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 22 PART 3

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NRS 41.032(1) as a matter of law and that the Defendants are therefore entitled to judgment as a matter of law on those claims.[17]

H. Fernley lacks standing to bring separation-of-powers claims against the state.

A defendant is entitled to summary judgment when the plaintiff lacks standing to bring its constitutional claims against the defendant. *See Doe v. Bryan*, 102 Nev. 523, 524-26 (1986). When the plaintiff lacks standing, 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 constitutional claims. *Heller v. Legislature*, 120 Nev. 456, 460-62 (2004).

In this case, the Defendants contend that political subdivisions like Fernley lack standing to bring claims against the state alleging violations of state constitutional provisions unless the provisions exist for the protection of the political subdivisions, such as provisions which protect political subdivisions from certain types of special or local laws. *See City of Reno v. County of Washoe*, 94 Nev. 327, 329-32 (1978); *State ex rel. List v. County of Douglas*, 90 Nev. 272, 280-81 (1974).[18] The Defendants contend that the separation-of-powers provision of the Nevada Constitution does not exist for the protection of political subdivisions but exists for the protection of state government, not local government, by prohibiting one branch of state government from impinging on the functions of another branch of state government. Therefore, the Defendants contend that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law because the separation-of-powers provision does not exist for the protection of political subdivisions of the state.

Fernley contends that courts in other states have allowed political subdivisions to bring separation-

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[17] Because the Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1), the Court does not need to address the Defendants' additional arguments that Fernley's claims for money damages are also barred by sovereign immunity under NRS 41.032(2).

[18] *See also City of New York v. State*, 655 N.E.2d 649, 651-52 (N.Y. 1995) ("the traditional principle throughout the United States has been that municipalities . . . lack capacity to mount constitutional challenges to acts of the State and State legislation. . . . Moreover, our Court has extended the doctrine of no capacity to sue by municipal corporate bodies to a wide variety of challenges based as well upon claimed violations of the State Constitution.").

of-powers claims against the state.[19] Fernley contends that the cases cited by the Defendants stand for the proposition that political subdivisions lack standing to challenge certain decisions in which the state itself gives or takes away rights or powers to or from a local government. Fernley contends that the cases do not stand for the proposition that political subdivisions cannot allege that the state government has exceeded its constitutional authority in violation of the separation of powers. Rather, Fernley contends that the separation-of-powers provision protects not only the three branches of state government but also the constitutional rights of individuals. *See Bond v. United States*, 564 U.S.___, 131 S.Ct. 2355, 2365 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."). Therefore, Fernley contends that it would undermine the significance of the separation-of-powers doctrine if a political subdivision could not bring separation-of-powers claims to redress injuries caused by the state to its constitutional rights.

The Court holds that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law. Fernley is a political subdivision of the state created for the convenient administration of government. It is not an individual, and it does not possess the same personal constitutional rights enjoyed by individuals under federal and state law:

> Public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

Randolph County v. Ala. Power Co., 784 F.2d 1067, 1072 (11th Cir. 1986) (quoting *City of Safety*

[19] *See City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App. 1996) (holding that cities have standing to "challenge statutes on separation of powers grounds."); *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (affirming decision in which two local governments successfully argued that "the statute violates the principle of separation of powers."); 1 John Martinez, *Local Government Law* § 3.2 (2d ed. Supp. 2012) ("local government units are held to have standing to invoke the following state constitutional provisions against the state: . . . (3) separation of powers").

Harbor v. Birchfield, 529 F.2d 1251, 1254-55 (1976)). Therefore, the fact that individuals or private entities may have standing to bring separation-of-powers claims against the state does not, *ipso facto*, mean Fernley has standing to bring separation-of-powers claims against the state. Fernley is the only plaintiff in this case, and it must have its own standing to pursue separation-of-powers claims against the state. Whether individuals or private entities would have standing has no bearing on this case.

The determination of whether political subdivisions have standing to invoke the protections of a state constitutional provision "is a question of state practice." *City of Austin*, 930 S.W.2d at 684 (quoting *Williams v. Mayor & City of Baltimore*, 289 U.S. 36, 47-48 (1933)). Therefore, although courts in other states have allowed political subdivisions to bring separation-of-powers claims against the state, this Court may not consider those decisions without first looking to the Nevada Supreme Court's decisions to determine the practice in this state.

In *City of Reno v. County of Washoe*, the Nevada Supreme Court held that Nevada's political subdivisions lack standing to bring claims for violations of the due process clause of Article 1, Section 8 of the Nevada Constitution because that provision does not exist for the protection of political subdivisions of the state. 94 Nev. at 329-31. By contrast, the Supreme Court also held that Nevada's political subdivisions have standing to bring claims for violations of Article 4, Sections 20 and 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. Thus, in Nevada, the determination of whether political subdivisions have standing to invoke the protections of a state constitutional provision depends on whether the state constitutional provision exists for their protection.

Although there are several provisions of the Nevada Constitution that exist for the protection of political subdivisions, the separation-of-powers provision is not one of them. The purpose of the separation-of-powers provision is to protect the constitutional design and structural framework of state

government by preventing one branch of state government from encroaching on the powers of another branch. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92 (2009). By its plain terms, the separation-of-powers provision has no application to political subdivisions and provides them with no protection from state action. Nev. Const. art. 3, § 1(1) ("The powers of the Government of the State of Nevada shall be divided into three separate departments"); *Mariposa County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948) ("it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government."). Because the separation-of-powers provision does not exist for the protection of political subdivisions of the state, the Court holds that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law.

I. Fernley's separation-of-powers claims have no merit.

Fernley claims that the C-Tax statutes violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. Even if the Court assumes that Fernley has standing to bring separation-of-powers claims against the state and even if the Court also assumes that those claims are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity as discussed previously, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution.

Fernley contends that the C-Tax system violates separation of powers because the power to make appropriations is a non-delegable function of the legislative branch and the C-Tax system unconstitutionally delegates the Legislature's power over appropriations to an executive branch agency by authorizing the Department of Taxation to collect and appropriate C-Tax revenues without any legislative participation or oversight. Fernley contends that, in the absence of a special request, the Legislature does not refer to local government budgets for C-Tax purposes and that based on the

Legislature's adoption of this "hands off" approach, the C-Tax system is essentially "appropriation by auto-pilot." Fernley contends that the Department of Taxation collects and appropriates C-Tax revenues based solely on the outcome of its mechanical application of designated mathematical formulas in the C-Tax statutes without regard to whether legislative objectives are being met. Fernley contends that the Legislature has made a few minor adjustments to the designated mathematical formulas in the C-Tax statutes since they were enacted in 1997, but has offered the Department of Taxation no guidance in the collection and appropriation process. Therefore, Fernley contends that the C-Tax system violates separation of powers because the Legislature has unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation without any legislative participation or oversight.

The Defendants contend that the Legislature has not unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation but has constitutionally enacted an ongoing appropriation of C-Tax revenues that complies with separation of powers because: (1) the Legislature has provided a clearly defined statutory method whereby the Department of Taxation can ascertain the exact amount to be appropriated under the C-Tax statutes in each fiscal year based on specific statutory formulas; and (2) those specific statutory formulas provide the Department of Taxation with clearly defined statutory standards for executing the C-Tax statutes. The Defendants contend that the Legislature's participation and oversight concerning the C-Tax system is demonstrated by the nearly 20-year legislative history of the C-Tax system which shows that the Legislature has conducted numerous interim studies of the system and has considered legislation proposing material changes to the system during every legislative session since its enactment in 1997. The Defendants contend that, over the past two decades, the Legislature has regularly, repeatedly and comprehensively considered, examined and studied all aspects of the C-Tax system and when the Legislature has deemed it necessary to change the C-Tax system as a matter of public policy, the Legislature has enacted legislation

amending the C-Tax statutes to conform with its public policy determinations. Therefore, the Defendants contend that the Legislature has not unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation without any legislative participation or oversight.

The Court agrees with the Defendants and holds that the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. The purpose of the separation-of-powers doctrine is to prevent one branch of state government from encroaching on the powers of another branch. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92 (2009). The Legislature can violate the separation-of-powers doctrine when it enacts a statute that unconstitutionally delegates legislative power to an executive branch agency. *Id.* at 292-300. However, there is no unconstitutional delegation of legislative power to an executive branch agency when the agency must work within sufficiently defined statutory standards to carry out the statutory provisions. *Sheriff v. Luqman*, 101 Nev. 149, 153-54 (1985). As explained by the Nevada Supreme Court:

> Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. The agency is only authorized to determine the facts which will make the statute effective. Such authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power. These standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized. Sufficient legislative standards are required in order to assure that the agency will neither act capriciously nor arbitrarily.

Id. (citations omitted).

With regard to the power to make appropriations, the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Nev. Const. art. 4, § 19. Thus, under the Nevada Constitution, the power to make appropriations is a legislative power. *See State v. Eggers*, 29 Nev. 469, 475 (1907) ("The provision that no moneys shall be

drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the legislature, which stands as the representative of the people."). When the Legislature exercises the power to make appropriations, "[i]t is not necessary that all expenditures be authorized by the general appropriation bill. The language in any act which shows that the legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient." *Id.* Furthermore, the Legislature may constitutionally enact an ongoing appropriation in a permanent and continuing statute which operates prospectively on a recurrent basis in future years so long as "a method is provided whereby the exact amount to be expended in pursuance of the act may be ascertained." *Norcross v. Cole*, 44 Nev. 88, 93 (1920).[20]

The Court finds that the C-Tax statutes contain a constitutionally valid ongoing appropriation and provide the Department of Taxation with clearly defined statutory standards to carry out the statutory provisions. Under the C-Tax statutes, the Legislature has provided a clearly defined statutory method whereby the Department of Taxation can ascertain the exact amount to be appropriated from the Local Government Tax Distribution Account in each fiscal year based on specific statutory formulas. NRS 360.600-360.740. The Department of Taxation is only authorized to apply its findings of fact, based on fiscal data, to the mathematical equations set forth in the C-Tax statutes to arrive at the exact amount to be appropriated to each local government, and Fernley acknowledges that the Department of Taxation distributes C-Tax revenues based solely on the outcome of its mechanical application of the mathematical formulas in the C-Tax statutes. Because the Department of Taxation properly functions as a factfinder under the C-Tax statutes and must perform its statutory duties in accordance with clearly

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[20] *See also State v. LaGrave*, 23 Nev. 25, 26-27 (1895) ("an appropriation may be prospective, that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues." (quoting *Ristine v. State*, 20 Ind. 328, 339 (1863))); *State v. Cooper*, 536 S.E.2d 870, 877 (S.C. 2000) ("An appropriation may be made by a permanent continuing statute. A continuing appropriation is an appropriation running on from year to year without further legislative action until the purpose of levy and appropriation has been accomplished." (citations omitted)).

defined statutory standards, the Court concludes that the C-Tax statutes do not unconstitutionally delegate the Legislature's power over appropriation of C-Tax revenues to the Department of Taxation.

In reaching its conclusion, the Court rejects Fernley's contention that there has been inadequate legislative participation and oversight concerning the C-Tax system. As the Defendants amply demonstrated, the C-Tax system has been the subject of the Legislature's continuing study, investigation and scrutiny since its enactment in 1997, and when the Legislature has deemed it necessary to change the C-Tax system as a matter of public policy, the Legislature has enacted legislation amending the C-Tax statutes to conform with its public policy determinations. The Court recognizes that Fernley disagrees with the Legislature's public policy determinations and that Fernley believes it should receive greater C-Tax distributions under the system. However, because the Court holds that the Legislature did not exceed its constitutional power over the appropriation of state tax dollars when it made public policy determinations regarding how C-Tax revenues are distributed to local governments, the Court may not second-guess the Legislature's public policy determinations or judge the wisdom, policy or fairness of how C-Tax revenues are distributed under the system. Therefore, if Fernley desires to receive increased C-Tax distributions, its answer lies with the Legislature, not with the courts.

J. Fernley's special-or-local law claims have no merit.

Fernley claims that the C-Tax statutes violate the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. Under Nevada law, political subdivisions have standing to bring constitutional claims against the state alleging violations of Article 4, Sections 20 and 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." *City of Reno v. County of Washoe*, 94 Nev. 327, 332 (1978). Nevertheless, even though Fernley has standing to bring its constitutional claims under Article 4, Sections 20 and 21 and even if the Court assumes that Fernley's claims are not otherwise barred as a matter of law by the

statute of limitations and sovereign immunity as discussed previously, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate either Article 4, Section 20 or Article 4, Section 21 of the Nevada Constitution.

1. Fernley's Article 4, Section 20 claims have no merit.

Article 4, Section 20 sets forth certain prohibited categories of special or local laws that the Legislature may not enact under any circumstances. *See Att'y Gen. v. Gypsum Res.*, 129 Nev. Adv. Op. 4, 294 P.3d 404, 407-11 (2013). Under one of the prohibited categories, the Legislature may not enact special or local laws "[f]or the assessment and collection of taxes for state, county, and township purposes." *See Clean Water Coalition v. M Resort*, 127 Nev. Adv. Op. 24, 255 P.3d 247, 253-59 (2011). Fernley contends that the C-Tax statutes are special or local laws "[f]or the assessment and collection of taxes for state, county, and township purposes" and therefore come within one of the prohibited categories of special or local laws enumerated in Article 4, Section 20.

However, as a threshold matter, the Court must first determine whether the C-Tax statutes are, in fact, special or local laws before the Court may consider whether the C-Tax statutes come within one of the prohibited categories of special or local laws enumerated in Article 4, Section 20. By its plain terms, Article 4, Section 20 applies only to special or local laws. It does not apply to general laws. Therefore, when statutes are challenged as unconstitutional special or local laws, the threshold issue is whether the statutes are, in fact, special or local laws. *Youngs v. Hall*, 9 Nev. 212, 217-22 (1874). If the statutes are general laws, Article 4, Section 20 has no application.

Fernley contends that the C-Tax statutes are special or local laws because, as applied to Fernley, the C-Tax statutes do not place Fernley on an equal basis with other participants in the C-Tax system, but rather impose on Fernley a far lesser status and burden Fernley like no other Nevada city because it is the only city to have incorporated in Nevada since the enactment of the C-Tax statutes. Fernley contends that its low C-Tax base distribution originally allocated to it nearly 20 years ago when it was a

small unincorporated town dictates the amount of C-Tax revenues that it receives today even though it has rapidly grown into Nevada's seventh largest city and other comparably sized cities, like Elko, Mesquite and Boulder City, do not suffer from the same handicap because, having existed at the time the Legislature enacted the C-Tax statutes, they started with a significantly higher base distribution. Fernley contends that the Legislature has made it impossible for a city like Fernley to obtain an adjustment to its C-Tax distributions, has demonstrated a shocking level of indifference to the inequitable situation and has chosen instead to ignore the plight of politically isolated communities like Fernley. Therefore, Fernley contends that although the C-Tax statutes may have statewide effect, they are nonetheless unconstitutional special or local laws in their application when they have the effect of burdening a particular locality like Fernley.

The Defendants contend that the C-Tax statutes are general laws that apply statewide to all similarly situated local governments and that all distributions under the C-Tax statutes are subject to the same statutory formulas that apply statewide to all similarly situated local governments. The Defendants contend that the C-Tax statutes do not single out Fernley by name or subject it to specialized burdens that would not be imposed on other similarly situated local governments. The Defendants contend that although the C-Tax statutes may actually operate on Fernley differently from other local governments, any differences in operation are because Fernley is in a different class founded upon natural, intrinsic, rational and constitutional distinctions. The Defendants contend that when the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional general-purpose governmental services, such as police protection and fire protection, and because Fernley is a new local government that does not provide those services, it is not similarly situated to other cities formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City, so there is a rational basis for placing Fernley in a different class and treating Fernley differently as a new local government. The Defendants contend that

no political subdivision has a constitutional right to an equal or equitable distribution of state tax dollars because the Legislature may distribute state tax dollars inequitably according to public policy considerations. The Defendants also contend that no political subdivision has a constitutional right to obtain an adjustment to its C-Tax distributions, and no political subdivision is entitled to any process for review or adjustment of its C-Tax distributions other than the legislative process.

The Court holds that the C-Tax statutes are general laws, not special or local laws, and therefore the C-Tax statutes are not subject to the constitutional prohibitions which apply to special or local laws in Article 4, Section 20. The Nevada Supreme Court has stated that "a law operative alike upon all persons similarly situated is a general law." *Youngs v. Hall*, 9 Nev. 212, 222 (1874). Stated another way, "[a] law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction." *Clean Water Coalition v. M Resort*, 127 Nev. Adv. Op. 24, 255 P.3d 247, 254 (2011) (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990)). At their core, the special-or-local law provisions of the Nevada Constitution "reflect a concern for equal treatment under the law." *Clean Water Coalition*, 255 P.3d at 254 (quoting Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1209 (1985)). Equal treatment under the law allows the Legislature to create different classifications of treatment, but the legislative classifications must be rationally related to a legitimate governmental purpose and must apply uniformly to all who are similarly situated.[21]

In addition, it is well established that no local government has a constitutional right to an equal or equitable distribution of state tax dollars because the Legislature may "disburse the proceeds of taxes, fees, and penalties to various communities inequitably according to need." *Anthony v. State*, 94 Nev.

[21] *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 520-22 (2009) (holding that businesses with nonrestricted gaming licenses were not similarly situated to businesses with restricted gaming licenses and because these businesses have different impacts on the economy, there was a rational basis for treating them differently).

337, 342 (1978).[22] Thus, if the Legislature enacts a statute which creates legislative classifications among local governments and distributes different amounts of state tax dollars to different local governments based on those legislative classifications, the statute is not a special or local law if "the classification is constitutionally reasonable." *McKenney v. Byrne*, 412 A.2d 1041, 1049 (N.J. 1980) (holding that a statutory scheme which distributed different amounts of state tax dollars to different local governments using statutory formulas "is not a special or local law because the classification is constitutionally reasonable.").

In this case, the Court finds that the Legislature's classification of new local governments for different treatment in the C-Tax statutes is rationally related to a legitimate governmental purpose and applies uniformly to all new local governments that are similarly situated. When the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional general-purpose governmental services, which the Legislature defined to mean police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740. The Legislature also wanted to discourage the formation of new local governments that did not provide general-purpose governmental services or did not assume the functions of another local government. NRS 360.740; NRS 354.598747. The Court finds that these legislative objectives serve a legitimate governmental purpose because they incentivize new local governments to provide certain services to their residents in exchange for increased C-Tax distributions. Therefore, the Court concludes that treating new local governments differently in the C-Tax statutes by requiring them to provide certain

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[22] *See also City of Las Vegas v. Mack*, 87 Nev. 105, 110 (1971) ("we are aware of no authority . . . which declares that an inequality in distribution of the tax in and of itself is sufficient to constitute a denial of due process."); *N.Y. Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938) ("The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."); *Hess v. Mullaney*, 213 F.2d 635, 640 (9th Cir. 1954) ("No requirements of uniformity or of equal protection of the law limit the power of a legislature in respect to allocation and distribution of public funds.").

services in order to qualify for increased C-Tax distributions is rationally related to a legitimate governmental purpose.[23]

The Court also finds that the C-Tax statutes apply uniformly to all new local governments that incorporate in Nevada after July 1, 1998, which is the effective date set forth in the C-Tax statutes. Even though at this time Fernley is the only entity that has incorporated in Nevada since July 1, 1998, if any other entity incorporates in Nevada, it will be required to comply with the same statutory requirements as Fernley in order to qualify for increased C-Tax distributions as a new local government under the C-Tax statutes. NRS 360.740; NRS 354.598747. Therefore, the Court concludes that the C-Tax statutes apply uniformly to all new local governments that are similarly situated and do not place Fernley in a closed class of one because "the classification applies prospectively to all [new local governments] which might come within its designated class." *County of Clark v. City of Las Vegas*, 97 Nev. 260, 263 (1981).[24]

In reaching its decision, the Court emphasizes that "all legislation necessarily involves linedrawing. But as long as there is a rational basis for the distinction drawn, it must be upheld." *Allen v. State*, 100 Nev. 130, 136-37 (1984). In the C-Tax statutes, the Legislature drew a line between cities formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City, and cities formed thereafter, like Fernley and any other new local government that may incorporate and come within the designated class. Because the Court finds that there is a rational basis for the distinction

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[23] *See Town of Ball v. Rapides Parish*, 746 F.2d 1049, 1062 (5th Cir. 1984) (holding that denying share of tax revenue to newly created town is rationally related to a legitimate governmental purpose because the legislative body "could have felt that in this parish there was no need for an additional incorporated town and denial of sales tax proceeds would be an effective counterforce.").

[24] *See also Reid v. Woofter*, 88 Nev. 378, 380 (1972) ("Since [the statute] in its operation and effect is so framed as to apply in the future to all counties coming within its designated class, it is neither local nor special within the provisions of Nev. Const., art. 4, §§ 20 or 21."); *Fairbanks v. Pavlikowski*, 83 Nev. 80, 83 (1967) ("The fact [the statute] might apply only to Las Vegas township is of no moment, for if there were others, the statute would then too apply. It therefore conforms to the constitutional mandate that there shall be no local and special laws, and that general laws shall have uniform operation.").

drawn by the Legislature, the C-Tax statutes must be upheld. Therefore, because the C-Tax statutes apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic, rational and constitutional distinctions, the Court holds that the C-Tax statutes are general laws, not special or local laws, and they are not subject to the constitutional prohibitions which apply to special or local laws in Article 4, Section 20.[25]

2. Fernley's Article 4, Section 21 claims have no merit.

Article 4, Section 21 provides that "[i]n all cases enumerated in the preceding section [Article 4, Section 20], and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." Similar to the underlying premise for its constitutional claims under Article 4, Section 20, Fernley's underlying premise for its constitutional claims under Article 4, Section 21 is that the C-Tax statutes are special or local laws. However, because the Court has already concluded that the C-Tax statutes are general laws, not special or local laws, Fernley's Article 4, Section 21 claims have no merit. As discussed previously, because the C-Tax statutes apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic, rational and constitutional distinctions, the Court holds that the C-Tax statutes are general laws of uniform operation throughout the state and therefore do not violate Article 4, Section 21.

Furthermore, even if the Court assumes that the C-Tax statutes are special or local laws because they treat new local governments differently from preexisting local governments formed before the enactment of the C-Tax statutes, the Court holds that the C-Tax statutes do not violate Article 4, Section 21 because a general law could not sufficiently "answer the just purposes of [the] legislation" and therefore could not be made applicable under these particular circumstances. *State v. Irwin*, 5 Nev.

[25] The Defendants also argue that because the C-Tax statutes do not involve the assessment and collection of taxes, but only involve the *distribution* of the proceeds of the taxes after they are assessed and collected, the C-Tax statutes cannot be classified as special or local laws "[f]or the assessment and collection of taxes" under Article 4, Section 20. Because the Court holds that the C-Tax statutes are general laws which are not subject to Article 4, Section 20, the Court does not need to address these arguments.

111, 122 (1869). Although the Nevada Constitution expresses a preference for general laws, special or local laws are not unconstitutional under Article 4, Section 21 in those situations where a special or local law is necessary because a general law could not be made "applicable" under the circumstances. *Clean Water Coalition*, 255 P.3d at 255. When determining whether a special or local law is permissible because a general law could not be made "applicable" for purposes of Article 4, Section 21, the Court must look to whether a general law could sufficiently "answer the just purposes of [the] legislation; that is, best subserve the interests of the people of the State, or such class or portion as the particular legislation is intended to affect." *Irwin*, 5 Nev. at 122; *see also Clean Water Coalition*, 255 P.3d at 259 (discussing the *Irwin* standard). In applying this standard, the Nevada Supreme Court has stated that the Legislature's decision to enact a special or local law must stand where a general law "fails to accomplish the proper and legitimate objects of [the] legislation." *Hess v. Pegg*, 7 Nev. 23, 28 (1871); *Evans v. Job*, 8 Nev. 322, 340-41 (1873). The Supreme Court has also rejected the notion that a special or local law is invalid simply because it is possible to conceive of a general law that could address some purposes of the legislation. *Irwin*, 5 Nev. at 122-25; *Hess*, 7 Nev. at 28-29. If a general law could not sufficiently "subserve" or carry out the just purposes of the legislation under the particular circumstances, a special or local law is permissible.

The Court agrees with Fernley that the Legislature could enact a general law which distributes C-Tax revenues based on population and which applies in the same manner to new local governments formed after the enactment of the C-Tax statutes, like Fernley, and to preexisting local governments formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City. However, the Court finds that such a general law could not sufficiently "subserve" or carry out the just purposes of the C-Tax statutes as intended by the Legislature.

As discussed previously, when the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional

general-purpose governmental services, such as police protection and fire protection, and it wanted to discourage the formation of new local governments that did not provide general-purpose governmental services or did not assume the functions of another local government. NRS 360.740; NRS 354.598747. To accomplish these legitimate purposes, the Legislature decided to incentivize new local governments, like Fernley, to provide certain services to their residents in exchange for increased C-Tax distributions. However, because preexisting local governments, like Elko, Mesquite and Boulder City, already provide the traditional general-purpose governmental services of police protection and fire protection, it would not accomplish the just purposes of the C-Tax statutes to apply the statutes in the same manner to preexisting local governments because they are intrinsically different from new local governments. Therefore, even if the Court assumes that the C-Tax statutes are special or local laws because they treat new local governments differently from preexisting local governments, the Court concludes that such special or local laws are permissible under Article 4, Section 21 because a general law could not sufficiently "answer the just purposes of [the] legislation" and therefore could not be made applicable under these particular circumstances.

Finally, the Court wants to reiterate that it sympathizes with Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents. However, the Court finds that the Legislature did not exceed its constitutional power over the distribution of state tax dollars when it made legislative public policy determinations regarding how those state tax dollars are distributed to local governments under the C-Tax statutes. Therefore, because the Court holds that the C-Tax statutes are constitutional, Fernley's answer lies with the Legislature, not with the courts.

COSTS AND DISBURSEMENTS

On September 19, 2014, the Department of Taxation, as a prevailing party, filed a Motion for Costs pursuant to NRS 18.020(3) and a Memorandum of Costs and Disbursements pursuant to NRS 18.110(1). On September 24, 2014, Fernley filed a Motion to Retax Costs and Opposition to

Motion for Costs pursuant to NRS 18.110(4). Because the Department of Taxation and Fernley dispute issues concerning an award of costs and disbursements in this matter, the Court enters a final judgment in favor of the Defendants, and the Court will decide the disputed issues concerning an award of costs and disbursements in a post-judgment order as permitted by Nevada's Civil Rules. NRCP 58(c) ("The entry of the judgment shall not be delayed for the taxing of costs."); *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (2000) ("a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court; except for post-judgment issues such as attorney's fees and costs. A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment."); *Campos-Garcia v. Johnson*, 130 Nev. Adv. Op. 64, 331 P.3d 890, 891 (2014) ("The order awarding attorney fees and costs was independently appealable as a special order after final judgment.").

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ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff City of Fernley's Motion for Summary Judgment is DENIED.

2. Plaintiff City of Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order is DENIED as moot.

3. The Defendants' Motions to Dismiss, which were converted into Motions for Summary Judgment, are GRANTED and final judgment is entered in favor of the Defendants on all causes of action and claims for relief alleged in Fernley's complaint.

4. Pursuant to NRCP 58, the Legislature is designated as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk of Court.

DATED: This 6th day of October, 2014.

JAMES T. RUSSELL
DISTRICT JUDGE

Respectfully submitted by:
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CERTIFICATE OF MAILING

I hereby certify that on the 7th day of October, 2014, I served a copy of the foregoing Order by United States Mail, postage prepaid, addressed as follows:

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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 22 PART 2

Filed By:

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23	Transcript of Hearing	Court Reporter	01/07/15	4213-4267
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Harbor v. Birchfield, 529 F.2d 1251, 1254-55 (1976)). Therefore, the fact that individuals or private entities may have standing to bring separation-of-powers claims against the state does not, *ipso facto*, mean Fernley has standing to bring separation-of-powers claims against the state. Fernley is the only plaintiff in this case, and it must have its own standing to pursue separation-of-powers claims against the state. Whether individuals or private entities would have standing has no bearing on this case.

The determination of whether political subdivisions have standing to invoke the protections of a state constitutional provision "is a question of state practice." *City of Austin*, 930 S.W.2d at 684 (quoting *Williams v. Mayor & City of Baltimore*, 289 U.S. 36, 47-48 (1933)). Therefore, although courts in other states have allowed political subdivisions to bring separation-of-powers claims against the state, this Court may not consider those decisions without first looking to the Nevada Supreme Court's decisions to determine the practice in this state.

In *City of Reno v. County of Washoe*, the Nevada Supreme Court held that Nevada's political subdivisions lack standing to bring claims for violations of the due process clause of Article 1, Section 8 of the Nevada Constitution because that provision does not exist for the protection of political subdivisions of the state. 94 Nev. at 329-31. By contrast, the Supreme Court also held that Nevada's political subdivisions have standing to bring claims for violations of Article 4, Sections 20 and 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. Thus, in Nevada, the determination of whether political subdivisions have standing to invoke the protections of a state constitutional provision depends on whether the state constitutional provision exists for their protection.

Although there are several provisions of the Nevada Constitution that exist for the protection of political subdivisions, the separation-of-powers provision is not one of them. The purpose of the separation-of-powers provision is to protect the constitutional design and structural framework of state

government by preventing one branch of state government from encroaching on the powers of another branch. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92 (2009). By its plain terms, the separation-of-powers provision has no application to political subdivisions and provides them with no protection from state action. Nev. Const. art. 3, § 1(1) ("The powers of the Government of the State of Nevada shall be divided into three separate departments"); *Mariposa County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948) ("it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government."). Because the separation-of-powers provision does not exist for the protection of political subdivisions of the state, the Court holds that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law.

I. Fernley's separation-of-powers claims have no merit.

Fernley claims that the C-Tax statutes violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. Even if the Court assumes that Fernley has standing to bring separation-of-powers claims against the state and even if the Court also assumes that those claims are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity as discussed previously, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution.

Fernley contends that the C-Tax system violates separation of powers because the power to make appropriations is a non-delegable function of the legislative branch and the C-Tax system unconstitutionally delegates the Legislature's power over appropriations to an executive branch agency by authorizing the Department of Taxation to collect and appropriate C-Tax revenues without any legislative participation or oversight. Fernley contends that, in the absence of a special request, the Legislature does not refer to local government budgets for C-Tax purposes and that based on the

Legislature's adoption of this "hands off" approach, the C-Tax system is essentially "appropriation by auto-pilot." Fernley contends that the Department of Taxation collects and appropriates C-Tax revenues based solely on the outcome of its mechanical application of designated mathematical formulas in the C-Tax statutes without regard to whether legislative objectives are being met. Fernley contends that the Legislature has made a few minor adjustments to the designated mathematical formulas in the C-Tax statutes since they were enacted in 1997, but has offered the Department of Taxation no guidance in the collection and appropriation process. Therefore, Fernley contends that the C-Tax system violates separation of powers because the Legislature has unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation without any legislative participation or oversight.

The Defendants contend that the Legislature has not unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation but has constitutionally enacted an ongoing appropriation of C-Tax revenues that complies with separation of powers because: (1) the Legislature has provided a clearly defined statutory method whereby the Department of Taxation can ascertain the exact amount to be appropriated under the C-Tax statutes in each fiscal year based on specific statutory formulas; and (2) those specific statutory formulas provide the Department of Taxation with clearly defined statutory standards for executing the C-Tax statutes. The Defendants contend that the Legislature's participation and oversight concerning the C-Tax system is demonstrated by the nearly 20-year legislative history of the C-Tax system which shows that the Legislature has conducted numerous interim studies of the system and has considered legislation proposing material changes to the system during every legislative session since its enactment in 1997. The Defendants contend that, over the past two decades, the Legislature has regularly, repeatedly and comprehensively considered, examined and studied all aspects of the C-Tax system and when the Legislature has deemed it necessary to change the C-Tax system as a matter of public policy, the Legislature has enacted legislation

amending the C-Tax statutes to conform with its public policy determinations. Therefore, the Defendants contend that the Legislature has not unconstitutionally delegated its power over appropriation of C-Tax revenues to the Department of Taxation without any legislative participation or oversight.

The Court agrees with the Defendants and holds that the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. The purpose of the separation-of-powers doctrine is to prevent one branch of state government from encroaching on the powers of another branch. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-92 (2009). The Legislature can violate the separation-of-powers doctrine when it enacts a statute that unconstitutionally delegates legislative power to an executive branch agency. *Id.* at 292-300. However, there is no unconstitutional delegation of legislative power to an executive branch agency when the agency must work within sufficiently defined statutory standards to carry out the statutory provisions. *Sheriff v. Luqman*, 101 Nev. 149, 153-54 (1985). As explained by the Nevada Supreme Court:

> Although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend. Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. The agency is only authorized to determine the facts which will make the statute effective. Such authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power. These standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized. Sufficient legislative standards are required in order to assure that the agency will neither act capriciously nor arbitrarily.

Id. (citations omitted).

With regard to the power to make appropriations, the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Nev. Const. art. 4, § 19. Thus, under the Nevada Constitution, the power to make appropriations is a legislative power. *See State v. Eggers*, 29 Nev. 469, 475 (1907) ("The provision that no moneys shall be

drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the legislature, which stands as the representative of the people."). When the Legislature exercises the power to make appropriations, "[i]t is not necessary that all expenditures be authorized by the general appropriation bill. The language in any act which shows that the legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient." *Id.* Furthermore, the Legislature may constitutionally enact an ongoing appropriation in a permanent and continuing statute which operates prospectively on a recurrent basis in future years so long as "a method is provided whereby the exact amount to be expended in pursuance of the act may be ascertained." *Norcross v. Cole*, 44 Nev. 88, 93 (1920).[20]

The Court finds that the C-Tax statutes contain a constitutionally valid ongoing appropriation and provide the Department of Taxation with clearly defined statutory standards to carry out the statutory provisions. Under the C-Tax statutes, the Legislature has provided a clearly defined statutory method whereby the Department of Taxation can ascertain the exact amount to be appropriated from the Local Government Tax Distribution Account in each fiscal year based on specific statutory formulas. NRS 360.600-360.740. The Department of Taxation is only authorized to apply its findings of fact, based on fiscal data, to the mathematical equations set forth in the C-Tax statutes to arrive at the exact amount to be appropriated to each local government, and Fernley acknowledges that the Department of Taxation distributes C-Tax revenues based solely on the outcome of its mechanical application of the mathematical formulas in the C-Tax statutes. Because the Department of Taxation properly functions as a factfinder under the C-Tax statutes and must perform its statutory duties in accordance with clearly

[20] *See also State v. LaGrave*, 23 Nev. 25, 26-27 (1895) ("an appropriation may be prospective, that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues." (quoting *Ristine v. State*, 20 Ind. 328, 339 (1863))); *State v. Cooper*, 536 S.E.2d 870, 877 (S.C. 2000) ("An appropriation may be made by a permanent continuing statute. A continuing appropriation is an appropriation running on from year to year without further legislative action until the purpose of levy and appropriation has been accomplished." (citations omitted)).

defined statutory standards, the Court concludes that the C-Tax statutes do not unconstitutionally delegate the Legislature's power over appropriation of C-Tax revenues to the Department of Taxation.

In reaching its conclusion, the Court rejects Fernley's contention that there has been inadequate legislative participation and oversight concerning the C-Tax system. As the Defendants amply demonstrated, the C-Tax system has been the subject of the Legislature's continuing study, investigation and scrutiny since its enactment in 1997, and when the Legislature has deemed it necessary to change the C-Tax system as a matter of public policy, the Legislature has enacted legislation amending the C-Tax statutes to conform with its public policy determinations. The Court recognizes that Fernley disagrees with the Legislature's public policy determinations and that Fernley believes it should receive greater C-Tax distributions under the system. However, because the Court holds that the Legislature did not exceed its constitutional power over the appropriation of state tax dollars when it made public policy determinations regarding how C-Tax revenues are distributed to local governments, the Court may not second-guess the Legislature's public policy determinations or judge the wisdom, policy or fairness of how C-Tax revenues are distributed under the system. Therefore, if Fernley desires to receive increased C-Tax distributions, its answer lies with the Legislature, not with the courts.

J. Fernley's special-or-local law claims have no merit.

Fernley claims that the C-Tax statutes violate the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. Under Nevada law, political subdivisions have standing to bring constitutional claims against the state alleging violations of Article 4, Sections 20 and 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." *City of Reno v. County of Washoe*, 94 Nev. 327, 332 (1978). Nevertheless, even though Fernley has standing to bring its constitutional claims under Article 4, Sections 20 and 21 and even if the Court assumes that Fernley's claims are not otherwise barred as a matter of law by the

statute of limitations and sovereign immunity as discussed previously, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate either Article 4, Section 20 or Article 4, Section 21 of the Nevada Constitution.

1. Fernley's Article 4, Section 20 claims have no merit.

Article 4, Section 20 sets forth certain prohibited categories of special or local laws that the Legislature may not enact under any circumstances. *See Att'y Gen. v. Gypsum Res.*, 129 Nev. Adv. Op. 4, 294 P.3d 404, 407-11 (2013). Under one of the prohibited categories, the Legislature may not enact special or local laws "[f]or the assessment and collection of taxes for state, county, and township purposes." *See Clean Water Coalition v. M Resort*, 127 Nev. Adv. Op. 24, 255 P.3d 247, 253-59 (2011). Fernley contends that the C-Tax statutes are special or local laws "[f]or the assessment and collection of taxes for state, county, and township purposes" and therefore come within one of the prohibited categories of special or local laws enumerated in Article 4, Section 20.

However, as a threshold matter, the Court must first determine whether the C-Tax statutes are, in fact, special or local laws before the Court may consider whether the C-Tax statutes come within one of the prohibited categories of special or local laws enumerated in Article 4, Section 20. By its plain terms, Article 4, Section 20 applies only to special or local laws. It does not apply to general laws. Therefore, when statutes are challenged as unconstitutional special or local laws, the threshold issue is whether the statutes are, in fact, special or local laws. *Youngs v. Hall*, 9 Nev. 212, 217-22 (1874). If the statutes are general laws, Article 4, Section 20 has no application.

Fernley contends that the C-Tax statutes are special or local laws because, as applied to Fernley, the C-Tax statutes do not place Fernley on an equal basis with other participants in the C-Tax system, but rather impose on Fernley a far lesser status and burden Fernley like no other Nevada city because it is the only city to have incorporated in Nevada since the enactment of the C-Tax statutes. Fernley contends that its low C-Tax base distribution originally allocated to it nearly 20 years ago when it was a

small unincorporated town dictates the amount of C-Tax revenues that it receives today even though it has rapidly grown into Nevada's seventh largest city and other comparably sized cities, like Elko, Mesquite and Boulder City, do not suffer from the same handicap because, having existed at the time the Legislature enacted the C-Tax statutes, they started with a significantly higher base distribution. Fernley contends that the Legislature has made it impossible for a city like Fernley to obtain an adjustment to its C-Tax distributions, has demonstrated a shocking level of indifference to the inequitable situation and has chosen instead to ignore the plight of politically isolated communities like Fernley. Therefore, Fernley contends that although the C-Tax statutes may have statewide effect, they are nonetheless unconstitutional special or local laws in their application when they have the effect of burdening a particular locality like Fernley.

The Defendants contend that the C-Tax statutes are general laws that apply statewide to all similarly situated local governments and that all distributions under the C-Tax statutes are subject to the same statutory formulas that apply statewide to all similarly situated local governments. The Defendants contend that the C-Tax statutes do not single out Fernley by name or subject it to specialized burdens that would not be imposed on other similarly situated local governments. The Defendants contend that although the C-Tax statutes may actually operate on Fernley differently from other local governments, any differences in operation are because Fernley is in a different class founded upon natural, intrinsic, rational and constitutional distinctions. The Defendants contend that when the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional general-purpose governmental services, such as police protection and fire protection, and because Fernley is a new local government that does not provide those services, it is not similarly situated to other cities formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City, so there is a rational basis for placing Fernley in a different class and treating Fernley differently as a new local government. The Defendants contend that

no political subdivision has a constitutional right to an equal or equitable distribution of state tax dollars because the Legislature may distribute state tax dollars inequitably according to public policy considerations. The Defendants also contend that no political subdivision has a constitutional right to obtain an adjustment to its C-Tax distributions, and no political subdivision is entitled to any process for review or adjustment of its C-Tax distributions other than the legislative process.

The Court holds that the C-Tax statutes are general laws, not special or local laws, and therefore the C-Tax statutes are not subject to the constitutional prohibitions which apply to special or local laws in Article 4, Section 20. The Nevada Supreme Court has stated that "a law operative alike upon all persons similarly situated is a general law." *Youngs v. Hall*, 9 Nev. 212, 222 (1874). Stated another way, "[a] law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction." *Clean Water Coalition v. M Resort*, 127 Nev. Adv. Op. 24, 255 P.3d 247, 254 (2011) (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990)). At their core, the special-or-local law provisions of the Nevada Constitution "reflect a concern for equal treatment under the law." *Clean Water Coalition*, 255 P.3d at 254 (quoting Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1209 (1985)). Equal treatment under the law allows the Legislature to create different classifications of treatment, but the legislative classifications must be rationally related to a legitimate governmental purpose and must apply uniformly to all who are similarly situated.[21]

In addition, it is well established that no local government has a constitutional right to an equal or equitable distribution of state tax dollars because the Legislature may "disburse the proceeds of taxes, fees, and penalties to various communities inequitably according to need." *Anthony v. State*, 94 Nev.

[21] *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 520-22 (2009) (holding that businesses with nonrestricted gaming licenses were not similarly situated to businesses with restricted gaming licenses and because these businesses have different impacts on the economy, there was a rational basis for treating them differently).

337, 342 (1978).[22] Thus, if the Legislature enacts a statute which creates legislative classifications among local governments and distributes different amounts of state tax dollars to different local governments based on those legislative classifications, the statute is not a special or local law if "the classification is constitutionally reasonable." *McKenney v. Byrne*, 412 A.2d 1041, 1049 (N.J. 1980) (holding that a statutory scheme which distributed different amounts of state tax dollars to different local governments using statutory formulas "is not a special or local law because the classification is constitutionally reasonable.").

In this case, the Court finds that the Legislature's classification of new local governments for different treatment in the C-Tax statutes is rationally related to a legitimate governmental purpose and applies uniformly to all new local governments that are similarly situated. When the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional general-purpose governmental services, which the Legislature defined to mean police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740. The Legislature also wanted to discourage the formation of new local governments that did not provide general-purpose governmental services or did not assume the functions of another local government. NRS 360.740; NRS 354.598747. The Court finds that these legislative objectives serve a legitimate governmental purpose because they incentivize new local governments to provide certain services to their residents in exchange for increased C-Tax distributions. Therefore, the Court concludes that treating new local governments differently in the C-Tax statutes by requiring them to provide certain

[22] *See also City of Las Vegas v. Mack*, 87 Nev. 105, 110 (1971) ("we are aware of no authority . . . which declares that an inequality in distribution of the tax in and of itself is sufficient to constitute a denial of due process."); *N.Y. Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938) ("The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."); *Hess v. Mullaney*, 213 F.2d 635, 640 (9th Cir. 1954) ("No requirements of uniformity or of equal protection of the law limit the power of a legislature in respect to allocation and distribution of public funds.").

services in order to qualify for increased C-Tax distributions is rationally related to a legitimate governmental purpose.[23]

The Court also finds that the C-Tax statutes apply uniformly to all new local governments that incorporate in Nevada after July 1, 1998, which is the effective date set forth in the C-Tax statutes. Even though at this time Fernley is the only entity that has incorporated in Nevada since July 1, 1998, if any other entity incorporates in Nevada, it will be required to comply with the same statutory requirements as Fernley in order to qualify for increased C-Tax distributions as a new local government under the C-Tax statutes. NRS 360.740; NRS 354.598747. Therefore, the Court concludes that the C-Tax statutes apply uniformly to all new local governments that are similarly situated and do not place Fernley in a closed class of one because "the classification applies prospectively to all [new local governments] which might come within its designated class." *County of Clark v. City of Las Vegas*, 97 Nev. 260, 263 (1981).[24]

In reaching its decision, the Court emphasizes that "all legislation necessarily involves linedrawing. But as long as there is a rational basis for the distinction drawn, it must be upheld." *Allen v. State*, 100 Nev. 130, 136-37 (1984). In the C-Tax statutes, the Legislature drew a line between cities formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City, and cities formed thereafter, like Fernley and any other new local government that may incorporate and come within the designated class. Because the Court finds that there is a rational basis for the distinction

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[23] *See Town of Ball v. Rapides Parish*, 746 F.2d 1049, 1062 (5th Cir. 1984) (holding that denying share of tax revenue to newly created town is rationally related to a legitimate governmental purpose because the legislative body "could have felt that in this parish there was no need for an additional incorporated town and denial of sales tax proceeds would be an effective counterforce.").

[24] *See also Reid v. Woofter*, 88 Nev. 378, 380 (1972) ("Since [the statute] in its operation and effect is so framed as to apply in the future to all counties coming within its designated class, it is neither local nor special within the provisions of Nev. Const., art. 4, §§ 20 or 21."); *Fairbanks v. Pavlikowski*, 83 Nev. 80, 83 (1967) ("The fact [the statute] might apply only to Las Vegas township is of no moment, for if there were others, the statute would then too apply. It therefore conforms to the constitutional mandate that there shall be no local and special laws, and that general laws shall have uniform operation.").

drawn by the Legislature, the C-Tax statutes must be upheld. Therefore, because the C-Tax statutes apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic, rational and constitutional distinctions, the Court holds that the C-Tax statutes are general laws, not special or local laws, and they are not subject to the constitutional prohibitions which apply to special or local laws in Article 4, Section 20.[25]

2. Fernley's Article 4, Section 21 claims have no merit.

Article 4, Section 21 provides that "[i]n all cases enumerated in the preceding section [Article 4, Section 20], and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." Similar to the underlying premise for its constitutional claims under Article 4, Section 20, Fernley's underlying premise for its constitutional claims under Article 4, Section 21 is that the C-Tax statutes are special or local laws. However, because the Court has already concluded that the C-Tax statutes are general laws, not special or local laws, Fernley's Article 4, Section 21 claims have no merit. As discussed previously, because the C-Tax statutes apply uniformly to all similarly situated local governments embraced in classes founded upon natural, intrinsic, rational and constitutional distinctions, the Court holds that the C-Tax statutes are general laws of uniform operation throughout the state and therefore do not violate Article 4, Section 21.

Furthermore, even if the Court assumes that the C-Tax statutes are special or local laws because they treat new local governments differently from preexisting local governments formed before the enactment of the C-Tax statutes, the Court holds that the C-Tax statutes do not violate Article 4, Section 21 because a general law could not sufficiently "answer the just purposes of [the] legislation" and therefore could not be made applicable under these particular circumstances. *State v. Irwin*, 5 Nev.

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[25] The Defendants also argue that because the C-Tax statutes do not involve the assessment and collection of taxes, but only involve the *distribution* of the proceeds of the taxes after they are assessed and collected, the C-Tax statutes cannot be classified as special or local laws "[f]or the assessment and collection of taxes" under Article 4, Section 20. Because the Court holds that the C-Tax statutes are general laws which are not subject to Article 4, Section 20, the Court does not need to address these arguments.

111, 122 (1869). Although the Nevada Constitution expresses a preference for general laws, special or local laws are not unconstitutional under Article 4, Section 21 in those situations where a special or local law is necessary because a general law could not be made "applicable" under the circumstances. *Clean Water Coalition*, 255 P.3d at 255. When determining whether a special or local law is permissible because a general law could not be made "applicable" for purposes of Article 4, Section 21, the Court must look to whether a general law could sufficiently "answer the just purposes of [the] legislation; that is, best subserve the interests of the people of the State, or such class or portion as the particular legislation is intended to affect." *Irwin*, 5 Nev. at 122; *see also Clean Water Coalition*, 255 P.3d at 259 (discussing the *Irwin* standard). In applying this standard, the Nevada Supreme Court has stated that the Legislature's decision to enact a special or local law must stand where a general law "fails to accomplish the proper and legitimate objects of [the] legislation." *Hess v. Pegg*, 7 Nev. 23, 28 (1871); *Evans v. Job*, 8 Nev. 322, 340-41 (1873). The Supreme Court has also rejected the notion that a special or local law is invalid simply because it is possible to conceive of a general law that could address some purposes of the legislation. *Irwin*, 5 Nev. at 122-25; *Hess*, 7 Nev. at 28-29. If a general law could not sufficiently "subserve" or carry out the just purposes of the legislation under the particular circumstances, a special or local law is permissible.

The Court agrees with Fernley that the Legislature could enact a general law which distributes C-Tax revenues based on population and which applies in the same manner to new local governments formed after the enactment of the C-Tax statutes, like Fernley, and to preexisting local governments formed before the enactment of the C-Tax statutes, like Elko, Mesquite and Boulder City. However, the Court finds that such a general law could not sufficiently "subserve" or carry out the just purposes of the C-Tax statutes as intended by the Legislature.

As discussed previously, when the Legislature enacted the C-Tax system, it wanted to encourage the formation of new general-purpose local governments that would provide their own traditional

general-purpose governmental services, such as police protection and fire protection, and it wanted to discourage the formation of new local governments that did not provide general-purpose governmental services or did not assume the functions of another local government. NRS 360.740; NRS 354.598747. To accomplish these legitimate purposes, the Legislature decided to incentivize new local governments, like Fernley, to provide certain services to their residents in exchange for increased C-Tax distributions. However, because preexisting local governments, like Elko, Mesquite and Boulder City, already provide the traditional general-purpose governmental services of police protection and fire protection, it would not accomplish the just purposes of the C-Tax statutes to apply the statutes in the same manner to preexisting local governments because they are intrinsically different from new local governments. Therefore, even if the Court assumes that the C-Tax statutes are special or local laws because they treat new local governments differently from preexisting local governments, the Court concludes that such special or local laws are permissible under Article 4, Section 21 because a general law could not sufficiently "answer the just purposes of [the] legislation" and therefore could not be made applicable under these particular circumstances.

Finally, the Court wants to reiterate that it sympathizes with Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents. However, the Court finds that the Legislature did not exceed its constitutional power over the distribution of state tax dollars when it made legislative public policy determinations regarding how those state tax dollars are distributed to local governments under the C-Tax statutes. Therefore, because the Court holds that the C-Tax statutes are constitutional, Fernley's answer lies with the Legislature, not with the courts.

COSTS AND DISBURSEMENTS

On September 19, 2014, the Department of Taxation, as a prevailing party, filed a Motion for Costs pursuant to NRS 18.020(3) and a Memorandum of Costs and Disbursements pursuant to NRS 18.110(1). On September 24, 2014, Fernley filed a Motion to Retax Costs and Opposition to

Motion for Costs pursuant to NRS 18.110(4). Because the Department of Taxation and Fernley dispute issues concerning an award of costs and disbursements in this matter, the Court enters a final judgment in favor of the Defendants, and the Court will decide the disputed issues concerning an award of costs and disbursements in a post-judgment order as permitted by Nevada's Civil Rules. NRCP 58(c) ("The entry of the judgment shall not be delayed for the taxing of costs."); *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (2000) ("a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs. A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final judgment."); *Campos-Garcia v. Johnson*, 130 Nev. Adv. Op. 64, 331 P.3d 890, 891 (2014) ("The order awarding attorney fees and costs was independently appealable as a special order after final judgment.").

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ORDER AND JUDGMENT

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff City of Fernley's Motion for Summary Judgment is DENIED.

2. Plaintiff City of Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order is DENIED as moot.

3. The Defendants' Motions to Dismiss, which were converted into Motions for Summary Judgment, are GRANTED and final judgment is entered in favor of the Defendants on all causes of action and claims for relief alleged in Fernley's complaint.

4. Pursuant to NRCP 58, the Legislature is designated as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk of Court.

DATED: This 6th day of October, 2014.

JAMES T. RUSSELL
DISTRICT JUDGE

Respectfully submitted by:
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CERTIFICATE OF MAILING

I hereby certify that on the 7th day of October, 2014, I served a copy of the foregoing Order by United States Mail, postage prepaid, addressed as follows:

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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

NOTICE OF ENTRY OF ORDER AND JUDGMENT

PLEASE TAKE NOTICE that on the **6th** day of October, 2014, the Court in the above-titled action entered an Order and Judgment in which a final judgment was entered in favor of the Defendants on all causes of action and claims for relief alleged in Plaintiff City of Fernley's complaint. A copy of the Order and Judgment is attached hereto as Exhibit 1.

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DATED: This **8th** day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **8th** day of October, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true and correct copy of the foregoing Notice of Entry of Order and Judgment, by electronic mail, directed to the following:

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Exhibit 1

Exhibit 1

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

ORDER AND JUDGMENT

INTRODUCTION

This action was brought by Plaintiff City of Fernley (Fernley), which is a general-law city incorporated under NRS Chapter 266 and located in Lyon County, Nevada. Fernley seeks money damages and declaratory and injunctive relief against Defendants State of Nevada ex rel. the State Department of Taxation (Department of Taxation) and the Honorable Kate Marshall in her official capacity as the Treasurer of the State of Nevada (State Treasurer). Fernley challenges the constitutionality of Nevada's system of allocating certain statewide tax revenues which are deposited and consolidated in the Local Government Tax Distribution Account and distributed to Nevada's local governmental entities under NRS 360.600-360.740. The system is administered by the Department of

Taxation and the State Treasurer, and it is commonly referred to as the consolidated tax system or the C-Tax system. The Legislature of the State of Nevada (Legislature) was permitted to intervene as a Defendant under NRCP 24 and NRS 218F.720 to defend the constitutionality of the C-Tax system.

On September 2, 2014, the Court heard oral arguments from the parties regarding the following motions: (1) Fernley's Motion for Summary Judgment, filed on June 13, 2014; (2) Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order, filed on June 18, 2014; (3) the State's Renewal of Motion to Dismiss, filed on May 5, 2014, which the Court converted into a Motion for Summary Judgment in the Court's June 6, 2014 Order; and (4) the Legislature's Joinder in the State's Renewal of Motion to Dismiss, filed on May 6, 2014, which the Court also converted into a Motion for Summary Judgment in the Court's June 6, 2014 Order. Therefore, at the hearing, each party presented the Court with a Motion for Summary Judgment, and each party asked for a final judgment to be entered in its favor on all remaining claims for relief alleged in Fernley's complaint.

In its complaint, Fernley alleged both federal constitutional claims and state constitutional claims. However, on January 25, 2013, the Nevada Supreme Court issued in this matter a Writ of Mandamus and Order Granting in Part and Denying in Part Petition for Writ of Mandamus which directed this Court to dismiss Fernley's federal constitutional claims because they were time-barred as a matter of law by the 2-year statute of limitations that applies to such claims. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). Accordingly, on February 22, 2013, this Court entered an Order Pursuant to Writ of Mandamus which granted the Defendants' Motions to Dismiss "in respect to the federal constitutional claims being asserted by Plaintiff." Therefore, before the hearing on the parties' summary-judgment motions, the Court had already dismissed Fernley's federal constitutional claims, which were its first claim for relief (denial of equal protection under the Fourteenth Amendment to the United States Constitution) and its fifth claim for relief (denial of due process under the Fourteenth Amendment to the United States Constitution).

Fernley's remaining claims for relief are its state constitutional claims, which are its second claim for relief (violation of the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution), its third claim for relief (creation of a special or local law in violation of Article 4, Section 20 of the Nevada Constitution), and its fourth claim for relief (violation of Article 4, Section 21 of the Nevada Constitution which provides that in all cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state). Fernley asks for money damages and declaratory and injunctive relief regarding its state constitutional claims.

At the hearing, the following counsel appeared on behalf of the parties: Joshua J. Hicks, Esq., and Clark V. Vellis, Esq., who appeared on behalf of Plaintiff City of Fernley; Andrea Nichols, Esq., Senior Deputy Attorney General, who appeared on behalf of Defendants State of Nevada ex rel. the Department of Taxation and State Treasurer; and Kevin C. Powers, Esq., Chief Litigation Counsel, and J. Daniel Yu, Esq., Principal Deputy Legislative Counsel, of the Legal Division of the Legislative Counsel Bureau (LCB), who appeared on behalf of Defendant Legislature.

Having considered the pleadings, documents and exhibits in this case and having received the arguments of counsel for the parties, the Court denies Fernley's Motion for Summary Judgment and grants the Defendants' Motions to Dismiss, which were converted into Motions for Summary Judgment, on all remaining claims for relief alleged in Fernley's complaint. Because the Court concludes that the Defendants are entitled to judgment as a matter of law, the Court denies, as moot, Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. Therefore, having adjudicated and denied all remaining claims for relief alleged in Fernley's complaint, the Court enters final judgment in favor of the Defendants for the following reasons.

First, the Court holds that Fernley's state constitutional claims are time-barred by the 4-year statute of limitations under NRS 11.220 as a matter of law. Second, to the extent that Fernley's state constitutional claims seek money damages, the Court holds that Fernley's claims for money damages are

additionally barred by sovereign immunity under NRS 41.032(1) as a matter of law. Third, the Court holds that, as a political subdivision of the state, Fernley lacks standing as a matter of law to bring separation-of-powers claims against the state under Article 3, Section 1 of the Nevada Constitution because that constitutional provision does not exist for the protection of political subdivisions of the state. Fourth, even if the Court assumes that Fernley has standing to bring separation-of-powers claims against the state and even if the Court also assumes that those claims are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. Finally, in contrast to its separation-of-powers claims, Fernley has standing as a matter of law to bring constitutional claims against the state alleging that the C-Tax statutes violate the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. Nevertheless, even if the Court assumes that Fernley's claims under Article 4, Sections 20 and 21 are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate either Article 4, Section 20 or Article 4, Section 21 of the Nevada Constitution.

In reaching its decision, the Court sympathizes with Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents. However, the Court finds that the Legislature did not exceed its constitutional power over the distribution of state tax dollars when it made public policy determinations regarding how those state tax dollars are distributed to local governments under the C-Tax statutes. In particular, the legislative history of the C-Tax statutes demonstrates that the Legislature determined as a matter of public policy to limit any new local government which is formed or incorporated after the enactment of the C-Tax statutes, such as the City of Fernley, from receiving increased C-Tax distributions unless the new local government: (1) provides certain general-purpose

governmental services, such as police protection and fire protection, as set forth in NRS 360.740; (2) assumes the functions of another local government as set forth in NRS 354.598747; or (3) enters into a cooperative agreement with another local government to establish alternative formulas for C-Tax distributions as set forth in NRS 360.730.

Because the Court finds that the Legislature's public policy determinations in this regard do not result in any of the constitutional violations alleged in Fernley's complaint, the Court's judicial review of the C-Tax statutes is at an end, and the Court may not judge the wisdom, policy or fairness of the C-Tax statutes because "matters of policy or convenience or right or justice or hardship or questions of whether the legislation is good or bad are solely matters for consideration of the legislature and not of the courts." *King v. Bd. of Regents*, 65 Nev. 533, 542 (1948). As further articulated by the United States Supreme Court in the context of state tax systems, "it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures." *Dane v. Jackson*, 256 U.S. 589, 598-99 (1921).

Thus, if Fernley desires to receive increased C-Tax distributions without complying with the current provisions of the C-Tax statutes, its answer lies with the Legislature, not with the courts. Accordingly, because the Defendants are entitled to judgment as a matter of law on all remaining claims for relief alleged in Fernley's complaint, the Court enters the following findings of fact, conclusions of law, and order and judgment pursuant to NRCP 52, 56 and 58.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural history.

Fernley filed its complaint on June 6, 2012. In response, the State filed a Motion to Dismiss on August 3, 2012, and the Legislature filed a Joinder in the State's Motion to Dismiss on August 16, 2012. Fernley filed an Opposition to the State's Motion to Dismiss on August 20, 2012, in which Fernley

argued that the State's Motion to Dismiss should be treated as a motion for summary judgment, and Fernley moved for a continuance to complete discovery under the summary-judgment rule in NRCP 56(f). On September 18, 2012, the Court approved a Stipulation and Order in which the parties agreed to treat the Legislature's Joinder in the State's Motion to Dismiss as the Legislature's own Motion to Dismiss.

On October 15, 2012, the Court entered an Order Granting a Continuance to Complete Discovery in which the Court denied both Motions to Dismiss to allow Fernley a period of time to complete discovery. That Order also provided that the Defendants, upon completion of a reasonable discovery period, were allowed to renew their Motions to Dismiss which would then be duly considered by the Court. On November 5, 2012, the State and the Legislature jointly filed a Petition for Writ of Mandamus with the Nevada Supreme Court that asked the Supreme Court to review this Court's order denying their Motions to Dismiss.

On January 25, 2013, the Nevada Supreme Court issued a Writ of Mandamus and an Order Granting in Part and Denying in Part the Petition for Writ of Mandamus filed by the Defendants. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). The Supreme Court stated that "the district court was obligated under clear legal authority to dismiss the federal constitutional claims" because Fernley "was required to bring its federal constitutional claims within two years of its incorporation, and its failure to do so renders those claims barred by the statute of limitations." *Id.* However, with regard to the Defendants' arguments that Fernley's state constitutional claims should be dismissed, the Supreme Court stated that "although we make no comment on the merits of these arguments, we nonetheless decline to exercise our discretion to entertain this writ petition with regard to these issues." *Id.* As a result, on February 22, 2013, this Court entered an Order Pursuant to Writ of Mandamus which dismissed Fernley's federal constitutional claims but ordered the parties to complete discovery regarding Fernley's state constitutional claims.

Following the completion of discovery, the State filed a Renewal of Motion to Dismiss on May 5, 2014, in which it argued that Fernley's state constitutional claims should be dismissed as a matter of law. On May 6, 2014, the Legislature filed a Joinder in Renewal of Motion to Dismiss. On June 6, 2014, the Court entered an Order converting the Defendants' Renewed Motions to Dismiss into Motions for Summary Judgment. Additionally in its June 6, 2014 Order, the Court dismissed all claims against the State Treasurer because the Court determined that the State Treasurer is entitled to sovereign immunity under NRS 41.032(1) as a matter of law. On June 13, 2014, Fernley filed a Motion for Summary Judgment seeking relief on its state constitutional claims. On June 18, 2014, Fernley also filed a Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. On September 2, 2014, the Court heard oral arguments from the parties regarding each party's Motion for Summary Judgment and Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. Therefore, each party has presented the Court with a Motion for Summary Judgment, and each party has asked for a final judgment to be entered in its favor on all remaining claims for relief alleged in Fernley's complaint.

B. History and overview of the C-Tax system.

In 1995, the Legislature created an interim committee to study Nevada's laws governing the distribution of state tax revenues to local governments. Senate Concurrent Resolution No. 40 (S.C.R. 40), 1995 Nev. Stat., file no. 162, at 3034-36. The Legislature authorized the interim study because it found that the existing laws relating to the distribution of tax revenues were inadequate to meet the demands for new and expanded services placed on local governments by Nevada's rapid population and economic growth. *Id.* Based on its study, the interim committee recommended consolidating six statewide tax revenue sources into a single account and establishing base amounts that would be distributed from the account to local governments. *LCB Bulletin No. 97-5: Laws Relating to the Distribution Among Local Governments of Revenue from State and Local Taxes* (Nev. LCB

Research Library, Jan. 1997) (Leg.'s Ex. 5). The interim committee also recommended establishing appropriate adjustments to the base amounts when public services provided by local governments are taken over by other entities or are eliminated. *Id.* The interim committee also recommended establishing the number and type of public services that new local governments must provide in order to participate in the distribution of revenue from the account. *Id.*

In 1997, based on the results of the interim study, the Legislature enacted Senate Bill No. 254 (S.B. 254), which created the C-Tax system codified in NRS 360.600-360.740. 1997 Nev. Stat., ch. 660, at 3278-3304. The Department of Taxation was given the duty to administer the C-Tax system and the state tax revenues deposited in the Local Government Tax Distribution Account (Account).[1] NRS 360.660. The proceeds from the following six state tax revenues are deposited in the Account: (1) the liquor tax—NRS 369.173; (2) the cigarette tax—NRS 370.260; (3) the real property transfer tax—NRS 375.070; (4) the basic city-county relief tax—NRS 377.055; (5) the supplemental city-county relief tax—NRS 377.057; and (6) the basic governmental services tax—NRS 482.181.

The state tax money in the Account is distributed to local governments under a two-tier system. Under the first-tier, a certain portion from each revenue source is allocated to each county according to specific statutory formulas and credited to the county's subaccount. The first-tier revenues in the county's subaccount are then distributed to the county and the cities, towns, enterprise districts[2] and special districts[3] in the county that are eligible for a second-tier distribution.

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[1] In 1997, the Account was enacted as the Local Government Tax Distribution Fund in the State Treasury. 1997 Nev. Stat., ch. 660, § 8, at 3278. In 1999, it was changed to the Local Government Tax Distribution Account in the Intergovernmental Fund (NRS 353.254) in the State Treasury. 1999 Nev. Stat., ch. 8, § 10, at 10.

[2] Enterprise districts are local governmental entities which are not counties, cities or towns and which are determined to be enterprise districts by the Executive Director based on the criteria in NRS 360.620 and 360.710. Examples of enterprise districts include certain general improvement districts (GIDs) and certain water, sewer, sanitation and television districts.

[3] Special districts are local governmental entities which are not counties, cities, towns or enterprise districts. NRS 360.650. Examples of special districts include certain hospital, library, fire-protection and mosquito-abatement districts.

To be eligible for a second-tier distribution, the entity must be an enterprise district, or it must be a county, city, town or special district that received "before July 1, 1998, any portion of the proceeds of a tax which is included in the Account." NRS 360.670. In addition, a county, city, town or special district is also eligible for a second-tier distribution if it was created after July 1, 1998, and it provides police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740.

The second-tier distributions in each county have two components—base amounts calculated under NRS 360.680 and excess amounts calculated under NRS 360.690. The base amounts for the enterprise districts in the county are distributed before any base amounts are distributed to the county and the cities, towns and special districts in the county. NRS 360.680. If there is sufficient money remaining in the county's subaccount after the enterprise districts receive their base amounts, the county and the cities, towns and special districts in the county are entitled to receive their base amounts. NRS 360.690. However, if there is not sufficient money remaining in the county's subaccount to distribute the full base amounts to the county and the cities, towns and special districts in the county, their base amounts are prorated in proportionate percentages. *Id.*

After distribution of all base amounts, if there is any excess money remaining in the county's subaccount, the county and the cities, towns and special districts in the county are entitled to receive distributions of excess amounts, but the enterprise districts are not entitled to receive such distributions. NRS 360.690. If excess amounts are distributed, the particular amount received by each entity is calculated using statutory formulas that take into account changes in population or changes in the assessed valuation of taxable property, or changes in both. *Id.* Because the statutory formulas used to calculate excess amounts involve varying factors, the excess amounts ultimately distributed to the county and the cities, towns and special districts in the county are significantly impacted by the specific population and property tax conditions attributable to each such entity.

Under the 1997 version of the C-Tax statutes, the base amounts distributed to the county and the cities, towns and special districts in the county were adjusted each fiscal year based on certain changes in the Consumer Price Index. S.B. 254, 1997 Nev. Stat., ch. 660, § 10, at 3279 (codified at NRS 360.680). In addition, any excess amounts distributed in the prior fiscal year were added to base amounts in subsequent fiscal years. *Id.* However, in 2001, the Legislature amended the C-Tax statutes to exclude excess amounts from being added to base amounts in subsequent fiscal years, so that base amounts were adjusted based only on certain changes in the Consumer Price Index. Assembly Bill No. 10, 2001 Nev. Stat., 17th Spec. Sess., ch. 7, § 1, at 109 (amending NRS 360.680). In 2013, the Legislature amended the C-Tax statutes to provide that any excess amounts distributed in fiscal years beginning on or after July 1, 2014, are added to base amounts in subsequent fiscal years. Assembly Bill No. 68, 2013 Nev. Stats., ch. 3, § 3, at 11-12 (amending NRS 360.680). Thus, under the 2013 version of the C-Tax statutes, base amounts are adjusted each fiscal year based on certain changes in the Consumer Price Index and the addition of any excess amounts distributed on or after July 1, 2014.

C. Statutory methods for increasing C-Tax distributions to new local governments.

When the Legislature enacted the C-Tax system in 1997, it provided several statutory methods for increasing C-Tax distributions to new local governments created after July 1, 1998. S.B. 254, 1997 Nev. Stat., ch. 660, §§ 14, 15 & 24, at 3282-86 & 3293-94 (codified at NRS 360.730, 360.740 & 354.598747). First, if a new local government is created after July 1, 1998, it is eligible to receive increased C-Tax distributions if it elects to provide police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740. Second, if a new local government assumes the functions of another local government, it is entitled to increased C-Tax distributions. NRS 354.598747. Third, a new local government may enter into a cooperative agreement with another local government to increase its C-Tax distributions, such as when the new local government agrees to take over services provided by the other

local government. NRS 360.730.

The parties disagree as to whether Fernley is eligible to request an increase in its C-Tax distributions under NRS 360.740 if it elects to provide police protection and at least two of the other required services. Fernley contends that a new local government which incorporates after July 1, 1998, and elects to provide the required services has only a 1-year window after incorporation in which to request an increase in its C-Tax distributions under NRS 360.740. Fernley's contention is based on the statutory provision mandating that the new local government must submit its request for increased C-Tax distributions "[o]n or before December 31 of the year immediately preceding *the first fiscal year* that the local government . . . would receive money from the Account." NRS 360.740(2) (emphasis added). In support of its contention, Fernley produced an advisory opinion from the Department of Taxation which stated in relevant part:

> Question Four: Is Fernley eligible to receive an adjustment pursuant to the provisions of NRS 360.740, as a municipality created after July 1, 1998?
>
> NRS 360.740 authorizes a newly created local government to receive an additional allocation of Tier 2 Base C-Tax. At the time the City of Fernley was created in 2001, it had the option of taking on police protection and two additional services (fire protection; construction, maintenance and repair of roads; or parks and recreation). At the time of its creation, Fernley had the option of taking on these services and receiving an additional allocation. Fernley did not opt to assume police protection. At this time, if Fernley assumes additional services it may be eligible for an adjustment of its C-Tax distribution pursuant to NRS 354.598747. In accordance with NAC 360.200(2), this opinion may be appealed to the Nevada Tax Commission.[4]

(Fernley's Ex. 24.)

The Legislature contends that NRS 360.740 does not limit a new local government to a 1-year

[4] Despite having the right to pursue an appeal of the Department's advisory opinion to the Nevada Tax Commission and the further right to seek judicial review under the Administrative Procedure Act, Fernley did not pursue any such relief. *See* NRS 360.245 & NAC 360.200 (providing for administrative appeals of the Department's advisory opinions to the Nevada Tax Commission); NRS 233B.120 (providing for judicial review of an agency's advisory opinions). Thus, Fernley did not exhaust its administrative and judicial remedies to obtain a dispositive ruling concerning whether it is eligible to request an increase in its C-Tax distributions under NRS 360.740 if it elects to provide the required services.

window after incorporation in which to request an increase in its C-Tax distributions. The Legislature contends that the term "the first fiscal year" in the statute does not refer to the first fiscal year after incorporation, but rather to the first fiscal year after the local government elects to provide the required services and files its request for increased C-Tax distributions, which can occur in any year after incorporation. The Legislature further contends that even if NRS 360.740 is ambiguous because it is subject to more than one reasonable interpretation, such ambiguity should be resolved in favor of new local governments being able to request increased C-Tax distributions in any year after incorporation in order to carry out the intent of the C-Tax statutes and to avoid any alleged constitutional problems. Thus, in the Legislature's view, Fernley remains eligible to submit a request under NRS 360.740 for increased C-Tax distributions if it elects to provide the required services.

Fernley counters that even if it is eligible to request an increase in its C-Tax distributions under NRS 360.740, it is caught in a "classic catch-22" because it must first provide police protection to request an increase in its C-Tax distributions under NRS 360.740 but it is currently unable to provide police protection because it does not have sufficient tax revenues to do so without first receiving an increase in its C-Tax distributions. Fernley also argues that even if it elects to provide police protection and the other services required by NRS 360.740, it would not be entitled to an increase in its C-Tax distributions because its request would have to be reviewed and approved by the Committee on Local Government Finance (CLGF) and the Nevada Tax Commission. NRS 360.740(4)-(6). Fernley believes "there is no likelihood of success for a new entity in such a process" based on its assertion that the members of the CLGF are representatives of other local governments which would stand to lose C-Tax revenues upon their redistribution to a new local government like Fernley.[5]

The Legislature contends that Fernley's interpretation of NRS 360.740 is not consistent with the

[5] The CLGF consists of eleven members. NRS 354.105. The following associations each appoint three members: (1) the Nevada League of Cities; (2) the Nevada Association of County Commissioners; and (3) the Nevada School Trustees Association. *Id.* The Nevada State Board of Accountancy appoints the other two members. *Id.*

intent or purpose of the statute and produces unreasonable or absurd results that must be avoided. The Legislature contends that because the intent or purpose of NRS 360.740 is to encourage the formation of new general-purpose local governments that provide their own traditional general-purpose governmental services, such as police protection and fire protection, the statute must be interpreted in a reasonable manner that facilitates, rather than impedes, distributing C-Tax revenues to those new general-purpose local governments. The Legislature contends that it would be unreasonable or absurd to interpret NRS 360.740 to require Fernley to provide a fully operational police department and the other required services before it may request an increase in its C-Tax distributions to fund those services. Instead, the Legislature contends that a reasonable reading of NRS 360.740 would require Fernley to take appropriate legislative action expressing the city's intent to provide police protection and the other required services beginning in an upcoming fiscal year and thereafter Fernley could submit a request under the statute "[o]n or before December 31 of the year immediately preceding the first fiscal year" that Fernley would receive increased C-Tax distributions to fund those services. Additionally, the Legislature contends that, regardless of the proper statutory interpretation of NRS 360.740, no political subdivision has a constitutional right to obtain an adjustment or increase in its C-Tax distributions and that the issue of whether Fernley is eligible to request an increase in its C-Tax distributions under NRS 360.740 has no bearing on its state constitutional claims.

Although the parties are in dispute regarding the proper statutory interpretation of NRS 360.740, it is not necessary for the Court to resolve the disputed statutory issues in order to adjudicate Fernley's state constitutional claims. Even if it is unclear whether the C-Tax statutes allow Fernley to submit a request under NRS 360.740 for increased C-Tax distributions, it is clear that the C-Tax statutes allow Fernley to receive increased C-Tax distributions under NRS 354.598747 if Fernley assumes the functions of another local government. It is also clear that the C-Tax statutes allow Fernley to enter into cooperative agreements with other local governments to increase its C-Tax distributions under

NRS 360.730, including in circumstances where Fernley agrees to take over services provided by another local government. Thus, contrary to Fernley's claims, the existing C-Tax statutes contain several statutory methods for Fernley to receive increases in its C-Tax distributions.

Despite the availability of these statutory methods, Fernley contends that Lyon County is unlikely or unwilling to enter into any cooperative agreements to increase Fernley's C-Tax distributions given that Lyon County has already rejected several of Fernley's previous requests to enter into such agreements. The Legislature contends, however, that Lyon County has officially represented on the public record in legislative proceedings that it is willing to negotiate a cooperative agreement to increase Fernley's C-Tax distributions if Fernley is willing take over one or more of the services the county is presently providing to the city.

The Legislature points to testimony given by Lyon County officials before the Legislature's 2011-2013 Interim C-Tax Study, which was created by the Legislature to comprehensively study the C-Tax system. Assembly Bill No. 71, 2011 Nev. Stat., ch. 384, § 1, at 2391-92. During the 2011-2013 Interim C-Tax Study, the Lyon County Comptroller testified that the county did not oppose providing additional C-Tax funding to Fernley and would be willing to discuss a redistribution of C-Tax funding between the county and the city if Fernley would be willing to take over one or more of the services provided by the county to the city, such as police protection. (Leg. Ex. 6.) The Comptroller further testified that if Fernley had opted to assume police-protection services when it incorporated and had engaged Lyon County in a discussion of C-Tax allocation, "Fernley would have received an allocation from Lyon County to go to the city coffers to pay for those services." *Id.* According to the Comptroller's testimony, because Fernley did not opt to provide police-protection services when it incorporated, "the only reason the City of Fernley had [C-Tax revenue at all] was because the city was receiving distributions when they were an unincorporated town providing park services previously." *Id.*

Although the parties disagree as to whether Lyon County is willing to enter into any cooperative

agreements with Fernley to increase its C-Tax distributions under NRS 360.730, it is not necessary for the Court to resolve that disagreement in order to adjudicate Fernley's state constitutional claims. Based on its plain terms, NRS 360.730 authorizes, but does not require, local governments to enter into cooperative agreements to adjust C-Tax distributions among the local governments. Thus, a local government's decision whether to enter into any cooperative agreements under NRS 360.730 is purely a discretionary decision entrusted to its governing body. Given that Lyon County has previously exercised its discretion under NRS 360.730 to reject such cooperative agreements, Fernley argues that NRS 360.730 is an "illusory remedy" because the possibility of Lyon County actually entering into any cooperative agreements with Fernley is so remote. Fernley, however, fails to cite any authority for the proposition that a political subdivision has any constitutional right to a statutory remedy for increasing its C-Tax distributions. In the absence of such a constitutional right, the Legislature is empowered to determine, as a matter of public policy, whether and under what circumstances a political subdivision may request or receive any increases in its C-Tax distributions.

In this case, the Legislature has provided several statutory methods for increasing C-Tax distributions to new local governments. While the Court acknowledges that the existing statutory methods for increasing C-Tax distributions may be difficult for Fernley to meet, especially if it must take over one or more services provided by another local government, it was within the Legislature's constitutional power over the distribution of state tax dollars to determine, as a matter of public policy, whether to provide such statutory methods in the C-Tax statutes in the first place and, if it decides to do so, to determine the criteria that must be satisfied in order to obtain an increase in C-Tax distributions. Given Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents, it is understandable that Fernley is dissatisfied with the statutory methods chosen by the Legislature, as a matter of public policy, for increasing C-Tax distributions to new local governments. Nevertheless, because the Court finds that the Legislature's public policy determinations in this regard

do not result in any of the constitutional violations alleged in Fernley's complaint, Fernley's dissatisfaction with the statutory methods chosen by the Legislature for increasing C-Tax distributions does not provide any evidentiary support for its state constitutional claims.

D. Application of the C-Tax system to Fernley.

When the Legislature enacted the C-Tax system in 1997, Fernley was an unincorporated town that was eligible for a second-tier distribution. To facilitate Nevada's transition to the new C-Tax system, the Legislature included transitory provisions in sections 35-36 of S.B. 254 which initially took precedence over NRS 360.600-360.740. S.B. 254, 1997 Nev. Stat., ch. 660, §§ 35-36, at 3301-04. Under section 35 of S.B. 254, Fernley's initial year of C-Tax distributions as an unincorporated town was the fiscal year beginning on July 1, 1998, and ending on June 30, 1999, and the base amount for Fernley's initial year of C-Tax distributions was calculated using the formula in that section. *Id.* § 35, at 3301-02. After the period in which Fernley's C-Tax distributions were calculated pursuant to S.B. 254's transitory provisions, the base amounts of Fernley's C-Tax distributions were thereafter calculated pursuant to the statutory formulas in NRS 360.680, as amended, and any excess amounts included in Fernley's C-Tax distributions were thereafter calculated pursuant to the statutory formulas in NRS 360.690, as amended.

Since the enactment of the C-Tax system in 1997, Fernley is the only governmental entity to incorporate as a new city in Nevada.[6] In 1998, a sufficient number of qualified electors of the unincorporated Town of Fernley formed the Fernley Incorporation Committee to take the steps required to circulate an incorporation petition and bring about Fernley's incorporation under NRS Chapter 266,

[6] Although Fernley is the only entity to incorporate as a new city in Nevada since 1997, it is not the only entity to consider incorporation. In 2012 for example, the voters of the Town of Laughlin in Clark County, Nevada, considered a proposal to incorporate as a new city, but they rejected the proposal. *See* Senate Bill No. 262, 2011 Nev. Stat., ch. 481, at 2997-3026 (providing for an election to be held on the question of the incorporation of the City of Laughlin).

Nevada's general law for municipal incorporation.[7] (Leg.'s Ex. 11.) Under NRS Chapter 266, an incorporation petition must include, among other things, the incorporation committee's plans for providing police protection, fire protection, road maintenance and other governmental services, along with an estimate of the costs and the sources of revenue for providing those services. *See* NRS 266.019. As a result, the Fernley Incorporation Committee corresponded with the Department of Taxation in 1998 to obtain estimates of the C-Tax distributions and the other tax revenues that Fernley could expect if it incorporated. (Leg.'s Ex. 11.)

On June 25, 1998, using several different population growth rates submitted by the Incorporation Committee, the Department of Taxation advised the Incorporation Committee that Fernley would realize little to no increase in its C-Tax distributions as the result of its incorporation, and the Department directed the Incorporation Committee to examine NRS 354.598747 to determine the impact on Fernley's C-Tax distributions if Fernley were to assume any of the services that would be provided to the incorporated city by Lyon County.[8] (Leg.'s Ex. 12.) On July 17, 1998, the Department of Taxation again advised the Committee that Fernley would not experience any significant increase in its C-Tax distributions if it incorporated within its existing boundaries unchanged. (Leg. Ex. 13.) On March 3, 1999, the Department of Taxation also advised the Committee of the requirements of NRS 360.740 concerning the provision of required services for a newly incorporated city to receive increased C-Tax distributions. (Leg. Ex. 14.)

On March 27, 2000, the Incorporation Committee submitted an informational letter along with its

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[7] The Nevada Constitution allows the Legislature to provide for the organization of cities through general laws for municipal incorporation. Nev. Const. art. 8, § 8; *State ex rel. Williams v. Dist. Ct.*, 30 Nev. 225, 227-28 (1908). It also allows the Legislature to create cities through special acts. Nev. Const. art. 8, § 1; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, 142-45 (1876); *W. Realty v. City of Reno*, 63 Nev. 330, 350-51 (1946).

[8] For example, based on a population of 6,510, the Department projected Fernley's C-Tax distribution would be $83,824.89 for the fiscal year beginning on July 1, 1999, and based on a hypothetical population growth rate of 9.09% with a resulting population of 12,000, the Department projected Fernley's C-Tax distribution would be $84,075.91, a net increase of only $251.02. (Leg.'s Ex. 12.)

incorporation petition to the CLGF which has a statutory duty under NRS Chapter 266 to determine whether certain requirements for incorporation of a general-law city have been satisfied. (Leg. Ex. 15 & Leg. Ex. 16.) The informational letter indicated that Fernley's fire protection was being provided by the North Lyon County Fire Protection District, its police protection was being provided by the Lyon County Sheriff's Department and the construction, maintenance and repair of its roads was being provided by Lyon County. (Leg. Ex. 15.) The informational letter also indicated that Fernley's recreational facilities, which included three public parks in Fernley, were being funded by Lyon County. *Id.* The incorporation petition set forth Fernley's plans for providing these governmental services after incorporation. (Leg. Ex. 16.) The incorporation petition indicated that Fernley expected the North Lyon County Fire Protection District to continue providing its fire-protection services and that it anticipated negotiating and entering into interlocal agreements with Lyon County for the continued provision of services relating to police protection, parks and recreation and the construction, maintenance and repair of roads. *Id.*

During a meeting of the CLGF to address the feasibility of Fernley's proposed incorporation, the CLGF noted that Fernley's incorporation petition relied on the expectation that Lyon County would continue providing a number of services and therefore expressed some concern that:

> how effective this can be is gonna [sic] 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 . . . if indeed, the working with the County goes smoothly I think we clearly have the ability to provide the revenues needed for a city. [but if] the County says no, go take a walk, then you've got big problems."

(Leg. Ex. 17.) In response, Debra Brazell, the Chair of the Incorporation Committee, assured the CLGF that "the change in [C-Tax] law is really equitable and really, really works nicely" and that because of Fernley's relationship with Lyon County, Fernley expected to maintain service levels "either by funds or negotiated services." *Id.*

Fernley's incorporation became effective on July 1, 2001. As evidenced by the public record preceding its incorporation, Fernley was aware in 2001 that it would receive little to no increase in its C-Tax distributions as a result of its incorporation regardless of any projected population growth. Fernley was also aware in 2001 that its C-Tax distributions could be increased only if it provided the required services under NRS 360.740, assumed the functions of another local government under NRS 354.598747, or entered into a cooperative agreement with another local government under NRS 360.730. Thus, Fernley was aware in 2001 that its C-Tax distributions would continue to be calculated and adjusted using its original base amount under section 35-36 of S.B. 254 and the statutory formulas in NRS 360.680 and 360.690, as amended, unless it complied with one or more of the statutory methods for increasing its C-Tax distributions. As stated by the Nevada Supreme Court in its order regarding the mandamus petition, "[n]either party disputes that, at the time of the City's incorporation in 2001, the City was aware that absent specific circumstances, its base consolidated-tax distributions would be set by its previous distributions and would remain at that level." *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013).

Unlike many other Nevada cities, Fernley does not provide the traditional general-purpose governmental services of police protection and fire protection. Instead, police-protection services are provided by the Lyon County Sheriff's Department, and fire-protection services are provided by the North Lyon County Fire Protection District. Even though Fernley does not provide the traditional general-purpose governmental services of police protection and fire protection, it asks to be compared to the Cities of Elko, Mesquite and Boulder City, which have similar populations to Fernley but which are different from Fernley because they provide the traditional general-purpose governmental services of police protection and fire protection. Thus, while Fernley believes it should receive the same C-Tax distributions as those general-purpose governments, it does not seem that Fernley wants to provide the same services as those general-purpose governments or assume the functions of another local

government as required by the C-Tax statutes.

Fernley contends, however, that its residents shoulder a unique burden among general-law cities because they pay a property tax charge that directly funds the fire-protection services of the North Lyon County Fire Protection District, which is a special district under the C-Tax statutes and which receives its own C-Tax distributions. (Fernley's Ex. 33.) However, it was representatives of Fernley who lobbied for the passage of special legislation in 2001 to preserve the North Lyon County Fire Protection District in order to avoid having to create a city fire department immediately upon Fernley's incorporation. Assembly Bill No. 663, 2001 Nev. Stat., ch. 135, at 701-02.

When a city incorporates under NRS Chapter 266, the general law provides that fire protection districts may no longer exist within that city after the incorporation becomes effective. NRS 266.043(2). However, before Fernley's incorporation became effective on July 1, 2001, representatives of Fernley lobbied for the passage of special legislation "providing for the continued existence of the North Lyon County Fire Protection District following the incorporation of the City of Fernley." Assembly Bill No. 663, 2001 Nev. Stat., ch. 135, at 701. The special legislation provided that:

> Notwithstanding the provisions of subsection 2 of NRS 266.043, the North Lyon County Fire Protection District may continue to exist on and after the date on which the incorporation of the City of Fernley becomes effective and the boundaries that district may continue to include territory incorporated into the new City of Fernley.

Id. § 3, at 701-02.

Based on the legislative committee testimony regarding the special legislation, its sole purpose was to maintain the North Lyon Fire Protection District "in 'status quo' position" in order to avoid having to create a city fire department immediately upon Fernley's incorporation. *Hearing on A.B. 663 before Assembly Comm. on Gov't Affairs*, 71st Leg. (Nev. Apr. 25, 2001). However, given that the special legislation uses the permissive term "may," there is no requirement that the North Lyon Fire Protection District must continue to exist indefinitely within the incorporated boundaries of Fernley.

Instead, Fernley's city council may create a city fire department under the general law in NRS 266.310, which authorizes the city council to "[o]rganize, regulate and maintain a fire department." *See Hearing on A.B. 663 before Assembly Comm. on Gov't Affairs*, 71st Leg. (Nev. Apr. 25, 2001) (testimony of LeRoy Goodman, Lyon County Commissioner, stating: "It was felt the fire district should remain the same until Fernley could afford to establish their own department."). Consequently, even though Fernley's fire-protection services are currently provided by the North Lyon County Fire Protection District, Fernley is authorized by existing law to take over those services, and Fernley could receive increased C-Tax distributions under NRS 354.598747 by assuming the fire-protection functions of the North Lyon County Fire Protection District.

Similarly, Fernley's city council may create a city police department under the general law in NRS Chapter 266. *See* NRS 266.390, 266.455, 266.460 & 266.530. Thus, even though Fernley's police-protection services are currently provided by Lyon County, Fernley is authorized by existing law to take over those services, and Fernley could receive increased C-Tax distributions under NRS 354.598747 by assuming the police-protection functions of the county. Accordingly, if Fernley wants to be comparable to the Cities of Elko, Mesquite and Boulder City, it has the statutory authority to provide the traditional general-purpose governmental services of police protection and fire protection like those other cities, and it would be entitled to increased C-Tax distributions under NRS 354.598747 if it provided those services.

E. Standards of review.

A party is entitled to summary judgment under NRCP 56 when the submissions in the record "demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731 (2005). The purpose of granting summary judgment "is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." *McDonald*

v. D.P. Alexander, 121 Nev. 812, 815 (2005) (quoting *Coray v. Hom*, 80 Nev. 39, 40-41 (1964)).

In addition, a party is entitled to summary judgment when the claims against the party are barred as a matter of law by one or more affirmative defenses. *See Williams v. Cottonwood Cove Dev.*, 96 Nev. 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of the claims against the party even if all allegations in the complaint are true. *Douglas Disposal v. Wee Haul*, 123 Nev. 552, 557-58 (2007). Such affirmative defenses include the statute of limitations and sovereign immunity. *See* NRCP 8(c); *Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (2008); *Kellar v. Snowden*, 87 Nev. 488, 491-92 (1971). Finally, a party is entitled to summary judgment when the other party lacks standing as a matter of law to bring a claim. *See Gunny v. Allstate Ins.*, 108 Nev. 344, 345 (1992).

In this case, the only claims remaining are Fernley's state constitutional claims in which Fernley alleges that the C-Tax statutes violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution and the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. As a general rule, when the plaintiff pleads claims that a state statute is unconstitutional, the plaintiff's claims present only issues of law which are matters purely for the Court to decide and which may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented.[9]

With regard to Fernley's state constitutional claims, each party moved for summary judgment, and each party argued that no genuine issues of material fact exist and that the Court could enter summary judgment in its favor as a matter of law. No party contended that the record is inadequate for consideration of the constitutional issues presented. Therefore, the Court finds that summary judgment

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[9] *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 506-09 (2009) (affirming district court's summary judgment regarding constitutionality of a statute and stating that "[t]he determination of whether a statute is constitutional is a question of law."); *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 294-95 (1983) (holding that a constitutional claim may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented).

is appropriate because there are no genuine issues of material fact which need to be tried and because Fernley's state constitutional claims fail on their merits as a matter of law. In addition, the Court also finds that summary judgment is appropriate because Fernley's state constitutional claims are barred as a matter of law by the statute of limitations and because Fernley's claims for money damages are additionally barred as a matter of law by sovereign immunity. Finally, the Court finds that summary judgment is appropriate because Fernley lacks standing as a matter of law to bring separation-of-powers claims against the state.

In reviewing the merits of Fernley's state constitutional claims, the Court must presume the C-Tax statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." *Id.* at 138. As a result, the Court must not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870) ("every statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution."). Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not declare an act void because it disagrees with the wisdom of the Legislature." *Anthony v. State*, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of the C-Tax statutes, the Court must not be concerned with the wisdom or policy of the statutes because "[q]uestions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine." *Worthington v. Second Jud. Dist. Ct.*, 37 Nev. 212, 244 (1914).[10] Guided by

[10] *See also In re McKay's Estate*, 43 Nev. 114, 127 (1919) ("Much has been said by counsel for appellant of the injustice of a [statute] that will deprive appellant of her inheritance. Even so, we cannot amend the statute. The policy, wisdom, or expediency of a law is within the exclusive theater of legislative action. It is a forbidden sphere for the judiciary, which courts cannot invade, even under pressure of constant importunity.").

these standards of review, the Court concludes that the C-Tax statutes are constitutional and that the Defendants are entitled to judgment as a matter of law for the following reasons.

F. Fernley's claims are time-barred by the statute of limitations.

A defendant is entitled to summary judgment when the plaintiff's claims are time-barred by the statute of limitations as a matter of law. *Ash Springs Dev. v. O'Donnell*, 95 Nev. 846, 847 (1979). In this case, the Defendants contend that Fernley's state constitutional claims are time-barred by the statute of limitations in NRS Chapter 11 as a matter of law. The Defendants posit that there are two potential limitations periods in NRS Chapter 11 that apply to Fernley's state constitutional claims. The first limitations period cited by the Defendants is the 2-year limitations period for personal injury actions in NRS 11.190(4)(e), which applies to all federal constitutional claims arising in Nevada under 42 U.S.C. § 1983.[11] The second limitations period cited by the Defendants is the 4-year limitations period in NRS 11.220, which applies generally to all causes of action arising in Nevada unless a different limitations period is provided by a specific statute.[12] The Defendants contend that because the events that form the basis of Fernley's state constitutional claims occurred when Fernley incorporated in 2001, which was more than a decade before it commenced this action in 2012, Fernley's state constitutional claims are time-barred as a matter of law by the statute of limitations, regardless of whether the Court applies the 2-year or 4-year limitations period to those claims.

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[11] *See Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985) (holding that because "§ 1983 claims are best characterized as personal injury actions," the state's personal injury statute of limitations should be applied to all § 1983 claims arising in the state); *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (holding that NRS 11.190(4)(e) "being the residual statute of limitations for personal injury actions is the statute of limitations applicable to section 1983 cases in Nevada."); *Day v. Zubel*, 112 Nev. 972, 977 (1996) (stating that "*Wilson* was interpreted by the Ninth Circuit [in *Perez*] to mandate a two year statute of limitations for such actions in Nevada.").

[12] *See State v. Yellow Jacket Silver Mining*, 14 Nev. 220, 230 (1879) (holding that Nevada's statute of limitations "embraces every civil action, both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033 [presently codified in NRS 11.220], and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature.").

Fernley contends that it has not been legislatively or judicially determined in Nevada whether the statute of limitations in NRS Chapter 11 applies to state constitutional claims, although Fernley does not cite any authority or make any arguments to support a conclusion that Nevada's statute of limitations does not apply to state constitutional claims. Fernley also contends that even if the statute of limitations applies to state constitutional claims generally, a limitations period longer than 4 years should apply to its state constitutional claims, although Fernley fails to cite any specific statute which sets forth a longer limitations period for its state constitutional claims. Finally, Fernley contends that even if the statute of limitations applies to its state constitutional claims, the continuing violations doctrine recognized by federal law permits Fernley to bring all of its claims that have arisen since at least its incorporation in 2001 because the C-Tax system from its inception has produced systematic and continuing constitutional violations with every dollar distributed under the system and therefore every such unconstitutional C-Tax distribution is still actionable as part of a series of continuing violations of Fernley's constitutional rights.

The Court holds that Nevada's statute of limitations in NRS Chapter 11 applies to Fernley's state constitutional claims and that the 4-year limitations period in NRS 11.220 is the governing limitations period because no other specific statute prescribes a different limitations period for those claims. The Court also holds that the continuing violations doctrine recognized by federal law does not save Fernley's state constitutional claims. In its mandamus order, the Nevada Supreme Court determined that the statute of limitations began to run on Fernley's federal constitutional claims at the time of its incorporation in 2001. This Court likewise concludes that the statute of limitations began to run on Fernley's state constitutional claims at the same time in 2001. The Nevada Supreme Court also determined that no exception applied under federal law that would allow Fernley to avoid the expiration of the limitations period on its federal constitutional claims. This Court likewise concludes that no exception applies, including the continuing violations doctrine under federal law, that would allow

Fernley to avoid the expiration of the limitations period on its state constitutional claims. Therefore, because Fernley's state constitutional claims are time-barred by the 4-year limitations period in NRS 11.220 as a matter of law, the Court holds that the Defendants are entitled to judgment as a matter of law on Fernley's state constitutional claims.

At the federal level, the United States Supreme Court has determined that "[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 292 (1983); *United States v. Clintwood Elkhorn Mining*, 553 U.S. 1, 9 (2008). Even though the Nevada Supreme Court has not determined the precise issue of whether the statute of limitations in NRS Chapter 11 applies to state constitutional claims, it has stated "it is clear that our Statute of Limitations embraces all characters of actions, legal and equitable, and is as obligatory upon the Courts in a suit in equity as in actions at law." *White v. Sheldon*, 4 Nev. 280, 288-89 (1868). Fernley did not provide the Court with any authority or arguments to support a conclusion that its state constitutional claims are not subject to Nevada's statute of limitations in the same manner as other civil causes of action seeking legal or equitable relief. Therefore, the Court holds that Nevada's statute of limitations applies to Fernley's state constitutional claims.

The Nevada Supreme Court has also stated that when the statute of limitations is raised as a defense in Nevada, the only questions for the Court are: "First—The precise time when the statute begins to run in each particular case; and, Second—Which clause of the statute covers the case?" *White*, 4 Nev. at 289. With regard to the first question, the Court finds that the Nevada Supreme Court has already determined the precise time when the statute of limitations began to run in this particular case because it determined that the statute of limitations began to run on Fernley's federal constitutional claims at the time of its incorporation in 2001. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). This Court does not believe a different standard should be applied to Fernley's state constitutional claims. Therefore, the Court concludes that the statute of limitations began to run on

Fernley's state constitutional claims at the same time as its federal constitutional claims, which the Supreme Court determined was at the time of Fernley's incorporation in 2001.

With regard to the second question, the Court finds that the 4-year limitations period in NRS 11.220 covers this case. Nevada's statute of limitations in NRS Chapter 11 provides that "[c]ivil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute." NRS 11.010. Nevada's statute of limitations also provides that "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." NRS 11.220. Read together, these provisions mean that every civil action in Nevada must be commenced within 4 years after the cause of action accrued, except where a different limitations period is prescribed by a specific statute. *State v. Yellow Jacket Silver Mining*, 14 Nev. 220, 230 (1879).

Relying on *White Pine Lumber v. City of Reno*, 106 Nev. 778, 779-80 (1990), Fernley suggests that a limitations period longer than 4 years should apply to its state constitutional claims, but Fernley fails to cite any specific statute which sets forth a longer limitations period for its state constitutional claims. In *White Pine Lumber*, the Nevada Supreme Court held that the 4-year limitations period in NRS 11.220 did not apply to the plaintiff's constitutional takings claim because a specific statute, NRS 40.090, provided a longer 15-year limitations period for such a claim. *Id.* at 779-80. Unlike the situation in *White Pine Lumber* where a specific statute provided a longer limitations period for the plaintiff's constitutional takings claim, there is no specific statute in this case that provides a longer limitations period for Fernley's state constitutional claims. Therefore, the Court concludes that the 4-year limitations period in NRS 11.220 covers Fernley's state constitutional claims.

Finally, Fernley argues that its state constitutional claims are not time-barred based on the continuing violations doctrine recognized by federal law which, according to Fernley, allows a plaintiff to avoid expiration of the limitations period where the plaintiff is injured by a systematic and continuing

policy of unlawful acts or a series of related and continuing violations of the plaintiff's rights. The Nevada Supreme Court has not recognized a continuing violations doctrine for state constitutional claims, and it has never applied the doctrine to avoid the running of Nevada's statute of limitations for any type of claims. Although some federal courts have recognized such a doctrine for federal constitutional claims, its application has been strictly limited by the United States Supreme Court. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *RK Ventures v. City of Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002); *Cherosky v. Henderson*, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003).[13]

Given that the continuing violations doctrine is a creature of federal law and has never been applied by the Nevada Supreme Court to avoid the running of this state's statute of limitations, it is questionable whether the continuing violations doctrine has any application in Nevada to state constitutional claims. Based on the record in this case, however, the Court does not need to resolve this question because the Nevada Supreme Court has already determined in its mandamus order that no exception applied under federal law that would allow Fernley to avoid the expiration of the limitations period on its federal constitutional claims. Because the Supreme Court's determination is now the law of this case, Fernley cannot rely on any exception under federal law, including the continuing violations doctrine, to avoid the expiration of the limitations period on its state constitutional claims.

As explained by the Nevada Supreme Court, "[t]he law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs.*, 126 Nev. Adv. Op. 4, 223 P.3d 332, 334 (2010). In order for the law-of-the-case doctrine to apply, "the appellate court must actually address and decide the issue explicitly or by necessary implication." *Id.*

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[13] To support its arguments regarding the continuing violations doctrine, Fernley relies on several Ninth Circuit cases that were decided before the U.S. Supreme Court's decision in *Morgan* in 2002. *See O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000); *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001). Because *Morgan* changed the law, Fernley's reliance on these pre-*Morgan* cases is misplaced, especially since *Morgan* reversed a Ninth Circuit decision.

When this case was before the Nevada Supreme Court on the mandamus petition, Fernley argued for application of the continuing violations doctrine as an exception under federal law to avoid the expiration of the limitations period on its federal constitutional claims. In deciding that Fernley's federal constitutional claims were time-barred by the statute of limitations, the Supreme Court stated:

> [A]t oral argument the City conceded that its federal constitutional claims would be barred unless this court applied an exception to allow it to avoid the expiration of the limitations period, *and we find that no such exception applies here.* Under these circumstances, the City was required to bring its federal constitutional claims within two years of its incorporation, and its failure to do so renders those claims barred by the statute of limitations.

State Dep't of Taxation v. First Jud. Dist. Ct., No. 62050 (Nev. Jan. 25, 2013) (emphasis added).

Thus, in its mandamus order, the Supreme Court ordered the dismissal of Fernley's federal constitutional claims based on the statute of limitations even though Fernley argued for application of the continuing violations doctrine as an exception under federal law. In doing so, the Supreme Court clearly rejected Fernley's reliance on the continuing violations doctrine to allow it to avoid the expiration of the limitations period, and that is now the law of this case. Given that the continuing violations doctrine, which is a creature of federal law, did not save Fernley's federal constitutional claims from the expiration of the statute of limitations, it follows that the doctrine does not save Fernley's state constitutional claims from the expiration of the statute of limitations either.

Therefore, because the 4-year statute of limitations began to run on Fernley's state constitutional claims at the time of its incorporation on July 1, 2001, and because Fernley did not commence this action until June 6, 2012, more than a decade later, the Court holds that Fernley's state constitutional claims are time-barred by the 4-year statute of limitations as a matter of law and that the Defendants are therefore entitled to judgment as a matter of law.[14]

[14] Because the Court holds that Fernley's state constitutional claims are time-barred by the statute of limitations, the Court does not need to address the Defendants' additional arguments that Fernley's state constitutional claims are also time-barred by the equitable doctrine of laches.

G. Fernley's claims for money damages are barred by sovereign immunity.

A defendant is entitled to summary judgment when the plaintiff's claims are barred by sovereign immunity as a matter of law. *See Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-05 (1977). In this case, the Defendants contend that Fernley's claims for money damages are barred by sovereign immunity. However, the Defendants do not contend that Fernley's claims for declaratory and injunctive relief are barred by sovereign immunity. *See Hagblom*, 93 Nev. 601-05 (applying sovereign immunity to claims for money damages but not to claims for declaratory and injunctive relief). Therefore, the Court's decision that Fernley's claims for money damages are barred by sovereign immunity as a matter of law does not apply to Fernley's claims for declaratory and injunctive relief.

The Defendants contend that a political subdivision like Fernley cannot bring a lawsuit to recover money damages against the state unless the state has waived its sovereign immunity and the political subdivision has been given specific statutory authorization for such a lawsuit.[15] The Defendants contend that the only Nevada statute which arguably could authorize Fernley to bring a lawsuit against the state to recover money damages is NRS 41.031(1), which is the state's conditional waiver of sovereign immunity for certain actions for money damages. The Defendants contend, however, that the state's conditional waiver of sovereign immunity is expressly limited by NRS 41.032(1), which protects the state from claims for money damages based on any acts or omissions of its agencies, officers and employees "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." The Defendants contend that because the state has exercised due care in the execution of

[15] *See Clark County v. State*, 65 Nev. 490, 501 (1948) ("By the act the state waived its immunity to suit and permitted the county to sue, and likewise definitely vested in the district court jurisdiction of the subject matter."); *State v. Bd. of County Comm'rs*, 642 P.2d 456, 458 (Wyo. 1982) ("the County cannot sue the State, its creator, in the absence of a specific constitutional or statutory provision authorizing such an action."); *Sch. Dist. No. 55 v. Musselshell County*, 802 P.2d 1252, 1255 (Mont. 1990) ("in the absence of a specific statutory or constitutional provision, one governmental subdivision may not sue another for damages.").

the C-Tax statutes and because those statutes have not previously been declared invalid by a court of competent jurisdiction, Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1) as a matter of law.[16]

Fernley contends that the state bears the burden of showing that it is entitled to sovereign immunity under NRS 41.032(1) and that the Defendants have not produced evidence to meet their burden of showing that the state has exercised due care in the execution of the C-Tax statutes. Fernley also contends that there is evidence that the state has not exercised due care in the execution of NRS 360.695 because the state has not exercised its authority under the statute to reduce C-Tax distributions to local governments that have experienced decreases in both population and the assessed value of taxable property. Under NRS 360.695, if a local government experiences decreases in both population and the assessed value of taxable property in three consecutive fiscal years, the Executive Director of the Department of Taxation has the authority to recommend a decrease in the C-Tax distributions received by the local government, but the Executive Director's recommendation does not become effective unless approved by the CLGF and the Nevada Tax Commission. Fernley alleges that in exercising this authority under NRS 360.695, the Executive Director has not recommended a decrease in the C-Tax distributions received by several local governments that have met the statutory criteria for such a decrease, including the Cities of Mesquite and Boulder City. Fernley contends that the Executive Director's decisions in this regard do not reflect the exercise of due care in the execution of NRS 360.695 when a city like Fernley has been repeatedly denied an increase in its C-Tax distributions.

[16] The Defendants note that at least one state court has held that the enactment of a general law waiving a state's sovereign immunity for certain actions for money damages does not provide the type of specific statutory authorization that is necessary for a political subdivision to bring a lawsuit against the state to recover money damages. *Carbon County Sch. Dist. v. Wyo. State Hosp.*, 680 P.2d 773, 775 (Wyo. 1984). The Defendants contend that it is questionable whether the state's conditional waiver of sovereign immunity in NRS 41.031(1) constitutes the type of specific statutory authorization that would allow Fernley to bring a lawsuit against the state to recover money damages. Because the Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1), the Court does not need to address this contention.

The Defendants counter that Fernley has the burden to show that the state has failed to exercise due care by proof that the state has deviated from the statutory requirements in its execution of the C-Tax statutes with regard to Fernley. The Defendants contend that Fernley has not met its burden because Fernley repeatedly alleges that the state has mechanically followed the statutory requirements and has distributed C-Tax revenues to Fernley based solely on the outcome of its mechanical application of the designated mathematical formulas in the statutes. The Defendants also contend that the issue of whether the state has exercised due care in exercising its discretionary authority under NRS 360.695 to decrease the C-Tax distributions received by other local governments has no relevance to the issue of whether the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley. The Defendants contend that because the state has followed the statutory requirements in the C-Tax statutes with regard to Fernley, the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley, and the state is entitled to sovereign immunity under NRS 41.032(1) from Fernley's claims for money damages.

The Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1) as a matter of law. Based on the state's conditional waiver of sovereign immunity in NRS 41.031(1), the state may be held liable in a civil action for damages, but such liability is expressly subject to the statutory exceptions and limitations in NRS 41.032-41.038, which preserve the state's sovereign immunity in certain circumstances. *See Boulder City v. Boulder Excavating*, 124 Nev. 749, 756 (2008). In this case, the Defendants claim sovereign immunity under the statutory exception in NRS 41.032(1), which provides:

> [N]o action may be brought [against the State] 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[.]

Because the statutory exception in NRS 41.032(1) is modeled on an analogous provision in the Federal Tort Claims Act (FTCA), 28 U.S.C. §2680(a), federal cases interpreting the FTCA are relevant in interpreting Nevada's statute. *Hagblom*, 93 Nev. at 602; *Martinez v. Maruszczak*, 123 Nev. 433, 444 (2007); *Frank Briscoe Co. v. County of Clark*, 643 F.Supp. 93, 97 (D. Nev. 1986). In interpreting the analogous provision in the FTCA, the United States Supreme Court has stated that the exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33 (1953); *see also* 2 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 12.03 (LexisNexis 2014) (collecting federal cases and stating that the exception "bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations."). The Supreme Court's interpretation of the exception is supported by its legislative history where Congress stated that it was not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." *Dalehite*, 346 U.S. at 29 n.21 (quoting several Senate and House reports regarding the purpose of the exception). Consequently, by enacting the exception, Congress made clear that a claim for damages against the government cannot be premised on the unconstitutionality or invalidity of a statute or regulation.

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

In this case, Fernley's claims for damages against the state are the exact types of claims that the state's sovereign immunity under NRS 41.032(1) is intended to prohibit because Fernley's claims for

damages are premised on the unconstitutionality of statutes that have not been declared invalid by a court of competent jurisdiction. Fernley contends, however, that the Defendants have not produced evidence to meet their burden of showing that the state has exercised due care in the execution of the C-Tax statutes and therefore the Defendants cannot claim the protection of sovereign immunity under NRS 41.032(1).

With regard to the issue of whether public officers have exercised due care in the execution of a statute, federal courts interpreting the FTCA have found that the plaintiff has the burden to prove the officers "in any way deviated from the statute's requirements," and "[a]bsent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care." *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005). Therefore, "it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. If the plaintiff fails to meet this burden, then the claim must be dismissed." *Id.* at 651 (citations omitted).

The Court finds that Fernley has not met its burden to show that the state has deviated from the statutory requirements in the execution of the C-Tax statutes with regard to Fernley. In support of its claims, Fernley alleges that the state has mechanically followed the statutory requirements of the C-Tax system and has distributed C-Tax revenues to Fernley based solely on the outcome of its mechanical application of the designated mathematical formulas in the statutes. Thus, Fernley's allegations do not support a finding that the state has deviated from the statutory requirements in the execution of the C-Tax statutes with regard to Fernley. The Court also agrees with the Defendants that the issue of whether the state has exercised due care in exercising its discretionary authority under NRS 360.695 to decrease the C-Tax distributions received by other local governments has no relevance to the issue of whether the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley. Therefore, the Court holds that Fernley's claims for money damages are barred by sovereign immunity under

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 22 PART 1

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

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, Intervener.	**Case No.: 12 OC 00168 1B** **Dept. No.: I**

NEVADA DEPARTMENT OF TAXATION'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO THE STATE OF NEVADA DEPARTMENT OF TAXATION

Defendant, the State of Nevada ex rel. its Department of Taxation ("Department") by and through its attorneys, Catherine Cortez Masto, Attorney General of the State of Nevada, and Senior Deputy Attorney General, Andrea Nichols, hereby responds to Plaintiff's Second Request for Production of Documents to the State of Nevada Department of Taxation.

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Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

GENERAL OBJECTIONS

The Department objects to each and every request in Plaintiff's Second Request for Production of Documents to the State of Nevada Department of Taxation as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The only remaining issues in Plaintiff's lawsuit concern whether Nevada's C-Tax system violates the Nevada Constitution. Since these are issues of law, not fact, Plaintiff's requests do not do not seek evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence, nor are the requests likely to lead to the discovery of admissible evidence.

The Department further objects to each and every request in Plaintiff's Second Request for Production of Documents to the State of Nevada Department of Taxation as overly broad and unduly burdensome. The Department was forced to divert employees from their regular duties and to expend extraordinary amounts of time and expense scanning documents as follows: 34 man-hours at the rate of $33.91 per hour for a total of $1,152.94; 96 man-hours at the rate of $22.80 per hour for a total of $2,188.80; 36 man-hours at the rate of $25.96 per hour for a total of $934.56; and, 4 man-hours at the rate of $51.00 per hour for a total of $204.00, for a grand total of $4,480.30.

Notwithstanding these objections the Department's response follows.

RESPONSES

REQUEST NO. 28: Please produce any and all tentative and final budget files submitted by each local governmental entity and special district for fiscal years 2013 and 2014, including but not limited to, the documents referenced by Warner Ambrose during his deposition taken on December 12, 2013. (Please see the Deposition Transcript for Warner Ambrose, pages 52 through 56).

RESPONSE TO REQUEST NO. 28: Copies of the requested budget files are on the disc submitted herewith.

REQUEST NO. 29: Please produce any and all files or agreements related to interlocal/cooperative agreements proposed or executed between local governmental entities,

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for the period 1997 to the present, including but not limited to, the documents referenced by Warner Ambrose during his deposition taken on December 12, 2013. (Please see the Deposition Transcript for Warner Ambrose, pages 37 through 42).

RESPONSE TO REQUEST NO. 29: Copies of the requested agreements are on the disc submitted herewith.

REQUEST NO. 30: Please produce any and all incorporation documents maintained or in possession of the Committee on Local Government Finance or the Nevada Department of Taxation for the period 1997 to the present, including but not limited to, the documents referenced by Warner Ambrose during his deposition taken on December 12, 2013. (Please see the Deposition Transcript for Warner Ambrose, page 8, lines 6-25; page 9, lines 1-5).

RESPONSE TO REQUEST NO. 30: Copies of the requested documents are on the disc submitted herewith.

REQUEST NO. 31: Please produce any and all expenditures of local governments for lobbying activities submitted by Lyon County, Storey County, Douglas County and Carson City to the Nevada Department of Taxation in compliance with NRS 354.58803 for the years 1997 through 2013.

RESPONSE TO REQUEST NO. 31: The Department's summary and the actual reports from Carson City, Douglas and Lyon Counties of lobbying expenditures for the1999 through 2013 Legislative Session are on the disc submitted herewith. Storey County did not file an individual report for 1999 through 2013. The Department has no record of receiving specific reports nor of preparing a summary of lobbying expenses for the 1997 Legislative Session.

REQUEST NO. 32: Please produce a current copy of the budget form that is provided by the Department of Taxation to local governments for submission of tentative yearly budgets and as referenced by Warner Ambrose during his deposition taken on December 12, 2014. (Please see the Deposition Transcript for Warner Ambrose, page 51, lines 16-25).

RESPONSE TO REQUEST NO. 32: Copies of the requested budget forms are on the disc submitted herewith.

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REQUEST NO. 33: Please produce any and all files kept by the Department of Taxation and/or the Local Government Finance section of the Department of Taxation which contain materials or relate in any way to any attempt by the city of Fernley to incorporate.

RESPONSE TO REQUEST NO. 33: All documents responsive to this request are contained in the response to Request No. 30.

REQUEST NO. 34: Please produce the entire file and all materials related in any way to the Local Government Finance hearing on March 27, 2000, and/or the transcript of such hearing that was introduced and marked as exhibit number 2 at the deposition of the Fernley Mayor taken on January 10, 2014 as part of this litigation.

RESPONSE TO REQUEST NO. 34: Documents responsive to this request were previously produced to Plaintiff in Defendants Nevada Department of Taxation and Nevada Treasurer's First Supplement to Early Case Conference Disclosures, Defendants Nevada Department of Taxation and Nevada Treasurer's Second Supplement to Early Case Conference Disclosures, and at the deposition of Fernley Mayor LeRoy Goodman, taken on January 10, 2014. Duplicates of these documents together with copies of newspaper articles and handwritten notes are on the disc submitted herewith.

REQUEST NO. 35: Please produce any and all materials related to hearings of the Local Government Finance Committee wherein C-Tax matters were agendized, presented, discussed or were in any way part of any item considered by the Local Government Finance Committee from the period 1997 to the present.

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Office of the Attorney General
5420 Kietzke Lane, Suite 202
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RESPONSE TO REQUEST NO. 35: Copies of the requested documents are on the disc submitted herewith.

DATED this 11th day of April, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: Andrea Nichols

ANDREA NICHOLS
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Attorneys for Defendants, Nevada Department of Taxation and Nevada Treasurer

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Reno, NV 89511

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 11th day of April, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true copy of the foregoing, **NEVADA DEPARTMENT OF TAXATION'S RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO THE STATE OF NEVADA DEPARTMENT OF TAXATION**, to the following:

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EXHIBIT B

EXHIBIT B

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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

NOTICE OF DEPOSITION OF TERRY E. RUBALD

TO: Terry E. Rubald; and,

TO: Andrea Nichols, Esq., of the Office of the Attorney General, Attorney for Defendant Nevada Department of Taxation.

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///

PLEASE TAKE NOTICE that at 9:30 a.m. on Tuesday, November 12, 2013, at the law offices of Smith & Harmer, Ltd., 502 North Division Street, Carson City, Nevada 89703, Plaintiff City of Fernley, Nevada will take the oral deposition of Terry E. Rubald, Chief, Local Government Services Division, Nevada Department of Taxation, upon oral examination, pursuant to Rule 26 and Rule 30 of the Nevada Rules of Civil Procedure, before a Notary Public or before some other officer authorized by the law to administer oaths.

Oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

DATED this 14th day of October, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

Joshua J. Hicks, Nevada Bar No. 6679
Clark V. Vellis, Nevada Bar No. 5533
50 West Liberty Street, Suite 1030
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Attorneys for the City of Fernley, Nevada

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(702) 382-2101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 14th of October, 2013, I caused to be served via electronic mail and U.S. Mail, a true and correct copy of the above foregoing **Notice of Deposition of Terry E. Rubald** properly addressed to the following:

Andrea Nichols, Esq.,
5420 Kietzke Lane, Suite 202
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Brenda J. Erdoes, Esq.
Kevin Powers, Esq.
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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

AMENDED NOTICE OF DEPOSITION OF TERRY E. RUBALD AS THE PERSON MOST KNOWLEDGEABLE FOR THE DEPARTMENT OF TAXATION

TO: The Person Most Knowledgeable for the Department of Taxation/Terry E. Rubald; and,

TO: Andrea Nichols, Esq., of the Office of the Attorney ~~General, Attorney for~~ Defendant Nevada Department of Taxation.

PLEASE TAKE NOTICE that at 9:30 a.m. on Thursday, December 12, 2013, at the law offices of Smith and Harmer, 502 North Division Street, Carson City, Nevada 89703, Plaintiff City of Fernley, Nevada will take the oral deposition of the Person Most Knowledgeable/Terry E. Rubald, for the Nevada Department of Taxation, upon oral examination, pursuant to Rule 26 and Rule 30 of the Nevada Rules of Civil Procedure, before a Notary Public or before some other officer authorized by the law to administer oaths.

Oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

DATED this 21st day of November, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____
Joshua J. Hicks, Nevada Bar No. 6679
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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

NOTICE OF DEPOSITION OF WARNER AMBROSE

TO: Warner Ambrose; and,

TO: Andrea Nichols, Esq., of the Office of the Attorney General, Attorney for Defendant Nevada Department of Taxation.

///

///

PLEASE TAKE NOTICE that at 1:00 p.m. on Friday, November 15, 2013, at the law offices of Smith & Harmer, Ltd., 502 North Division Street, Carson City, Nevada 89703, Plaintiff City of Fernley, Nevada will take the oral deposition of Warner Ambrose, Budget Analyst II, Nevada Department of Taxation, upon oral examination, pursuant to Rule 26 and Rule 30 of the Nevada Rules of Civil Procedure, before a Notary Public or before some other officer authorized by the law to administer oaths.

Oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

DATED this 14th day of October, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

Joshua J. Hicks, Nevada Bar No. 6679
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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, 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

AMENDED NOTICE OF DEPOSITION OF WARNER AMBROSE AS THE PERSON MOST KNOWLEDGEABLE FOR THE DEPARTMENT OF TAXATION

TO: The Person Most Knowledgeable for the Department of Taxation/Warner Ambrose; and,

TO: Andrea Nichols, Esq., of the Office of the Attorney General, Attorney for Defendant Nevada Department of Taxation.

///

PLEASE TAKE NOTICE that at 1:30 p.m. on Thursday, December 12, 2013, at the law offices of Smith and Harmer, 502 North Division Street, Carson City, Nevada 89703, Plaintiff City of Fernley, Nevada will take the oral deposition of the Person Most Knowledgeable/Warner Ambrose, for the Department of Taxation, upon oral examination, pursuant to Rule 26 and Rule 30 of the Nevada Rules of Civil Procedure, before a Notary Public or before some other officer authorized by the law to administer oaths.

Oral examination will continue from day to day until completed. You are invited to attend and cross-examine.

DATED this 21st day of November, 2013.

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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

ORDER AND JUDGMENT

INTRODUCTION

This action was brought by Plaintiff City of Fernley (Fernley), which is a general-law city incorporated under NRS Chapter 266 and located in Lyon County, Nevada. Fernley seeks money damages and declaratory and injunctive relief against Defendants State of Nevada ex rel. the State Department of Taxation (Department of Taxation) and the Honorable Kate Marshall in her official capacity as the Treasurer of the State of Nevada (State Treasurer). Fernley challenges the constitutionality of Nevada's system of allocating certain statewide tax revenues which are deposited and consolidated in the Local Government Tax Distribution Account and distributed to Nevada's local governmental entities under NRS 360.600-360.740. The system is administered by the Department of

Taxation and the State Treasurer, and it is commonly referred to as the consolidated tax system or the C-Tax system. The Legislature of the State of Nevada (Legislature) was permitted to intervene as a Defendant under NRCP 24 and NRS 218F.720 to defend the constitutionality of the C-Tax system.

On September 2, 2014, the Court heard oral arguments from the parties regarding the following motions: (1) Fernley's Motion for Summary Judgment, filed on June 13, 2014; (2) Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order, filed on June 18, 2014; (3) the State's Renewal of Motion to Dismiss, filed on May 5, 2014, which the Court converted into a Motion for Summary Judgment in the Court's June 6, 2014 Order; and (4) the Legislature's Joinder in the State's Renewal of Motion to Dismiss, filed on May 6, 2014, which the Court also converted into a Motion for Summary Judgment in the Court's June 6, 2014 Order. Therefore, at the hearing, each party presented the Court with a Motion for Summary Judgment, and each party asked for a final judgment to be entered in its favor on all remaining claims for relief alleged in Fernley's complaint.

In its complaint, Fernley alleged both federal constitutional claims and state constitutional claims. However, on January 25, 2013, the Nevada Supreme Court issued in this matter a Writ of Mandamus and Order Granting in Part and Denying in Part Petition for Writ of Mandamus which directed this Court to dismiss Fernley's federal constitutional claims because they were time-barred as a matter of law by the 2-year statute of limitations that applies to such claims. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). Accordingly, on February 22, 2013, this Court entered an Order Pursuant to Writ of Mandamus which granted the Defendants' Motions to Dismiss "in respect to the federal constitutional claims being asserted by Plaintiff." Therefore, before the hearing on the parties' summary-judgment motions, the Court had already dismissed Fernley's federal constitutional claims, which were its first claim for relief (denial of equal protection under the Fourteenth Amendment to the United States Constitution) and its fifth claim for relief (denial of due process under the Fourteenth Amendment to the United States Constitution).

Fernley's remaining claims for relief are its state constitutional claims, which are its second claim for relief (violation of the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution), its third claim for relief (creation of a special or local law in violation of Article 4, Section 20 of the Nevada Constitution), and its fourth claim for relief (violation of Article 4, Section 21 of the Nevada Constitution which provides that in all cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state). Fernley asks for money damages and declaratory and injunctive relief regarding its state constitutional claims.

At the hearing, the following counsel appeared on behalf of the parties: Joshua J. Hicks, Esq., and Clark V. Vellis, Esq., who appeared on behalf of Plaintiff City of Fernley; Andrea Nichols, Esq., Senior Deputy Attorney General, who appeared on behalf of Defendants State of Nevada ex rel. the Department of Taxation and State Treasurer; and Kevin C. Powers, Esq., Chief Litigation Counsel, and J. Daniel Yu, Esq., Principal Deputy Legislative Counsel, of the Legal Division of the Legislative Counsel Bureau (LCB), who appeared on behalf of Defendant Legislature.

Having considered the pleadings, documents and exhibits in this case and having received the arguments of counsel for the parties, the Court denies Fernley's Motion for Summary Judgment and grants the Defendants' Motions to Dismiss, which were converted into Motions for Summary Judgment, on all remaining claims for relief alleged in Fernley's complaint. Because the Court concludes that the Defendants are entitled to judgment as a matter of law, the Court denies, as moot, Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. Therefore, having adjudicated and denied all remaining claims for relief alleged in Fernley's complaint, the Court enters final judgment in favor of the Defendants for the following reasons.

First, the Court holds that Fernley's state constitutional claims are time-barred by the 4-year statute of limitations under NRS 11.220 as a matter of law. Second, to the extent that Fernley's state constitutional claims seek money damages, the Court holds that Fernley's claims for money damages are

additionally barred by sovereign immunity under NRS 41.032(1) as a matter of law. Third, the Court holds that, as a political subdivision of the state, Fernley lacks standing as a matter of law to bring separation-of-powers claims against the state under Article 3, Section 1 of the Nevada Constitution because that constitutional provision does not exist for the protection of political subdivisions of the state. Fourth, even if the Court assumes that Fernley has standing to bring separation-of-powers claims against the state and even if the Court also assumes that those claims are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution. Finally, in contrast to its separation-of-powers claims, Fernley has standing as a matter of law to bring constitutional claims against the state alleging that the C-Tax statutes violate the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. Nevertheless, even if the Court assumes that Fernley's claims under Article 4, Sections 20 and 21 are not otherwise barred as a matter of law by the statute of limitations and sovereign immunity, the Court holds that the Defendants are entitled to judgment as a matter of law on the merits of those claims because the C-Tax statutes do not violate either Article 4, Section 20 or Article 4, Section 21 of the Nevada Constitution.

In reaching its decision, the Court sympathizes with Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents. However, the Court finds that the Legislature did not exceed its constitutional power over the distribution of state tax dollars when it made public policy determinations regarding how those state tax dollars are distributed to local governments under the C-Tax statutes. In particular, the legislative history of the C-Tax statutes demonstrates that the Legislature determined as a matter of public policy to limit any new local government which is formed or incorporated after the enactment of the C-Tax statutes, such as the City of Fernley, from receiving increased C-Tax distributions unless the new local government: (1) provides certain general-purpose

governmental services, such as police protection and fire protection, as set forth in NRS 360.740; (2) assumes the functions of another local government as set forth in NRS 354.598747; or (3) enters into a cooperative agreement with another local government to establish alternative formulas for C-Tax distributions as set forth in NRS 360.730.

Because the Court finds that the Legislature's public policy determinations in this regard do not result in any of the constitutional violations alleged in Fernley's complaint, the Court's judicial review of the C-Tax statutes is at an end, and the Court may not judge the wisdom, policy or fairness of the C-Tax statutes because "matters of policy or convenience or right or justice or hardship or questions of whether the legislation is good or bad are solely matters for consideration of the legislature and not of the courts." *King v. Bd. of Regents*, 65 Nev. 533, 542 (1948). As further articulated by the United States Supreme Court in the context of state tax systems, "it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures." *Dane v. Jackson*, 256 U.S. 589, 598-99 (1921).

Thus, if Fernley desires to receive increased C-Tax distributions without complying with the current provisions of the C-Tax statutes, its answer lies with the Legislature, not with the courts. Accordingly, because the Defendants are entitled to judgment as a matter of law on all remaining claims for relief alleged in Fernley's complaint, the Court enters the following findings of fact, conclusions of law, and order and judgment pursuant to NRCP 52, 56 and 58.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural history.

Fernley filed its complaint on June 6, 2012. In response, the State filed a Motion to Dismiss on August 3, 2012, and the Legislature filed a Joinder in the State's Motion to Dismiss on August 16, 2012. Fernley filed an Opposition to the State's Motion to Dismiss on August 20, 2012, in which Fernley

argued that the State's Motion to Dismiss should be treated as a motion for summary judgment, and Fernley moved for a continuance to complete discovery under the summary-judgment rule in NRCP 56(f). On September 18, 2012, the Court approved a Stipulation and Order in which the parties agreed to treat the Legislature's Joinder in the State's Motion to Dismiss as the Legislature's own Motion to Dismiss.

On October 15, 2012, the Court entered an Order Granting a Continuance to Complete Discovery in which the Court denied both Motions to Dismiss to allow Fernley a period of time to complete discovery. That Order also provided that the Defendants, upon completion of a reasonable discovery period, were allowed to renew their Motions to Dismiss which would then be duly considered by the Court. On November 5, 2012, the State and the Legislature jointly filed a Petition for Writ of Mandamus with the Nevada Supreme Court that asked the Supreme Court to review this Court's order denying their Motions to Dismiss.

On January 25, 2013, the Nevada Supreme Court issued a Writ of Mandamus and an Order Granting in Part and Denying in Part the Petition for Writ of Mandamus filed by the Defendants. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). The Supreme Court stated that "the district court was obligated under clear legal authority to dismiss the federal constitutional claims" because Fernley "was required to bring its federal constitutional claims within two years of its incorporation, and its failure to do so renders those claims barred by the statute of limitations." *Id.* However, with regard to the Defendants' arguments that Fernley's state constitutional claims should be dismissed, the Supreme Court stated that "although we make no comment on the merits of these arguments, we nonetheless decline to exercise our discretion to entertain this writ petition with regard to these issues." *Id.* As a result, on February 22, 2013, this Court entered an Order Pursuant to Writ of Mandamus which dismissed Fernley's federal constitutional claims but ordered the parties to complete discovery regarding Fernley's state constitutional claims.

Following the completion of discovery, the State filed a Renewal of Motion to Dismiss on May 5, 2014, in which it argued that Fernley's state constitutional claims should be dismissed as a matter of law. On May 6, 2014, the Legislature filed a Joinder in Renewal of Motion to Dismiss. On June 6, 2014, the Court entered an Order converting the Defendants' Renewed Motions to Dismiss into Motions for Summary Judgment. Additionally in its June 6, 2014 Order, the Court dismissed all claims against the State Treasurer because the Court determined that the State Treasurer is entitled to sovereign immunity under NRS 41.032(1) as a matter of law. On June 13, 2014, Fernley filed a Motion for Summary Judgment seeking relief on its state constitutional claims. On June 18, 2014, Fernley also filed a Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. On September 2, 2014, the Court heard oral arguments from the parties regarding each party's Motion for Summary Judgment and Fernley's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order. Therefore, each party has presented the Court with a Motion for Summary Judgment, and each party has asked for a final judgment to be entered in its favor on all remaining claims for relief alleged in Fernley's complaint.

B. History and overview of the C-Tax system.

In 1995, the Legislature created an interim committee to study Nevada's laws governing the distribution of state tax revenues to local governments. Senate Concurrent Resolution No. 40 (S.C.R. 40), 1995 Nev. Stat., file no. 162, at 3034-36. The Legislature authorized the interim study because it found that the existing laws relating to the distribution of tax revenues were inadequate to meet the demands for new and expanded services placed on local governments by Nevada's rapid population and economic growth. *Id.* Based on its study, the interim committee recommended consolidating six statewide tax revenue sources into a single account and establishing base amounts that would be distributed from the account to local governments. *LCB Bulletin No. 97-5: Laws Relating to the Distribution Among Local Governments of Revenue from State and Local Taxes* (Nev. LCB

Research Library, Jan. 1997) (Leg.'s Ex. 5). The interim committee also recommended establishing appropriate adjustments to the base amounts when public services provided by local governments are taken over by other entities or are eliminated. *Id.* The interim committee also recommended establishing the number and type of public services that new local governments must provide in order to participate in the distribution of revenue from the account. *Id.*

In 1997, based on the results of the interim study, the Legislature enacted Senate Bill No. 254 (S.B. 254), which created the C-Tax system codified in NRS 360.600-360.740. 1997 Nev. Stat., ch. 660, at 3278-3304. The Department of Taxation was given the duty to administer the C-Tax system and the state tax revenues deposited in the Local Government Tax Distribution Account (Account).[1] NRS 360.660. The proceeds from the following six state tax revenues are deposited in the Account: (1) the liquor tax—NRS 369.173; (2) the cigarette tax—NRS 370.260; (3) the real property transfer tax—NRS 375.070; (4) the basic city-county relief tax—NRS 377.055; (5) the supplemental city-county relief tax—NRS 377.057; and (6) the basic governmental services tax—NRS 482.181.

The state tax money in the Account is distributed to local governments under a two-tier system. Under the first-tier, a certain portion from each revenue source is allocated to each county according to specific statutory formulas and credited to the county's subaccount. The first-tier revenues in the county's subaccount are then distributed to the county and the cities, towns, enterprise districts[2] and special districts[3] in the county that are eligible for a second-tier distribution.

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[1] In 1997, the Account was enacted as the Local Government Tax Distribution Fund in the State Treasury. 1997 Nev. Stat., ch. 660, § 8, at 3278. In 1999, it was changed to the Local Government Tax Distribution Account in the Intergovernmental Fund (NRS 353.254) in the State Treasury. 1999 Nev. Stat., ch. 8, § 10, at 10.

[2] Enterprise districts are local governmental entities which are not counties, cities or towns and which are determined to be enterprise districts by the Executive Director based on the criteria in NRS 360.620 and 360.710. Examples of enterprise districts include certain general improvement districts (GIDs) and certain water, sewer, sanitation and television districts.

[3] Special districts are local governmental entities which are not counties, cities, towns or enterprise districts. NRS 360.650. Examples of special districts include certain hospital, library, fire-protection and mosquito-abatement districts.

To be eligible for a second-tier distribution, the entity must be an enterprise district, or it must be a county, city, town or special district that received "before July 1, 1998, any portion of the proceeds of a tax which is included in the Account." NRS 360.670. In addition, a county, city, town or special district is also eligible for a second-tier distribution if it was created after July 1, 1998, and it provides police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740.

The second-tier distributions in each county have two components—base amounts calculated under NRS 360.680 and excess amounts calculated under NRS 360.690. The base amounts for the enterprise districts in the county are distributed before any base amounts are distributed to the county and the cities, towns and special districts in the county. NRS 360.680. If there is sufficient money remaining in the county's subaccount after the enterprise districts receive their base amounts, the county and the cities, towns and special districts in the county are entitled to receive their base amounts. NRS 360.690. However, if there is not sufficient money remaining in the county's subaccount to distribute the full base amounts to the county and the cities, towns and special districts in the county, their base amounts are prorated in proportionate percentages. *Id.*

After distribution of all base amounts, if there is any excess money remaining in the county's subaccount, the county and the cities, towns and special districts in the county are entitled to receive distributions of excess amounts, but the enterprise districts are not entitled to receive such distributions. NRS 360.690. If excess amounts are distributed, the particular amount received by each entity is calculated using statutory formulas that take into account changes in population or changes in the assessed valuation of taxable property, or changes in both. *Id.* Because the statutory formulas used to calculate excess amounts involve varying factors, the excess amounts ultimately distributed to the county and the cities, towns and special districts in the county are significantly impacted by the specific population and property tax conditions attributable to each such entity.

Under the 1997 version of the C-Tax statutes, the base amounts distributed to the county and the cities, towns and special districts in the county were adjusted each fiscal year based on certain changes in the Consumer Price Index. S.B. 254, 1997 Nev. Stat., ch. 660, § 10, at 3279 (codified at NRS 360.680). In addition, any excess amounts distributed in the prior fiscal year were added to base amounts in subsequent fiscal years. *Id.* However, in 2001, the Legislature amended the C-Tax statutes to exclude excess amounts from being added to base amounts in subsequent fiscal years, so that base amounts were adjusted based only on certain changes in the Consumer Price Index. Assembly Bill No. 10, 2001 Nev. Stat., 17th Spec. Sess., ch. 7, § 1, at 109 (amending NRS 360.680). In 2013, the Legislature amended the C-Tax statutes to provide that any excess amounts distributed in fiscal years beginning on or after July 1, 2014, are added to base amounts in subsequent fiscal years. Assembly Bill No. 68, 2013 Nev. Stats., ch. 3, § 3, at 11-12 (amending NRS 360.680). Thus, under the 2013 version of the C-Tax statutes, base amounts are adjusted each fiscal year based on certain changes in the Consumer Price Index and the addition of any excess amounts distributed on or after July 1, 2014.

C. Statutory methods for increasing C-Tax distributions to new local governments.

When the Legislature enacted the C-Tax system in 1997, it provided several statutory methods for increasing C-Tax distributions to new local governments created after July 1, 1998. S.B. 254, 1997 Nev. Stat., ch. 660, §§ 14, 15 & 24, at 3282-86 & 3293-94 (codified at NRS 360.730, 360.740 & 354.598747). First, if a new local government is created after July 1, 1998, it is eligible to receive increased C-Tax distributions if it elects to provide police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance and repair of roads; or (3) parks and recreation. NRS 360.740. Second, if a new local government assumes the functions of another local government, it is entitled to increased C-Tax distributions. NRS 354.598747. Third, a new local government may enter into a cooperative agreement with another local government to increase its C-Tax distributions, such as when the new local government agrees to take over services provided by the other

local government. NRS 360.730.

The parties disagree as to whether Fernley is eligible to request an increase in its C-Tax distributions under NRS 360.740 if it elects to provide police protection and at least two of the other required services. Fernley contends that a new local government which incorporates after July 1, 1998, and elects to provide the required services has only a 1-year window after incorporation in which to request an increase in its C-Tax distributions under NRS 360.740. Fernley's contention is based on the statutory provision mandating that the new local government must submit its request for increased C-Tax distributions "[o]n or before December 31 of the year immediately preceding *the first fiscal year* that the local government . . . would receive money from the Account." NRS 360.740(2) (emphasis added). In support of its contention, Fernley produced an advisory opinion from the Department of Taxation which stated in relevant part:

> Question Four: Is Fernley eligible to receive an adjustment pursuant to the provisions of NRS 360.740, as a municipality created after July 1, 1998?
>
> NRS 360.740 authorizes a newly created local government to receive an additional allocation of Tier 2 Base C-Tax. At the time the City of Fernley was created in 2001, it had the option of taking on police protection and two additional services (fire protection; construction, maintenance and repair of roads; or parks and recreation). At the time of its creation, Fernley had the option of taking on these services and receiving an additional allocation. Fernley did not opt to assume police protection. At this time, if Fernley assumes additional services it may be eligible for an adjustment of its C-Tax distribution pursuant to NRS 354.598747. In accordance with NAC 360.200(2), this opinion may be appealed to the Nevada Tax Commission.[4]

(Fernley's Ex. 24.)

The Legislature contends that NRS 360.740 does not limit a new local government to a 1-year

[4] Despite having the right to pursue an appeal of the Department's advisory opinion to the Nevada Tax Commission and the further right to seek judicial review under the Administrative Procedure Act, Fernley did not pursue any such relief. *See* NRS 360.245 & NAC 360.200 (providing for administrative appeals of the Department's advisory opinions to the Nevada Tax Commission); NRS 233B.120 (providing for judicial review of an agency's advisory opinions). Thus, Fernley did not exhaust its administrative and judicial remedies to obtain a dispositive ruling concerning whether it is eligible to request an increase in its C-Tax distributions under NRS 360.740 if it elects to provide the required services.

window after incorporation in which to request an increase in its C-Tax distributions. The Legislature contends that the term "the first fiscal year" in the statute does not refer to the first fiscal year after incorporation, but rather to the first fiscal year after the local government elects to provide the required services and files its request for increased C-Tax distributions, which can occur in any year after incorporation. The Legislature further contends that even if NRS 360.740 is ambiguous because it is subject to more than one reasonable interpretation, such ambiguity should be resolved in favor of new local governments being able to request increased C-Tax distributions in any year after incorporation in order to carry out the intent of the C-Tax statutes and to avoid any alleged constitutional problems. Thus, in the Legislature's view, Fernley remains eligible to submit a request under NRS 360.740 for increased C-Tax distributions if it elects to provide the required services.

Fernley counters that even if it is eligible to request an increase in its C-Tax distributions under NRS 360.740, it is caught in a "classic catch-22" because it must first provide police protection to request an increase in its C-Tax distributions under NRS 360.740 but it is currently unable to provide police protection because it does not have sufficient tax revenues to do so without first receiving an increase in its C-Tax distributions. Fernley also argues that even if it elects to provide police protection and the other services required by NRS 360.740, it would not be entitled to an increase in its C-Tax distributions because its request would have to be reviewed and approved by the Committee on Local Government Finance (CLGF) and the Nevada Tax Commission. NRS 360.740(4)-(6). Fernley believes "there is no likelihood of success for a new entity in such a process" based on its assertion that the members of the CLGF are representatives of other local governments which would stand to lose C-Tax revenues upon their redistribution to a new local government like Fernley.[5]

The Legislature contends that Fernley's interpretation of NRS 360.740 is not consistent with the

[5] The CLGF consists of eleven members. NRS 354.105. The following associations each appoint three members: (1) the Nevada League of Cities; (2) the Nevada Association of County Commissioners; and (3) the Nevada School Trustees Association. *Id.* The Nevada State Board of Accountancy appoints the other two members. *Id.*

intent or purpose of the statute and produces unreasonable or absurd results that must be avoided. The Legislature contends that because the intent or purpose of NRS 360.740 is to encourage the formation of new general-purpose local governments that provide their own traditional general-purpose governmental services, such as police protection and fire protection, the statute must be interpreted in a reasonable manner that facilitates, rather than impedes, distributing C-Tax revenues to those new general-purpose local governments. The Legislature contends that it would be unreasonable or absurd to interpret NRS 360.740 to require Fernley to provide a fully operational police department and the other required services before it may request an increase in its C-Tax distributions to fund those services. Instead, the Legislature contends that a reasonable reading of NRS 360.740 would require Fernley to take appropriate legislative action expressing the city's intent to provide police protection and the other required services beginning in an upcoming fiscal year and thereafter Fernley could submit a request under the statute "[o]n or before December 31 of the year immediately preceding the first fiscal year" that Fernley would receive increased C-Tax distributions to fund those services. Additionally, the Legislature contends that, regardless of the proper statutory interpretation of NRS 360.740, no political subdivision has a constitutional right to obtain an adjustment or increase in its C-Tax distributions and that the issue of whether Fernley is eligible to request an increase in its C-Tax distributions under NRS 360.740 has no bearing on its state constitutional claims.

Although the parties are in dispute regarding the proper statutory interpretation of NRS 360.740, it is not necessary for the Court to resolve the disputed statutory issues in order to adjudicate Fernley's state constitutional claims. Even if it is unclear whether the C-Tax statutes allow Fernley to submit a request under NRS 360.740 for increased C-Tax distributions, it is clear that the C-Tax statutes allow Fernley to receive increased C-Tax distributions under NRS 354.598747 if Fernley assumes the functions of another local government. It is also clear that the C-Tax statutes allow Fernley to enter into cooperative agreements with other local governments to increase its C-Tax distributions under

NRS 360.730, including in circumstances where Fernley agrees to take over services provided by another local government. Thus, contrary to Fernley's claims, the existing C-Tax statutes contain several statutory methods for Fernley to receive increases in its C-Tax distributions.

Despite the availability of these statutory methods, Fernley contends that Lyon County is unlikely or unwilling to enter into any cooperative agreements to increase Fernley's C-Tax distributions given that Lyon County has already rejected several of Fernley's previous requests to enter into such agreements. The Legislature contends, however, that Lyon County has officially represented on the public record in legislative proceedings that it is willing to negotiate a cooperative agreement to increase Fernley's C-Tax distributions if Fernley is willing take over one or more of the services the county is presently providing to the city.

The Legislature points to testimony given by Lyon County officials before the Legislature's 2011-2013 Interim C-Tax Study, which was created by the Legislature to comprehensively study the C-Tax system. Assembly Bill No. 71, 2011 Nev. Stat., ch. 384, § 1, at 2391-92. During the 2011-2013 Interim C-Tax Study, the Lyon County Comptroller testified that the county did not oppose providing additional C-Tax funding to Fernley and would be willing to discuss a redistribution of C-Tax funding between the county and the city if Fernley would be willing to take over one or more of the services provided by the county to the city, such as police protection. (Leg. Ex. 6.) The Comptroller further testified that if Fernley had opted to assume police-protection services when it incorporated and had engaged Lyon County in a discussion of C-Tax allocation, "Fernley would have received an allocation from Lyon County to go to the city coffers to pay for those services." *Id.* According to the Comptroller's testimony, because Fernley did not opt to provide police-protection services when it incorporated, "the only reason the City of Fernley had [C-Tax revenue at all] was because the city was receiving distributions when they were an unincorporated town providing park services previously." *Id.*

Although the parties disagree as to whether Lyon County is willing to enter into any cooperative

agreements with Fernley to increase its C-Tax distributions under NRS 360.730, it is not necessary for the Court to resolve that disagreement in order to adjudicate Fernley's state constitutional claims. Based on its plain terms, NRS 360.730 authorizes, but does not require, local governments to enter into cooperative agreements to adjust C-Tax distributions among the local governments. Thus, a local government's decision whether to enter into any cooperative agreements under NRS 360.730 is purely a discretionary decision entrusted to its governing body. Given that Lyon County has previously exercised its discretion under NRS 360.730 to reject such cooperative agreements, Fernley argues that NRS 360.730 is an "illusory remedy" because the possibility of Lyon County actually entering into any cooperative agreements with Fernley is so remote. Fernley, however, fails to cite any authority for the proposition that a political subdivision has any constitutional right to a statutory remedy for increasing its C-Tax distributions. In the absence of such a constitutional right, the Legislature is empowered to determine, as a matter of public policy, whether and under what circumstances a political subdivision may request or receive any increases in its C-Tax distributions.

In this case, the Legislature has provided several statutory methods for increasing C-Tax distributions to new local governments. While the Court acknowledges that the existing statutory methods for increasing C-Tax distributions may be difficult for Fernley to meet, especially if it must take over one or more services provided by another local government, it was within the Legislature's constitutional power over the distribution of state tax dollars to determine, as a matter of public policy, whether to provide such statutory methods in the C-Tax statutes in the first place and, if it decides to do so, to determine the criteria that must be satisfied in order to obtain an increase in C-Tax distributions. Given Fernley's desire to receive increased C-Tax distributions to provide improved services to its residents, it is understandable that Fernley is dissatisfied with the statutory methods chosen by the Legislature, as a matter of public policy, for increasing C-Tax distributions to new local governments. Nevertheless, because the Court finds that the Legislature's public policy determinations in this regard

do not result in any of the constitutional violations alleged in Fernley's complaint, Fernley's dissatisfaction with the statutory methods chosen by the Legislature for increasing C-Tax distributions does not provide any evidentiary support for its state constitutional claims.

D. Application of the C-Tax system to Fernley.

When the Legislature enacted the C-Tax system in 1997, Fernley was an unincorporated town that was eligible for a second-tier distribution. To facilitate Nevada's transition to the new C-Tax system, the Legislature included transitory provisions in sections 35-36 of S.B. 254 which initially took precedence over NRS 360.600-360.740. S.B. 254, 1997 Nev. Stat., ch. 660, §§ 35-36, at 3301-04. Under section 35 of S.B. 254, Fernley's initial year of C-Tax distributions as an unincorporated town was the fiscal year beginning on July 1, 1998, and ending on June 30, 1999, and the base amount for Fernley's initial year of C-Tax distributions was calculated using the formula in that section. *Id.* § 35, at 3301-02. After the period in which Fernley's C-Tax distributions were calculated pursuant to S.B. 254's transitory provisions, the base amounts of Fernley's C-Tax distributions were thereafter calculated pursuant to the statutory formulas in NRS 360.680, as amended, and any excess amounts included in Fernley's C-Tax distributions were thereafter calculated pursuant to the statutory formulas in NRS 360.690, as amended.

Since the enactment of the C-Tax system in 1997, Fernley is the only governmental entity to incorporate as a new city in Nevada.[6] In 1998, a sufficient number of qualified electors of the unincorporated Town of Fernley formed the Fernley Incorporation Committee to take the steps required to circulate an incorporation petition and bring about Fernley's incorporation under NRS Chapter 266,

[6] Although Fernley is the only entity to incorporate as a new city in Nevada since 1997, it is not the only entity to consider incorporation. In 2012 for example, the voters of the Town of Laughlin in Clark County, Nevada, considered a proposal to incorporate as a new city, but they rejected the proposal. *See* Senate Bill No. 262, 2011 Nev. Stat., ch. 481, at 2997-3026 (providing for an election to be held on the question of the incorporation of the City of Laughlin).

Nevada's general law for municipal incorporation.[7] (Leg.'s Ex. 11.) Under NRS Chapter 266, an incorporation petition must include, among other things, the incorporation committee's plans for providing police protection, fire protection, road maintenance and other governmental services, along with an estimate of the costs and the sources of revenue for providing those services. *See* NRS 266.019. As a result, the Fernley Incorporation Committee corresponded with the Department of Taxation in 1998 to obtain estimates of the C-Tax distributions and the other tax revenues that Fernley could expect if it incorporated. (Leg.'s Ex. 11.)

On June 25, 1998, using several different population growth rates submitted by the Incorporation Committee, the Department of Taxation advised the Incorporation Committee that Fernley would realize little to no increase in its C-Tax distributions as the result of its incorporation, and the Department directed the Incorporation Committee to examine NRS 354.598747 to determine the impact on Fernley's C-Tax distributions if Fernley were to assume any of the services that would be provided to the incorporated city by Lyon County.[8] (Leg.'s Ex. 12.) On July 17, 1998, the Department of Taxation again advised the Committee that Fernley would not experience any significant increase in its C-Tax distributions if it incorporated within its existing boundaries unchanged. (Leg. Ex. 13.) On March 3, 1999, the Department of Taxation also advised the Committee of the requirements of NRS 360.740 concerning the provision of required services for a newly incorporated city to receive increased C-Tax distributions. (Leg. Ex. 14.)

On March 27, 2000, the Incorporation Committee submitted an informational letter along with its

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[7] The Nevada Constitution allows the Legislature to provide for the organization of cities through general laws for municipal incorporation. Nev. Const. art. 8, § 8; *State ex rel. Williams v. Dist. Ct.*, 30 Nev. 225, 227-28 (1908). It also allows the Legislature to create cities through special acts. Nev. Const. art. 8, § 1; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, 142-45 (1876); *W. Realty v. City of Reno*, 63 Nev. 330, 350-51 (1946).

[8] For example, based on a population of 6,510, the Department projected Fernley's C-Tax distribution would be $83,824.89 for the fiscal year beginning on July 1, 1999, and based on a hypothetical population growth rate of 9.09% with a resulting population of 12,000, the Department projected Fernley's C-Tax distribution would be $84,075.91, a net increase of only $251.02. (Leg.'s Ex. 12.)

incorporation petition to the CLGF which has a statutory duty under NRS Chapter 266 to determine whether certain requirements for incorporation of a general-law city have been satisfied. (Leg. Ex. 15 & Leg. Ex. 16.) The informational letter indicated that Fernley's fire protection was being provided by the North Lyon County Fire Protection District, its police protection was being provided by the Lyon County Sheriff's Department and the construction, maintenance and repair of its roads was being provided by Lyon County. (Leg. Ex. 15.) The informational letter also indicated that Fernley's recreational facilities, which included three public parks in Fernley, were being funded by Lyon County. *Id.* The incorporation petition set forth Fernley's plans for providing these governmental services after incorporation. (Leg. Ex. 16.) The incorporation petition indicated that Fernley expected the North Lyon County Fire Protection District to continue providing its fire-protection services and that it anticipated negotiating and entering into interlocal agreements with Lyon County for the continued provision of services relating to police protection, parks and recreation and the construction, maintenance and repair of roads. *Id.*

During a meeting of the CLGF to address the feasibility of Fernley's proposed incorporation, the CLGF noted that Fernley's incorporation petition relied on the expectation that Lyon County would continue providing a number of services and therefore expressed some concern that:

> how effective this can be is gonna [sic] 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 . . . if indeed, the working with the County goes smoothly I think we clearly have the ability to provide the revenues needed for a city [but if] the County says no, go take a walk, then you've got big problems."

(Leg. Ex. 17.) In response, Debra Brazell, the Chair of the Incorporation Committee, assured the CLGF that "the change in [C-Tax] law is really equitable and really, really works nicely" and that because of Fernley's relationship with Lyon County, Fernley expected to maintain service levels "either by funds or negotiated services." *Id.*

Fernley's incorporation became effective on July 1, 2001. As evidenced by the public record preceding its incorporation, Fernley was aware in 2001 that it would receive little to no increase in its C-Tax distributions as a result of its incorporation regardless of any projected population growth. Fernley was also aware in 2001 that its C-Tax distributions could be increased only if it provided the required services under NRS 360.740, assumed the functions of another local government under NRS 354.598747, or entered into a cooperative agreement with another local government under NRS 360.730. Thus, Fernley was aware in 2001 that its C-Tax distributions would continue to be calculated and adjusted using its original base amount under section 35-36 of S.B. 254 and the statutory formulas in NRS 360.680 and 360.690, as amended, unless it complied with one or more of the statutory methods for increasing its C-Tax distributions. As stated by the Nevada Supreme Court in its order regarding the mandamus petition, "[n]either party disputes that, at the time of the City's incorporation in 2001, the City was aware that absent specific circumstances, its base consolidated-tax distributions would be set by its previous distributions and would remain at that level." *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013).

Unlike many other Nevada cities, Fernley does not provide the traditional general-purpose governmental services of police protection and fire protection. Instead, police-protection services are provided by the Lyon County Sheriff's Department, and fire-protection services are provided by the North Lyon County Fire Protection District. Even though Fernley does not provide the traditional general-purpose governmental services of police protection and fire protection, it asks to be compared to the Cities of Elko, Mesquite and Boulder City, which have similar populations to Fernley but which are different from Fernley because they provide the traditional general-purpose governmental services of police protection and fire protection. Thus, while Fernley believes it should receive the same C-Tax distributions as those general-purpose governments, it does not seem that Fernley wants to provide the same services as those general-purpose governments or assume the functions of another local

government as required by the C-Tax statutes.

Fernley contends, however, that its residents shoulder a unique burden among general-law cities because they pay a property tax charge that directly funds the fire-protection services of the North Lyon County Fire Protection District, which is a special district under the C-Tax statutes and which receives its own C-Tax distributions. (Fernley's Ex. 33.) However, it was representatives of Fernley who lobbied for the passage of special legislation in 2001 to preserve the North Lyon County Fire Protection District in order to avoid having to create a city fire department immediately upon Fernley's incorporation. Assembly Bill No. 663, 2001 Nev. Stat., ch. 135, at 701-02.

When a city incorporates under NRS Chapter 266, the general law provides that fire protection districts may no longer exist within that city after the incorporation becomes effective. NRS 266.043(2). However, before Fernley's incorporation became effective on July 1, 2001, representatives of Fernley lobbied for the passage of special legislation "providing for the continued existence of the North Lyon County Fire Protection District following the incorporation of the City of Fernley." Assembly Bill No. 663, 2001 Nev. Stat., ch. 135, at 701. The special legislation provided that:

> Notwithstanding the provisions of subsection 2 of NRS 266.043, the North Lyon County Fire Protection District may continue to exist on and after the date on which the incorporation of the City of Fernley becomes effective and the boundaries that district may continue to include territory incorporated into the new City of Fernley.

Id. § 3, at 701-02.

Based on the legislative committee testimony regarding the special legislation, its sole purpose was to maintain the North Lyon Fire Protection District "in 'status quo' position" in order to avoid having to create a city fire department immediately upon Fernley's incorporation. *Hearing on A.B. 663 before Assembly Comm. on Gov't Affairs*, 71st Leg. (Nev. Apr. 25, 2001). However, given that the special legislation uses the permissive term "may," there is no requirement that the North Lyon Fire Protection District must continue to exist indefinitely within the incorporated boundaries of Fernley.

Instead, Fernley's city council may create a city fire department under the general law in NRS 266.310, which authorizes the city council to "[o]rganize, regulate and maintain a fire department." *See Hearing on A.B. 663 before Assembly Comm. on Gov't Affairs*, 71st Leg. (Nev. Apr. 25, 2001) (testimony of LeRoy Goodman, Lyon County Commissioner, stating: "It was felt the fire district should remain the same until Fernley could afford to establish their own department."). Consequently, even though Fernley's fire-protection services are currently provided by the North Lyon County Fire Protection District, Fernley is authorized by existing law to take over those services, and Fernley could receive increased C-Tax distributions under NRS 354.598747 by assuming the fire-protection functions of the North Lyon County Fire Protection District.

Similarly, Fernley's city council may create a city police department under the general law in NRS Chapter 266. *See* NRS 266.390, 266.455, 266.460 & 266.530. Thus, even though Fernley's police-protection services are currently provided by Lyon County, Fernley is authorized by existing law to take over those services, and Fernley could receive increased C-Tax distributions under NRS 354.598747 by assuming the police-protection functions of the county. Accordingly, if Fernley wants to be comparable to the Cities of Elko, Mesquite and Boulder City, it has the statutory authority to provide the traditional general-purpose governmental services of police protection and fire protection like those other cities, and it would be entitled to increased C-Tax distributions under NRS 354.598747 if it provided those services.

E. Standards of review.

A party is entitled to summary judgment under NRCP 56 when the submissions in the record "demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 731 (2005). The purpose of granting summary judgment "is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." *McDonald*

v. D.P. Alexander, 121 Nev. 812, 815 (2005) (quoting *Coray v. Hom*, 80 Nev. 39, 40-41 (1964)).

In addition, a party is entitled to summary judgment when the claims against the party are barred as a matter of law by one or more affirmative defenses. *See Williams v. Cottonwood Cove Dev.*, 96 Nev. 857, 860-61 (1980). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of the claims against the party even if all allegations in the complaint are true. *Douglas Disposal v. Wee Haul*, 123 Nev. 552, 557-58 (2007). Such affirmative defenses include the statute of limitations and sovereign immunity. *See* NRCP 8(c); *Boulder City v. Boulder Excavating*, 124 Nev. 749, 754-55 (2008); *Kellar v. Snowden*, 87 Nev. 488, 491-92 (1971). Finally, a party is entitled to summary judgment when the other party lacks standing as a matter of law to bring a claim. *See Gunny v. Allstate Ins.*, 108 Nev. 344, 345 (1992).

In this case, the only claims remaining are Fernley's state constitutional claims in which Fernley alleges that the C-Tax statutes violate the separation-of-powers provision of Article 3, Section 1 of the Nevada Constitution and the special-or-local law provisions of Article 4, Sections 20 and 21 of the Nevada Constitution. As a general rule, when the plaintiff pleads claims that a state statute is unconstitutional, the plaintiff's claims present only issues of law which are matters purely for the Court to decide and which may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented.[9]

With regard to Fernley's state constitutional claims, each party moved for summary judgment, and each party argued that no genuine issues of material fact exist and that the Court could enter summary judgment in its favor as a matter of law. No party contended that the record is inadequate for consideration of the constitutional issues presented. Therefore, the Court finds that summary judgment

[9] *See Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 506-09 (2009) (affirming district court's summary judgment regarding constitutionality of a statute and stating that "[t]he determination of whether a statute is constitutional is a question of law."); *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 294-95 (1983) (holding that a constitutional claim may be decided on summary judgment where no genuine issues of material fact exist and the record is adequate for consideration of the constitutional issues presented).

is appropriate because there are no genuine issues of material fact which need to be tried and because Fernley's state constitutional claims fail on their merits as a matter of law. In addition, the Court also finds that summary judgment is appropriate because Fernley's state constitutional claims are barred as a matter of law by the statute of limitations and because Fernley's claims for money damages are additionally barred as a matter of law by sovereign immunity. Finally, the Court finds that summary judgment is appropriate because Fernley lacks standing as a matter of law to bring separation-of-powers claims against the state.

In reviewing the merits of Fernley's state constitutional claims, the Court must presume the C-Tax statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." *Id.* at 138. As a result, the Court must not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870) ("every statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution."). Furthermore, it is a fundamental rule of constitutional review that "the judiciary will not declare an act void because it disagrees with the wisdom of the Legislature." *Anthony v. State*, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of the C-Tax statutes, the Court must not be concerned with the wisdom or policy of the statutes because "[q]uestions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine." *Worthington v. Second Jud. Dist. Ct.*, 37 Nev. 212, 244 (1914).[10] Guided by

[10] *See also In re McKay's Estate*, 43 Nev. 114, 127 (1919) ("Much has been said by counsel for appellant of the injustice of a [statute] that will deprive appellant of her inheritance. Even so, we cannot amend the statute. The policy, wisdom, or expediency of a law is within the exclusive theater of legislative action. It is a forbidden sphere for the judiciary, which courts cannot invade, even under pressure of constant importunity.").

these standards of review, the Court concludes that the C-Tax statutes are constitutional and that the Defendants are entitled to judgment as a matter of law for the following reasons.

F. Fernley's claims are time-barred by the statute of limitations.

A defendant is entitled to summary judgment when the plaintiff's claims are time-barred by the statute of limitations as a matter of law. *Ash Springs Dev. v. O'Donnell*, 95 Nev. 846, 847 (1979). In this case, the Defendants contend that Fernley's state constitutional claims are time-barred by the statute of limitations in NRS Chapter 11 as a matter of law. The Defendants posit that there are two potential limitations periods in NRS Chapter 11 that apply to Fernley's state constitutional claims. The first limitations period cited by the Defendants is the 2-year limitations period for personal injury actions in NRS 11.190(4)(e), which applies to all federal constitutional claims arising in Nevada under 42 U.S.C. § 1983.[11] The second limitations period cited by the Defendants is the 4-year limitations period in NRS 11.220, which applies generally to all causes of action arising in Nevada unless a different limitations period is provided by a specific statute.[12] The Defendants contend that because the events that form the basis of Fernley's state constitutional claims occurred when Fernley incorporated in 2001, which was more than a decade before it commenced this action in 2012, Fernley's state constitutional claims are time-barred as a matter of law by the statute of limitations, regardless of whether the Court applies the 2-year or 4-year limitations period to those claims.

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[11] *See Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985) (holding that because "§ 1983 claims are best characterized as personal injury actions," the state's personal injury statute of limitations should be applied to all § 1983 claims arising in the state); *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (holding that NRS 11.190(4)(e) "being the residual statute of limitations for personal injury actions is the statute of limitations applicable to section 1983 cases in Nevada."); *Day v. Zubel*, 112 Nev. 972, 977 (1996) (stating that "*Wilson* was interpreted by the Ninth Circuit [in *Perez*] to mandate a two year statute of limitations for such actions in Nevada.").

[12] *See State v. Yellow Jacket Silver Mining*, 14 Nev. 220, 230 (1879) (holding that Nevada's statute of limitations "embraces every civil action, both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033 [presently codified in NRS 11.220], and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature.").

Fernley contends that it has not been legislatively or judicially determined in Nevada whether the statute of limitations in NRS Chapter 11 applies to state constitutional claims, although Fernley does not cite any authority or make any arguments to support a conclusion that Nevada's statute of limitations does not apply to state constitutional claims. Fernley also contends that even if the statute of limitations applies to state constitutional claims generally, a limitations period longer than 4 years should apply to its state constitutional claims, although Fernley fails to cite any specific statute which sets forth a longer limitations period for its state constitutional claims. Finally, Fernley contends that even if the statute of limitations applies to its state constitutional claims, the continuing violations doctrine recognized by federal law permits Fernley to bring all of its claims that have arisen since at least its incorporation in 2001 because the C-Tax system from its inception has produced systematic and continuing constitutional violations with every dollar distributed under the system and therefore every such unconstitutional C-Tax distribution is still actionable as part of a series of continuing violations of Fernley's constitutional rights.

The Court holds that Nevada's statute of limitations in NRS Chapter 11 applies to Fernley's state constitutional claims and that the 4-year limitations period in NRS 11.220 is the governing limitations period because no other specific statute prescribes a different limitations period for those claims. The Court also holds that the continuing violations doctrine recognized by federal law does not save Fernley's state constitutional claims. In its mandamus order, the Nevada Supreme Court determined that the statute of limitations began to run on Fernley's federal constitutional claims at the time of its incorporation in 2001. This Court likewise concludes that the statute of limitations began to run on Fernley's state constitutional claims at the same time in 2001. The Nevada Supreme Court also determined that no exception applied under federal law that would allow Fernley to avoid the expiration of the limitations period on its federal constitutional claims. This Court likewise concludes that no exception applies, including the continuing violations doctrine under federal law, that would allow

Fernley to avoid the expiration of the limitations period on its state constitutional claims. Therefore, because Fernley's state constitutional claims are time-barred by the 4-year limitations period in NRS 11.220 as a matter of law, the Court holds that the Defendants are entitled to judgment as a matter of law on Fernley's state constitutional claims.

At the federal level, the United States Supreme Court has determined that "[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 292 (1983); *United States v. Clintwood Elkhorn Mining*, 553 U.S. 1, 9 (2008). Even though the Nevada Supreme Court has not determined the precise issue of whether the statute of limitations in NRS Chapter 11 applies to state constitutional claims, it has stated "it is clear that our Statute of Limitations embraces all characters of actions, legal and equitable, and is as obligatory upon the Courts in a suit in equity as in actions at law." *White v. Sheldon*, 4 Nev. 280, 288-89 (1868). Fernley did not provide the Court with any authority or arguments to support a conclusion that its state constitutional claims are not subject to Nevada's statute of limitations in the same manner as other civil causes of action seeking legal or equitable relief. Therefore, the Court holds that Nevada's statute of limitations applies to Fernley's state constitutional claims.

The Nevada Supreme Court has also stated that when the statute of limitations is raised as a defense in Nevada, the only questions for the Court are: "First—The precise time when the statute begins to run in each particular case; and, Second—Which clause of the statute covers the case?" *White*, 4 Nev. at 289. With regard to the first question, the Court finds that the Nevada Supreme Court has already determined the precise time when the statute of limitations began to run in this particular case because it determined that the statute of limitations began to run on Fernley's federal constitutional claims at the time of its incorporation in 2001. *State Dep't of Taxation v. First Jud. Dist. Ct.*, No. 62050 (Nev. Jan. 25, 2013). This Court does not believe a different standard should be applied to Fernley's state constitutional claims. Therefore, the Court concludes that the statute of limitations began to run on

Fernley's state constitutional claims at the same time as its federal constitutional claims, which the Supreme Court determined was at the time of Fernley's incorporation in 2001.

With regard to the second question, the Court finds that the 4-year limitations period in NRS 11.220 covers this case. Nevada's statute of limitations in NRS Chapter 11 provides that "[c]ivil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute." NRS 11.010. Nevada's statute of limitations also provides that "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." NRS 11.220. Read together, these provisions mean that every civil action in Nevada must be commenced within 4 years after the cause of action accrued, except where a different limitations period is prescribed by a specific statute. *State v. Yellow Jacket Silver Mining*, 14 Nev. 220, 230 (1879).

Relying on *White Pine Lumber v. City of Reno*, 106 Nev. 778, 779-80 (1990), Fernley suggests that a limitations period longer than 4 years should apply to its state constitutional claims, but Fernley fails to cite any specific statute which sets forth a longer limitations period for its state constitutional claims. In *White Pine Lumber*, the Nevada Supreme Court held that the 4-year limitations period in NRS 11.220 did not apply to the plaintiff's constitutional takings claim because a specific statute, NRS 40.090, provided a longer 15-year limitations period for such a claim. *Id.* at 779-80. Unlike the situation in *White Pine Lumber* where a specific statute provided a longer limitations period for the plaintiff's constitutional takings claim, there is no specific statute in this case that provides a longer limitations period for Fernley's state constitutional claims. Therefore, the Court concludes that the 4-year limitations period in NRS 11.220 covers Fernley's state constitutional claims.

Finally, Fernley argues that its state constitutional claims are not time-barred based on the continuing violations doctrine recognized by federal law which, according to Fernley, allows a plaintiff to avoid expiration of the limitations period where the plaintiff is injured by a systematic and continuing

policy of unlawful acts or a series of related and continuing violations of the plaintiff's rights. The Nevada Supreme Court has not recognized a continuing violations doctrine for state constitutional claims, and it has never applied the doctrine to avoid the running of Nevada's statute of limitations for any type of claims. Although some federal courts have recognized such a doctrine for federal constitutional claims, its application has been strictly limited by the United States Supreme Court. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *RK Ventures v. City of Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002); *Cherosky v. Henderson*, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003).[13]

Given that the continuing violations doctrine is a creature of federal law and has never been applied by the Nevada Supreme Court to avoid the running of this state's statute of limitations, it is questionable whether the continuing violations doctrine has any application in Nevada to state constitutional claims. Based on the record in this case, however, the Court does not need to resolve this question because the Nevada Supreme Court has already determined in its mandamus order that no exception applied under federal law that would allow Fernley to avoid the expiration of the limitations period on its federal constitutional claims. Because the Supreme Court's determination is now the law of this case, Fernley cannot rely on any exception under federal law, including the continuing violations doctrine, to avoid the expiration of the limitations period on its state constitutional claims.

As explained by the Nevada Supreme Court, "[t]he law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs.*, 126 Nev. Adv. Op. 4, 223 P.3d 332, 334 (2010). In order for the law-of-the-case doctrine to apply, "the appellate court must actually address and decide the issue explicitly or by necessary implication." *Id.*

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[13] To support its arguments regarding the continuing violations doctrine, Fernley relies on several Ninth Circuit cases that were decided before the U.S. Supreme Court's decision in *Morgan* in 2002. *See O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000); *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001). Because *Morgan* changed the law, Fernley's reliance on these pre-*Morgan* cases is misplaced, especially since *Morgan* reversed a Ninth Circuit decision.

When this case was before the Nevada Supreme Court on the mandamus petition, Fernley argued for application of the continuing violations doctrine as an exception under federal law to avoid the expiration of the limitations period on its federal constitutional claims. In deciding that Fernley's federal constitutional claims were time-barred by the statute of limitations, the Supreme Court stated:

> [A]t oral argument the City conceded that its federal constitutional claims would be barred unless this court applied an exception to allow it to avoid the expiration of the limitations period, *and we find that no such exception applies here.* Under these circumstances, the City was required to bring its federal constitutional claims within two years of its incorporation, and its failure to do so renders those claims barred by the statute of limitations.

State Dep't of Taxation v. First Jud. Dist. Ct., No. 62050 (Nev. Jan. 25, 2013) (emphasis added).

Thus, in its mandamus order, the Supreme Court ordered the dismissal of Fernley's federal constitutional claims based on the statute of limitations even though Fernley argued for application of the continuing violations doctrine as an exception under federal law. In doing so, the Supreme Court clearly rejected Fernley's reliance on the continuing violations doctrine to allow it to avoid the expiration of the limitations period, and that is now the law of this case. Given that the continuing violations doctrine, which is a creature of federal law, did not save Fernley's federal constitutional claims from the expiration of the statute of limitations, it follows that the doctrine does not save Fernley's state constitutional claims from the expiration of the statute of limitations either.

Therefore, because the 4-year statute of limitations began to run on Fernley's state constitutional claims at the time of its incorporation on July 1, 2001, and because Fernley did not commence this action until June 6, 2012, more than a decade later, the Court holds that Fernley's state constitutional claims are time-barred by the 4-year statute of limitations as a matter of law and that the Defendants are therefore entitled to judgment as a matter of law.[14]

[14] Because the Court holds that Fernley's state constitutional claims are time-barred by the statute of limitations, the Court does not need to address the Defendants' additional arguments that Fernley's state constitutional claims are also time-barred by the equitable doctrine of laches.

G. Fernley's claims for money damages are barred by sovereign immunity.

A defendant is entitled to summary judgment when the plaintiff's claims are barred by sovereign immunity as a matter of law. *See Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 601-05 (1977). In this case, the Defendants contend that Fernley's claims for money damages are barred by sovereign immunity. However, the Defendants do not contend that Fernley's claims for declaratory and injunctive relief are barred by sovereign immunity. *See Hagblom*, 93 Nev. 601-05 (applying sovereign immunity to claims for money damages but not to claims for declaratory and injunctive relief). Therefore, the Court's decision that Fernley's claims for money damages are barred by sovereign immunity as a matter of law does not apply to Fernley's claims for declaratory and injunctive relief.

The Defendants contend that a political subdivision like Fernley cannot bring a lawsuit to recover money damages against the state unless the state has waived its sovereign immunity and the political subdivision has been given specific statutory authorization for such a lawsuit.[15] The Defendants contend that the only Nevada statute which arguably could authorize Fernley to bring a lawsuit against the state to recover money damages is NRS 41.031(1), which is the state's conditional waiver of sovereign immunity for certain actions for money damages. The Defendants contend, however, that the state's conditional waiver of sovereign immunity is expressly limited by NRS 41.032(1), which protects the state from claims for money damages based on any acts or omissions of its agencies, officers and employees "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." The Defendants contend that because the state has exercised due care in the execution of

[15] *See Clark County v. State*, 65 Nev. 490, 501 (1948) ("By the act the state waived its immunity to suit and permitted the county to sue, and likewise definitely vested in the district court jurisdiction of the subject matter."); *State v. Bd. of County Comm'rs*, 642 P.2d 456, 458 (Wyo. 1982) ("the County cannot sue the State, its creator, in the absence of a specific constitutional or statutory provision authorizing such an action."); *Sch. Dist. No. 55 v. Musselshell County*, 802 P.2d 1252, 1255 (Mont. 1990) ("in the absence of a specific statutory or constitutional provision, one governmental subdivision may not sue another for damages.").

the C-Tax statutes and because those statutes have not previously been declared invalid by a court of competent jurisdiction, Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1) as a matter of law.[16]

Fernley contends that the state bears the burden of showing that it is entitled to sovereign immunity under NRS 41.032(1) and that the Defendants have not produced evidence to meet their burden of showing that the state has exercised due care in the execution of the C-Tax statutes. Fernley also contends that there is evidence that the state has not exercised due care in the execution of NRS 360.695 because the state has not exercised its authority under the statute to reduce C-Tax distributions to local governments that have experienced decreases in both population and the assessed value of taxable property. Under NRS 360.695, if a local government experiences decreases in both population and the assessed value of taxable property in three consecutive fiscal years, the Executive Director of the Department of Taxation has the authority to recommend a decrease in the C-Tax distributions received by the local government, but the Executive Director's recommendation does not become effective unless approved by the CLGF and the Nevada Tax Commission. Fernley alleges that in exercising this authority under NRS 360.695, the Executive Director has not recommended a decrease in the C-Tax distributions received by several local governments that have met the statutory criteria for such a decrease, including the Cities of Mesquite and Boulder City. Fernley contends that the Executive Director's decisions in this regard do not reflect the exercise of due care in the execution of NRS 360.695 when a city like Fernley has been repeatedly denied an increase in its C-Tax distributions.

[16] The Defendants note that at least one state court has held that the enactment of a general law waiving a state's sovereign immunity for certain actions for money damages does not provide the type of specific statutory authorization that is necessary for a political subdivision to bring a lawsuit against the state to recover money damages. *Carbon County Sch. Dist. v. Wyo. State Hosp.*, 680 P.2d 773, 775 (Wyo. 1984). The Defendants contend that it is questionable whether the state's conditional waiver of sovereign immunity in NRS 41.031(1) constitutes the type of specific statutory authorization that would allow Fernley to bring a lawsuit against the state to recover money damages. Because the Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1), the Court does not need to address this contention.

The Defendants counter that Fernley has the burden to show that the state has failed to exercise due care by proof that the state has deviated from the statutory requirements in its execution of the C-Tax statutes with regard to Fernley. The Defendants contend that Fernley has not met its burden because Fernley repeatedly alleges that the state has mechanically followed the statutory requirements and has distributed C-Tax revenues to Fernley based solely on the outcome of its mechanical application of the designated mathematical formulas in the statutes. The Defendants also contend that the issue of whether the state has exercised due care in exercising its discretionary authority under NRS 360.695 to decrease the C-Tax distributions received by other local governments has no relevance to the issue of whether the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley. The Defendants contend that because the state has followed the statutory requirements in the C-Tax statutes with regard to Fernley, the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley, and the state is entitled to sovereign immunity under NRS 41.032(1) from Fernley's claims for money damages.

The Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1) as a matter of law. Based on the state's conditional waiver of sovereign immunity in NRS 41.031(1), the state may be held liable in a civil action for damages, but such liability is expressly subject to the statutory exceptions and limitations in NRS 41.032-41.038, which preserve the state's sovereign immunity in certain circumstances. *See Boulder City v. Boulder Excavating*, 124 Nev. 749, 756 (2008). In this case, the Defendants claim sovereign immunity under the statutory exception in NRS 41.032(1), which provides:

> [N]o action may be brought [against the State] 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:
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> 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[.]

Because the statutory exception in NRS 41.032(1) is modeled on an analogous provision in the Federal Tort Claims Act (FTCA), 28 U.S.C. §2680(a), federal cases interpreting the FTCA are relevant in interpreting Nevada's statute. *Hagblom*, 93 Nev. at 602; *Martinez v. Maruszczak*, 123 Nev. 433, 444 (2007); *Frank Briscoe Co. v. County of Clark*, 643 F.Supp. 93, 97 (D. Nev. 1986). In interpreting the analogous provision in the FTCA, the United States Supreme Court has stated that the exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33 (1953); *see also* 2 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 12.03 (LexisNexis 2014) (collecting federal cases and stating that the exception "bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations."). The Supreme Court's interpretation of the exception is supported by its legislative history where Congress stated that it was not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." *Dalehite*, 346 U.S. at 29 n.21 (quoting several Senate and House reports regarding the purpose of the exception). Consequently, by enacting the exception, Congress made clear that a claim for damages against the government cannot be premised on the unconstitutionality or invalidity of a statute or regulation.

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

In this case, Fernley's claims for damages against the state are the exact types of claims that the state's sovereign immunity under NRS 41.032(1) is intended to prohibit because Fernley's claims for

damages are premised on the unconstitutionality of statutes that have not been declared invalid by a court of competent jurisdiction. Fernley contends, however, that the Defendants have not produced evidence to meet their burden of showing that the state has exercised due care in the execution of the C-Tax statutes and therefore the Defendants cannot claim the protection of sovereign immunity under NRS 41.032(1).

With regard to the issue of whether public officers have exercised due care in the execution of a statute, federal courts interpreting the FTCA have found that the plaintiff has the burden to prove the officers "in any way deviated from the statute's requirements," and "[a]bsent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care." *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005). Therefore, "it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. If the plaintiff fails to meet this burden, then the claim must be dismissed." *Id.* at 651 (citations omitted).

The Court finds that Fernley has not met its burden to show that the state has deviated from the statutory requirements in the execution of the C-Tax statutes with regard to Fernley. In support of its claims, Fernley alleges that the state has mechanically followed the statutory requirements of the C-Tax system and has distributed C-Tax revenues to Fernley based solely on the outcome of its mechanical application of the designated mathematical formulas in the statutes. Thus, Fernley's allegations do not support a finding that the state has deviated from the statutory requirements in the execution of the C-Tax statutes with regard to Fernley. The Court also agrees with the Defendants that the issue of whether the state has exercised due care in exercising its discretionary authority under NRS 360.695 to decrease the C-Tax distributions received by other local governments has no relevance to the issue of whether the state has exercised due care in the execution of the C-Tax statutes with regard to Fernley. Therefore, the Court holds that Fernley's claims for money damages are barred by sovereign immunity under

NRS 41.032(1) as a matter of law and that the Defendants are therefore entitled to judgment as a matter of law on those claims.[17]

H. Fernley lacks standing to bring separation-of-powers claims against the state.

A defendant is entitled to summary judgment when the plaintiff lacks standing to bring its constitutional claims against the defendant. *See Doe v. Bryan*, 102 Nev. 523, 524-26 (1986). When the plaintiff lacks standing, 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 constitutional claims. *Heller v. Legislature*, 120 Nev. 456, 460-62 (2004).

In this case, the Defendants contend that political subdivisions like Fernley lack standing to bring claims against the state alleging violations of state constitutional provisions unless the provisions exist for the protection of the political subdivisions, such as provisions which protect political subdivisions from certain types of special or local laws. *See City of Reno v. County of Washoe*, 94 Nev. 327, 329-32 (1978); *State ex rel. List v. County of Douglas*, 90 Nev. 272, 280-81 (1974).[18] The Defendants contend that the separation-of-powers provision of the Nevada Constitution does not exist for the protection of political subdivisions but exists for the protection of state government, not local government, by prohibiting one branch of state government from impinging on the functions of another branch of state government. Therefore, the Defendants contend that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law because the separation-of-powers provision does not exist for the protection of political subdivisions of the state.

Fernley contends that courts in other states have allowed political subdivisions to bring separation-

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[17] Because the Court holds that Fernley's claims for money damages are barred by sovereign immunity under NRS 41.032(1), the Court does not need to address the Defendants' additional arguments that Fernley's claims for money damages are also barred by sovereign immunity under NRS 41.032(2).

[18] *See also City of New York v. State*, 655 N.E.2d 649, 651-52 (N.Y. 1995) ("the traditional principle throughout the United States has been that municipalities . . . lack capacity to mount constitutional challenges to acts of the State and State legislation. . . . Moreover, our Court has extended the doctrine of no capacity to sue by municipal corporate bodies to a wide variety of challenges based as well upon claimed violations of the State Constitution.").

of-powers claims against the state.[19] Fernley contends that the cases cited by the Defendants stand for the proposition that political subdivisions lack standing to challenge certain decisions in which the state itself gives or takes away rights or powers to or from a local government. Fernley contends that the cases do not stand for the proposition that political subdivisions cannot allege that the state government has exceeded its constitutional authority in violation of the separation of powers. Rather, Fernley contends that the separation-of-powers provision protects not only the three branches of state government but also the constitutional rights of individuals. *See Bond v. United States*, 564 U.S.___, 131 S.Ct. 2355, 2365 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."). Therefore, Fernley contends that it would undermine the significance of the separation-of-powers doctrine if a political subdivision could not bring separation-of-powers claims to redress injuries caused by the state to its constitutional rights.

The Court holds that Fernley lacks standing to bring separation-of-powers claims against the state as a matter of law. Fernley is a political subdivision of the state created for the convenient administration of government. It is not an individual, and it does not possess the same personal constitutional rights enjoyed by individuals under federal and state law:

> Public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

Randolph County v. Ala. Power Co., 784 F.2d 1067, 1072 (11th Cir. 1986) (quoting *City of Safety*

[19] *See City of Austin v. Quick*, 930 S.W.2d 678, 684 (Tex. App. 1996) (holding that cities have standing to "challenge statutes on separation of powers grounds."); *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987) (affirming decision in which two local governments successfully argued that "the statute violates the principle of separation of powers."); 1 John Martinez, *Local Government Law* § 3.2 (2d ed. Supp. 2012) ("local government units are held to have standing to invoke the following state constitutional provisions against the state: . . . (3) separation of powers").