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To: Construction Contractors and Real Estate Developers

From: Charles E. Chinnock, Executive Director

Subject: Section 7 of A.B. 3 (2005 Special Session)
Exemption for LEED Certified Buildings

The purpose of this memorandum is to detail the manner in which the Department of Taxation ("Department") proposes to implement and administer the partial sales and use tax exemption set forth at Section 7 of A.B. 3 (2005 Special Session). Section 7 of A.B. 3 amends NRS 374.307 to partially exempt products and materials used in the construction of a building which, when complete, will meet the requirements to be certified at the silver level or higher in accordance with the Leadership in Energy and Environmental Design ("LEED") Green Building Rating System. The exemption is effective from October 1, 2005, through December 31, 2005. If a contract for the construction of a qualifying project is executed on or before December 31, 2005, the Department will recognize the exemption for products and materials purchased after December 31, 2005, provided that the products and materials were used in the construction of the project. Subject to the approval of the Nevada Tax Commission, there are two methods by which a contractor or developer may avail himself of the exemption.

- (1) Once a project has obtained a LEED certification from the U.S. Green Building Council, any contractor or developer who has paid sales and/or use tax on the products and materials used in the construction of the project may submit a claim for credit or refund pursuant to NRS 374.635 to 374.655, inclusive. If necessary, the developer or contractor may submit the claim prior to the LEED certification in order to prevent the claim from being time-barred as outside the 3-year period of limitations set forth at NRS 374.640. If the period of limitations is an issue, the Department will hold the claim in abeyance pending the LEED certification.
- (2) Alternatively, if a project has not yet obtained a LEED certification, the prime contractor or the developer for the project may apply to the Director of the Office of Energy (the "Director") for written confirmation that the project has been designed to all applicable LEED requirements and specifications and that, when complete, the project will likely meet or exceed the LEED silver standard. If the Director issues such a confirmation, the Department may authorize either the developer or the prime contractor (hereinafter the "project representative") to purchase products and materials for the project using a deferral certificate, which will be comparable in form and substance to a resale certificate.

If the Department authorizes the project representative to purchase products and materials using a deferral certificate, the project representative will be required, in the ordinary course of business, to report and remit use tax at the rate of 2% on all tangible personal property purchased for use on the project. This is because the use tax deferral will apply to the local portion of the

sales and use tax only. *See* chapters 374 and 377 of NRS. The state portion of the tax (2%), codified at chapter 372 of NRS, is fully applicable unless the project is otherwise exempt pursuant to the provisions of NRS 372.260 to 372.350, inclusive. The state portion of the tax will be reported and remitted on a quarterly basis relative to the quarter in which tangible personal property is delivered to the project site.

With respect to the local portion of the tax, the project representative may be permitted to defer payment of the tax until such time as the project either obtains or is denied the required LEED certification. If the project obtains the certification, the materials and products used in the construction of the project will be deemed exempt from the local portion of the tax. If the project is denied the certification, the local portion of the use tax will be assessed at that time, together with interest thereon at the statutory rate of 1% per month. *See* NRS 360.295. Further, as a condition of the deferral, the Department may require the project representative to execute a waiver consenting to toll the 3-year period of limitations within which the Department would otherwise be required to issue a deficiency determination for any tax determined to be due on the project. *See* NRS 360.355.

Furthermore, if a subcontractor purchases products or materials under the project representative's deferral certificate, the subcontractor will be jointly and severally liable with the project representative for any use tax that is due for the project as indicated above. To facilitate an arrangement whereby the project representative contractually assumes the responsibility for reporting and remitting all use tax associated with the project, the project representative may wish to execute indemnification agreements with the subcontractors. Although such an indemnification agreement would not impact the Department's right to assess use tax against a subcontractor, it could alleviate a subcontractor's potential concerns about delegating tax reporting and compliance functions to the project representative.

Except as indicated above, the Department will not authorize a developer or contractor to defer the imposition of sales tax when purchasing materials or products that have already been earmarked for use on a specified construction project. Under ordinary circumstances, it is not permissible for a person to tender a resale certificate when purchasing tangible personal property unless that person is engaged in the business of selling tangible personal property and intends to sell the property in the ordinary course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose. *See* NRS 372.160. *See also* NAC 372.210. The Department proposes to issue deferral certificates for the limited purpose of implementing and administering the provisions of section 7 of A.B. 3 as detailed above.

Please be advised that the foregoing proposal is subject to the approval of the Nevada Tax Commission. The Commission will review the proposal at its public meeting on January 9, 2006, to be held at the Nevada Legislative Building, 401 S Carson Street, Room 3138, Carson City, Nevada, and by videoconference at the Legislative Counsel Bureau, Grant Sawyer State Office Building, 555 E Washington Avenue, Room 4401, Las Vegas, Nevada. Interested persons should consult the meeting agenda for additional details concerning the order of events. The agenda will be posted on the Department's web site at www.tax.state.nv.us.