OPINION NO. 60-168 COUNTY COMMISSIONER; VACANCY IN OFFICE—Appointment by Governor to fill vacancy on board does not "extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general (biennial) election."

Carson City, July 12, 1960

Honorable Fred Nelson, District Attorney, County of Esmeralda, Goldfield, Nevada

STATEMENT OF FACTS

Dear Mr. Nelson:

In the general election conducted in Nevada on November 4, 1958, there was elected in the County of Esmeralda, under the provisions of Section 244.025, subsection 3, NRS, a long term County Commissioner. The term of office is four years and the term would normally expire the first Monday of January 1963. Death intervened and on January 20, 1960, under the provisions of 244.040 NRS, the Governor appointed Jewell Parsons, to the office of County Commissioner, County of Esmeralda, "for the balance of the unexpired term ending the first Monday of January 1961." At the date hereof Mrs. Parsons still holds said office.

QUESTION

Does the term of office of Mrs. Parsons, by virtue of the appointment of Governor Sawyer of January 20, 1960, terminate at 12 p.m. of the day preceding the first Monday of January 1961?

CONCLUSION

Yes; said office terminates on that date and at that hour.

ANALYSIS

Section 26 of Article IV of the Constitution provides:

> Sec. 26. The legislature shall provide by law for the election of a board of county commissioners in each county, and such county commissioners shall, jointly and individually, perform such duties as may be prescribed by law.

Section 244.025, subsection 3 of NRS, provides:

3. At the general election in 1870, and at every general election held every 2 years thereafter, there shall be elected in each county one commissioner to serve upon the board of county commissioners for the term of 4 years; and a term of 4 years shall be known, both in this chapter and for the purpose of the election of county commissioners, as the long term; and the other commissioner or commissioners, as the case may be, necessary to fill the board, shall, at the election, be elected to serve upon the board for the term of 2 years.

Section 244.030 NRS provides:

244.030 County commissioners shall enter upon their duties on the 1st Monday of January succeeding their election, and shall hold their offices for 2 or 4 years, as the case may be, as provided in this chapter; and the term of office of 2 years or 4 years, as the case may be, shall expire at 12 p.m. of the day preceding the first Monday of January following a general election.

Section 244.040 NRS provides:

244.040 1. Any vacancy occurring in any board of county commissioners shall be filled by appointment of the governor.

2. The term of office of a person appointed to the office of county commissioner shall not, by virtue of the appointment, extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general election.

We take it to be axiomatic that in no case may the appointive authority appoint an officer to an elective office, by reason of vacancy therein, for a term to extend beyond the term for which the predecessor had been elected. We are here concerned with whether or not the Governor had the authority to appoint to the first Monday of January 1963, or whether the appointment in the language aforesaid was correct.

Apart from other provisions affecting only the larger counties, boards of county commissioners are composed of three members (subsection 2 of 244.025 NRS), and except for death or resignation, there are elected in each county at each biennial general election two commissioners, one for the short and one for the long term, for two and four years respectively.

If a vacancy occurred on a board by the death of a short term county commissioner, an appointment by the Governor, as authorized by NRS 244.040, subsection 1, would, under the provisions of NRS 244.030, terminate at 12 p.m. of the day preceding the first Monday of January following the next general election. The office could not be held beyond that time and date since it is only a two-year term.

It follows that NRS 244.040, subsection 2, has application only to vacancies in office of county commissioners elected to the long term, and then only if death or resignation occurs during the first two years of the term. If the vacancy occurred during the last two years of the term, the appointment would run its course to the same date that the term of the elected officer would have expired.

Subsection 2 of NRS 244.040, would be rendered meaningless if we construed the statute to authorize the Governor to make the appointment for the term to expire on the same date as that of the elected long term county commissioner, had he survived. The appointment cannot "extend beyond 12 p.m. of the day preceding the 1st Monday of January next following the next general election." The Governor was powerless to make an appointment for term to extend beyond said date. It follows that the appointment was in accordance with the law and that the office is open for election for the unexpired term of a long term county commissioner.

We are mindful of the fact that "general election" has been variously defined by our Supreme Court, and has been held to be the election at which the officer would ordinarily be elected. *Bridges v. Jepsen* (County Clerk), 48 Nev. 64, 227 P.588, and *Grand and McNamee v. Payne* (State Senator), 60 Nev. 250, 107 P.2d 307. However, for the reasons stated, such could not have been the legislative intent in enactment of the provisions of NRS 244.040, subsection 2. *See also Brown v. Georgetta* (United States Senator), 70 Nev. 500, 275 P.2d 376, and Attorney General Opinion No. 166 of June 21, 1960. These decisions are under differing constitutional provisions and statutes and are clearly distinguishable.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-169 INSURANCE DEPARTMENT; STATE BOARD OF HEALTH—With reference to the administration of trust funds, mausoleums and endowment care cemeteries are under the exclusive supervisory jurisdiction of the State Board of Health and the Department of Insurance, respectively.

Carson City, July 18, 1960

Honorable Paul A. Hammel, Insurance Commissioner, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Hammel:

Memory Gardens of Las Vegas, Inc., is a Nevada corporation, with its principal office located at 223 Fremont Street, Las Vegas, Nevada. It operates an endowment care cemetery approximately four miles from the City of Las Vegas, as regulated by the provisions of NRS 452.050-452.180. The corporation also operates a mausoleum on the same grounds under the regulations contained in NRS 452.210-452.270.

Under the provisions of NRS 452.180, the Commissioner of Insurance is vested with the power and duty of examination of the fiscal affairs of the

corporation, insofar as its operation pertains to an endowment care cemetery. Under such authority, the said Commissioner obtained an examination and report of the corporation's affairs to December 31, 1959, prepared by an accountant. We have been furnished with a copy of this report, filed with the Commissioner in June, 1960, to assist with this study.

In an official opinion of this office (Attorney General Opinion No. 408, dated September 24, 1958), rendered prior to the construction of the mausoleum here involved, it was indicated that upon licensing of the mausoleum the corporation would have to set apart a trust fund equal to 15 percent of the cost of the structure, to be invested in accordance with applicable statutory requirements, from which the earnings only might be used for maintenance of the mausoleum. As stated, the said trust fund consists of 15 percent of the cost of the mausoleum, and in no way is determined by the number of interments therein. In this connection, the corporation (as indicated in the accountant's report) did set apart a deposit of $11,743 in trust. Under NRS 452.250, supervisory authority of the mausoleum and said trust fund, so established, is vested in the State Board of Health.

Parenthetically, we note, analysis of the accountant's computations would appear to show that the sum which should have been set apart for the mausoleum trust fund as of December 31, 1959 should have been substantially more than said sum of $11,743. We have also been informed that the trust fund required to be set apart under the provisions of NRS 452.120 (endowment care cemetery) did not include any proceeds or income from services contracted or sold for vaults, crypts or catacombs *within* the mortuary building, but only the sum computed on the basis of graves, niches and crypts sold *outside* of the mausoleum building.

QUESTIONS

1. In setting up the trust fund required by the provisions of NRS 452.120 and 452.130, may the sum fixed by the accountant as of December 31, 1959 be reduced by the sum ($11,743) deposited in trust under the provisions of NRS 452.250?

2. Does the State Department of Health have any jurisdiction respecting the deposit and administration of the trust funds to be set apart and maintained under the provisions of NRS 452.250?

3. Does the Department of Insurance have any jurisdiction respecting the deposit and administration of the trust funds that have heretofore been set apart under the provisions of NRS 452.120?

4. Are both said funds to be augmented from time to time by further additions thereto?

5. In computing the sums that are to be added from time to time to the trust fund to be maintained under the provisions of NRS 452.120, should the trustees or accountant for the Commission compute for niches or crypts within the *mausoleum* building?

CONCLUSION

Question No. 1: No.

Question No. 2: No.

Question No. 3: No.

Question No. 4: Trust funds set apart to provide earnings which shall be used for the maintenance of the mausoleum are not required to be

increased from time to time by reason of the sale of vaults, crypts or catacombs therein. However, the sum set apart in a cemetery endowment care fund under the provisions of NRS 452.120 is required to be augmented from time to time as graves, niches and crypts are sold.

Question No. 5: No. Under the mausoleum statutes (NRS 452.210-452.270), it is contemplated that bodies be stored above ground, and, therefore, jurisdiction is vested in the State Board of Health to supervise and regulate mausoleums in such manner that the stored bodies shall not become a health hazard. The sum required to be set apart in trust is set in such amount as is deemed to be sufficient to maintain the mausoleum building. Additional bodies placed in a mausoleum would not require any addition to the trust fund.

ANALYSIS

NRS 452.120 provides:

> 452.120 "Endowment care cemetery" defined: Deposits required. An "endowment care cemetery" is one which shall hereafter have deposited in its endowment care fund, at the time of or not later than completion of the initial sale, not less than the following amounts for plots sold or disposed of:
>
> 1. $1 a square foot for each grave.
> 2. A sum equal to 15 percent of the sale price of each niche.
> 3. A sum equal to 15 percent of the sale price of each crypt.

NRS 452.250 provides:

> 452.250 Maintenance fund: Deposit; use of income limited.
>
> 1. There shall be deposited with the board of trustees or board of directors of any cemetery corporation or association where the mausoleum, vault or crypt is to be erected a maintenance fund in such sum as shall be determined and fixed by the state board of health.

In reliance upon NRS 452.250 the State Board of Health has promulgated the following resolution:

> Maintenance Fund. The sum of money that must be deposited with the board of trustees or the board of directors of the cemetery association authorized to receive the same in the building of a mausoleum must be not less than 15 percent of the cost of such structure.

In Attorney General Opinion No. 408 of September 24, 1958, we concluded that:

> 1. The Mausoleum Act of 1931 was not repealed by the Endowment Care Cemetery Act of 1953.
> 2. That health dangers and the cost of upkeep is greater in the case of a crypt than a grave.

3. That the legal burdens placed upon a company maintaining a mausoleum are not variable depending upon whether or not it is maintained in connection with a cemetery.

4. That the cost of upkeep of a cemetery is more or less proportional to the number of bodies interred therein.

5. That it is more costly to maintain a crypt within a cemetery than to maintain a grave.

6. That the cost of maintaining a mausoleum (maintenance of the building) is determined largely by the size of the structure and not by the number of bodies interred therein.

7. That the sums to be collected for the trust fund for the maintenance of a mausoleum are determined by the provisions of NRS 452.250 and not by 452.120, and that contributions under both statutes are not required in any case.

8. That the two funds should be kept separate and apart, for they are under the regulatory supervision of different administrative bodies of government.

It must be remembered that the governing provisions for administration of an endowment care cemetery are contained in Sections NRS 452.050 to 452.180, and that the provisions respecting the administration of mausoleums are contained in Sections NRS 452.210 to 452.270; that in the former case the supervisory administrative authority is lodged with the Insurance Commissioner and, in the latter case, with the State Board of Health. It is clear that the fact that one corporation owns and administers both an endowment care cemetery and a mausoleum upon the same grounds does not change this supervisory authority nor the duty to account to the proper supervisory authority within its delegated powers. Since the computation of the sum of $11,743 was under the provisions of NRS 452.250, computed as a percentage of the cost of the mausoleum, such sum is under the exclusive administrative supervision of the State Board of Health. Earnings only from this irreducible sum may be expended by the corporation for maintenance of the mausoleum. Accountings thereon are to be made to the State Board of Health.

On the other hand, to obtain or retain a license as an “endowment care cemetery” there must be compliance with the provisions of NRS 452.120 and 452.130, as to the creation and maintenance of a trust fund, from which the earnings only may be used for the “general care, maintenance and embellishment of its cemetery.” This fund, under the provisions of NRS 452.120, will be a constantly increasing fund, under the supervision of the Commissioner of Insurance.

The computation of the amount of this latter fund did not reflect the number of crypts, catacombs or vaults contracted in the mausoleum, and, indeed, such need not be considered or included. Such computed sum, therefore, need not be reduced since the method used in determining the sum appears to have been upon the proper legal basis.

In conclusion, there are no conflicts of jurisdiction. The Board of Health has exclusive supervisory jurisdiction over one fund and the Insurance Department has exclusive supervisory jurisdiction over the other fund. The fact that both operations are conducted by one corporation is without significance. The rents, issues and profits only from the funds may be used, each for its respective purpose. One fund does not change in

principal amount while the other fund is subject to augmentation. Reports should be rendered on both funds, as required, but not less frequently than annually.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-170 NEVADA GAMING COMMISSION—A member of said Commission who furnishes an armored car service to state gaming licensees is not in violation of NRS 463.023, subsection 3, and thereby disqualified from sitting on the Commission.

Carson City, July 26, 1960

Honorable Grant Sawyer, Governor of Nevada, Carson City, Nevada

STATEMENT OF FACTS

Dear Governor Sawyer:

A member of the Nevada Gaming Commission owns the only armored car service in Las Vegas, Nevada. A portion of the business of this service consists of picking up and transporting money for various gaming establishments licensed by the State and located in Clark County.

QUESTION

Is this member in violation of the law which provides that no person who is actively engaged or has a direct pecuniary interest in gaming activities shall be a member of the Commission?

CONCLUSION

The member of the Commission is neither actively engaged in gaming activities nor does he hold a direct pecuniary interest in gaming activities.

ANALYSIS

NRS 463.023, subsection 3, relating to qualifications of members of the Nevada Gaming Commission provides as follows:

> It is the intention of the legislature that the commission shall be composed of the most qualified persons available, preferably persons familiar with gaming operations; but no person actively engaged or having a direct pecuniary interest in gaming activities shall be a member of the commission.

To answer the question presented we must define what conduct on the part of a Commission member amounts to being actively engaged in gaming activities and what constitutes a direct pecuniary interest in gaming activities.

The word "actively" is the opposite of passively or *inactively (Golden State Theatre Corp. v. Johnson* (Cal.), 133 P.2d 295). In our opinion a person is not actively engaged in gaming activities unless he actually participates in the management or conduct of the gaming operation.

The owner of an armored car service could perform his services without any knowledge, information or participation in any manner in the actual conduct of the gaming operation in those establishments for whom the service is furnished. We think it apparent from the facts stated that the member in question is not actively engaged in gaming activities.

The answer as to what constitutes a direct pecuniary interest in gaming activities is less clear. In our opinion a direct pecuniary interest in gaming activities means an immediate or proximate financial participation in the actual conduct of the gaming operation. It is in no sense remote or contingent upon other factors.

Our Legislature has made a definite distinction between Board members and Commission members insofar as their respective outside activities are concerned. It will, therefore, be necessary to compare and analyze the distinctions respecting the qualifications that the Legislature has imposed on Board and Commission members respectively in order to determine the legislative intent relative to each.

Under NRS 463.060, subsection 3, relative to qualifications of Gaming Control Board members, it is provided as follows:

> No member shall be pecuniarily interested in any business or organization holding a gaming license under this chapter or doing business with any person or organization licensed under this chapter.

It is apparent that the Legislature, by inserting the word "direct" before the term "pecuniary interest" in relation to the qualifications of members of the Gaming Commission (NRS 463.023 (3)) and omitting the word "direct" or a word of similar import before the language "pecuniarily interested" in relation to the qualifications of Board members (NRS 463.060 (3)), intended to place a greater restriction on Board members than Commission members. Furthermore, under subsection 3 of NRS 463.060, members of the Board are expressly prohibited from doing business with a state gaming licensee or licensees, or from being interested in any such business. NRS 463.023, subsection 3, does not bar a Commission member from doing business with a state gaming licensee or licensees, or from being interested in any such business. However, the Legislature saw fit to make this language applicable only to Board members and not Commission members. If the Legislature had intended that members of the Commission should be prohibited from doing business with a state gaming licensee or licensees, or from being interested in any such business, it could have so provided by simply employing the language of NRS 463.060, subsection 3, and making it applicable to Commission members. This it did not do.

One reason that occurs to us for these distinctions lies in the fact that Board members are employed on a full-time basis for which they are

adequately compensated. Members of the Commission meet, generally, once a month for which they are paid $25.
Obviously, Commission members must earn a livelihood from a source other than state compensation.

The most likely persons to serve on the Commission are those who are self-employed for the reason that an employer would not, generally, be receptive to the idea of his employee being absent from his job in order to devote many hours and sometimes days each month to the Nevada Gaming Commission.

For a self-employed person to earn a living in Nevada, it is not uncommon for that person to have business transactions with gaming establishments. To place the same restriction on members of the Commissions as have been placed by the Legislature on Board members would result in narrowing considerably the field of competent persons to serve on the Commission.

From the facts stated and reasons given, we must conclude that the member of the Commission who is engaged in the armored car service is not actively engaged in gaming activities, nor does he hold a direct pecuniary interest in gaming activities.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

BY: Michael J. Wendell
Special Deputy Attorney General

OPINION NO. 60-171 INITIATIVE; ARTICLE 19, SECTION 3, NEVADA CONSTITUTION. NRS 302.060—Secretary of State is not required to place a proposed initiative measure on ballot if it would be invalid if adopted and made law. Initiative; Article 19, Section 3, Nevada Constitution. Construed—Legislature, when acting in good faith, may repeal an act which a proposed initiative measure seeks to amend and enact legislation dealing with same subject matter as proposed initiative measure. Initiative; Statutes—Where proposed amendment to statute which had been repealed would not be independent and complete in itself and stand like an independent enactment it would be void if enacted, and need not abe placed on ballot.

Carson City, July 27, 1960

Honorable John Koontz, Secretary of State, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Koontz:

An initiative petition seeking to amend NRS 674.320 by reducing the rate of interest on small loans from 3 percent per month to 1 1/2 percent per month was filed with the Secretary of State on November 25, 1958.

The petition was submitted to the 1959 Legislature which failed to take any action on the petition. The Legislature did, however, repeal Chapter 674 NRS in its entirety (Chapter 420, Statutes of Nevada 1959) and enact the "Nevada Installment Loan and Finance Act" (Chapter 208, Statutes of Nevada 1959, Chapter 675 NRS) which governs the same subject matter as Chapter 674.

Article 19, Section 3 of the Nevada Constitution, and NRS 302.060 provide that if no action is taken by the Legislature within 40 days after submission of an initiative measure the Secretary of State must place it on the ballot at the next general election.

QUESTION

Should the initiative measure seeking to amend NRS 674.320 be placed on the ballot where Chapter 674 has been repealed in its entirety?

CONCLUSION

The proposed initiative measure may be omitted from the ballot.

ANALYSIS

It is the rule in Nevada that mandamus will not issue to compel public officers to place a proposed initiative measure before the electorate, if, for some reason, it would be invalid if adopted and made law. This rule was announced in the case of *State v. Reno City Council*, 36 Nev. 334, 136 P. 110, where the petitioner sought to compel the City Council of Reno to submit to the electors a proposed ordinance directing the issuance of a liquor and restaurant license. The Court held that such an ordinance would be void because it constituted special legislation and stated:

> The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that would be void even if approved by a majority of the electors, is too clear for discussion or the citation of authorities.

See also Caine v. Robbins, 61 Nev. 416, 131 P.2d 516, where it was held the submission of a proposed initiative measure to the electors may be enjoined if the measure would be unconstitutional.

The ultimate inquiry must therefore be, would the proposed initiative measure, if adopted, be a valid act?

The answer to this question turns upon two preliminary questions: Did the Legislature have power to repeal Chapter 674 NRS and enact the "Installment Loan and Finance Act" while an initiative measure seeking to amend a portion of Chapter 674 was before it, and if it had such power, what is the effect of the repeal?

In *Tesoriere v. District Court*, 50 Nev. 302, 258 P. 291, one of the arguments raised by the petitioner was that an amendment enacted by the Legislature shortening the residence requirement in divorce actions was invalid because it sought to repeal a portion of a statute originally enacted

as an initiative measure. Such a statute, it was argued, could not be repealed except by a vote of the people. The Court held that the Legislature could repeal a portion of an enacted initiative measure without the approval of the people and in so holding stated:

> * * * by the adoption of the initiative it was not the intention of the people to curtail the power of the legislature over initiative measures except in such manner and to such extent as is expressly stated in section 3.

Justice Ducker wrote a concurring opinion wherein he stated in part:

> * * * it was within the power of the legislature to amend it at any time; for except where the right to legislate is withheld from the legislature by article 19, it has full authority therein by reason of section 1, art. 4, of the constitution, which provides: "The legislative authority of this state shall be vested in a senate and assembly, which shall be designated 'The legislature of the State of Nevada.' * * *."

In *Morton v. Howard*, 49 Nev. 405, 248 P.44, the County Clerk of Churchill County refused to file petitioner's declaration of candidacy for the office of County Assessor on the grounds that an act of the Legislature consolidated the office of County Assessor with the office of County Sheriff. Petitioner alleged that since a petition demanding a referendum on the statute the Clerk relied upon had been filed, the operation of the statute was suspended and the Clerk's refusal to file his candidacy was improper. The Court held that the mere filing of a referendum petition does not suspend the operation of the statute. The Court said:

> The people make their own Constitution, and, when they have not seen fit to provide that the filing of a referendum petition shall suspend the operation of a law, we are not authorized to read such provision into the Constitution.

The following general statement appears at 28 Am.Jur. 469:

> Under a general constitutional provision vesting the legislative power of the state in a legislature but reserving to the people the right of initiative and referendum, there is no superiority of power between the two. The legislature on the one hand and the electorate on the other are co-ordinate legislative bodies.

See also 33 A.L.R.2d 1120.

While the facts of the Tesoriere and Morton cases differ from those here presented, the quoted language clearly implies that the power of the Legislature to act is not curtailed by the initiative and referendum provisions of the Constitution except as expressly stated therein. There is nothing in Article 19 which prohibits the Legislature, when acting in good faith, from repealing an act which an initiative measure seeks to amend or from enacting legislation dealing with the same subject matter as a proposed initiative measure.

> It is a well-known rule that the legislature has plenary power to legislate upon every subject, unless there is a denial of that right by the constitution.
>
> *Moore v. Humboldt County*, 48 Nev. 397, 232 P. 1078.

It appearing, therefore, that the Legislature was not prohibited from repealing Chapter 674 NRS, it is necessary to decide whether or not the proposed initiative measure which seeks to amend that chapter is valid.

The authorities are divided on the question of whether a statute which has been repealed in its entirety can be amended. Those jurisdictions which hold such amendments valid do so when "the provisions of the new statute are independent and complete in themselves and stand like independent enactments." 82 C.J.S. 414. The measure here involved obviously cannot satisfy this test. It would govern "Every licensee under this chapter," but there is no longer a Chapter 674.

The measure, if adopted, would be void, such being the case, the Secretary of State is not required to place it on the ballot at the next ensuing general election.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-172 LAS VEGAS, CITY OF; CITY ATTORNEY; LICENSING AND REGULATION OF FOSTER HOMES UNDER COUNTY OR CITY ORDINANCES—Applicable statutes reviewed and found to exempt foster homes approved and licensed by State Welfare Department from application of any regulatory ordinance enacted by a county or city. A county or city may, however, by requirement of an occupational or business license, impose a tax for revenue purposes only upon foster homes operating within their jurisdictions, in reasonable amount and consistent with that imposed upon other or similar activities.

Carson City, August 3, 1960

Honorable Sidney R. Whitmore, City Attorney, City Hall, Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Whitmore:

It has been indicated that the City of Las Vegas, Nevada, is presently engaged in a revision of its ordinances relative to the licensing and regulation of child-care facilities.

Under Chapter 424, Nevada Revised Statutes, the State Welfare Department exercises certain powers relative to establishment of standards for, and the licensing and inspection of, "foster homes."

Other cities and counties may have, or contemplate enactment of, ordinances providing for licensing and regulation of group-care facilities, inclusive of "foster homes."

There is involved, therefore, a situation or activity, subject to possible licensing requirement by State, county, and city, in compliance with probably varying standards or regulations of said three governmental authorities.

The problem is general in nature, and has already been brought to the attention of this office on the basis of conflicting standards, regulations and inspections, when more than one governmental unit exercises jurisdiction.

QUESTION

Is a "foster home," approved and licensed by the State Welfare Department under the provisions of Chapter 424, Nevada Revised Statutes, exempt from licensing and regulatory ordinances enacted by a county or city?

CONCLUSION

As herein qualified: Yes.

ANALYSIS

NRS 424.020, entitled "Minimum standards; regulation of foster homes," provides as follows:

> 1. The state welfare department, in cooperation with the state board of health, shall:
> (a) Establish reasonable minimum standards for foster homes.
> (b) Prescribe rules for the regulation of foster homes.
> 2. All licensed foster homes must conform to the standards established and the rules prescribed in subsection 1.

NRS 424.030, entitled "Licensing of foster homes," provides as follows:

> 1. No person shall conduct a foster home as defined in NRS 424.010 without receiving an annual license to do so from the state welfare department.
> 2. No license shall be issued to a foster home until an investigation of the home and its standards of care has been made by the state welfare department.
> 3. Any foster home that conforms to the established standards of care and prescribed rules shall receive a license from the state welfare department, which shall be in force for 1 year from the date of issuance. On reconsideration of the standards maintained, the license may be renewed annually.

4. The license shall show:

(a) The name of the persons licensed to conduct the foster home.

(b) The exact location of the foster home.

(c) The number of children that may be received and cared for at one time.

5. No foster home can receive for care more children than are specified in the license.

NRS 424.040, entitled "Inspection of foster homes," provides as follows:

> The division of child welfare services of the state welfare department, or its authorized agent, shall visit every licensed foster home as often as is necessary to assure that proper care is given to the children.

NRS 424.050, entitled "Investigation of unlicensed foster homes," provides as follows:

> Whenever the state welfare department shall be advised or shall have reason to believe that any person is conducting or maintaining a foster home for children without a license, as required by this chapter, the state welfare department shall have an investigation made. If the person is conducting a foster home, the state welfare department shall either issue a license or take action to prevent continued operation of the foster home.

NRS 424.060 vests authority and power in the State Welfare Department for the removal of children from undesirable foster homes.

NRS 424.010, defining "foster home," makes all of the foregoing provisions applicable to:

> Any family home in which one or more children under 16 years of age not related by blood, adoption or marriage to the person or persons maintaining the home are received, cared for, and maintained for compensation or otherwise shall be deemed to be a foster home for children.

Preliminarily, it is to be noted that a municipality has no inherent power to require a license or to impose a license fee or tax relative to any business, activity or matter, unless that power is delegated by the State expressly or by necessary implication, and that such power will not be inferred from terms of uncertain import. However, generally speaking, licensing power is delegated to municipalities by the State, though the extent of the power and the businesses, activities and matters, to which the power relates will vary considerably. (McQuillin, Municipal Corporations, 3d Ed., Vol. 9, Sec. 26.22, p. 38.) In this connection, it is undoubtedly true that the existence of concurrent and overlapping jurisdiction in this field, based upon the fact that the involved license is both an exercise of the tax or revenue power and the exercise of governmental regulatory police power, creates and results in some very serious difficulties and problems. (McQuillin, supra, p. 56 et seq.)

Any consideration of the matter here involved suggests four possible alternative conclusions, namely:

1. That municipal (or county) governments have *exclusive* jurisdiction in the licensing and regulation of foster homes.

2. That the state and municipal (or county) governments have *concurrent* jurisdiction in the licensing and regulation of foster homes.

3. That the state has *exclusive* jurisdiction in the licensing and regulation of foster homes.

4. That to the extent that the State actually exercises it, the State must be deemed to have preempted jurisdiction and power, and additional or further municipal (or county) jurisdiction and regulation is prohibited.

The provisions from applicable statutes above quoted clearly deny any exclusive jurisdiction in municipalities (or counties) in the licensing and regulation of foster homes. (Alternative No. 1, above.)

It must also be assumed that if municipal (or county) licensing and regulatory legislation is in conflict with state law, it would be void unless by force of *state law itself* it prevails within the municipality (or county). (McQuillin, supra, Sec. 26.23, p. 44.) However, where there is no actual conflict, state licensing does not necessarily always preclude municipal (county) licensing of certain businesses, activities or matters; in other words, state and municipal licensing may be concurrent as to some subjects. In some instances, it has even been held that the power of a municipality to license is definitely limited to those things for which the State exacts a license. (McQuillin, supra, pp. 44-45, et seq.)

However, there are situations or matters where the effect of state licensing is to preclude municipal (or county) licensing therein. That is, the power to license and impose license fees or taxes, and/or to regulate certain businesses or activities, may only be exercised by the State; municipal (or county) licenses are unauthorized when state law covers these subjects. (McQuillin, supra, Sec. 26.23 et seq., p. 44 et seq.)

Apart from any limitation imposed by reason of the exercise of state jurisdiction in the field, municipalities (or counties) have the delegated legislative authority to license foster homes, either on the basis of their exercise of the taxing power, or governmental regulatory police power. Certainly, if the State had no need for any foster homes, it would not necessarily follow that a municipality (or county) also had no need for them. In other words, to the extent that a local need for foster homes existed, a municipality (or county) would properly have a legitimate concern with their supervision and regulation in exercise of their regulatory police powers for the general welfare, or as a taxable activity to raise revenue. We must therefore conclude that the State does not have exclusive jurisdiction in the field, but that, *generally*, concurrent jurisdiction in the licensing and regulation of foster homes by both the State and municipalities or counties exists.

Existence and exercise of concurrent jurisdiction by both the State and municipalities (or counties) would present no legal (or administrative) problem, if both said governmental authorities established and maintained similar standards and requirements. Such is not the case, however. Municipalities may consider their established standards both necessary and better than those of the State, or vice versa. The question then is which standards or regulations shall apply and be controlling?

In addition to differences in standards or requirements for eligibility or qualification for foster home licenses, there is also duplication in investigations and inspections. The necessity for such duplicate

investigations and inspections is lost upon those subjected thereto, and generally resented by them. So far as they are concerned, if they and their homes qualify for licensing by one governmental unit, they should be considered as qualifying for any and all governmental authorities. This aspect of the problem is not unimportant. It bears directly on the program for recruitment of foster homes, and experience has shown that the requirement for licenses by more than one governmental authority has affected the success of such recruitment programs.

While the foregoing general considerations are practical rather than legal in nature, they are relevant to the evaluation or construction of applicable statutory provisions. Chapter 424 of Nevada Revised Statutes establishes a comprehensive legal base for the licensing and inspection of foster homes, and vests the authority therefor in the State Welfare Department, with the cooperation of the State Board of Health. The standards that shall govern the licensing of a foster home shall be "reasonable minimum standards" as established by said State Welfare Department (NRS 424.020). Moreover, it is expressly provided that no person shall conduct a foster home as therein defined without receiving an annual license to do so from the State Welfare Department, after investigation by said Department and a finding of compliance with said Department's established standards (NRS 424.030). Finally, NRS 424.040 and 424.050, relating to the inspection of foster homes and the investigation of unlicensed foster homes, respectively, further confirm the authority and power of the State Welfare Department to exercise plenary jurisdiction over the establishment and conduct of foster homes throughout the State.

Applicable statutes, therefore, make a license from the State Welfare Department *mandatory* in connection with the establishment and conduct of a foster home anywhere in the State; in other words, a foster home cannot be legally established and operated solely on the basis of a municipal (or county) license.

It further follows from the above that a municipality (or county) may not impose any standards, requirements, conditions or terms which would in any way interfere with or encroach upon the licensing power and exercise of jurisdiction over foster homes by the State Welfare Department, since said Department is specifically and expressly charged with the duty and responsibility not only of licensing foster homes but also of inspecting licensed homes and investigating unlicensed foster homes. Such legislatively imposed duties and responsibilities cannot be legally delegated nor can they be validly assumed by another governmental unit (municipal or county). (Attorney General Opinion No. 632, dated June 15, 1948.)

In legal substance, the assertion by a municipality (or county) of a right to exercise of concurrent jurisdiction herein amounts to an assumption of power and authority to regulate an activity in derogation of State jurisdiction and authority. This becomes self-evident if consideration be given to the possible situation where a foster home would comply with state requirements but did not comply with municipal (or county) requirements. The State would license the operation. The ultimate and specific question would then be: Could the municipality (or county) prohibit the operation of the state-licensed foster home? In our considered opinion, and predicated upon the above cited statutory provisions, any such prohibition on the part of a municipality (or county) would be invalid.

We may finally indicate that federal matching funds are involved in connection with the administration of some welfare programs entailing the use of foster homes. To such extent, the State Welfare Department is, exclusively, the only agency authorized by the Legislature to formulate and establish standards of service. (*See* NRS 422.210, 422,230, 422.270, 422.220 and 422.260.)

It has been submitted that the licensing and regulation of foster homes by exercise of concurrent jurisdiction on the part of the State and a municipality (or county) is supported by existing concurrent jurisdiction in the gaming industry and in contracting, engineering, architecture, and even the professions, such as lawyers, doctors, dentists, etc. In our opinion, the analogy is not a valid one.

In the case of the gaming industry, county and municipal regulations are consistent with state regulations, and can in no wise be contrary to, nor more liberal than, state regulations. Further, in respect to gaming, counties and cities are directly and primarily concerned with their proper operation under both state delegated police and taxing powers. In other cases cited, the counties and municipalities are without power to prescribe the qualifications of those engaged in such activities or professions, but may only prescribe payment of an occupation or business license fee, for the privilege of doing business in the county or city.

In the case of the licensing and regulation of foster homes, however, the State, through its State Welfare Department, is the governmental authority primarily and most directly concerned with proper standards for, and the licensing and regulation of, foster homes, essentially involved in the proper administration of state welfare programs, which are supported, at least partially, by federal matching funds. Here proper discharge of state obligations excludes municipal (or county) interference of any kind, either by more liberal or more restrictive regulatory measures than those established by the State itself. Any licensing power in a city (or county) must, therefore, be strictly limited to the purpose of raising revenue only, and the amount of such occupational or business license tax would have to be reasonable and consistent with that imposed upon and exacted of other or similar activities. (Attorney General Opinion No. 671, dated September 9, 1948.)

The foregoing limitation on exercise of concurrent jurisdiction with respect to foster homes should not be construed to apply to day nurseries or semi-institutional child-caring agencies which are deemed to be excluded from the definition of "foster homes." (Attorney General Opinion No. 749, dated May 7, 1949.)

It is our advice and opinion, therefore, that a "foster home" approved and licensed by the State Welfare Department under the provisions of Chapter 424, Nevada Revised Statutes, is and should be exempt from licensing and regulatory ordinances enacted by a county or municipality, although it may be subjected to payment of an occupational or business license for revenue purposes only, if reasonable, and similarly imposed upon other or like activities.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter

Deputy Attorney General

OPINION NO. 60-173 PUBLIC EMPLOYEES RETIREMENT BOARD—In determining credit for employment service rendered, as required for eligibility for and participation in benefits provided by Public Employees Retirement System, statutes and rules or regulations in effect at time of any application for said benefits are held to be controlling and determinative.

Carson City, August 4, 1960

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Buck:

It is indicated that public school teachers became affiliated with the Public Employees Retirement System as of July 1, 1949. At that time the Retirement Act provided: "No employee whose position normally requires less than 600 hours of service per year may become a member of the system." (Chapter 124, Section 8, subsection 4, 1949 Statutes of Nevada.)

By Chapter 183, Section 2, 1951 Statutes of Nevada, the above was amended to provide that: "No employee whose position normally requires less than 1,200 hours of service per year may become or remain a member of the system." Nevada Revised Statutes 286.320, adopted in 1959, substantially predicates eligibility in the system and participation in any benefits thereunder on "* * * 1,200 or more hours of service per year."

We are also informed that for the period 1944-1949 "A" was a full-time teacher in the Reno School System. Prior to 1944, "A" had been an Americanization and Naturalization teacher for adults in evening classes from 1932, and had continued such service even after commencement of full-time service in 1944. "A" applied for service credit for the period from 1932-1944. The Retirement Board subsequently granted service credit for the period 1932-1944, presumably finding that the services performed and rendered during such period satisfied the "600 hour" requirement then in effect.

The duties of an Americanization and Naturalization teacher did not during the period 1932-1944, and do not presently, entail "1,200 or more hours" as required since 1951. "A" has requested advice as to her retirement status.

The Public Employees Retirement System was established by Chapter 181, 1947 Statutes of Nevada.

QUESTION

1. In determining credit for employment service rendered, as required for eligibility for and participation in benefits provided by the Public Employees Retirement System, which statutes shall be deemed applicable and controlling:

A. Statutes in effect at the time of original membership in system? or

B. Statutes in effect at the time of application for benefits under the system?

CONCLUSION

Question No. A: No.
Question No. B: Yes.

ANALYSIS

It is well-established general law that a pension granted by a public authority is not a contractual obligation, but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor. By the great weight of authority, it is also true that the fact that a pensioner makes compulsory contributions does not give him a vested right in the pension, and that he has no rights therein *except such as are conferred by the statutes creating and governing the pension fund.* (*See* Note, 98 A.L.R. 505-506 et seq., and cases cited therein.)

Generally, pension funds created by tax levies and assessments from the salaries of prospective beneficiaries are public funds (40 Am.Jur. 988, Sec. 34 and footnote citations), and it has been held that a Legislature has the unquestionable authority and power to order the liquidation of a state retirement system (*see Hansen v. Public Employees Retirement System Board of Administration*, 246 P.2d 591).

The right that any member of a public retirement system has in any benefits thereunder is an inchoate right only, until the conditions of eligibility thereto are satisfied. As enunciated by the United States Supreme Court, and applied under varying circumstances, the rule is:

> Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.
>
> (Note, 98 A.L.R. 505 citing *Lynch v. United States* (1934) 292 U.S. 571, 78 L.Ed. 1434, 54 S.Ct. 840.)

So a *Legislature* is not bound to continue in force rules and regulations previously adopted by a pension board, but may provide that new rules and regulations shall be adopted or be effective. And a statute, with retroactive effect, requiring a member to be of a certain age in order to be entitled to a pension, has been held not to impair any vested right. (*See* Note, 98 A.L.R. 506 and cases therein cited.)

The foregoing statements briefly summarize the majority view of the law. The following somewhat different opinion has been expressed in the case of *State ex rel. Gorezyea v. Minneapolis*, 174 Minn. 594, 219 N.W. 924:

> A pension or retirement allowance is a gratuity where it is granted for services previously rendered, and which, at the time they were rendered, were fully paid for and gave rise to no legal obligations for further compensation * * *. It is not a gratuity when the services are rendered while the pension or

> retirement relief statute becomes a part of the contract of employment and contemplates such pension or allowance as part of the compensation for the services rendered.

Under this *minority* view, the rule may be stated to be that when it has been determined that an officer is entitled to a pension and the pension has been officially allowed, or when the event happens upon which the granting of the pension is dependent, the pension thereupon becomes vested and cannot afterwards be revoked or impaired. However, the vested right thus acquired by a pensioner is held to be merely a right to be included among those entitled to share in the pension fund, and not a right to have the pension continued in the same amount as was originally allowed.

> Under this view the pensioner is protected against abolition of his pension, but not against a reduction in the amount. And *see McCann v. Retirement Bd.* (1928) 331 Ill. 193, 162 N.E 859, in which a policeman was held to have no vested right in a pension so as to preclude the correction of the allowance of the pension, *by reducing it so as to conform to a statute fixing the maximum salary to be considered for pension purposes, which statute was applied retroactively to include pensions previously allowed.* (Emphasis supplied.)
>
> (*See* Note, 98 A.L.R. 506-507, and cases therein cited.)

We find, therefore, that, under any view, the law is quite clear that until the conditions of eligibility for pension benefits are actually fulfilled or satisfied, a claimant has no vested rights thereto; and that eligibility requirements may be validly changed either by statute or rules and regulations duly adopted, *even with retroactive effect.*

Services to be included in computing the period of service for purpose of retirement benefits are undoubtedly an eligibility factor and, as such, governed by the same rule. We have carefully reviewed the Public Employees Retirement Act, particularly the provisions of NRS 286.030, 286.320, and 286.450, and find no basis therein for any exception to the rule in this particular case.

A member in the Public Employees Retirement System is, therefore, either eligible or not eligible for retirement benefits solely on the basis of applicable statutes or rules and regulations currently in effect at the time of application therefor, and with service credit as determined at the time of such application. (*See* Notes, 133 A.L.R. 1437 and 2 A.L.R.2d 1033; Attorney General Opinion No. 860, January 30, 1950; Attorney General Opinion No. 322, November 7, 1957; Attorney General Opinion No. 45, May 4, 1959.)

In the particular case here involved, it appears that the matter of service credit relates to the period 1932-1944, *which was prior to the establishment of the Public Employees Retirement System* (1947). Certainly, in such case there can be no claim that the employee contemplated any retirement rights or benefits in seeking and remaining in such employment. Consequently, even the minority rule of law is inapplicable. Such person is not being denied any service credit to which she might be entitled on the basis of services rendered *after* the retirement system was established, *but only with respect to wholly gratuitous allowance of credit for services rendered prior to the establishment of the*

retirement system. In our view, the State, acting through the Legislature, has the unquestionable authority and power to grant allowance of credit for such prior service, either wholly, in part, *or not at all*, as it might determine. In other words, it is within the authority and power of the Legislature to condition eligibility for participation in retirement benefits on the basis of a requirement of a minimum of "1,200 or more hours of service per year", and such service classification is not unreasonable as a matter of law and may be presumed to be actuarially justified on an over-all basis to assure financial soundness of the system.

In any event, conditions currently effective at the time of any application for retirement benefits must be deemed controlling and determinative of eligibility for, and the amount thereof; and such conditions, especially when prescribed in express statute, have precedence over prior statutes or administrative action, if any, had thereon.

We trust that the foregoing sufficiently clarifies the matter and proves helpful.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-174 GAMING—A member of the Nevada Gaming Commission engaged in the armored car service is precluded by law from contracting with a department of the State for said service.

Carson City, August 5, 1960

Mr. Louis Spitz, Director, Motor Vehicle Department, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Spitz:

The office of the Department of Motor Vehicles located in Las Vegas, Nevada is interested in contracting with a Las Vegas armored car service whereby the service will pick up the day's proceeds of that Department and transport the same to the bank for deposit. Mr. James Hotchkiss, a member of the Nevada Gaming Commission, is the owner of the armored car service in question and would receive compensation for performance under said contract.

QUESTION

Is Mr. Hotchkiss by virtue of his position as a member of the Nevada Gaming Commission, precluded from entering into a contract with the Nevada Department of Motor Vehicles as outlined above?

CONCLUSION

It would be unlawful for Mr. Hotchkiss to enter into the proposed contract.

ANALYSIS

It is essential that we first establish that the Director of the Motor Vehicle Department has the authority under the law to enter into such a contract that we have described.

The 50th Session of the Nevada Legislature amended Chapter 284 NRS to provide that the heads of departments, boards and commissions may contract for the services of persons as independent contractors (Statutes of Nevada 1960, Chapter 267, Section 3).

An independent contractor is defined in said chapter as a person who agrees to perform services for a fixed price according to his own methods and without subjection to the supervision or control of the other contracting party, except as to the results of the work. From the foregoing language of the statute cited, it appears the Director of the Motor Vehicle Department may contract for the services of an independent contractor. Our concept of the manner in which an armored car service operates leads us to conclude that such a service is within the definition of an independent contractor as that term is defined in the statute.

In the absence of any further restriction, we conclude that the Director of the Motor Vehicle Department is empowered to contract for armored car services to pick up the day's receipts of the Department and transport the same to the bank.

We now consider the specific question presented, namely, does the fact Mr. Hotchkiss, a member of the Gaming Commission, owns the armored car service in question alter the general conclusion we have reached?

Under NRS 281.220, subsection 1, it is provided as follows:

> It is unlawful for any officer of this state to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature or either branch thereof, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.

The question then arises is a member of the Nevada Gaming Commission a state officer? A state officer or public officer is one whose functions and duties concern the public and who exercises some portion of the sovereign power of the State. Generally such officers are required to take an oath of office (42 Am.Jur. pages 884 and 888). The Nevada Gaming Commission is charged with the responsibility of administering Chapter 463 NRS pertaining to gaming licenses and control (NRS 463.140). Before enterinig upon the duties of his office, each member appointed by the Governor must subscribe to the constitutional oath of office (NRS 463.025), and, in addition, swear that he is not actively engaged in nor does he hold a direct pecuniary interest in gaming activities.

We conclude that by virtue of the duties and responsibilities imposed upon the members of the Nevada Gaming Commission by Chapter 463

NRS said members are public officers of the State of Nevada and are therefore within the purview of NRS 281.220, subsection 1. Therefore, in our opinion it would be unlawful for Mr. Hotchkiss to contract with the Motor Vehicle Department under the facts heretofore stated.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Michael J. Wendell
Special Deputy Attorney General

OPINION NO. 60-175 BOARD OF STOCK COMMISSIONERS; ANIMALS; NRS 569.010, NRS 705.150—Under the provisions of NRS 569.010 and NRS 705.150, railroads are liable to Board of Stock Commissioners for negligently killing or injuring livestock whose ownership cannot be determined by diligent search and inquiries.

Carson City, August 10, 1960

Mr. W. F. Fisher, Executive Officer, Nevada State Department of Agriculture, 118 West Second Street, Reno, Nevada

Dear Mr. Fisher:

You have requested the opinion of this office on the following question.

QUESTION

Are railroads in Nevada liable to the State Board of Stock Commissioners for negligently killing or injuring livestock whose ownership is unknown?

CONCLUSION

Yes.

ANALYSIS

The pertinent statutes are herein set forth:

> 569.010 Certain animals deemed property of state board of stock commissioners; disposition of moneys collected for sales, injuries or killing.
>
> 1. Except as otherwise provided by law, all horses, mules, burros, hogs and cattle within the State of Nevada, the ownership of which cannot be determined by a diligent search through the recorded brands of the state and by inquiries among reputable stockmen and ranchers in the

vicinity where such animals are found, shall be deemed for the purpose of this section to be the property of the state board of stock commissioners.

2. The state board of stock commissioners shall have all rights accruing under the laws of this state to owners of such animals, and may dispose of any such animals by sale through an agent appointed by the board.

3. Except as otherwise provided by law, all moneys collected for the sale or for the injury or killing of any such animals shall be held for a period of 1 year, subject to the claim of any person who can establish legal title to any animal concerned. All moneys remaining unclaimed shall be deposited in the stock inspection fund after the period of 1 year. The state board of stock commissioners has the right to disallow all claims if the board deems the claims illegal or not showing satisfactory evidence of title.

4. The board shall not be held liable for any trespass or other damage caused by any of such animals.

705.150 Liability of railroad for negligent killing, injuring livestock; prima facie evidence of negligence. Every railroad corporation or company, operating any railroad or branch thereof within the limits of this state, which negligently injures or kills any animal of the equine, bovine, ovine or porcine species, or the goat kind, by running any engine or engines, car or cars, over or against any such animal shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof, unless it be shown on the trial of any action instituted for the recovery of such damages as provided in NRS 705.160 that the owner of such animal or animals immediately contributed to such killing or injury; provided:

1. That the mere straying of such animal or animals upon or along the railroad track or tracks concerned shall not be held upon such trial to be any evidence of contributory negligence on the part of the owner of such animal or animals, nor shall the grazing of the same unattended by a herder be so considered; and

2. That the killing or injury in such actions shall be prima facie evidence of negligence on the part of such railroad corporation or company.

705.160 Settlement of claims within 90 days; actions for recovery; assignment of claims.

1. If any railway company or corporation, or owner or operator of a railroad in this state, fails, within 90 days after receipt of the same, to effect settlement of claims received for damages arising from the injury or killing of livestock upon its track or right-of-way by the running of engines or cars over or against such animals in this state as provided in NRS 705.150 to 705.200, inclusive, then the owner of such injured or killed animals may sue and recover damages for such injury or killing from any such railway company or corporation or the owner or operator of such railroad in any court of competent jurisdiction in the county in which such animal or animals was or were killed or injured, together

with 7 percent interest per annum on the value of the animal or animals so injured or killed as established in such action, from the date such animal or animals was or were killed or injured until paid.

2. Any person having a claim arising under the provisions of NRS 705.150 to 705.200, inclusive, may assign the same in writing to any other claimant or person for value, or for the purpose of suit, who shall thereupon have all the rights and remedies of the assignor.

3. In case it becomes necessary on the part of the owner or owners to establish a claim for any animal or animals so killed or injured in any such action, he shall have the right to establish the actual and market value of such animal or animals or the actual damage so sustained.

The cited legislation nowhere expressly authorizes an action by the Board of Stock Commissioners to recover for death or injuries inflicted by railroads upon animals whose ownership is unknown, but the language of NRS 569.010 implies such authority. Paragraph 2 states the "board * * * shall have *all rights accruing under the laws of this state* to owners of such animals * * *." In this connection it is significant to note that at the time of the enactment of NRS 569.010 (Chapter 200, Statutes of Nevada 1925), NRS 705.150 (Chapter 88, Statutes of Nevada 1923) had been in effect for two years. Presumably the Legislature was aware of its existence and intended the right of action created thereby to inure to the Board.

Paragraph 3 of NRS 569.010 provides that all money "collected for the sale *or for the injury* * * * of * * * such animals" is to be held for a year subject to the claim of the rightful owner, clearly implying that the Board is vested with power to recover for injuries inflicted upon strays whose ownership is unknown at the time of injury.

NRS 569.010 vesting ownership of stray animals in the Board of Stock Commissioners, and NRS 705.150 et seq., creating a cause of action in favor of owners of livestock negligently killed or injured by railroads, are perfectly harmonious and no reason exists why the Board cannot avail itself of the remedy provided. Of course, in an action instituted under the provisions of NRS 705.150 the Board would have to establish that it was the "owner" of the affected animal. This could only be accomplished by showing that it had made "diligent search through the recorded brands of the state" and "inquiries among reputable stockmen and ranchers" to determine ownership.

An examination of the statutes of several western states discloses that the terminology employed in NRS 569.010, paragraph 1, is unique; however, the notion that the State has title to estrays is apparently an old one. "Blackstone said that by the early common law estrays were forfeited to the King as the general owner and lord paramount of the soil, in recompense for the damage they may have done therein, * * *." 2 Am.Jur. 794. The Utah Code defines estrays and expressly declares them forfeited to the state. 4-12-2 U.C.A. 1953.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-176 STATE PLANNING BOARD; GOVERNOR; BUDGET DIRECTOR—State Planning Board held to be lacking in legal authority to augment its regular professional staff and employ a Contract Administrator thereon whose salary would be funded out of, and assessed against, legislatively appropriated construction project funds.

Carson City, August 12, 1960

State Planning Board, 205 East Second Street, Carson City, Nevada

STATEMENT OF FACTS

Gentlemen:

At a meeting of the State Planning Board, held in Carson City, Nevada, on Friday, August 5, 1960, and attended by Governor Grant Sawyer, there was some discussion concerning what could be done to eliminate alleged delays in connection with the various construction projects legislatively authorized and charged to the State Planning Board for execution.

The Manager of the State Planning Board attributed such delays to insufficient staff personnel which had been requested but which had not been approved or authorized. Among such requested additional staff personnel there was a Mechanical-Electrical Engineer, whose professional capabilities could have been utilized in connection with the performance of all required preliminary planning work up to and including award of the construction contracts. In the expressed opinion of the Manager of the State Planning Board, such a "Contract Administrator" was imperatively needed, in view of the ever-increasing work load imposed upon the State Planning Board. It was further indicated that such a "Contract Administrator," if immediately available, might (after a reasonable period of training) be able to eliminate the apparent "bottleneck" and some part of the delay in the planning, preparation, and actual award of construction contracts.

In explanation for not approving and recommending such requested additional staff personnel to the State Legislature, Governor Sawyer indicated that, in his view (apparently concurred in by the Legislature), it was deemed desirable to restrict the number of permanent staff personnel to the indispensable minimum. However, such view was predicated on the assumption that legal authority presently actually existed to augment staff professional personnel as required by the State Planning Board's current work load, and to fund the salaries of such required additional professional personnel, on an apportioned basis, out of the legislative project appropriations. Such view was stated to be based upon NRS 341.090, which provides as follows:

> *Authorized expenditures.* The board may make expenditures necessary to carry into effect the purposes of its acts. *However, all expenditures made by the board shall be*

within the limits of the appropriation provided for the use of the board, or provided from funds appropriated by the legislature for construction work or major repairs. (Emphasis supplied.)

Admittedly, neither the foregoing statutory provision, nor the usual statutory powers conferred upon the State Planning Board in the specific legislative enactments relating to the execution of construction projects, have hitherto been construed by the State Planning Board to authorize increase in regular staff personnel, and to assess the salaries of such additional employees, as an apportioned item of cost, against the various and specific construction project appropriations made by the Legislature.

Because of its importance in connection with possible elimination of delays in the execution of authorized projects, both present and future, determination of the legal question outlined herein has been referred to this office.

QUESTION

Is the State Planning Board legally authorized and empowered to augment its regular professional staff, as may be required by construction projects with which the Legislature has charged it, and assess the amount of entailed additional salaries, as an item of cost, on an apportioned basis, against legislative appropriations made for various construction projects?

CONCLUSION

No.

ANALYSIS

NRS 341.150, relating to "Engineering and architectural services; costs; powers of board," provides as follows:

1. The state planning board shall furnish engineering and architectural services to all state departments, boards or commissions charged with the construction of any state building, the money for which is appropriated by the legislature. All such departments, boards or commissions are required and authorized to use such services.

2. The services shall consist of:

(a) Preliminary planning.

(2) Designing.

(c) Estimating of costs.

(d) Preparation of detailed plans and specifications.

The board may submit preliminary plans and designs to qualified architects or engineers for preparation of detailed plans and specifications if the board deems such action desirable. The cost of preparation of preliminary plans or designs, the cost of detailed plans and specifications, and the cost of all architectural and engineering services shall be charges against the appropriations made by the legislature for any and all state buildings or projects, or buildings or projects planned or contemplated by any state agency for

which the legislature has appropriated or may appropriate funds. *The costs shall not exceed the limitations that are or may be provided by the legislature.* (Emphasis supplied.)

3. The board shall:

(a) Have final authority for approval as to architecture of all buildings, plans, designs, types of construction, major repairs and designs of landscaping.

(b) Solicit bids for and let all contracts for new construction or major repairs to the lowest qualified bidder.

(c) After the contract is let, have supervision and inspection of construction or major repairs. The cost of supervision and inspection shall be a charge against the appropriation or appropriations made by the legislature for the building or buildings.

The foregoing detailed provisions of NRS 341.150 may reasonably be considered as amplification and clarification of the more general provisions contained in NRS 341.090, set forth in our Statement of Facts.

Typical of the provisions contained in specific enactments by the Legislature authorizing and appropriating funds for construction projects entrusted to execution by the State Planning Board, are the following excerpts from Chapter 261, 1960 Statutes of Nevada:

Section 1. For the support of the state planning board in carrying out the program of capital improvements, physical plant design, construction, rehabilitation, repairs, additions, equipment and furnishings, land acquisitions, surveys, preparation of plans, specifications and contract documents, and other thinGs set forth in sections 2 and 3 there is hereby appropriated from the general fund in the state treasury the sum of $2,063,877.

(Sections 2, 3 and 4 then list and describe specific projects and set forth definite sums of money authorized and allocable to each project.)

Sec. 5 The state planning board is hereby charged with the duty of carrying out the provisions of this act as provided in chapter 341 of NRS. *The state planning board shall insure that competent architects, engineers and other qualified persons are employed to prepare the plans and specifications required to accomplish the authorized work.* All work set forth in sections 3 and 4 shall be approved by the state planning board *and each contract pertaining to such work shall be approved by the attorney general* * * *.

Sec. 6. *The state planning board is charged with the duty of carrying out the provisions of this act relating to the preparation of the plans, specifications and contract documents necessary to the construction of the capital improvements* set forth in section 2. The state planning board shall insure that competent architects and engineers and other qualified persons are employed for the preparation of such plans and specifications and to assist in the preparation of the contract documents necessary to the construction of such facilities, *and each contract document pertaining to such work shall be approved by the attorney general.* The state

> planning board is authorized to advertise in a newspaper of general circulation in the State of Nevada for separate sealed bids for the construction of each project set forth in section 2 of this act. (Emphasis supplied.)

The provisions of NRS 341.160, relating to "Reports, recommendations of board: Priority of construction," are also deemed relevant in connection with the present problem:

> The board shall submit reports and make recommendations relative to its findings to the governor and to the legislature. *The board shall particularly recommend* to the governor and to the legislature *the priority of construction of any kind and all buildings or other construction work now authorized or that may hereafter be authorized or proposed.* (Emphasis supplied.)

From available information, it appears to be established practice for the State Planning Board *and its regular staff personnel* generally to do a considerable amount of advance planning in connection with any construction project *before* legislative authorization and funding of actual construction. This is understandable, when it is realized that in general there will be involved the selection and acquisition of a land site, design of building to fit the needs of the using agency, adaptation of the designed building to the land site, surveys of soil and other topographical features as they may affect adaptation and construction of the building, laboratory tests, and many other matters.

All such preliminary and advance planning is handled by *regular staff employees of the State Planning Board even before submission and recommendation for legislative approval and fund appropriation to effectuate actual construction.* Necessarily, *before* seeking legislative authorization and appropriation of construction funds, the State Planning Board must also, through regular staff members, have worked out the estimated cost of any construction project for submission and approval of the Legislature.

Manifestly, since all of these preliminary services have been rendered by regular staff employees of the State Planning Board *before* legislative authorization and funding of the construction project, the salaries of said employees could not properly be charged to the appropriated funds for the project as subsequently authorized by the Legislature.

We next consider the situation *after* the Legislature has authorized and funded a construction project. As indicated, there is need for a Contract Administrator at this point, who would be able to handle a reasonable number of projects. The logic of the situation would indicate that contract administration could probably be most efficiently handled by professional staff members who were responsible for most of the preliminary or advance planning, effected prior to legislative authorization and funding of the project, since they would be the persons most familiar with the scope of work entailed, the problems involved, costs, and other matters.

It is submitted that such would be preferable to employment of new part-time professionals. In any event, such Contract Administrator, even if not the same person who had performed all the preliminary or advance planning on the project (prior to its legislative authorization), would necessarily have to perform services which could only be properly

expected of a regular staff *employee* of the State Planning Board. Such services, directed to the actual award of the construction contract, in accordance with the policy determinations of the State Planning Board, necessarily entail direct supervisory control of a type *that can only be imposed upon a regular staff employee.* The point is, that such Contract Administration services cannot properly be effectuated by an independent contractor, through contractual agreement therefor, very simply, because the required degree of supervision and control which the State Planning Board must statutorily retain and exercise would not be possible under such circumstances.

The foregoing conclusion, reached on the basis of practical considerations, is reflected and confirmed in express legislative intent and the limitations imposed upon the character of services which the State Planning Board is authorized to engage and properly charge against funds appropriated for construction projects.

It will be noted from the statutory excerpts set forth herein that there is express and specific reference to services by "competent architects, engineers and other qualified persons"; in short, *independent contractors*, engaged to perform professional work pursuant to contract, to "be approved by the attorney general," and not *employees*, who, as such, would be subject to the direct supervisory control of the Board without necessity of any contract, as here indicated. Certainly, if the Legislature had intended to confer authority and power on the Board to augment or reduce regular *employee* staff in proportion to work load entrusted, and to assess salaries against appropriated construction funds, it could have done so simply enough, and quite explicitly. It did not, however, do so. Moreover, it is a rule of statutory construction, that enumeration and classification by the Legislature serves to characterize or typify, and justifies exclusion of enlargement or additions not characteristic of the express typical classification. ("Expressio unius, exlcusio alterius.") Since the statutes uniformly authorize the engagement of independent contractors, under contracts to be approved by the Attorney General, the Legislature must be deemed as having excluded hiring of additional *employees* for augmentation of regular staff to cope with increased work load in projects. (*See* Attorney General Opinion No. 161 dated April 10, 1952 and No. 186 dated July 15, 1952.)

We cannot ignore the serious implications and consequences which would result from statutory construction other than such as we have outlined. It is of the utmost importance that the cost of government be readily and definitely ascertainable at all times. If proper discharge of governmental functions entails larger staff and more employees, payment of their salaries is a justified item of cost and expenditure. Their compensation should be predicated on the establishment of authorized positions, rather than charged to *construction funds* appropriated for specific projects. At the very least, such assessment of *salaries* of public employees against construction funds tends to obscure the cost of government and results in a loss of proper legislative and public controls. Serious abuses and irregularities are possible where relatively substantial funds, *indefinitely controlled,* are available and can be improperly used.

There is another aspect of the matter which also deserves consideration. Assuming that augmentation and reduction of State Planning Board's regular *employee* staff in ratio to varying work load, is legislatively authorized, then, even as employees in the unclassified service, certain rights and benefits (vacation, sick leave, insurance, retirement, subsistence

and travel allowances, etc.) are entailed and would accrue. The administrative and funding difficulties involved in connection with such fringe-benefit *employee* rights should be obvious, where (as has here been suggested) the costs are to be assessed against various construction appropriations, necessarily exhausted or reverting, with completion of projects.

Finally, and also determinative of the matter on a practical basis, it is admitted by both the State Planning Board and the Budget Director's Office that the respective construction funds appropriated by the Legislature contain no allowance or contingent sum which could be applied to payment of the salary of an *employee* Contract Administrator. In such case, the salary, assessed against such appropriations, would *pro tanto*, constitute a diversion from *construction* purposes, as legislatively intended.

We have already indicated our conclusion that neither the specific project enactments nor Chapter 341 of Nevada Revised Statutes provide any sufficient legal authority for the *employment* of a Contract Administrator, the nature of whose duties would require direct supervisory control by the State Planning Board, hence precluding any rendition of such services on the basis of contract, as with an independent contractor. Since the Legislature did not see fit to authorize such position (or any equivalent thereof) in approving the Board's budgetary requests, the present employment of a contract Administrator would be improper without the approval of a change in the work program, justifying application of appropriated funds of the agency to accommodate employment of a person in such established position. Although NRS 284.145(8) would not authorize such employment, NRS 341.100 provides sufficient authority therefor, *if otherwise feasible and properly authorized in accordance with statutory budget controls.*

In conclusion, our negative answer to the question herein stated is specifically predicated on the fact (1) that the functions and duties of a Contract Administrator (indicated as the solution to the existing "bottleneck") can only be performed and rendered by an *employee* subject to the direct supervisory control of the State Planning Board, and that such services cannot be assured on the basis of contract with an *independent contractor;* (2) that statutory provisions and express legislative intent are not so broadly worded as to authorize the State Planning Board to augment and reduce the number of regular staff *employees* in ratio to its changing work load; (3) that the appropriations approved by the Legislature for the construction of the various projects do not contain any allowance or contingency sum for payment of the *salary* of an *employee* Contract Administrator; and (4) that the assessment of any such *employee's* salary out of authorized construction funds would be violative of express legislative intent and contrary to law.

For the future, it is, of course, entirely within the competency and prerogative of the Legislature expressly to authorize either (1) sufficient regular *employee* staff to assure efficient and expeditious completion of construction projects entrusted to the State Planning Board; or (2) expansion or contraction of employee staff dependent upon varying work load, with specific power to assess the salaries of additional *employees*, if any, against appropriated *construction* funds, on an apportioned basis.

With respect to the immediate situation, it has been indicated that there is available in the operating fund of the State Planning Board the sum of

$5,000 which could be applied to payment of the salary of a Contract Administrator (Mechanical-Electrical Engineer), if such position were authorized and established on the basis of a change in work program. This sum would not, presumably, be sufficient to meet the salary which such a position warrants, so that subsequent application to the Legislature would have to be made for any involved deficiency. However, such application for a change in work program, and use of such presently available funds for interim payment of a Contract Administrator's salary would constitute *immediate* effort and action in the right direction, namely: to get authorized projects into actual construction as soon as possible.

While finding a qualified person and training him for the performance of a Contract Administrator's duties may involve some delay, it is to be hoped that the period of time so involved would not be unduly long, and that he could soon be productively effective in processing projects to the point of actual award of construction contracts.

We trust that the foregoing sufficiently clarifies the problem here involved, and proves helpful, at least in some measure, in its solution.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-177 FISH AND GAME COMMISSION; COUNTY GAME MANAGEMENT BOARDS; HUNTING SEASONS— State Board has power to open season closed by County Board.

CARSON CITY, August 29, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada

Attention: Mr. Drake DeLanoy

STATEMENT OF FACTS

Dear Mr. Raggio:

On August 14, 1960, the Nevada Fish and Game Commission set an open season on chukar partridge in Washoe County, Nevada, for the fall of 1960, although the Washoe County Game Management Board had previously voted to close the season on this particular bird for the year 1960.

QUESTION

May the Nevada Fish and Game Commission reverse the action of a County Game Management Board when the said Board has closed a hunting season?

CONCLUSION

Your question is answered in the affirmative.

ANALYSIS

Initially, in determining this question we should look at NRS 501.345, which section was last amended in 1947 and reads as follows:

> 1. The commission is authorized to divide the State of Nevada into such districts as it shall find expedient with reference to hunting or fishing, and fix the dates for hunting or fishing in each of such districts within the limits provided in this Title; but the county board of any county may shorten or close the season entirely, except as to migratory birds. It shall be unlawful for any person to hunt in any such district or county on any day or days other than may be designated by the commission or the county board.
>
> 2. The county board of each county shall fix the open season in such county within the limits provided in this Title not less than 60 days before the dates specified in this Title for the opening of such season; but in the event an unforeseen emergency shall arise after any season shall have been declared open, and the county board shall determine that the interests of conservation so require, the board may declare such season closed, giving reasonable notice of such action, which notice shall be not less than 1 day.
>
> 3. The commission or any county board within its county may, in the interest of conservation, close to hunting or fishing designated areas in each county, in which event the county board shall post notice of such closing in the closed area, and give further notice thereof by publication.

Standing alone this section would indicate that there is little doubt as to the county Board's authority to close the season as to any game animal, game bird or fish, with the exception of migratory birds. However, we feel this question should also be considered in the light of NRS 501.330, subsection 2, paragraph (f), which reads as follows:

> * * * 2. Such enumeration and classification and the specification of the first and last day of the open or of the closed season found in NRS 501.335, 501.090 and 503.130, inclusive, shall not prohibit the commission or the respective county boards from taking any of the following steps by general rules and regulations, or in specific instances, and giving public notice thereof as is elsewhere provided in this chapter:
>
> * * * (f) Providing supervision and control throughout this state over all orders closing the open season temporarily or permanently because of emergency imperiling the preservation and conservation of fish, or otherwise, and requiring the approval of all such orders by the commission before they become effective.

It should be noted that paragraph (f) was added by amendment in 1949.

In Opinion No. 849, Report of the Attorney General 1948-1950, this office held that the aforementioned paragraph (f) vested the ultimate authority to close a fishing season in the State Board on the theory that since paragraph (f) was enacted after NRS 501.345 and the two provisions of the statute were not reconcilable, the latest expression of the legislative will controlled. However, in Opinion No. B 949, Report of the Attorney General 1950-1952, this office held that paragraph (f) applied only to fishing seasons. With due respect to our predecessor, we feel that we cannot concur in this interpretation of paragraph (f) as the opinion ignores the relevance of the words "or otherwise" in this paragraph. Had the Legislature intended to have this paragraph apply solely to fish, these two words would not have been necessary. The only logical meaning which can be attributed to this wording is that the Legislature intended to have the paragraph apply to seasons on game birds, game animals and fur bearing animals as well as fish.

This construction of the State Board's powers is further supported by NRS 501.350 which reads as follows:

> The commission shall have the power to compile the seasons for hunting, fishing and trapping and the limits for hunting and fishing as set by several county boards and to publish them as official regulations in the manner provided in this chapter and by printed form bearing the imprint of the commission, after first examining such seasons and limits to determine that there exists a desirable degree of uniformity and after a proper consideration of the biological balances necessary for good management, the populations existing, the available harvests, and the probable hunting and fishing pressure, and making such changes as are necessary.

The pertinent portions of this section were added in the year 1951. Again applying the rule that the latest expression of the Legislature controls, we construe this provision to mean that the State Board is to compile the seasons set by the County Boards, but may make necessary changes to insure that the county seasons have a degree of uniformity and are set in accordance with good fish and game management. In our opinion this section allows the State Board to open a season closed by the County Game Management Board in instances where they feel that an open season is warranted under good game management practices.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: William N. Forman
Special Deputy Attorney General, for Nevada Fish and Game Commission

---

OPINION NO. 60-178 NEPOTISM; NRS 281.210 CONSTRUED; PUBLIC OFFICERS—NRS 281.210 prohibits only the act of employing relatives within the class defined by the statute. Continued employment of a public employee following the election of his relative to the appointing board does not contravene the provisions of that statute. Public officers, tenure. Where appointments at pleasure are to be made by a board, the tenure of the incumbent is not terminated by a change in the personnel of the board.

Carson City, August 31, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

Your letter of August 24, 1960 relates that one of the candidates for the office of County Commissioner of Clark County is the nephew of the Clark County Road Superintendent. Although the office held by the candidate's uncle is denominated "County Road Superintendent" and he is an appointee of the Board of County Commissioners, we are unable to find any statutory authority authorizing such a position. NRS 403.110, et seq., provides for a "County Road Supervisor" who is appointed at the pleasure of the Board of County Highway Commissioners, which is a Board composed of the County Commissioners, the County Assessor, and the District Attorney (NRS 403.020). The candidate's uncle has held his present position for several years. You have asked this office if the antinepotism statute would have any application in the event the nephew of the present "County Road Superintendent" is elected.

QUESTION

Would the continued employment of a "County Road Superintendent" following the election of his nephew to the office of County Commissioner contravene the provisions of NRS 281.210?

CONCLUSION

No.

ANALYSIS

The relevant portions of the applicable statute read as follows:

> 281.210 Officers of state and political subdivisions prohibited from employing relatives; exceptions; penalties.
>
> 1. Except as provided in this section, it shall be unlawful for any individual acting as a * * * county official, or for any board, elected or appointed, to employ in any capacity on behalf of * * * any county * * * any relative of such

> individual or of any member of such board, within the third degree of consanguinity or affinity. * * *
>
> 4. No person employed contrary to the provisions of this section shall be entitled to or allowed compensation for such employment.
>
> 5. Any person violating any provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail for not less than 30 days nor more than 6 months, or by both fine and imprisonment.

The phrase "to employ" in the context used in NRS 281.210, supra, is susceptible of both a narrow and broad construction. The statute might be construed to prohibit only the act of hiring relatives within the class described or it might in addition make retaining such relatives in public employment unlawful. Webster's New International Dictionary furnishes us with definitions of the verb "employ" which would suit either construction: "to make use of the services of"; "to give employment to * * *."

Our court has never had occasion to construe NRS 281.210, but the Supreme Court of the State of Utah, in the case of *Backman v. Batemen*, 1 Utah 2d 153, 263 P.2d 561, was confronted with an antinepotism statute which expressly prohibited the continued employment of certain relatives of appointing officers.

> It is unlawful for any person holding any position the compensation
> for which is paid out of public funds to *retain in employment* or to employ * * *. Utah Code Ann., Sec. 52-3-1 (1953 Supp.) (Emphasis added.)

The Court in a divided opinion held the statute unconstitutional when it was invoked in an attempt to terminate the employment of the plaintiff, a high school principal who had served for 27 years and whose brother became a member of the Board of Education after the plaintiff was hired.

The adoption of a broad construction of our antinepotism statute would in many instances deprive a public servant of long standing of his job merely because his relative assumes a position on the appointing board years after his appointment. It would work a hardship not only on the government employee but upon the agency or political subdivision employing him. The difficulty involved in replacing tested, experienced public employees is common knowledge. The majority opinion in the *Backman* case, supra, suggests that the denial of employment under such circumstances constitutes a deprivation of the employee's constitutional rights. Construction of an ambiguous statute in such a manner as to cause hardship or unconstitutionality should be avoided. *Smith v. Southern Pacific Co.*, 50 Nev. 377, 262 P. 935; *V. & T.R.R. Co. v. Henry*, 8 Nev. 165.

It bears pointing out that subsection 5 of NRS 281.210 makes a violation of that section a misdemeanor. In *State ex rel. Robinson v. Keefe*, 111 Fla. 701, 149 So. 638, it was held that an antinepotism statute, highly penal in character, should be strictly construed. *See also Ex parte Todd*, 46 Nev. 214, 210 P. 131.

Construing the cited statute in a manner to prohibit only the act of hiring relatives within the proscribed class does not do violence to the general purpose of antinepotism legislation as expressed in the decided cases, which is to prevent the evil of selecting public employees on the basis of kinship rather than merit. *See* 88 A.L.R. 1103. If it had been the purpose of the Legislature to prohibit employment following the assumption of an appointing office by a relative, it could have expressly included such a provision in the act.

Based on the reasons above stated we are of the opinion that NRS 281.210 prohibits only the act of employing relatives within the class defined by the statute and that continued employment of the present "County Road Superintendent," should his nephew be elected to the appointing board, would not contravene the provisions of that statute.

An appointment, or reappointment, to the office of "County Road Superintendent" of an uncle of any of the members of the Board following the coming election would, of course, constitute a violation of the Nepotism Act, but it appears that election of new Commissioners does not create any necessity for such an appointment.

> Where appointments at pleasure are to be made by a board, the tenure of the incumbent is not terminated by a change in the personnel of the board * * *. (67 C.J.S. 200.)

The conclusions stated herein are in accord with Attorney General Opinions No. 347, October 3, 1929; No. 196, December 5, 1935; No. 223, September 10, 1952; insofar as they differ from the conclusion stated in Attorney General Opinion No. 430, December 3, 1958, we think the views here expressed ought to control.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-179 DISTRICT ATTORNEYS; COUNTY OFFICERS; ELECTIONS—NRS 252.060 construed. An appointment to the office of District Attorney vacated by resignation occurring prior to biennial election cannot extend beyond the next biennial election, at which time the electorate is to determine who shall fill the unexpired term of that office. NRS 294.300 construed. Resignation of District Attorney prior to the holding of a primary election but subsequent to the last day permitted for filing for such election creates a vacancy in party nomination after the holding of a primary, and NRS 294.300 applies, authorizing and requiring County Central Committees to nominate.

Carson City, September 20, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

Mr. George Foley was duly elected to the office of District Attorney of Clark County to serve a four-year term commencing January 1959 and ending January 1963. On August 22, 1960 he resigned from that office and the County Commissioners of Clark County appointed Jack C. Cherry to replace him. The vacancy in office occurred prior to the holding of the primary election of September 6, 1960, but subsequent to the last day for filing a declaration of candidacy for that election, which is declared to be not less than 50 days prior to the primary. (NRS 294.120.) A general election is to be held November 8, 1960; however, the office of District Attorney would not ordinarily appear on the ballot at that election (NRS 296.015, NRS 252.020). The District Attorney of Clark county has, in his letter of September 9, 1960, presented the questions appearing below for our consideration.

QUESTIONS

1. Is the office of District Attorney of Clark County to be filled by election on November 8, 1960, or does the appointment of the present District Attorney extend until the completion of the unexpired term of his predecessor?
2. If the office of District Attorney is to be filled by the coming election, in what manner are the candidates of the respective political parties to be chosen?

CONCLUSIONS

1. The office of District Attorney of Clark County is to be filled by election on November 8, 1960.
2. The County Central Committees of the respective political parties are authorized and required to nominate candidates for the office of District Attorney.

ANALYSIS

NRS 252.060 provides:

> 252.060 Vacancy in office. In case a vacancy should occur in the office of district attorney, by death, removal, or otherwise, the board of county commissioners shall appoint some suitable person to fill vacancy until the *next ensuing biennial election*. (Emphasis added.)

NRS 245.170 provides:

> 245.170 County commissioners to fill vacancies. When any vacancy shall exist or occur in any county or township office, except the office of district judge and county

> commissioner, the board of county commissioners shall appoint some suitable person, an elector of the county, to fill such vacancy until the *next ensuing biennial election.* (Emphasis added.)

The cited statutes can best be understood in the light of a brief review of pertinent judicial decisions.

In the case of *Bridges v. Jepsen*, 48 Nev. 64, 227 P. 588 (1924), the County Clerk and Treasurer of Douglas County who was elected for a four-year term commencing in January of 1923, died during the first week of his administration. The County Commissioners thereupon appointed Jepsen to fill the vacant office. Bridges sought mandamus to compel the County Clerk to include the office of County Clerk and Treasurer in the notice proclaiming offices to which candidates were to be nominated in the primary election of 1924. The controlling statute provided that when vacancies occurred in the office of County Clerk, the Board of County Commissioners was to appoint to fill the vacancy "until the next general election." The Court denied the writ, holding that the office of Clerk was not open for election, since it was filled by appointment until the next election at which a County Clerk would regularly be elected. The Court stated:

> * * * Now that county officers hold for a term of four years, a vacancy occurring in such offices is to be filled by appointment by the board of county commissioners until the next general election prescribed by law for the election of county officers. It may be that the legislature, having changed the term of county officers from two to four years, should have been provided that an election to fill a vacancy be held at any biennial election; but they did not do so, * * *.

The rule stated in the *Jepsen* case, supra, was followed in *Grant and McNamee v. Payne*, 60 Nev. 250, 107 P.2d 307 (1940), where it was held that an election for the office of State Senator of Clark County, vacated by the resignation of the incumbent in 1940 could not be held at the biennial election of 1940, but could only be held at the general election of 1942, when that office would ordinarily be filled by election. As to county offices as opposed to state offices, however, the Court said that the 1939 amendment to Section 4813 NCL (presently NRS 245.170, supra) was "for the purpose of changing the rule declared by this court in *State ex rel. Bridges v. Jepsen* * * *." The 1939 amendment referred to appears at page 146, Statutes of Nevada 1939, and that amendment together with the amendment appearing at page 165, Statutes of Nevada 1933, had the effect of changing the term of appointment to a vacated county office from the next ensuing general election to the next ensuing biennial election.

NRS 252.060, supra, relates specifically to the office of District Attorney and provides that the appointee of the Board of County Commissioners shall fill a vacancy "until the next ensuing biennial election." The legislative history beneath this statute does not indicate that it was ever amended; however, the comparable statute in NCL, Section 2085, provided that the appointee would "remain in office during the balance of the unexpired term." The reviser's note to NRS 252.060 notes the change in language and makes reference to Section 4813 NCL 1931 (supra). He has adopted the view that the 1939 amendment to that section,

which governed all county officers, amended the specific section governing District Attorneys. The Nevada Revised Statutes were enacted as the law of this State and all prior laws were repealed by virtue of Chapter 2, Statutes of Nevada 1957, page 2.

It can readily be observed from the foregoing that the existing statutes result from a clear legislative attempt to overcome the rule stated in the *Jepsen* case and furnish the electorate with an opportunity to fill a vacated county office at the earliest convenient time. It follows that the appointment of the present District Attorney of Clark County cannot extend beyond the next biennial election to be held on the 8th day of November, 1960, at which time the voters shall determine who shall fill the unexpired term of that office.

Having decided that the District Attorney must be elected at the coming biennial election, it is necessary to determine in what manner the political parties are to choose the nominees to that office. NRS 294.300 provides:

> 294.300 Vacancy in party nomination after primary: How filled. Vacancies occurring after the holding of any primary election shall be filled by the central committee of the political party of the county, district or state, as the case may be. Such action shall be taken not less than 30 days prior to the November election.

In the case of *Brown v. Georgetta*, 70 Nev. 500, 275 P.2d 376 (1954), it was contended the cited statute applied only in cases where the nominee at the primary election died or resigned, but the Court held the statute was not so limited. In that case it was applied to a vacancy in nomination created by a vacancy in office occasioned by the death of Senator McCarran following the primary election. The Court cited from *Penrose v. Greathouse*, 48 Nev. 419, 233 P. 527, 529:

> But, as said in *State v. Hostetter*, supra, where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which someone to fill the office for the unexpired term should be chosen, and no one has been nominated to said office (as in this case), there is a vacancy in the nominations within the meaning of the election law, and such a vacancy may be supplied, at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law.

In the case at hand the resignation of George Foley occurred prior to the actual holding of the primary election but following the last day permitted for filing. This resulted in the creation of a vacancy in party nomination after the holding of a primary, and we are, therefore, of the opinion that NRS 294.300 applies and the respective County Central Committees should nominate.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey

Deputy Attorney General

OPINION NO. 60-180 HEALTH, STATE DEPARTMENT OF— Foodstuffs manufactured or packaged in Nevada must bear the name (not license number) of the manufacturer or packer. NRS 585.350, 5(a) construed. If processed and packaged in Utah for shipment to and consumption in Nevada, the same rule applies, for the effect upon interstate commerce would be only indirect.

Carson City, October 3, 1960

Mr. W. W. White, Director, Division of Public Health Engineering, State Department of Health, 755 Ryland Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. White:

The Lucerne plant of Salt Lake City has undertaken the processing of milk for Cream o'Weber and Hi-Land Dairies in cartons containing the name and all of the advertising of Cream o'Weber and Hi-Land Dairy Companies. The Division of Public Health Engineering of the Nevada State Department of Health has informed the interested companies that the cartons shall also contain the following printed material, "Processed and Bottled, Lucerne, Salt Lake City," insofar as the cartons for export to Nevada for consumption in Nevada are concerned. The Cream o'Weber and Hi-Land Companies desire, in addition to their individual advertising, the following printed material on the carton: "Processed and Bottled, Salt Lake City, Plant No. 10." The Lucerne plant is licensed under the laws of Utah as Plant Number 10. The difference in views of proper content of the material to be printed on the carton is one of occupation and trade name competition, for Lucerne is a competitor of the two dairy companies designated.

QUESTION

Would the imprinting upon the carton for milk to be exported to Nevada for consumption in Nevada, in the form urged by the Cream o'Weber and Hi-Land Companies, satisfy the requirements of the Nevada law?

CONCLUSION

We have concluded that the question must be answered in the negative.

ANALYSIS

Under Chapter 585 of the Nevada Revised Statutes, entitled, "Food, Drugs and Cosmetics: Adulteration; Labels; Brands," Section NRS 585.350, in part provides:

585.350 A food shall be deemed to be misbranded:

> 5. If in package form, unless it bears a label containing: (a) The name and place of business of the manufacturer, packer or distributor.

In harmony with this statute, under its rule-making power, your department has promulgated a rule, together with other rules on July 12, 1960, which in part provides the following:

> Section 4. Labeling. All bottles, cans, packages, and other containers enclosing milk or any milk product defined in these regulations shall be plainly labeled or marked with * * * (5) the name of the producer of raw milk for pasteurization or processing, and the name of the plant and location at which the contents were pasteurized; * * *.

Under NRS 585.350, subsection 5, (a) if a carton of milk is in "package" form, and it appears to us that it clearly is in such form, the carton will be misbranded unless it bears a label containing "the name and place of business of the manufacturer, packer, or distributor."

By liberal construction of the statute, under the police powers of the State, in the interest of the health and welfare of the people, we believe that a plant which pasteurizes and packages milk is a "manufacturer or packer" within the provisions of the statute. This leads to the conclusion that the name of "Lucerne" as distinguished from the number assigned to this plant must be used in those milk products prepared for shipment and consumption in Nevada.

To this point we have disregarded the question of interstate commerce and have dealt with the statute as if all of the three interested companies were domiciled in Nevada.

Indirect effects upon interstate commerce, when imposed by the states, are not under the commerce clause of the United States Constitution rendered unconstitutional. This imposition is no more than that imposed upon persons similarly situated in Nevada. In *Schecter v. United States*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947, the Court said:

> * * * where the effect of interstate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.
>
> If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control.

See also Highland Farms Dairy v. Agnew, (1936 D.C.) 16 F.Supp. 575, and Attorney General Opinion No. 241 of February 12, 1957.

It follows, we think, without stating that as to milk products placed in cartons in Salt Lake City, Utah, not to be exported to Nevada for consumption here, that the Nevada State Department of Health has no control or jurisdiction.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-181 WATER AND WATER COURSES; STATE ENGINEER'S ORDER DECLARING ARTESIAN BASIN— State Engineer can administer artesian basin notwithstanding appeal of Order to District Court where no stay bond has been filed by appealing party.

Carson City, October 11, 1960

Honorable Hugh A. Shamberger, Director, Department of Conservation and Natural Resources, State Office Building, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Shamberger:

On June 27, 1960, the State Engineer declared a portion of Smith Valley, Nevada, as an artesian basin, pursuant to NRS 534.030, subsection 2. Thereafter, within the statutory period, a group of landowners in the declared basin filed an appeal with the District Court asking for a judicial review of the State Engineer's Order. Thereafter, a different group of landowners in the declared basin, being in favor of the Order of the State Engineer, petitioned the Court for leave to intervene in the judicial review proceedings and asked the State Engineer to proceed to regulate the basin in accordance with his Order and pending the judicial review. The State Engineer has taken the position that during the judicial review litigation that he would be exceeding his authority if he proceeded to regulate the basin. The petitioners in intervention, the group of landowners who favor the Order of the State Engineer, take the position that the State Engineer is duty bound to so regulate the basin in accordance with the Order.

QUESTION

Can the State Engineer proceed with the regulation of an artesian basin according to his Order designating said basin where an appeal from such Order has been filed with the appropriate District Court and where no stay bond has been filed by appellants or must he obtain a Court order for that purpose.

ANALYSIS

NRS 534.030 provides:

534.030 Supervision of ground water basins by state engineer; petition of well owners; review of orders; extent of supervision; advisory services of governing bodies of water districts, water conservation boards.

1. Upon receipt by the state engineer of a petition requesting him to administer the provisions of NRS 534.010 to 534.190, inclusive, as relating to designated areas, signed by not less than 15 percent of the owners of wells, in any particular basin or portion therein, having a legal right to appropriate underground water therefrom, he shall:

(a) Cause to be made the necessary investigations to determine if such administration would be justified.

(b) If his findings are affirmative, designate such area by basin, or portion therein, and shall make an official order describing the boundaries by legal subdivision as nearly as possible.

(c) Proceed with the administration of NRS 534.010 to 534.190, inclusive, as provided for herein.

2. In the absence of such a petition from the owners of wells in a ground water basin which the state engineer has found, after due investigation, to be in need of administration as relating to designated areas, the state engineer may upon his own motion enter an order in the same manner as if a petition, as described in subsection 1, had been received.

3. Such order of the state engineer may be reviewed by the district court of the county pursuant to NRS 533.450.

There follows subdivisions 4 and 5 but they are not pertinent to the discussion here.

The Order designating a portion of Smith Valley as an artesian basin was made by the State Engineer upon his own motion pursuant to NRS 534.030, subsection 2 as quoted above.

As noted in subsection 3 quoted above, the Order of the State Engineer may be reviewed by the District Court, pursuant to NRS 533.450. In NRS 533.450, subsection 1, it is stated in part, "Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3." Taken alone it would seem that the moment an appeal from the Order of the State Engineer is taken, such appeal would operate as a stay. However, NRS 533.450, subsection 5 states: "No bond shall be required except when a stay is desired, and the proceedings herein provided for shall not be a stay unless, within 5 days following the service of notice thereof, a bond shall be filed in an amount to be fixed by the court, with sureties satisfactory to such court, conditioned to perform the judgment rendered in such proceedings."

We think that subsection 5 quoted above is controlling and where no stay bond has been filed the State Engineer can administer a basin pursuant to his Order even though an appeal to the District Court is pending. It should be noted that the judicial review proceedings above referred to pertain to adjudication and appropriation proceedings. The underground water law came later and had no specific or special provisions for appeal or judicial review other than referring to NRS

533.450. Whether the judicial review proceedings as pertaining to underground waters are adequate or appropriate is a matter for the Legislature.

NRS 534.120 provides:

> 1. Within an area that has been designated by the state engineer, as provided for in NRS 534.010 to 534.190, inclusive, where, in his judgment, the ground water basin is being depleted, the state engineer in his administrative capacity is herewith empowered to make such rules, regulations and orders as are deemed essential for the welfare of the area involved.
>
> 2. In the interest of public welfare, the state engineer is authorized and directed to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted, and in acting on application to appropriate ground water he *may* designate such preferred uses in different categories with respect to the particular areas involved within the following limits: Domestic, municipal, quasi-municipal, industrial, irrigation, mining and stock-watering uses. (Emphasis supplied.)

The above two sections of NRS 534.120 are quoted only to point out the latitude and discretion lodged in the State Engineer in the performance of his administrative duties.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: William Paul
Special Deputy Attorney General for
Department of Conservation

OPINION NO. 60-182 PRIVATE DETECTIVES—A nonresident private detective or firm, even if licensed in another state, and there represent the public generally, may be employed by one Nevada employer, without the requirement of Nevada licensing. NRS 648.190 construed.

Carson City, October 14, 1960

Mr. Robert F. Stenovich, Superintendent, Nevada Highway Patrol, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Stenovich:

Recently a private detective, not licensed in Nevada, was employed by the Clark County Grand Jury, and by the office of District Attorney of Washoe County. Presumably in both cases the individuals are duly licensed in another state, and presumably these individuals have not accepted private detective employment in Nevada, except with the one employer as aforesaid.

QUESTION

Are such employments authorized by law?

CONCLUSION

We are of the opinion that the employment by the County Grand Jury is clearly authorized.

Unless the private investigator or firm is employed by the District Attorney, for and in aid of the Grand Jury of his county, under the provisions of NRS 172.320, subsection 4, we are of the opinion that such employment by a District Attorney is not authorized.

ANALYSIS

We are principally concerned with the question of whether or not a private detective (or firm) employed by a single employer in Nevada, must be licensed in Nevada, under the provisions of NRS chapter 648. Before exploring this question however, we observe that there is no question but that the Grand Jury of a county is authorized, with the consent of the Board of County Commissioners, to obtain the professional assistance of a private detective (or firm) in the performance of its inquisitorial powers and duties. This authority is contained in NRS 172.320, subsection 4, which provides the following:

> 4. The grand jury shall have the power, with the consent of the board of county commissioners, to engage the services of an attorney other than and in addition to the district attorney, certified public accountants, and such other skilled persons as may be necessary in the performance of its inquisitorial powers.

However, in our search we have not found a comparable section authorizing a District Attorney, as such, to employ a private investigator.

NRS 648.010, subsection 4, provides:

> "Private detective" means and includes any of the following:
>
> (a) Any person who engages in business or who accepts employment for hire, reward or fee to furnish or supply information as to the personal character or actions or identity of any person, or as to the character or kind of business or occupation of any person.

NRS 648.060 provides:

648.060 No person, unless he is licensed under this chapter, shall:

1. Engage in the business of private detective for hire or reward; or

2. Advertise his business to be that of private detective irrespective of the name or title actually used.

NRS 648.190, in part, provides:

648.190 This chapter shall not apply: * * *

5. To any person employed as special agent, detective or private investigator for one employer exclusively in connection with the affairs of that employer.

We are of the opinion that the fact that these persons are domiciled and licensed in another state as private detectives, and there offer their services to the public generally, is of no consequence in the determination of this problem, and that so long as their employment in Nevada is for one employer only and is upon an assignment "exclusively in connection with the affairs of that employer," such private detective falls within the quoted exception and is not required to be licensed in this State. Of course, if either private detective should advertise for or accept an appointment for private detective service, in this State, in addition to the one permitted contract, he would be required to be licensed by the Board, under the provisions quoted.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-183 TAXES; EMINENT DOMAIN; NRS 37.160; NRS 37.100—Where a tax-exempt public agency condemns real property, the tax liability of the owner ends on the effective date of the order permitting immediate occupancy if such is obtained, and not upon entry of the Final Order of Condemnation. Real property taxes which become a lien prior to condemnation are to be deducted from the condemnation award.

Carson City, October 17, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada

Attention: Mr. Eric L. Richards, Assistant District Attorney

STATEMENT OF FACTS

Dear Mr. Raggio:

On the 27th day of December, 1957, the State of Nevada, on relation of its Department of Highways, instituted proceedings to condemn for highway purposes a parcel of real property situate in Washoe County, owned by Ruth Garfinkle Olsen. Pursuant to the provisions of NRS 37.100 the State obtained an "Order for Immediate Possession," effective June 19, 1958. A Final Order of Condemnation was entered on August 3, 1960. Mrs. Olsen was assessed and paid real property taxes on the condemned parcel for the fiscal year commencing July 1, 1958 and ending June 30, 1959. She now seeks a refund of the amount paid.

QUESTION

Is a condemnee liable for payment of property taxes which accrued prior to the Final Order of Condemnation but following the entry of an order authorizing immediate occupancy of the parcel sought by the State?

CONCLUSION

No.

ANALYSIS

The problem of ascertaining at what stage in eminent domain proceedings rights in respect of real estate taxes are to be determined is discussed at 45 A.L.R.2d 536, et seq. The annotator there points out that the courts have reached varying solutions, depending upon the applicable statutes. NRS 37.160 provides:

> When payments have been made * * *, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the title to the property described therein shall vest in the plaintiff for the purpose therein specified.

Under the provisions of NRS 37.100, the plaintiff in an eminent domain proceeding "any time after the commencement of suit" may, upon a proper showing, obtain an order permitting occupancy of the premises sought and authorizing work to be done thereon. In cases where the condemnor has entered the property of the defendant pursuant to such an order, the transfer of title contemplated by NRS 37.160, supra, amounts to little more than a legal formality. The defendant property owner has been deprived of all the beneficial use and enjoyment of his land and he should not be required to pay taxes upon it.

Section 1253 of the California Code of Civil Procedure is, in substance, identical to NRS 37.160. Notwithstanding this provision, it was held in *City of Long Beach v. Aistrup*, 164 Cal.App.2d 41, 330 P.2d 282, that where a tax exempt condemnor obtains an order for possession of property prior to judgment and actually takes possession of the property, evicting the owners therefrom, the owners are not thereafter obligated to pay real property taxes.

It is clear that in California the date marking the termination of the landowner's tax liability is the date upon which the condemning authority actually takes possession of the property and makes substantial changes upon it. It has been held that such acts constitute a "taking" within the meaning of the California eminent domain provisions. *See People v. Joerger*, 12 Cal.App.2d 655, 55 P.2d 1269. However, we are of the opinion that where a tax exempt public agency condemns real property, the tax liability of the owner should end on the effective date of the order for immediate entry if such is obtained, even though the mere issuance of such an order does not constitute a "taking." *See People v. Watkins*, ____ Cal.App.____, 345 P.2d 960. Convenience commends this view. The County Assessor is not equipped to make inquiries as to the time when the condemnor has actually entered upon the defendant's property; but it is a simple matter to file a court order in the office of the County Recorder. As a practical matter, the effective date of the order and the date of physical entry should not vary to any great extent. Subparagraph 2, NRS 37.100 requires the court to take proof "of the reasons for requiring a speedy occupation" and presumably, the plaintiff would not be granted the order allowing occupancy unless he displayed an immediate need.

While Mrs. Olsen has not requested a refund of any taxes paid by her on the condemned parcel for the fiscal year 1957-1958, it is clear that such claim could not be allowed. By virtue of the provisions of NRS 361.450, a lien attaches on all property assessed on the first Monday in September "prior to the date on which the taxes are levied." Taxes for the fiscal year 1957-1958, therefore, became a lien on Mrs. Olsen's property in September of 1957, two months prior to the commencement of the action. It is the general rule that taxes which become a lien prior to condemnation are to be deducted from the condemnation award. 45 A.L.R.2d 529, *City of Long Beach v. Aistrup*, supra.

In view of the above, Mrs. Olsen's claim for refund of taxes paid on real property for the fiscal year 1958-1959 should be allowed, since immediate entry upon the parcel sought by the State of Nevada was authorized prior to the accrual of the property taxes.

Your attention is invited to NRS 354.220, et seq., authorizing refunds of moneys paid into the County Treasury where just cause exists, upon resolution of the Board of County Commissioners.

The views expressed herein are in accord with the conclusions stated in Attorney General Opinion No. 300, dated August 23, 1957.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-184 COUNTY COMMISSIONERS—County Commissioners have no authority to enact an ordinance establishing a standard of time for Clark County.

Carson City, October 24, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

Dear Mr. Cherry:

Your letter of October 7, 1960 requests the opinion of this office on the following question:

QUESTION

Is the Board of County Commissioners of Clark County, Nevada empowered to govern the standard of time applicable to Clark County?

CONCLUSION

No.

ANALYSIS

In 1918 the Federal Government established five "standard" time zones in the United States. The zones are designated Eastern, Central, Mountain, Pacific and Alaska. The Interstate Commerce Commission is authorized to define the limits of each zone. 15 U.S.C.A. Secs. 261 et seq. The statute provides that the time zones created shall govern all common carriers engaged in interstate commerce, all statutes, orders, rules and regulations relating to the time of performance of any act by an officer of the United States, or relating to the time within which rights shall accrue to persons under federal laws. The federal legislation, however, is not exclusive of state action on the same subject matter. *State v. Benton*, 10 Fed.2d 515, *aff'd*.47 S.Ct. 189, 272 U.S. 525, 71 L.Ed. 387.

The only Nevada legislation pertinent to the instant matter is NRS 237.010 which reads as follows:

> 1. The governor of the State of Nevada may establish daylight saving time for the State of Nevada. Such time shall be established by proclamation, and, if proclaimed, shall be the official time for the State of Nevada.
> 2. Daylight saving time, if proclaimed, shall be 1 hour in advance of the standard time applicable to any portion of the state.

It was held in *Smith v. City of Pittsburgh, et al.*, 30 Penn. Dist. Reps. 454, that the Council of the City of Pittsburgh had no power to enact a city ordinance establishing daylight saving time in view of the existence of a state statute approving Eastern Standard Time. The cited Nevada provision does not expressly declare "Standard Time" as defined in Title 15, U.S.C.A., to be the official time of the State of Nevada. However, it is arguable that NRS 237.010 is at least a legislative recognition of the federally declared standard time zones, since such was the "standard time applicable" to most of Nevada at the time of the enactment of the statute. The phrase "standard time" has been held to mean the standard time provided for in Section 261, 15 U.S.C.A., *McFarlane v. Whitney*, 134 Texas 394, 134 S.W.2d 1047.

Regardless of whether or not NRS 237.010 impliedly makes the federally declared "Standard Time" the official time for the State of Nevada, we are of the opinion that the County Commissioners have no authority to enact an ordinance establishing a standard of time for Clark County. It was stated in *King v. Lothrop*, 55 Nev. 405, 36 P.2d 355, that "It is well settled that county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." (Citing *Sadler v. Board of Commissioners of Eureka County*, 15 Nev. 539.) We find no statute expressly or incidentally authorizing County Commissioners to enact an ordinance regulating time.

It occurs to us in passing that perhaps the Legislature ought to consider the enactment of legislation clearly defining what is "standard time" in the State of Nevada and who is authorized to declare it or Nevadans may some day be faced with the confusion extant in Kentucky, where a Commissioner of the Court of Appeals of that state in a recent decision prefaced the Court's holding by the following remarks:

> We are again faced with the tribulations of time. This suit is an attack on the validity of our 1952 statute undertaking to regulate its official measurement in Kentucky.
>
> It was anciently observed, "Our time is a very shadow that passeth away". In Kentucky this is only a half truth. Our time is a fleeting shadow, but unfortunately, as a chronic problem in calculation, it will not pass away.
>
> It cannot be said with certainty what time it is in Kentucky. Watches show one hour and the courthouse clock another. It is five o'clock in Frankfort, but it is four o'clock in Louisville. This is rather convincing evidence that the hour was not a divine creation, but is wholly man made and arbitrary. What time it is, is what a person thinks it is, and practically nobody in Kentucky today is quite sure. *Hamilton v. City of Louisville (Ky.)*, (1960), 332 S.W.2d 539.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsay
Deputy Attorney General

OPINION NO. 60-185 EDUCATION, STATE DEPARTMENT OF; USE OF PUBLIC SCHOOL FUNDS FOR EDUCATIONAL PROGRAMS IN COUNTY JUVENILE DETENTION FACILITIES—Relevant statutes reviewed and found not to authorize apportionment and use of state distributive school funds for establishment and support of instructional programs restricted to benefit inmates of Detention and Rehabilitation Facilities recently established in Washoe and Clark Counties. NRS 388.440-388.540, pertaining to education of physically and mentally handicapped, and NRS 388.050, relating to establishment of "school attendance areas"

held inapplicable to authorize such educational program. Pending legislative authorization therefor, such educational programs would have to be assumed and paid for with county funds, if available therefor.

Carson City, October 26, 1960

Mr. Byron F. Stetler, Superintendent of Public Instruction. Department of Education, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Stetler:

It is indicated that the Washoe County School District has requested approval of the State Department of Education for the instruction of children who are detained at Wittenberg Hall (the newly established Washoe County Children's Detention Home) by School District teachers employed for the teaching of physically or mentally handicapped children who are unable to attend school.

It is also indicated that Clark County School District has requested approval for the establishment of a new "school attendance area" which shall include the Spring Mountain Youth Camp, the recently instituted Clark County Youth Detention and Rehabilitation Center, designed and intended to accommodate juveniles adjudged and held subject to the jurisdiction, custody and control of the District Court. Such new "school attendance area" (indicated as admittedly for the exclusive benefit of juveniles in said Youth Center), if authorized and approved by the State Department of Education, would permit the employment of a teacher or teachers to give academic instruction at the Youth Camp, with Clark County School District, rather than Clark County, assuming and paying the costs involved from apportioned distributive school funds.

QUESTIONS

I. In respect to apportionment and use of state distributive school funds therefor (NRS 387.125), would an instructional program for children, detained in a County Detention Facility, be authorized under statutory provisions (NRS 388.440-388.540) pertaining to the education of "physically or mentally handicapped minors"?

II. A. Would the instructional program contemplated for the Clark County Spring Mountain Youth Camp (as outlined in the letter of Honorable David Zenoff, District Court Judge, Clark County, Nevada, dated September 13, 1960) come within the purview and scope of "public school," as statutorily defined (NRS 388.010, 388.020), and the use of "public school" moneys, as regulated and governed by NRS 387.040-387.045?

B. If our answer to Question IIA is in the affirmative, would use of apportioned state distributive school funds be legally authorized for support and maintenance of a school in Clark County's Spring Mountain Youth Camp, a Juvenile Detention and Rehabilitation Facility?

CONCLUSIONS

Question No. I: No.
Question No. II, A: No.
Question No. II, B: No.

ANALYSIS

NRS 388.440, entitled "Physically or mentally handicapped minor" defined, provides as follows:

> As used in NRS 388.440 to 388.540, inclusive, "physically or mentally handicapped minor" means a physically or mentally defective or handicapped person under the age of 21 years who is in need of education. Any minor who, by reason of physical or mental impairment, cannot receive the full benefit of ordinary education facilities shall be considered a physically or mentally handicapped person for the purposes of NRS 388.440 to 388.540, inclusive. Minors with vision, hearing, speech, orthopedic, mental and neurological disorders or defects, or with rheumatic or congenital heart disease, or any disabling condition caused by accident, injury or disease, shall be considered as being physically or mentally handicapped.

The above statutory definition of "physically or mentally handicapped minor" must be deemed to exclude any but a *medical* handicap condition, insofar as special educational provisions are concerned, if they are to be paid out of State distributive school funds. Certainly, said definition does not contemplate that a child physically prevented from attending school because confined in a Youth Detention Facility, is necessarily "physically or mentally" handicapped, in the *medical* sense legally provided.

We would certainly agree that an adequate instructional program for such unfortunate children or youths as may be adjudged to require detention for social rehabilitative purposes is a most laudable objective. We are, however, concerned herein only with the legal question as to whether, under existing law, authority exists for use of public school funds for the indicated desired instructional programs.

In our considered opinion, sections NRS 388.440 through 388.540 do not provide any legal basis or authority for instructional programs to inmates, judicially committed to, and detained in, County Detention Facilities. Existing statutes which authorize special provision of education to the "physically and mentally handicapped" cannot be construed to include special educational provisions for children or youths, *not mentally handicapped.*

We have carefully examined other relevant Nevada statutes for such authority without success. In the case of the Nevada School Of Industry (the State Youth Detention Facility), express statutory authority is given to organize an instruction department, establish programs of study, or arrange for the attendance of inmates of the School at the Elko County High School (NRS 210.090). And NRS 210.100 directs that the Superintendent of the School of Industry make due arrangements for carrying out the statutory requirements relative to education of the inmates therein.

In the case of dependent children committed to the Nevada State Children's Home in Carson City, Nevada, NRS 423.220 expressly authorizes the attendance of such children in the public schools of the

Ormsby County School District on the same basis as is afforded any other resident children of said school district.

However, respecting County Detention Facilities (such as those established by both Washoe and Clark Counties), we find no statutory provision which clearly and explicitly applies. This is not surprising, since these facilities have only recently been established as an answer to the juvenile problem existing in these two most populous counties in the State. It must also be noted that school district boards are restricted to exercise of express powers conferred upon them or reasonably intended by the Legislature and no others.

Obviously, because attendance would admittedly be restricted to the inmates of such Detention Facilities only, the proposed and desired educational programs for such facilities cannot reasonably be said to be embraced in *public* schools, as statutorily defined. However, it has been suggested that the problem of providing education to the inmates of both such County Detention Facilities might be resolved by establishment of "school attendance areas" which would respectively include each of them in both Washoe and Clark Counties. In view of such suggestion, it is necessary, therefore, carefully to examine the provisions of NRS 388.050, entitled "School attendance areas: Creation; abolishment; 'resident child' defined," which, as here relevant, provides:

> 1. The board of trustees of a school district, with the approval of the superintendent of public instruction, may create a new school attendance area in the school district and define its boundaries when:
>
> (a) A school attendance area is not in existence.
>
> (b) Transportation to an existing school is not feasible or practical.
>
> 2. Whenever the attendance of any school child or school children is the determining factor in the creation of a school attendance area, such child must be a "resident child", or such children must be "resident children" within the meaning of subsection 3 *before any such school district shall be entitled to receive any apportionment of public school money.*
>
> 3. As used in this Title of NRS, the terms "resident child" and "resident children" mean all normal children between the ages of 6 and 17 years *who have actually resided in the proposed school attendance area within the school district with a parent or parents, or a guardian or guardians, for a period of at least 3 months, but do not include:*
>
> (a) Children residing in the proposed school attendance area within the school district who have already completed the grades proposed to be taught in the school.
>
> (b) *Children whose parents or guardians reside or have their home outside the state or in any other school district within the state.* (Emphasis supplied.), *See* Attorney General Opinion No. 177, June 24, 1935; Attorney General Opinion No. 270, December 3, 1938.

The italicized portions of the foregoing statutory provisions, it is submitted, impose restriction or limitations upon the establishment of new "school attendance areas" by use of public school moneys, which would

not be satisfied in the circumstances obtaining in the County Detention Facilities established by Washoe and Clark Counties. The inmate group in both such facilities would be a fluctuating one, in many cases lacking the required 3 months' residence therein. Also, the parents or guardians of the inmates would, at least in most instances, be resident outside the proposed "school attendance area." In short, these particular statutory provisions were never legislatively intended to include or resolve the particular educational problem here involved.

Admittedly, a satisfactory solution must be provided, in view of the importance of education in the rehabilitation of children and juveniles judicially committed to such County Detention Facilities. In the present state of the law, apportioned public school moneys are, however, not authorized therefor.

Pending possible legislative action providing such specific power and authorization, we are compelled to the conclusion that any expense or cost of educational programs, as outlined for the above-mentioned Washoe County and Clark County Detention Centers or Facilities, must be borne by each said county respectively, and be paid out of *county* funds.

We trust that the foregoing sufficiently answers your inquiries, and proves helpful in effecting a satisfactory and definitive solution to the problems herein reviewed.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-186 TAXATION; LEASEHOLD; LEASEHOLD IMPROVEMENTS—Where lease provides that possessory interest in real property and improvements made by lessee, to be removed upon termination of lease, are to be assessed and taxed to lessee, Assessor must assess possessory interest and improvements to lessee and not to lessor during term of lease.

Carson City, October 28, 1960

Honorable Jack C. Cherry, District Attorney, Clark County, Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Cherry:

The Union Pacific Railroad Company, as owner of lands within Clark County, from time to time has leased certain of its lands to individuals and other entities. The form of lease executed by the lessor and lessees, inter alia, provides:

It is agreed that *no* improvements placed upon the leased premises by the Lessee shall become a part of the realty, and the Lessee further agrees to pay before the same shall become delinquent all taxes levied or assessed during the life of this lease upon the leased premises and upon any buildings and improvements thereon, or to reimburse the Lessor for sums paid by the Lessor for such taxes, except taxes levied upon the leased premises as a component part of the railroad property of the Lessor in the state as a whole. (Section 2)

The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises upon the termination of this lease howsoever. Within thirty days after such termination the Lessee shall (a) remove from the premises, at the expense of the Lessee, all structures and other property not belonging to the Lessor; and (b) restore the surface of the ground to as good condition as the same was in before such structures were erected, including, without limiting the generality of the foregoing, the removal of foundations of such structures, the filling of all excavations and pits and the removal of all debris and rubbish, all at the Lessee's expense, failing in which the Lessor may perform the work and the Lessee shall reimburse the Lessor for the cost thereof within thirty days after bill rendered.

In the case of the Lessee's failure to remove said structures and other property the same shall, upon the expiration of said thirty days after the termination of this lease, become and thereafter remain the property of the Lessor; and if within ninety days after the expiration of such thirty-day period the Lessor elects to and does remove, or cause to be removed, said structures and other property from the leased premises and the market value thereof on removal or of the material therefrom does not equal the cost of such removal plus the cost of restoring the surface of the ground as aforesaid, then the Lessee shall reimburse the Lessor for the deficit within thirty days after bill rendered. (Section 17)

The Assessor had heretofore assessed the leased land and improvements to the lessor railroad, which assessment was premised upon the interpretation of NRS 361.035 defining "real estate" and NRS 361.030 defining "personal property." The interpretation of such sections being that the improvements in the nature of fixtures placed upon the leased land by the lessees did not constitute personal property, but constituted real property and by reason thereof were subject to assessment to the lessor as *owner* of the land and became a lien against such land until such taxes shall have been paid.

QUESTIONS

1. Does Nevada law mandatorily require the assessment of improvements under a leasehold interest to be made against the owner of the land irrespective of the ownership of the improvements thereon?

2. Should such improvements be assessed against the owner of the improvements where the lease provides for the dismantling and removal of such improvements by the lessee?

CONCLUSIONS

1. That the law does not mandatorily, or at all, require the assessment of improvements under a leasehold interest, as set forth hereinbefore, to be made to the lessor owner of the land.
2. That the said assessment should be made to the lessee tenant.

ANALYSIS

Statutes imposing taxes are subject to strict interpretation. 51 Am.Jur. 616, Sec. 650.

> It is well settled and familiar law that statutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not be extended beyond the clear import of the language used. (*Portland Terminal Co. v. Hinds*, 154 A.L.R. at p. 1306.)

The lessor and lessee herein mutually agreed that no improvements placed upon the leased land by the lessee shall become a part of the realty, and also that upon the expiration of the term of the lease the lessee shall remove from the premises, at the expense of the lessee, all structures and other property not belonging to the lessor. Thus the lessor expressly disclaims any right of ownership and control of the lessee's improvements, save and except, in the event of the failure of the lessee to remove its property at the end of the term as provided in section 17 of the lease agreement.

At common law, a building or other structure erected by one person on the land of another is, as a general proposition, considered as a part of the realty, nevertheless, where the intention of the parties is shown, it may be owned by and taxed to a person other than the owner of the land. (22 Am.Jur. 778, Secs. 63, 64. Anno. 154 A.L.R. 1309 et seq. *See also* 51 Am.Jur. 451, Sec. 435 as amended at p. 26, pocket part, Cumulative Supplement, 1960.)

A leading case in point with the instant question is *Portland Terminal Company v. Hinds*, hereinabove cited.

Briefly, the facts were that the land was owned by the Terminal Company, a railroad corporation, but leased by the owners of buildings erected upon said land. In 1942 taxes upon some 41 buildings were assessed to the Terminal Company. The company paid the taxes to assessed and filed with the assessors application for abatement thereof upon the ground that it was not the owner of the buildings. The assessors denied the applications. The company sought judicial relief.

The Court analyzed the facts, the statutory law of Maine, and many cases of other states and thereupon held as follows:

> 1. Where the interest of a lessee in a building erected by him on leased land is not merely a contractual right operative only between himself and the landowner, but has the status

> of a separate and distinct estate, a building which he has a right to remove upon the termination of the lease, or which is not to become the property of the lessor until the termination of the lease, is taxable during the term of the lease to the lessee rather than the lessor under a taxing statute which provides that buildings on leased land or on land not owned by the owner of the buildings shall, when situated in any city, town, or plantation, be considered real estate for purposes of taxation, but when located in unorganized territory shall be taxed as personal property.

In the course of the opinion the Court said:

> The exact issue presented has not been previously before this court. The question has been passed upon, however, in other jurisdictions and although the tax statutes of the different states are not the same, we believe that the principle upon which the decisions have been based is applicable to the case before us.
>
> Opposite results have been reached in the adjudicated cases, but the courts of those jurisdictions have been, for the most part, in agreement that the conclusion reached depends upon the view taken as to the nature of the interests of the building owner. In those jurisdictions where the interest of the building owner is considered a mere contractual right operative only between the parties thereto, it has been generally held that the building is taxable to the lessor as the owner of the entire property while in those jurisdictions where the interest of the building owner attains to the status of a separable and distinct estate, the building is taxable to the building owner. This reasoning would seem to be a logical application of the rule that property is taxable to its owner.

Adverting to the Nevada statutes governing the taxation of property, it may well be that NRS 361.035 defines the improvement property of the lessee herein as "real estate". But this, we think, is a classification for property tax valuation purposes and not necessarily fixing and determining that such property is to be at all times and under all circumstances assessable to the owner of the land upon which such property is located.

NRS 361.035(b) and (c) also defines possessory rights to land as real estate, but the language thereof does not import actual ownership of the land in all cases. Such definition also relates to the use of any land by a lessee, tenant or any other person to whom the right of use is granted by the owner. The power to tax possessory rights even to land of the United States was long ago sanctioned by the Court in *State v. Central Pacific R.R. Co.*, 21 Nev. 241; *Forbes v. Gracy*, 94 U.S. 762; Opinion No. 366, Attorney General Report 1946-1948. This latter right is now limited to possessory rights on federal lands upon which the government is not paying sums of money in lieu of taxes to the State. NRS 361.035(4).

The Nevada Supreme Court, in the case of *Nellis Housing Corporation v. State of Nevada*, No. 4120 dated May 22, 1959, 75 Nev. 267, dealt with a tax on possessory interests and leasehold improvements on land owned by the United States, but leased to a private corporation. The Court stated,

"It is conceded that the interests of the lessees are subject to taxation." Here both the lessees' possessory interest in the federal land and the improvements placed on the same were assessed and taxed.

Notwithstanding "possessory rights" to land are defined as "real estate", nevertheless such rights also constitute property belonging to a lessee tenant, which the assessor in the performance of his duty to ascertain all real and personal property, and the owner thereof subject to taxation, should evaluate and assess to the owner thereof. (NRS 361.260, 361.265) In this connection it is to be noted that the Court in the *Portland Terminal Co. v. Hinds* case applied the rule of taxation of the property in question there to the lessee owner on the principle that it applied to both real and personal property of the lessee.

The lessor owner of the land in question here has expressly contracted with the lessee that no improvement placed on the leased land by the lessee shall become a part of the land. Thus the lease in this respect places such improvements, defined in the statute as "real estate," squarely within NRS 361.035(3) reading:

> 3. When an agreement has been entered into, whether in writing or not, or when there is sufficient reason to believe that an agreement has been entered into, for the dismantling, moving or carrying away or wrecking of the property described in subsection 1, or where such property shall undergo any change whereby it shall be depreciated in value or entirely lost to the county, such property shall be classified as personal property, and not real estate.

We think it is clear that by reason of the terms of the lease agreement herein there are two classes of property owned by the lessee that, under the law, are assessable to him, i.e., possessory right to the use of the land classified as real estate and improvements placed upon the land classified as personal property.

It is the statutory duty of the Assessor to require any person, firm, etc., within the county owned by such person, etc. (NRS 361.265) The assessment of the tax is required to be made to the owner of the listed property. (NRS 361.260)

Every tax levied under the provisions of the law shall be a perpetual lien against the property assessed. (NRS 361.450) Also the Assessor, assessing property of any person etc., who does not own real estate within the county of sufficient value in the Assessor's judgment to pay the taxes on both real or personal property so assessed, shall proceed immediately to collect the taxes on the personal property. (NRS 361.505) Following the procedure set forth in NRS 361.535, 361.540, 361.560.

Entertaining the views hereinabove expressed, it is our considered opinion:

1. That the law does not mandatorily, or at all, require the assessment of improvements under a leasehold interest, as set forth hereinbefore, to be made to the lessor owner of the land.
2. That the said assessment should be made to the lessee tenant.

The Court in the *Portland Terminal Co. v. Hinds* case ended its opinion by saying:

> If there are difficulties to enforcing taxation of a building upon leased land as real estate, as suggested by counsel for

the appellees, resort must be had for correction by legislative action.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: W. T. Mathews
Special Deputy Attorney General

OPINION NO. 60-187 PUBLIC ACCOUNTANTS—One's "principal occupation" is that occupation to which he devotes his principal attention, in time, and effort in gaining livelihood. Chapter 131, 1960 Statutes, construed.

Carson City, November 2, 1960

Mr. J. W. McMullen, C.P.A., Secretary-Treasurer, State Board of Accountancy, P.O. Box 30, 320 South Virginia Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. McMullen:

The Legislature of 1960 enacted Chapter 131, in which it created the Nevada State Board of Public Accountants, provided for the licensing, registration and regulation of Certified Public Accountants, and Public Accountants, and partnerships thereof and provided for the suspension, and revocation of certificates, licenses, etc. The statute is a complete regulatory statute within itself, and repeals NRS 682.010 to 682.080, but protected rights, proceedings, acquired or instituted thereunder prior to April 1, 1960, which was provided as the effective date of the said Chapter 131.

Section 36 of the Act, in part, provides:

> Sec. 36. 1. Any person who:
> (a) Is a resident of this state, or has a place of business therein; and
> (b) Has attained the age of 21 years; and
> (c) Is of good moral character; and
> (d) Meets the requirements of subparagraphs (1) or (2) of this paragraph (d), may register with the board as a public accountant on or before September 1, 1960:
> (1) Persons who held themselves out to the public as public accountants and who were engaged as principals (as distinguished from employees) within this state on April 1, 1960, in the practice of public accounting as their *principal occupation.* (Emphasis supplied)

This section also in subsection 3 thereof provides:

> 3. The board shall in each case determine whether the applicant is eligible for registration. Any individual who is so registered and who holds a permit issued under section 39 shall be styled and known as a public accountant.

Pursuant to the statute quoted, some 190 persons have made application to the Board for registration and the issuance of a permit to designate each of such persons as a "Public Accountant." Such applications were filed prior to September 1, 1960. The Board will conduct its next meeting on November 11, 1960, and desires in the meantime to be advised as to the manner of construing and interpreting the language "principal occupation," for the purposes of granting or denying individual applications.

QUESTION

What tests are valid, under the statute, to be applied by the Nevada State Board of Public Accountants, in the granting or denying of individual registration of applicants as Public Accountants?

CONCLUSIONS AND ANALYSIS

We shall glean from the statute and the ruling cases, certain principles that may safely be declared as guides.

> 1. On April 1, 1960, the applicant for registration must have been "holding out" to the public that he was a Public Accountant.

If on April 1, 1960, an applicant for registration was employed in accounting work by a sole employer, and had held out to the public the information that he was available to do public accounting work, for hire, this requirement would not be met. Neither would this requirement be met by one who on that date, although doing accounting work exclusively, was a mere employee of a firm of accountants, or working exclusively for one firm or on one account.

> 2. On April 1, 1960, the applicant must have been engaged in the practice of public accounting as his "principal occupation."

One's "principal occupation" is that "occupation or business on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention, not for a day or wee, or month, but through the year." *Smalley v. Masten*, 8 Mich. 529. In this case it was held that it was error for the Court to permit testimony in regard to which of two occupations brought in the most money.

We are clearly of the opinion that no precise length of time of being so employed may be specified or required to make it the "principal occupation." Circumstances will vary in individual cases. One might break over very gradually in one instance from one occupation to another and thus be engaged in the occupation for a long time before it became his "principal occupation." Or, in another case the changeover might be very rapid.

In *State v. Eischen*, (Minn. 1957) 86 N.W.2d 652, the appointment of Eischen was challenged as a member of the State Board of Barber Examiners, on the ground that he had not, as required by statute, engaged in the barber trade for five years prior to his appointment. The Court held the appointment good and held that the statute did not require the five years of barber service be at the exclusion of all other activities, and that statutes prescribing qualifications for appointees to public office must be liberally construed in favor of the appointees. *Johnson v. Starkey*, 52 N.W. 24.

In *Evans v. Woodman Accident Association*, 171 P. 643, Evans, a school teacher, was killed while cutting down a tree on his father's farm. It was contended in an effort to defeat the insurance claim that he had changed his occupation to farmer from that of school teacher. The Court rejected this and said:

> The word "occupation" must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation.

In *Dorrell v. Norida Land and Timber Company*, (Idaho 1933) 27 P.2d 960, involving liability under the Workmen's Compensation Law, the Court defined "occupation" as "That which principally takes up one's time, thought and energies; especially one's regular business or employment; also whatever one follows as a means of making a livelihood."

In *Harris v. Southern Carbon Company, Inc.*, (La. 1935) 162 So. 430, the Court said:

> "Occupation" has been defined by the courts of this (Ohio) and other states to be "that particular business, profession, trade, or calling, which engages the time and efforts of an individual". In other words, the employment in which one regularly engages, or the vocation of one's life. * * *
>
> *See also: Industrial Commission of Ohio v. Roth*, (Ohio 1918) 120 N.E. 172, in which the above definition is adopted.
>
> *See also Sovereign Camp v. Craft*, (Alabama 1922) 94 So. 831, in which virtually the same definition has been employed.
>
> 3. One's "principal occupation" is not determined by the relative amount of money derived therefrom, but is determined by a factual analysis of which work, in gaining a livelihood, engages the bulk of his time, concentration and effort.

An individual shows which industry he regards as most desirable for him, as to income, health, satisfaction in the performance and long term dependability, (and perhaps other values important to him) principally by the time and concentration that he devotes to it.

4. One's "principal occupation," need not be his sole occupation.

One may have two or more occupations which he follows for profit to earn his livelihood. One of the several occupations may be classified as the "principal occupation", if he devotes to it more of his active concentration, time and attention than he devotes to the combined other occupations.

5. April 1, 1960, is the date which fixes the "principal occupation" of the applicant.

The evidence which will determine the "principal occupation" of the applicant on April 1, 1960, will include that date, and a number of weeks or months prior to that date, but will reject all evidence of occupation and employment subsequent to that date.

6. This statute prescribing regulations and qualifications for registration as Public Accountants must be liberally construed in favor of the applicant.

In those cases in which it is not clear that under the law and the evidence presented to the Board, the registration should be denied, the applicant is entitled to a liberal construction and as a result of such liberal construction is entitled to be registered.

Borderline cases may arise, in which the Board feels that additional information is available to the applicant, which, if supplied, would show clearly whether the application should be approved or rejected by the Board. In such cases it is suggested that the matter be continued and that the applicant be requested to supply documentary evidence or relevant testimony upon the specific matter to be designated in the communication.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-188 ELECTION LAW; CHANGE OF PARTY AFFILIATION—NRS Chapter 294 construed relative to change of party affiliation. An elector may not change party affiliation between General Elections of this State and become candidate for office at the Primary Election of political party newly chosen by him. Election Law; Refund of Filing Fees; County Commissioners—NRS Chapter 294 and NRS 354.220 construed. Elector disqualified from becoming candidate for office on primary ballot of political party not entitled to refund of filing fees as matter of legal right. Board of County Commissioners has power to consider application for refund of filing fees, and allow or reject claim for same.

Carson City, November 4, 1960

Honorable L. E. Blaisdell, District Attorney, Mineral County, County Court House, Hawthorne, Nevada

Dear Mr. Blaisdell:

Requests have been made for an opinion interpreting NRS Chapter 294 relating to certain phases of the primary election law and of the right of a party filing a declaration of candidacy to obtain the return of the filing fee for office when it has been determined that the name of that party could not legally appear on the ballot. We answered your telegram of August 16, 1960 by telegram of August 17, 1960. The answers to the questions posed in your telegram were accurate but it is deemed advisable, because of numerous inquiries, both written and oral, received by this office since that time, to issue a formal opinion clarifying the answers given, together with the reasons therefor as well as other related matters not previously specifically covered.

STATEMENT OF FACTS

A party who had been registered as a Democrat in 1958, and for some time prior thereto, reregistered as a Republican in June 1960 and filed for office in the primary elections of 1960 as a Republican. A party registered as an Independent in 1958, and prior thereto, reregistered as a Democrat in February 1960 and filed for office in the primary elections of 1960 as a Democrat. In both cases the applications and declarations of candidacy were accepted by the County Clerk of your county, together with payment of the filing fees required by law. There is some suggestion that in at least one instance the candidate inquired about the clause in the form of declaration of candidacy regarding reregistration and change of designation of political party affiliation since the last general election of this State and that the County Clerk informed the prospective candidate that the clause "was almost obsolete" and would not affect the candidacy of the party involved. Apparently the clause regarding reregistration and party affiliation were thereupon stricken from the declaration of candidacy in at least one instance before same was completed, signed, verified and filed. Thereafter, and as a result of the telegraphic opinion issued by this office, the names of the two candidates were stricken from the primary ballots of the respective political parties (or were never printed thereon) so that those names were not presented to the electorate to be voted upon at the primary elections held in 1960.

On the above state of facts questions are presented by your office and by several other District Attorneys in this State, as well as by many candidates and other interested parties.

QUESTIONS

1. May a qualified elector of the State of Nevada registered as an adherent of one political party and affiliated with such party at the last general election (1958) reregister, change the designation of his political party affiliation between general elections of this State and become a candidate at the primary elections of 1960 on the ballot of the other political party?

2. May a qualified elector of the State of Nevada registered as an Independent, with no party affiliation at the general election of 1958, (the last general election of this State) reregister in 1960 and claim affiliation with either of the political parties and become a candidate at the primary election on the ballot of the political party selected by him as a proposed candidate?

3. In the event the name of a proposed candidate in either of the situations described in the foregoing questions cannot legally appear on the primary ballot of either of the political parties, has such proposed candidate the right to demand and receive, from the County Clerk or the County Treasurer, the return of the fee paid pursuant to law for the filing of the declaration of candidacy?

4. If the answer to Question No. 3 is in the negative, has the Board of County Commissioners the power to make refund of the filing fee of such proposed candidate?

CONCLUSIONS

Question No. 1: No.
Question No. 2: No.
Question No. 3: No.
Question No. 4: Yes, as herein qualified.

ANALYSIS

NRS 294.125 reads as follows:

> Declaration of candidacy, acceptance of nomination: Form.
>
> 1. A declaration of candidacy or an acceptance of a nomination shall be in substantially the following form:
>
> Nomination Paper of _____ for the Office of _____.
>
> State of Nevada
> County of _____ss.
>
> For the purpose of having my name placed on the official primary ballot as a candidate for nomination by the _____ Party as its candidate for the office of _____, I, the undersigned _____ do solemnly swear (or affirm) that I reside at No. _____, _____Street, in the City (or Town) of _____, County of _____, State of Nevada, and that I am a qualified elector of the election precinct in which I reside; that I am a member of the _____ Party; *that I have not reregistered and changed the designation of my political party affiliation on an official affidavit of registration since the last general election;* that I believe in an intend to support the principles and policies of such political party in the coming election; *that I affiliated with such party at the last general election of this state;* that if nominated as a candidate of the _____ Party at the ensuing election I will

accept such nomination and not withdraw; that I will not knowingly violate any election law or any law defining and prohibiting corrupt and fraudulent practice in campaigns and elections in this state; and that I will qualify for the office if elected thereto.

_____
(Signature of candidate for office)

Subscribed and sworn to
before me this)_____
day of _____,
19_____.

_____
Notary Public (or other
officer authorized to
administer an oath).
(Emphasis supplied)

The above statute, particularly the emphasized portions, which are not in any way obscure or ambiguous, amply sustain our conclusions to Questions Nos. 1 and 2. We feel that any elector or official is put on notice and informed of exactly what is required in the matter of becoming a candidate on the primary ballot of a political party at a primary election. While it is our opinion that the statute, standing alone, furnished the complete answer to the first two questions propounded, official and judicial opinion interpreting the law is not lacking.

The matter of change of party affiliation and its effect on a declaration of candidacy for office (or acceptance of nomination) on the ballot of political party is treated fully in the case of *State v. Brodigan* (1914) 37 Nev. 458. In that case the Nevada Supreme Court held that compliance with the statute (now NRS 294.125) was essential in order to enable an elector to become a candidate for office on the primary ballot of a political party. The Court went to great lengths to list the elements of the declaration of candidacy or acceptance of nomination required of prospective candidates under the statute. One of these is the declaration of having affiliated with the same party at the last general election held in this State, in order to run for office on a party ticket in the primary elections.

After listing the elements required in the form of nomination paper (37 Nev. 465) the Court went on to say:

> By these declarations under oath, *made prerequisites for one seeking nomination*, it was undoubtedly intended to require the applicant to declare the parth of which he was a member *and with which he affiliated at the last general election, and this must be the same party under whose party designation he seeks the nomination at the ensuing primary.* Every substantial element of the nomination paper and the oath therein prescribed precludes the idea of an applicant for nomination seeking the nomination of two distinct parties at the same primary.
>
> The object of the primary law, generally speaking ,was to avoid those things which under the old convention system were believed to be corrupt. The spirit of the law was to get a popular expression as to choice of candidates from the membership of the respective political parties within the

> state. The various changes, amendments, and modifications of our primary laws that have been enacted by recent legislatures have had for their purpose and aim the elimination of one political party from the primary election of another, the object being to prevent one political party from interfering with another as to the selection of party nominees for the various offices. (Emphasis supplied.)

The office seeker in such cases *must* file a declaration of candidacy in the prescribed form or his name simply cannot appear on the official ballot to be used at a primary election.

NRS 294.115 reads as follows:

> Conditions for printing name on ballot. A candidate's name *shall not be printed* on an official ballot to be used at a primary election unless he qualifies by filing a declaration of candidacy or by filing an acceptance of nomination, and by paying a fee as provided in this chapter. (Emphasis supplied.)

The mandatory "shall not" negatives the possibility of departing from the requirements of the statutory provision fixing the essentials of the nomination paper, to wit, the declaration of candidacy or acceptance of nomination. These clauses may not be stricken from the nomination paper by the County Clerk, the candidate or any other party.

At this point it might be well to note that the direct primary law in substantially the form in which it is now found on the statute books of this State was subjected to and withstood a full-scale, broadside attack on its validity and constitutionality and was upheld by the Supreme Court of the State of Nevada. (*See Riter v. Douglass* (1910) 32 Nev. 400.)

The provisions of Chapter 294 NRS adverted to apply equally to those affiliated with one of the political parties desiring to become a candidate for office and those registered as Independent and seeking for the first time to become the candidate of a recognized political party in a primary election. This was definitely settled and established by the Nevada Supreme Court in the case of *Reed v. Stewart* (No. 4349, filed August 9, 1960) 76 Nev. 361, 354 P.2d 858.

The right of an elector to become the candidate of a political party at primary elections and to have his name printed on the official ballot must conform with the requirements of the direct primary law. However, what has been stated above refers only to a declaration of candidacy or acceptance of nomination as the proposed nominee of one of the political parties. Anyone desiring to become a candidate for office may be nominated as an Independent by complying with the procedure outlined in NRS 294.155. The provisions of the direct primary law deal only with present candidacy on the ballot of a political party at a primary election. Neither the qualifications of an elector nor the right of a duly qualified elector to become a candidate for office as an independent candidate can be abridged, amended, modified or restricted by statutory enactment for reasons other than those stated in the Constitution of the State of Nevada itself (Constitution Article 2, Section 1; Article 15, Section 3).

Parus v. District Court (1918) 42 Nev. 229,241; *State ex rel. Boyle v. Board of Examiners* (1890) 21 Nev. 67, 69; *State v. Findlay* (1888) 20 Nev. 198.

Parenthetically, it might be well to note that the clauses with which this opinion deals and to which it applies will not be effective after January 16, 1961, under the new election law (Statutes of Nevada, 1960, Chapter 157, Page 235). Section 57 of the new law has eliminated the clauses in the nomination paper relating to change of designation of political party and affiliation with that same party at the last general election held in this State. Our opinions must deal with the law as it exists and the statutory provisions now found; but it is not improper to direct attention to relevant future changes enacted by the Legislature. Moreover, since amendments, changes and modifications of our statute law, entirely within the province and sound discretion of the Legislature, are constantly found necessary or advisable, the deleted portions of the statute relating to primary elections and eligibility to become the candidate of a political party may well be restored.

We next consider Question No. 3, dealing with the *legal right* of a duly qualified elector to demand the return of the filing fee paid with his declaration of candidacy or acceptance of nomination when it has been ascertained that his name cannot appear or be printed on the official ballot of the political party whose candidate he seeks to become in the primary election.

As above pointed our the name of a candidate may not be printed on the official ballot to be used at a primary election unless he qualifies by filing his declaration of candidacy or acceptance of nomination and by paying the fee provided by law (NRS 294.115). The amount of the fee is specifically fixed in NRS 294.145, and is in the sum of $40 for any county office. The fees received by the County Clerk are required immediately to be turned over to the County Treasurer:

> 294.150 Disposition of filing fees.
> 1. The county clerk shall immediately pay to the county treasurer all fees received by him from candidates.

The Supreme Court of the State of Nevada has ruled that fees paid by electors with their declarations of candidacy or acceptance of nomination need not be returned by the official receiving same for filing the nomination paper (*State v. Brodigan* (1914) 37 Nev. 458l, 466). In that case the Court expressed itself as follows:

> By the provisions of the statute set forth above the money paid by a candidate filing a nomination paper is paid to the secretary of state in this instance as a “fee for such filing”. In the case at bar the services of the secretary of state were performed in the way of filing the nomination paper for which it appears from the record that the nomination paper of Raymond A. Gott was filed with the secretary of state and all the services required of the secretary of state in the way of filing were duly performed. The ministerial officer of the state, to wit, the secretary of state, having performed the services required of him under the law, was entitled to the fee designated by section 9 of chapter 3 of the act, and the fat that this fee so paid was thereafter to be turned over to the state treasurer, as other moneys collected by the secretary of state are turned over to the state treasurer for ministerial services performed, did not change the nature of the fee, and

> the same, having been paid to the secretary of state for filing services performed, cannot, in our judgment, be returned to the party seeking to have his name withdrawn. This might properly be considered in the nature of a forfeiture, but that is unnecessary for us to determine in this instance.

The fact that the officer receiving the filing fee in the cases under consideration was a county officer, namely, the County Clerk, rather than a State officer, to wit, the Secretary of State, does not, in our opinion, furnish any reason for a different conclusion. Nor does the fact that the candidate in the Brodigan case, supra, sought to have his name voluntarily withdrawn, while the candidates in the matters under review could not have their names on the ballots at the primary elections, in spite of their earnest desire to run for office, dictate any different conclusion. NRS 294.145 speaks of payment to the "filing officer" without any distinction drawn between the Secretary of State and the County Clerk. NRS 294.150 provides for the disposition of filing fees in either case and NRS 294.135 designates the appropriate officer, State or county, with whom nomination papers for various offices are to be filed. The foregoing judicial and statutory authorities conclusively deny to any candidate or proposed candidate a *legal right* to demand return of the filing fee paid with his declaration of candidacy or acceptance of nomination.

Does the conclusion reached above prevent the Board of County Commissioners, in a proper case, from ordering a refund of the filing fee to a candidate whose name could not legally appear on the official printed ballot at the primary election? We think not.

NRS 354.220 makes express provision for applications for refunds of money paid into the county treasuries in certain cases. The relevant portions of the statute read as follows:

> 354.220 Cases in which applications for refunds may be made.
>
> NRS 354.220 to 354.250, inclusive, shall apply in making applications for refund of moneys which have been paid into the county treasuries in cases where: * * *
>
> 4. In the opinion of the board of county commissioners, the applicant for refund has a just cause for making the application and the granting of such a refund would be equitable.

The form of the application and the manner of presenting same are not set forth in the statute. The time for presenting the claim is fixed at a maximum of 3 years from the time such claim was incurred (NRS 354.230).

Thus, the Board of County Commissioners has the *power, in its discretion*, to entertain and allow such claim. As to whether refusal to allow the claim would form the basis of suit against the county pursuant to NRS 354.250 we do not deem it necessary or proper now to decide. Nor should anything in this opinion influence the action of the Board in its ultimate decision. This opinion is intended only to indicate our conclusion that the Board of County Commissioners has the statutory authority and power to receive, pass upon and allow or reject any such claims for refund, if and when presented for its consideration and determination.

Respectfully submitted,
ROGER D. FOLEY
Attorney General

By: Norman H. Samuelson
Deputy Attorney General

OPINION NO. 60-189 TAXATION; FREEPORT LAW; TAX EXEMPTION OF PERSONAL PROPERTY—Warehouse defined to include open storage. Exemption limited to inanimate personal property.

Carson City, November 9, 1960

Honorable William J. Raggio, District Attorney, Washoe County, Reno, Nevada

Dear Mr. Raggio:

You seek our opinion whether or not under four factual situations certain personal property is tax exempt under the Nevada Freeport Act, NRS 361.160-361.185. We will set forth these problems using, in part, the same language that you have employed:

1. An aircraft company, a New Jersey corporation, stores earth moving construction machinery and spare parts on the property of an equipment company in Washoe County (not affiliated with the aircraft company). Part of the machinery is under cover and part is in the open air. The equipment company is not in the warehousing business, but carries instead a general merchandise license granted by the City of Reno. The aircraft company has filed a claim for exemption under the provisions of the Freeport Law.
2. A California resident ships five hundred head of sheep into Washoe County and puts them on the range or under fence for six months, and then ships them back to California for sale or other disposition.
3. A California resident who owns property in northern Nevada winters two thousand head of cattle in California and then ships them to his property in northern Nevada for six months, then returns them to California.
4. A meat packer who is a Nevada resident and owns a meat packing plant in California purchases cattle in Colorado and Wyoming and ships them to his California plant. While passing through Nevada the cattle are put in feed lots for periods of three to six months, or more, and then shipped on to the packing plant in California. These cattle are in transit through Nevada and are never sold in this State.

QUESTION

Is the personal property described in the four above problems tax exempt under the Nevada Freeport Act?

CONCLUSION

No. 1: Yes.
Nos. 2, 3 and 4: No.

ANALYSIS

Reference is made to our Opinion No. 138 of March 1, 1960, particularly where we took the position that the storage of aircraft with a bailee on an airport comes within the meaning of the word warehouse as that term is used in the Freeport Law.

Your attention is also directed to the language of the preamble to the 1955 amendment to the Freeport Law quoted at page 3 of said opinion (Chapter 362, 1955 Statutes, page 600). In the preamble the Legislature refers to "*storage in Nevada of goods and merchandise*" as being beneficial; makes mention that the "*warehouse industry of the State of Nevada*" has benefited the people of this State by the "*construction of warehouse facilities * * * increasing taxable valuations * * * and has provided employment for Nevada citizens;*" and "*that such tax-exempt warehousing be sponsored and encouraged.*"

The preamble concluded, "Whereas, It is deemed necessary that this act should be augmented by additional provisions which would indicate the wide-spread approval of this act by the people of the State of Nevada and the desire of the people of the state that the *provisions thereof be interpreted broadly and liberally*, to achieve the purposes of the legislation, such additional provisions being designed to further encourage resident and nonresident persons and corporations to warehouse goods and merchandise from outside the State of Nevada, intended for out-of-state destination, in the State of Nevada and to assemble and disassemble the same while in storage in Nevada, including the doing of all necessary acts to prepare such stored goods for shipment to their destination, including the separation of the same into portions of the whole, or into broken, mixed or odd lots; now, therefore… (Emphasis supplied.)

We are grateful to Springmeyer, Thompson & Dixon, Attorneys at Law, of Reno, Nevada, for their letter to you of October 17, 1960, and for the copy supplied to us. The authorities cited and quoted from support the position taken by this Department in Opinion 138 of March 1, 1960, that personal property otherwise exempt under the Freeport Law is nonetheless so because it is stored in the open on an airport ramp. We quote from Springmeyer, Thompson & Dixon's letter, in part:

> * * * we believe that the primary question is whether the term "warehouse" as used in the Freeport Law is restricted in its meaning to the term "building". We think not, and we thin Opinion No. 138 leaves no question about this. In Opinion No. 138, airplanes owned by Douglas in the possession of the bailee Alamo Airways at McCarran Field were held to be within the exemption provided by the Freeport Law.
>
> In 93 C.J.S. 395 it is said: "In a broad sense and as used in common parlance, a 'warehouse' is the building or place used for storing goods, wares and merchandise * * * It has, and has not, been held to be a mere inclosure."
>
> Case after case recognizes the principle of warehousing in open storage. For example, coal piled on open ground under

warehouse receipt has been held to be properly warehoused. *In re* Wyoming Valley Collieries Co., Pa., 29 F.Supp. 106.

The case of *In re* C.A. Taylor Log & Lumber Co., Wash., 41 R.2d 249, involved the storage of piles of lumber under warehouse receipt. The court recognized the validity of such open storage methods, saying at page 252: "The storage receipts being negotiable in form, duly indorsed and delivered, for value, to the bank, without notice of any fact impeaching the title evidenced by them, vested the bank with a lien prior to any right of the trustee to such of the lumber in the original placarded piles as can, by a fair preponderance of the evidence, be identified."

In connection with the Taylor case, it is to be noted that Section 3588 Remington Compiled Statutes contains the provision of the Uniform Warehouse Receipts Act to the effect that every such receipt must embody "the location of the *warehouse* where the goods are stored." This same provision is found in the Nevada Act, NRS 95.070.

The case of *In re* Cincinnati Iron Store Co., Ohio, 167 F. 486, likewise recognized the principal of open storage of iron beams. The beams were placed in different piles in the yard under a warehouse receipt. The validity of the warehouse receipt was sustained.

A leading case is *Love v. Export Storage Co.*, 131 F.1. There, a lumber company occupied four acres of leased ground. The yard was surrounded on three sides by a fence composed of four wires and a string of plank with gates in it. The fourth side next to the railroad was open. Lumber was in piles in the yard. The lumber company leased the yard to a storage company and entered into a warehousing agreement, receiving warehouse receipts for the lumber piled in the yard. In answer to the contention that the property was not warehoused, the court, at page 12, held: "One of the grounds upon which the position is urged is that the lumber in question was not warehoused by those proceedings. *Of course, an actual warehouse is not essential to the warehousing of goods.* They may be warehoused upon a parcel of ground inclosed or open, or partly so. And they may be warehoused upon what are the owner's premises at the time of the warehousing, and that, though they may then be on those premises and without changing their location thereon. The only thing essential to the warehousing of goods is that their possession changed from that of their owner to that of the warehouseman."

Considering the direction of our Legislature that the Freeport Law be interpreted *broadly and liberally*, and there being no language, either in the preamble or the act itself, limiting the meaning of warehousing to the complete inclosure under roof and between four walls and the cases cited by Springmeyer, Thompson & Dixon, we conclude that the open storage of goods constitutes warehousing within the meaning of the Freeport Law. We are of the opinion, therefore, that as to problem No. 1 above set forth the open storage of machinery and parts is warehousing within the meaning of the law and the said property is tax exempt, provided there is

full compliance with all sections of the Freeport Act, including record keeping, the filing of claims, monthly reports, etc., by the warehouse company.

We are not impressed with your conclusion that the bailee warehousing company is not in the warehouse business because it has only a general merchandise license. Licensing of warehousing companies, or of a person or persons engaged in such business, is, in this case, a problem that concerns the City of Reno. The Freeport Law requires no such licensing. So long as the said company is actually engaged in the storage of goods in compliance with the Freeport Act, such goods are tax exempt.

We do not believe that the personal property described in problems 2, 3 and 4 above is tax exempt.

From the preamble, as well as from the Freeport Act itself, it appears very clear that the Legislature never had in mind animate chattels such as cattle and sheep, but only inanimate personal property. Consider the language of NRS 361.160: "* * * the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged." Consider the language of the preamble: "* * * and to assemble and disassemble * * * including the doing of all necessary acts to prepare such stored goods for shipment to their destination, including the separation of the same into portions of the whole, or into broken, mixed or odd lots."

Although it is not applicable to problems Nos. 2, 3 and 4, your attention is called to the language of NRS 361.160, subsection 1(a):

> 1. Personal property in transit through this state is personal property, goods, wares and merchandise:
>
> (a) Which is moving in interstate commerce through or over the territory of the State of Nevada;

I am sure that the Washoe County Assessor is aware of the above language and does not attempt to tax personal property moving in interstate commerce, if stopped in transit for appreciable periods of time, such as in the above set forth problems, probably acquires a situs in Nevada for taxation unless otherwise exempt under the Freeport Law or other applicable statute.

Although we did not say so in Opinion 138, we were aware of the doubtful constitutionality of the Freeport Law, but in view of the approval of the voters on November 8, 1960, of Question No. 1, adding to Article X, Section 1, of the Nevada Constitution, language exempting property from taxation as spelled out in the Freeport statute, any doubt as to constitutionality has been removed.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

OPINION NO. 60-190 INSURANCE—The State Government and its political subdivisions may purchase insurance from a mutual company if the policies are nonassessable and clearly marked "without contingent liability." Federal stamp tax on such policies

(26-4371 U.S.C.A.) not collectible if policies countersigned by Nevada agent or broker.

Carson City, November 14, 1960

Mr. J. E. Springmeyer, Legislative Counsel, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Springmeyera:

Senate Resolution Number 9 of the legislative session of 1960 memorialized the Legislative Counsel Bureau to make a study and report the conclusions thereof to the legislative session to convene in 1961, in respect to the cost of public liability, fire and other insurance (not life insurance) procured by the State and its political subdivisions.

Pursuant to such request, preliminary studies have been conducted and it has been learned that some cities, counties and school districts have purchased policies of insurance and have become members of mutual companies, and also that as a condition precedent to receiving policies in such companies such entities have advanced member ship fees and premiums to such mutual insurance companies.

Revenue stamps issued pursuant to the internal revenue laws of the United States are, in certain cases, attached to such policies, and it is doubted if the State of Government or any political subdivision thereof is properly required to pay such tax.

QUESTIONS

Question No. 1. May the State or any of its political subdivisions become members of, and pay membership or advance premium fees to a mutual company as a condition precedent to obtaining insurance from such company?

Question No. 2 If the above question is answered in the affirmative, is the State, or a political subdivision thereof, required to pay a federal stamp tax upon stamps to be affixed to such policies?

CONCLUSIONS

No. 1: Yes, upon condition that the policies so issued are nonassessable, and are clearly marked thereon to be "without contingent liability."

No. 2: We are of the opinion that the federal law does not require revenue stamps to be affixed to such policies, with the exception of "surplus line" insurance policies issued by a nonadmitted company. The duty to affix and cancel the stamps is not that of the state officer however. (*See* Section 4384 of Title 26, United States Code.) The cost of such stamps is probably passed on indirectly and paid by the insured.

ANALYSIS

Section 10 of article VIII of the Nevada Constitution provides:

> Sec. 10. No county, city, town, or other municipal corporation shall become a stockholder in any joint-stock company, corporation or association whatever, or loan its credit in aid of such company, corporation, or association, except railroad corporations, companies or associations.

On June 29, 1955, Attorney General Opinion No. 78 held that:

> Contracts of Inter-Insurance may not be entered into by political subdivisions, being violative of Section 10 of Article VIII, Constitution, and of the budgetary law.

Respecting this opinion the inquiry was about reciprocal or inter-insurance only, which differs from mutual insurance, as we shall presently show briefly. This opinion was based upon the belief (from documents then made available) that reciprocal or inter-insurance contracts, binding the insured thereunder, were subject to assessment, and that for the political subdivisions to subscribe for and purchase something of indefinite cost, with contingency of assessment, was a "loan of credit," not capable of exact budgetary estimation, and therefore violative of the constitutional and statutory provisions. (*See* NRS 354.010 et seq., respecting cash operations upon a budgetary system.)

Subsequently, the conclusions were challenged by counsel for reciprocal exchanges, and thoroughly briefed with a request that the matter be reviewed. Upon review and upon a clear showing that with respect to the exchange under consideration the power of Attorney and the policies issued thereunder carried a definite provision and recitation that there was no contingent liability and that the policies were "nonassessable," the previous conclusion was modified and it was held that when nonassessable, "political subdivisions in Nevada may subscribe for reciprocal insurance."

In the present study we are concerned with the constitutional provision heretofore quoted and also the budgetary law under which the counties (NRS 354.010 et seq.) are required to operate.

For a detailed and authoritative discussion of the legal distinctions in composition of a "reciprocal or inter-insurance" entity and "mutual" insurance company, with resulting distinctions of operation and obligations, *see* Attorney General Opinion No. 163, April 24, 1956, p. 398, as taken from 94 A.L.R. p. 826.

That mutual companies may issue insurance policies in Nevada "without contingent liability," is provided by statute. (*See* NRS 682.210.) The danger of this provision is that the right to continue to issue such policies depends upon the continued maintenance of "a surplus equal to the capital of a stock company doing the same kind of kinds of business, but no company shall issue such policies except during such time as it shall continue to have such a surplus."

Having shown that under certain circumstances a mutual insurance company may issue upon Nevada risks, policies "without contingent liability," we are next confronted with the question of whether or not, assuming the issuance of such policies by such companies, the purchase thereof by a county, city or other municipal corporation, would offend Section 10 of Article VIII of the Constitution or the statutes requiring the operation of such governmental entities upon a cash and budgetary system.

The latest authority upon this proposition that we have found, reviews the earlier decisions, and passes upon a state constitutional provision almost identical to our own, is *State v. Northwestern Mutual Insurance Company* (Ariz. 1959), 340 P.2d 200. This case holds:

> The statute providing that any government or agency, state or political subdivision may be a member of a domestic foreign mutual insurer is not violative of the constitutional provision that neither the state, nor any subdivision thereof shall ever give or loan its credit, and hence a contract by a school district for a fire policy with a mutual company was not invalid.

In this case it is pointed our (p. 202) that the highest courts of eleven states have ruled that such nearly identical constitutional provisions do not prevent the purchase, by the state and its political subdivisions, of nonassessable policies, nor the prepayment of membership fees of premiums in such mutual companies. (*See* authorities cited 340 P.2d 202.) The State of Texas alone has ruled to the contrary. *Lewis v. Independent School District of Austin*, 161 S.W.2d 450.

We are clearly of the opinion, however, that policies issued by such mutual companies which do not contain provisions disclaiming or negativing assessment liability, would offend both Section 10 of Article VIII of the Constitution and the statutory budgetary provisions of the specific political subdivisions. The purchase of such policies from mutual companies by the State or its political subdivisions would be illegal and unauthorized.

We turn now to a consideration of the question of the liability of the State and its political subdivisions for payment of United States revenue stamps to be affixed to policies of insurance in which the State or its political subdivision is the insured.

Title 26, Section 4371 U.S.C.A. makes provision for a stamp tax upon insurance contracts, indemnity bonds, and annuity contracts. Section 4373 thereof provides the exemptions to the liability for the tax. This section in part provides:

> The tax imposed by section 4371 shall not apply to (1) Domestic agent. Any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, Territory, or District of the United States within which such insurer is authorized to do business; * * *."

Insurance of the type here under consideration (casualty, fidelity and surety; fire and marine) written by foreign and alien companies, upon Nevada risks, except surplus line, must be written by companies licensed to business in Nevada, and, under NRS 684.350, all such policies must be countersigned by a local agent.

When countersigned by a local agent under the provisions of NRS 684.350, policies issued by a company authorized to do business in Nevada are exempt from the stamp tax liability under Section 4373, Title 26, U.S.C.A.

"Surplus line" insurance, however, upon Nevada risks, presents a somewhat different picture. Surplus line insurance may be placed with a

company not licensed to do business in this State, through a duly licensed surplus line broker. (NRS 686.280, subsection 2.) Although under NRS 686.300, surplus line insurance is required to be initialed, by the surplus line broker in this State who clears the same, since it is by a company not licensed to do business in this State, such policies so initialed would not fall within the exception stated in Section 4371, Title 26 of U.S.C.A.

However, the liability for the tax (Section 4384, Title 26, United States Code, 1958 Edition) and duty to affix the stamps is upon "any person who makes, signs, issues, or sells any of the documents and instruments subject to the taxes imposed, * * *."

There are no exemptions from the liability for the tax, affecting the State Government or subdivisions, other than those above enumerated. The duty is not upon the insured to affix the stamps. If stamps are affixed to a policy, the cost is not doubt passed on to the insured. If the State Government or a political subdivision thereof is the insured, and stamps are affixed, as they should be for "surplus line" insurance, and the cost thereof is passed on to the insured, the resulting requirement to pay the cost is unavoidable, even as against the State.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-191 GAMING—Nevada Gaming Commission has authority to require administrative, supervisory and policymaking personnel of licensed gaming establishment to be qualified **for licensing provided established procedure is followed.**

Carson City, November 23, 1960

Nevada Gaming Commission, Carson City, Nevada

STATEMENT OF FACTS

Gentlemen:

At the regular monthly meeting of the Nevada Gaming Commission held in Carson City, Nevada, October 18, 1960, the question of the legal authority of the Board and Commission to control the employment of key personnel in casino operation was discussed.

The facts giving rise to this question concerns the recent denial by the Commission of an application by certain licensees in the Stardust and Desert Inn to acquire an interest in the Hotel Riviera operation.

We have been informed by the Administrative Secretary of the Commission that, after that denial, three of the key personnel of the casino operations of the Desert Inn and Stardust were employed as shift bosses on each of the three shifts at the Hotel Riviera Casino. We assume that such employees have no financial interest in the Riviera. With that as a

background, it was requested that the Department of the Attorney General research the law in this regard and that an opinion be given in order that the Board and Commission may have legal guidance on the question hereinafter stated.

QUESTION

What, if any, is the authority of the Board and Commission to control the employment of key casino personnel having administrative, supervisory or policymaking interest in the licensed operation?

CONCLUSION

The Board and Commission, by law, may require a state gaming licensee to qualify for licensing certain key personnel having supervisory, administrative or policymaking interest in the licensed operation, providing the procedure established by law is followed.

ANALYSIS

NRS 463.170, subsection 2, provides as follows:

> No corporation, limited partnership, business trust or organization or other association of a quasi-corporate character shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policymaking or supervisory, are individually qualified to be licensed under the provisions of this chapter.

The Hotel Riviera is a Nevada corporation under the corporate name of Hotel Riviera, Inc.

In our opinion the foregoing subsection is authority for the Board and Commission to require those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing.

In order to make a determination that an individual is qualified to be licensed in a presently licensed operation, it is necessary that the Board obtain requisite information about that individual. There is ample authority to permit the Board to secure this information. Said subsection 2 of NRS 463.170 implies this authority. Regulation 5.070 expressly permits the Board or its agents to summon any licensee, his agents or employees, to appear and testify regarding the conduct of any licensee, or the agents or employees of any licensee.

In order for the Board and Commission to exercise the foregoing authority against a currently licensed establishment, it is essential that a definite procedure be adhered to. That procedure is set forth in NRS 463.310 and 463.312.

Under NRS 463.310, subsection 1, the Board investigates apparent violations of Chapters 463 and 464 of NRS, or any regulations adopted thereunder. If disciplinary action or other action is to be taken against a licensee, the Board may conduct investigative hearings as may be necessary.

Under subsection 2, if the Board is satisfied that a license should be "*limited, conditioned*, suspended or revoked," it initiates a hearing by filing a complaint with the Commission together with a summary of evidence. If the Commission then determines that probable grounds exist for disciplinary or other action, it then proceeds to serve the licensee with a copy of the complaint in the manner set forth in NRS 463.312. (Emphasis supplied.)

Thereafter the Commission, under subsection 4 of NRS 463.310, has full power and authority to *limit, condition*, revoke or suspend any license for any cause deemed reasonable by the Commission.

Let us now examine how the procedure would work in practice. If the Board feels there is an apparent violation of NRS 463.170, subsection 2, because administrative, policymaking or supervisory employees in the licensed operation are not qualified to be licensed, a complaint may be filed with the Commission together with a summary of the evidence. This action is not to discipline the licensee at this time, but rather falls within the classification of "other action" as that term is used in NRS 463.310. The purpose of the proposed hearing is to determine before the Commission if the facts warrant a finding that the individual in question is not qualified to be licensed. If that is the finding and decision of the Commission, the license may then be *limited* or *conditioned* that the individual not be employed in such capacity.

Thereafter the licensee has his right to judicial review as provided by NRS 463.315.

If ultimately the imposition of the *limitation* or *condition* is affirmed on judicial review, and the licensee fails to comply with the condition, the Board may then institute proceedings to take disciplinary action against the licensee by filing a complaint as set forth in NRS 463.310.

The Board has no authority to *limit, condition*, suspend or revoke a license, but is limited to recommending such action to the Commission (NRS 463.310(2)). For the Commission, which sits as a quasi-judicial body, to take the initiative and direct a licensee to dismiss a particular employee under threat of revocation of his license would mean that the Commission has reached its conclusion that such employee is not qualified to be licensed based upon the evidence of the Board alone and without affording the licensee an opportunity to present his case to the Commission, as is provided by law.

We must also keep in mind that in order to afford gaming licensees the right o judicial review of orders and decisions of the Gaming Commission, NRS 463.315 became a part of the 1959 Gaming Act.

Although it is inapplicable in this case, your attention is directed to the Commission's emergency powers under NRS 463.312, subsection 9. Said section reads in part as follows:

> 9. Notwithstanding any other provisions of this section, the Commission may issue an emergency order for suspension, *limitation* or *conditioning* of a license in the following manner:
>
> (a) An emergency order for the suspension, *limitation* or *conditioning* of a license shall be issued only when the commission believes that: * * *
>
> (3) Such action is necessary for the immediate preservation of the public peace, health, safety, morals, good order or general welfare.

(b) The emergency order shall set forth the grounds upon which it is issued, including a statement of facts constituting the alleged emergency necessitating such action. (Emphasis supplied.)

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Michael J. Wendell
Deputy Attorney General

OPINION NO. 60-192 ARCHITECTURE, NEVADA STATE BOARD OF—Applicable statutes held not to confer any legal right to a refund or credit of fees paid with applications for examinations for Certificates of Registration. Rule-making power of the Board considered with respect to such holding where request is made for withdrawal of such applications, or failure for any reason, to take required examination or submit to required interview.

Carson City, November 28, 1960

Mr. Raymond Hellmann, A.I.A., Secretary-Treasurer, State Board of Architecture of Nevada, 421 Hill Street, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. Hellman:

It appears that two out-of-state architects filed applications for examinations for Certificates of Registration from the State Board of Architecture of Nevada to practice as architects in the State of Nevada. In connection with such applications, they paid a required fee of $35.

Apparently, said filings for Nevada Certificates of Registration were motivated by the expectation in each case of being engaged to render and perform professional work and services as architects in connection with certain projects in the State of Nevada. These expectations did not materialize, and said two out-of-state architects desire to withdraw their applications.

QUESTION

Is the Board of Architecture required to return the filing fee statutorily prescribed for qualifying examinations for Certificates of Registration authorizing the practice of the profession of architecture in the State of Nevada in circumstances where an applicant fails to appear for such examination or an interview?

CONCLUSION

No.

ANALYSIS

NRS 623.310 sets forth the schedule of fees in connection with examinations for, and the issuance and maintenance, or renewal or restoration of, Certificates of Registration, and makes the payment and receipt of such fees mandatory. NRS 623.160 provides that such fees shall be paid to, and receipted by, the Secretary of the Board, and shall be paid by him monthly into the State Treasury to the credit of a separate fund to be known as the architectural fund. Except as expressly or specifically authorized, there shall be no withdrawal from said fund. We find no express provision for any refund or credit of such fees in Chapter 623 of NRS, which regulates and governs architects and the practice of the profession of architecture in the State of Nevada.

NRS 623.140 confers upon the State Board of Architecture of Nevada the power to adopt rules and regulations for its government in the examination of applicants for certificates to practice architecture in the State of Nevada, and for any other purpose enumerated in the chapter, provided the same is not inconsistent with express provisions therein. Presumably, the Board has not adopted any rule or regulation relative to the question here involved.

We conclude, therefore, that said applicants have no *legal right* to refund or credit of the fee paid by them in connection with their application for the qualifying examination required for grant or issuance of a Certificate of Registration, authorizing the practice of architecture in the State of Nevada. Evident additional support for such conclusion is the fact that payment of said fee is presumably justified and authorized to defray the costs of processing such applications as may be submitted to the Board and the administering the examinations to applicants.

Undoubtedly, in certain instances, there may be good reason and cause to justify or excuse the absence of an applicant from a scheduled examination or interview, e.g., accident, illness, failure of available and necessary transportation, etc. It might seem that some consideration and allowance might be accorded such applicants, such as affording them an opportunity to take the examination or have and interview on a later date, without payment of any additional fee. On the other hand, the Board certainly is generally not responsible for the intervening cause or circumstance which prevented attendance at the examination or interview. And the fact is that, regardless of the cause or circumstances, administrative costs have been or are incurred in connection with the processing of applications, and for the holding of such examinations and interviews. Such being the general situation, it is not unfair to impose such entailed costs upon those responsible therefor, namely, those seeking the privilege and license authorizing the practice of the profession of architecture.

We, therefore, further conclude as follows:

A. By exercise of its rule-making power, the State Board of Architecture, in specified circumstances, may authorize refund or allow credit of fees paid by applicants in connection with qualifying examinations for Certificates of Registration.

B. The State Board of Architecture of Nevada, in exercise of its statutory powers, as a matter of sound administrative

policy and practice, may properly deny any refund or credit of fees prescribed of applicants desirous of taking qualifying examinations for Certificates of Registration.

See generally, Attorney General Opinion No. 188, November 4, 1960.

On the basis of the particular facts herein submitted, and in the absence of any applicable rule or regulation adopted by the Board, there is no legal or sufficiently good cause or reason shown to make any refund of the fees paid by the applicants here involved. Such persons were not prevented from taking the examination for which they had applied, but merely concluded that it would no longer serve their personal or financial interests to take such examination. While their change of mind was within their prerogative and may not be open to question, there was, presumptively, some change of position caused by the Board by reason of their applications, and the fees paid may be deemed to provide compensation therefor.

We trust that the foregoing review of the matter sufficiently answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-193 PARK COMMISSION, STATE—State Park Commission is authorized to expend moneys appropriated to acquire title to described lands from the United States, in preparing plans and specifications to be submitted to the Bureau of Land Management as part of the application for the grant. Chapters 252 and 97, Statutes of Nevada 1960 and Section 869, Title 43, U.S.C.A., construed.

Carson City, November 28, 1960

Mr. William J. Hart, Director, State Park Commission, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Hart:

The Legislature of 1960 enacted Chapter 97, p. 113, under the provisions of which it provided that when the State or a political subdivision thereof desires to purchase or lease public lands through the Bureau of Land Management, the application therefor shall be with the assistance of the State Land Register, who shall (1) examine the application to determine that the same is in proper form, with proper information and fee, and (2) determine from the records of the Bureau that the lands applied for are subject to disposition under the federal act.

The Legislature of 1960 also enacted Chapter 252, p. 451, under the provisions of which it appropriated $32,000 for the acquisition of certain lands, describing the lands desired, from the Bureau of Land Management, pursuant to the provisions of Title 43, Section 869, U.S.C.A. Section 6 of this act provides that the moneys appropriated shall be used only for the specific purposes described, and that any funds so appropriated remaining unexpended on July 1, 1962, shall revert to the general fund.

Sections 869 to 869-4 of Title 43, U.S.C.A., is a Congressional act of 1954, effective June 4, 1954, being amendatory of an act entitled "Public and Recreational Purposes Act of 1926." Under the provisions of Section 869 it is provided that before lands of the United States may be leased or conveyed to the State, or a political subdivision thereof, he must be satisfied that the land is to be used "for an established or definitely proposed project." Under the provisions of 869-1, it is provided that the Secretary of the Interior may classify the public lands and may sell or lease federal land to the State, or a political subdivision thereof, and that if so classified and conveyed for "historic monument purposes under this section shall be made without monetary consideration," otherwise to be made at a price fixed by the Secretary.

An application by the State Park Commission, made recently to the Bureau of Land Management, through the offices of the State Land Register, pursuant to Chapter 97, Statutes 1960, for the acquisition of certain lands designated in Chapter 252, Statutes 1960, to be acquired as provided in Section 869, Title 43, U.S.C.A., and the subsequent sections, has been rejected by the Bureau, pending receipt of engineering data pertaining to design, specifications, cost, and projected schedule of completion of improvements.

QUESTION

Is the State Park Commission authorized to make expenditures or the preparation of engineering data, design, specification and cost estimates in respect to the lands designated in Chapter 252, Statutes of 1960, prior to the acquisition of title to such lands from the United States?

ANALYSIS

Section 1 of Chapter 252 appropriates $32,000 to the Commission to purchase federal lands described in the act, pursuant to the provisions of Section 869 et seq., Title 43, U.S.C.A.

The federal statute has not been modified or amended subsequent to the effective date of the Nevada statute. It then provided for conveyance or lease to the State or certain designated political subdivisions by the Secretary of the Interior for "an established or definitely proposed project." That the agency of the Secretary of the Interior, namely the Bureau of Land Management, would require some evidence of the definitely proposed project, as a condition precedent to making the grant to the State's Commission, was or must have been anticipated by the Legislature prior to the enactment of Chapter 252, Statutes 1960. Further evidence of the fact that the Legislature anticipated that the Bureau would make such requirements prior to making the conveyance is shown by the enactment of Chapter 97, Statutes 1960, under the provisions of which the Legislature provided that the State Land Register should assist the said Commission

and determine, among other things, that the application for the land is in proper form.

Finally, it is likely under the provisions of the federal statute (Section 869-1, Title 43, U.S.C.A.) that upon submission to the Bureau of Land Management of the materials and data required by that Bureau, in application for the conveyance for state park purposes, that the conveyance or conveyances will be made "without monetary consideration" as is authorized in the federal act. It is also quite likely that this requirement of the Bureau will not add any costs to the Commission, for once the precise plans and specifications are made (before or after the acquisition of the title) it will not be necessary that the costs thereof be incurred again.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-194 DIVISION OF HOSPITAL SERVICES, STATE DEPARTMENT OF HEALTH—Names, appellations, or advertisements which connote or imply that unauthorized and unlicensed establishments are medical facilities or "hospitals," as defined by statute and rules and regulations, constitute false advertising and are violative of law. Penalties provided by law held to be applicable to any such violations.

Carson City, November 29, 1960

STATEMENT OF FACTS

Mr. Donald A. Baker, Director, Division of Hospital Services, Nevada State Department of Health, Carson City, Nevada

Dear Mr. Baker:

It appears that a complaint has been registered with your office by the Nevada State Association of Nursing Homes and Allied Institutions relative to certain alleged misleading advertisements on the part of boarding homes, represented to be "Rest Homes."

The complaint presumably quotes from "Rules and Regulations for Hospitals and Related Facilities in Nevada," Part 1—Definitions, Section 1.1, paragraph (c), as follows:

> Rest Home, Nursing Home, or Convalescent Home—Shall be defined as any place or institution which makes provisions for bed care, or chronic or convalescent care, for one or more nonrelated patients who by reason of illness or physical infirmity, are unable to properly care for themselves.

Submitted examples of alleged false advertisements either contain the word "Rest" in the name of the establishment; or the establishment is advertised in the newspapers under the caption of "Rest Homes"; or the advertisement states that the establishment is a "Licensed home for aged, infirm and handicapped persons"; or that a nurse and/or physicians are always in attendance or available.

It is indicated that rules and regulations heretofore adopted by the Nevada State Department of Health do not specifically cover the subject. Further, there appears to be some question as to said Department's authority and responsibility concerning the regulation of advertising of such nature, inclusive of the name which an owner or operator may assign to an establishment or institution irrespective of compliance with licensing requirements under applicable law.

Has the Nevada State Department of Health any legal jurisdiction over group-care facilities or boarding homes falsely represented or advertised as a "sanitarium," "rest home," "nursing home," "maternity home," of "lying-in asylum," if actually unlicensed as such?

CONCLUSION

Yes.

ANALYSIS

Group-care facilities, or boarding homes, of the type here involved, are apparently subject to the provisions of Chapter 431 of Nevada Revised Statutes.

NRS 431.010, paragraph 2, provides:

> Group care facility means an establishment maintained for the purpose of:
>
> (a) Furnishing food and shelter, in single or multiple facilities, to four or more aged, infirm or handicapped adult persons unrelated to the proprietor; and
>
> (b) Providing personal care or services which meet some need beyond basic needs of food, shelter and laundry.

NRS 431.020 provides that the State Welfare Department shall adopt, amend, promulgate and enforce reasonable rules, regulations and standards with respect to group care facilities licensed under the provisions of that particular chapter.

NRS 431.030 ("Standards for licensing, operation, maintenance of group care facilities"), as here relevant, provides as follows:

> 1. The (state welfare) department, with the advice of the state board of health in matters pertaining to health, shall formulate standards for the operation and maintenance of group care facilities, and standards of care conducive to the health and general welfare of persons residing in such facilities.
>
> 2. Standards for the licensing, operation and maintenance of group care facilities shall require that:
>
> (a) Practices and policies of the facility must provide adequately for the protection of the health, safety, physical,

> moral and mental well-being of the persons accommodated in the facility.

NRS 431.040 ("License for operation of group care facility required") provides as follows:

> No person shall operate a group care facility, as defined in this chapter, without a license from the (state welfare) department. No fee shall be charged for such licnese.

On the other hand, Chapter 449 of Nevada Revised Statutes relates to the regulation of "Hospitals and Maternity Homes."

NRS 449.020 ("Hospital defined") provides as follows:

> As used in NRS 449.020 to 449.240, inclusive, "hospital":
> 1. Means any institution, place, building or agency which maintains and operates facilities for the diagnosis, care and treatment of human illness, including convalescence, and including care during and after pregnancy, to which a person may be admitted for over-night stay or longer.
> 2. *Includes any sanitarium, rest home, nursing home, maternity home and lying-in asylum.* (Emphasis supplied.)

NRS 449.030 ("License required to establish, maintain hospital") provides as follows:

> No person, partnership, corporation or association, nor any state or local government unit or any agency thereof, shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in NRS 449.020 to 449.240, inclusive.

NRS 449.040 ("Application for license: Filing; contents.") substantially provides that there be a showing of evidence satisfactory to the State Department of Health that the applicant is of reputable and responsible character, and able to make compliance with applicable statutes and rules and regulations adopted pursuant thereto, relative to the establishment, and maintenance and operation of "a hospital."

Admittedly, the particular licensing requirement contained in Chapter 449 of Nevada Revised Statutes is primarily and substantively applicable to facilities "* * * for the diagnosis, care and treatment of human illness, including convalescence, and including care during and after pregnancy * * *." However, the statutory definition of "hospital" does expressly include, among other designated types of establishment, "rest homes," which name itself connotes convalescence or care (after some presumed disability, infirmity, or illness) within the apparent meaning and intent of the statutory definition of "hospital." Obviously, such implied meaning or connotation is even more emphasized by inclusion in any advertisement of statements informing the public generally and unequivocally that a "Nurse (is) in attendance at all times," and that there are "Two physicians always available." The reasonable import of such types of advertising is that the establishments therein referred to are in the nature of medical facilities or "hospitals," within the scope of the statutory definition, and presumable

subject to the control, supervision and licensing jurisdiction and authority of the Nevada State Department of Health, Division of Hospital Services.

Such conclusion is further confirmed by the definition of "Rest Home,: provided in the rule and regulation which has been promulgated and which, presumably, is presently effective. By both statute and rule, therefore, a "Rest Home" is a "hospital," subject to regulation, supervision and control of the State Department of Health under its licensing jurisdiction, authority and powers. In the absence of a "hospital" license, use by an unlicensed establishment of the name, or its characterization as a "Rest Home" is deceptive and misleading and, therefore, unauthorized.

Further support for the foregoing conclusion is to be found in NRS 207.170 ("False advertising prohibited"), which provides as follows:

> 1. It shall be unlawful for any person, firm, corporation or association, with intent to sell, let, lease, rent or in anywise offer or dispose of merchandise, products, securities, service, lodging, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for rent, lease sale of distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto * * * to make, publish, post, disseminate, display, circulate or place before the public, or cause, directly or indirectly, to be made, published, posted, disseminated, displayed, circulated or placed before the public in this state, in a newspaper or other publication or in a form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign or billboard, or in any other way, an advertisement of any sort regarding such lodgings, meals, merchandise, products, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.
>
> 2. Any person, firm, or any officer or managing agent of any corporation or association, who shall violate the provisions of subsection 1 shall be guilty of a misdemeanor, and shall be punished by a fine of not less than $50 nor more that $200, or by imprisonment in the county jail for not less than 30 days nor more than 90 days, or by both fine and imprisonment.

In our considered opinion, therefore, the type of advertising complained of is violative of both statute and rule defining a "Rest Home," when the establishments involved are not properly licensed by the State Department of Health as "hospitals." Moreover, such advertisements are also misleading and deceptive, and clearly violative of the prohibition against "false advertising."

Such unlicensed establishments should be served with appropriate notice to cease and desist from the use of unauthorized names and from advertisements in any manner inferring that they are "hospitals" as defined in statute and rules and regulations, and they should further be advised that noncompliance with such notice will subject them to the penalties provided in law.

We trust that the foregoing sufficiently answers your inquiry.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: John A. Porter
Deputy Attorney General

OPINION NO. 60-195 ELECTIONS; DISTRICT ATTORNEYS; NRS 252.060-NRS 282.010—A District Attorney who is elected at a biennial election at which District Attorneys are not ordinarily elected may assume office immediately following election upon qualification for office.

Carson City, December 2, 1960

Honorable James L. Wadsworth, District Attorney-elect, Esmeralda County, 1852 Las Vegas Boulevard North, North Las Vegas, Nevada

STATEMENT OF FACTS

Dear Mr. Wadsworth:

Ralph Denton was duly elected District Attorney for Esmeralda County at the general election of 1958. In September of 1959, Mr. Denton resigned that office and the County Commissioners appointed Fred Nelson to fill the vacancy created by the resignation. The office of District Attorney was placed on the ballot at the last biennial election, which occurred November 8, 1960, and, the votes having been canvassed, a certificate of election was issued to James L. Wadsworth.

QUESTION

When may the District Attorney-elect assume the duties of the office of District Attorney of Esmeralda County?

CONCLUSION

The District Attorney-elect may assume office immediately upon satisfying the required statutory qualifications.

ANALYSIS

The question posed above may be phrased in another way, ie., when does the term of the appointee, Fred Nelson, expire?

NRS 252.060 provides:

> In case a vacancy should occur in the office of district attorney, by death, removal, or otherwise, the board of county commissioners shall appoint some suitable person to fill such vacancy *until the next ensuing biennial* election. (Election supplied.)

NRS 245.170 relates to vacancies occurring in any county or township office and, similarly, provides that such vacancies shall be filled by appointment of the county commissioners "until the next ensuing biennial election."

If the election of James L. Wadsworth had been the result of a general election at which District Attorneys are regularly elected, he would enter office on the "first Monday of January subsequent to" the election. (*See* NRS 252.020.) But the office of District Attorney appeared on the November ballot by operation of the provisions cited above, which limit the term of an appointee to fill a vacancy created in that office until the next ensuing biennial election. *See* Attorney General's Opinion No. 179, dated September 20, 1960.

NRS 282.010, subparagraph 4, provides:

> The term of office of all officers, elected or appointed, shall begin from the time of their qualification, unless some other express provision is made by law.

It is our opinion, therefore, that Mr. Wadsworth may assume the office of District Attorney of Esmeralda County immediately upon satisfying the qualifications prescribed in NRS 252.030 (bond), and NRS 282.010 (oath). The incumbent appointee, Mr. Nelson, has occupied the office of District Attorney in "de facto" status only since the election of November 8, 1960. *See State v. Wells*, 8 Nev. 105.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-196 EMERGENCY LOANS; COUNTY COMMISSIONS—County Commissioners of Washoe County have no authority to appropriate funds to aid in the reconstruction of a baseball park owned by the City of Reno, a municipal corporation. State Board of Finance may not approve an application for a temporary emergency loan to Washoe County where the County Commissioners have no authority to expend sums for the purpose contemplated.

Carson City, December 20, 1960

Honorable Grant L. Robison, Secretary, State Board of Finance, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Robison:

Pursuant to the provisions of NRS 354.070, et seq., the Board of County Commissioners of the County of Washoe, adopted a resolution authorizing a temporary emergency loan in the sum of $25,000. The resolution recites that "sufficient sums are not presently available for the reconstruction of recreational facilities at the Moana Ball Park" which were recently destroyed by fire. The notice published pursuant to subsection 2, NRS 354.070, states that the loan is "to be used to help reconstruct the bleachers" at the ball park. Moana Ball Park is owned by the City of Reno, a municipal corporation, located within Washoe County.

The resolution of the Washoe County Commissioners is presently being considered by the State Board of Finance, and that Board seeks the opinion of this office on the following question:

QUESTION

May the State Board of Finance approve a resolution of the Washoe County Commissioners authorizing a temporary emergency loan for the purpose of assisting in the reconstruction of bleachers in a ball park owned by the City of Reno?

CONCLUSION

The State Board of Finance may not approve such a resolution.

ANALYSIS

NRS 354.070 through NRS 354.110 outline the method by which a Board of County Commissioners may in cases of "great necessity or emergency" authorize temporary loans. The State Board of Finance is charged with the responsibility of examining and approving such resolutions. (NRS 354.080). It is required that a copy of the county resolution be forwarded to the Secretary of the Nevada Tax Commission. The Secretary of the Commission then submits to the Board of Finance, the resolution, "together with a factual report of the tax structure" of the county concerned and the ability of the county to repay the loan. (NRS 354.080.) The information this office has received to date does not disclose whether or not such a report has been submitted.

We are in accord with the opinion of our predecessor who, in construing NRS 354.070 et seq., stated:

> To us, no doubt exists but that the purposes for which emergency loans may be obtained * * * are confined to such as are strictly applicable or necessarily for county needs or operation. (Attorney General Opinion No. 392, July 8, 1958.)

Our first inquiry then must be whether or not the Washoe County Commissioners are empowered to expend county funds for the purpose of aiding the reconstruction of a ball park owned by the City of Reno.

It is well established that "county commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect." *State ex rel. King v. Lothrop*, 55 Nev. 405, 36 P.2d 355. *See also Sadler v. Board of Com'rs. Of Eureka County*, *15 Nev. 39; State ex rel. Wood v. Haeger*, 55 Nev. 331, 33 P.2d 753.

Our search fails to reveal any statute expressly or impliedly authorizing County Commissioners to appropriate funds to aid in construction or reconstruction of a recreational facility owned by a municipal corporation located within the county. Such statutes as appear to be relevant to the instant question , on the contrary, clearly imply that the Legislature intended that such expenditures be prohibited.

NRS 244.300 reads as follows:

> The county commissioners of the several counties having a population of 7,000 or more, in addition to the powers now conferred upon them by law, are authorized and empowered to operate, manage, improve and maintain all public parks, golf courses and other public recreational centers and areas, the construction of which has either been initiated or completed, *and the title to which is held by the county*. (Emphasis added.)

NRS 244.445 provides:

> The county commissioners of the counties of the state having a population in excess of 15,000, * * * shall have power and jurisdiction within their respective counties, and outside of the limits of incorporated cities located in such counties: * * *.
>
> 2. To provide for the construction, improvement, maintenance, vacation and preservation of *county* parks, playgrounds, and recreational facilities, * * *.
>
> 3. To provide for the maintenance, repair, alteration, improvement and preservation of any other *county property* not herein mentioned, * * *. (Emphasis added.)

The emphasized portions of the cited statutes clearly limit expenditures by counties for the purpose of construction and maintenance of parks and recreational facilities to property owned by the county. We therefore conclude that the County Commissioners are without authority to appropriate funds for the purpose contemplated by the resolution, which is to assist in the reconstruction of a recreational facility, title to which does not lie in the county but in the City of Reno.

Article VIII, Sec. 10 of the Nevada Constitution prohibits a county from loaning its credit in aid of "any joint stock company, corporation or association whatever, * * * except, railroad corporations, companies or associations."

In *Conservation District v. Beemer*, 56 Nev. 104, 45 P.2d 779, the respondent argued that since the only express exemption contained in the constitutional provision related to railroads, a loan of the credit of Washoe County to a conservation district was unconstitutional, even though it was quasi-public corporation. However, the Nevada Supreme found it unnecessary to decide this point. Similarly, the question of the constitutionality of a loan of the credit of the County of Washoe to the municipal corporation of Reno might be raised here.

Regardless of the constitutionality of an expenditure of county funds to aid in the reconstruction of a city-owned ball park, for the reasons stated above it is our view that the Commission is without authority to

appropriate funds for such a purpose. It follows that the Board of Finance should not approve a loan sought for a purpose which is ultra vires.

The City of Reno may have sufficient funds available for recreational purposes to provide for the required reconstruction. In the event such funds are not available, your attention is invited to the provisions of NRS 354.420 which prescribe the means by which cities may make applications for emergency loans. A properly framed resolution submitted on behalf of the City would not be subject to the defects here pointed out relating to the Washoe County resolution, and could in our opinion be considered by the State Board of Finance.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: Earl Monsey
Deputy Attorney General

OPINION NO. 60-197 CORPORATIONS; FOREIGN—Fees payable to Secretary of State. The fees to be exacted of foreign corporations for the privilege of entering the State to do an intrastate business therein, computed upon authorized capital stock, shall not exceed $25,000. NRS 80.050, as amended by Chapter 132, 1960 Statutes, construed.

Carson City, December 21, 1960

Honorable John Koontz, Secretary of State, Carson City, Nevada

STATEMENT OF FACTS

Dear Mr. Koontz:

The El Paso Natural Gas Company, a Delaware corporation, qualified to do business in Nevada on February 15, 1954. At that time it paid to the Secretary of State a filing fee of $12,675. Having amended its charter increasing its authorized capital stock, it filed with the Secretary of State its amendment to Articles of Incorporation on August 8, 1956 and paid the further fee of $6,000. Having again amended its charter authorizing a further increase in its capital stock, it paid the Secretary of State, on January 17, 1957, a further sum of $6,225. On May 18, 1959, by charter amendment, the corporation increased its authorized capital to $179,775,000 and paid the further fee to the Secretary of State of $2,550. Upon this one item of fees computed upon authorized capital stock it has, therefore, paid the total of $27,450 to the Secretary of State of the State of Nevada. It has also paid other fees, not material here, for incidental services in the amount of $365. Such incidental fees cover such items as charges for certifying copies of Articles of Incorporation, the filing of lists of officers and directors annually and like services.

The Legislature of 1960, by Chapter 132, Statutes of 1960, page 177, effective March 9, 1960, amended NRS Section 80.050, which in part, as amended, provides as follows:

> 80.050 Foreign corporations shall pay the same fees to the Secretary of State as are required to be paid by corporations organized under the laws of this state, *but in no case shall the amount of fees to be paid exceed the sum of $25,000.*
>
> (The emphasis has been supplied. This represents the new material added by Chapter 132, Statutes 1960).

On August 30, 1960, the corporation caused to be filed with the Secretary of State a certificate of reduction of authorized capital to the then total of $174,925,000.

Recently the corporation has increased its authorized capital stock (it has a number of varieties and designations of preference, not material here) and has tendered to the Secretary of State, for filing, the amendment to its Articles of Incorporation. The Office of the Secretary of State desires an interpretation of the statute, as amended, with reference to the fee to be charged.

QUESTION

In computing fees to be paid to the Office of the Secretary of State by a foreign corporation on account of changes from time to time of its capital structure, may that officer add all fees paid on account of this one item, from time to time, and upon the total reaching $25,000, refrain from making further charges, upon further filings of changes in capital structure?

CONCLUSION

Yes, we construe such to be the meaning of the statute as presently amended.

ANALYSIS

Under NRS 80.050, prior to the 1960 amendment, it was the duty of the Secretary of State to collect of each foreign corporation upon changes in authorized capital stock, the same fees that would be collected from a domestic corporation upon making such changes. The fees to be collected of a domestic corporation upon its incorporation are provided in NRS 78.760. Under the provisions of NRS 78.765, it is provided that upon the filing of a certificate of amendment to the Articles of Incorporation, of a domestic corporation, increasing the authorized capital stock, a fee is to be collected in amount representing the difference between the charge that would have been made upon the filing of original Articles of Incorporation of that capital structure and the amount previously paid.

We have no doubt that the statutes mentioned would be regulative of the situation as to the fees to be charged in this case if it were not for the amendment of 1960, and that since the amendment to articles now offered for filing would bring the total authorized capital stock above, in amount, the total authorized by the amendment of May 18, 1959, of $179,775,000

that there would now be an additional charge, to be computed under NRS 78.760 and 78.765. Section NRS 80.030, subsection 2, requires a foreign corporation, qualified in Nevada, upon filing amendatory Articles of Incorporation in the place of its domicile, to file forthwith such amendatory articles in Nevada. Such was the law of Nevada from March 1949, and was a condition under which El Paso entered the State in February 1954. To require additional fees for such filings, as provided in NRS 78.765, would not render the act unconstitutional under the commerce clause or the due process clause of the Fourteenth Amendment. *State v. Koontz*, 69 Nev. 25, at 34; *Atlantic Refining Company v. Virginia*, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24. Such an entrance fee is not a tax but compensation for the privilege applied for, namely, the privilege of doing a local business. *Atlantic Refining Company v. Virginia*, supra.

But we have the amendment of 1960, and we have a corporation that heretofore has paid above $25,000 to the Secretary of State, computed entirely upon its authorized capital stock.

Under the authority of *General Motors Acceptance Corporation v. McCullem* (Texas 1928) 10 S.W.2d 687, this question well near on "all fours" was determined. There the statute provided for additional fees to be paid upon the filing of amendments to the Articles of Incorporation, and concluded with this provision: "* * * provided that in no event shall such fee exceed twenty-five hundred dollars." There it was held that the corporation having previously paid the full sum of $2,500 was entitled to have its certificate of amendment of Articles of Incorporation authorizing an increase in capital stock filed, without further charge. Upon such payment or payments the license was granted, as a ministerial act, for ten years, and held that increases in authorized capital stock, during such period, should be filed without further fees. In Nevada the authority is not granted for ten years, but upon a much higher scale of fees is granted for perpetuity.

The computation of the $25,000, however, is not to include all items and sums paid by a corporation, but only those sums paid under NRS 78.760 and 78.765. It is our opinion that other fees to be paid to the Secretary of State in behalf of a corporation, under the laws of Nevada, may not be added into the computation designated and intended by NRS 80.050, as amended by Chapter 132, Statutes 1960. This rule should prevail for the reason that other fees are for specific services and each of such other fees is more or less commensurate to the service, whereas the fees or charges here under consideration are exacted as compensation for the privilege of doing an intrastate business therein. The $25,000 is maximum that may be charged for this privilege, and not the maximum that may be charged of the corporation.

For the reasons given, it follows that El Paso Natural Gas Company is entitled to have filed by the Secretary of State its amended Articles of Incorporation, or amendment thereto, authorizing the sale of Capital stock of value in excess of the former maximum of $179,775,000, without the payment of further fees insofar as fee computation depends upon authorized capital stock.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 60-198 STOCK COMMISSIONERS, STATE BOARD OF—When uniform brand inspection has been dispensed with by a majority of the stockmen of a district, it cannot be reinstated by less than a majority vote of such stockmen. NRS 565.040, subsections 2 and 4 construed.

Carson City, December 21, 1960

Dr. W. F. Fisher, Executive Officer, State Department of Agriculture, Post Office Box 1209, Reno, Nevada

STATEMENT OF FACTS

Dear Mr. Fisher:

Section 565.010 Nevada Revised Statutes provides:

> 565.010 As used in this chapter "board" means the state board of stock commissioners.

NRS 565.040 in part provides:

> 565.040 1. The board is authorized and empowered to declare any part or parts of the State of Nevada a brand inspection district or districts.
> 2. After the creation of any brand inspection district as authorized by this chapter all neat cattle, horses or mules within any such district shall be subject to brand inspection in accord with the terms of this chapter before:
> (a) Consignment for slaughter within any district; or
> (b) Any transfer of ownership for sale or otherwise; or
> (c) Removal from such district when such removal is not authorized pursuant to a livestock movement permit issued by the board.
> 4. When a petition *signed by a majority* or the owners of neat cattle, horses or mules within a brand inspection district is filed with the board praying that the board inspection district be excluded from the operation of the provisions of paragraphs (a) and (b) of subsection 2 of this section, the board forthwith shall cause the brand inspection district to be so excluded by the issuance of a regulation in the manner prescribed in this chapter. (Emphasis supplied.)

Under the provisions of subsection 1 of NRS 565.040, the Board issued and published a regulation declaring Lyon County a brand inspection district.

Subsequent to the issuance and publication of the regulation declaring Lyon County a brand inspection district, a petition signed by a majority of the owners of neat cattle, horses and mules within said brand inspection

district, prepared pursuant to the provisions of subsection 4 of NRS 586.040, was filed with the said Board, praying that the brand inspection district so established, be relieved of brand inspection, under the provisions of (a) and (b) of subsection 2, of NRS 565.040. by said petition it was shown to the Board that it was the desire of a majority of the stock owners entitled to vote thereon that in said brand inspection district brand inspection be not required in transactions involving (a) consignment for slaughter within the district and (b) transfers of ownership within the district.

Thereafter, inquiry having been made to the Attorney General as to the mandatory effect of such petition upon the Board, it was officially ruled in Attorney General Opinion No. 309, dated September 19, 1957, that the provisions of subsection 4 of NRS 565.040, having been met by the signing and filing by a majority of the eligible stockmen of the county, praying to be relieved of inspection in situations designated by the statute, it became and was incumbent upon the Board to immediately honor the petition, and exclude the district so established from the operation of the provisions of (a) and (b) of subsection 2 of NRS 565.040.

Hereafter we shall refer to the full inspection authorized by the statute as "uniform brand inspection," and the inspection petitioned by the eligible stockmen of the district as "limited brand inspection."

It appears that thereafter, the Board of its own motion mailed ballots to all eligible stockmen of the Lyon County Brand Inspection District, according to its records, one hundred eighty-nine (189) in number, upon which ballots the stockmen were asked to vote upon the acceptance or rejection of uniform brand inspection. Of the 189 eligible stockmen, qualified to vote upon this question, ninety-eight (98) stockmen voted. Sixty-three (63) of their number voted for uniform brand inspection, i.e., 35 voted for the continuation of the present method of limited brand inspection.

QUESTION

May uniform brand inspection as provided by subsection 2 of NRS 565.040 be returned to the brand inspection district, upon the authority of the plurality vote mentioned, in light of the fact that limited brand inspection has been required by a majority of the eligible stockmen of the district?

CONCLUSION

We conclude that an affirmative vote of a majority of the eligible stockmen of the district will be required to return the district to uniform brand inspection.

ANALYSIS

After the lawful creation of the brand inspection district, comprising Lyon County, the district was, by affirmative action of a majority of its eligible stockmen, relieved of a portion of the restrictions placed upon it. It was relieved of uniform brand inspection and adopted limited brand inspection, in the manner provided in subsection 4 of NRS 565.040. Apparently more than one-half of the eligible stockmen of the county district, at that time (1957) desired to operate with limited brand

inspection. Apparently this same viewpoint still obtains for substantially less than one-half of their number (exactly one-third) have voted to return to uniform brand inspection.

It clearly appears to be the legislative intent that a majority of the eligible stockmen of the district might, by affirmative action, dispense with uniform brand inspection and avail themselves of a less restrictive procedure, and likewise the intention that thereafter a majority of the eligible stockmen of the district might, by affirmative action, reverse their former decision and reinstate uniform brand inspection.

If the ruling were otherwise, the conclusion might well be ridiculous. Suppose that upon the 189 ballots sent out, 15 stockmen vote. Suppose that 8 of the stockmen vote to return to uniform brand inspection and 7 vote to retain limited brand inspection. The 8 being a plurality would reverse the wishes of approximately 95 or more (a majority of 189 eligible voters) and would reinstate uniform brand inspection. The Legislature did not intend that in a case such as this silence (failure to vote) would constitute consent.

It is therefore our opinion that a proper statutory construction would require a vote a majority of all eligible stockmen of the district, so evidencing their desires, before the district could be returned to uniform brand inspection, and that the plurality vote obtained in this case is ineffectual.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: D. W. Priest
Deputy Attorney General
