

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1975

The following opinions have been furnished by this office in response to inquiries submitted by the various state officers and departments, district attorneys and city attorneys.

177 [NRS 245.043](#)—Annual Salaries for Elected County Officials—The term “annual salaries,” as used in [NRS 245.043](#), does not refer to a calendar year, but refers instead to the years of an elective county officer’s term, according to the time of year that the term commences. The salary to be paid is the salary specified by statute, neither more nor less, provided the full term is served.

CARSON CITY, January 7, 1975

THE HONORABLE WILLIAM P. BEKO, *Nye County District Attorney*, P.O. Box 593,
Tonopah, Nevada 89049

DEAR MR. BEKO:

You have requested an opinion regarding [NRS 245.043](#).

FACTS

All county elective officials assume their new terms of office on the first Monday of January following the general election. In 1975, this date falls on January 6. [NRS 245.043](#) requires that such county elective officials be paid *annual* salaries. Some counties have interpreted the term “annual salaries” to require payment between January 1 to December 31 of each year, thereby raising the question as to whether county elective officials serving the remainder of their terms from January 1 to January 6, 1975, are entitled to additional compensation.

QUESTION

What is the definition of the term “annual salaries,” as used in [NRS 245.043](#)?

ANALYSIS

There is no doubt but that the term of an incumbent county elective official this year will end on January 6, 1975, regardless of the actual date upon which he or she took office four years earlier. This is because Title 20 of Nevada Revised Statutes, which deals with counties, provides that elective county officials do not enter upon the duties of their offices until the first Monday of January subsequent to their election. This means, as a consequence, that incumbent elective officials continue serving their terms until that date arrives and a successor takes over. Incumbent county elective officials, therefore, have lawfully served their terms up to January 6, 1975.

However, [NRS 245.043](#), subsection 2, makes the following provision:

The elected officers of the counties of this state shall receive annual salaries in the base amounts specified in:

(a) Table 1 plus a special cost of living adjustment of 10 percent effective July 1, 1973 for service prior to January 6, 1975.

* * *

An annual salary is defined as a yearly fixed payment to employees, such payment being made regardless of the extent of services rendered by such employees. *Benedict v. United States*, 176 U.S. 357 (1899); *Williamson v. United States*, 309 F.2d 892 (C.A., Ky. 1962). A fixed annual salary does not take effect until the date that the official takes office. 63 Am.Jur.2d, *Public Officers and Employees*, § 376. An annual salary means the salary for each year of incumbency. The term “annual” does not refer to calendar years, but refers to the years of the incumbent’s term, according to the time of year that the term commences. *State ex rel. Harvey v. Linville*, 318 Mo. 698, 300 S.W. 1066, 1067 (1927).

According to the case law established above, calendar years, whether defined as January 1 to December 31 or defined as a 365 day period (see Attorney General’s Opinion No. 135, dated June 27, 1973, for the distinction), is not to be considered in the definition of “annual salaries” for the purposes of [NRS 245.043](#). It is the years of incumbency only that are to be considered, regardless of whether a particular year of incumbency is more or less than 365 days. An “incumbent year,” therefore, may be greater or less than 365 days. Furthermore, for the purposes of [NRS 245.043](#), an annual salary is determined to begin on the date an official commences his term.

The present terms of the various incumbent county elective officials began on January 4, 1971, and ended on January 6, 1975. These are the years of incumbency for which payment is to be made pursuant to [NRS 245.043](#). Therefore, for the incumbents’ last year of service, running from January 4, 1974 to January 6, 1975, they are to be paid the salary, neither more nor less, established by Table 1 of [NRS 245.043](#). With regard to the next 4 years, we would note that county elective officials began their terms on January 6, 1975 and will end them on January 1, 1979. Although their last year of incumbency will thus be shorter than the previous three years of service, the officials are entitled to be paid the entire amount specified by Table 2 of [NRS 245.043](#). When an office with a fixed salary is created and a person has fully discharged the duties of that office, he is entitled during his incumbency to be paid the salary prescribed by law. 63 Am.Jur.2d, *Public Officers and Employees*, § 362. Once again, calendar years are disregarded; only incumbent years are to be considered.

CONCLUSION

Incumbent county elective officials serving their last year of office from January 4, 1974 to January 6, 1975, are to be paid no more than the salary provided for in Table 1 of [NRS 245.043](#). The period of time between January 1 to January 6, 1975, is not to be considered for additional compensation, but constitutes part of the incumbents’ last year of office, for which [NRS 245.043](#) makes full compensation.

The term “annual salaries,” as used in [NRS 245.043](#), does not refer to a calendar year, but refers instead to the years of an elected county officer’s term, according to the time of year that the term commences. The salary to be paid is the salary specified by statute, neither more nor less, provided, of course, that the full term is served.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

178 Nevada Constitution, Article 9, Section 3—State issued general obligation bonds for the purpose of constructing various improvements in the state-owned Marlette Lake Water System may be contracted outside the constitutional debt limitation of 1 percent and may be redeemed over a period greater than 20 years.

CARSON CITY, January 8, 1975

MR. HOWARD E. BARRETT, *Director, Sstate Department of Administration*, 209 East Musser Street, Carson City, Nevada 89701

DEAR MR. BARRETT:

You have posed the following questions for opinions by this office:

QUESTIONS

1. If the State were to issue general obligation bonds for the purpose of constructing various improvements in the Marlette Lake Water System, could those bonds be contracted outside the State's constitutional 1 percent bonded indebtedness limitation?
2. Could such bonds be redeemed over a period greater than 20 years after approval by the Legislature?

ANALYSIS

Inasmuch as both questions posed focus upon limitations set out in the Nevada Constitution, Article 9, § 3, this analysis will consolidate the questions concerning constitutional limitations as to percent and duration of state indebtedness.

The first paragraph of Article 9, § 3 of the Nevada Constitution provides, *inter alia*, that:

The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one per cent of the assessed valuation of the state * * * Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law. * * *

The section was amended by the people in the general election of 1934 wherein they approved and ratified the addition of a second paragraph to Article 9, § 3, as follows:

The state, notwithstanding the foregoing limitations, may, pursuant to authority of the legislature, make and enter into any and all contracts necessary, expedient or advisable for the protection and preservation of any of its property or natural resources, or for the purposes of obtaining the benefits thereof, however arising and whether arising by or through any undertaking or project of the United States or by or through any treaty or compact between the states, or otherwise. The legislature may from time to time make such appropriations as may be necessary to carry out the obligations of the state under such contracts, and shall levy such tax as may be necessary to pay the same or carry them into effect.

The interrelationship between debt contracted pursuant to the limitations set forth in the first paragraph of Article 9, § 3 of the Nevada Constitution *vis a vis* debt contracted pursuant to the exemptions set forth in the second paragraph was analyzed by the Nevada

Supreme Court in *State ex rel. State Gen. Obligation Bond Commission v. Koontz*, [84 Nev. 130](#), 437 P.2d 72 (1968). The court, at 136, characterized the interrelationship as dependent upon the classification of debt and set forth two possible interpretations of the effect of Article 9, § 3:

Both ordinary and “natural resource” debt may constitute a single class, which is permitted to exceed the debt limit only if the last added amount which produced the excess was “natural resource” debt; or ordinary debt may constitute one class, which may be incurred up to the 1 percent limit, while “natural resource” debt constitutes a separate class, which may be incurred without limitation as to amount.

After discussion of the concept of separate classes of state debt as contained in the Nevada Constitution, Article 17, § 7, and in all factually similar cases brought to the court’s attention, the court concurred in the reasoning of those decisions supporting the concept of a separate class of debt, and at 137 held “that the bonds proposed to be issued by the Colorado River Commission (together with the Marlette Lake bonds and any others which may be issued under the exemption of the second paragraph debt limit section) will constitute a separate class of debt.”

Previously, in *Marlette Lake Co. v. Sawyer*, [79 Nev. 334](#), 383 P.2d 369 (1963), the Nevada Supreme Court found at 337 that Chapter 462, 1963 Statutes of Nevada, p. 1303 (whereby the Legislature found and declared the purchase of the Marlette Lake Company’s property to be “both expedient and advisable for the protection and preservation of the natural resources of the State of Nevada and for the purposes of obtaining and continuing the benefits thereof now and in future years * * *”) was “constitutionally permissible within the second paragraph of Nev. [Const. art. 9, § 3.](#)”

The proposed improvements in the Marlette Lake Water System would appear to qualify for treatment as a separate “natural resource” debt on the basis of one or more of the exemption grounds set forth in the second paragraph of Article 9, § 3, e.g., (a) the protection and preservation of state property; (b) the protection and preservation of its natural resources; (c) the obtaining of the benefits of state property; or (d) the obtaining of the benefits of its natural resources.

While *Marlette Lake Co. v. Sawyer*, *supra*, focuses upon exception of such acquisition from the 1 percent limitation of indebtedness, the case of *State ex rel. State Gen. Obligation Bond Commission v. Koontz*, *supra*, made it clear that debts qualifying under the terms set forth in the second paragraph of Article 9, § 3 are excepted from all the limitations listed in the first paragraph when at 136, the Nevada Supreme Court stated:

We hold that these words [notwithstanding the foregoing limitations] apply to all the limitations formed in the first paragraph: the amount of debt, the term for which it may be contracted, and the requirement of a specific tax appropriated for its repayment.

In holding that second paragraph debt limit section bonds constitute a separate debt exempt from all the limitations formed in the first paragraph of Article 9, § 3, the Nevada Supreme Court cautioned at 137:

In so holding, we wish not to be understood * * * as holding that any bonds issued for any purpose enumerated in the second paragraph automatically constitute part of this separate class. We believe that the words, “pursuant to authority of the legislature,” make the exemption discretionary [with the legislature]. * * *

CONCLUSION

The State may issue general obligation bonds for the purpose of constructing various improvements in the Marlette Lake Water System without complying with the limitations set out in the first paragraph of Article 9, § 3 of the Nevada Constitution as to debt ceiling and duration.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By PATRICK D. DOLAN, *Deputy Attorney General*

179 State fish and game laws are enforceable against non-Indian violators on Indian land absent an infringement of tribal sovereignty.

CARSON CITY, January 10, 1975

MR. GLEN GRIFFITH, *Director, Department of Fish and Game*, P.O. Box 10678, Reno, Nevada 89510

DEAR MR. GRIFFITH:

This is in response to your inquiry of November 5, 1974, regarding the issuance of a search warrant and apprehension of a non-Indian on the Duck Valley Indian Reservation.

QUESTION

The general substance of your question is: "Are state fish and game laws enforceable against non-Indians who commit violations on Indian Reservations?"

ANALYSIS

In September of 1950, this office, in Attorney General's Opinion No. B-950, answered a similar question pertaining to the Pyramid Lake Indian Reservation. We answered that inquiry in the affirmative, referring to the case of *Ex parte Crosby*, [38 Nev. 389](#) (1915), and citing from page 393 of that case:

That the state courts have jurisdiction over offenses committed by parties other than Indians on Indian reservations is, we think, well established; and this general rule is not affected by a provision in the enabling act of a state taking account of Indian lands or Indian reservations within the territory or providing that such Indian lands should remain under the absolute jurisdiction and control of the Congress of the United States. (*Draper v. United States*, 164 U.S. 240, 17 Sup.Ct. 107, 41 L.Ed. 419.)

For almost 100 years, jurisdiction over offenses between non-Indians on the reservations has been left to state authorities. In 1881, the United States Supreme Court ruled that the Federal Circuit Court for the District of Colorado had no jurisdiction in an indictment against a white man for the murder of another white man within the Ute Reservation in the State of Colorado. *U.S. v. McBratney*, 104 U.S. 621 (1881). That court held that by virtue of its acquisition of statehood, Colorado acquired criminal jurisdiction:

* * * over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation. * * * The courts of

the United States have, therefore, no jurisdiction * * * unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. (At page 624.)

See also: *New York ex rel. Ray v. Warden*, 326 U.S. 496 (1946); *Williams v. Lee*, 358 U.S. 217 (1959); and *William v. U.S.*, 327 U.S. 711 (1946).

Recently, this office stated, in reply to a question regarding jurisdiction on the Walker River Reservation:

There is no question that a state has jurisdiction over non-Indians committing criminal acts against the person or property of another non-Indian on an Indian reservation. *United States v. McBratney*, 104 U.S. 621 (1881); *New York ex rel. Ray v. Warden*, 326 U.S. 496 (1946).

In addition, the State of Nevada has jurisdiction to punish offenses committed by non-Indians on Indian reservations which offenses are not related to Indians or Indian property. This proposition is based upon the fact that, where Indian wards of the Federal government are not involved, an Indian Reservation is generally considered to be a portion of the state within which it is located, *Draper v. United States*, 164 U.S. 240 (1896); and the exercise of state jurisdiction in such instances would not affect the authority of the tribal council over reservation affairs and, therefore would not infringe on the right of the Indians to govern themselves. *State of New Mexico v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963). Attorney General's Opinion No. 166, dated May 2, 1974.

Fish and game laws have been treated in a manner much like criminal laws by the courts. See: *Donohue v. California Justice Court for Klamath Trinity Judicial District*, 15 Cal.App.3d 557, 93 Cal.Rptr. 310 (1971); *State ex rel. Nepstad v. Danielson*, 149 Mont. 438, 427 P.2d 689 (1967); 78 Decisions of the U.S. Department of the Interior, 101 (1971).

It should be noted that a recent case reached a contra result. In *Quechan Tribe of Indians v. Rowe*, 350 F.Supp. 106 (D.C. Cal. 1972), the court noted that the local sheriff had directly interfered with the Indians' enforcement of their own hunting rights by arresting the tribal officer who was enforcing them. No such incident has occurred here. When the acts of the local fish and game officials comply with state law, and do not interfere in any way with Indian rights, there can be no doubt that state laws are applicable.

Additionally, it should be noted as to the Duck Valley Indian Reservation, the 1863 treaty with the Western Shoshone provides for compensation to those Indian people "for loss of game and the rights and privileges hereby conceded." Thus, it is doubtful that there are any existing Indian rights as to game on that reservation that could be interfered with.

CONCLUSION

It is the opinion of the Office of the Attorney General that state fish and game laws are enforceable against non-Indian violators on Indian reservations, absent a showing that such enforcement infringes upon the right of the Indians to govern themselves and/or tribal property.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By D. G. MENCHETTI, *Deputy Attorney General*

180 Probation—Application of [NRS 207.080](#) and [207.090](#) to Persons on Probation Under [NRS 453.336](#), subsection 6—A person on probation under [NRS 453.336](#), subsection 6, is not a “convicted person” for the purposes of [NRS 207.080](#) and [207.090](#). Therefore, it is not necessary that he register as a convicted person.

CARSON CITY, January 22, 1975

MR. JAMES R. GEROW, *Deputy Chief, Department of Parole and Probation, Carson City, Nevada 89701*

DEAR MR. GEROW:

This is in response to your request for an opinion concerning the application of [NRS 207.080](#) and [207.090](#) to persons placed on probation under [NRS 453.336](#), subsection 6.

QUESTION

Is it necessary for a person who has been placed on probation under [NRS 453.336](#), subsection 6, to register as a convicted person under [NRS 207.080](#) and [207.090](#)?

ANALYSIS

[NRS 207.080](#) defines a “convicted person,” for the purposes of [NRS 207.080](#) to [207.150](#), inclusive, as follows:

- (a) Any person who has been or hereafter is convicted of an offense punishable as a felony * * *
- (b) Any person who has been or hereafter is convicted in the State of Nevada, or elsewhere, of the violation * * * (Enumerated offenses not relevant to this inquiry.)

For the purposes of imposition of legal disabilities and penalties, a person is convicted at the time a judgment of guilty is made and entered.

[NRS 453.336](#), subsection 6, states:

* * * [T]he court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions.

The intent of [NRS 453.336](#), subsection 6, is shown by [NRS 453.336](#), subsection 8, which reads as follows:

Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for a second or subsequent conviction under the provisions of [NRS 453.011](#) to [453.551](#), inclusive.

[NRS 453.336](#), subsection 8, makes the intent of the Legislature clear. A person who is placed on probation under [NRS 453.336](#), subsection 6, has not been convicted of a crime, and, unless the person violates his probation, he will not be convicted of the crime in question and will not suffer the penalties, civil and criminal, that flow from a conviction.

This is in contrast to the probation procedure in other crimes. That procedure is controlled by [NRS 176.175](#) to [176.255](#), inclusive. In these cases, a judgment of guilty is made and entered but sentence is suspended pursuant to terms and conditions. The ordinary probationer has been convicted of a crime, and suffers the criminal and civil penalties that follow from the conviction of a crime. The legislative directive is clearly to set up a special category for first time violators of [NRS 453.336](#). This takes into account the nature of the offense, and maximizes the chances of a successful rehabilitation of the first time offender.

CONCLUSION

A person on probation under [NRS 453.336](#), subsection 6, is not a “convicted person” for the purposes of [NRS 207.080](#) and [207.090](#). Therefore, it is not necessary that he register as a convicted person.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By PATRICK B. WALSH, *Deputy Attorney General*

181 Appeals from Justice or Municipal Courts—For the purposes of determining motor vehicle demerit points pursuant to [NRS 483.470](#), the date of conviction is the date a court pronounces sentence upon a defendant. When an appeal is taken from a justice or municipal court to a district court but is dismissed before the district court tries the case, the appeal is nullified and the date of conviction for the purposes of [NRS 483.470](#) is the date the justice or municipal court pronounced sentence on the defendant. When an appeal is taken from a justice or municipal court and is heard by the district court, the judgment of the justice or municipal court is vacated and the case is tried de novo by the district court and the date of conviction for the purposes of [NRS 483.470](#) is the date the district court pronounces sentence on the defendant.

CARSON CITY, January 24, 1975

THE HONORABLE PAUL W. FREITAG, *City Attorney*, 431 Prater Way, Sparks, Nevada
89431

DEAR MR. FREITAG:

You have relayed a request for an opinion by this office from The Honorable John G. Morrison, Sparks Municipal [Municipal] Judge, regarding the effective date of convictions for violations of the State’s motor vehicle laws, when an appeal has been taken to the district court.

FACTS

[NRS 483.470](#) provides that the Department of Motor Vehicles shall establish a system of demerit points to be assessed against a Nevada driver convicted of a traffic violation in Nevada by any municipal, justice or district court in the State. Details of the conviction are to be transmitted to the Department of Motor Vehicles by the court where the conviction is obtained.

[NRS 266.595](#) provides that final judgments of municipal courts may be appealed to the district court. In this regard, Judge Morrison has formulated two hypothetical situations. In the first situation, an appeal of a municipal court judgment is taken to the

district court. The parties, before the district court can hear the case, stipulate to a dismissal of the appeal. The district court enters an order accepting the stipulation, dismissing the case and ordering the defendant to abide by the judgment of the municipal court.

In the second situation, an appeal of a municipal court judgment is taken to district court and the case is heard. The district court sustains the conviction and the fine and orders the defendant to pay the fine sustained.

Since a report of conviction must then be sent to the Department of Motor Vehicles in the above situations, Judge Morrison's question relates to the effect the above appeals have on the effective date of conviction which must be reported to the Department of Motor Vehicles.

QUESTION

When a report of conviction for violation of the State's motor vehicle laws is sent to the Department of Motor Vehicles after an appeal to the district court is resolved, which date does the municipal court use as the date of conviction? Is it, in the case of a dismissed appeal, the date the order of dismissal is signed by the district court; is it, in the case of judgment upheld on the appeal in the district court, the date the judgment is sustained; is it the date the fine is paid; or is it the original date that the defendant was sentenced in municipal court?

ANALYSIS

As indicated above, [NRS 483.470](#) provides that the Department of Motor Vehicles will establish a system of demerit points to be assessed against Nevada drivers for traffic violations they may have committed. [NRS 483.470](#), subsection 2, defines "traffic violation" as:

* * * conviction on a charge involving a moving traffic violation in any municipal court, justice's court or district court in the State of Nevada. * * *

The first issue to be decided is a determination of what constitutes a "conviction" for the purposes of [NRS 483.470](#). The term "conviction" has been broken down into three classifications. An interpretation of the statute under consideration usually determines which classification applies. Under the first classification, "conviction" is used in the general or popular sense. It means the establishment of a defendant's guilt. It is merely the act of proving guilt. Second, "conviction" is used in the ordinary legal sense, as that particular stage of a prosecution when a guilty plea is entered or a guilty verdict returned. Finally, "conviction" may be used in the technical or strict sense of the term. It is the final judgment of the court denoting the consummation of the prosecution from the filing of the complaint to the judgment of the court. 18 C.J.S., Conviction. Some courts are split on the question of whether the imposition of sentence is within the final judgment of the court, and, thus, part of the "conviction." 13 Corpus Juris, Conviction. In Nevada, however, the imposition of sentence is considered to be part of the final judgment. *Allgood v. State*, [78 Nev. 326](#), 372 P.2d 466 (1962); *Ex parte Salge*, [1 Nev. 449](#) (1865).

Since the purpose of [NRS 483.470](#) is to permit the Department of Motor Vehicles to assign demerit points after official notification of conviction of a traffic violation, the third classification of the term "conviction" would appear to be the appropriate standard to follow. The first classification is inappropriate for the record keeping necessary under [NRS 483.470](#) as it is merely the popular terminology for the process of convicting. The second classification is limited only to the entering of a guilty plea or return of a guilty verdict and, therefore, is inappropriate for the purposes of [NRS 483.470](#), as a guilty plea may be withdrawn or a guilty verdict set aside before final judgment. For the purposes of [NRS 483.470](#), this office concludes that the term "conviction" means the final judgment of a court as to the guilt of a defendant, including the imposition of sentence. Therefore, a

defendant who has been found guilty of violating the State's traffic laws is convicted for the purposes of [NRS 483.470](#) on the date that a court sentences that defendant for the violation.

What effect, however, does an appeal have on determining the date of conviction? This question must be answered in terms of the hypothetical cases posed by Judge Morrison. In the first hypothetical, the appeal to the district court is dismissed and the district court orders the defendant to abide by the municipal court's judgment. Is the date of conviction the date the defendant was sentenced in municipal court or the date the district court signed the order of dismissal?

The general rule, which is followed in Nevada, is that the dismissal of an appeal has the effect of nullifying the appeal, leaving the trial court in the same position it was in before the appeal was taken. *Bancroft v. Pike*, [33 Nev. 53](#), 110 P. 1 (1910); for other jurisdictions see 5 C.J.S., Appeal and Error, § 1386. Therefore, it is the opinion of this office that dismissal by a district court of an appeal of a municipal court conviction for a traffic violation acts as a nullification of the act of appeal. The conviction in the municipal court stands as if it was never appealed and, therefore, the date of conviction which should be reported to the Department of Motor Vehicles is the date the municipal court pronounced sentence on the defendant.

The second hypothetical presented by Judge Morrison provides a different answer to the question of the effective date of conviction for the purposes of [NRS 483.470](#). In the second hypothetical, the appeal of the municipal court conviction is heard and sustained in the district court. In [NRS 266.595](#) and [5.090](#), the statutes speak of an "appeal" of the municipal court's decision and what occurs procedurally if the conviction and fine are "sustained." The wording would seem to indicate that the district court merely reviews the decision of the municipal court for error. This is not the case.

[NRS 266.595](#) provides that appeals to the district court from municipal court decisions shall be made in the same manner and with the same effect as appeals from justice courts. Chapter 189 of Nevada Revised Statutes regulates appeals to the district court from justice court. [NRS 189.080](#) provides that the procedure of appeal from justice court to district court:

* * * shall be the same as in criminal actions originally commenced in the district court, and judgment shall be rendered and carried into effect accordingly.

The statutes provide, therefore, that appeals from a municipal court to a district court are not merely a review of errors by the district court, but actually a trial de novo carried out by the district court. A trial de novo is defined as:

A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below. *Black's Law Dictionary*, 1677 (4th Ed., 1951).

The general rule is that an appeal, resulting in a trial de novo, annuls or vacates the judgment or decree of the lower court. 4 Am.Jur.2d, Appeal and Error, § 358. This rule is followed in Nevada. The case of *Rogers v. Hatch*, [8 Nev. 35](#) (1872), held that when an appeal results in a case being retried as if upon original process and the court has jurisdiction to settle the controversy by its own judgment and to enforce that judgment by its own process, the appeal vacates the judgment of the inferior tribunal.

Using the term "appeal" in connection with this trial de novo appears to be the result of the original use of the term in England. At common law, court decisions were reviewed for error upon a writ of error. The reviewing court could not retry the case but could only decide whether errors had been committed in the lower court and then affirm or reverse the lower court's decision. When a person decided to go into equity, however, this was called an appeal and the equity courts would hold a trial de novo and render their

own independent and enforceable judgment. Now, however, appeals are regulated by statute and have come to mean review of error, except where trials de novo are permitted by statute. 4 Am.Jur.2d, Appeal and Error, § 2; 4 C.J.S., Appeal and Error, § 17.

In this case, an “appeal” of a municipal court decision to the district court results in a trial de novo, which vacates the judgment of the municipal court. A new trial is held in district court with the district court, pursuant to [NRS 189.080](#), rendering its own independent and enforceable judgment. A conviction in district court of a matter appealed from municipal court is a new conviction. Therefore, it is the opinion of this office that the date of conviction, which must be transmitted to the Department of Motor Vehicles for the purposes of [NRS 483.470](#), of a case tried de novo in district court after an appeal from municipal court is the date that the district court sentences the defendant.

CONCLUSION

Since motor vehicle violations may be tried in justice courts as well as municipal courts and since appeals to district court from justice courts are also tried de novo in the district courts, the conclusions of this opinion apply equally to both justice and municipal courts.

It is the advice of this office that a conviction of a traffic violation for the purposes of the demerit point system created by [NRS 483.470](#) takes effect on the date a defendant is sentenced. When an appeal is taken from justice or municipal court to the district court and then dismissed before the case is heard, the appeal is nullified and the conviction of the justice or municipal court stands as if it had never been challenged. In that case, the date of conviction for the purposes of [NRS 483.470](#) is the date the justice or municipal court pronounced sentence upon the defendant.

When an appeal is taken from justice or municipal court to the district court and the district court hears the case, the judgment of the justice or municipal court is vacated. The district court tries the case de novo and renders its own independent and enforceable judgment. In that case, the date of conviction for the purposes of [NRS 483.470](#) is the date the district court pronounces sentence.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

182 Interest on County Public Hospital Accounts Receivable—In the absence of statutory authority providing otherwise, the board of trustees of a county public hospital may not charge interest on overdue accounts.

CARSON CITY, January 24, 1975

THE HONORABLE LARRY R. HICKS, *Washoe County District Attorney*, Courthouse, Reno, Nevada 89505

Attention: WILLIAM L. HADLEY, ESQ., *Chief Deputy District Attorney, Nonsupport Welfare Division*

DEAR MR. HICKS:

Advice has been requested on a question that has arisen under Chapter 450 of Nevada Revised Statutes, which relates to county hospitals.

QUESTION

May a county public hospital under [NRS 450.010](#) to [450.480](#), inclusive, charge interest on accounts which are overdue from nonindigent patients?

ANALYSIS

Chapter 450 of Nevada Revised Statutes, and in particular [NRS 450.010](#) to [450.480](#), inclusive, deals with the establishment and administration of county public hospitals. There is nothing in these statutes which expressly permits the board of hospital trustees for a county hospital to charge interest on overdue accounts. If such interest were permissible, it would have to be permitted by implication.

The applicable provision relating to requiring reimbursement for hospital costs is found in [NRS 450.420](#), subsection 2. This provides, in its pertinent parts:

The board of hospital trustees shall fix the charges for occupancy, nursing, care, medicine and attendance, other than medical or surgical attendance, of those persons able to pay for the same, as the board may deem just and proper. * * *

Again, as may be seen, there is nothing in this section which expressly authorizes the board of hospital trustees to charge interest on overdue accounts. Any authority for this action would have to come from an implied definition of the term “charges.”

However, although court cases appear evenly split in defining “charges” as including or excluding “interest” (see 6A Words and Phrases, Charges, 249), it is not necessary to decide this question on such a definition. Instead, we would note that [NRS 450.420](#), subsection 2, specifically enumerates the types of services for which charges shall be fixed, i.e., occupancy, nursing care, medicine and attendance. The purpose of this list is to enumerate the exact services for which reasonable compensation may be exacted. There is no enumeration of interest for compensation to the hospital for its delay in obtaining a payment for its services.

Interest may be imposed either as a penalty or punishment to compel timely payment of a sum owed or as compensation for actual delay in such payment. *U.S. v. Childs*, 266 U.S. 304 (1924); *U.S. v. Goldstein*, 189 F.2d 752 (C.A. Mass., 1951). There is no authority in Chapter 450 for a county board of hospital trustees to impose interest as a penalty or punishment. Nor is there any authority in [NRS 450.420](#), subsection 2, for a county board of hospital trustees to fix interest as compensation to the hospital for delay in payment.

The charges for compensation that are permissible under [NRS 450.420](#), subsection 2, are specifically enumerated there, and interest is not one of them. The principle of *expressio unius est exclusio alterius*—the mention of one thing implies the exclusion of another—applies in this question. In the Matter of Arascada, [44 Nev. 30](#), 189 P. 619 (1920).

It should be noted that there is no legal difficulty in reducing the hospital’s account to a judgment and then providing for interest, as this is provided for by law. See [NRS 17.130](#) and [18.120](#).

CONCLUSION

A county public hospital under [NRS 450.010](#) to [450.480](#), inclusive, may not charge interest on overdue accounts.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

183 County Commissioners—No authority in board to provide payment for unused sick and disability leave to any county officer or employee who terminates employment regardless of duration of said employment.

CARSON CITY, January 27, 1975

THE HONORABLE LARRY HICKS, *District Attorney*, Washoe County Courthouse, Reno, Nevada 89505

DEAR MR. HICKS:

In a letter from your predecessor dated December 19, 1974, the Office of the Attorney General was asked for its opinion on the following:

QUESTION

Does [NRS 245.210](#), subsection 2(h), authorize the board of county commissioners to pay long-term appointed officers and employees for accrued sick leave upon retirement or other termination of county service?

ANALYSIS

Boards of county commissioners, being creatures of statute and invested with special powers, can only exercise such powers as are expressly conferred upon them by statute, and such powers as are necessarily implied to carry out the express powers so granted. Their acts must affirmatively appear to be in conformity with the provisions of the statutes giving them power to act. *State ex rel. Beck v. Board of County Commissioners*, [22 Nev. 15](#), 34 P. 1057 (1894).

Authority for establishing an annual leave, sick leave and disability leave program for county officers and employees is conferred upon the board of county commissioners of each Nevada county by the provisions of [NRS 245.210](#). In general, this statute requires each county commission to enact an ordinance which will provide to all elected and appointed officers and employees of the county annual leave with pay of 1¼ working days for each month of service, which may be cumulative from year to year not to exceed thirty (30) working days. Subsections 2(c) and 2(f) set forth the rights of appointed officers and employees to be paid for their accumulated annual leave upon termination of employment where employment has exceeded six (6) or more months.

Subsection 2(g) of [NRS 245.210](#) is that section of the statute which provides for all elected and appointed officers and employees of the county to receive sick and disability leave with pay of 1¼ working days for each month of service, which may be cumulative from year to year, but not to exceed ninety (90) working days. However, with respect to sick leave, as distinguished from annual leave, neither [NRS 245.210](#) nor any other section of Nevada Revised Statutes contains any provision which indicates an intention of the Legislature that any officer or employee of the county is to receive payment for his unused sick and disability leave upon termination of his service to the county. Lack of such language with respect to the provisions of the statute concerning sick and disability leave, when contrasted with the presence of such language in those subsections of the law dealing with annual leave, requires this office to conclude that the Legislature intentionally avoided including any provisions in the law for payment to terminating officers and employees of the county for their unused sick and disability leave.

Subsection 2(h) of [NRS 245.210](#) provides that a board of county commissioners may, by order, provide for additional sick and disability leave for long-term employees and for prorated sick and disability leave for part-time employees. The letter of your predecessor specifically asked whether this language might be construed to authorize the

board of county commissioners to make payment for unused sick and disability leave for long-term employees of the county. We find nothing in the language of the statute to indicate that such a construction would be compatible with legislative intent concerning sick and disability leave in general. We are of the opinion that this language merely authorizes the board to reward faithful and long-time service by employees of the county with a rate of sick and disability leave accumulation that is greater than the rate established by ordinance for short-term employees. We further note that the construction suggested in the letter of your predecessor would, in our opinion, constitute a violation of the language appearing in [NRS 245.210](#), subsection 1, which reads:

* * * The provisions of such [county] ordinance may be more restrictive but not more extensive than the provisions set forth in subsection 2.

To interpret [NRS 245.210](#), subsection 2(h), so as to authorize the board of county commissioners to make payment for unused sick and annual leave accumulated by long-term employees would be a significant extension of the rights conferred by the statute in derogation of the mandate of the Legislature previously quoted.

Further support for our interpretation of [NRS 245.210](#) with respect to a county employee's right to payment for unused annual leave and sick and disability leave can be found by examining those sections of the State Personnel Act, [NRS Chapter 284](#), which set forth similar rights for state employees. [NRS 284.350](#) grants to state employees the same 1¼ days annual leave for each month worked and likewise provides for payment upon termination of service with respect to any unused annual leave. Similarly, [NRS 284.355](#) grants to state employees 1¼ days sick and disability leave for each month worked. Again, in the state statute there is a complete and total absence of any language by the Legislature which would expressly or impliedly authorize payment for unused sick and disability leave to a terminating employee. This conclusion was officially recognized in Attorney General's Opinion No. 219, dated May 22, 1961.

In closing, we would direct your attention to the decision of District Judge Emile Gezelin in the case of *Raggio v. County of Washoe*, wherein the court in its decision of December 14, 1971, concluded, as do we, that no authority existed in the board of county commissioners to provide for payment for accumulated and unused sick and disability leave to county employees under any circumstances.

CONCLUSION

A board of county commissioners has no authority to provide payment for accumulated and unused sick and disability leave to officers and employees of the county who terminate their services for any reason, regardless of the duration of their employment with said county.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

184 Constables—Appointment of deputies restricted to working deputies; all appointments and oaths of office by deputies and revocations of appointments are to be filed with county recorder; may carry concealed weapons outside his township and county in specified instances.

CARSON CITY, March 6, 1975

THE HONORABLE LOUIS TABAT, *Constable, North Las Vegas Township*, 810 East Lake Mead Boulevard, North Las Vegas, Nevada 89030

DEAR MR. TABAT:

You have advised this office of your practice of appointing “special” deputy constables of an honorary or nonworking nature, *vis a vis* working deputy constables who are engaged in transacting the official business appertaining to your office. You further note that only the appointment of working deputy constables who are sworn by the county clerk are filed for record with the county recorder. You have requested the opinion of this office regarding these practices and the authority of a constable to carry “weapons” outside his township area and outside the county in which his township is situated.

ANALYSIS

It should be observed at the outset that [NRS 258.060](#), which authorizes constables to appoint deputies, *does not distinguish* between “working,” “special,” “honorary,” “reserve,” or other classification, of deputy constables. The statute authorizes only the appointment of deputies to transact “the official business appertaining to the offices of constables,” that is, to assist the constable in the performance of the official business of the office. Therefore, the appointment of “nonworking,” “special,” or similarly designated deputy constables who are not employees actively engaged in transacting the official business of the office is not authorized in law and the practice should be discontinued. The appointment of any such person prior to this date is invalid and should be withdrawn.

Deputy constables lawfully appointed pursuant to [NRS 258.060](#) to transact official business of the constable’s office must subscribe to an oath which together with the written appointment is required to be filed with the county recorder. The statute also requires that whenever an appointment is revoked, a written revocation must be similarly filed.

Turning to your question regarding the authority of a constable to carry weapons (presumably concealed weapons) outside his township area and beyond the limits of the county in which his township is located, we note that [NRS 258.070](#), subsection 2, directs a constable to serve all mesne and final process issued by the justice of the peace. [NRS 4.310](#) empowers a justice of the peace to issue subpoenas [subpoenas] and final process “to any part of the county.” Necessarily, therefore, a constable is authorized to serve such mesne and final process in his capacity as a peace officer throughout the county in which the justice court of his township is located.

Regarding the service of primary process issued by a justice of the peace such as summons and complaint, Rule 4(c) of the N.J.R.C.P. provides that such process in civil actions may be served by the constable *of the township* or sheriff *of the county where the defendant is found*. Thus, a constable is authorized to serve summons and complaint upon a defendant in a civil action only in his own township, and if the defendant may be found in another township then the constable of that township or the sheriff of that county may make service and make return to the justice court. But, as noted, once jurisdiction is obtained the justice court’s intermediate and final process may be served by the constable throughout the county. [NRS 4.310](#), *supra*.

Regarding the execution of warrants of arrest, this office, in an opinion dated July 23, 1900, construed Section 4081, Compiled Laws, as limiting constables to executing *warrants of arrest* to the county in which the warrant was issued, without any endorsement thereon by a magistrate other than the one issuing the warrant, and that a constable could serve a warrant in other counties within the State only upon endorsement by a magistrate in the other county. In 1912, the law was changed to authorize that a warrant of arrest directed generally to any sheriff, constable, marshal, policeman or other peace officer in the county in which it is issued could be executed by such officer in any part of the State (N.C.L. Section 10737; [NRS 171.165](#)).

In 1967, [NRS 171.165](#) was repealed and [NRS 171.114](#) and [171.118](#) now provide that the warrant of arrest shall be directed to any peace officer and executed by a peace officer at any place within the State of Nevada.

We note, however, that in practice the execution of warrants of arrest are generally delivered to the sheriff's office or the police department for execution, although this practice is sometimes departed from in very remote areas of the State. Whenever a constable is directed by a magistrate to execute a warrant of arrest, the constable may execute it at any place in Nevada and in the course of so executing, he may be armed as a peace officer.

In summary, then, a constable may carry concealed weapons *when acting in the pursuit of his official duties* in the following situations:

1. When serving primary process issued by the justice of the peace, such as summons and complaint, in his township only. N.J.R.C.P. 4(c).
2. When serving both intermediate process, such as subpoenas [subpoenas], and final process, such as writs in aid of execution to satisfy a judgment, in any action or proceeding in justice's court throughout the county in which his township is situated. [NRS 4.310](#) and [258.070](#).
3. When executing a warrant of arrest issued by a magistrate directed to him at any place within the State. [NRS 171.114](#); [NRS 171.118](#).
4. While acting as the duly qualified constable in the discharge of his duties as constable within his township only. [NRS 258.070](#), subsection 1(a).

CONCLUSION

A constable may appoint only working deputies who are to transact the official business of the office. All lawful appointments of deputies and their oath of office must be filed with the county recorder, including all revocations of such appointments. A constable may carry concealed weapons beyond his township and county while engaged in those official duties enumerated above.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JAMES H. THOMPSON, *Chief Deputy Attorney General*

185 Public Utility Franchise Fees—The charge designated on Sierra Pacific Power Company's utility bills as "Franchise Fee" is properly chargeable to such utility's consumers and the passing on of such franchise fee to local government school districts does not violate the doctrine of intergovernmental immunity from taxation.

CARSON CITY, March 17, 1975

THE HONORABLE LARRY R. HICKS, *Washoe County District Attorney*, Courthouse, Reno, Nevada 89505

and

THE HONORABLE RONALD T. BANTA, *Lyon County District Attorney*, Courthouse, Yerington, Nevada 89447

DEAR SIRs:

By individual letters, the Office of the Attorney General was asked for its opinion on the following:

QUESTIONS

1. Can Sierra Pacific Power Company, as a public utility, legitimately pass on to its consumers the cost of its municipal franchise fees?
2. Assuming that Sierra Pacific Power Company has the right to pass on its municipal franchise fees, can such franchise fee properly be passed on to the Washoe County School District and the Lyon County School District without violating the doctrine of intergovernmental tax immunity?

FACTS

Pursuant to Bill No. 135, Ordinance No. 132, the City of Yerington granted Sierra Pacific Power Company (hereinafter “Sierra Pacific”) a franchise to use the public streets and rights-of-way for the location of its various utility facilities used in providing utility services to the area encompassed by the City of Yerington. In return for this franchise grant, Sierra Pacific is required to pay to the City of Yerington a franchise fee of two percent of the company’s gross revenues derived from its utility (electric power in this instance) operations conducted within the corporate limits of Yerington. The City of Reno, also pursuant to local ordinance, likewise charges Sierra Pacific a franchise fee based on Sierra Pacific’s gross revenues derived from its utility operations in the corporate limits of Reno. Various other municipalities in Sierra Pacific’s certificated service area also charge Sierra Pacific a similar franchise fee based on its gross revenues in a particular jurisdictional area. The franchise fees are not uniform among municipalities but are generally related to Sierra Pacific’s gross revenues. These fees, therefore, are to be distinguished from county franchise fees levied pursuant to Chapter 709 of Nevada Revised Statutes wherein it is provided that counties may charge a utility franchise fee of two percent of a utility’s *net profits*.

In Docket Nos. I & S 762-766 (Opinion and Order issued September 5, 1973), the Public Service Commission of Nevada required Sierra Pacific to separately itemize on each of its customer’s bills that proportion of the customer’s charge for service representing the franchise fee for the particular jurisdictional area in which the customer obtained service from Sierra Pacific. Prior to Docket Nos. I & S 762–766, Sierra Pacific had been incorporating such gross revenues franchise fees in its customers’ bills without separate itemization. Such separate itemization gives rise to the instant questions asked of this office.

ANALYSIS—QUESTION ONE

Sierra Pacific was given authority by the Public Service Commission of Nevada to pass on to its customers their proportionate share of the gross revenues municipal franchise fees in 1956 by virtue of Case No. 1258, wherein Sierra Pacific requested such authority. In its opinion in Case No. 1258, the Public Service Commission stated its rationale as follows:

Testimony of record indicates to the Commission that while this type of tax as proposed would directly benefit only those persons living within the boundaries of the political subdivision levying the tax, that were the utilities to absorb the levy, the burden of payment would fall not only upon users or customers within the area, but upon users or customers system wide. Obviously, the only way to prevent discrimination is for the customer or user living within the boundaries of the political subdivision levying the tax to pay directly as an added charge any taxes of this nature. Section 15 of the Public Service Commission Law states:

“It shall be unlawful for any public utility to grant any rebate, concession, or special privilege to any customer or user, which directly or indirectly shall or

may have the effect of changing the rates, tolls, charges, or payments, and any violation of the provisions of this section shall subject the violator to the penalty prescribed in Section 11 of this act.” Absorption of a locally imposed tax would clearly result in discrimination in favor of a local customer or user through the use of tax benefits for him while denying the same benefits to customers or users in other portions of a franchised area, and would also result in violation of Section 15 as it would have the effect of changing the rate. Case No. 1258, p. 2.

Although the Public Service Commission utilized the word “tax” in Case No. 1258, it is clear from the record in that case that the reference was to franchise fees or payments under discussion herein. Moreover, for the purposes of the analysis to this first question, it is immaterial that the payment is designated a fee or tax in that, as discussed below, such payments do in fact constitute an allowable cost of doing business.

The rationale of the Public Service Commission quoted above is generally regarded as being correct by both courts and other regulatory bodies. Moreover, it is generally held that such gross revenues franchise fees are an integral part of a utility’s cost of doing business and therefore properly included in a customer’s charge for service as any other cost of operation or expense.

The propriety of including franchise fees in a utility’s cost of operations was considered in the case of *City of Elmhurst v. Western United Gas & Electric Company, et al.*, 363 Ill. 144, 1 N.E.2d 489 (1936). In that case, the City of Elmhurst contested the defendant utility’s right to pass on to its consumers a three percent franchise fee imposed by the City of Elmhurst. That court held as follows:

Franchise payments are properly chargeable as an element of the cost of operation which should be borne by the consumers of the utility’s product or service (*Consolidated Gas Co. v. Newton*, 267 Fed. 236, P.U.R. 1920F, 483; *Chicago R. Co. v. Illinois Commerce Commission*, 277 Fed. 970, P.U.R. 1922C, 282) and the amortization of the franchise expenses should be charged as an operating expense (*Streator Aqueduct Co. v. Smith* [1923], 295 Fed. 385, 391, P.U.R. 1924D, 261). It would be unjust to spread the burden of this annual franchise payment over the whole Northern Division. It should be borne by the company’s consumers residing within the city as that city alone received the advantage of such annual payment. 1 N.E.2d 489 at 491.

The court in Elmhurst also stated that:

The discrimination forbidden by § 38 (Par. 53) is as to rates between customers of the same class in the territory. Customers residing in subdivisions of the same territory served by the public utility where an annual percentage of its gross receipts is exacted from the public utility, are not in the same class as those patrons who live in a municipality where such percentage is not exacted. 1 N.E.2d 489 at 491.

For opinions to the same effect see *Utah Power & Light Co.*, 95 P.U.R. NS 390 (1952); *Re Consolidated Edison Co. of New York*, 41 P.U.R.3d 305 (1961); *In Re Detroit Edison Co.*, 16 P.U.R. NS 9, (1936); *In Re Southern California Gas Co.*, P.U.R. 1922A, 277 (1921); and *In Re Pacific Tel & Tel Co.*, 37 P.U.R. NS 321 (1940).

It should also be noted that such separate itemization of the municipal gross revenue franchise fee does not constitute an “add-on” over and above Sierra Pacific’s lawfully authorized rate of return inasmuch as, for rate making purposes, such fees are treated as a cost of service much like the treatment given to a utility’s federal income tax liability. Separate itemization of the franchise fee only serves to inform the customer that

he is not subsidizing another municipality, thereby alleviating the fear of discrimination discussed above.

CONCLUSION—QUESTION ONE

It is the opinion of this office that the municipal franchise fees based on Sierra Pacific's gross revenues from a particular jurisdiction are properly includable in a customer's rates and charges for service received in that jurisdictional area.

ANALYSIS—QUESTION TWO

The passing on of the municipal franchise fees by Sierra Pacific to the Washoe and Lyon County School Districts does not violate the doctrine of intergovernmental tax immunity.

As you have indicated in your letters, pursuant to Chapters 361, 372 and 393 of Nevada Revised Statutes, school districts are exempt from the payment of property and sales taxes. These statutes would not seem in point for two reasons: First, the franchise fees imposed by the cities of Reno and Yerington are denominated as *fees* and not *taxes*. Indeed, such municipal franchises have contract characteristics, *City of North Las Vegas v. Central Tel. Co.*, [85 Nev. 620](#), 460 P.2d 835 (1969), and the fee paid by Sierra Pacific is in return for rights and privileges granted by such franchises. Second, assuming the fee is in fact a *tax*, the aforementioned tax exemption statutes do not apply inasmuch as such fee is not a property or sales tax but is rather an assessment levied on Sierra Pacific for the privilege of the franchise and Sierra Pacific's consequent right to use public rights-of-way in the conduct of its utility operations.

Furthermore, assuming that the fees are viewed as taxes and the school districts are exempt therefrom, Sierra Pacific's pass along of such would still seem not to violate the doctrine of intergovernmental immunity from taxation. In determining whether there has been a violation of this doctrine the Supreme Court of the United States has frequently stated that there is a distinction between the legal incidence of a tax and the economic burden of such. See *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Helvering v. Gerhardt*, 304 U.S. 405 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); and *United States v. City of Detroit*, 355 U.S. 466 (1957).

In *Polar Co. v. Andrews*, 375 U.S. 361 (1963), the U.S. Supreme Court stated as follows:

It may be that the economic burden of the tax ultimately falls upon purchasers of Polar's milk, including the United States. Decisions of this court make clear, however, that the fact that the economic burden of a tax may fall on the government is not determinative of the validity of the tax. 375 U.S. 361 at 381, 1n. 12.

A more definitive position of the Supreme Court of the United States in this area is seen in the case of *United States v. Boyd*, 378 U.S. 39 (1964). In that case, the State of Tennessee imposed a contractors use tax upon contractors using property in the performance of their contracts with others irrespective of the ownership of the property and the place where the goods were purchased. The tax rate was based on the purchase price or fair market value of the property. Subsequently, two contractors, Union Carbide and H. K. Ferguson, entered into a contract with the Atomic Energy Commission. These contracts essentially provided that any purchases by the contractors were to be paid with government funds and title to all property purchased passed directly from the vendor to the United States. In upholding Tennessee's imposition of the use tax on these contractors the Supreme Court stated as follows:

The Constitution immunizes the United States and its property from taxation by the States, *M'ulloch v. Maryland*, 4 Wheat 316, but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States. *James v. Dravo Contracting Co.*, 302 U.S. 134; *Graves v. New York*, 306 U.S. 466; *Alabama v. King & Boozer*, 314 U.S. 1. Nor is it forbidden for a state to tax the beneficial use by a federal contractor of property, *United States v. City of Detroit*, 355 U.S. 466, and even though his contract is for goods or services for the United States. (Citations omitted.) *The use by the contractor for his own private ends—in connection with the commercial activities carried on for profit—is a separate and distinct taxable activity.* (Italics added.) 378 U.S. 39 at 44.

A similar result was reached by the Nevada Supreme Court in *United States v. State ex rel. Beko*, [88 Nev. 76](#) (1972).

In the instant case, the municipal franchise fees are not imposed directly by one governmental entity on another but rather are imposed directly on Sierra Pacific in connection with its commercial activities carried on for profit. Therefore, even though the economic burden or “indirect tax” falls on Sierra Pacific’s consumers, which include other governmental entities, the legal incidence if such falls on Sierra Pacific and under the guidelines set forth in *Boyd*, *supra*, the franchise fee, if a tax, would appear to be a valid tax.

CONCLUSION—QUESTION TWO

The Municipal franchise fees imposed by the cities of Reno and Yerington on Sierra Pacific Power Company, based on that company’s gross revenues, are properly includable in Sierra Pacific’s bills to its customers receiving service within the jurisdictional limits of Reno and Yerington. The fact that such fees are passed on to the Washoe and Lyon County School Districts does not result in one governmental entity taxing another without such other’s consent.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By ROBERT L. CROWELL, *Deputy Attorney General*

186 [NRS 90.090](#), Security Defined—The remedial intent of the securities law requires a liberal test for the determination of what constitutes an investment contract. A “vacation license” or “hotel accommodation license,” under such a test, may constitute an investment contract and, therefore, be a security which must be registered under Chapter 90 of Nevada Revised Statutes.

CARSON CITY, March 18, 1975

THE HONORABLE WM. D. SWACKHAMER, *Secretary of State*, The Capitol, Carson City, Nevada 89701

Attention: RUSSEL W. BUTTON, *Deputy Secretary of State for Securities*

DEAR MR. SWACKHAMER:

You have requested advice as to whether a prepaid vacation or hotel accommodation scheme is to be considered a security, as that term is defined by [NRS 90.090](#).

FACTS

An individual, promoting a prepaid hotel accommodation scheme, has approached your office requesting a decision as to whether his scheme is a security. Implementation of his plan requires a contractual agreement between three parties. These include the purchaser, the promoter and any hotels participating in the promoter's plan. At the moment, only two hotels are participating in the plan.

The purchaser agrees to pay \$2,500, either in a cash transaction or by installment payments to the promoter. In return, the purchaser, if 40 years old or older, is guaranteed 10 days occupancy per year for life by the hotels without further occupancy charge, in any hotel participating in the plan. This occupancy privilege is extended to the purchaser and to members of his immediate family. The agreement terminates upon the death of the purchaser and there are no provisions for transferability. If the purchaser is under 40 years old, the agreement lasts for his lifetime, or a maximum of 15 years, whichever is sooner.

In the cash transaction, the promoter retains 25 percent of the money paid by the purchaser and turns over the remainder to the trustees of a trust created for the purpose of administering the plan. In an installment payment transaction, the promoter may either retain 25 percent of the gross sales price of the plan to be paid by the purchaser, or may pay that amount to the participating hotels, as may be determined between them by separate contract. The remaining 75 percent is paid over to the trustees mentioned above. The hotels, of course, agree in the contract to have rooms available for the implementation of the plan.

It is the intention of the promoter, as specifically stated in the agreement, to secure additional hotels to participate in the plan. The agreement additionally states, however, that only two hotels are currently in the plan and it is unknown when, if ever, other hotels will become available.

An integral part of this scheme is the establishment of a trust by the promoter to administer the plan. The purpose of the trust is to, in the words of the trust agreement:

* * * insure the financial ability of Trustor [promoter] and its affiliates, participants, and hotels participating in the Plan to execute the Plan as herein described and further to insure that funds will be available to pay to all of said participating hotels, on a monthly basis, sums of money according to the terms hereof.

Thus, although purchasers pay one fee and one fee only to participate in the plan, the participating hotels must be reimbursed on a continual monthly basis for making rooms available.

To secure the income necessary for this purpose, not only are the trustees of the trust permitted to make investments with the trust corpus, but the promoter is specifically obligated, by both the trust agreement and the contract with the purchaser and hotel, to “* * * secure participants [purchasers] in the Plan to effect a maximum occupancy in participating hotels not to exceed 50 percent of the total Room Days for hotel facilities affiliated with the Plan. * * *” The remaining 50 percent room day occupancy is to be rented out by the hotels at their “rack rate.” The agreements specify that the income from the “rack rates” shall cover all general operating expenses of the hotels. Revenue derived from the trust, however, will be necessary to cover capital improvement, debt service and profit. To meet these costs, an inflation factor, consisting of a percentage of the base rental rate, has been added into the rates to be paid by the trustees to the participating hotels. At the beginning of the third fiscal year of the operation of the plan, the trust shall pay to the participating hotel, for each room day, \$13.30 plus 10 percent; at the beginning

of the fourth fiscal year, \$13.30 plus 20 percent; at the beginning of the fifth fiscal year, \$13.30 plus 30 percent. Thereafter, the inflation figure will be adjusted up or down according to the U.S. Department of Agriculture's Consumer Price Index. As can be seen, therefore, in order to meet the costs of the plan, additional income is necessary each year for the scheme, either in the form of profitable investments by the trust or by securing additional purchasers to supply capital for the scheme.

Advertising has been prepared for this scheme which states:

ECONOMISTS WARN This very room may cost \$100 per day within five years.

Our * * * Plan is simple as it is sensible.

\$13.30 or LESS per day* The only way to beat rising hotel rates.

Guarantee a Deluxe Hotel Room for life at today's discount prices.

*Maximum use based on 15 year average life or plan expectancy.

Finally, on an informational note, the Securities and Exchange Commission characterizes schemes such as these by the terms "vacation licenses" or "hotel accommodation licenses." The SEC has not yet taken a position on whether such schemes are considered securities under federal law.

QUESTION

Is the vacation license or hotel accommodation license, under consideration in this opinion and as described above, a security within the meaning of [NRS 90.090](#)?

ANALYSIS

INTRODUCTION

Nevada is 1 of 27 states which has adopted the Uniform Securities Law, as amended. Am.Jur.2d Desk Book, Document No. 129 (1974 Cumulative Supplement). The definition of security contained in [NRS 90.090](#) was taken from the Uniform Securities Act. It provides as follows:

"Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferrable [transferable] share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Except for the words, "* * * certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease * * *," [NRS 90.090](#) is virtually identical with the definition of "security" in the federal Securities Act of 1933 (15 U.S.C. § 776). The federal act uses the words "* * * fractional undivided interest in oil, gas or other mineral rights. * * *." Because of the virtually identical wording of the two acts, interpretation of the term "security" under the federal act has had a significant bearing upon the meaning of the term in those states adopting the Uniform Securities Act. 69 Am.Jur.2d, Securities Regulation—State, § 26.

The particular scheme under consideration in this opinion does not appear to meet the more specific types of securities listed by [NRS 90.090](#), i.e., it is not a note, a bond, a voting trust certificate, etc. If this scheme is a security, then it must be defined as a security under one of the more encompassing provisions of [NRS 90.090](#). The question

thus resolves itself down to a consideration of whether this particular scheme is an “investment contract.”

The term “investment contract” has been considered in numerous federal and state cases over the years. Two tests have been devised by the courts to determine if a scheme is an “investment contract” and, therefore, a security.

THE HOWEY TEST

The first important test for the determination of what constitutes an investment contract was formulated by the United States Supreme Court in *Securities and Exchange Commission v. Joiner*, 320 U.S. 344 (1943). In that case, a promoter was selling oil leases, in which he represented that he would drill exploratory wells. The court formulated the following test:

* * * Had the offer mailed by defendants omitted the economic inducements of the proposal and promised exploration well, it would have been a quite different proposition. Purchasers would then have been left to their own devices for realizing upon their rights. * * *

It is clear that an economic interest in this well-drilling understanding was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end. *SEC v. Joiner*, supra, at 348, 349.

Joiner, therefore, stated that economic inducements, i.e., the expectation of economic benefits, coupled with the promotional efforts of persons other than the purchaser, created an investment contract.

This theme was taken further in the landmark securities case of *Securities and Exchange Commission v. Howey*, 328 U.S. 293 (1946), rehearing denied 329 U.S. 819 (1946). This case, which involved the selling of plots of land in a fruit orchard which was to be managed by others, prompted the Supreme Court to formulate this definition of an investment contract:

* * * [A]n investment contract is a contract, transaction, or scheme whereby a person invests his money in a common enterprise expecting profits to accrue solely from the efforts of the promoter or third parties, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. *SEC v. Howey*, supra, at 298-299.

Howey, therefore, added the common enterprise element to the *Joiner* requirements of economic inducements and efforts of one other than the purchaser, *Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission*, 285 F.2d 162 (9th Cir., 1960).

This definition, known as the *Howey* test, became for years the sole test of whether a transaction or scheme constituted an investment contract. This definition was universally accepted by both the federal courts and state courts. *Tcherepin v. Knight*, 389 U.S. 332 (1967); Anno., 47 A.L.R.3d 1375. A problem developed because this definition quickly became a rigid and unyielding model for what did and what did not constitute a security. Thus, for example, in a scheme in which the investor participated by recruiting other investors, although the real “selling” effort was made by a promoter, the courts refused to find the existence of a security because the scheme did not wholly involve the efforts of persons other than the investor. *Gallion v. Alabama Market Centers, Inc.*, 282 Ala. 679, 213 So.2d 841 (1968); *Commonwealth ex rel. Pennsylvania Secur. Com. v. Consumers Research Consultants, Inc.*, 414 Pa. 253, 199 A.2d 428 (1964).

This rigidity actually appears to be contrary to the liberal intent of the Supreme Court in *Howey*. The court stated that in searching for the definition of a security, form should be disregarded for substance and the emphasis be placed on economic reality. Its definition of investment contract:

* * * embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits. *SEC v. Howey*, supra, at 299.

In this respect, *Howey* was intended to complement *Joiner*, in which the court intended to reach “novel, uncommon or irregular devices, whatever they appear to be. * * *” *SEC v. Joiner*, supra, at 351.

Despite this intent, however, the *Howey* test assumed the character of immutable law, with each word gathering an unchanging importance. It was for the purpose of breaking loose from this situation that some courts began seeking an alternative to the *Howey* test.

THE RISK-CAPITAL TEST

An article which appeared in the *Western Reserve* (now *Case Western*) *Law Review* has had some influence on courts seeking an alternative to the *Howey* test. Coffey, “The Economic Realities of a ‘Security’: Is There a More Meaningful Formula?” 18 *W.Res.L.Rev.* 367 (1967).

Coffey contends the *Howey* test is defective because it ignores the risk of loss to the investor of the initial capital he advanced to the enterprise. *Howey*, instead, places too much emphasis on the expectation of profits. Coffey argues this is erroneous because the loss of the investor’s initial value is in as much need of protection by the securities laws from fraud as the need to protect an expectation of profits. Furthermore, he contends there is no really good definition of “profits.” Is it the return over and above initial investments? Is it merely the balance sheet profits of the enterprise? Does it mean unrealized appreciation or nonpecuniary benefits? Coffey, supra, at 374, 375.

In Coffey’s words, “Risk of loss of initial value is an essential attribute of a security.” There is an essential relationship between the value paid into the enterprise and the success of the enterprise. If the enterprise fails, the initial value paid is lost and, therefore, the investor is subject to the risks of the enterprise. The difficulty in concentrating on expectation of profits instead of risk of initial value is that in some situations, although there may be a serious risk of loss of initial value, profit may be difficult to assess or identify. If only profits are considered, as in the strict *Howey* test, then no finding of a security may result. He argues:

Where the evidence to support a reasonable expectation of future profits is tenuous or difficult to interpret, the presence of risk to original value should be examined carefully and employed as a complementary factor to determine the result. Coffey, supra, at 383.

Note that Coffey does not argue that the *Howey* test be disregarded. Instead, he proposes to inject another element that needs protection from fraud—risk of initial value or capital. He feels that both risk of initial value and profit are necessary in security transactions. However, the less defined “profit” becomes, the greater does the degree of risk to initial capital increase. Coffey believes that the reference point for profitability is the buyer and whether he has been led reasonably to expect some benefit over and above his initial investment. In a proper case, therefore, the buyer’s expectation of a nonpecuniary benefit in return for risking his investment in the risks of an enterprise will

fulfill the requirement for profit inducement. A strict interpretation of the term “profit” in the Howey test is thus unjustified.

It is sufficient if the seller is responsible for leading the buyer to believe that *some valuable benefit*, over and above his initial investment, will accrue as a result of the operations of an enterprise. (Coffey’s italics.) Coffey, *supra*, at 398-403.

Coffey summarizes his thesis in the following words:

The subjection of the buyer’s initial value to the risks of an enterprise with which he is not familiar and over which he exercises no control seems to be the “economic reality” which most clearly creates a need for the special fraud procedures, protections, and remedies of the securities laws. There are several manifestations of risk, some of which are difficult to discern, and therefore each transaction must be carefully analyzed to make certain that the risk factor has been accurately appraised.

In general, it is also necessary that the seller be responsible for leading the buyer reasonably to expect some valuable benefits over and above initial investment. Here again, it must be recognized that there are several different species of valuable benefit. Coffey, *supra*, at 412.

In recent years, various federal and state courts have begun to adopt this risk-capital test. The first to do so was the California Supreme Court in *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961). This involved a land development which was largely financed by the sale of memberships in a country club. Memberships were to be increased as additional facilities were added to the development. The members, although permitted to use the facilities, possessed no ownership or rights in the income or assets of the club.

The court, relying on the principle that securities laws are broad enough to protect the public against any scheme, however ingenious, concluded:

Petitioners are soliciting the risk capital with which to develop a business for profit. The purchaser’s risk is not lessened merely because the interest he purchases is labelled a membership. Only because he risks his capital along with other purchasers can there be any chance that the benefits of club membership will materialize. *Silver Hills Country Club v. Sobieski*, *supra*, at 908.

Another problem occurs when the investor, by the terms of the investment scheme, is expected to contribute some effort to the success of the enterprise. The Howey test, of course, requires promotion by persons other than the investor. In *Securities and Exchange Commission v. Glenn W. Turner Enterprises*, 474 F.2d 476 (1973), the federal court, while not abandoning the Howey test, argued that it should be applied more flexibly. The court adopted the view that it should consider which persons were engaged in those *essential* managerial efforts which affect the success or failure of the enterprise. Investors were involved only to the extent of recruiting other potential investors to meet with the promoters. The promoters actually did the selling. The court also adapted the risk-capital test to the problem by concluding that the investor was buying a share in the selling efforts of the scheme. His money and the money of other investors, whom he was expected to help bring into the plan, was what kept the plan going. Hence, there was an investment contract involved.

State ex rel. Healy v. Consumer Business System, Inc., 5 Or.App. 19, 482 P.2d 549 (1971), involved a scheme similar to that in the Turner case. The court found the

existence of a security by utilizing the risk-capital test. Again, the court did not reject the Howey test out of hand, but felt that it was not the exclusive test.

The “risk-capital” test protects the public by requiring those whose schemes fit within the conditions set down by the test to register their schemes so as to make potential investors aware of the fact that their capital will be risked before the working foundations of the enterprise are firmly in place. *State ex rel. Healy v. Consumer Business System, Inc.*, supra, at 554.

The court held that if a substantial portion of the initial capital used by the promoter is provided by the investor, the enterprise must be registered as a security.

One court has taken the restrictive view that the risk-capital test applies only to the initial capitalization supplied to an enterprise at the beginning of its existence. Thus, where an enterprise had been in business for 10 years, the court decided that the initial value paid by an investor into the company was not part of the initial capitalization utilized by the enterprise to set itself up in business. Therefore, it concluded that the investor’s value was not essential to the success of the enterprise and it refused to find the existence of an investment contract. *Weiboldt v. Metz*, CCH Federal Securities Law Reports, Par. 93, 794 (February 22, 1973).

The court, however, ignores the true intent of the risk-capital test, as pointed out by Coffey and reinforced by Sobieski and Healy, supra. The question is whether the capital furnished by an investor is being risked in the success of a scheme promoted by an enterprise. It does not matter whether an enterprise has been in business 1 year or 10 years if the success of the particular scheme it is promoting depends upon capital provided by investors. This is the true intent of the risk-capital test.

The risk-capital test is not designed to supplant the Howey test, but to complement it by introducing a new element. Whenever the success of an enterprise also depends on the initial value advanced by investors, when its success depends on a continuing source of such initial value, when, in effect, the initial value of investors is risked for the success of an enterprise dependent on such a continuing source, then that enterprise is a security. The risk-capital test also introduces flexibility into the Howey test by holding that some effort by the investor does not take the enterprise out of consideration as a security, so long as parties other than the investor have the essential management or control of the enterprise. Finally, profits may include the expectation of any benefit, pecuniary or not, over and above the value of the initial investment.

THE RECOMMENDED TEST

The case which best combines these elements of an investment contract into a workable test is *State by Commissioner of Secur. v. Hawaii Market Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971). This case involved a company with an initial capitalization of only \$1,000 that promoted a scheme, whose success depended on large amounts of capital supplied by increasing numbers of investors, who were also encouraged to recruit other potential investors. Adopting the principles stated by Coffey in his law review article mentioned above, the court formulated the following test of an investment contract:

An investment contract is created whenever:

1. An offeree furnishes initial value to an offeror;
2. A portion of this initial value is subjected to the risks of the enterprise;
3. The furnishing of the initial value is induced by the offeror’s promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and

4. The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. *State v. Hawaii Market Center*, supra, at 109.

This test appears to combine the best elements of the *Howey* and risk-capital tests and does so in such a flexible manner as to meet the true purposes of securities laws. As to the question of flexibility, it must be remembered that the *Howey* test is not found in any statute book. It is a judicial formulation and was originally designed to be “* * * a flexible rather than a static principle. * * *” *SEC v. Howey*, supra, at 299.

The three elements of the *Howey* test, although liberalized, are still contained in the *Hawaii Market Center* test. Although the element of *common* enterprise is not specifically mentioned, it must be implied in relation to an enforcement of Chapter 90, since [NRS 90.075](#) requires that a securities offering or sale must be made to at least 25 persons. This number of people injects the element of the commonality of the enterprise into the scheme. The element of profits still exists, although it has been expanded to include all valuable benefits, whether pecuniary or not. Finally, the element of promotion of the enterprise by persons other than the investor has been expanded to mean, not *sole* control of promotion by persons other than the investors, but *essential* control.

Blended into and made a part of this expanded and liberalized *Howey* test is the risk-capital test. If the success of an enterprise is dependent on initial capital and the failure of the enterprise risks that capital, the test is applicable.

In dealing with questions involving securities, the courts have uniformly held that they will look to substance rather than form. 1 Loss, *Securities Regulations*, 2d Ed., 488. It should be remembered that an early legislative purpose of securities regulation was aimed at “speculative schemes which have no more basis than so many feet of blue sky.” *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1916). Securities laws are based on the presumption that the public lacks knowledge and sophistication in securities investment. As such, securities laws are considered paternalistic and remedial in nature. They are enacted for the protection of the public, and because of the ingenuity of persons who devise speculative schemes over which unwary investors have little or no control, they should be liberally construed. Public officials enforcing securities laws should not be hampered by placing narrow constructions on these laws. *Tcherepin v. Knight*, supra; *Meihsner v. Runyon*, 23 Ill.App.2d 446, 163 N.E.2d 236 (1960); *Polikoff v. Levy*, 55 Ill.App.2d 229, 204 N.E.2d 807, cert. den. 382 U.S. 903 (1965); *McElfresh v. State*, 151 Fla. 140, 9 So.2d 277 (1942); *People v. Montague*, 280 Mich. 610, 274 N.W. 347 (1937); *Kerst v. Nelson*, 171 Minn. 191, 213 N.W. 904 (1927).

In short, the proper application of Chapter 90 of Nevada Revised Statutes requires a liberal construction. Accordingly, this office recommends the four step test outlined in *State v. Hawaii Market Center*, supra, as the test which the Secretary of State should use when considering whether a particular scheme constitutes an investment contract and, therefore, must be registered as a security.

APPLICATION OF THE RECOMMENDED TEST

Having considered the principles which should determine the test of what constitutes an investment contract, we may now apply that test to the hotel accommodation scheme being considered in this opinion:

1. Does an offeree furnish initial value to an offeror?

Yes. This element of the test is clear-cut. The purchaser who seeks to buy the hotel accommodation license must pay to the promoter a fee of \$2,500. This is the initial value which every purchaser must supply.

2. Is a portion of this initial value subjected to the risks of the enterprise?

Yes. In this case, the entire value is subjected to the risks of the enterprise. Twenty-five percent of the paid value is retained by either the promoter or the hotels and will be retained regardless of the success or failure of the plan. The remainder is paid to a trust fund for the purpose of meeting the expenses of the hotels for making rooms

available to purchasers. According to the terms of the agreement, these expenses are expected to rise for the next 5 years, thereby necessitating a steady and increasing flow of income into the trust. This flow of income is to be obtained, again according to the terms of the trust agreement, by the efforts of the promoter in obtaining more purchasers for the trust and by investing in income producing investments by the trust. The money, in either event, comes from additional purchasers. If this source of income is cut off or if the promoter fails to obtain enough participants, then the entire scheme must fail as the trust will not have enough money on hand to meet its monthly commitment to pay the hotels' expenses.

It is also the intent of the plan to obtain more participating hotels, but the plan cannot guarantee that more hotels will participate. In the final analysis, the question of whether more hotels will participate depends, in part, on the success of the enterprise, the ability of the plan to gain more purchasers and produce income to make it worthwhile for those hotels to participate.

In other words, the success of the scheme rests upon the initial value paid in by purchasers and, therefore, if the scheme fails, then the purchasers have lost their invested capital. This is a true risk-capital situation. Purchasers should be made aware that “* * * their capital will be risked before the working foundations of the enterprise are firmly in place.” *State ex rel. Healy v. Consumer Business System*, supra.

3. Is the furnishing of the initial value induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise?

Yes. In this case, as in the *Sobieski* case, supra, no direct pecuniary benefits are promised to purchasers. However, the advertising for the plan makes dire predictions as to what the state of the nation's economy will do to the cost of hotel rooms. It asserts that hotel rooms will perhaps, in 5 years, cost \$100 per day, but then asserts that by investing in the plan, a purchaser can be “guaranteed” hotel rooms for \$13.30 per day or less for the rest of his life, based on a life time expectancy of 15 years, for an investor 40 years old or older.

This would be a substantial savings for purchasers if the prediction of inflated room rentals comes true. Some might argue that such predictions are absurd or that there are no guarantees they will come true. But as Coffey states in his article, the reference point is the buyer himself. The question is whether he had been led reasonably to expect some benefit over and above his initial investment. The renting of hotel rooms at \$100 per day for 10 years (assuming the price will be \$100 per day within 5 years, thereby leaving only 10 years remaining from the 15 year life expectancy) for 10 days per year amounts to a cost of \$10,000. Considering that the prepaid plan costs “only” \$2,500, this is an expectation of a considerable savings and, thus, a considerable benefit over and above the initial investment.

4. Does the offeree receive the right to exercise practical and actual control over the managerial decisions of the enterprise?

No. The purchaser has no control over the enterprise. Once he pays his \$2,500 everything is handled by the promoter, the hotels and the trust.

In conclusion, it can be seen that this entire scheme is imbued with speculation in that continued income in the nature of additional investors or successful investment of the trust corpus is necessary for the success of the enterprise. Furthermore, the scheme is directed toward a large group of potential investors, none of whom can control the enterprise, but all of whom expect some valuable benefit from it. The history of the securities laws show that this is a situation demanding the protection of those same laws. The hotel accommodation scheme at issue meets the four criteria of the recommended test of an investment contract. Accordingly, it is the opinion of this office that this hotel accommodation scheme is an investment contract and, therefore, a security pursuant to

[NRS 90.090](#). As such it should be registered as a security under Chapter 90 of Nevada Revised Statutes.

CONCLUSION

This office agrees with the principle that transactions suspected of being securities must each be considered on their own merits. In deciding such questions, this office recommends the liberal test for investment contracts utilized in *State v. Hawaii Market Center*, supra. It is believed that this test reflects the true purpose of securities law—the protection of the unsophisticated public against speculative schemes.

Applying this test to the vacation or hotel accommodations scheme presented to you, it is our opinion that it is an investment contract and, therefore, a security within the meaning of [NRS 90.090](#). As such, it should be registered under Chapter 90 of Nevada Revised Statutes.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

187 Sales and Use Taxes—Nevada radio and television stations engaged in over-the-air product advertising which directs customers to place orders with and remit the purchase price to the stations are retailers, and are subject to sales tax under [NRS Chapters 372, 374 and 377](#).

CARSON CITY, March 31, 1975

MR. JOHN J. SHEEHAN, *Executive Secretary, Nevada Tax Commission*, Capital Plaza Building, 1100 East Williams Street, Carson City, Nevada 89701

DEAR MR. SHEEHAN:

You have requested an opinion of this office concerning the tax liability under Nevada's sales and use tax laws ([NRS Chapters 372, 374 and 377](#)).

QUESTION

Are Nevada radio and television stations subject to sales tax when the sale of tangible personal property is advertised by the stations if the stations receive the orders with the remittance and the purchased tangible personal property is later shipped directly to the purchasers, from out-of-state?

FACTS

Several radio and television stations engage in over-the-air product advertising which asks viewers to place orders for products such as record albums by phoning or writing the stations, and remitting the purchase price to the station. The stations send the orders to out-of-state suppliers who mail the purchased merchandise directly to the purchaser.

ANALYSIS

The sales and use tax acts (all citations hereafter to [NRS Chapter 372](#)) provide that all retailers of tangible personal property are subject to a sales tax, unless otherwise exempted. [NRS 372.105](#) reads:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers * * * (upon the) * * * sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

[NRS 372.060](#), subsection 1, defines “sale” as follows:

“Sale” means and includes *any transfer of title* or possession, exchange, barter, lease or rental, conditional or otherwise, *in any manner or by any means whatsoever*, of tangible personal property for a consideration. (Italics added.)

[NRS 372.050](#), subsection 1, defines “retail sale” as follows:

“Retail sale” or “sale at retail” means a sale for any purpose other than resale in the regular course of business of tangible personal property.

[NRS 372.055](#), which defines “retailer,” reads in part:

1. “Retailer” includes:
 - (a) Every seller who makes any retail sale or sales of tangible personal property, * * *

* * *

2. When the tax commission determines that it is necessary for the efficient administration of this chapter to *regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them*, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, *the tax commission may so regard them* and may regard the dealers, distributors, supervisors or employers *as retailers for purposes of this chapter*. * * * (Italics added.)

[NRS 372.155](#) states that:

For the purpose of the proper administration of this chapter and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

Full effect must be given to the Legislature’s intention as expressed in the language of the statute, and therefore the legislative definition of “sale at retail” and “retailer” must prevail over definitions found in dictionaries and it is immaterial whether or not a transaction upon which a tax is levied meets the technical requisites of a sale as defined for other purposes or by common law. *Market Street Railway Co. v. California State Board of Equalization*, 290 P.2d 20, 26 (Cal. 1955).

The radio and television stations in question do “transfer title * * * of tangible personal property for a consideration,” and therefore are “selling” within the terms of Nevada’s sales tax act. [NRS 372.060](#), subsection 1, *supra*. The prospective purchaser delivers the full purchase price to the station in response to the over-the-air solicitation and the purchased property is subsequently delivered by mail. The relationship between the station and the out-of-state supplier of the merchandise does not alter the character of the sale by the station to the ultimate purchaser. There has been no claim presented or other reason to believe that these sales were other than sales at retail, so the transactions may be treated as retail sales requiring the collection of the appropriate tax measured by the gross receipts. [NRS 372.050](#), subsection 1, *supra*; [372.155](#), *supra*.

The purchaser-customer deals solely with the radio or television station advertising products for sale, and is not given any prior notice of the fact that a third party supplier located outside of the State of Nevada will participate in the transaction. Even an independent “broker” who contracts with an out-of-state supplier may be liable for sales tax on his “resales” to the ultimate consumer. *Meyer v. State Board of Equalization*, 267 P.2d 257, 261 (Cal. 1954).

Further support for the conclusion that radio and television stations soliciting sales in their own names may be deemed to be taxable retailers is lent by the fact that several sister states require such radio and television stations to report and pay the appropriate sales tax on their retail sales, including Georgia, Michigan and California. Prentice Hall, *State and Local Taxes*, Par. 21, 667 (Ga.); Par. 21, 766.10 (Mich.); Par. 21, 154.10 (Cal.). Georgia and Michigan have adopted formal administrative regulations governing sales by radio and television stations, and California relies upon a formal legal opinion upholding the taxability of stations selling goods by soliciting telephone or mail orders to the station. California Sales Tax Counsel Letter, December 4, 1953.

CONCLUSION

Radio and television stations engaged in over-the-air product advertising within the State of Nevada, which directs customers to place orders with, and remit the purchase price to such stations, are “retailers” within the meaning of [NRS 372.055](#) and thus are subject to Nevada’s sales taxes imposed by [NRS Chapters 372](#), 374 and 377.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JAMES D. SALO, *Deputy Attorney General*

188 Initiative Petition—Article 19, Section 2, paragraph 2 of the Nevada Constitution is an exercise in direct government by the people, who may place such requirements on introducing an initiative petition as will insure that such a weighty, expensive and time-consuming means of adopting legislation has a statewide interest rather than a local appeal. As such, the provision is constitutionally valid.

CARSON CITY, April 18, 1975

THE HONORABLE DANIEL J. DEMERS, *Chairman, Assembly Committee on Elections*,
Nevada Legislature, Carson City, Nevada 89701

DEAR MR. DEMERS:

You have requested an opinion on the constitutionality of Article 19, Section 2, paragraph 2 of the Nevada Constitution, which requires initiative petitions to be signed by at least 10 percent of the number of voters who voted in the last general election in not less than 75 percent of the counties in the State, provided the total number of signers also equals at least 10 percent of the number of voters who voted in the entire State in the last general election.

QUESTION

Is Article 19, Section 2, paragraph 2 of the Nevada Constitution constitutionally valid?

FACTS

Originally, this section of the Nevada Constitution required that initiative petitions be signed by only 10 percent of the number of voters in the State who voted in the last general election. The present section, requiring 10 percent signatures in at least 75 percent of the State's counties, was enacted in 1958 as the result of an initiative petition to amend the Constitution. The purpose of the 1958 amendment was to require for initiative petitions more signatures from a diversified area of the State, rather than allow initiative petitions to be of a localized nature. *Wilson v. Koontz*, [76 Nev. 33](#), 348 P.2d 231 (1960).

ANALYSIS

Similar diversification requirements to initiative petitions have been upheld in other states as not involving any invidious discrimination. *Two Guys From Harrison, Inc. v. Furman*, 32 N.J. 199, 160 A.2d 265 (1960). It has been stated that such diversification requirements are proper in that they insure that initiatives, or in some cases referendums, depend on a sufficiently widespread demand by voters of more than one political subdivision in the State and that initiative petitions have substantial support throughout the State. *Opinion of the Justices*, 326 Mass. 781, 93 N.E.2d 220 (1950); *Phifer v. Diehl*, 175 Md. 364, 1 A.2d 617 (1938). Such a diversification requirement was designed so that trivial matters should not be presented. There must be a sufficient interest so that a substantial number of people of the State desire the legislation proposed. In other words, the public interest in a proposed initiative must not be a local interest, but must be statewide. *State ex rel. Graham v. Board of Examiners*, 239 P.2d 283 (Montana, 1952).

However, all of these cases were decided before the "one-man, one-vote" decisions by the United States Supreme Court. *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); and *Reynolds v. Sims*, 377 U.S. 533 (1964), all held that a state may not make a classification of voters which favor residents of some counties over residents of other counties. All votes had to carry equal weight. Persons in rural areas could not constitutionally be given ten times more voting power than persons living in urban areas.

One such case applying the "one-man, one-vote" rule is *Moore v. Ogilvie*, 394 U.S. 814 (1968). That case dealt with an Illinois law which required independent candidates to obtain at least 25,000 names on a nominating petition, at least 200 of which had to be obtained from at least each of 50 counties, in order for the names of such independent candidates to appear on the ballot. Forty-nine of Illinois' counties contained 93.4 percent of the state's population. The remaining 6.6 percent of the population lived in the other 53 Illinois counties. Theoretically, therefore, 6.6 percent of the state's population could prevent the nomination of these independent candidates if at least 200 names from some of these 53 counties could not be obtained on the nominating petition, despite the fact that 93.4 percent of the state's population in 49 other counties wished to nominate these candidates.

The Supreme Court rule that the Illinois law discriminated against the residents of the populous counties in favor of the rural counties and, therefore, it lacked the equality to which the exercise of political rights is entitled under the Fourteenth Amendment. The Supreme Court rejected the argument that the Illinois law was designed to require state-wide support for launching a new political party rather than support from a few localities.

This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our *representative* government. *Moore v. Ogilvie*, *supra*, at 818-819. (Italics added.)

However, a distinction can be made between the “one-man, one-vote” decisions and the initiative provisions of our Constitution. The essence of the “one-man, one-vote” decisions are that they are concerned with preserving *representative* government. In a representative government, the people do not act directly. They elect representatives to act for them. As such, it is important that the representatives accurately reflect the population that elects them. A minority of the people cannot have more representation than that to which they are entitled.

An initiative, however, is an exercise in *direct* government. The people directly propose legislation and the people directly enact legislation through an initiative. As such, the adoption of an initiative and referendum procedure changes the existing form of government with respect to legislating. The Legislature and the people then serve as coordinate legislative bodies, neither being superior to the other. 42 Am.Jur.2d, Initiative and Referendum, § 2. The people in enacting initiative measures are acting as legislative bodies, with the same sovereignty as the Legislature. Attorney General’s Opinion No. 153, dated December 21, 1934. The generally accepted view is that this system of direct legislation which has been in common use throughout the various state governments since their inception is clearly consistent with a republican form of government, even though it may deprive the Legislature of some law-making power or powers held by it at the adoption of the Federal Constitution. 16 Am.Jur.2d, Constitutional Law, § 393.

It is, of course, a constitutional requirement, under the “one-man, one-vote” decisions, that a Legislature must accurately reflect the population make-up of the State. This is for the reason that when the Legislature actually *enacts* a measure into law, no portion of the State will have greater voting power than another. The same constitutional requirement holds true when the people *actually vote* on an initiative question. However, *introducing* legislation and *enacting* legislation are two different things.

A Legislature determines its own rules of procedure. Nevada Constitution, Article 4, Section 6; 50 Am.Jur. Statutes, § 65. A Legislature may make such rules as it sees fit with regard to introducing legislation. In this respect, then, the Nevada Legislature, through its committee system and its rules for introducing legislation, allows representatives of less populated districts to have some influence over legislation that may affect the interests of their constituents. In this manner, minority rights are granted some protection. The same reasoning may be applied to introducing an initiative measure.

Therefore, the people, acting directly as a legislative body through the initiative may provide for themselves that support for introducing proposed initiative legislation must be found in three-fourths of the State’s counties. In fact, this was done in 1958 when the people themselves proposed and adopted the current form of Article 19, Section 2, paragraph 2. Such a provision is in accord with the reasoning of the cases cited above which upheld diversification requirements for introducing initiative petitions. The need to protect minority rights, the necessity of justifying the expense and time necessary for an initiative election, require that there be first shown a statewide interest or support for the introduction of something as weighty as an initiative petition. *Wilson v. Koontz*, supra; *Opinion of the Justices*, supra; *State ex rel. Graham v. Board of Examiners*, supra.

Whether such a distinction between the “one-man, one-vote” decisions and the nature of initiative legislation would be recognized and upheld by the courts is unknown. This office cannot answer that question as litigation on this particular problem has not yet arisen since the “one-man, one-vote” cases were decided. In such circumstances, it has always been a general rule of law that a state’s constitutional and statutory enactments are presumed constitutional and a court will not declare them unconstitutional unless there is clear evidence of their unconstitutionality. *King v. Board of Regents*, [65 Nev. 533](#), 200 P.2d 221 (1948); *Ex parte Iratacable*, [55 Nev. 263](#), 30 P.2d 284 (1934); *Ash v. Parkinson*, [5 Nev. 15](#) (1869). This office has followed this rule of law in the past. Attorney General’s Opinion No. 93, dated August 21, 1972; Attorney General’s Opinion No. 131, dated May 9, 1973. Indeed, the Attorney General has taken an oath to *support, protect and defend* the Constitutions and governments of the United States *and* Nevada and, therefore, has a

positive duty to reconcile the laws of this State with the Nevada and Federal Constitutions and to uphold and defend them whenever possible.

It is also worth noting that the United States Supreme Court has retreated somewhat in its “one-man, one-vote” decisions. *Maham v. Howell*, 410 U.S. 315 (1973), indicated that inequality in voting strength among various areas in a state may be tolerated if the state has some rational basis for the inequality, among which may be consideration of insuring some voice to political subdivisions. In this respect, a three judge federal court, considering Nevada’s reapportionment plan, stated that, because of peculiarities in Nevada’s geography and population make-up, the State had a legitimate basis in preserving the integrity of county boundaries and communities of interest in rural areas. *Stewart v. O’Callaghan*, 343 F.Supp. 1080 (1972).

CONCLUSION

A distinction can be made between the “one-man, one-vote” decisions and the constitutional provisions for an initiative petition. Initiatives are an exercise in direct government and there exists a rational basis for requiring a state-wide interest as a condition for introducing such legislation. Accordingly, it is the opinion of this office that Article 19, Section 2, paragraph 2 is a valid constitutional provision.

Respectfully submitted,

ROBERT LIST, *Attorney General*

189 Public Records—Department of Motor Vehicles may contract with a private firm to make searches of its records and copies thereof for the public, but may not compel the public to deal exclusively with a private firm in obtaining access to the department’s records.

CARSON CITY, May 8, 1975

MR. HOWARD HILL, *Director, Department of Motor Vehicles*, 555 Wright Way, Carson City, Nevada 89701

DEAR MR. HILL:

You have requested an opinion of the Attorney General as to whether the Department of Motor Vehicle is empowered to enter a contract whereby a private firm is authorized to make searches of the records of the department and furnish requesting private parties with copies of such records. In addition, you have asked whether the department has the authority to establish such contractual procedure as the exclusive method whereby private parties may obtain departmental records.

We understand that the department has contracted for a private research firm to handle private party requests to see or obtain copies of any nonprivileged records of the Department of Motor Vehicles; that the private research firm makes a search of the departmental records, copies any records requested and charges the requesting private party for such service; and that a portion of the amount charged by the private research firm is subsequently remitted to the Department of Motor Vehicles.

The initial contract to provide access to departmental records in the manner described above was entered into in 1963. This contractual arrangement was addressed in legislative audits of 1966 and 1973. Pursuant to suggestions contained in the latter audit and studies of the department, the Department of Motor Vehicles, through the State Purchasing Division, advertised for the submission of bids prior to reletting the contract in 1973. We understand this action was taken in an attempt to secure more revenue for

the State. The private firm which is the party to the present contract submitted the bid which resulted in the greatest benefit to the State and following a protest by the private firm previously furnishing the services in question, began performance of the present contract in August of 1973. In August of 1974, the Department of Motor Vehicles exercised an option clause in the contract and extended the contract for an additional year.

ANALYSIS

The initial question presented is whether the Department of Motor Vehicles has the authority to enter into the contract described above. Since state agencies have only that authority specifically granted by the Legislature or necessarily implied to effect the purpose of the department or agency, Attorney General's Opinion No. 425, dated November 24, 1958, the precise inquiry becomes whether the Department of Motor Vehicles has been specifically or impliedly empowered to enter into a contract which authorized a private firm, at the request of private parties, to conduct searches of and make copies of departmental records. In undertaking the analysis of this question, it must be remembered that, pursuant to [NRS 239.010](#), the records of the Department of Motor Vehicles are public records to which the public must be afforded access.

Neither [NRS 239.010](#) nor [NRS Chapter 481](#), which creates the Nevada Department of Motor Vehicles and sets forth the powers thereof, contain any authorization to contract with private agencies concerning making Department of Motor Vehicle records available to the public. However, [NRS 481.063](#) does provide that:

The director is authorized to charge and collect reasonable fees from persons making use of files and records of the department or its various divisions for any private purpose.

A question which logically arises is whether this language may be construed as a grant of the authority to contract.

Hamm v. Carson City Nugget, Inc., [85 Nev. 99](#) (1969), is analogous to the present inquiry. In *Hamm*, the Nevada Supreme Court addressed the question of whether violation of a criminal statute prohibiting the sale of liquor to intoxicated persons was negligence per se. In rendering its decision, the court stated, at page 102:

The section immediately preceding [NRS 202.100](#) ([NRS 202.070](#)) does impose a limited civil liability upon the proprietor of a saloon who sells liquor to a minor. *By providing for civil liability in one section and failing to do so in the section immediately following, the legislature has made its intention clear.* Accordingly, we must conclude that a violation of [NRS 202.100](#) does not impose civil liability upon one in charge of a saloon or bar, nor is such violation negligence per se. (Italics added.)

[NRS 481.055](#) and [481.059](#), which precede [NRS 481.063](#) in the Chapter establishing the Department of Motor Vehicles ([NRS Chapter 481](#)), specifically grant the director of the department authority to contract with private agencies concerning providing certain services. However, [NRS 481.063](#) contains no such authorization.

Based upon the holding in *Hamm v. Carson City Nugget, Inc.*, supra, it must be concluded that [NRS 481.063](#) grants no authority to contract. To paraphrase the court in *Hamm*, by expressly granting the authority to contract with reference to subject matter contained in [NRS 481.055](#) and [481.059](#) and failing to expressly grant the authority to contract with respect to subject matter of [NRS 481.063](#), the Legislature has clearly expressed its intention that [NRS 481.063](#) not be construed as a grant of authority to contract.

As set forth above, neither [NRS 239.010](#) nor the statute creating the Department of Motor Vehicles specifically authorizes the department to contract concerning making

departmental records available to the public. Such authority, if it exists, must then be contained in a separate statute or arise by implication.

[NRS 284.173](#) provides that department heads may contract for the services of independent contractors. If the private firm in question qualifies as an independent contractor, it would clearly appear that the contract in question would be authorized pursuant to [NRS 284.173](#). See *University of Nevada v. State of Nevada Employees Association, Inc.*, 90 Nev. Advance Opinion 36 (March 26, 1974), 520 P.2d 602 (1974).

An independent contractor is defined in [NRS 284.173](#), subsection 2, to be:

* * * a person, firm or corporation who agrees to perform services for a fixed price according to his or its own methods and without subjection to the supervision or control of the other contracting party, except as to the results of the work, and not as to the means by which the services were accomplished.

The private firm in question fits squarely within this definition, since the services are being performed for a fixed price; the methods used are not prescribed but are left to the private firm's discretion; employees of the private firm, subject to the private firm's control, are employed to perform the service; and no control except as to the end result and certain limitations as to hours of access to the departmental records are exercised by the Department of Motor Vehicles.

Based upon the above analysis, the answer to the initial question is in the affirmative. Having determined that the department is authorized to enter into the contract in question, the inquiry proceeds to a determination of whether such contractual relationship may be made the exclusive method by which the public is allowed to inspect and obtain records of the Department of Motor Vehicles.

As previously stated, the records of the Department of Motor Vehicles are public records and pursuant to [NRS 239.010](#) must "be open at all times during office hours to inspection by any person." The Legislature has by [NRS 239.010](#) clearly expressed its intention that the *public* is to have access to departmental records and this intention must be given effect. *Brown v. Davis*, [1 Nev. 409](#) (1865).

Although the Nevada courts have not expressly addressed the question of whether the public must be given *direct* access to public records, other states in construing both analogous statutes and the common law right to inspect and copy such records have concluded that public access to public records may be limited only insofar as necessary to prevent interference with the orderly functioning of the agencies whose records are being sought. *People v. Peller*, 181 N.E.2d 376, 378, 34 Ill.App. 372 (Ill.Ct.App., 1962); *State v. Ayers*, 171 N.E.2d 508, 509, 510, 171 Ohio St. 368 (S.Ct. Ohio, 1960). Such a conclusion is wholly in accord with the sound principle that good public policy requires liberality in providing the right to examine public records. *People v. Peller*, *supra*.

It is clear then that the public does have the right to access to the records of the Department of Motor Vehicles by dealing directly with the department. This conclusion compels a determination that the department may not condition access to departmental records on the use of the services of a private firm. *State v. Ayers*, *supra*.

CONCLUSION

For the reasons set forth above, it is the opinion of the Office of the Attorney General that the Department of Motor Vehicles does possess the power to enter into a contract whereby a private agency is authorized to conduct searches of the public records of the department at the request of private parties. However, access by the public to the records of the department may not be limited by or conditioned upon any requirement that the public be compelled to deal with a third party private firm.

Respectfully submitted,

190 Referendum—The Nevada Legislature has the authority to refer legislation to a vote of the people on its own initiative. A referendum question which has been approved by the people in this fashion may be subsequently amended, annulled or repealed by the Legislature acting alone and without further recourse to a vote of the people.

CARSON CITY, May 15, 1975

THE HONORABLE PAUL MAY, *State Assemblyman, Nevada State Legislature*, Legislative Building, Carson City, Nevada 89701

DEAR MR. MAY:

You have stated that the Legislature is considering referring certain pieces of legislation to the people for their approval. In this connection, you have asked two questions.

QUESTIONS

1. If legislation is referred to the people for their approval, may such legislation be subsequently amended only by a vote of the people or may the Legislature alone amend such statutes?
2. If the answer to this question is that the Legislature alone may not amend these statutes, can it be stipulated in the original ballot question that the Legislature may amend the statutes in the future without going to the people?

ANALYSIS

The only provision in the Nevada Constitution which provides for referendum questions is Article 19. Section 1, paragraph 1 of that article provides that a question on a statute or resolution enacted by the Legislature may be referred to the people upon the filing of a petition signed by a number of registered voters equal to 10 percent or more of the number of voters who voted at the last preceding general election. Section 1, paragraph 2 of the article then provides that if the statute or resolution is approved by the voters in the referendum question, the statute or resolution which has been approved “* * * shall stand as the law of the state and *shall not be amended, annulled, repealed, set aside, suspended, or in any way made inoperative except by the direct vote of the people.* * * *” (Italics added.)

This is the only procedure which is specifically authorized by the Nevada Constitution for referendum questions. There is no provision whatever in the Nevada Constitution which directly authorizes the Legislature to refer a question to the people on its own initiative. Accordingly, Section 1, paragraph 2 of Article 19, which provides that a statute or resolution which has been approved by referendum shall not be amended, annulled or repealed, applies only to referendum questions which have arisen and been approved subject to the procedures outlined in Section 1, paragraph 1 of Article 19. *Tesoriere v. District Court*, [50 Nev. 302](#), 258 P. 291 (1927). Therefore, any referendum question which has been approved pursuant to Article 19 of the Nevada Constitution may not be amended, annulled or repealed except by direct vote of the people. However, if another form of referendum is permitted, then the prohibition against amendment, annulment or repeal of a referendum question except by vote of the people does not apply, unless specifically provided by some other constitutional provision or by a statute.

In this particular instance, the Legislature is not proposing that legislation be referred to the people pursuant to the provisions of Article 19 of the Nevada Constitution.

Instead, the Legislature proposes, on its own initiative, to refer this question to the people. There is nothing in the Nevada Constitution, or anywhere else in the general statutes of the State, which directly authorizes the Nevada Legislature to refer legislation to the people on its own initiative.

However, the peculiarities of Nevada's own Constitution seem to indicate that the Legislature does have the authority to refer legislative matters on its own initiative to the people for their approval or rejection. The present form of Article 19 in the Nevada Constitution is not the original language of that article. The present language was adopted in 1962. Originally, Article 19, Section 3 of the Nevada Constitution provided as follows:

The people reserve to themselves the power to propose laws and the power to propose amendments to the constitution and to enact or reject the same at the polls, independent of the legislature, and also reserve the power at their option to approve or reject at the polls, in the manner herein provided, any act, item, section or part of any act or measure passed by the legislature. * * * The first power reserved by the people is the initiative. * * * *The second power reserved by the people is the referendum, which shall be exercised in the manner provided in sections 1 and 2 of this article.* * * * (Italics added.)

Under the original language to Article 19, therefore, the entire power of initiative *and* referendum was reserved solely to the people. Furthermore, with regard to the referendum, the language of the Constitution specifically provided that the referendum should be exercised only in the manner provided in Sections 1 and 2 of the original article. Sections 1 and 2 are similar to paragraphs 1 and 2 of Section 1 of the present Article 19. That is, a referendum could arise only upon petition by the people and, once a referendum question was approved, could not be amended or repealed except by a vote of the people.

Under Section 2, paragraph 1 of the present language of Article 19 of the Nevada Constitution, the people of Nevada continue to reserve solely to themselves the power to propose initiative legislation. The language of Section 2, paragraph 1 specifically states, “* * * the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution and to enact or reject them at the polls.” Significantly, however, the original language of Article 19 which provided that the people also reserved solely to themselves the power of the referendum has been entirely eliminated from the present language of Article 19. Nowhere in the present language of Article 19 is there a similar reservation to the people of the power of referendum. The original language reserving the power of referendum was specifically omitted by amendment. Additionally, the language of the original Article 19, which specified that referendums were to be conducted only in the manner provided in Sections 1 and 2, was also omitted. The general rule of legislative construction is that when a Legislature omits words in revising legislation, the courts are bound to assume that the omission was deliberate and for the purpose of effecting a change. A substantial change in legislative language indicates a change of legislative intent. *Crane, Hastings & Co. v. Gloster*, [13 Nev. 279](#) (1878); *Camino v. Lewis*, [52 Nev. 202](#), 284 P. 766 (1930). A Legislature is presumed by amendment to intend to create a new right or withdraw an existing right where a former provision of legislation is omitted. *Utter v. Casey*, [81 Nev. 268](#), 401 P.2d 684 (1965).

It would appear, therefore, that it was the intent of the people, by enacting the present language of Article 19 which eliminated the reservation of the referendum solely to the people, that other means of proposing referendum questions should be permitted. In this case, the alternative means for proposing referendum questions would be through the legislative power granted to the Nevada Legislature in Article 4, Section 1 of the Nevada Constitution. This is permitted even though the Nevada Constitution does not specifically authorize the Legislature to refer legislation on its own initiative. The reason for this is

that a state constitution, unlike the United States Constitution, does not act as a grant of power. State constitutions act solely as limitations of power and, therefore, an act of a state legislature, pursuant to its legislative function, is legal when the constitution contains no prohibition against the act. 16 Am.Jur.2d, Constitutional Law, § 17.

In other words, as a result of the repeal of the original language of Article 19, the Legislature is able to fully exercise its legislative function, pursuant to Article 4, Section 1 and, except where otherwise limited by the Constitution, to propose referendum questions on its own initiative. Such a referendum is part of the inherent power of the Legislature. *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952).

This brings us back, therefore, to our original question as to whether, in a situation where the Nevada Legislature on its own initiative proposes a referendum question, an approved referendum may be amended only by a vote of the people or whether the Legislature alone may also amend such a statute. As already stated, where a referendum has been proposed and approved pursuant to the provisions of Article 19, such a referendum may not be amended, annulled or repealed except by a vote of the people. That prohibition, however, applies only to referendums proposed and adopted pursuant to the provisions of Article 19. *Tesoriere v. District Court*, supra. The prohibition does not apply to any alternative means of proposing a referendum question.

The rule is that under the general constitutional provisions vesting the legislative power of the State in the Legislature, and where the people may also exercise referendum and initiative powers, there is no superiority between the two. The Legislature and the electorate are coordinate legislative bodies and in the absence of special constitutional restraints, either may amend or repeal an enactment by the other. 33 A.L.R.2d 1118. We have already concluded that the Legislature is authorized to propose referendum questions on its own initiative. There is nothing in the Nevada Constitution or in the general statutes which states that referendum questions proposed by the Legislature on its own initiative can be amended only by a vote of the people.

CONCLUSION

Accordingly, it is the opinion of this office that in the case of referendum questions proposed by the Legislature on its own initiative, statutes which are approved by that referendum may be amended in the future by the Legislature acting alone. Of course, referendum questions approved by the people pursuant to the provisions of Article 19 may not be amended except by a direct vote of the people. Your first question having been answered in the above manner, it is, therefore, unnecessary to consider your second question.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

191 Public Health—Chapter 326, Statutes of Nevada 1975, prohibits smoking in certain designated areas; violation of statute is misdemeanor.

CARSON CITY, June 30, 1975

MR. JOHN KOONTZ, *Acting Director, Nevada State Museum*, Carson City, Nevada 89701

DEAR MR. KOONTZ:

You recently requested from this office an interpretation of Assembly Bill No. 17 as it may affect the Nevada State Museum and other governmental agencies and institutions. Assembly Bill 17 is also known as Chapter 326, Statutes of Nevada 1975.

Chapter 326, which is effective July 1, 1975, sets forth a new public policy for the State of Nevada concerning the smoking of tobacco in certain specified public places, based upon a legislative finding that the quality of air is affected with the public interest.

The heart of Chapter 326 is Section 3 which, with certain exceptions noted below, prohibits smoking of tobacco in any form in the following locations:

1. A public elevator;
2. A library;
3. A museum;
4. A bus used by the general public, other than a chartered bus;
5. A room, including a lecture hall or a university concert hall, located in a public building while a public meeting is in progress in such room;
6. A hallway, waiting room or cafeteria open to the public and located in a state building; and
7. A public waiting room, lobby or hallway of any health and care facility as defined by [NRS 499.007](#) or office of any chiropractor, dentist, physical therapist, physician, podiatrist, psychologist, optician, optometrist, osteopath or doctor of traditional Oriental medicine.

PUBLIC ELEVATOR

Minutes of the committee hearings on this law disclose that the Legislature intended the phrase “public elevator” to include any elevator generally used by members of the public, whether such elevator is located in a privately-owned or publicly-owned building.

LIBRARY AND MUSEUM

Use by the Legislature of the unqualified and unrestricted terms “library” and “museum” in Chapter 326 tends to show that the no-smoking ban once again is to be applied to all such facilities regardless of whether they are privately or publicly operated.

BUSES

A smoking ban is imposed by this law in a bus, other than a chartered bus, used by the general public. Again, the term “bus” appears without limiting language on the question of interstate versus intrastate buses. We therefore conclude the term is intended to include all buses (i.e., motor carriers transporting passengers for a fee) operating in interstate commerce, under Interstate Commerce Commission certification, or intrastate commerce with Nevada Public Service Commission certification.

We understand that present regulations of the ICC permit designation of not more than 20 percent of the seats on an ICC-regulated motor carrier as a smoking area. 49 CFR Sec. 1061. This ICC regulation and our new state law appear compatible, since subsection 4 of Section 3 in Chapter 326 authorizes a specially designated smoking area in what would normally be a no-smoking area, whenever it is possible to confine the smoke to the specially designated smoking area, or where a totally separate area is set aside for smokers.

A ROOM LOCATED IN A PUBLIC BUILDING WHILE A PUBLIC MEETING IS IN PROGRESS

With respect to this particular no-smoking area, the key words appear to be “public building” and “public meeting.”

The term “public meeting” is defined in the new law to mean “a gathering for which there is (a) advance notice, (b) a planned agenda, and (c) a person presiding or otherwise in charge.” By statute, “public meeting” specifically does not include a trade

show or exhibition. This definition is similar to, but not quite the same as, the definition of the term "meeting" used in the Open Meeting Law, [NRS Chapter 241](#), as more fully explained in the Nevada Open Meeting Law Manual issued by this office in September 1974. The main difference is the fact that the Open Meeting Law applies without regard to the type of building in which a "meeting" of government officials occurs, whereas Chapter 326 applies only in "public buildings" as defined in this opinion. We are therefore of the belief that the Open Meeting Law would apply to any meeting to which Chapter 326 would apply, but the reverse is not always true, since an "open meeting" may occur in a nonpublic building to which the no-smoking prohibition of Chapter 326 has no application.

In Chapter 326, the term "public building" is not statutorily defined, but based upon judicial interpretation of this term we are of the opinion it refers to any building owned or occupied by public governmental agencies for the transaction of public or quasi-public business. Black's Law Dictionary, 4th Edition, page 1393.

With this definition in mind the no-smoking ban would apply to any room (except work areas, lounges or conference rooms as noted and explained below) owned or leased by a public agency of any governmental unit operating within the State of Nevada for the transaction of public and quasi-public business. This obviously includes all buildings where legal title is in the name of the state, county, city or other governmental unit. It also would include any areas in privately-owned office buildings leased by a public agency, but would appear to exclude such things as a conference room in a privately-owned hotel where the use is merely temporary.

In each instance, the ban on smoking in such rooms applies only when a public agency is holding a "public meeting" as defined in the law.

HALLWAY, WAITING ROOM, CAFETERIA IN A STATE BUILDING

With this section of the law, smoking is prohibited in any hallway, waiting room or cafeteria open to the general public and located in a state building. It should be noted that here the term used is "state building" rather than the broader "public building" referred to in the prior section. Having used two different terms, we can only conclude the Legislature intended for this restriction to have application in a more limited area, i.e., in a hallway, waiting room or cafeteria open to the general public and located in a building which is owned by the government of the State of Nevada. As a consequence, this particular part of the new no-smoking law appears inapplicable to buildings owned by other governmental units.

WAITING ROOM, LOBBY, HALLWAY OF ANY HEALTH AND CARE FACILITY OR OFFICE

The final area in which the smoking ban is imposed by the Legislature is the waiting room, lobby or hallway of any health and care facility licensed by the Division of Health or the waiting room, lobby or hallway in any office of a chiropractor, dentist, physical therapist, physician, podiatrist, psychiatrist, optician, optometrist, osteopath or doctor of traditional Oriental medicine.

SPECIALLY DESIGNATED SMOKING AREAS

Subsection 2 of Section 3 in Chapter 326 requires that the person or persons in control of those areas designated as no-smoking areas by law shall post signs prohibiting smoking in all such areas, except that such person or persons may, in his discretion, provide for separate rooms or portions of designated no-smoking areas to be used by smokers where it is possible to confine the smoke to such areas. Thus, notwithstanding the general no-smoking prohibition in each of the areas above described, persons in control of those areas may at their option provide for smoking on a limited basis.

In those areas where no smoking is to occur, to be in compliance with the law, "No Smoking" signs should be posted no later than July 1, 1975.

PENALTIES FOR VIOLATION

The person who smokes tobacco in any designated nonsmoking area is guilty under this law of a misdemeanor punishable by a fine of not less than \$10 nor more than \$100. In addition, a person who fails to post signs prohibiting smoking in those areas declared by the law to be nonsmoking areas is also guilty of a misdemeanor punishable by a fine of not less than \$10 nor more than \$100.

APPLICATION TO NEVADA STATE MUSEUM

With specific reference to the Nevada State Museum, the Legislature has declared the State Museum to be a state institution. [NRS 381.010](#). It receives support from and is operated by the State of Nevada through the Board of Trustees of the museum. It is our belief that the Nevada State Museum is clearly a nonsmoking area within the meaning of Chapter 326. Therefore, appropriate “No Smoking” signs must be posted on and after July 1, 1975, throughout the entire public portion of the museum building. At its discretion, the museum has the option of setting aside a specially designated room for smokers or designating a smoking area within an otherwise designated “no smoking” area for use by smokers, but only where it is possible to confine the smoke to such an area.

The “no smoking” prohibitions of Chapter 326 appear also to apply to all future meetings of the Board of Trustees of the Nevada State Museum. Those meetings are usually on advance notice, with a planned agenda, and a presiding officer, and, therefore, fit within the definition of “public meeting” in a room in a public building, as more fully explained above.

Originally Chapter 326 provided that work areas, employee lounges or conference rooms of state buildings would be prohibited “no smoking” areas. However, in its final version, all references to work areas, employee lounges and conference rooms were deleted from the bill, and, therefore, it is the opinion of this office that smoking may still occur in those portions of state and public buildings, including the State Museum, which are designated as work areas, employee lounges and conference rooms (unless a “public meeting” is taking place in said conference room) as opposed to those portions of a state or public building, such as the museum’s display areas, which are open to the general public.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

192 Recordation of Deeds—United States as Grantee—The United States and its agencies or instrumentalities may purchase or acquire real property, or interests therein, without the consent of the State of Nevada and such deeds or documents of conveyance must be recorded by county recorders upon presentation with appropriate fees. The United States must secure the consent of the State of Nevada pursuant to [NRS 328.030](#) to [328.150](#), inclusive, if it desires to acquire full, exclusive jurisdiction over the property acquired.

CARSON CITY, September 2, 1975

MR. JEROME MACK, *Chairman, Nevada Tax Commission*, 1501 South 6th Street, Las Vegas, Nevada 89104

DEAR MR. MACK:

During the past meetings of the Nevada Tax Commission, questions have arisen concerning the constitutional authority of the State of Nevada to bar recordation of any deed or conveyance in which the United States of America is the grantee unless there shall first have been placed on record a certificate of consent to the transaction on behalf of the State of Nevada as provided in [NRS 328.100](#). Additionally, an action has been initiated in United States District Court, District of Nevada, challenging the constitutionality of such a prohibition. *United States Postal Service v. Ardis C. Brown, Washoe County Recorder* (Civil No. 4-74-145-BRT). You have asked this office for an opinion clarifying the appropriate legal and constitutional role of the State of Nevada in considering granting consent for the acquisition of land or water interests by the United States within Nevada.

QUESTION

May the United States of America, or its agencies or instrumentalities, purchase or acquire interests in real property within the State of Nevada without the prior consent of the State of Nevada?

ANALYSIS

The resolution of the question presented requires an analysis and comparison of the provisions of [NRS 328.030](#) to [328.150](#), inclusive, with applicable provisions of the United States Constitution, as interpreted by the United States Supreme Court. In particular, Article I, Section 8, clause 17 of the United States Constitution reads as follows, in part:

The Congress shall have the Power * * *
* * *

To exercise exclusive Legislation in all Cases whatsoever, * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *

In an apparent effort to provide a reasonable procedure by which the United States of America could acquire the consent of the State of Nevada to the acquisition of property within this State, the Nevada Legislature adopted the provisions contained in [NRS 328.030](#) to [328.150](#), inclusive. In general terms, these provisions direct and authorize the Nevada Tax Commission to accept applications for such consent, and to give or withhold the consent of the State of Nevada to the acquisitions of real property or rights therein, including water rights, by the United States of America. [NRS 328.030](#), subsection 1, reads in part:

The consent of the State of Nevada to the acquisition by the United States of America of any land or water right or interest therein in this state, * * * desired for any purpose expressly stated in clause 17 of section 8 of article I of the Constitution of the United States, may be given by concurrence of a majority of the members of the Nevada tax commission, upon finding that such proposed acquisition and the method thereof and all other matters pertaining thereto are consistent with the best interests of the state. * * *

After setting forth several statutes relating to the application for the consent of the State of Nevada, and the conditions and requirements of consent to such acquisition of interests in real property, the Nevada Legislature provided, in [NRS 328.110](#):

No recorder of conveyances of real property in this state shall accept for recordation any deed of conveyance wherein the United States is the grantee unless there shall first have been placed on record with the official a certificate of consent pertaining to transaction as provided for in [NRS 328.100](#).

We are informed that the practical effect of this last-quoted statute was the precipitating factor leading to the filing of the action by the United States Postal Service against the County Recorder of Washoe County, *supra*. We are further informed that the United States Postal Service presented a properly executed and acknowledged deed for recordation to the County Recorder of Washoe County. The deed evidenced a transfer of real property, for consideration, from two private land owners to the United States Postal Service. The County Recorder of Washoe County, relying upon the language of [NRS 328.110](#), refused to record the deed due to lack of evidence of consent to the transaction on behalf of the State of Nevada.

While the literal language of Article I, Section 8, clause 17 of the United States Constitution, *supra*, appears to require the consent of a state legislature prior to the purchase of real property by the United States, significant limitations upon this language have been consistently applied by the United States Supreme Court. In particular, as the Supreme Court indicated in *Paul v. United States*, 371 U.S. 245, 264-265 (1962):

The power of the Federal Government to acquire land within a State by purchase or condemnation without the consent of the State is well established. *Kohl v. United States*, 91 U.S. 367, 371. But without the State's "consent" the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-142. In that event, however, it was held in *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 541, 542, that a State could complete the "exclusive" jurisdiction of the Federal Government over such an enclave by "a cession of legislative authority and political jurisdiction."

Thus if the United States acquires with the "consent" of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, § 8, cl. 17, or if the land is acquired without such consent and later the State gives its "consent," the jurisdiction of the Federal Government becomes "exclusive." * * * [A] State may condition its "consent" upon its retention of jurisdiction over the lands consistent with the federal use. *James v. Dravo Contracting Co.*, *supra*, 146-149.

The fact that the judicial interpretation outlined above is inconsistent with the literal language of the United States Constitution was recognized by the United States Supreme Court in *Fort Leavenworth R.R. Co. v. Lowe* (1885), *supra*, 530-531, wherein the court stated:

Purchase with such consent was the only mode that [at the time of the adoption of the Constitution] thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the States. * * * The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. * * *

It is therefore the clear and long-standing interpretation of the United States Supreme Court that the requirement of the consent of the various states referred in the

United States Constitution, *supra*, is only necessary if the United States desires to acquire full and exclusive legislative authority and jurisdiction over any property acquired for the purposes mentioned in the Constitution.

CONCLUSION

It is therefore the conclusion of this office that the United States of America, and its agencies or instrumentalities, may freely acquire real property, or interests therein, within the State of Nevada and record the appropriate deeds and other evidences of such transactions with the appropriate county recorders upon posting of the appropriate statutory recordation fees without the specific consent of the State of Nevada. The State of Nevada retains concurrent jurisdiction, at a minimum, over property purchased or acquired by the United States without the specific consent of the State. We further conclude that the refusal by a county recorder to record a deed in which the United States is the grantee pursuant to the terms of [NRS 328.110](#) will be violative of the United States Constitution, and therefore illegal.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JAMES D. SALO, *Deputy Attorney General*

193 Public Officers and the Nevada Ethics in Government Law—A “public officer,” for the purposes of the Nevada Ethics in Government Law, includes (1) elective officers and (2) persons appointed to positions created by law whose duties are specifically set forth in law and who are made responsible, by law, for the direction, supervision and control of their agencies. A “public officer” includes part-time officers and officers who receive no compensation for their duties. A “public officer” does not include persons in positions created by the United States Constitution, persons in the judicial department of the State, members of committees, commissions or boards which are solely advisory in nature, notaries public and commissioners of deeds, and deputies and assistants to public officers.

CARSON CITY, September 3, 1975

MR. HOWARD E. BARRETT, *Director, Department of Administration, Carson City, Nevada*
89701

DEAR MR. BARRETT:

Chapter 540 of the 1975 Statutes of Nevada, known as the Nevada Ethics in Government Law, applies to all state and local public officers and employees in the State, with the exception of persons in the judicial department of state government. You have stated that you feel that persons occupying positions established by the Constitution and statute are public officers. However, you have requested advice as to whether the major department heads, major division heads, members of administrative boards, heads of minor state agencies, members of licensing and advisory boards are public officers under the act.

Because this office has received numerous requests for opinions regarding this point from various local political subdivisions, this opinion will attempt to establish guidelines defining both state and local governmental officers and employees under the act.

FACTS

Chapter 540 of the 1975 Statutes of Nevada attempts to regulate the ethical conduct of public officers and employees in the State and further requires financial disclosures in certain instances from public officers. Under Section 12 of Chapter 540, a “public employee” means:

* * * any person performing public duties under the direction and control of a public officer for compensation paid by the state, a county or an incorporated city.

Section 14 of Chapter 540 provides that a “public officer” means:

* * * a public officer as defined by [NRS 281.005](#), but does not include any member of the judicial department of state government.

Referring to [NRS 281.005](#), subsection 1, we find that it states as follows:

“Public officer” means a person elected or appointed to a position which:
(a) Is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state; and
(b) Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

QUESTION

Who is a “public officer” for the purposes of Chapter 540 of the 1975 Statutes of Nevada, the Nevada Ethics in Government Law?

ANALYSIS

[NRS 281.005](#) contains three criteria for defining a public officer. First, his position must be created by the Constitution, a statute or an ordinance. Second, his position must involve the continuous exercise of a public power, trust or duty. Third, this exercise of a power, trust or duty must be part of the regular and permanent administration of government.

In this respect, then, an elective officer is the easiest public officer to define. In the United States, elective government offices do not arise spontaneously or by force of tradition. They must be created by act of law. They are created for the purpose of governing and they involve the exercise of certain responsibilities or certain powers and duties involving the people of the community. All elective officers, therefore, fit the criteria of [NRS 281.005](#). Further proof of the nature of such persons is found in [NRS 281.010](#) which lists the persons to be elected in the State and which specifically labels them “officers.”

When the legislature created and called it an “office” it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the law-making power impressed that stamp upon it. State ex rel. Kendall v. Cole, [38 Nev. 215](#), 220, 148 P. 551 (1915).

In addition to the list of persons specifically named in the statute, [NRS 281.010](#), subsection (1)(m) lists “Other officers whose elections are provided for by law.” Therefore, with the following exceptions, *all* persons elected to governmental positions, whether state, district, county or municipal, are subject to the provisions of Chapter 540.

Exceptions from the act include United States Senators, Nevada’s member of the House of Representatives and presidential electors. These persons are exempt because

their offices were created by the United States Constitution and not by the Constitution, statutes or ordinances of Nevada.

In addition, Justices of the Supreme Court, district judges and justices of the peace are exempt from the provisions of Chapter 540 because these offices constitute the judicial department of state government, which was specifically exempted from Chapter 540 by the act itself. Although district judges and justices of the peace are elected locally, nevertheless they are considered part of the judicial department of state government because Article 6, § 1, provides:

The Judicial power of the *State* shall be vested in a Supreme Court, District Courts, and in Justices of the Peace. * * * (Italics added.)

Municipal judges would also be included in this exemption, because Article 6, § 1, goes on to state:

* * * The Legislature may also establish Courts for municipal purposes only in incorporated cities and towns.

Employees of the various courts would also be exempt from Chapter 540 because, under section 12 of the act, a public employee is one performing duties under the direction and control of a *public officer*. However, under section 14 of the act, a public officer does not include any member of the judicial department of state government. Of course, such court employees would still be subject to [NRS 281.230](#) which prohibits all public employees from having an interest in any contract or transaction with their employing agencies, which interest is inconsistent with loyal service to the people.

In addition to listing officers who are to be elected, [NRS 281.010](#), subsection 2, goes on to provide:

The following officers shall be appointed:

- (a) Notaries public.
- (b) Commissioners of deeds for the respective states and territories of the United States and foreign countries.
- (c) All officers who are not elected.

It does not appear to be the intent of the Legislature, however, to include notaries public and commissioners of deeds as “public officers” for the specific purposes of Chapter 540, even though the Nevada Supreme Court has ruled that, generally, notaries public are public officers. *State v. Clarke*, [21 Nev. 337](#), 31 P. 546 (1892). In interpreting statutes, the basic rule is that one must always look to the intent of the Legislature. *Fairbanks v. Pavlikowski*, [83 Nev. 80](#), 423 P.2d 401 (1967). In determining legislative intent, one must find an intention that will lead to a reasonable result. *Nevada-Cal. Transp. Co. v. Public Service Commission*, [60 Nev. 310](#), 103 P.2d 43 (1940). Statutes should be construed so as to avoid absurd results. *Western Pacific R.R. v. State*, [69 Nev. 66](#), 241 P.2d 846 (1952).

In this case, there are many hundreds of Nevada citizens who are notaries public—lawyers, insurance salesmen, bank tellers, secretaries and etc. Furthermore, the sole duty of such persons is simply to acknowledge signatures. In addition, commissioners of deeds are not even Nevada citizens, but are persons who live in other states and who have been appointed by the Governor to acknowledge signatures of persons living out of state who are transferring deeds to Nevada property to other persons. [NRS 240.170](#) et seq. These persons are not part of the permanent administration of government and their sole function has little to do with the administration of government. It would, therefore, be absurd to find that it was the intention of the Legislature that these hundreds of ordinary citizens must register under, and comply with, Chapter 540. It is the

opinion of this office, therefore, that notaries public and commissioners of deeds are exempt from Chapter 540.

However, the third category of [NRS 281.010](#), subsection 2(c)—“All officers who are not elected”—presents the most difficulty, for not all persons appointed to government positions are necessarily public officers.

The distinction between a public officer and a public employee is shadowy and difficult to find. Although a distinction does exist, no rule can be laid down which is applicable in all cases. 63 Am.Jur.2d, Public Officers and Employees, § 11; Attorney General’s Opinion No. 229, dated December 11, 1956. In the final analysis, each question will have to be determined on its own merits with a view to considering the particular facts and circumstances surrounding the creation of the office, the intent and subject matter of the enacting legislation, the nature of the duties of the office, the method by which the duties are to be carried out and the end result sought. *State ex rel. Johnson v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937).

Still, a general guideline can be adopted and, in fact, has been legislated; namely, the three elements of the definition of a public officer found in [NRS 281.005](#). The most important of these elements is that the position must be created by the Constitution, a statute or ordinance. A public office cannot exist except by law. *State ex rel. Kendall v. Cole*, supra; 63 Am.Jur.2d, Public Officers and Employees, § 29; anno., 53 A.L.R. 595. Where a position has not been created by an enabling act or ordinance, but has been created administratively by a state or local agency, the position and its duties have not been specifically fixed by law. Instead, the position has been created by the state or local agency and the position and its duties may be fixed, amended or eliminated at the absolute will of the state or local agency. The position, therefore, would be merely a public employment for its exists at the will or pleasure of another. *State ex rel. Mathews v. Murray*, [70 Nev. 116](#), 258 P.2d 982 (1953).

However, the fact that a position has been established, authorized or mentioned in a statute does not always mean that position is a public office. Thus, a recent Nevada Supreme Court decision noted that the position of Director of the Clark County Juvenile Court Services was created by statute:

* * * However, it is also true that his duties were not defined by statute but rather by his superiors; that no tenure attached to his position; that he had no power to hire or fire; and that he was wholly subordinate and responsible to his superiors. *Mullen v. Clark County*, [89 Nev. 308](#), 311, 511 P.2d 1036 (1973).

Although this case speaks of the relationship of the person involved to his “superiors,” it should be remembered that the fact that a position is a subordinate one does not necessarily mean the incumbent is not an officer. An inferior officer is an officer nevertheless. 63 Am.Jur.2d, Public Officers and Employees, § 12.

Therefore, when considering the problem of whether a particular person is an officer or employee, one must initially ask two questions. First, is the person occupying a position created by the Constitution, a statute or ordinance? Second, even if the position was created, authorized or mentioned by statute or ordinance, have the duties of the position been specified by statute or ordinance? In looking at the duties specified by the statute or ordinance, one must then determine whether responsibility for the direction, supervision and control of the position has been vested in the incumbent. This is because it has been held that the distinction between an officer and employee is that the responsibility for results lies upon one and not upon the other and that there is also vested in an officer the power of direction, supervision and control. *Miller v. Ottawa County*, 146 Kan. 481, 71 P.2d 875 (1937).

Applying this standard to the problem before us, one can see that the heads of all the various state departments and agencies, such as commerce, administration, general services, human resources and the like, are public officers. Their positions are created by

statute and their duties are specified by law. Additionally, they are responsible for the direction, supervision and control of their agencies. If created by statute and if their duties are also specifically enumerated by statute, the heads of the divisions in such state departments and agencies, such as, for example, the Welfare Division of Human Resources, the Buildings and Grounds Division of General Services, and the Insurance Division of Commerce, would also be public officers. They, too, are responsible for the direction, supervision and control of their respective divisions, even though over-all administrative responsibility lies with the department head. Although utilizing state departments as examples in this opinion, nevertheless, the standard may be applied equally to district, county and municipal positions. In summation, the key factors are whether the positions were created by the Constitution, a statute or an ordinance, whether the statute or ordinance specifically enumerates the duties expected of each person holding the position and whether that person has been given the responsibility, by statute or ordinance, for the direction, supervision and control of the agency.

An example of a position *not* constituting public office would be that of the Manager of the Public Works Board. [NRS 341.100](#) merely provides that the Public Works Board shall appoint a manager. The manager's duties, however, are nowhere specified in the statute. Instead, the board is given all the responsibility for administering the agency. The manager, therefore, may exercise only such responsibility as the board sees fit to confer and what the board gives, the board can take away. The manager's duties, therefore, exist at the will and pleasure of the board and the manager must, as a result, be considered only a public employee.

Persons who hold the position of deputies and assistants in state and local government agencies would also be considered employees, because they may exercise only such authority and powers as their principals may see fit to grant them. It is true that many statutes which authorize positions for deputies and assistants state that they may exercise all the powers of their principals, but the principal has the responsibility for the agency and may permit the deputies or assistants to exercise full or only such partial authority as he sees fit. Exercise of the authority, in other words, depends upon the will or pleasure of the principal. As such, a deputy or assistant is wholly subordinated and responsible to his superiors. *Mullen v. Clark County*, supra. Attorney General's Opinion No. 6, dated February 3, 1931, and Attorney General's Opinion No. 353, dated November 24, 1954, which advised that deputy constables and deputy assessors, respectively, were public officers, were decided prior to *Mullen v. Clark County*, supra, and are hereby rescinded.

The second element of the definition of public officer found in [NRS 281.005](#) involves the continuous exercise of a public power, trust or duty. The customary definition of a "public officer" is that it is a person occupying a position created by law with duties that involve an exercise of a portion of the *sovereign* power of government, the performance of which involves the public and which is continuous in nature. 53 A.L.R. 595. This definition has been accepted in Nevada. *State ex rel. Kendall v. Cole*, supra; *State ex rel. Mathews v. Murray*, supra. This requirement that there be an exercise of a portion of the sovereign power of government does not conflict with the definition of "public officer" in [NRS 281.005](#). Indeed the definition, according to the Nevada Supreme Court, embodies that requirement.

In any event, it seems that the statutory definition of a public officer is in harmony with case law previously decided and contemplates that the individual in question is invested with some portion of the sovereign functions of government. See *State ex rel. Kendall v. Cole*, [38 Nev. 215](#), 219, 148 P. 551 (1915); *State ex rel. Mathews v. Murray*, [70 Nev. 116](#), 258 P.2d 982 (1953). (*Mullen v. Clark County*, supra, at 311.)

Thus, when [NRS 281.005](#) speaks of powers, trust and duty, it contemplates the exercise of a sovereign power of government. The term “sovereign power” has been defined as:

That power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish the legitimate ends and purposes of government. Black’s Law Dictionary, 1568 (4th ed. 1951).

It contemplates duties performed in the execution or administration of the law. State ex rel. Kendall v. Cole, supra, at 230. Therefore, any person holding a position which does not permit the execution or administration of the law would not be exercising a public power, trust or duty, i.e., sovereign functions. In this connection, therefore, a member of a purely advisory board or commission would not be subject to the provisions of Chapter 540. In illustration of this point, a California court, which had to decide if members of the California Commission on Interstate Cooperation were public officers, held:

Thus it is generally said that an “office” or “trust” requires the vesting in an individual of a portion of the sovereign powers of the state. * * * The positions here created do not measure up to so high a standard. They involve merely the interchange of information, the assembling of data and the formulation of proposals to be placed before the legislature. Such tasks do not require the exercise of a part of the sovereign power of the state. Parker v. Riley, 18 Cal.2d 83, 113 P.2d 873 (1941).

Therefore, a position on an advisory board or commission, with *solely* advisory duties and with no power to implement recommendations or carry out the administration of the law, would not constitute a public office and its members would not be public officers. For example, a Veterans Advisory Commission was created by Chapter 709 of the 1975 Statutes of Nevada. The sole duties of the commission are to advise the Commissioner for Veterans Affairs, coordinate activities of veterans’ organizations, disseminate information, make recommendations to the Governor, Legislature and Commissioner for Veterans Affairs and conduct studies. There is no administration of the law involved. Its functions are purely advisory. Therefore, members of the commission would not be exercising a public power, trust or duty, as defined by the Nevada Supreme Court, and such members would be exempt from the provisions of Chapter 540.

Another example of advisory board members who may be exempt from Chapter 540 would be members of regional, county or city planning commissions. Under Chapter 278 of Nevada Revised Statutes, which authorizes local governments to create planning commissions by ordinances, such commissions are to “adopt” master plans and subdivision maps and to recommend variances and special use permits. Usually, however, the final action regarding the actual adoption of master plans, subdivision maps, variances and special use permits lies with the local governmental governing boards. Therefore, the action of a planning commission is purely advisory. It is limited merely to making recommendations, with the local government taking the action necessary to actually adopt and effectuate the measures. It is possible, of course, under [NRS 278.315](#), for a local government to permit a planning commission to actually grant variances and special use permits. In such a case, a planning commission would be exercising a public power, duty or trust and its members would be subject to the provisions of Chapter 540, because they would no longer be acting in a purely advisory capacity. However, unless a local ordinance does in fact delegate the authority to grant variances and special use permits to a planning commission, such commissions are limited to a purely advisory role and, therefore, members of planning commissions would be exempt from Chapter 540.

Members of a county or city board of adjustment, on the other hand, would be subject to the provisions of Chapter 540, because they do not act in a purely advisory role. Under [NRS 278.300](#), a board of adjustment has three powers: (1) to hear appeals from an order or requirement of an administrative official or agency relative to zoning and building codes; (2) to decide variances where zoning and building regulations permit it to do so; (3) to decide special use permits where zoning and building regulations permit it to do so. A board acts in an advisory capacity with regard to variances and special use permits with the local government making the final decision, unless under [NRS 278.315](#) the local government delegates such final authority to the board. However, with regard to hearing appeals from administrative officers or agencies relative to zoning and building codes, a board of adjustment acts in a quasi-judicial function. It determines whether the administrative officer or agency acted properly. While the decision of the board may then be further appealed to the local government, the decision of the board is not a recommendation to the local government. Indeed, if no appeal is taken to the local government, the decision of the board is final. As such, a county or city board of adjustment does not act in a purely advisory role. It carries out a public power, trust or duty. Therefore, members of a county or city board of adjustment are subject to the provisions of Chapter 540.

The third element of the definition of public officer in [NRS 281.005](#) requires that the exercise of a public power, trust or duty be part of the regular and permanent administration of government. This refers not to the status of the officer, but to the duties he exercises. In other words, it makes no difference whether a public officer is only a part-time officer, exercising his duties only periodically while having another, permanent, private employment. If the duties which he exercises are part of the regular and permanent administration of government, if they are continuing in nature as provided for by law, then the person exercising the duties is a public officer. The duty exercised must not be for a single transaction, or occasional, transitory or incidental. *State ex rel. Kendall v. Cole*, supra; Attorney General's Opinion, dated May 10, 1909.

In addition, although the payment of compensation has been considered as one of many elements making up a public office, compensation is not essential to a definition of public office. One may be a public officer even without the payment of compensation. 63 Am.Jur.2d, Public Officers and Employees, § 5; Attorney General's Opinion No. 64, dated May 19, 1955.

Thus, a member of the State Public Works Board is a public officer, see Attorney General's Opinion No. 64, dated May 19, 1955; a member of the Nevada Tax Commission is a public officer, see Attorney General's Opinion No. 28, dated March 12, 1951; a member of a county fair and recreation board is a public officer, see Attorney General's Opinion No. 143, dated September 18, 1973.

In addition, members of occupational licensing boards would also be considered public officers despite the part-time, noncompensatory nature of their positions. Their positions are created by statute, their duties are specified by statute and they are made responsible, as a board, for the direction, supervision and control of their agencies. Their duties are not advisory in nature. Thus, members of, for example, the Contractor's Board or Board of Medical Examiners are subject to the provisions of Chapter 540.

CONCLUSION

Because of the number and differing variety of statutes and ordinances creating and specifying the duties of public officers, the question of whether a particular person is a public officer frequently will have to be decided on a case-by-case basis. However, certain general guidelines may be established.

1. All persons elected to governmental positions, whether on a state, district, county or municipal level, are public officers.
2. A person appointed to a governmental position, whether on a state, district, county or municipal level, is a public officer if his position is created by the Constitution,

a statute or ordinance and if, further, his duties are specifically set forth in the Constitution, statute or ordinance and that person is made responsible, by the Constitution, statute or ordinance, for the direction, supervision and control of his agency.

3. A person occupying a public office is a public officer regardless of whether he occupies that position full time or part time or whether he is compensated or not compensated.

Notwithstanding the above, the following persons are exempted from the provisions of Chapter 540:

1. United States Senators, Nevada's member of the House of Representatives and presidential electors because their positions were created by the United States Constitution and not by the Constitution, a statute or ordinance of this State.

2. Justices of the Supreme Court, district judges, justices of the peace and municipal judges and employees of the various courts because, under Chapter 540, members of the judicial department of state government are specifically exempted.

3. Members of committees, commissions or boards which are *solely* advisory in nature and which do not exercise *any* powers of executing or administering the law.

4. Notaries public and commissioners of deeds because their functions are such that the Legislature could not reasonably have intended them to be covered by Chapter 540.

5. Deputies and assistants because their exercise of authority is entirely dependent on the will of their superiors, who have the actual responsibility for the operation of their agencies.

Finally, we recognize the public interests which the Legislature sought to balance by the enactment of this law. Critics may fault the statute on its application as being too rigid on the one hand or too pliable on the other. These are questions which the next legislature session may well wish to address. Perhaps the issues were best summarized in Attorney General's Opinion No. 253, dated November 2, 1961:

The problem and question of conflicts of interest at various levels of government is deeper and more complex than any such distinctions [between officers and employees] might suggest. Two basic requirements are necessarily involved in any proper appraisal and evaluation of the matter. The first is that, presumptively, ethical standards in government activities at all levels should be beyond reproach, and that there must, accordingly, be effective regulation of conflicts of interest in government at all levels. The second is that government, at all levels, must be in a position to obtain the personnel and information it needs to meet the demands of the twentieth century in the public interest.

These basic requirements are coequal. Neither may be safely subordinated to the other. It must be emphasized that balance is needed in the pursuit of the two objectives. In the long run, the objective is a policy which neither sacrifices governmental integrity for opportunism, nor drowns practical staffing needs in a sterile moralism. Involved and needed, therefore, is a careful regulatory scheme that effectively restrains official conflicts of interest without generating pernicious side effects on recruitment of both regular staff, and talents or capabilities on an occasional or temporary basis, for performance of governmental functions and responsibilities.

It is our sincere hope that the Nevada Ethics in Government Law will not result in the loss of the talents and experiences of those Nevadans who serve us all at every level of government.

Respectfully submitted,

ROBERT LIST, *Attorney General*

194 County-City Consolidation Act—Sections 163 through 168, inclusive, of Chapter 648, 1975 Statutes of Nevada, contravene Article 4, Section 20 of the Nevada Constitution. However, the objectives of these sections may be achieved by following the procedures set forth in Sections 3, 126 and 135 of Chapter 648, 1975 Statutes of Nevada, and the procedures set forth in the Interlocal Cooperation Act. In addition, the districting plan created in Section 163 of Chapter 648, 1975 Statutes of Nevada, contravenes the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. However, the infirmities in the plan may be cured by the adoption of a districting plan which avoids the inclusion of incorporated areas in county commissioner districts and unincorporated areas in county-city commission districts.

CARSON CITY, October 8, 1975

THE HONORABLE MYRON E. LEAVITT, *Local Government Consolidation Committee*, Las Vegas City Hall, 400 East Stewart Avenue, Las Vegas, Nevada 89101

DEAR MR. LEAVITT:

Your committee, with the concurrence of the Clark County District Attorney's Office, has requested advice regarding Sections 163 and 164 of Chapter 648, 1975 Statutes of Nevada.

FACTS

The Clark County District Attorney's Office, in an informal letter opinion to you on September 5, 1975, has correctly stated that Chapter 648 is divided into four parts. Sections 2 through 110.6 constitute the Metropolitan Cities Incorporation Law. These sections are intended to implement the consolidation of county-city governmental functions involving large cities in counties of at least 200,000 population. Sections 111 through 136 constitute the Urban County Law. These sections complement the provisions of the Metropolitan Cities Incorporation Law and facilitate the consolidation of county-city governmental functions in counties of at least 200,000 population with cities organized under the Metropolitan Cities Incorporation Law. Sections 137 through 158 contain technical amendments to Chapters 244, 245, 266, 268, 280 and 318 of Nevada Revised Statutes and the Las Vegas Valley Water District Act to reflect the existence of the Metropolitan Cities Incorporation Law and the Urban County Law upon those statutes. Finally, Sections 159 through 171 implement provisions which affect the organization of the City of Las Vegas under the Metropolitan Cities Incorporation Law and provide the procedure for consolidating the governmental services and functions of Las Vegas and Clark County under the Urban County Law.

Although Chapter 648 contains four distinct parts, the comprehensive intent of the statute is to provide a system for the consolidation of governmental functions of certain large counties and cities. As such, Chapter 648 embraces but one subject and, therefore, does not violate Article 4, Section 17 of the Nevada Constitution which prohibits statutes from containing more than one subject. See *State ex rel. Brennan v. Bowman*, [89 Nev. 330](#), 512 P.2d 1321 (1973); *Tonopah and Goldfield Railroad Company, et al. v. Nevada-California Transportation Company, Inc.*, [58 Nev. 234](#), 75 P.2d 727 (1938).

The Metropolitan Cities Incorporation Law and the Urban County Law provide that a city and county operating under the two laws are to be governed by a board of commissioners consisting of eleven members. Three of these commissioners are to serve only as county commissioners. The other eight are to serve as county-city commissioners.

That is, in addition to acting with the other three commissioners as county commissioners, these eight also serve separately as city commissioners. No commissioners are elected at large. All are elected only by their respective districts.

Under Section 163 of Chapter 648, the Legislature has, by name, specifically districted Clark County for the purpose of electing the above-mentioned eleven member board of commissioners for the consolidated governments of Clark County and Las Vegas. The Legislature adopted the boundaries of the current Clark County Assembly Districts as the basis for creating the commissioner districts.

Specifically, the Legislature created seven commissioner districts in Clark County. Three of these districts are each composed of two merged assembly districts. Each of these commissioner districts elect only a single county commissioner. The remaining four commissioner districts are each composed of four merged assembly districts. Each of these commissioner districts elect two county-city commissioners. Meanwhile, in Section 160 of Chapter 648, the Legislature has established the new boundaries for the City of Las Vegas, which are to be effective in January 1977. However, the new boundaries of the City of Las Vegas do not always coincide with the boundaries of the merged assembly districts which the Legislature used as the basis for Clark County's commissioner districts.

This situation has given rise to the following problem. There are approximately 12,000 persons who, although living within the boundaries of the City of Las Vegas, are also living in commissioner districts which elect only a county commissioner and not any county-city commissioners. In addition, there are approximately 9,500 persons who do not live within the boundaries of the City of Las Vegas, but who do live in commissioner districts which elect county-city commissioners.

QUESTION ONE

Do Sections 163 and 164 constitute a special law regulating county business in violation of Article 4, Section 20 of the Nevada Constitution?

ANALYSIS—QUESTION ONE

Article 4, Section 20 of the Nevada Constitution provides as follows:

The legislature shall not pass local or special laws in any of the following enumerated cases—that is to say:

* * *

Regulating county and township business; Regulating the election of county and township officers;

* * *

A “local law” is one operating over a particular locality instead of over the whole territory of the State. A “special” law is one operating upon one or a portion of a class, instead of upon all of a class. State ex rel. Clarke v. Irvin, [5 Nev. 111](#) (1869). A statute, however, may be drafted in a manner so as to create classes of counties. So long as such a statute is statewide in operation and so long as it is worded in such a way as to apply in the future to all counties which may come within the class, then such a statute would not be in violation of Article 4, Section 20. An example would be a statute which applied to *all* counties of 100,000 or more population. Fairbanks v. Pavlikowski, [83 Nev. 80](#), 423 P.2d 401 (1967); State v. Donovan, [20 Nev. 75](#) (1887).

But the Nevada Supreme Court has repeatedly and consistently held that where a statute specifically names a county and thus applies only to that county, it is a local and special law that regulates the business of that county. State ex rel. Bible v. Malone, [68 Nev. 32](#), 38, 226 P.2d 277 (1951); McDonald v. Beemer, [67 Nev. 419](#), 220 P.2d 217 (1950); McDermott v. County Commissioners, [48 Nev. 93](#), 227 P. 1014 (1924); Wolf v. County of Humboldt, [32 Nev. 174](#), 105 P. 286 (1909); Schweiss v. District Court, [23 Nev. 226](#), 45 P. 289 (1896); Singleton v. Eureka County, [22 Nev. 91](#), 35 P. 833 (1894);

Williams v. Bidleman, [7 Nev. 68](#) (1871). In fact, it has been said that “county business” includes the election or appointment of officers. Singleton v. Eureka County, *supra*, at 101, concurring opinion.

Thus, the problem presented arises from Section 163 of Chapter 648 which specifically creates seven commissioner districts “* * * for the purpose of electing the 11 members of the board of commissioners of Clark County. * * *” Section 164 goes on to provide a timetable for the election of “* * * the 11 members of the board of county commissioners of Clark County. * * *”

Two cases which are directly on point with the question before us involve districting of Washoe and Clark counties. Chapter 30, 1933 Statutes of Nevada, specifically provided that Washoe County, no other county being named, was to be divided into commissioner districts for the election of county commissioners. The Nevada Supreme Court ruled that the statute was unconstitutional as a local or special law, in violation of Article 4, Section 20, because the statute regulated the internal affairs of a county and excluded from its operation counties which were, or could be in the future, similarly situated. McDonald v. Beemer, *supra*. A similar act which attempted to district only Clark County was also declared unconstitutional by the Nevada Supreme Court as a violation of Article 4, Section 20. State ex rel. Bible v. Malone, *supra*, at 38. See also, Attorney General’s Opinion No. 893, dated March 21, 1950, advising of the unconstitutionality of a similar act.

In the question before us, Sections 163 and 164 of Chapter 648 specifically refer to, and can apply only to, Clark County. Under the rationale of the Beemer and Malone cases, *supra*, Sections 163 and 164 are local and special laws. By their very terms, these statutes apply only to Clark County. They do not, and cannot, apply to any other county

¹It should be noted that the power of the Legislature to legislate with regard to cities is not similarly prohibited. Article 8, Section 1 of the Nevada Constitution does permit the Legislature to pass special legislation regarding cities.

in the State, either now or in the future. Sections 163 and 164, therefore, are not statutes of general application, but constitute local and special laws which regulate the business of Clark County and the election of its officers in violation of Article 4, Section 20.

We hasten to add that this conclusion does not necessarily wreck the consolidation scheme envisioned by the Legislature when it enacted Chapter 648. Section 169 of Chapter 648 contains a severability clause, which provides that if any portion of the chapter is held unconstitutional, the remainder of the act is not invalid. A remedy appears in Section 126 of the act, wherein the Legislature created a mechanism for districting of the county by a local entity. This section provides that the board of county commissioners existing at the time a city becomes organized under the Metropolitan Cities Incorporation Law shall district the county into seven commissioner districts for the purposes of electing the eleven member consolidated board of commissioners contemplated by Chapter 648. Inasmuch as the city would not be organized under the Metropolitan Cities Incorporation Law through Section 159 of Chapter 648 until January 3, 1977, by virtue of Section 172, subsection 8, of Chapter 648, it is suggested that one of the two procedures set forth in Section 3, subsection 2 or 3, of Chapter 648 be utilized to organize the city. Such a method would automatically trigger the districting provisions of Section 126 before January 3, 1977.

Thus, the Clark County Board of Commissioners has the authority, under the general provisions of the Metropolitan Cities Incorporation Law and the Urban County

Law, to district the county for the purposes of consolidation in a timely manner. The consolidation plan envisioned in Chapter 648 may then go forward.²

Four other sections of Chapter 648 also violate Article 4, Section 20 in that they too are local and special laws. Those provisions are: Section 165 creating citizens' advisory councils in Clark County; Section 166 creating a special local consolidation committee in Clark County; Section 167 dividing administrative functions between agencies of Las Vegas and Clark County; and, finally, Section 168 requiring Clark County and Las Vegas to negotiate jointly with public employees.

However, it is important to note that the citizens' advisory councils may be created by the board of county commissioners, pursuant to Section 135 of the Urban County Law, at the same time the board re-districts commissioner districts. The special local consolidation committee may be created, the administrative functions of government may be divided and Clark County may be included with Las Vegas in negotiations with public employees by means of an agreement between Clark County and Las Vegas pursuant to [NRS 277.080](#) et seq., the Interlocal Cooperation Act. The provisions of Sections 166, 167 and 168 may simply be adopted for these purposes by the local governments involved. The boundaries of the citizens' advisory councils, however, would be determined by the new boundaries of the re-districted commissioner districts.

²The city should complete its action to organize under the Metropolitan Cities Incorporation Law in sufficient time to enable the county commissioners to adopt a districting ordinance by no later than April 22, 1976. This would comply with the requirements of Section 126, subsection 4, of Chapter 648 that a districting ordinance be enacted by the county commissioners no later than 90 days before the last day for filing affidavits of candidacy for the next general election following the organization of the city. The last day for filing affidavits of candidacy for the next election is the third Wednesday in July, or July 21, 1976. [NRS 293.177](#) and [293.200](#).

CONCLUSION—QUESTION ONE

It is the opinion of this office that Sections 163 to 168, inclusive, of Chapter 648, 1975 Statutes of Nevada, are local and special laws contravening Article 4, Section 20 of the Nevada Constitution. However, the objectives of these sections may be achieved by following the procedures set forth in Sections 3, 126 and 135 of Chapter 648, 1975 Statutes of Nevada, and the procedures set forth in the Interlocal Cooperation Act.

QUESTION TWO

Is the commissioner districting arrangement established by Section 163 of Chapter 648, 1975 Statutes of Nevada, rendered unconstitutional by virtue of the fact that some residents of the City of Las Vegas reside in commissioner districts to be represented by county commissioners who are not assigned the additional duties of also serving as city commissioners, and some persons, who are not residents of the City of Las Vegas, reside in commissioner districts to be represented by county commissioners who are assigned such additional duties?

ANALYSIS—QUESTION TWO

This office has concluded, in its answer to Question No. One, that Section 163 contravenes Article 4, Section 20 of the Nevada Constitution. However, this office also concluded that the Clark County Board of Commissioners, pursuant to Section 126 of the Urban County Law, has the authority to district the county for the purposes of electing a consolidated county-city board of commissioners. Therefore, because the Clark County

Board of Commissioners is permitted to adopt a districting scheme, we turn to a constitutional analysis of the legislative scheme set forth in Section 163 for its guidance.

Although the citizens of Clark County, including the citizens of Las Vegas, would be electing an eleven member board of commissioners which will govern both the county and the city, nevertheless the county and the city remain separate entities with their own governing bodies. The county will be governed by this eleven member board of county commissioners which, pursuant to Section 125 of the Urban County Law, possesses all the powers granted to counties in Nevada under general laws relating to counties. In addition, Las Vegas will have an eight member board of city commissioners, which, although its members also serve as county commissioners, has the power, under Section 19 of the Metropolitan Cities Incorporation Law, to make and pass all lawful ordinances necessary for the municipal government of the city. Under Section 19, the city is an independent government with the power to *legislate* over its own affairs.

With this framework in mind, we may turn first to the question of those 12,000 residents of the City of Las Vegas who, under the legislative plan, would live in districts that elect county commissioners only. The city government, despite consolidation of many functions with the county, is a real and independent body of government. It legislates and governs over all the residents within the boundaries of the city. Yet if these 12,000 residents object to the way the city is run or object to some specific proposal of city government that affects them, they will have no representative of their own to complain to, no representative who is accountable to them, no representative to elect and certainly no representative to recall.

Democracy in the United States is a representative democracy. Unlike the direct democracy of many of the city-states of ancient Greece, in which each citizen took a direct part in decision making and legislation, the United States chose a form of democracy in which the citizens elected representatives to act for them. Because of this system, in which the citizens of our country have been removed one step from directly participating in the legislative process which so affects their lives, it has been held extremely important, under the constitutional principle of equal protection of the laws, that each citizen be represented in the affairs of his nation, state and his community as equally as possible with every other citizen. It is this principle which is at the heart of the recent reapportionment decisions of the United States Supreme Court, and it is for this reason that a system of representation in which citizens are represented in the nation, state or community unequally or not at all has been declared to be unconstitutional. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

The right to vote is protective of all fundamental rights and privileges. *Yick Ho v. Hopkins*, 118 U.S. 356, 370 (1886). Once the right to vote is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). When a state denies some citizens the right to vote, it deprives them of a fundamental political right protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Evans v. Cornman*, 398 U.S. 419 (1970); *Kramer v. Union School District*, 395 U.S. 621 (1969). The United States Supreme Court has taken a firm stand in striking down legislation which denies citizens the right to vote. In this connection, the court has stated:

Undeniably the constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. * * * *Reynolds v. Sims*, supra, at 554.

The Supreme Court went on to say in the *Reynolds* case that the essence of representative government is self-government, and, therefore, each and every citizen has

an inalienable right to full and effective participation in electing members of legislative bodies. *Reynolds v. Sims*, supra, at 565.

It is a denial of equal protection of the laws for a jurisdiction to deny a portion of its citizenry, otherwise qualified, the right to vote, while at the same time imposing the responsibilities of citizenship upon them. Thus, where a state denied the right of some of its residents, otherwise qualified, to vote while at the same time requiring them to pay state income taxes, the United States Constitution was violated. *Evans v. Cornman*, supra. In the instance before us, 12,000 citizens of the City of Las Vegas would be denied the right to vote for county-city commissioners who, while acting as city commissioners, could require those 12,000 citizens to pay ad valorem taxes, or who could pass building codes, zoning ordinances and other measures which would affect the very quality of their lives. See Sections 52, 53, 88 and 89 of Chapter 648, 1975 Statutes of Nevada.

The eight member board of city commissioners created by Chapter 648 has the power to legislate over all the persons and property residing within the boundaries of the city. Yet 12,000 citizens of the city, whose lives, conduct and property are subject to the legislation of the board of city commissioners, would be prevented from voting for the members of the city board. Other residents of the city could vote for their respective city commissioners, but these 12,000 could not. These 12,000 persons, by virtue of their residence within the city boundaries, stand in the same relationship to their city government as all other residents of the city, but they would be treated unequally in their right to vote for city commissioners. In the opinion of this office, therefore, Section 163 would contravene the Fourteenth Amendment of the United States Constitution by denying equal protection of the laws to some 12,000 residents of the city and, therefore, would be unenforceable. *Dunn v. Blumstein*, supra; *Evans v. Cornman*, supra; *Kramer v. Union School District*, supra; *Reynolds v. Sims*, supra.

A more difficult problem exists with regard to the 9,500 persons who, under the legislative plan, would live in the county, but not in the City of Las Vegas, but who would help elect county-city commissioners. The difficulty lies in the fact that residents of county-city commissioner districts elect representatives who perform a dual function. On the one hand, these representatives, when serving as county commissioners, represent all of the residents of their particular districts. On the other hand, these representatives, when acting as city commissioners, represent only the residents of the incorporated areas of their districts. When all of the county residents of a commissioner district also live in the city, the election of a county-city commissioner presents no problem. The commissioner represents a single constituency. But when a portion of the county residents of a commissioner district does not live in the city, then a commissioner, depending on which function he performs, can be said to represent two different constituencies. We have been unable to find any legal authority dealing with the particular question of who may properly elect a representative who performs dual functions, while representing different constituencies.

The question may be resolved by determining whether the votes of residents of the unincorporated area of a commissioner district "dilute" the votes of city residents in electing a person who will serve, at times, as a representative of city residents only. One must ask whether the votes of unincorporated residents of a county commissioner district have an undue influence in electing a person who will serve exclusively as a city commissioner on occasion. The United States Supreme Court has taken the position that where, as the result of residence, a citizen has a greater influence or weight in the election of a representative than another citizen, this constitutes a denial of equal protection of the laws. In other words, there has been a "dilution" in the votes of some citizens. *Reynolds v. Sims*, supra, at 557 and 563; *Gray v. Sanders*, supra. As the court said in the *Reynolds* case, "To the extent that a citizen's right to vote is debased, he is that much less a citizen. * * *" *Reynolds v. Sims*, supra, at 567.

The bulk of the 9,500 persons who, under the legislative plan, would live in the unincorporated areas of county-city commission districts, specifically 8,831 persons,

reside in Commissioner District A, where they constitute approximately 18 percent of the total population of the proposed district. Persons who live in unincorporated areas next to a major city obviously have an interest in the services of that city. It is to their interest, for example, that there be urban transportation, that traffic arteries be kept in good repair and that areas on the edge of the city be zoned in their interests. It is also to the interest of residents of unincorporated areas that the costs of these city services be paid by city residents, rather than by non-city residents. Residents of unincorporated areas will obviously tend to favor candidates who support their interests. Therefore, where non-city residents would constitute nearly one-fifth of the total population of a county-city district, it is possible for non-city residents to influence the election of a person who will serve at times as a representative of city residents only. Many elections have been decided by a much smaller margin. Furthermore, since county-city commission districts would be represented by two commissioners each, such non-city residents could actually influence the election of at least two of the eight member city commission.

It is, therefore, the opinion of this office that a districting plan which permits the bulk of some 9,500 non-city residents a substantial voice in electing persons who will serve, not only as county commissioners, but also as city commissioners, would contravene the Fourteenth Amendment of the United States Constitution by denying equal protection of the laws to city residents living in their respective districts.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the districting plan created in Section 163 of Chapter 648, 1975 Statutes of Nevada, contravenes the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. However, the infirmities in the plan may be cured by the adoption of a districting plan which avoids the inclusion of incorporated areas in county commissioner districts and unincorporated areas in county-city commissioner districts.

Respectfully submitted,

ROBERT LIST, *Attorney General*

195 Medical Practice Act—Term “Practice of Medicine,” defined by [NRS 630.020](#), includes practice of naturopathy; such inclusion is constitutional.

CARSON CITY, November 5, 1975

DR. KENNETH F. MACLEAN, *Secretary-Treasurer, Nevada State Board of Medical Examiners*, 1281 Terminal Way, Reno, Nevada 89502

DEAR DR. MACLEAN:

Recently the legal counsel for the Board of Medical Examiners requested an opinion from this office regarding the scope of the term “practice of medicine” as defined by subsection 1 of [NRS 630.020](#).

FACTS

An individual who professes to be a bona fide graduate naturopathic physician has inquired of the Board of Medical Examiners with respect to his desire to practice naturopathy in this State. We understand naturopathy to be a form of healing which emphasizes use of the purported healing properties in natural agencies such as air, light, heat, etc. Nevada has no special statute pertaining to the practice, testing or licensing of naturopaths, although several other states appear to have such statutes.

In 1959, the Idaho Supreme Court, in the case of *State v. Smith*, 337 P.2d 938, held under somewhat similar circumstances that the medical practice act of Idaho was unconstitutional insofar as said act defined the practice of medicine and surgery to affect the practice of naturopathy. There being no other statute applicable, the court held no license of any type was required for the practice of naturopathy in Idaho.

On the basis of the decision in *Smith*, the particular naturopath who has promoted the board's inquiry to this office is likewise taking the position that [NRS 630.020](#), subsection 1, is unconstitutional insofar as it may purport to include naturopathy within the definition of the term "practice of medicine," and, therefore, since no other law applies, this individual believes he should be allowed to practice his profession without a license at this time.

QUESTIONS

1. Does the practice of naturopathy come within the meaning of the term "practice of medicine" as defined in [NRS 630.020](#)?
2. If the answer to question 1 is "yes," does this constitute a violation of a naturopath's constitutional rights to due process or equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 8 of the Nevada Constitution.

ANALYSIS—QUESTION ONE

The term "practice of medicine" is defined in the Nevada Medical Practice Act at [NRS 630.020](#) to mean:

1. As used in this chapter, "practice of medicine" means:
 - (a) To diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.
 - (b) To apply principles or techniques of medical science in the diagnosis or the prevention of any of the conditions listed in paragraph (a).
 - (c) To offer, undertake, attempt to do or hold oneself out as able to do any of the acts described in paragraphs (a) and (b).
2. It shall also be regarded as practicing medicine within the meaning of this chapter if anyone uses in connection with his name the words or letters "M.D.," or any other title, word, letter, or other designation intended to imply or designate him as a practitioner of medicine in any of its branches.

Our concern is with the definition in subsection 1 of this NRS section.

All the states have adopted medical practice acts for regulating the provision of vital health care services to their residents. As the result of such statutes, the question of whether the practice of naturopathy constitutes the practice of medicine has been before various courts—both federal and state—on a number of occasions.

In *Aitchison v. State*, 105 A.2d 495 (Md. 1954), a conviction of a naturopath for unlawfully practicing medicine in violation of the state medical practice act was affirmed by the Maryland Court of Appeals in a case where the defendant had argued that naturopathy was a separate and distinct school from that of allopathic medicine and not intended by the legislature to be within the scope of the medical practice act. The court, however, examined the definition of naturopathy (i.e., a system of healing which does not use drugs or surgery to cure disease, but instead makes use of the healing properties of such natural agencies as air, sunshine, water, light, heat, electricity, exercise, rest, massage, etc.) and concluded such practices fell squarely within the broad definition of the term "practice of medicine" set forth in the Maryland Medical Practice Act, Maryland Code 1951, Art. 43, Sec. 138.

The court, in *Aitchison*, at page 499, declared:

It is absolutely clear from the definite language of the statute that the Legislature intended “practice of medicine” to include not only the application of medicine to patients, but any practice of the art of healing disease and preserving the health other than those special branches of the art that were expressly excepted.

A similar result was reached in *Hahn v. State*, 322 P.2d 896 (Wyo. 1958), by the Wyoming Supreme Court which, after a thorough review of numerous authorities cited in its decision, noted “that naturopathy is simply one of the methods of practicing medicine.” This court went on to quote with approval the following language from *People v. Johnerson*, 49 N.Y.Supp.2d 190, 196-197:

It has always been considered that the practice of medicine means and includes the practice of any of the so-called healing arts. The Legislature, in enacting a broad and comprehensive statute, intended thereby to protect the members of the public from untrained, unskilled and inefficient practitioners in any healing art. It is immaterial what method is used to effect a cure, or to relieve a person of pain. The true test is whether or not an attempt has been made by some manner or means to effect such cure or to relieve a person from some pain or ailment or physical condition complained of.

For other cases which rejected the contention that naturopathy is a separate and distinct profession and have held the practice of naturopathy to constitute the practice of medicine in violation of the state medical practice act, see *State v. Scopel*, 316 S.W.2d 515 (Mo. 1958); *Davis v. Beeler*, 207 S.W.2d 343 (Tenn. 1947); *State v. Errington*, 317 S.W.2d 326 (Mo. 1958); *Dantzler v. Callison*, 94 S.E.2d 177 (S.C. 1956); *State v. Errington*, 355 S.W.2d 952 (Mo. 1962); and *State ex rel. Shenk v. State Bd. of Examiners in the Basic Sciences*, 250 N.W. 353 (Minn. 1933).

CONCLUSION—QUESTION ONE

Based on the overwhelming weight of authority from numerous jurisdictions, and any contrary expressions in *State v. Smith*, supra, notwithstanding, we conclude that the practice of naturopathy would constitute the “practice of medicine” as that term is defined in [NRS 630.020](#), subsection 1, and any person desiring to engage in such a practice in this State must first apply for and receive a license to practice medicine from the Nevada State Board of Medical Examiners. [NRS 630.150](#). Failure to do so would constitute a felony under [NRS 630.410](#), as amended by Section 26 of Chapter 303, Statutes of Nevada 1975.

ANALYSIS—QUESTION TWO

The above-cited courts have also ruled on the constitutionality of applying the requirements of a state medical practice act to a naturopathic physician whose school may not have offered training in some of the areas included on standard tests for physicians and surgeons, etc.

For instance, in *Aitchison v. State*, supra, at page 498, appears the well known proposition that:

* * * no person has an absolute vested right to practice medicine, but only a conditional right which is subordinate to the police power of the State to protect and preserve the public health. * * * This regulatory power is justified by the fact that the practice of medicine requires special knowledge, training, skill and care, that health and life are committed to the physician’s care, and that patients ordinarily lack the knowledge and ability to judge his qualifications.

A Federal District Court has held that the fact that other states permit the licensing of naturopaths under special legislation without requiring them to meet the qualifications of the general medical practice act does not mean that a state medical practice act which would apply to a naturopath would abridge anyone's rights. *Hitchcock v. Collenberg*, 140 F.Supp. 894 (Dist. Md. 1956), affirmed mem.op. 353 U.S. 919 (1957).

Maryland, like Nevada, remained free to protect its own residents, so long as the method chosen with respect to regulation of a particular trade or business essential to the public health and safety was not so unreasonable and extravagant as to interfere with property and personal rights of citizens unnecessarily and arbitrarily.

This same federal court rejected the other arguments that a state medical practice act when applied to a naturopath is an invalid exercise of police power and is arbitrary, unreasonable and discriminatory because it (1) required naturopaths to pass examinations in non-naturopathic subjects; (2) conferred exclusive jurisdiction over naturopaths on their medical competitors; and (3) contained special provisions for the licensing of osteopaths, chiropractors, physical therapists, etc., but did not contain similar provisions for naturopaths. *Hitchcock v. Collenberg*, supra.

These same arguments have been rejected by other courts as well. In *Aitchison v. State*, supra, it is said, at page 500:

It is beyond question that the state has the power to regulate any of the special systems or branches of the medical art independent of the general practice of medicine. The regulations adopted by the state, in the exercise of the power to regulate the treatment of disease, need not be uniform with respect to all methods and systems of practice, but distinctions may be made and schools or methods of practice may be exempted from the regulations or subjected to peculiar regulations as long as the discrimination is not arbitrary or unreasonable.

The "naturopath may practice without any license" argument was also rejected in *Aitchison*, where the court noted that such could not be the legislature's intent in view of the fact that many bills to regulate naturopathy as a special area of medicine had been introduced and rejected by the Maryland legislature. The same thing has occurred in our own Nevada Legislature in past years.

The very fact that no such legislation has been passed indicates that the Legislature has not intended thus far to permit naturopaths to practice without a license. The Legislature has been careful to prevent medical treatments without the protection afforded by some official regulatory board. *Aitchison v. State*, supra, at 501.

The question of balancing the advantages and disadvantages of requiring a naturopath to meet the requirements of a medical education is for a state legislature to answer. It may reasonably believe that an education broader than that offered in the traditional naturopathic curriculum is necessary where a practitioner will be holding himself out to the public as capable of treating or curing many or almost all kinds of disease. Perhaps a state legislature may also reasonably believe such training would assist a naturopath in diagnosing ailments and determining which might better respond to treatment by a traditional physician or surgeon. Such rationalizations by a state legislature were cited favorably in *England v. Louisiana St. Bd. of Medical Examiners*, 246 F.Supp. 993 (E.D. La. 1965), affirmed mem.op. 385 U.S. 190 (1966), a case involving a chiropractor in a state with no special licensing law.

Other cases upholding as constitutional the application of the general state medical practice act to a naturopathic physician include *Dantzler v. Callison*, supra, and *Davis v. Beeler*, supra.

CONCLUSION—QUESTION TWO

The application of the Nevada Medical Practice Act, Chapter 630 of Nevada Revised Statutes, to a naturopathic physician is constitutional and does not constitute a violation of rights of due process and equal protection of the laws conferred by the federal and state constitutions.

The decision of the Idaho Supreme Court in *State v. Smith*, supra, is not at all in harmony with the other numerous cases on the questions discussed herein, and we therefore do not find *Smith* to be persuasive or to have any value as a precedent. We reject the *Smith* decision for the same reasons stated by the District Court of Appeal in *Oosterveen v. Bd. of Medical Examiners*, 246 P.2d 136 (Cal.App. 1952).

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*
