation. Accordingly, a

defense of qualified immunity should be resolved at the earliest possible stage in litigation.” Butler v. Bayer, 123 Nev. 450, 458 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 200 (2001)) (internal quotations and footnotes omitted).

In this case, Fernley asked for money damages on its federal and state constitutional claims. (PA1:10-11.) However, when the Legislature raised the defense of absolute immunity from money damages under 42 U.S.C. §1983 and NRS 41.032(1), Fernley did not offer any opposition to the Legislature’s argument and authority. (PA4:625-27.) This is not surprising because the State is absolutely immune from money damages on Fernley’s constitutional claims under federal and state law. Therefore, because the State is entitled to the defense of absolute sovereign immunity as a matter of federal and state law, the remedy of mandamus is appropriate to compel the district court to rule properly and dismiss Fernley’s constitutional claims for money damages based on sovereign immunity.

#### A. Federal law.

To bring a cause of action for a federal constitutional violation, a plaintiff must plead a civil rights claim under 42 U.S.C. §1983 (section 1983). Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) (“a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. §1983.”); Martinez v. Los Angeles, 141 F.3d 1373, 1382 (9th Cir. 1998); Azul-Pacifico, Inc.

officials acting in their official capacities, "the complaint fails to state an actionable claim." N. Nev. Ass'n Injured Workers, 107 Nev. at 114.<sup>6</sup>

In this case, Fernley's complaint alleged federal constitutional violations and asked for money damages from the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity. Because the State and its agencies and officials acting in their official capacities are absolutely immune from money damages under section 1983, the district court was obligated to dismiss or grant summary judgment to the State on Fernley's federal constitutional claims for money damages as a matter of law.

#### B. State law.

A plaintiff may bring a state-law claim for money damages against the State and its agencies and officials acting in their official capacities only to the extent authorized by Nevada's conditional waiver of its sovereign immunity. NRS 41.031 et seq.; Flagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 601-04 (1977). Nevada's conditional waiver of its sovereign immunity is expressly limited by NRS 41.032, which provides in relevant part:

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<sup>6</sup> Although section 1983 bars claims for money damages against the State and its agencies and officials acting in their official capacities, it does not bar claims for prospective declaratory or injunctive relief against state officials acting in their official capacities. N. Nev. Ass'n Injured Workers, 107 Nev. at 115-16 (citing Will, 491 U.S. at 71 n.10).

[N]o action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom, 93 Nev. at 603-05. Under NRS 41.032(1), the State and its agencies and officials acting in their official capacities are absolutely immune from money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. Hagblom, 93 Nev. at 603-04.

In its state constitutional claims, Fernley alleged that the State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity violated the Nevada Constitution in their execution and administration of the C-Tax system under NRS 360.600-360.740. Because those statutory provisions have not been declared invalid by a court of competent jurisdiction, the State and its agencies and officials acting in their official capacities enjoy absolute immunity from money damages under NRS 41.032(1) based on any acts or omissions in their



execution and administration of the C-Tax system. Furthermore, Fernley did not offer any opposition in the district court to this argument and authority. (P44:625-27.) Therefore, based on NRS 41.032(1), the district court was obligated to dismiss or grant summary judgment to the State on Fernley's state constitutional claims for money damages as a matter of law.

Even though sovereign immunity under NRS 41.032(1) is sufficient by itself to require dismissal of Fernley's state constitutional claims for money damages, those claims are also barred as a matter of law by sovereign immunity under NRS 41.032(2). Under that provision, the State and its agencies and officials acting in their official capacities are absolutely immune from money damages when their actions are based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or execution of social, economic or political policy. Martinez v. Maruszczyk, 123 Nev. 433, 445-47 (2007); Scott v. Dep't of Commerce, 104 Nev. 580, 583-86 (1988). As a general rule, this test is met when state agencies and officials are performing official duties to execute or carry out the policy of a statutory scheme. See Boulder Excavating, 124 Nev. at 757-60. Thus, state agencies and officials are entitled to sovereign immunity under NRS 41.032(2) whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez, 123 Nev. at 446.

In this case, the alleged injury-producing conduct arises from the performance of official duties by the named state agencies and officials to execute and carry out the social, economic and political policy of the C-Tax statutes which are an integral part of governmental policy-making or planning. Even though the state agencies and officials must perform their official duties within clearly defined statutory parameters, they still must exercise official discretion and judgment within those statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. Under such circumstances, the state agencies and officials are entitled to sovereign immunity from money damages under NRS 41.032(2). Therefore, based on NRS 41.032(2), the district court was obligated to dismiss or grant summary judgment to the State on Fernley's state constitutional claims for money damages as a matter of law.

**IV. Fernley's Fourteenth Amendment claims are barred as a matter of law by Fernley's lack of standing to bring the claims.**

The Court has considered writ petitions when the issue was whether the plaintiff lacked standing to bring its claims. D.R. Horton, 125 Nev. at 453-54. The Court considers writ petitions in such circumstances because when the plaintiff lacks standing to bring its claims, the plaintiff does not have the legal right to set judicial machinery in motion, and the plaintiff is barred as a matter of law from prosecuting its claims. Heller, 120 Nev. at 460-62.

# EXHIBIT 35

# EXHIBIT 35

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. THE  
NEVADA DEPARTMENT OF  
TAXATION; THE HONORABLE  
KATE MARSHALL, in her  
official capacity as TREASURER OF  
THE STATE OF NEVADA; and THE  
LEGISLATURE OF THE STATE OF  
NEVADA,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, in and for CARSON CITY;  
and THE HONORABLE JAMES  
TODD RUSSELL, District Judge,

Respondents, and

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Real Party in Interest.

Electronically Filed  
Dec 18 2012 08:51 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Supreme Court Case No. 62050

Original Action for Writ to  
First Judicial District Court,  
Carson City, Nevada,  
Case No. 12 OC 00168 1B

PETITIONERS' REPLY BRIEF

consideration of such legislation would be impacted by the Court's resolution of the legal issues in the mandamus petition. And as explained in the Petitioners' supplement to their mandamus petition, under the proposed deadline calendar for the 2013 legislative session, the sooner the Court is able to conclusively resolve the issues in the mandamus petition, the more time there will be available during the 2013 legislative session for committees in both Houses and the Houses themselves to consider legislation pertaining to the C-Tax system in light of the Court's determination of whether Fernley's constitutional challenges are barred as a matter of law and the C-Tax system is a valid exercise of the State's fiscal powers.

Therefore, Fernley's constitutional challenges to the C-Tax system raise important and urgent issues of law that need clarification, and it would be in the best interests of the State and its local governments for the Court to conclusively resolve the issues in the mandamus petition as soon as is reasonably possible before the important deadlines in the 2013 legislative session.

**F. Fernley's claims for money damages are barred as a matter of law by the State's sovereign immunity.**

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law by the State's sovereign immunity. In its answering brief, Fernley fails to make any argument or cite any authority to refute the Petitioners' argument and authority. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the

Petitioners' argument and authority, Fernley's claims for money damages on its federal constitutional claims are barred as a matter of law. See Polk v. State, 126 Nev. Adv. Op. 19, 233 P.3d 357, 360 (2010) ("a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal").

In their mandamus petition, the Petitioners argue that Fernley's claims for money damages on its state constitutional claims are barred as a matter of law by the State's sovereign immunity under subsection 1 *and* subsection 2 of NRS 41.032. Each subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 603-05 (1977).

In its answering brief, although Fernley makes an argument and cites authority regarding sovereign immunity under subsection 2 of NRS 41.032, Fernley does not make any argument or cite any authority regarding sovereign immunity under subsection 1 of NRS 41.032. (Ans. Br. 16-18.) Therefore, given that Fernley has failed to oppose the Petitioners' argument and authority regarding sovereign immunity under subsection 1 of NRS 41.032, Fernley's claims for money damages on its state constitutional claims are barred as a matter of law.

In addition, Fernley's state constitutional claims for money damages are also barred as a matter of law by sovereign immunity under subsection 2 of

NRS 41.032. Fernley contends that such sovereign immunity is not available because the act of administering the C-Tax system does not require the performance of official duties which involve an element of official discretion or judgment or which are grounded in the creation or execution of social, economic or political policy. (Ans. Br. 16-18.) Fernley's contention is wrong as a matter of law.

Under subsection 2 of NRS 41.032, state agencies and officials are entitled to sovereign immunity whenever "the injury-producing conduct is an integral part of governmental policy-making or planning." Martinez v. Maruszczak, 123 Nev. 433, 446 (2007). In this case, the alleged injury-producing conduct arises from the performance of official duties by state agencies and officials to execute and carry out the social, economic and political policy of the C-Tax statutes which are an integral part of governmental policy-making or planning. Even though the state agencies and officials must perform their official duties within clearly defined statutory parameters, they still must exercise official discretion and judgment within those statutory parameters to execute and carry out the policy of the C-Tax's statutory scheme. Under such circumstances, the state agencies and officials are entitled to sovereign immunity under subsection 2 of NRS 41.032.

Finally, Fernley contends that issues of sovereign immunity under NRS 41.032 are mixed questions of law and fact which should not be summarily

adjudicated at the motion-to-dismiss stage. (Ans. Br. 17-18.) However, when it is apparent from the face of the complaint that the defendants are entitled to sovereign immunity under NRS 41.032, as a matter of law, dismissal is required.<sup>3</sup>

G. Fernley's Fourteenth Amendment claims are barred as a matter of law by Fernley's lack of standing to bring the claims.

In its answering brief, Fernley acknowledges the existence of the doctrine precluding political subdivisions from bringing Fourteenth Amendment claims against the State. Fernley contends, however, that courts in other jurisdictions have found limited exceptions which allow political subdivisions to bring Fourteenth Amendment claims against the State. In particular, Fernley contends that courts have recognized limited exceptions when the legislation being challenged: (1) adversely affects a municipality's proprietary interest in a specific fund of moneys; or (2) involves issues concerning taxation that are of great public interest. (Ans. Br. 21-24.) The Court should reject Fernley's contentions because the limited exceptions advocated by Fernley should not be applied to this case.

Fernley cites City of New York v. State, 655 N.E.2d 649, 652 (N.Y. 1995), for the proposition that a political subdivision may bring Fourteenth Amendment

<sup>3</sup> See, e.g., Foster v. Washoe County, 114 Nev. 936, 941-43 (1998); Nev. Power v. Clark County, 107 Nev. 428, 428-30 (1991); Ramirez v. Harris, 105 Nev. 219, 220 (1989); Scott v. Dep't of Commerce, 104 Nev. 580, 583-85 (1988); Hagblom, 93 Nev. at 599-605.



# EXHIBIT 36

# EXHIBIT 36

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**City of Fernley**  
**MAYOR'S OFFICE**

Mayor & City Council  
Legislative  
Public Policy

April 3<sup>rd</sup>, 2012

TO: Assemblywoman Marilyn Kirkpatrick, Chair  
Legislative Commission's Subcommittee to  
Study the Allocation of Money Distributed from  
the Local Government Tax Distribution Account  
Grant Sawyer Office Building  
555 E. Washington Ave.  
Las Vegas, NV 89101-1072

FROM: Mayor Goodman  
City of Fernley

RE: Lyon County CTAX letter of March 13<sup>th</sup>, 2012

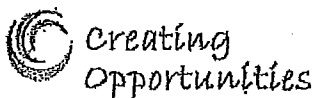
Dear Madame Chair,

Please allow the City of Fernley to take this opportunity to clarify for the record, and comment to Lyon County's position statement provided to the Interim Committee on March 13, 2012.

The County's letter indicates the City does not provide funds to pay for services provided to the residents of Fernley. However, the residents of Fernley's current property tax rate of \$3.3747 includes: State of Nevada (0.1700), Lyon County School District (1.3367), Lyon County (0.8644), Fernley Swimming Pool District (0.2000) and North Lyon Fire Maintenance District (0.2567). Based upon the combined tax rate of \$1.1211 imposed for Lyon County and North Lyon Fire Maintenance District, Lyon County is being paid by the residents of Fernley to provide services within the City's boundaries through the property taxes.

In Lyon County's letter of March 13<sup>th</sup>, 2012, the County lists various services it provides throughout the County and implies that the City could provide the services. The County is statutorily tasked with providing certain services *within and throughout* the County and the City's authority to implement certain programs is statutorily limited to the provisions of NRS 266 and NRS 268. Conversely, city services are only provided for those citizens within the City limits. The City wishes to clarify for the Committee that the City cannot take over the majority of those services, and/or they are not City services generally.

In Lyon County's letter of March 13<sup>th</sup>, 2012, the County lists various services it provides and implies the City can take over. The issue is these services would be



CITY OF FERNLEY  
v. STATE OF NEVADA  
JA 3637  
4854

CoF

provided throughout the County which encompasses the City of Fernley. Conversely, city services are only provided for those citizens within the City limits. The City wishes to clarify for the Committee that the City cannot take over the majority of those services, and/or they are not City services generally.

1. Law Enforcement; 911 Dispatch, Jail Services

Under NRS, the Sheriff is required to make a presence in the County even in an incorporated City as evidenced by the AG Opinion that states "the sheriff's duties within a city involve the same express statutory duties as the sheriff performs elsewhere throughout the county." See AGO 96-12. Under NRS Chapter 248, the Sheriff is required to be in control of the jail in his/her County.

2. Library

The City can create its own library under the Nevada Revised Statutes. The County however, may still maintain their library within the City limits as a County library.

3. Social Services

This is a County function within all jurisdictions.

4. Senior Services

This is an optional service.

5. Assessor's Services

The City does not have the authority to assess property, and pursuant to Chapter 250, the County Recorder is a County elected seat.

6. County Clerk Treasurer Services

The City has its own City Clerk and City Treasurer, and it would therefore not be appropriate for the City to take over the County related services.

7. Recorder's Services

Pursuant to Chapter 247, the County Recorder is a County elected seat.

8. Public Administrator and Guardian Services

Under NRS Chapter 253, the Public Guardian/Administrator is a County position, not a City position.

9. Justice Court

The City has its own Municipal Court and Judge with the authority to adjudicate misdemeanor violations only. The Justice Court handles gross and felony cases as well as misdemeanors for the County.

10. Juvenile Probation

The City does not have jurisdiction over Juvenile cases and therefore would have no reason or basis under which to assume this service.

11. District Attorney Services

Pursuant to NRS 252 the District Attorney is a County elected seat. The District Attorney prosecutes cases and provides civil legal advice for the County only, not the City. The City has its own City Attorney. It would not be appropriate for the City to take over the District Attorney's seat and services and outside the scope of the City's authority.

12. Search and Rescue Services

Under NRS 248.092, the Sheriff is responsible for search and rescue in their county.

13. Coroner Services

Pursuant to NRS 259, every county in this State constitutes a coroner's district and the Sheriff is allowed to serve as ex officio coroner, again the Sheriff's Office is duty bound to provide the same services with in or with out the City limits.

14. Pre-Sentence Investigation Services

This service is provided for felony and gross misdemeanor criminal cases only. The reports are prepared for District Court Judges within the County, and not for any municipal Judges or Courts within the City limits. The City does not have jurisdiction over felony and gross misdemeanors, only misdemeanors that occur in the City. Therefore, it would not be appropriate for the City to take over these services.

15. Fire Protection

The City of Fernley fire protection is a unique situation as compared to all other jurisdictions. The Lyon County's argument that the City of Fernley does not provide Fire protection is unfounded;

- During the course of forming the City of Fernley, per NRS 264, it had been determined that the city was the same geographical area as the current fire district.
- The Fire District had been in place providing Fire/ambulance response for many years via the volunteer firefighters and paid staff, with its own tax rate provided by city residents. At that time it was deemed to be in the best interest of the citizens of Fernley to leave in play the North Lyon County Fire Protection District to provide the current Fire and Ambulance services.
- Had the city chosen to dissolve the Fire District and provide those services, during the process of determining a base tax structure- the city would have added the District tax on to its base rate.

- Thus legislation was created to address the issue requiring the city to *not* take over the fire protection and allowed for a tax base in which to pay for the services.

In conclusion, while the County claims that the City does not pay for public safety, police or fire, the City's contention is that there are funds generated within the City through the specific taxes created to address those concerns. The City hopes to address with the Interim Committee the limited services that can be provided by the City.

Of importance is the distracted focus on services. The County hopes to focus the Committee's attention solely on the services provided to City residents. Unfortunately, this distracts from the primary issue involving the City of Fernley. The County is focusing on Tier Two distributions. However, Tier One distributions are the primary concern of the City. The City intends to help provide the Committee with the necessary information and tools to understand and address the unique inequity suffered by the City of Fernley due to its incorporation date and related issues.

The primary concern stems from the inflexibility of the C-Tax system. The C-Tax was designed to be a stable and equitable source of tax revenue for counties and local governments. Yet, the system in place allows for no opportunity to make meaningful adjustments. As a result, a municipality like Fernley contributes significantly more to the C-Tax system than it receives in distributions. We would refer the Committee to our original statement letter for further guidance on the position and unique issue of the City of Fernley.

Sincerely,



LeRoy Goodman, Mayor  
City of Fernley

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17 OFFICE OF THE CITY ATTORNEY  
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19 Fernley, Nevada 89408

20 *Attorneys for the City of Fernley, Nevada*

21 **IN THE FIRST JUDICIAL DISTRICT COURT**

22 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

23 CITY OF FERNLEY, NEVADA, a  
24 Nevada municipal corporation,

25 Plaintiff,

26 v.

27 STATE OF NEVADA ex rel. THE NEVADA  
28 DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her  
official capacity as TREASURER OF THE  
STATE OF NEVADA; and DOES 1-20,  
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL  
RECONSIDERATION AND REHEARING OF THE COURT'S JUNE 6, 2014 ORDER  
AS TO DEFENDANTS NEVADA DEPARTMENT OF TAXATION AND  
NEVADA TREASURER; PLAINTIFF'S OPPOSITION TO COUNTERMOTION  
FOR ORDER DISMISSING NEVADA DEPARTMENT OF TAXATION**

REC'D & FILED  
2014 JUL 25 PM 2:50  
ALAN GLOVER  
C. GRIBBLE CLERK  
DEPUTY

1 Plaintiff CITY OF FERNLEY, NEVADA (hereinafter "Fernley"), by and through its  
2 attorneys of record, Brownstein Hyatt Farber Schreck, LLP, hereby submits this: (1) Reply in  
3 support of its motion for the partial reconsideration of the Court's Order entered on June 6, 2014  
4 (the "June 6th Order"), and the rehearing of Defendants Nevada Department of Taxation and  
5 Nevada Treasurer's (collectively the "State") Renewal of Motion to Dismiss, which Defendant  
6 Nevada Legislature joined, with respect to the dismissal of Fernley's claims against the Honorable  
7 Kate Marshall, in her official capacity as Treasurer of the State of Nevada (the "State Treasurer");  
8 and (2) Opposition to the State's countermotion for an order dismissing Defendant Nevada  
9 Department of Taxation (the "Department").

10 This reply and opposition is based on the following memorandum of points and  
11 authorities, the attached exhibits, all other pleadings, papers, and documents on file with the  
12 Court in this action, such further documentary evidence as the Court deems appropriate, and the  
13 arguments of counsel at the hearing on this motion. For the Court's convenience, all of Fernley's  
14 exhibits are numbered consecutively, with Exhibits 1 through 5 attached to its motion and  
15 Exhibits 6 through 9 attached to this reply and opposition.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION.**

18 The Court should grant reconsideration and rehearing of its June 6th Order, and deny the  
19 State's countermotion for an order dismissing the Department, on each of the three separate and  
20 independent grounds set forth in Fernley's motion. The State does not oppose reconsideration and  
21 rehearing on any of these grounds, but instead merely offers the conclusory assertions that: (1)  
22 the dismissal of the State Treasurer was proper under the immunity provisions of NRS 41.032(1);  
23 and (2) the Department should likewise be dismissed pursuant to NRS 41.032(1). In doing so, the  
24 State misunderstands that it, not Fernley, has the burden to prove the applicability of NRS  
25 41.032(1). The State has not even attempted to satisfy this burden, however, which is  
26 understandable because neither the State Treasurer nor the Department is entitled to immunity  
27 under NRS 41.032(1) as a matter of law. The State's countermotion ~~additionally should be denied~~  
28 because it is both untimely and procedurally improper. For these reasons, not only is the

1 reconsideration and rehearing of the dismissal of the State Treasurer necessary and appropriate at  
2 this time, the State's counter-motion for an order dismissing the Department lacks merit and  
3 should be denied in its entirety.

4 **II. ARGUMENT.**

5 **A. The Court Should Grant Reconsideration And Rehearing Of The**  
6 **June 6th Order Because The State Has Not Challenged Any Of The**  
**Grounds On Which Fernley Seeks Such Relief.**

7 The State has not disputed any of the three grounds on which Fernley has moved for  
8 reconsideration and rehearing of the June 6th Order. Specifically, the State has remained silent as  
9 to Fernley's request for reconsideration and rehearing on the bases that: (1) the Court should not  
10 have dismissed Fernley's claims against the State Treasurer under NRS 41.032(1) because  
11 Fernley did not have the opportunity to brief the issue in its opposition to the State's renewed  
12 motion to dismiss; (2) the Court overlooked that the State and the Legislature only argued  
13 immunity with respect to Fernley's claims against the State Treasurer that seek an award of  
14 money damages, not as to Fernley's claims for declaratory and injunctive relief, when it dismissed  
15 Fernley's complaint against the State Treasurer pursuant to NRS 41.032(1); and (3) the Court  
16 overlooked that the State Treasurer is a necessary party to this action because she controls the  
17 public's money. Given this acquiescence by the State, the Court should grant Fernley's request  
18 for reconsideration and rehearing on each of these separate and independent grounds.

19 **B. The Court Should Grant Reconsideration And Rehearing Of The**  
20 **June 6th Order, And Deny The State's Counter-motion For An Order**  
21 **Dismissing The Department, Because The State Has Not Proven That**  
**Sovereign Immunity Precludes Fernley's Claims As A Matter Of Law.**

22 Rather than address the grounds on which Fernley moves for reconsideration and  
23 rehearing, the State has purported to argue the merits of the Court's dismissal of the State  
24 Treasurer under NRS 41.032(1). Not only should the Court reject this argument to the extent it  
25 exceeds the scope of the immunity asserted in the State's renewed motion to dismiss (*i.e.*, that the  
26 State is shielded from liability for claims for money damages, not from claims for declaratory and  
27 injunctive relief), the State's premise has no basis in law. ~~Contrary to the State's motion otherwise,~~  
28 Fernley has no duty to plead and prove that its claims are not barred by sovereign immunity. *See*



1 State's Opposition, at 3:3-5, 3:12-19. Precisely the opposite is true. The State has the burden to  
2 prove the applicability of each and every one of its defenses, and it has failed to establish that  
3 sovereign immunity shields the State Treasurer from liability as a matter of law. The Court  
4 therefore should reject the State's sovereign immunity defense in its entirety, grant reconsideration  
5 and rehearing of the June 6th Order dismissing of the State Treasurer pursuant to NRS 41.032(1),  
6 and deny the State's counter-motion for an order dismissing the Department.

7 Although the State recognizes that immunity is available under NRS 41.032(1) *only* if the  
8 government officer, employee, or contractor is "exercising *due care*, in the execution of a statute  
9 or regulation," it makes no attempt to establish that any government officer, employee, or  
10 contractor acted with "due care" in the execution of the C-Tax. *See* NRS 41.032(1) (emphasis  
11 added). This omission is fatal to the State's immunity defense because "the official seeking  
12 absolute immunity bears the burden of showing that such immunity is justified for the function in  
13 question." *See State v. Second Judicial Dist. Court*, 118 Nev. 609, 617, 55 P.3d 420, 425 (2002);  
14 *see also Pope v. Motel 6*, 121 Nev. 307, 318-19, 114 P.3d 277, 284-85 (2005) (defendant has "the  
15 burden of alleging and proving the existence of the privilege"). In other words, Fernley has no  
16 duty to allege that the Department and the State Treasurer acted without "due care" in the  
17 execution of the C-Tax, as the State misguidedly asserts, but rather it is the State's sole burden to  
18 prove that it acted with the statutorily required "due care." *See* State's Opposition, at 3:7-19.  
19 Given the State's failure to produce any evidence to support its claim of immunity based on NRS  
20 41.032(1), the Court should entirely reject that defense and grant reconsideration and rehearing of  
21 its dismissal of the State Treasurer.

22 Further precluding the State's immunity defense under NRS 41.032(1) is the undisputed  
23 evidence establishing that the State has not acted with "due care" in the execution of the C-Tax.  
24 Nowhere in the C-Tax did the Legislature mandate a reduction in the revenue base of a recipient  
25 that has experienced both a drop in population and a decline in the assessed value of taxable  
26 property. The Legislature instead provided in the C-Tax that the Department's Executive  
27 Director, the Committee on Local Government Finance, and the Nevada Tax Commission may  
28 decide whether to cut the revenue base of a recipient whose population and assessed value of

1 taxable property have decreased in the immediately preceding three fiscal years. *See* NRS  
2 360.695; Exhibit 6, at 59:24-63:15; Exhibit 7, at 109:3-10, 122:22-123:2; Exhibit 8, at 91:23-  
3 94:20. In exercising this authority, the Department's Executive Director has decided not to  
4 change the C-Tax bases of several local governments that have met the criteria for a reduction,  
5 including Mesquite and Boulder City. *See* Exhibit 6, at 59:24-63:15; *see also* Exhibit 7, at  
6 139:12-140:20. When a city like Fernley has repeatedly been denied a needed increase in its C-  
7 Tax base, decisions like these confirm that the State has not exercised "due care" in the execution  
8 of the C-Tax. As a result, the State's assertion of immunity under NRS 41.032(1) is unsustainable  
9 as a matter of law. Under these circumstances, the Court should: (1) reconsider its dismissal of  
10 the State Treasurer in the June 6th Order and rehear the State's renewed motion to dismiss  
11 regarding Fernley's claims against the State Treasurer; and (2) deny the State's countermotion for  
12 an order dismissing the Department.

13 C. **The State's Countermotion For An Order Dismissing The Department**  
14 **Should Be Denied As Procedurally Defective.**

15 Not only should it deny the State's countermotion for the reasons set forth above and in  
16 Fernley's moving papers, the Court should deny the State's countermotion for an order dismissing  
17 the Department on at least *three* basic procedural grounds. *First*, the Court previously ordered  
18 that June 13, 2014 was the due date for the filing of all dispositive motions in this action. *See*  
19 Exhibit 9, at 3:11-13. The State's countermotion, dated July 11, 2014, therefore is untimely.  
20 *Second*, the State's countermotion is procedurally improper because it does not relate to the same  
21 subject matter as Fernley's motion, which asks the Court to reconsider and rehear the June 6th  
22 Order dismissing the State Treasurer. The State's countermotion requests, by contrast, dispositive  
23 relief in the form of the dismissal of the Department. *Third*, the State's countermotion is  
24 unnecessarily repetitive and unduly burdensome on Fernley because the State asserted immunity  
25 in its renewed motion to dismiss and thereby also joined in the Legislature's immunity arguments.  
26 *See* State's Renewal of Motion to Dismiss, at 4:15-22 (dated May 5, 2014). Thus, on these  
27 separate and independent procedural grounds, the Court should deny the State's countermotion in  
28 its entirety.

1 **III. CONCLUSION.**

2 For the foregoing reasons, and the reasons set forth in its moving papers, Fernley  
3 respectfully requests that the Court: (1) reconsider its dismissal of the State Treasurer in the June  
4 6th Order and rehear the State's renewed motion to dismiss regarding Fernley's claims against the  
5 State Treasurer; and (2) deny the State's countermotion for an order dismissing the Department.

6 DATED this 25<sup>th</sup> day of July, 2014.

7 BROWNSTEIN HYATT FARBER SCHRECK, LLP

8  
9 By: 

10 Joshua J. Hicks, Nevada Bar No. 6679  
11 50 West Liberty Street, Suite 1030  
12 Reno, Nevada 89501  
13 Telephone: 775-622-9450

14 *Attorneys for the City of Fernley, Nevada*  
15  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 25<sup>th</sup> day of July, 2014, I caused to be served via electronic mail, a true and correct copy of the above foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION AND REHEARING OF THE COURT'S JUNE 6, 2014 ORDER AS TO DEFENDANTS NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER; PLAINTIFF'S OPPOSITION TO COUNTERMOTION FOR ORDER DISMISSING NEVADA DEPARTMENT OF TRANSPORTATION** properly addressed to the following:

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Brenda J. Erdoes, Esq.  
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Legislative Counsel Bureau  
401 South Carson Street  
Carson City, Nevada 89701

  
Employee of Brownstein Hyatt Farber Schreck, LLP

DECLARATION OF JOSHUA J. HICKS, ESQ.

I, Joshua J. Hicks, Esq., hereby declare as follows:

1. I am an attorney at the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel of record for Plaintiff City of Fernley, Nevada in Case No. 12 OC 00168 1B, currently pending before the First Judicial District Court, Carson City, Nevada. I submit this declaration in support of the Reply In Support Of Plaintiff's Motion For Partial Reconsideration And Rehearing Of The Court's June 6, 2014 Order As To Defendants Nevada Department Of Taxation And Nevada Treasurer; Plaintiff's Opposition To Countermotion For Order Dismissing Nevada Department Of Taxation. I have personal knowledge of the facts set forth herein, and if called upon to do so, am competent to testify thereto.

2. A true and correct copy of excerpts of the deposition transcript of Terry Rubald taken December 12, 2013, is attached hereto as Exhibit "6."


3. A true and correct copy of excerpts of the deposition transcript of Marian Henderson taken November 13, 2013, is attached hereto as Exhibit "7."

4. A true and correct copy of excerpts of the deposition transcript of Guy Hobbs taken January 13, 2014, is attached hereto as Exhibit "8."

5. A true and correct copy of the Stipulation And Order For An Extension Of Time To File Responses To Discovery Requests; Extend Certain Discovery Deadlines And Extend Time To File Dispositive Motions dated April 11, 2014, is attached hereto as Exhibit "9."

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of July, 2014, in Reno, Nevada.

  
JOSHUA J. HICKS, ESQ.

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,  
Plaintiff,

v.

STATE OF NEVADA ex rel. THE NEVADA DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her official capacity as TREASURER OF THE STATE  
OF NEVADA; and DOES 1-20, inclusive,  
Defendants,

NEVADA LEGISLATURE,  
Intervenor

Case No.: 12 OC 00168 1B  
Dept. No.: I

**INDEX OF EXHIBITS TO THE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR  
PARTIAL RECONSIDERATION AND REHEARING OF THE COURT'S JUNE 6, 2014  
ORDER AS TO DEFENDANTS NEVADA DEPARTMENT OF TAXATION AND  
NEVADA TREASURER; PLAINTIFF'S OPPOSITION TO COUNTERMOTION  
FOR ORDER DISMISSING NEVADA DEPARTMENT OF TAXATION**

Exhibit No.	Description	Pages
6	Excerpts of the deposition transcript of Terry Rubald taken December 12, 2013	5
7	Excerpts of the deposition transcript of Marian Henderson taken November 13, 2013	6
8	Excerpts of the deposition transcript of Guy Hobbs taken January 13, 2014	5
9	Stipulation And Order For An Extension Of Time To File Responses To Discovery Requests; Extend Certain Discovery Deadlines And Extend Time To File Dispositive Motions Dated April 11, 2014	4

# EXHIBIT 6

# EXHIBIT 6

1 IN THE FIRST JUDICIAL DISTRICT COURT  
2 OF THE STATE OF NEVADA, IN AND FOR CARSON CITY

3 --oOo--

4  
5 CITY OF FERNLEY, NEVADA, a  
6 Nevada municipal corporation

7 Plaintiff,

8 vs.

9 STATE OF NEVADA ex rel. THE  
10 NEVADA DEPARTMENT OF TAXATION;  
11 THE HONORABLE KATE MARSHALL,  
12 in her official capacity as  
13 TREASURER OF THE STATE OF NEVADA;  
14 and DOES 1-20, inclusive,

15 Defendants.

16 NEVADA LEGISLATURE,

17 Intervenor.  
18

19 Pages 1 to 90, inclusive.  
20

21 DEPOSITION OF TERRY RUBALD

22 Thursday, December 12, 2013

23 Carson City, Nevada

24 REPORTED BY:

25 Romona Malnerich  
Nevada CCR #269  
California CSR #7526

**CERTIFIED COPY**

Case No. 12 OC 00168 1B

Dept. No. 1

Case No. 66851  
JA 3651



1 statute, you have some oversight responsibilities in  
2 relation to budgets of local governments.

3 A Yes.

4 Q But as to the C-Tax and how that's working,  
5 you don't have any oversight responsibilities to make  
6 sure that it's working correctly.

7 A Correct.

8 Q We were talking before about -- when you look  
9 at the budgets, the Department of Taxation is concerned  
10 with making sure that the local governments live within  
11 their budgetary constraints. Correct?

12 A Yes.

13 Q In doing that, do you look at a particular  
14 local government to determine that there's enough money  
15 for the service needs of that county or local government?

16 A No.

17 Q So all you're worried about is, whatever  
18 they're doing, do they have enough money?

19 A Yes.

20 Q So if they're not providing enough services  
21 or if the services are inadequate within the county, does  
22 the Department of Taxation do anything about that?

23 A No.

24 Q We talked earlier about trying to get an  
25 increase and there's not a particular statute, but there

1 is a statute to decrease. Correct?

2 A Yes.

3 Q What's your understanding of that statute?

4 A My understanding is that if a local  
5 government, for three years in a row, has a decline in  
6 assessed value, in population, that the executive  
7 director will consider redistributing the C-Tax.

8 Q And how would you go about doing that? How  
9 would the executive director go about doing that?

10 A I believe it's formula-based, and I really  
11 can't speak to that.

12 Q And has the executive director, since the  
13 inception of the C-Tax up until today, ever made any such  
14 recommendation for a decrease?

15 A I recall about a decade ago that -- after the  
16 statute, of course -- that there may have been some local  
17 governments that might have met that criteria, but I  
18 believe the Department declined to make the change.

19 Q Does the Department just unilaterally make  
20 the change, or does it make a recommendation and then the  
21 change is made somewhere else?

22 A Well, I believe it goes to the tax  
23 commission.

24 Q And in this situation approximately 10 years  
25 ago, do you know why the Department of Taxation declined

1 to make a recommendation --

2 A I don't recall.

3 Q Do you know if they've done anything recently  
4 to look at any local government to see if a decrease in  
5 allocation would be required?

6 A I believe that the Department, in the  
7 statistics section, routinely looks at those figures.

8 Q And do you know if they've made any such  
9 recommendations in the last five years?

10 A I'm not aware of any recommendations.

11 Q Who makes the decision as to whether or not  
12 they're going to make a recommendation for a decrease?

13 A I believe the executive director.

14 Q And who's the executive director now?

15 A Chris Nielson.

16 Q How long has he been the executive director?

17 A About a year and a half, two years.

18 Q Who was it before that?

19 A Before that, it was Bill Chisel.

20 Q And how long was he the executive director?

21 A About six months.

22 Q Just only six months?

23 A Six to nine months.

24 Q And who was it before that?

25 A Before that, it was Dino DiCianno.

1           A       Probably Marian Henderson and the executive  
2 director.

3           Q       And the same situation exists in Boulder  
4 City. So if I asked you the same questions, why you've  
5 had increases in C-Tax revenues --

6           A       I don't know.

7           Q       -- when you've had three years of assessed  
8 value loss and population loss, that's not something you  
9 could testify to on behalf of the Department of Taxation?

10          A       That's correct.

11                   MS. NICHOLS: Can you clarify, when you're  
12 saying "that's correct," that that's not something you  
13 could testify to?

14                   THE WITNESS: That's not something I could  
15 testify to.

16 BY MR. VELLIS:

17          Q       In your position, are you aware of what taxes  
18 local governments use to finance their services?

19          A       Yes.

20          Q       What are the sources of financing the  
21 services for a local government?

22          A       Property tax and the C-Tax are the two major  
23 sources.

24          Q       Anything else?

25          A       In the nature of taxes, those are the two

# EXHIBIT 7

# EXHIBIT 7

1 IN THE FIRST JUDICIAL DISTRICT COURT

2 OF THE STATE OF NEVADA

3 IN AND FOR THE COUNTY OF CARSON CITY

4 -oOo-

5  
6 CITY OF FERNLEY, NEVADA,  
7 a Nevada municipal corporation,

**CERTIFIED COPY**

8 vs. Plaintiff,

Case No. 12 OC 00168 1B  
Dept. No. I

9 STATE OF NEVADA ex rel. THE  
10 NEVADA DEPARTMENT OF TAXATION;  
11 THE HONORABLE KATE MARSHALL,  
12 in her official capacity as  
TREASURER of the STATE OF  
NEVADA; and DOES 1-20,  
inclusive,

13 Defendants.

14 \_\_\_\_\_/  
15 Pages 1 to 153, inclusive.

16  
17  
18 **DEPOSITION OF MARIAN HENDERSON**

19 \_\_\_\_\_  
20 Wednesday, November 13, 2013  
21 Carson City, Nevada

22  
23 REPORTED BY:

CHRISTINA AMUNDSON  
CCR #641 (Nevada)  
CSR #11883 (California)

1 Q Okay. But he did at that time?

2 A Yes.

3 Q Okay. And tell me what the discussions were.

4 A I believe the first meeting was just more  
5 informational. They made a lot of inquiries about how can  
6 we get this done. There was an assumption on their part  
7 that the Department of Taxation had the authority -- had  
8 discretion in how the base amounts were determined and so,  
9 therefore, they wanted the director to change their base  
10 because they assumed he had authority to do that.

11 Q Okay. Anything else you recall?

12 A I recall that they -- they brought some -- I  
13 don't remember if it was handouts, but they had  
14 information. They had per capita distributions of C-Tax  
15 for different cities in Nevada.

16 Q Okay.

17 A They had a list of cities in Nevada by  
18 population and compared Fernley's distribution with  
19 similar-sized cities.

20 Q The information they provided you about the  
21 C-Tax distribution to Fernley and cities with similar  
22 populations, do you recall any of that information?

23 A Just that it was presented.

24 Q Do you remember any of the numbers?

25 A No.

1 A I don't know.

2 Q Okay. And the Fernley matter, you talked about  
3 the first meeting sometime in 2009, 2010 and you said  
4 there was, from what you recall, three or more.

5 Do you remember the second one, when it was?

6 A No. But it was only a few months after the  
7 first one.

8 Q Okay. Who was in attendance at that meeting?

9 A I think that it was the same people. I think it  
10 was Mayor Goodman, Brandy Jensen. I don't think Greg  
11 Evangelatos was there. Mel Drown -- like a drowning  
12 man -- Mel Drown.

13 Q Who is Mel Drown?

14 A He's for Fernley.

15 Q Okay.

16 A And then myself, Tom Gransbery, Penny Hampton.  
17 I don't remember whether Terry Rubald attended that one.

18 Q Okay.

19 A I think she did. And there was somebody else  
20 there -- oh, my supervisor at the time, Carolyn Misumi,  
21 M-i-s-u-m-i.

22 Q And you all were the representatives of the  
23 Department of Taxation. What was it or why was it, to  
24 your understanding, that Fernley was meeting with you, the  
25 Department of Taxation?



1 A They still thought that we had some  
2 discretionary power to change their CTX distribution.

3 Q Okay.

4 A And we had taken some numbers that they had  
5 provided at the previous meeting and we crunched them a  
6 few different ways, did some different scenarios. I don't  
7 remember all what it was but we did some scenarios with  
8 those numbers and then we discussed it.

9 Q Okay. And what was the purpose of doing the  
10 crunching of the numbers and the different scenarios?

11 A I'm not positive. I think that we ran -- that I  
12 ran CTX scenarios with different -- their different base  
13 amounts to see what the distribution -- how the  
14 distribution would change within the county. I recall  
15 doing that but I don't remember if it was before or after  
16 that second meeting.

17 Q Okay. And did anybody else in the Department of  
18 Taxation do anything in relation to that first or second  
19 meeting with Fernley other than what you've discussed?

20 A Well, Tom Gransbery and Penny Hampton and Terry  
21 Rubald may have been dealing with other local government  
22 issues.

23 Q Okay.

24 A I think they did. But I don't know what they  
25 did.

1    discontinue some service, how would that affect their  
2    base, if at all?

3           A    It doesn't.

4           Q    Not at all?

5           A    No.

6           Q    Okay. So if I'm a local town and I have a  
7    police department and I decide not to do that anymore and  
8    I'm not contracting with the county because I think the  
9    county has to be out there anyway, does that affect my  
10   baseline?

11          A    No, it does not.

12          Q    Okay. Are you familiar with the 366.90 that  
13   provides for the decrease in C-Tax allocations?

14          A    I'm familiar with it. Would you mind reading it  
15   to me?

16          Q    I don't know if I'm reading it off your thing,  
17   just your -- somebody's presentation. I think this is  
18   actually the state legislature's presentation, the fiscal  
19   analysis division.

20                It says, "The population and assessed value for  
21   a local government or special district in a county is  
22   decreased each of the three fiscal years preceding the  
23   current fiscal year. The Department of Taxation is  
24   required to review the base annual allocation amount,  
25   calculate it under 360.680 to determine whether to adjust

1 the amount."

2 A Yes, I'm familiar with that.

3 Q Okay. And has that ever happened?

4 A I do those calculations yearly at February 15th  
5 with the revenue projections. I send a memo to our  
6 director. I'm not aware that it has happened for three  
7 consecutive years. I don't remember ever putting an  
8 entity name's in that memo. I can certainly, you know,  
9 refer to my materials back at the office, if you want to  
10 request that, but my recollection is that that hasn't  
11 happened.

12 Q What materials are you talking about back at  
13 your office?

14 A The review that I do every year, the memo that I  
15 send to the director.

16 Q But as you sit here today on behalf of the  
17 Department of Taxation, you do not recall a situation  
18 where there was a decrease in the revenue to a C-Tax  
19 participant based on that statute?

20 A No, I don't recall.

21 Q Okay. Do you know as the person most  
22 knowledgable if the Department of Taxation, since the time  
23 of the enactment of the C-Tax up until today, has provided  
24 any kind of investigative materials or studies or reports  
25 or information to the legislature about C-Tax and the

# EXHIBIT 8

# EXHIBIT 8

1 IN THE FIRST JUDICIAL DISTRICT COURT  
2 OF THE STATE OF NEVADA IN AND FOR CARSON CITY

3 CITY OF FERNLEY, NEVADA, a )  
4 Nevada municipal )  
corporation, )

**Certified Copy**

5 Plaintiff, )

6 vs. )

Case No.  
12 OC 00168 1B

7 STATE OF NEVADA ex rel. THE )  
NEVADA DEPARTMENT OF )  
8 TAXATION; THE HONORABLE )  
KATE MARSHALL, in her )  
9 official capacity as )  
TREASURER OF THE STATE OF )  
10 NEVADA; and DOES 1-20, )  
inclusive, )

11 Defendants, )

12 NEVADA LEGISLATURE, )

13 Intervenor. )

14

15

16 DEPOSITION OF GUY HOBBS

17 Taken on Tuesday, December 17, 2013

18 At 9:35 a.m.

19 At 100 North City Parkway

20 Suite 1600

21 Las Vegas, Nevada

22

23

24 Reported by: Marilyn Speciale, CRR, RPR, CCR #749

25 Job No. 8315

1 then for the subsequent budget year, the Department of  
2 Taxation would undertake a review of the circumstances  
3 to determine whether an adjustment in the base was  
4 warranted. He explained if the Department of Taxation  
5 believed this to be the case, a recommendation would be  
6 submitted for additional review to the Committee on  
7 Local Government Finance." I won't read the rest of it.

8 You were not ever a member of the Committee on  
9 Local Government Finance, were you?

10 A. No.

11 Q. What were you talking about here when you were  
12 talking about this decline in the course of the three  
13 fiscal years?

14 A. Do you mind if I take a moment to read some of  
15 the rest of this?

16 Q. Please do, and I think I read the wrong  
17 paragraph. I think I wanted to read the one above it,  
18 which I can do if you want me to.

19 A. That's okay. I can read it.

20 (Witness examined document.)

21 Q. Okay. Did you get a chance to read it?

22 A. Yes. Could you just restate your question?

23 Q. Yes. Here is the reason I was asking. We  
24 were discussing earlier ways that an entity that was in  
25 the C-Tax pool could get an increase, and we discussed

1 how that could happen.

2 There is apparently an actual statutory  
3 provision for a decrease in your base, and is that what  
4 you were referring to in this testimony?

5 A. It would appear that it was, not recalling the  
6 statutory provision that you're referring to.

7 Q. Okay. And that was my next question. Do you  
8 recall what the statute was, what the recommendations  
9 were?

10 A. Not off the top of my head, I don't.

11 Q. Okay. But at least you understand that there  
12 was or there is some statutory provision that allows for  
13 a decrease in the base amount to a C-Tax recipient if  
14 certain criteria are met?

15 A. Yes.

16 Q. But there is no specific statutory criteria in  
17 the C-Tax that allows for an increase if certain  
18 criteria are met?

19 A. Not to my knowledge.

20 Q. And the only increase we know to the base was  
21 Henderson, and that's when their state assemblyman was  
22 the speaker of the assembly?

23 A. There's certainly that one. I believe there  
24 might have been one other, and there may have been more  
25 than that, but by my recollection, I think one of the

1 Clark County entities, the fire service district, I  
2 recall there being some issue about its base that had to  
3 do with that's a special district that overlaps  
4 unincorporated towns, and I believe there was some  
5 additions of unincorporated towns, and I believe they  
6 needed to make some adjustment there.

7 So the notion of adjustments being made to  
8 base, there is at least one, if not two, precedents for  
9 that.

10 Q. Okay. Other than those two, do you know of  
11 any others?

12 A. The only other ones I'm aware of were requests  
13 and not necessarily approvals.

14 Q. And the two you do know of went through the  
15 state legislature, correct?

16 A. Yes.

17 Q. Okay. Just a couple of general questions. I  
18 don't have copies of this. So I'm just going to kind of  
19 read these to you, but we kind of discussed this a  
20 little bit earlier.

21 During the period of 2000 to 2010, Fernley's  
22 population went from 8,543 to 19,368, which was a  
23 gain -- my mathematical skills which are in question --  
24 of 10,825 people over a ten-year period or 126.71  
25 percent increase.



1           During the same period of time, Boulder  
2   City's, for example, population went from 14,966 to  
3   15,023 which was a gain over a ten-year period of 57  
4   people or a .38 percent growth.

5           During that same ten-year period, Fernley's  
6   C-Tax distribution went from \$91,454.19 to \$170,625.04  
7   which was an increase of \$79,170.85, whereas Boulder  
8   City's increase went from \$5,952,931.77 to  
9   \$7,630,395.99, which was an increase of \$1,677,464 and  
10   change.

11           And the reason I'm asking you is in relation  
12   to the fact that the C-Tax is supposed to follow growth  
13   and we just talked about the growth in population of  
14   126.71 percent as opposed to .38 percent between Fernley  
15   and Boulder City, is the formula working correctly where  
16   Fernley has a C-Tax distribution of \$170,000 over --  
17   after whatever, 13 years or whatever it is, and Boulder  
18   City has 7 million dollars, and during that period of  
19   time when Fernley grew by 126 percent, their increase is  
20   only 79,000 and Boulder City's is \$1,600,000?

21           A. This answer may sound odd to you, but the  
22   mathematics of the formula, I think, are working  
23   correctly. Now, whether the mechanics of the formula  
24   itself match up to one's perception of logic could be  
25   something different. You know, the formula is probably

# EXHIBIT 9

# EXHIBIT 9

REC'D & FILED

2014 APR 11 PM 1:47

ALAN GLOVER

DEPUTY

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Clark V. Vellis, Nevada Bar No. 5533  
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50 West Liberty Street, Suite 1030  
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Brandi L. Jensen, Nevada Bar No. 8509  
Fernley City Attorney  
OFFICE OF THE CITY ATTORNEY  
595 Silver Lace Blvd.  
Fernley, Nevada 89408

*Attorneys for the City of Fernley, Nevada*

IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Plaintiff,

v.

STATE OF NEVADA ex rel. THE NEVADA  
DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her  
official capacity as TREASURER OF THE  
STATE OF NEVADA; and DOES 1-20,  
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**STIPULATION AND [PROPOSED]  
ORDER FOR AN EXTENSION OF  
TIME TO FILE RESPONSES TO  
DISCOVERY REQUESTS; EXTEND  
CERTAIN DISCOVERY DEADLINES  
AND EXTEND TIME TO FILE  
DISPOSITIVE MOTIONS**

On March 6, 2014, Plaintiff, City of Fernley, Nevada (hereinafter "Plaintiff"), served its objections to Defendants, State of Nevada Department of Taxation (hereinafter "Department") and Nevada Legislature (hereinafter "Legislature"), with regard to the Legislature's responses to Plaintiff's First Requests for Admissions, Interrogatories and Production of Documents and the Department's responses to Plaintiff's First Set of Interrogatories and First Request for Production of Documents.

015342\0001\11154486.1

Case No. 66851

JA 3670

BROWNSTEIN HYATT FARBER SCHRECK, LLP  
50 West Liberty Street, Suite 1030  
Reno, NV 89501  
775-622-9450

The Legislature responded to the objections and participated in a "meet and confer" with the Plaintiff on March 20, 2014, and the Department responded to the objections and participated in a "meet and confer" with the Plaintiff on March 27, 2014.

In addition, on March 11, 2014, Plaintiff served its Second Request for the Production of Documents to the Department and the Legislature. Responses to these requests are due on or before April 11, 2014. The close of discovery in this matter is set for April 11, 2014.

The Department and the Legislature have requested an extension of time to and including May 2, 2014, to produce and serve supplemental responses and documents to Plaintiff's First Requests for Admissions, Interrogatories and Production of Documents and to respond to Plaintiff's Second Request for the Production of Documents.

All parties will need time to review the responses and documents that are produced by May 2, 2014, and supplemental discovery may be needed thereafter by all parties, limited to those responses and documents.

Further, the date for filing of dispositive motions, oppositions and replies will need to be extended to accommodate the additional time to respond.

As such, Plaintiff, and Defendants, State of Nevada ex rel. the Nevada Department of Taxation; the Honorable Kate Marshall, in her official capacity as Treasurer of the State of Nevada; and the Nevada Legislature (hereinafter "Defendants") agree and stipulate as follows:

1. The deadline for Defendants to produce and serve their supplemental responses and documents to Plaintiff's First Requests for Admissions, Interrogatories and Production of Documents and to produce and serve their responses and documents to Plaintiff's Second Request for the Production of Documents is extended from April 11, 2014, to May 2, 2014.

2. If any party needs to conduct supplemental discovery based on the responses and documents that are produced and served by the Department or the Legislature on or before May 2, 2014, the party may conduct such supplemental discovery for this limited purpose only, but the party must serve its request for such supplemental discovery not later than May 23, 2014.

///

///

3. Each party reserves its rights to file motions to compel based on the responses and documents that are produced and served on the party on or before May 2, 2014, and also based on the responses and documents that are produced and served on the party in response to any supplemental discovery requests that are made by the party after May 2, 2014, but on or before May 23, 2014.

4. The parties further stipulate that each party must file and serve any such motions to compel not later than June 6, 2014.

5. The parties further stipulate that if any such motions to compel are filed and served on or before June 6, 2014, the parties waive any objections as to the timeliness of the motions, but the parties do not waive any other objections to any such motions to compel.

6. The parties further stipulate that the due date for dispositive motions is moved from May 23, 2014, to June 13, 2014; the due date for oppositions is moved from June 13, 2014, to July 11, 2014; and the due date for replies is moved from June 27, 2014 to July 25, 2014.

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BROWNSTEIN HYATT FARBER SCHRECK, LLP  
50 West Liberty Street, Suite 1030  
Reno, NV 89501  
775.622.9450

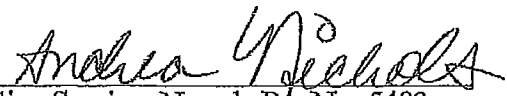
1 7. All other dates remain as previously set by the Court or by signed stipulation.

2  
3 DATED this 9<sup>th</sup> day of April, 2014.

4 BROWNSTEIN HYATT FARBER  
5 SCHRECK, LLP

OFFICE OF THE ATTORNEY GENERAL


6  
7 By:   
8 Joshua J. Hicks, Nevada Bar No. 6679  
9 Clark V. Vellis, Nevada Bar No. 5533  
50 West Liberty Street, Suite 1030  
Reno, Nevada 89501  
Telephone: 775-622-9450

By:   
Gina Session, Nevada Bar No. 5493  
Andrea Nichols, Nevada Bar No. 6436  
5420 Kietzke Lane, Suite 202  
Reno, Nevada 89511  
Telephone: 775-688-1818

10 *Attorneys for Plaintiff City of Fernley, Nevada*

*Attorneys for Defendants Nevada Department of  
Taxation and Kate Marshall, State Treasurer*


11  
12  
13 LEGISLATIVE COUNSEL BUREAU,  
14 LEGAL DIVISION

15  
16 By:   
17 Kevin C. Powers, Nevada Bar No. 6781  
18 L. Daniel Yu, Nevada Bar No. 10806  
401 South Carson Street  
Carson City, Nevada 89701  
Telephone: 775-684-6830

19 *Attorneys for Defendant Legislature of the*  
20 *State of Nevada*

21 IT IS SO ORDERED.

22  
23 DATE: April 10<sup>th</sup>

  
DISTRICT COURT JUDGE

1 Joshua J. Hicks, Nevada Bar No. 6679  
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13 **IN THE FIRST JUDICIAL DISTRICT COURT**

14 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

15 CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

16 Plaintiff,

17 v.

18 STATE OF NEVADA ex rel. THE NEVADA  
19 DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her  
20 official capacity as TREASURER OF THE  
STATE OF NEVADA; and DOES 1-20,  
21 inclusive,

22 Defendants,

23 NEVADA LEGISLATURE,

24 Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

26 **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**  
27 **AGAINST DEFENDANTS NEVADA DEPARTMENT OF TAXATION**  
28 **AND NEVADA TREASURER**

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1 Plaintiff CITY OF FERNLEY, NEVADA (hereinafter "Fernley"), by and through its  
2 attorneys of record, Brownstein Hyatt Farber Schreck, LLP, hereby submits this reply in support  
3 of its motion for an order entering summary judgment in its favor against Defendants Nevada  
4 Department of Taxation and Nevada Treasurer (collectively the "State"). This reply is based on  
5 the following memorandum of points and authorities, the attached exhibits, all other pleadings,  
6 papers, and documents on file with the Court in this action, such further documentary evidence as  
7 the Court deems appropriate, and the arguments of counsel at the hearing on this motion. For the  
8 Court's convenience, all of Fernley's exhibits are numbered consecutively, with Exhibits 1  
9 through 33 attached to Fernley's motion, and Exhibits 34 through 35 attached to this reply.

10 **I. INTRODUCTION.**

11 No matter how many times the State attempts to justify the burdens that Fernley must  
12 endure alone under the C-Tax, it cannot escape that the unique system of revenue collection and  
13 distribution established by the C-Tax violates the clear and unmistakable mandate of the Nevada  
14 Constitution in at least *three* separate and independent ways. *First*, the C-Tax violates the  
15 separation of powers clause set forth in Article 3, Section 1, because it has resulted in the  
16 Legislature's abdication of its authority over the collection and appropriation of C-Tax revenues  
17 to the Executive Branch. *Second*, the C-Tax violates the prohibition against local or special laws  
18 set forth in Article 4, Section 20, because it has effectively singled out Fernley for burdens not  
19 imposed on any other Nevada city. *Third*, the C-Tax violates the requirement set forth in Article  
20 4, Section 21, that all laws must operate generally and uniformly throughout the State because it  
21 is a local or special law that readily could have been made generally applicable. Thus, on each of  
22 these grounds, Fernley respectfully requests that the Court grant its motion in its entirety and  
23 enter summary judgment in its favor at this time.

24 **II. RESPONSE TO STATEMENT OF FACTS.**

25 **A. The State Concedes That Fernley Could Only Increase Its C-Tax Revenue**  
26 **Base By Providing Additional Services.**

27 The State does not dispute that Fernley is treated differently than cities which existed  
28 when the C-Tax was enacted, acknowledging that Fernley must provide additional services before



1 it has the potential to increase its C-Tax revenue base. By contrast, it is undisputed that cities in  
2 existence when the C-Tax was enacted could thereafter terminate services without experiencing  
3 any reduction in its C-Tax revenue base. *See, e.g., NRS Ch. 360; see also Exhibit 4, at 82:3-14;*  
4 *Exhibit 15, at 138:6-139:11.*

5 **B. The City Incorporation Committee Did Not Waive Fernley's Right To Assert**  
6 **A Constitutional Challenge To The C-Tax.**

7 The State misguidedly suggests that Fernley's Incorporation Committee, comprised of  
8 unelected citizens, somehow waived Fernley's future right to maintain a constitutional challenge  
9 to the C-Tax because: (1) the committee did not base its revenue and expenditure projections on  
10 an anticipated increase in C-Tax revenue; and (2) the committee knew that incorporation as a city  
11 would not automatically result in Fernley's receipt of additional C-Tax revenue. *See State's*  
12 *Opposition, at 4:22-5:5.* Not only is the State unable to cite any authority to support the notion  
13 that such a committee is empowered to waive a city's legal rights prior to its incorporation, it is  
14 well-settled that "waiver is the intentional relinquishment of a known right." *See Mahban v.*  
15 *MGM Grand Hotels, Inc., 100 Nev. 593, 596, 691 P.2d 421, 423 (1984).* The State provides no  
16 evidence that the incorporation committee intentionally waived Fernley's right to challenge the C-  
17 Tax on the constitutional grounds asserted in its complaint, assuming that the committee could  
18 somehow bind Fernley in the future exercise of its legal rights once it formally became a city  
19 (which it could not). Committee members also could not have reasonably anticipated the  
20 circumstances that would confront Fernley, such as the rapid population growth that followed its  
21 incorporation. The State's reliance on Fernley's incorporation process therefore is misplaced, and  
22 has no bearing on the validity of Fernley's claims under the Nevada Constitution.

23 **C. The Undisputed Evidence Contradicts The State's Assertion That Fernley**  
24 **Has Failed To Make An Effort To Negotiate An Agreement With Lyon**  
25 **County For The Redistribution Of C-Tax Revenue.**

26 The State mistakenly posits that Fernley has not improved its C-Tax revenue base because  
27 it has neglected to take advantage of the opportunity to negotiate a cooperative or interlocal  
28 agreement that would have redistributed some of Lyon County's ~~C-Tax revenue to Fernley in~~  
exchange for Fernley assuming one or more of the services provided on its behalf by Lyon

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.  
DEPARTMENT OF TAXATION;  
THE HONORABLE DAN  
SCHWARTZ, in his official capacity  
as TREASURER OF THE STATE OF  
NEVADA; and THE LEGISLATURE  
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

**JOINT APPENDIX**

**VOLUME 20 PART 2**

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1	Affidavit of Service Taxation	City of Fernley	07/02/12	17
1	Affidavit of Service Treasurer	City of Fernley	06/20/12	13-16
23	Amended Memorandum of Costs and Disbursements	State of Nevada/Dept Taxation	10/09/15	4058-4177
7	Answer	State of Nevada/Dept Tax/ Treasurer	02/01/13	1384-1389
7	Answer to Plaintiff's Complaint	Nevada Legislature	01/29/13	1378-1383
23	Case Appeal Statement	City of Fernley	11/07/14	4208-4212
1	Complaint	City of Fernley	06/06/12	1-12
21	Defendant Nevada Legislature's Reply in Support of its Motion for Summary Judgment	Nevada Legislature	07/25/14	3747-3768
21	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs	State of Nevada/Dept Taxation	10/03/14	3863-3928
22	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs (Cont.)	State of Nevada/Dept Taxation	10/03/14	3929-3947
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2	Exhibits to Joinder in Motion to Dismiss (Cont.)	Nevada Legislature	08/16/12	221-332
1	Joinder in Motion to Dismiss	Nevada Legislature	08/16/12	62-103
7	Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	Nevada Legislature	05/06/14	1421-1423
21	Memorandum of Costs and Disbursements	State of Nevada/Dept Taxation	09/19/14	3788-3793
21	Motion for Costs	State of Nevada/Dept Taxation	09/19/14	3776-3788
12	Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order	City of Fernley	06/18/14	2005-2045
7	Motion for Summary Judgment	City of Fernley	06/13/14	1458-1512
8	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1513-1732
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10	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1917-1948
11	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1949-2004
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1	Motion to Intervene	Nevada Legislature	08/03/12	18-40
21	Motion to Retax Costs and Opposition to Motion for Costs	City of Fernley	09/24/14	3794-3845
7	Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/05/14	1414-1420
7	Nevada Department of Taxation and Nevada Treasurer's Reply to Response to Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/23/14	1433-1437
12	Nevada Department of Taxation's Opposition to Plaintiff's Motion for Summary Judgment	State of Nevada/Dept Taxation	07/11/14	2053-2224
13	Nevada Department of Taxation's Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	State of Nevada/Dept Taxation	07/11/14	2225-2353

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23	Notice of Appeal	City of Fernley	11/07/14	4205-4207
22	Notice of Entry of Order	Nevada Legislature	10/08/14	4001-4057
23	Notice of Entry of Order	State of Nevada/Dept	10/17/14	4195-4204
7	Notice of Entry of Order Denying City of Fernley's Motion for Reconsideration of Order Dated November 13, 2012	State of Nevada/Dept Tax/ Treasurer	12/19/12	1364-1370
7	Notice of Entry of Order Granting A Continuance to Complete Discovery	City of Fernley	10/19/12	1344-1350
3	Notice of Entry of Order Granting Nevada Legislature's Motion to Intervene	Nevada Legislature	09/04/12	651-657
7	Notice of Entry of Order on Defendant's Motion for Extensions of Time to File Answer	State of Nevada/Dept Tax/ Treasurer	11/15/12	1354-1360
1	Notice of Non-Opposition to Legislature's Motion to Intervene	State of Nevada/Dept Tax/ Treasurer	08/06/12	59-61
2	Opposition to Motion to Dismiss and Motion for Continuance Pursuant to NRCP 56(F)	City of Fernley	08/20/12	331-441
3	Opposition to Motion to Dismiss and Motion for Continuance Pursuant to NRCP 56(F) (Cont.)	City of Fernley	08/20/12	442-625
2	Opposition to Motion to Nevada Legislature's Motion to Intervene	City of Fernley	08/20/12	324-330
13	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	City of Fernley	07/11/14	2354-2445
14	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2446-2665
15	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2666-2819
16	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2820-2851
17	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2852-2899
4	Opposition to Nevada Legislature's Joinder in Motion to Dismiss	City of Fernley	09/28/12	662-881
5	Opposition to Nevada Legislature's Joinder in Motion to Dismiss (Cont.)	City of Fernley	09/28/12	882-1101
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17	Opposition to Nevada Legislature's Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	City of Fernley	07/11/14	2900-2941
20	Opposition to Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order	Nevada Legislature	07/11/14	3586-3582

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17	Opposition to Plaintiff's Motion for Summary Judgment	Nevada Legislature	07/11/14	2942-3071
18	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3072-3292
19	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3292-3512
20	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3515-3567
7	Order (Converting Motion to Dismiss to Motion for Summary Judgment, Setting Briefing Schedule and Dismissing Treasurer)	First Judicial District Court	06/06/14	1451-1457
22	Order and Judgment	First Judicial District Court	10/06/14	3948-4000
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21	Order Vacating Trial	First Judicial District Court	09/03/14	3773-3775
23	Plaintiff's Motion to Strike, or Alternatively, Motion to Retax Costs	City of Fernley	10/14/14	4178-4189
21	Plaintiff's Objections to Nevada Legislature's Proposed Order and Request to Submit Proposed Order and Judgment	City of Fernley	10/02/14	3846-3862
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7	Reply in Support of Joinder in Motion to Dismiss	Nevada Legislature	10/08/12	1317-1340
3	Reply in Support of Motion to Intervene	Nevada Legislature	08/24/12	626-635
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20	Reply in Support of Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order as to Defendant's Nevada Department of Taxation and Nevada Treasurer; Plaintiff's Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	City of Fernley	07/25/14	3641-3673
20	Reply in Support of Plaintiff's Motion for Summary Judgment Against Defendant Nevada Legislature	City of Fernley	07/25/14	3606-3640
21	Reply to Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	State of Nevada/Dept Taxation	08/01/14	3769-3772
3	Reply to Opposition to Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	08/27/12	636-647
20	Reply to Plaintiff's Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Taxation	07/25/14	3583-3605
7	Response to Nevada Department of Taxation	City of Fernley	05/16/14	1424-1432
7	Second Stipulation and Order Regarding Change of Briefing Schedule	Parties/First Judicial District Court	03/17/14	1406-1409
7	Stipulation and Order for an Extension of Time to File Responses to Discovery Requests; Extend Certain Discovery Deadlines and Extend Time to File Dispositive Motions	Parties/First Judicial District Court	04/11/14	1410-1413
7	Stipulation and Order Regarding Change of Briefing Schedule and Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Jury Demand	Parties/First Judicial District Court	02/19/14	1403-1405
12	Stipulation and Order Regarding Change of Briefing Schedule and Setting Hearing for Oral Argument	Parties/First Judicial District Court	06/25/14	2046-2048
7	Stipulation and Order Regarding Defendant's Motion to Strike Plaintiff's Jury Demand	Parties/First Judicial District Court	10/23/13	1400-1402
3	Stipulation and Order Regarding Joinder to Motion to Dismiss	Parties/First Judicial District Court	09/18/12	658-661
23	Transcript of Hearing	Court Reporter	01/07/15	4213-4267
7	Writ of Mandamus	Nevada Supreme Court	01/25/13	1371-1372

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**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Plaintiff,

vs.

STATE OF NEVADA ex rel. THE NEVADA  
DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her  
official capacity as TREASURER OF THE  
STATE OF NEVADA; THE LEGISLATURE OF  
THE STATE OF NEVADA; and DOES 1-20,  
inclusive,

Defendants.

Case No. 12 OC 00168 1B  
Dept. No. 1

**DEFENDANT NEVADA LEGISLATURE'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION AND  
REHEARING OF THE COURT'S JUNE 6, 2014 ORDER**

Defendant, the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby files this Opposition to Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. This Opposition is made and based upon the following Memorandum of Points and Authorities, all pleadings, documents and exhibits on file in this case and any oral arguments that the Court may allow.

· 1 ·

## 2.

3

2.1



1 Following the completion of discovery, the Department and State Treasurer filed a Renewal of  
2 Motion to Dismiss on May 5, 2014, in which they argued that Fernley's state constitutional claims  
3 should be dismissed as a matter of law. On May 6, 2014, the Legislature filed a Joinder in Renewal of  
4 Motion to Dismiss. On June 6, 2014, the Court entered an Order converting the Defendants' Renewed  
5 Motions to Dismiss into Motions for Summary Judgment and directing the parties to file oppositions and  
6 replies regarding the Motions for Summary Judgment. Additionally in its June 6, 2014 Order, the Court  
7 dismissed all claims against the State Treasurer because the Court determined that the State Treasurer is  
8 entitled to sovereign immunity under NRS 41.032(1) as a matter of law.

9 In its Motion for Reconsideration and Rehearing, Fernley contends that good cause exists for the  
10 Court to reconsider its dismissal of the State Treasurer and rehear the Defendants' Renewed Motions to  
11 Dismiss on the issue of sovereign immunity because: (1) Fernley should have the opportunity to brief  
12 and argue the issue of sovereign immunity under NRS 41.032(1) before dismissal of its claims against  
13 the State Treasurer; (2) Fernley has stated claims for declaratory and injunctive relief against the State  
14 Treasurer that remain viable because the Defendants only argued that sovereign immunity barred  
15 Fernley's claims against the State Treasurer for money damages but not for injunctive or declaratory  
16 relief; and (3) the State Treasurer is a necessary party because she controls the State's money and  
17 Fernley has stated claims against the Department of Taxation for money damages as well as for  
18 declaratory and injunctive relief. (Mot. at 2-4.)

## 19 II. Summary of the argument.

20 The Court should deny Fernley's Motion for Reconsideration and Rehearing because Fernley had  
21 a full opportunity to brief and argue the issue of sovereign immunity under NRS 41.032(1) in the  
22 parties' previously filed motions, oppositions and points and authorities, but it failed to do so.  
23 Furthermore, based on those previously filed motions, oppositions and points and authorities, the State  
24 Treasurer—and all other Defendants in this case—are entitled to judgment as a matter of law on

1 Fernley's claims for money damages because those claims are barred by sovereign immunity under  
2 NRS 41.032(1) as a matter of law. In addition, the State Treasurer—and all other Defendants in this  
3 case—are entitled to judgment as a matter of law on Fernley's claims for declaratory and injunctive  
4 relief because those claims are barred by several affirmative defenses as a matter of law and because  
5 they have no merit as a matter of law. Therefore, in its June 6, 2014 Order, the Court properly dismissed  
6 all of Fernley's claims against the State Treasurer because the State Treasurer is entitled to judgment as  
7 a matter of law on all of those claims.

### 8 **III. Argument.**

#### 9 **A. Standard of review for motion for reconsideration.**

10 As a general rule, the district court may reconsider an order that it has entered in a pending case  
11 “for sufficient cause shown,” such as “when there has been a change of circumstances.” Trail v. Faretto,  
12 91 Nev. 401, 403 (1975). It is well established, however, that “[m]ere disagreement with a previous  
13 order is an insufficient basis for reconsideration.” Haw. Stevedores v. HT&T Co., 363 F.Supp.2d 1253,  
14 1269 (D.Haw.2005). Instead, “[a] motion to reconsider must provide a court with valid grounds for  
15 reconsideration by: (1) showing some valid reason why the court should reconsider its prior decision,  
16 and (2) setting forth facts or law of a *strongly convincing nature* to persuade the court to reverse its prior  
17 decision.” Frasure v. United States, 256 F.Supp.2d 1180, 1183 (D.Nev.2003) (emphasis added). Courts  
18 have determined that there are only three valid reasons that may justify reconsideration: “(1) an  
19 intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct  
20 clear error or prevent manifest injustice.” Haw. Stevedores, 363 F.Supp.2d at 1269; Frasure, 256  
21 F.Supp.2d at 1183; Brown v. Kinross Gold, U.S.A., 378 F.Supp.2d 1280, 1288 (D. Nev. 2005).<sup>1</sup>

22  
23 <sup>1</sup> When considering issues of civil procedure in Nevada, the Nevada Supreme Court has determined that  
24 federal cases addressing similar issues of civil procedure are to be regarded as highly persuasive. See  
Am. Home Assurance Co. v. Dist. Ct., 122 Nev. 1229, 1238 n.29 (2006); Exec. Mgmt. Ltd. v. Ticor  
Title Ins., 118 Nev. 46, 53 (2002); Las Vegas Novelty v. Fernandez, 106 Nev. 113, 119 (1990);  
Lawler v. Ginochio, 94 Nev. 623, 626 (1978).

1 In this case, Fernley does not contend that there has been an intervening change in controlling law  
2 or the discovery of new evidence to justify reconsideration. Therefore, the only valid reason that  
3 Fernley could claim to justify reconsideration is the need to correct a clear error or prevent a manifest  
4 injustice. However, because the Court's June 6, 2014 Order has not resulted in a clear error or created a  
5 manifest injustice, the Court should deny Fernley's Motion for Reconsideration and Rehearing because  
6 Fernley has not established any valid reasons to justify reconsideration.

7 **B. The Court properly decided the issue of the State Treasurer's sovereign immunity**  
8 **under NRS 41.032(1) as a matter of law based on the parties' previously filed motions,**  
**oppositions and points and authorities.**

9 In its Motion for Reconsideration and Rehearing, Fernley contends that it should have the  
10 opportunity to brief and argue the issue of sovereign immunity under NRS 41.032(1) before dismissal of  
11 its claims against the State Treasurer. (Mot. at 3-4.) Fernley also contends that the issue of sovereign  
12 immunity under NRS 41.032(1) is a mixed question of law and fact. (Mot. at 4.) The Court should  
13 reject Fernley's contentions because: (1) Fernley had a full opportunity to brief and argue the issue of  
14 sovereign immunity under NRS 41.032(1) in the parties' previously filed motions, oppositions and  
15 points and authorities, but it failed to do so; and (2) based on those previously filed motions, oppositions  
16 and points and authorities, it is apparent from the face of Fernley's complaint that the State Treasurer—  
17 and all other Defendants in this case—are entitled to sovereign immunity under NRS 41.032(1) as a  
18 matter of law even if all the facts alleged in Fernley's complaint are true.

19 In the Legislature's Joinder in Motion to Dismiss filed on August 16, 2012, the Legislature  
20 provided extensive points and authorities to support the application of sovereign immunity under both  
21 NRS 41.032(1) and NRS 41.032(2). (Leg.'s Joinder in Mot. to Dismiss at 11-13.) Each subsection of  
22 NRS 41.032 provides a separate and independent basis for applying sovereign immunity, and each  
23 subsection requires a separate and independent legal analysis regarding its application. See Hagblom v.  
24 State Dir. Mtr. Vehs., 93 Nev. 599, 603-05 (1977); Dalehite v. United States, 346 U.S. 15, 32-33 (1953)

1 (discussing the separate and independent purposes of analogous provisions under the Federal Tort  
2 Claims Act (FTCA), 28 U.S.C. §2680(a), which served as the model for NRS 41.032(1) and  
3 NRS 41.032(2)).<sup>2</sup>

4 Despite the fact that the Legislature briefed and argued the issue of sovereign immunity under  
5 both NRS 41.032(1) and NRS 41.032(2) in its points and authorities, Fernley failed to address or discuss  
6 the issue of sovereign immunity under NRS 41.032(1) in its points and authorities that were included in  
7 its Opposition filed on September 28, 2012. (Opp'n to Leg.'s Joinder in Mot. to Dismiss at 7-9.)  
8 Instead, Fernley's discussion focused exclusively on the issue of sovereign immunity under  
9 NRS 41.032(2), which is also known as discretionary-function immunity, and Fernley cited and  
10 discussed only cases which involved discretionary-function immunity under NRS 41.032(2) without  
11 citing or discussing any cases which involved sovereign immunity under NRS 41.032(1). Id. (citing and  
12 discussing only Ransdell v. Clark County, 124 Nev. 847, 855 (2008), and Rush v. Nev. Indus. Comm'n,  
13 94 Nev. 403, 407 (1978)).

14 Therefore, in the parties' previously filed motions, oppositions and points and authorities, Fernley  
15 had a full opportunity to brief and argue the issue of sovereign immunity under NRS 41.032(1), but it  
16 failed to do so. Under this Court's rules, Fernley's failure to provide any points and authorities in  
17 opposition to the issue of sovereign immunity under NRS 41.032(1) constitutes Fernley's consent to the  
18 Court's dismissal of its claims against the State Treasurer based on that sovereign immunity. See  
19 FJDCR 15(5) ("a failure of an opposing party to file a memorandum of points and authorities in  
20 opposition to any motion within the time permitted shall constitute a consent to the granting of the  
21

22 <sup>2</sup> Because the FTCA served as the model for NRS 41.032(1) and NRS 41.032(2), the Nevada Supreme  
23 Court has found that federal cases interpreting the FTCA are relevant in interpreting Nevada's  
24 provisions. Hagblom, 93 Nev. at 602; Martinez v. Maruszczak, 123 Nev. 433, 444 (2007); see also  
Frank Briscoe Co. v. County of Clark, 643 F.Supp. 93, 97 (D.Nev. 1986) ("decisions of the United  
States Supreme Court dealing with the scope of 28 U.S.C. §2680(a), Dalehite v. United States, 346  
U.S. 15, and later cases of the high court, are controlling and other federal cases are good precedent in  
the construction of NRS 41.032(2).").

1 motion.”).<sup>3</sup>

2 Furthermore, contrary to Fernley’s contentions, the Court properly decided the issue of sovereign  
3 immunity under NRS 41.032(1) as a pure matter of law. In some cases, “[i]ssues of sovereign immunity  
4 under NRS Chapter 41 present mixed questions of law and fact.” Ransdell v. Clark County, 124 Nev.  
5 847, 854 (2008); Martinez v. Maruszczak, 123 Nev. 433, 438 (2007). However, when it is apparent  
6 from the face of the complaint that the defendants are entitled to sovereign immunity under  
7 NRS 41.032(1) or NRS 41.032(2) even if all the facts alleged in the complaint are true, the issue of  
8 sovereign immunity presents a pure question of law, and the district court must dismiss all claims that  
9 are barred by sovereign immunity at the earliest possible stage in the litigation. See Hagblom, 93 Nev.  
10 at 599-605 (affirming early dismissal of claims based on sovereign immunity under NRS 41.032(1) and  
11 NRS 41.032(2)); Foster v. Washoe County, 114 Nev. 936, 941-43 (1998) (affirming early dismissal of  
12 claims based on sovereign immunity under NRS 41.032(2)). Even though sovereign immunity under  
13 NRS 41.032(1) and NRS 41.032(2) is a form of qualified immunity rather than a form of absolute  
14 immunity (see Boulder City v. Boulder Excavating, 124 Nev. 749, 754 (2008)), early dismissal of claims  
15 based on sovereign immunity is still required because such immunity is not merely a defense to liability,  
16 it is “an entitlement not to stand trial or face the other burdens of litigation. Accordingly, a defense of  
17 qualified immunity should be resolved at the earliest possible stage in litigation.” Butler v. Bayer, 123  
18 Nev. 450, 458 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 200 (2001)) (internal quotations and  
19 footnotes omitted).

20 As will be thoroughly discussed next, it is apparent from the face of Fernley’s complaint that the  
21 State Treasurer—and all other Defendants in this case—are entitled to sovereign immunity under  
22 NRS 41.032(1) as a matter of law even if all the facts alleged in Fernley’s complaint are true. Therefore,

23 <sup>3</sup> See also Walls v. Brewster, 112 Nev. 175, 178 (1996) (holding that district court acted properly in  
24 construing plaintiff’s failure to respond to motion to dismiss as admission that motion was  
meritorious); Nye County v. Washoe Med. Ctr., 108 Nev. 896, 899-900 (1992); King v. Cartledge, 121  
Nev. 926, 927-28 (2005).

1 in its June 6, 2014 Order, the Court did not make a clear error or cause a manifest injustice. Rather, the  
2 Court properly dismissed the claims against the State Treasurer at this stage in litigation because the  
3 State Treasurer is entitled to judgment as a matter of law.

4 **C. The State Treasurer—and all other Defendants in this case—are entitled to judgment as**  
5 **a matter of law on Fernley's claims for money damages because those claims are barred by**  
6 **sovereign immunity under NRS 41.032(1) as a matter of law.**

7 As discussed previously, Fernley failed to brief and argue the issue of sovereign immunity under  
8 NRS 41.032(1) even though it had a full opportunity to do so. Nevertheless, even if the Court were to  
9 give Fernley another opportunity to brief and argue the issue, the end result would be the same because  
10 the State Treasurer—and all other Defendants in this case—are entitled to sovereign immunity under  
11 NRS 41.032(1) as a matter of law even if all the facts alleged in Fernley's complaint are true.

12 In our national union of sovereign states, each state retains its status as an independent sovereign,  
13 and each state enjoys inherent sovereign immunity from judicial actions in its own state courts. Alden v.  
14 Maine, 527 U.S. 706, 711-29 (1999). Although each state's inherent sovereign immunity is recognized  
15 by the Eleventh Amendment to the United States Constitution, such inherent sovereign immunity is  
16 much broader in scope. Id. As explained by the United States Supreme Court:

17 [T]he sovereign immunity of the States neither derives from nor is limited by the terms of  
18 the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the  
19 authoritative interpretations by this Court make clear, the States' immunity from suit is a  
20 fundamental aspect of the sovereignty which the States enjoyed before the ratification of the  
21 Constitution, and which they retain today (either literally or by virtue of their admission into  
22 the Union upon an equal footing with the other States) except as altered by the plan of the  
23 Convention or certain constitutional Amendments.

24 Id. at 712-13.

25 Therefore, as an independent sovereign state, the State of Nevada and its agencies, officers and  
26 employees enjoy inherent sovereign immunity from all judicial actions in Nevada's state courts, except  
27 to the extent that: (1) there has been a valid abrogation of the State's inherent sovereign immunity under  
28 federal law, Alden, 527 U.S. at 756; or (2) the Nevada Legislature by general law has waived the State's

1 inherent sovereign immunity pursuant to Article 4, Section 22 of the Nevada Constitution.<sup>4</sup> In other  
2 words, absent a valid abrogation of sovereign immunity under federal law (which is not at issue in this  
3 case), the State of Nevada and its agencies, officers and employees cannot be sued in Nevada's state  
4 courts for any type of legal or equitable relief, unless the lawsuit and the type of relief being sought are  
5 both authorized by Nevada state law. See, e.g., Arnesano v. State, 113 Nev. 815, 820-24 (1997)  
6 (discussing the types of negligence lawsuits that may be brought against the State and the types of legal  
7 and equitable relief that may and may not be recovered in such lawsuits under Nevada state law).

8 In addition, it is well established that a city, county or other political subdivision cannot bring a  
9 lawsuit to recover money damages against the State unless it has been given specific statutory  
10 authorization for such a lawsuit. See Clark County v. State, 65 Nev. 490, 501 (1948) ("By the act the  
11 state waived its immunity to suit and permitted the county to sue, and likewise definitely vested in the  
12 district court jurisdiction of the subject matter."); State v. Board of County Comm'rs, 642 P.2d 456, 458  
13 (Wyo. 1982) ("the County cannot sue the State, its creator, in the absence of a specific constitutional or  
14 statutory provision authorizing such an action."); City of New York v. State, 655 N.E.2d 649, 651 (N.Y.  
15 1995) ("the traditional principle throughout the United States has been that municipalities and other  
16 local governmental corporate entities and their officers lack capacity to mount constitutional challenges  
17 to acts of the State and State legislation." ).<sup>5</sup>

18  
19 <sup>4</sup> Nev. Const. art.4, §22 ("Provision may be made by general law for bringing suit against the State as to  
20 all liabilities originating after the adoption of this Constitution[.]"); Hardgrave v. State, 80 Nev. 74, 77  
21 (1964) ("We construe the words "general law" as used in Section 22 to mean a general law passed by  
the legislature."); Taylor v. State, 73 Nev. 151, 153 (1957) ("It is the legislature alone which has the  
power to waive immunity or to authorize such waiver." ).

22 <sup>5</sup> See also Sch. Dist. No. 55 v. Musselshell County, 802 P.2d 1252, 1255 (Mont. 1990) ("in the absence  
23 of a specific statutory or constitutional provision; one governmental subdivision may not sue another  
for damages."); E. Jackson Pub. Schs. v. State, 348 N.W.2d 303, 306 (Mich. Ct. App. 1984) (holding  
24 that local school districts could not sue the state to "overturn the legislative scheme of [school]  
financing and to thus compel the Legislature to enact a different system that would conform to  
plaintiffs' theories of equality." ).

1 In this case, Fernley has not identified any Nevada statute which gives it specific statutory  
2 authorization to bring a lawsuit against the State to recover money damages. Furthermore, the only  
3 Nevada statute which arguably could authorize Fernley to bring a lawsuit against the State to recover  
4 money damages is NRS 41.031(1), which is the State's conditional waiver of sovereign immunity for  
5 certain actions for money damages. However, at least one court has held that the enactment of a general  
6 law waiving a state's sovereign immunity for certain actions for money damages does not provide the  
7 type of specific statutory authorization that is necessary for a political subdivision to bring a lawsuit  
8 against the State to recover money damages. Carbon County Sch. Dist. v. Wyo. State Hosp., 680 P.2d  
9 773, 775 (Wyo. 1984). Therefore, it is questionable whether the State's conditional waiver of sovereign  
10 immunity in NRS 41.031(1) constitutes the type of specific statutory authorization that would allow  
11 Fernley to bring a lawsuit against the State to recover money damages.

12 In any event, even assuming that the State's conditional waiver of sovereign immunity in  
13 NRS 41.031(1) provides Fernley with the requisite statutory authority to bring a lawsuit against the  
14 State, Fernley still cannot recover money damages against the State even if all the facts alleged in its  
15 complaint are true, because the State Treasurer—and all other Defendants in this case—are protected by  
16 the statutory exception in NRS 41.032(1), which retains the State's sovereign immunity from money  
17 damages based on any acts or omissions in the execution and administration of statutory provisions that  
18 have not been declared invalid by a court of competent jurisdiction. Hagblom, 93 Nev. at 603-04.

19 Pursuant to NRS 41.031(1), the Legislature has enacted a conditional waiver of the State's  
20 sovereign immunity which provides in relevant part that:

21 The State of Nevada hereby waives its immunity from *liability* and action and hereby  
22 consents to have its *liability* determined in accordance with the same rules of law as are  
23 applied to *civil actions* against natural persons and corporations, except as otherwise  
provided in NRS 41.032 to 41.038, inclusive, . . . if the claimant complies with the  
limitations of . . . NRS 41.032 to 41.036, inclusive.

24 NRS 41.031(1) (emphasis added).



1 Based on the statute's plain language, the State's conditional waiver of sovereign immunity  
2 exposes the State to "liability" in "civil actions." As commonly defined and understood, "civil liability"  
3 means "[t]he state of being legally obligated for civil *damages*." Black's Law Dictionary 926 (7th ed.  
4 1999) (emphasis added). Thus, under NRS 41.031(1), the State may be held liable in a civil action for  
5 damages, but such liability is expressly subject to the exceptions and limitations set forth in  
6 NRS 41.032-41.038. Boulder Excavating, 124 Nev. at 756 ("Through NRS 41.031(1), the Nevada  
7 Legislature has waived the State of Nevada's sovereign immunity to liability in civil actions, subject to  
8 certain statutory exceptions.").

9 Under the statutory exception in NRS 41.032(1), the State retains its sovereign immunity from  
10 liability for damages in any civil action challenging the constitutionality or validity of any statute or  
11 regulation. Hagblom, 93 Nev. at 603-04. Specifically, NRS 41.032(1) provides that:

12 [N]o action may be brought [against the State] under NRS 41.031 or against an immune  
13 contractor or an officer or employee of the State or any of its agencies or political  
subdivisions which is:

14 1. Based upon an act or omission of an officer, employee or immune contractor,  
15 exercising due care, *in the execution of a statute or regulation, whether or not such statute  
or regulation is valid, if the statute or regulation has not been declared invalid by a court of  
competent jurisdiction*[.]

16 (Emphasis added.)

17 In interpreting the analogous statutory exception in the FTCA, the United States Supreme Court  
18 has stated that the exception "bars tests by tort action of the legality of statutes and regulations."  
19 Dalehite, 346 U.S. at 33; see also 2 Jayson & Longstreth, Handling Federal Tort Claims §12.03  
20 (LexisNexis 2014) (collecting federal cases and stating that the exception "bars the use of a FTCA suit  
21 to challenge the constitutionality or validity of statutes or regulations."). The Supreme Court's  
22 interpretation of the exception is supported by its legislative history where Congress stated that it was  
23 not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation  
24 should be tested through the medium of a damage suit for tort." Dalehite, 346 U.S. at 29 n.21 (quoting

1 several Senate and House reports regarding the purpose of the exception); see also Handling Federal  
2 Tort Claims, supra, §12.02 (explaining that the exception's "objective was to ensure that certain  
3 governmental activities would not be disrupted by the threat of damage suits."). Consequently, by  
4 enacting the exception, Congress made clear that a claim for damages against the government cannot be  
5 premised on the unconstitutionality or invalidity of a statute or regulation. See Handling Federal Tort  
6 Claims, supra, §12.03 (collecting cases).

7 The Nevada Supreme Court has taken a similar view of the statutory exception in NRS 41.032(1).  
8 Hagblom, 93 Nev. at 603-04. In Hagblom, the plaintiff brought claims for declaratory relief regarding  
9 the validity of a state agency's regulation and also claims for money damages based on the state  
10 agency's implementation of the regulation. The Supreme Court upheld dismissal of the claims for  
11 money damages based on NRS 41.032(1), which the court stated "provides immunity to all individuals  
12 implementing the new regulation since that policy, applied with due care and without discrimination,  
13 had not been declared invalid by a court of competent jurisdiction." Id. at 603.

14 In its state constitutional claims, Fernley alleges that the State of Nevada, the Department of  
15 Taxation and the State Treasurer acting in her official capacity violated the Nevada Constitution in their  
16 execution and administration of the C-Tax system under NRS 360.600-360.740. Because those statutory  
17 provisions have not been declared invalid by a court of competent jurisdiction, the State and its agencies,  
18 officers and employees acting in their official capacities are entitled to sovereign immunity under  
19 NRS 41.032(1) as a matter of law even if all the facts alleged in Fernley's complaint are true. Therefore,  
20 the Court properly dismissed Fernley's claims for money damages against the State Treasurer because  
21 the State Treasurer is entitled to judgment as a matter of law on those claims.

22 //

23 //

24 //



1 DATED: This 11th day of July, 2014.

2 Respectfully submitted,

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Case No. 66851  
JA 3582

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15  
16 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
17 **IN AND FOR CARSON CITY**

18 CITY OF FERNLEY, NEVADA, a Nevada  
19 municipal corporation,

20 Plaintiff,

21 v.

22 STATE OF NEVADA, ex rel. THE NEVADA  
23 DEPARTMENT OF TAXATION; THE  
24 HONORABLE KATE MARSHALL, in her  
25 official capacity as TREASURER OF THE  
26 STATE OF NEVADA; NEVADA  
27 LEGISLATURE and DOES 1-20,  
28 Inclusive,

Defendants.

Case No.: 12 OC 00168 1B

Dept. No.: I

29  
30 **NEVADA DEPARTMENT OF TAXATION'S REPLY TO**  
31 **PLAINTIFF'S OPPOSITION TO NEVADA DEPARTMENT OF TAXATION**  
32 **AND NEVADA TREASURER'S RENEWAL OF MOTION TO DISMISS**

33 Defendant, State of Nevada, ex rel. its Department of Taxation ("Department"), by and  
34 through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, Gina  
35 Session, Chief Deputy Attorney General, and Andrea Nichols, Senior Deputy Attorney

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38 ///

Case No. 66851  
JA 3583

Office of the Attorney General  
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1 General, submits its Reply to Plaintiff's Opposition to Nevada Department of Taxation and  
2 Nevada Treasurer's Renewal of Motion to Dismiss.<sup>1</sup>

3 This Reply is made and based upon the following Memorandum of Points and  
4 Authorities, together with all other papers, pleadings and documents on file herein.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 The City of Fernley ("Fernley") is challenging the constitutionality of a C-Tax system  
8 that multiple counties, local governments, enterprise districts, and special districts statewide  
9 have relied upon for nearly twenty years for budgeting and planning purposes. The system  
10 is administered by the Department of Taxation pursuant to formulas lawfully enacted by the  
11 Nevada Legislature. Fernley is asking this Court to legislate from the bench and restructure  
12 this long-established statutory system. The Court should decline Fernley's invitation to step  
13 into the shoes of the Legislature and redraw the statewide C-Tax system, and enter  
14 summary judgment in favor of the Department for the following reasons:

- 15 1. There is no separation of powers violation because the Legislature has  
16 enacted a law providing the formulas for administering the C-Tax, and the  
17 Department is simply executing the system created by the Legislature;
- 18 2. The C-Tax is not a local or special law because it applies to all of the local  
19 governments, enterprise districts, and special districts statewide;
- 20 3. Though Fernley asserts the Legislature failed to enact a general law governing  
21 the distribution of C-Tax, Fernley is wrong. The laws enacted by the  
22 Legislature for the distribution of C-Tax are general laws that apply to all of the  
23 local governments, enterprise districts, and special districts statewide.

24 Fernley has failed to present a genuine issue of material fact tending to show that the  
25 C-Tax statutes violate the Nevada Constitution. Further, the Department has immunity  
26

27 <sup>1</sup> Defendant, the Honorable Kate Marshall in her official capacity as Treasurer of the State of Nevada,  
28 was dismissed pursuant to this Court's order of June 6, 2014. Should the Court reconsider this Order, all of the  
arguments made by the Department apply to the Treasurer as well.

1 pursuant to NRS 41.032 and Fernley's claims are barred by both the applicable statute of  
2 limitations and the doctrine of laches. Summary judgment in favor of Defendants is therefore  
3 warranted.

## 4 **II. PROCEDURAL POSTURE**

5 The City of Fernley ("Fernley") filed its Complaint on June 6, 2012, against the  
6 Department and the Honorable Kate Marshall in her official capacity as Treasurer of the  
7 State of Nevada ("Treasurer"). The Department and Treasurer filed their Motion to Dismiss  
8 on August 3, 2012. The Nevada Legislature ("Legislature") filed a Joinder in Motion to  
9 Dismiss on August 16, 2012.<sup>2</sup> Fernley filed its Opposition to the Department and Treasurer's  
10 Motion to Dismiss on August 20, 2012. The Department and Treasurer filed their Reply to  
11 Fernley's Opposition to their Motion to Dismiss on August 27, 2012. Fernley filed its  
12 Opposition to the Legislature's Joinder in Motion to Dismiss on September 28, 2012. The  
13 Legislature filed its Reply on October 8, 2012.

14 On October 15, 2012, this Court issued an order denying the Motions to Dismiss to  
15 allow Fernley a period of time to complete discovery and allowing Defendants to renew their  
16 Motions to Dismiss upon completion of a reasonable discovery period.

17 On May 5, 2014, the Department and Treasurer filed Renewal of Motion to Dismiss.  
18 Therein the Department and Treasurer argued that there are no facts which, if proved, would  
19 entitle Fernley to any relief and dismissal was therefore warranted pursuant to NRCP  
20 12(b)(5). On May 6, 2014, the Legislature filed a Joinder in Renewal of Motion to Dismiss.  
21 Fernley filed its Response on May 15, 2014. The Department and Treasurer filed their Reply  
22 on May 23, 2014. The Legislature filed its Reply on May 27, 2014, pointing out that because  
23 Answers had been filed, the Motions to Dismiss should be treated as motions for judgment  
24 on the pleadings pursuant to NRCP 12(c) and 12(h)(2).

25 On June 6, 2014, this Court issued its Order finding the Treasurer has immunity under  
26 NRS 41.032(1) and dismissing all claims against the Treasurer. The Order also clarified that  
27

28 <sup>2</sup> This Court granted Nevada Legislature's Motion to Intervene on August 30, 2012. Case No. 66851  
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1 Defendants' previously filed Motions to Dismiss would be treated as Motions for Summary  
2 Judgment, that Fernley would be allowed to file an Opposition, and that Defendants would  
3 have the opportunity to file Replies.

4 Fernley filed its own Motion for Summary Judgment on June 13, 2014. The  
5 Department and Legislature each filed Oppositions to Fernley's Motion for Summary  
6 Judgment on July 11, 2014.

7 Also on July 11, 2014, Fernley filed Plaintiff's Opposition to Nevada Department of  
8 Taxation and Nevada Treasurer's Renewal of Motion to Dismiss and Plaintiff's Opposition to  
9 Nevada Legislature's Joinder in Nevada Department of Taxation and Nevada Treasurer's  
10 Renewal of Motion to Dismiss. These documents are remarkably similar to Fernley's Motion  
11 for Summary Judgment filed on June 13, 2014. Accordingly, the Department incorporates by  
12 this reference its Opposition to Fernley's Motion for Summary Judgment, together with all of  
13 the dispositive motions previously filed herein.

14 **III. FACTS**

15 The relevant facts are set forth in Nevada Department of Taxation's Opposition to  
16 Plaintiff's Motion for Summary Judgment, and also Defendant Nevada Legislature's  
17 Opposition to Plaintiff's Motion for Summary Judgment, both of which were filed herein on  
18 July 11, 2014. In its Oppositions to the Defendants' Motions to Dismiss which were  
19 converted to Motions for Summary Judgment, Fernley has the burden to show that there is a  
20 genuine issue of material fact for trial. Fernley has failed to do so.

21 The material facts relevant to this Reply are found in: SB 254 passed by the Nevada  
22 Legislature in 1997; the statutes concerning the distribution of C-Tax revenues found in NRS  
23 360.680 and 360.690; the statutes concerning adjustments of C-Tax distributions in NRS  
24 360.695, 360.740 and 354.598747; and, the fact that the statutes were enacted in 1997,  
25 Fernley incorporated in 2001, and this lawsuit was filed in 2012.

26 ///

27 ///

28 ///

IV. ARGUMENT

A. The Standard of Review.

NRCP 56(b) allows a Defendant to move for summary judgment with or without supporting affidavits. NRCP 56(c) requires the granting of such a motion if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Here, Fernley has the burden to show a genuine issue of material fact.

The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact. The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial. If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence. But if the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out . . . that there is an absence of evidence to support the nonmoving party's case. In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.

*Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007).

In this case Fernley, as Plaintiff, bears the burden of persuasion at trial. Thus, once the Department either submitted evidence to negate Fernley's claims or pointed to the absence of evidence to support Fernley's case, Fernley has the burden of presenting evidence showing a material issue of fact. *Id.* 172 P.3d at 134. Fernley has failed to allege that there is a genuine issue for trial. Rather, Fernley asserts that the applicable law compels the entry of summary judgment in its favor. Plaintiff's Opposition to Renewal of Motion to Dismiss ("Opposition to Renewal of MTD"), p. 20, ll. 19-20.

In opposition to Defendants' Motions for Summary Judgment, Fernley has the burden,

to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The

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1 nonmoving party must by affidavit or otherwise, set forth specific  
2 facts demonstrating the existence of a genuine issue for trial or  
3 have summary judgment entered against him. The nonmoving  
party is not entitled to build a case on the gossamer threads of  
whimsy, speculation and conjecture.

4 *Wood v. Safeway, Inc.* 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005).

5 Conclusory statements along with general allegations do not create an issue of fact.  
6 *Yeager v. Harrah's Club, Inc.* 111 Nev. 830, 833, 897 P.2d 1093, 1095 (1995). Additionally,  
7 it is well established that tax statutes such as those at issue in this case enjoy a presumption  
8 of constitutionality. See *Westinghouse Beverage Group, Inc. v. Dept. of Taxation*, 101 Nev.  
9 184, 187, 698 P.2d 866, 868 (1985); *List v. Whisler*, 99 Nev. 133, 137-38, 660 P.2d 104, 106  
10 (1983); *Damus v. County of Clark*, 93 Nev. 512, 516, 569 P.2d 933, 935 (1977); and,  
11 *Nevada v. Irwin*, 5 Nev. 111, 120 (1869).

12 Whether or not the C-Tax system violates the Nevada Constitution is a question of  
13 law. There simply are no material facts genuinely at issue. The C-Tax system does not  
14 violate the Nevada Constitution and judgment in favor of the Department is therefore  
15 warranted.

16 **B. The Department Has Immunity From Liability.**

17 The Department is entitled to immunity pursuant to NRS 41.032, which provides in  
18 relevant part, that no action may be brought against the State or any of its agencies which is  
19 based upon an officer or employee exercising due care in the execution of a statute or  
20 regulation or based upon the performance of a discretionary function. Fernley's Opposition  
21 to this argument is set forth in Section IV(B)(1)(a) and (b) of its Opposition to Nevada  
22 Legislature's Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of  
23 Motion to Dismiss.

24 First, Fernley asserts that Defendants have not moved to dismiss Fernley's claims for  
25 Declaratory and Injunctive Relief based on sovereign immunity. In response to this  
26 argument the Department notes that the State of Nevada has immunity from suit pursuant to  
27 the Eleventh Amendment of the United States Constitution. NRS 41.031(3). Immunity under  
28 the Eleventh Amendment applies to suits seeking declaratory relief. See *e.g. Lugo v.*

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1 *Banfield*, 177 P.2d 244, 246 (Or. 1947) and *Executive Air Service, Inc. v. Div. of Fisheries*  
2 *and Game*, 173 N.E.2d 614, 615-16 (Mass. 1961). In this case, however, the Department  
3 does not oppose Fernley's claims for declaratory and injunctive relief on the basis of the  
4 State's sovereign immunity, but rather on the basis that Fernley has failed to state a claim  
5 upon which relief may be granted. As a matter of fairness Fernley should be entitled to a  
6 determination of whether or not the C-Tax system violates the Nevada Constitution. But  
7 regardless of whether or not the statute is found to be constitutional, the Department is  
8 immune from liability pursuant to NRS 41.032.

9 Fernley next asserts that Defendants bear the burden of establishing that they  
10 exercised due care in the execution of the C-Tax system in order to demonstrate immunity  
11 pursuant to NRS 41.032(1). As is set forth in the standard of review above, Fernley, as  
12 Plaintiff, bears the burden of persuasion at trial. Thus once Defendants pointed to the  
13 absence of evidence to support Fernley's case, Fernley has the burden of presenting  
14 evidence showing a material issue of fact. *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134.<sup>3</sup>

15 In an attempt to create a factual issue, Fernley claims, "the Department's Executive  
16 Director has decided not to change the C-Tax bases of several local governments that have  
17 met the criteria for reduction." Plaintiff's Opposition to Nevada Legislature's Joinder in  
18 Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss, p.  
19 6, ll. 23-26. Fernley then claims a genuine issue of material fact exists as to whether that  
20 decision reflected the exercise of 'due care.'" *Id.* at ll. 27-28.

21 This argument fails first because the Executive Director does not have the authority to  
22 change the C-Tax base of a local government. Pursuant to NRS 360.695, if the population  
23 and the assessed value of taxable property within a local government has decreased for  
24 three years, the Executive Director of the Nevada Department of Taxation submits findings  
25

26 <sup>3</sup> Fernley's citation to *State v. Second Judicial District Court ex rel. County of Washoe*, 118 Nev. 609,  
27 55 P.3d 420 (2002) is also not applicable; that case dealt with the applicability of absolute quasi-judicial  
28 immunity which differs markedly from the analysis of immunity pursuant to NRS 41.032. The analysis under  
NRS 41.032 concerns sovereign immunity and the legislature's qualified waiver of sovereign immunity for tort  
liability. See *Martinez v. Maruszczak*, 123 Nev. 433, 439-440 168 P.3d 729, 725 (2007).

1 to the Committee on Local Government Finance ("CLGF"). The CLGF reviews the findings  
2 and if it determines that an adjustment in C-Tax is appropriate, the CLGF submits its  
3 recommendation to the Nevada Tax Commission. Second, if the Department's Executive  
4 Director made a decision either to submit findings or not to submit findings to the CLGF, the  
5 Department would be protected by discretionary immunity under NRS 41.032(2).

6 In *Martinez v. Maruszczak*, 123 Nev. 433, 444-47, 168 P.3d 720, 728-29 (2007), the  
7 Nevada Supreme Court recognized that NRS 41.032(2) (the discretionary immunity  
8 exception) mirrors the Federal Tort Claims Act ("FTCA") and determined that the same two  
9 part test for determining discretionary immunity in federal cases should be applied in  
10 determining discretionary immunity under 41.032(2). The Nevada Supreme Court has not  
11 issued a published decision concerning any test applicable to the due care exception in NRS  
12 41.032(1). However, it stands to reason that it would also adopt the federal test since this  
13 provision is also found in the exception to the waiver of sovereign immunity in the FTCA. 28  
14 U.S.C. § 2680(a).

15 To determine whether the due care exception bars a claim under the FTCA, federal  
16 courts apply a two part analysis. *Welch v. U.S.*, 409 F.3d 646, 652 (4th Cir. 2005). First, the  
17 Court determines whether the statute in question specifically proscribes a course of action  
18 for an officer to follow; second, if a specific action is mandated, the Court inquires as to  
19 whether the officer exercised due care in following the dictates of the statute. *Id.* If due care  
20 was exercised, sovereign immunity has not been waived. *Id.*

21 Here, the statutes proscribe a course of action for the Department to follow. The  
22 Department administers the C-Tax system in accordance with NRS 360.680 and 360.690.  
23 These statutes simply proscribe the manner in which the Department is to distribute  
24 revenues collected from six taxes. Fernley admits that the Department "distributes C-Tax  
25 revenue pursuant to a mechanically applied formula. . ." Opposition to Renewal of MTD, p.  
26 19, ll. 26-28.

27 Further, with respect to the second prong of the analysis, Fernley has not submitted  
28 one shred of evidence tending to show that the Department failed to exercise due care in

1 carrying out the requirements of the C-Tax legislation.<sup>4</sup> Fernley requests a determination  
2 that the C-Tax system is unconstitutional on its face and as applied. But even if the statutes  
3 are found unconstitutional this would show a defect in the statute, not a failure of Defendants  
4 to exercise due care in carrying out the requirements of the statute. *Welch*, 409 F.3d at 653.  
5 The purpose of the due care immunity exception is to immunize the conduct of State  
6 agencies and officials regardless of whether the statutes under which they are proceeding is  
7 ultimately upheld. *Id.* at 652-53.

8 Here, there are no facts tending to show that the Department failed to exercise due  
9 care in carrying out the requirements of the C-Tax legislation. Whether or not the C-Tax  
10 statutes are found to be constitutional is of no consequence. The Department is immune  
11 from liability under the due care exception to the State's waiver of sovereign immunity  
12 pursuant to NRS 41.032(1).

13 Even assuming for the sake of argument there were some evidence tending to show  
14 that the Department failed to exercise due care in carrying out the statutory requirements of  
15 the C-Tax legislation, the Department would be entitled to discretionary immunity from  
16 liability pursuant to NRS 41.032(2). In *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729, the  
17 Nevada Supreme Court adopted the two part *Berkovitz-Gaubert* test for discretionary  
18 immunity. "[T]o fall within the scope of discretionary-act immunity, a decision must (1)  
19 involve an element of individual judgment or choice, and (2) be based on considerations of  
20 social, economic, or political policy." *Id.* 168 P.3d at 728. The purpose of the exception is to  
21 prevent judicial second guessing of legislative and administrative decisions grounded in  
22 social, economic and political policy through the medium of an action in tort. *Id.* at 446, 168  
23 p.3d at 729. The United States Supreme Court explained,

24 When established governmental policy, as expressed or implied  
25 by statute, regulation, or agency guidelines, allows a Government  
26 agent to exercise discretion, it must be presumed that the agent's  
acts are grounded in policy when exercising that discretion. For a

27 <sup>4</sup> Fernley claims an issue as to whether the Executive Director failed to exercise due care in making a  
28 determination and submitting findings pursuant to NRS 360.695. There is no evidence to support this  
allegation but if there were, such a decision would be entitled to discretionary immunity.

complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

*United States v. Gaubert*, 499 U.S. 315, 324-25 (1991).

In its Complaint, Fernley admits that the C-Tax system is not designed to allow the Department to make any meaningful adjustments. *Id.* at p. 4, ll. 16-21. But in its Opposition, Fernley states there is an issue as to whether the Executive Director exercised due care in carrying out the requirements of NRS 360.695. Opposition to Renewal of MTD, p. 6, l. 27 to p. 7, l. 1.

On its face, the statute allows the Executive Director to determine whether an adjustment is necessary but the Executive Director must submit the finding to the CLGF for review, and if the CLGF finds adjustment necessary, the CLGF sends its recommendation to the Nevada Tax Commission. Assuming for the sake of argument that the Executive Director made any such determination, and either did or did not submit a finding, it would involve individual judgment. Further, any action taken by the Department in connection with administering the C-Tax system would necessarily involve consideration of the State's economic policy. Discretionary immunity applies precisely to such administrative functions. Thus there is no genuine issue of material fact as to the Department's immunity from liability and Defendants are entitled to judgment as a matter of law.

**C. Fernley's Claims are Barred by the Statute of Limitations.**

It is uncontroverted that the statutes at issue were enacted in 1997. Fernley did not incorporate as a city until 2001 and did not bring this lawsuit until 2012. In its Joinder in Motion to Dismiss, the Legislature argued that this matter is barred by any applicable statute of limitations. While the Nevada Supreme Court declined to rule on the applicable statute of limitations for Fernley's claims under the Nevada Constitution, if it were to follow the lead of the United States Supreme Court, the two year statute of limitations in NRS 11.190(4)(e) would apply. But if that is not applicable the general four year statute of limitations

1 11.220 would apply. Under either limitations period, Fernley's state constitutional claims are  
2 barred as a matter of law.

3 In its Opposition, Fernley first raises a confusing argument concerning the burden of  
4 proof. In the first case cited by Fernley, *Dozier v. State*, 124 Nev. 125, 131, 178 P.3d 149,  
5 154 (2008), the Nevada Supreme Court concluded, "that when a defendant charged with a  
6 criminal offense affirmatively raises a statute-of-limitations defense, if the State seeks to  
7 disprove that defense. . . the State must do so by a preponderance of the evidence." Here,  
8 the State as Defendant has affirmatively raised the statute of limitations defense, applying  
9 the reasoning of *Dozier*; if Fernley as Plaintiff seeks to disprove that defense, it must do so  
10 by a preponderance of the evidence. Fernley has not met its burden.

11 Next, Fernley cites to a federal court order concerning a discovery dispute. In *Adobe*  
12 *Systems Inc. v. Christenson*, No. 2:10-cv-00422-LRH-GWF 2011 WL 540278, the  
13 Defendants argued that they should not be required to respond to written discovery requests  
14 because the time period the alleged copyright and trademark infringement occurred was not  
15 set forth in the Complaint. The Court noted that some courts have dismissed complaints that  
16 fail to set forth the operative dates with respect to the applicable statute of limitations. The  
17 Court reasoned however that because the statute of limitations is an affirmative defense  
18 which the defendant has the burden of pleading and proving, a plaintiff need not affirmatively  
19 plead facts showing the absence of such a defense in order to state a claim. The Order  
20 granted in part and denied in part Plaintiff's Motion to Compel. The Order is totally irrelevant  
21 here as the relevant time periods are not in dispute.

22 Fernley then cites to *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137 (1979)  
23 wherein the Nevada Supreme Court found that defendant did not raise the defense of res  
24 judicata prior to trial, and because that issue was not properly before the trial court, the  
25 judgment of dismissal predicated thereon could not be upheld. Again, the case has no  
26 application to the facts of this case because the statute of limitations defense was raised in  
27 the Legislature's Joinder in Motion to Dismiss, and was affirmatively alleged in both the  
28 Legislature's Answer (at p. 4, ll. 4-5) and the Department's Answer (at p. 4, l. 19).  
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1 cannot complain that it did not have sufficient notice of the statute of limitations defense prior  
2 to trial.

3 In *Chachas v. City of Ely, Nevada*, 615 F.Supp.2d 1193, 1203 (2009), Nevada's  
4 Federal District Court considered a statute of limitations defense, noting that once the  
5 moving party provides evidence to establish the absence of a genuine issue of fact on each  
6 issue material to the affirmative defense, "the burden shifts to the nonmoving party to set  
7 forth specific facts showing the existence of genuine issues of material fact on the affirmative  
8 defense." Here, Fernley, as the nonmoving party, has the burden to show the existence of a  
9 genuine issue of material fact. Summary judgment is appropriate where, as in this case, a  
10 cause of action is barred by the statute of limitations. *Stalk v. Mushkin*, 125 Nev. 21, 25, 199  
11 P.3d 838, 840 (2009).

12 Next, Fernley argues that the Nevada Supreme Court could apply an even larger  
13 limitations period because the Nevada Supreme Court applied a 15 year statute of limitations  
14 to a claim arising under the Takings Clause of the Nevada Constitution in *White Pine Lumber*  
15 *Co. v. City of Reno*, 106 Nev. 778, 801 P.2d 1370 (1990). That case concerned an alleged  
16 taking by the City of Reno of a parcel of real property. The applicable statutes of limitations  
17 found in Chapter 11 of the NRS specifically apply to actions other than for the recovery of  
18 real property. Because Fernley's claims against the Department do not concern real  
19 property, Fernley's argument in this regard is without merit.

20 Since the Nevada Supreme Court has not determined the applicable statute of  
21 limitations for violations of Articles 3 and 4 of the Nevada Constitution, it may turn to federal  
22 cases interpreting similar statutes. See *UMC Physicians' Bargaining Unit of Nevada Service*  
23 *Employees Union v. Nevada Service Employees Union*, 124 Nev. 84, 90-91, 178 P.3d 709,  
24 713-14 (2008); and *Martinez*, 123 Nev. at 444-47, 168 P.3d at 728-29. Federal Courts  
25 considering claims for violations of the United States Constitution brought pursuant to 42  
26 U.S.C. § 1983 apply the state statute of limitations for personal injury actions. *Wilson v.*  
27 *Garcia*, 471 U.S. 261, 279-80 (1985). Where state law provides multiple statutes of  
28 limitations for personal injury actions, federal courts apply the state's general residual statute

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1 for personal injury actions. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). In Nevada, an  
2 action for personal injuries must be commenced within two years. NRS 11.190(4)(e). Thus  
3 it is most likely that the two year statute of limitations applies to Fernley's claims alleging  
4 violations of the Nevada Constitution. Because Fernley waited more than two years to  
5 commence this action, Fernley's state constitutional claims are barred as a matter of law.

6 Lastly, relying on federal rather than Nevada state cases, Fernley argues that the  
7 continuing violations doctrine should apply. But this doctrine has no applicability to the facts  
8 of this case. Fernley claims that a constitutional violation occurs with every dollar collected  
9 and distributed under the C-Tax system. But to determine whether a statute of limitations  
10 has run against an action, the time must be computed from the day the cause of action  
11 accrued. *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997) (citing *White v.*  
12 *Sheldon*, 4 Nev. 280, 288-89 (1868)). A cause of action accrues when a suit may be  
13 maintained thereon. *Id.* (quoting Black's Law Dictionary at 19 (5th ed. 1979)). Here,  
14 Fernley's cause of action accrued if at all, either when the C-Tax was enacted in 1997 or  
15 when Fernley incorporated in 2001. Fernley did not bring this action until 2012, well past any  
16 applicable statute of limitations. Accordingly, this action is time-barred.

17 **D. Fernley's Claims are Barred by Laches.**

18 Constitutional claims may be time-barred by the equitable doctrine of laches when  
19 there has been an unreasonable or inexcusable delay in bringing the claims and such delay  
20 has worked to the disadvantage or prejudice of others, or has resulted in a change of  
21 circumstances which would make the granting of relief inequitable. *Miller v. Burk*, 124 Nev.  
22 579, 598, 188 P.3d 1112, 1125 (2008). "To determine whether a challenge is barred by the  
23 doctrine of laches, this court considers (1) whether the party inexcusably delayed bringing  
24 the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the  
25 condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to  
26 others." *Id.*

27 In its Opposition, Fernley claims that the third prong of this test is not satisfied  
28 because the delay was not prejudicial to others. Plaintiff's Opposition to Legislative  
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Joinder in Renewal of Motion to Dismiss, p. 11, l. 24 to p. 12, l. 3. But Fernley's delay has prejudiced both the other participants in the C-Tax system and the State. For the past eleven years, the other participants in the C-Tax system have reasonably relied on the validity of the C-Tax system for purposes of budgeting and fiscal planning. In addition, the State has reasonably relied on the validity of the C-Tax system for purposes of providing funding for the operations of local government. If the C-Tax system is declared invalid now after such a long period of operation, such a declaration would bring chaos to Nevada's tax distribution system and would clearly upset the settled expectations of the other participants in the C-Tax system and the State. Therefore, because consideration of Fernley's claims after an unreasonable and inexcusable eleven-year delay would upset settled expectations, would work to the disadvantage and prejudice of others, and would make the granting of relief inequitable, Fernley's claims are also time-barred by laches as a matter of law.

**E. Fernley Has No Standing to Bring a Separation of Powers Claim.**

In a well-reasoned argument, the Legislature explained that the City of Fernley is a political subdivision of the State of Nevada. NRS 41.0305. As such the City of Fernley has only those powers delegated to it by the State. *City of Trenton v. State of N.J.*, 262 U.S. 182, 187 (1923). It is well established that political subdivisions lack legal capacity and standing to bring claims against the state alleging violations of state constitutional provisions, unless the provisions exist for the protection of political subdivisions of the state. *City of New York v. State*, 655 N.E.2d 649, 651-52 (N.Y. 1995). For example, Nevada's political subdivisions lack standing to bring claims against the state for violations of the due process clause of Article 1, § 8 of the Nevada Constitution because that provision does not exist for the protection of political subdivisions of the state. *Reno v. County of Washoe*, 94 Nev. 327, 330-331, 580 P.2d 460, 462 (1978). However, Nevada's political subdivisions have standing to bring claims against the state for violations of Article 4, §§ 20-21 of the Nevada Constitution because those provisions "exist for the protection of political subdivisions of the State. Their effect is to limit the Legislature, in certain instances, to the enactment of general, rather than special or local, laws." *Id.* at 332.

1       The Separation-of-Powers Clause of the Nevada Constitution does not exist for the  
2 protection of political subdivisions of the state. It exists for the protection of *state*  
3 government by prohibiting one branch of state government from impinging on the functions  
4 of another branch of state government. Nev. Const. art. 3, § 1(1); *Comm'n on Ethics v.*  
5 *Hardy*, 125 Nev. 285, 291-94 212 P.3d 1098, 1103-05 (2009); *Heller v. Legislature*, 120 Nev.  
6 456, 466-72, 93 P.3d 746, 752-56 (2004); *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437,  
7 439 (1893) ("As will be noticed, it is the *state* government as created by the constitution  
8 which is divided into departments"). In interpreting the Separation-of-Powers Clause of the  
9 California Constitution of 1849, which was the model for Nevada's Separation-of-Powers  
10 Clause, the California Supreme Court stated that "the Third Article of the Constitution means  
11 that the powers of the *State* Government, not the local governments thereafter to be created  
12 by the Legislature, shall be divided into three departments." *People v. Provines*, 34 Cal. 520,  
13 534 (Cal. 1868). Thus, "it is settled that the separation of powers provision of the  
14 constitution, Article 3, § 1, does not apply to local governments as distinguished from  
15 departments of the state government." *Mariposa County v. Merced Irrig. Dist.*, 196 P.2d 920,  
16 926 (Cal. 1948).

17       In its Opposition, Fernley cites to a case from Texas, *City of Austin v. Quick*, 930  
18 S.W.2d 678 (Tex. App. 1996). Plaintiff's Opposition to Legislature's Joinder in Motion to  
19 Dismiss, p. 12, l. 12. That case recognizes that a city's standing for purposes of bringing a  
20 state constitutional claim is a question of state practice. *City of Austin*, at 684. Fernley next  
21 cites to an Alaska case, *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska  
22 1987). But that case does not even consider the issue of standing. The cases have no  
23 application to whether Fernley has standing to bring a separation of powers claim in Nevada.

24       Because the Separation-of-Powers Clause of the Nevada Constitution does not exist  
25 for the protection of political subdivisions of the state, Fernley lacks standing to bring claims  
26 against the state alleging violations of that constitutional provision. Therefore, Defendants  
27 are entitled to judgment as a matter of law with respect to Fernley's separation of powers  
28 claims.

**F. There are No Facts Supporting a Claim for Violation of the Separation of Powers Clause of the Nevada Constitution.**

Assuming for the sake of argument that Fernley has standing to bring such a claim, there are simply no facts tending to show a violation of the Separation of Powers Clause of the Nevada Constitution. The separation of powers clause is found in Article 3, § 1 of the Nevada Constitution. It prohibits one department from exercising the functions of another.

In its Opposition, Fernley alleges that, "[T]he C-Tax system fundamentally violates the separation of powers doctrine because it has resulted in the Legislature abdicating its authority over the collection and appropriation of C-Tax revenues to the Executive Branch." Opposition to Renewal of MTD, p. 23, ll. 22-24. Yet Fernley admits that the Department appropriates "C-Tax revenues based solely on the application of its mechanical application of a designated mathematical formula. . ." *Id.* at p. 24, ll. 17-20. Further, "the Department has acknowledged that its only concern is to ensure that necessary mathematical calculations are performed correctly, and that C-Tax revenue has been collected and appropriated accordingly." *Id.* at ll. 21-23. Fernley has presented no facts tending to show that the Legislature has given the Department the power to make appropriations; rather the Legislature has enacted a mathematical distribution formula which the Department administers.

The Nevada Constitution gives the Legislature the power to enact laws concerning appropriations from the treasury. Nev. Const. art. 4, § 17. However, it is the function of the executive department to execute those laws. Nev. Const. art. 5, § 7. *See also Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). In fact the executive branch has a constitutional duty to see that the laws enacted by the Legislature are faithfully executed. *State of Nev. Emps. Ass'n. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992). In executing laws, the executive branch has the power to administer appropriated funds such as collected taxes. *North Lake Tahoe Fire Protection Dist. v. Washoe County Board of County Commissioners*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 589 (2013). Here, the

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1 Legislature enacted a law concerning the administration of appropriated funds and the  
2 Department is simply executing it.

3 No separation of powers violation has been found in similar factual situations where  
4 the statutes at issue provide specific formula for the calculation of taxes to be distributed to  
5 local governments. In *State of Nevada ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d  
6 1321 (1973), the Nevada Supreme Court considered a challenge to a revenue bond law  
7 enacted by Clark County. The Nevada Supreme Court found that the law did not unlawfully  
8 delegate legislative authority in contravention of Nev. Const. art. 3, § 1 because adequate  
9 standards were specified in the law, the purpose was stated with particularity, and the  
10 legislative guides were clear for the counties to follow. *Id.* at 334, 512 P.2d at 1323.  
11 Similarly, in *City of Las Vegas v. Mack*, 87 Nev. 105, 481 P.2d 396 (1971), a shop-owner  
12 argued that the County-City Relief Tax law unconstitutionally delegated the legislative power  
13 to impose a tax to boards of county commissioners. The Nevada Supreme Court again  
14 found no constitutional violation because the statute left nothing to the discretion of the  
15 county commissioners. *Id.* at 109, 481 P.2d at 398.

16 In this case the C-Tax allocations, codified at NRS 360.680 and 360.690, provide  
17 clear direction to the Department of Taxation in the calculation of taxes to be distributed to  
18 local governments. The City of Fernley has not identified any facts tending to show that the  
19 Department has done anything other than execute the laws enacted by the Legislature. In  
20 its Complaint, Fernley admits that the C-Tax system is not designed to allow the Department  
21 to make any meaningful adjustments. Complaint, p. 4, ll. 16-21. Further, Fernley alleges  
22 that the Department applies a mathematical formula and that its concern is to ensure that the  
23 necessary mathematical calculations are performed correctly. Opposition to Renewal of  
24 MTD, p. 24, ll. 21-23. Thus according to the facts alleged by Fernley, the statute is clear and  
25 leaves nothing to the discretion of the Department.

26 There are simply no facts which, if proved, would state a claim for violation of the  
27 Separation of Powers Clause of the Nevada Constitution. Accordingly, judgment in favor of  
28 Defendants on Plaintiff's second claim for relief is warranted.

1           **G.     There are No Facts to Support a Claim that the C-Tax System is a Local or**  
2           **Special Law.**

3           Article 4, § 20 of the Nevada Constitution states in relevant part, "[T]he legislature  
4 shall not pass local or special laws in any of the following enumerated cases-that is to say . .  
5 . For the assessment and collection of taxes for state, county, and township purposes." The  
6 tax statutes at issue in this case do not violate Article 4, § 20 for two reasons. First, the  
7 constitutional provision at issue applies to *assessment and collection* of taxes; it does not  
8 apply to the *disbursement or appropriation* of taxes. Second, the C-Tax system is not a  
9 special law either on its face or as applied to Fernley.

10          Nevada cases discussing the assessment and collection of taxes for purposes of  
11 Article 4, § 20 primarily concern legislation directing counties to levy taxes for particular local  
12 purposes. *Gibson v. Mason*, 5 Nev. 283 (1869) concerned legislation directing Ormsby  
13 County to issue bonds to the Virginia and Truckee Railroad Co., and to levy a tax for the  
14 interest on and redemption of those bonds. The Nevada Supreme Court explained,

15                 We are clearly of opinion that the constitutional provision  
16                 simply prohibits special legislation regulating those acts which the  
17                 assessors and collectors of taxes generally perform, and which  
18                 are denominated "assessment" and "collection of taxes;" and that  
19                 it does not inhibit the Legislature from authorizing or directing the  
20                 County Commissioners from levying a special tax by the passage  
21                 of a local law.

22          *Id.* at 305.

23          This principle was relied on in *Washoe County Water Conservation Dist. v. Beemer*, 56  
24 Nev. 104, 107, 45 P.2d 779, 782 (1935) (finding legislation requiring Washoe County to  
25 issue bonds and levy a tax for payment thereof to pay for improvements along the Truckee  
26 River, "was not a law for the assessment and collection of taxes, as those words are used in  
27 said section 20."); *Cauble v. Beemer*, 64 Nev. 77, 89, 177 P.2d 677, 682 (1947) (finding  
28 legislation requiring Washoe County to issue bonds and levy a tax to pay such bonds for  
improvements to Washoe General Hospital clearly, "is not a law for the assessment and  
collection of taxes, as those words are used in Sec. 20, Art. IV of the Constitution of the  
State of Nevada."); and, *City of Reno v. County of Washoe*, 94 Nev. 327, 335, 580 P.2d 360, 366,

1 465 (1978) (upholding Washoe County Airport Authority power to levy and collect taxes, and  
2 to fix a rate of levy, subject to the approval of Washoe County).

3 Fernley's Complaint does not concern functions performed by assessors and  
4 collectors of tax. Rather, Fernley's Complaint concerns the distribution of tax. Specifically,  
5 Fernley seeks a larger distribution of C-Tax revenues. Fernley claims it, "has been rebuffed  
6 in its efforts to obtain a larger share of the distribution to Lyon County." Complaint, p. 4, ll.  
7 22-23. Fernley further alleges its, "inability to obtain any adjustment to its C-Tax distribution  
8 severely limits Fernley's ability to operate and plan for its future." *Id.* at p. 5, ll. 1-2. Since  
9 Fernley's challenge concerns the *distribution* of taxes rather than the *assessment and*  
10 *collection* of taxes, Nev. Const. art. 4, § 20 is not implicated.

11 Even if Fernley's claims concerned the assessment and collection of taxes, the  
12 legislation at issue is not a special or local law because it is applied to Fernley in the same  
13 manner as any other local government in the State of Nevada. The taxes distributed  
14 pursuant to NRS 360.680 and 360.690 are distributed to local government throughout the  
15 entire state of Nevada. The C-Tax legislation does not single out one entity or local  
16 government.

17 The cases cited by Fernley are inapposite. *Clean Water Coalition v. The M Resort,*  
18 *LLC*, 127 Nev. Adv. Op 24, 255 P.3d 247 (2011) concerned fees collected by the Clean  
19 Water Coalition, which was created pursuant to an interlocal agreement between four  
20 political subdivisions in Southern Nevada. It did not concern fees collected statewide. *Town*  
21 *of Pahrump v. County of Nye*, 105 Nev. 227, 773 P.2d 1224 (1989) concerned the transfer of  
22 certain powers and functions from Nye County to the unincorporated town of Pahrump. The  
23 legislation applied only to those two entities; again it did not apply statewide. Lastly,  
24 *Attorney General v. Gypsum Resources*, 129 Nev. Adv. Op. 4, 294 P.3d 404 (2013)  
25 concerned the zoning of land adjacent to Red Rock Canyon Conservation Area. It was not a  
26 law that applied to the entire State of Nevada.

27 Here, the C-Tax system is not a statute that relates only to the City of Fernley. The C-  
28 Tax system is applied to counties, local governments, and special districts throughout the



1 State of Nevada. The City of Fernley alleges that it is the only municipality to incorporate in  
2 Nevada since the C-Tax system was implemented in 1997. But there is no allegation and no  
3 facts tending to show that the law would apply differently to any other municipality that  
4 incorporated after 1997.

5 In *Damus v. County of Clark*, 93 Nev. 512, 569 P.2d 933 (1977), the Plaintiff argued  
6 that a law allowing any county with a population in excess of 200,000 to issue special  
7 obligation bonds violated Nev. Const. art. 4, § 20 because it only applied to Clark County.  
8 The Court first noted that, "every act passed by the legislature is presumed to be  
9 constitutional." *Id.* at 516, 569 P.2d at 935. The Court then found, "[T]he fact the law might  
10 apply only to Clark County is of no consequence, for if there were others, the statute would  
11 then also apply. It therefore conforms to the constitutional mandates that there shall be no  
12 local or special laws, and that general laws shall have uniform operation. *Id.* at 518, 569  
13 P.2d at 936 (citations omitted). Thus the fact that Fernley is the only city to incorporate is of  
14 no consequence since the law would apply to any other newly incorporated city, if there were  
15 any.

16 Fernley argues that it should receive similar distributions to cities of comparable size.  
17 The fact that the law is not based on population does not make it unconstitutional. But it is  
18 worth noting that Fernley receives less than other cities because it does not provide the  
19 same level of services. Plaintiff's, Exhibit "30" pp. 27-28; see also Exhibit "1" to Defendants'  
20 Motion to Dismiss filed August 3, 2012.

21 The City of Fernley has the burden to demonstrate that the law is unconstitutional.  
22 Nev. Const. art. 4, § 20 is not implicated since the City of Fernley's challenge concerns the  
23 *distribution* of taxes and not the *assessment and collection* of taxes. Even if Nev. Const. art.  
24 4, § 20 is applicable, there are simply no facts that would tend to show that the C-Tax is a  
25 special law with respect to the City of Fernley because the legislation applies Statewide.  
26 Accordingly, judgment in favor of Defendants on Plaintiff's third claim for relief is also  
27 warranted.

28 ///

1           **H.     There are No Facts to Support a Claim for Violation of Article 4, Section**  
2           **21 of the Nevada Constitution.**

3           In its fourth claim for relief, the City of Fernley claims the C-Tax system violates Nev.  
4 Const. art. 4, § 21, which states, "[I]n all cases enumerated in the preceding section, and in  
5 all other cases where a general law can be made applicable, all laws shall be general and of  
6 uniform operation throughout the State." As a general rule, if a statute is either a special or  
7 local law or both, and comes within one or more of the cases enumerated in Nev. Const. art.  
8 4, § 20, such statute is unconstitutional; if the statute is special or local or both, but does not  
9 come within any of the cases enumerated in Nev. Const. art. 4, § 20, then its constitutionality  
10 depends upon whether a general law can be made applicable. *Damus v. Clark County*, 93  
11 Nev. 512, 517, 569 P.2d 933, 936 (1977).

12           As set forth more fully above, the C-Tax is not a special law with respect to the City of  
13 Fernley because the legislation is applied the same way to all local governments. The City  
14 of Fernley receives smaller C-Tax distributions than other cities with similar sized  
15 populations because the City of Fernley does not provide similar services and functions.

16           Even if this Court determines that the C-Tax laws at issue are local or special, the  
17 laws are still permissible if a general law cannot be made applicable. In making this  
18 determination the Court looks to whether the challenged law best serves the interests of the  
19 people of the state, or such class or portion as the legislation is intended to affect, and such  
20 legislation will be upheld where general legislation is insufficient to meet the particular needs  
21 of a particular situation. *Clean Water Coalition*, 127 Nev. Adv. Op. 24, 255 P.3d at 259.

22           Here, the clear purpose of the C-Tax is to distribute State revenue to government  
23 entities that provide needed services such as law enforcement and fire protection. Clearly,  
24 such legislation serves the best interests of the people of the State of Nevada. Accordingly,  
25 even if the C-Tax legislation is found to be special or local legislation, it must be upheld since  
26 a general law cannot be made applicable for purposes of Nev. Const. art. 4, § 21. For these  
27 reasons, the Department is entitled to judgment as a matter of law with respect to Fernley's  
28 fourth claim for relief.

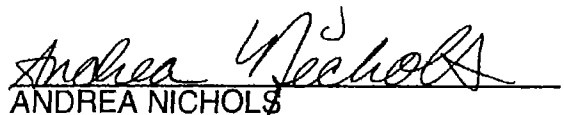
1 **V. CONCLUSION**

2 In light of the foregoing, Defendant, State of Nevada, ex rel. its Department of  
3 Taxation, respectfully requests that this Court enter its order granting summary judgment in  
4 the Department's favor and dismissing Plaintiff's claims against it.

5 DATED this 25<sup>th</sup> day of July, 2014.

6 CATHERINE CORTEZ MASTO  
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8 By:



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Case No. 66851  
JA 3604

**CERTIFICATE OF SERVICE**

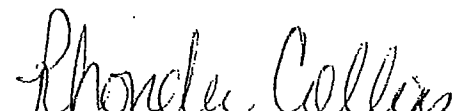
I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 25<sup>th</sup> day of July, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a copy of the foregoing **NEVADA DEPARTMENT OF TAXATION'S REPLY TO PLAINTIFF'S OPPOSITION TO NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S RENEWAL OF MOTION TO DISMISS**, by electronic mail directed to the following:

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**IN THE FIRST JUDICIAL DISTRICT COURT**

**OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Case No.: 12 OC 00168 1B

Dept. No.: I

Plaintiff,

v.

STATE OF NEVADA ex rel. THE NEVADA  
DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her  
official capacity as TREASURER OF THE  
STATE OF NEVADA; and DOES 1-20,  
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**  
**AGAINST DEFENDANT NEVADA LEGISLATURE**

1 Plaintiff CITY OF FERNLEY, NEVADA (hereinafter "Fernley"), by and through its  
2 attorneys of record, Brownstein Hyatt Farber Schreck, LLP, hereby submits this reply in support  
3 of its motion for an order entering summary judgment in its favor against Defendant Nevada  
4 Legislature (the "Legislature"). This reply is based on the following memorandum of points and  
5 authorities, the attached exhibits, all other pleadings, papers, and documents on file with the  
6 Court in this action, such further documentary evidence as the Court deems appropriate, and the  
7 arguments of counsel at the hearing on this motion. For the Court's convenience, all of Fernley's  
8 exhibits are numbered consecutively, with Exhibits 1 through 33 attached to Fernley's motion,  
9 and Exhibits 34 through 36 attached to this reply.

10 **I. INTRODUCTION.**

11 No matter how many times the Legislature attempts to justify the burdens that Fernley  
12 must endure alone under the C-Tax, it cannot escape that the unique system of revenue collection  
13 and distribution established by the C-Tax violates the clear and unmistakable mandate of the  
14 Nevada Constitution in at least *three* separate and independent ways. *First*, the C-Tax violates  
15 the separation of powers clause set forth in Article 3, Section 1, because it has resulted in the  
16 Legislature's abdication of its authority over the collection and appropriation of C-Tax revenues  
17 to the Executive Branch. *Second*, the C-Tax violates the prohibition against local or special laws  
18 set forth in Article 4, Section 20, because it has effectively singled out Fernley for burdens not  
19 imposed on any other Nevada city. *Third*, the C-Tax violates the requirement set forth in Article  
20 4, Section 21, that all laws must operate generally and uniformly throughout the State because it  
21 is a local or special law that readily could have been made generally applicable. Thus, on each of  
22 these grounds, Fernley respectfully requests that the Court grant its motion in its entirety and  
23 enter summary judgment in its favor at this time.

24 **II. RESPONSE TO STATEMENT OF FACTS.**

25 **A. The Legislature Concedes That Fernley Could Only Increase Its C-Tax**  
26 **Revenue Base By Providing Additional Services.**

27 The Legislature does not dispute that Fernley is treated differently than cities which  
28 existed when the C-Tax was enacted, acknowledging that Fernley must provide additional

1 services before it has the potential to increase its C-Tax revenue base. By contrast, it is  
2 undisputed that cities in existence when the C-Tax was enacted could thereafter terminate  
3 services without experiencing any reduction in its C-Tax revenue base. *See, e.g.,* NRS Ch. 360;  
4 *see also* Exhibit 4, at 82:3-14; Exhibit 15, at 138:6-139:11.

5 **B. The Legislature Has Not Reviewed Service Levels of C-Tax Recipients to**  
6 **Determine Whether Distributions Are Appropriate.**

7 The Legislature claims that it “repeatedly and comprehensively” considers the C-Tax  
8 system, outlining various statutory adjustments. *See, Legislature’s Opposition*, at 10:2-4. Notably  
9 lacking from the Legislature’s overview, however, is any evidence whatsoever that the  
10 Legislature has ever reviewed whether C-Tax distributions are sufficient to meet local  
11 government service levels. If the Legislature really does engage in “comprehensive” reviews of  
12 the C-Tax system, there should be evidence of a Legislative review of what C-Tax is being used  
13 for and whether the goals of the C-Tax system, such as ensuring that revenue follows growth, are  
14 being accomplished. Instead, the Legislature has acknowledged that local government budgets,  
15 which demonstrate what C-Tax is being used for by local governments, are placed in a “file  
16 drawer” rather than being routinely reviewed. (Exhibit 20, at 138:14-23, 144:22-145:18).

17 Further, and as undisputed by the Legislature, Fernley grew rapidly from 2001 to 2013,  
18 yet received only \$33,018.27 more in C-Tax in 2013 than it did in 2001. (Exhibit 1). Other cities  
19 with much smaller levels of growth received millions more in 2013 than in 2001. For example,  
20 during that same time frame Mesquite’s distribution increased by \$2,119,650.26, Boulder City  
21 increased by \$2,597,747.07 and Elko increased by \$7,063,483.29. (*Id.*). If the C-Tax was  
22 designed to ensure that revenue follows growth, there should have been some review of these  
23 type of blatant discrepancies.

24 The undisputed fact that the Legislature does not review whether C-Tax distributions are  
25 meeting local government service needs and whether revenues actually follow growth is telling,  
26 and proves that the C-Tax system does nothing more than preserve the status quo established in  
27 1997 and perpetuate artificially low distributions to recipients who had a low base distribution at  
28 that time.

1           C.     The City Incorporation Committee Did Not Waive Fernley's Right To Assert  
2                 A Constitutional Challenge To The C-Tax.

3           The Legislature misguidedly suggests that Fernley's Incorporation Committee, comprised  
4 of unelected citizens, somehow waived Fernley's future right to maintain a constitutional  
5 challenge to the C-Tax because: (1) the committee did not base its revenue and expenditure  
6 projections on an anticipated increase in C-Tax revenue; and (2) the committee knew that  
7 incorporation as a city would not automatically result in Fernley's receipt of additional C-Tax  
8 revenue. *See* Legislature's Opposition, at 17: 8-14. Not only is the State unable to cite any  
9 authority to support the notion that such a committee is empowered to waive a city's legal rights  
10 prior to its incorporation, it is well-settled that "waiver is the intentional relinquishment of a  
11 known right." *See Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421, 423  
12 (1984). The Legislature provides no evidence that the incorporation committee intentionally  
13 waived Fernley's right to challenge the C-Tax on the constitutional grounds asserted in its  
14 complaint, assuming that the committee could somehow bind Fernley in the future exercise of its  
15 legal rights once it formally became a city (which it could not). Committee members also could  
16 not have reasonably anticipated the circumstances that would confront Fernley, such as the rapid  
17 population growth that followed its incorporation. The Legislature's reliance on Fernley's  
18 incorporation process therefore is misplaced, and has no bearing on the validity of Fernley's  
19 claims under the Nevada Constitution.

20           D.     The Undisputed Evidence Contradicts The Legislature's Assertion That  
21                 Fernley Has Failed To Make An Effort To Negotiate An Agreement With  
22                 Lyon County For The Redistribution Of C-Tax Revenue.

23           The Legislature mistakenly posits that Fernley has not improved its C-Tax revenue base  
24 because it has neglected to take advantage of the opportunity to negotiate a cooperative or  
25 interlocal agreement that would have redistributed some of Lyon County's C-Tax revenue to  
26 Fernley in exchange for Fernley assuming one or more of the services provided on its behalf by  
27 Lyon County. *See* Legislature's Opposition, at 15:6-17:14. In making this unfounded charge, the  
28 Legislature downplays Fernley's evidence that it has unsuccessfully sought to effectuate a  
cooperative or interlocal agreement with Lyon County to obtain a more favorable redistribution of



1 C-Tax revenue. *See* Exhibit 3, at 59:14-25. This undisputed evidence establishes that Fernley  
2 sought a 10 percent redistribution of Lyon County's C-Tax revenue on one occasion, and a  
3 \$200,000 redistribution on another, with the intent to use the additional funds to, among other  
4 things, undertake necessary road repairs, upgrade city parks, and provide more police services.  
5 *See id.*; *see also* Exhibit 29.

6 The Legislature goes further and suggests that Lyon County provides twelve different  
7 services to Fernley, implying that Fernley is somehow deserving of less C-Tax as a result. What  
8 the Legislature neglects to say, however, is that all of these services are required to be provided at  
9 the county level. *See* Exhibit 36.

10 Finally, the Legislature has not disputed the opinions of Fernley's designated expert  
11 witnesses which establish that Fernley's infrastructure and public safety remain significantly  
12 underfunded and understaffed because of Fernley's low C-Tax revenue base. *See* Exhibit 31.  
13 Thus, it is undisputed that Fernley has diligently but unsuccessfully tried to obtain a cooperative  
14 or interlocal agreement.

15 E. The Legislature Confirms That Few C-Tax Recipients Enter Into  
16 Cooperative Or Interlocal Agreements For The Reallocation Of C-Tax  
17 Revenue.

18 At the same time it erroneously blames Fernley for not having entered into a cooperative  
19 or interlocal agreement with Lyon County, and implies that it was not difficult for Fernley to  
20 effectuate such an agreement. The Legislature essentially confirms that there have been no  
21 meaningful cooperative or interlocal agreements for the redistribution of C-Tax revenue since the  
22 system was adopted in 1997. *See* Legislature's Opposition 11:21-17:14. The Legislature has  
23 submitted no evidence of any other cooperative or interlocal agreement, or any evidence of a  
24 governmental entity assuming responsibility for services provided by another government entity  
in exchange for a redistribution of C-Tax revenue.

25 F. All Facts That Remain Uncontroverted By The State Should Be Adjudicated  
26 In Fernley's Favor.

27 The Legislature has made no attempt to controvert many of the facts set forth in Fernley's  
28 motion. For example, the Legislature does not dispute Fernley's complaint that its C-Tax

1 distributions are only a fraction of the C-Tax revenues received by comparably sized Nevada  
2 cities, Fernley's account of the Legislature's unwillingness to grant it relief, or Fernley's  
3 assertions regarding the impacts on its public safety service levels, roads, and public works that  
4 have resulted from artificially low C-Tax distributions. The Court should adjudicate all such  
5 undisputed facts in Fernley's favor.

6 **III. ARGUMENT.**

7 **A. Conflicting Interpretations of Certain C-Tax Provisions Between the**  
8 **Executive and Legislative Branches Confirm that Fernley Has No Chance of a**  
9 **C-Tax Distribution Outside of a Judicial Resolution.**

10 It bears repeating that Fernley did not name the Legislature as a defendant in this case, but  
11 instead the Legislature forcibly intervened. Now, the Legislature has taken the position that  
12 certain C-Tax statutes should be interpreted differently than how those provisions have  
13 historically been interpreted by the State.<sup>1</sup>

14 As pointed out in Fernley's motion for summary judgment, NRS 360.740 provided  
15 Fernley a one-year window to request an adjustment based on the provision of additional services.  
16 This interpretation is based on a plain reading of reading of the statute, which states that such a  
17 request must be made "on or before December 31 of the year immediately preceding the *first*  
18 fiscal year that the local government or special district would receive money from the [C-Tax]  
19 Account . . ." See NRS 360.740(2) (emphasis added). The executive branch of the government,  
20 via the State, provided Fernley with a consistent interpretation. See Exhibit 24. Nonetheless, the  
21 Legislature would read the word "first" out of the statute and say that adjustments could be made  
22 in any year. Not only is that interpretation inconsistent with the plain language of the statute, but  
23 it is inconsistent with the interpretation of the branch of government charged with enforcing the  
24 law.

25 Similarly, the Legislature argues that the plain language of NRS 360.740(1) should be  
26 disregarded. Fernley pointed out that in order to obtain an adjustment for police services, a

27 <sup>1</sup> The Legislature raises arguments based on laches, sovereign immunity and statutes of  
28 limitations by reference to the State's opposition. See Legislature's Opposition, at 24 n.9.  
Fernley addresses the inapplicability of those defenses in its other briefs. To avoid unnecessary  
repetition those arguments will not be repeated here.

1 municipality must already have a police department. But without funds to stand up a police  
2 department, that is an impossible situation. Notably, the State did not disagree with Fernley's  
3 claim that NRS 360.740(1) creates a catch-22 for any municipality seeking an adjustment based  
4 on the provision of police services. Regardless, the State and Legislature have vigorously  
5 opposed Fernley's efforts to obtain relief at all levels. Lyon County has refused to consider even  
6 modest redistributions, and Lyon County has even retained a lobbyist to work against Fernley  
7 (who also sits as a member of the Committee on Local Government Finance who would consider  
8 any such adjustment).<sup>2</sup> Any further attempts to seek an adjustment would be futile.

9 Most significantly, the conflicting interpretations between the State and the Legislature  
10 further demonstrates the futility of seeking relief outside of this case. There is no question that  
11 Fernley has tried but been unsuccessful in obtaining a C-Tax adjustment. If the Executive and  
12 Legislative branches of the State Government cannot even agree on how the statutes should be  
13 interpreted, Fernley has no chance of getting an adjustment outside of a judicial determination in  
14 its favor.

15 **B. The C-Tax Violates The Separation Of Powers Clause Of The Nevada**  
16 **Constitution As A Matter Of Law.**

17 **1. Fernley Has Standing To Bring A Separation Of Powers Claim**  
18 **Against the State.**

19 The Legislature erroneously asserts that Fernley lacks standing to maintain a separation of  
20 powers claim. *See* Legislature's Opposition, at 24:16-25:14. It is well-settled that local  
21 governments have standing to state such a claim. *See City of Austin v. Quick*, 930 S.W.2d 678,  
22 683-84 (Tex.App. 1996); *State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska  
23 1987); *see also* John Martinez, *Local Government Law*, Pt. I, Ch.3, § 3.2 ("local government units  
24 are held to have standing to invoke the following state constitutional provisions against the state:  
25 ... (3) separation of powers"). Here, the basis of Fernley's separation of powers claim is that the  
26 Legislative Branch unconstitutionally delegated its authority to appropriate funds to the Executive

26 <sup>2</sup> Incredibly, the Legislature goes so far as to suggest that Fernley should disincorporate. *See*  
27 Legislature's Opposition, at 22 n.8. Given that the Legislature has not contested Fernley's  
28 contention that the public safety levels provided by Lyon County in Fernley are well below  
national and state standards, and that Fernley's infrastructure is in a severe state of disrepair, such  
cavalier comments only confirm that Fernley has no option but to seek relief from this Court.

1 Branch. *See* Exhibit 2, at 6:1-22. Fernley therefore has stated a classic separation of powers  
2 claim — it alleges that the C-Tax violates the separation of powers of the Executive and  
3 Legislative Branches, two of the three branches of our state government. *See id.*

4 The mistaken premise of the Legislature's standing challenge is that only the three  
5 branches of government may assert violations of the separation of powers clause. *See*  
6 Legislature's Opposition, at 24:15-18. The separation of powers clause does not only protect the  
7 rights of the three branches of government, as the Legislature inaccurately maintains. *See id.* The  
8 United States Supreme Court has observed, for example, that "the claims of individuals—not of  
9 Government departments—have been the principal source of judicial decisions concerning  
10 separation of powers and checks and balances." *See Bond v. United States*, 131 S.Ct. 2355, 2365  
11 (2011) (further pointing out that "individuals, too, are protected by the operations of separation of  
12 powers and checks and balances"). Fernley has standing to maintain this claim because, just as its  
13 rights under Article 4, Section 20 and 21 of the Nevada Constitution have been violated by the C-  
14 Tax, it has indisputably suffered injury to its constitutional rights because of the separation of  
15 powers violation that resulted from the enactment and enforcement of the C-Tax. *See Citizens for*  
16 *Cold Springs v. City of Reno*, 125 Nev. 625, 632, 218 P.3d 847, 851-52 (2009); *Cohen v. Mirage*  
17 *Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003); *see also Clinton v. City of New York*, 524  
18 U.S. 417, 434-35 (1998) ("[o]nce it is determined that a particular plaintiff is harmed by the  
19 defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has  
20 standing — regardless of whether there are others who would also have standing to sue").

21 The essence of the Legislature's argument is that a violation of the separation of powers  
22 clause should not be redressed if a political subdivision, such as Fernley, is the only complaining  
23 party. The Legislature cites no Nevada Supreme Court decision to support such a notion, which  
24 ignores the importance placed on the separation of powers by the plain language of the Nevada  
25 Constitution. *See* Nev. Const., art. 3, § 1. Not only has Nevada "embraced" the separation of  
26 powers doctrine, it has "incorporated it into its constitution." *See Comm'n on Ethics v. Hardy*,  
27 125 Nev. 285, 291-92, 212 P.3d 1098, 1103-04 (2009). The Nevada Constitution therefore "goes  
28 one step further" than the United States Constitution, which merely "expresses separation of

1 powers through the establishment of the three branches of government." *See id.* It would  
2 undermine the significance of the separation of powers doctrine if a local government could not  
3 allege that the state government has exceeded its constitutional authority.

4 Finally, the Legislature digresses into an irrelevant discussion which suggests that the  
5 separation of powers doctrine is inapplicable to local governments. *See* Legislature's Opposition,  
6 at 25:1-8. Whether a claim can be made that a local government violated the doctrine is  
7 inconsequential here, where no such claim is at issue. Fernley has standing to bring a claim  
8 pursuant to Article 3, Section 1, of the Nevada Constitution as a matter of law.

9 **2. The Legislature Has Violated The Separation Of Powers Clause By**  
10 **Relinquishing Its Authority To Collect And Appropriate C-Tax**  
**Revenues To The Executive Branch.**

11 The Legislature obscures the role played by the Executive Branch in the execution of the  
12 C-Tax in an effort to conceal the law's constitutional infirmities, including its violation of the  
13 separation of powers clause of the Nevada Constitution. The Court should reject the Legislature's  
14 theory for the reasons set forth in Fernley's motion, and for at least two additional reasons:

15 -- *First*, the Legislature seeks to distract from the relevant inquiry by purporting to  
16 characterize the C-Tax as an "ongoing appropriation which operates prospectively on a recurrent  
17 basis." *See* Legislature's Opposition, at 25:22-26:1. In doing so, the Legislature apparently  
18 would like to divert the Court's attention from the unique nature of the C-Tax system, which  
19 requires the Department to collect revenue from the subject taxes, deposit such revenue into a  
20 segregated State account called the Local Government Tax Distribution Account ("C-Tax  
21 Account"), and then distribute the revenue from the C-Tax Account to the designated recipients  
22 without any involvement by the Legislature and without any determination that the Legislature's  
23 objectives are being fulfilled. *See* NRS 360.660 *et. seq.*; *see also* Exhibit 6, at 1077; Exhibit 20,  
24 at 144:22-145:18. The Legislature does not dispute that it cannot delegate its power to make  
25 appropriations, yet that is precisely the effect of this statutory scheme. The absence of any  
26 legislative participation or oversight has left the Executive Branch, acting through the  
27 Department, solely responsible for the collection and appropriation of C-Tax revenues. The result  
28 is the clear and unmistakable violation of the separation of powers clause of the Nevada

1 Constitution as a matter of law. *See Nev. Const., art. 3, § 1.*

2 -- *Second*, contrary to the Legislature's notion otherwise, the Executive Branch is not  
3 merely "administering" appropriated funds in accordance with its constitutional authority. *See*  
4 Legislature's Opposition, at 25:22-26:1. Even if the Legislature's characterization were correct  
5 (which it is not), however, the Executive Branch may not administer appropriated funds in a  
6 manner that conflicts with the legislative purpose. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe*  
7 *Cnty. Bd. of Cnty. Comm'rs*, 129 Nev.Adv.Op. 72 slip op., at 10-11, 310 P.3d 583, 589 (2013)  
8 (the Executive Branch has a "general power" to "administer appropriated funds, so long as doing  
9 so does not conflict with legislative purpose"). That is precisely what the Executive Branch  
10 would be doing here under the Legislature's theory, where the stated legislative purpose  
11 underlying the C-Tax was to direct revenue to areas experiencing growth while Fernley is the  
12 prime example of revenue distribution not following growth.

13 In sum, because the Legislature has indisputably abdicated its exclusive constitutional  
14 authority over the collection and appropriation of C-Tax revenues to the Executive Branch, the  
15 Court should hold that the C-Tax violates Article 3, Section 1, of the Nevada Constitution as a  
16 matter of law.

17 C. **The C-Tax Is A Local Or Special Law In Violation Of The Nevada**  
18 **Constitution As A Matter Of Law.**

19 By its plain terms, the C-Tax violates Article 4, Section 20, of the Nevada Constitution  
20 because it is a local or special law that involves "the assessment and collection of taxes for state,  
21 county, and township purposes." *See Nev. Const., art. 4, § 20; Attorney General v. Gypsum Res.,*  
22 *LLC*, 129 Nev.Adv.Op. 4, slip op. at 9-10, 294 P.3d 404, 409 (2013). The Legislature mistakenly  
23 disputes that a violation of Article 4, Section 20, has occurred, claiming that the C-Tax is broadly  
24 applicable and does not single out Fernley in any way. *See Legislature's Opposition*, at 28:4:6. In  
25 doing so, the Legislature overlooks that a law (like the C-Tax) is local or special, and accordingly  
26 violates Article 4, Section 20, even though it has broad applicability when it has the effect of  
27 burdening a particular locality, such as Fernley. *See, e.g., Clean Water Coal. v. The M Resort,*  
28 *LLC*, 127 Nev.Adv.Op. 24, slip op. at 14-18, 255 P.3d 247, 255-56 (2011). It is undisputed that

1 the C-Tax burdens no other Nevada city like it burdens Fernley, as the only city to have  
2 incorporated in this State since the C-Tax was adopted. To illustrate this burden, if Fernley  
3 rapidly grew to become the largest city in Nevada by population, it would continue to receive  
4 only a fraction of the C-Tax revenue appropriated to Las Vegas, or even Boulder City and  
5 Mesquite. Under these circumstances, it is untenable for the Legislature to maintain that the C-  
6 Tax is not a local or special law that contravenes Article 4, Section 20.

7 To advance its subjective litigation interests, the Legislature exacerbates its error by  
8 further inaccurately contending that Article 4, Section 20, is not implicated here because Fernley's  
9 claims relate to the distribution of taxes rather than to the assessment and collection of taxes. *See*  
10 Legislature's Opposition, at 29:2-6. The Legislature cannot avoid that the collection and  
11 distribution of C-Tax revenue are inextricably intertwined. The Court has to look no further than  
12 the name of the segregated State account used for the deposit of the revenue *collected* pursuant to  
13 the C-Tax – the Local Government Tax *Distribution* Account – to reach this conclusion. The  
14 Legislature disregards that C-Tax revenue is collected and then deposited into this segregated  
15 account, which the Department's Executive Director administers, instead of the state general fund,  
16 which the Legislature appropriates every biennium<sup>3</sup>. *See* NRS 360.605; NRS 360.660; NRS  
17 360.680. Because the collection and distribution of C-Tax revenue function together in this  
18 manner, it is impossible to isolate the collection of C-Tax revenue from the distribution of such  
19 revenue. Thus, by definition, the C-Tax is a local or special law that violates Article 4, Section  
20 20, as a matter of law.

21 **D. The C-Tax Violates The General And Uniform Clause Of The Nevada**  
22 **Constitution As A Matter Of Law.**

23 The Legislature understandably ignores Fernley's extensive analysis of *Anthony v. State*,  
24 94 Nev. 338, 580 P.2d 939 (1978), which is directly on point and compels the conclusion that the  
25 C-Tax violates Article 4, Section 21, of the Nevada Constitution. *See* Fernley's Motion, at 28:6-

26 \_\_\_\_\_  
27 <sup>3</sup> The Legislature mistakenly claims that if the C-Tax is violative of Article 4, Section 20, then all  
28 legislative distributions would be "constitutionally suspect." *See* Legislature's Opposition, at 29  
n. 13. This is untrue because other legislative appropriations are not inextricably intertwined with  
collections as with the C-tax system

23. The Legislature cannot avoid the impact of *Anthony* on the constitutionality of the C-Tax, however, by failing to acknowledge its precedential effect. Simply stated, the C-Tax does not survive scrutiny under Article 4, Section 21, of the Nevada Constitution for the same reasons that the statutes at issue in *Anthony* were held unconstitutional – the C-Tax continues to perpetuate the status quo of 1997 to protect the fiscal policy of participants in the system at that time while depriving subsequently established local governments, such as Fernley, of its benefits. Based on *Anthony* alone, the Court should summarily hold that the C-Tax violates the general and uniform clause of the Nevada Constitution as a matter of law.

Equally unavailing to the Legislature is its conclusory assertion that the C-Tax must be upheld because the Legislature could have reasonably "believed" that a special or local law was necessary to serve the public interest. *See* Legislature's Opposition, at 30:1-5. Not only has the Legislature provided no evidence that it had such a "belief," it readily could have enacted a general law relating to the collection and appropriation of the six taxes that comprise the C-Tax. Specifically, the C-Tax could have required that the taxes be collected, deposited into a fund segregated for local governments, and appropriated biennially by the Legislature after a careful review of local government budgets. *See* Fernley's Motion, at 27:18-22. It is well-settled that a special or local law is unconstitutional where, as here, a general law could have been made applicable. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, slip op. at 14, 255 P.3d at 255. Despite the Legislature's stated goal of directing tax dollars to higher growth areas through the C-Tax, it is undisputed that the Legislature does not review how recipients spend the C-Tax revenue distributed to them, and that the Department does not assess whether the C-Tax functions correctly or fulfills legislative objectives. *See* Exhibit 5, at 90:7-18; Exhibit 7, at 37:11-38:8, 42:7-22, 56:23-57:1, 58:8-16, 59:4-19; Exhibit 15, at 72:16-20.

Finally, the Legislature untenably contends that Fernley receives smaller C-Tax distributions than comparably sized Nevada cities because it is not similarly situated with them. Undermining such a notion is the State's discovery responses in this action, which confirm that law enforcement and other government services are not determinative of Fernley's C-Tax distributions. For example:



1 INTERROGATORY NO. 19: If you are claiming that C-Tax distributions to  
2 Fernley, Nevada are based in any way on the provision of public safety or other  
3 government services, please set forth in detail each and every fact which supports  
such a claim.

4 SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 19: *C-Tax*  
5 *distributions to Fernley, Nevada are not based on the provision of public safety*  
6 *or other government services.* However, it is possible that the City of Fernley  
could seek additional C-Tax revenue pursuant to NRS 360.730 and/or 354.598747  
via cooperative agreement with other local governments and/or by assuming the  
functions of another local government or district.

7  
8 See Exhibit 19, at 2:14-21 (emphasis added). In addition, it is undisputed that the Legislature  
9 does not require a reduction in the revenue base of a C-Tax recipient that stops providing a  
10 service, including law enforcement, regardless of the cost savings. See, e.g., NRS Ch. 360; see  
11 also Exhibit 4, at 82:3-14; Exhibit 15, at 138:6-139:11. The only reasonable conclusion that can  
12 be reached based on such evidence is that the nature and cost of services provided by a C-Tax  
13 recipient is inconsequential to the amount of its C-Tax distribution. Under these circumstances,  
14 the Legislature is merely further attempting to perpetuate the status quo of 1997 at Fernley's  
15 expense and in contravention of the mandate of Article 4, Section 21, of the Nevada Constitution.

16 IV. CONCLUSION.

17 For the foregoing reasons, and the reasons set forth in its moving papers, Fernley  
18 respectfully requests that the Court grant this motion in its entirety and enter summary judgment  
19 in its favor, granting declaratory, injunctive, and monetary relief to Fernley so that past and future  
20 C-Tax distributions meet constitutional standards.

21 DATED this 25<sup>th</sup> day of July, 2014.

22 BROWNSTEIN HYATT FARBER SCHRECK, LLP

23  
24 By: 

25 Joshua J. Hicks, Nevada Bar No. 6679  
26 50 West Liberty Street, Suite 1030  
27 Reno, Nevada 89501  
28 Telephone: 775-622-9450

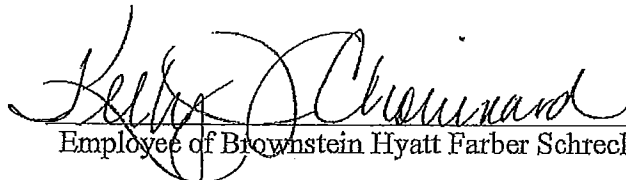
*Attorneys for the City of Fernley, Nevada*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 25<sup>th</sup> day of July, 2014, I caused to be served via hand delivery, a true and correct copy of the above foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT NEVADA LEGISLATURE** properly addressed to the following:

Andrea Nichols, Esq.  
anichols@ag.nv.gov  
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Reno, Nevada 89511

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Legislative Counsel Bureau  
401 South Carson Street  
Carson City, Nevada 89701

  
Employee of Brownstein Hyatt Farber Schreck, LLP

DECLARATION OF JOSHUA J. HICKS, ESQ.

I, Joshua J. Hicks, Esq., hereby declare as follows:

1. I am an attorney at the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel of record for Plaintiff City of Fernley, Nevada in Case No. 12 OC 00168 1B, currently pending before the First Judicial District Court, Carson City, Nevada. I submit this declaration in support of the Reply In Support Of Plaintiff's Motion For Summary Judgment Against Defendant Nevada Legislature. I have personal knowledge of the facts set forth herein, and if called upon to do so, am competent to testify thereto.

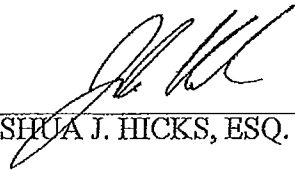
2. A true and correct copy of excerpts from the "Petition For Writ Of Mandamus" filed in *State of Nevada ex rel. The Nevada Department of Taxation, et al. v. The First Judicial District Court, et al.*, Nevada Supreme Court Case No. 62050, which has been maintained within my office's files, is attached hereto as Exhibit "34."

3. A true and correct copy of excerpts from the "Petitioner's Reply Brief" filed in *State of Nevada ex rel. The Nevada Department of Taxation, et al. v. The First Judicial District Court, et al.*, Nevada Supreme Court Case No. 62050, which has been maintained within my office's files, is attached hereto as Exhibit "35."

4. A true and correct copy of correspondence from Mayor LeRoy Goodman to Assemblywoman Marilyn Kirkpatrick dated April 3, 2012, attached hereto as Exhibit "36".

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 25<sup>th</sup> day of July, 2014, in Reno, Nevada.

  
JOSHUA J. HICKS, ESQ.

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,  
Plaintiff,

v.

STATE OF NEVADA ex rel. THE NEVADA DEPARTMENT OF TAXATION; THE  
HONORABLE KATE MARSHALL, in her official capacity as TREASURER OF THE STATE  
OF NEVADA; and DOES 1-20, inclusive,  
Defendants,

NEVADA LEGISLATURE,  
Intervenor

Case No.: 12 OC 00168 1B  
Dept. No.: I

**INDEX OF EXHIBITS TO THE REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AGAINST DEFENDANT NEVADA LEGISLATURE**

<b>Exhibit No.</b>	<b>Description</b>	<b>Pages</b>
34	Excerpts of the Petition for Writ of Mandamus Jointly Filed by Taxation and Legislature	7
35	Excerpts of the Reply Brief Jointly Filed by Taxation and Legislature	5
36	Correspondence from Mayor LeRoy Goodman to Assemblywoman Marilyn Kirkpatrick dated April 3, 2012	4

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF FERNLEY, NEVADA, a  
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.  
DEPARTMENT OF TAXATION;  
THE HONORABLE DAN  
SCHWARTZ, in his official capacity  
as TREASURER OF THE STATE OF  
NEVADA; and THE LEGISLATURE  
OF THE STATE OF NEVADA,

Respondents.

Electronically Filed  
May 20 2015 10:34 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

**JOINT APPENDIX**

**VOLUME 20 PART 1**

Filed By:

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1	Affidavit of Service Taxation	City of Fernley	07/02/12	17
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21	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs	State of Nevada/Dept Taxation	10/03/14	3863-3928
22	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs (Cont.)	State of Nevada/Dept Taxation	10/03/14	3929-3947
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10	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1917-1948
11	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1949-2004
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21	Motion to Retax Costs and Opposition to Motion for Costs	City of Fernley	09/24/14	3794-3845
7	Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/05/14	1414-1420
7	Nevada Department of Taxation and Nevada Treasurer's Reply to Response to Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/23/14	1433-1437
12	Nevada Department of Taxation's Opposition to Plaintiff's Motion for Summary Judgment	State of Nevada/Dept Taxation	07/11/14	2053-2224
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22	Notice of Entry of Order	Nevada Legislature	10/08/14	4001-4057
23	Notice of Entry of Order	State of Nevada/Dept	10/17/14	4195-4204
7	Notice of Entry of Order Denying City of Fernley's Motion for Reconsideration of Order Dated November 13, 2012	State of Nevada/Dept Tax/ Treasurer	12/19/12	1364-1370
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15	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2666-2819
16	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2820-2851
17	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2852-2899
4	Opposition to Nevada Legislature's Joinder in Motion to Dismiss	City of Fernley	09/28/12	662-881
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6	Opposition to Nevada Legislature's Joinder in Motion to Dismiss (Cont.)	City of Fernley	09/28/12	1102-1316
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19	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3292-3512
20	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3515-3567
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20	Reply in Support of Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order as to Defendant's Nevada Department of Taxation and Nevada Treasurer; Plaintiff's Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	City of Fernley	07/25/14	3641-3673
20	Reply in Support of Plaintiff's Motion for Summary Judgment Against Defendant Nevada Legislature	City of Fernley	07/25/14	3606-3640
21	Reply to Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	State of Nevada/Dept Taxation	08/01/14	3769-3772
3	Reply to Opposition to Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	08/27/12	636-647
20	Reply to Plaintiff's Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Taxation	07/25/14	3583-3605
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12	Stipulation and Order Regarding Change of Briefing Schedule and Setting Hearing for Oral Argument	Parties/First Judicial District Court	06/25/14	2046-2048
7	Stipulation and Order Regarding Defendant's Motion to Strike Plaintiff's Jury Demand	Parties/First Judicial District Court	10/23/13	1400-1402
3	Stipulation and Order Regarding Joinder to Motion to Dismiss	Parties/First Judicial District Court	09/18/12	658-661
23	Transcript of Hearing	Court Reporter	01/07/15	4213-4267
7	Writ of Mandamus	Nevada Supreme Court	01/25/13	1371-1372

# EXHIBIT 6

EXHIBIT 6

---

Chairwoman Kirkpatrick stated that if there were changes that were discussed everybody would have the opportunity to repost their concerns.

Assemblyman Ellison stated that Dawn Stout, Elko County was supposed to testify, although he did not think she was present. In addition, he indicated that Cash Minor, Elko County was in attendance.

Josh Foli, Comptroller, Lyon County, stated that the County Commission Chair was present at the meeting, along with the County Manager, but both had to leave to attend a board meeting. Mr. Foli referred to the handout Churchill County Agenda Report (Exhibit D), and stated that the first-tier distribution was working properly for Lyon County, and the second-tier distribution did not have any issues like many other counties. He noted that Fernley believed the city was not receiving their fair share of CTX within Lyon County, which he believed was a second-tier issue not a first-tier issue, although Fernley thought it was possibly both a first-tier and second-tier issue. He noted that Lyon County did not have any opposition as a county with providing additional CTX funding to the City of Fernley and City of Yerington. However, it was his understanding that CTX was like water – it flowed to where services were being provided. Although he has seen representations that maybe the City of Fernley provided 100 percent of the services for the residents, Lyon County currently provided law enforcement, 911 Dispatch and jail services to the City of Fernley at no charge. Also, Lyon County provided library services in addition to social services, senior services, Assessor's services, County Clerk-Treasurer services, Recorder's services, Public Administrator services, Public Guardian services, Justice Court, Juvenile Probation, District Attorney services, Search and Rescue services, Coroner services, and pays the State of Nevada for Health and Human Services and Pre-Sentence investigation services for the City of Fernley. Mr. Foli indicated that if the City of Fernley or City of Yerington wished to provide some of those services, and were allowed to statutorily, Lyon County was willing to discuss their CTX distribution and have it changed appropriately to fund that, under the provisions of NRS 354.598747, where a city or another local government could assume functions currently being provided by another local government. Mr. Foli noted that Lyon County was not opposed to the City of Fernley taking over any or all of their law enforcement services, and a board meeting was scheduled in April with Fernley and Yerington to discuss the second-tier CTX distribution.

Mr. Foli directed the Subcommittee to the chart on page 2, Exhibit E, which showed a comparison of most of the cities in Nevada they could easily obtain data for, on the CTX distribution currently received and how much the cities paid for public safety services. He noted the data was from the Department of Taxation final figures for CTX distribution as of June 2011. The public safety portion was obtained from the Comprehensive Annual Financial Reports (CAFR) found online for each of the entities for FY 2011. He noted the only exception were the mining counties that generated substantial pieces of sales tax or Supplemental City County Relief Tax (SCCRT), and cities such as Carlin, Winnemucca, and Elko, actually received more CTX than they spent on public safety services. Public safety services in the rest of the state actually

cost more than the CTX they received. Mr. Folli indicated that the City of Fernley had absolutely no public safety costs and if similar to the rest of the state, the CTX would be spent on public safety services, since the county provided 100% of those services, along with North Lyon County Fire, a separate fire district outside of the city's jurisdiction or legal authority.

Concluding his presentation, Mr. Folli noted that Lyon County did not have any issues with the first-tier CTX distribution and the second-tier distribution was currently working well; however, Lyon County was willing to negotiate the second-tier distribution and was willing to shift services between entities.

Chairwoman Kirkpatrick asked Mr. Folli what kind of services Lyon County provided and was it because the county was so large and spanned over such a large area. She asked the reasoning behind the county still providing services because she thought the Subcommittee heard earlier that in order to incorporate, they had to provide services.

Mr. Folli stated that the City of Fernley had the option to take over public safety services when they incorporated in 2001. For example, Lyon County provided Sheriff's deputies in Fernley, along with a jail and dispatch services, which were all public safety services. He added that North Lyon County Fire Protection District provided fire protection services for the City of Fernley. He noted that if Fernley had chosen to take any service or combination of services, and had the discussions at the point, Fernley would have received an allocation from Lyon County to go to the city coffers to pay for those services. Since Fernley chose not to provide law enforcement services, they did not receive additional CTX under statute. In fact the only reason the City of Fernley had CTX was because the city was receiving distributions when they were an unincorporated town providing park services previously.

Mr. Folli said to address the question of Chairwoman Kirkpatrick, the City of Fernley chose not to take those services when the city incorporated. The city had every chance since incorporation in 2001 to discuss the issue with Lyon County and take over services and modify the CTX so that they received what they needed to fund any services, which at this time has not occurred.

Chairwoman Kirkpatrick asked if Lyon County had an interlocal agreement between the entities on some of the services and if the services were separate. Mr. Folli replied that at this point in time there was no interlocal agreement in place with the City of Fernley. He noted that there was an interlocal agreement in place for a couple years when Fernley originally incorporated and the county agreed to provide law enforcement services, but it was vague to where the funding was going to come from. The process continued indefinitely and Lyon County continued to provide law enforcement services to Fernley for no additional charge because Lyon County received CTX for that service.

# EXHIBIT 7

EXHIBIT 7

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process that everyone could agree that the formula was never going to be simple, but possibly they could use simple whole numbers for the formula because she believed that percentages sometimes get lost in the translation. She wanted the local governments to be part of the discussion and everyone had to come to the conclusion that it could not be simple because Nevada was a unique state.

Mr. Carey agreed with Chairwoman Kirkpatrick and the City of Sparks' desire for simplicity was probably not a real solution to the allocation of money distributed from the local government tax distribution account. The problem was complex and was likely to be more complex as Nevada moved forward. Mr. Carey respectfully stated that it was hard to follow the tables and pages and he hoped they could work together with the Subcommittee to find a solution that was maybe not simple, but bridged the gap for the changes needed.

Marcia Berkbigler, City of Fernley, stated that the Fernley was unique in the CTX situation because it was the only city in the State of Nevada that incorporated after the CTX system was enacted in its current form. The issue and concern of Fernley was that although the city took over responsibility for many different types of services in the city when they incorporated, such as the City Attorney, and Public Works, the city did not get a recalculation for their CTX at that time. She noted that Fernley has never had a recalculation of the formula and has received the same CTX post incorporation that it received before incorporation, which put the city in a unique position, which was detailed on page 80, Exhibit A.

Assemblyman Ellison asked Ms. Berkbigler when Fernley and Lyon County were going to meet to work out a solution to the CTX distribution and requested notification of the meeting. Ms. Berkbigler replied that the two cities were going to meet in the late part of April and she would provide him with the date of the meeting.

Chairwoman Kirkpatrick asked if the City of Fernley had police services because it was one of the criteria for incorporating. She stated that the City of Fernley seemed to be the only entity out of 175 that wanted to change to the first-tier tax distribution. She hoped to move away from the first-tier CTX distribution, but wanted to know if there was a different way to address the issues of the City of Fernley as opposed to opening up the first-tier distribution. She wondered about the thought process behind why Fernley wanted the first-tier distribution before the Subcommittee went any further, because she thought it was only fair to put everything out there so people could rest easily and work collaboratively because there were only three more meetings of the Subcommittee.

Ms. Berkbigler replied that she could not address the concerns of Chairwoman Kirkpatrick at this time but would take her concerns back to the Fernley City Council and the City Attorney and would provide their comments to the Subcommittee as soon as possible.

Chairwoman Kirkpatrick asked about the police services in Fernley, which was a part of the initial requirement to become a city. Ms. Berkbigler replied that when Fernley first incorporated in 2001 there was an agreement with Lyon County to continue to provide police services through the Sheriff's Office, which they had to have in the city anyway, so an agreement was set-up to do that. Ms. Berkbigler understood from the agreement that there was no monetary connection to that agreement and it was just an agreement in place. The agreement was extended and expired in 2003, and she did not believe an agreement was currently in effect. She stated that the City of Fernley does not provide police service and the county provided Sheriff services, which was on the agenda for the next Council meeting.

Ms. Kirkpatrick stated that the law was very clear in 1998 on what the city had to have in order to get additional CTX revenue. If the City of Fernley made an agreement with Lyon County it would seem that Lyon County would not give the city money for something Fernley did not provide. However, when the agreement expired she wondered who would provide those services because it would be problematic for both budgets if there was not an agreement in place. She said the Subcommittee would have a discussion on incorporation because she believed they had to be clear on how it works and because they could not be a city and then decide they did not want the services and go back. She stated that the meeting packet with the responses from the different cities would be part of the record for the meeting, but she wanted to have a clear understanding of the data provided to the Subcommittee.

Ms. Berkbigler replied that she was not sure she could answer all of Chairwoman Kirkpatrick's questions and concerns because she was not employed with the City of Fernley at that time. She was aware that there was an agreement negotiated and she knew that the basis of the agreement was that since Lyon County had to continue keeping a Sheriff's Office in the City of Fernley, an agreement was reached that Lyon County would continue to provide police services in the City of Fernley. She was unsure of the details about who paid for what but she could provide that information to the Subcommittee in writing if that was their desire. As far as fire services, Mr. Berkbigler stated that was a totally different entity and taking over fire services was not an option because it was set up differently in legislation by Assemblyman Joseph Dini.

Chairwoman Kirkpatrick requested that Mayor Goodman come to the next meeting because she believed he was the County Commissioner when all this transpired. She wanted the information on the record and going forward regarding cities and what incorporation does. Whether it was this Subcommittee or herself, requesting a bill draft, she thought the CTX distribution had to be clear. She wanted to hear what made the City of Fernley unique across the state and address what the city did or did not have. Chairwoman Kirkpatrick stated by that time of the bill draft request she hoped that Fernley could provide a definite answer about the first-tier formula.

Ms. Berkbigler replied that Mayor Goodman would attend the next meeting in Las Vegas and address the concerns of the Chairwoman.

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# EXHIBIT 8

# EXHIBIT 8

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## **VII. OVERVIEW AND DISCUSSION OF RESPONSES BY LOCAL GOVERNMENTS AND SPECIAL DISTRICTS TO THE CTX ISSUES RESPONSE FORM.**

*This agenda item was taken out of order.*

Russell Guindon, Principal Deputy Fiscal Analyst, Fiscal Analysis Division, thanked the local governments for responding quickly to requests for information from staff. He said page 59 of the meeting packet (Exhibit A), showed the responses from the local governments to a survey regarding the CTX. He noted that LCB staff did not summarize or paraphrase the responses. The intent of the survey was to ensure the local governments had a chance to stay engaged in the process, and to let them know what was proposed at the prior meetings.

Mr. Guindon noted that Lander County's response was not included in the meeting packet (Exhibit A), but it was posted to the Subcommittee website with the other responses on the website. In addition, some of the local governments included cover letters with additional information in their responses. Those cover letters were included in the meeting packet behind tab X (page 123).

Chairwoman Kirkpatrick thanked staff for collecting and compiling the responses. She said that it was important to have this information on the record.

## **VIII. ISSUES FROM LOCAL GOVERNMENTS REGARDING THE FIRST-TIER DISTRIBUTION OF CTX REVENUE.**

*This agenda item was taken out of order.*

Chairwoman Kirkpatrick said that she understood that some of the local governments were working together; however, she wanted to make sure that everyone was heard on these issues, because she did not know how closely the north and south were working together. She thought there was probably one specific proposal for change that people were trying to work from as a basic map. She said that the Subcommittee was trying to figure out what was agreeable and what was not agreeable. She wanted to make sure that all of the local government opinions were on the record. She asked for comments on the first-tier distribution.

LeRoy Goodman, Mayor, City of Fernley, thanked the Subcommittee for the opportunity to address the members. He said today's meeting was very interesting with lots of good information on the CTX and its problems. He said that Fernley is unique because its problem was with the base amount, rather than the 1-plus or zero plus. Fernley was the only municipality to incorporate in the state since 1997. One entity changed from incorporated to unincorporated, and even though the population in that entity decreased to less than half of what it had been, it receives more CTX than it did in 2001. He said that the Subcommittee members had heard about these problems before. He was hopeful that the legislative process can result in increased base CTX distribution to

Fernley. The City of Fernley appeared before the 2011 Legislature and the Department of Taxation to request a change to the CTX distribution. The two requests by the City of Fernley to receive some of Lyon County's tier one distribution were denied. The City of Fernley has chosen to file a lawsuit to seek relief through the judicial system. He said that the City of Fernley was simply asking for an equitable base amount and to be treated like the other entities in the state, whether they are cities, unincorporated towns or counties. He said that Fernley is also unique because it is the largest city in Lyon County, yet it is 50 miles from the county seat. He said that Fernley is much closer to four other county seats in western Nevada than to its own county seat. He said that Fernley is also different in the fact that it generates 35% to 45% of the assessed value, and has 36% of the population of the county, yet its base distribution is less than 1% of the revenue that comes into the county. He said that the base is the factor that needs to be changed. He said that the additional revenue would be used for roads, which are a tremendous problem in Fernley; a water treatment plant; and parks. He noted that the population of the City of Fernley decreased by only 300, to 19,000, over the recession. There was lots of industry coming into Fernley. He noted Amazon was in the process of increasing their staffing level, and hired 160 new full-time, permanent employees in March 2012. Amazon planned to add another 1,100 employees before November 1, 2012. He said that the City of Fernley had a viable economic development organization, and was working with the Economic Development Authority of Western Nevada (EDAWN) and the Northern Nevada Development Authority (NNDA). In conclusion, Mayor Goodman said that the City of Fernley needed an equitable distribution of the CTX.

Senator Lee asked if the current base had been assigned to the City of Fernley, and how many years ago that occurred. Mayor Goodman replied that in 1997 when the CTX was formulated, under the "six-pack" of taxes the City of Fernley received about \$84,000 as an unincorporated town. In 2001, the City of Fernley received \$100,000, and in 2011, the City of Fernley received a base of \$120,000. With the excess, it amounted to about \$136,000 for the year.

Senator Lee noted that Mayor Goodman was previously a county commissioner. He was now the mayor of a smaller, more intense group of people. This base adjustment would come from the county, which would have to share some of its first-tier money with the City of Fernley. He asked about the relationship between the county and the city.

Mayor Goodman said that when the City of Fernley incorporated in 2001 it entered into an agreement with the Lyon County Sheriff's Department to continue to provide services. The Lyon County Sheriff was named Chief of Police of the City of Fernley. He noted that the City of Fernley residents pay \$0.64 property tax to Lyon County. He said that in 2007, the Lyon County Sheriff said that the agreement was no longer needed, because the county needed to have a presence in the city. Today, Lyon County has 13 deputies and one administrative assistant within the City of Fernley. He noted those deputies cover Stagecoach, Silver Springs, and travel to wherever they are needed, because they are Lyon County deputies. He noted that the fire district was a separate district, which received some CTX. The City of Fernley residents also pay

\$0.265 property tax to the North Lyon County Fire District. He explained that when the City of Fernley incorporated in 2001, because the North Lyon County Fire Department and the Fernley volunteers owned all of the firefighting equipment, Assemblyman Joe Dini, who was Speaker at the time, proposed a bill to keep the North Lyon County Fire District as is.

Senator Lee asked whether there was a procedure to change the base. He noted that many cities were not happy with the base, and wanted to negotiate with the counties.

Mayor Goodman said that the remedy could be addressed by allowing Taxation to review unusual circumstances, such as the situation in which Fernley became a city. He noted that there was a procedure for that input for a limited time, but according to Ms. Rubald's testimony, Fernley would not have access to that remedy, because it required a request to Taxation one year before the action took place. He explained that Fernley voted to incorporate in November of 2000, and became a city on July 1, 2001. There was no city council in place to pass a resolution to ask for this money at the time it was required. He said that there has to be a procedure whereby a city, unincorporated town or county can make a case to Taxation, and involve the other entities that may be affected. This would prevent litigation and involvement by the Legislature. He believed that one of the speakers mentioned putting an appeals process in place, and allowing the Nevada Tax Commission to make the final ruling.

Assemblyman Ellison noted that in order for a jurisdiction to be eligible for CTX distribution, it must be committed to providing police services and parks. He asked if that was done, or was in the process. Mayor Goodman said those services were in place. He noted that both the City of Fernley and the City of Yerington received funds from the county for police services. The City of Fernley has taken over all of the other services, and was taking over the Lyon County cemetery, which will become the City of Fernley cemetery on July 1, 2012. He said zoning, planning, community development, municipal judges, city treasurer, city clerk, animal control, and vector control were the responsibility of the City of Fernley effective July 1, 2001. He explained that the former town of Fernley had owned the waste water system since 1972. He noted that in 2001 there was a 7.7777 cent road tax in Lyon County. In 2004 that tax was absolved and put under the general fund, and the revenue was no longer shared with the City of Fernley. That revenue amounted to about \$450,000 in 2004, and that had a devastating effect on the City of Fernley. He said the current road funds for the City of Fernley consist of the 9-cent RTC tax and the 2.35-cent gasoline tax, which generates close to \$1.1 million for roads, which is woefully short.

Assemblyman Ellison asked about the City of Fernley's police and jail services.

Josh Hicks of Brownstein Hyatt Farber Schreck, which was representing the City of Fernley, replied that the statute that references police service is not applicable to the situation in the City of Fernley. He said the statute lets a newly formed government apply before the end of the calendar year. That statute was not available to the City of Fernley. He said that these plans are not pertinent to that particular statutes. He said if

the City of Fernley had more CTX funds, it would be appropriate for Mayor Goodman to discuss those issues, but he wanted to make sure that the Subcommittee understood that the statute itself was not an available remedy to the City of Fernley, or to any city that is already incorporated.

Mayor Goodman noted that the jail was located in Yerington. He said that there was a new \$26.5 million public safety complex being built. He explained that the county was using cash for the project, rather than bonds. He said that the residents of the City of Fernley and the city council felt strongly that, should they prevail in getting and increase in the distribution of the CTX, the City of Fernley would augment the Lyon County Sheriff's Office with City of Fernley staff. He was very happy with the Lyon County Sheriff and the services it provided to the City of Fernley. He said that the substation had a lieutenant and a captain because it is on Interstate 80, which is very busy. He would augment that staff with four to six deputies to be permanently stationed in the City of Fernley. He said that there were times when there was something happening outside of Fernley – for example, in Silver Springs – leaving only one Sheriff's Deputy in Fernley for up to 8 hours, for a population of 19,000.

Senator Lee asked Mr. Hicks about the lawsuit on behalf of the City of Fernley. Mr. Hicks said that Mr. Yu of the LCB Legal Division provided a succinct description of the lawsuit. Mr. Hicks said that the lawsuit was pending in federal court. It was filed, but not served. The parties in the case are the City of Fernley and the defendants in the case are the state Department of Taxation and the State Treasurer. Those are the parties that administer the CTX system for the state. He said the lawsuit was in a preliminary phase.

Senator McGinness noted that one of the impact assessment topics brought up by Mr. Aguero was that rural and urban areas would be treated similarly, respecting the ability for individual counties to modify their particular distribution through a memorandum of understanding (MOU). He asked if the City of Fernley has requested a specific amount of funding from Lyon County.

Mayor Goodman said that in 2011, the City of Fernley asked for 10% of Lyon County's \$13.2 million share of the CTX, and that request was denied. He said that in 2012, the City of Fernley simply asked for the opportunity to discuss the development of a MOU for a portion of the CTX. He said that the request was denied on April 5, 2012. He said that the biggest concern for the City of Fernley was funding for roads.

Chairwoman Kirkpatrick noted that the 2011 Legislature agreed to perform a study to review the CTX. She said the CTX distribution was a complicated issue that affected 175 entities. Of those 175 entities, 6 had issues with the current CTX distribution formula. She said it was unfair to expect the legislature would digest the problem in the 120 days of a legislative session. She said that the interim study has been productive, because there were discussions about a potential solution for all entities. She warned that changes could be made to the formula that would result in 100 ~~entities disagreeing~~ with the distribution. She did not want for the legislators to be pitted against each other.

She said that the legislators all represented different entities, and had to do what was best for the state.

Chairwoman Kirkpatrick understood that the City of Fernley incorporated after 1998, and asked why the statute requiring that the entity provide police protection would not apply. Mr. Hicks said that he was referencing the process in the statute. He said that the statute was applicable, but because the application must be made within 12 months and was not made for whatever reason, it is not applicable today. The City of Fernley cannot currently ask for an adjustment under that statute.

Chairwoman Kirkpatrick asked Mayor Goodman what the residents expected for the City of Fernley when it was incorporated. Mayor Goodman explained that Fernley had been an unincorporated town. A committee of five people started a petition process to ask that Fernley be incorporated. The city was required to encompass all of north Lyon County under the statute at the time. The committee presented the petition to the Lyon County Board of Commissioners, and the county clerk verified there was a sufficient number of signatures. The Lyon County commissioners voted unanimously to allow Fernley to move forward with the process and put the item on the ballot for a vote by the residents of Fernley. It was placed on the ballot in November of 2000, and it passed almost 3 to 1 for incorporation. The committee then testified before the Committee on Local Government Finance (CLGF), and provided a tour of Fernley to the CLGF members, which made the determination that Fernley was big enough to incorporate. The committee submitted a preliminary budget using the CTX distribution the town of Fernley was receiving at the time. The Lyon County Sheriff's Department agreed to continue to provide police services to Fernley. There was an election, at which time five council members and a mayor were elected, which took effect July 1, 2001. He said there was much to learn in the process of changing from an unincorporated town to a city. For an unincorporated town, decisions on budgeting, planning and zoning are approved by the county.

Chairwoman Kirkpatrick asked whether the residents who were involved in the process of incorporation thought they would be provided police services and road services. Mayor Goodman said the Lyon County Sheriff indicated that the county would continue to have a presence in the city and would provide those services, and had agreed to serve as the chief of police effective July 1, 2001. The residents understood that their property taxes would probably increase. Because Fernley is a distance from the county seat, the residents liked the idea of a local government based in Fernley.

Chairwoman Kirkpatrick said that Lyon County and the City of Fernley had provided testimony that they would meet in April to discuss the issues. She asked if that meeting took place. Mayor Goodman said that the City of Fernley met with the Lyon County Commission in early April 2012 to request an MOU to enter into an agreement for a portion of the CTX received by the county for the City of Fernley. There was discussion in an open meeting, and the Lyon County commission denied the request.

Jeff Page, Lyon County Manager, said that representatives from Lyon County have advised the Subcommittee on more than one occasion that it is opposed to any change to the first-tier distribution. However, they would be willing to discuss changes to the second-tier distribution. He noted that the Board of County Commissioners has twice rejected the City of Fernley's request for an MOU regarding the CTX funding due to advice from legal counsel that the City of Fernley would have to take on additional services, noting that Fernley has yet to provide information as to what services they would take on, other than to improve the road system. He said that the Board of County Commissioners has dealt with budget deficits over the past few years. This year Lyon County cut \$3.3 million from its budget, and the City of Fernley has not taken on any additional services that would reduce the budget concerns of the county. He said that the county had the same problem with lack of funds for road improvements as the City of Fernley. He said that if the county brought the roads up to standard, it would have a deficit of \$30.2 million. He noted that the county was building a justice complex, including a new jail facility. He said that 100 inmates were housed in a jail that was designed to house 50 inmates. The county did not want to address the overcrowding issue in the federal court system. He said that the Lyon County Board of County Commissioners want to work with the City of Fernley to on the road issue. He noted that the City of Yerington also has issues with road funding. The Lyon County Board of County Commissioners is considering developing a general improvement district to address the road situation.

Mr. Page said that the Lyon County Board of County Commissioners is reluctant to enter into an MOU regarding the CTX, because there are a number of services that the county must provide statutorily that the cities are not required to provide. That includes human and social services, as well as senior services. For example, the Nevada State Legislature and Lyon County, with the cooperation of all of the Nevada counties, discussed taking on services and paying for services. He said that any further cuts to the CTX distribution to Lyon County would greatly reduce its ability to provide services that are mandated by the State of Nevada. He said that the county has reduced its non-mandated services drastically. For example, although the libraries remained open, the work was performed by volunteers, with very limited paid staff. Funding for the senior centers has been reduced. Funding for mandatory services, such as the Sheriff's Office, was reduced by 3% to 4%. Other elected officials' budgets were also reduced. He said that if Lyon County had the funding, it would be happy to discuss changes to the CTX formula. He did not anticipate any major changes to the county's economy for the next three to five years.

Josh Foli, Lyon County Finance Director and Comptroller, said Fernley had been an unincorporated town that levied a tax for parks and had a fee-generated utility operation. Fernley originally received CTX distribution for maintaining the parks within its limits. He said that the CTX for the maintenance of the parks has continued, and that is where the current distribution of consolidated tax originated. Fernley had the opportunity when it incorporated to take additional CTX under the statute. In his professional opinion, the statute allowed Fernley to take CTX if it ~~provide the services~~ that the CTX funds. That statute requires that the entity take over police services and

# EXHIBIT 9

EXHIBIT 9

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greater than negative 2% average population growth over a five-year period. When that factor was simulated, it resulted in a more equitable distribution over time. He said the plus factor, in addition to an excess that is not growing over time, would cause the excess distribution to become a smaller and smaller issue. The excess should never be 60% or 50% or 40% of total distribution. Rather, it should be 4%, 5%, 6% or 7% of total distribution. The combination of the plus factor, along with not allowing the excess to grow unabated over time, would result in the stability that the formula sought at its outset.

Mr. Aguero said the next meeting of the working group was on June 7, 2012, in Northern Nevada. By that time, the working group had come to a resolution as to how the formula itself would work. There had not yet been any discussions as to how the base might be adjusted, or how to deal with the perceived inequity of some of the individual entities. He said the opening discussion was specific to the City of Fernley, an entity that was concerned about the formula and its allocation. There was general consensus among the working group members that the City of Fernley's struggles were truly problematic, and Mayor LeRoy Goodman and his team laid out their case eloquently and in a compelling manor. As the working group argued and debated as to how we got to where we are today, and how to change it, we kept coming back to the same fundamental principle: the formation of a new government cannot result in existing government services becoming more expensive to provide, unless the citizens of that community vote to increase taxes on themselves. To create a new entity for which the costs for services are higher than they had been through the county, and expect the CTX to pay for that additional expense, is the situation which we are trying to avoid. At the same time, the City of Fernley's approach would have also meant that if a new government entity was formed tomorrow in Clark County, the new entity should not only be provided with revenue from within Clark County, but that it should be provided revenue from every entity across the state. He agreed with the mayor's comment from the June 7, 2012, meeting that it is more expensive, in many ways, to provide services in a city, particularly in Fernley. For example, if there is no city, there is no need for a city attorney. There is a real danger in allowing new governments to be formed that have the ability to redistribute money, and increase the cost of the new government to existing governments for services that are already being provided. This was not a satisfactory response for the City of Fernley. The mayor was very clear that the inequities and challenges, even with these underlying principles, do not resolve Fernley's problems. Therefore, they would seek redress in whatever way possible, and they have.

Mr. Aguero said the working group thought the statutes needed to be clarified such that, if an entity was willing to take on a service that is currently provided by the county, a process was needed to apply for those funds. In some ways those provisions already exist, but they need to be clarified, because there was confusion about what was possible and what was not possible. There was a general consensus among the group that, to the extent that a city was going to provide the same services, they should be dedicated those same revenues.



# EXHIBIT 10

EXHIBIT 10

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MINUTES OF THE MEETING OF THE  
LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY  
LAWS RELATING TO THE DISTRIBUTION AMONG LOCAL GOVERNMENTS  
OF REVENUE FROM STATE AND LOCAL TAXES (S.C.R. 40)  
Las Vegas, Nevada

The sixth and final meeting of the S.C.R. 40 Interim Study Subcommittee was called to order by Chairman Ann O'Connell, on Monday, May 20, 1996, at 9:10 a.m., in Room 119 of the Legislative Building, Carson City, Nevada.

**SUBCOMMITTEE MEMBERS PRESENT:**

Senator Ann O'Connell, Chairman  
Senator Dean A. Rhoads  
Senator Raymond Shaffer  
Senator Jon C. Porter  
Assemblyman Bob Price  
Assemblywoman Joan Lambert  
Assemblyman P.M. Roy Neighbors  
Assemblywoman Jeannine Stroth-Coward

**ADVISORY COMMITTEE MEMBERS PRESENT**

Mr. Mike Alastuey, Clark County School District  
Mr. Gary Cordes, City of Fallon  
Mr. Steven M. Hanson, City of Henderson  
Mr. Guy Hobbs, Counties Representative  
Mr. Michael Pitlock, Department of Taxation  
Ms. Terri Thomas, City of Sparks  
Ms. Mary Walker, Carson City

**ADVISORY COMMITTEE MEMBERS EXCUSED**

Ms. Mary Henderson, Washoe County  
Mr. Marvin Leavitt, City of Las Vegas

**STAFF PRESENT**

Kevin Welsh, Deputy Fiscal Analyst, Fiscal Analysis Division  
Ted Zuend, Deputy Fiscal Analyst, Fiscal Analysis Division  
Jeanne Botts, Program Analyst, Fiscal Analysis Division  
Kim Guinasso, Deputy Legislative Counsel, Legal Division  
Terry Cabauatan, Secretary, Fiscal Analysis Division

**OTHERS PRESENT:**

Case No. 66851  
JA 3529

The exhibits presented at the meeting are available from the Fiscal Analysis Division.

Exhibit A is the Meeting Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is handout

Exhibit D are attachments from presentation.

Exhibit E is

Chairman O'Connell outlined the day's program and invited the groups who wanted to present their concerns regarding special districts to present their views during the group discussions. Discussions on special districts would be given during those group presentations. The Chairman explained the full subcommittee would reconvene and would then vote on the issues and recommendations as presented to them by the advisory committee.

**2. Approval of Minutes from March 25, 1996 meeting.**

**SENATOR SHAFFER MOVED TO APPROVE THE MINUTES.**

**SENATOR RHOADS SECONDED THE MOTION.**

**MOTION PASSED UNANIMOUSLY BY THE MEMBERS PRESENT.**

**B: Report from the Advisory Committee - Presented by Guy Hobbs, Michael Pitlock, and Mary Walker.**

Mr. Hobbs referred to section 4 of the packet, there are four proposed language that deal with recommendations 1 through 7 that were previously approved by the subcommittee. The first proposal deals with recommendations 1, 2, 3, and 4 of the status report and the recommendations previously approved. Proposal #1 establishes the basic parameters of the formula that has been discussed in the past few months. The combination of the several revenues into a consolidated revenue distribution account (listed on the first page); the designation of the base, the revenue neutrality; the application of the CPI to the base used in the formula; identification of the amounts in excess of the base plus CPI and the manner that would be computed and the way that would be distributed.

Mrs. Lambert asked, in the worksheet, the assessed valuation figures do not include the assessed valuation in redevelopment districts; is that assessed valuation in or out of this mix. Mr. Hobbs replied the assessed valuation for net proceeds in the language as it was formulated. Mrs. Lambert asked about redevelopment districts. Mr. Hobbs thought redevelopment was not included for purposes of the computation. Mrs. Lambert asked if it were the advisory committee's recommendation that redevelopment assessed valuation be excluded from the formula. Mr. Hobbs referred the question to Ms. Mary Walker. Ms. Walker replied the redevelopment assessed valuation is left out of the distribution at present. She mentioned when they had discussed property taxes, that was really a separate area. Mrs. Lambert thought NRS 377.057, the distribution of SCCRT, included the redevelopment for

tax increment assessed valuation. Ms. Walker thought redevelopment districts actually received SCCRT at one time, but that was changed. She offered to check into it.

Mrs. Lambert next asked about the differences in the formula. With the current system, there is a small percentage of the revenues (10 to 20 %) based on actual population, BCCRT, cigarette, liquor, real property transfer tax. And then the larger share, the SCCRT, the motor vehicle privilege tax (MVPT) are based on actual assessed valuation times the 1981 rate.

Now, the lion's share would be whatever the entity's base share is currently times a set percentage (the CPI) and whatever excess is left over, which seems to Mrs. Lambert to be a pretty small share. Mrs. Lambert asked, would the effect over time exarcebate an equity problem that might already be in place for an entity. What would be the impact on the small entity versus a large entity? Does the proposed system provide more or less incentive for cities to try to annex to receive more assessed valuation and population.

Mr. Hobbs noted, as far as why the new formula is preferred over the old, was probably well addressed at the last meeting. Ms. Walker had provided numbers around the state on what the growth in SCCRT has been over time compared to what their growth in population and assessed value had been over time. There was absolutely no correlation. He offered to refresh everyone's memory at the group discussions if they don't recall the information. That formula is being driven by the 1980-81 tax rate and the current assessed valuation. The 1980-81 tax rate does not have much bearing on what things are really like today in most areas. Carrying forward with the revenue neutral proposal brings forward some of the inequities in the current distribution system. They are somewhat institutionalized by carrying forward those bases and making it revenue neutral at the base year. Mr. Hobbs said clearly the alternative to that would be to go and adjust the bases. The methodology for making such adjustments would have to be fairly defined otherwise, it could be a very subjective process. Mr. Hobbs pointed out that was one of the reasons the advisory committee included in the recommendations the ability for a local entity, if they felt their base did not adequately reflect their current needs to go and petition through the department of taxation, the committee on local government finance and ultimately the Tax Commission to have an adjustment made to their base. He acknowledged Mrs. Lambert's assumption that once the base amount is funded and additionally fund the CPI, the amount remaining for distribution in accordance with population and assessed value statistics is a rather small component of the overall revenue. Mr. Hobbs, being more familiar with Clark County, noted the figure is \$13 to \$14 million of \$387 million that is being distributed. So he explained, it takes about \$373 million to fund the base plus the CPI. Somewhere less than five percent of the combined revenues are distributed according to the growth statistics. But, if revenue neutrality were to be used, that's what they would have to deal with. Clearly, Mr. Hobbs thought if more revenue comes in, then that number could rise; but he pointed out the cost of funding the consumer price index portion is a fairly significant amount of money. Again citing Clark County, Mr. Hobbs noted of the \$387 million in total revenue, approximately \$9 million to fund the CPI increase over the base year leaves about \$13-14 million to be allocated according to the growth statistics. He said if the CPI were not used, there would be more funds to be distributed. The CPI was put in the formula to guarantee that the local governments would have the same purchasing power from year to year as they did in the base year. Again, if the base year does not reflect their needs they have an opportunity to petition to change the base.

Additionally, Mr. Hobbs noted under the existing system, the state has at least four different formulas being used to distribute six revenues. Under the revised system that is being

proposed there would be one formula to distribute the six revenues. He cautioned however, not to be misled by the amount that is being distributed according to the growth statistics. It tends to be in the five percent or less range in most of the counties. One of the cautions Mr. Hobbs noted to watch out for in the first few years under the proposed system, would be the ability of the revenues to maintain pace with the amount needed to fund the base plus the CPI's that continue to roll up. If a recessionary period occurred, the state could be in a position that the total revenues produced from the six revenues are insufficient to fund the base plus the CPI. But that problem would still be encountered under the old system as well. To address that potential situation, the advisory committee has recommended that in the event the revenue is not sufficient to meet the base plus the CPI to revert to prior year formula to keep funds in the same equilibrium that existed in the prior year.

Mrs. Lambert noted, she could already see that some of the rural guarantee counties would be receiving less next year and could not even fund the CPI. Mr. Hobbs pointed out from the meeting the advisory committee had with the special districts last month, they discussed some of the things the proposed distribution formula does not accomplish. One is that the formula does not change the distribution of revenues between counties. There is no transfer of revenues between counties. What is being proposed is the second tier within a county. Mr. Hobbs noted it is the same amount of money, only somewhat remixed. Mrs. Lambert asked if anyone had analyzed to determine if this might be an incentive or a disincentive for cities to annex than the current formula provides. Mr. Hobbs replied the incentive issues were discussed at the informational meeting. Since population and assessed valuation are statistics to be used in the new formula, there would probably be some incentive to have more population and more assessed value. In the current system, the governments use population for some number of revenue, namely, BCCRT, cigarette and liquor tax and for real property transfer tax and assessed valuation for other revenues. Mr. Hobbs was unsure there would a big change in the incentives because the same statistics are being used. Mr. Cordes noted one of the existing incentives is for the counties that have only one city. He cited Nye County, the second city to incorporate would then share the BCCRT and the excise taxes on cigarette and liquor; that would be stripped wholly out of the county's budget. That is one large incentive, under the current legislation that would go away. Mr. Hobbs noted because of the manner those revenues have been distributed in the past, may depend upon what type of county and how many cities if any, as far as the population are concerned. The SCCRT distribution formula does include redevelopment agencies. He added the recommendations that have been written into proposal No. 1 do not change that approach. Mrs. Lambert thanked the advisory committee for the explanations.

Senator Rhoads mentioned two enterprise funds that get "hit" in his district namely, Elko County Convention Authority (\$344,000) and Elko County TV District (\$139,000). That money would be redistributed in the county he understood; but asked if those entities get a five-year phase in and asked how the percentage would work. Mr. Hobbs replied under recommendation no. 9, provides that the special districts which solely provide enterprise activity be considered for elimination from the formula that distributes SCCRT, MVPT and etc., and that it be done on a five-year phase out to begin with the fiscal year that starts with July 1, 1998. Part of that recommendation also includes direction to the advisory committee and LCB staff to continue to analyze the effect of the enterprise activities of quasi or hybrid special districts. Those districts that have an enterprise activity mixed in with two other general government type functions. For example, he cited a fund that has a water system,

snow removal, road maintenance and maybe one or two others. To be able to isolate the enterprise activity, not only of the special and general improvement districts but the recommendation also included reviewing counties, cities, and towns that had enterprise activities to determine whether or not there was any subsidy from the general government revenues to the enterprise activities. The advisory committee felt there was no difference between the special and general improvement districts and a county or a city that has an enterprise activity if that enterprise activity is being subsidized by general tax revenue. Mr. Pitlock also noted, one of the issues discussed was since all the money was staying within the county, there was nothing in the recommendation that would prohibit another entity from entering into an inter-local agreement and providing funds to a special district to compensate them for the funds that they're losing.

Mr. Neighbors asked, if they were to leave the net proceeds out of the formula, citing Round Mountain as an example, would they be penalized or receive additional revenue. He was informed that net proceeds are currently out of the formula. Mr. Neighbors asked if it would be part of their assessed value. Mr. Hobbs explained the reason for removing the net proceeds at the beginning was to remove some of the volatility that might exist in some of the rural counties where mining may come and go. The five-year moving average also smooths out much of that volatility. Those concerns were voiced by the rural representatives of the advisory committee and that brought about the suggestion. Senator O'Connell explained it would protect situations such as White Pine just experienced. That was one of the reasons they were given much more stability in their funding.

Mr. Hobbs next addressed recommendation no. 5 (proposal no. 2) which deals with mergers and consolidation of existing units of government and provides that language to allow those mergers and consolidations to take effect. Recommendation no. 6 (proposal no. 3) sets forth the ability to arrive at an alternative distribution formula within a county, pointed out by Mr. Pitlock earlier. Mr. Hobbs added a small change in the recommendation. Instead of locking those entities that might come up with an alternative distribution agreement into a five-year term, the language has been changed to reflect a three-year term as an alternate. Proposal no. 4 would allow a local government to request an adjustment to its base if it felt their base did not adequately reflect what its current needs and conditions are.

Continuing, Mr. Hobbs noted recommendations no. 8, 9, and 10, which were not acted upon at the previous subcommittee meeting. Recommendation no. 8 sets forth a language that would deal with the creation of a new entity that would wish to share in the distribution of the revenues. The recommendation of the technical [advisory] committee is that any such new entity would need to provide at least police protection and at least two of the following services: fire protection, road maintenance and parks and recreation to be eligible for consideration for sharing the distribution of revenues. If they meet the test of providing three of those services, the procedure would then be to petition through the Department of Taxation to the Nevada Tax Commission to get a base amount established.

Mrs. Lambert asked how to deal with the equity consideration of the North Las Vegas Library District. Would this recommendation preclude them from ever getting SCCRT? Mr. Hobbs replied North Las Vegas Library District has been established to not receive SCCRT. They may want to actually bring up that issue to the Legislature. Mr. Hobbs reminded the subcommittee the proposed formula does not go into effect until July 1, 1998 and the NLV

# EXHIBIT 11

EXHIBIT 11

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# Fernley Incorporation Committee

Debra Brazell, Chairman  
Randy Ashley  
Linda Gregory  
Dave Zimmermann

P.O. Box 1553  
Fernley, NV 89408  
Looking To The Future

April 27, 1998

STATE OF NEVADA  
Department of Taxation  
Local Government Finance Section  
Mr. Gene Etcheverry, Supervisor  
1550 E. college Parkway  
Carson City, Nevada 89706

RE: Incorporation Projections

Dear Mr. Etcheverry,

This letter will introduce and announce the formation of the Fernley Incorporation Committee, formed in accordance with NRS 266. We are excited about the prospects of bringing the town of Fernley into incorporation.

I had the opportunity of discussing the tax basis with Mr. Ambrose today. I see there is much to learn about the distribution of these monies and look forward to any information or suggestions you can offer, and your opinion with regards to advantages/disadvantages for Fernley.

The committee is in preparation of the proposed budget and requires your estimate of the tax base that the incorporated Fernley could expect. I have a copy of a report that was prepared by your office February 1996, (report enclosed). We would respectfully request an updated version.

We are working toward a July 4<sup>th</sup> petition drive, and therefore, we are anxious to receive this report. Your efforts to accelerate the information process will be sincerely appreciated.

We look forward to working with you on this important project.

Sincerely,



Debra K. Brazell  
Fernley Incorporation Committee, Chairman

DKB:ds



# EXHIBIT 12

# EXHIBIT 12

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STATE OF NEVADA  
DEPARTMENT OF TAXATION

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Carson City, Nevada 89706-7921

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Governor

MICHAEL A. PITLOCK  
Executive Director

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June 25, 1998

Ms. Debra K. Brazell, Chairman  
Fernley Incorporation Committee  
P. O. Box 1553  
Fernley, NV 89408

Re: Budgetary Update

Dear Ms. Brazell:

Pursuant to your recent request for updated information regarding the impact the proposed incorporation of the Town of Fernley would have on the Consolidated Tax Distribution to the local governments in Lyon County.

The request indicated proposed scenarios with populations quite a bit larger than the current certified population of 6,510. If Fernley were to incorporate, with the boundaries unchanged, the new city would not realize an increase in revenue from consolidated tax. If the new city were to annex property extending the boundaries (and therefore population), then a larger share of the available revenue in the county's consolidated tax account would be realized by the city.

You requested information utilizing a number of different populations for the incorporated area. Listed below are the impacts to the Consolidated Tax Distribution:

- 1) Population growth of 6.63% (FY99 @ 6,510 over FY98 @ 6,105).

Current projected revenue for Fernley Town (population of 6,510) is \$ 83,824.89. The projected revenue for the City of Fernley (with same population) would be the same.

- 2) Population growth of 11.11% (10,000 over 9,000).

Projected revenue for the City of Fernley based on a population of 10,000 is \$ 84,282.22.

- 3) Population growth of 10.00% (11,000 over 10,000).

Projected revenue for the City of Fernley based on a population of 11,000 is \$ 84,168.76.

- 4) Population growth of 9.09% (12,000 over 11,000).

Projected revenue for the City of Fernley based on a population of 12,000 is \$ 84,075.91.

Ms. Debra Brazell

June 25, 1998

Page 2

The various population percentages noted above have been applied to projected Consolidated Tax revenue to Lyon County in the amount of \$9,094,264.01. You did indicate in your request or our conversations if the proposed city is going to assume any of the services presently provided by the county. If this is being considered, please refer to NRS 354.598747 (attached).

I hope this information is helpful to the committee as you begin the incorporation process. If you should have any questions, please contact me at 687-8358.

Sincerely,



Warner R. Ambrose, Budget Analyst  
Local Government Finance

Enclosures

# EXHIBIT 13

EXHIBIT 13

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STATE OF NEVADA  
DEPARTMENT OF TAXATION

1550 E. College Parkway  
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July 17, 1998

Ms. Debra K. Brazell, Chairman  
Fernley Incorporation Committee  
P. O. Box 1553  
Fernley, NV 89408

Re: Budgetary Update

Dear Ms. Brazell:

Pursuant to your second request, I have updated the information regarding the impact the proposed incorporation of the Town of Fernley would have on the Consolidated Tax Distribution and two of the Motor Fuel Taxes to which the proposed city would be entitled to.

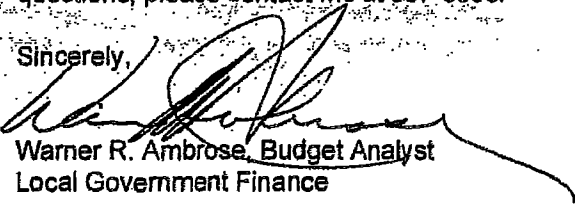
The request indicated proposed scenarios with populations quite a bit larger than the current certified population of 6,510. If Fernley were to incorporate, with the boundaries unchanged, **the new city would not realize a significant increase in revenue from the consolidated tax.** If the new city were to annex property extending the boundaries (and therefore population), then a larger share of the available revenue in the county's consolidated tax account would be realized by the city.

I also calculated the impact of incorporation relative to distribution of the 1-cent county option motor fuel tax and the 2.35-cent motor fuel tax. The impact of the different population scenarios you requested was calculated. The total tax impact of incorporation is indicated on the enclosed pages.

The projected total revenues for the incorporated City of Fernley are substantially below those calculated in 1996. This is primarily due to the implementation of the Consolidated Tax Distribution program. The proposed city's revenues are directly affected by the changes relative to Basic City-County Relief and Cigarette taxes.

I hope this information is helpful to the committee as you begin the incorporation process. If you should have any questions, please contact me at 687-8358.

Sincerely,

  
Warner R. Ambrose, Budget Analyst  
Local Government Finance

Enclosures

Case No. 66851-  
JA 3540

# EXHIBIT 14

EXHIBIT 14

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KENNY C. GUINN  
Governor

DAVID P. PURSELL  
Executive Director

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March 3, 1999

Ms. Debra K. Brazell  
Fernley Incorporation Committee  
P.O. Box 1553  
Fernley, NV 89408

Dear Ms. Brazell:

I have had the opportunity to review the proposed budget for the City of Fernley. As I mentioned to you on the phone, I have included some comparisons of revenues and expenditures for other Cities in Nevada.

I am unable to comment on the feasibility of the proposed budget at this time. I would need more information regarding the assumptions used to calculate the various revenues. I would also need to know the level of service as they relate to each expenditure function shown on the proposed budget.

After our telephone discussion yesterday, I would like to direct you to several statutes that will affect the creation of the new city. I have enclosed a copy of NRS 360.740, which spells out the level of service required of a newly created local government if they are to receive a distribution from the Consolidated Tax. Also included is NRS 354.5987, which provides the formula for the amount of allowed ad valorem revenue a new local government will receive. You may wish to seek legal advice on how each of these statutes may affect your efforts.

You indicated to me that the future governing board would decide what services would be provided and which would be negotiated for with the county. The petition you are required to circulate to proceed with your plans to incorporate must include plans for providing police and fire protection, maintaining the streets, providing water and sewer services, collecting the garbage and providing administrative services in the proposed city, with an estimate of the costs and sources of revenue. In order for the committee to provide this information as part of the petition some assumptions must be made at this time.

I am also including NRS 266.0285, which details the factors to be considered by the County Commissioners and the Committee on Local Government Finance in determining the feasibility of the new city.

Case No. 66851  
JA 3542

I understand your frustration in the creating a budget for the proposed new city. It may be that you are premature in attempting to develop a budget before the committee clearly identifies the units involved in each function to be provided by the new city.

I will be happy to assist you in any way I can so please feel free to call me at 775-687-6673.

Sincerely,

Jaynese Knight, Budget Analyst  
Local Government Finance



**NRS 360.720 Enterprise districts prohibited from pledging revenue from fund to secure obligations; qualifications for allocations from fund for certain newly created governmental entities.**

1. An enterprise district shall not pledge any portion of the revenues from any of the taxes included in the fund to secure the payment of bonds or other obligations.

2. The executive director shall ensure that a governmental entity created between July 1, 1996, and July 1, 1998, does not receive money from the taxes included in the fund unless that governmental entity provides police protection and at least two of the following services:

- (a) Fire protection;
- (b) Construction, maintenance and repair of roads; or
- (c) Parks and recreation.

3. As used in this section:

- (a) "Fire protection" has the meaning ascribed to it in NRS 360.740.
- (b) "Parks and recreation" has the meaning ascribed to it in NRS 360.740.
- (c) "Police protection" has the meaning ascribed to it in NRS 360.740.
- (d) "Construction, maintenance and repair of roads" has the meaning ascribed to it in NRS 360.740.

(Added to NRS by 1997, 3282)

**NRS 360.730 Establishment of alternative formula for distribution of taxes in fund by cooperative agreement. [Effective July 1, 1998.]**

1. The governing bodies of two or more local governments or special districts, or any combination thereof, may, pursuant to the provisions of NRS 277.045, enter into a cooperative agreement that sets forth an alternative formula for the distribution of the taxes included in the fund to the local governments or special districts which are parties to the agreement. The governing bodies of each local government or special district that is a party to the agreement must approve the alternative formula by majority vote.

2. The county clerk of a county in which a local government or special district that is a party to a cooperative agreement pursuant to subsection 1 is located shall transmit a copy of the cooperative agreement to the executive director:

(a) Within 10 days after the agreement is approved by each of the governing bodies of the local governments or special districts that are parties to the agreement; and

(b) Not later than December 31 of the year immediately preceding the initial year of distribution that will be governed by the cooperative agreement.

3. The governing bodies of two or more local governments or special districts shall not enter into more than one cooperative agreement pursuant to subsection 1 that involves the same local governments or special districts.

4. If at least two cooperative agreements exist among the local governments and special districts that are located in the same county, the executive director shall ensure that the terms of those cooperative agreements do not conflict.

5. Any local government or special district that is not a party to a cooperative agreement pursuant to subsection 1 must continue to receive money from the fund pursuant to the provisions of NRS 360.680 and 360.690.

6. The governing bodies of the local governments and special districts that have entered into a cooperative agreement pursuant to subsection 1 may, by majority vote, amend the terms of the agreement. The governing bodies shall not amend the terms of a cooperative agreement more than once during the first 2 years after the cooperative agreement is effective and once every year thereafter, unless the committee on local government finance approves the amendment. The provisions of this subsection do not apply to any interlocal agreements for the consolidation of governmental services entered into by local governments or special districts pursuant to the provisions of NRS 277.080 to 277.180, inclusive, that do not relate to the distribution of taxes included in the fund.

7. A cooperative agreement executed pursuant to this section may not be terminated unless the governing body of each local government or special district that is a party to a cooperative agreement pursuant to subsection 1 agrees to terminate the agreement.

8. For each fiscal year the cooperative agreement is in effect, the executive director shall continue to calculate the amount each local government or special district that is a party to a cooperative agreement pursuant to subsection 1 would receive pursuant to the provisions of NRS 360.680 and 360.690.

9. If the governing bodies of the local governments or special districts that are parties to a cooperative agreement terminate the agreement pursuant to subsection 7, the executive director must distribute to those local governments or special districts an amount equal to the amount the local government or special district would have received pursuant to the provisions of NRS 360.680 and 360.690 according to the calculations performed pursuant to subsection 8.

(Added to NRS by 1997, 3282, effective July 1, 1998)

**NRS 360.740 Request of newly created local government or special district for allocation from fund. [Effective July 1, 1998.]**

1. The governing body of a local government or special district that is created after July 1, 1998, and which provides police protection and at least two of the following services:

- (a) Fire protection;
- (b) Construction, maintenance and repair of roads; or
- (c) Parks and recreation,

may, by majority vote, request the Nevada tax commission to direct the executive director to allocate money from the fund to the local government or special district pursuant to the provisions of NRS 360.680 and 360.690.

2. On or before December 31 of the year immediately preceding the first fiscal year that the local government or special district would receive money from the fund, a governing body that submits a request pursuant to subsection 1 must:

- (a) Submit the request to the executive director; and
- (b) Provide copies of the request and any information it submits to the executive director in support of the request to each local government and special district that:
  - (1) Receives money from the fund; and
  - (2) Is located within the same county.

3. The executive director shall review each request submitted pursuant to subsection 1 and submit his findings to the committee on local government finance. In reviewing the request, the executive director shall:

(a) For the initial year of distribution, establish an amount to be allocated to the new local government or special district pursuant to the provisions of NRS 360.680 and 360.690. If the new local government or special district will provide a service that was provided by another local government or special district before the creation of the new local government or special district, the amount allocated to the local government or special district which previously provided the service must be decreased by the amount allocated to the new local government or special district; and

(b) Consider:

(1) The effect of the distribution of money in the fund, pursuant to the provisions of NRS 360.680 and 360.690, to the new local government or special district on the amounts that the other local governments and special districts that are located in the same county will receive from the fund; and

(2) The comparison of the amount established to be allocated pursuant to the provisions of NRS 360.680 and 360.690 for the new local government or special district to the amounts allocated to the other local governments and special districts that are located in the same county.

4. The committee on local government finance shall review the findings submitted by the executive director pursuant to subsection 3. If the committee determines that the distribution of money in the fund to the new local government or special district is appropriate, it shall submit a recommendation to the Nevada tax commission. If the committee determines that the distribution is not appropriate, that decision is not subject to review by the Nevada tax commission.

5. The Nevada tax commission shall schedule a public hearing within 30 days after the committee on local government finance submits its recommendation. The Nevada tax commission shall provide public notice of the hearing at least 10 days before the date on which the hearing will be held. The executive director shall provide copies of all documents relevant to the recommendation of the committee on local government finance to the governing body of each local government and special district that is located in the same county as the new local government or special district.

6. If, after the public hearing, the Nevada tax commission determines that the recommendation of the committee on local government finance is appropriate, it shall order the executive director to distribute money in the fund to the new local government or special district pursuant to the provisions of NRS 360.680 and 360.690.

7. For the purposes of this section, the local government or special district may enter into an interlocal agreement with another governmental entity for the provision of the services set forth in subsection 1 if that local government or special district compensates the governmental entity that provides the services in an amount equal to the value of those services.

8. As used in this section:

(a) "Fire protection" includes the provision of services related to:

- (1) The prevention and suppression of fire; and
- (2) Rescue,

and the acquisition and maintenance of the equipment necessary to provide those services.

(b) "Parks and recreation" includes the employment by the local government or special district, on a permanent and full-time basis, of persons who administer and maintain recreational facilities and parks. "Parks and recreation" does not include the construction or maintenance of roadside parks or rest areas that are constructed or maintained by the local government or special district as part of the construction, maintenance and repair of roads.

(c) "Police protection" includes the employment by the local government or special district, on a permanent and full-time basis, of at least three persons whose primary functions specifically include:

- (1) Routine patrol;
- (2) Criminal investigations;
- (3) Enforcement of traffic laws; and
- (4) Investigation of motor vehicle accidents.

(d) "Construction, maintenance and repair of roads" includes the acquisition, operation or use of any material, equipment or facility that is used exclusively for the construction, maintenance or repair of a road and that is necessary for the safe and efficient use of the road except alleys and pathways for bicycles that are separate from the roadway and, including, without limitation:

- (1) Grades or regrades;
- (2) Gravel;
- (3) Oiling;
- (4) Surfacing;
- (5) Macadamizing;
- (6) Paving;
- (7) Cleaning;
- (8) Sanding or snow removal;
- (9) Crosswalks;
- (10) Sidewalks;
- (11) Culverts;
- (12) Catch basins;

**NRS 354.5987 Establishment of allowed revenue from taxes ad valorem of certain local governments by Nevada tax commission. [Effective July 1, 1998.]**

1. For the purposes of NRS 354.59811, the allowed revenue from taxes ad valorem of any local government:

(a) Which comes into being on or after July 1, 1989, whether newly created, consolidated, or both; or

(b) Which was in existence before July 1, 1989, but did not receive revenue from taxes ad valorem, except any levied for debt service, for the fiscal year ending June 30, 1989, must be initially established by the Nevada tax commission.

2. Except as otherwise provided in subsections 3 and 6, if the local government for which the allowed revenue from taxes ad valorem is to be established performs a function previously performed by another local government, the total revenue allowed to all local governments for performance of substantially the same function in substantially the same geographical area must not be increased. To achieve this result, the Nevada tax commission shall request the committee on local government finance to prepare a statement of the prior cost of performing the function for each predecessor local government. Within 60 days after receipt of such a request, the committee on local government finance shall prepare a statement pursuant to the request and transmit it to the Nevada tax commission. The Nevada tax commission may accept, reject or amend the statement of the committee on local government finance. The decision of the Nevada tax commission is final. Upon making a final determination of the prior cost of performing the function for each predecessor local government, the Nevada tax commission shall:

(a) Determine the percentage that the prior cost of performing the function for each predecessor local government is of the allowed revenue from taxes ad valorem of that local government; and

(b) Apply the percentage determined pursuant to paragraph (a) to the allowed revenue from taxes ad valorem and subtract that amount from the allowed revenue from taxes ad valorem of the predecessor local government.

The allowed revenue from taxes ad valorem attributable to the new local government for the cost of performing the function must equal the total of the amounts subtracted for the prior cost of performing the function from the allowed revenue from taxes ad valorem of all of the predecessor local governments.

3. If the local government for which the allowed revenue from taxes ad valorem is to be established is an unincorporated town which provides a service not previously provided by another local government, and the board of county commissioners has included the unincorporated town in a resolution adopted pursuant to the provisions of NRS 269.5755, the Nevada tax commission shall, if the unincorporated town does not receive revenue from taxes ad valorem, establish the allowed revenue of the town from taxes ad valorem at an amount which is in the same ratio to the assessed valuation of the town as the combined allowed revenues from taxes ad valorem are to the combined assessed valuations of the other unincorporated towns included in the common levy.

4. The allowed revenue from taxes ad valorem of an unincorporated town which provides a service not previously provided by another local government must be:

(a) Reduced by 75 percent for the first fiscal year following the fiscal year in which the allowed revenue from taxes ad valorem is established pursuant to subsection 3;

(b) Reduced by 50 percent for the second fiscal year following the fiscal year in which the allowed revenue from taxes ad valorem is established pursuant to subsection 3; and

(c) Reduced by 25 percent for the third fiscal year following the fiscal year in which the allowed revenue from taxes ad valorem is established pursuant to subsection 3.

5. In any other case, except as otherwise provided in subsection 6, the allowed revenue from taxes ad valorem of all local governments in the county, determined pursuant to NRS 354.59811, must not be increased, but the total allowed revenue from taxes ad valorem must be reallocated among the local governments consistent with subsection 2 to accommodate the amount established for the new local government pursuant to subsection 1.

6. In establishing the allowed revenue from taxes ad valorem of a county, city or town pursuant to this section, the Nevada tax commission shall allow a tax rate for operating expenses of at least 15 cents per \$100 of assessed valuation in addition to the tax rate allowed for any identified and restricted purposes and for debt service.

7. As used in this section:

(a) "Predecessor local government" means a local government which previously performed all or part of a function to be performed by the local government for which the allowed revenue from taxes ad valorem is being established pursuant to subsection 1.

(b) "Prior cost of performing the function" means the amount expended by a local government to perform a function which is now to be performed by another local government. The amount must be determined on the basis of the most recent fiscal year for which reliable information is available.

(Added to NRS by 1981, 307; A 1983, 558, 1052; 1985, 1653; 1989, 1046, 1564, 2076, 2088; 1991, 1436; 1995, 143, 2179; 1997, 3295, effective July 1, 1998)

**NRS 266.0265** Judicial review of determination that proposed area is unsuitable for incorporation. A qualified elector or any other person who has an ownership interest in real property within the area proposed to be incorporated, and who is aggrieved by the determination of the committee on local government finance pursuant to NRS 266.0264 may appeal the determination to the district court within 30 days after the committee notifies the board of county commissioners of the determination. The district court shall limit its review to the issues contained within the record of the public hearing and in the determination. The district court may allow the record to be supplemented by additional evidence concerning those issues. The determination of the committee on local government finance may be reversed only upon a showing that the determination is in violation of constitutional or statutory provisions, is arbitrary or capricious or involves an abuse of discretion. If the determination of the committee on local government finance is reversed, the committee shall complete its report pursuant to NRS 266.0261 and the procedure for incorporation must be continued as if the committee on local government finance had not made its determination.

(Added to NRS by 1989, 234; A 1995, 147)

**PUBLISHING CO.**

Municipal Corporations § 12(12).  
WESTLAW Topic No. 268.  
C.J.S. Municipal Corporations § 26.

**NRS 266.027** Public hearing on petition and report of committee on local government finance.

1. The board of county commissioners shall, within 14 days after it receives the report requested pursuant to NRS 266.0261, designate a date, time and place for a public hearing on the petition and the report.

2. The date of the public hearing must not be earlier than 14 days nor later than 30 days after the date on which the date, time and place of the public hearing was designated.

3. The board of county commissioners shall cause notice of the public hearing, including a copy of the petition without signatures, to be published in a newspaper of general circulation within the county at least 7 days before the hearing is held. The board shall provide notice of the date, time and place set for the public hearing at least 7 days before the hearing is held to the governing body of each city or town within the county.

(Added to NRS by 1987, 1702; A 1989, 236)

**WEST PUBLISHING CO.**

Municipal Corporations § 12(7).  
WESTLAW Topic No. 268.  
C.J.S. Municipal Corporations § 22.

**NEVADA CASES.**

Notice must apprise persons that rights may be affected. Although former provisions of NRS 266.020 (cf. NRS 266.027) did not expressly require that notice of public meeting give accurate description of boundaries of proposed city, proper notice must, at very least, apprise persons who are likely to be affected by proposed action that their rights may be involved. In re Incorporation of Mesa Vista v. Pelham, 104 Nev. 516, 762 P.2d 879 (1988)

**NRS 266.028** Record of public hearing; testimony at hearing; additional hearings.

1. The board of county commissioners shall keep a record of the hearing and include as part of the record the report requested pursuant to NRS 266.0261 and any report submitted by a commission, agency or district pursuant to NRS 266.0262.

2. The board of county commissioners shall allow any interested person to present oral or written testimony at the hearing. The board may invite representatives from state and local governments to present testimony.

3. The board may hold additional hearings but all hearings on the petition must be completed within 30 days after the initial hearing is held.

(Added to NRS by 1987, 1703; A 1989, 237)

**NRS 266.0285** Factors for consideration in determining advisability of incorporation and feasibility of proposed city.

1. To determine the advisability of incorporation and the feasibility of the proposed city, the board of county commissioners shall consider the following factors with regard to the area proposed to be incorporated:

- (a) Its population and density of population;
- (b) The land area, land uses, topography, natural boundaries and drainage basin;
- (c) The extent to which the area is devoted to agriculture, mineral production or other uses that may not require significant improvements to the property;
- (d) The extent of commercial and industrial development;
- (e) The extent and age of residential development;
- (f) The comparative size and assessed value of subdivided land and unsubdivided land;
- (g) Current and potential issues concerning transportation;
- (h) Past expansion of population and construction;
- (i) The likelihood of significant growth in the area and in adjacent incorporated and unincorporated areas during the next 10 years;
- (j) The present cost, method and adequacy of regulatory controls and governmental service, including, but not limited to, water and sewer service, fire rating and protection, police protection, improvement and maintenance of streets, administrative services and recreational facilities in the area and the future need for such services and controls;
- (k) The present and projected revenues for the county and the proposed city;
- (l) The probable effect of incorporation on revenues and services in the county and local governments in adjacent areas;
- (m) The probable effect of the proposed incorporation and of any alternatives to incorporation on the social, economic and governmental structure of the affected county and adjacent areas;

(n) The probable effect of the proposed incorporation and of any alternatives to incorporation on the availability and requirement of water and other natural resources; and

(o) Any determination by a governmental agency that the area is suitable for residential, commercial or industrial development, or that the area will be opened to private acquisition.

2. If the area proposed to be incorporated is within 5 miles of an existing city, in addition to the factors listed in subsection 1, the board of county commissioners shall consider:

- (a) The size and population of the existing city;
- (b) Growth in population and commercial and industrial development in the existing city during the past 10 years;
- (c) Any extension of the boundaries of the existing city during the past 10 years;
- (d) The probability of growth of the existing city toward the area proposed to be incorporated in the next 10 years, considering natural barriers and other factors that might influence such growth; and
- (e) The willingness of the existing city to annex the area proposed for incorporation and to provide services to the area.

3. The board of county commissioners shall also consider:

- (a) The recommendations of any commission, agency, district or member of the public who submits a written report;
- (b) Testimony from any person who testifies at a hearing; and
- (c) Existing petitions for annexation of any part of the area.

(Added to NRS by 1989, 233)

#### NRS CROSS REFERENCES.

Cities with less than 250 electors cannot be incorporated, NRS 265.010

#### WEST PUBLISHING CO.

Municipal Corporations ¶ 5 to 7.

WESTLAW Topic No. 268.

C.J.S. Municipal Corporations §§ 7 to 9.

#### NRS 266.029 Opinion of board of county commissioners on advisability of incorporation and feasibility of proposed city; election required.

1. Upon conclusion of the final hearing, the board of county commissioners may take the matter under consideration and shall, within 30 days after the conclusion of the hearing, issue an opinion, in writing, concerning the advisability of the incorporation and the feasibility of the proposed city.

2. The board shall designate a date on which the election will be held. The date of the election must not be earlier than 60 days nor later than 120 days after the board issues its opinion.

3. The board shall cause notice of the election to be published in a newspaper of general circulation within the county at least once each week for 3 consecutive weeks. The final publication of notice must be published before the day of the election.

4. The notice must include a copy of the petition, a description of the area proposed to be incorporated, the statement of the estimated fiscal effect of the proposed incorporation prepared pursuant to NRS 266.0263, the location of the polling places and the date and time of the election.

(Added to NRS by 1987, 1703; A 1989, 237)

**NRS 266.031 Withdrawal of petition.** A petition for incorporation may be withdrawn at any time before the 30th day preceding the day of the election held pursuant to NRS 266.029 if a notice of withdrawal signed by at least four members of the committee is filed with the county clerk. Upon filing the notice of withdrawal, no further action may be taken on the petition for incorporation.

(Added to NRS by 1987, 1703)

#### WEST PUBLISHING CO.

Municipal Corporations ¶ 12(5).

WESTLAW Topic No. 268.

C.J.S. Municipal Corporations § 17.

#### NRS 266.032 Form and contents of ballot. The ballots used for the election held pursuant to NRS 266.029 must:

1. Be in substantially the following form:

Shall the area described as .....(describe area) be incorporated as the City of ..... (name of city)?

Yes .....

No .....

The voter shall mark the ballot by placing a cross (x) next to the word "yes" or "no."

2. Contain the statement of the estimated fiscal effect of the proposed incorporation prepared pursuant to NRS 266.0263.

3. Contain a copy of the map or plat that was submitted with the petition pursuant to NRS 266.019 and depicts the existing streets, sewer interceptors and outfalls and their proposed extensions.

(Added to NRS by 1987, 1703; A 1989, 237)

# EXHIBIT 15

EXHIBIT 15

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# Fernley Incorporation Committee

Debra Brazell, Chairman  
Randy Ashley  
Linda Gregory  
Karen Streckfus  
Dave Zimmerman  
Michelle Mackler, Secretary

P.O. Box 1553  
Fernley, NV 89408

*Looking To The Future*

March 27, 2000

Committee on Local Government Finance  
Marvin Levitt, Committee Chairman  
Nevada Legislative Building – Room 2135  
401 Wouth Carson Street  
Carson City, Nevada 89701

**Subject: Fernley Town Incorporation**

**Members of the Committee:**

In response to your inquiry, and request, the Fernley Incorporation Committee respectfully responds and submits the following regarding NRS 266.0285, items A – J and M - O.

**A. Fernley's population, and density of population:**

1. Fernley has grown from a small farm community to a town with over 8030 people. Lyon County is Northern Nevada's growth leader, with a population increase of almost 60 percent during the past decade. U.S. Census 2000 estimates that for 1999 Lyon County is the 30<sup>th</sup> fastest growing county in the nation. The population increased in Lyon County from 20,001 in 1990 to 34,150 in 1999, an increase of 14,149, or 70.9%. Most of this growth is in Fernley.
2. The population and density is equal to or greater than other incorporated cities in Nevada.

**B. The land area, land uses, topography, natural boundaries and drainage basin:**

1. Fernley's growth is fueled by its 5,000-acre Nevada Pacific Industrial Park, home of Amazon.Com distribution center and other large (*Fortune 100*) companies.
2. Please see **Exhibit A**, which identifies existing land uses by acres.
3. Please see the *Existing Land Use Map*.
4. Please see the *Schematic Physical Constraints Map*.

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JA 3550

Master

**C. The extent to which the area is devoted to agriculture, mineral production or other uses that may not require significant improvements to the property:**

1. Agriculture plots of 100 acres plus has been given the opportunity to opt out of incorporation. Landowners that decided to opt out are listed in the petition on pages 1 and 2. A binder with the certified letters to the 100 acres + property owners, and their responses are available for inspection.
2. Nevada Cement along with their large limestone mine was excluded in the incorporation, as they used their option to opt out of the incorporation.
3. Most of the farm ground is changing to smaller developed parcels.

**D. The extent of commercial and industrial development:**

1. UPS, which is ranked 52<sup>nd</sup> in the *Fortune 500*, who plans to cover its purchase of 230 acres with some 3.5 million square feet of warehouse and logistic support facilities. The first building, at 256,000 square feet, is leased and managed by UPS solely for logistics service to its client Allied Signal, a Fortune 500 aerospace and automotive parts manufacturer. The site is UPS's western distribution campus providing third party logistics in 11 states. Quebecor Printing the second largest commercial printer in the United States, completed a 410,000 square foot building in 1999. MSC Industrial Supply, a direct mail supplier, occupies a 350,000 square foot facility, and is situated on 50 acres of Fernley land. MSC generates over \$500 million in annual sales from its 4,000-page catalogue. Ultimately, MSC will cover an area of 1,440,000 square feet, (that's the equivalent of 25 football fields). Amazon.Com, the worldwide bookseller is at the heart of the industrial development and operates a magnificent 600,000 + square foot facility. Without question, the greatest eruption in Lyon County's industry boom is now occurring in the town of Fernley.

**E. The extent and age of residential development:**

1. The majority of growth in Fernley has developed in the last 8 to 10 years. Fernley emerged in 1905 when the Newlands Project first supplied Truckee River water to the Fernley-Fallon corridor. The town had 466 people in 1941 and 1,470 residents in 1970. By 1982, the population had swelled to 4,200. The current grocery store was built in 1981. Over 500 new homes have been built during the past 15 months.

**F. The comparative size and assessed value of subdivided land and un-subdivided land:**

1. 1999-2001 assessed valuation is \$212,518,036; this is approximately 32% of Lyon County. Please see the Assessed Valuation report, Exhibit B.
2. Fernley's assessed valuation is greater than 7 of the counties in the state of Nevada.
3. The present tax rate is .1428 of .2271 allowed.



**G. The current and potential issues concerning transportation:**

1. Nevada Department of Transportation District Traffic Office reports the following as of March 23, 2000:
  - a. Plans to widen 95A from Freemont to Interstate 80 to a five-lane road. This will include sidewalk, curb and gutter.
  - b. Installation of a traffic signal at the intersection of 95A and Newlands Dr.
  - c. Replacement of the Railroad Separation Bridge between Freemont and 50 Alt A in the next 2 years.
  - d. Plans to widen 50 Alt A between Fernley and Fallon are included in the 10-year plan.
  - e. Replacement and improvement of the 95A Truckee Canal Bridge are also included in the 10-year plan.
  - f. State Route 427 Railroad Underpass Bridge is under assessment.
2. All highways are sufficient to service growth.
  - a. I-80 on the North side
  - b. Highway 95 runs through town to South Lyon County connecting to Highway 50
  - c. Highway 447 runs North to North-East California
  - d. Highway 50 Alt, East to Fallon
3. Please see the 1999 Nevada Department of Transportation (NDOT) report, **Exhibit C.**
4. Please see the *Existing Transportation Network Map.*

**H. Past expansion of population and construction:**

1. The population in 1996 was 6,010. The State Demographer reports population to be 8,030; this is 33% growth in 3 years.
2. In the past, Fernley's population in large, commuted to the Reno/Sparks area for work. With the recent industrial expansion, this is changing due to the availability of local jobs. In fact, many Reno/Sparks residents are commuting to Fernley for work.

**I. The likelihood of significant growth in the area and in adjacent incorporated and un-incorporated areas during the next 10 years.**

1. Fernley is ideally located at the gateway to the Pacific Coast market. The Industrial Parks offer significant tax, political, environmental and shipping advantages which are virtually unparalleled by any other industrial parks throughout the western states. The industrial park have attracted topflight companies such as UPS, Quebecor Printing, Allied Signal, Amazon.Com, MSC Industrial Supply, Polyglass, and Fortifiber, adding substantial job opportunities to Fernley and to the surrounding area. Another important element to the Fernley area is I-80 at the confluence of the highways 95 and 50 and the Union Pacific Railroad mainline. As the industrial parks grow, so grows Fernley, with many new housing developments sprouting throughout the community. This growth has propelled Lyon County into a top spot as one of the fastest growing counties in the nation.

2. With Fernley's wide-open spaces, industrial parks, affordable housing, quality of life, and new commercial businesses, the likelihood of significant growth is certain. Future growth is definite and unavoidable.

**J. The present cost, method and adequacy of regulatory controls and governmental service, including, but not limited to, water and sewer service, fire rating and protection, police protection, improvement and maintenance of streets, administrative services and recreational facilities in the area and the future need for such services and controls:**

1. Fernley currently has the entire essential regulatory controls and government services listed above. Please see the *Public Facilities Map*.
2. **Water and Sewer Service:** Fernley Town Utilities operates the present water and sewer systems. Fernley Utilities has provided some general statements regarding the water and wastewater system, please see the attached letter, **Exhibit D**. Please also see the *Schematic Sewer and Water Distribution Maps*, (these 2 maps are unfinished but are somewhat helpful). Please see the Petition, page 4.
3. **Fire Rating and Protection:** Fire service is provided through the North Lyon County Fire District, proposals are included in the Petition, page 3. Please also see Assessed Valuation Report, **Exhibit B**.
4. **Police Protection:** The Lyon County Sheriff's Department is in place and provided by the County. Proposals are included in the Petition, page 3. Please see the attached letter from Sheriff Smith, **Exhibit E**.
5. **Improvement and Maintenance of Streets:** Lyon County is providing improvement and maintenance of streets. Proposals are included in the Petition, page 3 and 4.
6. **Administrative Services:** Administrative services are in place. Proposals are included in the Petition, pages 3 and 4. Please also see the attached letter from Judge Lehman, **Exhibit F**.
7. **Recreational Facilities:** There are three public parks in the Town of Fernley. Lyon County provides funds to the Town of Fernley through the Lyon County General Fund. There is also a public swimming pool. Proposals are included in the Petition, page 3.

**M. The probable effect of the proposed incorporation and of any alternatives to incorporation on the availability and requirement of water and other natural resources:**

1. The Incorporation Committee is not aware of any effect on the availability and requirement of water and other natural resources due to incorporation. Any probable effect on water and other natural resources will be due to ongoing growth with the impact being mitigated by incorporation and planning.

**N. Any determination by a governmental agency that the area is suitable for residential, commercial or industrial development, or that the area will be opened to private acquisition:**

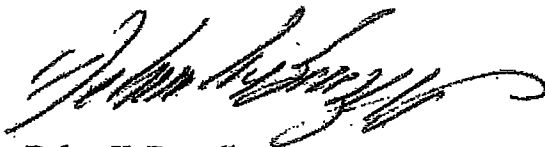
1. The Fernley area is in use for residential, commercial and industrial development, and most of the area is open for private acquisition. Development is underway. Please see the *Existing Zoning Map*.
2. If approved for incorporation, Fernley will become the 9<sup>th</sup> largest city in Nevada with 10 cities being smaller in population.

**O. The recommendation of any commission, agency, district or member of the public who submits a written report:**

1. The committee regards the verified petition to be a written public opinion, requesting that the incorporation issue be placed on the ballot, please see page 1 of the Petition.
2. All County Commissioners have expressed support for incorporation.

If the Fernley Incorporation Committee can be of any further assistance, please contact me at (775) 575-4100.

Respectfully,



Debra K. Brazell  
Fernley Incorporation Committee, Chairman

DKB:dm  
File: local gov.

# EXHIBIT 16

EXHIBIT 16

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To the Board of County Commissioners of Lyon County, Nevada:

We, the undersigned qualified electors of the State of Nevada respectfully petition the Board of County Commissioners to submit a proposal to incorporate as a city certain unincorporated contiguous area located within Lyon County, namely that area constituting the Town of Fernley, to the qualified electors who reside within the area to be incorporated, for their approval or disapproval at the September 5, 2000 Primary Election, the November 7, 2000 General Election, or at a special election to be held for that purpose.

The following is the description of the area proposed to be incorporated:

1. THE AREA PROPOSED TO BE INCORPORATED LIES WITHIN A PORTION OF LYON COUNTY, STATE OF NEVADA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

SAID AREA IS BOUNDED ON THE SOUTH BY THE PORTION OF THE COMMON TOWNSHIP LINE OF TOWNSHIP EIGHTEEN NORTH (T18N) AND TOWNSHIP NINETEEN NORTH (T19N) M.D.B. & M. WHICH LIES BETWEEN THE WEST BOUNDARY OF CHURCHILL COUNTY, AND THE EAST BOUNDARY OF STOREY COUNTY.

AND THEN; BOUNDED ON THE EAST AND NORTH BY THAT PORTION OF THE COMMON BOUNDARY OF LYON COUNTY AND CHURCHILL COUNTY TO ITS INTERSECTION WITH WASHOE COUNTY ON THE WEST LINE OF SECTION 4, TOWNSHIP TWENTY NORTH (T20N), RANGE TWENTY FIVE EAST (T25E) AND LYING NORTH OF THE COMMON TOWNSHIP LINE OF TOWNSHIP EIGHTEEN NORTH (T18N) AND TOWNSHIP NINETEEN NORTH (T20N) M.D.B. & M.,

AND THEN; BOUNDED ON THE NORTH BY THE COMMON BOUNDARY OF LYON COUNTY AND WASHOE COUNTY TO ITS INTERSECTION WITH THE EAST BOUNDARY OF STOREY COUNTY ON THE NORTH LINE OF SECTION 10, TOWNSHIP TWENTY NORTH (T20N), RANGE TWENTY FOUR EAST (R24E),

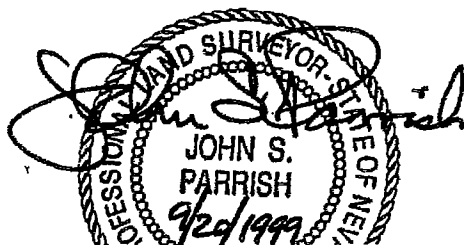
AND THEN; BOUNDED ON THE WEST BY A PORTION OF THE COMMON BOUNDARY OF LYON COUNTY AND STOREY COUNTY WHICH LIES BETWEEN THE NORTH BOUNDARY OF LYON COUNTY AND THE COMMON TOWNSHIP LINE OF TOWNSHIP EIGHTEEN NORTH (T18N) AND TOWNSHIP NINETEEN NORTH (T19N) M.D.B. & M., EXCLUDING CERTAIN PARCELS UNDER 100 ACRES.

EXCEPTING THEREFROM THE FOLLOWING PARCELS DESCRIBED AS PER THE LYON COUNTY ASSESSOR'S MAPS AND RECORDS:

LYON COUNTY ASSESSOR'S PARCEL NO.	ACRES	PARCEL MAP PAGE NO.	LOCATED WITHIN A PORTION OF THE UNINCORPORATED TOWN OF FERNLEY
20-581-01	183.17	20-58	POR. E2E2 SEC. 22 OIR SEC. 23, T20N, R25E, M.D.B. & M.
21-031-05	333.60	21-03	POR SEC. 33, T21N, R25E, M.D.B. & M.
21-031-06	333.60	21-03	S2-T21N, R25E, M.D.B. & M.
21-042-01	267.40	21-04	N2 SEC. 11, T20N, R24E, M.D.B. & M.
21-161-03	160.00	21-16	N2-T20N, R24E, M.D.B. & M.
21-161-06	110.00	21-16	N2-T20N, R24E, M.D.B. & M.
21-164-04	4520.87	21-16	POR. T19-20N, R24E. M.D.B. & M.
21-164-05	1184.00	21-16	POR. T19-20N, R24E. M.D.B. & M.

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21-107-23	21-107-23	21-107-23	21-107-23
21-164-28	423.72	21-16	POR. SEC. 28, T20N, R24E, M.D.B. & M.
21-164-29	102.22	21-16	POR. SEC. 28, T20N, R24E, M.D.B. & M.
21-165-17		21-16	Old Parcel No - See 21-165-22
21-165-22	385.63	21-16	POR. SEC. 15, T20N, R24E, M.D.B. & M.
21-201-01	668.12	21-20	SEC. 3, T20N, R25E, M.D.B. & M.
21-201-07	131.52	21-20	POR. SEC. 15, T20N, R25E, M.D.B. & M.
21-201-23	476.18	21-20	POR. SEC. 9, T20N, R25E, M.D.B. & M.
21-201-25	70.18	21-20	N2-T20N, R25E, M.D.B. & M.
21-201-26	186.62	21-20	N2-T20N, R25E, M.D.B. & M.
21-221-10	131.61	21-22	POR. N2 & POR. N2S2, SEC. 8 & POR. NW4NW4 SEC. 8
21-241-07	305.34	21-24	N2 & POR. 2 SEC. 8, T20N, R25E, M.D.B. & M.
21-261-04	170.13	21-26	POR. SEC. 17, T20N, R25E, M.D.B. & M.
21-301-12	127.39	21-30	S2-T20N, R25E, M.D.B. & M.
21-301-14	112.39	21-30	S2-T20N, R25E, M.D.B. & M.
21-301-32	80.00	21-30	S2-T20N, R25E, M.D.B. & M.
21-301-33	144.00	21-30	S2-T20N, R25E, M.D.B. & M.
21-302-59	160.00	21-30	S2-T20N, R25E, M.D.B. & M.
21-302-92	166.64	21-30	S2-T20N, R25E, M.D.B. & M.
21-302-93	254.88	21-30	S2-T20N, R25E, M.D.B. & M.
21-321-06	131.17	21-32	SEC. 19, T20N, R25E, M.D.B. & M.
21-392-01	1851.22	21-39	N2-T20N, R26E, M.D.B. & M.
21-412-01	8113.00	21-41	S2-T19N, R23E, M.D.B. & M.
21-412-02	160.00	21-41	S2-T19N, R23E, M.D.B. & M.
21-441-01	164.02	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-02	381.00	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-05	684.80	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-22	160.00	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-23	160.00	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-25	160.00	21-44	POR. SEC. 11, T19N, R25E, M.D.B. & M.
21-441-26	320.00	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-35	160.00	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-44	160.02	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-69	160.50	21-44	N2-T19N, R25E, M.D.B. & M.
21-441-90	142.61	21-44	N2-T19N, R25E, M.D.B. & M.
21-451-14	160.00	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-18	160.00	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-37	320.00	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-39	160.00	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-40	160.00	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-81	161.07	21-45	S2-T19N, R25E, M.D.B. & M.
21-451-84	152.70	21-46	N2-T19N, R26E, M.D.B. & M.
21-461-01	163.18	21-46	POR. SEC. 5, T19N, R26E, M.D.B. & M.
21-461-06	631.83	21-46	N2-T19N, R26E, M.D.B. & M.



2. The proposed name is the City of Fernley.
3. The total acreage of the area is approximately 76,551 of which 44,447 acres is State/Federal Government property.
4. The number of persons who reside in the area is recorded by the demographer as 7,020 approximate and estimated by the committee to be 9,000 plus.
5. The number of owners of record of real property within the area is approximately 5,890 of which 2,964, includes non-taxable, (school & BLM lands) and 2,926 of which is taxable property owners.
6. The area to be included in the proposed City meets the suitability requirements of NRS 266.017-
  - It is currently used, or suitable for, residential, commercial, industrial or government purposes;
  - It is contiguous and urban in character, and includes all contiguous area used for residential purposes;
  - It includes the entire area of the unincorporated town now existing within the area proposed for incorporation.
7. The Fernley Incorporation Committee's statement and plan for providing police and fire protection, maintaining the streets, providing water and sewer services, collecting the garbage and providing administrative services in the proposed new City of Fernley is as follows:

**Police Protection:**

Lyon County Sheriff's Department is in place and provided by the County. These services include the employment by Lyon County Sheriff on a permanent and full-time basis, of at least three persons who primary functions specifically include:

- (a) Routine patrol;
- (b) Criminal investigations;
- (c) Enforcement of traffic laws; and
- (d) Investigation of motor vehicle accidents.

The Sheriff's Department is funded with General Fund Revenue from Lyon County. The amount allocated to Lyon County to provide Police Protection may be decreased by the amount allocated to the new City of Fernley. It is proposed that this allocation be used to negotiate and enter into a inter-local agreement or contract with Lyon County Sheriff's Department to continue police protection. It is also proposed to appoint the Lyon County Sheriff as the Chief of Police for the new City of Fernley and share the proportioned financial responsibility of his employment. It is proposed that through negotiations, the new City of Fernley will utilize the existing facilities, supplies, equipment, and capital assets.

**Fire Protection:**

Provisions for prevention and suppression of fire and rescue, and the acquisition and maintenance of the equipment necessary to provide these services are provided by the North Lyon County Fire Protection District. No changes are anticipated at this time.

**Parks & Recreation:**

Lyon County provides funds to the Town of Fernley through the Lyon County General Fund. The Town of Fernley employs on a permanent and full-time basis, persons who administer and maintain recreational facilities and parks. It is proposed that the existing agreement and allocation continue. The new City of Fernley will negotiate and enter into an inter-local agreement with Lyon County to continue these services.

**Construction, Maintenance & Repair of Roads:**

Lyon County has provided construction, maintenance, and repair of roads for the Town of Fernley, including acquisition, operation, and use of material, equipment and facilities that are used exclusively for the construction, maintenance or repair of roads that is necessary for the safe and efficient use of the roads, including:

- |                         |                |
|-------------------------|----------------|
| a. Grades or re-grades; | s. Bridges;    |
| b. Curb.                | t. Overpasses. |

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g.	Cleaning;	y.	Artificial lights and lighting equipment
h.	Sanding or snow removal;	z.	Parkways;
i.	Crosswalks;	aa.	Fences or barriers that control access;
j.	Sidewalks;	ab.	Control of vegetation;
k.	Culverts;	ac.	Rights of way;
l.	Catch basins;	ad.	Grade separations;
m.	Drains;	ae.	Traffic separators;
n.	Sewers;	af.	Devices and signs for control of traffic;
o.	Manholes;	ag.	Facilities for personnel who construct, maintain or repair roads; and
p.	Inlets;	ah.	Facilities for the storage of equipment or repair roads.
q.	Outlets;		
r.	Retaining walls;		

The amount allocated to Lyon County to provide construction, maintenance and repair of roads may be decreased by the amount allocated to the new City of Fernley. It is proposed that this allocation be used to negotiate and enter into an inter-local agreement with Lyon County for the services listed above. In addition, it is proposed that the new City form the Fernley Public Works Department. The new department will work with Lyon County and will be responsible for building permits and engineering. The new department will employ a public works director/engineer, and two building inspectors.

#### **Water and Sewer Service:**

The Town of Fernley currently owns and operates Fernley Utilities as an enterprise fund. It is proposed that the water and sewer services will operate under the new City of Fernley.

#### **Collection of Garbage:**

Garbage collection is currently franchised to a disposal service. The Committee proposes no change at this time.

#### **City Officers:**

It is proposed that the new City of Fernley officers consist of an elected mayor and Five elected city councilmen. It is also proposed to employ a city manager.

#### **City Attorney:**

The amount allocated to the Town of Fernley to provide an attorney to the Town of Fernley, may be decreased by the amount allocated to the new City of Fernley. It is proposed that this allocation be used to negotiate and enter into a contract for legal services from an attorney in good standing admitted to practice law in the courts of Nevada.

#### **City Clerk/Treasurer:**

The amount allocated to the Town of Fernley to provide clerk services to the Town of Fernley may be decreased by the amount allocated to the new City of Fernley. It is proposed that this allocation be used to hire a City Clerk/Treasurer. It is proposed that the City Clerk and the City Treasurer position be combined into the office of the City Clerk and Treasurer.

#### **Municipal Court:**

It is proposed that the new City of Fernley appoint the existing Justice of the Peace as the Municipal Court Judge and contract directly with that Justice of the Peace for these services. In addition, the City would direct the Justice of the Peace to hire a part time municipal clerk or contract with his existing staff.

8. The attached map indicates the existing dedicated streets, sewer interceptors and out-falls, and their proposed extension.



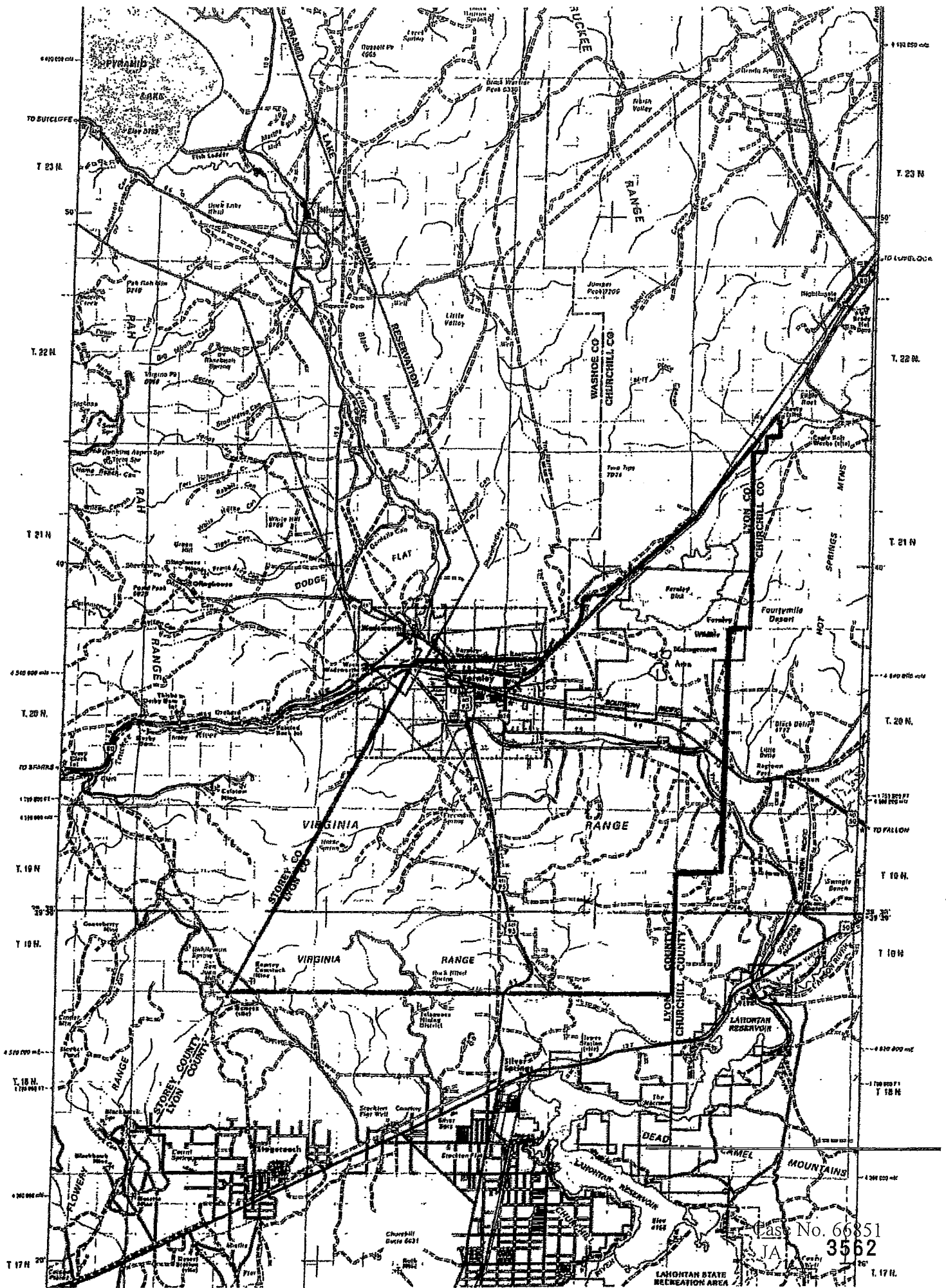
<b>ESTIMATED SOURCES AND REVENUE</b>		
<b>FUND BALANCE JULY 1, 1998</b>	<b>\$ 65,000.00</b>	<b>\$ 65,000.00</b>
<b>TAXES</b>		
Ad Valorem	343,835.00	\$ 343,835.00
<b>BUSINESS LICENSES AND PERMITS</b>		
State Annual Fees of Gaming	53,000.00	
City Gaming Licenses	65,000.00	
Business Licenses	75,000.00	
Liquor Licenses	10,500.00	
City Gaming Tax (1/2% of Gross Gaming revenue)	25,000.00	
Sub Total		\$ 228,500.00
<b>INTERGOVERNMENTAL REVENUES</b>		
Consolidated Tax	87,979.00	
County Option 1 Cent Motor Vehicle Fuel Tax	47,872.00	
1.75 Cents Motor Vehicle Fuel Tax	77,357.00	
2.35 Cents Motor Vehicle Fuel Tax	62,943.00	
Ad Valorem Road Funds	115,000.00	
County General Ad Valorem	86,000.00	
RTC Shared Revenue	69,000.00	
Sub Total Taxes, Licenses & Revenues		\$ 546,151.00
<b>FRANCHISE FEES</b>		
Sanitation	15,000.00	
Telephone	18,550.00	
Gas	20,000.00	
Cable TV	10,000.00	
Electric	14,788.00	
Sub Total Franchise Fees		\$ 78,338.00
<b>FINES &amp; FORFEITS</b>		
Fines	26,000.00	
<b>OTHER</b>		
Interest	12,500.00	
Engineering Services	45,000.00	
Building Rental	12,000.00	
Parks	45,000.00	
Miscellaneous	500.00	
Sub Total Fines, Forfeits & Other		\$141,000.00
<b>NON-BUSINESS LICENSES &amp; PERMITS</b>		
Building Permits	200,000.00	
Real Estate Transfer Tax	10,000.00	
Dog Licenses	600.00	
Work Permits	6,000.00	
Subtotal Non-Business Licenses & Permits		\$ 216,600.00

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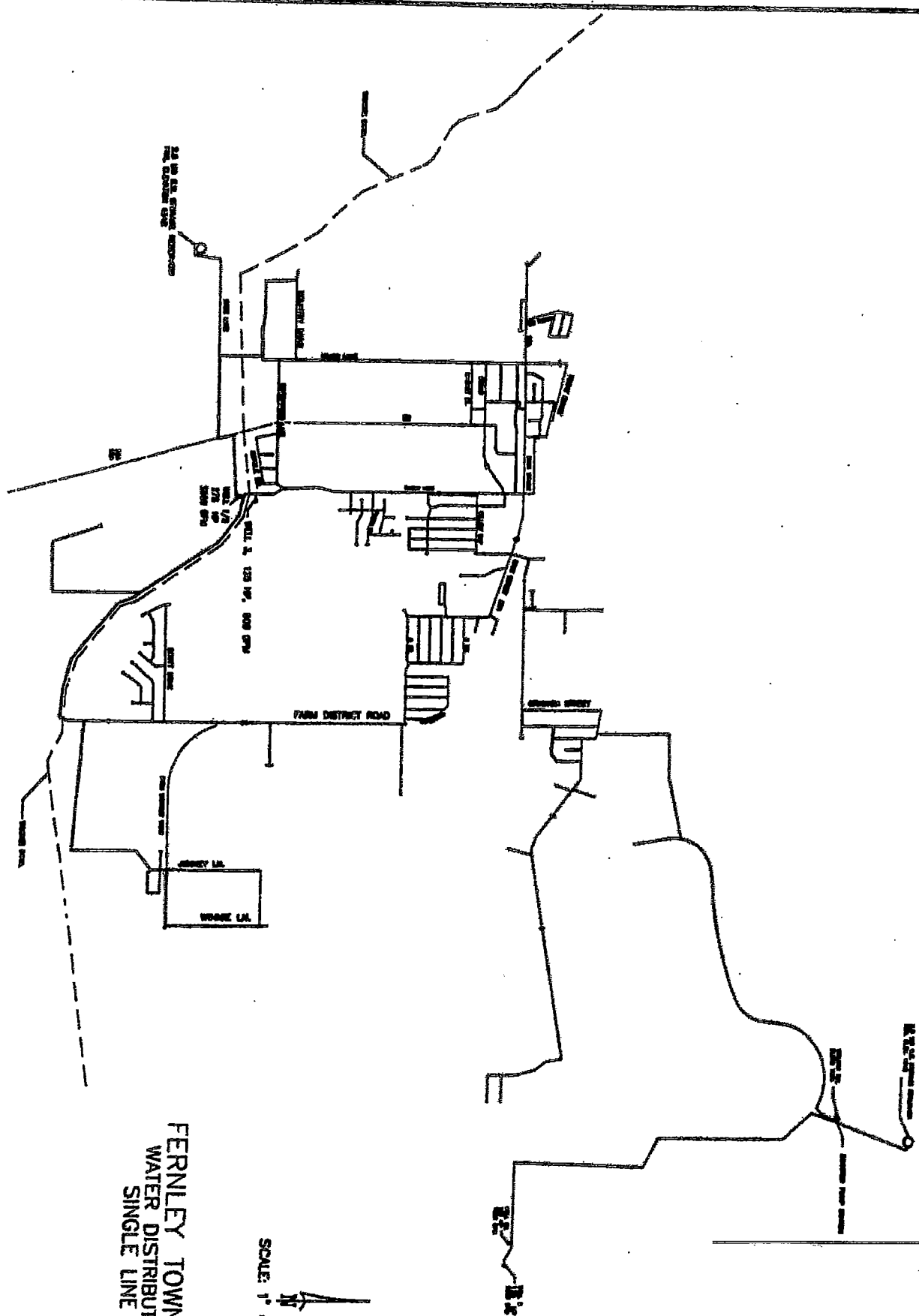
<b>ESTIMATE OF COSTS</b>		
<b>ADMINISTRATION</b>		
Mayor and Five City Counsel	\$ 23,700.00	
Benefits	5,000.00	
City Manager	61,500.00	
Benefits	24,087.00	
Municipal Court/City Judge and City Clerk	75,000.00	
City Attorney	65,000.00	
City Clerk/Treasurer	35,875.00	
Benefits	13,275.00	
Sub Total		\$ 303,437.00
<b>CONSTRUCTION, MAINTENANCE AND REPAIR OF ROADS</b>		
Inter-Local Agreement with Lyon County Public Works Dept. for Construction, Maintenance, & Road Maint.	\$ 160,000.00 Negotiated Services	
Public Works Director / Engineer	52,500.00	
Benefits	19,425.00	
Building Inspectors (2)	70,000.00	
Benefits	25,900.00	
Water & Sewer Service	Enterprise Fund	Enterprise Fund
Collection of Garbage	Franchised	Franchised
Sub Total		\$ 327,825.00
<b>PARKS AND RECREATION</b>		
Inter-Local Agreement with Lyon County	\$ 90,000.00 Negotiated Services	\$ 90,000.00
<b>POLICE PROTECTION</b>		
Contract with Lyon County/Chief of Police	\$ 859,000.00 Negotiated Services	\$ 859,000.00
<b>FIRE PROTECTION</b>		
Provided by North Lyon County Fire Protection District	Existing	Existing
Reserves	\$ 39,162.00	\$ 39,162.00
<b>TOTAL ESTIMATED COSTS</b>		<b>\$1,619,424.00</b>

The full cost of services being provided to Fernley, by Lyon County, have not been delineated. The Committee on Local Government Finance and the Department of Taxation will define these costs in the forthcoming studies and reports. It is proposed that some services currently being provided by Lyon County will continue to be provided to Fernley through inter-local agreements and/or contracts.

Incorporation will give the new City of Fernley the ability to work directly with entities such as the Bureau of Reclamation, Bureau of Land Management, Nevada Department of Transportation, etc., increasing Fernley's ability to efficiently negotiate for and provide additional needs and services. Bonds and grants for important services will also be available to the new city.



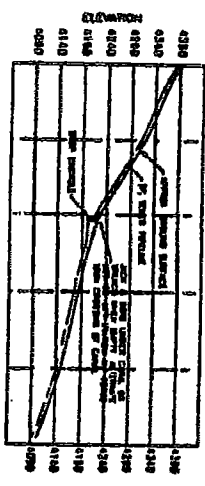
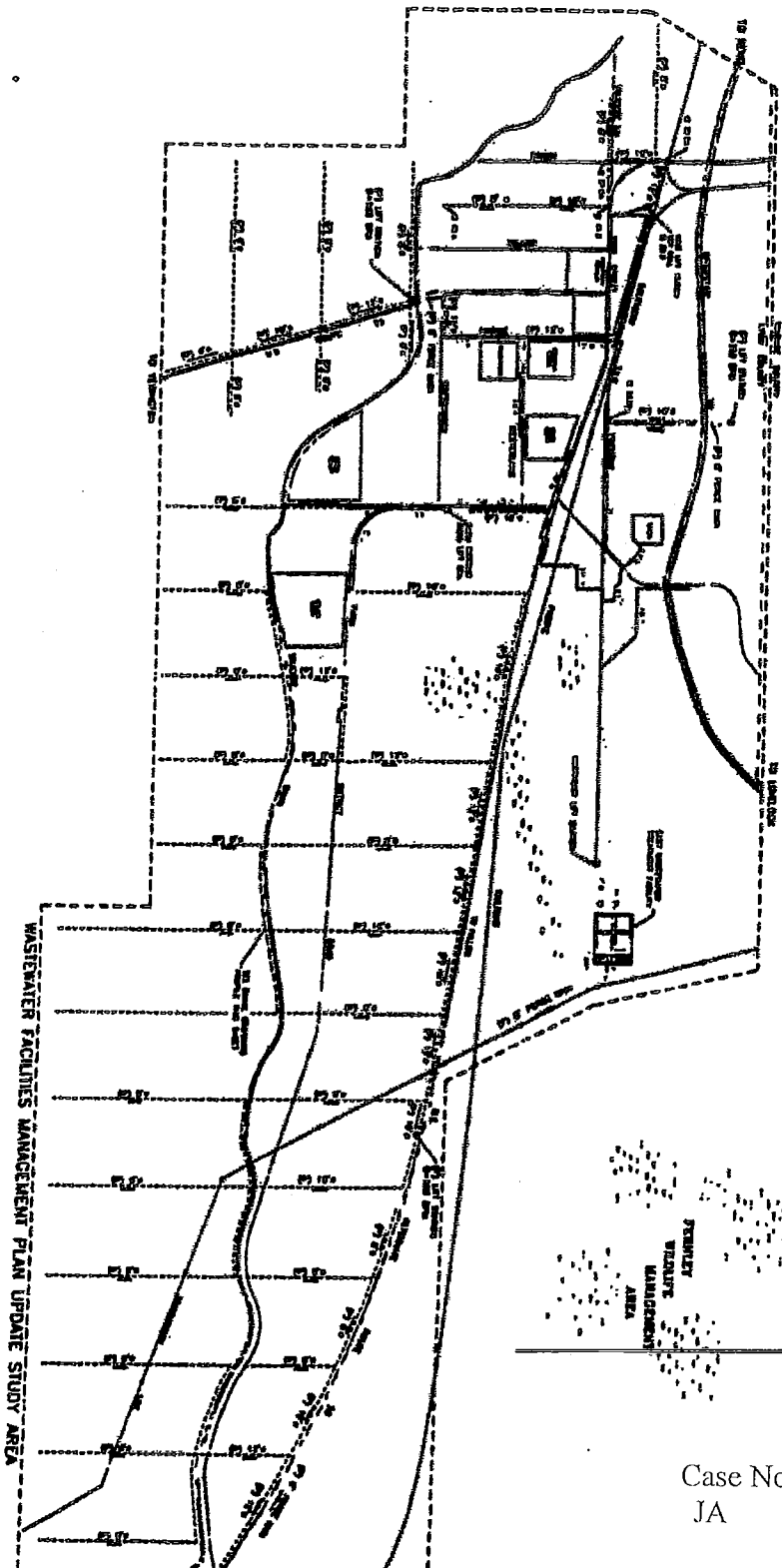
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FERNLEY TOWN UTIL  
 WATER DISTRIBUTION SYST  
 SINGLE LINE DIAGRAM

SCALE: 1" = 800'





PROPOSED CANAL CROSSING PROFILE



- KEY
- EXISTING SCENE LINE
  - EXISTING FLOOD LINE
  - PROPOSED FLOOD LINE
  - PROPOSED CANAL CROSSING PROFILE
  - PROPOSED FLOOD LINE
  - PROPOSED FLOOD LINE
  - EXISTING FLOOD LINE
  - EXISTING FLOOD LINE

# EXHIBIT 17

EXHIBIT 17

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then whatever revenue stream that comes from that won't be there either. So that's where the differences are. The city of Fernley, town of Fernley and Lyon County as a whole have a relatively low tax rate in relationship to the total revenue, what we used to call the maximum allowed combined revenue – the split between CTX or sales tax revenues and property tax. Part of that is because back in 1981 and that timeframe, Lyon County did have a tax rate very close to or at \$5.00. You guys remember how the formula worked – it was based on the relative tax rate in place at the time of the tax shift. So, they've been the beneficiary of a very large proportion of their operating revenues coming from the sales tax as opposed to the property tax. In the other handout I did prepare for you, the property tax comparison, and basically the first half of this report is just a trade-off. If the County were to give up a million dollars in allowed ad valorem revenue, what that cost per hundred in assessed value which is \$14.88 it would cost the residents of Fernley 47 cents. So indeed, if the results of this incorporation are dependent on property tax, there will be a significant impact. And I think that's what this report shows. They feel that they don't have to raise taxes and they can negotiate for services and or revenue with the County which would again be coming out of their heavily-weighted consolidated tax distribution.

In the lower half of this report, I've given you the overlapping tax rate for the town of Fernley, and that includes the state rate, the schools, etc., at 2.858. That's based on the revenue projections we have just prepared so that we take everyone's rate that's allowed or proposed, then that would be the rate that would be a taxpayer impact. And that would generate \$1,000 per household for \$100,000 home. That's not extremely high as all of us know, but that would be what the existing people pay in Fernley now, regardless of . . . however, neither Lyon County nor the town of Fernley levy the maximum rate allowed and if they were to, by way need for additional services or impact in some way, if they were to have to utilize an additional tax rate, the maximum tax rate at this point that could be imposed in the proposed city is \$3.41 and that would make basically \$193 difference to the average homeowner. I wanted to show both of those simply because I don't truly know whether or not, as Rebecca pointed out, and there are questions and certainly the community is growing and there will be needs in that community growing as fast as they are; regardless of whether they maintain their status as a town, a fire district and a swimming pool district or if they become a city and incorporate all of that. The potential for a higher tax rate exists, but it exists any given day, again, regardless of the incorporation of the city. As the needs of the community grow, with growth, we have to pay for it and they enviable position that they have a lot of industry that keeps the tax rates down. But certainly they do have the opportunity and the tax rate within the existing tax structure, to levy a higher rate if it were required. So basically that was the analysis required per statute and I hope I've addressed, and if you have any other questions, I would be happy to address them.

**Chairman Leavitt:** When I looked at this, it looked like to me there are several things this is dependent on. Look at the consolidated tax number. We show \$98,000 coming in per the consolidated tax for this entity on a \$212 million assessed valuation and we show \$238,000 to the town of Yerington on a \$38 million assessed valuation. You look at relationships, they are really very different. If you look at the other cities, we also see substantially more coming in from consolidated tax. However, it looks like this proposal anticipates the county providing a number of services rather than the city doing them, and the County providing these services probably makes it somewhat equivalent to what they would otherwise have a consolidated tax if they had reached some agreement to transfer money to the County instead of services directly. Anyway, the result of all that, it seems to me, anyway that the – how effective this can be is gonna be determined largely on how willing and how able the city is to reach agreement with the County eventually on the provision of services or the trading back and forth of this money, mostly from the consolidated tax I would assume. When we look at everything, if indeed, the working with the County goes smoothly I think we clearly have the ability to provide the revenues needed for a city. If the County says no, go take a walk, then you've got big problems. Is that wrong?

**Debra Brazel:** That's correct. The law, the way it was set up before, the consolidated tax law, there would be a specific fund, you would know exactly what that amount of money was that you could spend, then that changed. At first, I thought, oh no, we can't do this, there is no way we can do this. But I continued in my research I discovered that actually the change in law is really equitable and really, really works nicely, and as I said before, gives us a chance to work into a easy-like. We really are in the ideal situation, because right now, the county has been so supportive, they've taken good care of Fernley in the past and I don't see any reason why there can't be an agreement made and of course that will have to be between the new officials and the county. But the county is so very willing. I think that is one of the big keys here. The other thing I wanted to mention, all those services that are necessary with the exception of the municipal court and the money to pay for the mayor and the councilmen, all those services are there. And what's not there, there are other funds that can be negotiated for to take of those little things, the muni court can be changed around to where that money for the tickets will help take care of that. The foundation that Fernley has now is great, because everything we need to be a city is there now, and what is there now, according to law, will stay there, either by funds or by negotiated services.

**Member Mary Walker:** I was just thinking about a lot of what's happening in government in Nevada, and actually there's a lot of consolidation. Metro consolidation down south, for example, the sheriff's office and police office. And a lot of time those consolidations occur because they don't want to have two different administrations, or the burden of two different administrations, they consolidate. One of them I'm working on is up in Reno, the Reno Fire Department and the Truckee Meadows fire department. Just by consolidating those two, we're saving over \$600,000 just in administrative costs. The chief fiscal officer, chief executive officers, some of the administrative staff, that type of thing. When you look at what's been consolidated in Nevada, it's been fire, which is what you have here initially, sheriff and police, for example consolidated Metro, which is what you have here, you're judicial and municipal you have a lot of rural entities that have consolidated judicial and municipal courts, which is what you have here. So I like the approach in that you're not doubling up on the administration costs in a lot of these areas. And where you are having administration, you have administration now for it. So I think that's a good step forward.

**Debra Brazel:** Because of that, we can negotiate with the county because they've been doing that administration. So that money can come to Fernley and take care of what's needed there. We're in such an ideal situation and the time is now while we have a chance; it's taken the committee two years to get here before you; this is really a great day to come here before you. It's been quite an eye-opening and interesting experience. I've really gained quite a respect for the taxation and all of those laws and the way it all works because it's so protective and because it's set up that way. All these questions, like what Rebecca brought up, they're gonna be handled and they're gonna be taken care of by people qualified for it to get to that point, and ultimately, which is wonderful in an American way, the people get the final say.

Break.

**Chairman Leavitt:** Are there any additional comments anyone at the table wishes to make?

(No)

Anyone else? Come forward. Identify yourself.

**Danny Lunsford:** Danny Lunsford, a Fernley Town Advisory Board member, representing myself as a private citizen. [Comments ensued]