
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.

OPINION NO. 79-1 The Appointment of Counsel for Indigent Misdemeanants in Municipal Court and Payment Thereof–An indigent defendant need not request counsel to obtain a court-appointed attorney pursuant to NRS 171.188; a police judge may, pursuant to NRS 7.125, compensate a court-appointed attorney who represents a misdemeanant; NRS 171.188, subsection 4 pertains to reimbursement of costs incurred and NRS 7.125 pertains to the fee available for a court-appointed attorney appearing before either justice, municipal or police court.

February 6, 1979

The Honorable Judge Zane Azbarea, *Municipal Court of the City of Las Vegas,* 1928 North Bruce Street, North Las Vegas, Nevada 89030

Dear Judge Azbarea:

You have requested an opinion concerning the applicability of NRS 7.125 and NRS 171.188 to the appointment and payment by a municipal court of attorneys, other than the public defender, to represent indigent criminal defendants. In particular, you ask the following:

QUESTIONS

1. Whether a request by a defendant for counsel is a condition precedent to the duty of a magistrate to appoint an attorney pursuant to NRS 171.188?
2. Whether a police judge can, pursuant to NRS 7.125 *et seq.*, compensate an attorney, other than the public defender, appointed to represent an indigent defendant charged solely by a complaint?
3. What is the applicability of NRS 171.188, subsection 4 to payment of court-appointed counsel, other than the public defender, in light of NRS 7.125?

ANALYSIS

The United States Supreme Court has held that no person can be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at trial or he made a knowing, and intelligent waiver of that Sixth Amendment right. Argersinger v. Hamlin, 407 U.S. 25 (1972). This holding was a logical extension of the court's decision nine years earlier that indigents had a right to court-appointed counsel in criminal cases if they could not afford one. Gideon v. Wainwright, 372 U.S. 335 (1963). To implement this constitutionally-mandated requirement, the Nevada Legislature enacted NRS 171.188 as a procedure to determine if a person is indigent and thereby qualifies for court-appointed counsel. A public defender system was set up for certain counties (NRS 260.010, *et seq.*) and the State (NRS 180.010, *et seq.*) to handle indigent criminal defendants.

Under Nevada case law an attorney appointed by a court to represent an indigent criminal defendant must act without compensation unless a statute provides to the contrary. "Essential service without regard to financial regard is one of the great traditions of the legal profession. 'I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed,' reads the oath of an attorney." Brown v. Board of County Comm'rs, 85 Nev. 149, 151, 451 P.2d 708, 709 (1969). NRS 7.125 and its precursors indicate the Nevada Legislature has long determined that attorneys are to be compensated for such service. (See 1875 Stats. of Nev., ch. LXXXVI, p. 142 and amendments and revisions thereof.) Thus, there has been a clear legislative intent for over one hundred years to compensate attorneys who represent indigent criminal defendants.

Your first question asks whether a defendant needs to request the appointment of an attorney to represent him to bring NRS 171.188 into play. that statute reads in the pertinent part: "Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal or police judge or master, request the appointment of an attorney to represent him." The United States Supreme Court has answered this question in the negative. The court in Kitches v. Smity, 401 U.S. 847, 848 (1971) stated, "Where assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Therefore, since Argersinger v. Hamlin, supra, requires a person be afforded counsel at trial before he can be imprisoned for any offense, no formal request for counsel need be raised by a defendant. A court sua sponte must inquire about the defendant procuring counsel if it determines there is a reasonable expectation of imprisonment for the defendant if convicted. NRS 171.188 merely sets out the requirements a defendant must follow to prove indigency and make himself eligible for court-appointed counsel.

In a related matter, it is clear that a court cannot force an attorney upon a defendant, indigent or not, who does not desire one. Faretta v. California, 422 U.S. 806 (1975). Faced with a case where there is a reasonable expectation that a criminal defendant may receive imprisonment as a sentence if convicted, the court must inquire about counsel for the defendant or elicit a knowing and intelligent waiver of the right to be represented by an attorney. Argersinger v. Hamlin, supra, at 37. If a defendant claims he is without means to secure an attorney, then the court must use the procedure outlined in NRS 171.188 to determine if he is qualified to receive a court-appointed attorney to represent him.

Your next question goes to the method of compensation for attorneys, other than the public defender, appointed to represent criminal defendants charged solely by complaint. In particular, you inquire about the impact of NRS 7.115 on the above situation.

NRS 7.115 states:

> A magistrate or district court shall not appoint an attorney other than a public defender to represent a person charged with any offense by indictment or information unless such magistrate or the district court makes a finding, entered into the record of the case, that the public defender is disqualified from furnishing such representation and sets forth the reason or reasons for such disqualification.

The definition of a magistrate includes police judges (NRS 169.095) and NRS 7.115 does not preclude magistrates from appointing an attorney for an indigent defendant where a complaint is filed, but only requires a recorded finding of the reason or reasons why the public defender is disqualified from representing a person charged with any offense by indictment or information before a private attorney can be appointed to represent an indigent defendant.

NRS 7.115 must also be examined in light of the other provision of the bill creating it. 1975 Statutes of Nevada, Chapter 612, pages 1153-1156 (codified as NRS 7.125-7.175). These statutes indicate a clear legislative intent to allow magistrates to appoint attorneys to represent indigent defendants who are charged solely with misdemeanors. NRS 7.125, subsection 1 authorizes

appointment of an attorney other than the public defender to represent or defend a defendant at any stage of the criminal proceedings beginning at the defendant's initial appearance before the magistrate. NRS 7.125, subsection 2(c) sets a three hundred dollar ($300) limit on an attorney's fee if the most serious crime is a misdemeanor. NRS 7.135, subsection 1 providing for certification of expenses reasonably incurred in excess of the statutory limit, allows such certification by a "magistrate if the services were rendered in connection with a case disposed of entirely before him. * * *" NRS 7.145, subsection 1(a) reiterates this requirement with regard to claims for compensation and expenses. These provisions taken as a whole contemplate a compensation and a claims procedure for attorneys appointed to represent defendants in cases that are entirely and exclusively disposed of before a magistrate. This would include a case before a police judge based solely upon a criminal complaint.

Your final question deals with the applicability of the payment provision under NRS 171.188, subsection 4 in relation to the fee schedule of NRS 7.125. NRS 171.188, subsection 4 reads:

> The county or state public defender shall be reimbursed by the city for costs incurred in appearing in municipal or police court. The county shall reimburse the state public defender for costs incurred in appearing in justice court. If a private attorney is appointed as provided in this section, he shall be reimbursed by the county for appearance in justice court or the city for appearance in municipal or police court in an amount not to exceed $75 per case.

That provision was added in 1973. 1973 Statutes of Nevada, Chapter 289, section 1, pages 357-358. The present fee schedule in NRS 7.125 for attorneys appointed to represent indigent criminal defendants was created two years later. 1975 Statutes of Nevada, Chapter 612, pages 1153-1156.

There are certain rules for statutory construction that aid in ascertaining legislative intent, some of which pertain to this situation. Legislation must be harmonized when reasonably possible, and it is presumed that the Legislature, in enacting a statute, acted with full knowledge of statutes already existing and relating to the same subject. Ronnow v. City of Las Vegas, 57 Nev. 332, 65 P.2d 133 (1937). NRS 7.125 discusses the fee an attorney is to receive for representing or defending an indigent defendant. NRS 171.188, subsection 4 talks of reimbursement for costs incurred for appearances injustice, municipal, or police court. Nevada looks at costs and fees as distinct entities. (See NRS 18.005 and NRS 18.010.) Therefore, the seventy-five ($75) per case amount in NRS 171.188, subsection 4 puts a limit on the costs an attorney may claim in an appearance before the above-enumerated courts, but NRS 7.125 would still govern any fee going to a court-appointed attorney based on twenty dollars ($20) an hour for out-of-court work and thirty dollars ($30) an hour for court appearances, with a three hundred ($300) maximum fee for a misdemeanor case. If costs are reimbursed to an attorney under NRS 171.188, subsection 4 and he makes a fee claim under NRS 7.125, he would have to make a sworn statement specifying any "reimbursement applied for or received in this same case" under NRS 7.145, subsection 2. The Nevada Supreme Court has discussed the interrelation of NRS 7.125 and NRS 171.188 in another contest. Brackenbrough v. State, 92 Nev. 460, 553 P.2d 419 (1976). These statutory schemes are not mutually exclusive but are reasonably harmonious.

CONCLUSIONS

1. It is not necessary for a defendant to request an attorney before a magistrate can utilize the provisions of NRS 171.188. If a magistrate determines there is a reasonable expectation of imprisonment for a defendant if convicted, the magistrate must broach the subject of legal representation if the defendant does not. Then if the defendant states he is without means to hire counsel NRS 171.188 must be used to determine if the defendant is indigent and thereby qualifies for court-appointed counsel.

2. The present scheme and the history of NRS 7.125 indicate a clear legislative intent to compensate attorneys who represent indigent defendants charged with a public offense at the level of the criminal justice system. This would include magistrates before whom defendants appear charged solely by a criminal complaint.

3. The cost reimbursement provision of NRS 171.188, subsection 4 and the fee schedule of NRS 7.125 are not mutually exclusive payment systems for court-appointed attorneys who appear before justice, municipal, or police courts. The former covers costs incurred for appearances before those courts with a seventy-five ($75) maximum. The latter sets up a fee schedule to compensate a court-appointed attorney for his time expended, in and out of court, on a particular case. This schedule assigns a three hundred dollar ($300) limit for a misdemeanor case, subject to increase based upon "extraordinary circumstances."

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT A. BORK, *Deputy Attorney General, Criminal Division*

OPINION NO. 79-2 Inspectional Search Warrants–(1) NRS 618.325, subsection 2 is unconstitutional to the extent it purports to authorize warrantless entries, without consent, of the nonpublic areas of the place of employment. (2) With certain recognized exceptions, a warrant is required to be issued on varying standards of probable cause, depending on the nature of the search intended. (3) The district court has jurisdiction to issue warrants in other than criminal cases and such warrants must be directed to and executed by the sheriff.

CARSON CITY, February 6, 1979

The Nevada Industrial Commission, JOHN R. REISER, *Chairman,* Claude Evans and James S. Lorigan, *Commissioners,* 515 East Musser Street, Carson City, Nevada 89701

GENTLEMEN:

You have requested advice on a variety of matters, which may conveniently be addressed under two broad headings.

QUESTION ONE

Specifically, you ask concerning the effect of a recent decision, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), on the administrative search provisions of NRS 618.325, subsection 2.

ANALYSIS–QUESTION ONE

NRS 618.325, subsection 2 provides as follows:

> Upon presenting appropriate credentials to any employer, the director or his representative may:
>
> (a) Enter without delay and at reasonable times any place of employment; and
>
> (b) Inspect and investigate during regular working hours or at other reasonable times and within reasonable limits, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and question privately any such employer or an employee.

In Marshall v. Barlow's, Inc., supra, an OSHA inspector entered the customer service area of the company, an electrical and plumbing business, and advised Barlow, the president and general manager, that the wished to conduct a search of the working (nonpublic) area of the establishment. Barlow's, Inc. had simply turned up in OSHA's selection process and no complaint had been received. Barlow refused the inspector entry upon learning these facts and that the inspector had no search warrant. OSHA subsequently obtained a district court order compelling Barlow to admit the inspector, but Barlow again refused entry and sought injunctive relief. The district court order was issued based on section 8(a) of the federal OSHA legislation which is virtually identical to the authorization granted the Department of Occupational Safety and Health under NRS 618.325, subsection 2.

This issue before the court was whether a warrant must be obtained by the regulatory agency, upon the nonconsent of the employer, authorizing a "routine" inspectional search of the nonpublic areas of commercial premises.

The court held that "* * * the act is unconstitutional insofar as it purports to authorize inspections without [search] warrant. * * *" Marshall v. Barlow's, Inc., 436 U.S. at 325. This holding applies to NRS 618.325, subsection 2 since, as mentioned earlier, the regulation or statute in question is virtually identical insofar as the authorization granted the regulatory agencies.

Marshall v. Barlow's, Inc., supra, is one of the most recent progeny of two earlier landmark cases, Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967). Marshall v. Barlow's, Inc., supra, is essentially an application of the Camara-See rationale to federal legislation purporting to authorize warrantless entries and searches upon the nonpublic portions of commercial establishments for the purpose of conducting "routine" area or periodic inspections for violations of occupational safety and health laws or regulations. The term "routine" is employed in the sense that the agency has no specific reason to believe that a violation actually exists on the business premises. The distinction between "routine" searches and those motivated by evidence of specific violations is critical in the context of the standard of probable cause which will be discussed in the analysis of your second question.

CONCLUSION--QUESTION ONE

It is the opinion of this office that NRS 618.325, subsection 2 is unconstitutional to the extent it purports to authorize "routine" inspections of the nonpublic portions of a place of employment without a search warrant. A warrant based on probable cause must be obtained for entry and inspection of such areas in the event of nonconsent by the employer or other appropriate person.

QUESTION TWO

More generally, you ask guidance regarding "* * * the nature and requirements of affidavits in support of a search warrant; the court having jurisdiction of such matters; the proper party to serve the search warrant * * *; the procedure for returns; and other matters properly related thereto."

ANALYSIS--QUESTION TWO

(A) The Probable Cause Requirement.

The question of what constitutes "probable cause" justifying the issuance of an inspectional warrant authorizing a routine entry is not altogether clear. However, the court has refused to apply the traditional probable cause standard to regulatory inspections and instead has adopted a relaxed standard. The Camara probable cause standard requires only that reasonable administrative or legislative standards for an area inspection be satisfied:

> Such standards, which will vary with the municipal program being enforced, may be

based upon the passage of time, the nature of the building (e.g., a multi-family apartment house) or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

In Marshall v. Barlow's, Inc., supra, the court stated:

> A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. 436 U.S. at 321.

Presumably, to show probable cause under these standards for area or periodic inspections the inspector would have to describe the agency's standards for inspection (for example, each establishment is to be inspected once a year), allege that these standards are reasonable and provide any other information available on the business, e.g., its nature, hazards, results of prior inspections, number of employees, known conditions on the premises, agency experience of violations in like establishments and the frequency of violations occurring at the particular establishment and in the industry.

On the other hand, the traditional standard of probable cause in the criminal sense applies in those instances where specific evidence of a violation on the business premises is brought to the department's attention which involves the imposition of criminal sanctions. (Imprisonment and fine, NRS 618.685 through 618.720, inclusive.)

When specific evidence of a violation involving the imposition of an administrative fine is brought to the department's attention, the standard of probable cause is as yet unarticulated. An argument may be made that the standard is less than probable cause in the criminal sense, requiring less verification of the facts. A phone call, suitably verified, would probably be sufficient; even an anonymous call or note might suffice if other evidence regarding the business premises were gathered. In view of the case-by-case basis the court has taken, all that may safely be said is that the standard of probable cause for administrative fine violations is not yet defined. All that may safely be done under the complaint procedure is to require the employee/informant to sign a written complaint detailing the violation and thereafter verifying the information to the extent possible with independent data on the business premises.

(B) The Warrant Requirement.

The court has not yet provided an adequate standard for determining when warrants are required. It is clear that nonconsent triggers the necessity of obtaining a warrant in all cases where the nonpublic portions of the business are to be inspected.

The provisions of NRS 179.015-179.115, inclusive, govern the issuance, grounds, contexts, execution and return of search warrants in criminal proceedings. These provisions will govern any warrant authorizing the seizure of property which is the product, instrumentality or means or evidence of crime pursuant to an investigation for violations of Chapter 618, NRS, for which criminal sanctions are imposed as contrasted with those violations calling for assessment of administrative fines.

A warrant is required only when the intended search includes nonpublic areas and in which, therefore, the employer enjoys a reasonable expectation of privacy. Under NRS 618.155 "place of employment" is defined as "* * * any place * * * where * * * any industry, trade, work or business is carried on * * * and where any person is employed by another * * *." A work area in a given commercial establishment may well be a public area, i.e., one where customers may or are even expected to go. In other words, "nonpublic" and "place of employment" are not

necessarily functional equivalents. An employer may not lawfully refuse entry to a work area to which the public at large is given access, nor is a warrant required in these circumstances. In the event of refusal to permit entry into public work areas, an inspector may not employ force to gain entry, but instead must resort to the enforcement provisions of NRS 618.515. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

Some basis exceptions exist to the necessity of obtaining a search warrant which apply to the regulatory field.

A search which normally requires a warrant may be made without a warrant if consent is obtained. When valid consent is given, it operates as a waiver of the Fourth Amendment warrant requirements. What constitutes a valid consent and who may give consent are two questions not entirely settled.

There is no requirement that the employer be advised of his right to refuse entry, although knowledge of the right to refuse, or absent of such knowledge, is one factor among many considered by the courts in determining if the consent was voluntary. Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). The Court in Camara v. Municipal Court, 387 U.S. 523 (1967), suggested but did not seem to require, that consent be first refused before a warrant is sought. An explicit consent is not necessary; even a casual consent ("Go ahead" or words of similar import) or silent acquiescence to the search have both been viewed as valid consent. U.S. v. Thriftimart, 429 F.2d 1006 (9th Cir. 1970); U.S. v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969).

Consent must be obtained from the person whose rights may otherwise be invaded or from someone with express authority to act for the affected person in his absence. Consent may be obtained from the employer, one sharing common authority, or such other person having a sufficient relationship to the premises. U.S. v. Matlock, 415 U.S. 164 (1974). NRS 618.095, subsection 4 sets forth a comprehensive definition of "employer" to include "[a]ny officer or management official having direction or custody of any employment or employee." It is certainly arguable that this definition, per se, vests in management or supervisory personnel the authority to consent to an inspectional search without a warrant. Presumably, though, management and supervisory personnel, such as general partners, general managers, corporate or other entity officers, have authority within the scope of their employment to consent to a search of their areas of responsibility.

A second exception deals with instances where there is probable cause to search but exigent circumstances exist making it impossible or impracticable to obtain a warrant in light of a need to act without delay. These situations may properly be characterized as "now or never" circumstances involving such considerations as destructibility or mobility of evidence, or the existence of an emergency. Thus, for example, the courts have recognized the legitimacy of warrantless entries in the regulatory field where there is a compelling need for prompt official action and under circumstances where there is not time or where it is impracticable to obtain a warrant in light of imminent and grave danger to life that immediate abatement of the hazard is required. Camara v. Municipal Court, 387 U.S. 523, 539 (1967); and Owens v. City of North Las Vegas, 85 Nev. 105, 110-111 (1969).

NRS 618.425 requires the department to conduct a special investigation as soon as practicable in the event it finds there are reasonable grounds to believe that a safety or health violation exists that threatens physical harm, or that an imminent danger exists. The violation involved may or may not involve criminal sanctions, as opposed to the levy of administrative fines. The statutory scheme contemplates the necessity of immediate action, possibly without a warrant, in an emergency situation upon a finding of probable cause in the criminal sense if a crime is involved, or upon perhaps a somewhat more relaxed finding if administrative fines may be imposed (NRS 618.635 through 618.675, inclusive). Whether or not a warrant is required if a criminal sanction is involved depends on the gravity and immediacy of the hazard.

Lastly, under the "open fields" exception, an inspector may, without notice, consent or warrant, enter any portion of the employer's premises open to the public at large and from there

observe whatever the general public could see on or off the premises. Air Pollution Var. Bd. of Colo. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

(C) The Inspectional Warrant in Nevada.

No statutory provision exists governing the issuance of search warrants in other than criminal proceedings. However, the provisions of NRS 179.015-179.115, inclusive, are not exclusionary of grounds or circumstances other than criminal in nature which permit issuance of a search warrant. In Owens v. City of North Las Vegas, 85 Nev. 105, at 107-108 (1969), the court upheld the issuance of a search warrant for municipal building code violations and held:

> The question is not whether the search was authorized by our state law. The question is, whether the search was reasonable under the Fourth Amendment to the United States Constitution. Just as a search authorized by state law may be an unreasonable one under the Fourth Amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. [Citations omitted.]

No common law right existed to the issuance of a search warrant and no provision of Chapter 618, NRS, in express terms empowers the department to seek a search warrant. A stated purpose of the Act, however, is to effectively enforce departmental health and safety regulations. NRS 618.015, subsection b. For that purpose, the department was created as the primary agency responsible for occupational safety and health within the State, NRS 618.185, subsection 1, with the duty to supervise and regulate all matters pertaining to the health and safety of employees, NRS 618.175. Authority is conferred to enforce the installation, use and maintenance of safety devices or other protective methods, NRS 618.315, subsection 3(b). NRS 618.325, subsection 1 provides that the director and his representatives "* * * shall act with full power and authority to carry out and enforce the orders, standards and policies fixed by the department, * * *." Other enforcement provisions include the issuance of citations, NRS 618.465, and the imposition of administrative fines, NRS 618.625-618.675, inclusive.

The section which most closely confers express authorization on the department to seek a search warrant to carry out the purposes of the Act is NRS 618.285, subsection 4, which provides that the department shall "institute legal proceedings to compel compliance with this chapter or any rules, regulations, standards or orders adopted or issued under this chapter." To this end, the department is empowered to prosecute, defend and maintain actions in its own name. NRS 618.525, subsection 1.

In Marshall v. Barlow's, Inc., 436 U.S. at 320, the court touched upon authority of OSHA to seek a warrant:

> Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process." (Footnote 15.)

The legislative intent evident in Chapter 618 of NRS is to confer broad enforcement powers on the department. From this intent alone it is not unreasonable to conclude that the department has be necessary implication the authority to seek a warrant in order to carry out its duties and the purposes of the Act. Additionally, the language of NRS 618.284, subsection 4 requiring the department to institute legal proceedings to compel employer compliance with the provisions of the Act is for all analytical purposes the legal equivalent of the regulatory authorization given OSHA inspectors to seek "compulsory process."

The conclusion is that inspectional warrants in other than criminal cases are appropriately issued in Nevada. The director is authorized to request their issuance. However, the absence of legislation governing the procedure surrounding the issuance of search warrants in other than

criminal cases necessarily makes the answer to your remaining questions somewhat speculative. What court may issue such warrants and who appropriately executes them?

The issuance of search warrants is governed by the strictures of the Fourth Amendment and is also subject to whatever statutory control exists. Generally, the only constitutional requirement is that the issuing court be a disinterested magistrate. But in Nevada courts of the justice of the peace and municipal courts are of special and limited jurisdiction, having only those powers, duties and responsibilities fixed by law, and no presumption may be drawn or implied in favor of their jurisdiction. Levy & Zenter Co. v. Justice Court, 48 Nev. 425 (1925); Attorney General's Opinion No. 224 (1978); Attorney General's Opinion No. 64 (159); and 68 Am.Jur.2d Search and Seizures § 71. These courts are expressly authorized to issue search warrants in criminal proceedings, NRS 179.025 and NRS 169.095. However, neither the justice nor municipal court is expressly authorized by constitution or statute to issue search warrants in other than criminal proceedings and the conclusion must be reached that such authority does not exist in such proceedings under Chapter 618, NRS, not involving the potential of the imposition of criminal sanctions pursuant to the Act. See NRS 4,370; NRS 179.025; NRS 169.095 and Articles 6 and 8 of the Nevada Constitution (Justice Courts) and NRS 5.050-5.060; Article 6, section 9 of the Nevada Constitution (Municipal Courts). It is unnecessary here to decide the authority of either court to issue inspectional warrants in other than criminal proceedings for violations of county or municipal ordinances. See, Owens v. City of North Las Vegas, 85 Nev. 105 (1969) (authority of justice court presumed); NRS 5.050, subsection 1(a) and NRS 5.060 (municipal court power to issue process, writs and warrants).

Article 6, section 6 of the Nevada Constitution provides that the district courts shall have original jurisdiction in certain civil and criminal cases, but does not say that the district courts have jurisdiction to issue search warrants. Article 1, section 18 of the Nevada Constitution provides that no warrant shall issue but upon probable cause. This section thus recognizes that search warrants may be issued under certain stated limitations, but without regard to the civil or criminal nature of the search.

The district courts are expressly authorized to issue "* * * all other writs proper and necessary to the complete exercise of their jurisdiction." Article 6, section 6 of the Nevada Constitution; NRS 3.190, subsection 3. An early Nevada case suggests that the enumeration of powers in Article 6, section 6 was not intended to exclude the delegation of other powers to the district courts by the Legislature. Gay v. District Court, 41 Nev. 330, 342 (1918). A more recent case, though, has expressed doubt as to the authority of the Legislature to enlarge the jurisdiction of a court beyond that granted constitutionally, at least if the additional duties are "foreign" to the court. Laxalt v. Cannon, 80 Nev. 588, 592 (1964).

A search warrant, essentially an *ex parte* order issued in the name of the state, falls within the statutory definition of "writ." NRS 10.010; NRS 28.010; NRS 64.020. Similar language as employed in Article 6, section 6 and NRS 3.190, subsection 3 appeared in a Minnesota statute and served as a basis for an opinion by that state's attorney general that district courts had the authority to issue inspectional warrants for housing and building code inspections despite there being no statute authorizing such warrants or the procedure governing their issuance. Minn. O. Att'y. Gen. 59a-9 (1967). The duty of the district courts is to uphold and enforce valid state legislation, including the provisions of Chapter 618, NRS, empowering the director to enter and inspect commercial premises and to seek compulsory process in the courts to enforce that right. The duty of the district court in the matter is therefore entirely "natural" as opposed to one "foreign" to the judiciary.

It is accordingly the opinion of this office that only the district court is the appropriate court authorized to issue search warrants for inspection of commercial premises under Chapter 618, NRS, in other than criminal cases.

The last question deals with the persons authorized to execute the warrant. Again, there is little or no statutory guidance as to governing procedures in other than criminal cases. Inspectors

of the department are not defined as peace officers by NRS 169.125. NRS 179.045, subsection 2 provides that a criminal search warrant must be directed to a peace officer. Therefore, warrants issued pursuant to NRS 179.015-179.115 in criminal proceedings must be directed to and executed by a peace officer and not the department or its inspectors.

Nevada law contains no provision similar to Fed.R.Crim.P. 41(c) authorizing an d requiring that search warrants be directed to and executed by any civil officer empowered to enforce or assist in enforcing any federal law. An argument may be made that NRS 618.325, subsection 1 authorizes an inspector to execute a warrant in other than criminal cases by the use of the phrase "The director and his representatives * * * shall act with full power and authority to carry out and enforce the orders, standards and policies fixed by the department, * * *" and, to that end, authorization is given to enter and inspect. It is doubtful that this quoted language can be or should be unequivocally construed to permit execution of the warrant by an inspector.

NRS 618.325 was added to the chapter in 1973 and amended by the Legislature in 1975. The Camara-See cases were decided in 1967. Neither case involved the regulatory field of occupational health and safety, although in hindsight, the See rationale could be considered a good indication of how the court would rule once the issue was squarely presented, as it was in 1978 in Marshall v. Barlow's, Inc., supra. Until Marshall the federal courts were split on the issue of the warrant requirement under OSHA legislation. See, for example, Brennan v. Buckeye Industries, Inc., 374 F.Supp. 1350 (S.D. Ga. 1974); Brennan v. Gibson's Products, Inc., 407 F.Supp. 154 (E.D. Tex. 1976). Because of the uncertainty in the law, it is simply not evident that the Legislature even intended to address itself to the question of inspectional warrants or the authority of the inspectors to execute warrants.

In view of this, it is the opinion of this office that departmental inspectors do not have the authority to execute search warrants in other than criminal cases by virtue of the language used in NRS 618.325. Sound policy reasons support this conclusion in that an inspector enjoys none of the authority of a peach officer which the latter may employ in the execution of a warrant or other court process. See, for example, NRS 179.055 and NRS 248.200. The warrants should be directed to and executed by the sheriff acting pursuant to NRS 248.090; NRS 248.100; and NRS 248.120-130, or by a peace officer having similar authority to serve and execute process.

CONCLUSION--QUESTION TWO

(A) The traditional standard of probable cause in the criminal sense is not required in the case of area or periodic inspections. However, it is the appropriate test where specific evidence of violations of Chapter 618, NRS, imposing criminal sanctions are made known to the department. A more relaxed standard of probable cause should be employed where specific evidence of violations imposing administrative fines only are made known to the department.

(B) A warrant is required for area or periodic inspections upon non-consent to entry and inspection of the nonpublic areas of the place of employment. A warrant is likewise necessary where specific evidence of violations of chapter 618, NRS, imposing either administrative fines or criminal sanctions, is made known to the department. A warrant is not required: (1) if valid consent is given by the appropriate person; (2) where there is probable cause to search, but due to an emergency there is not time to seek a warrant; or, (3) when the case falls within the "open fields" exception.

(C) The director of the Department of Occupational Health and Safety has the authority to seek a search warrant to enforce the right of entry and inspection granted by NRS 618.325, subsection 2. The issuance of search warrants in other than criminal proceeding is appropriate in Nevada. The district court is the proper issuing court having jurisdiction of the matter. All warrants, whether civil or criminal in nature, must be directed to and executed by the sheriff, or other peace officer having like authority. A departmental inspector may accompany and assist in the service and execution of the warrant in the manner set forth in NRS 618.325.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By EDWIN E. TAYLOR, JR., *Deputy Attorney General, Criminal Division*

OPINION NO. 79-3 Enactment Of Municipal Ordinances By Initiative Petition--A proposed municipal ordinance, which has been offered for consideration by initiative petition, but which would benefit a private corporation through the expenditure of public funds would be contrary to Article 1, Section 8 and Article 8, Section 10 of the Nevada Constitution. A city council may not enact, nor offer to the people for their enactment under NRS 295.215, a municipal ordinance which, if enacted, would be contrary to the constitution and laws of the State of Nevada or the city charter.

CARSON CITY, February 13, 1979

THE HONORABLE GEORGE E. FRANKLIN, *City Attorney,* City of North Las Vegas, P.O. Box 4086, North Las Vegas, Nevada 89030

DEAR MR. FRANKLIN:

You have requested an opinion as to the legality of an ordinance contained in an initiative petition submitted to the North Las Vegas City Council concerning bonds issued under the Consolidated Local Improvements Law for facilities constructed in the Nellis Industrial Park.

FACTS

The City of North Las Vegas, pursuant to Chapter 271 of NRS, the Consolidated Local Improvements Law, has issued bonds and warrants to defray the costs of certain public improvements affecting the Nellis Industrial Park. Again in accordance with Chapter 271, an assessment district has been established for the purpose of assessing the landowners affected by these improvements for the funds to pay off the bonds and warrants. A large landowner, a private corporation, which is subject to assessments under this law has apparently refused to pay these assessments. The city, to avoid defaulting on the bonds and warrants, has been paying for them from public moneys diverted from the city's general funds and other public funds. You have informed us that some $3 million has been paid in this way. The city has been in litigation with the landowner and has obtained a money judgment against the corporation for the unpaid assessments. This judgment has been affirmed in the Nevada Supreme Court.

The city council has now received an initiative petition proposing an ordinance to deal with this matter. The city does not question the sufficiency of the form of the petition. However, the city does question whether the ordinance may be legally enacted.

The proposed ordinance would require the city to enter into a settlement agreement, the terms of which are attached to the ordinance and apparently made a part thereto, which would require the city to dismiss with prejudice all its litigation against the private corporation involved in this matter. The city would further be required by the ordinance and the agreement to release or assign to the private corporation all unpaid assessments previously levied against the corporation. Finally, the city would be required by the ordinance and the agreement to issue new bonds or warrants worth $2.7 million for improvements on property owned by the private corporation in the Nellis Industrial Park.

Once the market value of all the property in the Nellis Industrial Park, whether owned by the

private corporation or not, reached $10 million, the city would be obligated by the ordinance to release and discharge any assessments levied against the corporation for the repayment of the bonds and warrants.

QUESTION

Ordinarily, under NRS 228.150 subsection 2, the Attorney General is not required to give his opinion relating to the interpretation of city ordinances. However, in this case the request for an opinion inextricably involves a request for an interpretation of NRS 295.215 and the city council's authority, if any, to proceed under that state statute. Therefore, this office offers the following response to the request. In addition, because of the conclusion reached by this office in this opinion, it is not necessary to consider the legality of the form of the proposed ordinance, a question which you also posed in your request for an opinion.

It is readily apparent that the proposed ordinance is special legislation designed to benefit not the public as a whole, but a private corporation. A special law applies only to certain individuals or classes of individuals and is designed to benefit private interests and not public interests. Clarke v. Irwin, 5 Nev. 111, 120 (1869); Attorney General's Opinion No. 215, July 12, 1977. It is true that the originators of the initiative measure have stated in its preamble that the ordinance is designed to help prevent the default of the city on its bonds, which would endanger the city's credit rating, and to help prevent the use of general fund moneys to meet the city's obligations. However, considering the actual thrust of the proposed ordinance, i.e., the conferring of substantial benefits on a private corporation, it would appear that the preamble of the proposed ordinance does not reflect its true purpose and effect. There are other means for preserving the city's credit rating and treasury than through special legislation, including the successful prosecution of litigation against persons or entities failing to pay their assessments. Indeed, the foreclosure of assessment liens for unpaid assessments is specially authorized by Chapter 271 of NRS 12 the means for meeting these public objectives.

Generally, absent law to the contrary, an ordinance which is designed to benefit special interests rather than public interests is void. State ex rel. Davies v. Reno, 36 Nev. 334, 336-337, 136 P. 110 (1913). This case dealt with an initiative petition, circulated under the authority conferred by the then Reno City Charter, to enact an ordinance granting a private individual a special license. The initiative provisions of the Reno City Charter did not permit special legislation.

However, the initiative petition submitted to the North Las Vegas City Council was circulated under the authority of Article 19, Section 4 of the Nevada Constitution. This section states:

> The initiative and referendum powers provided for in this article are further reserved to the registered voters of each county and each municipality as to all local, *special* and municipal legislation of every kind in or for such county or municipality * * *. (Italics added.)

This section of the state constitution unequivocally permits special legislation to be enacted by municipalities by means of initiative measures.

A constitution, however, must be considered as a whole:

> Effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the court must harmonize them, if practicable, and must lean in favor of a construction that will render every word operative, rather than one which may make some words idle and nugatory. Ex parte Shelor, 33 Nev. 361, 374, 111 P. 291 (1910).

The proposed ordinance must be construed with reference to two other provisions of the state constitution which have a bearing on the question asked. Article 1, Section 8 of the Nevada Constitution provides in part:

> * * * No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made * * *

Article 8, Section 10 provides:

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

Public funds may not be spent for private purposes. Thus, if a county, for example, were to levy a tax to retire bonds and the bonds were issued to meet private purposes, the law would be declared void pursuant to Article 1, Section 8 of the Nevada Constitution. State ex rel. Brennan v. Bowman, 89 Nev. 330, 332, 512 P.2d 1321 (1973). Such a result is based on the rationale that government cannot use its taxing power to raise revenues from its citizens for the use of a private enterprise conducted by other citizens. This would constitute an unauthorized invasion of a private right contrary to the fundamental principle that a tax is valid only when it is levied for a public purpose. See State v. Churchill County, 43 Nev. 290, 296, 185 P. 459 (1919).

In discussing that portion of Article 1, Section 8 which prohibits the taking of private property for public use without just compensation, the Nevada Supreme Court in Gibson v. Mason, 5 Nev. 283 (1869) at page 304 stated:

> When, therefore, property is taken in satisfaction of a tax, it is not within the constitutional prohibition [because the payment of taxes is a duty and creates no obligation to repay]. But it is argued from the provision, by counsel, if private property cannot be taken for public use without just compensation, it cannot be taken for private use, claiming that the tax sought to be collected is simply for the private purpose, that it is levied for the benefit of private individuals, or that it is taking the property of one citizen and giving it to another. *If this were a fact we should unhesitatingly declare the law unconstitutional* * * *. (Italics added.)

The United States Supreme Court, in construing the "due process" provisions of the Fourteenth Amendment to the United States Constitution has gone one step further and has stated:

> One person's property may not be taken for the benefit of another private person, even though compensation be paid. Thompson v. Consolidated Gas Co., 300 U.S. 55, 79-80 (1937). See also Eggmeyer v. Eggmeyer, 554, S.W.2d 137, 141 (Tex. 1977); Washington-Summers, Inc. v. City of Charleston, 430 F.Supp. 1013, 1015 (S.D.W.Va. 1977).

NRS 271.495, subparagraph 1 of the Consolidated Local Improvements Law provides that if the special fund created by the proceeds of assessments levied for improvements is insufficient to pay off bonds and interest for the project, the deficiency "shall" be paid out of the municipality's general fund, regardless of source. Subparagraph 2 of NRS 271.495 provides that if general fund moneys are insufficient for this purpose, the governing body of the municipality shall levy, "and

it shall be its duty to levy," general ad valorem taxes upon *all* property in the municipality to meet the deficiency.

To a certain extent these events have already occurred in this matter. Because the private corporation involved has refused to pay its assessments on the project, the City of North Las Vegas has had to reach into general fund moneys for over $3 million to meet the deficiency on the outstanding bonds and warrants. This is a direct charge on all the taxpayers of the municipality.

If the City of North Las Vegas, which has brought successful litigation against the delinquent landowner for reimbursement, is required by the proposed ordinance to waive its judgment and release its claims against the private corporation for these funds, it will in effect, by permanently using general fund moneys to meet the bond debt, have taxed all the private citizens of the city to pay a debt owned by one private interest, the private corporation against which the claims for reimbursement are brought. In effect a tax will have been levied for a private purpose–the relief of the private corporation of its debts–and it must be considered the taking of the private property of the citizens of the city and effectually giving it to a private interest. Under the authority of Gibson v. Mason, supra and State ex rel. Brennan v. Bowman, supra, it is the opinion of this office that such a measure would be contrary to Article 1, Section 8 of the Nevada Constitution.

The situation is compounded by the additional fact that under the proposed ordinance a new $2.7 million issue of bonds and warrants for projects on property owned by the private corporation is required. When all the property in the Nellis Industrial Park reaches a market value of $10 million, which is likely to be due in part to construction of the improvements paid for by the city , the ordinance would require that assessments levied against the private corporation be "released and discharged." Since the market value figure could be reached before sufficient assessments are collected to reduce or retire the bond debt, the city's general fund from tax revenues would be permanently liable for any deficiencies under Chapter 271. Once again, a tax would be effectively, and perhaps actually, levied on all the citizens of the city, taking their private property and, in effect, giving it to a private interest for the improvement of the property of a private corporation. Based on the above authorities, this too would be in the opinion of this office, contrary to Article 1, Section 8 of the Nevada Constitution.

With respect to Article 8, Section 10 of the Nevada Constitution, a municipality is prohibited from loaning its credit in aid of a corporation. The term "loan its credit in aid of such company," which is used in Article 8, Section 10, has been interpreted as an action imposing a financial burden on a city and which constitutes a charge on its tax funds. McLaughlin v. L.V.H.A., 68 Nev. 84, 94, 227 P.2d 206 (1951); State ex rel. Brennan v. Bowman, supra at 333. Unlike the fact pattern in those two cases, where the court held that the statutes under consideration imposed no county liability on bond issues, NRS 271.495 does put a charge on the city's tax funds for improvements under Chapter 271 of NRS. While the underlying purpose of Chapter 271 is the construction of improvements, generally considered a public purpose, the proposed municipal ordinance, by its terms, transmutes the public purposes of Chapter 271 into a publicly financed private project for the private corporation which stands to specially benefit from the terms of the proposed ordinance.

By canceling the private corporation's past assessment debt and by allowing the canceling of its future assessment debt, with the moneys for issued bonds to be paid by the city's general fund or possible future tax levies, it is the opinion of this office that the proposed ordinance requires the city to loan its credit in aid of a corporation and, therefore, is contrary to Article 8, Section 10 of the Nevada Constitution.

Having established, at least to our satisfaction, the illegality of the proposed ordinance under the state constitution, we may now review the city council's duty, if any, to consider the enactment of the proposed ordinance or to submit it to a vote of the people pursuant to NRS 295.215. Under subparagraph 1 of this statute the city council is required to consider the enactment of an ordinance proposed by initiative petition, assuming the petition is sufficient as to

form and number of signatures. In the event the city council fails to adopt the ordinance within sixty days after submission, the proposed ordinance must be submitted to a vote of the people within one year after the council has failed to enact the ordinance.

In State ex rel. Davies v. Reno, supra, a petitioner demanded a writ of mandamus to compel the city council to submit a proposed ordinance offered by initiative petition to the voters. As previously noted, the court ruled that the proposed ordinance, if enacted, would be void as providing for a special benefit when a general law would be proper. In considering whether the city council still had to perform the duty of submitting the proposed ordinance to the voters, the court stated:

> But a so-called proposed ordinance in proper form, that could never be an ordinance in substance, is not a proposed ordinance any more than an act of a legislature in violation of the constitution would be a statute. The initiative and referendum provisions of the city charter provide an additional method for the adoption of ordinances, but the fact that such method is pursued adds no additional validity to the ordinance. If the ordinance would be void if adopted by the city council, the infirmity would not be cured by its adoption by a vote of the electors of the city. [Cites omitted.] The writ prayed for is denied. State ex rel. Davies v. Reno, supra, at 338.

State ex rel. Davies v. Reno, supra, was cited with approval by the Supreme Court in Caine v. Robbins, 61 Nev. 416, 425-426, 131 P.2d 516 (1942). in which the court affirmed the issuance of an injunction which enjoined a county clerk from submitting an initiative petition measure to the voters on the grounds the ordinance, if adopted, would be void for want of an enacting clause. The court held that a minority of voters, i.e., the signers of the petition, should not be permitted to set into motion the legal machinery for the enactment of a measure which would be void, with its consequent injury to the taxpayers. Caine v. Robbins, supra at 426.

CONCLUSION

Therefore, while Article 19, Section 4 of the Nevada Constitution permits special legislation generally to be enacted by municipalities through initiative petitions, such special legislation is subject to the provisions of the remainder of the constitution, and only special legislation which does not conflict with the remainder of the constitution may enacted. Special municipal legislation which would confer a financial benefit on a private corporation through the expenditure of public funds is not, in the opinion of this office, valid legislation under Article 1, Section 8 and Article 8, Section 10 of the Nevada constitution. In the opinion of this office, the ordinance proposed to the North Las Vegas City Council by the initiative petition in this matter is contrary to those two provisions of the constitution.

Accordingly, it is also the opinion of this office that the North Las Vegas City Council has no duty or obligation under NRS 295.215 to consider the enactment into law, or to submit to the people for their enactment, a proposed ordinance offered by an initiative petition which would, if enacted, be contrary to the Constitution and laws of the State of Nevada or the city charter.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-4 Criminal Appeals From Municipal Court–NRS 189.010 and 189.020

must be read in pari materia so that an appeal from a municipal court in a criminal matter must be filed with the court within 10 days after rendition of the judgment. To be filed, a document must be received. Merely mailing a notice of appeal within the 10-day period is not sufficient to meet the filing requirement, since filing requires the actual receipt of the notice by the court within the time allowed by law. Even though the filing may be nontimely, the magistrate has the duty to forward the case to the district court under NRS 189.030. The proper place to move to dismiss the appeal for lack of timeliness would be before the district court pursuant to NRS 189.060.

CARSON CITY, February 16, 1979

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

Attention: TOM PERKINS, ESQ., *Assistant City Attorney*

DEAR MR. FREITAG:

You have requested advice concerning an interpretation of NRS 189.010 and 189.020 and whether the municipal court has a duty to forward a case to the district court in the event of a nontimely appeal.

FACTS

NRS 189.010, which is applicable to municipal courts as well as justice courts (see Section 4.010 of the Sparks City Charter; Chapter 450, Statutes of Nevada 1975; NRS 266.550 and 266.565) provides as follows:

> Any defendant in a criminal actin tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of such justice is held, at any time within 10 days from the time of the rendition of the judgment.

NRS 1898.020, which is also applicable to municipal courts, provides in part:

> 1. The party intending to appeal must file with the justice and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court.

In a recent case before the Sparks Municipal Court, a defendant was found guilty of various misdemeanors and on the tenth day thereafter his attorney mailed a notice of appeal to the Municipal Court, which arrived on the twelfth day.

QUESTION

In order to appeal a criminal conviction in municipal court under NRS 189.010 and 189.020, is it enough to merely mail a notice of appeal by the tenth day after judgment or just the notice of appeal by the tenth day after judgment or must the notice of appeal be received and filed with the court by the tenth day? In the event an appeal is not filed in a timely manner, is the municipal court still required to forward the case to the district court, as is provided in NRS 189.030?

ANALYSIS

This office has recently adopted certain internal guidelines concerning the processing of Attorney General opinions. It has been decided, among other points, that we will not issue opinions on:

Questions in current or imminent litigation, unless the question of law relates to the respective office, department, agency, board or commission or any legal duty, responsibility or authority relating thereto of the person requesting the opinion.

In this case, your question has been posed to this office at the request of the municipal court and it pertains to a legal duty of the court, i.e., whether the court is still required to forward a case to the district court in the event of a nontimely appeal. Accordingly, your request merits a response.

NRS 189.010, standing alone, simply states that in a criminal matter a judgment may be appealed within 10 days. No mention is made of the physical process of filing. NRS 189.020, standing alone, simply requires a notice of appeal to be filed with the municipal court and is silent as to the time of filing the notice. NRS 189.020 may thus be contrasted with Rule 4 of the Nevada Rules of Appellate Procedure which denotes specific time limits for the actual process of filing a notice of appeal. Both statutes are also silent, unlike Rule 25(a) of the Nevada Rules of Appellate Procedures for example, as to whether filing by mail is permitted and the date when filing by mail is perfected.

It is the rule of statutory construction that statutes dealing with the same subject matter, i.e., *in pari materia*, are to be construed and interpreted together. This is particularly the case when the law to be interpreted is part of the same statute. Raggio v. Campbell, 80 Nev. 418, 425, 395 P.2d 625 (1964). NRS 189.010 obviously deal with the same subject matter–appealing criminal convictions in magistrate's courts–and both were enacted as part of the same statute, i.e., the Criminal Practice Act of 1911, Sections 662 and 663. Generally, there is nothing uncertain, obscure or misleading in a portion of an act when it is considered in connection with the act as a whole. Ex parte Iratacable, 55 Nev. 263, 283, 30 P.2d 284 (1934).

Therefore, while the provision dealing with the actual filing of a notice of appeal in a criminal matter is found in a portion of the law (NRS 189.020) that is separate from that portion specifying the time within which a convicted defendant may appeal (NRS 189.010), the two statutes are to e interpreted together. In reading them together, as a part of the whole, there is nothing obscure, misleading or uncertain about NRS 189.020. A notice of appeal, in the opinion of this office, must be *filed* with the magistrate, under NRS 189.020, within the 10 days set forth in NRS 189.010.

In order to be considered filed a document must actually be delivered to and received by the filing officer. Golden v. McKim, 45 Nev. 350, 353-354, 204 P. 602 (1922); Blake v. R.M.S. Holding Corp., 341 So.2d 795, 799 (Fla. 1977); U.S. v. Solly, 545 F.2d 874, 876 (3rd Cir. 1976); American Express v. Monfort, 545 S.W.2d 49, 52 (Tex. 1976); In re Imperial Sheet Metal, Inc., 352 F.Supp. 1149, 1152 (D.La. 1973). A document is *not* filed when it is mailed, Wirtz v. Local Union, 246 F.Supp. 741, 750 (D. Nev. 1965); merely mailing a document does not satisfy the filing requirement, In re Imperial Sheet Metal, supra at 52-53.

Therefore, it is the opinion of this office that NRS 189.010 and 189.020, when read together, require a notice of appeal from a conviction in municipal court to be *filed* with the court within 10 days after rendition of the judgment. It is also our opinion that merely mailing the notice of appeal within the 10-day period is not sufficient to meet the filing requirement. The notice must be received by the court for filing within the allowable 10-day period.

NRS 238.100 does provide that any document "required or permitted by law or regulation" to be filed by mailing shall be considered filed as of the date of the postmark on the envelope in which it was mailed. However, NRS 189.010 and 189.020 do not specifically require or permit filing by mail, and, indeed, it is our interpretation based on the above authorities that the statutes, being silent on the subject of mailing, require actual delivery and receipt of the document for filing. This office has also confirmed the information that the Sparks Municipal Court does not have a written regulation or rule pertaining to filing documents by mail. Instead, it is the policy of

the court that, pursuant to the two statutes, notices of appeal, whether delivered personally or by mail, must be received within the 10-day period allowed for filing.

However, regardless of the nontimeliness of filing an appeal, NRS 189.030 provides that, "The justice must, within 10 days after the notice of appeal is filed, transmit to the clerk of the district court all papers relating to the case and a certified copy of his docket." This action is not tied to the timeliness of filing an appeal. It is a mandatory action which is to take place after the appeal is filed regardless of when it is filed.

The remedy for disposing of a nontimely appeal is found in NRS 189.060. Subparagraph 1 of that statute provides that an appeal may be dismissed for failure to take it in time. But subparagraph 2 of NRS 189.060 provides:

> If the appeal is dismissed, a copy of the order of dismissal must be *remitted to the justice,* who may proceed to enforce the judgment. (Italics added.)

The clear implication is that only the district court may dismiss the appeal for want of timeliness since it is the district court which could only remit the order of dismissal to the magistrate.

Thus it would be the opinion of this office that it would be the duty of the magistrate to forward the appeal to the district court, even though the appeal was filed in a nontimely manner, and that the city attorney would then be free to move for the dismissal of the appeal before the district court for lack of timeliness. The district court could then reach its decision pursuant to NRS 189.060.

CONCLUSION

It is the opinion of this office that NRS 189.010 and 189.020 must be read in *pari materia* so that an appeal from a municipal court in a criminal matter must be filed with the court within 10 days after rendition of the judgment. To be filed, a document must be received. Therefore, it is also the opinion of this office that merely mailing a notice of appeal within the 10-day period is not sufficient by itself to meet the filing requirement, since filing requires the actual receipt of the notice by the court within the time allowed by law.

However, it is also the opinion of this office that it would be the duty of the magistrate under NRS 189.030 to forward the appeal to the district court, even though made in a nontimely manner, and that the city attorney would then be free to move for the dismissal of the appeal before the district court for lack of timeliness. The district court could then reach its decision pursuant to NRS 189.060.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-5 Public Meetings–Meetings of a city insurance committee are subject to the Open Meeting Law. City Manager and department heads may review claims in staff meetings. City Attorney may not meet in private with City Council to discuss settlement of claims absent express statutory authority.

CARSON CITY, February 23, 1979

THE HONORABLE ROBERT L. VAN WAGONER, *City Attorney*, City Hall, P.O. Box 1900, Reno, Nevada 89505

Re: Meetings of the Insurance Committee and the Open Meeting Law

DEAR MR. VAN WAGONER:

In your letter of January 10, 1979, you presented for our review five questions related to the Insurance Committee of the City of Reno established pursuant to a motion of the City Council on December 6, 1976.

FACTS

It is our understanding that the Insurance Committee was set up for the purpose of reviewing general liability claims made against the city and deciding whether such claims should be settled or taken to trial. The Committee, as described in Council Memo No. 76-910, consists of the City Manager, Finance Director and the City Attorney, with ex-officio membership for the city's specially retained defense counsel, a professional claims adjuster and a representative of the Independent Insurance Agents of Northern Nevada.

It is our further understanding that the Insurance Committee reviews all claims involving more than $1,500. Apparently with respect to claims between $1,500 and $5,000, the Committee can actually recommend payment of a particular amount and payment is then made without further action by the City Council. Only those claims in excess of $5,000 are presented to the full City Council for determination, after first being reviewed by the Insurance Committee.

QUESTION ONE

Is the Insurance Committee required to conduct all of its meetings open to the public with notice, agenda and publication of written minutes?

ANALYSIS

The answer to your question must be "yes," according to the definition of the term "public body" set forth in the Nevada Open Meeting Law. NRS 241.015, subsection 2 provides:

> Except as otherwise provided in this subsection, "public body" means an administrative, advisory, executive or legislative body of the state or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including but not limited to any board, commission, committee, subcommittee or other subsidiary thereof. "Public body" does not include the Legislature of the State of Nevada.

The structure and operation of the City of Reno's Insurance Committee, as outlined in Council Memo No. 76-910, certainly appears to indicate that the Committee is "an administrative, advisory [or] executive body of * * * a local government" which "expends or disburses or is supported in whole or in part by tax revenue" and which also "advises or makes recommendations to any entity [i.e., the City Council] which expends or disburses or is supported in whole or in part by tax revenue." We also would note that a "committee" is specifically mentioned in the statute as an included body.

As you know, statutes of this type, intended for the public's benefit, are usually given a quite liberal interpretation by the courts, making their coverage as broad as the language will reasonably permit. In fact, we are reminded of a recent, unreported decision of the Second Judicial District Court [Reno Newspapers, Inc. v. City of Reno, et al.] in which a special committee formed to negotiate increased landing fees at Reno International Airport was held to

be within the provisions of the former Open Meeting Law, a statute whose terms were less well defined than those in the present statute.

It cannot be denied that the Insurance Committee is engaged in the conduct of the people's business, particularly when it reviews, deliberates and actually makes the final decision on those claims over $1,500 but less than $5,000.

NRS 241.020, subsection 1 requires *all meetings* of public bodies to be open and public, "except as otherwise specifically provided by statute." We have found no other statute within the Nevada Revised Statutes (with one exception not applicable to the City of Reno) which specifically authorizes the closing of meetings of public bodies for discussing and deciding the settlement of claims against that body. We are therefore compelled to conclude that the City of Reno Insurance Committee, as a public body within the meaning of the Nevada Open Meeting Law, must comply with all the procedural requirements of Chapter 241 including open meetings duly noticed, a published agenda and written minutes available for public inspection.

The only exception to the general rule discussed above would appear to be a discussion by the Insurance Committee which specifically involved the character, alleged misconduct, professional competence or physical or mental health of a particular person, be he the claimant or an employee of the city. See NRS 241.030, subsection 1. However, the Open Meeting Law itself makes clear that this exception "shall not be used to circumvent the spirit or letter of this chapter in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory powers." NRS 241.030, subsection 4.

QUESTION TWO

May the City Manager, Finance Director and City Attorney *meet as staff*, rather than as a formally designated committee, to review claims against the city.

ANALYSIS

You have not provided us with any further details as to how this "staff meeting" would function. To the extent that this would be merely a name or title change, with the group continuing to have the same membership, organization and purposes as outlined above for the Insurance Committee, we are of the opinion the Open Meeting Law would remain applicable. However, to the extent that such a meeting was for the purpose of providing information to the City Manager, who in turn would arrive at his own conclusion and recommendation on a particular claim for submission to the City Council, we foresee no legal impediment. As noted in the case of Bennett v. Warden, 333 So.2d 97 (Fla.App. 1976), meetings between an executive officer and advisors, consultants, staff or personnel under his direction, for the purpose of fact finding, to assist him in the execution of his duties are not meetings within the contemplation of the Sunshine Law. See also People ex rel. Cooper v. Carlson, 328 N.E.2d 675 (Ill.App. 1975) where staff meetings of department heads were held to be outside the scope of the Open Meeting Law where no motions or resolutions were made, no votes were taken and no ordinance or resolution of the county board made the staff people a public or subsidiary body.

QUESTION THREE

May the City Attorney and the city's specially retained defense counsel meet with the City Council in private to discuss settlement of insurance claims?

ANALYSIS

As mentioned in answer to your first question, NRS 241.020, subsection 1 expressly limits exceptions to the Open Meeting Law to situations where a statute specifically authorizes a closed meeting. We have found no Nevada statute which authorizes a City Attorney to meet with a City Council in private for the purpose of settling claims against the city.

Some people have suggested that the attorney-client privilege (NRS 49.095) regarding

communications by a client to his attorney constitutes a statutory exemption to the Open Meeting Law. However, in view of the specificity of NRS 241.0220, subsection 1 we believe we are not free to read a part of our evidence code as going beyond its apparent scope, i.e., to prevent *testimony* on confidential communications.

The only way an exception for this type of meeting can be created is by an act of our Legislature. We would note that the Nevada Legislature is presently meeting in regular session here in Carson City.

QUESTION FOUR

May the Insurance Committee meet in private under the procedures outlined in Council Memo No. 76-910 without violating the Open Meeting Law?

ANALYSIS

We believe this question was answered by us in the negative in our discussion under your Question 1.

QUESTION FIVE

Would the answers to the previous four questions remain the same if one or two members of the City Council were added to the membership of the Insurance Committee?

ANALYSIS

As you can no doubt detect from our previous answers, the presence or absence of council members on the Insurance Committee has no particular legal significance under the Open Meeting Law. The purposes and actual operations of the committee are the factors which bring it within the Open Meeting Law, not its membership.

CONCLUSIONS

In the Attorney General's Nevada Open Meeting Law Manual, revised August, 1977, at page 16 (Question and Answer No. 22), we acknowledged the fact that the Nevada statutes contain no express provision governing the validity of action taken in violation of their provisions. At the same time, we suggest that in our opinion the Nevada Supreme Court would probably follow that line of cases in other states which hold such actions are voidable by the courts if properly challenged, rather than void *ab initio,* even though there is no direct reference to voidableness in the statute. See Bogert v. Allentown Housing Authority, 231 A.2d 147 (Pa. 1967) and Toyah Independent School District v. Pecos Arso Independent School District, 466 S.W.2d 371 (Tex.Civ.App. 1971). We continue to adhere to this position.

In summary, meetings of the Insurance Committee for the City of Reno are subject to the requirements of the Open Meeting Law. Claims may be privately reviewed by appropriate department heads and the City Manager in a true staff meeting. The City legal advisors may not meet in private to discuss settlement of claims with the City Council.

We trust the discussion of your five questions set forth above will assist you, the Insurance Committee and the Reno City Council in better carrying out your responsibilities in accordance with law.

Respectfully submitted,

Richard H. Bryan, *Attorney General*

OPINION NO. 79-6 Public employees and political campaign contributions–The Legislature may validly prohibit appointed public employees from soliciting or

receiving political campaign contributions for themselves or on behalf of other political candidates and may also validly prohibit appointed public employees from making political campaign contributions to political candidates. In the absence of contrary legislation, a law which prohibits appointed public employees from making, soliciting or receiving political contributions would not extend to the spouses of such appointed public employees.

Carson City, March 16, 1979

The Honorable Paul Freitag, *City Attorney,* City Hall, 431 Prater Way, Sparks, Nevada 89431

Attention: Steven P. Elliott, *Assistant District Attorney*

Dear Mr. Freitag:

You have requested an interpretation of Section 1.130(5) of the Sparks City Charter. This section was enacted by the Legislature into law as part of Chapter 470, Statutes of Nevada 1975, and was amended to its present form in Chapter 380, Statutes of Nevada 1977.

FACTS

Section 1.130(5) of the Sparks City Charter provides as follows:

> A person who holds any compensated appointive city position shall not *make*, *solicit* or *receive* any contribution of campaign funds for any elected officer of the city or candidate for any city office or take any part in the management, affairs or political campaign of any such candidate." (Italics added.)

QUESTION ONE

May the Legislature validity prohibit appointive public employees from soliciting or receiving political campaign contributions for themselves or on behalf of other political candidates?

ANALYSIS–QUESTION ONE

Section 1.130(5) applies only to appointive employees of the city. It does not apply to elected officers. By its terms, it is apparent the legislature intended, through its enactment, to completely divorce politics from the day-to-day administration of city business by the city's employees. An elected officer, however, by the very fact of his election, is a politician and must necessarily be involved in politics. He is responsive and responsible to the body politic. Therefore, the Legislature may reasonably distinguish between the class of public employees on the one hand and the class of elected officers on the other in considering the effect of politics in municipal administration. See McGowan v. Maryland, 366 U.S. 420, 426 (1961); Koontz v. State, 90 Nev. 419, 529 P.2d 211 (1974).

The provisions of Section 1.130(5) are unique to the Sparks City Charter. No other special charter city has similar provisions in its charter, nor are similar provisions contained in Chapter 266 of NRS, which pertains to general law incorporated cities. However, since Sparks is a special charter city, the Legislature in enacting Section 1.130(5) as part of the city charter was acting pursuant to Article 8, Section 1 of the Nevada Constitution. This section permits the enactment of special legislation relating to municipalities. McGill v. Chief of Police, 85 Nev. 307, 309, 454 P.2d 28 (1969).

Furthermore, since the provisions of Section 1.130(5) prohibit the soliciting or receiving of campaign contributions for any candidate for city office, it is apparent the section would apply to the candidacy of an appointed city employee himself for elective office as well as applying to

candidates the employee supports.

Finally, it should be noted that the restrictions of Section 1.130(5) are limited only to Sparks city political candidates and campaigns.

There are three landmark United States Supreme Court decision which directly answer the question asked. The first is United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). That case considered the validity of the federal Hatch Act as it applied to federal public employees. The provision of the law which was challenged prohibited federal public employees from taking an active part in partisan political campaigns. The law specifically exempted nonpartisan campaign activities from its provisions.

The Supreme Court acknowledge that insofar as the law interfered with the appellant's rights to further his own political views, it worked "a measure of interference" with his First Amendment rights. Public Workers v. Mitchell, supra at 94-95. However the court noted that fundamental human rights were not absolute. First Amendment rights were subject to the need for order. The court had to balance the guarantees of freedom against a legislative enactment designed to protect a democratic society against the "supposed evil" of political partisanship by public employees. Public Workers v. Mitchell, supra at 96.

The court also noted that there was a long history of cases supporting the position that the legislative authority could curb the political activities of public employees. In Ex parte Curtis, 106 U.S. 371 (1882), the Supreme Court upheld a law prohibiting federal public employees from giving or receiving money to or from other officers and employees of the federal government for political purposes, on the basis of Congress' legitimate need to uphold the efficiency and integrity of the public service. For the same reason, a law prohibiting Congressmen from directly or indirectly soliciting or receiving political contributions from federal employees was also upheld in United States v. Wurzback, 280 U.S. 396 (1929). The danger that Congress sought to avoid by enacting such laws was the danger that political considerations rather than merit would be the basis for advancement in the civil service, and it sought to protect the public from government favors being channeled through political connections. United Public Workers v. Mitchell, supra at 96-98.

The court also stated that the Hatch Act did not otherwise interfere with a wide range of other public activities which would be protected by the First Amendment. Then, in footnote 34, the Supreme Court made this famous statement:

> When in 1891 New Bedford, Mass., under a rule removed policeman for political activity, an opinion by Mr. Justice Holmes disposed summarily of McAuliffe's contention that the rule invaded his right to express his political opinion with the epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. New Bedford, 155 Mass. 316, 220, 29 N.E. 517.[1] Public Workers v. Mitchell, supra at 99.

The Supreme Court then concluded that when the Congress believed that the actions of federal public servants threatened the integrity and competency of the civil service, legislation to forestall such a danger and to insure the usefulness of the service was required. In this case, Congress responded with the Hatch Act and the court stated, "We cannot say with such a background that these restrictions are unconstitutional." Public Workers v. Mitchell, supra at 103.

The second case dealing with the question at hand is United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). This case again challenged the validity of the Hatch Act as to federal employees. This time it was contended that the law was vague and overbroad in its terms. It was also asserted that the holding of United Public Workers v. Mitchell had been eroded by the decisions of lower federal courts and the new state of the law should be recognized by the Supreme Court.

Instead, the Supreme Court specifically reaffirmed the decision in United Public Workers v. Mitchell and asserted that a whole variety of legislation which would restrict partisan activities of public employees (the Hatch Act still exempted nonpartisan activities) would be valid, including a ban on joining political committees, raising campaign funds, being a partisan candidate, managing a campaign or serving as a delegate at a party convention. Civil Service comm. v. Letter Carriers, supra at 556.

The court stated that the government has an interest in regulating the conduct and speech of its employees that differs significantly from the interest it possess in connection with the regulation of speech of the citizenry in general. A balance had to be struck between the interests of a public employee as a citizen and the interest of the government in promoting the efficiency of its public services. The laws and programs of government had to be carried out without bias or favoritism for any political party, group or individuals. Forbidding certain political activities to its employees would "reduce the hazards to fair and effective government." In addition, the government had an important interest in forbidding the appearance of impropriety as well as its practice in order to foster public

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[1]Although the Supreme Court has rendered the "right v. privilege" theory of public employment meaningless (see Graham v. Richardson, 403 U.S. 365 (1971), and has held that employment under certain conditions constitutes a property right protected by the Fourteenth Amendment, this does not mean that a public employee cannot be terminated or disciplined for valid reasons, but only that he is entitled to a hearing. Board of Regents v. Roth, 408 U.S. 564 (1972).

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confidence in government. Civil Service Comm. v. Letter Carriers, supra at 564-565.

Finally, the court concluded that the wording of the law was precise enough in its terms, describing the persons affected and the activities prohibited, so as to avoid the vagueness allegation and that since not all forms of public expression were prohibited to public employees, it was not overbroad in its terms. Civil Service Comm. v. Letter Carriers, supra at 580.

The third case pertaining to the question is Broadrick v. Oklahoma, 413 U.S. 601 (1973). In this case a state statute which prohibited public employees from soliciting or receiving, directly or indirectly, campaign contributions and from being political candidates or participating in the management of a political party or campaign was challenged on the basis of being vague and overbroad. The court noted that the state attorney general and other state officials interpreted the act to apply only to partisan political activities. Broadrick v. Oklahoma, supra, at 618.

As in the *Letter Carriers* case, the court did not find the act to be vague, holding instead that men of common intelligence did not have to guess at its meaning. Its words were plain and certain and gave adequate warning as to what activities were prohibited. Broadrick v. Oklahoma, supra at 607.

With respect to whether the law was overbroad, the court concluded:

> Unlike ordinary breach of the peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute directed at particular groups or viewpoints. [Cite omitted.] The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreath scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of

conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. Broadrick v. Oklahoma, supra at 616.

The court then upheld the state statute as constitutional.

These three cases convince this office that Section 1.130(5) is valid legislation. It meets a valid governmental need, i.e., insuring that the administration of municipal affairs in Sparks by the city's appointed employees is as free from political considerations and influence as possible. It is not directed at particular groups or philosophies, but is neutral and evenhanded in its effect. It is narrow in scope, applying only to political campaigns affecting Sparks municipal elections. It is certain in its terms and definite in its prohibitions so that no one need guess at its effects. It does not prohibit other forms of public expression protected by the First Amendment, such as speech, signing nomination petitions, displaying yard signs and wearing buttons or displaying bumper stickers. It certainly does not prohibit voting. With respect to affecting appointed public employees who wish to run for elective office in Sparks, the law does not prohibit the potential candidate from relying on other sources of campaign funding not associated with soliciting or receiving campaign contributions, i.e., relying on one's own financial resources, for example.[2] Alternatively, as implied in footnote 34 in United Public Workers v. Mitchell, supra at 99, such an appointed public employee may wish to resign in order to be able to obtain campaign contributions for his own campaign.

It is true that in United Public Workers v. Mitchell, Civil Service Comm. v. Letter Carriers and Broadrick v. Oklahoma, the Supreme Court, relying on the particular facts before the court, upheld governmental prohibitions on the partisan political activities of government employees, but there is no logical reason why such prohibitions may not be imposed on nonpartisan activities as well, particularly where all the elective offices of a government are nonpartisan. This is the case in Sparks. See Section 5.050 of the Sparks City Charter. Because an office is called nonpartisan on the ballot does not mean that political parties lose interest in the office or that incumbents give up their party affiliations. When all of the elective offices in a government are made nonpartisan, the potential for competition for those offices and the possible danger of trading political favors for such offices are just as real and intense as in partisan contests. Therefore, this office is of the opinion that in order to meet the need for integrity and efficiency in government, the Legislature may logically and validly extend prohibitions against political activities on the part of government employees to nonpartisan offices as well.

CONCLUSION–QUESTION ONE

It is the opinion of this office that the Legislature may validly prohibit appointive public employees from soliciting or receiving political contributions for themselves in their own campaigns for elective office or on behalf of other political candidates and, therefore, those provisions of Section 1.130(5) of the Sparks City Charter are valid legislation.

QUESTION TWO

May the Legislature validly prohibit appointive public employees from making political campaign contributions to political candidates? If so, does the prohibition extend to the spouses of such appointed public employees?

ANALYSIS–QUESTION TWO

Section 1.130(5) prohibits any person who holds any compensated appointive city position from making any political campaign contributions to candidates for city office. Again, it must be remembered that the section applies only to appointive public employees, not elected public officers, and is narrowly restricted to Sparks municipal elections.

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[2]Chapter 294A of NRS, which is applicable to municipal political candidates, defines, "contribution" as "a gift, subscription, pledge, loan, conveyance, deposit, payment, transfer or distribution of money, and includes the payment of any person other than a candidate, of compensation for the personal services of another person which are rendered without charge to the candidate."¶

In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court considered the validity of the Federal Election Campaign Act which, among other things, limited the amount of money a candidate for federal office could spend and also limited the amount of money a person could contribute to a federal candidate. The court acknowledged the importance of money in a campaign and its effect on free speech. However, this acknowledgment was related to the spending of money in a campaign by the candidate himself. The amount he could spend affected the quantity of his free expression and to restrict his spending would directly restrict "the number of issues discussed, the depth of their exploration and the size of the audience reached." Campaign spending limitations were thus invalid restrictions on First Amendment rights. Buckley v. Valeo, supra at 19 and 51.

However, the court considered things differently from the perspective of a person wishing to contribute funds to a political campaign. As stated, the federal act in question placed certain limits on the amount a person could contribute to candidates. In this instance, the court stated:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. Buckley v. Valeo, supra at 20.

This is because a contribution is only a symbolic expression, the quantity of which does not necessarily reflect the depth of support a person may have for a candidate. Such support may be expressed in other ways and means. Therefore, a restriction on contributions would involve little direct restraint on political communication as the contributor retains the freedom to discuss candidates and issues. Buckley v. Valeo, supra at 21.

Furthermore, the court concluded that contribution limitations did not infringe a candidate's rights to engage in political dialogue since the only effect of such limitations would be to require him to collect contributions from more or other sources. Buckley v. Valeo, supra at 21-22. Therefore, the court upheld restrictions on campaign contributions.

Section 1.130(5) of the Sparks City Charter does more than put limitations on how much an appointed public employee can contribute to a political campaign. It flatly prohibits all such contributions by appointed public employees. However, given the legitimate and valid interest of the Legislature in insuring the integrity and efficiency of the public service by divorcing politics from municipal administration, as sanctioned in United Public Workers v. Mitchell, supra, Civil Service Comm. v. Letter Carriers, supra and Broadrick v. Oklahoma, supra, combined with the Supreme Court's finding that campaign contributions restrictions have minimal impact on First Amendment freedoms in Buckley v. Valeo, supra, it is the opinion of this office that these provisions of Section 1.130(5) are valid.

This conclusion is consistent with the holding of the united States Supreme Court in Ex parte Curtis, supra in which a federal statute which flatly prohibited federal employees from giving political contributions to other federal officers and employees was upheld. The court noted that the law was enacted in accordance with Congress' legitimate interest in promoting the efficiency and integrity of government. The court also noted that the affected employees were free to contribute to the political campaigns of other persons who were not federal officers and

employees. Ex parte Curtis, supra at 373.

In this regard, Section 1.130(5) is also narrow in scope. It applies only to Sparks municipal elections and it still leaves appointed public employees free to engage in speech, sign nomination petitions, display yard signs, wear buttons and display bumper stickers, etc.

Having reached this conclusion, the next consideration is whether the prohibition in Section 1.130(5) against campaign contributions applies to spouses of appointed public officials. The actual wording of Section 1.130(5) makes no reference to spouses or other family connections of appointed public employees of Sparks. The section specifically refers only to a "person who holds any compensated appointive city position."

There is no doubt that Section 1.130(5) works a "measure of interference," though a valid measure, with First Amendment rights. United Public Workers v. Mitchell, supra at 94-95. However, any restriction or limitation on a First Amendment right requires an "exacting scrutiny." Buckley v. Valeo, supra at 16. Considering the restrictive effect of Section 1.130(5) on First Amendment rights, it is the opinion of this office that if the Legislature meant to include the spouses of Sparks appointed public employees within the prohibitions of Section 1.130(5) the Legislature would have done so expressly.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the Legislature may validly prohibit appointive public employees from making political campaign contributions to political candidates and, therefore, those provisions of Section 1.130(5) of the Sparks City Charter are valid legislation. It is also the opinion of this office that the provisions of Section 1.130(5) of the Sparks City Charter do not apply to spouses of appointive public employees of the city.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-7 Budget Act, State Industrial Attorney, State Insurance Fund NRS 353.210, subsection 1 requires submission of a budget to the Chief of the Budget Division by the State Industrial Attorney and inclusion of same in the executive budget received by the Legislature; Board of Examiners and State Controller administer of Office of State Industrial Attorney's budget.

CARSON CITY, March 23, 1979

PATRICIA BECKER, *State Industrial Attorney*, 1000 East William Street, Carson City, Nevada 89710

DEAR MS. BECKER:

In your recent letter, you requested this office to answer two questions pertaining to your office and its budget.

QUESTION ONE

Does NRS 353.210, subsection 1 apply to the office of the State Industrial Attorney, thereby requiring submission of a budget for the office of State Industrial Attorney to the Chief of the Budget Division?

ANALYSIS

A governmental entity is covered by NRS 353.210, subsection 1, a provision of the State budget Act (NRS 353.150 to 353.246 inclusive), if the entity is an agency of the executive department of state government "* * * fees or other moneys under the authority of the State including those operating on funds designated for specific purposes by the constitution or otherwise." NRS 353.210, subsection 1. The Legislative Department, the Public Employees' Retirement System and the Judicial Department of state government are the only agencies exempted from the operation of this statute. These agencies must, however, at the request of the Chief of the Budget Division, hereinafter referred to as the Chief, submit to him for his information in preparing the executive budget the budgets which they propose to submit to the Legislature. NRS 353.210, subsection 3.

The office of State Industrial Attorney was created by Statutes of Nevada 1977, Chapter 443. This Act may now be found at NRS 616.253 to 616.2539, inclusive. The State Industrial Attorney is appointed by the Governor and is in the unclassified service of the State. NRS 616.253. All salaries and other expenses of administering this office are paid from the State Insurance Fund. NRS 616.2433, subsection 2. Agencies which are financed by such a fund are "* * * agenc[ies] of the state, set up for the proper administration of the law * * *." Appleman, Insurance Law and Practice, Vol. 7A § 4592, p. 190, "State Insurance Funds," Sims v. Moeur, 19 P.2d 679 (Ariz. 1933) and Moran v. State ex rel. Derryberry, 534 P.2d 1282 (Okla. 1975).

Employers are required by NRS 616.395, subsection 1 and other provisions of law to make contributions to the State Insurance Fund. Accordingly, the office of State Industrial Attorney is an agency which receives "* * * moneys under the authority of the State * * *." NRS 353.210, subsection 1, supra. Moreover this office operates on funds designated for specific purposes by the Constitution of the State of Nevada. Article 9, Section 2 of Constitution requires that any moneys paid for the purpose of providing compensation for industrial accidents and occupational diseases and for administrative expenses incidental thereto be placed in a trust fund for specific purposes. See also State v. McMillan, 36 Nev. 383 (1913), and Attorney General's Opinion No. 92 (August, 3, 1972). Thus it is the opinion of this office that NRS 353.210, subsection 1 applies to the office of the State Industrial Attorney.

Because NRS 353.210, subsection 1 is part of the State Budget Act, the applicability of this statute to the office of the State Industrial Attorney raises the related but inseparable question of whether the budget for this office must be included in the executive budget and submitted to the Legislature for approval.

"[T]he legislature possesses the entire control and management of the financial affairs of the state." City of Reno v. McGowan, 84 Nev. 291, at 293 (1968). To provide a mechanism for the expeditious exercise of this constitutional power the Legislature enacted the State Budget Act. Pursuant to this Act, agencies must, unless expressly excluded, submit their requested budgets to the chief for review and, if need be, for modification. NRS 353.210 and NRS 353.230. Individual agency budget requests are then integrated into a financial plan for the State. The plan is entitled the executive budget, NRS 353.185, subsection 6. The executive budget includes "the general appropriations bill authorizing, by departments, institutions and agencies, *and by funds*, all expenditures of the executive department of the state government for the next 2 fiscal years * * * if and when adopted by the legislature." [Italics added.] NRS 353.205, subsection 3. Thus, under the State Budget Act, expenditures from a fund are only authorized if and when approved by the Legislature. Accordingly, unless statutory or constitutional authority to the contrary exists elsewhere, it is clear that since the office of the State Industrial Attorney operates on State Insurance Fund moneys, it must submit a budget for legislative approval pursuant to the State Budget Act.

As discussed above, the constitutional provision relating to this fund, Article 9, Section 2, only limits the purposes for which moneys in the State Insurance Fund may be expended. It does

not operate to deny the Legislature the right to review and control the budgets of agencies operating from these funds. Attorney General's Opinion No. 92 (August 3, 1972). However, the Legislature may not appropriate State Insurance Fund moneys for purposes other than those contemplated by the Constitution. See Moran, supra, at 1288. NRS 616.425 and NRS 616.435, the statutory provisions pertaining to the State Insurance fund, do not limit legislative authority to control the budget of the office of State Industrial Attorney. NRS 616.425 merely creates the fund and names the Nevada Industrial Commission as "custodian thereof for the benefit of employees" within the provisions of Chapter 616 of NRS. As custodian, the Commission does not have unfettered discretion to manage the fund. The fund, although it is a "special fund" (State v. McMillan, supra), is still a "public fund" in the sense that the public welfare is highly involved with its proper administration. Senske v. Fairmont & Waseka Canning Co., 45 N.W.2d 640 (Minn. 1951). The Legislature has ultimate authority in managing and controlling such a fund. City of Reno supra. NRS 616.435 which states that the Commission must authorize all disbursements from the State Insurance Fund must be read in conjunction with the legislative power to control and to manage this fund and in conjunction with NRS 616.2533, subsection 2, infra.

CONCLUSION—QUESTION ONE

It is the opinion of this office that NRS 353.210, subsection 1 applies to the office of State Industrial Attorney and requires submission of a budget to the Chief of the Budget Division and inclusion of said budget in the executive budget to be reviewed and approved by the Legislature.

QUESTION TWO

What state agency is responsible for administering the budget of the office of State Industrial Attorney?

ANALYSIS

This office will assume, for purposes of responding to your question, that when you speak in terms of responsibility for administering your budget, you are asking which state agency(ies) must audit and approve disbursements from your budget accounts. In order to answer your question it is necessary to analyze the relationship between NRS 616.2533, subsection 2 and NRS 616.435, subsection 1. NRS 616.2533, subsection 2, provides that "all salaries and other expenses of administering [the office of state industrial attorney] shall be paid from the state insurance fund as other claims against the state are paid." NRS 616.435, subsection 1 provides that "all disbursements from the state insurance fund shall be paid by the state treasurer upon warrants or vouchers of the [industrial] commission authorized and executed by the commission * * *."

In analyzing the relationship between these two provisions, this office must, if possible, and, if consistent with the intention of the Legislature, construe them so as to make them consistent and harmonious. School Trustees v. Bray, 60 Nev. 345 (1941). One possible construction of the phrase "as other claims against the state are paid" is that the phrase only requires that before a disbursement for salaries or other expenses is authorized from the State Industrial Attorney's budget it must be audited and approved by an independent state agency. NRS 616.435, subsection 1 provides for such an audit and approval function to be accomplished by the Nevada Industrial Commission. However, this construction of NRS 616.2533, subsection 2 has several insurmountable difficulties. If the Legislature had intended for the Nevada Industrial Commission to fulfill this function it was not necessary to include the above-quoted phrase in NRS 616.2533, subsection 2. If the phrase was omitted then the disbursement mechanism provided for in NRS 616.435, subsection 1 would automatically be incorporated into NRS 616.2533, subsection 2 by reference therein to the State Insurance fund. Therefore, if the construction of NRS 2533, subsection 2 above stated is accepted as the correct construction it

would have the effect of making "as other claims against the state are paid" surplus or unnecessary statutory language. Not only is this office required to construe statutes, if possible, so as to make them harmonious, but it is also required to construe a particular statute so as to give meaning and effect to each of the words contained therein. School Trustees, supra. This office is not at liberty to ignore a portion of a statute or to treat it as surplus language unless the portion is the result of an obvious error. U.S. v. Menasche, 348 U.S. 528, 75 S.Ct. 513 (1955), Cole v. Washington Utilities and Transp. Commission, 485 P.2d 71 (Wash. 1971) and Sutherland, Statutory Interpretation, § 46.06 (Rev.3d ed. 1973). No obvious error appears here.

The words "as other" have a very definite meaning in the law. In Stephenson v. Bonney, 216 P.2d 315 (1950) the Oklahoma Supreme Court was called upon to construe a statute which in pertinent part provided that delinquent installments of sewer assessments were to be "collected as other taxes." 11 O.S. 1941 § 279. The court held that in this context the word "as" means "in like manner." Accordingly, the court incorporated into this statute the same procedure set forth in the provision pertaining to the collection of delinquent ad valorem taxes. See also Ulrich v. Farrington Manufacturing Co., 34 N.W. 89 (Wis. 1887); the word "as" and the words "in the manner" are synonymous, and Leonard v. St. Clair, 149 P. 1058 (Ida. 1915); the words "as other expense are paid" must be construed so as to incorporate into the provision in which the words are contained the same statutory requirements found elsewhere pertaining to the payment of expenses.

Given the definite meaning of the words employed by the Legislature, it must be assumed that the Legislature intended that salary and other expense claims of the office of State Industrial Attorney be audited and approved in same manner as such claims are for almost all other state agencies. All claims against the State, other than claims for salaries of officers fixed by law, are the responsibility of the Board of Examiners. Nevada Constitution, Article 5, Section 21, NRS 353.090 and State v. Eggers, 35 Nev. 250 (1912). The Board has delegated by regulation this responsibility to the Pre-Audit Section of the Budget Division of the Department of Administration. State Administrative Manual, Fiscal Affairs, § 5601, et seq. Claims for salaries of officers fixed by law are the responsibility of the State Controller. NRS 227.160, subsection 2 and State v. LaGrave, 23 Nev. 120 (1896). The salary of the State Industrial Attorney is fixed by law. NRS 616.253, subsection 3. Moreover, while it might be argued that in order to harmonize the two statutes a construction should be placed on NRS 616.2533, subsection 2 that would allow for both Board of Examiners/Controller and Nevada Industrial Commission audit and approval, this construction would violate the plain meaning of the quoted phrase. If claims against the budget of the office of State Industrial Attorney had to be audited and approved by not only the Board or the Controller but also by the Commission these claims would not be paid "as other claims against the state are paid."

NRS 616.435, subsection 1 is a general statute, which deals comprehensively with all disbursements from the State Insurance Fund. NRS 616.2533, subsection 2 is a specific statute which only concerns itself with disbursements from the Insurance Fund to pay the salaries and other expenses incident to the administration of the office of State Industrial Attorney. "Where one statute deals with a subject in general and comprehensive terms, and other deals with another part of the same subject in a more minute and definite way, the special statute, to the extent of any necessary repugnancy will prevail over the general one." Ronnow v. City of Las Vegas, 57 Nev. 332, at page 365 (1937). Thus NRS 616.2533, subsection 2 prevails over NRS 616.435, subsection 1. The State Industrial Attorney's budget is to be administered by the Board and the Controller and not the Nevada Industrial Commission.

Moreover, the above-stated conclusion would seem to be consistent with the apparent intent of the Legislature to create an office which is independent of the very agency it is often in an adversary relationship with. By removing budgetary control of the office of State Industrial Attorney from the Nevada Industrial Commission, the office will be in a better position to fulfill, in an unhampered fashion, its role of representing Nevada Industrial Commission claimants.

The fact that the State Insurance Fund is a "special fund," State v. McMillan, supra, does not prohibit the Legislature from directing that the Board and /or the Controller administer this budget. In McMillan at page 388, the court was careful to point out that the statutes creating the State Insurance Fund and empowering the Commission to control disbursements therefrom did "not provide that claims against the state * * * insurance fund shall be presented to the board of examiners or to the state controller." Implicitly, because the Legislature has the final control and management of the fiscal affairs of the State, City of Reno, supra, it may constitutionally delegate that authority to the Board of the Controller.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the Board of Examiners acting through the Pre-Audit Section approves all disbursements for the salary of the State Industrial Attorney. This disbursement is audited and approved by the State Controller.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

OPINION NO. 79-8 Public Meetings—Agenda for public meeting should be prepared so as to include all items a public body expects to consider. Agenda items should be described with reasonable specificity, so as to give notice to the public.

CARSON CITY, March 26, 1979

JOHN S. MCGIMSEY, *District Attorney of Lincoln County,* P.O. Box 555, Pioche, Nevada 89043

DEAR MR. MCGIMSEY:

In your letter of February 22, 1979, you posed the following question to this office:

QUESTION

What standards or guidelines govern with respect to the contents and specificity of agendas for the meetings of public bodies?

ANALYSIS

The Open Meeting Law, Chapter 241 of NRS, now requires inclusion of an agenda as part of the minimum public notice which all public bodies must give before holding a meeting. NRS 241.020, subsection 3. However, neither the law itself nor the legislative proceedings which led to its enactment in 1977 sheds any further light on what is to be included in the agenda and how specific must the information be. Without clear standards or guidelines in the statue, public bodies, in our opinion, must consider themselves as being governed by a standard of reasonableness in preparing the agenda for a meeting of that body, keeping always in mind the spirit and purpose of the Open Meeting Law.

Black's Law Dictionary, 4th ed., at page 85 defines the word "agenda" to mean "a memoranda of things to be done, as items of business or discussion to be brought up at a meeting; a program consisting of such items." From such a definition it follows that an agenda must list *all* the things that can reasonably be anticipated will be done at that particular meeting. No distinction should be made as between items on which action will be taken and items on

which no action by the public body is anticipated at that meeting. Thus, all informational as well as action items should be set forth on the agenda. We have seen agendas for some public agencies which actually categorize each agenda item as "informational" or "action," and we applaud such a procedure because it gives to the public one additional, important fact regarding the type of consideration to be given to that time.

Since an agenda is required under Nevada law as part of the posted notice to the public, it seems reasonable to conclude that agendas should be written in a manner that actually gives notice to the public of the items anticipated to be brought up at a meeting . In the Attorney General's Nevada Open Meeting Law manual issued in August, 1977, we observed that there are important objectives to be achieved from requiring the deliberations and actions of public bodies to be open and public. Some of these reasons are set forth in a Note in 54 Cal.L.Rev. 1650, 1655 (1966):

> The goal in requiring that deliberations take place at meetings that are open and public is that committee members make a conscientious effort to air viewpoints on each issue so that the community can understand on what their premises are based. Add to those premises when necessary, and intelligently evaluate and participate in the process of government.

This type of citizen participation would be hampered if the public was unable to avail itself of the opportunity to attend a public meeting because it lacked sufficient knowledge of the items of business to be considered at that particular meeting. As an example, an agenda item which merely listed consideration of business permits or building permits without identifying who has applied for such permits effectively denies those members of the public with an interest in or information about a particular permit application any opportunity of observing the proceedings or perhaps even participating therein. Listing the name, and where appropriate, the addresses of such applicants, seems a reasonable thing to do in terms of the spirit and purpose of the Open Meeting Law.

Applying a reasonableness standard necessarily means that the degree of specificity that is reasonable for any particular agenda item will vary from item to item depending upon all the relevant circumstances. The person preparing an agenda must always keep in mind that the purpose of the agenda is to give the public notice of what its government is doing, has done or may do. An agenda should never be drafted with the intent of creating confusion or uncertainty as to the items to be considered or concealing any matter from receiving public notice. The use of general or vague language as a mere subterfuge is certainly to be avoided, and any other use of broad or unspecified categories in an agenda should be restricted only to those items in which it cannot reasonably be anticipated what specific matters will be considered.

Earlier in this opinion it was stated that an agenda must list all items that can reasonably be anticipated will be considered or acted upon at a particular meeting. However, occasionally an unforeseen circumstance requiring immediate action by a public body may come to that body's attention after the agenda has been prepared and posted. The urgency of the situation may be compounded by the existence of statutory or regulatory deadlines or the fact that the particular public body meets only infrequently. The Open Meeting Law recognizes the legitimacy of such situations and provides for them by allowing an item of this type to be added to the agenda as an "emergency" item at the beginning of the meeting. NRS 241.020, subsection 4, Again, we would caution that addition of an item to the meeting agenda in this manner should never be used as a subterfuge by a public body to avoid giving notice of that item to the public.

CONCLUSION

The agenda for a meeting should be prepared so as to include all items which the public body expects to consider at that meeting, and the items should be described on the agenda with reasonable specificity so that in fact the public will receive notice of what is to be discussed or

acted upon.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

OPINION NO. 79-9 County Commission Election Districts—In counties of less than 100,000 population, county commission election districts may not initially be created under the provisions of Chapter 237 of NRS, known as the Local Government reapportionment law, but must initially be created under NRS 244.050. County commission election districts in such counties created initially under Chapter 237 without prior reference to NRS 244.050 would be invalid. Chapter 237 is not applicable to county commission districts, but applies only to other local government units as defined in the statute.

Carson City, March 26, 1979

The Honorable A. D. Demetras, *Esmeralda County District Attorney,* P.O. Box 527, Goldfield, Nevada 89013

Dear Mr. Demetras:

You have requested advice concerning the legality of the county commission election districts currently existing in Esmeralda County.

FACTS

Prior to 1972, there were not county commission election districts established for Esmeralda County. All county commissioners not only were elected on an at-large basis, but served their constituents on an at-large basis as well. The provisions of NRS 244.050, which permit the establishment of county commission election districts by petition and a favorable vote of the people at a general election, had never been implemented in the county.

However, in 1971 the Nevada Legislature enacted Chapter 237 of NRS, known as the Local Government Reapportionment Law (Chapter 648, Statutes of Nevada 1971). The statute, as originally enacted, purportedly required the governing boards of local government units to divide the geographical areas they served into a number of election districts equal in number to the membership of the governing boards. The districting was required to take place prior to January 1, 1972. This latter provision has since been repealed.

The Esmeralda Board of County Commissioners, relying on this act, enacted Ordinance No. 166 on December 30, 1971 which divided the county into three commission election districts as nearly equal in population as possible. Since Chapter 237, as originally enacted, was silent on the subject, Ordinance No. 166, by amendment on May 2, 1972, provided for at-large elections of county commissioners rather than election by the voters of each district only. Chapter 237 has since been amended to affirmatively permit county commissions to make this choice.

QUESTION

Are the county commission election districts of Esmeralda County, as established by Ordinance No. 166 under the terms of Chapter 237 of NRS, validly established?

ANALYSIS

Unless a contrary action is taken pursuant to statutory authorization, county commissioners in counties of less than 100,000 population are elected and serve on an at-large basis. See NRS 244.010 and 244.020.

NRS 244.050, though, which applies only to counties of less than 100,000 population, provides for a means of establishing commission election districts. Whenever at least 35 percent of the county's registered voters petition for the establishment of county commission election districts, the question shall be put on the ballot at the next general election and, if a favorable vote on the question is received, the county commission shall establish the districts. The statue provides that the commissioners shall still be elected on an at-large basis while representing particular districts. In the even the districts are subsequently abolished, pursuant to petition and election, commissioners shall be elected and serve on an at-large basis as was previously permitted under NRS 244.010 and 244.020. As noted earlier, the procedures of NRS 244.050 for the establishment of commission election districts have not been implemented in Esmeralda County.

In interpreting NRS 244.050, the Nevada Supreme Court has held in a number of cases decided prior to the enactment of Chapter 237 that county commissioners exercise limited and special powers only and that when their power to act is questioned, the record must show affirmatively all the facts necessary to give authority to perform the act questioned. Where the record fails to show that a board of county commissioners followed the procedures of NRS 244.050 in creating commission election districts, any districts which were otherwise established would be invalid. State v. Kelso, 46 Nev. 128, 208 P. 424 (1922). On this point see also Hanson v. County Commissioners, 75 Nev. 27, 333 P.2d 994 (1959); State ex rel. Kearns v. Streshley, 46 Nev. 199, 209 P. 712 (1922).

As noted above these cases, while apparently on point, were decided prior to the enactment of Chapter 237 of NRS. The question thus resolves itself into deciding whether Chapter 237 alone, and without initial action under NRS 244.050, permits a county of less than 100,000 population to establish commission election districts.

As discussed above, Chapter 237 required local government units to create election districts. "Local government unit" is presently defined in NRS 237.025, subsection 2 as:

> any unit of local government in the State of Nevada, the boundaries of which are coextensive with and which duplicate the county lines of the county in which such unit is located. "Local government unit" shall not include Carson City, or any other incorporated city, but does include any school district, hospital district or other district within or conterminous with Carson City. (See Chapter 660, Statutes of Nevada 1973.)

However, as originally enacted, NRS 237.025, subsection 2 defined "local government unit" as:

> any unit of local government in the State of Nevada, *including*, but not limited to *counties*, incorporated cities and towns, unincorporated towns, school districts, general improvement districts, housing authorities, hospital districts, county hospitals and all other special districts. (Italics added.) See Chapter 648, Statutes of Nevada 1971.

The existence of both NRS 244.050 and Chapter 237 as originally enacted quite naturally gave rise to a great deal of confusion as to whether one or both of these statutes authorized county commissioners to establish commission election districts. In the case of Esmeralda County, it is apparent that Chapter 237, as originally enacted, led the commissioners to believe that the statue permitted, indeed required, the establishment of commission election districts by January 1, 1972 independent of the provisions of NRS 244.050.

The Nevada Supreme Court has never ruled on the point in question, but at least one district court has. In a case whose facts are identical with the situation in Esmeralda County, the Fifth Judicial District Court considered the inter-relationship of Chapter 237 and NRS 244.050 in the districting of the Mineral County Board of Commissioners.

The Mineral County Board of Commissioners had not established commission election districts under NRS 244.050. Instead, after Chapter 237 was enacted in 1971, the county commission established election districts under that law. In a case entitled "In the Matter of the Application of Mineral County, and the Board of Mineral County School Trustees for Judicial Confirmation of Redistricting," in the Fifth Judicial District Court in and for the County of Mineral, Civil Case No. 4463 (August 28, 19792), the district court first noted that in Hadley v. Junior college District, 397 U.S. 50 (1970), at 56, the United States Supreme Court stated that "*when* members of an elected body are chosen for separate districts," each district must be divided into areas of as equal population as is practicable. (Italics added.) Referring to Chapter 237, the district court then stated, after noting the confusion engendered by having two apparently applicable districting statutes in existence:

> A reasonable and plausible interpretation of the act would be to hold that it applied only to those local governing bodies which had established a districting system. The essential purpose of the act, coming after the Legislature reapportioned itself and following the decision in Hadley vs. Junior College District, supra, would appear to be to direct compliance with the "one man-one vote" principle without a wholesale alteration of existing election procedure. Also, this is consistent with the name of the act, that it is a "reapportionment" measure. The meaning of reapportionment is that it is to divide again on the basis of some prescribed formula, which would be equal population areas in this case * * *. In the Matter of the Application of Mineral County, supra.

On this latter point, the word "apportion" means to divide and distribute proportionately. Black's Law Dictionary, "Apportion," 128 (4th ed. 1951). The prefix of "re" means "again"; to denote repetition of an action. Webster's New International Dictionary, "re," 2070 (Unabridged, 2nd ed. 1950). Therefore, reapportionment could occur only if there had been an apportionment in the first place.

It would appear from this interpretation, then, that the purpose of Chapter 237 was to reapportion *existing* election districts in local governments prior to January 1, 1972, so as to accurately reflect the results of the 1970 decennial census. Unfortunately, there is no legislative history surrounding this statute which would confirm this analysis, since Chapter 648, Statutes of Nevada 1971 was introduced, read and enacted in both houses of the Legislature as an emergency measure during the last two days of the 1971 session and no committee minutes exist nor were floor remarks recorded in the journals of either house pertaining to the statute.

The district court went on to note that Mineral County had not previously implemented NRS 244.050. It then stated that:

> It is my view that this board was then exempt from the provisions of the [reapportionment] act, as it was not a districted board and there was no requirement that it be a districted board. There was clear statutory authority which permitted it to operate as a nondistricted board, and in my view this made the Mineral County Board of Commissioners a local government unit which was exempted from the provisions of NRS 237.035. The resolution establishing the districts was not initiated by a petition signed by 35 percent of the registered voters and could not be submitted to popular vote as required by NRS 244.050. I do not believe that the provisions of NRS 244.050 can be avoided. In the matter of the Application of Mineral county, supra.

The court then concluded that the initial establishment of commission election districts by the board under Chapter 237 without prior reference to NRS 244.050 required that the court refuse to confirm the districts established by the board.

This office finds the district court's analysis of the problem persuasive and we adopt it as our conclusion in this matter.

It should be noted that the original definition of "local government unit" in NRS 237.025, subsection 2 has since been amended to eliminate counties from its provisions (see above). Instead, the authority for counties to periodically reapportion commission election districts is found in NRS 244.016, subsection 2 for counties of over 200,000 population, in NRS 244.014, subsection 3 for counties with a population between 100,000 to 200,000 and in NRS 244.050, subsection 1 for counties of under 100,000 population. The provisions of the Local Government Reapportionment Law would thus authorize reapportionment for all other local government units whose boundaries are coextensive with and which duplicate county boundaries.

CONCLUSION

It is the opinion of this office that in counties of less than 100,000 population, county commission election districts may not be created initially under the provisions of Chapter 237 of NRS, known as the Local Government Reapportionment Law, but must be created initially under NRS 244.050. County commission election districts in such counties created initially under Chapter 237 of NRS without prior reference to NRS 244.050 would, in the opinion of this office, be invalid under the authority of State v. Kelso, supra. Indeed, it is our opinion that Chapter 237, as now amended, no longer applies to county commission election districts, but only to other applicable local government units as defined by the statute.

Because the Esmeralda County Board of Commissioners did not crate its county commission election districts pursuant to NRS 244.050, but relied exclusively on Chapter 237 of NRS, it is the opinion of this office that the currently existing commission election districts in Esmeralda County are invalid. Since the county commissioners have always been elected on an at-large basis, this opinion does not in any way adversely affect the incumbent status of the current commissioners. Until and unless the Esmeralda County Commissioners properly establish commission election districts, county commissioners, in the opinion of this office, should both be elected and serve on an at-large basis.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, Deputy *Attorney General*

OPINION NO. 79-10 Counties—Insurance—Liability—Insurance purchased on behalf of counties for in-state torts of public hospital employees and agents need not provide more than $35,000 coverage per each cause of action in addition to coverage for multiple causes of action arising from the same tort. For out-of-state torts much higher limits per cause of action may be provided, depending on the degree of risk involved.

CARSON CITY, May 10, 1979

WILLIAM L. HADLEY, *Chief Deputy, Nonsupport Welfare Division, Office of the Washoe County District Attorney,* Washoe Medical Center, 77 Pringle Way, Reno, Nevada 89520

DEAR MR. HADLEY:

In your letter of March 9, 1979, you inquired of this office regarding the question of sovereign immunity and how it may affect a county public hospital established under the provisions of Chapter 450 of the Nevada Revised Statutes. You informed us that Washoe Medical Center in Reno is so established under Chapter 450.

Specifically, you have asked the following:

QUESTION

Is there any legal necessity for maintaining in force a liability insurance policy for torts committed by employees and agents of Washoe Medical Center with limits over and above the statutory amount of $35,000?

ANALYSIS

As early as 1934, the Nevada Supreme Court held in McKay v. Washoe General Hospital, 55 Nev. 336, 33 P.2d 755 that a public hospital established pursuant to Chapter 450 of the Nevada Revised Statutes is not a legal entity and therefore neither it nor its board of trustees is subject to suit for any alleged tort. Complete immunity of county hospitals from suit has remained the law of our State to this date, with the decision in McKay being favorably cited by our Supreme Court in Bloom v. Southern Nevada Memorial Hospital, 70 Nev. 533, 275 P.2d 885 (1954), Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973) and King v. Baskin, 89 Nev. 290, 511 P.2d 115 (1973).

This is not to say that no person or entity is legally liable for the torts of hospital employees and agents. In Hughey v. Washoe County, supra, the Supreme Court declared the proper defendants in an action based upon such a tort would be the county itself and its board of commissioners. If anyone needs insurance protection for hospital employee torts, such protection would, under the cases cited above, be a proper concern for the county and its commissioners. In view of the decision in McKay v. Washoe General Hospital, supra, and its progeny, neither the county hospital not [nor] its board of trustees would appear to have any need for individual liability insurance protection for malpractice-type torts occurring within this State.

With respect to the amount of protection required by a county operating a public hospital under Chapter 450 and its board of commissioners, the Nevada Legislature, in waiving the sovereign immunity of the State and its political subdivision for an action sounding in tort, placed certain limitations on that waiver, chief of which is a maximum exposure to liability of $35,000 per claimant. NRS 41.035, subsection 1. The constitutionality of such a damage limitation was upheld in State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970) and reaffirmed in State v. Kallio, 92 Nev. 665, 557 P.2d 705 (1976).

After the decision in Silva, the Nevada Supreme Court was quickly faced with the question of whether the $35,000 [at that time $25,000] limitation was the maximum amount a plaintiff could recover from one incident or whether the limitation applied to each separate claim or stated cause of actin with awards being possible up to the statutory limit in each. In State v. Webster, 88 Nev. 690, 504 P.2d 1316 (1972), the Supreme Court specifically authorized the stacking of all claims emanating from a particular incident with the $35,000 limitation on damages being applicable to each one separately rather than as a whole.

Based upon the existing Nevada case law, we are of the opinion that a political subdivision which has established a public hospital pursuant to Chapter 450 of NRS and desires to protect itself with respect to in-state tort liability for the torts of hospital employees and agents may do so by purchasing insurance under NRS 41.038 which will pay any damages awarded on a cause of action up to a limit of $35,000 per claim or cause of action. The purchase of a policy with a higher limit on individual claims appears unnecessary, since our Supreme court on at least one occasion has actually ordered a district court to reduce a jury award which exceeded the statutory limit on individual claims down to the statutory limit set forth at NRS 41.035, subsection 1. See

State v. Webster, supra, at page 696. In fact, the purchase of insurance with policy limits exceeding $35,000 per claim is not legislatively authorized according to the court in State v. Silva, supra, at 917; however, such a purchase has been held not to act as a waiver of the statutory limitation, again according to Silva.

In view of the fact that under Webster damage awards may be stacked according to the number of proven claims, any insurance policy purchased by the county should also provide a substantial, but reasonable, amount of coverage for all claims that may arise out of a single incident.

What has been set forth above applies only to torts committed by a hospital employee or agent within the boundaries of the State of Nevada. A perplexing new wrinkle has been added to the issue of sovereign immunity by the recent decision of the United States Supreme Court in the case of State of Nevada v. Hall, 47 L.W. 4261 (March 5, 1979), rehearing denied 47 L.W. 3684 (April 17, 1979). The facts in the hall case involved a University of Nevada employee who, while driving a state-owned vehicle in the State of California on official business, was involved in a serious collision which resulted in severe injuries to California residents in another car. The high court in Hall held the State of Nevada was not constitutionally immune from suit in the courts of another state with respect to the torts of its agents and employees committed in another state. Likewise, another state was under no constitutional obligation to recognize the sovereign immunity of the State of Nevada or any limitations attached to a waiver of said immunity, such as the $35,000 limitation set forth in NRS 41.035, subsection 1. Any such recognition granted to such matters by the other state would be merely a matter of comity. This case cost the State of Nevada over $1 million in damages when the U.S. Supreme Court rejected the State of Nevada's claim of immunity from suit without its consent and its claim of a limitation on the amount of damages that could be awarded under Nevada Law.

To the extent that employees or agents of a county hospital may have occasion to journey to other states on official business, the decision in Hall mans that the liability of the county and its board of commissioners could be substantially higher for any torts committed in the other state than would be the case if the same tort were committed within the State of Nevada. Also, in view of the general rule set forth at 15A CJS, Conflicts of Law, § 22(4), p. 532 that the law of the forum generally governs in determining the capacity of a party to sue or be sued, a county public hospital and its board of trustees may find themselves being declared by a court of another state to be proper parties in a suit involving an out-of-state tort. Under these circumstances, future liability insurance policies purchased by governmental entities in Nevada may have to be custom designed to provide certain coverage limits for torts committed within the State and much higher limits for torts committed elsewhere.

Throughout this opinion we have limited our discussion to torts committed by employees and agents of a county public hospital, i.e., salaried interns, residents, nurses, orderlies, etc. This is because of the long standing general rule of law that ordinarily a physician or surgeon on the "staff" of a hospital is not considered to be an employee of that hospital in the rendering of medical services, and the hospital is therefore not legally responsible for the acts of such a physician in the rendering of his professional services. Hill v. Hospital Authority of Clarke County, 137 Ga.App. 633, 224 S.E.2d 739 (1976); Evans v. Bernhard, 23 Ariz.App. 413, 533 P.2d 721 (1975); Mayers v. Litow, 154 Cal.App.2d 413, 316 P.2d 351 (1957).

Of course there are always exceptions to the general rule. For instance, in Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335 (1972) the court noted that a hospital could be held liable for failure to properly supervise staff physicians where it has knowledge, actual or constructive, of the negligent acts of a physician and does nothing about them; while in Adamski v. Tacoma General Hospital, 20 Wash.App. 98, 579 P.2d 970 (1978) the court observed that liability might be imposed on a hospital which held out to the public the ostensible agency of an emergency room physician who was under contract, but not an actual employee or agent. Where such liability might be imposed upon a county in connection with the malpractice of a staff

physician, there is at present every reason to believe that the sovereign immunity limitations discussed above would continue to apply with respect to the responsible county governing board.

We have interpreted your letter of March 9, 1979, as expressing some concern for whether the operation of a county public hospital should be considered a governmental or proprietary function of the county, so far as such classification may affect its liability or immunity status. Since 1970, the governmental-proprietary classification or test has been held to no longer apply in determining whether a governmental entity in Nevada is amenable to suit. The waiver of immunity contemplated by NRS 41.031 was held in Harrigan v. City of Reno, 86 Nev. 678, 475 P.2d 94 (1970) to be complete without regard to such arbitrary classifications.

CONCLUSION

Based upon existing case law concerning torts committed within the State of Nevada, liability insurance for torts committed by employees and agents of a county hospital established under the provisions of Chapter 450 of the Nevada Revised Statutes need not provide coverage in excess of $35,000 per individual claim or cause of action. However, since multiple causes of action may arise from the same tort or incident, the county should provide additional coverage above the statutory amount of $35,000 to provide a reasonable amount of protection for all claims consistent with the extent to which the county may be subjected to liability resulting from each incident of loss involving torts of hospital employees and agents.

With respect to torts occuring outside the State of Nevada, there are no apparent limits on the potential liability of the county and its commissioners, and coverage with substantially higher limits than $35,000 per individual claim and per incident would appear to be prudent, depending on the degree of risk perceived. In addition, depending upon the law of the particular forum, a county public hospital and its board of trustees may find themselves being declared to be proper parties in a foreign malpractice action, in which event the county establishing a public hospital may want to include the hospital and its trustees as named insureds on the appropriate liability policy.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

OPINION NO. 79-11 Time For Filing Subdivision Maps—Under NRS 278.360 the time for filing final subdivision maps can extend no longer than one year after the filing of a tentative map plus no more than one additional year's extension, regardless of whether such maps embrace the entire proposed subdivision or only a portion or portions thereof.

CARSON CITY, Jun 13, 1979

THE HONORABLE MONTE J. MORRIS, *City Attorney,* P.O. Box 367, Boulder City, Nevada 89005

DEAR MR. MORRIS:

You have requested an opinion interpreting NRS 278.360.

FACTS

NRS 278.360, which relates to the filing of final subdivision maps, provides as follows:

1. Unless the time is extended, the subdivider *shall within 1 year* after approval of the tentative map *or before the expiration of any extension* by the governing body cause the subdivision, *or any part thereof,* to be surveyed and a final map prepared in accordance with the tentative map. Failure to record a final map within the time prescribed in this section terminates all proceedings, and before the final map thereafter be recorded, or any sales be made, a new tentative map shall be filed.

2. The governing body or planning commission may grant to the subdivider *a single extension of not more than 1 year* within which to record a final map after receiving approval of the tentative map. (Italics added.)

Section 11-36-4(M) of the Boulder City Code provides as follows:

Within one year after approval or conditional approval of the tentative map by the City Council, the subdivider may cause the subdivision, *or any portion thereof which is determined by the City Engineer to be a logical unit of the surveyed map,* to be surveyed and a final map be prepared and filed with the City Engineer with the prescribed fees * * *." (Italics added.)

The Planning and Engineering Department of Boulder City has taken the position in the past that, after a tentative map of a proposed subdivision was filed, a developer could divide the subdivision into smaller units and, so long as *a* final map for one of these units was filed within one year, or within one year plus an extension of an additional year, the developer could thereafter in the future file final maps for the remaining units. This could be done one, two or several years thereafter, without having to terminate proceedings and file a new tentative map. For example, a developer could file a tentative map for the entire proposed subdivision on January 1, 1975. So long as a final map for a unit of the subdivision was filed on or before January 1, 1976 (assuming no extensions were granted), the proceedings, according to this interpretation, could not be terminated and final maps for remaining units of the subdivision could be filed January 1, 1977, January 1, 1978, January 1, 1979, etc. In the words of a legal opinion which you prepared for the City Council on September 26, 1978, "Subsequent units may be mapped and recorded at the discretion of the subdivider and as economic circumstances dictate."

You have stated that other jurisdictions in Southern Nevada agree with this interpretation and require developers, after the first final map was filed within the statutory time limit, to file other, subsequent final maps every year thereafter or within "reasonable" time limits.

However, an official of the State Lands Division, who served on a special interim legislative committee to revise Chapter 278 of NRS, states that the purpose of NRS 278.360, as amended by language proposed by the committee, was to require a complete termination of all proceedings and the filing of a new tentative map if the final map or maps for the entire subdivision covered by the original tentative maps were not filed within one year or one year plus the one year extension period. Under this interpretation, merely filing a final map on a portion of the subdivision within the statutory time limit would not toll the statue as to the remainder of the subdivision.

QUESTION

After a tentative map for a subdivision has been filed, does the filing of a final map of a portion of the subdivision within the statutory time limit set out in NRS 278.360 toll the statute as to the filing of subsequent final maps of the remaining portions of the subdivision after the statutory time limit?

ANALYSIS

The language added to NRS 278.360 by the 1977 Legislature allowed for a one year extension to the original one year time limit for filing final maps. The 1977 amendments also provided that only "a single extension of not more than 1 year" could be granted for filing a final map. Chapter 580, Statutes of Nevada 1977, Section 10. The amendments to NRS 278.360 adopted by the 1977 Legislature when read in conjunction with the interim committee's recommendations constitute a declaration of legislative policy to require subdividers to file a final map on the entire subdivision within one year from the approval of the tentative map. The only exception to this requirement is the "single extension of not more than a year" found in NRS 278.360, subsection 2.

The variety of interpretations adopted by other political entities in Clark County would emasculate the provisions of NRS 278.360, subsection 2 and render them nugatory. Moreover, such a construction would be at odds with the purpose as well as the specific language of subparagraph 2 of NRS 278.360 which permits only a single extension of one year from the original one-year period for filing a final map.

I would appear to this office that the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is applicable here. The affirmance of a distinct policy on a particular subject implies the negation of the intention of the Legislature to establish a different policy. Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237 (1967). Where a statute creates, regulates and prescribes a mode of procedure, that mode must be followed and non other. Battle v. Hereford, 133 S.E.2d 86, 90 (W.Va. 1963); 2A Sutherland, Statutory Construction, 123, § 47.23 (Sands, 4th ed. 1973).

The interpretations put upon NRS 278.360 by the governing bodies of the jurisdictions you mention in your opinion request would read into the statute certain automatic extensions of time to file final maps which simply are not there. Furthermore, the jurisdictions differ on the nature of these alleged automatic time extensions. One requires annual filings of final maps and another merely requires them to be filed in a "reasonable" time. The only extension of time allowed for filing final maps by the statute is a single one year's extension specifically granted by the planning commission or governing body of the applicable jurisdiction. The expression of one mode of procedure by NRS 278.360 is the exclusion of others. Galloway v. Truesdell, supra; Battle v. Hereford, supra.

When a statute directs a thing to be done by a private party within a specified time and makes his rights dependent on proper performance thereof, the statute is mandatory as to the time the thing must be performed. 2A Sutherland, Statutory Construction, 445, § 57.19 (Sands, 4th ed. 1973).

* * * It is the province of the courts to enforce the will of the Legislature, as expressed in the statutes. It is evident from the ordinary grammatical construction of the words used, that it intended a right should be enjoyed only upon some specified conditions, there is no power, in the courts or elsewhere, to dispense with the conditions imposed, or to hold that a thing which it deemed essential to be done at one time, may nevertheless be done at another * * *. Corbett v. Board of Examiners, 7 Nev. 106, 108 (1871).

CONCLUSION

It is the opinion of this office that under NRS 278.360 the time for filing final subdivision maps is limited to one year after the filing of a tentative map, unless extended by the governing body of the planning commission of the applicable jurisdiction. Should a developer choose for an additional period of not more than one year as provided in NRS 278.360, subsection 2 to divide his proposed subdivision in to units for the purposes of filing final maps, it is the opinion of this office that the failure to file final maps for all the unite within the statutory time period will terminate the proceedings as to any unfiled units and a new tentative map must be filed as to those units.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION No. 79-12 State Employment, Right to Travel, Durational Residential Preference.—Governor's policy and NRS 284.253 which allow a preference to Nevada residents in qualifying for appointment to state employment, insofar as they restrict such preference to persons who have physically resided in Nevada for at least 6 months, violates the constitutional right to travel granted to all citizens of the United States. Nondurational preference for residents is permissible and is not clearly unconstitutional.

CARSON CITY, June 18, 1979

MR. JAMES WITTENBERG, *Administrator, Personnel Division,* Capitol Complex, Carson City, Nevada 89710

DEAR MR. WITTENBERG:

This is in response to your request for an opinion concerning the State's nonresident hiring policy.

FACTS

In a memorandum issued in 1971 to all agency chiefs, the Governor's office instructed the administrators of most Nevada agencies to appoint only Nevada residents to positions in state government with the exception of critical manpower shortage positions, if qualified Nevada residents were not available for appointment. Within the meaning of this policy, a resident is defined as someone who has been domiciled in Nevada for at least 6 months.

QUESTION ONE

Does the hiring policy which allows a preference to Nevada residents who have resided in the State for 6 months unconstitutionally discriminate against Nevada residents who have been domiciled in the State for less than 6 months?

ANALYSIS

In order to properly respond to the above question, this office has concluded that an analysis of the State's nonresident hiring policy must necessarily include an analysis of NRS 284.253, the underlying statutory basis for the policy, because both the policy and the statute pose closely related questions of constitutional law.

In proceeding to render an opinion as to the constitutionality of the durational aspects of the policy and NRS 284.253, this office acknowledges the general principle of law that a statute is presumed to be constitutional. Thus any reasonable doubts as to the constitutionality of the provisions in question here will be resolved in favor of the validity of the same. See: Attorney General's Opinion No. 85 (June 19, 1972), Attorney General's Opinion No. 93 (August 21, 1972), Attorney General's Opinion No. 131 (May 9, 1973) and Attorney General's Opinion No. 203 (April 20, 1976).

A. State Hiring Policy

Pursuant to the current policy followed in hiring state employees, a new Nevada resident, in most cases, must wait 6 months before becoming eligible for state employment. The effect of this residence requirement is to create two classes of bona fide Nevada residents. One class consists of residents who have resided in the State 6 months or longer. The other class consists of residents who have exercised their constitutional right to travel interstate[1] within the last 6 months.

The United States Supreme Court has never decided whether or not a durational residency requirement for public employment is constitutional. It has, however, analyzed such requirements in other contexts. The leading case on how to analyze a statute, which impacts on the right to travel, and the Equal Protection Clause, is Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969). In Shapiro, the court invalidated a one-year durational residency requirement for the receipt of welfare benefits. The court found that the requirements created two classes of potential welfare recipients indistinguishable from each other except for the fact that the members of one class had recently exercised their right to travel

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[1]The right to travel interstate is grounded on the Privileges and Immunities Clause of Art. IV, § 2 of the United States Constitution. "The constitutional right to travel from one State to another * * * occupies a position fundamental to the concept of our Federal Union." Untied States v. Guest, 383 U.S. 745, 757, 86 S.Ct. 1170, 1178 (1966).

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interstate. On the basis of this sole difference one class was granted and the other class was denied welfare assistance. thus [Thus] the classification tended[2] to penalize the class composed of persons who had recently migrated interstate. Any "classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest is unconstitutional. (Emphasis added by the court.)" *Id.*, at 634, 89 S.Ct. at 1331.

In Shapiro, the argument was made that the waiting period requirement was justified as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. Without looking to the particular facts of the case, the court summarily rejected this argument.

> [This] reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits[3] and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. *Id.* at 632, 89 S.Ct. at 1330.

When a statute is challenged as being violative of the Equal Protection Clause a court will scrutinize it under one of two tests. If, as in Shapiro, a statute impinges on a fundamental constitutional right the statue will likely be required to withstand scrutiny under the compelling state interest test. Pursuant to this test, a court will only uphold a statute if a state can show a compelling justification for it. If the statute does not impinge a fundamental right it will probably be scrutinized pursuant to the rational relationship test. Under this test the person challenging the statute bears a heavy burden of persuasion. He must show that no reasonable basis exists for the statute. Inasmuch as the test applied is almost always determinative of the conclusion of court reaches, see Dunn, infra, dissenting opinion of Chief Justice Burger, it must first be decided which test a court would apply in analyzing the question posed here.

In Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972), the court, after invoking the compelling state interest test because the statute both affected a fundamental right (voting) and penalized the recent exercise of the right to travel, found that the state did not show a compelling interest and thus invalidated a one year durational requirement for voting. In Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076 (1974), the court invalidated a statute which provided that resident indigents could not receive free nonemergency medical care unless they had

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[2] "Shapiro did not rest upon a finding that denial of welfare actually deterred travel." Dunn v. Blumstein, 405 U.S. 330, 339, 92 S.Ct. 995, 1002 (1972). A person attacking a durational residency requirement need not show any actual deterrence. He must merely show that the requirement operates or serves to penalize those persons who have recently exercised the right to travel interstate. Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076 (1974).

[3]A durational residency requirement for public employment cannot withstand scrutiny merely because public employment is a "privilege" and not a "right." See Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), Shapiro, supra, and Nehring v. Ariyoshi, 443 F.S. 228 (D.C. Ha. 1977).

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been residents for over a year. Strict scrutiny was applied because nonemergency medical care was as much as "necessity of life" as welfare assistance, *Id.* at 259, 94 S.Ct. at 1082. However, in Memorial, *Id.* at 258, 94 S.Ct. at 1082, the court recognized that not all durational residency requirements should be evaluated by the strict scrutiny—compelling interest standard. For instance, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975), a one-year state residency requirement for the filing of a petition for divorce was upheld. In Sosna the court did not say whether it found a compelling state interest or whether strict scrutiny need even be applied. It merely stated that the divorce statute was "of a different stripe." Its purpose was to prevent the collateral attack of Iowa's divorce decrees in the courts of other states.

With one exception, Town of Milton v. Civil Service Commission, 312 N.E.2d 188 (Mass. 1974), all the lower federal and state courts that we can find which have been faced with an equal protection challenge to a durational residency requirement for public employment have applied the compelling state interest test. For example, see: Justice v. Manzagol, 11 E.P.D. 7184 (D.C.N.M. 1976) (three judge court), Nehring, supra; Andre v. Board of Trustees, Village of Maywood, 561 F.2d 48 (C.A. 7, 1977); Jenkins v. McCollum, 446 F.S. 667 (N.D.Ala. 1978); and Eggert v. City of Seattle, 505 P.2d 801 (Wash. 1973). The probable reason why strict scrutiny was applied is perhaps best articulated in Nehring, at page 237.

> [T]he forced inability of a new resident to apply for * * * available &public] jobs is a penalty, particularly for those people who are generally trained for work performed primarily by government. Even though private jobs are still available, the universe of potential jobs is smaller * * *. With the exception of those with inherited wealth or those who are on the public dole, employment is the only way for people to provide themselves with the "necessities of life."

As noted above, an attempt to justify a durational requirement because of past tax payments was summarily rejected in Shapiro. In Nehring the State of Hawaii argued that its requirement was designed to control growth and thus protect the fragile environment of the state. This was

rejected because it was in effect an attempt to establish an interstate migration policy. In Justice, the State of New Mexico attempted to justify the requirement as a means to insure a stable civil service, the employees of which were knowledgeable of the customs and habits of New Mexico. This was not found to be compelling.

In line with the decisions cited, this office is of the opinion that the compelling interest test must be applied to the durational requirement contained in the State's hiring policy. Taking into consideration the attempted justifications of similar provisions, it is unlikely that a court would hold that Nevada has established a compelling reason for the burden it places on new bona fide residents in securing public employment. Therefore, this office is compelled to advise that the durational requirement of the current state hiring policy would probably not withstand a constitutional challenge based on the right to travel interstate.

B. NRS 284.253

NRS 284.253, in pertinent part, provides:

> In establishing the list of eligible persons, a preference shall be allowed for persons who have resided in this State for at least 6 months. Five points shall be added to the passing grade achieved on the examination.

NRS 284.253, unlike the State's hiring policy, does not absolutely bar most new residents from state employment. It does, however, classify them differently and puts them at a disadvantage in obtaining state employment. In Shapiro and Dunn, the court made it clear that the compelling state interest test would be triggered by any classification which serves to penalize the exercise of the right to travel interstate. Memorial Hospital, supra. The question here then becomes: Does the five point preference granted to qualified "long term" residents constitute a penalty of constitutional magnitude? Not all differential treatment based upon duration of residence is unconstitutional. Memorial Hospital, supra. However, it seems clear that whenever a statute places a newly arrived resident at the disability in obtaining food, clothing and shelter through employment solely because of the duration of his residency, it operates as a penalty. Here the preference may oftentimes operate to deny an otherwise qualified newly arrived resident the means to provide the basic necessities of life. For this reason, this office is of the opinion that the durational aspect of NRS 284.253 must meet the same constitutional test as the policy. Because of the difficulty of establishing a reason for the difference in treatment between "long time" bona fide residents and "new" bona fide residents afforded by NRS 284.253 and for the same reasons as aforestated, this office again is compelled to advise that the durational definition of resident found in NRS 284.253 would likewise probably not withstand a constitutional challenge.

CONCLUSION—QUESTION ONE

The Governor's nonresident hiring policy and NRS 284.253, tot he extent they allow a preference to Nevada residents based on the length of domicile in Nevada, penalize the constitutional right to travel interstate and thus are permissible only if they promote a compelling state interest. Because no compelling interest has been propounded which would justify the durational residential preference found in the policy and in the statute, and because of the difficulty of establishing a compelling justification for such a policy in view of the case law that has addressed this question, this office must advise that the 6-month residency requirement violates the constitutional right to travel interstate granted to all citizens of the United States.

QUESTION TWO

It is constitutionally permissible for bona fide Nevada residents, irrespective of the length of their residency in the state, to be preferred over nonresidents in appointments to state service,

and, if yes, is the durational definition of resident found in NRS 284.253 severable therefrom?

ANALYSIS

This office will proceed within the same analytical framework as set forth at the beginning of Question No. 1 in answering the question posed here.

Both the Governor's policy and NRS 284. 253, supra, provide favorable treatment to Nevada residents in appointments to state service. Although the treatment afforded by the policy (nonresidents are not to be hired if a qualified resident is available) is more advantageous to residents than NRS 284.253 (five points are added to the passing grade of a resident), for purposes of this analysis the difference is irrelevant. If Nevada may bar, in most cases, nonresidents from obtaining employment with the State, it surely may provide residents with a five-point preference.

In June of 1978, a unanimous Supreme Court decided Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, a decision which casts some doubt on a state's ability to favor its own residents with respect to appointments to state service. In somewhat broad language the court invalidated an Alaskan executive order and its underlying statutory basis, A.S. 38.40.010 et seq. (collectively known as "Alaska Hire"), which granted a preference to Alaska residents in all areas of private employment arising out of oil and gas leases wherein Alaska was a party. The court held that for Alaska Hire to withstand constitutional scrutiny under the Privileges and Immunities Clause of the Constitution, Article IV, Section 2,[4] Alaska Hire must meet a rigid test. Residents could not validly be granted an employment preference merely because they were residents. Instead, Alaska had to show a "substantial reason" for the differential treatment. A "substantial reason" did not exist, reasoned the court, unless it could be shown that nonresidents "constitute a peculiar source of evil at which the * * * statute is aimed." *Id.* at 525, 98 S.Ct. at 2488. Moreover, even if Alaska had shown a direct correlation between an influx of nonresidents and the "evil" sought to be corrected, Alaska would have also had to show that the discriminatory statue was narrowly enough drafted so as to operate only in the area where remedial measures were required.

Alaska attempted to justify Alaska Hire as a mechanism to alleviate the chronic high unemployment rate of its rural residents, even though Alaska Hire did not grant a preference solely to these residents. Instead it provided an across-the-board preference to all residents regardless of their employability. Alaska Hire was invalidated, *inter alia*, because of its broad scope. "Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaska residents clearly is not." *Id.* at 528, 98 S.Ct. at 2489.

Both the Governor's policy and NRS 284.253 grant an across-the-board job preference to all qualified Nevada residents. If Hicklin is applicable to the question posed here, namely whether a state may grant a preference to its own residents in appointments to state service, then clearly those provisions are unconstitutional. Hicklin, however, is apparently distinguishable because it concerned a large number of private employers and not

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[4]"The citizens of each State shall be entitled to All Privileges and Immunities of citizens of the several States."

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just public employment. Hicklin, itself, may have implicitly recognized this difference. Alaska contended that because it owned the oil and gas that was the subject of Alaska Hire, it was justified in discriminating against nonresidents. Alaska's contention was based on McCready v. Virginia, 94 U.S. 391 (1876) which some lower courts have read as creating an "ownership"

exception to the Privileges and Immunities Clause. The court did not accept Alaska's argument because of the facts of the case. "Alaska has little or not proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the state's oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents." *Id.* at 529, 98 S.Ct. at 2490. The act affected "Virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources * * *." *Id.* at 531, 98 S.Ct. at 2491.

Here the preference afforded Nevada residents is much more limited in scope. Moreover, Nevada arguably has a "proprietary interest" in the activity at issue here. In Sherman v. City of Pasadena, 367 F.S. 1115 (C.D.Ca. 1973), a federal district court stated that when a city acts as an employer it is functioning in a proprietary capacity. See also McCarthy v. Philadelphia Civil Service commission, 424 U.S. 645 at 646, fn. 6, 96 S.Ct. 1154 to 1155 (1976) where the U.S. Supreme Court implied that a state's relationship with its own employees may, itself, justify a differential treatment of nonresidents. These two factors alone may be sufficient to distinguish Hicklin.

Even if this office was not of the opinion that Hicklin implicitly recognized the distinction discussed above, we would still feel justified in advising that the differential treatment afforded nonresidents by the policy and by NRS 284.253 is not clearly unconstitutional. In McCarthy, supra, the court was faced with an equal protection—right to travel challenge to a city ordinance which required employees of the city to be residents thereof as a condition of continued employment. The court dismissed this challenge in a *per curiam* opinion by simply stating that neither in Shapiro, or the cases that followed it, had it ever "questioned the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application." [Emphasis by the court.] *Id.* at 646, 96 S.Ct. at 1155. The court then went on to say:

> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus in Shapiro, we stated: "The residence requirement and the one-year waiting period requirement are distinct and independent prerequisites." And in Memorial Hospital, * * *, the court explained that Shapiro and Dunn did not question "the validity of appropriately defined and uniformly applied bona fide residence requirements." *Id.*

McCarthy concerned a person who was terminated by the City of Philadelphia because he moved from the city to New Jersey; not a person who was denied the possibility of employment because of nonresidency. However, as one court has stated, this is a factual distinction without a legally significant difference. Andre v. Board of Trustees, Village of Maywood, 561 F.2d 48 (C.A. 7, 1977). Cf. Jenkins, infra.

For other decisions which have upheld municipal residency requirements as a condition of employment, see Ector v. City of Torrance, 514 P.2d 433 (Ca. 1973), cert. denied 415 U.S. 935, 94 S.Ct. 1451; Kennedy v. City of Newark, 148 A.2d 473 (N.J. 1959); Detroit Police Officers Assn. v. City of Detroit, 190 N.W.2d 97 (Mich. 1971), appeal dismissed for want of a substantial federal question, 405 U.S. 950, 92 S.Ct. 1173 (1972); Andre, supra; and Mogle v. Sevier County School District, 540 F.2d 478 (C.A. 10, 1976). Cf. Jenkins v. McCollum 446 F.S. 667 (N.D.Ala. 1978); a municipality may not require residence in the municipality as a requirement for appointment to the service thereof, citing but apparently misreading McCarthy, supra.

As stated earlier, Hicklin casts some doubt on the constitutionality of Nevada's residential preference. However, given the fact that Hicklin is apparently distinguishable and given the Supreme Court's statement in McCarthy, supra, this office is of the opinion that the governor's policy and NRS 284.353, insofar as they provide differential treatment to nonresidents only, exclusive of the question of length of residence, are not clearly unconstitutional and are

permissible.

If only a portion of a statute is invalid a court will not invalidate the entire statute if the remainder may stand independently, and it appears that the Legislature would have still enacted the remainder. Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 332 (1976). We believe this to be the case with the valid portion of NRS 284.253. The remainder still provides an advantage to Nevada residents which we believe the Legislature would want to retain. See for example Carter v. Gallagher, 337 F.S. 626 (D.C. Minn. 1971); where a federal district court deleted an invalid durational residency segment from a Minnesota statute, Minn. Stat. § 197.45(1), which provided Minnesota veterans with a preference in obtaining state employment.

NRS 281.060, subsection 2 also provides a preference to Nevada residents in employment with the State of Nevada. This provision has been previously construed by the Attorney General on two occasions, Attorney General's Opinion No. S-14 (December 17, 1962) and Attorney General's Opinion No. 96 (December 3, 1963). In those opinions the Attorney General advised that the provision was very narrow in its application.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the Governor's nonresident hiring policy and NRS 284.253 insofar as they provide a preference to employment with the State to all bona fide Nevada residents, and exclusive of the question of length of residence, are not clearly unconstitutional, and are permissible. The constitutional portion of NRS 284.253 may be severed from the durational definition of resident contained therein and, as such, may stand.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

OPINION NO. 79-13 Classified State Service, Due Process clause, Termination Procedures—Current personnel regulations insofar as they do not afford, absent extraordinary circumstances, a classified state employee who has attained permanent status a pretermination hearing before the appointing authority or his designated representative are unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Such employee is entitled to reasonable advance notice of the proposed disciplinary charges against him and the opportunity to respond to the authority imposing discipline in connection with a pretermination hearing.

CARSON CITY, June 28, 1979

MR. JAMES WITTENBERG, *Personnel Administrator, Personnel Division,* Capitol Complex, Carson City, Nevada 89710

DEAR MR. WITTENBERG:

You have requested an opinion as to the constitutionality of current administrative practices pertaining to termination of classified state employees who have attained permanent status, in light of the recent Nevada Supreme Court Opinion of State ex rel. Sweikert v. Briare, 94 Nev. Adv. Op. 221 (December 20, 1978). Throughout this opinion, any reference to "employees" or "state employees" shall refer only to classified state employees who have attained permanent

status, which is the only class of employees mentioned in your opinion request.

FACTS

Once a classified state employee has attained permanent status, he may only be terminated for "cause." NRS 284.385 and State Administrative Manual, Rules For Personnel Administration, hereinafter referred to as S.A.M., Rule XII. Pursuant to current regulations, an employee may be terminated immediately subsequent to receipt by him of written notice specifying the action to be taken and the grounds upon which the action is based. S.A.M. Rule XII E. It is the understanding of this office that under current regulations an employee who is about to be dismissed for "cause" is not entitled to nor typically given a pretermination hearing of any type or form. He is, however, entitled to a post-termination trial type hearing before an impartial hearing officer. NRS 284.390, et seq.

QUESTION

Does Rule XII E of the Rules of Personnel Administration, State Administration Manual, insofar as it does not afford a classified state employee who has attained permanent status the right to a hearing of any type or form prior to termination, meet the requirements of "due process" as mandated by the United States Constitution? If not, what minimal requirements may be required in connection with a pretermination hearing?

ANALYSIS

Once an employee has attained permanent status, he may only be terminated for "cause" and thus has a "property interest" in his employment. An employee who has attained a "property interest" in his position of employment may only be terminated in accordance with procedural safeguards required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974), State ex rel. Sweikert v. Briare, 94 Nev. Adv. Op. 221 (December 20, 1978).

The leading United States Supreme Court decision on what procedural safeguards are mandated by the Due Process Clause prior to termination is Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974). In Arnett, the Supreme Court was faced with a due process challenge to the procedural provisions of the federal civil service act, entitled the Lloyd-La Follette Act, regulating the termination of nonprobationary classified government employees. (5 U.S.C. § 7501). Under the act, such an employee has a "property interest" in continued employment and may only be disciplined for "cause." The act also sets forth the procedure which an agency is required to follow in order to terminate an employee.

In a five to four decision, the court upheld the procedural provisions of the act, discussed below. However, the court's full decision is embodied in five opinion which reveal varying points of view among the different justices. Justice Rehnquist, joined by two other justices in his reasoning, wrote the court's plurality opinion. Justice Rehnquist held that Congress, which created the "property interest," could also constitutionally prescribe the procedural requirements which condition the "interest." In other words, reasoned the Justice, the employee "must take the bitter with the sweet." *Id.* at 154, 94 S.Ct. at 1644. The Nevada Legislature has set forth at NRS 284.385 et seq. limitations, which condition the "property interest" in continued state employment. If Justice Rehnquist's reasoning had been accepted by a majority of the court, there would be no question of the constitutionality of Nevada's termination procedure. However, a majority of the court has never accepted this reasoning, and the lower federal and state courts have not followed it. See Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1977) (dissenting opinion, Justice Stevens), Peacock v. Board of Regents of Univ. & State Col. Of Ariz., 510 F.2d 1324 (C.A. 9, 1975) and Skelly v. State Personnel Board, 539 P.2d 774 (Cal. 1975).

The reasoning that has been accepted as controlling is found in Justice Powell's concurring opinion in Arnett. Hence all further reference to Arnett, unless otherwise stated, will be to Justice Powell's concurring opinion, with which Justice Blackmum concurred.

Justice Powell specifically rejected the "bitter with the sweet" rationale. Instead, Justice Powell wrote that, while the legislature may elect not to confer a property interest, once it has conferred this interest it may only be terminated in accordance with the Constitution. The legislature may not validly restrict or condition the right in a manner which does not afford due process procedural safeguards.

Arnett specifically held that while a pretermination evidentiary hearing before an impartial decision maker, such as used in a typical trial setting, was not required by the Constitution, some sort of a hearing was required before a permanent, classified employee may be validly terminated. *Id.* at fn. 6. See also Skelly, supra, Davis v. Vandiver, 494 F.2d 830 (C.A. 5, 1974) and Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975).

In Goss, several high school students were suspended without being given an opportunity to present their version of the facts upon which the school principal based his decision to suspend them. The court, after ruling that the students had a property interest in their education which deserved due process protection, held the summary suspension to be unconstitutional. "At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." (Emphasis by the court.) *Id.* at 579, 95 S.Ct. at 738. Thus, in Arnett and Goss, the Supreme Court has held that before a person may be deprived of a protected property interest he must, absent extraordinary circumstances, be afforded some type of a pre-deprivation hearing.

Because current state procedure does not include any type of a pretermination hearing for a classified employee who has attained permanent status, it is the opinion of this office that it is constitutionally defective. Arnett, supra, Goss, supra. See also State ex rel. Sweikert, supra, at page 3, wherein the Nevada Supreme court has stated an "employee with a property interest in his employment is entitled by due process to a pretermination hearing absent extraordinary or exigent circumstances. Fuentes v. Shevin, 407 U.S. 67 (1972)."

The Fuentes decision cited in Sweikert involved a consumer debtor who was allegedly in default on an installment contract employed to purchase personal property. The debtor's creditor secured the return of the property via a writ of replevin obtained from a court clerk without first requesting the same from a judge. In Fuentes, the United States Supreme Court held that a hearing before a judge is generally required before one could have his property seized pursuant to such a writ.

Given the citation of Fuentes in Sweikert, it might be argued that in Nevada a permanent classified state employee may not be validly terminated absent a pretermination hearing before an impartial hearing officer in a trial type setting. However, this office is of the opinion that the Nevada Supreme Court did not cite Fuentes to indicate the type of hearing required but rather for the general proposition that some sort of hearing is required. As long as a property deprivation is not *de minimus,* a person has a "basic right to a hearing of some kind [ ], Fuentes v. Shevin, * * *" before he may be deprived thereof. Goss, supra, at page 576, 95 S.Ct. at 737.

Because some type of hearing, absent extraordinary circumstances discussed below, is required before a permanent classified state employee may be validly terminated, it becomes necessary to discuss what type of a hearing is mandated and the prerequisites which must accompany the hearing.

Such an employee is entitled to prior written specification of the charges being made against him and a right to examine all the material on which the charges are based. See NRS 284.385, S.A.M. Rule XII F, Arnett and Skelly. In Arnett the court approved a federal regulation which provided "* * * statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for review." 5 C.F.R. § 752.202(a)(2).

Such an employee is entitled to receive advance notice of the proposed disciplinary action. In Arnett, the court approved 30 days advance written notice. It did not discuss whether or not a shorter amount of time would be acceptable. Those courts which have addressed the amount of time required have stated that it must be "reasonable." What is "reasonable" depends on the facts and circumstances of each case, but, at a minimum, should be a sufficient amount of time to allow a typical employee an "ample opportunity to review the material relied on by the agency to support the reasons in the Notice [ ], to prepare an answer * * *," and to secure countervailing evidence. 5 C.F.R. 752.202(b). Although this office is unable to predict with certainty what time period a court would deem reasonable in all cases, it appears that a time period of less than 30 days is allowable if the above requirements are met.

Such an employee must have the right to respond orally and in writing to the authority imposing discipline. In Arnett, the court approved a regulation which provided "[t]he [persons] designated to hear the answer shall be persons who have the authority either to make a final decision on the proposed adverse action or to recommend what final decision shall be made." 5 C.F.R. § 752.202(b).

The above are, in the opinion of this office, the minimum procedural requirements which must be met if extraordinary circumstances are not present. In Davis v. Vandiver, supra, the United States Court of Appeals, Fifth Circuit, approved a procedure which allowed an employee to appear at the informal hearing with a representative of his choice, allowed him to submit affidavits, and to speak with a personnel officer if he did not understand the procedure of the charges. The employee was also allowed 8 hours of official time in which to review the charges and prepare an answer. On this latter point see 5 C.F.R. 752.202(b) quoted in Arnett at 416 U.S. 143, fn. 10. 94 S.Ct. 1633. You may want to consider affording an employee these rights by regulation.

A precise definition of "extraordinary circumstances" which covers all possible factual situations surrounding termination is not possible. However, within the context of employment, such circumstances may generally be defined as those wherein life, limb or property is in imminent danger because of an act or omission of the employee. Sweikert, supra.

CONCLUSION

It is the opinion of this office that, absent extraordinary circumstances, the current procedure followed in terminating a permanent classified state employee is unconstitutional because the procedure does not include any type of a pretermination hearing before the appointing authority or his designated representative. Such hearing must include, at a minimum: (1) reasonable advance notice to the employee of the proposed disciplinary action and charges against him; (2) and an opportunity to respond to the authority imposing discipline at the hearing.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT H. ULRICH, *Deputy Attorney General*

OPINION NO. 79-14a Nevada State Public Defender—NRS 180.110 requires counties participating in the State Public Defender system to pay a proportionate share for the use of this service, if a County Public Defender system has not been established.

CARSON CITY, July 5, 1979

NORMAN Y. HERRING, ESQ., *Nevada State Public Defender*, P.O. Box B, Carson City, Nevada 89710

DEAR MR. HERRING:

You have requested an opinion on the legality of requiring counties of a population of less than 100,000 to pay a proportionate share of the cost of the Nevada State Public Defender system as set out in NRS 180 et seq.

FACTS

The Nevada State Public Defender represents indigent criminal defendants at all levels of the criminal process from the filing of the complaint to the appeal and post-conviction petitions after court appointment in all the counties except Clark and Washoe counties. That office received $90,567 from the State General Fund for administration and operation of the Nevada State Public Defender system. The rest of the budget of $364,244 comes from funds contributed on a proportionate basis from the counties where the Nevada State Public Defender represents indigent defendants in criminal matters. Elko County has questioned whether this cost is more properly upon the State and not chargeable to the counties.

ANALYSIS

The United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 344 (1972) stated emphatically:

> * * * reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused to crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

More recently the Supreme Court has held "* * * no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial." [Footnote omitted.] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). This ruling of the court was expressly made retroactive in Berry v. Cincinnati, 414 U.S. 29 (1973). The holding in Argersinger was reaffirmed in a case where the court declined to extend the right of counsel to indigent criminal defendants who are not sentenced to a term of imprisonment. Scott v. Illinois, 99 S.Ct. 1158 (1979).

From the foregoing authorities it is clear no indigent criminal defendant in Nevada can be sentenced to a term of imprisonment without either being represented by counsel or validly waiving this Sixth amendment right. The court in these decisions did not address where the financial burden for providing counsel for indigent criminal defendants must lie. The decision to allocate that burden is left squarely to each individual sovereign state.

In response to this constitutional mandate our Legislature created the State Public Defender system. NRS 180 et seq. (1971 Statutes of Nevada, Chapter 622, page 1410). Previously in 1965, our legislature had granted to the counties the power to create an office of the public defender. Two years later this provision became mandatory for counties having a population of 100,000 or more. NRS 260.010 et seq. (1965) Statutes of Nevada, Chapter 279, page 597; 1967 Statutes of Nevada, Chapter 674, page 1475, Chapter 678, page 1545). The State Public Defender statutes were amended in 1973 to allow the State Public Defender to collect certain amounts of money from the respective counties for use of his service, NRS 180.110 (1973) Statutes of Nevada, Chapter 486, page 719.)

That provision reads as follows:

> 1. Each fiscal year the state public defender may collect from the counties amounts which do not exceed those authorized by the legislature for use of his service during that year.
>
> 2. The state public defender shall submit a bill to the county on or before the 15th day of May and the county shall pay the bill on or before the 20th day of July. The counties shall pay their respective amounts to the state public defender who shall deposit the amounts with the treasurer of the State of Nevada and shall expend the funds in accordance with his approved budget.

During each subsequent legislative session NRS 180.110 has been amended to set a fee schedule collectable by the State Public Defender from the counties who use his services (1975 Statutes of Nevada, Chapter 461, page 714; 1977 Statutes of Nevada, Chapter 164, page 309, 1979 Statutes of Nevada, Chapter 316, (S.B. 340)).

NRS 171.188 sets forth the procedure for appointment of an attorney for an indigent criminal defendant. This procedure was amended in 1971 to require that the judge designate the appropriate public defender unless good cause appears to not do so. (1971 Statutes of Nevada, Chapter 622, page 1412). During the next legislative session the provision was again amended to read in the pertinent part:

> 4. The county or state public defender shall be reimbursed by the city for costs incurred in appearing in municipal or police court. The county shall reimburse the state public defender for costs incurred in appearing in justice court. (1973) Statutes of Nevada, Chapter 289, page 357).

NRS 171.188 and NRS 180.110 demonstrate an apparent legislative intent to require the various counties employing the services of the State Public Defender to pay for those services. This legislative intent to make counties responsible for these services is further underscored by language in NRS 171.188 which states that even when a private attorney is appointed to represent an indigent criminal defendant the “county” or “city” must provide for reimbursement for these services rendered.

The statutory scheme embodying the criminal justice system consistently puts the financial burden of that system upon the county. NRS 3.100 requires the county to furnish courtroom, offices and facilities for district court judges. NRS 3.310, subsequent 5 states the salary of a district court bailiff must be paid by the county. Under NRS 3.370, subsection 2 the county treasury must pay court reporters’ fees for transcripts prepared in criminal cases. Salaries of justices of the peace are paid by the county. NRS 4.040. Under NRS 6.160 the county is to pay for the fees and expenses of grand jurors and trial jurors. NRS 7.155 requires that the compensation and expenses of an attorney other than the public defender, appointed to represent an indigent criminal defendant be paid out of the county treasury. Finally, the district attorney and the sheriff and their deputies are paid by the county. NRS 245.043 et seq.

There is no doubt that the Legislature has the authority to order the counties to pay the

expense. As stated by the Nevada Supreme Court, "Clearly, a county is not a municipal corporation. * * * It is, at the most, only a quasi corporation, and possesses only such powers, and is subjected to only such liabilities, as are specially provided for by law." Schweiss v. District court, 23 Nev. 226, 230, 45 P. 289 (1896). The court in State ex rel. Holley v. Boerlin, 30 Nev. 473, 475-476, 98 P. 402, 403 (1908) explained:

> It is well settled that boards of county commissioners are inferior tribunals of special and limited jurisdiction, and that they can only exercise such powers as are especially granted, and that, when the law prescribes a mode which they must pursue in the exercise of these powers, it excludes all other modes of procedure. * * * As to the wisdom, policy, and expediency of the law, these are matters for the people of the state in legislature assembled to determine. An executive office should execute the law as it is made. It is not for nay board of county commissioners to substitute their judgment for that of the legislature as to what is best for the county, where a statue expressly defines what shall be done; * * *. [Citations omitted.]

Finally, where acts of a board of county commissioners do not comply with the statute, those acts are void. Caton, et al. v. Frank, 56 Nev. 56, 69-70, 44 P.2d 521, 525 (1935)l

The Legislature, in a proper exercise of its power, has established a State Public Defender system to comply with constitutional requirements as enumerated by the United States Supreme Court. The statutory scheme, consistent with other areas of the criminal justice system, requires the counties to bear the financial responsibility for the prosecution of indigent criminal defendants in their jurisdiction. Each county, except the counties of Clark and Washoe, has the option of belonging to the State Public Defender system or of creating by ordinance a county public defender. NRS 260.010 et seq. In either case the Legislature has placed the funding of such an office on the counties.

CONCLUSION

Any county having a population of less than 100,000 that has not created a county public defender office pursuant to NRS 260.010 must pay its proportionate share of expenses for the use of the State Public Defender as required by NRS 180.110.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT A. BORK, *Deputy Attorney General, Criminal Division*

OPINION NO. 79-14 Planning Commissions—An ordinance which authorizes a governing body to affirm, modify or reverse recommendations of a planning commission is valid. A governing body is not subsequently precluded from acting on a proposed amendment to a master plan which failed to obtain a two-thirds vote of a planning commission for favorable action. However, in taking the latter action, the governing body is itself governed by the procedures specified in NRS 278.220.

CARSON CITY, July 17, 1979

THE HONORABLE DAVID B. SMALL, *District Attorney*, 208 North Carson, Carson City, Nevada 89701

Attention: STEPHEN P. BOLAND, *Chief Deputy District Attorney*

DEAR MR. SMALL:

You have requested advice regarding Chapter 278 of the Nevada Revised Statutes, as it pertains to planning commissions.

QUESTION ONE

Is that portion of Section 18.02.040 of the Carson City Municipal Code, which provides that the Board of supervisors may affirm, modify or reverse recommendations of the Regional Planning commission, invalid because of any provision of statutory law?

ANALYSIS—QUESTION ONE

At the outset, it should be noted that our analysis of this question is limited to the actual terms and provisions of Section 18.02.040 of the Carson City Municipal Code.

Section 18.02.040 states, in part, as follows:

> The Regional Planning commission is given the power to hear applications and to recommend to the Board of Supervisors action on special use permits, variances, changes in zoning, amendments to the ordinance and appeal of administrative decisions. The Board of Supervisors shall review recommendations of the Regional Planning Commission to affirm, modify or reverse any such recommendation.

This office, in reviewing Chapter 278 of NRS which pertains in part to planning commissions, does not find any provision in the statutes which prohibit or invalidate Section 18.02.040 of the Carson City Municipal Code. Instead, the provisions of Section 18.02.040 which authorizes the Board of Supervisors to affirm, modify or reverse recommendations of the planning commission as to special use permits, variances, changes in zoning, etc. are authorized by NRS 278.020 and NRS 278.260. The former statute provides, in part, that the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land. The latter statute provides that the governing body of a city or county shall provide for the manner in which zoning regulations, restrictions and boundaries shall be determined, established and enforced and, from time to time, amended.

CONCLUSION—QUESTION ONE

It is the opinion of this office that Section 18.02.040 of the Carson City Municipal Code is not invalid because of any provision of statutory law, but that it is authorized by NRS 278.020 and NRS 278.260.

QUESTION TWO

If a proposed change of land use, which Carson City considers to be an amendment to the Master Plan, is not carried by the affirmative votes of two-thirds of the total membership of the Regional Planning Commission, does this constitute a final decision upon which the Board of Supervisors is precluded from acting?

ANALYSIS—QUESTION TWO

NRS 278.210, subsection 2 provides that a master plan can be adopted, amended, extended or added to by a resolution of the planning commission carried by the votes of not less than two-thirds of the total membership of the commission. Regardless of the outcome of such a vote, Section 18.05.095(1) of the Carson City Municipal Code requires the proposed change to be submitted to the Board of Supervisors, which may then approve, modify or disapprove the

recommendation of the commission pursuant to Section 18.05.096(1) of the Code.

NRS 278.020 specifically empowers the governing bodies of cities and counties to regulate and restrict the improvement of land. NRS 278.220 clearly provides that the adoption of, change in or addition to a master plan may be made by a governing body. This, in our opinion, gives a governing body full authority to take such action as it sees fit relative to a master plan regardless of the outcome of the action of the planning commission in the first instance. However, in taking its action, a governing body is governed itself by the procedures specified in NRS 278.220.

In particular, subparagraph 4 of NRS 278.220 provides:

> *No* change in or addition to the master plan or any part thereof, as adopted by the planning commission, shall be made by the governing body in adopting the same until the proposed change or addition shall have been referred to the planning commission for a *report* thereon and an attested copy of the report shall have been filed with the governing body. Failure of the planning commission so to report within 40 days, or such longer period as may be designated by the governing body, after such reference shall be deemed to be approval of the proposed change or addition. (Italics added.)

The word "report" is used in the statute as a noun. The closest definition relative to the present question is found in subparagraph 2 of Webster's New International Dictionary, Unabridged, 2113 (2d ed. 1961):

> a An account or relation, esp. of some matter specially investigated; as the *report* of an expert upon a mine. B A sketch or a fully written account, as of a speech, debate or the proceedings of a public assembly, etc. c An official statement of facts, oral or written; as, *report* of a Committee to the Senate. D A statement in writing of proceedings and facts exhibited by an officer to his superiors; as, the *reports* of the heads of departments to Congress, of a referee to a court * * *." (Dictionary's emphasis.)

A report thus embraces more than a mere conclusion, request for action or bare recommendation. It embodies the result of an investigation or analysis and contains supporting information, facts and reasons supporting a conclusion. Franck v. Board of Education, 33 Misc.2d 754, 227, N.Y.S.2d 614, 620 (1962); Groad v. Jansen, 13 Misc.2d 741, 173 N.Y.S.2d 946, 948 (1958); E.K. Hardison Seed Co. v. Jones, 149 F.2d 252, 257 (6th Cir. 1945).

In our opinion, then, NRS 278.220(4) requires that before *any* change or addition to a master plan can be made by a governing body, the planning commission must file a report with the governing body pertaining to the change or addition. The report cannot be a mere recommendation or a bare statement of the planning commission's vote, but must report the planning commission's evaluation of the proposal and any facts or reasons supporting the conclusion or recommendation. In this way, the governing body will have the benefit of the planning commission's opinion of the impact upon the community of any action the governing body may take.

In our opinion, a proposed change or addition to a master plan may be "referred" to a planning commission in two ways. First, the proposal may have been presented to the planning commission in the first instance pursuant to NRS 278.210. It is then incumbent upon the planning commission to file a report along with its recommendation with the governing body, pursuant to NRS 278.220, subsection 4. If no report accompanies the recommendation and the governing body wishes to change or add to the master plan after receipt of the planning commission's recommendation, the matter must be sent back to the planning commission for its report. This is in accordance with the provisions of NRS 278.220, subsection 4 that *no* change or addition to the master plan can be made by the governing body without the planning commission's report.

Second, a governing board may wish to initiate a change or addition to a master plan or may wish to modify a planning commission recommendation to such a significant extent that the proposed action would be beyond the scope of the original proposal. In either instance, NRS 278.220, subsection 4 would require that the matter be referred to the planning commission for a report to be compiled, in our opinion, under the procedures of NRS 278.210. Being dependent upon a case by case evaluation, the question of what kind of modification by the governing body of a planning commission's recommendation would significantly alter the original proposal or be beyond its scope is a matter that can be presented to the governing body's legal counsel for his advice.

Our advice may be summed up and categorized in the following examples.

1. Assume that a planning commission recommends a change or addition to a master plan and accompanies this with its report as defined in this opinion. The governing body may accept or reject the recommendation without further reference to the planning commsssion [commission]. However, if the planning commission recommends a change or addition to the master plan without an accompanying report, while the governing body may reject the recommendation without further reference to the planning commission, it can accept the recommendation to change or add to the master plan only after re-referring the matter to the planning commission for its report. Once the report is received, the governing body is free to reject or accept the proposal.

2. Assume that a planning commission recommends a change or addition to a master plan and accompanies this with its report as defined in this opinion, but the governing body wishes to modify the recommendation. Provided the modification is not beyond the scope of the original proposal, the governing body could take action without re-referring the matter to the planning commission. If the modification is beyond the scope of the original proposal, as may be determined with the assistance of the governing body's legal counsel, referral to the planning commission for another report pursuant to NRS 278.220, subsection 4 and in accordance with the procedures of NRS 278.210 would be necessary before the governing body could take action. Of course, if a recommendation by the planning commission is not accompanied by a report and the governing body wishes to modify it, a referral to the planning commission for a report would be necessary before the governing body could take action, regardless of whether the modification is beyond the scope of the original proposal or not. At all events, once the report is received, the governing body would be free to accept or reject the modified proposal.

3. Assume that a planning commission fails to adopt a change or addition to a master plan by a two-thirds vote as is required by NRS 278.210, subsection 2. Pursuant to NRS 278.020 and any local ordinances, such as Sections 18.05.095 and 18.05.096 of the Carson City Municipal Code, the governing body is authorized to consider the matter and take action ratifying the planning commission's rejection of the proposed change or it may take actin to adopt, or to modify and adopt, the proposed change. If a report as defined in this opinion concerning the proposed change and the commission's failure to adopt the change is forwarded to the governing body, the governing body may take one of the above three actions without further referral to the planning commission, unless a modification beyond the scope of the original proposals considered, in which case a re-referral to the planning commission would be needed before the governing body could act. However, if a report is not forwarded to the governing body in such a case, while the governing body could ratify the planning commission's failure to adopt a change to the master plan by a two-thirds vote without further referral to the commission, a referral to the commission would be needed if the governing body wanted to adopt the proposed change or wanted to modify and adopt it, regardless of whether the modification was beyond the scope of the original proposal or not. This, of course, is required by the provisions of NRS 278.220, subsection 4 that *no* change or addition to a master plan can be adopted by a governing body unless the matter is referred to the planning commission for its report. Once the report is received, the governing body would be free to adopt o reject the proposal.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the Carson City Board of Supervisors is not precluded from subsequently acting on a proposed amendment to the Master Plan which initially failed to obtain an affirmative two-thirds majority vote of the Regional Planning Commission. However, in taking such action, the Board of Supervisors must be governed by the procedures specified in NRS 278.220.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-15 Municipal Sewage Systems—A municipality may not contract away its police power to acquire, own, operate, regulate and control a public sewer system, nor contract away its police power to issue building permits. Any contract to the contrary would be invalid and void ab initio.

Carson City, July 19, 1979

The Honorable Louis S. Test, *City Attorney,* P.O. Box 1900, Reno, Nevada 89505

Dear Mr. Test:

Your office has requested advice on a question arising from the following factual situation.

FACTS

As a result of the rapid growth of the cities of Reno and Sparks in recent years, the Reno-Sparks joint water pollution control plant, which is jointly owner by the two cities, has been severely limited in its ability to service new customers. The demand for service from new construction constantly threatens to outrun the available capacity of the sewer plant to treat the additional sewage that such new construction would generate.

To help meet this problem, Reno has established a waiting list, on which persons wishing to start new construction and to connect with the sewer plant must be listed for the purpose of being permitted to connect with the sewer plant in their turn as sewage capacity becomes available. For the purpose of allocating sewage capacity and relating the issuance of building permits to sewage allocations, certain administrative procedures have been established regulating this subject.

Both Reno and Sparks have agreed to expand the sewer plant in a project known as “Early Start.” However, the project is not expected to be completed until the summer of 1980. In an effort to develop even more sewage capacity in the area, a group of private firms have formed a corporation called Waste Water Technology, Inc. (hereafter called WWT). WWT has presented a contract between itself and the cities of Reno and Sparks whereby WWT will pay $5,750,000 to the cities for the purpose of immediately expanding the joint sewer plant to handle additional sewage capacity. In return, WWT wishes to be “assured” that building permits will be available to members of WWT or to persons who, while on the city of Reno’s waiting list, “purchased gallonage” of sewer capacity from WWT from sewer capacity allocated to WWT.

QUESTION

May municipal corporations, which own and operate a public sewer plant and facilities,

contract with private enterprise to expand the publicly owned sewer plant and to authorize control over and sale of a portion of the increased capacity to private group interests?

ANALYSIS

At the outset, it should be noted that the proposed contract between WWT and the cities of Reno and Sparks has not been executed. Indeed, to our knowledge, the city council of Sparks has not even formally considered the contract, although Reno has. Therefore, this contract has not been presented to the Attorney General for his approval under NRS 277.140. Nevertheless, the contract will be discussed din this opinion since a consideration of the question necessarily involves a consideration of the contract. In the event that the parties go forward to execute this proposed contract, it must then be subsequently submitted formally for the Attorney General's determination as to legality under NRS 277.140.

As to the question asked, it is a general and well established legal principal that a Legislature may not bargain away the police powers of the State. This is an essential attribute of sovereignty and a contract which would bargain away such an important power would be invalid and void ab initio. United States Trust Co. v. New Jersey, 431 U.S. 1, 22, 23 (1977).

Thus, a Legislature may not contract away its power to condemn by eminent domain, regulate lotteries, abate nuisances, regulate riparian rights, regulate public utility rates, or prohibit practices injurious to public safety. "The legislature cannot 'bargain away the public health or the public morals'." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434-440 (1934). The reason such contracts are void ab initio was state din an early United States Supreme Court case:

> One whose rights, such as they are, are subject to state regulation, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

Individuals, by entering into contracts, may not estop the Legislature from enacting laws for the public good. Koscot Interplanetary, Inc. v. Draney, 90 Nev. 450, 458, 530 P.2d 108 (1974).

The power of the State to exercise such authority as is necessary for the common good is known as the police power and is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people. Thus, the police powers extend to public health. Manigault v. Springs, 199 U.S. 473, 480 (1905); Stone v. Mississippi, 101 U.S. 814, 818 (1880). The establishment and maintenance of a sewer system is considered to be an exercise of the police power. County Drain Commission of Oakland County v. City of Royal Oak, 306 Mich. 124, 10 N.W.2d 435 (1934); State v. Metropolitan St. Louis Sewer District, 365 Mo. 1, 275 S.W.2d 225 (1955); Greyhound Lines v. City of Chicago, 24 Ill.App.2d 718, 321 N.E.2d 293 (1974); Campbell v. Knoxville, 505 S.W.2d 710 (Tenn. 1974). "The drainage of a city in the interest of public health and welfare is one of the most important purposes for which the police power can be exercised * * *." New Orleans Gas Co. v. Drainage Commission, 197 U.S. 453, 460 (1905).

The issuance of a building permit is also an exercise of the police power. Bode v. Parish of Jefferson, 309 So.2d 730, 731 (La. 1975); Town of Renner v. Wiley, 458 S.W.2d 516, 521 (Tex. 1970); County of Union v. Benesch, 98 N.J.Super. 167, 236 A.2d 409, 411 (1967); Agnew v. City of Los Angeles, 12 Cal.Rptr. 507, 513 (1961).

Although municipalities posses no inherent police powers, such powers may be delegated to municipal corporations by the Legislature and this may be done by a general grant of authority. Ex parte Sloan, 47 Nev. 109, 114, 217 P. 233 (1923); Greyhound Lines v. City of Chicago, supra at 298; Dukes v. Shell Oil Co., 40 Del. Ch. 174, 177 A.2d 785, 790 (1962). When properly delegated to a municipality, its regulation of a sewer system or its issuance of building permits is a proper exercise of the police power by the municipality. 9 McQuillan, Municipal Corporations, 3d ed., § 26.200; 11 McQuillan, Municipal Corporations, 3d ed., § 31.10. The authority

delegated to the City of Reno to exercise the police power over sewage systems is found in Sections 2.310 and 6.010 of the Reno City Charter (Chapter 662, Statutes of Nevada 1971) and its authority to exercise the police power of issuing building permits is found in NRS 278.020 and Section 2.220 of the Reno City Charter.

Thus we have established that municipalities may exercise their police powers over the ownership, regulation and control of public sewer systems and with the respect to issuing building permits; that the City of Reno possesses such police powers; that the police powers cannot be contracted or bargained away; that contracts which do so are invalid and void ab initio. Bearing these principles in mind, WWT's proposed contract, which you included in your opinion request, with the cities of Reno and Sparks may be analyzed.

It is the opinion of this office that the proposed contract is contrary to law in numerous respects. The core of the problem lies in the assumptions of the parties that sewer capacity in a public sewer system can be purchased by private parties thereby giving the private parties a proprietary interest in a portion of the public sewer system.

Thus, the proposed contract has the following provisions:

1. Paragraph 3 of the proposed agreement requires the issuance of building permits to persons on Reno's waiting list as of Februrary [February] 15, 1979 who "have purchased gallonage from Waste Water Tech," which assumes that WWT owns such gallonage.
2. Paragraph 3(a) requires persons applying for building permits through WWT to specify in the application how much sewer gallonage is being "purchased" through WWT.
3. Paragraph 3(e) assets "it is agreed that Waste Water Tech has, subject to the terms hereof, purchased sewer capacity in the joint plant in the total amount of 3,000,000 gallon per day average flow * * *."
4. Paragraph 3(g) requires Reno to allocate, once the Early Start Project is completed, the balance of the 3 million gallons of capacity "purchased" by WWT to WWT.
5. Paragraph 4(a) permits WWT to dispose of sewage capacity under the expanded plant.
6. Paragraph 4(c) states that WWT "shall not be obligated to sell more than 250,000 gallons" of sewer capacity to applicants.
7. Paragraph 4(d) provides for how WWT will allocate sewage capacity allowed to it.
8. Paragraph 5 states that WWT "has sold to MGM Grand Hotel 100,000 gallons of the three million gallons created under this agreement."

The cumulative effect of the above cited provisions, in our opinion, constitutes an impermissible relinquishment of control over a certain portion of the city's public sewer system. In return for paying $5.75 million, WWT is acquiring the right to allocate and distribute or sell a capacity of three million gallons in the public sewer system, as if WWT owned and controlled that portion of the public sewer system necessary to treat three million gallons. Its is contrary to law.

The leading case in this area is Ericksen v. City of Sioux Falls, 70 S.D. 40, 14 N.W.2d 89 (1944). This case involved a contract by which a private company, in exchange for paying the city large sums of money to improve a sewer plant, obtained the right to dispose of as much sewage into the plant as it could handle. In turn, the city was absolutely obligated to treat as such sewage as the private company could put in to the plant and of whatever nature.

The South Dakota Supreme Court declared that contract void. The court stated:

> The supervision and regulation of the sewers is a police function of the city. Therefore, in granting permission for the use of the sewers in the first instance and for the continuing use thereof, *the city must at all times retain control*, and any attempt by way of contract to deprive the city of that control is void. The police power of the city cannot be bargained away by contract but must at all times be available to meet such public needs as may arise. (Italics added.) Ericksen v. City of Sioux Falls, supra at 95.

The court pointed out that no one had any vested right in the use of sewers, nor could a city grant such a vested right, and the fact that someone expended considerable sums of money to connect with a sewer system gives him no vested right in the system. Erickson [Ericksen] v. City of Sioux Falls, supra at 95 and 96.

The court in Ericksen pointed out that the parties seemed to view the sewer plant as property subject to joint control of the parties, a sort of partnership affair. The law, however, does not authorize such a view. A sewer plant belongs to the city and the city cannot part with its control. Money paid by private firms to the city to improve the sewer plant could be accepted by the city as "voluntary contributions," but such payments can impose no liability on the city, nor vest rights or supervisory control in the sewer system in the private firms. Ericksen v. City of Sioux Falls, supra at 96.

In Warren v. Bradley, 39 Tenn.App. 451, 284 S.W.2d 698 (1955) a developer paid funds to the city for expanding the sewer plant. In return, he was permitted to charge fees to other persons for connecting with the plant. The court in this case repeated the identical principles stated in Ericksen and went on to point out the absurdity of the contract by saying that if a private developer could charge for public sewer services, a developer could just as easily take over a public street for which he paid money for improvements and charge a toll for use. Neither act was permitted.

In North Kansas School District v. J.A. Peterson-Renner, Inc., 369 S.W.2d 159, 166 (Mo. 1963), a private party paid a sum of money to the sewer district to improve a sewer plant and make connections. In return the municipality contracted that no one could connect with this part of the system without the written permission of the private party. The private party also had the right to authorize persons to connect with the plant. However, the court noted that the city could not give up control of the public sewer system could be no greater than the right of any other citizen.

It would be *against public policy to allow private persons to acquire or retain a proprietary interest in a public sewer system.* Such private control would interfere with the right of the city to control a public sewer system and would further interfere with the city's right to extend use of the system *equally* to all other citizens. City of Shawnee v. Thompson, 275 P.2d 323 (Okla. 1954).

A public sewer system is public property belonging solely to the city and, as such, is available to all property owners who wish to connect with it. Cabot v. Industrial Development Corp. v. Shearman Concrete Pipe Co., 239 Ark. 23, 387 S.W.2d 336, 337 (1965); Water Works and Sanitary Sewer Bd. v. Sullivan, 260 Ala. 214, 69 So.2d 709 (1954); State v. Metropolitan St. Louis Sewer District, supra at 231.

Other cases which are in accord with all the above cases are State ex rel. Gordon v. Taylor, 149 Ohio St. 427, 79 N.E.2d 127 (1948); City of Vernon v. City of Los Angeles, 275 P.2d 72 (Calif. 1954); Lamar Bath House Co. v. City of Hot Springs, 229 Ark. 214, 315 S.W.2d 884 (1958), appeal dismissed 359 U.S. 534 (1959).

Even the payment of sewer fees does not vest any right or title to a sewer system or to sewer capacity. A sewer fee is merely a service charge for the use of the facilities. 11 McQuillan, Municipal Corporations, 3d ed., § 31.30a; Jennings v. Walsh, 214 Kan. 398, 521 P.2d 311, 314 (1974); State v. Bartos, 102 Ariz. 15, 423 P.2d 713, 714 (1967).

Certainly a municipality may enter into binding contracts with private parties for the purpose of making connections to the sewer system or for the mutual development of the system. 64 CJS Municipal Corporations, § 1805; 11 McQuillan, Municipal Corporations, 3d ed., § 31.13. For the most part, however, such contracts which have been upheld by the courts concern private developers or other municipalities located outside the boundaries of the contracting municipality providing the sewer service. City of Cleveland v. Village of Cuyahoga Heights, 810 Ohio App. 191, 75 N.E.2d 99 (1947); Atlantic Const. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949); City of North Newton v. Regier, 152 Kan. 434, 103 P.2d 873 (1940); Tronslin v. City of

Sonora, 114 Cal.App.2d 235, 301 P.2d 891 (1956).

Such contracts, for the most part, have been upheld in the face of a municipality's argument that to do so would involve bargaining away the municipality's police power. But, the distinction drawn by the courts is that the developer was located outside the boundaries of the municipality at the time of the contract. City of Cleveland v. Village of Cuyahoga Heights, supra at 102-103; Atlantic Const. Co. v. City of Raleigh, supra at 168; City of North Newton v. Regier, supra at 875; Tronslin v. City of Sonora, supra at 893. Therefore, while a sewer system may have been created for the health and welfare of a city's inhabitants, "* * * that is not to say it was a like proceeding for the benefit of those persons residing outside its corporate limits." Tronslin v. City of Sonora, supra at 893. A developer located outside the corporate limits cannot be compelled to connect with a sewer system, nor is a city compelled to extend sewer service beyond its boundaries. Thus, in such contracts, both parties voluntarily exchange valuable consideration and a contract, premised on reasonable terms, is valid. City of Cleveland v. Village of Cuyahoga Heights, supra at 102; Atlantic Const. Co. v. City of Raleigh, supra at 168; City of North Newton v. Regier, supra at 875; Tronslin v. City of Sonora, supra at 893.

Although this concept is not developed very well by the courts discussing these cases, a reasonable explanation for this distinction seems to arise from the fact that sewer capacity for residents of the city was more than adequate for their needs at the time of making the contract. When nonresidents seek to use the system the parties may voluntarily contract to do so and no disadvantage is imposed on the city's residents as to their ability to use the system. The city having made a bargain cannot deny its benefits when either no harm is done to the sewer system, nor a disadvantage imposed on resident users. Such situations differ form the facts facing the City of Reno. The present sewer plant cannot meet the needs of the residents and in order to fairly allocate what capacity exists and what will exist, a waiting list has been set up. The thus permit parties who could afford to do so to specially contract with the city, regardless of whether located within or without the city, destroys the purpose behind the waiting list and places those unable to afford specially contracting with the city in a disadvantageous position. As will be discussed below, this presents a problem with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The most important distinction, however, in these cases revolves around the reasonableness of the contract's terms, in that in none of these cases was the municipality required to give up control or ownership of the sewer system. The developers merely contracted to connect with and use the system. In fact, the City of Cleveland, Atlantic Const. Co. and Tronslin the real issue in dispute was merely whether the contractor was entitled to free service. It can be argued, of course, that under WWT's proposed contract, the city is not being required to give up control of the operation of the sewer plant either. Indeed, in one case at least, Morrison Homes Corp. v. City of Pleasanton, 58 Cal.App.3d 324, 130 Cal.Rptr. 196 (1976), a court upheld a contract providing for the annexation of territory outside the city and for the allowance of sewer connections therein on just such a distinction. In Ericksen v. City of Sioux Falls, supra, Warren v. Bradley, supra, and North Kansas School District v. J.A. Peterson-Renner, Inc. supra, the contractor did exercise some control over the sewer system. This was done by determining how much sewage could be put into the system while requiring the municipality in all events to process the flow, Ericksen v. City of Sioux Falls, supra; by actually allowing the private developer to charge sewer fees, Warren v. Bradley, supra; and by allowing the private developer to exercise the right of permitting persons to connect with the sewer system or not, North Kansas School District v. J.A. Peterson-Renner, Inc., supra.

WWT's proposed contract also purports to control the city's sewer system, not by operation of the sewer plant itself, but by allowing it to "purchase" sewer capacity and to give it the right to dispose of such "purchased" sewage capacity, either to its own members or, up to a certain quantity, to other persons on the abeyance list as of February 15, 1979. Insofar as WWT "sells" such gallonage to other persons or is in a position to determine who can receive such gallonage

or how much (see Paragraphs 3 and 4 of the proposed contract), WWT exercises a control over the city's sewer system. Warren v. Bradley, supra; North Kansas School District v. J.A. Peterson-Renner, Inc., supra. It acts as a partner with the city in the operation of the sewer system. Ericksen v. City of Sioux Falls, supra. This would be contrary to the law enunciated in those cases. In particular the proposed contract would purpose to give WWT a proprietary interest in the sewer system, i.e., ownership of sewage capacity which is the property of the city and which it must dispose of or make available to the general public on an equal basis. This proprietary interest by a private developer would be contrary to public policy. City of Shawnee v. Thompson, supra.

Therefore, as WWT's proposed contract allows it to purchase sewage capacity in a public sewer system and to treat that sewage capacity as its own property with the right to resell it to others, the proposed contract would be invalid and void. The joint sewer plant is public property and the City of Reno cannot contract away its control of the system or sell parts of it to private buyers.

Those portions of paragraphs 3 and 4 of the proposed contract which reserve to the members of WWT the right to exclusively use sewage capacity in return for the payment of $5.75 million or which allow WWT to sell sewage capacity to purchasers who could afford to buy it from WWT would also appear to be in violation of the Equal Protection Clause of the fourteenth Amendment to the United States Constitution. As it stands now, all citizens of Reno who wish to begin new construction must be placed on a waiting list to connect with the sewer system. WWT, however, by its payment of $5.75 million to the city, and other persons, by paying WWT for sewage capacity, would be assured of connecting with the system before all other applicants who could not or would not pay the price, thereby allowing them to circumvent the waiting list established by the city for distributing available sewage capacity. Indeed, we are informed that some members of WWT are not even on the abeyance list. Not only would this subvert the principle of equality of access to and use of a public sewer system, City of Shawnee v. Thompson, supra, but would also create a suspect classification based on wealth, something which is contrary to equal protection of the laws. "Lines drawn on the basis of wealth or property, like race * * * are traditionally disfavored." Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). Cf. Edwards v. California, 314 U.S. 160, 184-185 (1941), Jackson concurring; Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

Indeed, the denial of equal protection of the laws goes one step further. Under paragraphs 3 and 4 of the proposed contract only those persons on the residential waiting list as of February 15, 1979 would be eligible to apply to WWT for sewage capacity. However, Reno city officials have informed us that numerous potential residential users have been added to the list since then. No reason is given for drawing a lien on this or any other date as to residential users eligible to apply for sewer capacity under the contract and those residential users ineligible to apply for sewer capacity under the contract, thereby creating two unequal classes of residential users. In our opinion, this too would be in violation of the Equal Protection Clause of the fourteenth Amendment. Cf. Koontz v. State, 90 Nev. 419, 421 (1974).

In our opinion, the proposed contract would also be invalid because it proposes to contract away the city's power to issue building permits. Thus, the proposed contract has the following provisions:

1. Paragraph 3 of the proposed contract mandates the issuance of building permits to WWT and to persons on Reno's waiting list who purchase gallonage from WWT without any limiting conditions or control by the city.

2. Paragraph 3(d) prohibits Reno from issuing building permits based upon the increased capacity o the sewer plant, as expanded by WWT's funds, except as provided in the contract and until project Early Start is completed.

3. Paragraph 3(e) regulates and limits the manner in which Reno shall issue building permits

based upon the expanded plant.

4. Paragraph 4(c) states, "Waste Water Tech reserves the right to withhold the issuance of permits under this paragraph until after September 1, 1979, to determine if more than 250,000 gallons are requested by persons on the abeyance or waiting list."

A provision in paragraph 3(a) of the contract which requires building permit applications to comply with all the requirements of the City of Reno, refers only to the requirements of the application itself and not to the actual issuing of building permits.

Under these provisions, the right to the exclusive issuance and control of building permits has been taken from the City of Reno and placed in the hands of WWT. The power to grant or deny a permit resides with the body or official designated to wield that power and an unauthorized delegation of that power is invalid. 62 CJS, Municipal Corporations, 227(3). Granting or denying building permits is an exercise of a police power by the municipality, 9 McQuillan, Municipal Corporations, 3d ed., § 26.200, and the police powers cannot be contracted away. United States Trust Co. v. New Jersey, supra.

Furthermore, the contract requires the issuance of these permits solely upon the basis of WWT buying sewage capacity from Reno or solely upon other persons subsequently buying sewage capacity from WWT. No other consideration which enters into the issuance of building permits—traffic, building codes, health, safety, zoning, etc.—is contemplated. Thus paragraph 3 states:

> The City of Reno *shall issue* building permits to the members of Waste Water Tech and to members of the public who were on the City of Reno's residential abeyance or waiting list as of February 15, 1979 and who have purchased gallonage from Waste Water Tech * * *." (Italics added.)

Aside from the equal protection problems noted above, this provision is contrary to the Administrative Procedures For Handling Sewage Treatment Capacity For The City of Reno In Accordance With Reno Resolution No. 3223 Adopted August 19, 1977 and violates Reno City ordinances pertaining to the requirements for obtaining building permits.

As to the former matter, the fact that one has submitted building plans in advance under the Administrative Procedures to the Reno Building and Safety Department, is placed on the waiting list and may later receive a sewer allocation, does not mean that one automatically [automatically] receives a building permit. Paragraph 12 of the Administrative Procedures provides in part:

> Under no circumstances will any person, firm or corporation infer from these procedures that they are at any time guaranteed or assured of a building permit or any sewage capacity.

Paragraph 17 of the Administrative Procedures provides that after sewage capacity is allocated, a builder has 30 days to obtain a building permit and that should the permit not be issued, the sewage allocation reverts to the city.

Thus, the city contemplates that at all times Reno city ordinances pertaining to the issuance of building permits, such as requiring compliance with building codes must be followed and should the requirements of the ordinances not be met, the permit shall not be issued. For example, Section 13.04.010 of the Reno Municipal Code adopts the Uniform Building Code, 1976 edition, and makes it a part of the Municipal Code. Section 302(a) of the Uniform Building Code, 1976 edition, prevents the issuance of a building permit unless the applicant's plans and specifications confrom [conform] to the building Code *and other pertinent laws and ordinances.* The contract, however, would ignore the requirements of various city ordinances as to the issuance of building permits and would require that building permits be issued solely on the basis of WWT purchasing sewer capacity from the city or of other persons subsequently purchasing sewer

capacity from WWT. This would be contrary to Reno city ordinances.

We do not mean to imply that *no* contract by private developers to connect and use a public sewer system in exchange for funds to expand the system would be permitted. Certain binding contracts in such cases are indeed valid. 64 CJS, Municipal Corporations, § 1805; 11 McQuillan, Municipal Corporations, 3d ed., § 31.13. However, such contracts must be written, in our opinion, so as to give the private party no control or proprietary interest in the sewer system, no undue advantage over the citizens in derogation of equal protection of the laws, nor enable the private party to control the issuance of building permits, as discussed above.

CONCLUSION

In the opinion of this office, a municipality may not contract away its police power to acquire, own, operate, regulate and control a public sewer system, nor may it contract away its police power to issue building permits. Any contract to the contrary, in the opinion of this office, would be invalid and void ab initio.

Applying these principles to the proposed contract referenced and submitted to this office in your opinion request, it is the opinion of this office that the proposed contract between Waste Water Technology, Inc. and the cities of Reno and Sparks would be invalid and void ab initio, if executed, on the grounds that the city would be illegally contracting away its police power to control the public sewer system and the issuance of building permits, that the Equal Protection Clause of the Fourteenth Amendment to the United States constitution would be violated and that Reno city ordinances and administrative procedures for handling building permits would be violated.

Private firms may give, and the city may accept, voluntary contributions for the expansion of the sewer plant or may properly contract to use an expanded plant, but these actions shall not vest any interest, control or property right in the sewer system by these private firms. All citizens of the city would have an equal right to the use of the expanded plant, subject to laws, ordinances or regulations governing use.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-16 Taxation and Licensing Exemption for Free Port Warehouses—Liquor in Free Port warehouses and the privilege of placing liquor in Free Port are exempt from property taxation under NRS 369.330. Liquor becomes subject to the NRS 369.330 excise tax when reconsigned to an in-state destination. Neither the cigarette wholesale dealer licensing requirement of NRS 370.080 nor the liquor importer licensing requirement of NRS 369.180 apply to persons using a Free Port warehouse in the State of Nevada.

CARSON CITY, July 24, 1979

MR. ROY E. NICKSON, *Executive Director, Department of Taxation,* Capital Plaza, 1100 East William, Carson City, Nevada 89710

DEAR MR. NICKSON:

In your letter of April 2, 1979, you raised a question concerning the taxability of liquor in

Free Port warehouses under the excise tax imposed by NRS 369.330. You further inquire as t the applicability of cigarette wholesaler licensing requirements under NRS 370.080 and liquor importer licensing requirements under NRS 369.180 to persons placing items in Free Port warehouses. A review of the statutes and applicable case law has led to the following analysis and conclusions:

QUESTION ONE

Does the excise tax imposed on liquor by NRS 369.330 apply to liquor held in free Port or to the privilege of placing liquor in Free Port?

ANALYSIS

Thirty-seven states have enacted Free Port laws to encourage temporary storage of goods in public or private warehouses within the state. CCH, State Tax Guide (All States) L20-100. Originally enacted as Chapter 77 of 1949 Statutes of Nevada, NRS 361.160 to 361.185, Nevada's Free Port exemption became part of the State Constitution in 1960. Article 10, Section 1, Nevada State Constitution.

NRS 361.160 provides, in part, that:

> 1. Personal property in transit through this state is personal property:
>
> * * *
>
> (b) Which was consigned to a warehouse, public or private, within the State of Nevada from outside the State of Nevada for storage in transit to a final destination outside the State of Nevada, whether specified when transportation begins or afterward.
>
> Such property is deemed to have *acquired no situs in Nevada for purposes of taxation.* * * * The exemption granted shall be *liberally construed* to effect the purposes of NRS 361.160 to 361.185, inclusive.
>
> 2. Personal property within this state as mentioned in NRS 361.030 and NRS 361.045 to 361.155, inclusive, shall not include personal property in transit through this state as defined in this section. (Italics added.)

Property held in Free Port warehouses is deemed "property in transit" under the provisions of NRS 361.160 and is not subject to *property taxation* for purposes of Chapter 361.

NRS 369.030, however, is not a tax on property but an excise tax "to be collected respecting all liquor and upon the *privilege* of importing, possessing, storing, or selling liquor." NRS 369.330. (Italics added.)

Property taxes are taxes directly on property, Village of Lombard v. Illinois Bell Telephone Co., 90 N.E.2d 105 (Ill. 1950); excise taxes are ones "imposed upon the exercise of a privilege or use within the state." Wright v. Steers, 179 N.E.2d 721 (Ind. 1962). Nevada's constitutional Free Port provision in Article 10, Section 1, provides, in part, that:

> Personal property which is moving in interstate commerce through or over the territory of the State of Nevada, or which was consigned to a warehouse, public or private, within the State of Nevada from outside the State of Nevada, whether specified when transportation begins or afterward, shall be deemed to have *acquired no situs in Nevada for purposes of taxation and shall be exempt form taxation.* Such property shall not be deprived of such exemption because while in the warehouse the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged. (Italics added.)

This constitutional exemption contains no limiting subpart such as subsection (2) of NRS 361.160. Further, it suffers no contextual constraints, unlike NRS 361.160 which operates within

the confines of NRS Chapter 361, a chapter clearly dealing only with property taxation. And, perhaps most importantly, Article 10, Section 1, not only repeats the "no-situs" provision of NRS 361.160 but also adds a critical and unequivocal general exemption—Free Port property "shall be exempt from taxation."

Therefore, liquor in free Port, like any other personal property in Free Port, is exempt from all forms of taxation. Moreover, liquor in Free Port has no situs in Nevada for purposes of taxation. Article 10, Section 1, Nevada State Constitution. Therefore the privilege of placing liquor in Free Port is exempt from taxation because the act of placing in Free Port is not "importing, possessing, storing or selling liquor," as defined in Chapter 369.

CONCLUSION

Liquor in Free Port is exempt from property taxation under NRS 361.160. Liquor in Free Port is equally exempt from all forms of taxation under the constitutional Free Port provision. Article 10, Section 1, Nevada State Constitution. Finally, the privilege of placing liquor in Free Port is exempt from the excise tax imposed by NRS 369.330 since this privilege does not involve importation, possession, storage, or sales within the State of Nevada.

QUESTION TWO

If the excise tax imposed on liquor by NRS 369.330 does not apply to liquor held in Free Port, when will such liquor become subject to the above excise tax?

ANALYSIS

Personal property which is moving in interstate commerce through or over the territory of the State of Nevada or which was consigned to a warehouse within the State of Nevada from outside the State of Nevada for a destination outside the State acquires no situs for purposes of taxation. Article 10, Section 1, Nevada State Constitution. Only reconsignment to an in-state destination will trigger the excise tax under NRS 369.330.

This conclusion is obvious from the wording of Article 10, Section 1. Property can only receive a Free Port exemption if it is moved in the course of interstate commerce from outside the State into the State and is stored within the State for a final out-of-state destination.

CONCLUSION

Liquor exempted from the NRS 369.330 excise tax under Article 10, Section 1, of the Nevada State Constitution becomes subject to the excise tax when it is reconsigned to an in-state destination.

QUESTION THREE

Does the liquor importer license requirement of NRS 369.180 apply to persons placing liquor in a Free Port warehouse in the State of Nevada?

ANALYSIS

Under NRS 369.180, subsection 1 a person may not import liquors into the State of Nevada unless he first secures an importer license or permit from the State of Nevada. An "importer" is defined in NRS 369.030 to be "any person who, in the case of liquors brewed, fermented or produced outside the state, is first in possession thereof *within the state after completion of the act of importation."* (Italics added.)

As has already been discussed in the answer to Question 1 above, liquor in Free Port has not been imported because, for purposes of taxation, it has not yet been brought within the State. Article 10, Section 1, of the Nevada State Constitution. More particularly, liquor in Free Port, because not yet imported, is exempt from the excise tax imposed by NRS Chapter 369 on the privilege of importing liquor. The excise tax is the only tax imposed by Chapter 369; NRS

369.180 thus attains significance only as it gives the State a method to know who is exercising the privilege of importing and thus who is to be taxed under NRS 369.330. Therefore, since importation does not occur until property is reconsigned to an in-state destination, the licensing requirements of NRS 369.180 do not apply to persons placing liquor in a Free Port warehouse in the State of Nevada.

CONCLUSION

The liquor importer license requirement of NRS 369.180 does not apply to persons placing liquor in a Free Port warehouse in the State of Nevada. The licensing requirement applies only when liquor is reconsigned to an in-state destination and thus leaves Free Port. When liquor is thus reconsigned, the person first in possession of the liquor within the State after completion of the act of importation must obtain an exporter's license under NRS 369.180.

QUESTION FOUR

Does the cigarette wholesale dealer's licensing requirement of NRS 370.080 apply to persons placing cigarettes in Free Port warehouses in the State of Nevada?

ANALYSIS

Under NRS 370.080 a person cannot engage in business as a dealer of cigarettes in the state of Nevada unless he first secures a wholesale or retail cigarette dealer's license from the Department of Taxation. A "wholesale dealer" is defined in NRS 370.055 to be

> 1. Any person who brings or causes to be brought into this state unstamped cigarettes purchased form the manufacturer or another wholesaler and who stores, sells or otherwise disposes of them within the state; and
> 2. Any person who manufactures or produces cigarettes within this state and who sells or distributes them within the state.

The cigarette wholesale or retail cigarette dealer's license required under NRS 370.080 is imposed for purposes of taxation. The licensing procedures enables the Department of Taxation to collect the cigarette tax under NRS 370.165. Licensed wholesale dealers must submit monthly reports of inventory and of the value of revenue stamps they have affixed to cigarette packages sold in or shipped into the State by them during the preceding month. NRS 370.240. Using these reports the Department of Taxation determines the taxes due the State.

As discussed previously, under Article 10, Section 1, of the Nevada State Constitution, property in a Free Port warehouse has no situs for purposes of taxation. Since the license required under NRS 370.080 is imposed for purposes of taxation, cigarettes in a Free Port warehouse have not situs in the state of Nevada for the purposes of NRS 370.080 dealer's license. Given that a wholesale dealer must be someone who brings or causes to be brought *into the State* unstamped cigarettes or who manufactures or produces cigarettes *within the State,* persons placing cigarettes in a Free Port warehouse are to wholesale dealers for purposes of the NRS 370.080 licensing requirements. Items having no situs are not in the State. Therefore, the cigarette wholesale dealer licensing requirement of NRS 370.080 does not apply to persons placing cigarettes in a Free Port warehouse in the State of Nevada.

CONCLUSION

The cigarette wholesale dealer licensing requirement of NRS 370.080 does not apply to persons placing cigarettes in a Free Port warehouse in the State of Nevada.

When the cigarettes are reconsigned to an in-state destination the Free Port exemption from taxation under Article 10, Section 1, of the Nevada State Constitution is lost and the importer becomes subject to the wholesale licensing requirements of NRS 370.080.

Respectfully submitted,

RICHARD H. BYRAN [BRYAN], Attorney General

OPINION NO. 79-17 Taxes—Remedies And Procedures, Collection of Delinquent Taxes—NRS 361.565 et seq. and NRS 361.635 et seq. provide alternate remedies and procedures for the collection of delinquent taxes. Real property ad valorem taxes are delinquent if not paid in full by the first Monday of March immediately following the first Monday in July when the taxes become due and payable.

CARSON CITY, August 9, 1979

CAL DUNLAP, ESQ. *Washoe County District Attorney,* P.O. Box 11130, Reno, Nevada 89510

DEAR MR. DUNLAP:

This opinion is issued in response to a request from the office of the Washoe County District Attorney for clarification of the proper procedure to be followed by a county treasurer in collecting delinquent property taxes of the sum of $3,000 or more in each tax year. To reflect current statutory provisions, this Opinion discusses the remedies available under NRS 361.565 et seq. and NRS 361.635 et seq. for collection of *all* delinquent ad valorem taxes, regardless of amount. Consideration of the applicable statutes and case law in light of your specific questions has led to the following analysis and conclusions:

QUESTION ONE

Notwithstanding the provisions of NRS 361.635 (providing a method for collection of delinquent taxes by suit), is a county tax receiver still required to give notice of a tax delinquency on real property of the sum of $3,000 or more and to issue to the county treasurer, as trustee, a certificate authorizing said treasurer to hold said property subject to a two-year redemption period, as per the provisions of NRS 361.565?

ANALYSIS—QUESTION ONE

NRS 361.565 et seq. provides for collection of delinquent real property taxes by placing the delinquent property in trust with the county treasurer, enabling the State to satisfy the tax debts out of the property itself and the rents, issues, and profits derived from the property. NRS 361.595-361.620. Alternatively, under NRS 361.635 et seq. the district attorney may sue the delinquent person or persons and owner or owners, known or unknown, NRS 361.650, subsection 1, where the delinquency is at least $1,000. NRS 361.635, subsection 3.

The delinquent tax collection process works as follows: First, within 20 days of the first Monday in March each year, the tax receiver *must* notify any delinquent taxpayer that his property will be placed in trust if he fails to pay his taxes by 1:30 p.m. of the fourth Monday in April of the current year. NRS 361.565. Failure to publish notice of delinquencies within 20 days of the first Monday in March will preclude any subsequent publication of notice and issuance of certificate until the notice period within 20 days of the first Monday in March of the Following year. If the taxpayer does not pay by the fourth Monday in April, the tax receiver *must* issue a certificate to the county treasurer, placing the delinquent property in trust. NRS 361.570. Failure to issue a certificate by 1:30 p.m. of the fourth Monday in April precludes issuance of a certificate until 1:30 p.m. on the fourth Monday in April of the following year. For two year after issuance of the certificate, the county treasurer will collect all rents derived from the land to

satisfy current and subsequently accruing tax debts, NRS 361.595-361.620. During these two years, the taxpayer can redeem the property by paying all the taxes, penalties, and costs plus 10 percent interest per year. NRS 361.565, subsection 5(d). However, if after two years the tax debt is still outstanding, the tax receiver must execute and deliver to the county treasurer a deed to the property. NRS 361.585. The county treasurer may then sell the property to satisfy the debt, NRS 361.595, unless the property owner, a beneficiary under a deed of trust, a mortgagee, the taxpayer, a person holding a contract to purchase the property prior to its conveyance to the county treasurer, or the successor in interest of any of the above persons pays the tax debt (1) within 90 days of notice that the property is to be acquired by local government or the University of Nevada system or 2 prior to public notice of sale by the county treasurer. NRS 361.585.

Second, within three days after he makes out the March delinquency list required under NRS 361.565, the county treasurer must deliver to the district attorney a certified list of delinquencies of $3,000 or more. NRS 361.635, subsection 1(a). In addition, the county treasurer may deliver a certified list of delinquencies less than $3,000 but more than $1,000. NRS 361.635, subsection 1(b). If the delinquencies are not paid within 20 days of delivery of the certified list, the district attorney may, and must when so directed by the county board of commissioners, sue the delinquent person or persons and all owners, known or unknown, to satisfy the tax debt. NRS 361.635, subsection 2; NRS 361.650, subsection 1. This is a full adversary action; if judgment is rendered for the State, a lien is created on any available real and personal property of the defendant(s), subject to execution and sale under NRS 21.010 et seq. NRS 361.700. Where the property sold to satisfy the judgment is the delinquent real property or other real property, the judgment debtor has one year to redeem it. NRS 21.190-21.210.

CONCLUSION—QUESTION ONE

Under NRS 361.565 et seq. a tax receiver *must* give notice to *all* tax delinquencies and *must,* if the delinquency is not cleared by the fourth Monday in April, issue a certificate placing the delinquent property in trust. It is the opinion of this office that this mandate applies regardless of the amount of delinquency and regardless of whether a suit for collection is instituted pursuant to NRS 361.635 et seq. The suit provided for in NRS 361.635 et seq. simply gives the state an additional method of collecting on large (over $1,000) delinquencies; this alternate remedy in no way obviates the notice requirements of NRS 361.565.

QUESTION TWO

If a trustee’s certificate has not been issued to the county treasurer on a parcel of real property having a delinquent tax of the sum of $3,000 or more assessed against it on the fourth Monday in April after said tax has become delinquent, can the tax receiver issue a trustee’s certificate at any date thereafter? If so, does the two-year redemption period commence from the date of the issuance of the certificate or some other date? If not, can the tax receiver issue a trustee’s certificate to the treasurer on the next succeeding fourth Monday in April, if the tax is still delinquent both for the original tax year and any succeeding tax year?

ANALYSIS—QUESTION TWO

NRS 361.565 was enacted to give the state and county a means to collect delinquent taxes. NRS 361.565, subsection 5(b) provides the notice of delinquency must inform the taxpayer that if he or his successor in interest does not pay the delinquent taxes and legal penalties and costs, the tax receiver will, by certificate, place the delinquent property in trust, with the county treasurer acting as trustee. According to NRS 361.565, subsection 1 this delinquency notice must be given within 20 days after the first Monday in March; under NRS 361.565, subsection 5(d) the notice must tell the taxpayer that the tax receiver will issue the trust certificate *on the fourth Monday in April of the current year at 1:30 p.m.* NRS 361.570, subsection 1 provides the tax receiver must issue the certificate pursuant to the notice given as provided in NRS 361.565 and

at the time so noticed. Further, under NRS 361.580 the ex officio tax receiver must swear before the county auditor as to the amount of the taxes paid on the assessment roll, the amount of taxes stricken by the board of county commissioners, and the amount of taxes on the delinquent roll *on the third Monday in May of each year following the redemption period as set fourth in NRS 361.570.* Taken together, the provisions of NRS 361.565, 361.570, and 361.580 clearly indicate that the trustee certificate must be issued at 1:30 p.m. on the fourth Monday in April of the current year.

As noted above in the answer to question one, failure to issue a certificate at 1:30 p.m. of the fourth Monday in April precludes issuance of a certificate until 1:30 p.m. on the fourth Monday in April of the following year.

The certificate must specify that the property may be redeemed within two years from its (the certificate's) date. NRS 361.570, subsection 3(a). NRS 361.570, subsection 3(a). Therefore, the two-year redemption period commences from the date the certificate is issued.

CONCLUSION—QUESTION TWO

It is the opinion of this office that a trust certificate must be issued at 1:30 p.m. on the fourth Monday in April of the current year, provided the notice requirements of NRS 361.565 and 361.570 have been complied with. Failure to issue a certificate at 1:30 p.m. on the above date precludes issuance of a certificate until that time on the fourth Monday in April of the following year. The two year redemption period guaranteed to the taxpayer under NRS 361.565, subsection 5(d) begins running the day the certificate is issued.

QUESTION THREE

If a county tax receiver has not issued a certificate to the county treasurer with respect to a parcel of real property on which a delinquent tax of the sum of $3,000 or more has been assessed, may the county commence legal action against said property under the provisions of NRS 361.635 prior to the expiration of the two-year redemption period that would have existed, had a certificate been issued in accordance with provisions of NRS 361.565? The concern here is whether the remedy of collecting taxes of the sum of $3,000 or more pursuant to NRS 361.635 is cumulative to other tax collection procedures or whether the county must first give notice and issue a trustee's certificate (thereby creating a two-year redemption period) before utilizing NRS 361.635 procedures.

ANALYSIS—QUESTION THREE

As discussed in the answer to question one above, NRS 361.565 et seq. and NRS 361.635 et seq. provide alternate means to collect delinquent taxes. NRS 361.565 et seq. guarantees collection by providing for placing the delinquent property in trusteeship, allowing the state to satisfy the delinquencies out of the property itself and the rents, issues, and profits derived from the property. NRS 361.595-361.620. On the other hand, NRS 361.635 et seq. guarantees collection on delinquencies over $1,000 by providing for a suit against the delinquent person or persons and all owners, known or unknown. NRS 361.650, subsection 1. The choice is between in rem and in personam satisfaction.

NRS 361.565 mandates the delinquent taxpayer be notified within 20 days after the first Monday in March of each year that his property will be placed in trust if he does not clear his tax debt by 1:30 p.m. of the fourth Monday in April of the current year. If the taxpayer fails to meet his deadline, the tax receiver must issue a certificate to the county treasurer, placing the delinquent property in trust. NRS 361.570. However, whether the certificate is issued or not, the county district attorney may sue the potentially liable parties *personally.* NRS 361.635, subsection 3. Of course, such a suit may be brought only for delinquencies of at least $1,000; and, for amounts between $1,000 and $3,000, the county treasurer must have *elected* to deliver to the county district attorney a certified list of accumulated delinquencies. NRS 361.635,

subsection 1(a) and (b). (If the delinquency is over $3,000, the county treasurer *must* deliver the list. NRS 361.635, subsection 1(a).) Also, the district attorney must wait 20 days after delivery of the list before filing suit. NRS 361.635, subsection 2.

The two-year redemption period under NRS 361.565 does not apply to the in personam action under NRS 361.635 since the two-year period applies to redeeming the delinquent property held in trust while a judgment in personam under NRS 361.635 may be satisfied out of *any* of the taxpayer's or owner's property, real or personal, the judgment constituting a lien as in other civil cases. NRS 361.700.

It is possible that a property owner may complain if notice has been given that the taxpayer will have two years to redeem his delinquent property under NRS 361.565, and suit is brought pursuant to NRS 361.635 et seq., followed by judgment being rendered against the taxpayer/defendant, subjecting his property to execution and sale *within* the two-year redemption period. For this reason the Legislature should be requested to amend the delinquency notice under NRS 361.565, subsection 5(d), and until such amendment, this office recommends that the notice given pursuant to this statute should contain the following information:

> (d) That if the amount is not paid by the taxpayer or his successor in interest the tax receiver will, on the fourth Monday in April of the current year at 1:30 p.m. of that day, issue to the county treasurer, as trustee for the state and county, a certificate authorizing him to hold the property, subject to redemption within 2 years after date thereof, by payment of the taxes and accruing taxes, penalties and costs, together with interest at the rate of 10 percent per annum from date due until paid as provided by law and that such redemption may be made in accordance with the provisions of Chapter 21 of NRS in regard to real property sold under execution. Provided that, in the event suit is brought against the taxpayer or his successor in interest pursuant to NRS 361.635 et seq., and judgment is rendered against the taxpayer or his successor in interest, satisfaction may be had out of any of the real or personal property of the taxpayer or his successor in interest. Further provided that, if said satisfaction is had by sale of the delinquent real property itself, pursuant to writ of execution under NRS 21.010 et seq., even if within the 2-year redemption period, taxpayer or his successor in interest will have only 1 year from the date of sale within which to redeem the delinquent real property, pursuant to NRS 21.210.

For the sake of consistency, the Legislature should also be requested to amend NRS 361.570, subsection 3(a), as follows:

> (a) That the property may be redeemed within 2 years from its date unless the property is sold under writ of execution issued on a judgment rendered in an action brought pursuant to NRS 361.635 et seq., in which case the property may be redeemed within 1 year from the date of sale, pursuant to NRS 21.210.

The above amendments will guarantee that the taxpayer and other concerned parties receive adequate notice of potential property deprivations and opportunities for redemption.

CONCLUSION—QUESTION THREE

Issuance of a certificate is clearly mandated by NRS 361.570, but in the opinion of this office, there is no indication that election of this remedy is a prerequisite to filing suit under NRS 361.635 et seq. for delinquencies over $1,000. Further, filing of suit need not await expiration of the NRS 361.565 two-year redemption period since the period only applies to redeeming delinquent real property held in trust under NRS 361.565 et seq. Statutory redemption is provided for elsewhere if judgment is rendered against the defendant(s), and his real property is sold under writ of execution. NRS 21.190-21.210.

QUESTION FOUR

If the answer to the preceding question three is in the affirmative, please clarify the length of the redemption period in the event a judgment is obtained in favor of the county in connection with a lawsuit instituted in accordance with the provisions of NRS 361.635 and the real property in question is sold at an execution sale. Does the two-year redemption period of NRS 361.565 apply, or does the one-year redemption period of NRS 21.210 apply?

ANALYSIS—QUESTION FOUR

As noted in the answer to question three, a judgment rendered for the State or county in a suit under NRS 361.635 constitutes a lien, which may be satisfied by execution on the sale of any of the real or personal property of the taxpayer(s) or owners(s). NRS 361.700. Under NRS 21.010 the party in whose favor judgment is given may, at any time within six years after entry thereof, issue a writ of execution for its enforcement. (The six-year limit, however, does not apply to judgments in an NRS 361.635 action, the lien remaining in force until the delinquent tax, penalties, and costs of suit and sale have been paid. NRS 361.700, subsection 4.) If the writ is enforced by sale of the delinquent real property (or any other real property), the property is subject to redemption within one year after the sale. NRS 21.190-21.210.

Interestingly, once the two-year redemption period has expired, property held in trust under NRS 361.565 et seq. may also be sold to satisfy the delinquency of that particular property. NRS 361.595. However, until the two-year period of redemption has expired, the county treasurer must satisfy the debt out of rents derived from the property. NRS 361.605. (Clearly the reason for allowing immediate sale under NRS 361.635, versus requiring expiration of the two-year redemption period under NRS 361.565, is the stricter compliance with traditional due process safeguards afforded by the full adversary proceeding under NRS 361.635.) Once sale has occurred under NRS 361.595, the delinquent taxpayer may only recover the land sold by bringing an action or counterclaim within three years after the county treasurer executed and delivered the deed. NRS 361.600.

CONCLUSION—QUESTION FOUR

It is the opinion of this office that real property sold under a writ of execution obtained on a judgment rendered against the defendant(s) in an action to collect delinquent real property taxes under NRS 361.635, is subject to a one-year redemption period under NRS 21.190-21.210.

QUESTION FIVE

Is a real property ad valorem tax delinquent after the first Monday of July when it becomes due and payable or after the first Monday of the succeeding March when the fourth installment of said tax is due and payable?

ANALYSIS—QUESTION FIVE

Taxes assessed under the real property tax roll are due and payable on the first Monday in July. NRS 361.483, subsection 1. However, such taxes may be paid in four equal installments, NRS 361.483, subsection 2, due and payable on the first Monday in July, the first Monday in October, the first Monday in January, and the first Monday in March. NRS 361.483, subsection 4. In the event a taxpayer elects to pay the taxes in four equal installments, penalties are provided if any installment is not paid within 10 days following the date the installment is dues. NRS 361.483, subsection 5.

To be delinquent taxes must be past due and unpaid, Ryan v. Roach Drug Co., 239 P. 912, 918 (Okla. 1925); Tallman v. Board of Commissioners of Northern Road Improvement District of Arkansas County, 49 S.W.2d 1039, 1040 (Ark. 1932), and coupled with a present obligation to pay. Cornell v. Maverick Loan & Trust Co., 144 N.W. 1072, 1074 (Nebr. 1914). Since taxes

noted on a real property tax roll in Nevada are due and payable on the first Monday in July, failure to pay all taxes due on that date would result in said taxes becoming delinquent, unless the Nevada Legislature has enacted legislation to obviate this result. In the opinion of our office, the Legislature has obviated such a result by providing in NRS 361.483, subsection 5 that real property taxes may be paid in four installments, subject to certain penalties if any quarterly installment is not timely paid. Therefore, if all of the taxes remain due and unpaid after the first Monday in July, delinquency does not immediately occur, but penalties attach if any quarterly installment is not timely paid. The real estate taxes would ultimately become delinquent on the passage of the March installment date without full payment of the taxes then due.

CONCLUSION—QUESTION FIVE

It is the opinion of the office that a real property ad valorem tax is delinquent if not paid in full by the first Monday of March immediately following the first Monday in July when the tax became due and payable.

SUMMARY

NRS 361.565 et seq. and NRS 361.635 et seq. provide alternate remedies for the collection of delinquent taxes. Regardless of the amount of delinquency and regardless of whether a suit for collection is instituted pursuant to NRS 361.635 et seq., the county tax receiver must give notice of all tax delinquencies and must, if the delinquency is not cleared by the fourth Monday in April, issue a certificate placing the property in trust, pursuant to NRS 361.565 et seq.

The trust certificate may be issued at 1:30 p.m. on the fourth Monday in April of the current year, provided the notice requirements of NRS 361.565 and 361.570 have been complied with. From the day the certificate is issued, the taxpayer has two years to redeem his property.

Even if the tax receiver never issues a certificate, however, the county district attorney may bring a suit in personam where the delinquency exceeds $1,000, and the treasurer has delivered to the district attorney a list of such delinquencies. This filing of suit need not await expiration of the two-year redemption period provided by NRS 361.565, the defendant having recourse to the one-year statutory redemption under NRS 21.190-21.210 if judgment is rendered against him, and his real property is sold under writ of execution.

Respectfully submitted,

RICHARD H. BRYAN, Attorney General

OPINION NO. 79-18 County Hospitals and Payment to Physicians for Indigent Care—The board of hospital trustees has not authority to pay physicians who render services to indigent patients in a county hospital. A board of county commissioners cannot authorize payment to physicians to provide medical assistance to indigents in a county hospital, unless such payments are necessary to provide medical aid to qualified indigents in the county.

CARSON CITY, August 27, 1979

THE HONORABLE ROBERT J. MILLER; *District Attorney,* Clark County Courthouse, 200 East Carson, Las Vegas, Nevada 89101

DEAR MR. MILLER:

In your letter of August 8, 1979, you requested the opinion of this Office on the following:

QUESTION

Does the county, acting either through the board of county commissioners in their capacity as the ex officio board of trustees of the county hospital or through the board of county commissioners as the governing authority of the county, have legal authority to pay physicians who render services to indigent patients in the county hospital?

ANALYSIS

Analysis of the question necessarily involves a discussion of the interrelationship of several Nevada Revised Statutes, defining and limiting the powers of a board of county commissioners and a board of trustees of a county hospital. The initial grant of authority enabling the board of trustees of staff county hospitals is NRS 450.180, subsection 2, which provides as follows:

> The board of hospital trustees shall have the power:
>
> * * *
>
> 2. To employ physicians and interns, either full-time or part-time, as the board determines necessary, and to fix their compensations.

Standing alone, the statute would not be subject to dispute. However, the 60th Session of the Nevada Legislature amended NRS 450.180, by the addition of a section 5, which provides as follows:

> The board of trustees shall have the power:
>
> * * *
>
> 5. To contract with individual physicians or private medical associations for the provision of certain medical services as may be required by the hospital. *The compensation provided for in the contract must not include compensation to the physician for services rendered to indigent patients.* (Italics supplied.) See: Section 1, Chapter 296, Statutes of Nevada 1979.

Further, NRS 450.440 authorizes the board of trustees to organize a staff of physicians to give proper medical and surgical attention and service to the indigent sick, and most pertinent to the question at hand, requires, in subsection 3, that:

> No member of the staff nor any other physician who attends an indigent patient may receive any compensation for his services except as otherwise provided in NRS 450.180 or to the extent that medical care is paid for by any governmental authority or any private medical care program.

To ascertain the meaning of these three statutes, it is necessary to apply rules of statutory construction. The purpose of all rules or maxims for the construction or interpretation of statues is to learn the intention of the Legislature in enacting the statutes or to aid in the ascertainment of legislative intent. See Ronnow v. City of Las Vegas, 57 Nev. 332, 363, 65 P.2d 133 (1937); Thorpe v. Schooling, 7 Nev. 15, 17, 18 (1871); and Nevada Attorney General's Opinion No. 213, dated July 8, 1977.

Statutes must be construed in their entire context, U.S. v. Alpers, 338 U.S. 680 (1950), and, so far as practicable, various provisions must be reconciled. Board of School Trustees v. Bray, 60 Nev. 345, 109 P.2d 274 (1941). Reconciling the statutes noted above, specifically NRS 450.180, subsection 2, which generally allows payment to physicians, and NRS 450.180, subsection 5, and NRS 450.440, subsection 3, which prohibits payment for indigent care, requires consideration of the following rule of construction:

> If [the provisions of the statutes to be reconciled] cannot be harmonized, the provision, being general in nature, must, under a well-established canon of construction, be controlled by specific provisions of the * * * act touching the same subject matter. Wainwright v. Bartlett, Judge, 51 Nev. 170, 177-178, 271 Pac. 689 (1928). See also Ex parte Smith, 33 Nev. 466, 474-475, cited in Nevada Attorney General's Opinion No. 338, dated May 2, 1942.

This rule of construction would thus lead to the conclusion that the conflict between the general provisions of NRS 450.180, subsection 2, allowing compensation for physicians, and NRS 450.180, subsection 5, and NRS 450.440, subsection 3, which specifically prohibit remuneration to be paid to hospital staff physicians for indigent care must be resolved by applying the specific provisions precluding payment.

Additionally, where a former statute is amended or a doubtful interpretation is rendered certain by subsequent legislation, such amendment is persuasive evidence of what the Legislature intended by the first statute. Sheriff of Washoe County v. Smith, 91 Nev. 729, 542 P.2d 440 (1975). During the 1979 Legislative Session, section 5 of NRS 450.180 was enacted and serves as persuasive evidence of what the Legislature intended insofar as compensation to staff physicians for medical care to indigents in a county hospital is concerned. The Legislature must be understood to mean what it has clearly expressed, Thompson v. Hancock, 49 Nev. 336, 245 Pac. 941 (1926), and, the clear expression under NRS 450.180, subsection 5, is that physicians will not be compensated for the rendition of care to the medically indigent by the board of trustees of a county hospital.

There remains, however, the question as to whether the board of trustees of a county hospital may permit, pursuant to NRS 450.440, subsection 3, compensation to be paid to any member of the staff or other physician for services rendered to any medically indigent patient "* * * to the extent that [such] medical care is paid for by any governmental authority or any private medical care program." The resolve this question, an additional statutory construction guideline must be considered.

Statutes relating to the same subject matter are to be construed together, and, if possible, are to be construed so as to give each a reasonable effect in accordance with the legislative intent. Fleck v. Rogers, 10 Nev. 319 (1875), cited In The Matter of Ah Pah, 34 Nev. 283, at 292, 119 Pac. 770 (1911). In connection with the question asked, the reference in NRS 450.440, subsection 3, to compensation programs for medical care pursuant to "any governmental authority" requires an analysis of the extent to which a county has statutory authority elsewhere in the Nevada Revised Statutes to provide payment to physicians who provide medical services to indigent persons.

Chapter 428 of the Nevada Revised Statutes provides an insight into the legislative intent as to the duties and responsibilities of a county as well as the State for the care of the medically indigent. NRS 428.150 provides as follows:

> There is hereby established a state plan for the assistance to the medically indigent, pursuant to Title XIX of the Social Security Act (42 U.S.C. §§ 1396-1396d).

The plan for *State Aid* for Medically Indigent (italics added), commonly known as S.A.M.I., was implemented by the Nevada Legislature in 1967, pursuant to Title XIX of the Social Security Act. As your letter of August 3, 1979, to Assistant County Manager Joseph Denny indicates, NRS 450.440, subsection 3, was simultaneously amended to include the provision for compensation to physicians "to the extent that medical care is paid by any governmental authority."

In fact, the amendatory language was enacted as a section of the very same Assembly Bill which implemented S.A.M.I.—Chapter 369, Statutes of Nevada 1967, approved in the 54th

Session of the Nevada Legislature. Thus, one construction of the meaning of the phrase "governmental authority: as contained in NRS 450.440, subsection 3, is that this term refers to programs of the state and federal government that provide compensation for medical services and not medical aid programs of a county commission or a county hospital or board of trustees. Since the provisions of Title XIX of the Social Security Act, adopted pursuant to NRS 428.150 through NRS 428.370, do provide for a method of payment for inpatient hospital services rendered by physicians to the medically indigent and were enacted contemporaneously with NRS 450.440, subsection 3, such a construction could certainly be justified. In addition, the 57th Session of the Nevada Legislature passed Chapter 517, Statutes of Nevada 1973, to comply with provisions of the Federal Welfare Reform legislation. Contained therein is a substantial program guaranteeing physicians the right to assignment of rights from the recipients for their care. The provision, enacted as NRS 428.290, subsection 2, provides as follows:

> 2. A recipient shall first utilize all individual or group indemnification programs for which he is eligible, by contract or other legal entitlement, for medical or remedial care before utilizing state aid to the medically indigent. A recipient shall upon request of a provider of medical or remedial care, or upon request of the welfare division, execute a written assignment of his benefits under such indemnification programs to the providers of medical or remedial care to apply toward the cost of such care. Such indemnification programs include, but are not limited to, all private insurance carriers, Blue Shield and Blue Cross plans, prepaid group health plans, trusts, life care contracts, Medicare, military benefits including CHAMPUS, military facility care and Veterans' Administration benefits. Whether such indemnification programs are provided by an individual, partnership, association, corporation, state or local agency, trustee, legal representative, employer or employee organization, or any other organization group, such indemnifiers shall recognize a written assignment of benefits signed by the beneficiary of such indemnification benefits.

Since the Legislature has authorized a program for providing care for the medically indigent, including compensation to those who render care, it would certainly appear that this could have been the intended compensation program established under "governmental authority" referred to in NRS 450.440, subsection 3.

However, the Legislature did not choose to restrict this term to the S.A.M.I. program. As noted above, physicians are prohibited from receiving compensation for the services provided to indigent patients directly from the board of trustees at the county level, pursuant to NRS 450.180 and NRS 450.440, but nothing in these statutes would preclude physician payments under any other compensation program established under "governmental authority." Since NRS 450.440, subsection 3, does not limit a compensation scheme to the Nevada S.A.M.I. program, it could arguably include a county-authorized payment plan established outside the authority of a board of trustees of a county hospital, provided there is legal authority to do so.

In Chapter 428 of the Nevada Revised Statutes, a board of county commissioners is authorized to provide certain aid and relief to indigent persons. NRS 428.090, subsection 3, imposes a duty on a board of county commissioners to make allowance for medical aid to indigent persons who meet the uniform standards of eligibility prescribed by the board. The section in question reads as follows:

> 3. The board of county commissioners shall make such allowance for board, nursing, *medical aid* or burial expenses as the board shall deem just and equitable, and order the same to be paid out of the county treasury. (Italics supplied.) NRS 428.090, subsection 3.

The above language would appear not only to authorize but mandate a board of county commissioers [commissioners] to provide medical aid to all persons within the county who meet

the uniform standards or eligibility, the expenses of which must be paid out of the county treasury. Significantly, this statute does not specify any particular type of medical service or method by which medical aid must be provided. In short, it does not mandate that a board of county commissioners establish a compensation program for physicians rendering inpatient hospital services in a county hospital. In fact, NRS 428.090, subsection 4, relieves the board of county commissioners from any responsibility to provide medical aid to the extent of the amount of money or the value of services provided by the Nevada State Welfare Division of the Department of Human Resources pursuant to the Nevada S.A.M.I. program referred to above. The question that is not resolved by the language contained in NRS 428.090 is whether or not the board of county commissioners is empowered to establish a compensation program for physicians rendering hospital services in a county hospital to provide medical aid to indigent persons qualifying for such assistance, notwithstanding the statutory provisions in Chapter 450 of the Nevada Revised Statutes prohibiting a board of trustees of a county hospital from compensating physicians for providing such services.

The Nevada Supreme Court has recently recognized a rule of statutory construction that statutory provisions should be construed in such a manner as to render them compatible with each other. See Bodine v. Stinson, 85 Nev. 657, 461 P.2d 868 (1969), cited in state of Nevada v. Rosenthal, 93 Nev. 36, 559 P.2d 830 (1977). Another fundamental rule of statutory interpretation recently applied by the Nevada Supreme Court is that the unreasonableness of a result produced by one among alternative possible interpretation of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result. See Sheriff of Washoe County v. Smith, supra, at page 733.

It has long been recognized that a board of county commissioners has only such powers as are expressly granted to it, or as may be necessarily incidental for the purpose of carrying such powers into effect. See State ex rel. King v. Lothrop, 55 Nev. 405, 408 (1934), citing Sadler v. Board of County Commissioners of Eureka County, 15 Nev. 39 (1880). All appropriations or expenditures of public money by municipalities must be for a public purpose. 15 McQuillan on Municipal Corporations, § 39.19. The determination of what is a proper public purpose is for the Nevada Legislature to decide. McLaughlin v. Las Vegas Housing Authority, 68 Nev. 84 (1951). In view of these general propositions, it is necessary that any action of the board of county commissioners to authorize compensation for particular medical services be in conformity with some provision of law giving the Board power to act, or such action will be without authority. Authority cannot be imputed merely because the Nevada Revised Statutes or the Nevada Constitution lacks a prohibition against certain acts. See Nevada Attorney General's Opinion No. 92 (August 21, 1951) and the citation noted therein.

Applying the above rules of statutory construction and principles of law together, it would appear that a reasonable interpretation of the power granted to a board of county commissioners in NRS 428.090, subsection 3, is that a board of county commissioners has both the authority and mandate to make such allowance for "necessary" medical aid expenses to be paid out of the county treasury, which cannot be otherwise provided by other county services or other governmental programs providing such assistance. Since the board of trustees of a county hospital is empowered to provide medical and surgical attention and service to indigent persons admitted to a county hospital for treatment, for which physicians and members of the staff may not receive any compensation for their services, it has been assumed by this office, in the absence of findings by a board of county commissioners that particular facts or circumstances have established a "necessity" to pay for these services, that a board of county commissioners is not required to make any allowance for these particular medical aid services, since they would not be "necessity" to pay for these services that a board of county commissioners is not required to make any allowance for these particular medical aid services, since they would not be "necessary" medical aid expenses to carry out the mandate of the provisions of NRS 428.090. A contrary interpretation would produce an unreasonable result in that the establishment of a

compensation program by a board of county commissioners pursuant to NRS 428.090, subsection 3, for expenses that have not been determined to be "necessary" to provide medical aid, which results in members of the staff of a county hospital being paid for rendering medical assistance to indigent patients admitted to the hospital, would allow a board of county commissioners to do indirectly what a board of trustees of a county hospital could not do directly. Such interpretation would clearly violate the rules of statutory construction of construing statutory provisions in such a manner as to render them compatible with each other. Furthermore, it would invite speculation whether or not such expenditures of public money would be for a truly public purpose within the meaning of the Nevada Revised Statutes and the Nevada Constitution.

In summary, physicians can be compensated for the care of indigents in a county hospital in the following manner:

1. Receipt of moneys resulting from the assignment of benefits under indemnification programs, including but not limited to all private insurance carriers, Blue Shield and Blue Cross plans, prepaid group health plans, trusts, life care contracts, Medicare military benefits, military facility care and Veterans' Administration benefits.
2. Receipt of S.A.M.I. benefits provided pursuant to NRS 428.150 trough 428.370.
3. Availability of financial and medical assistance to members of the staff of physicians of a county hospital pursuant to NRS 450.440, subsection 4, as follows:

> The board of hospital trustees or the board of county commissioners may offer the following assistance to members of the staff in order to attract and retain them:
>
> (a) Establishment of clinic or group practice;
>
> (b) Malpractice insurance coverage under the hospital's policy of professional liability insurance;
>
> (c) Professional fee billing; and
>
> (d) Free or reduced rent for office space in facilities owned or operated by the hospital, as the space is available, if this assistance is offered to all members of the staff on the same terms and conditions.

4. Ability to exercise hospital staff privileges.
5. Receipt of moneys from a compensation program established pursuant to government authority, including one established by a board of county commissioners, provided it is based on a finding of "necessity" and an express or necessarily implied power of the commission.

The foregoing analysis indicates that neither the board of trustees nor a board of county commissioners, in the absence of a finding of "necessity," may compensate physicians for services to the medically indigent admitted to a county hospital for treatment by direct financial remuneration.

CONCLUSION

It is the opinion of this office that a county, acting through its board of trustees of a county hospital, has no authority to pay physicians on the staff of a county hospital for their services to the medically indigent. A board of county commissioners cannot authorize payment to physicians to provide medical assistance to indigents in a county hospital, unless such payments are necessary to provide medical aid to qualified indigents in the county.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By JEFFREY L. ESKIN, *Deputy Attorney General*

Re: Supplemental Clarification of OPINION NO. 79-18 County Commissioners and Payments to Physicians for Indigent Care—Payments to physicians deemed necessary to provide medical aid to indigent patients in a county hospital lie within the governmental discretion of the board of county commissioners, based on findings which take into consideration (1) the need of indigent persons in the county for the medical aid to be provided by such payments; (2) the legality of any contract by which compensation is to be paid; (3) the avilability [availability] of funds in the county indigent fund; and, if applicable, (4) the nature of any emergency declared by the county commission to provide additional funds to the county indigent fund for medical care to indigents, by which any such compensation program would be funded.

CARSON CITY, December 27, 1979

THE HONORABLE ROBERT J. MILLER, *District Attorney of Clark County*, Clark County Courthouse, Las Vegas, Nevada 89101

Attention: SCOTT W. DOYLE, Deputy District Attorney

DEAR MR. DOYLE:

This is in response to your letter of September 14, 1979, in which you have requested an expansion and clarification of Attorney General's Opinion No. 79-18 (August 29, 1979)l In that opinion, this office concluded that there was no statutory authority by which the trustees of the county hospital in Clark County could compensate physicians on its staff for treatment of indigent patients admitted to the county hospital for medical care. However, this Opinion also noted that the Clark County Board of Commissioners were not legally precluded from considering a compensation program for physicians who render medical aid to indigent persons, provided said program is based on a finding by the county commission that it is necessary to establish such a program to provide adequate medical aid to those persons who meet uniform county standards of eligibility. By letter dated November 2, 1979, you provided our office with your legal evaluation of the issues raised in your letter of September 14, 1979, and the following opinion has taken this legal evaluation into account in analyzing the questions addressed herein.

QUESTION ONE

Does a board of county commissioners have any legal authority to provide all needed medical assistance to eligible indigent persons, including payments to physicians with county hospital staff privileges, for the care of indigent persons admitted to the county hospital for treatment, upon a finding by the commissioners that the expenses for such medical care would be "necessary" to provide adequate medical aid for said persons?

ANALYSIS

This office concurs with the statement in your letter of November 2, 1979, that NRS 244.160 authorizes a board of county commissioners in Nevada to take care of and provide for the indigent sick of the county *in such a manner only as is or may be provided by law*. With respect to the above question, NRS 428.090, subsection 3, provides that a board of county commissioners shall make allowance for medical aid expenses as the board "deems just and equitable" in connection with the medical care of indigent persons who meet the uniform

standards of eligibility prescribed by the board. These expenses would be paid out of the county treasury.

As noted in Attorney General's Opinion 79-18, medical expenses paid pursuant to the statutory authority of NRS 428.090, subsection 3 must be based on a finding by the board of county commissioners that said expenses are "necessary" to provide indigent medical aid that cannot be provided by other county services or other governmental programs, such as hospital physician care provided by members of the medical staff at the county hospital pursuant to the rules and regulations of the board of county hospital trustees. The opinion of this office that a finding of "necessity" by the board of county commissioners in the context of NRS 428.090, subsection 3 is a proper interpretation of this statute was promoted by the concern expressed in Attorney General's Opinion 79-18 that any expenditures of public moneys pursuant to NRS 428.090, subsection 3 must be for a proper public purpose. This concern is further highlighted by the statutory language contained in NRS 428.090, subsection 4, which relieves the county commission of the responsibility to provide medical aid or any other type of remedial aid pursuant to this statute to the extent of the amount of money or the value of service provided by the welfare division of the State Department of Human Resources.

In order to assure members of the public that any compensation program to provide indigent medical aid pursuant to NRS 428.090, subsection 3 is for a proper public purpose and does not duplicate aid made available by state funds, a finding by the board of county commissioners that a compensation program for county hospital staff physicians is "necessary" to provide medical aid to indigent patients would demonstrate that such a program is needed to carry out the expenses and implied powers, duties, *and responsibilities* of the board of Chapter 428 of NRS to provide adequate medical aid (not otherwise available) to persons coming within the purview of that chapter.

Obviously, nothing compels a board of county commissioners to establish such a physician compensation program. It lies within the board's governmental discretion to determine if a finding of "necessity" is warranted, based on the particular facts and circumstances presented to the board in connection with any proposed compensation program. The process used by the board in making a finding of what constitutes "necessary" medical aid in the context of any proposed program to compensate county hospital staff physicians would be similar to the procedure used by the board in determining what constitutes an "emergency" for the purpose of augmenting the county indigent fund pursuant to NRS 428.050, subsection 3 to provide necessary medical care as required in Chapter 428 of Nevada Revised Statutes. It would also be similar to the process used by a county commission in making a finding of the size and nature of the medical staff (including physicians) deemed necessary to insure adequate staffing of medical facilities established in the outlying areas of the county pursuant to NRS 255.1605. In both of these statutes, the Legislature has not provided a definition of what would constitute an "emergency" warranting a supplementation of the county indigent fund to provide "necessary" medical care or a definition of what medical personnel would be "necessary" to serve the needs of an area in which a medical facility has been established by the county commission. In either situation, the board of county commissioners would have to make their determination based on the facts and circumstances presented to the board. Clearly, such a decision involve the exercise of governmental discretion by the board, limited by any applicable legal limitations noted by the county counsel.

In your letter of November 2, 1979, you indicated that NRS 428.090, subsection 3 is merely general enabling legislation and is controlled by the more specific provisions of NRS 450.180 and 450.440, which expressly delegate the power to compensate physicians for professional services in the county hospital to the board of hospital trustees. You have further indicated that applicable provisions in Chapter 450 of NRS establish a statutory duty on the part of physicians on the staff of a county hospital to treat medically indigent patients admitted to the hospital without compensation. Because of this statutory duty, you have concluded that any agreement entered into between staff physicians of the county hospital and a county governmental authority

other than the board of hospital trustees would be invalid because of the failure of legal consideration. In support of this position, you have cited Restatement of the Law of Contracts 2d, Section 76A, and 1 Williston on Contracts, Third Edition, Section 132.

In order to reach the conclusions stated above, it is necessary to analyze whether county hospital staff physicians are in fact bound by an official statutory duty to render indigent medical aid in the hospital without compensation, which duty precludes any other contractual arrangements by said staff physicians for compensation in connection with these services. As stated in the Restatement of the Law of Contracts 2d, Section 76A, the existence of this official duty must be "neither doubtful nor the subject of hones dispute."

The following two statutes in Chapter 450, Nevada Revised Statutes, directly address the question of whether or not physicians are bound by such an official duty:

1. NRS 450.180, paragraph 5, as amended by Chapter 296, Statutes of Nevada 1979, states:

> 5. [The board of hospital trustees shall have the power] to contract with individual physicians or private medical associations for the provision of certain medical associations for the provision of certain medical services as may be required by the hospital. *The compensation provided for in the contract must not include compensation to the physician for services rendered to indigent patients.* (Italics added.)

2. NRS 450.440, as amended by Chapter 651, Statutes of Nevada 1979, provides as follows:

> 1. The board of hospital trustees shall organize a staff of physicians composed of every regular practicing physician and dentist in the county in which the hospital is located who requests staff membership and meets the standards fixed by the regulations laid down by the board of hospital trustees.
>
> 2. The staff shall organize in a manner prescribed by the board so that there is a rotation of service among the members of the staff to give proper medical and surgical attention and service to the indigent sick, injured or maimed who maybe admitted to the hospital for treatment.
>
> 3. No member of the staff nor any other physician who attends an indigent patient may receive any compensation for his services *except* as otherwise provided in NRS 450.180 or *to the extent that medical care is paid for by any governmental authority or any private medical care program.*
>
> 4. The board of hospital trustees or the board of county commissioners may offer the following assistance to members of the staff in order to attract and retain them:
>
> (a) Establishment of clinic or group practice;
>
> (b) Malpractice insurance coverage under the hospital's policy of professional liability insurance;
>
> (c) Professional fee billing; and
>
> (d) Free or reduced rent for office space in facilities owned or operated by the hospital, as the space is available, if this assistance is offered to all members of the staff on the same terms and conditions. (Italics supplied.)

Clearly, the official duty established for physicians on the staff of a county hospital to render services to indigent patients is couched in terms of any proposed contractual arrangement between said physicians and the board of county hospital trustees. Significantly, the statutes have not precluded county hospital staff physicians from receiving any compensation for treating indigent patients. Rather, the Nevada Legislature has chosen to allow physicians who attend an indigent patient admitted to the county hospital to receive compensation for his services "to the extent that medical care is paid for by any governmental authority or any private medical care program." As discussed in Attorney General's Opinion 79-18, the use of the term "governmental

authority" in NRS 450.440, subsection 3, was not limited to the Nevada S.A.M.I. program or any other particular program established under a governmental authority. In fact, the 1979 Nevada Legislature reenacted NRS 450.440, subsection 3, with no major change. In addition, the basic authority of a board of county commissioners to establish medical aid programs pursuant to Chapter 428, Nevada Revised Statutes, was also reenacted without major change by the 1979 Nevada Legislature. See Chapter 593, Statutes of Nevada, 1979, Sections 23-32.

The "governmental authority" of a board of county hospital trustees is distinguishable from the "governmental authority" of a board of county commissioners. In this connection, it has been acknowledged in prior Nevada Attorney General's Opinions that Chapter 450, Nevada Revised Statutes, indicates a statutory scheme establishing a county hospital as part of the responsibilities, operations and functions relating to county government. See Nevada Attorney General's Opinion No. 79-25, December 11, 1979. This office has also acknowledged that a county hospital is not a legal entity and cannot be subjected to suit for any alleged torts of hospital employees and agents, thereby subjecting a county to potential liability for said employees' or agents' tortious conduct. See Nevada Attorney General's Opinion No. 79-10, May 10, 1979. However, the term "governmental authority" can also refer to the powers, duties and responsibilities pertaining to or proceeding from a particular governmental entity in which the authority to act is vested in a governing board. In this sense, the board of trustees of a county hospital exercises distinct and separate governmental authority over many aspects of the county hospital's operation to the exclusion of any other governmental authority, including that of the board of county commissioners.

There are many examples of the unique and separate governmental powers of a county hospital board of trustees. NRS 450.150 and NRS 450.160 provide that a board of county hospital trustees constitutes the governing authority in establishing and maintaining a county public hospital and in adopting such by-laws, rules and regulations for the government of the hospital. Such rules and regulations may include those governing the admission of physicians to the staff and supervision of the compensation arrangements for said physicians as may be deemed expedient for the economic and equitable conduct of the staff consistent with all of the provisions contained in Chapter 450 of the Nevada Revised Statutes. In addition, the board of county hospital trustees has exclusive control of all expenditures of moneys collected to the credit of the county hospital fund and the purchase, supervision, care and custody of all grounds, rooms or buildings purchased, constructed, leased or set apart for hospital purposes. See NRS 450.250. Finally, this office has previously concluded that a board of county hospital trustees, having the right to levy or receive moneys from ad valorem taxes for the maintenance and operation of the county hospital, is a "local government" within the meaning of NRS 354.470, and as such, has the authority to hire auditors, or other necessary employees exclusive of any governmental authority exercised by the board of county commissioners in which the county hospital is located. See Nevada Attorney General's Opinion No. 403, May 5, 1967; and Nevada Attorney General's Opinion No. 43, September 15, 1971.

In contrast to the governmental authority exercised by a board of county hospital trustees, a board of county commissioners exercises a separate governmental authority, which is generally defined in Chapter 244, Nevada Revised Statutes. In addition, Chapter 428 of the Nevada Revised Statutes empowers a board of county commissioners to exercise additional governmental authority, respecting the care, support and relief of the poor, indigent, incompetent and those incapacitated by age, disease or accidents, who are lawfully resident within the county.

In view of the fact that a board of county hospital trustees and a board of county commissioners exercise separate and independent governmental authority, the prohibition imposed on a board of county hospital trustees in Chapter 450 of Nevada Revised Statutes from compensating county hospital staff physicians for treatment of indigent patients admitted to the hospital does not expressly bare the payment of compensation to county hospital staff physicians pursuant to any "other governmental authority," including that exercised by a county

commission. Admittedly, there is reason to believe that the Nevada Legislature considered the Nevada S.A.M.I. program as an example of a compensation program by which physicians could be compensated within the meaning of NRS 450.440, subsection 3, as discussed in Attorney General's Opinion 79-18. However, the statute does not restrict county hospital physicians to this particular program.

Because the controlling statutes expressly provide for compensation to physicians in certain circumstances, as explained above, holdings in cases like State ex rel. State Board of Medical Examiners, et al. v. Clausen, 146 P. 630 (Wash. 1915) cited in your letter of November 2, 1979 must be viewed in the context of the statutes construed therein. In the Clausen case, the Attorney General of the State of Washington and the several prosecuting attorneys in that state were by statute designated as the legal representatives of the board of medical examiners, and the Washington Supreme Court concluded that these officials were the only persons who could lawfully be paid for the "necessary" legal work of the Washington State Board of Medical Examiners. The attempt by the board to employ private counsel, based on the board's finding that private legal services were necessary for the successful performance of their statutory duties, was invalidated by the court. The Washington court did note that if certain legal officers had not been constituted by statute as the legal representatives of the board of medical examiners, then the board would have had the implied power to use such means as were reasonably necessary to carry out its legal responsibilities, including the hiring and paying of private legal counsel with state funds. Clearly, the circumstances involved in Clausen are inapposite to those involving county hospital staff physicians in Nevada; and the governmental authority of the county commission to act in this matter must be examined in light of the statutes empowering the commission to provide medical aid to indigent persons in the county, as has been discussed above.

In your letter of November 2, 1979, you set forth a set of hypothetical facts involving a "concerted job action" by staff physicians at the county hospital for the purpose of exerting pressure on a board of county commissioners to provide compensation to said physicians for rendering professional services to indigent hospital patients, notwithstanding the rules and regulations of the board of county hospital trustees requiring said staff physicians to provide said medical care without compensation. It is a well-established rule that any contract which has a tendency to cause public officials to violate or neglect their duty is contrary to public policy and therefore illegal. See Grismore on Contracts, Revised Edition, Section 290, page 497 (1965). Furthermore, any bargain which has a tendency to cause a person who is subject to a private duty to violate that duty is equally obnoxious to the law. See Grismore on Contracts, supra, at page 498.

In view of these general legal principles, this office concurs in your assessment that a blatant attempt by a group of hospital physicians to pressure a board of county commissioners to enter a contract for compensation for the clear purpose of circumventing any public or private duties owed to another governmental authority, such as the board of county hospital trustees, would be of questionable validity. Any type of duress or unconscionable conduct evident in this situation would not be favored by the courts. Thus, any finding of "necessity" in these circumstances would obviously have to be based on facts other than the :concerted job action" by the staff physicians desiring to receive compensation. It would have to depend on other facts establishing a genuine need for medical care not otherwise available in the county, including an evaluation of the financial capability of the county to meet such need.

CONCLUSION—QUESTION ONE

NRS 428.090, subsection 3, which is not limited by NRS 450.440, subsection 3, indicates that a board of county commissioners does have legal authority to provide medical assistance to eligible indigent patients, including payments to physicians for the provision of medical care, provided such expenses are found by the board of county commissioners to be "necessary" to

provide medical aid to indigent persons in the county. In exercising this authority, the county commission should take into consideration (1) the need of the indigent persons in the county for the medical aid to be provided by such payments; (2) the legality of any contract by which compensation is to be paid; (3) the availability of funds; and (4) if applicable, the nature of any emergency declared by the county commission to provide additional funds of this purpose. In this connection, the county commission should consider any circumstances constituting duress or an improper attempt by staff physicians at a county hospital to circumvent the rules, regulations, and by-laws of the county hospital trustees requiring said staff physicians to treat indigent medical patients without compensation before entering into any agreement to provide compensation. Courts do not favor agreements intended to allow persons to violate or neglect their public or private legal duties. However, the ultimate determination of whether or not a compensation program is "necessary" to provide medical aid to indigent persons lies within the governmental discretion of the county commission, taking all pertinent facts and circumstances into account.

QUESTION TWO

Is the standard of "necessity" rather than "just and equitable" the correct legal standard in determining whether compensation should be paid to staff physicians for services rendered indigent patients in the county hospital?

ANALYSIS

As noted in the analysis to question one, a finding by the county commission that a physician compensation program is "necessary" to provide medical aid to indigent patients is a proper interpretation of NRS 428.090, subsection 3, because such a finding would assure the public generally that any expenditure of public moneys in this manner if for a proper public purpose and that such a program does not duplicate other available State aid absolving the county commission of the responsibility of providing medical care in accordance with NRS 428.090, subsection 4.

Accordingly, this office concurs in your analysis of this question in your letter of November 2, 1979 to the extent that the standard of "just and equitable" refers to the standard of the medical care to be received by the indigent person and not the standard by which compensation is to be paid to the medical care provider. This interpretation is consistent with the necessarily implied powers delegated to a board of county commissioners in Chapter 428 of the Nevada Revised Statutes to provide adequate medical aid to persons coming within the purview of that chapter.

CONCLUSION—QUESTION TWO

A standard of "necessity" and not "just and equitable" is the correct standard in determining whether compensation should be paid to staff physicians for services rendered to indigent patients admitted to a county hospital for treatment.

QUESTION THREE

Please identify the source of funds for any compensation of county hospital staff physicians providing professional services to indigent patients presenting themselves for treatment at the county hospital, assuming there is legal authority for such an expenditure.

ANALYSIS

NRS 428.050 authorizes a board of county commissioners to levy an ad valorem tax for the purposes of providing aid and relief to those persons coming within the purview of said chapter. Subsection 2 of this statute provides that no county may expend or contract to expend for purposes of such aid and relief a sum in excess of that provided by the maximum ad valorem levy set forth in subparagraph 1 of the statute, together with such outside resources as it may receive from third persons, including, but no limited to, expense reimbursements, grants in aid or donations lawfully attributable to the county indigent fund.

This office concurs in your legal evaluation that the aforesaid county indigent fund is an appropriate source of funds for any expenditures authorized by the board of county commissioners to provide for medical aid to indigent persons. As you have noted in your letter of November 2, 1979, the county indigent fund cannot be augmented by interfund transfers, short-term financing, or transfers form the contingency fund unless there is a declaration of an emergency by the board of county commissioners, based on the finding that the health of the poor is placed in jeopardy and there is a lack of money to provide necessary medical care pursuant tot he provisions of Chapter 428, Nevada Revised Statutes.

This office places great significance on the language in subsection 3 of NRS 428.050 that gives a board of county commissioners the discretion to determine whether or not the health of the poor is placed in jeopardy and there is a lack of money to provide necessary medical care such that would warrant the declaration of an emergency. Assuming such a finding could be made, the statute appears to give the board of county commissioners legal discretion to provide additional funds for medical care from whatever resources may be available. This office concurs that the purpose of expenditures from the county indigent fund must be designed to directly aid the destitute. However, if it becomes necessary to aid the destitute by arranging for compensation to physicians to provide medical aid, the board of county commissioners appears to have the legal authority to make whatever adjustments are necessary in the county indigent fund to meet the declared emergency.

CONCLUSION—QUESTION THREE

The county indigent fund established pursuant to the authority contained in NRS 428.050 would be an appropriate source of funds to pay expenses necessary to provide medical aid to indigent persons, including compensation of physicians. However, any augmentation of the county indigent fund to pay unbudgeted and unanticipated medical expenses must be preceded by the declaration of an emergency based on a determination by the county commission that the health of the poor is placed in jeopardy and there is a lack of money to provide necessary medical care, pursuant to NRS 428.050, subsection 4.

In your letter of November 2, 1979, you indicated that a fourth question pertaining to the legal authority to amend the budget of the board of county hospital trustees for the present and succeeding fiscal years pursuant to subsection 6 of Section 14, of Chapter 593, Statutes of Nevada 1979 to account for any additional unbudgeted expenditures that would be required to compensate the county hospital staff physicians has been substantially mooted by Attorney General's Opinion 79-18. Accordingly, this office considers this request to be withdrawn and no response is necessary.

Though immaterial to an analysis of the questions set forth above, this office conducted an informal survey of the 15 counties in Nevada other than Clark and Washoe counties, to ascertain whether or not any other board of county commissioners had in fact exercised its authority to provide medical aid to indigent persons by entering agreements to compensate physicians for providing medical care. Practices differ widely from county to county. However, six counties apparently have authorized payments to be made in some form to physicians who treat both indigent and nonindigent patients admitted to the county hospital for medical assistance. It is not known under what particular facts an circumstances each of the boards of county commissioners of the counties in question have determined to establish a compensation program. However, the fact that some counties have decided such programs are necessary to provide medical care for indigent persons tends to affirm the conclusion of this office that the language contained in NRS 450.440, subsection 3, coupled with the general enabling legislation in NR 428.090, subsection 3, does empower the board of county commissioners to at least consider what is necessary medical aid or indigent persons in each particular county of Nevada. However, this office would again emphasize that nothing in this opinion should be construed as compelling a county commission to consider such a program.

In sum, this office reiterates its previous opinion that only upon a finding that compensation for physicians treating indigent patients admitted to the county hospital for treatment is "necessary" is there legal authority for the board of county commissioners to provide such compensation. Such a finding must take into consideration the need for medical aid to be provided as a result of the compensation program, the legality of any proposed agreement or contract by which compensation is to be paid, the availability of funds in the county indigent fund, and the nature of the emergency requiring the provision of additional funds to the county indigent fund to provide necessary medical care to indigent persons of the county by means of any such compensation program.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 79-19 Nevada Tahoe Regional Planning Agency (NTRPA)—Review of Gaming Construction Projects and Enlargement of Gaming Area With Respect to Environmental Impact—Current Role of NTRPA in Lake Tahoe Basin—NTRPA currently has the responsibility to review applications submitted to said agency by local governments involving construction projects to determine if such projects would enlarge permitted public areas within existing or approved gaming establishments, and to consider the environmental impact and effect to certain construction projects. NTRPA may not allow expansion of public areas in which gaming may be permitted contrary to the provisions of S.B. 323, Chapter 287, Statutes of Nevada 1979, and may only exercise the powers granted to NTRPA by A.B. 513, Chapter 574, Statutes of Nevada 1979, when all the provisions of said statute are in full force and effect.

CARSON CITY, September 13, 1979

MR. KEN KJER, *Chairman, Nevada Tahoe Regional Planning Agency,* Nye Building, Room 213, 201 South Fall Street, Carson City, Nevada 89710

DEAR MR. KJER:

This is in response to your letter of June 12, 1979, in which you asked several questions concerning the duties and responsibilities of the Nevada Tahoe Regional Planning Agency (NTRPA) in relation to legislation enacted by the 1979 Nevada Legislature, to wit: S.B. 323, Chapter 287, Statutes of Nevada 1979, and A.B. 413, Chapter 574, Statutes of Nevada 1979. A review of the aforementioned statutes has led to the following analysis and conclusions:

QUESTION ONE

Does NTRPA still have the responsibility to review gaming projects for their environmental impact as required by NRS 278.812 in view of the provision of S.B. 323, Chapter 287, Statutes of Nevada 1979?

ANALYSIS

In order to respond to your first question, it would be helpful to review the relevant statutes of the 1979 Nevada Legislative Session as they affect the Nevada Tahoe Regional Planning Agency (NTRPA) in relation to the preexisting statutory duties of this agency. One of these

statutes, A.B. 503, Chapter 575, Statutes of Nevada 197, would amend the TRPA Compact and would not change NTRPA's preexisting duties. However, if A.B. 503 does not become legally effective, S.B. 323, Chapter 287, Statutes of Nevada 1979 and A.B. 513, Chapter 574, Statutes of Nevada 1979, and A.B. 513, Chapter 574, Statutes of Nevada 1979, if fully implemented, together will greatly change the role and responsibilities of NTRPA in connection with the planning and regulation of land use, transportation, conservation of natural resources, recreation, and public services and facilities in that portion of the Lake Tahoe Basin situated in the State of Nevada.

Prior to the enactment of S.B. 323 and A.B. 513, the duties and responsibilities of NTRPA were largely restricted to reviewing and approving or disapproving (with respect to environmental impact) applications referred from local governments, which had been submitted to and approved by local governing authorities in connection with the "development and construction" of any business or recreational establishment required by law to be individually licensed by the State of Nevada. See NRS 278.812 and 278.824, subsection 1. Obviously, recreational establishments licensed by the State would refer to gaming licensees. However, even this authority was limited by statute, so that NTRPA could not exercise any of the authority, powers and functions granted to the Tahoe Regional Planning Agency. See NRS 278.824, subsection 2.

Section 20 of A.B. 513, Chapter 574, Statutes of Nevada 1979 repeals NRS 278.812 and 278.824, *when said Section becomes effective*. Section 24 of A.B. 513 indicates that Section 20 (repealing NRS 278.812 and 278.824) becomes effective upon a proclamation by the Governor of the State of Nevada either that the State of California has withdrawn from the Tahoe Regional Planning Compact or the Governor of the State of Nevada has found that the Tahoe Regional Planning Agency has become unable, for lack of money or for any other reason, to perform its duties or to exercise its powers as provided in the TRPA Compact. See Section 24, A.B. 513, Chapter 574, Statutes of Nevada 1979. As of the date of this Opinion, no proclamation has been issued by the governor of the State of Nevada, activating Sections 1 through 23 of Chapter 574, Statutes of Nevada 1979; and accordingly, neither NRS 278.812 nor 278.824 have been repealed. Until such a proclamation is issued, NTRPA will be limited to exercising the powers specified in NRS 278.812 through 278.826 prior to the 1979 Nevada legislative session, except as these powers were modified by S.B. 323, Chapter 287, Statutes of Nevada 1979, effective on May 4, 1979.

S.B. 323, Chapter 287, Statutes of Nevada 1979, amends Chapter 278 of the Nevada Revised Statutes by restricting gaming in the Nevada portion of the Lake Tahoe Basin. The statute accomplishes this objective in two ways: (1) limiting the area which may be open to public use (as distinct from that devoted to private use of guests and exclusive of any parking area) within any structure housing gaming under a nonrestricted license to the area existing or approved for public use as of May 4, 1979; and (2) limiting gaming activities conducted pursuant to a restricted gaming license (that are not incidental to the primary use of the premises of a gaming license issued to a nonrestricted gaming establishment on a seasonal basis to the extent permitted by such a gaming license issues before January 1, 1979. See Section 5, S.B. 323, Chapter 287, Statutes of Nevada 1979, approved May 4, 1979.

With respect to the enforcement of the limitations contained in S.B. 323, the duties of NTRPA (the "agency" referred to in said statute) appear to be confined to reviewing applications for certain construction activities involving structures housing gaming in the Lake Tahoe Region and approving same only to the extent permitted by said statute. NTRPA has been given no express authority to enforce the statutory limitations on licensed gaming activities, in the Tahoe region, which activities are subject to the exclusive jurisdiction and control of the Nevada Gaming Commission and the state Gaming Control Board. See NRS 463.140.

The duties of NTRPA stated in S.B. 323 are as follows:

1. It cannot permit the construction of any structure to house gaming under a nonrestricted

licenses not existing or approved on or before January 1, 1979, or the enlargement in cubic volume of any such existing or approved structure. See Section 5, subsection 1(a), Chapter 287, Statutes of Nevada 1979.

2. It must determine whether to approve any permit issued by a local government in connection with any external modification of any structure housing gaming under a nonrestricted license, provided the area within such structure that is open to public use is limited to the area existing or approved for public use on May 4, 1979. See Section 5, subsection 1, Chapter 287, Statutes of Nevada 1979.

3. It cannot permit restaurants, convention facilities, showrooms or other public areas to be constructed elsewhere in the Nevada portion of the Tahoe region outside any structure housing gaming in order to replace areas existing or approved for public use in such structure on May 4, 1979. See Section 5, subsection 1, Chapter 287, Statutes of Nevada 1979.

4. It may permit a structure housing licensed gaming to be rebuilt or replaced to a size not to exceed the cubic volume and land coverage existing or approved on May 4, 1979. See Section 4, subsection 2, Chapter 287, Statutes of Nevada 1979.

5. It must consider individually every application referred to the agency created by NRS 278.780 to 278.828, inclusive, and sections 4 to 6 of Chapter 287, Statutes of Nevada 1979, as to its effect on the facilities necessary for people and traffic and whether or not the granting of such application would exceed the capacity of the environment to tolerate development in those areas under the jurisdiction of NTRPA. See NRS 278.780 and Section 1, subsection 6, Chapter 287, Statutes of Nevada 1979.

Significantly, nothing in the language contained in S.B. 323 (Chapter 287, Statutes of Nevada 1979) indicates that the duties and responsibilities of NTRPA set forth in NRS 278.812 to 278.826 have been modified or rescinded. In fact, as noted above, Section 1 of S.B. 323 reenacts NRS 278.780, subsection 6, requiring NTRPA to consider every application individually as to environmental impact, which is referred to the agency under authority of NRS 278.780 to 278.828, inclusive, and Section 4 to 6 of S.B. 323. Accordingly, within the limits imposed on the construction and with respect to the expansion of gaming activities within structures being operated pursuant to a nonrestricted gaming license, extensive discussions occurred in the legislative committees of the 1979 Nevada Legislative that considered S.B. 323. AS initially introduced, S.B. 323 required approval from NTRPA for the expansion of gaming or remodeling of any structure housing gaming. Se First Draft of S.B. 323, page 2, lines 29, 30. The Nevada Senate adopted Amendment No. 405 on March 28, 1979, amending S.B. 323 so that NRTPA approval was required for any locally issued permit respecting “external modification” of a structure housing gaming. This version was retained in the bill as eventually passed. See Chapter 287, Statutes of Nevada 1979, Section 5, subsection 1. Records of the legislative history concerning this amendment indicated that some legislators interpreted the requirement of NTRPA approval for “external modification” as exempting from NTRPA jurisdiction the approval of internal remodeling or expansion of gaming within the permitted public area of a gaming establishment. For example, see Minutes of Nevada Senate Committee on Natural Resources of March 22 and 26, 1979. Indeed, nothing on the face of the language of Chapter 287, Statutes of Nevada 1979, indicates that the expansion of gaming and related activities in areas open to the public use which does not involve a construction project is subject to NTRPA review and approval. For that mater, NRS 278.812 likewise limits NTRPA’s jurisdiction to approving “development or construction” of gaming establishments.

If, however, the expansion of gaming activities involves an external modification of a gaming structure, the enlargement of public use areas (as distinct from private use areas) or the replacement of any restaurant, convention facility, showroom, or other public use area, NTRPA is not relieved from the duty of reviewing any application submitted to it by a local governing authority for approval in connection with such a construction project. In fact, the only method identified in NRS 278.812 and Chapter 287, Statutes of 1979, by which NTRPA can exercise its

jurisdiction to enforce the mandates of said statutes is to review an application for construction activity submitted to it from a local government and to determine whether or not to approve same in accordance with the legal requirements specified for the project in question. This conclusion is further supported by the language of NRS 278.780, which was reenacted in S.B. 323, Chapter 287, Statutes of Nevada 1979. Section 1 of S.B. 323 amends subsection 6 of NRS 278.780 by referring to Sections 4 to 6 of S.B. 323 and then reiterating the requirement of NTRPA must consider individually every application referred to the agency with respect to the environmental effect of the project described in said application.

Therefore, even though approval from NTRPA has not been required in Section 5 of S.B. 323 for any modifications of a structure housing gaming that are not external, NTRPA has not been relieved of the responsibility of reviewing and considering applications for construction projects referred to it by local governing authorities. Upon receipt of such an application, NTRPA would first have to determine whether the application involves a construction project for which NTRPA approval is required. If NTRPA finds that the project does *not* involve an external modification or the expansion or replacement of a public use area (including any such area contained in a structure that was existing or approved on January 1, 1979), or the type of "development or construction" that NTRPA has previously reviewed pursuant to NRS 278.812, no further action would be required. If, on the other hand, NTRPA finds that the project involves any of these items, it must consider both the restrictions in S.B. 323 and the environmental factors noted in NRS 278.780 before approval can be given.

In determining whether or not a project constitutes the "development or construction" of a gaming establishment within the meaning of NRS 278.812, reference can be made to past projects reviewed and approved by NTRPA to determine how the agency has construed the meaning of this statute. A court would follow this construction unless there were compelling indications that it was wrong. See People of the State of California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 219 (9th Cir. 1975). In this connection, our office has been advised that NTRPA has reviewed and approved certain construction projects involving internal remodeling of gaming establishments, pursuant to its authority under NRS 278.812. In addition, NTRPA should give some consideration to the legislative findings contained in NRS 278.780, which were reenacted by S.B. 323, in determining whether a particular "development or construction" project is subject to NTRPA's jurisdiction. These findings emphasize the need to maintain an equilibrium between the Tahoe region's natural endowment and its manmade environment. They further emphasize that in order to enhance the efficiency and governmental effectiveness of the region, NTRPA was established to exercise "effective" environmental controls in carrying out its statutory mandates. Accordingly, the duties of NTRPA under both NRS 278.812 and S.B. 323 should be construed in a manner that is consistent with the State's legislative objective of exercising effective environmental controls in the Tahoe region under NTRPA's jurisdiction. Under such an interpretation, a project that involves construction pursuant to a locally issues permit that would expand an area within permissible limits and that could have an adverse environmental impact may be subject to NTRPA's authority to review and approve the project, if the agency has determined it is necessary to exercise effective environmental controls in the Tahoe region.

CONCLUSION—QUESTION TWO

It is the opinion of this office that NTRPA still has the authority and responsibility to review certain construction projects that enlarge a gaming area within a structure housing licensed gaming, through enlargement of gaming activities per se within the permitted public area and cubic volume of a gaming establishment may not require NTRPA approval. NTRPA approval is required in connection with any external modification of such a structure, and NTRPA is prohibited from approving any project that expands or replaces a public use area within a gaming establishment. Any other application for development or construction submitted to the agency for

approval must first be reviewed by the agency to determine if its approval is required, and if the agency finds such approval is required, it must then consider the environmental impact of the project in the same manner as NTRPA has reviewed other projects submitted to it pursuant to NRS 278.812 and NRS 278.780. The required review of NTRPA would occur after a local authority has approved and referred an application for any development or construction project involving a gaming establishment to NTRPA.

QUESTION THREE

What is the current role of NTRPA? Does it have any specific authority to review projects that include uses that are licensed by the State (i.e., unrestricted gaming licenses), or is NTRPA's authority limited to monitoring current facilities to see they do not increase their cubic volume or expand their public area that existed on the effective date of S.B. 323, to wit: May 4, 1979?

ANALYSIS—QUESTION THREE

In the analysis to question one above, a list of the duties and responsibilities of NTRPA pursuant to S.B. 323 are set forth, concerning various activities related to structures housing gaming in the Nevada portion of the Lake Tahoe region. In addition, NTRPA still as the responsibility of reviewing applications for development or construction of any gaming business or recreational establishment referred to NTRPA by any local authority, as discussed in the Analysis of question two above. Accordingly, under current law NTRPA still retains a specific, though limited, role in the review of construction projects involving structures that house gaming activities in the Nevada portion of the Lake Tahoe region. It has no authority to review or regulate gaming activities occurring inside such structures.

If sections 1 through 23 of A.B. 513, Chapter 574, Statutes of Nevada 1979 go into full legal force and effect, NTRPA will assume a much greater role in the Nevada portion of the Lake Tahoe region. However, since this statute is not yet fully effective, the current role is best defined in NRS 278.812 to 278.826, as modified by S.B. 323 in the manner discussed above.

In preparation for carrying out the provisions of S.B. 323, you have indicated that NTRPA has requested documentation from each holder of an unrestricted gaming license in the Nevada portion of the Lake Tahoe region that would supply the agency with information pertaining to (1) the total cubic volume of each gaming facility; and (2) the square footage dedicated to hotel guests and parking facilities. You have asked whether or not this approach would meet the requirements and intent of S.B. 323 to identify "public areas." Unfortunately, an adequate response to your question would turn on the partucular [particular] facts and circumstances pertaining to a specific gaming establishment, which is beyond the scope of this opinion. However, the language contained in S.B. 323 itself gives some indication of the information that may be required by NTRPA to carry out the statute's provisions in connection with an application for construction involving a structure housing gaming. Such information would include:

1. The cubic volume of any existing or approved structure to house public areas in which gaming may be conducted under a nonrestricted gaming license on January 1, 1979.
2. the cubic volume of area within any structure housing gaming under a nonrestricted license used for restaurants, convention facilities, showrooms, or other public areas, which would permit the enlargement of gaming and related activities within the structure in question.
3. The amount of land coverage encompassed by any structure housing licensed gaming.

You will note that S.B. 323 does not contain a definition of "structure" or "licensed gaming establishment" within the meaning of this statute. However, references in the statute to a "structure housing gaming" and "gaming establishment" certainly appear to refer to any business or activity licensed by the State of Nevada in accordance with the applicable statutes and regulations that require a person or legal entity to obtain a gaming license to engage in any gaming or parimutuel wagering within the State of Nevada. A "licensed gaming establishment" is

defined in Chapter 463 of Nevada Revised Statutes to mean "any premises licensed pursuant to the provisions of this Chapter wherein or whereon gaming is done." See NRS 463.0118. Since gaming licenses issued by gaming authorities in Nevada are intended to permit regulated gaming activities to occur on or in certain designated premises, the structure in which Nevada gaming authorities have indicated their intent to permit a particular licensee to engage in gaming would be the "structure" or "gaming establishment" within the meaning of S.B. 323.

Accordingly, in the event NTRPA receives an application for approval of any development or construction in connection with a gaming establishment and the extent of the public area to be included in the structure housing gaming must be determined, officials of the State Gaming Control Board may be able to assist NTRPA or its staff in defining or ascertaining the limits of the structure within the meaning of S.B. 323 insofar as licensed gaming activities are concerned. Once these limits are established and NTRPA obtains the information noted above, it should then be in a position to carry out the provisions of S.B. 323.

CONCLUSION—QUESTION THREE

Until A.B. 513, Chapter 574, Statutes of Nevada 1979 becomes legally effective upon the issuance of a proclamation by the Governor of the State of Nevada, the duties and responsibilities of NTRPA are set forth in NRS 278.812 to 278.826, as modified by the provisions of S.B. 323, Chapter 287, Statutes of Nevada 1979. The public area encompassed by a structure housing gaming within the meaning of S.B. 323 should be determined by NTRPA in coordination with the Nevada State gaming authorities that have licensed the gaming being operated on the premises.

We hope the above has adequately responded to your inquiries.

Respectfully submitted

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 79-20 Sheriffs: Additional Compensation for Ex Officio Coroner Duties Not Authorized. A sheriff who is ex officio coroner is not entitled to additional compensation for the coroner duties although he is entitled to allowances for travel and subsistence expenses necessarily incurred in the performance of his coroner duties.

CARSON CITY, October 2, 1979

THE HONORABLE JOHN S. HILL, *Churchill County District Attorney*, 73 North Maine Street, Fallon, Nevada 89406

DEAR MR. HILL:

You have requested an opinion as to whether sheriffs who are ex officio coroners are entitled to additional compensation for their coroner duties.

QUESTION

Chapter 634, 1979 Statutes of Nevada provides that all sheriffs in this state are ex officio coroners, except in those counties which by ordinance have created the office of coroner. Is a sheriff entitled to receive additional compensation for performing the duties of ex officio coroner?

ANALYSIS

Compensation for the office of sheriff is set by the Legislature. Nev. Const. Art. 4, § 32, NRS 245.043. The Legislature's power over the establishment of salaries of certain county officials, of which the sheriff is one, is conclusive and cannot be delegated. Attorney General's Opinion 214, dated July 12, 1977; cf. NRS 245.043. The Legislature has provided that, with an exception not here relevant, the salaries set forth in RS 245.043 "are in full payment for all services required by law to be performed." See, Attorney General's Opinion 214, supra; Attorney General's Opinion 146, dated September 26, 1973.

Except for allowances for travel and subsistence expenses, Chapter 634 makes no provision for additional compensation for a sheriff-corner. It is therefore concluded that a county sheriff is entitled to no additional compensation for ex officio duties as coroner.

CONCLUSION

A sheriff who is ex officio coroner is not entitled to additional compensation for the coroner duties, although he is entitled to allowances for travel and subsistence expenses necessarily incurred in the performance of his coroner duties.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By JOHN C. DE GRAFF, *Deputy Attorney General, Criminal Division*

OPINION NO. 79-21 Peace Officer Status of Washoe Airport Authority Police Service—(1) Members of a security force employed by the Airport Authority would not be peace officers within the definitions of NRS 169.125 and would not have the arrest powers set forth in NRS 171.124 absent express conferment of peace officer status by the Legislature. Section 10, subsection 13, Chapter 474, Statutes of Nevada (1977) does not contain such an express conferment of peace officer status nor do any other statutory provisions. (2) The Chief of Police of the City of Reno does not have the authority to deputize any member of a police service created by the Airport Authority for the purpose of making them peace officers.

CARSON CITY, October 12, 1979

THE HONORABLE CALVIN R. X. DUNLAP, *Washoe County District Attorney*, P.O. Box 11130, Reno, Nevada 89510

Attention: JOHN J. KADLIC, *Deputy District Attorney, Counsel for the Washoe County Airport Authority*

DEAR MR. DUNLAP:

You have requested an opinion concerning the ability of the Washoe County Airport Authority (hereinafter referred to as "Authority") to creat [create] its own police force at Cannon International Airport. Specifically, you have asked two questions:

QUESTION ONE

Would the members of a security force employed by the Authority be peace officers within the definitions of NRS 169.125, having the arrest powers set forth in NRS 171.124?

ANALYSIS—QUESTION ONE

Section 10, subsection 13 of Chapter 474, Statutes of Nevada (1977) at page 971 (Washoe County Airport Authority Act) provides that the Authority may "[p]rovide its own * * * police * * * service." The question is whether this language confers on the Authority the power to create a security force whose members have peace officer status under the provisions of Titles 15 and 16, NRS, the Criminal Code.

Concededly, there is ample evidence that the Legislature intended to grant broad powers upon the Authority to operate the airport. Section 10 of Chapter 474 provides that: "The Authority may do all things necessary to accomplish the purposes of this act. The Authority may, by reason of example and not of limitation: * * * 13. Provide its own * * * police * * * service." Furthermore, Section 2, subparagraph (d) of Chapter 474 requires that the provisions of the act be broadly construed to accomplish the stated purposes of the act, one of which is to operate an airport for a public and governmental purpose and as a matter of public necessity. The operation of an airport, beyond question, requires the maintenance of order and the keeping of the peace as a matter of public necessity. Additionally, Section 11 of Chapter 474 provides that the Authority has and may exercise all rights and powers necessary and incidental to specific powers granted, which specific powers do not limit any power necessary or appropriate to effectuate the purposes of the act.

The resolution of the issue was further complicated by the addition in the 1979 legislative session of Section 10, subsection 17 of Chapter 474 which grants the express power to the Authority to adopt regulations governing traffic offenses on airport property and makes violations of such regulations unlawful. It would seem that if the Authority already had broad police power, the addition of Section 10, subsection 17 would be unnecessary. From the apparent need to confer such express authority for relatively minor offenses, it may be argued that the Authority does not have broad police power. However, the Legislature may merely have desired to clarify the matter as, indeed, the grants of express powers are by way of example not of limitation. Thus, it is difficult to discern overall legislative intent in the matter. Moreover, the act does not expressly confer "peace officer" status as is typical elsewhere in the Nevada Revised Statutes. It is, therefore, necessary to turn to certain provisions of the criminal code to ascertain legislative intent.

NRS 169.125 provides that " 'Peace Officer' *includes:"* [emphasis added] certain designated individuals. A term whose statutory definition declares what it "includes" is usually a term susceptible of enlargement and not of limitation. "It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated." 2A Sutherland Statutory Construction (4th ed.) § 47.07 at page 82.

NRS 169.125 identifies twenty-six categories of law enforcement personnel as being peace officers. Of the twenty-six categories, fourteen restrict the scope of the exercise of the police power to the enforcement of particular statutes or carrying out prescribed duties. Illustrative of these restrictive categories are employees and personnel of the highway patrol, the gaming commission and board, the parks department, the fish and game department, legislative security officers, and employees of the department of prisons. Fish and game personnel, for example are peace officers only when "* * * exercising those enforcement powers conferred by Title 45 and Chapter 488 of NRS." (NRS 169.125, subsection 22). Legislative security officers are peace officers only "* * * when carrying out duties prescribed by the legislative commission." (NRS 169.125, subsection 23).

NRS 169.125 is essentially a collection point for identifying who are peace officers for the purposes of the criminal code. This section both reaffirms the peace officer status of certain persons where the original enabling legislation has already expressly granted that status (e.g. the

highway patrol, NRS 481.180), and it also *creates* peace officer status where the enabling legislation is silent on the matter (e.g. district attorney and attorney general special investigators, Chapters 228 and 252 NRS). There are omissions: for example, investigators for the Private Investigator's Licensing Board are expressly made peace officers in the enabling legislation, NRS 648.050, but are not enumerated in NRS 169.125. The Legislature historically has been cautious in creating the peace officer status either in enabling legislation or in NRS 169.125. When granted, it has been done in express terms. Additionally, where public corporations, such as the University of Nevada System, have been authorized to create police departments, such authorization for peace officer status has been expressly granted. NRS 396.325.

It should be noted that the term "police service" is susceptible of an interpretation other than one authorizing the creation of peace officer status for persons employed in the service or one establishing an independent airport police department. For example, the Authority may provide "police services" by contracting with a licensed private security organization, or by establishing its own security force, members of either having citizen arrest powers. The Authority may also contract with local law enforcement agencies to provide police services. It is not evident that the Legislature intended to authorize the creation of an independent airport police department. It is evident, though, that the Legislature intended to grant to the Authority the ability to provide its own police protection tailored to the unique circumstances of the operation of an airport. To construe the term "police services" as authorizing something less than full-blown peace officer status would not, therefore, frustrate legislative intent; rather such construction serves to give meaning to and furthers legislative intent.

It is, therefore, the opinion of this office that the term "includes," as used in NRS 169.125, is intended to limit the peace officer status to those persons enumerated therein, or if omitted, to those persons expressly granted peace officer status by enabling legislation. The legal doctrine of *ejusdem generis* is applicable here in the sense that the Authority's "police service" is simply not the same kind or class as those enumerated in NRS 169.125. See 2A Sutherland Statutory Construction (4th ed.) § 47.18 at pages 109-111.

A final question arises whether peace officer status is conferred by NRS 169.125, subsection 25 (Chapter 186, Statutes of Nevada 1979) at page 281), which grants security officers employed by a city or county such status when enforcing ordinances. The Authority is a quasi-municipal corporation and not a city or a county. Section 2, subparagraph (c), Chapter 474, Statutes of Nevada (1977) at page 969. In view of the caution and clarity with which the Legislature has approached the grant of peace officer status, and because of the use of the words "city or county" in NRS 169.125, subsection 25, this office must necessarily decline to alter the plain and unambiguous meaning of section 25 to include quasi-municipal corporations.

CONCLUSION—QUESTION ONE

Members of a security force employed by the Airport Authority would not be peace officers within the definitions of NRS 169.125 and would not have the arrest powers set forth in NRS 171.124 absent express conferment of peace officer status by the Legislature. Section 10, subsection 13, Chapter 474, Statutes of Nevada (1977) does not contain such an express conferment of peace officer status nor do any other statutory provisions in the Nevada Revised Statutes.

QUESTION TWO

Does the Chief of Police for the City of Reno have the power to deputize members of an Authority security force to confer on them the arrest powers set forth in NRS 171.124?

ANALYSIS—QUESTION TWO

The office of policeman or police patrolman was unknown at common law. Wherever such office exists, its is a creature of statute or municipal charter. 16 McQuillan, The Law of

Municipal Corporations, § 45.06a (3rd ed. 1979). A sheriff of a metropolitan police department is empowered by statute to appoint police officers, NRS 248.040, and any sheriff may appoint deputies, Article 4, Section 32 of the Nevada Constitution. An examination of the applicable statutes (Title 21, NRS) and the City Charter of Reno (Chapter 662, Statutes of Nevada (1971)) fails to disclose any authority for a nonmetropolitan chief of police to deputize members of the security force of a quasi-municipal corporation.

The charter provides for the appointment of a Reno chief of police at Section 1.090 who is charged with performing "* * * such duties as may be designated by the city manager and such other duties as may be directed by the city council." Section 1.100. Although the creation of a police department is without doubt within the authority of the charter, neither it, nor any ordinance or resolution of the city council known to this office authorizes the chief of police to deputize any members of a police service created by the Authority for the purpose of making them police officers. The conclusion therefore must be that this authority does not exist. As noted above, the Authority may contract with and use the officers and employees of the City of Reno in the performance of its functions so as to permit the Authority to provide police services by means of the Reno City Police Department.

CONCLUSION—QUESTION TWO

The Chief of Police of the City of Reno does not have the authority to deputize any member of a police service created by the Airport Authority for the purpose of making them peace officers.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By EDWIN E. TAYLOR, JR., *Deputy Attorney General, Chief, Criminal Division*

OPINION NO. 79-22 Taxation; Agricultural and Open Space Land; Deferral of Property Tax and Interest—New legislation deleting the calculation of interest provision for property taxes deferred on agricultural and open-space lands must be given prospective interpretation, and interest previously calculated continues to remain as lien against property.

CARSON CITY, October 29, 1979

MRS. JEANNE B. HANNAFIN, *Deputy Executive Director, Department of Taxation,* Capitol Plaza, 1100 East William Street, Carson City, Nevada 89710

DEAR MRS. HANNAFIN:

Chapter 361A of Nevada Revised Statutes provides for the deferral of property tax on agricultural and open-space lands which are retained in their pristine status. See NRS 361A.090. The several county assessors are legislatively authorized to assess agricultural and open-space lands at 35 percent of their respective values for that particular land use rather than assess each property at its full cash value as is normally required. NRS 361A.130, 361A.220. The difference between the property taxes calculated on a full-cash value assessment and those calculated on an agricultural or open-space value assessment is the property tax subject to deferral.

Within statutory limitations, this deferred tax is recaptured, with interest, pursuant to NRS

361A.280. Prior to its amendment by Chapter 184, 1979 Statutes of Nevada, this statute provided that the deferred tax plus interest became a perpetual lien against the property, enforceable in an adjusted amount whenever agricultural or open-space property was subsequently converted to a higher use.

Chapter 184 amended NRS 361A.280 to delete the interest provision. You have requested an opinion from the Attorney General concerning the legal effect to this amending legislation. Specifically, you have queried whether the interest calculated from July 1, 1976 to June 30, 1979, retains its lien status irrespective of the amending legislation and whether payment of the 1978-79 taxes during fiscal 1979-80 has any effect on the calculation of interest on the 1978-79 deferred taxes.

ANALYSIS

Because Chapter 184 deletes the interest provision in NRS 361A.280, you are concerned with the impact of the amending legislation on the status of the interest already calculated and attached as a perpetual lien against the identified property.

The legal issue presented by your inquiry pertains tot he retroactive application of legislation. It is the uniform law among the several states, and the consistent pronouncement from our Nevada Supreme Court, that absent legislative dictate to the contrary, retrospective interpretation of law is disfavored. In Riche v. Wadkins, 92 Nev. 631, 632, 555 P.2d 1232 (1976), our Nevada Supreme Court recently reiterated:

> the statute was silent as to its retroactive effect and we have long held that courts will not give retrospective interpretation to statutes unless the legislative intent that they do so is clearly manifested in the statute.

Likewise, in Clark County School District v. Beebe, 91 Nev. 165, 170, 533 P.2d 161 (1975), our Court held:

> There is nothing in the statute which indicates either expressly or impliedly that the Legislature intended that it be applied retrospectively. * * * Unless the contrary plainly appears, such statutes operate prospectively only.

Because Chapter 184 neither expressly nor impliedly authorizes retroactive application of its provisions, it must be given prospective interpretation only. Moreover, although retrospective application of new law is frequently given when the change effected by the legislation is procedural in nature, see Ellison Ranching Co. v. Bartlett, 53 Nev. 420, 426, 3 P.2d 151 (1931), the amending legislation here, by its deletion of the interest calculation provision in the former law, affects substantive not procedural matters and cannot be given retrospective consideration.

Therefore, it is the opinion of this office that commencing July 1, 1979, no interest may be calculated on the taxes deferred for property committed to agricultural or open-space use. The interest, however, previously calculated on the deferred taxes during the period July 1, 1976 to June 30, 1979 has continuing vitality and, with exception for statutory adjustments pursuant to NRS 361A.280, that interest must be collected at the time agricultural or open-space property is subsequently converted to a higher land use.

It is the further opinion of this office that interest is properly recorded against the liens for deferred taxes filed for the fiscal year 1978-79 irrespective that the property taxes calculated on the agricultural and open-space assessments are due and payable during the fiscal year 1979-80 when, pursuant to legislative amendment, no further interest may be calculated on deferred property tax.

NRS 361.483 specifies that property taxes for any particular fiscal year become due and payable on the “1st Monday of July” in the ensuing fiscal year, and further provides for payment

of these taxes in quarterly installments during that ensuing fiscal year.

The Legislature established the 1st Monday of July as merely the collection date for taxes accrued during the preceding fiscal year. Likewise, establishment of quarterly payment periods was merely designed for the financial convenience of the taxpayer. That the dates for payment of taxes occur in the ensuing fiscal year provides no basis for the retroactive application of new legislation, notwithstanding that the legislation itself becomes effective during that ensuing fiscal year.

CONCLUSION

It is the opinion of this office that in the absence of express or implied directory language, the amending legislation must be given prospective interpretation only and that subject to certain statutory adjustments, the interest calculated on deferred taxes between July 1, 1976 and June 30, 1979, inclusive, must be collected pursuant tot he provisions of NRS 361A.280 prior to its amendment, whenever agricultural or open-space land is subsequently converted to a higher land use.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By TUDOR CHIRILA, *Chief Deputy Attorney General, Tax Division*

OPINION NO. 79-23 Public Service Companies; Payment of Interest on Deposits—NRS 704.671 requires public service companies which are defined as public utilities to pay interest on deposits, but utilities owned by municipalities or general improvement districts are not public service companies nor public utilities as contemplated by NRS 704.671.

CARSON CITY, October 29, 1979

JOHN S. MCGIMSEY, ESQ., *Lincoln County District Attorney*, P.O. Box 555, Pioche, Nevada 89043

DEAR MR. MCGIMSEY:

This opinion is issued in response to your letter asking whether or not NRS 704.671 requires a utility owned by a city within Lincoln County and a utility formed under a general improvement district to pay interest on deposits. A consideration of the applicable statutes and case law has led to the following analysis and conclusion:

QUESTION ONE

What entities must comply with the provisions of NRS 704.671?

ANALYSIS—QUESTION ONE

NRS 704.671 states:

1. Every *public service company*, corporation or individual furnishing light and power, telephone, gas or water, or any of them, to the public shall pay to every customer from who any deposit has been required interest on the deposit in an amount equal to the average prime

rate plus 1 percent per annum from the date of deposit until the date of settlement or withdrawal of deposit. "Average prime rate" is the arithmetic mean of the range of interest rates in effect during the next preceding calendar year prior to the settlement date or the withdrawal date of the deposit. Where such deposit remains for a period of 1 year or more and the person making the deposit continues to be a customer or consumer, the interest on the deposit shall be either paid in cash to the depositor or applied on current bills for the use of the service provided by the *public utility*, as the depositor may desire.

2. Any *public utility* that fails, refuses or neglects to pay the interest provided in subsection 1 and in the manner required by subsection 1 is guilty of a misdemeanor. (Italics added.)

On the face of the statute, all "public service companies" are required to pay interest on deposits. However, nowhere else in Chapter 704 of NRS is the term "public service company" used nor is it defined. Neither is Nevada case law helpful.

Other states which use the term public service companies treat them like public utilities.

In Maryland, a public service company means a common carrier company, electric company, steam heating company, telegraph company, radio common carrier, water company, sewage disposal company, and/or any combination thereof. Md. Ann. Code art. 78, section 2. These same entities in one form or another fit the definitions of public utility as outlined in NRS 704.020.

In Pennsylvania, "[T]he term (public service company) includes a corporation which holds itself out to render service to the public for compensation." Pennsylvania Chautauqua v. Public Service Commission, 160 A. 225 at 226 (Pa. Supr. Ct. 1932).

The most extensive discussion of the nature of a "public service company" has been in Georgia where a court has indicated:

> A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in business sui generis, is immaterial. It is a public service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations, on account of the interest which the public has in the manner in which their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. * * * "One of the great requirements which the government demands of every institution impressed with a public interest, and one which is thrown over every citizen as a great and protective shield, is the duty to act impartially with all. They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted for others in like circumstances." Dunn v. Western Union Telegraph Co., 59 S.E. 189 at 190 (Ga.App. 1907).

The term "public service company" as used in NRS 704.671 is analagous to the term public utility, and as such, it must pay interest on deposits.

The history of NRS 704.671 leads us to the same conclusion. The requirement that utilities pay deposit interest was first established in 1933 Statutes of Nevada. Chapter 192. That legislation was entitled:

> An act requiring power and light and *utilities companies* requiring deposits for makers to pay interest on said deposits, providing a penalty for the violation thereof, and other matters relating thereto. (Italics added.)

Reference may be had to the titles of chapters and headings of sections in arriving at the intention of the Legislature in doubtful matters. State ex rel. Pacific Reclamation Co. v. Ducker, 35 Nev. 214, 127 P.990 (1912).

In Statutes of Nevada 1933, Chapter 192, utilities as discussed in the text of the act were referred to by the generic term "public service companies." So, even at the birth of the act the terms "public service company" and "utility" could be exchanged synonymously.

At present NRS 704.671 is entitled:

> *Public utility* required to pay interest on deposits made by customers and consumers; penalty. (Italics added.)

Furthermore, in ascertaining the Legislature's intention, resort must first be had to the words of the statute. Maynard v. Johnson, 2 Nev. 25, reversing 2 Nev. 16 on rehearing. The entire statute must be examined, giving effect, if possible, to all its parts, and endeavoring to harmonize them. Brooks v. Dewar, 60 Nev. 219, 106 P.2d 755 (1940). Indeed, the first step is to ascertain intent from the language of the statute, if possible, and when that is clear and unambiguous, the inquiry stops. Virginia and Truckee R.R. v. County Commissioners, 6 Nev. 68 (1870).

While the expression "public service companies" is undefined in NRS 704.671, the statute in the last sentence of subsection 1 has been amended since 1933 to state that interest may be applied on current bills for the use of service provided by the "public utility." Subsection 2 of NRS 704.671 provides sanctions only for a "public utility" which fails to comply. The conclusion to be derived from these two references is that the Legislature considers a "public service company" and a "public utility" as one and the same.

CONCLUSION—QUESTION ONE

While the phrase "public service companies" in NRS 704.671 is undefined by Chapter 704 of NRS, the term is synonymous with "public utilities" and it is "public utilities" which must pay interest on deposits.

QUESTION TWO

Are utilities owned and operated by municipalities and general improvement districts within the definition of "public utilities" for the purpose of applying the provisions of NRS 704.671?

ANALYSIS—QUESTION TWO

As defined by NRS 318.015, a general improvement district is a quasi-municipal corporation. The provisions of NRS 704.020 defining public utilities include corporations. NRS 704.030, exempting certain corporations, does not exclude general improvement districts or municipal corporations which own utilities.

However, this office has long held that the definitions of public utilities as stated in NRS 704.020 do not include municipally owned utilities. Attorney General's Opinion 732, March 11, 1949; Attorney General's Opinion 187, July 17, 1952; Attorney General's Opinion 99, December 12, 1963.

Specifically, in Attorney General's Opinion 732, March 11, 1949 the question of whether or not the Public Service Commission of Nevada had jurisdiction over Lincoln County Power District No. 1 was addressed. This office reasoned that the definition of public utility contained in section 6106, N.C.L. 1926 did not include municipal corporations. The same is true today. NRS 704.020. Furthermore section 6137, N.C.L. 1929 provided that a municipality was not required to obtain a certificate of public convenience when operating or maintaining a public utility. The same is true today. NRS 704.340. Since a general improvement district is quasi-municipal pursuant to NRS 318.015, it would also follow under this reasoning that a utility

owned by a general improvement district is outside the scope of NRS 704.020.

These views would also seen fit to specifically incorporate either municipalities or general improvement districts into the NRS 704.020 definition of public utilities in the years since Attorney General's Opinion 732, March 11, 1949 was issued and followed by this office in two subsequent opinions.

The legislation permitting the formation of general improvement districts was passed in 1959. 1959 Statutes of Nevada, Chapter 319. The only utility-like power given was that of acquiring sanitary sewer improvements. 1959 Statutes of Nevada, Chapter 319, page 463. The power to acquire water distribution facilities was granted during the next session of the Legislature. 1961 Statutes of Nevada, Chapter 281, page 464. A few years later general improvement districts were granted the right to acquire electric light and power improvements. 1967 Statutes of Nevada, Chapter 542, pages 1693-1694. During those years there was no reference to general improvement districts having any status similar to that of public utilities. But in 1967, sewer districts and water districts were placed under the jurisdiction of the Public Service Commission of Nevada with regard to rates charged and service and facilities furnished *in the same manner as public utilities* as defined in NRS 704.020. 1967 Statues of Nevada, Chapter 542, pages 1711-1712 (amending NRS 318.140 and NRS 318.144). Had the Legislature at this time considered general improvement districts as coterminous with the NRS 704.020 definition of public utilities, there would have been no nee dot reference the phrase "in the manner as public utilities."

During all those years and up to the present there has been absolutely no mention regarding the Chapter 704 public utility status of electric, light and power districts, although the Legislature could have included them at any item as it did in 1967 with sewer and water districts. Thus, it is reasonable to assume that except for water and sewer districts there was no such intent.

Ten years later the Legislature removed the "in the same manner as public utility" status which had been conferred in 1967 upon water and sewer utility" status which had been conferred in 1967 upon water and sewer districts. 1977 Statutes of Nevada, Chapter 293, page 542. Thus, the Legislature has expressed an intention that they not be subject to the provisions of NRS Chapter 704.

Finally, the issue of whether or not municipally-owned utilities are public utilities as defined by Nevada law has been addressed by the State's highest court. The court held in Ronnow v. City of Las Vegas, 57 Nev. 332, at 345-346, 65 P.2d 133 (1937), that the definition of the term public utility is confined to the particular classes of public utilities dealt with in the Public Service Commission Act and is not applicable to the term public utility or used in statutes which authorize cities to acquire, construct or establish public utilities.

CONCLUSION—QUESTION TWO

It is the opinion of this office that utilities owned by municipalities or general improvement districts are to included in the definition of public utilities as prescribed by NRS 704.020. Hence the provisions of NRS 704.671, which require the payment of interest on customer deposits by public utilities, do not apply.

SUMMARY

Since general improvement districts are quasi-municipalities and since the Legislature has remained silent on the public utility status of light and later exempting them, it follows that general improvement districts, like municipalities, cannot be brought under the NRS 704.020 definition of public utilities. Therefore, since only public utilities as defined in NRS 704.020 are subject to the provisions of NRS 704.671, general improvement districts and municipalities are exempt.

This conclusion is further bolstered by the provisions of NRS 704.340 which exempt municipalities from the requirement of obtaining a certificate of public convenience and

necessity which all public utilities must do pursuant to NRS 704.330.

To the extent Attorney General's Opinion 208, September 12, 1956, conflicts with this conclusion, it has since been tacitly overruled by Attorney General's Opinion 99, December 12, 1963. Attorney General's Opinion 208, September 12, 1956, found that the Nevada statute defining public utilities made no distinction between public utilities owned by private enterprise and those operated by municipalities. However, Attorney General's Opinion 99, December 12, 1963 specifically held that the definitions of public utility found in NRS 704.020 do not include municipally-owned utilities.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By HAMPTON M. YOUNG, JR., *Deputy Attorney General*

OPINION NO. 79-24 Unnecessary delay in bringing arrestee before magistrate—NRS 171.178 requires inquiry into circumstances leading to delay if an arrestee is not brought before magistrate within 72 hours of arrest. (1) The magistrate may release the arrestee from custody upon a finding of unnecessary delay. (2) The rule of the 72 hour inquiry does not apply to arrestees already admitted to bail or released on recognizance.

CARSON CITY, December 6, 1979

THE HONORABLE JOHN S. HILL, *Churchill County District Attorney,* 73 North Maine Street, Fallon, Nevada 89406

DEAR MR. HILL:

Your [You] have asked two questions concerning the 1979 amendment to NRS 171.178 which provides that it an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay and may release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

QUESTION ONE

Does the language 'the magistrate may release the person," as contained in NRS 171.178, subsection 3(b) authorize either the discharge of an arrestee from further prosecution or dismissal of a complaint if one has been filed?

ANALYSIS

NRS 171.178 requires that an arrested person be brought before a magistrate "without unnecessary delay." The purpose of the rule is to inform the accused of his constitutional rights and to assure that he is not left to languish in jail. See Brown v. Justice's Court, 83 Nev. 272, 428 P.2d 376 (1967).

The 1979 amendment added the following language at subsection 3. "If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate: (a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and (b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay." Chapter 589, 1979 Statutes of

Nevada at 1191.

While the willful failure of the prosecutor to comply with important procedural rules, or his conscious indifference to the, constitute grounds for habeas relief, see State v. Austin, 87 Nev. 81, 482 P.2d 284 (1971), Maes v. Sheriff, 86 Nev. 317, 468 P.2d 332 (1979), the language of NRS 171.178, subsection 3(b) speaks to "release" rather than dismissal of action or discharge of the arrestee from further prosecution.

The amendment of NRS 171.178 was introduced as S.B. 154 on January 30, 1979. When originally introduced, S.B. 154 provided: "If an arrested person is not brought before a magistrate within 24 hours after arrest, he must be released immediately."

S.B. 154, as originally introduced further provided: "If a complaint is not filed within 48 hours from the time of the initial appearance before the magistrate, the arrested person must be released from jail, and the preliminary examination date, if any, must be vacated."

The February 6, 1979, minutes of the Senate Judiciary Committee contain a report of the testimony of Senator Neal, the bill's sponsor. Senator Neal indicated that the purpose of the bill was to reduce the amount of time an arrestee has to wait in jail before a complaint is filed or the arrestee is brought before a magistrate. Senator Neal alluded to cases where people were incarcerated up to eight days without charges filed or appearance before a magistrate.

Testimony by others, and questions by committee members, indicate that there was general opposition to both the 24-hour time limit and the mandatory release provision.

When the bill was passed out of committee on February 21, 1979, the language that now appears in NRS 171.178, subsection 3 had been substituted for the requirement of a 24-hour appearance before a magistrate. The appearance had been eliminated completely. (The bill was subsequently amended in a manner not relevant to this analysis.)

The purpose of the original version of S.B. 154 was to define "unnecessary delay" in terms of a definite number of hours (24) and to provide a specific mandatory remedy when unnecessary delay occurred (release). The remedy mandated would have been release from custody only since it contemplated that the release would occur prior to a first appearance and prior to the invocation of judicial process.

By its amendment to S.B. 154, the Legislature rejected a specific definition of "unnecessary delay" in terms of hours. Instead, it substituted a 72-hour "trigger" that prompts an inquiry into the circumstances leading to the delay. The prosecution is afforded the opportunity to explain the circumstances of the delay, but the failure of the prosecuting attorney to offer any explanation at all, or one considered satisfactory by the magistrate, does not per se render the delay "unnecessary." The magistrate in the exercise of judicial discretion must make a finding that the delay was unnecessary before he may release the arrestee.

In its amendment of S.B. 154, the Legislature retained the remedy of the original version of the bill, release from custody, but declined to make release mandatory. The language of the amendment is permissive: "[T]he magistrate * * * *may* release the person * * *." Thus release is not mandatory under NRS 171.178 even if the delay was "unnecessary." Presumably, there may be other factors present in the case that might militate against release for delay, albeit unnecessary. In addition, there are other remedies available whereby an aggrieved arrestee may seek his release.

CONCLUSION—QUESTION ONE

The word "release" in NRS 171.178, subsection 3(b) contemplates release from custody only and does not mandate either the discharge of the arrestee from further prosecution or the dismissal of the complaint if one has been filed.

QUESTION TWO

Does the rule of the 72-hour inquiry apply only when the accused is in actual custody or does it also apply in situations where the accused is already admitted to bail or is released on

recognizance?

ANALYSIS

The amendment to NRS 171.178 addresses the statutory language "without unnecessary delay."

Subsection 5 of NRS 171.178, unchanged by the 1979 amendment except for a minor semantic adjustment not here relevant, establishes a separate standard for persons who are admitted to bail without having made a first appearance before a magistrate. See NRS 171.178, subsection 1 which provides in part "*Except as provided in subsections 5* and 6, a peace officer making an arrest * * * shall take the arrested person without unnecessary delay before [a magistrate] * * *." (Italics added.)

Subsection 5 provides: "[W]here the defendant can be admitted to bail without appearing personally before a magistrate, he muse be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter."

Rather than an appearance "without unnecessary delay," a defendant admitted to bail (and, a fortiori, released on recognizance) must appear before a magistrate "at the earliest convenient time thereafter." This standard connotes reference to the court's calendar and other factors, about which no opinion is expressed, which would establish a "convenient time" for the appearance.

CONCLUSION—QUESTION TWO

Since the 1979 amendment addresses only the standard of "unnecessary delay" which applies only to those in physical custody, the 72-hour inquiry does not apply to persons who are already admitted to bail or released on recognizance.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By JOHN C. DE GRAFF, *Deputy Attorney General, Criminal Division*

OPINION NO. 79-25 District Attorney and County Hospitals—Although a board of hospital trustees has the option, under NRS 450.260, to hire other counsel to collect hospital debts, district attorneys, under NRS 252.110, subsection 3, have the duty to otherwise collect such debts for county hospitals if a board of hospital trustees does not utilize its option to hire other counsel.

CARSON CITY, December 11, 1979

THE HONORABLE ROBERT J. JOHNSTON, *District Attorney*, P.O. Box 240, Ely, Nevada 89301

Attention: GARY D. FAIRMAN, ESQ., *Deputy District Attorney*

DEAR MR. JOHNSTON:

You have requested advice concerning an interpretation of NRS 252.110.

QUESTION

Does NRS 252.110 mandate the White Pine County District Attorney to prosecute the collection of delinquent patient debts for services rendered by a county hospital?

ANALYSIS

NRS 252.110 provides that:

> The district attorney shall:
>
> * * *
>
> 3. *Prosecute* all recognizances forfeited in the district court and *all actions for the recovery of debts*, fines, penalties and forfeitures *accruing to his county*. (Italics added.)

The authority for establishing county hospitals is found in Chapter 450 of NRS. Although the movement for establishing a county hospital may be initiated by a county's taxpayers, the enabling authority for the actual creation of the hospital is vested with the board of county commissioners, subject to voter approval of any bonds to be issued in support of the hospital. See NRS 450.010-450.050.

In addition, a board of county commissioners, upon the request of the board of hospital trustees, may also levy taxes for the maintenance and support of the county hospital. See NRS 450.240. With one exception, *all* moneys received by a county hospital must be deposited in the county treasury and credited to the hospital fund in the county treasury. Moneys can be paid out of the fund only upon warrants drawn by the board of hospital trustees upon authenticated vouchers of the hospital board, but only after approval of same by the county auditor. See NRS 450.250. An exception to the requirement that a hospital fund be maintained i the county treasury is found in subparagraph 3 of NRS 450.250. This provides that moneys received for a county hospital in counties of less than 20,000 population may be deposited in a separate account established and administered by the board of hospital trustees under NRS 354.603.

NRS 354.603 outlines the procedures for allowing county hospital boards in such counties to establish separate bank accounts outside the county treasury. However, NRS 354.603, subsection 1(c) requires the county hospital board to submit monthly reports listing all transactions for the account to the county treasurer and, at the request of the board of county commissioners, to give a full account and record of all moneys in the account. NRS 354.603, subsection 6 provides that the board of county commissioners may close the separate account and order the return of the funds to the county treasury if it determines the funds in the separate account are being misused or mismanaged.

NRS 450.200 provides that proceedings for the condemnation of property for the use of the county hospital are to be instituted and prosecuted by the board of county commissioners. NRS 450.220 provides that title to money, personal property or real property donated to the county hospital, although controlled by the hospital board, shall be vested in the county. NRS 450.500 provides that a board of county commissioners may convey a county hospital, or lease it, to a non-profit corporation under certain conditions.

All of the above-noted statutes indicate a statutory scheme establishing a county hospital as part of the responsibilities, operations and functions relating to county government. Thus, in a case to determine whether county hospitals were immune to suit, the Nevada Supreme Court indicated that a county hospital, because of a similar statutory scheme then in existence, was not an independent entity from the county with an independent authority to own property, have an income or raise money. McKay v. Washoe County General Hospital, 55 Nev. 336, 339, 341, 33 P. 755 (1934). In Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), the Supreme Court, after making a reference to a county hospital being established under Chapter 450 of NRS, concluded at page 23 that a county hospital:

> is a county institution established, owned, and supported by the county. The hospital *having no entity apart from the county* it must follow that the county is the party legally responsible for obligations of the hospital. (Italics added.)

The court also concluded that even though a board of county commissioners was without managerial control over a county hospital, this fact did not deprive the county of representation or control of the hospital. Hughey v. Washoe County, supra at 24.

Even the fact that the William B. Ririe Hospital, as the county hospital for White Pine County, maintains a separate account under NRS 450.250, subsection 3, does not separate the hospital from the responsibilities, operations and functions of county government since both the county treasurer and the board of county commissioners maintain close supervisions and review of the account under NRS 354.603, subsections 1(c) and 6. Although without managerial control, the county still has general representation and control over the account. Cf. Hughey v. Washoe County, supra at 24.

Thus, it is the opinion of this office that a debt owed the county hospital is a debt owed the county and the district attorney has a duty under NRS 252.110, subsection 3 to prosecute actions for the recovery of such a debts.

NRS 450.260 provides that a county hospital board shall have the power, by legal action, to collect claims due the hospital and the board is authorized to pay from the hospital fund all fees and expenses necessarily incurred in the collection of such claims. In interpreting this specific provision the Nevada Supreme Court held that NRS 450.260 did not make a county hospital an independent entity from the county capable of being sued in its own right apart from the county. Bloom v. Southern Nevada Hospital, 70 Nev. 533, 535, 275 P.2d 885 (1954). Instead, it would be the opinion of this office that NRS 450.260, especially through its authorization to pay for legal fees and expenses, gives the board of hospital trustees the option of hiring other counsel for the collection of its debts. However, it is also our opinion that the statute does not obligate the board to hire other counsel and, instead, the board may rely upon the mandatory provisions of NRS 252.110, subsection 3 which requires the district attorney to undertake such actions.

CONCLUSION

It is the opinion of this office that although a board of hospital trustees has the option, under NRS 450.260, to hire other counsel to collect hospital debts, district attorneys, under NRS 252.110, subsection 3, have the duty to collect such debts for county hospitals if a board of hospital trustees does not utilize its option to hire other counsel.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-26 CATV System—The Circumstances Under Which an Election is Required Before a CATV System May Be Issued a Franchise or a Certificate of Public Convenience and Necessity—Where a general improvement district provides television service in a county having a population of less than 100,000 approval of the qualified electors residing within the district is required before the Public Service Commission of Nevada may issue a certificate of public convenience and necessity or before a city or county may issue a franchise for operation of a CATV system in the same area. Where a general improvement district has been merged with county government.

CARSON CITY, December 11, 1979

WILLIAM MACDONALD, ESQ., *Humboldt County District Attorney,* Humboldt County Court House, Winnemucca, Nevada 89445

DEAR MR. MACDONALD:

You have asked whether approval of the qualified electors is required before the Public Service Commission of Nevada may issue a certificate of public convenience and necessity or before a city or county may issue a franchise for operation of a cable television installation ("CATV") system in an area formerly provided television service by a general improvement district and currently offered the same service by a county television department.

BACKGROUND

In 1976, the Humboldt County TV Maintenance District, a general improvement district formed to provide translator TV service to certain residents of Humboldt County and governed by the provisions of Chapter 318 of NRS, was merged into Humboldt County government as the Humboldt County TV Department. Since the time of the merger, the Humboldt County TV Department has served all the functions previously served.

Applications have recently been filed with city and county government and with the Public Service Commission of Nevada for authority to construct and operate a CATV system which would cover Winnemucca and a portion of the unincorporated area of Humboldt County, the same territory now provided translator service by the Humboldt County TV Department.

ANALYSIS

NRS 318.1194 reads as follows:

> 1. In any area where a general improvement district has been formed which exercises the powers conferred by NRS 318.1192, in a county having a population of less than 100,000, as determined by the last preceding national census of the Bureau of the Census of the United States Department of Commerce, no franchise may be granted under NRS 244.185, 266.305, 268.085 and 269.125 and no certificate of public convenience and necessity may be issued under chapter 711 of NRS, unless approved by the qualified electors of such district.
>
> 2. The board of county commissioners of the county where such a district is located shall order that the question of approval of such franchise or certificate be voted upon by the qualified electors of such district not less than 30 days nor more than 90 days after such franchise is approved by the county commissioners or notice is received of approval by the city council or of readiness to issue such certificate by the Public Service Commission of Nevada. If no regular election is to be held within the period prescribed in this subsection, the board of county commissioners shall provide for a special election; otherwise, the vote shall be held at the same time as such primary or general election. The general election laws of the state shall apply to any special election held under the provisions of this section.

The provisions of NRS 318.1192 confer upon a general improvement district the power to acquire television broadcast, transmission and relay improvements, to levy special assessments against real property specially benefited by these improvements and to fix rates and charges for the television services furnished by the district. The provisions of NRS 244.185, 266.305, 268.085 and 269.125 confer upon boards of county commissioners and city councils the power to grant franchises for the construction and operation of television installation systems so long as the is power is exercised in accordance with requirements of NRS 318.1194. And the provisions of NRS 711.095 require the Public Service Commission of Nevada to comply with the procedures found in NRS 318.1194 in issuing a certificate of public convenience and necessity to a CATV company in a county having a population of less than 100,000 where a general improvement district is providing television service pursuant to the powers conferred upon it by

NRS 318.1192. Accordingly, where a general improvement district is operating television maintenance facilities pursuant to the powers vested in it by NRS 318.1192, the Public Service commission of Nevada may not issue a certificate of public convenience and necessity nor may a city or county grant a franchise to operate a CATV system in a county having a population of less than 100,000 unless the proposed action is first approved by the qualified electors of the district in the manner provided in NRS 318.1194, subsection 2.

In the instant case, by local ordinance a general improvement district has been merged with county government, and a department of county government is operating the television maintenance system. Under these circumstances, the foregoing analysis no longer obtains, and it is necessary to examine NRS 318.1194 in conjunction with two additional statutes to determine whether an election must be held.

NRS 244.157 reads as follows:

> 1. Subject to the conditions imposed in subsection 2, the board of county commissioners of any county of this state *may* exercise any of the powers in any unincorporated area within its county that a board of trustees of any general improvement district, *if organized*, would be permitted to exercise pursuant to the provisions of chapter 318 of NRS.
>
> 2. A board of county commissioners may exercise the powers authorized under subsection 1 only upon compliance with the same procedures that a board of trustees of a general improvement district would be required to follow for the same class of improvements within an improvement district. This subsection does not apply if the exercise of powers authorized under subsection 1 is required by a federal law or a regulation issued thereunder. [Italics added.]

Through this language the Legislature has given the board of county commissioners powers in unincorporated areas of the county coextensive with the powers which would be enjoyed by a board of trustees of a general improvement district, if one were organized and operating. By designating unincorporated areas, however, the Legislature has not evinced its intention to prohibit a board of county commissioners which acts pursuant to a separate grant of authority from exercising these powers within incorporated areas. An example of such additional authority is observed when a general improvement district is merged with another governmental unit pursuant to the provisions of NRS 318.490 et seq.

NRS 318.490 establishes the procedure to be followed by a board of county commissioners in providing for the merger, consolidation or dissolution of a general improvement district. When a general improvement district is merged with county government, all the district's functions and obligations are assumed by the successor entity of the county. NRS 318.510, subsection 1(b). This entity, therefore, enjoys authority coextensive with that formerly held by the board of trustees of the district, including jurisdiction in all geographic areas previously served by the district. NRS 244.157 merely authorizes a board of county commissioners to serve the functions of a board of trustees of a general improvement district "in any unincorporated area." If this phrase were interpreted as language intended in all cases to circumscribe the powers of county government when acting in lieu of a general improvement district, then NRS 244.157 on its face would conflict with the referenced provisions of NRS 318.490 et seq., which do not limit the geographic area wherein the county may function.

Since NRS 244.157 and NRS 318.490 et seq. both address powers of county government vis-a-vis [vis-à-vis] powers of powers of boards of trustees of general improvement districts, these two statutes are in *pari materia.* Statutes are in *pari materia* when they relate to the same subject matter, and statutes in *pari materia* should be read together as constituting one law. Champion v. Shoreline School District No. 412 of King County, 81 Washington 2d 672, 504 P.2d 304 (1972). Additionally, where statutes are in *pari materia,* they must be given effect if possible. Raggio v. Campbell, 80 Nev. 418, at 425, 395 P.2d 625 (1964). Effect can reasonably be given to section

244.157 of NRS and to the provisions of NRS 318.490 et seq. by reading the limiting language of NRS 244.157 as applicable only when no general improvement district exists or has existed in the first place. However, once a district has been created and then merged with county government pursuant to NRS 318.490 et seq., all the powers of the district over the territory, unincorporated and incorporated, are merged in the county, and the county may exercise these "district powers" in the entire territory.

Furthermore, giving effect to both statutes is consonant with the rule of statutory construction which permits reference to extrinsic authority where a statute, in this case NRS 244.157, although apparently clear and unambiguous without reference to any other statute, "* * * taken alone would violate constitutional restrictions, in which case it may be construed with other statutes on the same subject in order to discover an interpretation that renders it constitutional." A. Southerland, Statutes and Statutory Construction, § 51 (4th ed. 1975). Old Homestead Bakery v. March, 75 Cal.App. 247, 242 P. 749 1925). The constitutional problem which would ensue by interpreting NRS 244.157 without referring to the provisions of NRS 318.490 et seq. is revealed in the process of determining who may vote in the election mandated by NRS 318.1194.

Subsection 2 of NRS 318.1194 requires the board of county commissioners to order that the question of approval of the franchise or certificate "* * * be voted upon by the qualified electors of such district * * *." However, where no general improvement district exists and the board of county commissioners, pursuant to NRS 244.157 and NRS 318.490 et seq. exercises the powers which would otherwise be exercised b a board of trustees of a general improvement district if one were organized, it becomes necessary to assume the existence of a "district" to determine who are "the qualified electors of such district." NRS 318.020, subsection 7 defines "qualified elector" as "a person who has registered to vote in district elections." And NRS 318.09525 establishes the procedure which must be followed in registering to vote in district elections. Having already determined that the board of county commissioners may function in all areas previously served by the general improvement district, we must conclude that the qualified electors of the district consist of those persons who would be qualified pursuant to NRS 318.09525 to vote in a district election. These electors, therefore, will include residents of both the incorporated and unincorporated areas of the proposed CATV service, or franchise, area currently served by the Humboldt County TV Department. This interpretation does not permit extrastatutory encroachment by the county upon the integrity of the incorporated entity, in this case the City of Winnemucca, which has already been served by both the district and the department. Nor will this analysis lead to the absurd result which would ensue if the limiting language of NRS 244.157 were interpreted to apply even after merger of a district with a county. Under that scenario, the board of county commissioners would be required to hold an election only among the qualified electors who reside in the unincorporated areas served by Humboldt County TV Department. Should such a referendum be considered binding upon the tax-paying residents of the incorporated areas served by the department, serious questions regarding unconstitutional disenfranchisement would ensue. A statute will not be construed so that an absurd result is reached unless no other interpretation is possible. Mulford v. Davey, 64 Nev. 506, at 512, 186 P.2d 360 (1947).

Thus, it is the opinion of this office that where a general improvement district, such as the Humboldt County TV Maintenance District, has been merged with county government and the county has assumed all functions, obligations and rights of the district, the county is empowered to perform all official acts which the district was authorized to perform prior to the merger. Providing translator TV service to residents of a part of the unincorporated area of Humboldt County as well as to the residents of Winnemucca was one of the official acts properly performed by the Humboldt County TV Maintenance District. Therefore, the Humboldt County TV Department may continue to serve the same unincorporated area previously served by the district.

It is further the opinion of this office that having elected to exercise the powers delineated in NRS 318.1192, the board must comply "* * * with the same procedures that a board of trustees

of a general improvement district would be required to follow for the same class of improvements * * *" within an improvement district if one were organized. NRS 244.157, subsection 2. Consequently, upon approving a franchise, or upon receiving notice of approval by the city council, or of readiness to issue a certificate of public convenience and necessity by the Public Service Commission of Nevada, the board of county commissioners must comply with the election procedures outlined in subsection 2 of NRS 318.1194.

CONCLUSION

In a county having a population of less than 100,000, approval of the qualified electors residing within the territory proposed to be included in a service, or franchise, area is required before the Public Service Commission of Nevada may issue a certificate of public convenience and necessity or before a city or county may issue a franchise for operation of a CATV system in an area formerly provided television service by a general improvement district and currently offered the same service by a county television department.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By GEORGE M. KEELE, *Deputy Attorney General*

OPINION NO. 79-27 TAXES—Constitutionality of Seal and Padlock Provisions of NRS 374.150, subsection 5 and NRS 374.155, subsection 2—The Department of Taxation may administratively seal and padlock a place of business after suspension or revocation of its retailer permit at a noticed administrative hearing. The Department of Taxation may not administratively seal and padlock a place of business, which operates without first obtaining a retailer permit, unless an administrative hearing is provided. In the area of tax collection, the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the availability of a judicial forum to test the validity of the Department of Taxation's action, which can occur only after an administrative hearing subject to judicial review.

CARSON CITY, December 12, 1979

MR. ROY E. NICKSON, *Executive Director, Department of Taxation,* Capital Plaza; 1100 E. William, Carson City, Nevada 89710

DEAR MR. NICKSON:

You have requested the opinion of this office concerning a question regarding the constitutionality of seal and padlock procedures as authorized in NRS 374.150, subsection 5 and NRS 374.155, subsection 2. A review of the statutes and applicable case law has led to the following analysis and conclusions:

QUESTION

Does the Department of Taxation have unilateral authority to seal and padlock a place of business if all conditions incident thereto and as set forth in NRS 374.150 and 374.155 have been met?

In order to avoid any confusion in responding to this question, our analysis will be divided into two parts, based on the following factual situations:

1. Sealing and padlocking businesses whose permits have been administratively revoked or suspended; and
2. Sealing and padlocking businesses which have failed to apply for a retailer permit.

BACKGROUND

In the past, the Department of Taxation has not sealed and padlocked retail businesses administratively. Court order were obtained following administrative revocation or suspension of a retailer's permit, as well as in cases where a retailer operated his business without applying for a permit. In both of these situations, the seal and padlock orders were issued at judicial hearings where the retailer was ordered to show cause why his place of business should not be sealed and padlocked.

As a preliminary matter, the statutes in question and the procedures engendered thereunder must be examined. Both statutes are found in NRS Chapter 374, entitled "Local School Support Tax," which sets up a one percent tax on retail sales of tangible personal property. NRS 374.110.

In order to assure compliance with this chapter, all retailers are required to obtain a permit from the Department of taxation (hereinafter the "Department"). NRS 374.130. The Department may suspend or revoke a permit for failure to comply with any provision of the chapter. NRS 374.150. A noticed administrative hearing precedes any decision to suspend or revoke a permit. *Id.*

The Department is given the power to seal and padlock any place of business operating without a permit, or after a permit has been suspended or revoked. NRS 374.150, NRS 374.155. The statutes containing the seal and padlock provisions are set forth as follows:

> NRS 374.150. Revocation, suspension of permit: Procedure; sealing, padlocking place of business.
>
> 1. Whenever any person fails to comply with any provision of this chapter relating to the sale tax or any regulation of the department relating to the sales tax prescribed and adopted under this chapter, the department, upon hearing, after giving the person 10 days' notice in writing specifying the time and place of hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by the person.
>
> 2. The department shall give to the person written notice of the suspension or revocation of any of his permits.
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> 3. The notices may be served personally or by mail in the manner prescribed for service of notice of a deficiency determination.
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> 4. The department shall not issue a new permit after the revocation of a permit unless it is satisfied that the former holder of the permit will comply with the provisions of this chapter relating to the sales tax and the regulations of the department.
>
> 5. If a permit is revoked, the department may seal and padlock the place of business for which the permit was issued.
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> NRS 374.155. Engaging in business as seller without permit unlawful; sealing, padlocking place of business.
>
> 1. A person who engages in business as a seller in a county without a permit or permits or after a permit has been suspended, and each officer of any corporation which so engages in business, is guilty of a misdemeanor.
>
> 2. If, after notice, to the seller, served personally or by mail, the seller continues to engage in business without a permit, or after a permit has been suspended or revoked, the department may seal and padlock any place of business of the seller. If notice under this subsection is served by mail, it shall be addressed to the seller at his address as it appears in the records of the department.

Thus, the right to seal and padlock a business adheres automatically after revocation of a permit at a duly noticed administrative hearing. NRS 374.150, subsection 5. If a seller continues in business after his permit is revoked or suspended, the Department is again given the right to seal and padlock the business in NRS 374.155, subsection 2. Furthermore, after giving notice to the seller, the Department may close any business which is operating without first obtaining a permit. *Id.*

ANALYSIS

A. Constitutionality of administrative sealing and padlocking of business following revocation or suspension of retailer permits.

The Fourteenth Amendment to the United States Constitution provides that no State "shall * * * deprive any person of live, liberty, or property, without due process of law * * *." In a series of well-known decisions, the United States Supreme Court has elaborated the basic elements of procedural due process for governmental deprivation of individual property or liberty interests. See for example: Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d. 18 (1976); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (19974); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Goldberg v. Kelly, 297 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The Supreme Court has made it clear in these cases that procedures which provide for redress only through a subsequent suit are insufficient where the governmental action does not serve a particularly urgent need. Where the government's need is not urgent the property owner must be afforded either a pre-deprivation or prompt post-deprivation hearing to test the validity of the government's action, and to minimize the harm of a wrongful taking.

A major source of this new view of due process is the court's rejection of the belief that property rights are entitled to less protection than personal rights. Lynch v. Household Finance Corp., 405 U.S. 538, at 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972). In spite of this expanded concept of the requirements of due process, the Supreme Court continues to recognize the government's right to seize property without affording pre-deprivation or prompt post-deprivation hearing or notice in situations where the government's need is urgent. See for example: Colero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (seizure of yacht carrying contraband); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 49 (1928) (bank failure); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (an epidemic).

The raising of revenue for the support of government is such an "urgent need" of government. The United States District Court for the District of Oregon stated the rule in U.S. v. Johnson, 424 F.Supp. 631, at 633 (D.Ore. 1976), where it said that, "* * * the courts unanimously agree that collection of the revenues upon which our government depends is such an 'extraordinary situation'." (Citation omitted.) The United States Supreme Court has affirmed summary tax collection procedures in Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931). In Phillips, the court sustained the Internal Revenue's summary deficiency assessments against a corporation for delinquent income and profits taxes, saying, *inter alia:*

> *The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled.* Where, as here, adequate opportunity is afforded for a alter judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare Cheatham v. United States, 92 U.S. 85, 88089, 23 L.Ed. 561; Springer v. United States, 102 U.S. 586, 594, 26 L.Ed. 253; Hagar v. Reclamation District No. 108, 111 U.S.

701, 708-709, 4 S.Ct. 663, 28 L.Ed. 569. Property rights must yield provisionally to governmental need. 283 U.S. at 595. (Italics added.)

To the same effect: Nickey v. Mississippi, 292 U.S. 393, 396, 54 S.Ct. 743, 744, 78 L.Ed. 1323 (1934); Bull v. United States, 295 U.S. 247, 259-260, 55 S.Ct. 695, 699, 700, 79 L.Ed. 1421 (1935).

Although the decision in Phillips was in part based on the now rejected dichotomy between personal and property rights, the court has reaffirmed its decision in recent cases. See Fuentes v. Shevin, 407 U.S. 67, 92, N. 24, 92 S.Ct. 1983, 32 L.Ed. 556 (1972); G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed. 530 (1977). In Fuentes the court struck down Florida and Pennsylvania prejudgment replevin statutes, but stated, citing Phillips, that the "* * * summary seizure of property to collect the internal revenue of the United States * * * was an 'extraordinary situation' which justified the postponement of notice and opportunity for a hearing." Fuentes, 407 U.S. at 91, 92. The Phillips case was again cited with approval in G.M. Leasing Corp., where the court upheld the warrantless seizure of certain automobiles to satisfy a delinquent income tax liability. As additional authority for the warrantless seizures the court stated:

> If additional support were needed * * * it is found in * * * *the right of the Government to collect taxes by summary administrative proceedings.* Thus, in Bull v. United States, 295 U.S. 247, 260, 55 S.Ct. 695, 699, 79 L.Ed. 1421 (1935) it was stated that a tax assessment "is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." See also Cheatham v. United States, 92 U.S. 85, 87-90, 23 L.Ed. 561 (1876); State Railroad Tax Cases, 92 U.S. 575, 612-615, 23 L.Ed. 663 (1876); Graham v. Du Pont, 262 U.S. 234, 255, 43 S.Ct. 567, 569, 67 L.Ed. 965 (1923). *The rationale underlying these decisions, of course, is that the very existence of government depends upon the prompt collection of the revenues.* In Phillips v. Commissioner, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931), the Court rejected a constitutional challenge to the statutory system under which taxes may be collected summarily without a pre-seizure judicial hearing. It was held that a s long as there was an adequate opportunity for a post-seizure [judicial] determination of the taxpayer's rights the statute met the requirement of due process. 429 U.S. at 352, n. 18. (Italics added, citations omitted.)

Thus, it is clear that summary tax collection procedures, which provide only for a subsequent judicial review, satisfy the Fourteenth Amendment mandate of due process. Note: The decision in Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976) is inapposite. There, the Supreme Court merely held that a taxpayer is entitled to know the factual basis of the Internal Revenue Service's jeopardy assessment, to enable him to establish an exception to the Anti-Injunction Act. 26 U.S.C. (I.R.C. 1954) § 7421a. See Cedarbrook Realty, Inc. v. Nahill, 399 A.2d 374 (Pa. 1979).

The procedures provided for the enforcement of the Local School Support Tax in NRS 374, Sections 150 and 155 go beyond the requirements of due process in tax collection, by giving notice and hearing *before* revocation or suspension of a retailer's permit. A seller has a constitutionally protected property right in his permit to engage in the business of retailing once the permit has been issued. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Rhebock v. Dixon, 458 F.Supp. 1056, 1060 (N.D.Ill.,E.D. 1978); Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971); Jordan v. United Ins. Co. of America, 289 F.2d 778 (D.C.Cir. 1961). The procedure in NRS 374.150 for revocation or suspension of retailer permits, comports with the normal requirements of due process by providing pre-deprivation notice and hearing.

In its decision to revoke or suspend a permit, the Tax Commission orders the taxpayer to cease doing business as a retailer, and informs him that all statutory remedies afforded in Chapter 374 will be exercised to enforce compliance with the decision. The permit, and seal and padlock provisions of Chapter 374 are the means provided for the enforcement of the Local School Support Tax. See In re West Coast Cabinet Works, 92 F.Supp. 636, at 656 (S.D.Cal. 1950); Reliance Insurance Co. v. Nutt, 403 S.W.2d 828 (Tex.Civ.App. 1966); Gibson Co. V. Oklahoma Tax Commission, 69 P.2d 329 (Okla. 1937). These procedures can only be employed following an administrative hearing, at which the taxpayer is entitled to present evidence on his own behalf. NRS 233B.121 et seq. As discussed above, such pre-deprivation notice and hearing are unnecessary in the field of tax collection. Phillips v. Commissioner, 283 U.S. at 595, 596.

With respect to the enforcement of commission orders, our office is informed that county sheriffs have always been called on to enforce court orders to seal and padlock businesses. In fact, the various sheriffs' offices have provided the actual seals, whereas the padlocks have been supplied by the Department. To ensure the continuation of this cooperative effort, an administrative regulation should be adopted requiring the Department to direct its seal and padlock orders to the sheriff or other peace officer for enforcement. See NRS 233B.040, subsection 1, and compare NRS 372.585. This will assure peace officer assistance and obviate any concern regarding potential breaches of the peace during the enforcement of administrative seal and padlock orders.

CONCLUSION—SUBPARAGRAPH A.

Thus, it is the opinion of this office that the administrative sealing and padlocking of a business after the retailer's permit has been revoked or suspended at a noticed administrative hearing does not violate the Fourteenth Amendment's requirement of due process. This conclusion is fortified by the availability of judicial review of final agency decisions in contested cases. NRS 233B.130.

Furthermore, administrative orders can be enforced in the same manner as court orders to seal and padlock businesses, provided a valid regulation to that effect is adopted.

B. Constitutionality of administrative sealing and padlocking of businesses which have failed to apply for retailer permits.

The more difficult issue to be answered herein is whether the Department may constitutionally seal and padlock a business which has simply failed to apply for a retailer permit. Under NRS 374.155, Subsection 2 the Department is given the power to seal and padlock businesses which operate without having obtained a permit. The Department is required to give notice of its intention to close a business in these cases. NRS 374.155, subsection 2, However, the statute does not provide for an administrative hearing, *Id.*

The right to engage in a lawful occupation is one of the liberty interests entitled to the procedural protection of due process under the Fourteenth Amendment. This was first articulated by the Supreme Court in the early case of Allgeyer v. Louisiana, 165 U.S. 578 (1897), where it was said that the liberty mentioned in the Fourteenth Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or vocation*, * * *" 165 U.S. 589. (Italics added.) To the same effect: Powell v. Pennsylvania, 127 U.S. 678 (1888); Dent v. West Virginia, 129 U.S. 114 (1889); Booth v. Illinois, 184 U.S. 425 (1902); Traux v. Raich, 239 U.S. 33 (1915); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In view of this recognized liberty interest to pursue a livelihood, it is clear that the State may not deprive one of this interest without providing due process.

Although the statute in question does not provide for a hearing at the administrative level, such pre-deprivation procedures are not mandated in tax collection. Phillips, 283 U.S. 589, 595,

596. All that is necessary is the opportunity for an ultimate judicial determination on the taxpayer's rights. *Id.*

However, in the situation where an administrative decision is made without a hearing, the Nevada Administrative Procedure Act, NRS 233B.010 et seq., does not clearly provide for judicial review. The Act provides for judicial review of "* * * a final decision in a contested case." NRS 233B.130, subsection 1. "Contested case" is defined as "* * * a proceeding * * * in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032.

At first glance, the decision of the Department to seal and padlock a place of business which has failed to apply for a permit, would seem to fit this definition in that such a decision is an "administrative penalty." However, in light of subsequent provisions of the Administrative Procedure Act, the Department's decision to seal and padlock such businesses is not a "contested case." The logic of this conclusion is demonstrated by analogy to the Nevada Supreme Court's decision in Southwest Gas Corp. v. Public Service Com'n of Nev., 92 Nev. 48, 546 P.2d 219 (1976). In the Southwest Gas case the court noted that the Public Service Commission's order dismissing the utility's application for a rate increase was not a "contested case," saying:

> Southwest Gas contends that, *since there was no opportunity for hearing* prior to the entry of the order of dismissal by the commission, this does not qualify as a "contested case," subject to judicial review under NRS 233B.130. The argument is persuasive. *Even more persuasive, however, is a careful reading of NRS 233B.140 which prescribes the scope of, and limitations on judicial review under NRS Chapter 233B.* NRS 233B.140, subsection 4 provides, in part: "The review shall be conducted by the court without a jury and shall be confined to the record." (Italics added.) The entire record before the commission in Docket No. 529 consists of the application of Southwest Gas and the order of the commission dismissing that application. As will be pointed out more fully below, the commission seeks to justify its dismissal of Docket No. 529 on the basis of matters known to it but outside the record in Docket No. 529. If such extrinsic matters are necessary to uphold the order of dismissal, and if such matters would not be a part of the record before the court in a review under NRS 233B.130 and NRS 233B.140, the review must, necessarily, be something less than "adequate" and would be, in fact, useless. 92 Nev. At 56. (Italics added.)

Similarly, the "record" of the Department's decision in cases where a retailer has failed to apply for a permit, would consist solely of the notice provided under NRS 374.155, subsection 2. Review of such a record would be useless, and is not contemplated by the Administrative Procedure Act. Furthermore, the Department would necessarily resort to extrinsic evidence to support its decision.

CONCLUSION—SUBPARAGRAPH B

It is the opinion of this office that the Department of Taxation may not administratively seal and padlock a business which is found to be operating without having first obtained a retailer's permit. However, we recommend that the Department of Taxation provide, by duly promulgated regulation, for an administrative hearing to precede any decision to seal and padlock a business in such cases. Following the administrative hearing, a business may be constitutionally sealed and padlocked, in view of the fact that judicial review is clearly provided by NRS 233B.010 et seq. Again, we recommend the adoption of a regulation requiring peace officer assistance in the enforcement of administrative seal and padlock orders.

SUMMARY

In summary, the rule is well-established that "[t]he Legislature may provide the most

summary measures for enforcement of collection of taxes." Gathwright v. Mayor & City Council of Baltimore, 30 A.2d 252, at 255 (Md.App. 1943). The United States Supreme Court in numerous decisions has stated its belief that summary administrative tax collection procedures are necessary because, "* * * [t]axes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection [than actions at law]." Bull v. United States, 295 U.S. 247, 259-60, 55 S.Ct. 695, 699, 700, 79 L.Ed. 1421 (1935). See also, Phillips v. Commission; Fuentes v. Shevin, and G. M. Leasing Corp. v. U.S. discussed above.

Therefore, it is in the opinion of this office that the seal and padlock provisions of NRS 374.150, subsection 5 and NRS 374.155, subsection 2, relating to businesses whose permits have been revoked or suspended are constitutional, and may be employed without judicial order, if all conditions set forth therein, pertaining to noticed administrative hearings have been met. It is the further opinion of this office that the Department of Taxation may not administratively seal and padlock under NRS 374.155, subsection 2, a place of business which is found to be operating without having applied for the necessary permit, unless an administrative hearing is first provided pursuant to official regulation.

Finally, we have recommended the adoption of an administrative regulation requiring the Department to direct its seal and padlock orders to a sheriff or other peace officer for enforcement.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By BROOKE A. NIELSEN, *Deputy Attorney General*

OPINION NO. 79-28 Legal Holidays for State and County Government Offices; Presidential Proclamation Declaring Holiday for Federal Government Employees—Executive Order declaring holiday for limited purpose of allowing federal government employees to take administrative leave on December 24, 1979 does not establish a "legal holiday" for state and county government offices withing [within] the meaning of NRS 236.015. Within his governmental discretion, the Governor of Nevada is not prevented from appointing such day as a legal holiday.

CARSON CITY, December 18, 1979

MR. CHAN G. GRISWOLD, *Chief Civil Deputy District Attorney*, Washoe County Courthouse, South Virginia and Court Streets, P.O. Box 11130, Reno, Nevada 89520

DEAR MR. GRISWOLD:

This is in response to your letter of December 12, 1979, in which you have asked the following:

QUESTION

Does President Carter's Proclamation declaring December 24, 1979 a holiday for federal employees operate to make December 24, 1979 a "legal holiday" for state and county employees pursuant to NRS 236.015?

ANALYSIS

NRS 236.015, subsection 1, provides in pertinent part that "Any day that may be appointed by the President of the United States * * * as a legal holiday" is declared to be a legal holiday for state and county government offices.

On December 11, 1979, President Jimmy Carter issued an Executive Order, which reads as follows:

EXECUTIVE ORDER
PROVIDING FOR THE CLOSING OF GOVERNMENT
DEPARTMENTS AND AGENCIES ON MONDAY,
DECEMBER 24, 1979

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1-1. *General Provisions.*

1-101. All Executive departments and agencies shall be closed and their employees excused from duty on Monday, December 24, 1979, the day before Christmas Day, except as provided by Section 1-102 below.

1-102. The heads of Executive departments and agencies may determine that offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 24, 1979, for reasons of national security or defense or for other public reasons.

Section 1-2. *Pay and leave for Employees.*

1.201. Monday, December 24, 1979, shall be considered a holiday for the purposes of the pay and leave of employees of the United States.

On December 13, 1979, this office was advises [advised] by Mr. William Nichols, General Counsel of the Federal Office of Management and Budget, that the above Executive Order was worded in virtually the same form that has been used by many former Presidents to give federal employees a day off from work either the day before or after Christmas Day, when December 25 falls on a Tuesday or a Thursday. However, notwithstanding this tradition and the use of the term "holiday" in the President's Executive Order, Mr. Nichols advised that it was never intended that this proclamation have the effect of declaring December 24, 1979 a federal or national legal holiday. Rather, the purpose of this Executive Order is to permit the heads of departments and agencies in the Executive branch of the Federal Government to allow their employees to take administrative leave on December 24, 1979 without losing any pay and other leave benefits. He emphasized that this Presidential Order was not intended to have any effect on employees outside the Federal Government and did not require the head of any executive department or agency to close any office or installation, if it was determined that such office must remain open and certain employees must report for duty on December 24, 1979, because of reasons of national security or defense or for other public reasons.

The understanding of the General Counsel of the Office of Management and budget with respect to the limited effect of President Carter's Executive Order is confirmed by events in Nevada in recent years when Christmas Day has fallen on a Thursday. In 1975, then-Governor Mike O'Callaghan did not declare Friday, December 26, a holiday, even though President Ford had declared that day a "holiday" for federal workers. In 1969, then-Governor Paul Laxalt did exercise his gubernatorial powers, apparently pursuant to NRS 223.130, to declare a holiday in Nevada on the Friday following December 25, 1969. However, the effect of the 1969 Proclamation appears to have been limited by Chapter 315, Statutes of Nevada 1969, which amended NRS 236.010 (the forerunner of NRS 236.015) by deleting from the list of legal holidays for state and county government offices any day declared by the Governor as a legal holiday. The 1971 Nevada Legislature resorted to the list of legal holidays any day declared by

the Governor as a legal holiday. See Chapter 332, Statutes of Nevada 1971. In any event, it clearly would not have been necessary for either Governor O'Callaghan or Governor Laxalt to decide whether of not to declare a legal holiday for state and county employees, if as a matter of state law the Presidential executive Order establishing a holiday for federal employees had already established a "legal holiday" for state and county government offices.

Because of the limited scope and intended purpose of President Carter's Executive Order as discussed above, it is readily apparent that the President's use of the term "holiday" must be viewed in the context of the federal laws relating to the organization of the Government of the United States and to its civilian officers and employees. These laws are generally codified in Title V, United States Code, "Government Organization and Employees." Section 6103 thereof establishes eight legal public holidays (not including December 24) and also sets forth certain rules relating to statutes involving the pay and leave of federal employees "with respect to a legal public holdiay [holiday] and *any other day* declared to be a holiday by federal statute or Executive Order." (Italics supplied.) See 5 U.S.C.A. Section 6103, "Holidays," subparagraph (b).

The provisions of Title V, United States Code, have not been extended to the State of Nevada. As noted by the Second Circuit Court of Appeals of Louisiana: "The act [Title V, United States Code] was confined strictly to the organization of the United States Government and to its civilian officers and employees, and its language negates any intent on the part of the Congress to extend its provisions to the states or to designate holidays to be observed by the states, their employees, or the public generally." Consolidated Marketing, Inc. v. Busi, La.App., 256 So.2d 695, at 697 (1972).

Since the President's Executive Order of December 11, 1979 has not, as a matter of Federal law, established a "legal public holiday" but only a "holiday" limited to the pay and leave status of federal employees, it becomes necessary to examine the use of the term "legal holiday" within the context of NRS 236.015. This term is used in a sentence which appears at the end of a paragraph that specifically names nine "legal holidays" for state and county government offices and which includes language referring to any day appointed by the President of the Governor for *public* fast and thanksgiving. In this context, it appears that the use of the term "legal holiday" in NRS 236.015 falls within the orbit of the general understanding of the term "holiday":

> The term "holiday" is sometimes used as meaning a consecrated day, or a religious festival; but it may also mean a day on which the ordinary occupations are suspended, or a day of exemption or cessation from work or of festivity, recreation, or amusement, and not a day of rest and religious devotion; and a legal holiday is a day designated and set apart by legislative enactment for one or more of such purposes. 40 C.J.S. "Holidays," Section 1, page 410.

Holidays proclaimed by the President of the United States that are limited in their effect or restricted to a purpose not included within the general meaning of "holiday" as set forth above have not been included within the meaning of the term "holiday" as it is used in statutes similar to NRS 236.015. For instance, the California Supreme Court held that a proclamation of the President of the United States declaring certain bank holidays did to have the effect of establishing "special holdiays [holidays]" within the meaning of Section 10 of the California Political Code, as amended March 6, 1933, which read in pertinent part as follows:

> Holidays within the meaning of this code, are * * * very day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or general or special holiday * * *." See Vidal v. Backs, 218 Cal. 99, 21 P.2d 952, 86 A.L.R. 1134 (1933).

The court indicated that sound public policy required a strict interpretation of the words

"bank holidays" as used in a Presidential proclamation in relation to the state statute in question, and such an interpretation precluded the inclusion of such limited purpose holidays within the meaning of "general or special holiday" as used in the state statute.

In another context, the California Supreme Court has noted that the Presidential proclamation setting aside April 14, 1945 as "a day of mourning and prayer" in remembrance of President Franklin D. Roosevelt would constitute a "holiday" within the common understanding of that word, as set forth above. See Laubisch v. Roberdo, 277 P.2d 9, at 14 (1954).

Within the context of NRS 236.015, this office has concluded that a day appointed by the President as a "legal holiday" refers to a day appointed by the President for a general observance of an event having such national significance that it should be set apart for the general populace to worship, revere the memory of a great leader or benefactor of humanity, rejoice over some great national or historical event, rekindle the flame of an ideal, or generally celebrate an occasion identified by the President as worthy of a national observance. A day set apart for administrative leave by certain federal government employees in the executive branch of the federal government does not fall within this orbit of the general understanding of the term "legal holiday" as used in the aforesaid Nevada statute. Accordingly, this office is of the opinion that President Carter's Executive Order of December 11, 1979 has not established a legal holiday on December 24, 1979 for state or county employees within the meaning of NRS 236.015.

It should be emphasized that the above analysis has been confined to the Presidential Order of December 11, 1979. Nothing stated herein should be construed as preventing the Governor of Nevada from declaring December 24, 1979, a legal holiday within the meaning of NRS 236.015. NRS 223.130 empowers the Governor to declare not more than two legal holidays in any one calendar year, which may be in addition to the holidays enumerated in the aforesaid statute. This authority is independent of that of the President; and, as noted above, this authority was exercised in 1969 but not in 1975, under similar circumstances. In this connection, this office has been advised that even though December 26, 1975 was not declared as a legal state holiday, the Governor did recommend that state agencies could, if not detrimental to safety and welfare of the public, staff State offices with "skeleton crews" during that day, which had been declared as a holiday for Federal Government employees. This apparently allowed many state and county workers to use comp time and annual leave on that day.

Clearly, such a policy decision lies within the sound governmental discretion of the Governor and those county officials charged with the responsibility of maintaining and staffing government offices that must be open on days not constituting a "legal holiday" within the meaning of Nevada law.

CONCLUSION

President Carter's Proclamation declaring December 24, 1979 a holiday for Federal employees does not operate to make said day a "legal holiday" for state and county employees, pursuant to NRS 236.015. However, the Governor of Nevada is not prevented from declaring such a day a legal holiday, pursuant to his authority in NRS 223.130, which decision lies within the Governor's governmental discretion.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By LARRY D. STRUVE, *Chief Deputy Attorney General*

OPINION NO. 79-29 Lieutenant Governor's Compensation—In the absence of the

Governor from the State, the Lieutenant Governor shall receive compensation for acting as Governor only when the Lieutenant Governor performs an immediately needed specific act or function. When performing such an act or function the Lieutenant Governor is entitled to the full per diem compensation permitted by law during each calendar day he performs such an act or function and regardless of the length of time necessary to do so.

CARSON CITY, December 19, 1979

BRUCE GREENHALGH, *Director, Department of General Services*, Room 305, Blasdel Building, Capitol Complex, Carson City, Nevada 89710

DEAR MR. GREENHALGH:

You have requested advice concerning an interpretation of NRS 224.050, subsection 2.

FACTS

Whenever the Governor leaves the State, it has been the policy of his office to notify the Lieutenant Governor of this fact by letter. A copy of the letter is sent to the Accounting Division of the Department of General Services and this "triggers" a paycheck payable to the Lieutenant Governor for $60 per day for the number of days that the Accounting Division designates. The full $60 per day is paid regardless of the number of hours per day the Governor is actually absent and the payment is made regardless of whether the Lieutenant Governor performs any act or function as acting Governor. This practice appears to have been followed for a number of year [years].

QUESTION ONE

Is it necessary for the Lieutenant Governor to perform some act or function as acting Governor when the Governor is absent from the state in order to receive the compensation fixed by NRS 224.050, subsection 2?

ANALYSIS—QUESTION ONE

Both Article 5, Section 18 of the Nevada Constitution and NRS 223.070 provide that in case of the Governor's "absence from the State, the powers and duties of the Office shall devolve upon the Lieutenant Governor." NRS 224.050, subsection 2 provides that:

> In addition to the annual salary provided for in subsection 1, the Lieutenant Governor is entitled to receive $60 per day for such times as he may be *actually employed as governor* * * *. (Italics added.)

Although the statute uses the terms "actually employed as Governor," it is not clear whether this language means the Lieutenant Governor must perform some specific act or function as acting Governor in order to receive the above-stated compensation.

Prior to Sawyer v. First Judicial District Court, 82 Nev. 53, 410 P.2d 748 (1966), the language found in NRS 224.050, subsection 2 was susceptible to an interpretation that whenever the governor is absent, i.e., physically not present, from the State, his duties devolve upon the Lieutenant Governor who is thus actually employed as Governor, regardless of whether he performs an act or function as acting governor. However, the case of Sawyer v. First Judicial District Court, supra forecloses this line of reasoning.

In Sawyer, supra, the Governor left the State for a few hours to give a dinner speech in California. In his absence the Lieutenant Governor, purporting to act as Governor under Article 5, Section 18 of the Constitution, called for a State Grand Jury.[1] Upon his return, the Governor

revoked the request, but the First Judicial District Court ordered the jury to be impaneled pursuant to the Lieutenant Governor's call. The Governor filed a petition for a writ of prohibition in the Supreme Court. Sawyer v. District Court, supra at 54-55.

Courts in the various states that have constitutional provisions similar to Article 5, Section 18 have divided on the question of when the Lieutenant Governor may exercise the power of Governor in the Governor's absence from the State. Some have taken the position that any absence from the State by the Governor, regardless of how long or whether only temporary, vests the Lieutenant Governor with the powers of the Governor. Other states hold that short, temporary absences of the Governor from the State do not vest such powers in the Lieutenant Governor. See cases cited in 38 Am.Jur.2d, Governor, § 13. In Sawyer v. District Court, supra, the Nevada Supreme Court advocated the latter position.

The court indicated that the overwhelming majority of courts which

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[1]Under NRS 6.135, only the governor or the Legislature, while in session, may call for a State Grand Jury to be impaneled.

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have considered this issue have decided that "absence" from the State meant "effective absence," that is, "an absence which is measured by the State's *need* (court's emphasis) at a given moment *for a particular act* (our emphasis) by the official then physically not present." Sawyer v. District Court, supra at 56. The court went on to state:

> Thus in the event of a specified official's physical non-presence, the crux of a provision for succession in the event of "absence" is the state's immediate need for a specific act or function * * *. Sawyer v. District Court, supra at 57.

The court concluded that since the Governor was out of the State for a few hours on a Sunday evening, there was no need for a grand jury request for that brief period and the writ was granted thereby preventing the impaneling of a State Grand Jury. Sawyer v. District court, supra at 58, 59.

From this case it is apparent that in Nevada a Lieutenant Governor can act as Governor in the Governor's absence from the State only when the Governor is effectively absent. The Governor is effectively absent only when he is gone from the State and there is an immediate need for a specific act or functon [function] to be performed. It therefore follows that in order for the Lieutenant Governor to be entitled to the compensation allowed by NRS 224.050, subsection 2, the Lieutenant Governor must perform some immediately needed specific act or function as acting Governor in the Governor's absence.

Under this interpretation, the Lieutenant Governor would be "actually employed as Governor," within the meaning of subsection 2 of NRS 244.050, (a) at the moment there is an immediate need to exercise a gubernatorial power or duty during the Governor's absence from the State, (b) which power or duty must be performed at that particular moment and (c) which the Governor is unable to perform.

It is suggested by this office that compensation paid to the Lieutenant Governor pursuant to NRS 244.050, subsection 2 be based on claims setting forth information on the performance of any needed specific act or function by the Lieutenant Governor as acting Governor in the Governor's absence. Such a claim would be filed by the Lieutenant Governor with the appropriate state office for the statutory compensation.

CONCLUSION—QUESTION ONE

It is the opinion of this office that the Lieutenant Governor must perform some immediately needed specific act or function as acting Governor in the Governor's absence from the State in order to be entitled to receive the compensation provided in NRS 224.050, subsection 2.

QUESTION TWO

When the Governor is effectively absent from the state for less than a day's time and the Lieutenant Governor is otherwise entitled to the compensation provided by NRS 224.050, subsection 2, is the Lieutenant Governor entitled to the full compensation provided by the statute or a pro rata share thereof, based on the number of hours the Governor is actually absent?

ANALYSIS—QUESTION TWO

NRS 224.050, subsection 2 merely provides that the Lieutenant Governor is entitled to receive $60 per day for such times as he may be actually employed as governor * * *."

The case law is persuasive that a "day" means a calendar day in all cases where a statute simply provides for an officer's compensation at a certain sum per day. No length of time need be spent in order to entitle the officer to his full per diem compensation. Thus, an officer may spend only a few minutes per day in his official duties and still be entitled to a full per diem compensation. United States v. Erwin, 147 U.S. 685, 686 (1893); Commonwealth v. Thomas, 328 Pa. 19, 195 A. 103, 106 (1937); Stetler v. McFarlane, 230 N.Y. 400, 130 N.E. 591, 594 (1921); State ex rel. Greb v. Hurn, 102 Wash. 328, 172 P. 1147, 1148 (1918); Northern Trust Co. v. Snyder, 113 Wisc. 516, 89 N.W. 460, 470 (1902); 1 A.L.R. 277; 63 Am.Jur.2d Public Officers and Employees, § 377.

In Washoe County v. Humboldt County, 14 Nev. 123 (1879), a trial was moved from Humboldt County to Washoe County and the latter sued the former for the costs of trial. In the course of its opinion the Nevada Supreme Court noted:

> The fee bill authorizes the sheriff to charge five dollars for each day's attendance upon the court. He is entitled to the five dollars if he is only detained one minute, and he cannot charge any more if he is kept in attendance for the entire twenty-four hours. Washoe County v. Humboldt County, supra at 131.

CONCLUSION—QUESTION ONE

It is the opinion of this office that the Lieutenant Governor is entitled to the full per diem compensation permitted by NRS 224.050, subsection 2 during each calendar day he performs an immediately needed specific act or function as acting Governor when the Governor is absent from the State, regardless of the length of time necessary for him to perform that act or function.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

OPINION NO. 79-30 Carey Act Land Applications—Only natural adult persons may apply for up to 160 acres of Carey Act lands. Corporations may apply to segregate land for such settlement as a part of scheme to construct reclamation facilities. Foreign corporations may file such application without qualifying pursuant to NRS 80.010 to do business in this State if the filing of such application is the only corporate act performed

within the State; but qualification to transact business in Nevada is necessary prior to any review of such application or completion of any other corporate act. "Delinquent" corporations may file Carey Act land segregation applications. Corporations whose rights to do business have been forfeited may not file such applications.

CARSON CITY, December 28, 1979

MR. JAC R. SHAW, *Administrator, Division of State Lands*, Nye Building, 201 South Fall Street, Carson City, Nevada 89701

DEAR MR. SHAW:

This is in response to your letter in which you asked several questions concerning corporations making Carey Act applications pursuant to Chapter 324 of the Nevada Revised Statutes.

QUESTION ONE

May companies or corporations legally apply for Carey Act lands?

ANALYSIS

The 1979 Legislature amended and, to some extent, consolidated pertinent portions of NRS 324.120 and NRS 324.220 into 324.120, subsections 1 and 2 which now provide as follows:

> 1. Any natural person, association, company or corporation desiring to construct impounding dams, canals, ditches or other irrigation works, pumping plants, or artesian wells to reclaim lands under the provisions of this chapter, may file with the division an application for any land which is listed by the division as being available for reclamation through the division.
> 2. Any person who is a citizen of the United States or a lawful permanent resident of the United States and who is more than 18 years of age, may file an application with the division for that land in an amount not exceeding 160 acres. Chapter 166 Statutes of Nevada 1979, Section 9.

The Carey Act lands referred to in Chapter 324 of the Nevada Revised Statutes are lands which are claimed by the United States pursuant to 41 U.S.C. 641 et seq. and by the State of Nevada pursuant to Chapter 633, Statutes of Nevada 1979. However, the aforementioned federal statutes and Chapter 324 of the Nevada Revised Statutes indicate the intention of both sovereigns that these lands be irrigated, reclaimed, and occupied to the extent possible within the constraints of state water law and other applicable state laws. See, for example NRS 324.120, subsection 3(d) and (e) and Idaho Irrigation Co. v. Gooding, Idaho, 265 U.S. 518 (1924).

The basic statutory scheme is that the State contracts with one or more of the interests described in NRS 324.120, subsection 1, supra, for the construction of the necessary reclamation facilities. Under appropriate circumstances, the Division of State Lands and the Department of the Interior "segregate" (NRS 324.140) appropriate lands for such projects. These lands are made available to "settlers" (NRS 324.160, subsection 1(b)) as described in NRS 324.120, subsection 2. The "settlers" execute contracts approved by the State with the owners of the reclamation works. NRS 324.160 and NRS 324.220, subsection 1.

The specific wording of NRS 324.120, subsection 1 allows companies and corporations to apply for the segregation of land. However, NRS 324.120, subsection 2 makes clear that only adult natural persons may make applications for up to 160 acres each for the actual settlement and cultivation of the land.

To avoid an area of possible confusion, it might be well to note that a natural person may do

business under a fictitous [fictitious] name pursuant to Chapter 602 of the Nevada Revised Statutes. The fictitous [fictitious] name may contain the word "company" or the word "corporation." See Attorney General's Opinion 244 (august 30, 1961). Therefore, a natural person doing business under a fictious [fictitious] name containing the word "company" or the word "corporation" May file for up to 160 acres of Carey Act land.

CONCLUSION—QUESTION ONE

Companies or corporations desiring to construct reclamation facilities may legally apply for the segregation of Carey Act land. However, only adult, natural persons who are citizens or lawful permanent residents of the United States may file applications to become actual settlers on not to exceed 160 acres of such land.

QUESTION TWO

Must companies or corporations applying for Carey Act land segregations be organized under the corporation laws of the State of Nevada?

ANALYSIS

It is noteworthy that even with regard to the eventual settlers upon the land, the Nevada Legislature has only required that such a natural persons who are citizens or permanent residents of the United States. NRS 324.120, subsection 2 does not require that the settlers be Nevada citizens or permanent residents of Nevada. For these reasons, it can be inferred that it was not intended to require that corporations applying for the segregation of Carey Act lands pursuant to NRS 324.120, subsection 1 be Nevada corporations.

For further indication of legislative intent, it is instructive to review similar provisions in other contexts. For example, NRS 463.490 describes the qualifications for receipt of a state gaming license by corporations. In that section it is specified that in order to eligible for such licensing, a corporation shall be incorporated in the State of Nevada or, under certain conditions, it may be a corporation organized under the laws of another state.

Water appropriation pursuant to Chapter 533 of the Nevada Revised Statutes is required for Carey Act qualification. NRS 324.220. Both water appropriation and Carey Act land applications involve valuable public resources. NRS 533.325 provides that any corporation "authorized to do business in the State of Nevada" may make an application to the State Engineer for a permit to appropriate water. Obviously, it was intended that water appropriation applications could be made by corporations organized under the laws of the State of Nevada and by foreign corporations.

Considering the fact that NRS 324.120 was amended in both 1977 and in 1979 and considering the requirements that the Legislature has placed upon corporations desiring to file applications with regard to other matters important to the State, it appears that there was no legislative intent to require that corporations making application for land segregation under the Carey Act be corporations organized under the laws of the State of Nevada.

CONCLUSION—QUESTION TWO

It is the opinion of this office that corporations need not be organized under the corporation laws of the State of Nevada in order to be eligible to file applications for land segregation pursuant to NRS 324.120, subsection 1.

QUESTION THREE

Is a foreign corporation required to qualify to do business in the State of Nevada before it can file a valid application for land segregation pursuant to NRS 324.120?

ANALYSIS

NRS 80.010, subsection 1 requires that corporations organized under the laws of another state or foreign country file a certificate of corporate existence, a designation of resident agent in the State of Nevada, and various other information with the Secretary of State of the State of Nevada "before commencing or doing any business in this State." The question then arises as to whether or not the mere act of filing a Carey Act application for land segregation is "commencing or doing any business in this State."

The Nevada Supreme Court has spoken several times upon the subject of the meaning of the term "doing business in this State." In Ex Rel. Pacific States Security Co. v. District Court, 48 Nev. 53, 226 Pac. 1106 (1924), the Nevada Supreme Court held that the conduct of a single "piece of business" is not "doing business in this State."

Where the only activity of a foreign corporation in the state of Nevada was the solicitation of an agreement to carry passengers between two points in California, and Nevada Supreme Court held that an action by that corporation to collect payment due under said agreement was not barred by the provisions of NRS 80.210 which denies access to the courts of the State of Nevada by foreign corporations which have failed to comply with the qualification provisions of NRS 80.010, subsection 1, *supra.* Peccole v. Fresno Air Service, Inc. 86 Nev. 377, 469 P.2d 397 (1970), cited, League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 93 Nev. 270, 563 P.2d 582 (1977). See also Paterson v. Condos, 55 Nev. 134 28 P.2d 499 (1934).

No case has been found in which a single act by a foreign corporation within the State of Nevada has been determined to constitute "doing business in the State" as defined in NRS 80.010. Based upon the foregoing case authorities, it is the opinion of this office that the single act of a foreign corporation in filing an application for land segregation pursuant to NRS 324.120 would not amount to "doing business in this State." Therefore, it is our opinion that such foreign corporation is not required to qualify to do business in the state of Nevada pursuant to NRS 80.101 before filing such an application. On the other hand, if a foreign corporation undertakes any other business beyond the mere filing of the application for land segregation, it is clear that such foreign corporation is required to qualify to do business in the State of Nevada. Likewise, the application should not be submitted to the State Engineer for his report pursuant to NRS 324.130 until a corporate applicant has qualified to do business in this State.

We recognize the difficulty in determining when foreign corporations have performed sufficient acts to require qualification. For that reason, it would be advisable to promulgate a regulation pursuant to NRS 324.060 specifying as a part of the Carey Act filing process that any foreign corporate applicant present a certificate executed by the Nevada Secretary of State authorizing such corporation to transact business in this State. NRS 78.155.

CONCLUSION—QUESTION THREE

It is the opinion of this office that a foreign corporation is not required to qualify to do business in the State of Nevada pursuant to NRS 80.010 in order to be eligible to file an application for land segregation pursuant to NRS 324.120. However, before completing any act within this State beyond such filing, such corporation would be required to so qualify.

QUESTION FOUR

What is the status of Carey Act applications for land segregation by corporations found to be delinquent or in default of their obligations pursuant to the Private Corporations statutes of this State?

NRS 78.060, subsection 2 provides that a corporation may continue in its rights, privileges and powers for the period specified in its certificate or articles of incorporation, and when no period is specified, perpetually, or until it is dissolved according to law.

NRS 78.170, subsection 1 states that Nevada corporations which have refused or neglected to make the filing and pay the fees required in NRS 78.150 to 78.190, inclusive, shall be deemed to

be in default. Further, if a corporation fails to perform the aforementioned functions by the first day of the ninth month following the date when the filing was required, the corporation forfeits its right to transact any business within this State. NRS 80.150 specifies similar requirements and penalties for foreign corporations. NRS 78.170 and NRS 80.150 are self-executing statutes and, with some exceptions, non-compliance with their provisions ipso facto deprives a corporation of its right to do business within the State. Porter v. Tempa Min. and Mill Co., 59 Nev. 332, 93 P.2d 741 (1939), Fidelity Metals Corporation v. Risley, 175 P.2d 592 (Calif. 1946). One of the exceptions appears to be the right of the corporation, through its directors as trustees to dispose of and convey its property. NRS 78.175. Porter v. Tempa Min. and Mill Co., supra. Also, Allen v. Hernon, 74 Nev. 238, 328 P.2d 301 (1958) appears to create an exception where a corporation, or those claiming under it, seek to avoid liability upon an obligation by asserting the forfeited corporate right to transact business. By their wording NRS 78.170 and NRS 80.150 require the forfeiture of the right to transact business only when the above described statutory period has elapsed. Therefore, there seems to be no reason to doubt that if a corporation is merely "delinquent" by reason of being late in fulfilling the requirements of NRS 78.150 to 78.190 in the case of a Nevada corporation or NRS 80.110 to NRS 80.180 in the case of a foreign corporation, any application for land segregation filed by such corporation pursuant to NRS 324.120 would be valid. However, if any Nevada corporation or a foreign corporation engaging in more than one corporate act in Nevada has forfeited its right to transact business within the State pursuant to NRS 78.170 or NRS 80.150, it appears that there is no exception which would make valid a land segregation application filed by it.

The foregoing discussion points up an area of inconsistency with the obvious potential for unfairness. Such a situation would exist if a corporation whose right to do business has been forfeited pursuant to the statutes in its state of origin similar to NRS 78.170 is allowed to file an application for land segregation because such application is the only "piece of business" that such corporation is performing in the State of Nevada, while Nevada corporations and foreign corporations engaging in repeated transactions are not allowed to do so. See Ex Rel. Pacific States Security Co. v. District Court, supra. It would appear that if your division adopts the regulation mentioned in the analysis in response to Question Three, the aforementioned inconsistency would be eliminated.

CONCLUSION—QUESTION FOUR

Applications for land segregation pursuant to NRS 324.120 by corporations that are delinquent in meeting the requirements of NRS 78.150 to 78.190 are not invalid by reason of such delinquency. However, such applications by corporations whose right to transact business within the State have been forfeited by operation of NRS 70.170 are not valid.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT C. MANLEY, *Deputy Attorney General*

SUPPLEMENTAL OPINION 79-A

Carson City, April 12, 1979

The Honorable Robert List, *Governor, State of Nevada*, State Capitol Building, Carson City, Nevada 89701

Subject: Inquiry as to legality of "leave with pay" for state employees to attend Good Friday services.

The Governor's office was recently advised that the Legislative Counsel has informally advised members of the staff of the Legislative Counsel Bureau that it would be impermissible for them to take leave "with pay" in order to attend Good Friday services, because Article 11, Section 10 of the Nevada Constitution. Your office has asked whether or not this constitutional prohibition would apply to all state employees who seek leave "with pay" to attend Good Friday services.

Article 11, Section 10 of the Nevada Constitution states: "No public funds of any kind or character whatever, State, County, or Municipal, shall be used for sectarian purpose." The term "sectarian" is defined in Black's Law Dictionary as: "Denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; in a broader sense, used to describe the activities of the followers of one faith as related to those of adherents of another."

Since the term "sectarian" is most comprehensive in scope (Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127), the attendance of Good Friday services would most likely be viewed as a "sectarian purpose" within the meaning of Article 11, Section 10 of the Nevada Constitution. Accordingly, unless some other legal basis can be found by which state employees can be given leave "with pay" to attend Good Friday services, the Nevada Constitution would not permit the use of any public funds for such a "sectarian purpose."

There is no provision in the 1977-79 State Administrative Manual (SAM) providing for leave with pay to attend religious or other analogous services. SAM provides leave "with pay" for many purposes, including the following: (1) to vote; (2) to perform military service; 3 to fight fires; (4) to serve on juries; and (5) to attend educational seminars. However, there is not general provision authorizing the Governor or state agency supervisors to authorize "leave with pay" for any purposes other than those expressly set forth in the State Administrative Manual.

The governor may declare a legal holiday for all or part of Good Friday, pursuant to his authority in NRS 223.130. In such event, all state offices would be closed and state employees would be free to observe any religious or secular traditions they chose.

Though leave "with pay" except as noted above would probably not be permissible, nothing in the Nevada Constitution would prohibit leave "without pay" in order to participate in Good Friday services.

On February 14, 1977, the Attorney General's Office issued Attorney General's Opinion No. 221, which held that it was constitutionally permissible to allow local school boards to permit pupils to be released from school during certain periods of time for sectarian instruction or devotional exercises. The Opinion was based on the U.S. Supreme Court decision of Zorach v. Clauson, 343 U.S. 306 (1952). Of interest to the question raised above is the statement of Justice Douglas, who wrote the Zorach opinion. Justice Douglas stated:

> When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person * * *. But it can close its doors or suspend operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

Applying the reasoning of Justice Douglas, it would appear permissible for any state agency to allow a state employee to take annual leave or leave "without pay." In addition, nothing in our

Constitution would preclude an adjustment of working hours on Good Friday, in order to permit any state employee to participate in religious services. This could include permitting lunch hours to be taken at different times or permitting employees to work before or after normal working hours to compensate for time taken off during regular office hours to participate in Good Friday services. However, the language in Article 11, Section 10 of the Nevada Constitution would appear to preclude the State of Nevada from financing any leave taken by an employee for sectarian purposes.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

SUPPLEMENTARY OPINION 79-B

CARSON CITY, April 23, 1979

THE HONORABLE JOHN S. MCGIMSEY, *Lincoln County District Attorney,* P.O. Box 555, Pioche, Nevada 89403

DEAR MR. MCGIMSEY:

It would be the opinion of this office that NRS 281.210, the Anti-Nepotism Law, does embrace general improvement districts within its provisions since NRS 318.015, the General Improvement District law, provides that general improvement districts shall be considered quasi-municipal corporations. As such, in the opinion of this office a general improvement district would be a "municipality" as that term is used in NRS 281.210, subsection 1.

NRS 281.210 embraces more than just individuals employing relatives. It also covers boards, agencies or commissions acting as such. Thus, subparagraph 1 of NRS 281.210 prohibits:

> * * * any individual acting as a school trustee, state, township, municipal or county official, or as an employing authority of the State of Nevada, any school district or of the state, any town, city or county, *or for any state or local board, agency or commission, elected or appointed,* to employ * * * any relative of such individual or of any member of such board or commission, within the third degree of consanguinity or affinity. (Italics added.)

Therefore, it would be the opinion of this office that it would not be permissible to hire a relative of an individual within the prohibited classification even if such hiring is done by unanimous action of a board.

It would also be the opinion of this office that a board cannot insulate itself from the Anti-Nepotism Law by hiring an employee who would then hire all employees for the district. This is because the ultimate hiring authority would still lie with the board, which would have the right at any time to intervene in or revoke the hiring employee's powers.

Finally, we are uncertain a to what you are asking when you wish to know whether the act of hiring a relative becomes moot upon the reelection of the board member. If a relative of a board member cannot be hired during the board member's first term, we see nothing in the statute which would permit the hiring of such a relative upon the reelection of the board member. If anything, the prohibition against hiring is still in effect.

Attorney General's Opinion No. 178, dated August 31, 1960, does provide that a person who was already employed at the time of the election of his relative to the appointing authority may continue in such employment, provided this is a continuing employment contract. In the event the

employment contract comes up for renewal before a board upon which the employee's relative has been elected, the prohibition of the statute, in our opinion, would apply.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

SUPPLEMENTAL OPINION 79-C Initial application for a certificate of permission to perform marriage, residence requirement—NRS 122.064, subparagraph 1, which provides that a certificate of permission to perform marriages in the State of Nevada may be obtained only from the county clerk of the county in which a minister resides does not preclude a county clerk from accepting and processing an application from a minister who maintains an official ministerial residence in the county for the purpose of performing regular ministerial functions for a congregation or religious group organized within the county.

CARSON CITY, October 15, 1979

THE HONORABLE MICHAEL SMILEY ROWE, *Douglas County District Attorney,* Office of the District Attorney, Courthouse, Minden, Nevada 89423

DEAR MR. ROWE:

This is in response to your request for an opinion concerning the residency requirement of NRS 122.064, which states that a certificate of permission to perform marriages in the state of Nevada may be obtained only from the county clerk of the county in which a minister resides.

FACTS

In your letter of August 28, 1979, you have indicated that the Douglas County Clerk's Office has been presented with several applications for certificates of permission to perform marriages from ministers who are licensed or ordained and are in good standing within their respective denominations whose governing body and church are incorporated and organized within the State of Nevada but who do not maintain a domicile or permanent residence in Douglas County, Nevada. However, said ministers reside outside the county in areas in close physical proximity to the church or religious body organized in the county. The following opinion is based on and confined to the specific facts stated in your letter pertaining to a minister of the Tahoe-Douglas Community Baptist Church located in Douglas County, who resides in South Lake Tahoe, California. The minister is the sole pastor of his church, which is physically located in Douglas County, Nevada. The pastor is in good standing with the American Southern Baptist Convention and his particular denomination. The Douglas County Clerk has refused to accept and process an initial application for a certification of permission to perform marriages in the State of Nevada submitted pursuant to NRS 122.064, which refusal has been based on the sole fact that the minister does not reside in Douglas County. It has been assumed in this Opinion that the minister would meet all of the other qualifications for a certificate of permission to perform marriages stated in NRS 122.064, but for the fact that he is not a permanent resident of Douglas County, Nevada.

QUESTION

Does NRS 122.064 establish a permanent residency requirement for the minister noted in the statement of facts above who desires to apply for an initial certificate of permission to perform marriages, which requirement would impose a constitutionally impermissible burden on the right of members of his church organized within the State of Nevada to freely exercise their religious beliefs?

ANALYSIS

I. Citizens of Nevada have a constitutional right to have a marriage solemnized by a minister of their own faith, which is an incident of the constitutional guarantee of "liberty of conscience" contained in Article I, Section 4 of the Nevada Constitution.

Article I, Section 4 of the Nevada Constitution states as follows:

> Section 4. Liberty of conscience. *The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State,* and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, that the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness or justified practices inconsistent with the peace, or safety of this State. (Italics supplied.)

The above constitutional language is virtually identical to similar language contained in the Constitution of the State of New York. This language has been liberally construed in various decisions of trial courts in the State of New York to the effect that it provides a constitutional guarantee of freedom of religious worship, including the right to have one's marriage solemnized by a minister of one's own faith. See Matter of O'Neill v. Hubbard, 180 Misc. 214, 40 NYS2d, 202 (1943); In Re Saunders, 37 NYS2d, 341 (1942); and Ravenal v. Ravenal, 338 NYS2d, 324 (1972). The nature of this constitutional right is best described in the case of O'Neill v. Hubbard, supra, in which a judge of the New York Supreme Court stated as follows:

> The untrammeled right to entertain any religious belief and to adhere to any religious dogma which does not violate positive enactments of law and which does not flaunt basic concepts of morality is thus guaranteed by organic law [the Constitution of the State of New York]. The right to have a marriage solemnized by a minister of one's own faith is an incident of that guarantee. It may not be impaired by the Legislature in the manner here attempted. O'Neill v. Hubbard, supra, at pages 204-205.

In the O'Neill case, the New York Supreme Court mandated the New York City Clerk to list on the roster of persons qualified to solemnize marriages a minister of a church not appearing on the Federal Census of Religious Bodies, which was a prerequisite of such listing in accordance with New York statutory law. The court viewed the statutory requirement as a legislative restriction upon the recognition of religious bodies, constituting an invasion of and an unwarranted interference by the state with the religious freedom guaranteed by Article I, Section 3 of the New York State Constitution, which contains language virtually identical to that of the Nevada Constitution reproduced above.

In view of the similarity of the constitutional language in the New York and Nevada State Constitutions, it is the opinion of this office that the construction of this language by the New York court would be a persuasive indication of the meaning to be afforded to this language in the State of Nevada, even though no Nevada cases have been found directly on point.

II. Absent any violation of a state or Federal constitutional provision, the Nevada Legislature has the power and authority to provide requirements by statute for the qualification and licensing of all persons thought necessary to legally perform the marriage ceremony in the state of Nevada.

In the administration of the marriage ceremony, a pastor or minister is a public civil officer

similar in nature to a judge or a justice of the peace authorized to perform the same functions, and in this capacity, the Legislature has the power to provide by statute the qualifications and licensing requirements of said officers, which are thought necessary to legally perform the marriage ceremony. See 66 Am.Jur.2d, "Religious Societies" Sec. 23, citing Goshen v. Stonington, 4 Conn. 209 (1822); Galloway v. Truesdell, 83 Nev. 13, 22, 422 P.2d 237 (1967), citing 45 Am.Jur. 742, Sec. 30; and 52 Am.Jur.2d "Marriage," Sec. 40, citing Galloway v. Truesdell, supra; and Nevada Attorney General's Opinion 4, January 10, 1951. The statutory requirements for obtaining an initial application for a certificate of permission to perform marriages as contained in NRS 122.064 has already been subjected to a constitutional challenge in the Nevada Supreme Court. However, in the case of Paramore v. Harry K. Brown, 84 Nev. 725, 448 P.2d 699 (1968), the Nevada Supreme Court ruled that NRS 122.064, subsection 3 was constitutional and did not constitute a special law or contain language impermissible on the grounds of being void for vagueness. No other constitutional challenges were made in that case.

The most extensive analysis of the legal authority of the Nevada Legislature to prescribe licensing requirements and qualifications for ministers seeking to obtain a certificate of permission to perform marriages is found in the case of Galloway v. Truesdell, supra, which invalidated a statute empowering District Judges in Nevada to determine the qualifications of ministers to receive a certificate of permission to perform marriages. The Nevada Supreme Court ruled that such a statute was unconstitutional, because it imposed legislative, administrative, ministerial, and investigative functions upon the district courts and district judges, which were nonjudicial in character and unauthorized under the Nevada Constitution. However, the Nevada Supreme Court took great pains to point out that the State of Nevada does have a legitimate interest in regulating and licensing persons who perform the marriage ceremony in this State. A portion of the court's opinion is as follows:

> The State has a paramount interest in the marriage ceremony and its ramifications. Certain proper restrictions, such as the requirement that the person who performs the ceremony must be certified so to do, can be imposed by the Legislature, in a proper exercise of its legislative power. *This power is subject to judicial control only where, in the exercise thereof, there has been a violation of a State or Federal constitutional provision, which limits the Legislature in the performance of acts in connection with the power it assumes to exercise.* However, the State's cardinal interest in marriage and the ramifications thereof is no greater than the State's interest in the general health and welfare of the people; the right and power to license physicians, dentists, businesses of all kinds, to license or grant privileges to carry concealed weapons, regulate and license public utilities and other examples too numerous to mention, as more particularly set out hereafter. The subjects are all properly within the legislative sphere, and the function of licensing, controlling and regulating them is logically and legitimately derived from the basic legislative power. (Italics supplied.) Galloway v. Truesdell, supra, at page 23.

As emphasized above, the only limitation on the exercise of legislative power in the licensing and regulating of persons who perform the marriage ceremony is that the licensing requirements must not contravene any constitutional provision. Galloway v. Truesdell, supra, has been cited extensively in many courts throughout the United States, including many legal reference works.

III. Residence within a district or political unit is not a necessary qualification of a civil public officer, unless an express statutory or constitutional provision requires such residence; and statutory provisions requiring residence are not unconstitutional per se.

In the absence of an express statutory or constitutional provision requiring residence within a district or political unit, the decided weight of authority supports the view that residence within the district or other political unit is not a necessary qualification of a civil public officer. Nevada has followed this line of authority in the case of State ex rel. Schur v. Payne, 57 Nev. 286, 63

P.2d 921 (1937), which involved a person who was held to be eligible to the office of justice of the peace of a township, even though he resided in another township in the same county. It should be noted that the Nevada Supreme Court found no constitutional or statutory provision expressly requiring residence within the township from which the officer in question was elected.

Likewise, the general weight of authority indicates that statutes making residence within a district or political unit a qualification of a public officer are generally valid and not unconstitutional per se. See Annotation in 32 L.R.A. (N.S.) 835, citing State ex rel. Attorney General v. Covington, 29 Ohio State 102; and McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 47 Lawyer's Edition 2d, 366, 96 Sup.Ct. 1154 (1976).

IV. The use of the term "resides" in NRS 122.064, subsection 1 would ordinarily refer to the place of a minister's permanent residence or domicile, unless such an interpretation would result in the infringement of the constitutional rights of the members of a particular congregation in Nevada.

For the purposes of NRS 122.064 only, the term "resides" insofar as it means "residence" and the term "domicile" may not necessarily be synonymous. In fact, residence may refer to a temporary, permanent, or transient state of occupancy as opposed to a fixed abode, *depending upon the purpose of the particular object or use of the term in a particular statute.* In the case of Weible v. United States, 244 F.2d, 158 (1957), the Ninth Circuit Court of Appeals noted that domicile is the most steadfast of the two words and is pretty well anchored in legal literature so far as meaning is concerned. "Residence," on the other hand, has an evasive way about it, with as many colors as Joseph's coat. "Residence" reflects the context in which it is found, whereas "domicile" controls the context. See Weible v. United States, supra, at page 163.

In determining the meaning to be accorded the term "residence" or "resides" as it is used in a particular piece of legislation, such as NRS 122.064, the context of this term within the statute and the legislative purpose must be examined. See 25 Am.Jr.[Jur.]2d, "Domicile" Sec. 4, page 7. The notion of "domicile" is more inclusive than the notion of "residence," and the former term has a broader and more comprehensive meaning. Actual residence is not necessary to preserve a domicile after it has once been acquired, and consequently, one may be a resident of one jurisdiction while having a domicile in another for certain purposes, such as application of attachment statutes. See 25 Am.Jur.2d, "Domicile," Sec. 4, pages 7-8, citing 26 ALR 187-188. With respect to clergymen, it has been noted that clergymen are not prevented from acquiring a domicile in places to which they are assigned, even though they are affiliated with certain sects or denominations that assign ministers for short periods of time to certain locations, at the end of which they may be reassigned to other locations or returned to former locations. See 25 Am.Jr.[Jur.]2d, "Domicile," Sec. 45.

With respect to establishing residence (as opposed to a permanent domicile), the case law generally indicates that it is established by bodily (physical) presence in a place. See Weible v. United States, supra, at page 163. Depending on the context, it can also be established by physical presence in a place coupled with an intention of remaining in that place. See 37 Words and Phrases, "Residence," page 69, citing Hughes v. Illinois Public Aid Commission, supra.

In the context of the facts noted above and in view of the purpose of NRS 122.064 to authorize ministers of bona fide congregations or religious groups in Nevada to obtain certificates by which they can solemnize marriages of members of their congregation, it is the opinion of this office that the term "resides" would ordinarily refer to a minister's legal residence or domicile, unless it can be established in a particular case that said term should be construed to mean a "ministerial residence," as discussed below, for the purpose of protecting the constitutional rights of the members of a particular congregation.

V. NRS 122.064, subsection 1 does not expressly require that a minister be domiciled in the county in which he submits an initial application for a certificate of permission to perform marriages.

The pertinent statutory language states as follows:

1. A certificate of permission may be obtained only from the county clerk of the county *in which the minister resides,* after the filing of a proper application. (Italics supplied.) See NRS 122.064, subsection 1.

It is significant to note that the above language was included in the statute enacted by the 1967 Nevada Legislature, in response to the decision in the Nevada Supreme Court case of Galloway v. Truesdell, supra, which invalidated the preexisting statute (NRS 122.070) insofar as it required District Judges to process applications for such certificates. Statutes predating NRS 122.070, which was reviewed in Galloway v. Truesdell, supra, did not contain a residency requirement for ministers per se but instead authorized ordained ministers of any religious society or congregation within the State of Nevada to obtain licenses for the purpose of solemnizing marriages. See Generally: Nevada Attorney General's Opinion No. 4, January 10, 1951.

A review of the legislative history of S.B. 66, Chapter 487, Statutes of Nevada 1967, enacting the language now contained in NRS 122.064, subsection 1 fails to reveal the legislative intent respecting the use of the term "resides" used in NRS 122.064, subsection 1. According to the Minutes of the Assembly Judiciary Committee of April 4, 1967, which considered this bill, it appears that the primary concern of the legislatures was the requirement that an applicant's ministry be one of service to his congregation, and the performance of marriages would be incidental to this ministry. This would be one of the primary requirements to be investigated by a county clerk in processing an application for a certificate of permission to perform marriages. It is also noted in the committee minutes that another purpose of this legislation was to codify the State's legitimate interest in seeing that a marriage is properly performed. No direct comments were made concerning the requirement that an applicant for a certificate of permission to perform marriages must submit his initial application to the county clerk of the county in which he resides. Accordingly, the meaning to be accorded to this portion of the statute must be interpreted in light of the purpose of the statue and the context of the particular situation in which it becomes relevant in processing an application for a certificate.

VI. Any residency requirement contained in NRS 122.064, subsection 1 must be construed in such a way as to preserve the constitutional right of the members of a bona fide congregation or religious group organized in Nevada to have their marriages solemnized by a minister of their own faith.

Based on the facts noted above, it would appear that the minister in question is physically present in Douglas County at such times as he performs the ministerial duties of the church or congregation which he serves in Douglas County, to-wit: The Tahoe-Douglas Community Baptist Church. In carrying out these ministerial functions, the minister in question would undoubtedly occupy an office or other place set aside for the minister in the church building located in Douglas County, Nevada, from which he could arrange, perform or otherwise carry out his various ministerial duties for his congregation, many of whom would presumably be Nevada residents.

Since the minister in question is the sole pastor of his congregation, it would appear that the Nevada constitutional provisions respecting "liberty of conscience: discussed in Section I above could be involved, insofar as the rights of the members of this minister's Nevada congregation to have their marriage solemnized by a minister of their own faith are concerned. Accordingly, it is the opinion of this Office that the Douglas County Clerk should apply the language in NRS 122.064, subsection 1 noted above in such a way that a minister serving a bona fide Nevada congregation is not precluded from submitting an application for a certificate of permission to perform marriage. Once such an application is received, the county clerk should determine whether or not the applicant maintains a bona fide ministerial residence within the county before processing the application further. In making such a determination, the county clerk may consider

the facts and circumstances surrounding the applicant's ministry in Nevada in deciding whether the minister maintains an actual ministerial residence in the county. Relevant facts that could be considered by the county clerk in making this determination would include, without limitation, the following:

1. Whether or not a congregation or religious group organized for the purpose of conducting regular religious services or observances under the guidance or direction of the applicant actually exists in the county.

2. Whether or not there exists in the county an actual church or stated meeting place for worship or other religious observances, which is maintained, owned, or provided by the congregation or religious group in question for use by the minister-applicant and the members of the church or group.

3. Whether or not the minister-applicant has in fact been called, appointed, or otherwise authorized to serve as the minister of the congregation or religious group organized in the county and whether or not the minister-applicant is qualified to serve and is actually serving on a regular basis all of the ministerial functions of said congregation or religious group, including the solemnization of marriages of members of the congregation or group.

4. Whether or not the establishment of a ministry or ministerial residence in the county has been accomplished for the sole purpose of acquiring a certificate of permission to perform marriages to engage in the business of solemnizing marriages, which would not be incidental to the ministry of the congregation or religious group in question.

If satisfied that a bona fide ministerial residence has been established or is being maintained within the county by the minister-applicant, the county clerk may proceed to examine the qualifications of the applicant and may take whatever action is authorized by NRS 122.064 in connection with t e processing and issuance of an initial certificate of permission to perform marriages.

CONCLUSION

NRS 122.064, subsection 1 cannot be applied in such a way so that the members of the congregation of the Tahoe-Douglas Community Baptist Church are deprived of their constitutional right to have marriages solemnized by the minister of their faith in this State. If the minister-applicant can establish to the satisfaction of the county clerk that he has a bona fide ministerial residence in Douglas County notwithstanding the fact that he maintains another residence in the State of California in close proximity to his church or congregation, the clerk is not precluded from accepting and processing an application for a certificate of permission to perform marriages pursuant to NRS 122.064. It is emphasized that this conclusion is based on the facts and analysis noted above and should not be interpreted as requiring the county clerk to accept all applications from ministers who do not reside in the county. Each such case must be considered on its own merits.

I hope the above assists you in resolving this matter.

Respectfully submitted,

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