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February 18, 2016

Senator Michael Roberson
P.O. Box 530940
Henderson, NV 89053-0940

Dear Senator Roberson:

As Chair of the Legislative Commission, you have asked this office several questions that are pertinent to the Legislative Commission's investigation of the regulation of local license taxes and fees on businesses, which includes the Legislative Commission's evaluation of such regulation by the City of Las Vegas (City).

First, you have asked whether the City's powers under NRS 268.095 and its City Charter to impose license taxes or fees on businesses, whether for generating revenue or for regulation, are limited or preempted by the following legislation enacted during the 2015 regular legislative session:

1. The limited home-rule bill for cities that modified the common-law rule on local governmental power known as Dillon's Rule. Assembly Bill No. 493 (A.B. 493), 2015 Nev. Stat., ch. 465, at 2699-2703.

2. The bills that created a comprehensive statewide system for the regulation and taxation of transportation network companies (TNCs) that engage in the business of using digital networks or software application services to facilitate what is known as "ridesharing" services to connect fare-paying passengers to drivers who can provide transportation services to the passengers. Assembly Bill No. 175 (A.B. 175), 2015 Nev. Stat., ch. 278, at 1372-1391; Assembly Bill No. 176 (A.B. 176), 2015 Nev. Stat., ch. 279, at 1392-1413; and Senate Bill No. 376 (S.B. 376), 2015 Nev. Stat., ch. 447, at 2594-2610.

Second, you have asked a question relating to the recent municipal ordinance passed by the Las Vegas City Council on January 20, 2016, which amends the Las Vegas Municipal Code and purports to establish a local business license "fee" on the TNCs. City of Las Vegas Ordinance

No. 6494, Bill No. 2015-95 (Jan. 20, 2016).[1] Specifically, you have asked whether the City's purported business license "fee" on the TNCs is preempted by state law under the doctrines of express preemption, field preemption or conflict preemption.

To answer your questions, we must consider several legal principles that govern the construction of statutes and the hierarchy of law and power between the State and its local governments. First, we must consider several well-established rules of statutory construction which govern the interpretation of multiple statutes relating to the same subject and which give interpretative preference to more recently enacted statutes that apply more specifically to a given situation. Second, we must consider Dillon's Rule on local governmental power and the Legislature's purposes and objectives in enacting the limited home-rule bill for cities which modified Dillon's Rule regarding matters of local concern but which did not modify Dillon's Rule regarding matters of statewide concern.

Finally, we must consider the express preemption clause in section 44 of A.B. 176, which limits the power of local governments to regulate and impose taxes and fees on the TNCs and their affiliated drivers. In doing so, we must consider well-established legal differences between taxes and fees. We also must consider the Legislature's purposes and objectives in enacting the comprehensive statewide system for the regulation and taxation of the TNCs and whether that comprehensive statewide system occupies the entire field of regulation and taxation of the TNCs and whether local regulation and taxation of the TNCs would frustrate the purposes and objectives of that comprehensive statewide system.

Based on consideration of these legal principles as explained in the discussion below, it is the opinion of this office that to the extent there is any conflict between the statutes, the more specific and more recently enacted provisions of the express preemption clause in section 44 of A.B. 176 take precedence over the general and previously enacted provisions of subsection 1 of NRS 268.095. It also is the opinion of this office that because regulation and taxation of the TNCs and their affiliated drivers are matters of statewide concern, Dillon's Rule on local governmental power must be applied to these matters, and any fair or reasonable doubt as to whether the City Council has the power to impose the purported business license "fee" on the TNCs must be resolved against the City Council and the power must be denied.

Furthermore, it is the opinion of this office that the express preemption clause in section 44 of A.B. 176 preempts the City Council's power to impose the purported business license "fee" on the TNCs because the exaction is a prohibited tax for revenue, not a permissible fee for regulation, and it is not paid in the same manner that is generally applicable to any other business that operates within the jurisdiction of the City. Finally, it is the opinion of this office that the City Council's power to impose the purported business license "fee" on the TNCs is also preempted under the doctrines of field preemption and conflict preemption.

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[1] A copy of the ordinance is available at:
http://www5.lasvegasnevada.gov/sirepub/cache/2/dnc535ktrmastorpdkndtgow/11077961021820160134581 15.PDF

BACKGROUND

I. The Legislature's comprehensive statewide system for the regulation and taxation of the TNCs and their affiliated drivers.

During the 2015 regular legislative session, the Legislature enacted A.B. 175, A.B. 176 and S.B. 376 to create a comprehensive statewide system for the regulation and taxation of the TNCs and their affiliated drivers. Under the bills, the Nevada Transportation Authority administers and enforces the state laws governing the statewide regulation of the TNCs, and the Nevada Department of Taxation administers and enforces the state laws governing the statewide taxation of the TNCs.

In enacting the comprehensive statewide system of regulation, the Legislature included a statement of legislative purpose and policy proclaiming "[i]t is hereby declared to be the purpose and policy of the Legislature in enacting this chapter to ensure the safety, reliability and cost-effectiveness of the transportation services provided by drivers affiliated with transportation network companies in this State." A.B. 176, 2015 Nev. Stat., ch. 279, § 21, at 1401. To achieve its policy objectives, the Legislature provided that the TNCs cannot operate in Nevada and their affiliated drivers cannot provide transportation services in Nevada unless the TNCs hold valid permits issued by the Transportation Authority. Id. § 25, at 1402. .To obtain such permits, the TNCs must comply with an application process developed by the Transportation Authority and pay application fees established by the Transportation Authority to defray the costs of evaluating and processing the applications. Id. §§26-27, at 1402-03, §§48-50, at 1410-11.

If the TNCs are issued permits after completing the application process, the TNCs and their affiliated drivers are exempt from the provisions of NRS Chapter 706 that regulate taxicabs and other common motor carriers to the extent that the services provided by the TNCs and their affiliated drivers are within the scope of the permit. Id. § 43, at 1409. As a result of this exemption, the Transportation Authority "shall not apply any provision of chapter 706 of NRS to a transportation network company or a driver who operates within the provisions of this chapter [regulating TNCs] and the regulations adopted pursuant thereto." Id. § 25, at 1402.

Each year after the issuance of permits, the TNCs must pay annual assessments at rates determined by the Transportation Authority based on their gross operating revenues derived from in-state operations in Nevada. Id. §50, at 1411. The Transportation Authority must use the revenue generated from the annual assessments to defray the costs of the comprehensive statewide system of regulation of the TNCs and their affiliated drivers. Id.

To ensure the safety and reliability of the drivers affiliated with the TNCs, the Legislature required the TNCs to take certain actions to protect the public health, safety and welfare. Id. §§29-50, at 1403-11. For example, the TNCs must: (1) vet the identities and backgrounds of the drivers before they begin service and during their terms of service; (2) inspect and ensure the safety and reliability of their vehicles; (3) terminate or suspend agreements with drivers who violate certain standards of good behavior and safe conduct; (4) follow certain requirements

when charging and collecting fares; (5) adopt policies that prohibit various types of discrimination; (6) provide certain safety and transactional information to passengers; (7) maintain various operational and business records; (8) create a system to receive and address complaints; and (8) provide certain information and reports to the Transportation Authority. Id. In addition, the Legislature prohibited drivers from engaging in dangerous or deceptive practices that are detrimental to passengers. Id. Finally, the Legislature invested the Transportation Authority with substantial investigation and enforcement powers so that it is able to discover, address, remedy and penalize any violations by the TNCs and their affiliated drivers. Id.

Based on the legislative committee hearings for Senate Bill No. 439 (S.B. 439), which was the precursor bill to A.B. 175 and A.B. 176, the legislation regulating the TNCs was designed and intended to regulate the TNCs in a manner that was different from the taxicabs and other motor carriers regulated under NRS Chapter 706 because the TNCs operated under different business models and often served different community needs, locations and passengers in comparison to the taxicabs and other motor carriers. See Hearing on S.B. 439 before Senate Comm. on Commerce, Labor and Energy, 78th Leg. (Nev. Mar. 30, 2015 and Apr. 9, 2015). In fact, opponents of S.B. 439 repeatedly highlighted that the legislation created "an entirely new transportation regulatory system" that regulated the TNCs differently from the taxicabs and other motor carriers regulated under NRS Chapter 706. Id.

Because the legislation regulating the TNCs created an entirely new statewide regulatory system, the Legislature imposed an entirely new statewide excise tax on the TNCs at the rate of 3 percent of the total fare charged for transportation services. A.B. 175, 2015 Nev. Stat., ch. 278, § 28, at 1380, as amended by A.B. 176, 2015 Nev. Stat., ch. 279, § 51, at 1412. Finally, to ensure that the entirely new statewide regulatory system and the entirely new statewide excise tax expressly preempted local laws and regulations, the Legislature included an express preemption clause in section 44 of A.B. 176, which limits the power of local governments to regulate and impose taxes and fees on the TNCs and their affiliated drivers. A.B. 176, 2015 Nev. Stat., ch. 279, § 44, at 1409. The express preemption clause provides in relevant part:

> 1. Except as otherwise provided in subsection 2, a local governmental entity shall not:
>
> (a) *Impose any tax or fee on a transportation network company operating within the scope of a valid permit issued by the Authority pursuant to this chapter, a driver who has entered into an agreement with such a company or a vehicle operated by such a driver or for transportation services provided by such a driver.*
>
> (b) Require a transportation network company operating within the scope of a valid permit issued by the Authority pursuant to this chapter to obtain from the local government any certificate, license or permit to operate within that scope or require a driver who has entered into an agreement with such a company to obtain from the local government any certificate, license or permit to provide transportation services.
>
> (c) Impose any other requirement upon a transportation network company or a driver which is not of general applicability to all persons who operate a motor vehicle within the jurisdiction of the local government.

> 2. Nothing in this section:
> (a) Prohibits a local governmental entity from requiring a transportation network company or driver to obtain from the local government *a business license or to pay any business license fee in the same manner that is generally applicable to any other business that operates within the jurisdiction of the local government.*
> * * *

Id. (emphasis added).

Based on the plain language of subsection 1 of the express preemption clause, a local government is broadly prohibited from imposing "any tax or fee" on the TNCs and their affiliated drivers. By contrast, subsection 2 carves out a much narrower exception that allows a local government to require the TNCs and their affiliated drivers to obtain a business license and pay any business license "fee" in the same manner that is generally applicable to any other business that operates within the jurisdiction of the local government. Because the plain language of subsection 1 expressly uses the terms "tax" and "fee" in the preemption clause, whereas the plain language of subsection 2 uses only the term "fee" in the exception clause, it follows that the exception clause is much narrower in scope and excepts only a business license "fee" from preemption and does not except a business license "tax" from preemption. As a result, under the plain language of the express preemption clause, a local government is preempted from requiring the TNCs and their affiliated drivers to pay a business license "tax" which, as explained in the discussion below, is any governmental exaction of money with revenue as its main objective, not regulation.

II. The City's purported business license "fee" on the TNCs.

Under existing provisions of the Las Vegas Municipal Code § 6.04.030, the City levies an annual business license "fee" on:

> **Motor carrier and transportation services**, which is any business operating as a common motor carrier as defined in NRS Chapter 706 that provides trucking, passenger transportation service including limousine and sightseeing for hire over fixed or non-fixed routes.[2]

Las Vegas Mun. Code § 6.04.030. Such a business must pay an annual business license "fee" of $100. Id. With certain exceptions not relevant here, "[t]he fee amount of one hundred dollars shall be charged for each vehicle operated as part of the business." Id.

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[2] In NRS Chapter 706, a "common motor carrier" is defined to mean "any person or operator who is held out to the public as willing to transport by vehicle from place to place, either upon fixed route or on-call operations, passengers or property, including a common motor carrier of passengers, a common motor carrier of property and a taxicab motor carrier." NRS 706.036.

In Ordinance No. 6494, the City Council amended Las Vegas Municipal Code § 6.04.030 with the intent to establish a business license "fee" on the TNCs by adding a new "licensing category" to that section which reads as follows:

> **Transportation network company**, which is any business entity that uses a digital network or software application service to connect a passenger to a driver who can provide transportation services to the passenger as defined by NRS Title 58. An applicant for this license must furnish a certificate or other proof of registration with the Transportation Services Authority. *The required $100 annual fee shall be paid on a semi-annual basis of $50, and the fee shall be charged to the transportation network company for each active driver, as calculated based on the number of active drivers in each month of a license period, with each month being added together and then divided by the number of months in the license period.*
>
> For the purposes of calculating such fee, "driver" means a natural person that operates, regardless of ownership, a motor vehicle that is the subject of an agreement with a transportation network company to receive connections to potential passengers and related services from a transportation network company in exchange for the payment of a fee to the transportation network company, and "active driver" means a driver who has provided service in response to one or more prearranged requests for service from a transportation network company in any thirty day period. The transportation network company shall provide a report to the Department listing the company's identification number of each active driver prior to the end of each month.

City of Las Vegas Ordinance No. 6494, Bill No. 2015-95, § 2 (Jan. 20, 2016) (amending Las Vegas Mun. Code § 6.04.030) (emphasis added).

During the meeting at which the City Council passed Ordinance No. 6494, city staff advised the City Council that it had the power to enact the ordinance under NRS 268.095 and the business license "fee" exception to the express preemption clause in section 44 of A.B. 176. According to the advice of city staff, NRS 268.095 provides the City Council with the "absolute right" to impose a business license "fee" for the sole purpose of revenue collection, either through a flat fee or a gross revenue fee, and the express preemption clause in section 44 of A.B. 176 did nothing to take away that right.[3]

Under subsection 1 of NRS 268.095, the City Council may "fix, impose and collect for revenues or for regulation, or both, a license tax on all character of lawful trades, callings, industries, occupations, professions and businesses conducted within its corporate limits." NRS 268.095(1). However, the City Council's power under subsection 1 is subject to the provisions of subsection 9 of the statute, which provides that:

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[3] The City Council's January 20, 2016 meeting may be viewed at: http://www5.lasvegasnevada.gov/sirepub/mtgviewer.aspx?meetid=2005&doctype=AGENDA.

> The powers conferred by this section are in addition and supplemental to, and not in substitution for, and the limitations imposed by this section do not affect the powers conferred by, any other law. *No part of this section repeals or affects any other law or any part thereof, it being intended that this section provide a separate method of accomplishing its objectives, and not an exclusive one.*

NRS 268.095(9) (emphasis added).

Thus, based on the plain language of subsection 9 of NRS 268.095, the City Council's power to impose license taxes on businesses for revenues or for regulation, or both, under subsection 1 of the statute is not an exclusive power which prevails over any other statute or which repeals or affects any other statute or any part thereof. In other words, the power conferred on the City Council by subsection 1 of NRS 268.095 does not stand alone, and it cannot be interpreted and applied in isolation from other statutes. Rather, as will be discussed next, the City Council's power must be interpreted and applied in harmony with the express preemption clause in section 44 of A.B. 176, which limits the City Council's power to regulate and impose taxes and fees on the TNCs and their affiliated drivers.[4]

DISCUSSION

I. To the extent there is any conflict between the statutes, the more specific and recently enacted provisions of the express preemption clause in section 44 of A.B. 176 take precedence over the general and previously enacted provisions of subsection 1 of NRS 268.095.

It is a fundamental rule of statutory construction that "words within a statute must not be read in isolation." Banegas v. State Indus. Ins. Sys., 117 Nev. 222, 229 (2001). Instead, it is presumed that the Legislature intended for each statute to be read as part of a larger statutory scheme. State Indus. Ins. Sys. v. Bokelman, 113 Nev. 1116, 1123 (1997). Therefore, when the Legislature enacts multiple statutes which relate to the same subject, those statutes are considered to be *in pari materia*, and courts will strive to interpret the statutes in harmony with each other so as to render the statutes compatible whenever possible. State v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 294-95 (2000); State v. Rosenthal, 93 Nev. 36, 45 (1977).

For example, the Nevada Supreme Court has found that "to the extent that [NRS] chapters conflict, they should be harmonized in a manner that would give effect to both chapter's purposes." Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 153 n.40 (2008). When harmonizing conflicting statutes, the governing rule is that a statute

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[4] The Las Vegas City Charter § 2.150(1) uses language parallel to NRS 268.095(1) in that the charter provides the City Council with power to "[f]ix, impose and collect a license tax for regulation or for revenue, or both, upon all businesses, trades and professions." Because the charter and NRS 268.095(1) contain parallel language, our opinion in this matter applies equally to the charter and NRS 268.095(1).

which applies specifically to a given situation takes precedence over a statute which applies only generally. Nev. Power Co. v. Haggerty, 115 Nev. 353, 364 (1999); Sierra Life Ins. Co. v. Rottman, 95 Nev. 654, 656 (1979). If conflicting statutes cannot be harmonized, the governing rule is that the statute enacted later in time prevails. State ex rel. Herr v. Laxalt, 84 Nev. 382, 385 (1968) ("[I]n construing irreconcilable statutes the later in time prevails."). The reason for this rule is that the more recently enacted statute "is the latest expression by the legislature on the subject, and has superseded any inconsistent provisions of prior legislative enactments." Lamb v. Mirin, 90 Nev. 329, 333 (1974).

The provisions of subsection 1 of NRS 268.095 give the City Council a general power to impose license taxes on businesses for revenues or for regulation, or both, without regard to the type of business operations being conducted. By contrast, the provisions of the express preemption clause in section 44 of A.B. 176 specifically apply to the business operations of the TNCs and their affiliated drivers and specifically limit the City Council's power to regulate and impose taxes and fees on the TNCs and their affiliated drivers.

Consequently, it is the opinion of this office that to the extent there is any conflict between the statutes, the more specific provisions of the express preemption clause in section 44 of A.B. 176 take precedence over the general provisions of subsection 1 of NRS 268.095. It also is the opinion of this office that even assuming there is any conflict between the statutes that cannot be harmonized, the more recently enacted provisions of the express preemption clause in section 44 of A.B. 176 prevail over the previously enacted provisions of subsection 1 of NRS 268.095.

II. Because regulation and taxation of the TNCs and their affiliated drivers are matters of statewide concern, Dillon's Rule on local governmental power must be applied to these matters, and any fair or reasonable doubt as to whether the City Council has the power to impose the purported business license "fee" on the TNCs must be resolved against the City Council and the power must be denied.

Under state constitutions in some jurisdictions, such as Arizona, California and Colorado, certain cities are entitled to the powers and protections of constitutional home rule, which allows the cities to exercise legislative powers over matters of local concern without an express grant or delegation of authority from the state legislature. However, in Nevada, cities are not afforded the powers and protections of constitutional home rule under the Nevada Constitution. State ex rel. Rosenstock v. Swift, 11 Nev. 128, 140 (1876). As explained by the Nevada Supreme Court:

> The existence of a fundamental right of municipal local self-government, is necessarily dependent upon some constitutional grant or manifest implication, neither of which can be found in the constitution of this state. Hence, a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication. Its officers or agents, who administer its affairs, are created by the legislature, and chosen or appointed in the mode prescribed by the law of its creation. Nevertheless,

> the principle of local self-government has always been recognized, to a certain extent, by the legislature of this state in the passage of statutes creating and providing for the government of municipal corporations, and the selection of officers and agents to administer the affairs of such corporations has generally been intrusted to the electors of the respective municipalities, or their appointment committed to the authorities thereof.

Id. (citations omitted).

Historically under Nevada law, the exercise of powers by the governing body of an incorporated city has been governed by the common-law rule on local governmental power known as Dillon's Rule, which defines and limits the powers of local governments. A.B. 493, 2015 Nev. Stat., ch. 465, § 2, at 2700-01; Ronnow v. City of Las Vegas, 57 Nev. 332, 341-43 (1937); 1 John F. Dillon, Commentaries on the Law of Mun. Corps. § 237 (5th ed. 1911). As applied to city government, Dillon's Rule provides that the governing body of an incorporated city possesses and may exercise only the following powers and no others: (1) those powers granted in express terms by the Nevada Constitution, statute or city charter; (2) those powers necessarily or fairly implied in or incident to the powers expressly granted; and (3) those powers essential to the accomplishment of the declared objects and purposes of the city and not merely convenient but indispensable. Id. In addition, Dillon's Rule also provides that if there is any fair or reasonable doubt concerning the existence of a power, that doubt is resolved against the governing body of an incorporated city, and the power is denied. Id.

During the 2015 regular legislative session, the Legislature enacted A.B. 493 which granted limited statutory home rule to cities in Nevada and which modified Dillon's Rule with regard to matters of local concern. A.B. 493, 2015 Nev. Stat., ch. 465, § 2, at 2700-01. However, with regard to matters of statewide concern, Dillon's Rule still applies to cities. Id. In particular, section 6 of A.B. 493 excludes from the definition of a "matter of local concern" any matter that concerns:

> 1. A state interest that requires statewide uniformity of regulation;
> 2. The regulation of business activities that are subject to substantial regulation by a federal or state agency; or
> 3. Any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this State to federal or state regulation that preempts local regulation.

Id. § 6, at 2701.

With regard to matters of local concern, section 7 of A.B. 493 modifies Dillon's Rule as follows:

> 1. *Except as prohibited, limited or preempted by the Constitution, statutes or regulations of the United States or this State* and except as otherwise provided in this section, the governing body of an incorporated city has:
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> (a) All powers expressly granted to the governing body;
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> (b) All powers necessarily or fairly implied in or incident to the powers expressly granted to the governing body; and
>
> (c) *All other powers necessary or proper to address matters of local concern for the effective operation of city government, whether or not the powers are expressly granted to the governing body. If there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter of local concern pursuant to this paragraph, it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature.*

Id. § 7, at 2702.

Given its plain language, section 7 of A.B. 493 recognizes that any power expressly granted to the governing body of a city may be "prohibited, limited or preempted" by a specific statute. The plain language of section 7 of A.B. 493 also demonstrates that the modification of Dillon's Rule is limited to matters of local concern and does not extend to matters of statewide concern.

Based on the Legislature's passage of a comprehensive statewide system for the regulation and taxation of the TNCs and their affiliated drivers, it is the opinion of this office that the regulation and taxation of the TNCs and their affiliated drivers are matters of statewide concern. As a result, it is the opinion of this office that Dillon's Rule on local governmental power must be applied to these matters, and any fair or reasonable doubt as to whether the City Council has the power to impose the purported business license "fee" on the TNCs must be resolved against the City Council and the power must be denied.

III. The express preemption clause in section 44 of A.B. 176 preempts the City Council's power to impose the purported business license "fee" on the TNCs because the exaction is a prohibited tax for revenue, not a permissible fee for regulation, and it is not paid in the same manner that is generally applicable to any other business that operates within the jurisdiction of the City.

The Legislature may preempt local regulation over any matter that is not purely or strictly of local concern. Lamb v. Mirin, 90 Nev. 329, 332-33 (1974). Therefore, a local charter or ordinance that conflicts with state law is preempted unless the Legislature has clearly given preeminence to the local law. See Falcke v. County of Douglas, 116 Nev. 583, 588 (2000); City of Reno v. Reno Police Prot. Ass'n, 98 Nev. 472, 475 (1982); Lamb, 90 Nev. at 332-33. For example, "ordinances are subordinate to statutes if the two conflict." Falcke, 116 Nev. at 588. These preemption principles are reflected in the Las Vegas City Charter § 2.090, which provides that "[t]he City Council may make and adopt all ordinances, resolutions and orders, *not*

repugnant to . . . the provisions of NRS." Id. (emphasis added). The Las Vegas City Charter § 2.160(1) also provides that "[t]he City Council may enact and enforce such local police ordinances *as are not in conflict with the general laws of the State.*" Id. (emphasis added).

Express preemption occurs when the Legislature expresses its intent to preempt local regulation by including explicit preemption language in the statute, and the court's primary task is to "identify the domain expressly pre-empted by that language." Pacificare of Nev., Inc. v. Rogers, 127 Nev. Adv. Op. 71, 266 P.3d 596, 600 (2011) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996)). That task must "in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of . . . pre-emptive intent." Id. (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

As discussed previously, based on the plain language of subsection 1 of the express preemption clause, the City Council is broadly prohibited from imposing "any tax or fee" on the TNCs and their affiliated drivers. By contrast, subsection 2 carves out a much narrower exception that allows the City Council to require the TNCs and their affiliated drivers to obtain a business license and pay any business license "fee" in the same manner that is generally applicable to any other business that operates within the jurisdiction of the local government. Because the plain language of subsection 1 expressly uses the terms "tax" and "fee" in the preemption clause, whereas the plain language of subsection 2 uses only the term "fee" in the exception clause, it follows that the exception clause is much narrower in scope and excepts only a business license "fee" from preemption and does not except a business license "tax" from preemption. See Coast Hotels v. State Labor Comm'n, 117 Nev. 835, 841 (2001) ("when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded").

Furthermore, when the Legislature expressly creates an exception, it is presumed the Legislature did not intend to create other exceptions by implication. See Sonia F. v. Dist. Ct., 125 Nev. 495, 499 (2009); TRW, Inc. v. Andrews, 534 U.S. 19, 28 (2001). As stated by the United States Supreme Court, when a legislative body "explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980). If the Legislature wanted to except a business license "tax" from the express preemption clause in section 44 of A.B. 176, it could have easily done so in a manner similar to other statutes. For example in NRS 268.097, the Legislature expressly preempted cities from regulating any taxicab motor carrier regulated by the Transportation Authority, but the Legislature also expressly excepted the cities' collection of "a license *tax* on and from a taxicab motor carrier *for revenue purposes only.*" NRS 268.097(2) (emphasis added). By not using such plain language in section 44 of A.B. 176, it must be presumed that the Legislature did not want to except a business license "tax" from preemption.

Therefore, under the plain language of the express preemption clause, the City Council is preempted from requiring the TNCs and their affiliated drivers to pay a business license "tax." Based on that interpretation of the express preemption clause, the threshold issue is whether the

City Council's purported business license "fee" on the TNCs is actually a business license "tax" imposed for purposes of revenue instead of for purposes of regulation.

In addressing the issue of whether an exaction amounts to a tax or a fee, courts have found that "the nature of the tax or charge that a law imposes is not determined by the label given to it but by its operating incidence." State v. Medeiros, 973 P.2d 736, 741 (Haw. 1999) (internal quotation omitted) (citing City of Huntington v. Bacon, 473 S.E.2d 743, 752 (W. Va. 1996) ("'It is a well-nigh universal principle that courts will determine and classify taxation on the basis of realities, rather than what the tax is called in the taxing statute or ordinance.'" (quoting Hukle v. City of Huntington, 58 S.E.2d 780, 783 (W. Va. 1950))); Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (explaining that ultimately, "the nature of a monetary exaction must be determined by its operation rather than its specially descriptive phrase" (internal quotation omitted))). Therefore, the fact that the City Council labeled the exaction as a business license "fee" in the ordinance is not determinative of whether it is a tax or fee.

The Nevada Supreme Court has explained the difference between a tax and a fee as follows: "An exaction of money for the purpose of generating revenue is a tax. While a tax is compulsory and it entitles the taxpayer to receive nothing except the governmental rights enjoyed by all citizens, a user fee is optional and applies to a specific charge for the use of publicly provided services." Clean Water Coalition v. M Resort, 127 Nev. Adv. Op. 24, 255 P.3d 247, 256 (2011) (citations omitted). To determine whether a charge is a fee instead of a tax, the court analyzes whether the charge: (1) applies to the direct beneficiary of a particular service; (2) is allocated directly to defraying the costs of providing the service; and (3) is reasonably proportionate to the benefit received. Id. at 257. By contrast, "when it appears from the Act itself that revenue is its main objective, and the amount of the tax supports that theory, the enactment is a revenue measure." Id. at 258 (quoting Douglas Cnty. Contractors Ass'n v. Douglas Cnty., 112 Nev. 1452, 1459 (1996)).

Based on application of these factors to the City Council's exaction, the business license "fee" imposed on the TNCs is a revenue-producing tax because its main objective is to generate revenue and its requirement for the TNCs to pay the annual $100 "fee" on each "active driver" supports the theory that the City Council established the fee for purposes of maximizing the City's revenue, not for purposes of defraying the City's costs of regulating the TNCs. This is also evidenced by the fact that the revenues from the "fee" are deposited in the City's General Fund and expended for general governmental purposes, without being segregated or earmarked solely for purposes of defraying the City's costs of regulating the TNCs. See Las Vegas City Charter § 3.280(1).

Moreover, during the January 20, 2016 meeting regarding the ordinance, city staff advised the City Council that NRS 268.095(1) provides the City Council with the "absolute right" to impose a business license "fee" for the sole purpose of revenue collection, either through a flat fee or a gross revenue fee, and the express preemption clause in section 44 of A.B. 176 did nothing to take away that right. Given city staff's advice, it must be presumed that the City Council intended for the business license "fee" imposed on the TNCs to be a revenue-producing

tax whose main objective is to maximize the City's revenue, not defray the City's costs of regulating the TNCs. Therefore, it is the opinion of this office that the express preemption clause in section 44 of A.B. 176 preempts the City Council's power to impose the purported business license "fee" on the TNCs because the "fee" is a prohibited tax for revenue, not a permissible fee for regulation.

Furthermore, it is the opinion of this office that the express preemption clause in section 44 of A.B. 176 also preempts the City Council's power to impose the purported business license "fee" on the TNCs because the "fee" is not paid "in the same manner that is generally applicable to any other business that operates within the jurisdiction of the local government." Under the Las Vegas Municipal Code § 6.02.085, the City charges a $50 nonrefundable processing fee for each application filed for a new business license. Because each business must pay this processing fee for a business license in the same manner that is generally applicable to any other business that operates within the City's jurisdiction, this processing fee is not preempted by section 44 of A.B. 176.

By contrast, no other business that operates within the City's jurisdiction must pay the purported business license "fee" in the same manner as the TNCs because they are the only businesses that must pay the "fee" based on each "active driver." Therefore, because the "fee" is not paid "in the same manner that is generally applicable to any other business that operates within the jurisdiction of the local government," it is the opinion of this office that the express preemption clause in section 44 of A.B. 176 preempts the City Council's power to impose the purported business license "fee" on the TNCs.

IV. The City Council's power to impose the purported business license "fee" on the TNCs is preempted under the doctrine of field preemption.

Express preemption is only the starting point in the preemption analysis. See Altria Group, Inc. v. Good, 555 U.S. 70, 76-77 (2008). Although courts must begin their analysis by determining whether the Legislature expressly preempted local regulation in an express preemption clause, the presence or absence of an express preemption clause does not end the preemption inquiry. Id. Instead, courts still must consider whether the Legislature intended state law to occupy the entire regulatory field (field preemption) or whether there is an actual conflict between state law and local regulation (conflict preemption). Id.

If the Legislature has decided to occupy an entire regulatory field, all local regulation within that field is preempted by state law. See Lamb v. Mirin, 90 Nev. 329, 332-33 (1974); Douglas County Contractors Ass'n v. Douglas County, 112 Nev. 1452, 1463-65 (1996). Implied field preemption occurs when the Legislature has enacted such a detailed and comprehensive regulatory scheme that the only logical implication to be drawn is that the Legislature intended to occupy the entire regulatory field and has left no room for local regulation to supplement state law. See Capital Cities Cable v. Crisp, 467 U.S. 691, 699 (1984); Arizona v. United States, 132 S.Ct. 2492, 2501 (2012).

Courts are more likely to find implied field preemption when the field of regulation is one which requires statewide uniformity or control, one which involves unique state interests, or one which historically has been regulated by the state government. See, e.g., United States v. Locke, 529 U.S. 89, 106-16 (2000); Arizona v. United States, 132 S.Ct. 2492, 2500 (2012); State v. Reliant Energy, Inc., 128 Nev. Adv. Op. 46, 289 P.3d 1186, 1189 (2012).

As discussed previously, the Legislature enacted A.B. 175, A.B. 176 and S.B. 376 to create a comprehensive statewide system for the regulation and taxation of the TNCs and their affiliated drivers. The legislation was designed and intended to regulate the TNCs in a manner that was different from the taxicabs and other motor carriers regulated under NRS Chapter 706 because the TNCs operated under different business models and often served different community needs, locations and passengers in comparison to the taxicabs and other motor carriers. See Hearing on S.B. 439 before Senate Comm. on Commerce, Labor and Energy, 78th Leg. (Nev. Mar. 30, 2015 and Apr. 9, 2015). In fact, opponents of the legislation repeatedly highlighted that the legislation created "an entirely new transportation regulatory system" that regulated the TNCs differently from the taxicabs and other motor carriers regulated under NRS Chapter 706. Id. Because the legislation created an entirely new statewide regulatory system, the Legislature imposed an entirely new statewide excise tax on the TNCs at the rate of 3 percent of the total fare charged for transportation services. A.B. 175, 2015 Nev. Stat., ch. 278, § 28, at 1380, as amended by A.B. 176, 2015 Nev. Stat., ch. 279, § 51, at 1412.

Given that the Legislature has enacted such a detailed and comprehensive statewide regulatory scheme for the regulation and taxation of the TNCs and their affiliated drivers, it is the opinion of this office that the only logical implication to be drawn is that the Legislature intended to occupy the entire regulatory field and has left no room for local regulation of the TNCs to supplement state law. Therefore, it is the opinion of this office that the City Council's power to impose the purported business license "fee" on the TNCs is preempted under the doctrine of field preemption because the Legislature has decided to occupy the entire regulatory field regarding the TNCs and their affiliated drivers.

V. The City Council's power to impose the purported business license "fee" on the TNCs is preempted under the doctrine of conflict preemption.

As discussed previously, "the existence of an 'express pre-emption provisio[n] does not bar the ordinary working of conflict pre-emption principles' or impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause." Arizona v. United States, 132 S.Ct. 2492, 2504-05 (2012) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869-872 (2000)); Williamson v. Mazda Motor of Am., 131 S.Ct. 1131, 1135-36 (2011); PLIVA, Inc. v. Mensing, 131 S.Ct. 2567, 2577 n.5 (2011) ("the absence of express pre-emption is not a reason to find no conflict pre-emption.").

Therefore, even if the Legislature does not intend to occupy an entire regulatory field, local regulation over a matter still will be preempted by state law if the local regulation is in direct conflict with state law or if the local regulation frustrates the purposes and objectives of state

law. See Crowley v. Duffrin, 109 Nev. 597, 604-05 (1993). A local regulation will be in direct conflict with state law if: (1) the local regulation allows an activity which state law prohibits; or (2) the local regulation prohibits an activity which state law allows. See Lamb, 90 Nev. at 333 ("That which is allowed by the general laws of a state cannot be prohibited by local ordinance, without an express grant on the part of the legislature."). A local regulation will frustrate the purposes and objectives of state law if the local regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the state legislature when it enacted the law. See Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1122 & n.26 (Alaska 1978) (citing Ray v. Atl. Richfield Co., 435 U.S. 151 (1978)).

In enacting the comprehensive statewide system of regulation of the TNCs and their affiliated drivers, the Legislature included a statement of legislative purpose and policy proclaiming "[i]t is hereby declared to be the purpose and policy of the Legislature in enacting this chapter to ensure the safety, reliability and cost-effectiveness of the transportation services provided by drivers affiliated with transportation network companies in this State." A.B. 176, 2015 Nev. Stat., ch. 279, § 21, at 1401. To promote its objectives, the Legislature: (1) centralized regulation of the TNCs and their affiliated drivers with the Transportation Authority; (2) exempted the TNCs and their affiliated drivers from the provisions of NRS Chapter 706 that regulate taxicabs and other common motor carriers to the extent that the services provided by the TNCs and their affiliated drivers are within the scope of the permit; and (3) with few exceptions, preempted local regulation of the TNCs and their affiliated drivers.

In contravention of the Legislature's objectives, the purported business license "fee" requires the TNCs to comply with new administrative burdens at the local level that could be time-consuming and potentially labor-intensive, including various accounting and reporting requirements mandated by the ordinance. City of Las Vegas Ordinance No. 6494, Bill No. 2015-95 (Jan. 20, 2016). Because compliance with the new administrative burdens at the local level could be costly and inefficient, those burdens stand as an obstacle to the accomplishment and execution of the full purposes and objectives intended by the Legislature when it enacted the comprehensive statewide regulatory scheme and wanted to encourage and promote cost-effective transportation services. Therefore, because the purported business license "fee" conflicts with the comprehensive statewide regulatory scheme, it is the opinion of this office that the City Council's power to impose the purported business license "fee" on the TNCs is preempted under the doctrine of conflict preemption.

CONCLUSION

It is the opinion of this office that to the extent there is any conflict between the statutes, the more specific and more recently enacted provisions of the express preemption clause in section 44 of A.B. 176 take precedence over the general and previously enacted provisions of subsection 1 of NRS 268.095. It also is the opinion of this office that because regulation and taxation of the TNCs and their affiliated drivers are matters of statewide concern, Dillon's Rule on local governmental power must be applied to these matters, and any fair or reasonable doubt

as to whether the City Council has the power to impose the purported business license "fee" on the TNCs must be resolved against the City Council and the power must be denied.

Furthermore, it is the opinion of this office that the express preemption clause in section 44 of A.B. 176 preempts the City Council's power to impose the purported business license "fee" on the TNCs because the exaction is a prohibited tax for revenue, not a permissible fee for regulation, and it is not paid in the same manner that is generally applicable to any other business that operates within the jurisdiction of the City. Finally, it is the opinion of this office that the City Council's power to impose the purported business license "fee" on the TNCs is also preempted under the doctrines of field preemption and conflict preemption.

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

Sincerely,

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