

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1980

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. 80-1 County Sheriffs and Common Jails of Counties—(1) A county sheriff, as keeper of the common jail, does not have the discretion to refuse to receive persons charged by Nevada Highway Patrol with violation of state law. (2) The costs of housing a person, arrested by the Highway Patrol for violation of state statute, in an alternate jail facility because of insufficient room in the common jail are chargeable to the county or governmental agency charged with the responsibility of maintaining the common jail.

Carson City, January 24, 1980

S. Barton Jacka, Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89711

Attention: Bernard Dehl, Chief, Nevada Highway Patrol Division

Director Jacka:

The following opinion is submitted in response to your letter of October 30, 1979.

FACTUAL BACKGROUND

The Nevada Highway Patrol has been notified in writing by the Sheriff of Washoe County, Nevada, that he (the sheriff) will “refuse any additional intake of inmates into the jail” once that facility reaches a prisoner population of 200 persons. The sheriff has suggested that the patrol make temporary arrangements with municipalities or adjacent counties for the housing of persons arrested by the patrol for violation of state motor vehicle laws. As vacancies occur in the Washoe County jail, the sheriff states that the patrol will be immediately notified and acceptance of patrol arrestees will be resumed.

The patrol customarily houses its arrestees in county jails throughout the State. The Legislature has not appropriated funds in the patrol budget for housing of its prisoners in jail facilities. The cost of providing and maintaining common jail facilities is borne either by the county or the governmental agency established in the county for this purpose, such as the metropolitan police department in Clark County.

The Washoe County jail, constructed some two decades ago, was designed for an inmate capacity of 149 prisoners. With the use of additional bunks, an “emergency” inmate population of 163 may be accommodated. Current inmate population hovers at a daily average of some 200 inmates. Virtually all sections of the county jail are currently at or well in excess of their design capacity. As a result of the population level, not atypically, a dozen or more inmates sleep

on mattresses laid on the floor. Conditions at the Washoe county jail, including overcrowding, are the subject of federal civil rights suits.

The sheriff advises that past experience has shown that where the jail population exceeds the 200 inmate level, inmate tension increases with the attending enhanced potential of riot, violence among inmates and breach of security. The opportunity for exercise, limited already by the facility's design, proportionately decreases. The feeding, care and showering of inmates become somewhat more difficult as does the separation of pretrial detainees from those already convicted, and the separation of the more serious offenders from those accused of lesser crimes. In an attempt to reduce the population level the sheriff no longer accepts federal and immigration detainees. There is no foreseeable expectation for relief in the immediate future by way of the construction of a new facility, or through the reduction in the number of persons arrested within the county.

QUESTION ONE

Does a county sheriff, as keeper of the common jail, have the discretion to refuse to receive persons charged by the Nevada Highway Patrol with violations of state statute?

ANALYSIS—QUESTION ONE

[NRS 211.010](#) provides, in part, that “one common jail shall be built or provided in each county, and maintained in good repair at the expense of the county.” The board of county commissioners has the care of the building, its repair, inspection and must inquire into the security thereof and the treatment and condition of prisoners. The commissioners are obliged to take necessary precautions against escape, sickness or infection. [NRS 211.020](#). Likewise, expenses for medical care must be borne by the county. [NRS 211.140](#), subsection 4. To achieve these ends, the county may levy taxes, [NRS 244.150](#), and issue bonds for construction of jail facilities, [NRS 244.785](#). Note: In a county that has created a metropolitan police department to pay for law enforcement expenses, costs relating to the operation and maintenance of the jail and the inmates housed therein are borne by the department and funded by the governmental entities that have created the department. See Chapter 280, NRS. Hereafter, any reference to county responsibilities regarding jail facilities shall also include those of a metropolitan police department created to assume these responsibilities.

The actual day-to-day responsibility for the operation of the common jail is delegated to the county sheriff who has custody and charge of the jail facility and the prisoners kept therein. [NRS 211.030](#), subsection 1 and [NRS 211.140](#), subsection 1. As a result of the obligations imposed, the sheriff is necessarily exposed to potential liability for willful or negligent acts or omissions in the operation of the jail and care of its prisoners, including liabilities for escape, riot, mistreatment of prisoners, injury to prisoners and the broad panorama of violations of civil and constitutional guarantees. Essential to the proper discharge of his duties, the sheriff enjoys wide latitude and discretion in the operation of the facility, and in anticipating the probable consequences of permitting certain conduct, practices or conditions to exist in the penal environment. See *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974); *Williams v. Edwards*, 547 F.2d 1206, 1212 (5th Cir. 1977) and *Jackson v. Werner*, 394 F.Supp. 805, 806 (W.D. Penn. 1975).

[NRS 248.060](#) provides that a sheriff is guilty of a gross misdemeanor if he shall “willfully [willfully] refuse to receive * * * any person charged with a criminal offense.” Although this provision is couched in negative terms, rather than in terms imposing an affirmative duty to receive arrestees, this section assumes the existence of an affirmative duty on the part of the sheriff as keeper of the common jail to receive arrestees, making the refusal to do so a crime, thus serving to confirm the existence of a nondiscretionary, ministerial duty to accept arrestees.

Statutes in Florida (Fla. Stat. § 839.21), identical to ours for analytical purposes, have been said to bind that state's director of corrections "with the compelling force of criminal sanction, to accept *all* prisoners brought to him." (Italics added.) *Costello v. Wainwright*, 525 F.2d 1239, 1253 (5th Cir. 1976) (vacated and remanded on other grounds, 539 F.2d 547 (1976)).

The above-cited statutory provisions unequivocally confirm the existence of a statutory scheme mandating the establishment of a "common" jail within each county for the receipt of persons arrested for violation of state statute, as part of the responsibility, operations and functions of a county in our State. Under a similar statutory scheme in a different context, counties have been determined responsible for the operation of public hospitals established in the county. See Attorney General's Opinion 79-25 (Nev. 1979).

The use of the adjective "common" in [NRS 211.010](#) supports this conclusion. "Common" is an adjective that has a multiplicity of definitions depending upon the context in which the word is employed. The first and usual definition is that of belonging or pertaining to the community at large. *U.S. v. Crescent-Kevan Co.*, 164 F.2d 582, 587 (3d Cir. 1948); Black's Law Dictionary (4th ed. 1968). In the context of [NRS 211.010](#), its use implies a dedication of the place described to the community interest and may be regarded as synonymous with "public." In short, the adjective "common" is merely descriptive of the accepted function of a jail, i.e., a public building in a county or city where persons are ordinarily confined for punishment or where persons under arrest are detained. *Grab v. Lucas*, 146 N.W. 504, 505 (Wis. 1914) and, see, generally, the cases collected at 23 Words and Phrases "Jail."

It is, therefore, the opinion of this office that a county sheriff, as keeper of the common jail, does not have the discretion to refuse to receive a person arrested by the patrol for a violation of state statute. It should be noted in this regard that no other political subdivision of this State has been given the overall statutory responsibility to maintain a common jail which must accept arrestees brought to it. It may then be inferred that in order to carry out these obligations, the county (or metropolitan police department) must provide adequate facilities for the receipt of arrestees. Where resort to alternative facilities is necessary, (see, Analysis—Question Two, *infra*) it is the immediate responsibility of the sheriff, as keeper of the common jail, and the ultimate responsibility of the county (or department) under our statutory scheme, to arrange for the use of other facilities and to designate to the arresting agencies which alternative facility they are to utilize.

The sheriff may, however, in the exercise of his sound judgment and the discretion granted him in the daily administration of the jail, refuse to receive arrestees into a *particular* jail facility where receipt of additional prisoners would result in egregious overcrowding and the concomitant health, safety and security problems. Likewise, the sheriff may for sound reasons designate that a particular facility be utilized for the receipt of a particular class of prisoner or one from a particular arresting agency. The existence of this administrative latitude in the operation of the common jail does not and cannot under our statutory scheme obviate the responsibility of the county to maintain common jail facilities as may be appropriate to county-wide needs, nor does it diminish the duty of the sheriff to receive prisoners.

CONCLUSION—QUESTION ONE

A county sheriff, as keeper of the common jail, does not have the discretion to refuse to receive persons arrested by the Nevada Highway Patrol for violation of state law.

QUESTION TWO

Are the costs of housing a person arrested by the patrol for a violation of state statute in a non-county operated alternate jail facility chargeable to the county or other governmental agency charged with the responsibility of maintaining the common jail?

ANALYSIS—QUESTION TWO

In order to answer the question presented, it is necessary to determine what overall liability the county has in the first instance in regard to the payment of maintenance costs of persons arrested for violation of state law. The general rule is that the State is liable for jail expenses only when such liability is expressly imposed by statute. See *City of Pasadena v. Los Angeles County*, 258 P.2d 28, 29 (Cal. Dist. Ct. App. 1953) and: 72 C.J.S. Prisons § 26(b). Likewise, counties are subject “to only such liabilities as are *especially* provided for by law.” (Italics added.) *Schweiss v. District Court*, [23 Nev. 226](#), 230 (1896).

In *Kovarik v. County of Banner*, 224 N.W.2d 761, 764 (Nev. 1975), the court states that:

[A]s a general rule * * * it is the duty of a county to pay the expenses of the local administration of justice within the county, and it has been said that this duty may arise as well from the general system of county organization as from express statutes defining the duties of counties on this particular subject.

A county is a political subdivision of the state created for the purpose of performing certain state governmental functions. The financial liability of the county may be found by necessary implication from a statutory scheme. *Kovarik v. County of Banner*, supra, and *State v. Rush*, 217 A.2d 441 (N.J. 1966). By such a statutory scheme, a state legislature may validly require its subordinate political subdivisions to incur expenses for a public purpose. This is true even though some conceptual difficulty may exist in separating “state purposes” from “local purposes,” or where the subdivision must raise taxes to perform the function. *Kovarik v. County of Banner*, supra, at 224 N.W.2d 765-766 and see, *Meadowlands Regional Develop. Agency v. State*, 270 A.2d 418, 428-429 (N.J. 1970).

Historically, the legal and financial responsibility for operating the local criminal justice system for the enforcement of state statutes has been placed upon the counties. Put succinctly, the county sheriff is obliged to keep and preserve the peace in the county ([NRS 248.090](#)), the district attorney, the county’s chief legal advisor, prosecutes ([NRS 252.090](#)), and the justice and district courts have the jurisdiction over criminal cases ([NRS 3.190\(g\)](#); [NRS 4.370](#), subsection 3). Given the duties of the county and its sheriff in regard to the common jail (Analysis—Question One, supra), and the historical responsibility imposed by the constitutional and statutory scheme, it is reasonable to conclude that by necessary implication the county or other governmental entity charged with the responsibility of maintaining the common jail must bear the costs of housing persons arrested by a state law enforcement agency for violations of state statute. The correctness of this conclusion is reinforced by a 1969 decision of the Nevada Supreme Court in *State v. District Court*, [85 Nev. 241](#).

In *State v. District Court*, supra, the Washoe District Court entered an order directing the state controller to draw and the state treasurer to pay a warrant for the fees of two court-appointed attorneys and the expenses of a defense investigator. The district judge who entered the order found that these expenses were an unreasonable burden upon Washoe county and should be borne instead by all the citizens of the State. The State sought prohibition in the Nevada Supreme Court.

The court held that the district judge was without authority to enter such an order “because there was no [state] legislative appropriation for such expense.” The court reasoned that no charge may be made upon the state treasury absent the existence of a statute indicating the legislative intent to authorize the expenditure and fixing a maximum amount to be paid. The district court could, however, require payment by the county for the services of court-appointed

counsel pursuant to [NRS 7.260](#), subsection 3 (cf. [NRS 7.155](#)) which required the county treasurer to reimburse for services and expenses which constituted “a county charge.”

State v. District Court, supra, involved the general issue of which governmental entity bore the financial responsibility for the payment of the costs of the administration of the local criminal justice system. The State was not liable because it had not been expressly made responsible. The dichotomy of state versus local purpose was present in the case, as was the potential of a perhaps onerous fiscal burden upon a political subdivision. This case is thus illustrative of the general legal principles set forth previously, indicating that such principles are applicable as the law of this State. See also *In re Two Minor Children*, [95 Nev. 225](#) (1979).

It is, therefore, the opinion of this office that the costs of housing persons arrested by the patrol for violations of state statute are chargeable to the county or governmental agency charged with the responsibility of maintaining the common jail. In the latter situation, the local governments obligated by statute to fund the agency responsible for maintaining the common jail in the county, such as a metropolitan police department, are chargeable for the costs thereof in the manner specified by law. Local county government is liable, in effect, as is “specially provided for by law.” *Schweiss v. District Court*, supra. Having concluded that the county or other appropriate local governmental entity is liable, it then follows that in the event resort to facilities other than the county operated common jail is necessary, the governmental entity responsible for maintaining the common jail must pay these costs of housing in alternate places of confinement. At least three alternatives exist within our statutory scheme. In each alternative, the county is expressly authorized to assume the costs of housing arrestees of the patrol

[NRS 211.080](#), subsection 1 provides that any sheriff “for any sufficient cause” may remove a prisoner to another county jail with the consent of the sheriff of the other facility. The costs of removal and of maintaining the prisoner must be “defrayed by the county from which they were so removed.” [NRS 211.080](#), subsection 2. Secondly, the director of the department of prisons may, at the request of the sheriff, accept a county inmate for safe-keeping with the costs of care and custody to be “borne by the local government affected.” [NRS 209.311](#). Lastly, the county commission may enter into inter-local cooperative agreements with other political subdivisions for the joint use of facilities and law enforcement agencies. [NRS 277.180](#), subsections 2(a) and (f). Such agreements do not relieve the contracting public agencies of “any obligation or responsibility imposed by law * * *” [NRS 277.130](#).

CONCLUSION—QUESTION TWO

The costs of housing a person arrested by the highway patrol for a violation of state statute in an alternate jail facility because of insufficient room in the common jail are chargeable to the county or governmental agency charged with the responsibility of maintaining the common jail.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Edwin E. Taylor, Jr.
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OPINION NO. 80-2 Elections and Campaign Disclosure Reports—[NRS 294A.010](#) requires electoral candidates to disclose all political contributions received regardless of when received. [NRS 294A.020](#) requires electoral candidates to disclose only those campaign expenditures made after the second Monday in June of the electoral year in which the candidate is campaigning. However, there is nothing which prohibits voluntary disclosures of campaign expenditures made prior to that date.

Carson City, January 31, 1980

The Honorable George E. Franklin, City Attorney, P.O. Box 4086, North Las Vegas, Nevada 89030

Dear Mr. Franklin:

For the purpose of giving legal advice to elected officials in North Las Vegas as to their responsibilities under the Nevada Campaign Practices Act, Chapter 294A of NRS, you have requested advice on the reporting requirements of [NRS 294A.010](#) and [294.020](#).

FACTS

In 1973 the Legislature enacted a campaign practices act, applicable to legislators only. This act required that campaign expenditures be disclosed and also imposed limits on such expenditures. No beginning time period was set forth in the statute for reporting expenditures. Chapter 415, Statutes of Nevada 1973.

In 1975 the Legislature expanded the scope of the campaign practices law to include all electoral candidates (see Attorney General's Opinion No. 198, January 28, 1976). The 1975 act also added a requirement that campaign contributions received be disclosed. Chapters 406 and 719, Statutes of Nevada 1975. The new law on campaign contribution reports contained no beginning time period for reporting such contributions (see Chapter 406, *supra*). The new amendments to the campaign expenditure report law did establish a beginning time period for reporting such expenses in the definition of the term "campaign expenses" (see Chapter 719, *supra*). Thus [NRS 294A.020](#), as amended, required electoral candidates to report their "campaign expenses." The term "campaign expenses" was defined in [NRS 293.031](#) as:

- * * * all expenditures contracted for or made * * * to further directly the campaign for election of the candidate during the periods:
1. Between the first day on which a *certificate of candidacy* may be filed and the primary election; and
 2. Between the primary election and the general election. (Italics added.)

The Secretary of State, pursuant to [NRS 294A.060](#) (added to the statutes by Chapter 406, *supra*), soon deemed it necessary to promulgate regulations concerning campaign disclosure reports and turned to the office of the Attorney

General for advice. The position of the Attorney General's office with respect to campaign contributions was that the law contained no beginning time period for such reports and it specifically required the total of *all* contributions to be reported. This office advised the Secretary of State that political contributions had to be reported regardless of when received, whether or not a candidate had then publicly announced his intention to seek public office at the next election. With respect to campaign expenditures, this office interpreted the term "certificate of candidacy" as used in the definition of "campaign

expenses” to be synonymous with the term “declaration or acceptance of candidacy,” which candidates had to file to be placed on the ballot. See [NRS 293.177](#) and [293.180](#). However, the election laws did not specify a beginning date for filing a “declaration or acceptance of candidacy.” In the absence of such a date, a candidate would not know from which date he or she should report campaign expenditures.

Accordingly, this office suggested to the Secretary of State that he promulgate a regulation specifying the first day of January of each election year as the beginning date for filing campaign expenditure reports. January 1 was selected because this date would reasonably cover most significant campaign expenses a candidate would make in any electoral campaign. The Secretary of State adopted such a regulation in October, 1975.¹

In addition, the Secretary of State on January 2, 1976 also adopted his “Regulations for Election Campaign Practices Act” which required all campaign contributions be reported regardless of when received. Thus, *campaign contributions* received a year or several years prior to the election had to be reported. However, only those *campaign expenses* made after the first day of January of the electoral year up to the primary election and between the primary and general elections had to be reported. These regulations were in force for the 1976 elections.

In 1977 the Legislature amended the act again, repealing the campaign expenditure limitations pursuant to federal and state court decisions and adding another reporting period fifteen days before the general election. The definition of “campaign expenses” in [NRS 293.031](#) remained the same, and no beginning time period for reporting campaign contributions was enacted in this legislation. Chapter 550, Statutes of Nevada 1977. However, the 1977 amendments, now codified as [NRS 294A.005](#), did contain a definition of “candidate” as one:

1. Who files a declaration of candidacy;
2. Who files an acceptance of candidacy; or
3. Whose name appears on an official ballot at any election. See Chapter 550, *supra*.

It became necessary for the Secretary of State to promulgate new regulations concerning campaign disclosure reports for the 1978 elections. Again, following the advice of the Attorney General’s office, regulations concerning the time period for reporting campaign expenses and contributions, identical to the 1976 regulations, were promulgated. Pursuant to amendments to the Administrative Procedure Act enacted in 1977, these regulations were submitted to the Legislative Counsel’s office and to the Legislative Commission for its review. On September 27, 1977, the Secretary of State was advised by the Legislative Counsel’s office that these regulations were reviewed by the Legislative Commission without objection. These regulations were in force for the 1978 election.

In 1979, minor amendments were made to the Election Campaign Practices Act (see Chapter 601, Statutes of Nevada 1979), and new regulations were needed. Again, pursuant to the advice of the Attorney General’s office, the Secretary of State drafted regulations pertaining to the time periods for reporting campaign contributions and expenses identical with the regulations promulgated for 1976 and 1978 elections.

However, the Legislative Counsel’s office raised several substantive objections to the regulations based on its interpretation of [NRS 293.031](#), [294A.005](#), 294A.010 and 294A.020. First, it was pointed out that the term “certificate of candidacy” in the definition of “campaign expenses” in [NRS 293.031](#) was not synonymous with the term “declaration or acceptance of candidacy” and that in fact, [NRS 293.180](#) contains a specific opening filing date for certificates of candidacy, namely the second Monday in June of the electoral year. Therefore, the Legislative

¹ This opening filing date for the declarations or acceptances of candidacy was enacted into statutory form by the Legislature in Chapter 178, Statutes of Nevada 1979.

Counsel's office contended that only those campaign expenses incurred after the second Monday in June of an electoral year need be reported.

Second, the Legislative Counsel's office interpreted [NRS 294A.005](#), which contained a definition of the term "candidate," as impliedly fixing the beginning filing date for reporting campaign contributions as the date a candidate actually filed his declaration or acceptance of candidacy. Pursuant to this interpretation, only those contributions received after a candidate filed his declaration or acceptance of candidacy need be reported.

The Secretary of State recognized that he did not have to follow the Legislative Counsel's advice in order to promulgate his regulations.²

In an effort to avoid such last minute litigation and in an effort to amicably resolve the conflict, the Secretary of State decided to seek the advice of the Legislative Commission at its December 19, 1979 meeting. Both the Secretary of State and the members of the Legislative Commission noted that the commission's advice would not be binding on the Secretary of State. After both views of the controversy were presented to the Legislative Commission, it adopted the Legislative Counsel's opinion.

Subsequently, the Secretary of State promulgated his new regulations for the 1980 elections concerning campaign disclosure reports. The regulations were reviewed by the Legislative Commission under [NRS 233B.067](#) without objection. However, the Secretary of State did *not* promulgate the Legislative Counsel's opinions on the time frame for reporting campaign contributions and expenses in the regulations themselves. Instead, he included them in language he termed "commentary." Thus under Regulations 5.1 and 5.2, dealing with contributions, the Secretary of State has this "commentary":

This means that a candidate need only account for and report contributions received on the date or after he has filed his candidacy. January 1, is the first date and July 16, 1980 is the last date to file for office, so the person who did not file until the last day would only have to report contributions from July 16 on.

Under Regulations 8.1 and 8.2, dealing with campaign expenses, the Secretary of State has this "commentary":

Based on [NRS 293.031](#) and [293.180](#) the beginning of the time for which a candidate must report his campaign expenses is the second Monday in June (June 9, 1980) of the year in which the primary and general elections are held.

* * *

² Under NRS 233B.063 and 233B.064, the Legislative Counsel is limited to reviewing and revising regulations prepared by executive agencies only for their form—grammar, capitalization, numbering, arrangement of paragraphs and sentences, etc.—so as to be sure the language is clear, concise and suitable for presentation in the proposed Nevada Administrative Code. The Legislative Counsel is prohibited from altering the meaning or effect of the substantive content of a regulation without the agency's consent. Thus, while the Legislative Counsel may suggest a change in administrative regulations based on his interpretation of the law, the agency is not bound by that interpretation and may promulgate the regulation according to its own interpretation. Likewise, while the Legislative Commission may review regulations to determine if they are in conformity to statutory authority as it interprets the law, it cannot impose any objections to the regulations upon the executive agency. The agency may disregard such objections and insist that the regulations be filed with the Secretary of State, at which time they go into force and effect. The Legislative Commission's recourse is to refer the matter back to the next session of the Legislature, unless the Legislature is already in session in which case the regulations are immediately referred to the Legislature without being filed with the Secretary of State. NRS 233B.067. Any other procedure would be contrary to the principle of separation of powers. Article 3, Section 1 of the Nevada Constitution. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967).

This means that a candidate need not account for or report any expenses he has had or expenditures that he has made to further his campaign prior to the second Monday in June (June 9, 1980).

Since these “commentaries” are not a part of the regulations they do not have the force of law normally imputed to regulations. See [NRS 233B.040](#). Nevertheless, such “commentaries” will be distributed to electoral candidates as required by [NRS 294A.065](#). It can be assumed that candidates would rely on the “commentaries” in preparing their campaign disclosure reports. Therefore, it is important that these “commentaries” not be misleading because gross misdemeanor penalties may be involved against a candidate who violates the provision of Chapter 294A of NRS. However, the Secretary of State knew from prior experience that litigation from electoral candidate could conceivably arise over the disputed language. Prior experience in election litigation also showed that such litigation frequently occurred very close to the electoral time periods for performing certain acts, thereby leading to confusion and expense in the enforcement of the election law.

QUESTION ONE

For what period must political campaign contributions be reported by electoral candidates under [NRS 294.010](#)?

ANALYSIS—QUESTION ONE

There is nothing in either Chapters 293 or 294A of NRS which specifies a beginning reporting date for the disclosure of campaign contributions. Instead, [NRS 294A.010](#) provides, in pertinent part:

Every candidate for state, district, county, city or township office at a recall, special, primary or general election shall * * * report the total amount of *all* his campaign contributions on affidavit forms to be designated and provided by the secretary of state. (Italics added.)

* * *

4. *Each* contribution * * * in excess of \$500, shall be separately identified * * * and reported on the affidavit report form provided by the secretary of state. (Italics added.)

It is the duty of the courts to interpret and enforce statutes in accordance with the intention of the Legislature. *Worthington v. District Court*, [37 Nev. 212](#), 244, 142 P. 230 (1914). What is true of the courts is equally true for an executive agency such as the Attorney General’s office. Attorney General’s Opinion 216, July 12, 1977. Where the language of a statute is plain and unambiguous, the legislative intent must be ascertained from the language itself and one should not go beyond such language. *Seaborn v. First Judicial District Court*, [55 Nev. 206](#), 218, 219, 29 P. 500 (1934). Where the intention of the Legislature is thus clear, it is the duty of the courts (and of this office—Attorney General’s Opinion 216, supra) to give effect to such intention and not to nullify its manifest purpose. *Woofter v. O’Donnell*, [91 Nev. 756](#), 762, 542 P.2d 1396 (1975).

It is the opinion of this office that the clear and unambiguous language of [NRS 294A.010](#), subsections 1 and 4 manifests the intention of the Legislature that all campaign contributions received, regardless of when received, must be reported.

However, the Legislative Counsel is of the opinion, as expressed in his revisions of the Secretary of State’s proposed regulations, the [NRS 294A.005](#), when read with [NRS 294A.010](#), requires a candidate to report only those contributions received *after* the date when he filed a

declaration of candidacy, an acceptance of candidacy or when his name appeared on an official ballot, whichever circumstance is applicable. This interpretation relies on [NRS 294A.005](#) which provides:

For the purposes of this chapter, “candidate” includes any person:

1. Who files a declaration of candidacy;
2. Who files an acceptance of candidacy; or
3. Whose name appears on an official ballot at any election.

As can be seen, however, there is nothing in this statute which specifies, explicitly or implicitly, a beginning time period for the reporting of campaign contributions. All that the statute does is to define *who* should report campaign contributions and does not specify *when* such reports are to begin. A court cannot read into a statute something beyond the manifest intention of the Legislature as gathered from the statute. Ex parte Pittman, [31 Nev. 43](#), 50, 99 P. 700 (1909); *Seaborn v. First Judicial District Court*, supra at 219.

Thus, for example, an individual who is considering running for a particular office may collect campaign contributions, even though at a later date he decides not to file for any office. Since that individual has not filed a declaration or acceptance of candidacy, nor will he appear on an official ballot at an election, he does not have to report his contributions. This is because he is not a “candidate” as defined by [NRS 294A.005](#) for the purposes of the law. However, if he goes through with his plans and files a declaration or affidavit of candidacy or appears on an official election ballot he must report his contributions at that time he becomes a “candidate” for the purposes of disclosure. The law does not state that he must report only those contributions received after the date of such actions, but that he must report *all* contributions. [NRS 294A.010](#). In the opinion of this office, this means that contributions received during the electoral year or which were received a year or several years prior to the election, and which may have been received even when the candidate had not yet determined for which specific office he would run, must be reported once the candidate files a declaration or acceptance of candidacy or when his name appears on an official election ballot.

It is also a rule of statutory construction that statutes should not be construed so as to lead to absurd or unreasonable results. *Sierra Pacific Power v. Public Service Commission*, [92 Nev. 522](#), 525, 554 P.2d 263 (1976); *Sheriff v. Smith*, [91 Nev. 729](#), 733, 542 P.2d 440 (1975); *Paulette v. State*, [92 Nev. 71](#), 72, 545 P.2d 205 (1976); *Western Pac. R.R. v. State*, [69 Nev. 66](#), 69, 241 P.2d 486 (1952). It is our opinion that to read into [NRS 294A.005](#) a requirement that candidates need only report contributions received after the date of filing a declaration or acceptance of candidacy or when their names appear on an official election ballot would lead to an absurd or unreasonable result.

The time for filing declarations or affidavits of candidacy is between January 1 and the third Wednesday of July of each electoral year. Chapter 178, Statutes of Nevada 1979. In addition, independent candidates do not file declarations or acceptances of candidacy. Instead, they would qualify as “candidates” under subparagraph 3 of [NRS 294A.005](#) since their names appear on an official ballot at an election after the filing of a certificate of candidacy signed by a certain percentage of the voters. [NRS 293.200](#).

If the Legislative Counsel’s interpretation were to be followed this would mean that a candidate who filed a declaration or affidavit of candidacy on January 1, 1980 would report all contributions received after that date, while a candidate who filed on July 16, 1980 would report only those contributions received after that date. An independent candidate, whose name would not appear on an official ballot at an election until the

actual date of the election, would thus have to report only those contributions received on or after the date of the election. Since independent candidates, by virtue of not belonging to any political party, do not appear in primary elections, this would mean that an independent candidate would have to report only those contributions received on or after the date of the general election. A more absurd or unreasonable result cannot be imagined.

In short, neither law nor logic supports the position that [NRS 294A.005](#) requires candidates to report only those contributions received after the date a declaration or acceptance of candidacy is filed or after a candidate's name appears on an official election ballot at an election.

CONCLUSION—QUESTION ONE

It is the opinion of this office that [NRS 294A.010](#) requires electoral candidates to disclose all political contributions received regardless of when they were received. This means that contributions received a year or even several years in advance of the election, and which may have been received even when the candidate had not yet determined for which specific office he would run, must nonetheless be reported.

This office will recommend to the Secretary of State, through this opinion, that his “commentary” to Regulations 5.1 and 5.2 of his Regulations for Nevada Campaign Practices Act be changed to reflect the above advice.

QUESTION TWO

For what period must political campaign expenses be reported by electoral candidates under [NRS 294A.020](#)?

ANALYSIS—QUESTION TWO

Unlike the campaign contribution statutes, [NRS 294A.020](#) is supplied with a beginning date from which campaign expenses are to be reported. [NRS 294A.020](#) provides in pertinent part:

1. Every candidate for state, district, county, city or township office at a recall, special, primary or general election shall * * * report his campaign expenses on affidavit forms to be designed and provided by the secretary of state.

It is the definition of “campaign expenses” which provides the beginning reporting date for such expenses. [NRS 293.031](#), which was a part of the campaign practice act amendments in Chapter 719, Statutes of Nevada 1975, provides in pertinent part:

“Campaign expenses” means all expenditures contracted for or made * * * to further directly the campaign for election of the candidate during the periods:

1. Between the first day on which a *certificate of candidacy* may be filed and the primary election; and
2. Between the primary election and the general election. (Italics added.)

As noted above, this office had advised the Secretary of State since 1975 that “certificate of candidacy” was synonymous with “declaration or acceptance of candidacy.” Relying upon that advice, the Secretary of State promulgated regulations for the 1976 and 1978 elections which required candidates to report campaign expenditures from the first day in January of each of those electoral years. Based on the language contained in [NRS 293.180](#), the Legislative Counsel has now advised the Legislative Commission that campaign expenditures need only be reported

from the second Monday in June of each electoral year, which is the first day a “certificate of candidacy” may be filed. After reflecting upon the opinion of the Legislative Counsel, the Attorney General’s office has reconsidered its previous advice and now concurs with the Legislative Counsel that this interpretation is a correct statement of the law.

A careful review of the applicable law reveals that the terms “declaration or acceptance of candidacy” are not synonymous with “certificate of candidacy.” [NRS 293.177](#) provides that no name of a candidate may be printed on an official election ballot unless the candidate has first filed a declaration or acceptance of candidacy. A *declaration* of candidacy is filed by a person who initially puts himself forward as a candidate. As [NRS 293.180](#) provides, an *acceptance* of candidacy is filed by a candidate only *after* a certificate of candidacy designating him a candidate is first filed by 10 or more voters. A certificate of candidacy is thus a separate document which is used by the voters to designate candidates. The document is also used by voters in [NRS 293.200](#) to designate independent candidates to appear on an election ballot. In either case, the first day a certificate of candidacy may be filed is the second Monday in June of the electoral year. [NRS 293.180](#), subsection 1 and 293.200, subsection 5. It is thus apparent that the Legislature, by specifically referring to “certificate of candidacy” in [NRS 293.031](#), has designated the second Monday in June of the electoral year as the beginning period for filing reports of campaign expenses.³

Where the language of statute is plain and unambiguous, legislative intent must be ascertained from the language itself and one should not go beyond such language. *State v. Washoe county*, [6 Nev. 104](#), 107 (1870); *Ex parte Rickey*, [31 Nev. 82](#), 101-102, 100 P. 134 (1909); *Ex parte Smith*, [33 Nev. 466](#), 479, 111 P. 30 (1910); *State v. Beemer*, [51 Nev. 192](#), 199, 272 P. 656 (1928); *In re Walter’s Estate*, [60 Nev. 172](#), 183-184, 104 P.2d 968 (1940); *Seaborn v. First Judicial District court*, *supra* at 218, 219.

Where the language of a statute is plain, certain, clear and unambiguous, there is no room for statutory construction. Courts will construe the language of a statute only when the meaning is in doubt. *Ex parte Todd*, [46 Nev. 214](#), 218-219, 210 P.2d 131 (1922); *Brooks v. Dewar*, [60 Nev. 219](#), 237, 106 P.2d 755 (1940); *Porter v. Sheriff*, [87 Nev. 274](#), 275, 485 P.2d 676 (1971). Where the language of a statute is clear it is conclusive. *In re Prosole*, [32 Nev. 378](#), 383, 108 P. 630 (1910).

The plain and unambiguous language of [NRS 293.031](#) leaves no room for concluding that the term “certificate of candidacy” is synonymous with “declaration of acceptance of candidacy.” A court cannot read into a statute something beyond the intention of the Legislature as manifested from the language of the statute itself. *Ex parte Pittman*, *supra* at 50; *Seaborn v. First Judicial District Court*, *supra* at 219. Courts have no authority to change the obvious meaning of a statute. *Heywood v. Nye County*, [36 Nev. 568](#), 571, 137 P. 515 (1913); *Seaborn v. First Judicial District Court*, *supra* at 219. Where the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and not to nullify its manifest purpose. *Woofter v. O’Donnell*, *supra* at 762; *State ex rel. Barrett v. Brodigan*, [37 Nev. 245](#), 248 141 P.988 (1914). The Legislature must be understood to mean what it has plainly expressed. *Thompson v. Hancock*, [49 Nev. 336](#),

³ Although legislative history is not binding on the courts and should not even be used unless the meaning of a statute is in doubt, *Maynard v. Johnson*, 2 Nev. 25, 26 (1866), this office reviewed the legislative history—committee minutes and tape recordings of floor debates—surrounding Chapter 719 *supra*, but found no pertinent information in these sources. Although the information is not recorded anywhere, the Legislative Counsel recalls a legislator asking him to prepare an amendment using the beginning date for filing declarations of candidacy as the beginning date for filing campaign expense reports. The Legislative Counsel correctly informed him that at that time (1975) there was no beginning date for filing declarations of candidacy and suggested instead using the term “certificate of candidacy,” since NRS 293.180 provided a date for filing such documents. The suggestion was acted upon. Telephone interview with Frank W. Daykin, Legislative Counsel, January 10, 1980.

341, 245 P. 941 (1926). As noted above, what is true of the courts is equally true of the Attorney General's office. Attorney General's Opinion 216, *supra*. The rules of statutory construction noted above have been followed by this office many times in the past. See, for example, Attorney General's Opinion 100, September 29, 1917; Attorney General's Opinion 47, July 31, 1931; Attorney General's Opinion 596, March 29, 1948; Attorney General's Opinion 216, *supra*.

It is true that there is also a rule of statutory construction that statutes should not be construed so as to lead to absurd or unreasonable results. *Sierra Pacific Power v. Public Service Commission*, *supra* at 525. However, a statutory requirement which uniformly requires all candidates to start reporting their campaign expenses for a period of time beginning three months prior to the primary election and then for a period between the primary and general elections is not intrinsically absurd. It is within the power of the Legislature, as a matter of policy, to set whatever time period it believes proper. Such a requirement certainly does not compare with an interpretation that would require candidates to report for differing periods of time depending on when they filed or which would restrict reports to a period commencing with the date of the general election. Enacting the provision into law in 1975 at a time when only certificates of candidacy had beginning filing dates was not necessarily unreasonable.

While this office recognizes that many Nevada citizens have expressed serious reservations about a public policy which shortens the time periods for reporting campaign expenses,

such policy decision is for the Legislature to establish. Neither a court nor this office has the authority to substitute its judgment for that of the Legislature. The policy, wisdom or expediency of a law is solely within the province of the Legislature and the courts have no authority to enter into those areas. The courts must be concerned with legislative intent as expressed in the statute and not with the wisdom of legislative policy. In re estate of McKay, [43 Nev. 114](#), 127, 184 P. 305 (1919); *State ex rel. Stokes v. Second Judicial District Court*, [55 Nev. 115](#), 121, 27 P.2d 534 (1933); *School Trustees v. Bray*, [60 Nev. 345](#), 353, 109 P.2d 274 (1941); *State v. Cornblit*, [72 Nev. 202](#), 205, 209 P.2d 470 (1956). A court may not substitute a different statute for the one under consideration. *School Trustees v. Bray*, *supra* at 354.

It may be argued that since January 2, 1976, when the Secretary of State first promulgated his regulations on this subject, candidates have been filing campaign expense reports covering the period of time from January 1 of the electoral year to the primary election. Indeed, at one point in 1977, the regulation was reviewed without objection by the Legislative Counsel's office and the Legislative Commission. However, "when the administrative practice and construction are clearly erroneous, they must not be followed." *Raggio v. Campbell*, [80 Nev. 418](#), 424, 395 P.2d 625 (1964). Thus the rule of statutory construction that the contemporaneous construction of a statute by the statute's administrators will be given great weight by the courts must be modified if the plain meaning of the language used in the statute administered does not support such an interpretation of the law. *State v. Brodigan*, [35 Nev. 35](#), 39, 126 P. 680 (1912); *Seaborn v. Wingfield*, [56 Nev. 260](#), 270, 48 P.2d 881 (1935); In re MacDonald's Estate, [56 Nev. 346](#), 350, 53 P.2d 625 (1936).

As noted above, this office is aware of the concerns of many Nevada citizens regarding an interpretation of [NRS 294A.020](#) which shortens the reporting period for campaign expenses. However, "The resolution of this problem, if it is perceived as one, is legislative action at the next session of the Legislature to cure the defect." Attorney General's Opinion 216, *supra*.

We would also emphasize that there is nothing in [NRS 293.031](#) or 294A.020 which would prevent a candidate from voluntarily disclosing his campaign expenses for a period of time prior to the second Monday in June of an electoral year. Indeed, such disclosure should be encouraged as a public service since it has been held that [NRS 294.020](#) "serves important informative and deterrent functions * * *." *Arvey v. Sheriff*, [93 Nev. 469](#), 471, 567 P.2d 470 (1977).

CONCLUSION—QUESTION TWO

It is the opinion of this office that [NRS 294A.020](#) requires electoral candidates to disclose only those campaign expenditures made after the second Monday in June of the electoral year in which the candidate seeks public office. However, there is nothing which prohibits voluntary disclosures of campaign expenditures made prior to that date, consistent with the practices used in the 1976 and 1978 elections.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-3 County Commissioners—Medical Care for Sexual Assault Victims—
Filing of report with law enforcement agency is not a prerequisite for receiving free initial emergency medical care or for county being responsible for costs. Commissioners may not impose such a requirement by ordinance or regulations, nor may commissioners require a victim of sexual assault to agree in advance to testify at any criminal trial or to otherwise assist law enforcement officials in their investigation and prosecution of the offender.

Carson City, February 5, 1980

Calvin R. X. Dunlap, District Attorney, Washoe County Courthouse, P.O. Box 11130, Reno, Nevada 89520

Attention: Chan G. Griswold, Chief Civil Deputy

Dear Mr. Dunlap:

In your letter of December 19, 1979, you posed three questions to this office arising from various provisions of the law for assistance to victims of sexual assault, [NRS 217.280-217.350](#).

QUESTION ONE

Does subsection 3 of [NRS 217.310](#), when read in conjunction with [NRS 449.244](#), make the filing of a report with the appropriate law enforcement agency a prerequisite to county payment for initial emergency medical care or for examination and tests performed for the purpose of gathering evidence for possible prosecution of the person who committed the offense?

ANALYSIS

[NRS 217.300](#) allows any victim of a sexual assault to request and receive initial emergency medical care at a hospital for any physical injuries which resulted from the assault. The statute further declares that “any costs incurred shall be charged to and paid by the county in whose

jurisdiction the offense was committed.” Likewise, [NRS 449.244](#) places responsibility for the cost associated with initial emergency medical care or evidence gathering in cases involving victims of sexual offenses on “the county in whose jurisdiction the offense was committed.” Neither of these statutes makes reference to any prerequisites for the extension of care to sexual assault victims. No prior approval by the board of county commissioners for such emergency care and examinations is required by these two statutes, the decision to provide such care free of charge to sexual assault victims having been made for all counties in Nevada by the Legislature itself.

On the other hand, provision of additional or follow-up medical care or psychological counseling necessitated by the sexual assault must first be approved by the board of county commissioners under the terms of [NRS 217.310](#). The filing of a report with the appropriate law enforcement agency is expressly made a prerequisite to the approval of such “treatment under the provisions of this section,” i.e., [NRS 217.210](#). We believe the reference to “treatment under the provisions of this section” means only that medical treatment or psychological counseling which occurs after the termination of the initial emergency care which is provided for in a separate section of the law, i.e., [NRS 217.300](#). Therefore, a police report is not required for the provision of initial emergency medical care services.

Our opinion on this matter is based in part on statements of various members of the Senate Judiciary Committee which considered the recent amendments to [NRS 217.310](#) and [449.244](#), which may be found at Chapter 353, Statutes of Nevada 1979, to the effect that emergency treatment and coverage would occur regardless of whether a police report was filed. Our opinion also relies upon the fact that subsection 2 of [NRS 217.340](#) grants up to three days after a sexual assault occurs in which the victim may file the required police report. If the circumstances of the attack and the victim are such that the offense could not be reasonably reported to the police within three days of occurrence, the time for filing the report is extended by the law until three days after the time when a report could reasonably have been made. Furthermore, the requirements of [NRS 217.340](#) are expressly made applicable only to treatment to be authorized by the board of county commissioners under [NRS 217.310](#) or 217.320. The statute makes no reference to initial emergency medical care provided under [NRS 217.300](#), which, as we have previously noted, requires no prior approval or action by the board of county commissioners.

CONCLUSION—QUESTION ONE

The filing of a report with the appropriate law enforcement agency is *not* a prerequisite to the rendition of initial emergency medical care to victims of sexual assault or to the performance of evidence gathering examinations, nor is the filing of such a report a prerequisite to the payment by the board of county commissioners of the cost of such emergency care or examinations.

QUESTION TWO

If the filing of a report with the appropriate law enforcement agency is not required by [NRS 217.310](#) for emergency care or evidence gathering examinations, may a board of county commissioners impose such a requirement on persons seeking such care?

ANALYSIS

We have noted above that it appears the Legislature has already made the policy decision for Nevada’s sixteen counties and Carson City that free emergency medical care shall be given to the victims of sexual assaults. Under [NRS 217.300](#) there is no apparent discretion and there are no preconditions to be satisfied. It is also apparent from the minutes of the 1979 Senate Judiciary

Committee that uniformity among the counties in the provision of these services was seen as being a desirable objective.

Had the Legislature intended for each county to have authority to add conditions, limitations or restrictions to the availability of emergency medical care, beyond any found in the basic state law, it could easily have said so with but the addition of a few words. The Legislature has itself defined the conditions of eligibility as being any victim of sexual assault as defined by [NRS 200.366](#). When a person finds himself or herself in such unfortunate circumstances, he or she is eligible for free emergency medical care under [NRS 217.300](#).

In your letter you indicated some concern over verifying that the recipient of free emergency medical care is in fact a victim of sexual assault and therefore a person entitled under law to such care. We believe a board of county commissioners could use the regulation making authority conferred by [NRS 217.350](#) to prescribe a procedure whereby some assurance could be had that the recipient of free county medical care is actually entitled thereto. For instance, by regulation, the commissioners could require execution at the treating hospital of a simple certificate declaring that the signer was and is a victim of sexual assault, as defined by [NRS 200.366](#), and is requesting initial emergency medical care under the terms of [NRS 217.300](#).

Although [NRS 217.350](#) may be used to establish a legal procedure for verifying eligibility, we do not believe this statute would authorize a board of county commissioners to further condition, restrict or limit eligibility, as defined by the Legislature. The addition of a new requirement for eligibility goes beyond merely “prescribing the procedures to be followed.” Also, any county regulation that required the filing of a report with a law enforcement agency in any time period less than three days after the occurrence of a sexual assault would appear to be in direct contradiction to the terms of [NRS 217.340](#).

A county possesses only such powers as are specially given to it by law. *Schweiss v. First Judicial District Court*, [23 Nev. 226](#), 45 P. 289 (1896). Where the acts of a board of county commissioners do not comply with the statutes, those acts are void. *Caton v. Frank*, [56 Nev. 56](#), 44 P.2d 521 (1935).

CONCLUSION—QUESTION TWO

A board of county commissioners may *not* impose a local requirement that victims of sexual assault must file a report with the appropriate law enforcement agency before they are given initial emergency medical care or evidence gathering examinations at county expense. Such care is available under state law to all victims of sexual assault.

QUESTION THREE

Can a board of county commissioners require as a condition to receiving medical treatment or counseling under either [NRS 217.300](#) or 217.310 that the recipient must first agree to testify at any criminal trial or otherwise continue to cooperate with the law enforcement officials in their investigation and prosecution of offender?

ANALYSIS

For the reasons set forth in our analysis of your Question Two, we are of the opinion that a board of county commissioners may not further condition eligibility for receiving free medical care or counseling by requiring a sexual assault victim to first agree to give testimony or otherwise cooperate with law enforcement officials for the purposes of prosecution.

We would further note that such a requirement, which is acquiesced in by a victim of sexual assault, could potentially raise an issue at the trial of the alleged offender that the county “bought” the victim’s testimony in exchange for medical care and psychological counseling. Although we would hope that any judge or jury would see the absurdity of such an argument, such a requirement seems to allow the introduction into the trial of a diverting element for which there is little, if any, real justification. In cases of sexual assault, testimony of the victim, who is often the only eyewitness to the crime, may be of considerable importance to a successful prosecution, and it appears to us unwise for the county to voluntarily created a situation which in any way may tend to bring into question the victim’s credibility as a witness.

Your concern with the possible implications of Disciplinary Rule 7-109 of the Code of Professional Responsibility is well taken. Although we have found no reported decision which conclusively establishes that such payments for medical care and psychological counseling by the county, in which the prosecutor is an officer or employee, would constitute a violation of this disciplinary rule, the need for lawyers, both public and private, to avoid even the appearance of impropriety is a well established legal maxim. To the extent that a requirement for compulsory testimony on behalf of the district attorney in exchange for free county medical care and psychological counseling may be said to create the appearance of impropriety, we would not recommend such a requirement even if we thought the commissioners otherwise possessed the authority to adopt it.

CONCLUSION—QUESTION THREE

A board of county commissioners may *not*, as a condition to receiving medical treatment of psychological counseling under either [NRS 217.300](#) or 217.310, require a victim of sexual assault to agree in advance to testify at any criminal trial or to otherwise continue to cooperate with law enforcement officials in their investigation and prosecution of the offender.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 80-4 Elections: Political Party or Independent Candidate Qualification, Initiative and Referendum Measures and Recall Elections—Under [NRS 293.128](#), [293.200](#), 295.015, 295.045, 295.095, 295.140, 295.205 and 306.020, voters who are presently registered in Nevada may sign petitions for political party and independent candidate qualification, initiative and referendum measures and recall elections, regardless of whether or not these persons actually voted in the last preceding general election.

Carson City, February 26, 1980

The Honorable Wm. D. Swackhamer, Secretary of State, Capitol Complex, Carson City, Nevada
89710

Attention: David L. Howard, Chief Deputy Secretary of State

Dear Mr. Swackhamer:

You have requested advice concerning who may be entitled to sign petitions under Nevada law pertaining to qualifying political parties and independent candidates for the ballot, placing initiative and referendum measures on the ballot and holding recall elections.

FACTS

[NRS 293.128](#), [293.200](#), 295.015, 295.045, 295.095, 295.140, 295.205 and 306.020 contain the statutory requirements for submitting petitions for the purposes of qualifying political parties and independent candidates on the ballot, placing initiative and referendum measures on the ballot and for initiating recall elections. Every electoral year, your office is the recipient of numerous inquiries as to whether those statutes must be interpreted to limit persons signing such petitions to only those registered voters who actually voted at the last preceding general election.

QUESTION

Are only those persons who actually voted by the last preceding general election permitted to sign petitions under [NRS 293.128](#), [293.200](#), 295.015, 295.045, 295.095, 295.140, 295.205 and 306.020?

ANALYSIS

The election laws, as is provided by both statutory and case law, are to be interpreted liberally with a view to promoting the purpose for which they were enacted. The statutes providing for petitions to qualify political parties or independent candidates, to introduce initiative or referendum measures, or to hold recall elections are all part of Title 54 of the Nevada Revised Statutes. [NRS 293.127](#) provides:

This Title shall be liberally construed to the end that all electors shall have an opportunity to participate in elections and that the real will of the electors may not be defeated by any informality or by failure substantially to comply with the provisions of this Title with respect to the giving of any notice or the conducting or an election or certifying the results thereof.

Thus, courts have liberally construed requirements for qualifying political parties on the ballot, cf. *Long v. Swackhamer*, [91 Nev. 498](#), 500-501, 538 P.2d 587 (1975), qualifying independent candidates on the ballot, *Springer v. Mount*, [86 Nev. 806](#), 809, 477 P.2d 159 (1970), placing initiative and referendum measures on the ballot, *Colorado Project—Common Cause v. Anderson*, 495 P.2d 220, 221 (Colo. 1972), and for holding recall elections, *Cleland v. District Court*, [92 Nev. 454](#), 455-456, 552 P.2d 488 (1976). Such a policy, of course, is still subject to the general rule that when the language of a statute is plain, its intention must be found in such language only. *Cirac v. Lander County*, 95 Nev., Advance Opinion 191 (November 2, 1979). Thus, for example, the procedures specifically outlined for authenticating signatures on an initiative petition must be strictly adhered to. *Lundberg v. Koontz*, [82 Nev. 360](#), 366, 418 P.2d 808 (1966).

Turning our attention to the statutes at issue, [NRS 293.128](#) and [293.200](#) provide in pertinent part as follows:

[NRS 293.128](#). To qualify as a political party any organization shall * * * file a petition * * * signed by a *number of registered voters* equal to or more than 5 percent of the entire number of votes cast at the last preceding general election for Representative in Congress * * *. (Italics added.)

[NRS 293.200](#). 1. Independent candidates for partisan office shall qualify by filing * * * a certificate of candidacy signed by a *number of registered voters* equal to at least 5 percent of the total number of ballots cast in the state or in the county, district or municipality electing such officer at the last preceding general election * * *. (Italics added.)

In the opinion of this office, the reference in each statute to the words “a number of registered voters” when referring to who may sign such petitions clearly does not limit the class of persons who are eligible to sign such petitions to voters who voted in the immediately preceding general election. Any presently registered voter, regardless of whether he or she voted in the last preceding general election or not, is eligible to sign such petitions. Reference to the last preceding general election is clearly made for the sole purpose of determining the minimum number of presently registered voters who must sign such petitions for the purpose of qualifying political parties or independent candidates.

The above two statutes present little problem in reaching this conclusion because of the unambiguous nature of the language. However, with respect to the requirements for a qualifying petition in connection with initiative and referendum measures and recall elections, the relevant statutes contain different wording:

[NRS 295.015](#). An initiative petition * * * shall be proposed by
a number of registered voters equal to 10 percent or more of the
number of voters who voted at the last preceding general election in not
less than 75 percent of the counties in the state, but the total number of registered voters signing
the initiative petition shall be equal to 10
percent or more of *the voters who voted in the entire state at the last preceding
general election*. (Italics added.)

[NRS 295.045](#). Whenever *a number of registered voters* of this state equal to 10 percent or more of *the number of voters who voted at the last preceding general election* express their wish [for a referendum election] * * *. (Italics added.)

[NRS 295.095](#). 2. Initiative petitions [for county ordinances] must be signed by *a number of registered voters* of the county equal to 15 percent or more of *the number of voters who voted at the last preceding general election* in the county.

3. Referendum petitions [on county ordinances] must be signed by *a number of registered voters* of the county equal to 10 percent or more of *the number of voters who voted at the last preceding general election* in the county. (Italics added.)

[NRS 295.140](#). Whenever 10 percent or more of *the registered voters* of the county equal to 10 percent or more of *the number of voters who voted at the last preceding election*, shall express their wish that any act or resolution enacted by the legislature, and pertaining to such county only [be subject to a referendum] * * *. (Italics added.)

[NRS 295.205](#). 2. Initiative petitions [for city ordinances] must be signed by *a number of registered voters* of the city equal to 15 percent or more of *the number of voters who voted at the last preceding municipal election*.

3. Referendum petitions [on city ordinances] must be signed by *a number of registered voters* of the city equal to 10 percent or more of *the number of voters who voted at the last preceding municipal election*. (Italics added.)

[NRS 306.020](#). For the purpose of recalling any public officer, there may be filed * * * a petition signed by *a number of registered voters* not less than 25 percent of *the number who actually voted in the election by which the officer sought to be recalled was elected to his office*. (Italics added.)

Experience has shown by the number of inquiries to the Secretary of State regarding these laws that the language of the laws, specifically the reference to the number of voters who voted at the last election, has engendered confusion in the minds of persons wishing to circulate such petitions as to who is eligible to sign them. The confusion is perhaps created by the impression that only those registered voters who voted at the last statutorily relevant election may sign such petitions.

It is the opinion of this office, however, that the statutes' references to the number of voters who voted at the last election merely establishes a frame of reference for determining the minimum number of presently registered voters who need to sign such petitions to make them viable. It is the reference in the statutes to "a number of registered voters" (or "the registered voters" in the case of [NRS 295.140](#)) which establishes the eligibility of persons to sign these petitions. These words show an unqualified eligibility for all presently registered voters to sign such petitions.

This interpretation is consistent not only with the actual wording of the statutes, but with the legislative and judicial policy that election statutes should be liberally construed whenever legally possible. Thus, with respect to a recall statute that fixed the minimum number of signatures on a recall petition to 30 percent of the qualified electors who voted at the last election, the North Dakota Supreme Court held that its sole purpose was to prescribe the minimum number of signers necessary to recall an official and was not a limitation on who can sign such a petition. *State v. Baillie*, 245 N.W. 466, 468 (N.D. 1932). The court went on to point out that after an official was elected, new electors may come of age or become residents of the state and it certainly would not be the intent of the law to disqualify such persons from signing such petitions. *State v. Baillie*, supra at 468.

This rationale is as true in considering petitions for initiative and referendum measures as it is for recall petitions. A recall statute should be liberally construed with a view to promoting the purpose for which it was enacted. *Cleland v. District Court*, supra at 455-456. Initiative provisions should be liberally construed to effectuate their purpose and to facilitate their exercise by the voters. *Colorado Project—Common Cause v. Anderson*, supra at 221.

CONCLUSION

It is the opinion of this office that under [NRS 293.128](#), [293.200](#), 295.015, 295.045, 295.095, 295.140, 295.205 and 306.020, any voter who is presently registered in Nevada may sign petitions for political party and independent candidate qualification, initiative and referendum measures and recall elections.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By Donald Klasic
Deputy Attorney General

OPINION NO. 80-5 LOCAL GOVERNMENT FINANCE—Budgets; Imposition of Expenditure Limitation on General Fund—The Department of Taxation may, in certain circumstances, adjust a general fund budget of a local government if necessary to enforce the expenditure limitations contained in Chapter 593, 1979 Statutes of Nevada. The Department of Taxation may not require a local government to reduce its general fund for purposes of calculating future expenditure limits where the local government has withdrawn certain accounts from general fund support and has created funds exempt from expenditure limitations to maintain the government services represented by those accounts.

CARSON CITY, March 3, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, 1100 East William, Carson City, Nevada 89710

Dear Mr. Nickson:

You have solicited an opinion from this office pertaining to the scope of authority given the Department of Taxation to enforce the expenditure limitation recently imposed on local governments by the Nevada Legislature.

QUESTION ONE

Under what circumstances does the Department of Taxation have authority to enforce the provisions of Chapter 593, 1979 Statutes of Nevada, by adjusting the base year general fund determination of a local government?

ANALYSIS—QUESTION ONE

It is evident that the clear and overriding policy objective of Chapter 593, 1979 Statutes of Nevada, is to constrain the expenditures of local governments to an amount reasonably comparable to the sums expended in the base year for a particular level of community services. Pursuant to Section 14, subsection 6 of the act, this statutory restraint on governmental expenditures may be exceeded only by the deliberate approval of the taxpayers at either a general or special election.

In order to carry out this mandate of the Legislature, the Nevada Tax Commission and the Department of Taxation have been given broad powers to review and adjust budgets of local governments to assure that the statutory limitation are enforced.

For instance, the department must disapprove any budget of a governing body of a local government which does not comply with the expenditure limitations contained in Section 14, subsections 1 and 2 of Chapter 593. See

Section 14, subsection 3, Chapter 593, Statutes of Nevada 1979. The Nevada Tax Commission must determine the status of any disputed exempt fund of a local government by applying generally recognized principles of governmental accounting; and the director of the Department of Taxation must determine the manner of taking into account any changes in the designations or sources of revenue for the funds of a local government in light of the expenditure limitations noted in Section 14 of the act. See Section 15, subsection 4, Chapter 593, Statutes of Nevada 1979. The Tax Commission is further empowered to establish the base from which permissible expenditures from the General Fund are to be calculated for a local government established after July 1, 1978. See Section 16, subsection 1(b), Chapter 593. Statutes

of Nevada 1979. Finally, the Tax Commission is required to reduce the total expenditure of any default budget of a local governing body so that it conforms to the limitations permitted by the act. See Section 17, subsection 2, Chapter 593, Statutes of Nevada 1979.

Thus, the statutory scheme contained in Chapter 593 contemplates that in appropriate circumstances, the Department of Taxation may adjust the base year general fund determination of a local government. For example, if exempt funds were established apart from general fund support during the base year and were thus not included in the General Fund for that fiscal year, and should these funds subsequently be unable to support their operation from the revenues generated or allocated to them, they could then be placed within general fund support. This would constitute a change in the designation or source of revenue for those funds as anticipated by Section 15, subsection 4, and the department would then have occasion to adjust by a discretionary amount the base year General Fund figure, because programs formerly receiving no general fund support would now receive support from that fund. Consistent with legislative policy, however, the level of services provided the community would remain relatively unchanged.

Should, however, a local government subsequently intend to support from the General Fund an activity which for the base fiscal year was neither included in the General Fund nor established as an exempt fund, the appropriations for that operation would be subject to electoral approval by the taxpayers pursuant to Section 14, subsection 6 of the act because the proposed activity, in contrast to legislative policy, would constitute an increase in the level of community services. The department could then legitimately deny adjustment to the General Fund and compel the local government to obtain electoral approval for the proposed program.

If a local government mislabels a fund or utilizes inappropriate accounting procedures, Section 15, subsection 4 of the act authorizes the Tax Commission to determine the correct status of the fund. Thus, if a local entity characterizes a fund as an enterprise fund for the purpose of circumventing the expenditure limitations in Section 14 of the act, and the fund is not an enterprise fund (based on generally recognized principles of governmental accounting), the Tax Commission has authority to determine that the fund in question has been incorrectly designated as an exempt fund. The department also has the authority to disapprove any budget containing such mislabeled exempt fund, if the statutory expenditure limitations are exceeded.

CONCLUSION—QUESTION ONE

The Department of Taxation may adjust the General Fund of a local government entity in certain situations. As indicated in the preceding analysis, adjustment of a local government budget may occur whenever the designations or sources of revenue of a local government are changed; and such budgets may be disapproved by the department whenever the expenditure limitations of Section 14, Chapter 593, Statutes of Nevada 1979, are exceeded or the budget in question contains any fund that has been determined by the Tax Commission to have been mislabeled or improperly characterized as an exempt fund within the meaning of Section 15, Chapter 593, Statutes of Nevada 1979.

QUESTION TWO

Where a local government has changed the designation of expenditures that had been included in the “General Fund” in the base year to a fund that is exempt from the spending limitation in a future year, is the director of the Department of Taxation authorized to require an adjustment to the base year figure for the calculation of the spending limitation in subsequent years?

ANALYSIS—QUESTION TWO

Chapter 593, Statutes of Nevada 1979, imposes an expenditure limitation on the General Fund budgeted by any local government in years subsequent to fiscal year 1978-1979. With limited adjustment, the General Fund budgeted for this base year may not be increased during ensuing fiscal years. [NRS 354.534](#) defines “General Fund” as:

the fund that is available for any legally authorized purpose and which is therefore used to account for all revenues and all activities not provided for in other funds. The general fund is used to finance the ordinary operations of a government unit.

For purposes of the expenditure limitation, however, Section 15, subsections 1 and 2 of the act expansively define “General Fund” to include all other funds except the several which are specifically exempted.

The question you have raised concerns whether a particular local government would violate the expenditure limitation by establishing exempt funds and not reducing the base year General Fund by the amount removed. If the answer to this question is in the affirmative, the removal of an account from the General Fund for a particular government function and establishment of a separate exempt fund for that particular activity would result in a concomitant reduction in the General Fund by the amount of the removed budgeted appropriations.

As noted above, the statutory expenditure limitation is enforced by the Department of Taxation pursuant to its authority to review and approve the submitted budgets of all local government entities in the State. Chapter 593, Section 14, subsection 3, Statutes of Nevada 1979.

Chapter 593, Section 14, subsection 1, imposes the expenditure limitation:

The amount budgeted by a local government, except a school district, pursuant to [NRS 354.598](#) for the fiscal year commencing July 1, 1978, for expenditure from its general fund, less any amount allowed as an ending balance for that fiscal year and less and contribution to the state for aid to the medically indigent, is the base from which the permissible expenditure from that fund in subsequent years must be calculated.

In addition, Section 15, subsection 4 of the act provides in part:

The Nevada tax commission shall determine the status of any disputed fund by applying generally recognized principles of governmental accounting. The director of the department of taxation shall, in cases where the designations or sources of revenue for the funds of a government are changed, determine the manner of taking the changes into account for the purposes of section 14 of this act.

It is the opinion of this office that neither these sections nor any other section of Chapter 593 provides authority for the Department of Taxation to compel adjustment to any local government general fund should the local government in fiscal years subsequent to the base year elect to remove from General Fund support certain accounts and create funds properly exempt from the expenditure limitation.

In order to illustrate this principle, assume that a local government budgets in the base year a General Fund in the amount of \$100,000, of which amount \$30,000 is designated for the operation of an airport supported by the General Fund. Assume further that the local government subsequently removes the operation of the airport from General Fund support and creates an exempt enterprise fund pursuant to Section 15, subsection 2 of the act and [NRS 354.610](#), to operate this activity. One interpretation of the expenditure limitation in Chapter 593 would require the reduction of the \$100,000 base amount in the General Fund account by the \$30,000 which formerly supported the activity now conducted as an exempt enterprise fund. Based on this

interpretation, the department director could request the local government to adjust its base year General Fund to \$70,000, in order to comply with the expenditure limit imposed for subsequent fiscal years by Chapter 593.

However, this office has concluded that the above interpretation would be erroneous. Rather, it is the opinion of this office that the General Fund for the base year need not reflect the removal of certain accounts to legitimate exempt fund status coupled with a concomitant reduction in the base amount of the General Fund. Admittedly, the logic to compel reduction in the General Fund is alluring, but this logic is premised in error. It assumes the existence of generic governmental functions which must receive fixed budgeted attention, thus restricting a segment of General Fund revenue for one function, a segment for another, and so forth. The logic further assumes that the local government is constrained to expend for a particular budgeted account the exact amount budgeted for that account.

The fallacy of the above logic lies in the assumptions. In the above example involving the operation of a local airport, had the local government not created an exempt enterprise fund for this function, there would be nonetheless no guarantee that, in future years, appropriations of funds would be budgeted to support the airport. The local government could decide not to operate this element of the transportation function and budget no funds for its support in future fiscal years. Because no creation of exempt fund accounts would occur, the department would have no basis on which to require adjustment of the General Fund, since there is no statutory requirement that local governments must always support particular functions from the General Fund. The choice of functions lies within the governmental discretion of local government. Moreover, local governments have authority, pursuant to [NRS 354.606](#), to transfer between accounts balances of General Fund revenues appropriated for specific functions, and are thus not constrained to expend any or all of the budgeted allocation for a particular purpose.

In either context, however, the local government would then have at its disposal greater General Fund resources and could allocate those revenues to other functions without violating the expenditure limitations of Chapter 593. Any concern that a local government may have excess expenditure resources available to support other functions, if warranted where an exempt fund is expressly created without a reduction in the General Fund, is equally warranted when a local government readjusts activities to be supported from the General Fund.

If a local government decides not to operate in subsequent years an activity budgeted in the General Fund for the base year, our office can find no statutory authority that would require a downward adjustment of the base year General Fund by the department. Likewise, simply because a local government elected to operate an activity on a self-supporting enterprise basis rather than deleting support of the activity, the local government would not be required to reduce its General Fund account by the amount previously budgeted for that activity in the base year.

The error of this approach in implementing the statutory expenditure limitation is the effort to categorize and constrain particular functions within the budgeted General Fund. The statute does not authorize so specific an identification and such premise may not be inferred. *Seaborn v. District Court*, [55 Nev. 206](#), 219, 29 P.2d 500 (1934).

Chapter 593, Section 14, subsection 1, states only that:

The amount budgeted by a local government * * * for the fiscal year commencing July 1, 1978, for expenditure from its general fund * * * is the base from which the permissible expenditure from that fund in subsequent years must be calculated.

The purpose of the statute is to fix the General Fund at a particular expenditure level, with certain adjustments, and thereby maintain an accustomed level of community

services acceptable to the taxpayers within the jurisdiction of a particular local government entity. The statute does not authorize examination of the various elemental budget functions and accounts supported by the General Fund, and it is the opinion of this office that the Department of Taxation may not so inquire. Should a local government attempt to circumvent the expenditure limitation and establish as an exempt fund one that clearly is not, the Nevada Tax Commission retains authority pursuant to Section 15, subsection 4 of the act to properly determine the correct status of that account.

A statutory construction inconsistent with this interpretation would necessarily constrain and penalize those local governments which create exempt funds to support various services. However, as noted in the analysis to Question One, this does not mean that every attempt by a local government to establish an exempt fund is proper and must be approved.

CONCLUSION—QUESTION 2

It is the opinion of this office that the Department of Taxation may not require adjustment in the base year General Fund of a local government budget pursuant to Chapter 593, Section 15, subsection 4, Statutes of Nevada 1979, should the local government in fiscal years subsequent to the base year denominated by the act remove accounts supported by the General Fund in the base year and establish them as funds properly exempt from the expenditure limitation imposed by the act on the budgeted General Fund.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Tudor Chirila
Chief Deputy Attorney General,
Tax Division

OPINION NO. 80-6 Libraries—Library circulation records are not “public records” under [NRS 239.010](#); rather, they are, by constitutional law, to be confidential.

Carson City, March 10, 1980

Joseph J. Anderson, State Librarian, Nevada State Library, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Anderson:

Recently you inquired of this office with respect to the following:

QUESTION

Do the circulation records of Nevada public libraries constitute “public records” open for general inspection under the provisions of [NRS 239.010](#)?

ANALYSIS

In an informal letter opinion dated October 20, 1979, former Attorney General Harvey Dickerson concluded that library circulation records were merely internal bookkeeping devices used for keeping track of publications and documents and were therefore not “public records.” Although we concur with General Dickerson’s overall conclusion, we do so for the somewhat broader reasons set forth herein.

[NRS 239.010](#), in part, provides that “all public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person * * *.” No other Nevada statute expressly makes library circulation records or the identity of library patrons confidential, and we have found no reported judicial decision in this or any other jurisdiction which has so held. However, we firmly believe that if the courts of our State were faced with the issue they would rule that the First Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), makes confidential that information in library circulation records which would disclose the identity of library patrons in connection with the materials they have obtained for their person reading. We would note that we are joined in this view by the Texas Attorney General. See Texas Open Records Decision No. 100 (July 10, 1975).

Freedom of the press is a fundamental personal right which is not confined merely to newspapers and periodicals. *United States v. Caldwell*, 408 U.S. 665, 704 (1972). The constitutional guarantee embraces the circulation of books as well as their publication. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The rights of freedom of speech and press necessarily protect the right to receive information and ideas, regardless of their social worth. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. Struthers*, 318 U.S. 141 (1943).

Also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one’s privacy:

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. *Olmsted v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The effect of the decision in *Stanley v. Georgia*, supra, was to free every American from an unconsented inquiry into the contents of his personal library. Mr. Justice Marshall eloquently wrote at page 565 of the opinion:

If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.

If that be so, we equally believe the state has no business telling, or assisting others to tell, a man’s neighbors what books he has checked out at the local public library to read in the privacy

of his own home. If the privacy of a privately purchased library is constitutionally protected, the same principle surely applies to the contents of a “library” on loan to an individual.

In free speech and press cases the United States Supreme court has frequently mentioned the “chilling effect” a particular governmental statute or practice may have on the otherwise free exercise of constitutional rights, and it has been generally zealous in its pronouncements in favor of maximum freedom in the absence of a compelling and overriding state interest. If library circulation records were held to be open to public inspection under a statute like [NRS 239.010](#), we can foresee a potentially significant chilling effect on the reading habits of library patrons, particularly those who may choose to read controversial or unorthodox materials which are not in favor with some segment of the public or a particular governmental agency. To the extent that such persons may therefore be deterred from reading materials because of a fear of public disclosure of their own private reading habits, they would be denied the right to receive information and ideas guaranteed to them by the First and Fourteenth Amendments. The state through its public records statute would, in effect, be impermissibly contracting the spectrum of available knowledge. Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Our state and county libraries are citadels of information for the private pursuit of education and entertainment. Thousands of public dollars are expended yearly by our libraries to purchase all types of material intended to be read and enjoyed by our citizens. It is simply inconceivable that the Legislature would have intended an interpretation of the term “public records” as used in [NRS 239.010](#) to encompass library circulation records, where to do so could have a significant effect on the use the public is willing to make of the contents of our libraries. The establishment and operation of our state and county libraries represents a commitment to intellectual freedom in this State which the office of the Attorney General enthusiastically supports and defends.

CONCLUSION

Based upon the rulings of the United States Supreme Court noted above, it is our opinion that library circulation records are not “public records”; rather, they are, as a matter of constitutional law, to be confidential.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 80-7 State Fiscal Affairs; University of Nevada System; Augmentation of Work Program Allotments—The University of Nevada System is included within the operation of Section 5, Chapter 623, Statutes of Nevada 1979, the 60th Session’s Authorized Expenditures Act. The Chief of the Budget Division may recommend to the Interim Finance Committee approval of an increase in the authorized expenditure limitation amounts for the system. If such approval is obtained, the increase will not cause a concomitant reduction in the general fund appropriation available to the system pursuant to Section 5, Chapter 623, Statutes of Nevada 1979.

Carson City, March 18, 1980

MR. HOWARD BARRETT, Director, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Barrett:

FACTS

The Sixtieth (1979) Session of the Nevada Legislature appropriated from the General Fund \$14,677,470 for the operation of the University of Nevada, Las Vegas and \$17,987,836 for the operation of the University of Nevada, Reno during the 1979-80 fiscal year. See Section 24, Chapter 695, Statutes of Nevada 1979. These amounts represent the respective differences between anticipated expenditures to accomplish planned fiscal year work programs¹ for each campus for fiscal year 1979-80 and projected revenue from student fees, and other selected sources of income² for each campus. In this connection, our office has ascertained from information contained in the Executive Budget program statement for the 1979-81 biennium that these revenue projections were based in part on the assumption that enrollments for the UNR and UNLV campuses would remain constant during the current biennium. However, it now appears that enrollments on both campuses are greater than anticipated, and it is now expected that revenue for each campus from the named sources will also be greater than projected. Total increased revenue from the named sources for both campuses for fiscal year 1979-80 is now expected to be approximately \$1,070,000.³

In 1979 the Legislature enacted Chapter 623, Statutes of Nevada 1979, the pertinent provisions of which provide:

Section 1. Expenditure of the following sums not appropriated from the general fund * * * is hereby authorized during the fiscal year[] beginning July 1, 1979, and ending June 30, 1980 * * * by the various officers, departments, boards, agencies, commissions and institutions of state government hereinafter mentioned:

* * *

University of Nevada System	
University of Nevada, Reno.....	\$3,945,960
University of Nevada, Las Vegas	\$3,164,161
* * *	

Section 4(1). * * * in accordance with the provisions of S.B. 255 of the 60th session of the Nevada legislature the chief of the budget division of the department of administration may, with the approval of the governor, authorize the augmentation of the amounts authorized in section[] 1 * * * of this act for

¹ For an explanation of what constitutes a "work program" see the provisions of the State Budget Act, NRS 353.150 to 353.246, inclusive.

² During fiscal year 1979-80, the 60th Session of the Legislature projected that the University of Nevada, Reno would receive \$3,835,960 from student fees and other miscellaneous related sources and \$110,000 from identified sources of federal funds. See print-out of the legislatively approved budget at page marked 206119. The Legislature also projected that the University of Nevada, Las Vegas would receive \$3,075,310 and \$88,851, respectively, from the same sources during the same period. Id. at page marked 206125.

³ Agenda for February 19, 1980 of the Nevada Board of Examiners, page 5.

expenditure by a given officer, department, board, agency, commission and institution * * * from any source which he determines is in excess of the amount so taken into consideration by this act * * *.

Section 5. Where the operation of an office, department, board, agency, commission, institution or program is financed by an appropriation or appropriations from the general fund in the state treasury as well as by funds received from other sources, the portion provided by appropriation from the general fund in the state treasury must be decreased *to the extent that the receipts of the funds from other sources approved by this act are exceeded* * * *. (Italics supplied.)

Prior to the effective date of Chapter 623, the chairman of the Senate Finance Committee and Assembly Ways and Means Committee corresponded with the Chancellor of the University of Nevada System on May 23, 1979, and invited the System to appear before the Interim Finance Committee to present additional evidence for budgeting support if student enrollment projections on which the budget for the System was based proved to be greater than anticipated.

The legislatively authorized expenditure limitations set forth in Section 1 of Chapter 623 noted above for each campus are the respective totals for each campus of the projected revenue subtotals from student fees and other selected sources noted at footnote 2. Accordingly, the following opinion is premised on the fact that the expenditure limitations established by the 1979 Nevada Legislature are controlling only on these identified sources of non-general fund revenue. Since there has been an increase in some of these identified sources of non-general fund revenue of the University of Nevada System, you have requested our opinion on the two questions set forth below.

QUESTION ONE

Did the 60th Session of the Nevada Legislature intend to include the University of Nevada System within the operation of Section 5, Chapter 623, Statutes of Nevada 1979; and if yes, may this section constitutionally be applied to the General Fund appropriation to the System in the event the authorized sums calculated from the identified non-general fund revenue sources of the System are exceeded?

ANALYSIS—QUESTION ONE

That the 60th Session of the Legislature intended for the University of Nevada System (hereinafter designated as System) to be included within the operation of Section 5, Chapter 623, Statutes of Nevada 1979, manifestly appears from the language of Section 1 of Chapter 623 and by the direct reference in Section 4 of Chapter 623 to “S.B. 255 of the 60th Session of the Nevada legislature.” Section 5 includes within its operation officers, departments, boards, agencies, commissions and institutions. The University of Nevada System is expressly mentioned as such in Section 1 of the act. Moreover, S.B. 255, which became Chapter 364 of the 1979 Session Laws, expressly refers in Section 6 to the System as a state agency.

Chapter 364 and Chapter 623 both address the same subject matter, namely the fiscal affairs of state agencies, in general, and limitation of expenditures thereof, in particular. Statutes on the same subject matter are in *pari materia*. Statutes in *pari materia* are to be construed together. This rule “applies with peculiar force to statutes passed at the same session of the legislature, especially * * * where one refers to the other * * *.” 82 C.J.S. Statutes, Section 367. Construing both provisions together, it is readily apparent that the University of Nevada System is an agency within the meaning of Section 5 of Chapter 623, *supra*.

Chapter 623, the 1979 Legislature's⁴ Authorized Expenditures Act, was enacted in close concert with Chapter 695, Statutes of Nevada 1979, the General Appropriation Act. Proposed work programs for each state agency were scrutinized. This scrutiny included looking at the level of activity proposed, the needs of the State and its people, and the amount of non-general fund moneys that were expected to be available to fund a proposed work program. Only after these and other factors were closely examined did the Legislature arrive at, and approve, a budget for an agency. In the case of the System, as noted above, the appropriation level from the General Fund represents the difference between anticipated approved expenditures and the projected amount of revenue from several selected and identified sources of non-general fund income. Thus, the amount of the University's appropriation is closely tied to the projected amount of revenue from selected non-general fund sources.

In an effort to prevent an agency's expenditure of an amount in excess of that budgeted by the Legislature for a particular biennium, both the 1979 and preceding Legislatures have enacted Authorized Expenditures Acts, such as Chapter 623, *supra*. Pursuant to these acts, whenever an agency's actual revenue from non-general fund sources exceeds the amount projected, by the Legislature, a mechanism is provided whereby the General Fund appropriation can be reduced by the amount of the excess, so that the available resources of an agency remain at the budgeted amount, unless that amount is augmented as provided by law.

If the System and its governing body, the Board of Regents, were created by legislative enactment, there would be no question concerning the constitutionality of including the System within Chapter 623. "The Legislature may do as it sees fit with offices of its own creation * * *." *King v. Board of Regents*, 65 Nev. 533, 545, 200 P.2d 221, 227 (1948). The University and the Board of Regents, however, were created by the Constitution of the State of Nevada.⁵ In *King*, *supra*, the Supreme Court of Nevada construed the provisions of the Constitution relating to the University and the Board " * * * in such a manner as to give the Board a large degree of independence from other branches of state government * * *." Attorney General's Opinion 124 (April 14, 1964), at page 178. "[It] is clear * * * that it was the intention of the framers of the Constitution to vest exclusive executive and administrative control of the University in a board of regents to be elected by the people * * *." *King v. Board of Regents*, 65 Nev. at 569, 200 P.2d at 238.

The authority vested in the regents must, however, be viewed in conjunction with the exclusive authority of the Legislature to appropriate General Fund money from the state treasury.⁶ The power of the Legislature to appropriate money "is entirely a different function from the administration and control of the University itself." *King*, *supra*, 65 Nev. at 569, 200 P.2d at 238. When a state legislature appropriates money for a constitutionally created university, it "may put certain conditions on money it appropriates for the University which are binding if

⁴ For earlier similar acts see chapter 597, Statutes of Nevada, 1977, Chapter 678, Statutes of Nevada 1975, Chapter 743, Statutes of Nevada 1973, Chapter 474, Statutes of Nevada 1963, and Authorized Expenditures Acts enacted in between those years.

⁵ Article 11, Section 4 provides:

The Legislature shall provide for the establishment of a State University * * * to be controlled by a Board of Regents whose duties shall be prescribed by law.

Article 11, Section 7 provides:

The Governor, Secretary of State and Superintendent of Public Instruction, shall for the first Four Years and until their successors are elected and qualified constitute a Board of Regents to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of Office of said Board of Regents provide for the election of a new Board of Regents and define their duties.

⁶ This exclusive authority is set forth in the Nevada Constitution at Article 4, Section 19: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

the regents accept the money. These conditions may not interfere with the regents' management of the University and may only be applied to state appropriated funds." *Sprick v. Regents of University of Michigan*, 204 N.W.2d 62, 67 (Mich.App. 1972) affirmed on other grounds 210 N.W.2d 332 (Mich. 1973). See also *Regents of University of Minnesota v. Lord*, 257 N.W.2d 796 (Minn. 1977) citing on the point here King, *supra*.

As noted in the facts above, a General Fund legislative appropriation was made to the System, the amount of which is contingent upon a certain level of projected revenue from selected non-general fund sources. If the projected revenue is in excess of the amount budgeted for the work programs planned, the level of resources available to the regents to meet the needs of the University remains the same; dollars appropriated from

the General Fund are only reduced by the amount that actual revenues exceed projected revenues. If the Legislature were not able to structure a General Fund appropriation in this manner, to-wit enacting a contingent appropriation, it would be required to appropriate General Fund moneys in a vacuum without taking any expected non-general fund revenues into consideration. This office does not believe that the Nevada Constitution requires this result. In fact, Article 11, Section 6 of the Nevada Constitution provides that the Legislature shall provide for the support and maintenance of the University "by direct legislative appropriation from the general fund, upon the presentation of *budgets in the manner required by law.*" (Italics supplied.) To the extent that the Legislature desires to structure the General Fund appropriation of the System in relation to identified non-general fund revenues generated in the course of operating its planned work programs, the Nevada Constitution appears to give the Legislature discretion in this matter.

CONCLUSION—QUESTION ONE

The 60th Session of the Nevada Legislature intended to include the University of Nevada System within the operation of Section 5, Chapter 623, Statutes of Nevada 1979. Chapter 695, Statutes of Nevada 1979, the General Appropriations Act and Chapter 623, when read together create a contingent appropriation to the System. The condition attached to the General Fund appropriation as set forth in Section 5, Chapter 623 is constitutional, because the authorized expenditure limitation amounts upon which the General Fund appropriation is based is the total of projected revenues from selected and identified non-general fund sources of revenue available to the System, which sources were taken into consideration by the Legislature when providing General Fund appropriations for the System. Thus, whenever the authorized sums calculated from the identified non-general fund revenue sources of the System are exceeded, Section 5 of Chapter 623, Statutes of Nevada 1979, requires a concomitant reduction of the General Fund appropriation, unless there is an augmentation as discussed in the succeeding section.

QUESTION TWO

If the answer to both inquiries of Question One is yes, does Chapter 623, Statutes of Nevada 1979, authorize the chief of the budget division to recommend approval by the Interim Finance Committee of an increase in authorized expenditure limitation amounts for the Universities of Nevada, Reno and Las Vegas, when the actual amount of revenue from the identified sources taken into consideration in enacting Chapter 523 exceeds the projected amounts from these same sources? If the answer is yes, does such approval obviate a concomitant decrease pursuant to Section 5 of Chapter 623 in the General Fund appropriations for each campus?

ANALYSIS

The University of Nevada System anticipates that actual revenue from legislatively considered sources will exceed the expenditure limitations for the System identified in Chapter 623, Statutes of Nevada 1979, by approximately \$1,070,000 in the 1979-80 fiscal year. This increase is a result of larger than anticipated enrollments. The University proposes to augment its budget by the amount of these increased revenues.

The provisions of Chapter 623 of the 1979 Session Laws pertaining to the analysis here are set forth supra. Other provisions are as follows:

Section 5 of S.B. 255, which became Chapter 364, Statutes of Nevada 1979, provides:

No state agency may augment money which has been authorized for expenditure by the legislature except as allowed by [NRS 353.220](#).

[NRS 353.220](#), as amended by Chapter 364 at Section 9, provides:

1. The head of any department, institution or agency of the executive department⁷ of the state government, whenever he deems it necessary by reason of changed conditions, may request the revision of the work program of his department, institution or agency at any time during the fiscal year, and submit the revised program to the governor through the chief with a request for revision of the allotments for the remainder of that fiscal year.

* * *

3. Before encumbering any appropriated or authorized money, each request for revision must be approved or disapproved in writing by * * * the governor or the chief, if the governor has by written instrument delegated this authority to the chief.

4. Whenever a request for a revision of a work program of a department, institution or agency would, when considered with all other changes in allotments for that work program made pursuant to [NRS 353.215](#) and subsections 1, 2 and 3 of this section, increase or decrease by 10 percent or \$25,000, whichever is less, the expenditure level approved by the legislature for any of the allotments within the work program, the request must be approved as provided in subsection 5 before any appropriated or authorized money may be encumbered for the revision.

5. If a request for the revision of a work program requires additional approval as provided in subsection 4 [and approval is not immediately necessary to protect life or property, the additional approval must be obtained from the Interim Finance Committee.]⁸

Section 4 of Chapter 623 provides that the chief of the budget division in accordance with Chapter 364 may “authorize the augmentation of amounts in section[] 1 * * * of this act for expenditures from any * * *

source which he determines is in excess of the amount so taken into consideration by this act.” The sources of revenue for the System identified in Section 1 of Chapter 623 are mainly student fees. As discussed above, this source of projected income was specifically taken into account by

⁷ Whether the University is a part of the Executive Branch is not germane to the discussion here. Section 5 of Chapter 364 is not limited in its application to Executive Branch agencies. Therefore, the operational provisions of NRS 353.220 are incorporated into Section 5 notwithstanding the fact that NRS 353.220 is so limited.

⁸ This portion of subsection 5 has been paraphrased because it deals mainly with under what circumstances Interim Finance Committee approval is not required and time limits when approval is required.

the Legislature and became a part of the portion of the Authorized Expenditures Limitation Act for fiscal year 1979-80 pertaining to the University.

There are two possible constructions of Section 4. One places emphasis on the phrase “source which * * * is in excess * * *.” Under this construction, the chief would only be authorized to allow augmentation if the source of the moneys is a source not made a part of Section 1, because it would be deemed an “excess source.” Given the facts noted above, no augmentation would be possible under this construction. The second construction places emphasis on the phrase “amounts * * * in excess of the amount * * * taken into consideration by this act.” Under this construction the budget division chief would only be authorized to allow augmentation if the source of the moneys is from a source made a part of section 1 of the act. In light of the legislative history of the act, it is the opinion of this office that the latter construction appears to be more consistent with legislative intent and is, therefore, the proper construction of Chapter 623.

As stated above, Chapter 623 has been enacted in similar form by many sessions of the Nevada Legislature preceding the 1979 session. Of importance to the analysis of the foregoing question is the language change which occurred between 1967 and 1969. Section 4, Chapter 440, Statutes of Nevada 1967, in pertinent part provided:

The chief * * * may * * * authorize the augmentation of the amount authorized in section[] 1 * * * for expenditure * * * from any * * * source which he determines *has not been taken into account by this act* or is in excess of the amount so taken into consideration * * *. [Italics supplied.]

The underlined portion was deleted when the Legislature in 1969 enacted Chapter 659, Statutes of Nevada, the 55th Session’s Authorized Expenditures Act. Thus, in 1967, the chief of the budget division had authority to augment from two categories of sources: sources not taken into consideration by the act and sources which were. Chapter 623, Statutes of Nevada 1979, follows the language adopted by the 1969 Legislature, expressly conferring on the chief the authority to augment amounts taken into consideration by the act. Significantly, this language of the Authorized Expenditures Acts enacted subsequent to 1969 and prior to 1979 has not been altered.

As noted in the facts above, the proposed expenditure limitation increase for the System is an increase in the amount authorized from a source taken into account by the Legislature and set forth in Section 1 of Chapter 623. Thus the chief, in conformity with Chapter 364, Statutes of Nevada 1979, has authority to recommend approval of the increase.

Chapter 364 was introduced in the 1979 Legislature as S.B. 255, and Section 4 of Chapter 623 makes specific reference to S.B. 255 requiring any augmentation of any amount of expenditure authorization to be accomplished in accordance with the former enactment. When one statute so refers to another, the two statutes must be construed together and if, because of an ambiguous phrase, the statutes are susceptible of two constructions one of which would render them consistent and the other not, the consistent construction is to be favored. This applies with particular force when the two statutes, as here, were enacted during the same legislative session. 82 C.J.S. Statutes § 367.

Section 5 of Chapter 364 prohibits state agencies from augmenting moneys except as allowed in [NRS 353.220](#). The word augmentation in Section 5 can, and therefore must, be given the same meaning in this section as in Section 4 of Chapter 623. Augmentation is a synonym of the term increase. *Matthew v. Wabash R. Co.*, 78 S.W. 271 (Mo.App. 1903). The Legislature clearly used it in this manner in Section 4 of Chapter 623 and in Sections 5 and 9 of S.B. 255. Section 9 governs an “increase [in an] expenditure level approved by the legislature for * * * the allotments within [a] work program” for an agency. Allotment refers to legislatively approved expenditure levels for an agency. Allotment refers to legislatively approved expenditure levels for an agency

set forth in the budget in categories such as salaries, operating expenses, and travel. An agency's work program consists of its objectives and functions.

Since the chief of the budget division may recommend an augmentation or increase in the expenditure limitation levels prescribed in Section 1 of Chapter 623, it is necessary to determine whether such augmentation would cause a concomitant decrease in the agency's General Fund appropriation. Obviously if such an augmentation does result in such a decrease in the General Fund appropriation there would be no increase in the total budgeted resources available to an agency. In such event the University System would have to seek additional money to offset the increased expense resulting from greater enrollments than projected when the System's budget was approved. If the additional expense money could not come from increased student fee revenues other sources would have to be used, such as the Contingency Fund.⁹ In 1979 the Legislature appropriated \$5,000,000 to the fund. Chapter 470, Statutes of Nevada 1979. As noted above, the University System is seeking an augmentation totaling approximately \$1,070,000 to offset increased enrollment expenses for fiscal year 1979-80. The next year the System will be seeking \$907,000. If granted, one agency would receive about 40 percent of the Contingency Fund appropriation. Once this appropriation is exhausted the only way to meet increased expenses for the University and the other state agencies dependent on allocations from the Contingency Fund would be to call a special session of the Legislature.

Because of the apparent legislative intent behind Section 4 of Chapter 623, this office is of the opinion that an augmentation of an authorized expenditure amount in Section 1 of Chapter 623 obviates a decrease in the general fund appropriation pursuant to Section 5 of Chapter 623, until the augmented expenditure limitation is reached. The language in Section 5 mandates a decrease only when the amounts "approved by this act are exceeded * * *." The expenditure limitations so approved include not only the amounts set forth in Section 1 but also "augmentation of the amounts authorized in Section 1" as provided in Section 4 of the act.

The strongest indication that the 1979 Legislature intended that the funds from other sources "approved by this act" include section 1 "sums" and Section 4 "augmentations" comes from the language employed in S.B. 255 and the Legislative purpose behind S.B. 255.

In construing a statute, this office can rely on statements of legislative employees who participated in the drafting of a statute. *Silver v. Brown*, 408 P.2d 689 (Calif. 1966). In a memorandum from William Bible, Legislative Fiscal Analyst, to Assemblyman Don Mello, dated February 26, 1979, Mr. Bible explained the provisions of S.B. 255. This same memorandum was placed in, and became a part of, the record of the Senate Government Affairs Committee hearing on February 28, 1979, when the Committee considered S.B. 255.

The Legislative Fiscal Analyst described the legislative purpose behind S.B. 255 as follows: "in what is probably the heart of S.B. 255, Section * * * 5 [and] 9 * * * of the bill provide for substantially increased [legislative] oversight over the receipt and expenditure of federal funds. Currently, agencies are allowed by the Legislature to receive and expend non-state funds in two ways: (1) through individual statutes in the agency's enabling legislation that permit the agency to accept and expend gifts, federal grants, or private donations; or (2) through inclusion of an agency in the Authorized Expenditure Act * * *. [T]he Authorization Act is open-ended in that it allows state agencies detailed in the Act to increase, with approval of the Governor, any spending authorization which has been established by the Legislature * * *. Section 5 of S.B. 255 would require that any augmentation of the Authorized Expenditure Act must be approved by the Interim Finance Committee under the review procedures of an amended [NRS 353.220](#) (work program revision section of the State Budget Act). (Italics supplied.)

⁹ The Contingency Fund exists pursuant to NRS 353.266 and is under the control of the Interim Finance Committee. NRS 353.266 to 353.269, inclusive.

Implicit in the above statement is the fact that S.B. 255 was intended to give the Legislature control over increases in agency spending via the augmentation procedure. If the only result of an augmentation is a concomitant reduction in general fund appropriations under Section 5 of Chapter 623, then, of course, there could be no increased spending by this method. As noted above, the purpose of S.B. 255 was to provide legislative control over any increases in expenditure authorizations but not to prohibit any increases. It lies within the discretion of the Interim Finance Committee to determine whether or not an increase in an expenditure authorization is warranted.

In the budget for each agency are allotments for certain categories, the total of which are set forth as a work program. [NRS 353.220](#) now requires that when a requested work program revision will increase or decrease (by a specified amount) the expenditure level approved by the Legislature of an allotment, the revision must be approved by the Interim Finance Committee. Frequently, implicit in an approval of an increased allotment in an increase in total expenditures. The Legislature clearly appears to have intended that the money to pay for the approved increased expenditure level could come from increases in revenues from sources taken into consideration in Chapter 623. Pursuant to S.B. 255, the Legislature now has control of all significant expenditure increases sought to be accomplished via an augmentation.

While this office is of the opinion that the words employed in S.B. 255 clearly indicate that the Legislature had in mind increased total authorized expenditures resulting from approved augmentation, we feel there is another and perhaps more important reason to accept this latter conclusion. This latter conclusion will provide much greater flexibility in the operation of state government, especially when one considers the limited appropriation of the Contingency Fund to meet the needs of all state agencies during the interim between legislative sessions when unforeseen changes in circumstances may occur.

CONCLUSION—QUESTION TWO

The chief of the budget division may recommend to the Interim Finance Committee approval of an increase in the authorized expenditure limitation amounts for the University of Nevada, Reno, and the University of Nevada, Las Vegas. If such approval is obtained, the increase will not cause a concomitant reduction in the general fund appropriation available to the respective campuses pursuant to Section 5, Chapter 623, Statutes of Nevada 1979.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-8 Parole Board Immunity from Suit—Members of the Nevada Board of Parole Commissioners enjoy immunity from suit, as provided in [NRS 41.032](#), subsection 2, for the discretionary act of grant of parole in the event an inmate paroled by the board commits a tortious act while on parole status.

Carson City, March 19, 1980

Bryn Armstrong, Chairman, Board of Parole Commissioners, 309 E. John Street, Carson City, Nevada 89710

Dear Mr. Armstrong:

The following response is submitted in reply to your inquiry of January 18, 1980.

QUESTION

Do the members of the Nevada board of Parole Commissioners enjoy immunity from suit under [NRS 41.032](#), subsection 2 in the event an inmate paroled by the board commits a tortious act while on parole status?

ANALYSIS

[NRS 41.032](#) provides that no action may be brought against any officer or employee of the state or any of its agencies which is:

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies * * * or of any officer or employee * * * whether or not the discretion involved is abused.

The Nevada Supreme Court in *Hagblom v. State Dir. of Motor Vehicles*, [93 Nev. 599](#), 604-605, 571 P.2d 1172 (1977), summarized the body of developing case law construing [NRS 41.032](#), subsection 2, since its enactment in 1965:

Subsection 2 provides immunity for acts of discretion even where the discretion is abused. * * *

Appellant contends that even discretionary acts have been subject to liability and cites for that proposition *Silva*, supra; *State v. Webster*, [88 Nev. 690](#), 504 P.2d 1316 (1972); *Harrigan v. City of Reno*, [86 Nev. 678](#), 475 P.2d 94 (1970); and *Chapman v. City of Reno*, [85 Nev. 365](#), 455 P.2d 618 (1969). Those cases are not supportive of appellant's position. In *Silva*, *Harrigan*, and *Webster*, this Court held that [NRS 41.032\(2\)](#), might not provide immunity from liability for acts even though they had their origin in discretionary acts. The test, however, applied in those cases involved the obscure analytical distinction between discretionary and operational functions. Although a given act involved the exercise of discretion and was thus immune from liability, negligence in the operational phase of a decision *would* subject the State, it [sic] agencies, and employees to liability. There is no obscurity present here, for respondents acts were, from their origin, distinctly discretionary. * * *

* * *

Whether sovereign immunity is invoked is the precise issue before us. When the State qualifiedly waived its immunity from liability and consented to civil actions, it did so to provide relief for persons injured through negligence in performing or failing to perform non-discretionary or operational actions. It *did not* intend to give rise to a cause of action sounding in tort whenever a state official or employee made a discretionary decision injurious to some persons. Appellant alleges liability premised solely upon acts discretionary and squarely within the protected penumbra of immunity. [Italics supplied.]

As applied to a public official, an act of discretion involves the right of an official conferred upon him by law to act (or not act) in certain circumstances, according to the dictates of his own conscience and judgment, in a way that seems to him just and proper. *State v. Tindell*, 210 P. 619, 622 (Kan. 1922).

The decision of the board to grant parole under our statutory scheme is uniquely a discretionary act ([NRS 213.1099](#)-213.140, inclusive, where the permissive “may” is ubiquitous), though one which is subject to some preconditions. Firstly, the prisoner must be “otherwise eligible for parole under [NRS 213.107](#) to [213.160](#), inclusive * * *” See [NRS 213.1099](#). For example, a prisoner may not be paroled until he has served one-third of his sentence or one year, whichever is longer. [NRS 213.120](#).

Secondly, the board may grant parole only if from all the information known to the board it then appears:

(a) That there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws; and

(b) That such release is not incompatible with the welfare of society. ([NRS 213.1099](#), subsection 1(a)(b).)

It is evident from the words of art employed in the above-quoted sections that the making of such affirmative findings by a board member in a particular case is in itself an act of discretion or, as one Nevada court put it, “a judgment call on his part—one within his discretion to make.” *LaFever v. City of Sparks*, [88 Nev. 282](#), 284, 496 P.2d 750 (1972). Unquestionably, the exercise of the ultimate decision to grant parole involves an area of great public concern, i.e., the safety of the citizenry. However, given the premise that these two findings are themselves “judgment calls” that must be made in connection with the ultimate decision to grant parole, it must be concluded that the process of making such findings was intended to be an integral part of the overall decisional process *before* parole may be granted and in no manner can be considered part of any operational stage, e.g., parole supervision. See, for example, *State v. Silva*, [86 Nev. 911](#), 478 P.2d 591 (1970).

This conclusion is reinforced by several facts. For example, even if the board finds affirmatively on both issues, it may still deny parole for other reasons. Furthermore, since the very purpose of immunity from suit in the case of discretionary actions by public officials is to allow them to exercise judgment and to make what seem to them sound decisions without fear of suit, it seems only reasonable to include the “judgment calls” required by [NRS 213.1099](#), subsection 1(a) and (b) in the scope of discretionary actions. Statutes similar to [NRS 41.032](#), subsection 2 have recently been held constitutional against due process challenges on similar grounds.

In *Martinez v. California*, ___ U.S. ___, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), the United States Supreme Court held that a California statute which granted immunity to that state’s parole officials was not unconstitutional when applied to defeat a tort claim under state law in an action brought against parole board members by the father of a young girl who had been murdered by a parolee. The court reasoned that the state’s interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting against wholly arbitrary state action. Such an immunity statute was not irrational since fear of suit in the area of discretionary acts by parole officials could impair the state’s ability to implement a parole program designed to promote rehabilitation as well as security inside the prison by the promise of reward for good conduct.

Lastly, it should be emphasized that no inmate is entitled to be paroled as the grant of parole is strictly a matter of legislative grace. See, generally, Palmer, *Constitutional Rights of Prisoners*, Section 8.1-8.34 (1973). Accordingly, the entire process preceding grant of parole involves a series of discretionary judgments about the ability of the prisoner to return to society, essentially involving the making of informed guesses. See *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

CONCLUSION

It is, therefore, the opinion of this office that members of the Nevada Board of Parole Commissioners enjoy immunity from suit, as provided in [NRS 41.032](#), subsection 2, for the discretionary act of grant of parole in the event an inmate paroled by the board commits a tortious act while on parole status.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Edwin E. Taylor, Jr.
Deputy Attorney General,
Chief, Criminal Division

OPINION NO. 80-9 Financial Liability of City and County for Prisoner Maintenance—As between an incorporated city and a county which are not participants in a metropolitan police department within the meaning of Chapter 280, NRS and which are not parties to an interlocal agreement allocating the financial responsibilities of each entity for a jointly used jail facility, the financial liability for the cost of maintaining a prisoner in a county jail is dependent upon the basis of the prisoner's detention. If the prisoner is being detained for a violation of county ordinance or state statute, the county is financially liable for the costs of maintaining the prisoner. If the detention is based on a violation of municipal ordinance, the city must assume the responsibility for these costs. Liability is not based upon whether a municipal or county peace officer effected the arrest, and the responsibility of the costs of prisoner maintenance, once established on the basis of the prisoner's detention, is not altered as a result of the arraignment or conviction of the prisoner.

Carson City, March 26, 1980

John C. Giomi, District Attorney, Lyon County Court House, Yerington, Nevada 89477

Dear Mr. Giomi:

The following response is submitted in reply to your recent written inquiry, wherein you ask for advice concerning the respective financial responsibilities of Lyon County and the City of Yerington in the operation of jointly used jail facilities. In your letter, you advise that the following is a statement of the current arrangement between city and county regarding joint use of the jail facility.

The Sheriff's Department of Lyon County and the City of Yerington Police Department personnel are housed in joint facilities located in Yerington, Nevada. Such joint housing includes the jail that is for the benefit and use of the Sheriff of Lyon County and the City of Yerington Police Department. The jail is funded by county funds and the Sheriff's Department is responsible for the staffing and care of the jail. By agreement, the City of Yerington pays the County of Lyon Sheriff's Department a certain sum per day, per city prisoner.

QUESTION

As between city and county, what is the respective financial liability of each entity for the costs of maintaining a prisoner arrested or convicted for a violation of a county or state statute or for a violation of a city ordinance, who is thereafter housed in a jointly shared but county funded jail facility?

ANALYSIS¹

There appears to be a dearth of case law on the issue presented herein. However, research has disclosed a case that in our opinion is dispositive of the question. In *Washington Township Hosp. Dist. v. County of Alameda*, 263 C.A.2d 272, 69 Cal.Rptr. 442 (1968), a city police officer arrested a suspect for criminal homicide (a state violation). The suspect was injured and, in the opinion of the arresting officer, required immediate medical attention. Accordingly, the suspect was admitted to a township hospital which was closer than two available county operated hospitals. After receiving medical aid, the suspect was arraigned on a charge of murder.

The township hospital commenced an action for declaratory relief against both city and county to determine which entity was liable for the medical services rendered the suspect. The county denied liability on the ground that the services were not furnished at its request while the city denied liability on the ground that the county was liable as a result of the suspect having been arrested for a violation of state law. The trial court found the county liable only for the suspect's post-arraignment care and the city liable for medical services rendered before arraignment on the murder charge.

On appeal, the court reversed the order of the trial court and remanded with directions to enter judgment against the county for the total medical expenses incurred by the suspect, both pre-arraignment and post-arraignment. The court held:

It has long been settled that liability for the cost of maintaining a prisoner in a county jail is dependent upon the basis of the prisoner's detention and that where a prisoner is committed to the county jail for a violation of a city ordinance, the cost of such imprisonment must be borne by the city. (*County of Sonoma v. Santa Rosa*, (1984) 102 Cal. 426 [36 P. 810]; Gov. Code, § 36903.)

It is equally well established that where a prisoner is confined in the county jail after having been charged with or convicted of violating a state law or county ordinance, the expense of his care and maintenance must be paid by the county, and this is true even though the prisoner may have been arrested by a city police officer. (*City of Pasadena v. County of Los Angeles*, (1953) 118 Cal.App.2d 497 [258 P.2d 28]. However, if the arresting city police officer chooses not to take advantage of a

¹ In Attorney General's Opinion No. 80-1 (Nev. 1980), this office determined that, as between state and county, the county must bear the financial costs of housing inmates charged with violations of state statute. Although this opinion is not dispositive of the exact issues raised herein, it does settle one question of city and county liability in the instance of an arrest by a state law enforcement officer for a violation of state statute. As noted therein, the county is chargeable for the expenses of housing such a prisoner.

local county facility where the prisoner may be placed in the custody of the sheriff and, in the absence of any request by the county, confines the prisoner temporarily in the city jail, the cost of maintaining the prisoner must be deemed an expense voluntarily incurred by the city and cannot be recouped from the county. (*City of Pasadena v. County of Los Angeles*, supra.)

The court noted that the statutory scheme in California clearly indicated a legislative intent that the county was liable for the costs of maintenance, including medical care, of “county prisoners,” i.e., those persons charged with violations of county ordinances or state statutes. The city was likewise responsible in the case of city prisoners, i.e., those persons charged with violations of city ordinances. The court adopted the “nature of the offense” test for determining liability. Simply put, the county is liable for the costs of maintenance of persons arrested for a violation of county ordinance or state statute and the city is liable for such costs for persons arrested for a violation of city ordinance. In determining liability, it makes no difference whether a municipal or county peace officer effected the arrest.

This conclusion does not apply to instances where the Nevada Legislature has either mandated the merger of the law enforcement agencies of participating cities and counties into one metropolitan police department or where the Legislature has authorized its political subdivisions or public agencies to enter into formal agreements for the joint and cooperative use of law enforcement facilities, such as jails. In the first instance, the respective financial obligations of the participating entities are governed by the provisions of Chapter 280, NRS. In the latter instance, the financial liability of the contracting parties is governed by the terms of the agreement. Chapter 277, NRS. A cooperative agreement may well result in a modification of the respective financial liabilities set forth above for financial and practical reasons depending on the local circumstances. However, absent such modification, the “nature of the offense” test is applicable.

The court’s decision in *Washington Township Hosp. Dist. v. County of Alameda*, supra, is persuasive because it is consonant with Nevada’s statutory scheme. Incorporated cities, such as Yerington, may enact police ordinances, have municipal courts, city attorneys, chiefs of police and may build jails. See Chapters 266 and 268, NRS. Fines and forfeitures for violations of municipal ordinances are payable into the city treasury. [NRS 5.090](#), subsection 2 and [NRS 266.585](#). The city may contract with the county for the joint use of jail facilities. [NRS 277.180](#), subsection 2(a) and (f). This statutory scheme and the circumstance that fines are remitted to the city is a persuasive indication of legislative intent that the city is responsible for the enforcement of its own ordinances, which necessarily includes the costs of maintenance of prisoners charged with or convicted of violations of municipal ordinance. See, Attorney General’s Opinion No. 073-81 (Fla. 1973) and Attorney General’s Opinion No. 072-260 (Fla. 1972).

Likewise, the county is responsible under the statutory scheme to maintain a common jail and is liable for the maintenance costs of its prisoners who, in accordance with the nature of the offense test, are charged with or convicted of violations of county ordinance. Chapter 211, NRS. The county is additionally responsible for such costs in the case of persons arrested for a violation of state statute and for persons convicted of state offenses for which the county jail is the appropriate place of confinement. [NRS 193.140](#) and [NRS 193.150](#); see, Attorney General’s Opinion No. 80-1 (Nev. 1980).

CONCLUSION

As between an incorporated city and a county which are not participants in a metropolitan police department within the meaning of Chapter 280, NRS and which are not parties to an interlocal agreement allocating the financial responsibilities of each entity for a jointly used jail

facility, the financial liability for the cost of maintaining a prisoner in a county jail is dependent upon the basis of the prisoner's detention. If the prisoner is being detained for a violation of county ordinance or state statute, the county is financially liable for the costs of maintaining the prisoner. If the detention is based on a violation of municipal ordinance, the city must assume the responsibility for these costs. Liability is not based upon whether a municipal or county peace officer effected the arrest, and the responsibility for the costs of prisoner maintenance, once established on the basis of the prisoner's detention, is not altered as a result of the arraignment or conviction of the prisoner.

Nothing in the above conclusion should be construed as preventing the city and county from entering into an interlocal agreement by which the county would assume a portion of the financial burden of maintaining city prisoners, or vice versa.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Edwin E. Taylor, Jr.
Deputy Attorney General,
Chief, Criminal Division

OPINION NO. 80-10 Jurisdiction of Clark County District Board of Health—The health planning functions of a Health Systems Agency delineated in Public Law 93-641 fall within the parameters of the Clark County District Board of Health's jurisdiction over "all public health matters" as set forth in [NRS 439.410](#), subsection 2.

Carson City, March 28, 1980

Mr. Terry Jones, Legal Counsel, Clark County District Board of Health, 600 East Charleston Boulevard, Las Vegas, Nevada 89104

Dear Mr. Jones:

This is in response to your letter of December 27, 1979, wherein you requested advice concerning an interpretation of [NRS 439.410](#).

FACTS

The Clark County District Board of Health was designated as the Health Systems Agency (hereinafter referred to as HSA) for the health services area of Clark County on June 1, 1976. They continued in that role until May 31, 1979, when the federal government de-designated the HSA for not following the federal guidelines. The Clark County District Board of Health now wishes to tender a new application for designation as the HSA for the Clark County health services area.

QUESTION

Does there exist in Nevada, statutory authority for the Clark County District Board of Health to apply for designation as the Health Systems Agency for Clark County as provided for in Public Law 93-641, the National Health Planning and Resources Development Act of 1974 as amended by Public Law 96-79.

ANALYSIS

It is a common principle of law that governmental entities, such as boards of health, being creatures of statute, have only such powers as the statutes confer, either expressly or by necessary implication. 39 Am.Jur.2d Health, § 4; 3 Sutherland, Statutory Construction, § 65.02 (1974). The Nevada Supreme Court has so held in its consideration of the powers of the Board of Cosmetology. *Andrews v. Nevada State Board of Cosmetology*, [86 Nev. 207](#) (1970).

The district boards of health are created pursuant to [NRS 439.370](#), subsection 3. [NRS 439.410](#), as amended by Chapter 105, Statutes of Nevada (1979), delineates in pertinent part the powers and jurisdiction of the district boards of health as follows:

1. The district board of health has the powers, duties and authority of a county board of health in the health district.
2. The district health department has *jurisdiction over all public health matters* in the health district.
3. In addition to any other powers, duties and authority conferred on a district board of health by this section, the district board of health may be affirmative vote of a majority of all the members of the board adopt regulations consistent with law which shall take effect immediately on their approval by the state board of health to:
 - (a) Prevent and control nuisances;
 - (b) Regulate sanitation and sanitary practices in the interests of the public health;
 - (c) Provide for the sanitary protection of water, food supplies and sewage disposal; and
 - (d) *Protect and promote the public health generally* in the geographical area subject to the jurisdiction of the health district. (Italics added.)

The dispositive issue then is to glean the legislative intent behind the grant of authority to the district boards of health “over all public health matters,” i.e., would the Clark County District Board of Health, serving the functions of an HSA, be involved in matters related to public health? It should be noted at this juncture that the Legislature has not expressly defined the term “public health matters.”

The express purpose of Public Law 93-641, National Health Planning and Resources Development Act of 1974, is found at Sec. 2(a) and (b):

Sec. 2. (a) The Congress makes the following findings:

- (1) The achievement of equal access to quality health care at a reasonable cost is a priority of the Federal Government.
- (2) The massive infusion of Federal funds into the existing health care system has contributed to inflationary increases in the cost of health care and failed to produce an adequate supply or distribution of health resources, and consequently has not made possible equal access for everyone to such resources.
- (3) The many and increasing responses to these problems by the public sector (Federal, State, and local) and the private sector have not resulted in a comprehensive, rational approach to the present—
 - (A) lack of uniformly effective methods of delivering health care;

- (B) maldistribution of health care facilities and manpower; and
- (C) increasing cost of health care.

(4) Increases in the cost of health care, particularly of hospital stays, have been uncontrollable and inflationary, and there are presently inadequate incentives for the use of appropriate alternative levels of health care, and for the substitution of ambulatory and intermediate care for inpatient hospital care.

(5) Since the health care provider is one of the most important participants in any health care delivery system, health policy must address the legitimate needs and concerns of the provider if it is to achieve meaningful results; and , thus, it is imperative that the provider be encouraged to play an active role in developing health policy at all levels.

(6) Large segments of the public are lacking in basic knowledge regarding proper personal health care and methods for effective use of available health services.

[Sec. 2.] (b) In recognition of the magnitude of the problems described in subsection (a) and the urgency placed on their solution, it is the purpose of this Act to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health services, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy.

In order to achieve this purpose, the Congress enacted Section 1511(a) which creates health service areas throughout the United States to which health systems agencies shall be designated. Section 1521 provides for a state health planning agency which will coordinate with the local HSA through its recommendations to the state agency respecting the need for new institutional health services proposed to be offered. Section 1513(F).

Section 1512 defines the term “HSA” to mean an entity which meets one of three legal structures: (1) a nonprofit private corporation; (2) a public regional planning body; or (3) *a single unit of general local government if the area of the jurisdiction of that unit is identical to the health service area.*

Section 1513(b) states the functions of the HSA in providing health planning and resources development for its health service area. Some of these functions are:

- (1) The agency shall assemble and analyze data concerning—
 - (A) the status (and its determinants) of the health of the residents of its health service area,
 - (B) the status of the health care delivery system in the area and the use of that system by the residents of the area,
 - (C) the effect the area’s health care delivery system has on the health of the residents of the area,
 - (D) the number, type, and location of the area’s health resources, including health services, manpower, and facilities,
 - (E) the patterns of utilization of the area’s health resources, and
 - (F) the environmental and occupational exposure factors affecting immediate and long-term health conditions.

In addition, the HSA shall establish an implementation plan (AIP) which describes objectives which will achieve the goals of the Health Systems Plan (HSP). In establishing the AIP, the HSA shall give priority to those objectives which will maximally improve the health of the residents of the area, as determined on the basis of the relation of the cost of attaining such objectives to their benefits. Section 1513(b)(3).

These functions delineated supra are for the express purpose of:

- (1) improving the health of residents of a health service area,
- (2) increasing the accessibility (including overcoming geographic, architectural, and transportation barriers), acceptability, continuity, and quality of the health services provided them,
- (3) restraining increases in the cost of providing them health services,
- (4) preventing unnecessary duplication of health resources, each health systems agency shall have as its primary responsibility the [sic] provision of effective health planning for its health service area and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and implement the health plans of the agency, and
- (5) preserving and improving, in accordance with section 1502(b), competition in the health service area. Section 1513(a) as amended (P.L. 96-79).

There is no question that the stated purposes of the functions of the HSA, as set forth in Public Law 93-641, are matters related to the “public health” of the citizens of the health systems area, in this case Clark County.

Further, the term “public health matters” should not be strictly construed to mean only preventive health measures. “Power in the realm of health is not restricted to measures for the prevention and control of contagious, infectious or dangerous diseases * * *. Whatever rationally tends to promote and preserve the public health is an appropriate subject of legislation within the police powers of a state,” 39A CJS, Health and Environment, Section 5.

In *Dowell v. City of Tulsa*, 273 P.2d 859, 861 (1954), the court, faced with analyzing state statutes providing for various regulations and standards to promote and protect public health, was asked to determine whether the city could, pursuant to its police power, require citizens of the city to use or pay for water that is fluoridated. The court held:

(1) In view of the broad terms in which our Legislature has spoken on the subject, we cannot believe that it has intended to restrict its enactment of measures designed to promote the public health and welfare to those designed to prevent the spread of infectious, contagious or dangerous diseases. We think the mere reading of the statutes herein cited and others enacted by our Legislature is sufficient to show that it has not so restricted its policy, and that it has chosen to make many minimum requirements with reference to food, lodging and a myriad of subjects connected with the public health and/or welfare that have no direct connection with or relation to infectious, contagious or dangerous diseases.

Since there is no case authority in Nevada stating expressly that health planning is a “public health matter,” as that term is used in [NRS 439.410](#), we look to our sister state of California for enlightenment. California has found that health planning is a proper health police power. In the case of *Simon v. Cameron*, 337 F.Supp. 1380 (1970), the court was asked to review the constitutionality of California’s health statutes which granted review authority to local health planning agencies of proposals for construction of new or related health facilities based upon community need. (The same function as the local HSA’s in Nevada.) The court held at page 1381:

There can be little question but that health planning is a necessary and proper function of the State Legislature. It was held to be such in *Attoma v. Department of*

Social Welfare, 26 A.D.2d 12, 270 N.Y.S.2d 167 (1966). In this case the New York Supreme Court held that a determination of community need, as a condition precedent to licensing a health facility, was a reasonable exercise of the state's police power over the public health, safety and welfare.

Turning once again to the statutory scheme found in Nevada, one sees that the Legislature has determined that health planning is a necessary function of the state police power in regulating health. Title 40 of Nevada Revised Statutes entitled *Public Health and Safety*, encompasses all the health statutes including Chapter 439 of Nevada Revised Statutes, entitled *Administration of Public Health*. As noted supra, Chapter 439 contains the legislative grant of authority to district boards of health to exercise jurisdiction over all "public health matters." ([NRS 439.410](#), subsection 2).

Chapter 439A of Nevada Revised Statutes, entitled *Planning for Health Care*, is the legislative grant of authority to the Department of Human Resources to act as the state health planning and development agency for the purposes of the federal act ([NRS 439A.081](#)). Chapter 449 of Nevada Revised Statutes, entitled *Health and Care Facilities*, is the statutory grant of authority to the Department of Human Resources to regulate licensure of all health facilities within the state.

The health division acting under [NRS Chapter 449](#), and the Health Planning Agency acting under [NRS Chapter 439A](#), are inseparably dependent upon each other in the licensing function. [NRS 439A.100](#), subsection 1 provides that the health division shall not issue a license to a new health care facility or health maintenance organization without an approval in writing from the director of the Department of Human Resources of Office or Health Planning and Resources.

It is apparent that the Legislature, in developing a statutory public health scheme, has delegated health police powers to respective agencies of both the state and local governments in such a fashion that they must act in concert to achieve the goal of better conditions in the health community.

It is clear that the State's police power to regulate the licensure of health facilities is a proper grant of authority by the Legislature. Such regulation has, as its foundation, the promotion of the health of the State's citizens. In the case of *Friendship Med. Center, Ltd., v. Chicago Bd. of Health*, 367 F.Supp. 594 (1973) (reversed and remanded for other reasons) the court stated at page 602:

It is beyond dispute that a state has broad power to establish and enforce standards of conduct for the purpose of protecting the health of everyone within its boundaries. It is a vital part of its police power. Moreover, a state's discretion in that field extends naturally to the regulation of all professions concerned with health. *Barsky v. Board of Regents*, 347 U.S. 442, 449, 74 S.Ct. 650, 98 L.Ed. 829 (1954); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1954).

The Nevada Legislature has determined that licensure cannot take place until need for the services has been determined. Therefore, the planning function and ascertainment of need is as crucial a step in the police power regarding health as is the actual licensing function.

The Clark County District Board of Health was designated as the HSA for the health services area of Clark County on June 1, 1976, and served in that capacity until May 31, 1979. The Nevada Supreme Court, in construing statutory grants of authority, held in *Seaborn v. Wingfield*, [56 Nev. 260](#) (1935) at page 270:

Where a doubt may exist as to the proper construction to be placed on an constitution or statutory provision, courts will give great weight to the construction

placed thereon by other co-ordinate branches of government and by officers whose duty it is to execute its provisions.

See also People of St. of Cal. Ex Rel. Younger v. Tahoe Reg. P. Ag., 516 F.2d 215 (1975); *King v. Board of Regents*, [65 Nev. 533](#) (1948); *School Trustees v. Bray*, [60 Nev. 345](#) (1941). The record reflects that the Clark County District Board of Health acted in the capacity of the HSA for Clark County for three years. Further, the Office of Health Planning and Resources of the Department of Human Resources, the state agency responsible for administering the Federal health Planning act, acted in concert with the Clark County HSA without questioning the authority of said governmental entity to so act. In addition, the U.S. Department of Health, Education and Welfare designed the Clark County District Board of Health as the HSA for Clark County.

There exists much case authority for the proposition that statutes concerning public health should be entitled to liberal construction for the accomplishment of its obvious beneficent objective. *State v. Owens-Corning Fiberglass Corp.*, 242 A.2d 21 (App.Div. 1968); most recently cited in *Lom-Ran Corp. v. Dept. of Environmental Protection*, 394 A.2d 1233 (1978); *Snohomish City Bldrs. Ass'n v. Snohomish Health Dist.*, 508 P.2d 617 (1973); *State v. Sanner Contracting Co.*, 514 P.2d 443 (1973); *Wilson v. County of Santa Clara*, 137 Cal.Rptr. 78 (1977); *State ex rel. Anderson v. Fadely*, 308 P.2d 548 (Kan. 1957); 39A CJS, Health and Environment, Sec. 5; 3 Sutherland, statutory Construction, § 65.03 (1974).

Sutherland, at § 71.01 states in part:

[T]he policy of the courts has been to give general welfare legislation a liberal construction with a view towards the accomplishment of its highly beneficent objectives. In judicial language: "No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction."

And at § 71.02 in part:

Since a very early time the courts have been committed to the doctrine of giving statutes which are enacted for the protection and preservation of public health an extremely liberal construction for the accomplishment and maximization of their beneficent objectives. * * * While the courts have usually employed a relatively strict interpretation of statutes granting powers to administrative agencies, the relaxation of this rule in the interpretation of statutes granting powers to boards having control over public health has been notable.

The promotion and improvement of health is a fundamental obligation of the national government and the health of the people of the nation is a matter of national concern. In recognition of these principles, Congress has enacted health legislation in many forms including Public Law 93-641, the National Health Planning Resources Development Act of 1974. The Nevada Legislature also believing that the promotion and improvement of health is a fundamental obligation, has decided that the State should participate in this plan to promote the health of its citizens by enacting [NRS Chapter 439A](#). We have seen a legislative scheme in Title 40 of the Nevada Revised Statutes that encompasses all aspects of public health—from prevention to licensing of health facilities to planning for health care by determining need to achieve the goals discussed supra as stated in the federal act. One of the stated purposes of this legislation is to attempt to control the inflationary increases in cost of health care and thereby make possible equal access for everyone to these health care resources. In order to develop a

program to achieve these goals, the Legislature has seen fit to delegate to the department the task of administering the federal act in the State of Nevada. To perform this task, the Legislature enacted [NRS 439A.100](#) which provides for participation by an HSA in the health planning process. The legislative scheme contained in Chapter 439A of NRS contemplates that any health plan and budget of an HSA is subject to annual review and comment of the State Health Coordinating Council. ([NRS 439A.060](#).) Presumably, this assures that the health planning process at the local level complies with the goals and objectives of the federal and State legislation noted above to promote and improve the public health in the area included within an HSA's jurisdiction. If a county district board of health is designated as an HSA, this office assumes that any portion of the board's budget to be used in carrying out the functions of an HSA would be identified as such and approved in accordance with the usual budget procedures applicable to approval of a budget for a district board of health. The separate identity of the HSA budget would assure that the review and comment require by [NRS 439A.060](#) would occur, thereby ensuring that any such funds are designated and used for the aforementioned beneficent public health purposes.

CONCLUSION

It is therefore the opinion of this office that the health planning functions of an HSA as set forth in Public Law 93-641, in light of the beneficent purposes of that act to promote the public health generally, as well as the obvious intent of the Nevada Legislature in enacting Title 40 of Nevada Revised Statutes to promote the public health, are directly and inseparably intertwined with the public health, and, therefore, fall within the jurisdiction of "all public health matters" of the Clark County District Board of Health as set forth in [NRS 439.410](#), subsection 2.

Since the District Board of Health is given the authority to adopt regulations to protect and promote the public health generally, ([NRS 439.410](#), subsection 3(d)), the function of promoting the public health by participating in the process of cost containment to allow for easier access to health care for all citizens irrespective of their financial station in life would clearly serve this beneficent purpose.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Bryan M. Nelson
Deputy Attorney General

OPINION NO. 80-11 Navigable River—The State Engineer, irrigation districts, the Division of State Lands, the individual counties, and the United States all have the authority to seek removal of structures which encroach upon the natural channel of a navigable river. The United States, as well as the cities, counties, and public districts, including irrigation districts and flood control districts have the authority to improve a navigable river to maintain its water capacity or avoid flood damage to adjoining property. However, no federal or state statute sets forth a definite duty to undertake such projects. Liability of

irrigation district for downstream property damage depends upon unique circumstances of the case.

Carson City, April 8, 1980

Mr. Roland Westergard, Director, Department of Conservation and Natural Resources, Capitol Complex, 201 S. Fall Street, Carson City, Nevada 89710

Dear Mr. Westergard:

You have posed three questions to this office concerning the Carson River.

QUESTION ONE

Who has the authority to seek removal of structures which may encroach upon the natural channel of the Carson River or structures which are otherwise vulnerable to flood damage during high water releases?

ANALYSIS

By virtue of the "Equal Footing Doctrine" title to all lands underlying navigable waters devolved upon the individual states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). Under the Tenth Amendment to the United States Constitution, the land below navigable waters was reserved to the states, subject only to limitations imposed by expressly conferred federal powers, such as the regulation of interstate commerce. *United States v. Holt Bank*, 270 U.S. 49 (1926); *Scott v. Lattig*, 227 U.S. 229 (1913); *Shively v. Bowley*, 152 U.S. 1 (1894); *Mumford v. Wardwell*, 73 U.S. 423 (1867); *Pollard's Lessee v. Hagan*, supra. The Nevada Supreme Court has declared that the Carson River is navigable and that the State holds the lands below its ordinary high-water mark in trust for public use. *State v. Bunkowski*, [88 Nev. 623](#), 503 P.2d 1231 (1972). See also *State Engineer v. Cowles Bros., Inc.*, [86 Nev. 872](#), 478 P.2d 159 (1970). However, while the State owns submerged and submergible lands, and may grant leases or easements upon them, the granting of such rights in the lands remains subject to the public's paramount interest in navigation, commerce, and fishing, and the State, as trustee of that interest, must act accordingly. *Brusco Towboat Co. v. State, By and Through Straub*, 567 P.2d 1037 (Or.App. 1977); *Hardin v. Jordan*, 140 U.S. 371 (1891).

With regard to such structures in navigable waters, the United States Supreme Court in *Shively v. Bowley*, supra, said:

By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the King's is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Hargrave's Law Tracts, 85; Mitf. P1. (4th ed.) 145; *Blundell v. Catterall*, 5B. & Ald. 268, 298, 305; *Attorney General v. Richards*, 2 Anstr. 603, 616; *Attorney General v. Parmeter*, 10 Price, 378, 411, 464; *Attorney General v. Terry*. L.R. 9 Ch. 425, 429 note; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65; *Barney v. Keokuk*, 94 U.S. 324, 337.

By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover

compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament which provides for compensations for “injuries affecting lands,” “including easements, interests, rights and privileges in, over or affecting lands.” The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. *Bucleuch v. Metropolitan Board of Works*, L.R. 5 H.L. 418; *Lyon v. Fishmongers Co.*, 1 App.Cas. 662. “That decision,” said Lord Selborne, “must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.” *North Shore R.Co. v. Pion*, 14 App.Cas. 612, 620, affirming 14 Can.Sup.Ct. 677. 152 U.S. at 13-14.

[NRS 1.030](#) provides that the common law of England is the rule of decision in all courts of the State of Nevada to the extent that it does not conflict with the constitution and laws of the United States or of the State of Nevada.

The law is well settled that there is no prescriptive right against the sovereign. See Attorney General’s Opinion No. 259, August 24, 1965. Thus, encroaching structures (purprestures) do not gain any legal standing merely because of long existence.

Lands below the high-water mark of streams are called submerged and submergible lands. The high-water mark in a natural stream has been defined as follows:

“High-water mark” means what its language imports—a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. [Citations omitted.]

The high-water mark, therefore, may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes. *State v. Sorenson*, 271 N.W. 234 (Ia. 1937).

The Administrator of the Division of State Lands holds title to all lands and interests in lands owned by the State of Nevada except lands owned for highway and university purposes. [NRS 321.001](#). [NRS 322.050](#) authorizes the Administrator of the Division of State Lands to lease or grant easements upon state lands. These easements and leases require the concurrence of interested state agencies and the Governor. Therefore, the Administrator of the Division of State Lands with such concurrences may grant easements or leases for the placement of appropriate structure in the Carson River. It is recommended by this office that the Division of State Lands adopt regulations pursuant to [NRS 233B.050](#) to establish criteria and procedures for the granting and denial of applications for docks, piers, and other appropriate structures in the navigable rivers of this State, except in areas where regulations of this nature have already been adopted.

It should be noted that all leases or easements upon submerged and submergible lands are subject to the federal government’s right to remove a structure in a navigable stream which interferes with the superior sovereign’s navigational servitude or easement. *Federal Power Commission v. The Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. The Virginia Electric & Power Co.*, 365 U.S. 624 (1961); *Scott v. Lattig*, supra.

We turn now to a discussion of the various entities which have the authority to seek the removal of purprestures in navigable rivers in Nevada. Those entities include:

1. The State Engineer has the authority to order the removal of obstructions in water courses in Nevada. [NRS 535.050](#). That statute applies to all obstructions and to all streams and water courses.

2. Irrigation districts are vested with full power to remove obstructions from natural water courses situated within or outside of their boundaries when such is necessary to secure complete drainage of the land within the district. [NRS 539.245](#).

3. As mentioned above, the Administrator of the Division of State Lands is responsible for holding title to all real property of the State of Nevada except land held for highway or university purposes. [NRS 321.001](#). It is the opinion of this office that the Administrator of the Division of State Lands may bring an action through the Attorney General to cause the removal of encroachments within the ordinary high-water mark of navigable waters. *Woods v. Johnson*, 241 C.A. 2d. 278, 60 Cal.Rptr. 515 (1966).

4. [NRS 202.480](#) provides that obstructions in navigable rivers are public nuisances which may be abated by the court having jurisdiction thereof. Thus, the various counties, through their district attorneys, have the authority to seek the removal of structures in navigable rivers. [NRS 252.090](#). [NRS 535.110](#) also provides that it is a misdemeanor to erect any unlawful structure “in a river or stream * * *.”

5. As mentioned above, the United States has the authority to cause the removal of structures in navigable waters which interfere with the federal navigational easement or servitude. The cases indicate that the control of floods in navigable rivers is essentially the control of navigation. *United States v. West Virginia Power Co.*, 56 F.Supp. 298 (1944). Thus, the United States has the authority to cause the removal of structures in navigable rivers which interfere with flood control objectives as well as those that interfere with navigation.

Attention is directed now to the portion of your first question which deals with the possible removal of structures which are not within the high-water mark of the Carson River, but which are vulnerable to flood damage during extraordinary water releases through the Lahontan Dam. It is assumed for the purposes of analysis that such structures comply with all state statutes and local ordinances and are valid and existing improvements upon real property that happen to be vulnerable as above described.

An irrigation district has broad powers pursuant to [NRS 539.207](#) with regard to the acquisition “by purchase, condemnation or other legal means” of property necessary for the “use and supply, operation, maintenance, repair and improvement of the works of the district.” As you know, the entire course of the Carson River, after its passage through the Lahontan Dam, is within the boundaries of the Truckee-Carson Irrigation District (T.C.I.D.). Therefore, if it is foreseeable that it may be necessary for T.C.I.D. to release more water than the river channel at a particular point is capable of carrying and, if it is not possible or appropriate to remedy the problem through a channeling project undertaken pursuant to [NRS 539.245](#) as hereinafter discussed, it is our opinion that T.C.I.D. may elect, pursuant to [NRS 539.207](#), to acquire vulnerable improvements such as those you describe.

A flood control district created pursuant to [NRS 543.240](#) et. seq. may consist of numerous non-contiguous areas. Such a district is governed by the county commissioners of the county containing the bulk of the district. However, under some circumstances such a district may include portions of other counties. [NRS 543.250](#). Such flood control districts have the authority to enter into agreements with irrigation districts. [NRS 543.450](#), subsection 3. Flood control districts may acquire property by purchase or condemnation when “necessary or convenient for the construction, use, supply, maintenance, repair and improvement” of flood control works. [NRS 543.450](#), subsection 2. Therefore, it is the opinion of this office that flood control districts have the authority to acquire property which is vulnerable to flooding during high water releases from Lahontan Dam.

It might be well to note the value of county and city zoning laws for the prevention of the construction of future structures and improvements in areas that are vulnerable to flooding from the Carson River. See “Flood Plain Zoning for Flood Loss Control,” 50 Iowa Law Review 552 (1965).

CONCLUSION—QUESTION ONE

It is the opinion of this office that the State Engineer, an irrigation district, the Division of State Lands, the local counties through their district attorneys, and the United States all have the authority to seek removal of structures which may encroach upon the natural channel of the Carson River. It is the further opinion of this office that irrigation districts and flood control districts have the authority to acquire lands containing improvements which are vulnerable to flooding during high water releases, but which lands are not located below the high-water mark of the Carson River.

QUESTION TWO

Who has the responsibility, if any such exists, for maintaining or improving the Carson River channel to maintain its water capacity to avoid flood damage to adjoining property?

ANALYSIS

A channel clearance program for navigable rivers is established by [NRS 532.220](#). The program is administered by the State Engineer. The statute provides that any incorporated city, county or other political subdivision of the state may apply to the State Engineer for a grant from the program if federal money is not available for the proposed project, the local government agrees to match the grant equally, and if the amount applied for does not exceed the balance in the fund. No legislative history is available regarding this statute. However, it is apparent that the Legislature intended that cities, counties and other political subdivisions may pursue projects for channel clearance in navigable rivers.

Chapter 543 of the Nevada Revised Statutes deals with flood control. [NRS 543.030](#) states:

The director (of the Department of Conservation and Natural Resources) is hereby authorized to give all assurances and perform any other acts required by the Secretary of the Army and the Congress of the United States in connection with flood control projects in the State of Nevada, when and as directed by acts of the Legislature of the State of Nevada.

[NRS 543.040](#) provides for a flood control revolving fund. However, the purpose of this fund is limited to the paying of necessary costs to carry out the assurances and perform the acts provided for in [NRS 543.030](#) (above).

[NRS 543.090](#) provides that when the United States “has approved or may approve” a flood control project in the State of Nevada, and a county, city or public district “has given or is in a position to give” the assurances required by the Watershed Protection and Flood Prevention Act, and such county, city or public district is in need of immediate financial assistance for planning, engineering, administration, acquisition of easements and rights-of-way or other costs, such entities may apply to the Director of the Department of Conservation and Natural Resources for loans for such purposes. Irrigation districts created pursuant to Chapter 539 of Nevada Revised Statutes, are “public districts.” See Attorney General’s Opinion No. 143, September 18, 1973. Therefore, it appears that irrigation districts may initiate flood control projects with or without loan assistance from the State. That opinion is supported by [NRS 543.020](#) which states:

It is hereby declared to be the policy of the State of Nevada to cooperate with the United States and its departments and agencies, *and with the counties, cities and public districts* of the state, in preventing loss of life and property, disruption of commerce, interruption of transportation and communication and waste of water resulting from floods, and in furthering the conservation, development, utilization and disposal of water. [Italics added.]

In order “to secure complete drainage” of lands within the district, an irrigation district “is vested with full power to widen, straighten or deepen any water course.” [NRS 539.245](#). As mentioned above, all of the Carson River after its passage through Lahontan Dam is encompassed within the boundaries of T.C.I.D. Therefore, if it is foreseeable that T.C.I.D. may find it necessary to release extraordinary quantities of water through Lahontan Dam that the Carson River is not capable of carrying within its channel, it would appear that a project to avoid flood damage to adjacent properties by improving the river channel would be for the purpose of “securing complete drainage” of lands within the district and, thus, within the purview of [NRS 539.245](#). [NRS 539.245](#) also provides that an irrigation district may “cut a new channel upon other lands” if necessary to accomplish the drainage purpose. If required, an irrigation district may use the right of eminent domain to obtain the real property for such a new channel. [NRS 539.245](#), subsection 2.

Flood control districts created pursuant to [NRS Chapter 543](#) should be specifically mentioned as having the authority to undertake projects for the control of flood waters. [NRS 543.360](#).

The United States has channel clearance and flood control authority pursuant to 33 U.S.C. 701.

As set forth above, the State clearly has the authority to maintain or improve the channel of a navigable river. However, no statutory or common law duty or obligation to perform such work has been found. Certainly, an entity or entities controlling a dam in a navigable river may have a duty to make provision for such a river to have the capacity to safely conduct waters which may foreseeably be necessarily released in the operation of such dam and which waters may cause damage to improvements above the ordinary high-water mark of such river or to structures below the ordinary high-water mark for which easements or leases have been granted by the State.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the United States, as well as cities, counties, and public districts, including irrigation districts and flood control districts, have the authority to maintain or improve the Carson River channel to assure its water capacity or to avoid flood damage to adjoining property. No federal or state statute sets forth a definite duty to perform such projects. However, an entity that operates and controls a dam in a navigable river may have a duty or responsibility to take necessary steps to make provision for the river to have the capacity to safely conduct waters which it can foresee may have to be released into the river in connection with the operation of the dam.

QUESTION THREE

Is T.C.I.D. liable for any downstream property damage occasioned by its releases of water from Lahontan Dam, either (a) when the amount released does not exceed the quantity of upper Carson River water discharged into Lahontan Reservoir, or (b) when, for whatever reason, the Truckee-Carson Irrigation District is compelled to discharge water from Lahontan Dam in excess of the upper river discharge?

ANALYSIS

It is not possible to answer this question in broad terms. Liability will depend upon the facts in the individual circumstance. However, it should be noted that it is axiomatic that releases into the channel of a natural waterway that are greater than the stream can withstand may bring about liability. *Laurelon Terrace v. The City of Seattle*, 246 P.2d 1113 (Wash. 1952); *King County v. Boeing Co.*, 384 P.2d 122 (Wash. 1963).

It is our understanding that many of the contractual responsibilities concerning the operation of the Lahontan Dam are presently being litigated. Questions concerning the relative obligations of the United States and T.C.I.D. with regard to the operation of Lahontan Dam should be directed to their respective counsel.

CONCLUSION—QUESTION THREE

It is the opinion of this office that the liability of T.C.I.D. for any downstream property damage occasioned by its release of water from Lahontan Dam would depend upon the facts in the individual circumstance and that, therefore, no broad answer to the questions can be given.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert C. Manly
Deputy Attorney General,
Conservation and Natural Resources

OPINION NO. 80-12 Instructions in human reproductive system, related communicable diseases and sexual responsibility—If the board of trustees of a school district establishes a course or unit of a course of instruction on the human reproductive system, related communicable diseases and sexual responsibility pursuant to [NRS 389.065](#), the subjects of the course must be taught by certificated teachers or school nurses whose qualifications have been previously approved by the board of trustees and may not be taught by any other person.

Carson City, April 17, 1980

Mr. Ted Sanders, Superintendent of Public Instruction, 400 West King Street, Capitol Complex,
Carson City, Nevada 89710

Dear Mr. Sanders:

On behalf of the Nevada State Board of Education you have requested an opinion of this office regarding [NRS 389.065](#).

FACTS

The 1979 Legislature passed enabling legislation authorizing boards of school trustees in Nevada to establish a course or unit of a course of instruction on the human reproductive system, related communicable diseases and sexual responsibility. [NRS 389.065](#), Chapter 455, Statutes of Nevada 1979. If a board of trustees elects to establish such a course or unit of a course the statute specifies certain conditions which must be complied with. You are specifically concerned with subsection 3 which provides as follows:

The subjects of the course may be taught *only* by a teacher or school nurse whose qualifications have been previously approved by the board of trustees.
[Italics added.]

It is a common practice for teachers to bring into the classroom non-educators and resource persons from outside the school district to aid in instruction by presenting specific information pertinent to their area of employment, education, or background.

QUESTION

If a board of trustees of a local school district elects to establish a course of instruction pursuant to [NRS 389.065](#), may resource persons who are not “teachers” or “school nurses” whose qualifications have been previously approved by the board be used in teaching such course?

ANALYSIS

To determine the statute’s meaning, it is necessary to study its language, the plain meaning of its words. *State v. California Mining Co.*, [13 Nev. 203](#), 217-218 (1878). As stated in *Seaborn v. District Court*, [55 Nev. 206](#), 219, 29 P.2d 500 (1934):

No sentence, clause, or word should be construed as unmeaning and surplusage if a construction can be found legitimately which will give force and preserve all the words of the statute. It is a canon of construction that, if it is possible, effect must be given to every word of an act.

The statute specifically provides that the “subjects of the course may be taught *only* by a teacher or school nurse * * *.” [Italics added.] “Only” is defined in Black’s Law Dictionary to mean “solely; merely; for no other purpose; at no other time; in no otherwise; alone; of or by itself; without anything more; exclusive; nothing else or more.” *State v. Bosch*, 242 P.2d 477, 487 (Mont. 1952). “Only” is a restrictive word, a word of limitation. *Cummings v. Lockwood*, 327 P.2d 1012, 1015 (Ariz. 1958). It is a word of restriction or exclusion, of restriction as to that which it qualifies and of exclusion as to other things. *White Stores v. Atkins*, 303 S.W.2d 720, 726 (Tenn. 1957).

Although it is a common and accepted practice to bring in outside experts to supplement a teacher’s instruction of a subject, the statute uses the word “only.” In [NRS 389.065](#) the Legislature must be understood to have restricted those persons who may teach a course or unit of a course on the human reproductive system, related communicable diseases and sexual responsibility to teachers and school nurses whose qualifications have been approved by the board of trustees. No mention is made of outside experts or resource persons. The Legislature must be understood to mean what it has plainly expressed, especially when the words used in a statute are free from ambiguity and doubt. *Thompson v. Hancock*, [49 Nev. 336](#), 341, 245 P. 941 (1926).

The meaning of the words used in a statute may also be sought by examining the context and by considering the reasons or causes which induced the Legislature to promulgate it. Ex parte Siebenhour, [14 Nev. 365](#), 368 (1879). The statute must also be construed as a whole. Ex parte Iratacable, [55 Nev. 263](#), 282-283, 30 P.2d 284 (1934).

Considering [NRS 389.065](#) as a whole it is clear the Legislature determined that restrictions and safeguards are necessary when teaching a course on the human reproductive system, related communicable diseases and sexual responsibility. Chapter 389 generally provides for courses of study in a number of different areas, e.g., American government, citizenship, American history, physical training, driver education. Some of these courses are even required to be offered in all public schools of the State. However, nowhere are there conditions placed on such courses of instruction similar to those found in [NRS 389.065](#). In addition to the requirements of subsection 3 set forth above, the statute requires that an advisory committee be appointed by the school board, which shall advise the district on the content of and materials to be used in a course of instruction on the human reproductive system as well as the recommended age of pupils to be taught. The pupil's parent or guardian must give written consent for the pupil to attend the course. The materials to be used in the course must be made available to the parent or guardian prior to the course being conducted.

Considering the plain meaning of the words used in subsection 3 and considering it in context with the statute as a whole, it must be concluded that the course must be taught by a teacher or school nurse whose qualifications have been approved by the board of trustees.

Although "teacher" is not specifically defined in Chapter 389, [NRS 391.311](#), subsection 8 defines teacher as "a certificated employee the majority of whose working time is devoted to the rendering of direct educational service to students of a school district." In regard to the term "school nurse," the regulations for teacher certification as adopted by the Board of Education provide for special certificates to be given to registered nurses licensed by the Nevada State Board of Nursing. Each special certificate is then endorsed as "school nurse, r.n.," or "professional school nurse" depending on the nurse's qualifications. Therefore, if a person is not a certificated employee the majority of whose working time is devoted to rendering direct educational services to students of a school district or a registered nurse specially certified as a school nurse by the Nevada State Board of Education, such person may not teach human sexuality in the public schools.

The above interpretation is consistent with the legislative history as recorded in the committee minutes of the Assembly Education Committee and the Senate Human Resources and Facilities Committee. [NRS 389.065](#) was added to Chapter 389 by A.B. 650. Section 3 of A.B. 650 as originally introduced provided as follows:

Any such course of instruction must be:

- (a) Taught by a person whose certificate authorizes such instruction, selected by the board of trustees after consulting the advisory committee.
- (b) Presented in a manner appropriate for the age and level of maturity of the pupils to be instructed.

At the Assembly Education Committee hearings on A.B. 650 there was discussion regarding the qualifications and training of persons who would teach human sexuality. The Committee appointed a subcommittee which reported back and recommended certain amendments as contained in Amendment No. 887. In the proposed amendments regarding Section 3, "course of instruction" was changed to "subjects of the course" and "teacher" and "school nurse" were specifically named as being the "only" persons to teach the course. A.B. 650 as amended then passed the Assembly and was considered by the Senate Human Resources and Facilities Committee. One of the bill's authors, Assemblyman Lonie Chaney, testified that they

were attempting to get to the root of the problem by having experienced instructors teach the children. The Senate Resources and Facilities Committee made no changes in section 3, as amended. The Legislature subsequently passed the bill.

CONCLUSION

If a board of trustees of a local school district elects to establish a course of instruction under [NRS 389.065](#) concerning the human reproductive system, related communicable diseases and sexual responsibility, persons who are not certificated “teachers” or “school nurses” whose qualifications have been previously approved by the board of trustees may not participate in giving any instruction in the subjects of the course.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Emmagene Sansing
Deputy Attorney General

OPINION NO. 80-13 State Public Defender, Officer Status When acting in Behalf of a Client—The Nevada State Public Defender, when acting in behalf of a client in a criminal proceeding, is an officer of the State of Nevada as the term officer is used in [NRS 41.0339](#).

Carson City, April 24, 1980

Norman Herring, Public Defender, State of Nevada, Capitol Complex, Carson City, Nevada
89710

Dear Mr. Herring:

QUESTION

Is the Nevada State Public Defender, when acting in behalf of an indigent defendant in a criminal prosecution after appointment pursuant to [NRS 171.188](#), an “officer” of the State of Nevada as that term is used in [NRS 41.0339](#)?

ANALYSIS

[NRS 41.0339](#), in pertinent part, provides:

The [attorney general] shall provide for the defense, including the defense of crossclaims and counterclaims, of any officer * * * of the state * * * in any civil action brought against that person based on any alleged act or omission relating to his public duties if [certain specified conditions not pertinent to this analysis are complied with].

The term “public officer” as defined in [NRS 281.005](#) includes “* * * a person * * * appointed to a position which [i]s established by * * * a statute of this state * * * and [i]nvolves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.”¹ If a position’s incumbent meets the elements in the definition, the incumbent is a public officer. Attorney General’s Opinion No. 193 (Nev. 1975). The position of State Public Defender is established by statute. [NRS 180.010](#). The duties of the State Public Defender are prescribed by statute and include sole responsibility for the operation of the office of State Public Defender. [NRS 180.060](#) and [NRS 180.080](#). Indeed, “[n]o other officer or agency of the state may supervise the state public defender or assign him duties in addition to those prescribed [in chapter 180 of NRS].” [NRS 180.010](#), subsection 4. Thus the position involves the administration of part of the government. The delegation of these duties “constitutes a delegation of sovereignty to the office of the Public Defender.” *People of Cook County v. Majewski*, 328 N.E.2d 195, 197 (Ill.App. 1975), cert. denied. Delegation of sovereignty is equivalent to exercising a public power, trust or duty. Therefore, the State Public Defender would certainly appear to be an officer as defined by statute.

However, recent decisions from the Supreme Courts of Connecticut, *Spring v. Constatino*, 362 A.2d 871 (1975), Pennsylvania, *Reese v. Danforth*, 406 A.2d 735 (1979) and Arkansas, *Mears v. Hall*, 569 S.W.2d 91 (1978), have cast doubt upon this conclusion at least, as will appear below, when the State Public Defender is acting under court appointment in behalf of a client accused of a crime. The doubt raised by these decisions has understandably caused the State Public Defender concern. “Until very recently, public defenders have had little to fear from dissatisfied clients alleging professional malpractice.” Nlada² Briefcase, “Defender’s Liability for Malpractice: A Case of Future Shock?” Volume XXXIV, Number 4, August 1977, page 103.

Those clients who filed suit filed under 42 U.S.C. § 1983.³ “Federal courts have consistently held, however, that public defenders are not liable in a § 1983 action. * * *

However, several court decisions [such as those mentioned above], coupled with the current mania for malpractice [sic] suits, may result in the state forum becoming the new battleground in which the defender malpractice issue will be litigated.” *Id.* If the State Public Defender is not an officer, when acting in behalf of a client, he will not be entitled to a defense under [NRS 41.0339](#) in those suits which are most likely to be filed against him concerning his prescribed duties.

We now turn to a discussion of *Spring*, *Reese*, and *Mears*, *supra*, and their applicability to the officer status of the Nevada State Public Defender when he is acting in behalf of a client.⁴ In *Spring*, *supra*, the Connecticut Supreme Court had before it the question of “whether an attorney occupying the position of public defender and assigned to represent an indigent defendant enjoys immunity⁵ from liability for professional malpractice * * *.” *Spring*, *supra*, at 873. In order to be

1 This definition has been judicially accepted in Nevada. See, for example, *Eads v. City of Boulder City*, 94 Nev. 735, 587 P.2d 39 (1978).

2 National Legal Aid and Defender Association.

3 “Every person who, under color of [state law] subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

4 Even assuming these cases are deemed controlling in Nevada they do not affect the “officer” status of the Public Defender when he is performing purely administrative duties such as preparing a budget. *Spring*, *supra*, at 875, *Townsend v. County of Los Angeles*, 122 Cal.Rptr. 500 (Cal.App. 1975), *Hayes v. State*, 599 P.2d 569 (Wyo. 1979) and *State v. Rascon*, 550 P.2d 266 (N.M. 1976).

5 Although the issue of immunity of public defenders is not before us, it would seem appropriate to discuss the U.S. Supreme Court’s latest decision in a case which casts some light on the extension of such immunity. In *Ferri v. Ackerman*, U.S., 100 S.Ct. 402 (1979) the court was called upon to decide whether a private attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal

entitled to immunity, the public defender had to be deemed a state officer or official when representing a client:

A public defender in representing an indigent is not a public official as that term has been defined by this court. The essential characteristics of a “public office” are [, inter alia,] the power to exercise some portion of the sovereign functions of government. * * * Even though the state must ensure that indigents are represented by competent counsel, it can hardly be argued⁶ that the actual conduct of the defense of an individual is a sovereign or governmental act. The principle that the state cannot function both as prosecutor and defender is so deeply rooted in our system of justice as to require no citation. The public defender when he represents his client is not performing a sovereign function and is therefore not a public or state official to whom the doctrine of sovereign [sovereign] immunity applies. *Id.* at 875.

As is apparent from the above statement, the Connecticut Supreme Court was concerned about a defendant’s constitutional right to a fair trial. If the public defender when representing a client, exercises a sovereign function, the court apparently reasoned he would have to be acting in behalf of the state. If this is the case, then the court felt it would lead to a violation of the stated principle. With all due respect to the Connecticut court, we do not feel that a defendant is denied a fair trial if he is represented by a “state officer.” An issue similar to the concern expressed by the Connecticut court, was raised in *People v. Mullins*, 532 P.2d 736 (Colo. 1975). There a convicted criminal argued that he was denied a fair trial because the public defender who represented him at trial was appointed by the Colorado Supreme Court. The court ruled that the statutory scheme in Colorado for appointing a public defender “does not create such a nexus as would violate * * * the right of a defendant to a fair trial.” *Id.* at 739. This holding was reached, in large part, because under Colorado law the public defender is afforded a great deal of independence from other state agencies when he acts in behalf of a client. The same may be said of the Nevada State Public Defender. [NRS 180.010](#), subsection 4, *supra*. Thus, even if the Nevada Public Defender is deemed a state officer when acting in behalf of a client, the principle stated by the Connecticut court would not be violated. Given this, we feel that the conclusion reached by the Connecticut court is a result of erroneous analysis and therefore not persuasive.

In Spring, the court also held that the Public Defender was not an officer or employee as that term was defined in a statutory scheme similar to [NRS 41.0305](#) to [41.039](#), as amended by Chapter 678, Statutes of Nevada 1979. See Connecticut General Statutes, Chapter 53, §§ 4-141 to 4-165. Connecticut General Statutes, Chapter 53 § 4-141 included within the definition of state officer or employee, when Spring was decided on April 18, 1975, “* * * every person elected or appointed to or employed in any office, position or post in the state government * * *” Connecticut General Statutes, Chapter 53 § 4-165 provided, at that time, “[n]o state officer or employee shall be personally liable for damage or injury, not wanton or wilful, caused in the

law, entitled to absolute immunity in a state malpractice suit brought against him by his former client. The court answered this question in the negative. The court left open the question of whether a state may conclude, as a matter of state law, that such privately appointed attorneys are absolutely immune. The court reasoned that because malpractice is a state created cause of action, a state is free to define the defenses, including immunity, to malpractice, unless the state defined defense conflicts with federal law.

⁶ In *People of Cook County*, *supra*, at 197 the court stated:

“Clearly, the representation of indigent defendants is a requirement of due process of law which constitutes a delegation of sovereignty to the office of the Public Defender.”

In both cases the respective courts addressed the question of whether representation constitutes an act of the sovereign or, in other words, the state. Opposite conclusions were reached. Thus it would appear that it can be “argued.”

performance of his duties and within the scope of his employment.” Another section of the statutory scheme provided that where an officer or employee was personally immune, the state was liable for his acts. Connecticut General Statutes, Chapter 53, § 4-160; see Spring, supra, at 876.

Even though the Connecticut Public Defender Certainly appears to fit within the definition⁷ of state officer or employee, the Connecticut court held that the public defender was not a state officer when representing an indigent accused. In so doing, the court judicially created an exception to the broad language in § 4-161. The exception was apparently based on what the court felt the correct public policy of Connecticut should be. The court felt that Connecticut should not be liable for the acts of a public defender, when representing a client, because the State of Connecticut had no right to control the manner of representation.

Generally, where no exceptions are provided for in a statute, it will be presumed that the legislature did not intend to make an exception. See for example, *Bowen v. Chemi-cote Perlite Corp.*, 423 P.2d 104 (Ariz.App. 1967), *Stockton Theater, Inc. v. Palermo*, 304 P.2d 7 (Cal. 1956) and Sutherland, *Statutory Construction*, 4th ed. Vol. 2A, § 47.11. Thus, inasmuch as a legislature is the primary definer of what the public policy of a state should be, once it has spoken through an enactment, a court should not alter the public policy statement encompassed in the enactment by creating an exception thereto. That the Connecticut Legislature did not intend for § 4-161 to exclude a public defender when he is representing a client became glaringly obvious in early 1976. By Connecticut Public Acts, No. 76-731, February 1976, at sections 1 and 2, the Connecticut Legislature amended §§ 4-161 and 4-165, supra, by adding respectively thereto the following language:

In addition to the foregoing, “state officers and employees” includes attorneys appointed * * * as public defenders or assistant public defenders * * *.

For the purpose of this section “scope of employment” shall include, but not be limited to, representation by an attorney * * * as a public defender or assistant public defender or an indigent accused * * *

If this office were to create an exception of [NRS 41.0339](#), supra, in line with that created in Spring, supra, we would be doing precisely the same thing in Nevada that was disapproved by the Connecticut Legislature.

In Reese, supra, a public defender when faced with a malpractice action brought by a former client pleaded immunity as a defense. Immunity there turned on the common law of Pennsylvania concerning “official immunity.” Id. at 737. The Reese court held that the public defender was not entitled to immunity. The Pennsylvania decision was based on the common law of the Commonwealth and the public policy underlying it. In Nevada the public policy on the issue here, as discussed above, has been stated by the Nevada Legislature. Given this, the Reese decision is not persuasive. The Mears decision, supra, turned on unique provisions of Arkansas law and is thus likewise not persuasive.

CONCLUSION

⁷ The Connecticut Supreme Court appears to have conceded this when it stated a “private attorney appointed to serve as special public defender * * * clearly functions as an independent contractor, but, under the broad definition of § 4-141 he would be an employee of the State * * *.” Id., at page 877. fn. 5. If the court felt a private attorney fit within the definition of an employee of the state then it follows that the public defender would also be deemed an employee or officer.

Thus, in the opinion of this office, the State Public defender is an “officer,” even when representing an indigent accused pursuant to court appointment, as that term is used in [NRS 41.0339](#).

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: ROBERT H. ULRICH
Deputy Attorney General

OPINION NO. 80-14 Classified State Service, Mandatory Retirement, Year-to-Year Employment After Age 65—Rule IV(C)(1), insofar as it requires mandatory retirement of state classified employees at age 65, albeit with the possibility of reemployment, is plainly inconsistent with [NRS 284.3781](#) and therefore invalid. [NRS 284.3781](#) and Rule IV(C)(1) are invalid insofar as they allow an across-the-board difference in treatment of classified employees 65 but less than 70 years of age under the Federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634, inclusive. With the invalid portion stricken from [NRS 284.3781](#), the remainder does not stand independently and therefore the statute is invalid in its entirety.

Carson City, April 28, 1980

Mr. James Wittenberg, Administrator, Nevada State Personnel Division, Capitol Complex,
Carson City, Nevada 89710

Dear Mr. Wittenberg:

QUESTION

Does Rule IV(C)(1), Rules for State Personnel Administration which mandates the retirement of state classified employees at age 65, comply with Nevada and federal statutory law?

ANALYSIS

Rule IV(C)(1) currently provides:

Any employee in the classified service who attains the age of 65 shall be retired from service * * *. The appointing authority may rehire employees so retired on a year-to-year basis.

This opinion will first discuss the validity of this Rule under Nevada law. The Rule’s consistency with the Federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634, inclusive, will be discussed later.

1. *Validity of the Rule Under Nevada Statutory Law.*

The principle to be applied in evaluating administrative rules or regulations in Nevada has been characterized by the Nevada Supreme Court as follows:

* * * only in a clear case will the court interfere and say that * * * a rule or regulation is invalid because it is unreasonable or because it is in excess of the authority of the agency promulgating it. Moreover, an administrative rule or regulation must be clearly illegal, or plainly and palpably inconsistent with law, or clearly in conflict with a statute relative to the same subject matter * * * in order for the court to declare it void on such ground. *Oliver v. Spitz*, [76 Nev. 5](#), 9, 348 P.2d 158, 160 (1960).

Rule IV(C)(1) addresses the subject matter of employees in the classified service who are 65 years of age or older. Pursuant to the Rule these employees “shall be retired from service” *Id.* Subsequent to retirement an appointing authority may rehire the employee on a year-to-year basis. [NRS 284.3781](#) addresses the same subject matter as Rule IV(C)(1). [NRS 284.3781](#) provides:

Beginning on July 1, 1973, any employee in the classified service of the state personnel system who is 65 years of age or older may be hired or continued in the classified service on a year-to-year basis.

By its plain language this statute does not call for mandatory retirement at age 65, nor can it be so construed. [NRS 284.3781](#) was added to Nevada law by Section 1, Chapter 577, Statutes of Nevada 1973. Section 10 of Chapter 577 repealed [NRS 284.378](#). Prior to its repeal this section, in pertinent part, provided:

* * * any employee in the classified service who has attained the age of 65 years shall be retired from service * * *. The appointing authority may rehire employees so retired on a year-to-year basis [until the employee reaches the age of 70].

As can be seen from the repeal of [NRS 284.378](#) the Nevada Legislature in 1973 intended to abolish mandatory classified employee retirement. Accordingly, Rule IV(C)(1) insofar as it requires mandatory retirement at age 65, albeit with the possibility of reemployment, is plainly inconsistent with current Nevada law and therefore invalid.

Chapter 577, Statutes of Nevada 1973, was in part entitled, “An Act * * * providing for year-to-year employment of classified employees 65 years of age or older * * *.” The title of an act may be considered in construing a statute. *Torreyson v. Board of Examiners*, [7 Nev. 19](#) (1871). Thus, a proper construction of [NRS 284.3781](#) allows for year-to-year employment, as opposed to employment with an indefinite term, of classified employees who attain the age of 65. Rule IV(C)(1) is inconsistent with [NRS 284.3781](#) because continued employment after age 65 is attained is different from being “rehired” each year. As presently worded, the Rule requires retirement at age 65. If the part of the Rule concerning mandatory retirement is stricken, employment of an employee could continue beyond age 65, as provided in [NRS 284.3781](#) and thus there would be no need to rehire such an employee. Accordingly, the Rule in its present form is inconsistent with [NRS 284.3781](#) and therefore invalid.

2. *Validity of Rule Under Federal Statutory Law.*

In order to properly respond to the above question, this office has concluded that an analysis of Rule IV(C)(1) must also include an analysis of [NRS 284.3781](#). Both the Rule and the statute address the treatment of classified employees who have attained the age of 65. Thus an analysis of the Rule on this point is also an analysis of the statute.

As noted above, [NRS 284.3781](#) provides for continued employment of employees in the classified service who are 65 years of age or older on a year-to-year basis. (Rule IV(C)(1) allows such employees to be rehired on a year-to-year basis, as discussed above.) Younger employees in the classified service are employed for indefinite terms. Thus difference in treatment is accorded

classified employees solely on the basis of age. Does this difference in treatment comport, wholly or in part with federal law?

Following is a brief outline of the 1967 Federal Age Discrimination in Employment Act, hereinafter referred to as ADEA, as amended by P.L. 95–256 (April 6, 1978). 29 U.S.C. § 621(a)(4), in pertinent part provides:

The Congress hereby finds and declares * * * the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Section 623(a) provides:

It shall be unlawful for any employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *.

29 U.S.C. § 630 includes within the definition of “employer” a state or a political subdivision of a state.

Section 631(a) provides as amended by P.L. 95-256:

The prohibition in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

The ADEA excludes employees retired pursuant to a bona fide retirement plan and allows differences in treatment on the basis of age where age is a bona fide occupational qualification.

As can be readily seen, [NRS 284.3781](#), insofar as it affords different treatment across-the-board of classified employees over 65 years of age but less than 70 years of age, is not consistent with ADEA.¹ When Congress added 29 U.S.C. § 621(a)(4) it specifically declared it was enacting ADEA pursuant to its powers under the Commerce Clause of the United States Constitution. At

29 U.S.C. § 630, Congress stated its intent to have the provisions of the act mandatory on the several states. While it is arguable, on the basis of the United States Supreme Court case of *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress does not have the power to make this act applicable to the states under its Commerce Clause powers because of the tenth amendment² to the United States Constitution the courts have ruled that they need not look solely to Congress' powers under the Commerce Clause to validate such an act. They are also entitled to look to Section 5 of the Fourteenth Amendment in deciding whether the act is valid insofar as it applies to the states. This provision confers upon Congress the power “to enforce, by appropriate legislation, the provisions of” the Equal Protection Clause³ contained in Section 1 of the Fourteenth Amendment. On primarily this basis, the

courts that have addressed this question have unanimously upheld ADEA's applicability to the several states. See *Marshall v. Delaware River and Bay Authority*, 471 F.Supp. 886 (D.Del.

1 When NRS 284.3781 was enacted in 1973 it was consistent with ADEA. The 1978 amendment to § 631(a), changed the applicability of ADEA from 65 years of age to 70.

2 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

3 “No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.”

1979); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *Remmick v. Barnes County*, 435 F.Supp. 914 (D.N.D. 1977); *Usery v. Board of Education of Salt Lake City*, 421 F.Supp. 718 (D.Utah 1976); *Aaron v. Davis*, 424 F.Supp. 1238 (E.D.Ark. 1976).

Although it does not appear that Congress has preempted a state's right to enact age discrimination laws, see *Simpson v. Alaska State Com'n For Human Rights*, 423 F.Supp. 552 (D.Alaska 1976), in a situation where a state law is in conflict with a validly enacted federal law that provides greater protection to the employee than the state law, the provisions of the state statute must yield to the federal statutory provisions providing greater individual protection. See Constitution of the United States, Article VI, Clause 2; "The Constitution and the Laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme Law of the Land * * * any thing in the * * * Laws of any State to the contrary notwithstanding." Thus both Rule IV(C)(1) and [NRS 284.3781](#), to the extent they are inconsistent with the provisions of ADEA by subjecting employees in the classified service between the ages of 65 and 70 to a continuation of employment on a year-to-year basis solely by reason of an employee's age, are not valid pursuant to Federal law. A similar conclusion was recently state by the Attorney General of Oregon. Attorney General's Opinion No. 7749 (Ore. 1979).

When an invalid portion of a statute is stricken, courts will typically uphold and enforce the remainder of the statute, "if the remainder may stand independently, and it appears that the legislature would still have enacted the remainder. *Dunphy v. Sheehan*, [92 Nev. 259](#), 549 P.2d 332 (1976)." Attorney General's Opinion No. 79-13 (Nev. 1979) at page 12. This is not the case with [NRS 284.3781](#). With the invalid age portion stricken, the remainder has no operative force. Moreover, a court, and therefore this office, has no authority to amend the language of a statute to allow it to conform to federal law. Ex parte Blaney, 184 P.2d 892 (Cal. 1947) and *Santa Barbara School Dist. v. Superior Ct.*, 530 P.2d 605 (Cal. 1975). Given this, [NRS 284.3781](#) must be deemed invalid in its entirety. *Clover Valley Lumber Comp. v. The Sixth Judicial Dist. Court*, [58 Nev. 456](#), 83 P.2d 1031 (1938). Nothing in the opinion, however, should be construed as preventing the State of Nevada from enacting legislation which treats classified employees who are 70 years of age or older differently from younger employees.

CONCLUSION

Rule IV(C)(1), insofar as it requires the mandatory retirement of state classified employees at age 65, albeit with the possibility of reemployment, is plainly inconsistent with [NRS 284.3781](#) and therefore invalid. NR S284.3781 and Rule IV(C)(1) are invalid insofar as they allow an across-the-board difference in treatment of classified employees 65 but less than 70 years of age under the Federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634, inclusive. With the invalid age portion stricken from [NRS 284.3781](#), the remainder does not stand independently and therefore the statute is invalid in its entirety.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-15 Alternative Sentencing Programs—Workmen’s Compensation—

Persons given the option by a judge to serve a public agency or nonprofit organization without compensation rather than paying a fine or spending time in jail for criminal violations are not entitled to mandatory workmen’s compensation coverage pursuant to [NRS 616.055](#). However, such persons may be covered under the act, pursuant to [NRS 616.067](#), which establishes coverage provisions for volunteer workers after the Industrial Commission has deemed such volunteers to be “employees” and the implementing agency has secured coverage and complied with the act. Counties would be the employing organization, capable of approving coverage under the Nevada Industrial Insurance Act, in any circumstance under which they control the details of work and maintain supervision of the volunteer. The county or city may be held liable under the Doctrine of Respondeat Superior for injuries inflicted by volunteers on third persons, if it is determined that the political subdivision maintains supervision and control over the volunteer.

Las Vegas, May 5, 1980

The Honorable Robert J. Miller, District Attorney of Clark County, Clark County Courthouse,
Las Vegas, Nevada 89101

Attention: Mr. Stanley W. Parry, Deputy District Attorney

Dear Mr. Miller:

Your office has requested an opinion regarding the following:

QUESTION ONE

Where the Eighth Judicial District Court gives a criminal defendant the option to perform a fixed number of hours of volunteer service for a public agency or private nonprofit charitable organization in lieu of a jail sentence or a fine, as a condition of probation, what liability is incurred by Clark County under the Nevada Industrial Insurance Act?

ANALYSIS

The question you pose necessarily involves the resolution of whether non-incarcerated convicted persons who perform services in lieu of fines or confinement are entitled to coverage under the Nevada Industrial Insurance Act, and if so, whether the county is required to secure coverage as an “employer.” The Nevada Industrial Insurance Act embodies a plan to compensate employees and workers for injuries sustained in and arising out of the course of their employment. [NRS 616.270](#), subsection 1. The purpose of industrial insurance is to put an end to private controversy and litigation between employers and employees, giving workmen the right of compensation regardless of negligence, *Pershing Quicksilver Co. v. Thiers*, [62 Nev. 382](#), 152 P.2d 432 (1944), cited in *Nevada Industrial Commission v. Peck and Woomack*, [69 Nev. 1, at 5](#), 239 P.2d 244 (1952), and to provide security to laborers and their dependents by distributing the economic losses which result from employment-related injuries and death upon the industry and the consuming public. Accordingly, the act has been liberally construed so that its humane and beneficial purposes are accomplished. Attorney General’s Opinion No. 295 (July 31, 1957).

The Nevada Industrial Insurance Act is embodied in Chapter 616 of the Nevada Revised Statutes. The chapter provides that every employer within its provisions and those employers who accept its terms shall provide and secure compensation for personal injuries sustained by an

employee arising out of and in the course of employment. [NRS 616.270](#), subsection 1. Generally, employers who secure coverage are relieved from other liability for recovery of damages or other compensation for such personal injury. [NRS 616.270](#), subsection 3.

Initially, a determination must be made as to whether persons given the option to work in service capacities in lieu of a fine or confinement are deemed “employees,” under the Nevada Workmen’s Compensation scheme.

The term “employee” is defined at the outset in [NRS 616.055](#) as follows:

“Employee” and “workman” are used interchangeably in this chapter and mean every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and include, but not exclusively: 1) * * *.

The operative language necessary to determine whether an employment relationship exists, based on the facts before us, is the provision establishing coverage for those under a “contract for hire.”

A number of states have considered this very question with respect to prisoners. The general rule adopted by these jurisdictions is that a prisoner does not come within the scope of workmen’s compensation acts, absent special legislation. *Watson v. Industrial Commission*, 100 Ariz. 327, 414 P.2d 144 (1966); *Jones v. Houston Fire and Casualty Insurance Co.*, 134 So.2d 377 (La.App. 1961); *Brown v. Jamesburg State Home for Boys*, 60 N.J.Super. 123, 158A.2d 445 (1960); *Scott v. City of Hobbs*, 69 N.M. 330, 366 P.2d 854 (1961); *In re Kroth*, 408 P.2d 335 (Okla. 1965). But see *California Highway Commission v. Industrial Accident Commission*, 200 Cal. 44, 251 P. 808, 49 A.L.R. 1377 (1926).

The rationale is persuasive. “* * * Inmates are not free to choose whether or not they labor. The reward received by the inmates is not sufficient to create a contract of hire * * *” (See Attorney General’s Opinion No. 172, September 30, 1974). In *Watson v. Industrial Commission*, 100 Ariz. 372, 714 P.2d 144 (1966), the Arizona Supreme Court, in construing the term “contract for hire,” held that the words “imply a voluntary relation between the parties * * * a contract for employment contemplates at least two parties * * * a contract for employment contemplates at least two parties capable of giving consent. Prisoners do not consent to do work, but perform the task as a convict by operation of law and not by consent or contract * * * There was no agreement voluntarily entered, no consideration, no mutuality of agreement, or intent to contract between competent parties.” *Supra* at 148.

However, as you correctly note, other jurisdictions have allowed compensation for convicted persons working outside of prison for another state agency or private employers. In *Pruitt v. Workmen’s Compensation Appeals Board*, 68 Cal.Rptr. 12 (Cal.App. 1968), the court ruled that a county jail inmate who voluntarily works for a third party, whether a private party or municipality, and is under the control of the private party or municipality, enters into a master-servant relationship, and the inmate becomes an employee, notwithstanding the fact that the benefits received by the inmate may not be of any monetary or of very little value.

The *Pruitt* court reasoned that: (1) the inmate was not a felon who had lost his rights as a citizen; (2) a distinction must be made between compulsory work performed as an incident to penal servitude and voluntary work performed; and, (3) a court must look to the substance and essence of the relationship between a petitioner and party sought to be charged as employer. *Van Horn v. Industrial Accident Commission*, 219 Cal.App.2d 457, 33 Cal.Rptr. 169, hearing denied (1963). Thus, the court held that a county jail inmate who, at the time of the claimed injury, had been “loaned out” to the city to work on the sewage plant was a city employee for workmen’s compensation purposes, where the prisoner did such work voluntarily in return for credit on sentence time served, interlude release from jail confinement, and a carton of cigarettes per week. The court, in finding the existence of a master-servant relationship, stressed the mandate of

liberal interpretation in favor of the worker. “Any reasonable doubt as to whether an act contemplated by the employment, in view of the state’s liberal policy of construction in favor of the employee, should be resolved in favor of the employee.” *Supra* at 16. Also *see California Highway Commission v. Industrial Accident Commission*, 200 Cal. 44, 251 p. 808 (1926); *Johnson v. Industrial Commission*, 88 Ariz. 354, 356 P.2d 1021 (1960).

Further, in *Hamilton v. Daniel International Corp.*, 257 S.E.2d 157 (1979), the Supreme Court of South Carolina held that where a work release prisoner entered into a voluntary contract of employment with the employer and enjoyed the same salary and working conditions as other employees, because of the employer-employee relationship between the parties, the employer was required to provide workmen’s compensation benefits to an employee injured on the job site, notwithstanding employee’s prisoner status. The court ruled that “* * *, The rationale for the rule generally denying compensation is not present here, where Hamilton entered into a private contract of hire with Daniel and was practically indistinguishable from any other Daniel employee. For purposes of his [relationship] relationship with Daniel, Hamilton transcended his prisoner status and became a private employee entitled to workmen’s compensation benefits.” *Supra* at 158.

It is apparent that the mere fact that a person is under some degree of compulsion to work has not, in a minority of states, absolutely prohibited the provision of workmen’s compensation benefits. This issue has not been presented to the Nevada Supreme Court for resolution. Persuasive arguments exist in light of *Watson*, *Jones*, *Brown*, *Scott* and *Kroth* to deny coverage for prisoners, while a modern trend, supported by the 1979 South Carolina decision in *Hamilton*, appears to provide sufficient support for a finding of coverage.

It is the firm conviction of this office that workmen’s compensation statutes must be liberally construed and that doubts must be resolved in favor of coverage. However, it is a fundamental concept that our task is to attempt to ascertain legislative intent. The Nevada Legislature has specifically established a category for juveniles who have been ordered by the district court to perform work.

Specifically, [NRS 616.082](#) provides as follows:

Any person less than 18 years of age who is subject to the jurisdiction of the juvenile division of the district court and who has been ordered by the court to do work, and while engaged in such work and while so acting in pursuance of the court’s order, shall be deemed, for the purpose of this chapter, an employee of the county at a wage of \$50 per month, and shall be entitled to the benefits of this chapter, upon compliance by the county. (Added to NRS by 1971, 249; A 1973, 1580.)

The Legislature did not establish the same provision for adults. The maxim “*expressio unius est exclusio alterius*”—the expression of one thing is the exclusion of another—would appear to apply to assist in determining the intention of the lawmakers. When certain persons or things are specified in law, contract, or will, an intention to exclude all others from its operation may be inferred, *Little v. Town of Conway*, 171 S.C. 27, 170 S.E. 447, 448. However, the rule of construction cannot be used to defeat or override expressed legislative intent or to create a doubt. *Illinois Cent. R. Co. v. Franklin Co.*, 56 N.E.2d 775, 781, 387 Ill. 30.

There is a satisfactory resolution to the dilemma. As noted, the Legislature has not established a similar statute for adults ordered by or given the choice to work by district judges. As such, the aforementioned maxim of statutory construction is determinative in finding that there has been no legislative intent requiring *mandatory* coverage for adult prisoners as employees, pursuant to [NRS 616.055](#). Consequently, persons exercising the volunteer option of the alternative

sentencing program *who receive no compensation for their services* are not *entitled* to mandatory coverage until the Legislature specifically makes a provision to the contrary.

Although coverage is not *mandatory*, persons volunteering under the alternative sentencing program *may* be covered pursuant to [NRS 616.067](#). There is nothing in the act to preclude adults, who volunteer to provide community service as a condition of probation, from being “deemed” by the commission as “employees,” pursuant to [NRS 616.067](#).

The statute provides as follows:

Employee: Volunteer workers in public service programs. Persons who perform volunteer work in any formal program which is being conducted:

1. Within a state or local public organization;
2. By a federally assisted organization; or
3. By a private, incorporated, nonprofit organization which provides services to the general community, and who are not specifically covered by any other provisions of this chapter, while engaged in such volunteer work, may be deemed by the commission, for purposes of this chapter, as employees of such organizations at a wage of \$100 per month and shall be entitled to the benefits of this chapter when such organizations approve such coverage and comply with the provisions of this chapter and implementing regulations thereunder. (Added to NRS by 1975, 290).

The statute provides for persons “who perform volunteer work * * * and who are not specifically covered by any other provisions of this chapter” to be covered as “employees” after a determination made by the Industrial Commission. Persons volunteering are thus not deemed “employees” pursuant to the mandatory coverage of provisions of [NRS 616.055](#), but could fall into the provisions of [NRS 616.067](#). Certainly, a person who volunteers to work in the alternative sentencing program may be deemed a volunteer in light of the concept of liberal interpretation of these statutes. There is no compulsion to accept the alternative to incarceration or payment of fines. In fact, such a person must specifically volunteer to become a participant in the program, thereby benefiting the community and employer in many ways.

The process of discretionary coverage under [NRS 616.067](#) is a two-step process by design. Initially, the commission must make a determination that such volunteers are to be “deemed” employees, and secondly, the employing organization must approve coverage and comply with the provisions of the chapter. Consequently, these volunteers may, in fact, be covered under the provisions of the chapter and need not be subjected to the unmitigated risk of uncompensated injury for entering the alternative sentencing program. After the commission deems such individuals to be employees, and the organizations specified in the statute approve and secure coverage, alternative sentencing volunteers are entitled to coverage.

Once it is determined that adults exercising the option to perform volunteer services may be “employees,” pursuant to [NRS 616.067](#), the question arises as to whether the county is liable for workmen’s compensation premiums.

The county is not required to make premium payments since the program, itself, is not mandatory. However, the county may approve the program, pursuant to [NRS 616.067](#), subsection 3, and would then be required to secure coverage as an employing organization. Our office need only indicate that the failure of an employing organization to secure the benefits and protections of workmen’s compensation would place that organization—in this case, the county—in the unenviable position of defending lawsuits based upon negligence, the results of which may be substantial financial loss. While the cost of claims are ever increasing, it truly would be shortsighted for counties not to seek protection by exercising the right to secure coverage.

There is some question, however, as to whether the county or the agency receiving the volunteer would be primarily liable for payments, once a decision has been made to approve coverage.

Elements which show the existence of employer-employee relationship under Nevada Industrial Insurance law are: (1) Exercise of control over details of work; (2) payment of compensation; (3) power of appointment; (4) power of dismissal; and, (5) for whose benefit such work was done. *Buhler v. Maddison*, 109 Utah 267, 176 P.2d 117 (1947). It is quite apparent that liability will be predicated on the strength of the elements cited above. The facts and circumstances of each placement will determine whether the county has sufficient control to be primarily liable for payment as employer. For example, in *Pruitt*, at page 13, it was determined that a county jail inmate was an “employee” of the city because at the time of the injury, he was solely under the city’s control. While general indications exist to conclude that in a majority of cases the agency of placement will be considered the employer and will be the agency which would be in a position to approve coverage, it is the recommendation of this office that the county and placement agencies agree by contract as to which party is obligated to secure workmen’s compensation, if not both.

CONCLUSION—QUESTION ONE

Persons given the option by a district court judge to work without compensation for a public agency or nonprofit organization rather than serving time or paying a fine for criminal violations may be deemed “employees,” pursuant to [NRS 616.067](#), which establishes provisions for coverage for volunteer workers in public service programs under the Nevada Industrial Insurance Act. Such persons are not deemed “employees,” pursuant to [NRS 616.055](#), requiring mandatory coverage. The county would be the employing organization under the Nevada Industrial Insurance Act in any circumstance under which it controls the details of work and maintains supervision of the volunteer.

QUESTION TWO

What liability, if any, is incurred by the city or county if covered volunteers inflict injury on third parties?

ANALYSIS

Liability of political subdivisions is predicated upon the waiver of immunity provisions of [NRS 41.031](#) and [NRS 41.032](#).

The State of Nevada has partially waived its immunity from liability and has consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided. The State, further, has partially waived the immunity from liability and action for all of its political subdivision, which include counties and cities. [NRS 41.031](#), subsection 1.

A political subdivision is generally liable for tortious conduct of its employees, subject to certain immunities. The question turns on whether volunteers exercising the option to engage in voluntary public service programs in lieu of paying fines or serving jail time are “employees” of the political subdivision sought to be held liable. The term “employee” is defined in [NRS 41.0307](#), but is not determinative of this issue. The expansive definition of “employee” provided under the Nevada Industrial Insurance provisions is inapplicable.

The ultimate resolution turns on the Doctrine of Respondeat Superior—let the master answer. The maxim means that the master is liable in certain cases for wrongful acts of his servant. *Southern Paramount Pictures Co. v. Gauling*, 24 Ga.App. 478, 101 S.E. 311. Under this

doctrine, the master is responsible for the want of care on the servant's part toward those to whom the master owes a duty to use care. *Shell Petroleum Corp. v. Magnolia Pipe Line Co.*, Tex.Cir.App., 85 S.W.2d 829. The doctrine applies only when the relation of master and servant existed between the defendant and wrongdoer at the time of the injury sued for. *James v. J.S. William & Son*, 177 La. 0133, 150 So.9, 11. It is elementary that “* * * the relationship of master and servant rests upon a contract of service between parties, the essential elements of which are that the master shall have control of the employee and the right to direct the manner in which the service shall be performed.” *Taylor v. Arkansas Light and Power*, 173 Ark. 888, 293 S.W. 1007, at 1008.

We concur with your opinion that, under the circumstances of the program, the master would be liable for the negligent acts of a volunteer who inflicts injuries on third parties. A master not only has control and supervision of the individual, but also has the choice of allowing the volunteer to serve or not. It is apparent that either the county or other political subdivision may be deemed to be the “master” upon which liability would be predicated, depending on the facts and circumstances of each case. Since it is virtually impossible to assess accountability for all potential claims, it is the recommendation of this office that all parties concerned proceed to procure liability coverage. The failure to so provide coverage places that political subdivision or placement agency in the position of maximum financial exposure. As such, every effort should be made between the organizations to establish satisfactory financial safeguards.

CONCLUSION—QUESTION TWO

The county or city may be held liable under the Doctrine of Respondeat Superior for injuries inflicted by volunteers on third persons. if it is determined that the political subdivision maintains sufficient supervision and control over the volunteer. As such, it is the recommendation of this office that agreements be reached between political subdivisions and the placement organizations which provide liability coverage.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Jeffrey L. Eskin
Deputy Attorney General

OPINION NO. 80-16 Initiative; Constitutional Amendment; Retrospective Interpretation—In the absence of express intent authorizing retroactive application of a constitutional amendment, prospective interpretation only must be given. County assessors need to prepare multiple assessment rolls in anticipation of the passage of a constitutional amendment affecting property assessments irrespective that the effective date of the amendment occurs during the preparation of the assessment rolls. The preparation of a single assessment roll is governed by existent law.

Carson City, May 14, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, 1100 E. William Street,
Carson City, Nevada 89710

Dear Mr. Nickson:

You have solicited an opinion from this office pertaining to the effect, if any, passage of the initiative petition for a constitutional amendment relating to property taxes would have on the preparation of tax assessment rolls already in preparation during the fiscal year in which passage of the initiative occurs.

ANALYSIS

The initiative, commonly known as Question 6, has already received voter approval at the 1978 General Election, but it must receive a second vote of approval at the 1980 General Election to become a valid amendment to the Nevada Constitution upon completion of the canvass of votes by the Nevada Supreme Court. Art. 19, § 2(4), Nev. Const.; [NRS 295.035](#). In due course, the canvass of votes should be completed on November 26, 1980, the fourth Wednesday in November. [NRS 293.395](#), subsection 2. At that time the initiative would be effective and become an operative part of our Constitution.

Your query addresses the impact this effective date of the constitutional amendment would have on the assessment roll preparation already begun prior to that date. The legal issue presented by your inquiry pertains to the retroactive application of constitutional amendments. It is the uniform law among the several states, and the consistent pronouncement from our Nevada Supreme Court, that absent express dictate to the contrary, retrospective interpretation of constitutional amendments is disfavored.

In *Torvinen v. Rollins*, [93 Nev. 92](#), 94, 560 P.2d 915 (1977), the Nevada Supreme Court held:

As a general rule, a constitutional amendment is to be given only prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms * * *. Here, the amendment is void of any terms indicating the legislature or electorate intended retrospective application.

Cf. Rice v. Wadkins, [92 Nev. 631](#), 632, 555 P.2d 1232 (1976); *Clark County School District v. Beebe*, [91 Nev. 165](#), 170, 533 P.2d 161 (1975). See also *Gellantly v. Chelan County*, 534 P.2d 1027 (Wash. 1975); *Kayden Industries, Inc. v. Murphy*, 150 N.W.2d 447, 453 (Wis. 1967). Because Question 6 conspicuously absents from its several provisions any reference to retroactive application, it is the opinion of this office that the constitutional amendment must be given prospective interpretation only.

This analysis seems sound for several reasons. In Nevada, the county assessors are under an express statutory duty. They must begin preparation of the assessment roll on July 1, conclude the preparation by December 15, and publish the tax roll by January 1. [NRS 361.260](#) and [361.300](#). If Question 6 were to be implemented on the date it became effective, November 26, 1980, the assessors would have to reappraise the property to conform to the new standards within the three weeks preceding the December 15 deadline date, and would consequently have to wastefully discard the prior five months of appraisal effort.

Alternatively, the assessors could develop multiple assessment rolls in anticipation of the passage of Question 6, but such speculative expenditure of public funds is equally wasteful should Question 6 fail passage. Moreover, this speculative expenditure of funds not budgeted for that express purpose may result in an illegal overexpenditure of appropriations budgeted for a particular governmental function, and thereby possibly expose certain county officials to criminal sanctions. [NRS 354.626](#), subsection 1 provides in part:

No governing body or member thereof, officer, office, department or agency shall, during any fiscal year, expend * * * any money * * * in excess of the amounts appropriated for that function * * *. Any officer or employee of a local government who willfully violates [NRS 354.470](#) to [354.626](#), inclusive, is guilty of a misdemeanor, and upon conviction thereof shall cease to hold his office or employment.

If Question 6 passed, and were a court to give retrospective interpretation to the constitutional amendment and order the county assessors to prepare an assessment roll prior to the December 15 date which would reflect the Question 6 assessment mandate, that court order itself may cause county officials to overspend the budgeted appropriations.

It is unlikely that a Nevada court would order county officials to possibly break one law to comply with another, particularly where there is no compelling need for such harsh interpretation and where Nevada precedent already disfavors retrospective interpretations of constitutional amendments.

Even were the preparation of multiple assessment rolls not to cause an overexpenditure of the budgeted appropriations, such speculative expenditure would remain unlawful. The expenditure of public funds must be for a public purpose. 15 McQuillan on Municipal Corporations (3rd Ed. 1970), § 39.19. The determination of a proper public purpose, however, is the exclusive responsibility of the Legislature. *McLaughlin v. L.V.H.A.*, [68 Nev. 84](#), 93, 227 P.2d 206 (1951).

By requiring the preparation of an assessment roll, the Legislature has implicitly determined that expenditures of public funds for that purpose are proper. The expenditures, however, must be made pursuant to the laws governing preparation of the assessment roll. Expenditures premised on anticipated future law are improper and illegal. Nowhere has the Legislature authorized such speculative expenditure, and until the present law is modified by statute or by constitutional amendment, expenditures of public funds for the preparation of an assessment roll can be made lawfully only pursuant to existent law.

It is therefore the opinion of this office that Question 6 would not be given retroactive application for the purposes of establishing an assessment roll for fiscal year 1980-81. Each county assessor must undertake the statutory duty to reappraise property pursuant to the law in existence when that duty commences and may not anticipate passage of Question 6 by the preparation of multiple assessment rolls.

While our Nevada courts would likely give the assessment element of Question 6 prospective interpretation, it is uncertain whether other provisions of Question 6 would be applicable in fiscal year 1980-81. In *Appeal of Crescent Precision Products, Inc.*, 516 P.2d 275 (Okla. 1973), the Supreme Court of Oklahoma considered the retroactive application of a constitutional amendment as it related to property taxation. The court concluded that a constitutional amendment has no impact on taxes calculated for the fiscal year during which the amendment is adopted.

Our courts, however, may not adopt that position, but rather may implement any provision of Question 6 which may reasonably be given prospective application during fiscal year 1980-81. For example, Question 6 provides a tax limitation equal to 1 percent of the appraised value. Because the tax rate is not certified pursuant to [NRS 361.455](#) until approximately six months after the effective date of Question 6, our courts may consider the application of the 1 percent tax limitation sufficiently prospective enough to impose that provision for the 1980-81 fiscal year. *Cf. Washington State Department of Revenue v. Hoppe*, 512 P.2d 1094 (Wash. 1973).

Unlike the preparation of the assessment roll which statutorily must begin prior to the effective date of Question 6, the calculation of the tax rate statutorily begins subsequent to that effective date. Our courts may

well so distinguish the assessment element of Question 6 from the tax rate element, and implement the one but not the other for fiscal year 1980-81. Such distinction is conceivably consistent with a prospective interpretation and may well be adopted by our courts. If that distinction is made, fiscal year 1980-81 would then be a transition year, with the assessment roll prepared pursuant to the former statutory mandate and the tax rate calculated pursuant to the new constitutional amendment.

CONCLUSION

Because our Nevada Supreme Court has specifically proscribed the retroactive application of a constitutional amendment in the absence of express intent to the contrary, because Question 6 contains no such express contrary intent, and because the speculative expenditure of public fund to anticipate passage of the initiative and prepare multiple assessment rolls may force an illegal overexpenditure of certain budgeted functions and thereby expose various county officials to possible criminal sanctions, it is the opinion of this office that Question 6 cannot reasonably be given retrospective interpretation and that the county assessors should prepare but a single assessment roll for fiscal year 1980-81 pursuant to existent law.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Tudor Chirila
Chief Deputy Attorney General,
Tax Division

OPINION NO. 80-17 Recall Petitions—Under [NRS 306.015](#), subsection 2, a notice of intent to circulate a recall petition must be signed by three currently registered voters who actually voted in the last preceding general election held in the jurisdiction which elects the officer being recalled. To the extent [NRS 306.020](#), subsection 1 is in conflict with the provisions of Article 2, Section 9 of the Nevada Constitution with regard to the question of the number of signatures required on a recall petition, the provisions of Article 2, Section 9 should be followed. Under Article 2, Section 9 of the Nevada Constitution and [NRS 306.020](#), subsection 1 the total number of voters voting in the preceding general election of the State or of the county, district or municipality from which the officer was elected is to be used as the basis for determining the minimum number of signatures needed on recall petition.

Carson City, May 21, 1980

The Honorable Wm. D. Swackhamer, Secretary of State, Capitol Complex, Carson City, Nevada
89710

Dear Mr. Swackhamer:

You have requested advice concerning an interpretation of [NRS 306.015](#), subsection 2 and 306.020, subsection 1.

QUESTION ONE

Does [NRS 306.015](#), subsection 2 require the three signers of a notice to circulate a recall petition to have actually voted at the last preceding general election held in the jurisdiction which elects the officer sought to be recalled?

ANALYSIS—QUESTION ONE

[NRS 306.015](#), subsection 1 requires persons proposing to recall an elected officer to file a notice of intent to circulate a recall petition. [NRS 306.015](#), subsection 2 provides in subparagraph (2) that the notice of intent shall be:

Signed by three registered voters who actually voted in the state or in the county, district or municipality electing such officer at the last preceding general election.

Taking the statute in its component parts, the law first establishes the status of the three signers of the notice of intent. The notice must be signed by three registered voters. In the opinion of this office this means that the signers must be currently registered voters at the time the notice of intent is signed.

Next, the law identifies with particularity who is eligible to sign the notice. The statute requires the notice to be signed by the aforesaid three presently registered voters “who actually voted in the state or in the county, district or municipality electing such officer * * *.”

In Attorney General’s Opinion 80-4, February 26, 1980, this office stated its opinion that under [NRS 306.020](#), subsection 1 it was not necessary for the persons signing a recall petition to have actually voted in the election which elected the recalled officer to his position. This was based upon a reading of the language of the statute which merely required the petition to be signed “by a number of registered voters” equaling at least 25 percent of the number of voters who actually voted in the election which elected the officer sought to be recalled. It was held that all that the statute did was to establish a base number from a particular year from which the requisite percentage of signatures could be determined. The use of the words “by a number of registered voters” implied, and it was so held by this office in its opinion, that any currently registered voter, regardless of whether he or she actually voted in the election in which the recalled officer was elected to his position, was eligible to sign a recall petition. Attorney General’s Opinion 80-4, supra.

However, [NRS 306.015](#), subsection 2 is dissimilar in language from [NRS 306.020](#), subsection 1 in that the words “by a number of registered voters” is absent from [NRS 306.015](#), subsection 2. Instead, this statute requires in unequivocal language that a notice of intent to circulate a recall petition must be signed by “three registered voters who actually voted” in the preceding general election in the jurisdiction electing the officer sought to be recalled. Thus, in the opinion of this office, the signers of the notice of intent must actually have voted in an immediately preceding general election in order to be eligible to sign the notice.

This brings us to a consideration of the third component in [NRS 306.015](#), subsection 2, that of identifying the election in which these persons must first have voted in order to be eligible to sign the notice of intent. First, they must have voted “in the state or in the county, district or municipality electing such officer * * *.” If the officer in question is a state official, the signers of the notice must have voted in the requisite statewide election in Nevada. If the officer in question

is a county officer, the signers of the notice must have voted in the requisite county election in the county where the officer serves and from which he was elected. The same follows with respect to district or municipal officials who are being recalled. Second, the statute identifies the requisite election as the “*last preceding* general election.” (Italics added.)

It is thus apparent that the signers of the notice need not necessarily have voted in the election during which the recalled officer was elected to his position. General elections occur every two years (see [NRS 293.060](#)), but most officers are elected to four-year terms and some, such as judges, are elected to six-year terms. The officer may thus have been elected to his position at a general election prior to the general election last past. However, the statute requires the signers to have voted only at the *last preceding* general election in the appropriate state, county, district or municipal jurisdiction in which the officer serves.

CONCLUSION—QUESTION ONE

It is the opinion of this office that under [NRS 306.015](#), subsection 2 a notice of intent to circulate a recall petition must be signed by three currently registered voters who actually voted in the last preceding general election held in the jurisdiction which elects the officer being recalled.

QUESTION TWO

Is [NRS 306.020](#), subsection 1 in conflict with Article 2, Section 9 of the Nevada Constitution?

ANALYSIS—QUESTION TWO

Article 2, Section 9 of the Nevada Constitution authorizes the recall of public officers. This provision does not merely establish this principle, but actually goes into detail as to how a recall may be accomplished. Thus Article 2, Section 9 provides that a recall shall be initiated by petition, establishes the number of signatures needed on the petition, provides some details of what the petition shall contain, establishes a timetable for a recall election, describes the ballot, provides for other candidates to run for the office and puts limitations on the number of petitions that can be filed against an officer and when petitions can be filed.

Such detailed provisions indicate that Article 2, Section 9 is self-executing.

A constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates *principles*, without laying down rules by means of which those principles may be given the force of law. (Author’s emphasis). 1 Cooley on Constitutional Limitations, 167-168 (8th Ed. 1927). See also *State ex rel. Clark v. Harris*, 74 Or. 573, 144 P. 109, 111 (1914).

Nevertheless, not every detail can be provided for or every problem anticipated in a constitution. Legislation is thus proper to fill in additional details and that is the purpose of Chapter 306 of NRS. Thus, some provisions such as [NRS 306.030](#) and [306.070](#) supply additional details as to the form of the petition and the form of the ballot. Other provision provide for problems not anticipated by the constitution, such as providing a means for signatories to remove their names from the petition or regulating the use of punch card ballots. See [NRS 306.040](#) and [306.060](#). Finally, other provisions merely repeat the provision of the constitution, such as [NRS 306.090](#) and [306.100](#) which repeat the constitution’s limitations on when petitions can be filed and how many can be filed against any officer.

One provision of the statute, however, presents the possibility, under certain circumstances, of being in conflict with the constitution. Article 2, Section 9 provides, in pertinent part, that the number of signatures on a recall petition must be:

not less than twenty-five per cent (25%) of the number who actually voted in the state or in the county, district or municipality electing said officer, *at the preceding general election * * **. (Italics added.)

However, [NRS 306.020](#), subsection 1 provides that the number of signatures on a recall petition must be:

not less than 25 percent of the number who actually voted *in the election by which the officer sought to be recalled was elected to his office*. (Italics added.)

In the opinion of this office the term “the preceding general election” refers to the general election immediately preceding the filing of a recall petition. To the extent that the officer sought to be recalled was elected at the general election immediately preceding the filing of a recall petition, the number of signatures on the petition would be calculated from “the election by which the officer sought to be recalled was elected to his office.” Article 2, Section 9 and [NRS 306.020](#), subsection 1 would not be in conflict under this factual assumption.

However, as noted in the analysis to Question one, while general elections occur every two years, most public officers are elected to four-year terms and some, such as judges, are elected to six-year terms. Thus an officer may have been elected at a general election two to four years prior to the general election immediately preceding the filing of a recall petition. Under this factual assumption, the term “election by which the officer sought to be recalled was elected to his office” would not be the same as the term “the preceding general election.” To this extent, then, [NRS 306.020](#), subsection 1 would be in conflict with Article 2, Section 9 of the Nevada Constitution.

The problem presented by the language of [NRS 306.020](#), subsection 1 is resolved by the fact that Article 2, Section 9 is self-executing with regard to the question of determining the number of signatures which should be on a recall petition. Therefore, any filing officer with whom a recall petition is filed should follow the provisions of Article 2, Section 9 of the Nevada Constitution in determining whether a recall petition has the sufficient number of names. In other words, filing officers must determine if a recall petition contains a number of signatures equal to 25 percent of the number of voters who voted at the immediately preceding general election. In this regard, to the extent that [NRS 306.020](#), subsection 1 would conflict with the provisions of the constitution, Article 2, Section 9 should be followed and not the provisions of [NRS 306.020](#), subsection 1.

CONCLUSION—QUESTION TWO

It is the opinion of this office that to the extent [NRS 306.020](#), subsection 1 is in conflict with the provisions of Article 2, Section 9 of the Nevada Constitution, with regard to the question of the number of signatures required on a recall petition, the provisions of Article 2, Section 9 should be followed.

QUESTION THREE

In determining the number of required signatures for a recall petition under Article 2, Section 9 of the Nevada Constitution and under [NRS 306.020](#), subsection 1, is it necessary to consider

only the number of voters voting for or against the recalled officer or the total number of voters voting at the preceding general election?

ANALYSIS—QUESTION THREE

Prior to its amendment in 1970, Article 2, Section 9 established the requisite number of signatures for a recall petition as a number not less than 25 percent of those electors who voted in the state, county, district or municipality electing the officer to be recalled at the preceding election for justice of the Supreme Court. Statutes of Nevada 1967, page 1782 and Statutes of Nevada 1969, page 1663.

Thus, the means for determining the requisite number of signatures for a recall petition, prior to 1970, was not tied to the number of voters voting for or against the officer who was to be recalled, but was established by determining the number of voters from the state, county, district or municipality, in which the officer served, who cast votes in the race for Supreme Court justice.

In 1970, the voters approved an amendment to Article 2, Section 9 which removed the words “for justice of the supreme court” and merely referred to the number of voters who voted at the preceding general election. In discussing this proposed amendment on the floor of the Assembly in 1967, Assemblyman Clinton Wooster stated:

The original bill was requested by the Legislative Counsel to clarify the law regarding the recall of public officers in the constitution. When it was introduced in the committee, we suggested two changes which Mr. McDonald agreed would be an improvement upon the bill. The first is to add “general” to the word “election” so that we know which election we’re talking about. The second is to delete the words “justices of the supreme court” so that we are talking about *the total vote cast* in each election. (Italics added.) Remarks of Assemblyman Clinton Wooster on the Assembly floor, February 10, 1967 from a recording currently stored in the Division of State, County and Municipal Archives of the State Library.

This view is consistent with the requirement of Article 2, Section 9 that one should look to the preceding general election in determining the number of signatures required on a recall petition. As has already been noted, the election at which an officer was elected may not necessarily be the same as the “preceding general election.” Thus when a preceding general election is not the same as the election at which an officer was elected it is impossible to fix the number of signatures on a recall petition as 25 percent of the number who voted for or against the officer, since no one would have been able to vote for or against the officer in such a situation. Twenty-five percent of the total vote cast in the preceding general election of the state or of the county, district or municipality from which the officer was elected, as noted by Assemblyman Wooster, is thus the proper criterion for determining the requisite number of signatures on a recall petition.

CONCLUSION—QUESTION THREE

It is the opinion of this office that under Article 2, Section 9 of the Nevada Constitution and [NRS 306.020](#), subsection 1, the total number of voters voting in the preceding general election of the state or of the county, district or municipality from which the officer was elected is to be used as the basis for determining the minimum number of signatures needed on a recall petition.

Respectfully submitted,

RICHARD H. BRYAN

Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-18 Labor Law—An individual categorized as a “pre-apprentice” is not exempted from the prevailing wage requirements set forth in [NRS 338.010](#) through 338.090 for public works projects.

Carson City, May 29, 1980

Mr. Richard K. McNeel, Labor Commissioner, 505 E. King Street, Room 601, Carson City, Nevada 89710

Attention: Mr. Glenn E. Taylor, Mediator-Conciliator

Dear Mr. McNeel:

You have requested an Attorney General’s Opinion concerning the status of so-called “pre-apprentices” in relation to public works projects in this state.

FACTS

The Associated General Contractors of America, Southern Nevada Division, has protested the labor commissioner’s decision that non-registered apprentices will be paid the prevailing journeyman wage in his or her respective classification for public works projects. A registered apprentice’s normal wage rate begins at approximately 50 percent of the journeyman’s wages. In the recent past, apprenticeship programs in Clark County for carpenters, cement masons and plasterers have utilized a system in which new employees are hired for a 60- to 90-day probationary period and are categorized as “pre-apprentices.” This system has been followed, the contractors maintain, because of the large failure rate among new apprentice applicants. The apprenticeship committees have not thought it practical to go through an indentureship until there were greater assurances of the applicant’s reliability. When these “pre-apprentices” have been sent on public works projects, they have been receiving beginning apprentice wage rates.

The Nevada labor agreements covering Southern Nevada for carpenters, cement masons and plasterers, effective July 1, 1979, now provide a specific category termed “pre-apprentice” with the further stipulation that the “pre-apprentices” shall be paid wages and fringe benefits corresponding to amounts paid indentured apprentices during their first period of apprenticeship.

The labor commissioner has not recognized the term “pre-apprentice” as a legal category nor as an exemption under the provisions of [NRS 338.080](#) pertaining to public works projects, which require workers to be paid the prevailing wage rate in their particular classification. He maintains that anyone who is not an apprentice, covered by a written contract, must be paid the prevailing wage rate for the work performed.

It should be noted that under the provisions of [NRS 338.030](#), the labor commissioner has the authority to determine the types of classes of unskilled and skilled workmen for which general prevailing rates of per diem wage can be established. For example, if a new classification such as “helper” is part of the collective bargaining agreement between a union

and a contractor-employer, the labor commissioner has generally recognized such position and established a prevailing wage rate for such category. If a new labor classification is proffered to the labor commissioner, he may investigate and assess what the workmen actually do in this category. If said work does not already fall within an established classification, the labor commissioner has the authority to establish a new classification if such is warranted.

For the purposes of this opinion, the term “pre-apprentice” is limited to those situations in which workmen are neither covered under an indenture agreement nor have been classified in a labor category for which a general prevailing rate of per diem wage has been determined pursuant to Chapter 338 of NRS. See [NRS 338.030](#).

QUESTION

Is an individual categorized as a “pre-apprentice” exempted from the prevailing wage requirements set forth in [NRS 338.010](#) through 338.090 of the Public Works Projects Statutes?

ANALYSIS

The category termed “apprentice” is clearly defined in the Nevada Revised Statutes. To become an “apprentice,” an individual must have a written agreement which provides not only for training on the job with an employer or agency but also for a minimum number of hours of instruction in the chosen field. [NRS 610.010](#) provides as follows:

As used in this chapter, “apprentice” means a person who is covered by a written agreement with an employer, or with an association of employers or an organization of employees acting as agent for an employer, which apprenticeship agreement:

1. Is approved by the state apprenticeship council.
2. Provides for not less than 2,000 hours of reasonably continuous employment for the person.
3. Provides for his participation in an approved schedule of work experience through employment and for at least 144 hours per year of related supplemental instruction.

The purpose of the apprenticeship programs is to foster training and employment among young, unskilled men and women. [NRS 610.020](#). As a means to this end, the Legislature mandates that a program of voluntary apprenticeship under an approved apprenticeship agreement providing facilities for training with related instruction be established. [NRS 610.020](#), subsection 2. Another purpose of the program is to regulate the supply of skilled workers with the employment demands within the State of Nevada. [NRS 610.020](#), subsection 4. For instance the local or state joint apprenticeship committees shall advise employers and employees on the number of apprentices which may be employed locally in the trade. [NRS 610.140](#).

[NRS 338.020](#), subsection 1 of the Public Works Projects Statutes provides as follows:

1. Every contract to which a public body of this state is a party, requiring the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor in the performance of public work, shall contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workmen. The hourly and daily rate of wages shall not be less than the rate of such wages then prevailing in the county, city, town, village or district in this state in which the public work is located, which prevailing rate of wages shall have been determined in the manner provided in [NRS 338.030](#).

[NRS 338.080](#), subsection 2 provides as follows:

None of the provisions of [NRS 338.010](#) to [338.090](#), inclusive, shall apply to:

* * *

2. Apprentices recorded under the provisions of chapter 610 of NRS. (1931 NCL § 6179.62; NRS A 1967, 34)

The provisions of Chapter 338.080, subsection 2 of the Nevada Revised Statutes state clearly that apprentices as defined within Chapter 610 of NRS are exempted from the prevailing wage rate requirement for public works projects. The Nevada Statutes allow apprentices under an apprentice agreement to be paid a graduated scale of wages to be written into the agreement. [NRS 610.150](#), subsection 6. This provision allows employers to pay a lower wage scale for apprentices than for journeymen in the same classification. By taking into consideration the lower wage scale for apprentices, a contractor's overall bid can be lower than if he hired only journeymen to be paid at the prevailing rate. Such a provision promotes the employment and training of apprentices and in turn is financially advantageous to contractors and allows them to obtain more public works contracts. See *Gregory Electric Co. v. U.S. Dept. of Labor*, 268 F.Supp. 987, 990 (1967).

The allowance of a lower wage scale for apprentices on public works projects provides an incentive for employers to hire apprentices and train them. However, to prevent circumvention of the law, the Legislature saw fit to strictly regulate the use of apprentices. The statutes provide for a written agreement, which is often called an indenture, by which the young person is thereby committed to working and receiving instruction for a certain number of hours during his or her apprenticeship term. [NRS 610.010](#) and [610.020](#), subsection 2. The reasons for these strict statutes are clear. If they were not followed, young people could very easily be exploited; in addition to not being paid the prevailing wage for similar work skills, they could, without adequate supervision and safeguards, be improperly trained. In California, for instance, the statutes allow only apprentices covered by a valid agreement under § 3077 of the California Labor Code to be eligible to be employed on public works projects. Cal. Lab. Code § 1777.5 (West).

A probationary period, which is longer than the 60- 90-day “pre-apprentice” system is written into each apprenticeship agreement. NRS 610.150, subsection 7 provides that each apprenticeship agreement or indenture contain:

A statement providing for a period of probation of not more than 500 hours of employment and instruction extending over not more than 6 months, during which time any apprentice indenture shall be terminated by the local joint apprenticeship committee at the request, in writing, of either party to the indenture, and providing that after such probationary period the apprentice indenture may be terminated after due hearing of the case by the local joint apprenticeship committee subject to appeal to the state apprenticeship council.

The probationary period within [NRS 610.150](#), subsection 7 allows an employer to terminate an apprentice within a 6-month period by a simple request in writing. The apprentice has no right to a hearing or appeal if terminated within the probationary period. In light of this provision, the need for a “pre-apprentice” system in response to a large failure rate among new apprentices is not evident. A probationary period of 60-90 days before indentureship does not appear warranted, when state statute already allows a longer probationary period to be written into an apprenticeship agreement or indenture. Furthermore, a pre-probationary period prior to indentureship, as established by the “pre-apprentice” system, is not authorized by statute. Rather,

there appears to be enough flexibility within an apprenticeship program set up pursuant to Chapter 610 of Nevada Revised Statutes to allow employers to terminate apprentices who do not successfully complete the program during a probationary period. The apprenticeship agreements themselves would protect both a fledgling apprentice and the employer on a public works project in the first few months of training.

In view of the policy behind the apprenticeship program and the clear statutory language noted above, it is the duty of the labor commissioner to strictly enforce the provisions of Chapter 610 of NRS. In order to carry out this duty, the labor commissioner must interpret the definition of the term “apprentice” in keeping with Chapter 610 of NRS. Therefore, the labor commissioner, in strictly construing the status of an apprentice, must allow only those persons who are under written contract in a valid apprenticeship program to be exempted under [NRS 338.080](#), subsection 2 from the prevailing wage rate on public works projects. There is no exemption under [NRS 338.080](#) for a “pre-apprentice.” When a statute contains an express exemption, the inference is a strong one that no other exceptions were intended. The rule generally applied is that an exception in a statute amounts to an affirmation of the application of the statutory provisions to all other cases not excepted and excludes all other exceptions. *Sands*, 2A Sutherland Statutory Construction, § 47.23 (4th Ed.); *Bushnell v. Superior Ct. of Maricopa Cty.* 102 Ariz. 309, 428 P.2d at 989 (1967); Attorney General’s Opinion No. 180, October 23, 1964. Where the language of a statute is plain and unambiguous, the legislative intent must be ascertained from the language itself and one should not go beyond such language. *Seaborn v. First Judicial District Court*, [55 Nev. 206](#), 218, 219, 29 P. 500 (1934).

This opinion is in keeping with the case law and regulations concerning apprentices under the federal public works projects. Under 29 C.F.R. Section 5.5(A)(4), the Secretary of Labor has determined that government contractors may only employ apprentices as such “only when they are registered, individually, under a bona fide apprenticeship program * * * registered with the Bureau of Apprenticeship and Training, U.S. Dept. of Labor * * *.” Because the apprentices are a class whose minimum wage rates are less than the journeymen’s classification, logically the effect of the apprenticeship provision is to make lower costs possible for a contractor on government projects, by allowing him to pay some of his employees at apprenticeship rates rather than at journeyman rates. *Gregory Electric Company v. U.S. Department of labor*, 268 F.Supp. 987, 990 (DCS 167). The case law in this area has stated that the apprenticeship programs are promoted to further the welfare of apprentices and to safeguard them. The apprenticeship programs were not intended to only benefit and promote the interest of the contractor. *Id.* at 993.

Because there is no such term as “pre-apprentice,” nor a definition of such term within the statutes, it is the opinion of this office that the term has no legal significance under Nevada law with respect to the exemption of “apprentices” from the provisions of [NRS 338.010](#) to [338.090](#), inclusive. Therefore all individuals termed as “pre-apprentices” in any contract within the State of Nevada do not fall within any exemption from the provisions of Chapter 338 or NRS for any public works projects. They cannot, therefore, be paid at a lower rate than the prevailing wage rate for workers in their respective classes on such public works projects. This conclusion is based on the clear and unambiguous language of [NRS 338.080](#), subsection 2 when read in conjunction with the definition of apprentice provided in Chapter 610 of the Nevada Revised Statutes. This statutory scheme manifests the intention of the Legislature that only certified apprentices and no other persons are to be exempted from the provisions of [NRS 338.080](#), subsection 2.

Nothing herein shall be construed as preventing labor or management from requesting the labor commissioner to recognize additional classifications for workmen whose work does not fall within one of the established categories. The labor commissioner has the authority to investigate and establish new

classifications for workmen and to determine the general prevailing rate of per diem wage for additional classifications where a new category is warranted.

CONCLUSION

An individual categorized as a “pre-apprentice” is not exempted from the prevailing wage requirements set forth in [NRS 338.010](#) through 338.090 for public works projects.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Pamela M. Bugge
Deputy Attorney General,
Civil Division

OPINION NO. 80-19 Retirement, Public Employees—Elected county officers may participate in the “employer-pay-all” program, but must comply with all the terms and conditions of [NRS 286.421](#). Attorney General’s Opinion No. 214 (Nev.), dated July 12, 1977 is overruled.

Carson City, June 19, 1980

Vernon Bennett, Executive Officer, Public Employees Retirement System, 693 W. Nye Lane,
Carson City, Nevada 89701

Dear Mr. Bennett:

Recently you requested from this office an opinion on the following:

QUESTION

May elected county officers, whose compensation is fixed by law by the State Legislature, participate in the “employer-pay-all” provisions of the Public Employees Retirement Act?

ANALYSIS

In Attorney General’s Opinion No. 214 (Nev.), dated July 12, 1977, this office opined that elected county officers could not participate in the “employer-pay-all” provisions of the Public Employees Retirement Act because of the requirement of Section 2 of [NRS 286.421](#) that as part of the conversion to “employer-pay-all” the elected county officer’s salary must be comparably decreased or adjusted in such a way that there is an offset against a salary increase. At the time of our 1977 opinion we were of the belief that language in Article 4, Section 32 of the Nevada Constitution directing the Legislature to fix the compensation of certain county officers had the effect of prohibiting such changes to the salary of an elected county officer. For the reasons set forth below, we hereby overrule Attorney General’s Opinion No. 214 (Nev.), dated July 12, 1977, and adopt as our opinion on this subject the conclusion that elected county officers may

participate in the “employer-pay-all” program, but they must do so in accordance with all the terms and conditions of [NRS 286.421](#).

Our new opinion is prompted by a change in the law which took effect on January 1, 1979. At the time of our earlier opinion Section 1 of [NRS 245.043](#) declared that elected county officers *shall receive* annual salaries in the base amounts specified in a table which accompanied the statute. The specific, mandatory language “shall receive” was changed to read “entitled to receive” by Chapter 541, Statutes of Nevada 1977, with an effective date of January 1, 1979 for this and other relevant amendments to [NRS 245.043](#). This subtle, but distinctive, change in language carries with it the implication that elected county officers are entitled to receive the salaries set forth in the statute but may choose and agree to receive something different. This implication is reinforced by the prefatory clause to Section 1 of [NRS 245.043](#) which reads “Except as provided by any special law * * *.” The special provisions of [NRS 286.421](#) appear to fit the circumstances of a special law dealing with compensation of public officers.

A change in the law in 1973 also supports our new opinion on this subject. Before July 1, 1973 there existed as part of [NRS 245.043](#) a restriction on increasing or diminishing the salary of an elected county officer during his term of office. That restriction was eliminated by Chapter 794, Stats. of Nevada 1973. We would further note that there is no similar restriction in the State Constitution for elected county officers as exists at Article 15, Section 9 with respect to those state officers whose salaries were initially set by Article 17, Section 5 of the Constitution.

Since the Legislature enacted both [NRS 245.043](#) and [286.421](#), it may be argued that, in keeping with the constitutional requirements of Article 4, Section 32, the Legislature alone has indeed fixed the compensation of elected county officers through both statutes. Thus, there is no improper delegation of authority, as was suggested in Attorney General’s Opinion No. 214 (Nev.), but only the establishment of some choices on how such compensation may be received.

Under the present provisions of [NRS 286.421](#), the conversion to “employer-pay-all” can occur only at the beginning of a fiscal year or at some other established payroll adjustment period. In addition, the law mandates that payment of employee contributions by a public employer must be (1) in lieu of equivalent basic salary increases or cost of living increases, or both; or (2) counterbalanced by an equivalent reduction in the employee’s salary. For purposes of illustration we can use the salary of a county sheriff to show how the conversion to “employer-pay-all” could occur. Since [NRS 245.043](#) sets the salary of elected county officers, including a county sheriff, until at least January 1, 1982, there will be no salary increases which can be traded off for the payment of the employee’s retirement contribution before that date. However, a county sheriff could agree to an 8 1/2 percent reduction in his existing salary on July 1, 1980, which is the beginning of the next fiscal year. (The reduction is only 7 1/2 percent for elected county officers not participating in the special early retirement program for police officers and firemen.) Such a reduction would appear to meet the requirements of the statute found at [NRS 286.421](#), subsections 2, 6, 7 and 8.

CONCLUSION

Elected county officers may participate in the “employer-pay-all” program of the Public Employees Retirement Act, but in doing so must comply with all the terms and conditions of said program found at [NRS 286.421](#). Attorney General’s Opinion No. 214 (Nev.), dated July 12, 1977, to the contrary is overruled.

Respectfully submitted,

RICHARD H. BRYAN

Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 80-20 Ineligibility of Other Incumbent County or Township Officers Running For Election As County Commissioners—Under [NRS 244.020](#), subsection 2, incumbent county or township officers, other than incumbent county commissioners, are ineligible to run for election for county commissioner. Such officers must resign their positions before being able to run for election to the office of county commissioner.

Carson City, June 19, 1980

The Honorable William D. Swackhamer, Secretary of State, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Swackhamer:

You have requested advice concerning an interpretation of [NRS 244.020](#), subsection 2.

QUESTION

May an incumbent county or township officer run for the office of county commissioner without resigning his current office?

ANALYSIS

[NRS 244.020](#), subsection 2 provides as follows:

No county or township officer shall be eligible to the office of county commissioner.

The term “officer” was defined in Attorney General’s Opinion No. 193, dated September 3, 1975 as (1) all persons elected to governmental positions, whether on a state, district, county or municipal level, and (2) a person appointed to a governmental position, whether on a state, district, county or municipal level, if his position is created by the constitution, a statute or ordinance and if, further, his duties are specifically set forth in the constitution, statute or ordinance and that person is made responsible, by the constitution, statute or ordinance, for the direction, supervision and control of his agency.

[NRS 244.020](#) is applicable by its terms, except as noted below, to all county officers or township officers within any particular county. It is also applicable only to candidates for the office of county commissioner. The question of whether incumbent county or township officers must resign their offices prior to being able to run for election to the office of county commissioner hinges on the definition of the word “eligible” as it is used in [NRS 244.020](#), subsection 2.

The courts are generally split on the question of what the term “eligible” means. The term can be defined in one of two ways. First, it could mean “capable of being chosen,

as an eligible candidate” or “as a candidate for office.” Second, it can mean “legally qualified to hold office” or “legally qualified to serve.” Courts defining the term have utilized either or both of these definitions. *State ex rel. Sundfor v. Thorson*, 6 N.W. 2d 89, 92 (N.D. 1942); *State v. Johnson*, 115 S.E. 748, 749 (S.C. 1923); *Bradfield v. Avery*, 102 P. 687, 689 (Idaho 1909); *Edwall v. Secretary of State*, 30 P.2d 1037, 1038 (Ore. 1934); 29 C.J.S., “Eligible,” pp. 1203-1204.

The Nevada Supreme Court has defined the term as utilizing both definitions. Thus, the Nevada Supreme Court has held that the term “eligible” is defined as “the capacity to hold office” as well as “the capacity to be elected to office.” *State ex rel. Nourse v. Clarke*, [3 Nev. 566](#), 570 (1868); *State ex rel. Summerfield v. Clarke*, [21 Nev. 333](#), 338 (1892).

Therefore, an incumbent county or township officer is not only ineligible to hold the office of county commissioner at the same time as he serves in his other office, but he is also ineligible to run for election to the office of county commissioner at the same time as he serves in his present county or township office.

The question obviously arises as to whether this interpretation applies to incumbent county commissioners. In our opinion, it obviously does not. The purpose of statutes similar to [NRS 244.020](#), subsection 2 is to insure the integrity of any given office by removing the incumbent officers from the temptation of using their offices for *political advancement*. Cf. *Reynolds v. Howell*, 126 P. 954 (Wash. 1912); *State v. Cobb*, 2 Kan. 27 (1863). An incumbent county commissioner running for reelection is obviously not seeking to advance himself politically since he has already arrived at the office to which he is seeking election. Therefore, [NRS 244.020](#), subsection 2 does not apply to an incumbent county commissioner. Indeed, to require an incumbent county commissioner to resign his office before he can run for reelection would give the statute an absurd interpretation. Statutes should not be interpreted to give absurd results. *Sierra Pacific Power v. Public Service Commission*, [92 Nev. 522](#), 525, 554 P.2d 263 (1976).

[NRS 244.020](#), subsection 2 is an old statute, having originally been enacted in 1865. The policy considerations behind the statute may no longer be as relevant or as important today as they were then. In addition Nevada case law on the definition of the term “eligible” is also rather old. Nevertheless, the cases represent the stated view of the law in Nevada and this office believes it has no choice but to follow the precedent established.

CONCLUSION

It is the opinion of this office that under [NRS 244.020](#), subsection 2, incumbent county and township officers, other than incumbent county commissioners, are ineligible to run for election to the office of county commissioner. Such county and township officers must resign their positions before running for election to the office of county commissioner.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-21 School Building Construction Bids and Contracts—The action of a public body in accepting a written bid for a public works project and awarding the successful bidder the contract constitutes the actual contract even though the contract is not formally signed until a later date. Taking into consideration the actual circumstances of a transaction along with the purpose of the statute itself, a contract made in violation of the terms of a statute and which is declared invalid thereby may, under the proper circumstances, be enforceable.

Carson City, July 2, 1980

The Honorable John C. Giomi, Lyon County District Attorney, Lyon County Courthouse,
Yerington, Nevada 89447

Dear Mr. Giomi:

You have requested an opinion concerning an interpretation of [NRS 393.110](#).

FACTS

[NRS 393.110](#) provides, in its pertinent parts, as follows:

1. Unless standard plans are to be used as provided in [NRS 385.125](#), *before letting* any contract or contracts for the erection of any new school building, the board of trustees of a school district shall submit plans therefore to and obtain the written approval of the plans by the state public works board * * *. (Italics added.)
3. No contract for any of the purposes specified in subsections 1 and 2 made by a board of trustees of a school district contrary to the provisions of this section is valid, nor shall any public money be paid for erecting, adding to or altering any school building in contravention of this section.

On January 3, 1980 and February 21, 1980, respectively, the Lyon County School District submitted plans for the construction of four new schools in Lyon County to the Public Works Board for its approval. On January 25, February 1 and February 8, 1980, the School District published its invitations to bid on the construction of these schools. On February 14 and March 13, 1980 bids were opened and examined for the school construction projects.

On March 27, 1980, the School District met to consider the award of the bids. At that time, the Public Works Board had still not approved the plans for the school construction projects. However, some action was necessary since a 45-day time limit prohibiting the withdrawal of bids by bidders was about to expire for two of the projects. At the School District meeting a motion was made to award the construction of two of the projects, which were advertised for an d bid on as one package, to the construction company which was the low bidder. The other two projects were awarded to another company which was the low bidder for those projects. The motion specifically provided that the awards were contingent upon the issuance of special use permits by the county commission.

During the discussion on the motion, it was pointed out that the Public Works Board, along with several other reviewing agencies, had not yet approved the plans.¹ However, no one seemed

¹ The minutes are silent as to whether NRS 393.110, requiring the written approval of the plans by the Public Works Board prior to awarding the contracts, was mentioned in connection with the information that Public Works Board approval had not yet been obtained. However, on May 21, 1979 a Public Woks Board employee sent a memorandum to all Nevada school districts in which he stated that he “noticed” that construction on school

to take any special notice of this information, according to the minute of the meeting. After prolonged discussion, the motion with its attendant condition requiring the issuance of special use permits was adopted and the contracts were so awarded. On April 3, 1980, the county commission voted to issue the special use permits, thus meeting the conditions of the contract award.

The contracts, however, were not immediately formalized in writing and executed. At a meeting of the School District Board on April 17, 1980, when it was alleged by some citizens that the contracts were let contrary to [NRS 393.110](#), the fact that contracts had not been formally signed was noted and it was stated that the contractors had done no work on the projects and that one of them at least considered itself in a “holding pattern” pending approval of the school construction plans by the Public Works Board. In fact, you have informed this office that the contractors assert that they were aware that if the plans were not approved by the Public Works Board there would be no contracts.

On April 24, 1980 the Public Works Board approved the school construction plans. On May 1, 1980 the contracts were formally signed and executed by the School District and the contractors. The contractors did not perform any work on these projects until after the contracts were formally signed on May 1. One of the contractors prior to May 1 did locate metal construction sheds on the sites of two of the schools, but he did so without authorization from the school board and without expectation of payment.

QUESTION

Is a contract to build a school building, which is awarded before the Public Works Board approves the construction plans under [NRS 393.110](#), but which is formally signed and executed after such approval, a valid contract?

ANALYSIS

Under [NRS 393.110](#), subsection 1 a school district is required to obtain Public Works Board approval of school construction plans “before letting the contract or contracts.” [NRS 393.110](#), subsection 3 provides that contracts made contrary to subparagraph 1 of the statute are invalid. The term “let” means “the act of awarding the contract to the proposer after the proposals have been received and considered.” Black’s Law Dictionary, “Let”, 813 (5th Ed. 1979).

It has long been decided in this and other states and in the courts of the United States that in the letting of contracts for the doing of public works where the legislative body or the administrative officer is required by statute to call for bids and must under competitive bidding conditions let the contract to the lowest responsible bidder, *the making of the award gives rise to a contract between the public body and the successful bidder.* (Italics added.) Application of City of Susanville, 285 P.2d 1007, 1010 (Cal. 1955)

The acceptance by the proper public authorities of a bid submitted pursuant to a proposal or advertisement for bids for a contract for public works, upon plans and specifications, and offering to do the work, converts the offer into a binding contract even though a formal contract has not been executed. The bid and its acceptance creates the contract and no formal contract is necessary, being merely a subsequent formal and ministerial step. *Garfielde v. United States*, 93

projects was being begun without final Public Works Board approval of the plans. He pointed out that under NRS 393.110 this “was not permissible.” He concluded that “you may open bids prior to approval, but may not let a construction contract without this approval.”

U.S. 242, 244 (1874); *United States v. Purcell Envelope*, 249 U.S. 313, 319-320 (1910); *Pennington v. Sumner*, 270 N.W. 629, 109 A.L.R. 355, 367 (Iowa 1936); *Application of City of Susanville*, supra at 1010; *Tennessee Valley Authority v. Mason Coal, Inc.*, 384 F.Supp. 1107, 1115 (E.D.Tenn. 1974); *City of Merrill v. Wenzel Brothers, Inc.* 277 N.W.2d 799, 803 (Wis. 1979).

However, not every acceptance of a bid creates a contract. The facts must reveal if the contract is in fact complete upon its award. 10 McQuillan, Municipal Corporations, section 29.80, p. 442-443 (3rd Ed. 1966). Thus, it is possible to award a contract contingent on subsequent events and if the condition is not met, there is no contract. *Cullen v. Rock County*, 12 N.W.2d 38 (Wis. 1943).

In the present instance, the Lyon County School District did attach a condition to the award of the contract. However, this condition was limited solely to the subsequent issuance of special use permits and when those permits were issued on April 3, 1980, the conditions were met. Nothing appears in the record which further conditioned the award of the contracts on the approval for the Public Works Board of the school construction plans. Although the minutes of the March 27 School District meeting reveal that the Board was informed that the Public Works Board had not yet approved the plans, that information was not translated into a condition of the contract award.

The statement that the contractors assert that it was their understanding that the contracts were not effective until Public Works Board approval of the plans does not create a substitute for the official record of the acceptance of the bids made at the time the action was taken. The duly signed bid and the resolution accepting the bid constitute the contract. 10 McQuillan, Municipal Corporations, supra at 443. See also [NRS 111.120](#), the Statute of Frauds.

A case on point in Nevada is *Harmon v. Tanner Motor Tours*, [79 Nev. 4](#), 377 P.2d 622 (1963). In this case several common carriers bid on

a ground transportation contract with the county. Tanner Motor Tours submitted a written bid which was accepted by the county. Later, however, the county executed a written contract with one of the other bidders. In the subsequent lawsuit, the county argued there was no contract because no formal contract was executed. The court disagreed, stating:

The resolution of acceptance of the bid must be deemed evidence of an intent by the Board to be bound thereby. To hold otherwise would render, the proceedings (invitation for bids, their reception, and the acceptance of one) meaningless and a sham. We hold, therefore, that binding obligations arose from Tanner's bid and its acceptance by the board notwithstanding the subsequent failure to prepare and sign the contemplated formal agreement. *Harmon v. Tanner Motor Tours*, supra at 14.

In summary, the record clearly reveals that the School District awarded, or let, school construction contracts to the contractors long before the school construction plans were approved by the Public Works Board, contrary to [NRS 393.110](#), subsection 1. The record clearly shows that the award was not conditioned upon subsequent approval of the construction plans by the Public Works Board. Contracts were created by the school board's March 27 bid awards.

However, under the particular circumstances of this transaction and taking the purpose of the statute into consideration, are the contracts invalid? It is readily apparent that had construction begun on the projects after the contract awards had been made on March 27 but before Public Works Board approval of the construction plans on April 24, the contracts would clearly have been invalid and the contractors would not have been entitled to payment under subparagraph 3 of [NRS 393.110](#). In the present instance, however, no construction took place until after Public Works Board approval of the plans and until after the formal contracts were signed on May 1.

Subparagraph 3 of [NRS 393.110](#) specifically provides that no contract made contrary to the provisions of subparagraph 1 is valid. But although a statute by its terms makes an agreement absolutely void, courts may determine that under the circumstances of the case the statute merely

means “voidable.” 14 Williston on Contracts (3rd Ed.), § 1630A, p. 25. Thus it has been stated that:

Even if a statute expressly declares an agreement to be illegal or void, justice requires and the courts have continually decided that the effect of such a statute upon a particular case must depend upon the circumstances of that case. The words of the statute will be interpreted in the light of the purpose of the statute with due regard to the result that will be reached by the interpretation. 1 Corbin on Contracts, § 8, p. 17.

In addition to insuring adequate safety standards for school construction the purpose of [NRS 393.110](#) requiring pre-contract approval of school construction plans is to achieve standardization of school construction projects so as to obtain savings in costs for school buildings.

Furthermore, the specialized knowledge available to the Public Works Board in connection with public works projects would thus be made available to school boards which are generally inexperienced and unversed in the highly technical requirements involved in and connected with the design and construction of a school building. Attorney General’s Opinion No. 146 (Nev.), March 21, 1960.

Since no construction on these school projects took place until after Public Works Board approval of the plans, the statute’s goals of insuring the public safety and insuring economy in costs have been achieved. The public interest, as established by [NRS 393.110](#), has been satisfied and neither the contractors nor the school board has been harmed as each is now satisfactorily performing their bargain under the contracts.

Under the circumstances where no construction took place until after Public Works Board approval of the school construction plans and taking into consideration the intent of the statute and how it was nonetheless satisfied under the aforesaid circumstances, it is the opinion of this office that if this matter were to be litigated a court would in all probability find the contracts to be merely voidable. A voidable contract can be ratified. Restatement of the Law of Contracts § 475(c). This is what occurred, after the Public Works board approved the school plans on April 24, when the school district and the contractors formally signed contracts on May 1.

Although this office is of the opinion that under the particular circumstances of this case a court is likely to preserve the contracts, we wish to take this opportunity to strongly criticize the irregular actions of the school district in making these contracts. The prohibitions of a statute are not to be taken lightly. The school district was put on notice by the Public Works Board of the requirements of [NRS 393.110](#) nearly a year prior to the award of the contracts. The school district was specifically informed at its March 27, 1980 meeting that the Public Works Board had not yet approved the school construction plans. The school district was aware of the legal and proper expedient of awarding contract bids subject to a later condition being met, as it demonstrated when it awarded the contracts subject to issuance of special permits by the county. Yet no similar condition was imposed with respect to Public Works Board approval of the plans. The only thing that saves these contracts was the self restraint of the parties in holding up construction work until after the plans were approved by the Public Works Board.

This office is aware of the need of public bodies to hold down costs on public works projects by acting quickly on bids to prevent their withdrawal before awards are made. In the future it is recommended, in the event Public Works Board approval has not yet been given to school plans when bids are opened and action is needed to preserve bids, that bids be specifically awarded upon the condition that approval by the Public Works Board of the construction plans be obtained and that if the plans are disapproved the contract is void. This condition should specifically be made a part of the award motion and should appear in the minutes of the board’s meeting.

CONCLUSION

It is the opinion of this office that the action of a public body in accepting a written bid for a public works project and awarding the successful bidder the contract constitutes the actual contract even though the contract is not formally signed until a later date. It is also the opinion of this office that, taking into consideration the actual circumstances of a transaction along with the purpose of the statute itself, a contract made in violation of the terms of a statute and which is declared invalid thereby may, under the proper circumstances, be enforceable.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-22 Taxation; [NRS 361.245](#); Taxation of Personal Property to Lessee in Possession—Nevada property tax law requires all property to be assessed to owner except, among others, personal property subject to a security interest. [NRS 361.245](#). Personal property which is subject of lease intended for security should be assessed under [NRS 361.245](#) to lessee in possession.

Carson City, June 6, 1980

Stephen P. Boland, Esq., Chief Deputy District Attorney, Carson City District Attorney, 208 N. Carson, Carson City, Nevada 89701

Dear Mr. Boland:

You have requested the opinion of this office regarding taxation of personal property which is the subject of a “capital lease.” A review of the statutes and applicable case law has led to the following analysis and conclusion:

QUESTION

In essence you have asked: “Under what circumstances, if any, is a lessee of personal property liable for payment of ad valorem property taxes under Nevada law?”

ANALYSIS

You have generally described a factual situation wherein a hypothetical leasing company leases certain equipment to an entity which is exempt from the payment of property taxes under [NRS Chapter 361](#). The lease contract, called a “capital lease,” is defined by the

leasing company as “a full-payout, noncancelable bailment in which the majority of the incidents of ownership pass to the lessee.” The leasing company claims that because the lessee of the property is a tax exempt organization, no property tax is due. This assertion assumes, of course, that the lessee would be the party responsible for the personal property tax under Nevada law.

You have not forwarded any examples of “capital leases” for our examination. Therefore, the instant opinion is not intended to resolve the question under the terms of a particular existing lease. But rather, the intent and scope of this opinion is to delineate the controlling principles in this area as a guide to assessors when faced with questions of assessment of property which is subject to capital leases or subject to similar lease arrangements.

Throughout the statutes dealing with taxation of real and personal property runs the concept that the owner of property is the person who is considered to be the taxpayer. For example, county assessors must between July 1 and December 15 each year, “ascertain by diligent inquiry and examination all real and personal property in the county subject to taxation, and also the names of all persons, * * * owning it.” [NRS 361.260](#), subsection 1. The county assessor must then determine the full cash value of the property “and assess it to the person * * * owning it.” *Id.* If the assessor knows of the name of an absent owner of personal property, then the property must be assessed to the absent owner. [NRS 361.265](#). Where the name of the absent owner is not known to the county assessor, then the property must be assessed to “unknown owner, but no mistake [t]herefore or [t]hereafter made in the name of the owner or the supposed owner of personal property shall render the assessment on any sale of such property for taxes invalid.” *Id.* Additionally, the assessor is required to demand of each owner a statement “of all the personal property within the county, owned or claimed by such persons * * *.” *Id.*

Contrary to the concept of taxation of property to its owner, [NRS 361.245](#):

When personal property is subject to a security interest it shall, for the purpose of taxation be deemed the property of the person who has possession thereof.

Under this provision, personal property which is the subject of a conditional sale and in which the seller retains a security interest, is taxed to the person in possession. This is the only provision of the property tax law which could be construed to give the result proposed by the leasing company. Our inquiry is now focused on determining whether or not a “capital lease” of personal property constitutes the functional equivalent of a conditional sale creating a security interest in the property so that the property is properly taxable under [NRS 361.245](#) to the person in possession.

Although the Nevada Supreme Court has not faced the precise issue under consideration herein, the court has had the opportunity to consider [NRS 361.245](#) in *General Electric Credit Corporation v. Andreen*, [74 Nev. 199](#), 326 P.2d 731 (1958). In *Andreen* the court held that personal property sold under a conditional sales contract which retained title in the seller was assessable to the buyer in possession. At the time *Andreen* was decided, [NRS 361.245](#) provided that only mortgaged or pledged property would be taxed to the person in possession. In spite of this language limiting the exception to pledgees or mortgagees in possession, the court stated, citing numerous authority and quoting from a leading Alabama case, that:

When a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment *in contemplation of an ultimate absolute ownership*—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use of enjoyment of the property as such. 74 Nev. at 205 (Italics added.)

In 1965, the Legislature amended [NRS 361.245](#) to conform to the court's holding in *Andreen* that a contracting vendee in possession is the owner of the property for the purpose of ad valorem property taxation under Nevada law. Thus, to the extent the lessee in possession in the situation you have described, can be considered to hold the property subject to a security interest, the lessee would properly be taxed as the "owner" of the property.

Our research disclosed very little relevant authority from other jurisdictions. Two cases, however, merit some discussion: *RCA Corporation v. State Tax Commission of Missouri*, 513 S.W.2d 313 (Mo. 1974); *Szabo Food Service, Inc. of N.C. v. Balentine's, Inc.* 206 S.E.2d 242 (N.C. 1974).

In *RCA Corporation* the Supreme Court of Missouri considered whether the manufacturer of electronic data-processing equipment was liable for ad valorem personal property taxes where the equipment was used by state agencies under printed agreements captioned "Equipment Lease and Service Agreement." Holding that the agreements were not intended for security, the court stated:

While in form the agreements are leases "[t]he real character of the instruments[s] is not determined from [their] technical form, but from the intention of the parties as gathered from the four corners of the contract[s]." *Kolb v. Golden Rule Baking Co.*, supra, 9 S.W.2d 1.c. 842[1]. * * *

We must gather the intention of the parties from the entire instrument without regard to its form, or technical terms used therein, *Kolb*, supra, in the light of the nature of the transactions, the situation and relationship of the parties, and the purposes sought to be achieved by them.

These rules do not preclude our noticing that the language of the instruments is "lease language," not "sale language." There is no language affirmatively indicating that they were intended as security devices. Title is expressly reserved in *RCA* until exercise of the option to purchase, following payment in full of all amounts due. Risk of loss or damage to the equipment passes to the state agency with title but prior to passage of title is in *RCA*. The department of revenue is relieved of any obligation to carry insurance on the property. Liability for payment for use of the equipment is provided for on an annual basis, for seven years, in annual stops. The agency has the exclusive right to cancel the agreement on any anniversary date after one year's use.

The agreement, therefore, runs for one year at a time and may be terminated by the agency at any annual stop. *There is no absolute obligation on the agency to purchase, pay for, or assume title to the equipment at any time prior to exercise of the option to purchase. Whether that ever happens is entirely optional with the agency.* (Italics added.)

* * *

These transactions are not conditional sales, and should not be treated as such * * * because neither agency has assumed an absolute obligation to purchase or pay the purchase price for the equipment. The tests by which a court determines whether a transaction is a conditional sale or a lease are stated in *Kolb*, supra, 9 S.W.2d 1.c. 843[3]: *if the transferee is obligated and bound to pay the purchase price it is a conditional sale, but if the agreement requires or permits the transferee to return the property in lieu of paying the purchase price the instrument will be held a lease.* In a conditional sale "the purchaser undertakes an absolute obligation to pay for the property." [Citations omitted.] 513 S.W.2d at 316.317. (Italics added.)

In Szabo the Supreme Court of North Carolina reversed the lower court's finding that the agreement between the parties constituted a conditional sale, as opposed to a lease. The Szabo court held that the contract between the parties was a true lease and therefore, the lessor was responsible for all ad valorem taxes accrued during the period of the lease. The test for determining whether an agreement is a lease or a conditional sale of property was described by the court as follows:

Whether an agreement constitutes a conditional sale or a contract of a different character is a question of the parties' intent as shown by the language they employed. In ascertaining its true character "the whole contract is to be considered and no detached term or condition is to be given prominence or effect over another. The question of intent is one of fact to be determined from the circumstances surrounding each case; * * *."

One of the principal tests for determining whether a contract is one of conditional sale or lease is *whether the party is obligated at all events to pay the total purchase price of the property which is the subject of the contract. If the return of the property is either required or permitted the instrument will be held to be a lease; if the so-called lessee is obligated to pay the purchase price, even though it be denominated rental, the contract will be held to be one of sale.* Annot., 175 A.L.R. 1366, 1384 (1948). "A lease of personal property is substantially equivalent to a conditional sale when the buyer is bound to pay rent substantially equal to the value of the property and has the option of becoming or is to become, the owner of the property after all the rent is paid. * * * a lease which provides for a certain rent in installments is not a conditional sale if the lessee can terminate the transaction at any time by returning the property, even though the lease also provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property. And though the rent is to be applied at the buyer's option toward the payment of the price, *the transaction is not a conditional sale if the price largely exceeds the rent that the lessee is bound to pay.*" 206 S.E.2d at 249. (Italics added.)

The court "* * * conceded that when a lessee, pursuant to an agreement that upon compliance with the terms of the lease he shall become the owner of the property for no additional consideration, has made periodic payments which relate to the property and are commensurate with the value or stated purchase price of the property, the purported lease is in reality a security agreement." Id., at 252.

These tests, enunciated in RCA Corporation and Szabo, are consistent with the Nevada Supreme Court's position in Andreen. The Nevada court felt that the party responsible for the taxes was, "* * * the person whose interest is * * * in contemplation of an ultimate ownership," 74 Nev. at 205, and the court went on to say that "* * * a contracting purchaser * * * may be considered the owner." Id., at 206. Clearly, the court intended that the party to be taxed would be the one who was liable for the purchase price and in possession of the property.

I have noted your reference to the District Court decision in *Nevada National Leasing Co., Inc. v. Department of Taxation*, Case No. 310493, entered September 27, 1977 in the Second Judicial District. Although that decision concerns capital leases if was rendered under provisions of Nevada sales and use tax law. For that reason it is irrelevant herein.

CONCLUSION

From the foregoing analysis it is clear that a lessee in possession of personal property will be held responsible for ad valorem taxes under [NRS 361.245](#) when the lease is intended for security. Whether a particular lease is in fact intended for security will depend on the facts of each case.

Generally, the test to be followed by the assessor in determining whether or not a lease is intended for security, can be summarized as follows:

1. The lessee must be bound to pay the purchase price of the property or be bound to pay a rental commensurate with the purchase price of the property;
2. The lessee must be in possession of the property; and
3. The return of the property must not be required or permitted by the instrument.

It is the opinion of this office that if the above conditions are satisfied by the terms of the “capital leases” to which you have referred, then the lessee is responsible for the personal property taxes under [NRS 361.245](#).

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Brooke A. Nielsen
Deputy Attorney General

OPINION NO. 80-23 Administrative Law; Agency Rehearings—Pursuant to its statutory authority to issue rules of procedure, the Nevada Tax Commission may adopt administrative regulations granting taxpayers the right to petition for rehearing of matters upon which the Commission has already rendered a decision.

Carson City, May 16, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, Capital Plaza, 1100 E. William Street, Carson City, Nevada 89710

DEAR MR. NICKSON:

You have requested that this office issue an opinion regarding the authority of the Nevada Tax Commission to grant a rehearing of a tax matter after an initial decision has once been rendered. An analysis of the relevant statutes and case law leads to the following conclusions regarding your inquiry.

QUESTION

Is the Nevada Tax Commission able to grant a rehearing for further consideration of a tax matter upon request or petition by the taxpayer?

ANALYSIS

An administrative body generally finds the limits of its authority delineated by the statutory framework establishing the powers and duties of the agency. Within the broad boundaries of

statutory responsibilities, however, the administrative body itself may be allowed discretion to formulate standards and practices necessary for efficient conduct of its business and discharge of its obligations. The statutory provisions applicable to the Nevada Tax Commission reveal a typical administrative structure in which the commission itself is delegated broad authority to formulate the procedural rules and regulations necessary for accomplishing its functions. As [NRS 360.090](#) provides:

The members of the Nevada tax commission shall have power to prescribe regulations for carrying on the business of the tax commission and of the department.

The authority of administrative agencies in general to prescribe their own procedural regulations is further indicated by the Nevada Administrative Procedures Act, [NRS chapter 233B](#). [NRS 233B.050](#), addressing procedural matters, in part specifies that:

1. In addition to other regulation-making requirements imposed by law, each agency shall:
 - (a) Adopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.

These statutory provisions indicate a legislative determination that Nevada administrative bodies, such as the Tax Commission, are granted discretion to formulate those procedural regulations necessary for conducting their business. However, the statutes are silent regarding whether that procedural discretion extends to the granting of a rehearing of an administrative matter upon request or petition once an initial decision has been rendered. Although no Nevada court decision directly addresses this question, reference may be made to the general principles underlying administrative law as determined by courts of other jurisdictions when faced with a similar issue.

The United States Supreme Court has consistently held that rehearings before federal administrative agencies are generally within their own discretion, in the absence of restrictive statutory provisions. *United States v. Pierce Auto Freight Lines Inc.*, 327 U.S. 515, 535 (1946). *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974); *Radio Corporation of America v. United States*, 341 U.S. 412 (1951). *McKart v. United States*, 395 U.S. 185, 195 (1969). The federal analysis rests on notions of administrative autonomy which mandate that an agency be allowed an opportunity to find and correct its own errors and the corresponding consideration that judicial economy will be served as well by allowing an agency to rehear a matter in dispute before an aggrieved party must resort to the courts.

State courts deciding the issue of an administrative agency's discretion to rehear a matter have looked to a number of factors and, depending upon various factual and statutory distinctions, have come to various conclusions. A few states have adopted the position that an administrative body possesses no power to rehear a matter once a decision has been rendered, and that only an express grant of statutory authority will enable such a rehearing to be granted.

Oliver v. Civil Service Commission of City of Chicago, 224 N.E.2d 674 (Ill. 1967); *Phelps v. Sallee*, 529 S.W.2d 361, 365 (La. 1975). Other states hold that if such a power is not expressly stated by statute, it may be reasonably implied from the statutes which establish the administrative body's functions and powers. *Wray v. Benton County Public Utility District*, 513

P.2d 99, 101 (Wash. 1973); *Levers v. Anderson*, 326 U.S. 219 (1946); 2 Am.Jur.2d Administrative Law § 523. One important consideration these jurisdictions have relied upon in finding such implied authority to rehear a matter is the expressed authority to develop and issue rules of procedure. *Atlantic Greyhound Corp. v. Public Service Commission*, 54 S.E.2d 175 (W.Va. 1949). Still other states adopt the rationale of the United States Supreme Court and hold as a matter of course that an administrative body, absent express statutory restrictions, possesses an inherent right to grant a rehearing of a matter that is still within its jurisdiction. *Skulski v. Nolan*, 343 A.2d 721, 729 (N.J. 1975); *Indursky v. Board of Trustees of the Public Employee Retirement System*, 349 A.2d 86, 91 (N.J. 1975); *In Re Fain*, 65 C.A.3d 376, 389; 135 Cal.Rptr. 543, 550 (1976); *In Re Muszalski*, 52 C.A.3d 500, 503; 125 Cal.Rptr. 286, 289 (1975). These jurisdictions consider such a power to be one of the requisite endowments of any quasi-judicial deliberative body unless such reconsideration is expressly limited by statute.

As the above-noted authority suggests, a uniform treatment of this issue is not evident among the jurisdictions in which it has been considered. However, the authority to grant a rehearing seems to be consistently implied in favor of administrative agencies which have been granted procedural discretion similar to that evident in the Nevada statutes. [NRS 233B.130](#) providing for the judicial review of final administrative decisions also by implication recognizes the right of administrative agencies to grant rehearings. Subsection 2 of the provision states:

2. Proceedings for review shall be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the act on which the proceeding is based occurred. Unless otherwise provided by specific statute, a petition shall be filed within 30 days after the service of the final decision of the agency or, *if a rehearing is held*, within 30 days after the decision thereon. Copies of the petition shall be served upon the agency and all other parties of record. (Italics added.)

The rationale of jurisdictions finding the power to reconsider decisions implied from similar statutes is persuasive and, absent some legislative restriction, the objects of administrative autonomy and judicial economy are well served by the authority of administrative agencies to grant rehearings according to regulations that they may reasonably adopt. However, any regulations so adopted should recognize that once an administrative decision is appealed to a higher administrative authority or judicial tribunal, the agency initially rendered the decision has lost jurisdiction of the matter and is no longer able to grant a rehearing or otherwise consider the matter unless it is remanded.

CONCLUSION

It is the opinion of this office that the Tax Commission has the power to rehear an administrative matter still within its jurisdiction. Pursuant to such authority the commission may adopt procedural regulations specifying the necessary criteria a petitioner-taxpayer must meet before a petition for rehearing will be considered.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Timothy Hay
Deputy Attorney General

OPINION NO. 80-24 Distributive School Fund; Emergency Financial Assistance—The fact that the Legislature did not amend the maximum tax levy figure in a provision of the emergency financial assistance statute at the time the Legislature amended another statute to reduce the maximum tax levy available to school districts does not invalidate the emergency financial assistance statute. So long as a school district has imposed the maximum tax levy authorized by law, it may, if otherwise qualified, receive emergency financial assistance. The maximum tax levy authorized by law is the lesser of the two tax levies determined either pursuant to the State Board of Examiners calculations or pursuant to the calculation of a revenue limitation for a particular school district.

Carson City, July 22, 1980

Mr. Howard W. Barrett, Director, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Barrett:

You have solicited an opinion from this office pertaining to the continued vitality of the statutory provision permitting school districts to receive emergency financial assistance from the State Distributive School Fund. You are particularly concerned with the effect recent legislative tax reforms may have on that statute.

QUESTION

May a school district receive emergency financial assistance from the State Distributive School Fund even though it has not levied the maximum tax rate required by [NRS 387.1245](#)?

ANALYSIS

[NRS 387.1245](#) provides the statutory authorization for the State to grant needful school districts emergency financial assistance from the State Distributive School Fund. One of the several conditions precedent to receiving such assistance, however, requires the applying school district to have levied in its county the maximum school district ad valorem tax of \$1.50 per \$100 of assessed property valuation.

A dilemma arises from the fact that the Legislature, without amending the emergency financial assistance statute, amended [NRS 387.195](#) to withdraw the authority of the school districts to in fact levy the maximum \$1.50 tax. In effect, the school districts are precluded from levying the \$1.50 amount, but apparently can satisfy a condition precedent to receive emergency financial assistance only by making this impossible levy.

A literal reading of the statutes would obviously forbid an award of emergency financial assistance to any school district because no school district could ever legally impose the condition precedent maximum tax levy. One statute holds out the possibility of assistance which another statute assures can never be obtained.

The resolution to this dilemma must be founded in legislative policy. Assuredly, the Legislature would never have permitted such statutory anomaly had the inconsistency come to its attention. Statutes should always be construed so as to avoid absurd results. *Cragun v. Nevada*

Pub. Employees' Ret. Bd., [92 Nev. 202](#), 547 P.2d 1356 (1976); *Welfare Div. v. Washoe Co. Welfare Dept.*, [88 Nev. 635](#), 503 P.2d 457 (1972). The fact that [NRS 387.1245](#) remained unamended while a new maximum permissible tax levy for school districts was established does not necessarily suggest that the Legislature intended to impliedly repeal the emergency financial assistance statute. Repeal by implication is disfavored and will be attributed only where there exists an irreconcilable repugnancy between two statutes. *City of Las Vegas v. Int'l Assoc. Firefighters*, [91 Nev. 806](#), 543 P.2d 1345 (1975). This opinion, therefore, is premised upon the apparent policy inherent within the legislative scheme.

[NRS 387.195](#), prior to its amendment, provided that boards of county commissioners mandatorily levy a 70-cent ad valorem tax to sustain the county school districts. It also provided that the commissioners were required to impose an additional 80-cent levy when such levy was recommended by the school district board of trustees. The maximum possible tax levy for school district purposes thus totaled \$1.50, a 70-cent, mandatory and an 80-cent optional levy.

This maximum possible levy corresponded to the condition precedent for receiving emergency financial assistance from the Distributive School Fund. The legislative policy was apparently to assure that a local school district exhaust its maximum local resources available before requesting state aid from funds accrued on a statewide basis. Therefore, to qualify in part for emergency financial assistance, a school district was required to impose the maximum tax levy against the local assessed valuation.

As a measure of tax reform to reduce property tax rates, however, the 1979 Nevada Legislature modified the tax levy available to school districts by withdrawing authorization to levy the 70-cent mandatory rate. The State replaced this lost revenue by concomitantly increasing other programs of support for the school districts. In addition, the State likewise replaced 30 cents of the 80-cent optional tax levy during the initial effective year of the tax reforms, and the Legislature created a sliding scale formula to adjust the contribution of the State to this optional levy during the second year of the legislative biennium.

Depending upon the percentage increase or decrease of specified revenues generated from the sales and use tax and the state gaming license fee, the State would contribute either a greater or lesser amount of the 80-cent optional levy. The portion of the optional levy available to the school districts would adjust accordingly, being reduced if the State contributed more and being increased if the State contributed less. Section 38, chapter 593, Statutes of Nevada 1979. Cf. [NRS 387.1233](#), subsection 1 (c). No circumstance, however, could permit a school district to levy an optional tax in excess of 80 cents.

[NRS 387.1245](#), subsection 1 expressly states the condition precedent for obtaining emergency financial assistance in these terms:

The tax levy for the applying district shall be the maximum of \$1.50 for operating costs as authorized by law * * * .

It is clear that the legislative policy was to assure that the applying school district levy the maximum tax "authorized by law." The reference to the \$1.50 amount is simply a recitation of the maximum figure provided in [NRS 387.195](#) prior to its amendment, and as such is mere surplusage. The salient language of the statute evidences the intent to require imposition of the maximum permissible tax levy.

The context of the statutes and the apparent legislative intent are here more significant than the recitation of an anomalous figure inadvertently retained in a statute. The fact that [NRS 387.1245](#) remained unamended can be attributed more to oversight than to deliberate exclusion. The intent of the Legislature, however, remains obvious and there exists no reasonable logic to exalt the form of the statute over its substance.

It is therefore the opinion of this office that [NRS 387.1245](#) continues to be a vital statute and may authorize emergency financial assistance to needful school districts which qualify for such aid. It is the further opinion of this office that as a condition precedent to obtaining such assistance, a school district need not impose a maximum \$1.50 tax levy, but rather need only impose the maximum optional levy “authorized by law.”

The more difficult analysis, however, concerns the particular determination of the maximum tax levy “authorized by law,” because in addition to providing a formula to adjust the optional ad valorem tax rate available to school districts, the Legislature as well placed a revenue limitation on school districts as to had also “capped” the expenditures of other local governments. [NRS 387.199](#).

The process of calculating a revenue cap for a particular school district also necessarily includes the determination of a maximum optional tax levy available to the school district because the tax rate is merely a mathematical function of the total assessed valuation and the budgeted revenue anticipated. That is, revenue is the product of a tax rate applied to the total assessed valuation. Limiting the collection of revenue, therefore, necessarily limits the available tax rate as well.

The Legislature has thus knowingly provided for the calculation of two disparate tax levy maximums. One is determined by the State Board of Examiners and the other is determined through the calculation of a revenue limitation for a particular school district. [NRS 387.195](#). While the maximum levy determined by the State Board of Examiners provides the absolute maximum levy permissible, the levy determined by the revenue cap nevertheless remains a maximum “authorized by law” irrespective that such levy may be significantly lower than the absolute permissible limit.

The resolution of this additional dilemma must as well be harmonious with legislative policy. Emergency financial assistance was designed to aid those needful school districts which have levied the maximum tax rate authorized by law so that the remainder of the state taxpayers are not supporting a school district which has not exhausted its maximum local resources.

In the context of this legislative policy and objective, it is an insubstantial distinction whether the ultimate maximum tax levy “authorized by law” is either the tax rate established by the State Board of Examiners or the tax rate established by the revenue limitation. If a local school district is constrained by the tax levy determined under the revenue cap, it matters not that the State Board of Examiners has established a greater permissible tax levy maximum. The school district is effectively precluded from ever levying that permissible maximum. In fact, the school district is statutorily required to levy the lesser rate. [NRS 387.195](#).

It is therefore the opinion of this office that the maximum levy “authorized by law” is the lesser of the two alternative maximums calculated. It is this lesser figure which constitutes the initial effective restriction. Consequently, it is the further opinion of this office that a school district is eligible for emergency financial assistance if it is exacting the lesser of the two alternative maximum tax levies “authorized by law.”

CONCLUSION

The emergency financial assistance statute remains viable to aid needful school districts with support from the State Distributive School Fund irrespective that the statute was not amended by the Legislature to reflect the reduced maximum tax levy now permitted school districts. An otherwise qualified school district may receive emergency financial assistance if it has imposed the lesser of the tax levy maximums calculated either pursuant to the State Board of Examiners formula or pursuant to the formula determining its revenue limitation.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Tudor Chirila
Chief Deputy Attorney General,
Tax Division

OPINION NO. 80-25 Local Government Finance; Short-Term Financing—A local government may not levy a special tax to retire short-term indebtedness prior to creating the indebtedness. If excess revenue is collected pursuant to the levy of special tax and a surplus results in the short-term indebtedness fund maintained to retire that debt, a local government may resolve to transfer the excess to its General Fund provided that all short-term indebtedness is retired. Alternatively, the local government may utilize the surplus for other short-term financing purposes after the Director of the Department of Taxation determines the original purpose of the fund has already been satisfied.

Carson City, August 3, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, 1100 E. William Street,
Carson City, Nevada 89701

Dear Mr. Nickson:

You have solicited a written opinion from this office memorializing a prior verbal opinion issued to you pertaining to the use of short-term financing by local governments. You have asked a series of questions which can be reduced to the following inquiries.

QUESTION ONE

May a local government levy a special tax to fund short-term financing prior to obtaining approval for such financing?

ANALYSIS

Initially, a general review of the short-term financing statutes may be appropriate to provide a proper perspective for this analysis. [NRS 354.430](#) to [354.460](#), inclusive, pertain to the short-term financing of local governments. [NRS 354.430](#), provides that any local government defined by [NRS 354.474](#) may adopt a short-term financing resolution pursuant to [NRS 354.618](#) and forward that resolution to the executive director of the Department of Taxation for approval.

After considering the tax structure of the political subdivision concerned and the probable ability to repay the proposed short-term indebtedness, the executive director is empowered to approve or disapprove the resolution, which is not effective until so approved, although a disapproval may be appealed to the Nevada Tax Commission.

[NRS 354.450](#) provides that after short-term financing has been authorized, the political subdivision must determine whether there is sufficient money in the General Fund or a surplus in any other fund except the bond interest and redemption fund to meet the purpose of the short-term indebtedness. If there is sufficient money available in other funds, a loan may be made from

those funds and applied to the short-term indebtedness. Loans made pursuant to this provision must be repaid by revenue collected from the levy of a special tax, if in the judgment of the executive director of the Department of Taxation repayment is warranted.

Authority to levy a special tax for the repayment of short-term indebtedness is provided by [NRS 354.460](#) which states that a special tax may be levied at the first tax levy following the creation of any short-term indebtedness. The answer to your inquiry must meld with this legislative design. From the above abbreviated review of the appropriate statutes, it is apparent that the consistent statutory scheme requires that short-term financing be authorized prior to the levy of a special tax to discharge the indebtedness.

CONCLUSION—QUESTION ONE

It is the opinion of this office that the short-term financing statutes permit a local government to levy a special tax to fund short-term financing only after it has in fact received approval to create such indebtedness. It is the further opinion of this office that a local government may not levy a special tax in anticipation of creating short-term indebtedness.

QUESTION TWO

May the revenues collected from a special tax levy be used for any purpose other than redeeming the approved short-term indebtedness for which the tax was levied?

ANALYSIS

Several of your questions related to the above general query and will be addressed in this analysis.

[NRS 354.460](#), subsection 1 provides:

At the first tax levy following the creation of any short-term indebtedness, the governing board of any political subdivision shall, when necessary, levy a tax sufficient to pay the same. * * * the proceeds of which shall be placed in a short-term debt service fund * * * to be used solely for the purpose of redeeming the short-term indebtedness for which the same is levied.

Although the statutory language indicates that the proceeds of the special tax levy are to be used solely to retire the short-term debt for which the tax was levied, that does not mean each tax dollar must be traced from its source to its actual expenditure. Indeed, it would be impossible to segregate a particular tax dollar for a particular purpose.

The statutory language merely means that an amount equal to the revenue received from the special tax levied is to be placed in a single short-term debt service fund from which all the short-term indebtedness is to be retired. The limiting language means that the money in that fund cannot be used to directly support some other governmental function, but must be used exclusively to retire the short-term indebtedness for which it was levied.

While the money cannot be directly used for other purposes, however, the Legislature has provided that any excess money in the fund may be transferred under certain conditions. [NRS 354.460](#), subsection 2 provides:

The treasurer of any county is authorized, upon receipt of a written resolution of the governing board of any political subdivision for

which a special tax fund is maintained, to transfer the money remaining in the short-term debt service fund of that political subdivision to the general fund of that political subdivision after payment in full of the indebtedness and interest thereon.

The provision indicates that while any short-term indebtedness exists, the money in the short-term indebtedness fund must only be used to retire that indebtedness. After all the indebtedness has been retired, any excess money in the fund may be transferred to the General Fund of the political subdivision upon resolution of the governing board.

The political subdivision, of course, may elect not to transfer the excess funds to the General Fund, but rather may retain the excess money in the short-term indebtedness fund. The relationship of this analysis to the analysis submitted for Question One is that although a local government may not deliberately levy a special tax prior to the creation of short-term indebtedness merely to build a surplus in the short-term indebtedness fund, a local government may retain a surplus in that fund if the surplus is a result of mere inadvertent collection of excess revenue for legitimate short-term indebtedness purposes. Once such a surplus accrues in the fund and no transfer to the General Fund is effected, disposition of the surplus may be properly controlled by the provisions of [NRS 354.450](#). If the political subdivision desires to apply these funds to future short-term financing needs, the Director of the Department of Taxation may determine, pursuant to [NRS 354.450](#), subsection 3, that the surplus funds will not be needed for their original purpose because the original debt has been retired, thus allowing the use of the funds without necessitating that a special tax be levied for their repayment.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the revenues collected from a special tax levied to retire short-term indebtedness must be used solely to retire short-term indebtedness. After all short-term indebtedness has been retired, a local government may, upon written resolution, transfer to the General Fund any excess revenue remaining in the short-term indebtedness fund. It is the further opinion of this office that a local government may utilize the excess revenue in the short-term indebtedness fund to retire subsequent short-term indebtedness after the Director of the Department of Taxation determines that the surplus will not be needed for its original purpose of retiring the original short-term debt which has already been retired.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Timothy Hay
Deputy Attorney General,
Tax Division

OPINION NO. 80-26 Demerit Points; Assessment of Demerit Points for Failure to Appear in Response to a Traffic Citation—Pursuant to [NRS 483.470](#) the Department of Motor Vehicles may assess demerit points only upon receipt of notice of conviction for a traffic violation. A failure to appear on a written promise does not constitute a conviction; therefore, demerit points may not be assessed.

Carson City, July 31, 1980

Mr. Barton Jacka, Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Jacka:

You have solicited an opinion from this office pertaining to whether the Department of Motor Vehicles may treat a failure to appear on a written promise to appear on a traffic citation as a conviction for the purpose of assessing demerit points.

This opinion reaffirms a letter opinion issued by this office June 14, 1977.

ANALYSIS

Pursuant to [NRS 483.470](#) the Department of Motor Vehicles (hereinafter Department) is vested with the authority to assess demerit points for traffic violations and suspend drivers' licenses. 483.470, subsection 3 states:

The Department shall establish a uniform system of demerit points for various *traffic violations* occurring within the State of Nevada effecting any holder of a driver's license issued by the Department. (Italics added.)

The statutory language of subparagraph 3 clearly limits the Department's authority to assess demerit points only in situations where there has been a traffic violation. [NRS 483.470](#), subsection 2 defines "traffic violations" as follows:

As used in this section, "traffic violations" *means conviction on a charge involving a moving traffic violation* in any municipal court, justice's court or district court in the State of Nevada, and including a finding by a juvenile court pursuant to [NRS 62.083](#) that a child has violated a traffic law or ordinance other than one governing standing or parking. (Italics added.)

When subparagraphs 2 and 3 are read together, it is clear that the Department may assess demerit points only when it is in receipt of notice that a driver has been convicted of moving traffic violation. [NRS 483.450](#) defines conviction as follows:

For the purpose of [NRS 483.010](#) to [483.630](#), inclusive, the term "conviction" means a final conviction, and includes a finding by a juvenile court pursuant to [NRS 62.083](#). Also, for the purpose of NRS 483.010 to 483.630, inclusive, a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, is equivalent to conviction.

Based on the above language, you have questioned whether the Department has authority to assess demerit points for those citations wherein the defendant violates a written promise to appear in court. A promise to appear is viewed by the Department as the equivalent of posting a bail. Therefore, the result of a person not appearing in court, under this interpretation, would constitute a conviction, whether it involves bail forfeiture or a failure to appear on a written promise.

[NRS 483.470](#), subsection 8 requires that where any licensee has accumulated twelve or more demerit points, the Department shall suspend his license until the total demerits have dropped below twelve in number in the next preceding twelve months. Thus, when a licensee has accumulated enough demerits that another conviction would result in the accumulation of twelve or more points, he may avoid suspension by failing to appear on the written promise. Therefore, by not assessing demerits for a failure to appear, it allows and encourages errant drivers to circumvent the statutory purpose of [483.470](#).

In spite of such results, the statutory language of [NRS 483.450](#) and [483.470](#) is clear and leaves little room for interpretation. In construing a statute the legislative intent is the primary object to ascertain, but in so doing there are rules of interpretation which must be followed. Ex parte Pittman, [31 Nev. 43](#), 99 Pac. 700 (1909). The first step is to ascertain the intent from the language of the statute, and when it is clear and unambiguous the inquiry stops. *Seaborn v. District Court*, [55 Nev. 206](#), 29 Pac. 2d 500 (1934); Ex parte Smith, [33 Nev. 466](#), 111 Pac. 930 (1910).

The Legislature has seen fit to use the term “conviction” for the purpose of [NRS 483.470](#) in relationship to the term “traffic violation.” Nowhere in the statute is there an indication that a failure to appear may constitute a conviction.

Expressio Unius Est Exclusio Alterius is a maxim of statutory interpretation that when the Legislature enumerates certain instances in which an act or thing may be done, it names all that is contemplated. Ex parte Arascada, [44 Nev. 30](#), 189 Pac. 619 (1920). The Legislature has not included the aspect of a failure to appear in its definition of conviction; therefore, it did not intend to treat a failure to appear as a conviction. This interpretation is in harmony with the facts that the Legislature has twice, in 1975 and again in 1977, been made aware of the problem but as refused to pass corrective legislation.

I am advised that the Department is frustrated with the statutory loophole left for persons who fail to appear on a written promise. However, the Department may not, by administrative fiat, do that which the Legislature has refused to do.

CONCLUSION

It is the duty of the Department to enforce the law as written, not as it would have it. *Underwood v. Howland*, 162 S.E.2d 124 (N.C. 1968). The statutory language is clear that a licensee’s failure to appear on a written promise does not constitute a conviction within the meaning of [NRS 483.470](#) and [483.450](#). Therefore, demerit points may not be assessed on this basis.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Joe E. Colvin
Deputy Attorney General

OPINION NO. 80-27 Workers’ Compensation; Self-insurers’ and the State Treasury—
Funds used to pay workers’ compensation benefits by a self-insured employer who complies with Chapter 533, Statutes of Nevada 1979, need not be held in a trust account in

the Nevada State Treasury pursuant to Article 9, section 2 of the Nevada Constitution. The Commissioner of Insurance is entrusted with the responsibility of overseeing and enforcing the self-insurance program.

Carson City, August 6, 1980

Mr. Claude S. Evans, Chairman, The Advisory Board of Review for the Nevada Industrial Commission, P. O. Box 2115, Carson City, Nevada 89701

Dear Mr. Evans:

You have requested the opinion of this office concerning Chapter 533, Statutes of Nevada 1979 p. 1035 (A.B. 84).

FACTS

The State of Nevada Worker's Compensation Laws are compiled in Chapters 616 and 617 of the NRS entitled the Nevada Industrial Insurance Act (N.I.I.A.). This act provides a plan to compensate workers injured in the course of their employment. [NRS 616.270](#), subsection 1. The purpose of the N.I.I.A. is to terminate private suits between employers and employees and to compensate workers regardless of negligence. *Quicksilver Company v. Thiers*, [62 Nev. 383](#), 389 (1944); *NIC v. Peck*, [69 Nev. 15](#), 239 P.2d 244 (1952). The N.I.I.A. provides for a state insurance fund which is composed exclusively of contributions from the employers of this State. Where an employer contributes to and is subject to the N.I.I.A., either through compulsion or election, the act relieves the complying employer from common law liability. [NRS 616.270](#), [617.370](#); 2A Larson, *Workmen's Compensation Law* § 65.10. Where the act is not applicable, because either the injury or the employment is not within its coverage, the act does not interfere with any existing remedy. 81 Am.Jur.2d, *Workmen's Compensation* § 53. See Larson, supra. Prior to the legislative passage of the act, employers could protect themselves against common law liability through a private worker's compensation insurance policy; but if they did not secure adequate private protection in this manner, they were subject to common law suits and could be held liable for damages assessed against them. *McAfee v. Garrett Freightlines, Inc.*, 95 Nev. Advance Opinion 131 (June 28, 1979), p. 3, 596 P.2d 851.

In the 1979 Nevada Legislature, Assembly Bill No. 84 was passed and became law on May 26, 1979. Chapter 533, Statutes of Nevada 1979, p. 1035. Among other changes this bill adds language to Chapters 616 and 617 of the Nevada Revised Statutes to permit employers to self-insure for liability against industrial accidents and occupational diseases. Section 3, subsection 1 of this chapter states that employers who are certified as self-insured employers shall directly assume the responsibility for providing compensation due their employees under [NRS Chapters 616](#) and 617. To become eligible for self-insurance, an employer must present sufficient administrative and financial resources to the commissioner of insurance in order to qualify. Section 4, subsection 1, Chapter 533, Statutes of Nevada 1979, p. 1035. Section 3, subsection 2 of the chapter states that self-insured employers, although not required to pay a premium required of other employers pursuant to Chapters 616 and 617 of NRS, are still "relieved from other liability for personal injury to the same extent as are other employers." The statute does not dictate in what manner the employers must hold the funds that will be used to pay for workers' compensation benefits.

Article 9, section 2 of the State of Nevada Constitution provides as follows:

[Sec. 2] * * * Any moneys paid for the purpose of providing compensation for industrial accidents and occupational diseases, and for administrative expenses incidental thereto, * * *, shall be segregated in proper accounts in the state treasury, and such moneys shall never be used for any other purposes, and they are hereby declared to be trust funds for the uses and purposes herein specified. (1953 Statutes of Nevada 729; Senate Joint Resolution 11, No. 25; 1955 Statutes of Nevada 927).

QUESTION

Must funds used to pay workers' compensation benefits by a self-insured employer who complies with Chapter 533, Statutes of Nevada 1979, be held in a trust account in the state treasury pursuant to Article 9, Section 2 of the Nevada Constitution?

ANALYSIS

All the states of the United States have some form of workers' compensation laws. The State of Nevada's system of workers' compensation prior to the passage of Chapter 533 was a state monopoly. However, there are two other recognized methods for the payment of claims for workers' compensation in addition to state insurance: private insurance and self-insurance. At present, six states require insurance in an exclusive state fund.¹ However, four of these states now recognize self-insurance as an alternative.² Twelve states have a competitive state fund in which all three methods are permitted. Private insurance is permitted in all but the exclusive state fund states. 4 Larson, *The Law of Workmen's Compensation*, § 92.10.

The Nevada workers' compensation laws were enacted in 1913. Initially, the State Treasurer was made custodian of the State Insurance Fund by statute. Section 24, Chapter 111, Statutes of Nevada 1913, p. 146. It provided as follows:

Sec. 24. All premiums provided for in this act shall be paid to the state treasurer, and shall constitute the state insurance fund for the benefit of employees of employers and for the benefit of dependents of such employees, and shall be disbursed as hereinafter provided.

Subsequently, in the case of *State v. McMillan*, [36 Nev. 383](#) (1913), the Nevada Supreme Court held that although the State Treasurer was the custodian, the State Insurance Fund was not a part of the state treasury.

The court explained its conclusion as follows:

These premiums (N.I.I.A.) are not paid for the purposes for which taxes and revenues are usually paid into the state treasury, and could not be used or made available for the payment of warrants for the ordinary expenses of the state government which are payable out of the state treasury. The State Insurance Fund being derived only from the payment of premiums by employers who do not object to coming under the terms of the compensation act, and being provided for the special and humane purpose of compensating employees who are maimed or injured, and the widows and orphans of those who are killed, may be distinguished from the state treasury, which is provided for the payment of the general expenses of the state government, and which is supplied

¹ Nevada, North Dakota, Ohio, Washington, West Virginia and Wyoming.

² Nevada, Ohio, Washington and West Virginia.

under compulsory laws and provisions of the constitution requiring a uniform system of taxation. *Id.* at 388-389.

The Nevada Supreme Court viewed the State Insurance Fund as a special fund placed in the State Treasurer's hands only for safekeeping. *Id.* at 387. Thus, the fund was to be held in trust to insure its proper administration for the benefit of injured employees and their dependents.

Other jurisdictions who have dealt with the topic have reiterated the Nevada Supreme Court's opinion on this subject. In *State of Idaho v. Musgrave*, 84 Idaho 77; 370 P.2d 778, 782 (1962), the Idaho Supreme Court quoted the McMillan case among others and held that "the money in the fund does not belong to the state and is not in the state treasury * * * It is deposited with the state 'treasurer' as 'custodian' and is held by him as such for the contributing employers and the beneficiaries of the compensation law, and for the payment of the costs of the operation of the fund." Moreover, it was held that a claim against the state should not be considered to be a claim against the state insurance fund. *Id.*, 82 Am.Jur.2d, *Workmen's Compensation*, § 661.

In addressing this question of whether the state insurance fund was part of the state treasury, the Utah Supreme court held that: "the (state insurance) fund is publicly administered, but its debtors are not debtors to the state. It belongs, not to the state, but to the contributing employers for their mutual benefit." *Chez v. Industrial Commission*, 62 P.2d 549, 551 (1936), 108 ARL 365. In the most recent case dealing with that concept, the Oklahoma Supreme Court held unconstitutional a provision authorizing the Legislature to take and then appropriate for other than workers' compensation purposes, the surplus funds of the state insurance fund. The court held:

It is our conclusion the funds of the state insurance fund are not State funds and do not belong to the State, that such funds are trust funds for the benefit of employers and employees, and are not available for the general or other purposes of the state * * *. *Moran v. State*, 534 P.2d 1282, 1288 (Okla. 1975).

Similarly, in *Senshe v. Fairmont and Waseca Canning Co.*, 45 N.W.2d 640, 646 (1951), the Minnesota Supreme Court held that the state treasurer had not discretionary power over disbursements of the workers' compensation funds, since they were supported solely from employers' contributions to defray an industrial burden for which they were collectively responsible. This court promoted the trust concept of workers' compensation benefits by stating that the enforcement of this fund was for the public welfare and the state was in effect acting as public trustee through the Industrial Commission to establish, collect and administer the fund for the protection of workers and society as a whole from the burdens of disability. *Id.* at 64.

In this vein, the Washington Supreme Court also emphasized the trust aspect of workers' compensation funds by stating that the purpose of any workers' compensation act is to provide funds to pay for workers' industrial injuries and these funds are thereby "trust funds devoted to the special purposes designated by the act." *Mason-Walsh-Athinson-Kier Co. v. Dept. of Labor-Industries*, 105 P.2d 832 (1940), quoted from *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 25 P.2d 569, (1933); 28 P.2d 1119 (1934).

The overall conclusion to be drawn from this line of cases is that workers' compensation funds belong to the employers who participate and their employees, and not to the state itself. However, the state may oversee the trust aspects of the workers' compensation act requiring employers to comply in order to insure that benefits will accrue to the workers and their beneficiaries.

The 1955 amendment to Article 9, section 2 of the Nevada Constitution established a constitutional trust fund in the state treasury for "any moneys paid for the purpose of providing

compensation for industrial accidents and occupational diseases, and for administrative expenses incidental thereto.”

By enacting this constitutional trust, the voters of Nevada insured that the NIC moneys would not be subject to diversion for any other purpose except by subsequent vote of the people. By stating that NIC moneys are to be “segregated in proper accounts in the state treasury,” the Legislature intended that the moneys were to be considered a part of the state treasury although restricted as to a particular use or purpose. Under the legislative scheme, the State Treasurer is not empowered to disburse NIC moneys without the commissioner’s authorization. [NRS 616.435](#). However, the State Treasurer is liable for the faithful performance of his duty as custodian of the State Insurance Fund. [NRS 616.435](#).

At the time the 1955 constitutional amendment was enacted, the Nevada Industrial Commission was composed of three members who administered a state monopoly in which employers, who were not grandfathered in by the provisions of [NRS 616.255](#), subsection 2, paid premiums to the Nevada Industrial Commission (NIC) rather than directly to the State Treasurer. Although the above language of the amendment is vague, it is reasonable to assume that the drafters intended only to refer to NIC premiums in the phrase “any moneys paid * * *.” The meager legislative history available regarding the above amendment is encapsulated in one explanatory sentence in a publication issued by the State Printing Office referring to the amendment and which reads as follows:

This amendment would prevent any moneys *collected by the Nevada Industrial Commission* from being used in any other manner or for any other purpose than those specified. (Italics supplied.) (Proposition to be voted upon in State of Nevada at General Election, November 6, 1956) at p. 12. State Printing Office, 1956.

Although but a glimpse of legislative intent in the matter, this statement does point to the Legislature’s focus on NIC funds only in the context of the constitutional amendment submitted to the voters in 1956. Since no form of self-insurance was available in Nevada 1955, the Legislature had not occasion to be concerned about such matters. In addition, there is no history of an attempt on the part of the Legislature to require the seven self-insured employers who were grandfathered in under [NRS 616.255](#), subsection 2 to deposit their premiums in the state treasury. Said self-insured employers have never to this date kept their workers’ compensation insurance funds in the state treasury.

Since the State of Nevada maintained only one system of workers’ compensation insurance before the constitutional amendment to Article 9, section 2, it is logical to conclude that the language of Article 9, Section 2 was not meant to be all inclusive. In this light, the provisions of Chapter 533, Statutes of Nevada 1979, allowing self-insured employers to provide and maintain their own funds for workers’ compensation do not appear to be in conflict with the above constitutional provisions. The funds, whether the State Insurance Fund, whose premiums are contributed by employers, or the self-insured employers’ funds, are separate from the state general revenue funds. Therefore, the enactment of a self-insurer’s option under Chapter 533, Statutes of Nevada 1979, would not be precluded by the Nevada Constitution.

However, since the constitutional provision in question expressly states that the funds are to be used for trust purposes and no other, the Legislature appeared to be supremely concerned with the proper use of funds obtained for the purpose of providing workers’ compensation benefits. In addition, the Legislature has held that the employees of this State and their beneficiaries are entitled to financial benefits if they fall victim to industrial accidents or diseases. Chapters 616 and 617 of NRS. These legislative provisions and the long line of cases quoted above, holding

that workers' compensation funds are held in trust, point to the necessity of strict state supervision of the self-insurance program.

Since the self-insured employers are governed by the provisions of the NRS, Chapters 616 and 617, the State bears the responsibility of overseeing such a program. The burden rests specifically on the State Insurance Commissioner to insure compliance with the statutes. The Legislature has granted the Commissioner of Insurance broad authority over self-insurers to protect the individual worker. Some examples include the following: (1) requiring the employer to present satisfactory evidence of adequate financial and administrative resources to make payment of compensation; (2) requiring the employer to deposit security in the amount of at least 105 percent of the employer's expected annual incurred cost of claims and no less than \$100,000; and (3) allowing or requiring the employer to submit evidence of excess insurance or reinsurance to provide against catastrophic losses. [NRS 616.291](#). However, [NRS 616.272](#), subsection 4 provides that the security deposited with the commission pursuant to [NRS 616.291](#) does not relieve that employer from responsibility for the administration of claims and payment of compensation under this chapter. In cases of insolvency, bankruptcy, or failure to pay compensation, these deposits or securities may be used. [NRS 616.292](#). If these securities should prove inadequate, the commissioner may assess all self-insurers to provide for claims against any self-insurer who becomes insolvent. [NRS 616.292](#).

Although each self-insured employer is required to furnish to the Commissioner of Insurance an annual audited financial statement, the commissioner may examine the records and interview the employees of any self-insured employer, as often as he deems advisable, to determine:

1. The adequacy of the deposit with the Insurance Commissioner;
2. The sufficiency of reserves used to pay for benefits; and
3. The reporting, handling and processing of injuries or claims. [NRS 616.338](#).

At the very least, the Commissioner must examine these records once every three years. [NRS 616.338](#). He may also issue regulations to impose additional requirements from these employers if he deems it necessary. The Commissioner is thus entrusted with the duty of keeping watch over the self-insured employers to insure the protection of the workers of this State.

The duties of the Insurance Commissioner in overseeing the self-insured program are especially important, in view of the fact that the legislation authorizing the program does not expressly establish that self-insurers maintain trust funds from which benefits can be paid to insured workers. In addition to the legal requirements of having a trustee and beneficiary, in order to establish a valid trust there must exist a segregated trust property or "res." *Scott on Trusts*, § 74, P. 676. If the property is not so segregated or earmarked as trust property, then no trust attaches, 1 *Scott on Trusts*, § 87.1, P. 731. However, a self-insurer may, in relation to injured employees, have similar fiduciary responsibilities to those of the trustees of the State Insurance Fund in being required to act with honesty and candor.

Until the Legislature should see fit to impose a statutory trust on funds earmarked for workers' compensation benefits by self-insurers, the Commissioner of Insurance is charged with the responsibility of enforcing the statutory and regulatory requirements in order to protect employees. For example, the Commissioner does have the power to require that self-insured employers maintain adequate reserves to cover their liabilities. [NRS 616.338](#), subsection 2. In addition, the Commissioner may impose fines and withdraw the certificate of self-insurance from an employer if he intentionally or repeatedly violates certain requirements of the act. If the self-insurers do not comply with the act, they also open themselves to the possibility of court action by the beneficiaries themselves. [NRS 616.270](#), [NRS 616.296](#); *McAfee v. Garrett Freightlines*, 596 P.2d, 851 (1979).

CONCLUSION

Funds used to pay workers' compensation benefits by a self-insured employer who complies with Chapter 533, Statutes of Nevada 1979, need not be held in a constitutional trust account in the state treasury pursuant to Article 9, section 2 of the Nevada Constitution. The Commissioner of Insurance is entrusted with the responsibility of overseeing and enforcing the self-insurance program.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Pamela M. Bugge
Deputy Attorney General

OPINION NO. 80-28 Community Antenna Systems—[NRS 704.800](#) does not apply to tampering with the equipment used in CATV operations or to the unauthorized reception of a CATV signal. Any prosecutions for such offenses must be commended under [NRS 205.470](#).

Carson City, August 21, 1980

David B. Small, Esq., Carson City District Attorney, 208 N. Carson Street, Carson City, Nevada 89701

Dear Mr. Small:

You have requested the opinion of this office as to whether [NRS 704.800](#) is applicable to Community Antenna Television (CATV) facilities or if the existence of [NRS 205.470](#) precludes the application of the former section to cable television. A review of the pertinent statutes and other applicable authority has led to the following analysis and conclusion:

ANALYSIS

[NRS 704.800](#) provides:

1. Every person who willfully, and with intent to injure or defraud:

(a) Opens, breaks into, taps or connects with any pipe, flume, ditch, conduit, reservoir, wire, meter or other apparatus belonging to or used by any water, gas, irrigation, electric or power company or corporation, or belonging to or used by any other person, persons or association, or by the state, or by any county, city, district or municipality, and takes and removes therefrom or allows to flow or be taken or be removed therefrom any water, gas, electricity or power belonging to another; or

(b) Connects a pipe, tube, flume, conduit, wire or other instrument or appliance with any pipe, conduit, tube, flume, wire, line, pole, lamp, meter or other apparatus belonging to or used by any water, irrigation, gas, electric or power company or corporation, or belonging to or used by any other person, persons or association, in such manner as to take therefrom water, gas, electricity or power for any purpose or use, without passing through the meter or instrument or other means provided for

registering the quantity consumed or used, is guilty of a public offense, as prescribed in [NRS 193.155](#), proportionate to the value of the property removed, altered or damaged and in no event less than a misdemeanor; and such person is also liable to the person, persons, association or corporation, or the owner or user whose property is injured, in a sum equal to treble the amount of actual damages sustained thereby.

2. In any prosecution under subsection 1, proof that any of the acts therein forbidden were done on or about the premises occupied by the defendant charged with the commission of such an offense, or that he received the use or benefit of such water, gas, electricity or power by reason of the commission of any such acts, is prima facie evidence of the guilt of such defendant.

This provision was originally enacted by the Legislature in 1911. The section has been amended several times, the most recent changes being made by the 1979 Legislature. Nowhere are cable television, community antenna, coaxial cable or broadcasting of any type mentioned. [NRS 205.470](#) provides:

Any person who without authority leads or attempts to lead from its uses or make use of the electrical signal or any portion thereof from any posts, wires, towers or other materials or fixtures employed in the construction or use of any line of a television coaxial cable, a microwave radio system, or a community antenna television system is guilty of a misdemeanor.

The statute establishes a specific offense for the unauthorized tampering with any CATV system. Such offense is punishable as a misdemeanor.

[NRS 205.470](#) was added to NRS by the 1963 Legislature. The section has been amended three times, most recently in 1979. These amendments and changes did not change the specific nature of the section; in fact, the 1979 amendments tightened and condensed the language of the section making it even more apparent that the Legislature intended the unauthorized tampering with CATV systems to be covered by this separate, specific section.

The Nevada Supreme Court has recently affirmed the position that it took in *W. R. Co. v. City of Reno*, [63 Nev. 330](#), 1972 P.2d 155 (1946). The court held that it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally. *Sierra Life Ins. v. Rottman*, 95 Nev. Advance Opinion 179 (1979).

[NRS 704.800](#) specifically prohibits the unlawful taking of water, gas, electricity or power but does not mention CATV in any way. A CATV system is a facility which receives television and FM radio signals off-the-air by means of antenna (or microwave receivers), converts and modifies the signals, and distributes them by the use of coaxial cable to the premises of its customers. 26 F.C.C. 403, 408 (1969). A CATV facility is composed of three basic and separate parts: the reception, headend, and distribution system. Historically, CATV companies have strung coaxial cable from their headend site down the mountainside to the locality being served. The cable is connected to existing telephone or electric utility poles. New distribution systems have recently been developed which make it possible to transport 12 or more high quality TV signals simultaneously over distances of several miles without the use of coaxial cable. 2 Pac.L.J. 528, 530 (1971).

To include CATV within [NRS 704.800](#) would be a stretch of the very specific and plain language of the section. The definition and explanation of CATV operations, noted above, do not lead to the conclusion that CATV signals are water, gas, electricity or power. The California Supreme Court has specifically upheld a ruling

of the California Public Utilities Commission that a CATV company was not an electrical corporation because “there is nothing in the record to show that its community antenna system is used in connection with or to facilitate the production, transmission, delivery, or furnishing of electricity for light, heat, or power.” *Television Transmission, Inc. v. California Public Utilities Commission*, 47 C.2d 82, 301 P.2d 862 (1956).

A CATV signal does not enable a television set to operate. The signal only allows the set to receive channels it would not be able to receive or receive as clearly. Although there are many definitions of power in the dictionary none seems to make CATV signals power under the terms of [NRS 704.800](#). There is little authority on the legal meaning of the term power. The Nevada Supreme Court has never considered the definition as an issue. If the term is given its common meaning it does not appear that CATV can fall under [NRS 704.800](#).

The Nevada Supreme Court has consistently held that if the law is plain and unambiguous there is no room for construction or interpretation. *Brown v. Davis*, [1 Nev. 409](#), 413 (1865). As recently as 1976 the Nevada court has reaffirmed this view holding that where the language is clear “courts are not permitted to search for its meaning beyond the statute itself. In re Walters’ Estate, [60 Nev. 172](#) (1940).” *Peot v. Peot*, [92 Nev. 388](#) (1976). Following these rules of statutory construction, the definition of “power” in [NRS 704.800](#) should not be expanded to include CATV.

Furthermore, the penal nature of [NRS 704.800](#) must be considered. Nevada case law is quite specific and very consistent in reference to the construction of penal statutes. “Penal laws generally prescribe what shall or shall not be done, and then declare consequences of violation of either requirement.” Ex parte Deidesheimer, [14 Nev. 311](#) (1879).

[NRS 704.800](#) is a penal law because it sets forth what shall not be done and declares the consequences of any violation. [NRS 704.800](#) states that any person who breaks into, taps, connects with any pipe, flume, conduit, wire or other instrument belonging to or used by any water, irrigation, gas, electric or power company or belonging to or used by any other person is guilty of a public offense as set forth by [NRS 193.155](#). [NRS 193.155](#) provides sanctions for such offense.

To bring a case within a penal statute the case should not only be within the wrong which the Legislature intended to remedy, but also within the plain intelligible words of the statute. Implications are not to be resorted to in order to find that a crime has been committed. Ex parte Deidesheimer, supra, cited, *Adler v. Sheriff of Clark County*, [92 Nev. 436](#) (1976).

The United States Supreme Court held in *Connally v. General Construction Co.*, 269 U.S. 385 (1926), that where a statute carries sanctions for disobedience its terms must be sufficiently explicit to inform those who are subject to it what conduct will render them liable to penalties. The Nevada Supreme Court has cited the above holding with approval in In re Laiolo, [83 Nev. 186 at 188](#) (1967).

In Laiolo the Nevada Court also held that “where the governmental intention is in doubt, the ordinance must be strictly construed and the doubt resolved in favor of the party charged with violation,” citing *Smith v. District Court*, [75 Nev. 526](#) (1959), Ex parte Todd, [46 Nev. 214](#) (1922), Ex parte Smith, [33 Nev. 466](#) (1910). In re Laiolo, supra, at 188.

As has been previously outlined, [NRS 704.800](#) does not specifically mention cable television, community antenna, CATV, coaxial cables, or broadcasting in any form. There is no evidence of any legislative intent to include tampering with CATV systems. The existence of [NRS 205.470](#) and its very specific language regarding CATV systems seems to indicate the Legislature’s express intent to treat tampering with CATV separately from [NRS 704.800](#).

CATV is not the only public utility for which the Legislature has provided a specific criminal statute. [NRS 205.480](#) et seq. establish specific offenses for the unlawful use of telephone and telegraph service. Telephone and telegraph systems are also not enumerated by [NRS 704.800](#). It

appears that in the area of tampering and unauthorized use the Legislature felt that communications systems should be treated separately from the other traditional public utilities.

CONCLUSION

It is the conclusion of this office based upon the foregoing authorities that [NRS 704.800](#) does not apply to tampering with the equipment used in CATV operations or to the unauthorized reception of a CATV signal.

The provisions of [NRS 205.470](#) apply specifically to the unauthorized use of television and radio signals and equipment. Any prosecutions for such offenses must be commenced under [NRS 205.470](#).

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Hampton M. Young, Jr.
Deputy Attorney General

OPINION NO. 80-29 School Districts and Zoning Regulations—As a condition to the issuance of a special use permit, county commissioners, under [NRS 278.250](#) and [278.580](#), subsection 5 may require school districts to construct and maintain traffic control signs and devices nearby proposed schools. [NRS 393.155](#) which gives discretionary authority to school districts to expend money for such purposes does not preempt the county's authority in this matter.

Carson City, August 21, 1980

Robert L. Petroni, Chief Legal Counsel, Clark County School District, 2832 E. Flamingo Road,
Las Vegas, Nevada 89121

Dear Mr. Petroni:

You have requested advice concerning the authority of a board of county commissioners to impose zoning requirements on a school district with respect to the construction of traffic control signs and devices.

FACTS

You have recently pointed out that [NRS 393.155](#) gives *discretionary* authority to the Clark County School District to spend money for the construction and maintenance of traffic control signs and devices in and around intersections which are located near schools. However, you have also pointed out that the Clark County Board of Commissioners has recently adopted a resolution which *requires* the Clark County School District Board of Trustees to spend moneys for the

construction and maintenance of such traffic control signs and devices as a mandatory condition for the issuance of special use permits for the construction of schools.

You have stated that the school district is of the opinion that the county commissioners may not impose this new policy in light of the merely optional authority conferred by [NRS 393.155](#) upon school districts. In particular, you have stated that it “appears” that the Legislature has preempted the authority of the board of county commissioners to adopt its resolution. Accordingly, you have requested an opinion from this office concerning this matter.

ANALYSIS

It is true that [NRS 393.155](#) does grant discretionary authority to a school district to construct traffic signs and devices near schools. However, this statute does not necessarily prohibit a local government from enacting lawful ordinances requiring school districts to construct such devices. The most that [NRS 393.155](#) appears to do is to grant the authority to a school district to construct such traffic devices in the absence of another local governmental entity undertaking this responsibility. However, provided another local government entity has the lawful authority to require a school district to construct such devices, [NRS 393.155](#) does not necessarily prohibit or preempt that authority. The language of the statute is not such as would totally exclude, and therefore preempt, local regulation. *Cf. Lamb v. Mirin*, [90 Nev. 329](#), 332, 526 P.2d 80 (1974).

A county possesses only such powers as are specifically provided by law. *Schweiss v. First Judicial District Court*, [23 Nev. 226](#), 230, 45 P. 289 (1896). A board of county commissioners is regarded as an inferior tribunal of special and limited jurisdiction and can perform only those acts expressly granted by statute. *Caton v. Frank*, [56 Nev. 56](#), 69-70, 44 P.2d 521 (1935); *Arlington Heights v. County of Cook*, 273 N.E.2d 706, 708 (Ill. 1971).

In this instance, Clark County’s resolution requiring school districts to construct and maintain traffic control devices before granting special use permits is an incident of the county’s lawful authority to enact legislation pertaining to zoning. The authority of a county to enact zoning regulations depends upon a grant of power from the Legislature. *Golden v. Planning Board of Ramapo*, 30 N.Y.2d 350, 334, N.Y.S.2d 138, 145 (1972). Such a legislative delegation of authority has taken place. Thus, [NRS 278.250](#) grants counties the authority to enact zoning ordinances. In turn, this statute in part provides that the zoning regulations shall be designed:

(f) To develop a timely, orderly and efficient arrangement of transportation and public facilities and services.

* * *

(i) To promote health and general welfare.

In addition, [NRS 278.580](#), subsection 5 provides as follows:

Notwithstanding any other provision of law, the state and its political subdivisions *must comply with all zoning regulations adopted pursuant to this chapter*, except for the expansion of any activity existing on April 23, 1971. (Italics added.)

The resolution of the Clark County Commissioners concerning the requirement that the school district construct such traffic devices in order to obtain a special use permit relates to § 29.66.020 of the Clark County Code, which contains the requirement for special use permits for the construction of schools in Clark County. Therefore, it is the opinion of this office that the enactment of the aforesaid resolution was in accordance with the lawful authority of Clark County with respect to its powers to enact ordinances pertaining to zoning regulations.

CONCLUSION

Accordingly, it is the opinion of this office that, pursuant to [NRS 278.580](#), subsection 5, the Clark County School District is required to comply with the resolution of the Clark County Commissioners requiring the school district to construct and maintain traffic control devices located near proposed schools as a condition of the issuance of special use permits. Furthermore, in our opinion, [NRS 393.155](#) does not conflict with this authority nor establish a legislative preemption in favor of the school district with respect to this matter.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-30 Taxation; Appraiser Certificate; County Assessor—A duly elected county assessor need not hold an appraiser certificate to be eligible for his office, but any deputy assessor assigned the responsibility for property appraisal must hold such a certificate. If a county assessor office consists solely of the elected county assessor, he must either hold a valid appraiser certificate if he intends to undertake the property appraisal function, contract with qualified private appraisers or employ qualified deputy assessors to properly appraise property in compliance with law.

Carson City, August 29, 1980

Roy E. Nickson, Executive Director, Department of Taxation, Carson City, Nevada 89710

Dear Mr. Nickson:

You have requested our response to the following question:

Must a duly elected county assessor hold a valid appraiser's certificate issued by the department in order to perform any duties as an appraiser and can he delegate the duty to appraise to an employee who does not hold such certificate?

ANALYSIS

Pursuant to [NRS 361.260](#), it is the duty of the county assessor to appraise and value all real and personal property subject to taxation in his county.

[NRS 361.221](#), subsection 1 requires, with minor exception, that:

* * * a person shall not perform the duties of an appraiser for property tax purposes as an employee of or an independent contractor for the state or any of its political subdivisions unless he holds a valid appraiser's certificate issued by the department.

Although the duties of a county assessor require him to appraise property subject to taxation and although an appraiser for property tax purposes is statutorily required to hold a valid appraiser certificate, there is no constitutional or statutory requirement that a county assessor, an elected public official, must hold a valid appraiser certificate if he does not actually perform appraisal functions.

[NRS 281.010\(n\)](#), subsection 5 establishes the office of county assessor. [NRS 250.010](#) provides for the election of persons as county assessors but does not require any specific qualifications to hold such office. As well, an individual appointed county assessor to fill a vacancy in that office must be a qualified elector and resident of that particular county, but again is not required to hold a valid appraiser certificate. [NRS 250.040](#).

The fact that a county assessor is not statutorily required to hold a valid appraiser certificate cannot be attributed to mere legislative oversight for in the very chapter pertaining to the election of county assessors, the Legislature provided that deputy county assessors assigned the responsibility of appraising property must hold a valid appraiser certificate issued by the Department of Taxation. [NRS 250.065](#).

The legislative design is evident. Only those individuals with actual appraisal responsibility must hold a valid appraiser certificate. Because a county assessor need not assign himself any appraisal responsibility, it is the apparent legislative intent not to require a county assessor to hold a valid appraiser certificate as a prerequisite qualification for election to that office.

CONCLUSION

It is therefore the opinion of this office that a duly elected county assessor need not hold a valid appraiser certificate to be eligible for his office. A county assessor may delegate appraisal responsibility to deputy assessors but those persons must hold valid appraiser certificates prior to commencing their appraisal duties.

It is the further opinion of this office that in the less populated counties wherein the office of county assessor is staffed by the elected official only, that official must hold a valid appraiser certificate in order to appraise taxable property himself. Alternatively, in such counties, if the elected officer does not possess a valid appraiser certificate the requirements for properly appraised property may be satisfied if deputy assessors possessing appraisal certificates or private appraisers holding the certificates are employed by the elected assessor to perform the actual property appraisals.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Timothy Hay
Deputy Attorney General,
Tax Division

OPINION NO. 80-31 County Employees, Limitation on Base Salaries ([NRS 245.047](#)), Overtime and Shift Differential Pay—The phrase “base salary” as used in [NRS 245.047](#)

does not include overtime pay or shift differential pay. Therefore paying a deputy sheriff, whose base salary is 95 percent of the sheriff's salary, overtime or shift differential pay in addition to his regular salary does not violate the limitation contained in [NRS 245.047](#). A county may enact an ordinance allowing for overtime compensation in the absence of any other law or authority permitting same.

Carson City, September 17, 1980

The Honorable George G. Holden, District Attorney, Lander County, Nevada, P.O. Box 448,
Battle Mountain, Nevada 89820

Dear Mr. Holden:

FACTS

Several deputy sheriffs in the Lander County Sheriff's Office are currently receiving salaries which are 95 percent of the salary established for the Lander County Sheriff by [NRS 284.043](#), subsection 1. [NRS 245.047](#), in pertinent part, provides that “* * * no county employee who is employed by or works under an elected county officer* * * may receive a base salary in excess of 95 percent of the base salary provided in [NRS 245.043](#) for such elected county officer. * * *” The Lander County Sheriff is an elected county official. [NRS 248.010](#).

QUESTION ONE

May deputy sheriffs who receive salaries which are 95 percent of the salary of the elective sheriff for whom they work receive shift differential or overtime pay in addition to their regular salaries?

ANALYSIS—QUESTION ONE

The answer to this question is found in an analysis of what the Nevada Legislature intended when it chose to use the phrase “base salary” in [NRS 245.047](#). In construing this phrase this office must give the words their plain and ordinary meaning unless the context in which the words are used clearly indicates that another meaning was intended by the Legislature. Ex parte Zwissig, [42 Nev. 360](#), 178 P. 20 (1919). Here another meaning is not indicated. In fact it would appear that when the Legislature wants to limit the total compensation of a person in the context of county employment the Legislature knows precisely how to do it. [NRS 245.043](#) referred to in [NRS 245.047](#) provides: “The annual salaries [set forth herein for specified elected county officers] are in full payment for all services required by law to be performed by such officer.” No similar language is found in [NRS 245.047](#). In *Lake v. Travelers Ins. Co.*, 188 N.W.2d 80 (Mich.App. 1971) the court stated that the plain meaning of the phrase “basic annual salary” was clear. It excluded overtime pay. In *Hunter v. City of New York*, 391 NYS2d 289 (Sup.Ct. 1976) the court held that the terms “base pay” or “annual salary” did not include overtime pay or shift differential pay.¹ The court was construing New York City Local Law 1/1975 which required financial disclosure statements to be filed by “each city employee whose salary is twenty five thousand dollars a year or more.” In various dictionaries the definition of “base pay” does not include overtime pay or shift differential pay. See Black's Law Dictionary 138 (5th edition

¹ Shift differential pay is additional compensation to employees who are assigned to work non-standard working hours such as the graveyard shift.

1979), and Webster's Seventh Collegiate Dictionary 71 (1971); "a rate or amount of pay for a standard work period, * * * exclusive of additional payments or allowances." Dictionary definitions have previously been used by this office in construing statutes, see Attorney General's Opinion 171 (November 3, 1944), and have been accepted by the courts. *Lake v. Travelers Ins. Co.*, supra, and *Pearson v. State Social Welfare Board*, 353 P.2d 33 (Cal. 1960).

CONCLUSION—QUESTION ONE

The phrase "base salary" as used in [NRS 245.047](#) does not include overtime or shift differential pay. Therefore a deputy sheriff, whose salary is 95 percent of the sheriff's salary may receive in addition to his regular salary, shift differential or overtime pay without violating the limitations contained in [NRS 245.047](#).

QUESTION TWO

May Lander County validly pay overtime compensation to deputy sheriffs by enacting an ordinance providing for such compensation, in the absence of any other law or authority permitting such payment?

ANALYSIS—QUESTION TWO

We are advised that Lander County currently has no ordinance authorizing overtime compensation for deputy sheriffs.

County "employees are not entitled to compensation for overtime work in absence of a * * * law authorizing it." *Rusk v. Whitmire*, [91 Nev. 689](#), 692, 541 P.2d 1097, 1099 (1975). The authorizing law may be a statute or an ordinance. *Id.* See also *Dunn v. City of Carson City*, [88 Nev. 451](#), 499 P.2d 653 (1972). Inasmuch as deputy sheriffs are specifically excluded from the provisions of [NRS 281.100](#) which requires that most county employees be paid cash compensation or be given compensating vacation time for time worked in excess of normal work periods, this legal authority must be found elsewhere. This authority will exist if a proper ordinance is enacted. *Dunn*, supra.

CONCLUSION—QUESTION TWO

Lander County may validly pay overtime compensation to deputy sheriffs if an ordinance is enacted which provides for such compensation.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-32 State Probationary Classified Employees, Reserve Military Training Duty, Extension of Probationary Period and Merit Salary Increase Anniversary

Dates—Rule VIII(A)(1)(d), Rules For Personnel Administration, is consistent with Nevada statutory law, but is inconsistent with a valid federal statute; 38 U.S.C. § 2024. 38 U.S.C. § 2024 requires that an employee must be treated for seniority purposes as if military service related absence did not occur.

Carson City, September 22, 1981

James F. Wittenberg, Administrator, Personnel Division, State of Nevada, Capitol Complex,
Carson City, Nevada 89710

Dear Mr. Wittenberg:

You have asked this office to answer a question concerning the status of a probationary classified state employee who is in the reserve forces of the United States Military and is ordered to report for training duty¹ for a period in excess of 15 days. The specific question you have asked is as follows:

QUESTION

When a probationary classified state employee is granted leave without pay to attend reserve force military training may the employee's probationary period expiration and merit salary increase anniversary dates validly be extended for the same length of time the employee was on such leave?

ANALYSIS

In order for probationary employees to attain permanent status they must serve a fixed probationary period which may not exceed one year. [NRS 284.290](#). Under the Rules For Personnel Administration, Rule VIII(A)(1)(d), "time off for military service [in a non-pay status] will not count toward completion of the probationary period or toward the awarding of a merit salary increase."

This opinion will first discuss the validity of Rule VIII(A)(1)(d) under Nevada law. The rule's validity under federal statutory law will be discussed later.

1. *Validity of the Rule Under Nevada Law.*

The principle to be applied in evaluating administrative rules or regulations in Nevada has been characterized by the Nevada Supreme Court as follows:

[A]n administrative rule or regulation must be clearly illegal, or plainly and palpably inconsistent with law, or clearly in conflict with a statute relative to the same subject matter * * * in order for the court to declare it void on such ground. *Oliver v. Spitz*, [76 Nev. 5](#), 9, 348 P.2d 158, 160 (1960).

[NRS 284.370](#) pertains to the same general subject matter as the Rule, namely leave to attend reserve force training duty. [NRS 284.370](#), in pertinent part, provides as follows:

¹ The training duty referred to here is for a period of less than three months and should be distinguished from active duty for non-training purposes or active duty for longer periods of time. This opinion does not address the latter two.

Any person holding a position in the classified service who is an active member of [a reserve component of the United States Military] or the Nevada National Guard shall be relieved from his duties, upon request, to serve under orders on training duty without loss of his regular compensation for a period not to exceed 15 working days in any calendar year.

Thus, under the Statute probationary employees are treated, for pay purposes, as if they were performing their regular state employment duties during the first 15 days of any active training period in each calendar year. Consistent with the Statute, the Rule only provides for non-pay status and a resultant extension of the probationary period when the employee's active duty training exceeds 15 days in a calendar year. Thus, given the test outlined in *Oliver*, supra, this office is of the opinion that the Rule is not void because of clear inconsistency with Nevada statutory law. Moreover, in an informal opinion of this office dated March 2, 1973, authored by Deputy Attorney General Margie Ann Richards and directed to Mr. James Wittenberg, Nevada State Personnel Division, the Rule was cited and discussed with approval. As will be pointed out below, however, the Rule, while valid in 1973, must be deemed partially invalid in 1980.

2. *Validity of the Rule Under Federal Statutory Law.*

In 1974 Congress enacted the Vietnam Era Veterans Readjustment Assistance Act hereinafter referred to as the Act. Act of December 3, 1974, Pub. L. No. 93-508, 88 Stat. 1594. The Act, inter alia, extended veterans' reemployment rights previously afforded to employees of private employers² to employees of state and local governments. *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070 (5th Cir. 1979). The Act, insofar as it is pertinent here, provides as follows:

38 U.S.C. § 2024(d):

Any employee * * * who holds a position [in the employ of a state] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training * * * such employee shall be permitted to return to such employee's position with such seniority, * * * as such employee would have had if such employee had not been absent for such purposes.

Subsection (d) then goes on to provide when the employee must return to work. Failure to return to work when provided allows the employer to discipline the employee on the basis of unauthorized leave. Subsection (d) of § 2024 is included in that portion of the Act pertaining to reservists. Other portions of § 2024 enumerate the right of reservists who are called to active nontraining duty and the right of new enlistees in the reserves or regular forces. By subsection (f) of § 2024, members of the National Guard are included within the provisions of subsection (d).

Before discussing what is meant by "such seniority, * * * as such employee would have had if such employee had not been absent" it is first necessary to discuss and decide whether the Act is valid vis-a-vis its applicability to the several states. If the Act is an unconstitutional congressional enactment as regards the states then, of course, Rule VIII(A)(1)(d) stands as is and there is no need for further analysis of the act.

The Act was passed pursuant to the war powers of Congress found in Article 1, Section 8 of the United States Constitution.³ See *Peel*, supra, and *Jennings v. Illinois Office of Education*, 589

² Employee veterans of private employers have been afforded reemployment rights since the Selective Training and Service Act of 1940, c. 720, § 8, 54 Stat. 890 (1940) (expired 1947) and succeeding Acts of Congress. *Peel*, infra, pages 1073, fn. 6.

³ U.S. Const. art. I, § 8 provides, inter alia:

F.2d 935 (7th Cir. 1979), cert. denied, 441 U.S. 967, 99 S.Ct. 2417. In the Act Congress has attempted to control, in part, the relationship between a state and its employees whenever an employee is called upon to serve in the Armed Forces. In *National League of Cities v. Usery*, 425 U.S. 833, 96 S.Ct. 2465 (1976) the United States Supreme Court invalidated that portion of the Fair Labor Standards Act (FLSA) which attempted to regulate the minimum wages and maximum hours of state employees. The court held as it did because the Tenth Amendment⁴ prohibited an otherwise valid exercise of congressional power where Congress had attempted “to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.” Id. at 852, 96 S.Ct. at 2474. The FLSA was enacted pursuant to Congress’ Commerce Clause power. Here we are dealing with Congress’ war powers. Whether Congress may, pursuant to the latter powers, validly apply the act to the states, notwithstanding the Tenth Amendment, has not to our knowledge been decided by the United States Supreme Court. This office is of the opinion, however, that the High Court would decide in the affirmative if and when called upon to do so.

In *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438 (1946), the Supreme Court held that the constitutional grant of war powers was sufficient to sustain a statute that might otherwise violate the Tenth Amendment. See Jennings, supra at 937. “In *National League of Cities*, Justice Rehnquist [writing for a plurality of the Court] took pains to note that Case was not being overruled and that the scope of Congress’ authority under its war powers was not even being addressed.” Jennings, supra, at 938. Moreover, Justice Rehnquist strongly implied that if the national interest sought to be furthered by Congress in an enactment pursuant to a delegated power was of sufficient magnitude, the enactment would be valid notwithstanding interference with state functions.⁵ Justice Blackmun concurred in *National League of Cities* because the plurality opinion “adopts a balancing approach, and does not outlaw federal powers in areas * * * where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” *National League of Cities*, 426 U.S. at 856, 96 S.Ct. at 2476. For the reasons expressed below, we feel the High Court would find that the balance of interests is in favor of the Act.

The Congress shall have Power To * * * provide for the Common Defense and general Welfare of the United States; * * *

* * *

To declare War,

To raise and support Armies, * * *

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces; * * *

* * *

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, * * *

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. * * *

⁴ The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

⁵ In *National League of Cities*, Justice Rehnquist distinguished *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792 (1975), a case in which the validity of the Economic Stabilization Act of 1970 was upheld. Under this Act the wages of state employees were frozen.

“We think our holding today quite consistent with *Fry*. The enactment at issue there was occasioned by an extremely serious problem which endangered the wellbeing of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States’ freedom beyond a very limited specific period of time.” *National League of Cities*, supra, 426 U.S. at 853, 96 S.Ct. at 2475.

“The war power * * * is one of the vital powers of Congress, essential to the protection of the nation.” Peel, *supra*, at 1084. “If [a state’s claim under the Tenth Amendment] were to be honored as to the Act, a State would be impairing part of the mechanism for manning the Armed Forces of the United States. * * * To accept [a state’s claim] would render the Constitution self-destructive.” Jennings, *supra*, at 938. Balanced against the federal interest is the State’s interest in structuring and administering the relationship between it and its employees. The constraint placed on this interest by the act is minimal, and therefore the balance of interests in the opinion of this office is tipped in favor of the validity of the act. The act is “a legitimate exercise of Congress’ power to raise armies.” Peel, *supra*, at 1084. In Accord: Jennings, *supra*, *Comacho v. Public Service Commissioner*, 450 Fed.Supp. 231 (D.P.R. 1978), *Schaller v. Board of Ed. of Elmwood Local Sch.*, 449 Fed.Supp. 30 (N.D.Ohio 1978).

EXTENSION OF PROBATIONARY PERIOD

As stated above, see footnote 2, the original statute establishing veterans’ reemployment rights was enacted in 1940. The 1940 Act has been

renamed on several occasions but its substantive reemployment provisions have remained virtually unchanged. Thus the judicial precedents developed under prior acts are applicable to construing the 1974 Act. *Hanna v. American Motors Corp.*, 557 F.2d 118 (7th Cir. 1977) and *Bankston v. Stratton-Baldwin Co., Inc.*, 441 Fed.Supp. 247 (S.D.Ala. 1977). *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 84 S.Ct. 595 (1964) is such a precedent and, as will be seen, is controlling here. Tilton had been promoted before he left for military duty, but he had not worked enough days to complete the probationary period necessary to attain permanent status in the new position. When he returned he successfully completed the number of days required by his employer and thus automatically attained permanent status. [Nevada law is the same on this point. Pursuant to Rule VIII(C)(3) if employees are not separated from service during a probationary period they automatically attain permanent status.] The railroad set his permanent status achievement date as of the time he actually finished the probationary period; Tilton claimed that the date should have been fixed as of the time he would have satisfied the probationary work requirement had it not been for his military service. “A returning veteran cannot claim a [status] that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period * * * he can insist upon a seniority date reflecting the delay caused by military service.” *Id.* at 181, 84 S.Ct. at 602. Thus while the calendar day upon which the employee actually attains permanent status may be delayed by the same number of days that the employee was on leave without pay serving in the military, once permanent status is attained the employee must be treated as if he attained permanent status on the date he would have but for the military service.

EXTENSION OF ANNIVERSARY DATE

You have also asked this office to address the validity of extending a merit salary increase anniversary date by the number of days a probationary classified employee is in the military service on a non-pay status. Anniversary date is defined in the Personnel Rules at I(D)(2) as “one year from date of current continuous employment. Rule III(G) provides: “An employee whose last performance rating was standard or better * * * will thereby qualify for merit salary adjustments * * * on their anniversary date.”

From the Rules cited here it can be seen that receipt of a merit salary increase depends on two factors: length of service and receipt of a standard or better rating on the last performance evaluation. The latter should be contrasted with the

requirement concerning attainment of permanent status noted earlier. There up to one year of actual work duty is required. Here the performance requirement is met not by duration of work but by the receipt, on the last received performance evaluation, of a standard or better rating. This factor may be met before, after or even during the period of military service. Given this difference and the fact that an anniversary date is based solely on the length of time elapsing from initial appointment, see Rule III(G) above, it is the opinion of this office that an employee who attends the type of training duty set forth in footnote 1, will have his anniversary date set as if he had not been absent for such duty.

CONCLUSION

While Rule VIII(A)(1)(d), Rules for Personnel Administration, is consistent with Nevada statutory law, it is inconsistent with 38 U.S.C. § 2024. The federal statute enacted pursuant to and in furtherance of Congress' constitutionally delegated war powers, may validly be applied to the several states in the manner provided by Congress. The federal statute prohibits a state employer from denying one of its employees who has served in the Armed Forces of the United States a state employment benefit based solely on length of service to the State. Attaining permanent status in the state classified service is based on length of service and performance. Once the performance aspect is met, an employee who has been on leave without pay serving in the military during a probationary period must be treated as if military service related absence did not occur. Thus, once permanent status is attained, the date on which such status is established must be determined on the date he would have become a permanent employee but for the military service. A merit salary increase anniversary date may not be extended for the amount of time a person has served in the Armed Forces of the United States. Since a merit salary increase depends on the length of service and receipt of a standard or better rating on the last performance evaluation, a classified employee who has served in the military and has received a standard or better performance evaluation is entitled to a merit salary increase on the anniversary date that would have occurred but for the employee's absence for military duty.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-33 Counties; Building Permits; Liability for Issuance of Building Permits—A county is not liable to an applicant for a building permit for the issuance of the permit in a flood-prone area or in an area so designated by the federal government.

Carson City, September 25, 1980

John S. Hill, Churchill County District Attorney, 73 N. Maine Street, Fallon, Nevada 89406

Re: County liability for issuing building permits in flood-prone areas

Dear Mr. Hill:

You have requested an opinion from this office on the following:

QUESTION

Can Churchill County be held liable for issuance of a building permit in flood-prone areas or areas that have been so designated by the federal government?

ANALYSIS

A. Potential claimants and bases for liability.

The question you have posed includes several distinct questions: what are the possible bases of liability; who are the potential plaintiffs, i.e., the persons in whose favor liability might arise; does governmental immunity affect the imposition of liability on the county. Other threshold questions arise in deciding each of these questions.

Your concern, which is the basis of your question, is the possibility of liability to an applicant for a building permit in a flood-prone area who receives the permit requested and who builds a structure in the flood-prone area pursuant to the permit. It is assumed for purposes of this opinion that county liability, or lack thereof, would extend to successors-in-interest to the applicant. These successors would include all future owners and inhabitants of the structure. Liability to this type of person, referred to in this opinion as an applicant, is the primary subject of this opinion.

Other persons to whom the county may be found liable in a particular case may be classified as persons other than applicants for a building permit. The case of *County of Clark v. Powers et al*, 76 Nev. Advance Opinion 129, June 4, 1980 establishes that under some circumstances a county can be held liable to this class of persons.

Under theories of nuisance and trespass, liability can arise if the county is actively and substantially involved in activities incidental to the construction of structures permitted by a building permit. See also *Mayotte v. Village of Mayfield*, 54 Ohio App.2d 97, 375 NE2d 816 (1977). Liability in these and other cases was not based on the mere issuance of building permits. It was based on the reasonable use rule respecting interference with the natural flow of surface water. Criteria for the application of the rule in Nevada in urban areas are found in the Powers decision. Even though liability was not predicated on the issuance of building permits, it is related, and should therefore be noted by the county.

The research of this office has located no state in which liability has been imposed in favor of any person, whether an applicant or a person other than an applicant, based solely on the issuance of a building permit. The question presented here more narrowly involves only permits issued in flood-prone areas. Even in the flood-plagued southern and eastern states no instances of liability were found for the issuance of permits in flood-prone areas.

Liability has in some instances been predicated on void or invalid permits issued in violation of a city building ordinance. *Haslund v. City of Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976); *154 East Park Avenue Corp. v. City of Long Beach*, 350 N.Y.S.2d 974 (1973). Liability has been found for the negligent issuance of a certificate of occupancy of a building inhabited in violation of a multiple residency ordinance. *Sextone v. City of Rochester*, 32 A.D.2d 737, 301 N.Y.S.2d 887 (1969).

In other instances liability has been refused for alleged negligent performance of a building inspector in issuing a permit and in subsequent negligent inspection of construction in progress.

Hoffert v. Owatonna Inn and City of Owatonna, 199 NW2d 158 Minn. (1972); *Modlin v. City of Miami Beach*, 201 So.2d 70 Fla. (1967).

The New York courts have taken the position that “The granting or withholding of a building permit is an exercise of sovereign power for which no liability should fall upon the municipality.” *Rottkamp v. Young and Town of Hempstead*, 249 N.Y.S.2d 330, 21 A.D.2d 373, 257 N.Y.S.2d 944, 205 N.E.2d 866 (1965).

A California court of appeals in *Friedman v. City of L.A.*, 52 C.A.3d 317 (1975), has assumed but not specifically decided that a city is immune from liability for erroneous or negligent issuance of a building permit; citing *Burns v. City of Folsom*, 31 C.A.3d 999 (1973). In *Burns* a court of appeals in another district rejected the contention that the issuance of a permit was ministerial and that the building official therefore had a mandatory duty to issue the permit; and found instead that issuance was a discretionary determination that fell within the immunity for discretionary acts.

These cases illustrate the different means by which courts have precluded liability: absence of a duty to the applicant (Florida), public policy considerations (New York), statutory immunity for discretionary acts (California).

B. Existence of a duty of due care under state law.

A duty of due care in issuing permits could exist if a state or federal law imposed a duty to act in a particular manner.

Possible bases of a duty could include the delegation of authority “to regulate and restrict the improvement of land and to control the location and soundness of structures” for the purposes of promoting the health, safety and general welfare of the community. [NRS 278.020](#). Pursuant to this statute the county has discretionary authority to zone a flood-prone area in a manner deemed appropriate by the governing body. 50 Iowa Law Review 552 (1965). However, “[A]uthority to act is not alone the legal equivalent to a command to act * * *” *Baldwin v. City of Overland Park*, 468 P.2d 168, Kan. (1970). Therefore, the authority to regulate, restrict and control ([NRS 278.020](#)) without more does not create a duty to do so in any particular manner. This would include the giving of a warning or notice to an applicant that the proposed building site was in a flood-prone area. While giving a warning or notice might be considered desirable or beneficial, it is not a duty required by law.

In addition to the general grant of authority found in [NRS 278.020](#), the Legislature has specifically provided discretionary authority to “adopt a building code, specifying the design, soundness and materials of structures” and to enforce the code. [NRS 278.530](#). Enforcement of the code and of zoning ordinances may be accomplished “by means of the withholding of building permits.” ([NRS 278.570](#)). The enactment of ordinances, including the adoption of the Uniform Building Code, is discretionary and therefore does not impose a duty on the county to give notice or warning or to consider the location of the structure as such may relate to possible flooding. *Baldwin*, above.

The courts which have considered the question of a duty of due care in the issuance of a permit have denied liability on the grounds that any duty which might exist is not owed to an individual, such as an applicant for a permit. Because it is owed instead to the public generally, no liability arises in favor of an individual applicant. *Molden, Hoffert*, above.

Governing bodies who adopt the Uniform Building Code have not attempted to assume responsibility to give a notice or to consider location. Section 102 of the code refers to “location * * * of all buildings and structures * * *,” but the code’s provisions respecting location shows that location is considered only for determining occupancy classifications. Location is considered for purposes of ensuring minimal access; location of entrances and exits; resistance to the spread of fire among adjacent buildings; isolation of hazardous, flammable or explosive materials; and minimal light, ventilation and sanitation. No portion of the code attempts to make location in a flood-prone area a consideration in issuing a building permit. Even the section on earthquake

regulations, Section 2312, refers only to differing structural requirements. No attempt is made to pass upon the inherent suitability or safety of the location itself.

Since the county does not, in issuing building permits, make any determinations or representations respecting the possibility of flooding of the building site, no liability to the county can arise from any reliance on the permit by the applicants, insofar as flooding of the site is concerned.

The State Legislature may impose, but has not imposed, mandatory duties upon a county.

Other states have done so, and liability has been found in favor of an application, if a duty is breached. For example, California has imposed a duty to issue building permits only when the work covered by the permit is to be done either by a state-licensed contractor

or by one exempt from such licensing. Bus. and Prof. Code 7031.5. *Young v. City of Inglewood*, 92 Cal.App.3d 437 (1979). Another mandatory precondition to the issuance of a permit in California is that applicants for building permits carry workers compensation insurance. Labor Code 3800. *Morris v. County of Marin*, 18 C.3d 901, 559 P.2d 607 (1977). Our research discloses no similar mandatory duties imposed by the Nevada Revised Statutes. If such duties do exist or are enacted in the future, a county could be held liable to an applicant if the county does not perform or satisfy the mandatory precondition to the issuance of a permit.

Following the Florida and Minnesota decisions that no duty is owed to an individual applicant and finding no Nevada statutes creating particular duties, as in California, it is the opinion of this office that there is no duty of due care under state law regarding potential flooding owed to an applicant for a building permit.

C. Existence of a duty of due care under federal law.

The federal statutes relating to this question are the National Flood Insurance Act of 1968, P.L. 90-448 Title XIII, 82 Stat. 572, appearing generally as 42 USC 2414, 4001 et seq.; and the Flood Disaster Protection Act of 1973, P.L. 93-234, 87 Stat. 975, appearing generally at 42 USC 4001 et seq. These acts make low cost flood insurance available to persons living or building within an area designated as flood-prone by the agency which administers the acts, the Federal Emergency Management Agency. The insurance is available if the county chooses to participate in the program. County participation would include enactment of ordinances respecting developments and construction standards in a flood-prone area.

The applicability of these statutes is discretionary or optional with a county. The federal statutes do not require insurance as a condition to building structures in such areas nor do the statutes require the county to impose restrictions on development in the area or to impose minimum construction standards. If a county chooses to participate, it must enact land-use ordinances respecting flood-prone areas. The content of such ordinances is discretionary with the governing body. The only sanctions for failure to enact or enforce ordinances meeting the approval of the federal flood insurance administrators are loss of eligibility for low cost insurance and for being declared a federal disaster area in the event of a flood. Therefore, no liability arises from federal law for the issuance of building permits in an area designated as flood-prone by the federal government.

D. Governmental immunity for discretionary acts.

Regarding the act of issuing building permits, the cases researched indicate a conceptual parallel among the non-existence of a duty to act in a particular way, the discretionary nature of the act, and governmental immunity for the act. However articulated, the result is no liability.

The two California cases mentioned above, *Friedman v. City of L.A.* and *Burns v. City of Folsom*, interpreted that state's law of governmental immunity for the discretionary act of issuing building permits. The Nevada

Legislature has provided immunity for discretionary actions in substantially the same manner as the California act. [NRS 41.032](#). Compare Cal.Gov. Code 810 et seq., specifically 820.2. the New York courts have held that common-law immunity exists,

independent of statute, for the exercise of this particular governmental power. *Rottkamp*, above. There being no Nevada Supreme Court decisions to the contrary, the rationale and legal principles of these courts are persuasive.

In some respects the issuance of a building permit is not discretionary. If an applicant has complied with all applicable laws and if changes in zoning are not pending before the governing body, the county can be mandated to issue a permit. In this sense, there is often little, if any, discretion exercised by the building official. Yet for purposes of immunity for governmental decisions, the issuance of a permit is discretionary, because it is based upon an existing zoning ordinance which constitutes a previously made discretionary decision to allow structures to be built in the area.

When the governing body enacts a zoning ordinance which allows the building of structures in a flood-prone area, the decision to issue building permits conforming to that ordinance is simultaneously made. This initial decision to issue building permits is the same exercise of discretion that resulted in the enactment of the zoning ordinance. This discretionary aspect of the issuance of a building permit should not be confused with the essentially ministerial duty that the governing body itself has imposed, by ordinance, upon its own building official, to issue the permit if the plans “conform to the requirements of * * * other pertinent * * * [zoning] ordinances, * * *.” (Section 393(a), UBC, 1979). The existence of this ministerial duty, imposed by county ordinance, does not negate the discretionary nature of the decision regarding the zoning ordinance, which simultaneously provided for and anticipated the issuance of permits in the future. For purposes of deciding whether governmental immunity exists, the act of issuing a building permit is discretionary.

CONCLUSION

In view of the above authorities and statutes it is the opinion of this office that a county is not liable to an applicant for the issuance of a building permit in flood-prone areas or in areas that have been so designated by the federal government.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: George Campbell
Deputy Attorney General

OPINION NO. 80-34 Taxation—Appraisals of new construction at full cash value. No statutory authority exists to backdate appraised values of new construction to values of prior years. Property appraisals for the purposes of ad valorem taxation are to reflect the full cash value of the property at the time of the appraisal under the provisions of [NRS 361.260](#), subsection 1. Under this statutory scheme the practice of backdating the value of new construction to the time of the last general reappraisal of the geographic area in which the new construction is located is improper.

Carson City, October 2, 1980

Chan G. Griswold, Chief Civil Deputy, Washoe County District Attorney, County Courthouse,
P.O. Box 11130, Reno, Nevada 89520

Dear Mr. Griswold:

QUESTION

You have requested an opinion regarding the legality of the practice by some county assessors of backdating the appraised value of new construction to the time of the last general reappraisal in the geographic area of new construction. Our analysis and opinion in response to that inquiry follows:

ANALYSIS

In order to properly analyze your question, a review of the general provisions relating to property taxation in Nevada is in order. Article X, Section 1 of the Nevada Constitution provides:

The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, * * *.

In response to this constitutional mandate the Legislature has provided a specific statutory structure reflecting the intent that property taxation be equitable. Among the provisions enacted to effectuate this goal are [NRS 361.260](#), subsection 1 which provides:

Between July 1 and December 15 in each year, the county assessor, except when otherwise required by special enactment, shall ascertain by diligent inquiry and examination all real and personal property in his county subject to taxation, and also the names of all persons, corporations, associations, companies or firms owning the property. He shall then *determine the full cash value of all such property* and he shall then list and assess it to the person, firm, corporation, association or company owning it. (Italics added.)

And [NRS 361.225](#) which states:

Except as otherwise provided in [NRS 361.249](#), all property subject to taxation must be assessed at 35 percent of its *full cash value*. (Italics added.)

[NRS 361.025](#) defines full cash value as follows:

Except as provided in [NRS 361.227](#), “full cash value” means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.

It is apparent from each of the above statutes that the intent of the statutory scheme is to value all property at full cash value, thus assuring equity in the treatment of similarly situated taxpayers. Unfortunately, due to practical considerations each property in the State has not been reappraised on a yearly basis. In response to this consideration the Legislature has included [NRS 361.260](#), subsection 3 in the statutory scheme which allows reappraisals at maximum 5-year intervals to satisfy the other statutory provisions relating to property appraisals:

In addition to the inquiry and examination required in subsection 1, the county assessor shall appraise property using standards approved by the department and reappraise all property at least once every 5 years thereafter using the same standards. Such appraisals and reappraisals at 5-year intervals must be accepted as the examination required under subsection 1, for the intervening 4 years.

This provision relieves the county assessors from the otherwise clear statutory directive to value each property within the county at its full cash value on a yearly basis. The effect of [NRS 361.260](#), subsection 3 is to create a statutory presumption that all property, properly appraised within the 5-year cycle, is to be considered at full cash value for the purposes of equalization. The Nevada Supreme Court has validated cyclical reappraisal plans administered under this provision. *Recanzone v. Nevada Tax Commission*, [92 Nev. 302](#), 550 P.2d 401 (1976).

The essence of your inquiry concerns the relationship between the provisions of [NRS 361.260](#), subsection 3 which allows property to be reappraised once every 5 years and the other statutory mandates which require that all property be appraised at its full cash value. Properly construed, this statutory scheme presents no inherent conflicts. Although property *may* be permissibly reappraised only once every 5 years under the cyclical reappraisal concept, *whenever* taxable property is valued, that valuation must reflect the current full cash value of the property.

It is clear that the practice of backdating the value of new construction is inconsistent with the mandates of the statutory scheme. However, it appears that the practice began, at least in part, as a response by the several county assessors to the administrative actions of the state and county boards of equalization when considering the taxable value of new construction.

The equalizing bodies are charged with the duty to insure that property subject to taxation is taxed at uniform and equitable rates. If a county assessor believed that the value of new construction appraised at full cash value would ultimately be reduced by the county or state boards in order to equalize the value with the surrounding property which had been valued in earlier years, the practice of backdating would merely reflect an administrative efficiency geared to reducing the number of unnecessary appeals to the equalizing authorities.

However well intentioned, such a response by the assessors is in error for two reasons. The assessor's clear statutory directive is to appraise property at its full cash value. [NRS 361.260](#), subsection 1. Without some specific statutory directive an assessor may not arrive at some value less than the full cash value of the property appraised merely in anticipation of possible future action by one of the equalizing bodies. Such a rationale would confuse the statutory scheme by justifying, to some degree, the office of county assessor usurping the functions of the equalizing authorities. Such a result is clearly not anticipated in the statutes. More importantly, however, the equalizing authorities are mandated by statute to equalize property values by assuring that all properties are valued at their full cash value. [NRS 361.345](#), subsection 1 relating to the county boards of equalization states:

The county board of equalization shall have power to determine the valuation of any property assessed by the county assessor, and may change and correct any valuation found to be incorrect either by adding thereto or deducting therefrom such sum as shall be necessary to make it *conform to the actual or full cash value of the property assessed*, whether such valuation was fixed by the owner or the county assessor. (Italics added.)

[NRS 361.395](#), subsection 1(b) mandates the State Board of Equalization to:

Review the tax rolls of the various counties as corrected by the county boards of equalization thereof and raise or lower, *equalizing and establishing the full cash value* of the property, for the purpose of the valuations therein established by all the county assessors and county boards of equalization and the Nevada tax commission, of any class or piece of property in whole or in part in any county * *

*(Italics added.)

Thus, the Legislature has envisioned a two-tiered process for insuring equitable and uniform rates of assessment for property tax purposes. Initially all property is to be appraised at full cash value and ultimately all property values are to be equalized at full cash value as well. Under a consistent application of this statutory scheme, the equalizing authorities should avoid the administrative backdating of the value of new construction just as the county assessor should avoid this practice when making the initial appraisal of the property.

Under the facts of a typical backdating problem the constitutional and statutory directives will function without complication if consistently applied. The county assessor should make an appraisal of the new construction at its current full cash value. If that valuation is contested before the boards of equalization, those bodies are mandated to equalize the contested property values at full cash value. However, this process must be considered in light of the statutory presumption contained in [NRS 361.260](#), subsection 3. Under the statutory scheme, the assessor and equalizing authorities should determine the full cash value of the new construction on the date it is assessed and presume that the full cash value of the surrounding property has been legally appraised, if within the 5-year cycle, pursuant to the authority contained in [NRS 361.260](#), subsection 3. This process would fully satisfy the constitutional mandate for the Legislature to provide by law for a “uniform and equal rate of assessment and taxation.”

CONCLUSION

It is the opinion of this office that backdating the appraised value of new construction to the time of the last general reappraisal of the geographic area in which the new construction is located violates the clear intent of the statutory scheme which envisions that equitable taxation of property is achieved if all property is taxed upon its full cash value. Although there is no inherent inequity in the practice of backdating if uniformly administered within the several counties, additional statutory enactments validating the concept would be necessary to enable it to occur under our legislative scheme.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Timothy Hay
Deputy Attorney General

OPINION NO. 80-35 Habeas Corpus, Private Attorneys Fees, Reserve for Statutory Contingency Fund—The fees of a private attorney who represents the State in defending a

habeas corpus action filed by a prison inmate may be paid from moneys in the reserve for Statutory Contingency Fund. [NRS 212.070](#), [NRS 41.03435](#) and [NRS 353.264](#).

Carson City, October 3, 1980

Mr. Howard E. Barrett, Director, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Barrett:

You have asked this office to answer several questions concerning paying the fees of private attorneys who have represented the State of Nevada from funds under the control of the Board of Examiners in the Reserve for Statutory Contingency Fund. The fund was created pursuant to [NRS 353.264](#) which provides as follows:

1. The reserve for statutory contingency fund is hereby created as a trust fund.

2. The reserve for statutory contingency fund shall be administered by the state board of examiners, and the money in the fund may be expended only for:

(a) The payment of claims which are obligations of the State under [NRS 41.03435](#) [and] 212.070 * * *.

(b) The payment of claims which are obligations of the state under [NRS 7.125](#) * * * but such claims must be approved * * * only when the money otherwise appropriated for those purposes has been exhausted.

A reading of this provision shows that moneys in the fund may only be expended for purposes specified by statute. Thus the answers to your questions are found in the construction of those provisions enumerated in [NRS 353.264](#) which relate to the questions set forth below.

QUESTION ONE

May moneys in the Reserve for Statutory Contingency Fund validly be used to pay the fees of a private attorney who represents the State of Nevada in a *habeas corpus* action relating to the prosecution or conviction of a person for an offense committed while that person was a state prison inmate?

ANALYSIS—QUESTION ONE

While in a great majority of cases the Attorney General will defend *habeas corpus* actions filed by a person challenging the legality of a prosecution or conviction of that person for a criminal act committed while a Nevada prison inmate, there may arise a set of circumstances where, in the interest of justice the Attorney General must disqualify himself and his office from so defending. It is on these infrequent occasions that private counsel is obtained to defend the State's interests.

[NRS 212.070](#), one of the provisions enumerated in [NRS 353.264](#) (supra), provides:

The expenses and costs of prosecuting any person or persons for escaping from, or breaking out of, the state prison, or attempting so to do, or for the commission of any crime while a prisoner therein, shall be a state charge, and shall be paid from the reserve for statutory contingency fund upon approval by the state board of examiners.

Based upon the language of [NRS 212.070](#), the question here becomes twofold: Is a private attorney's fee an "expense and cost" and if yes, is the defense of a *habeas corpus* action of the type set forth above part of a "prosecution"?

In an informal opinion of this office dated June 7, 1978, former Chief Deputy Attorney General James H. Thompson opined that the fees of a private attorney who represents a prisoner for a crime allegedly committed in the Nevada prison is payable out of the fund pursuant to [NRS 212.070](#). Thus this office has opined that "expenses and costs" include attorney's fees. We adhere to our earlier stated conclusion.

The word "prosecution" encompasses more than the mere trial of an accused by the State. It connotes the beginning as well as the carrying on of a criminal action. *People v. Zara*, 255 N.Y.S.2d 43 (Sup.Ct. 1964). See also *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976) and cases cited therein at footnote 16 on page 270. Inasmuch as a *habeas corpus* action is typically filed to challenge the legality of an ongoing criminal proceeding or to collaterally attack a conviction, the defense of such a challenge is an integral part of a criminal prosecution. Thus the word "prosecution" includes defending a *habeas corpus* action.

CONCLUSION—QUESTION ONE

Pursuant to [NRS 212.070](#) and [NRS 353.264](#) the fee of a private attorney may be paid from moneys in the Reserve for Statutory Contingency Fund for representing the State of Nevada in a *habeas corpus* action filed by a person charged with or convicted of committing a crime while a Nevada prison inmate. The analysis and conclusion to question two is equally applicable here. Thus the fees of a private attorney who represents the State in a *habeas corpus* action of the nature here may also be paid from the fund because of [NRS 41.03435](#).

QUESTION TWO

May moneys in the Reserve for Statutory Contingency Fund validly be used to pay the fee of a private attorney who represents the State in a *habeas corpus* action arising out of a prosecution or conviction for a crime not committed by a person while that person was a state prison inmate?

ANALYSIS—QUESTION TWO

In an attempt to prevent any confusion, we wish to make it clear that in responding to question two, we are discussing *habeas corpus* proceedings arising out of non-prison related offenses, not *habeas* actions relating to offenses committed by Nevada prison inmates.

In your request for an opinion you suggest that [NRS 7.125](#) might possibly serve as the statutory authority for payment here. This section only refers to the payment of private attorneys appointed to represent an indigent accused. To hold it as authority for the payment in issue here would be tantamount to adding language to it not provided for by the Nevada Legislature. This we cannot do. [NRS 7.125](#), in part, provides as follows:

1. * * * an attorney other than a public defender appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance before the magistrate or the district court through the appeal, if any, is entitled to receive a fee * * *.

[NRS 41.03435](#), which is enumerated in [NRS 353.264](#), supra provides as follows:

The attorney general may employ special counsel whose compensation must be fixed by the attorney general, subject to the approval of the state board of examiners, if the attorney general determines at any time prior to trial that it is impracticable, uneconomical or could constitute a conflict of interest for the legal service to be rendered by the attorney general or a deputy attorney general. Compensation for special counsel must be paid out of the reserve for statutory contingency fund.

[NRS 41.03435](#) is part of those sections of the Nevada Revised Statutes relating to the liability of and actions against the State and its officers and employees. [NRS 41.0305](#) to [NRS 41.039](#), inclusive. [NRS 41.03435](#) is entitled¹ “Tort Actions; Employment of special counsel by attorney general.” The legislative history of this and related sections conclusively shows, however, that the title of [NRS 41.03435](#) does not accurately reflect the breadth of the applicability of this section. It is applicable not just to tort actions but to any civil proceeding brought against an officer or employee of the State “* * * based on any alleged act or omission relating to [the] public duties [of such person].” [NRS 41.0339](#).

The language in [NRS 41.03435](#) was originally added to NRS in 1977 as part of a major revision of [NRS 41.0337](#). See Section 4, Chapter 584, Statutes of Nevada 1977.² Prior to its amendment in 1977, the latter section provided, in pertinent part, as follows:

1. No tort action arising out of an act or omission within the scope of his public employment may be brought against any officer or employee * * * unless the state * * * is named as a party defendant under [NRS 41.031](#).
2. The state * * * shall defend any *such action* on behalf of the officer [or] employee * * * unless such person refuses legal representation offered by the state * * *. (Italics added.)

By Section 4 of Chapter 584 the language of subsection 2, *supra*, was deleted. In lieu thereof a new subsection 2 was added along with new subsections 3 through 7. Subsection 4 thereof became [NRS 41.03435](#) in 1979. See footnote 2. New subsection 2 provided in part as follows:

The attorney general * * * shall provide for the defense * * * of any officer or employee * * * of the state * * * in any civil action against such person [if certain specified conditions are met].

Under [NRS 41.0337](#), prior to its amendment in 1977 the officer or employee was only entitled to a defense if he was sued in a tort action. Subsequent to the 1977 amendments, the officer or employee, in appropriate cases, was entitled to a defense “in any civil action.” “An amendment making a material change in the phraseology of a statute is ordinarily viewed as showing an intention on the part of the legislature to change the meaning of the provision rather than interpret it.” Sutherland, *Statutes and Statutory Construction*, Vol. 2A, 4th Ed. § 22.30, fn. 2 citing *Twinlock, Inc. v. Superior Court of Los Angeles*, 344 P.2d 788 (Cal. 1959). Here the amendment must be viewed as proof of such a legislative intent. The Legislature must be deemed to know that a tort action is but a type of civil action and thus by enacting the 1977 amendment it must be presumed that the Legislature intended to broaden the scope of [NRS](#)

¹ Pursuant to NRS 220.120 the Legislative Counsel is authorized to entitle sections of NRS. Titles, however, do not have the force of law nor are they a part of any statute. NRS 220.120, subsection 6 and Section 4, subsection 4, Chapter 2, Statutes of Nevada 1957.

² By Section 7, Chapter 678, Statutes of Nevada 1979 this language was placed into a separate statutory provision and later numbered NRS 41.03435.

[41.0337](#). Subsection 4 of [NRS 41.0337](#) must be read in conjunction with Subsection 2. When so read it authorizes the Attorney General to employ special counsel, in appropriate cases, to defend state officers and employees in civil action with compensation therefor to be paid from the Reserve for Statutory Contingency Fund. This same authority now exists in [NRS 41.03435](#) because the only effect of the 1979 legislation, insofar as is pertinent here, was to place old [NRS 41.0337](#), subsection 4 into a separate section of NRS. It still relates to the same subject matter, defense of a civil action.

“It is the prevailing view that *habeas corpus* is, in its nature, a civil rather than a criminal proceeding, even when it is sought in behalf of one charged with or convicted of a crime.” 39 Am.Jur.2d Habeas Corpus § 10. *See also Hill v. Warden*, Nevada State Prison, 96 Nev. Advance Opinion 14 (1980) where the Nevada Supreme Court stated that its earlier decisions (those that the Legislature must be deemed to have been aware of) said that *habeas corpus* was in the nature of a civil action.

Having decided that [NRS 41.03435](#) applies to civil actions and that *habeas corpus* is in the nature of a civil action, although it is a portion of the overall “prosecution” of a criminal matter (see analysis to question one above), it now becomes necessary to look at [NRS 41.0339](#), the successor to [NRS 41.0337](#), subsection 2. [NRS 41.0339](#) now provides:

The [attorney general] shall provide for the defense * * * of any officer or employee * * * in any civil action brought against that person based on an alleged act or omission relating to his public duties if [*inter alia*] the [attorney general] has determined that the act or omission on which the action is based appears to be within the course and scope of public duty * * *.

A person bringing a *habeas corpus* action of the type in issue here typically files it against the Warden of the Nevada State Prison alleging that the Warden may not lawfully continue to incarcerate him because the conviction and/or sentence which led to his incarceration was invalid. Therefore, he is challenging the Warden’s act of incarcerating him, which act the Warden is under a duty to continue until lawful authority mandates him to release the person. [NRS 209.131](#).

CONCLUSION

Pursuant to [NRS 41.03435](#) and [NRS 353.264](#) the fee of a private attorney may be paid from moneys in the Reserve for Statutory Contingency fund for representing the State of Nevada in a *habeas corpus* action filed by a Nevada State Prison inmate challenging the validity of the conviction which led to the incarceration of the inmate.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-36 Taxation—Property found to be escaping taxation. The authority of the Tax Commission to place such property on the tax rolls under provisions of [NRS 361.325](#), subsection 3. Under the existing statutory scheme property undervalued, through oversight or error, does not constitute property escaping taxation.

Carson City, October 6, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, 1340 S. Curry Street, Carson City, Nevada 89710

Dear Mr. Nickson:

QUESTION

On behalf of the Nevada Tax Commission you have requested that this office issue an opinion indicating whether parcels outside of the 5-year appraisal cycle can be considered property escaping taxation as that term is used in [NRS 361.325](#), subsection 3. Our analysis and opinion in response to that inquiry follows.

ANALYSIS

The essence of your inquiry is whether properties that have not been reappraised within the 5-year cycle constitute property escaping taxation to the extent they are undervalued for taxation purposes.

[NRS 361.260](#), subsection 3 provides, in part:

* * * [T]he county assessor shall appraise property using standards approved by the department and reappraise all property at least once every 5 years thereafter * *

This provision alters what would otherwise appear to be a statutory directive contained in [NRS 361.260](#), subsection 1 indicating that all properties statewide should be examined and appraised on an annual basis. [NRS 361.260](#), subsection 3 effectively creates a statutory presumption that property reappraised within a 5-year cycle has been timely appraised under the Nevada statutory scheme.

[NRS 361.325](#), subsection 3 provides, in part:

The Nevada tax commission shall cause to be placed on the assessment roll of any county *property found to be escaping taxation* coming to its knowledge after the adjournment of the state board of equalization.

It appears from surveying the relevant case law that Nevada's courts have not interpreted the term "property found to be escaping taxation" in the context of property that has not been timely reappraised. Although the Office of the Attorney General has rendered prior opinions construing this statute and its predecessors, those opinions as well have not addressed the question whether *undervalued* property is, in fact, property escaping taxation. See generally: Attorney General's Opinion 83 (Nev.), dated September 8, 1913; Attorney General's Opinion 95 (Nev.), dated October 27, 1919; Attorney General's Opinion 920 (Nev.), dated May 22, 1950.

In the absence of a clear definition of this term in Nevada law, reference to other jurisdictions which have considered the question may provide guidance. The Maryland Supreme Court has summarized the approach taken by the majority of courts that have considered the issue:

The * * * cases disclose the line which has been drawn by most courts throughout the country. Where an assessment has actually been made and taxes paid on property, such property has not “escaped” assessment and taxation. It simply is not escaped or omitted property under the language of typical “escaped property” statutes. The language of these statutes reveals that they were not intended to authorize a retroactive increase in the assessment and taxation for prior years because of an asserted mistake in valuation, or some other alleged mistake. On the other hand, where property has not been assessed and taxed at all for the years in question, the courts have regularly held that escaped property statutes apply * * *. *Grosvenor v. Supervisor of Assessments*, 315 A.2d 758, 764 (1974).

Construing a similar statute the Court of Appeals of Washington has stated:

It has been consistently held that this statute does not authorize the assessor to recover omitted value, where property has been listed but erroneously undervalued on the tax rolls of prior years. *See Star Iron & Steel Co. v. Pierce County*, 5 Wash.App. 515, 488 P.2d 776 (1971); *Tradewell Stores, Inc. v. Snohomish County*, 69 Wash.2d 352, 418 P.2d 466 (1966); *Wood Lumber Co. v. Whacom County*, 5 Wash.2d 63, 104 P.2d 752 (1940). *Tacoma Goodwill Industries Rehabilitation Center, Inc. v. County of Pierce*, 518 P.2d 196, 197 (1973).

Under this interpretation of property found to be escaping taxation, only if an identifiable property remains untaxed will the provisions of [NRS 361.325](#), subsection 3 be operative.

CONCLUSION

It is the opinion of this office that property which is merely undervalued for tax purposes should not be considered property escaping taxation under the purview of [NRS 361.325](#), subsection 3.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Timothy Hay
Chief Deputy Attorney General
Tax Division

OPINION NO. 80-37 District Attorney; County Commissioners; Private Legal Counsel—A
board of county commissioners has no authority under Nevada law to hire its own continuous private legal counsel over the objection of a district attorney who is ready,

willing, and able to provide all legal services for the commissioners required of the district attorney by Nevada law. A board of county commissioners may retain private legal counsel to manage or to assist the district attorney in managing specific cases in which the county is a party, though such an arrangement should be made in cooperation with the district attorney.

Carson City, October 14, 1980

The Honorable Thomas L. Stringfield, Elko County District Attorney, Elko County Courthouse,
Elko, Nevada 89801

Dear Mr. Stringfield:

This is in response to your written request for an Attorney General's Opinion, concerning the legal authority of the Elko County Commission to hire its own private legal counsel for the purpose of handling all the legal work of the county commission, thereby precluding the use of the services of the elected Elko County District Attorney and his office for this purpose.

FACTUAL BACKGROUND

According to your letter, the Elko County Commission has hired a private attorney as the Commission's continuing legal counsel since September of 1977. For this service, private counsel has received compensation at the rate of \$25 per hour, and some items of office equipment have been leased by the Commissioners for use in the private law office of their retained attorney.

The duties of the Elko County Commission's private legal counsel have included the following:

1. Attending meetings of the Elko County Commission, at which time both written and oral legal opinions have been rendered upon request; and

The rationale supporting this operation of the statutory scheme is persuasive. It recognizes the proposition that although a taxpayer has no right to rely on an error or oversight which allows taxes to be completely avoided, taxpayers who pay assessments on their property may properly assume that their tax liability is extinguished and not subject to continuing adjustment should the property valuation be challenged in later years.

However, one noteworthy exception to the majority view has been expressed by the courts of California. Their judicial interpretation of the California Constitution and tax statutes allows assessments questioned in later years to be adjusted upwards if a determination is made that property was initially undervalued for any reason. *Bauer-Schweitzer Malting Co., Inc. v. City and County of San Francisco*, 506 P.2d 1019, 106 Cal.Rptr. 643 (1973); *Hewlett-Packard Company v. County of Santa Clara*, 50 Cal.App.3d 74, 123 Cal.Rptr. 195 (1975).

Although this approach offers the prospect of great flexibility for adjusting erroneous assessments in later years, it also incorporates the significant disadvantage that the taxation process remains uncertain for both the taxpayer and the taxing authorities for a number of years after the initial assessment occurs. Thus taxpayers who regularly pay their taxes in the ordinary course of their affairs may be faced with the prospect of a significant additional assessment in some later year. This may occur through no fault of the taxpayer and leaves the taxpayer no opportunity to plan for payment, in a single year, of tax liability that accrued over a long period of time.

The jurisdictions that have rejected the California approach have done so based on sound public policy, expressing both equity for innocent taxpayers and finality in the taxation process. After considering this question, the Illinois Supreme Court concluded:

“The result of the application of the omitted property theory as a remedy would have a chaotic [sic] effect on the public, the taxing bodies and the public officials who are charged with calculating and collecting the taxes involved.

“In addition, our decision also recognizes the fundamental principle that taxes must have some degree of finality, stability, and security to the taxpayer. (*People ex rel. Grier v. Hunt* (1924), 311 Ill., 291, 293, 142 N.E. 522). Otherwise the payment of taxes in one year would be ludicrous if the taxes for that year could be increased years later for incongruities in prior assessments of real property.” *Hamer v. Rich*, 373 N.E.2d 64 (1978).

It appears from the cases that recognition of the public policy involved has been an important factor in interpreting the statutes regarding property found to be escaping taxation. Absent an express statutory directive indicating that undervalued property should be included within this term, the substantial case law developed within the majority of the states appears to accurately reflect the legislative intent evidenced by the statutes that an actual property must remain untaxed before property escaping taxation exists.

2. Making court appearances on behalf of the Elko County Commissioners and in the name of Elko County.

Note: The nature of the litigation handled by the Commission’s retained counsel was not specified, though it has been assumed in this opinion that virtually all of such matters are in the nature of civil proceedings in which Elko County has been named as party and do not involve criminal prosecutions for public offenses or violations of criminal statutes.

You have objected to the current arrangement between the Elko County Commissioners and their retained private legal counsel, and it is assumed in this opinion that your office is ready, willing, and able to perform the legal services now being provided to the Elko County Commission by their private attorney. Based on the foregoing, you have asked the following:

QUESTION

Does the Elko County Commission have the legal authority under Nevada law to hire its own private legal counsel to provide continuing legal services to the commission, including the rendering of legal advice and the controlling of litigation involving the County of Elko, over the objection of the county’s elected district attorney who is ready, willing, and able to provide such services?

ANALYSIS

With respect to the legal authority of a board of county commissioners, it has become axiomatic in Nevada case law that county commissioners have only such powers as are expressly granted by the Nevada Legislature or as may be necessarily incidental for the purposes of carrying such powers into effect. See: *State ex rel. King v. Lothrop*, [55 Nev. 405](#), 408, 36 P.2d 355, 357 (1934); *Sadler v. Board of Commissioners of Eureka County*, [15 Nev. 39](#), 42 (1880); *State v. Canavan*, [17 Nev. 422](#), 424 (1883); Art. 4, Sec. 26 of the Nevada Constitution; [NRS 244.195](#).¹

The Nevada Legislature has not expressly provided by statute that a board of county commissioners can retain private legal counsel of any purpose. However, statutory language

¹ NRS 244.195 states as follows: “The boards of county commissioners shall have power and jurisdiction in their respective counties to do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board.”

similar to that contained in [NRS 244.1652](#) has been cited by the Nevada Supreme Court as authority for an implied power in the county commissioners to retain private legal counsel in connection with specific litigation in which it is necessary to protect the interest of the county. See: *Ellis v. Washoe County*, [7 Nev. 291](#) (1872).

In the *Ellis* case, the Washoe County Commissioners entered into a contract with private attorneys to perform certain legal services in connection with the defense of a suit instituted to test the validity of an act of the Nevada Legislature approved on February 17, 1871, that changed the county seat from Washoe City to the town of Reno. At the time the private attorneys submitted their claim for payment in connection with the legal services rendered, the county recorder and ex officio county auditor rejected the claim, resulting in a lawsuit in which the only issue was whether or not the county commissioners possessed the authority to bind the county to pay for legal services rendered by private legal counsel. The Nevada Supreme Court held they did have such authority and noted as follows:

This particular power is not given in express terms, but the power “to control the prosecution or defense of all suits to which the county is a party,” * * * clearly embraces the power to employ counsel to protect the interest of the county. Litigation can only be controlled by means of attorneys having the authority to appear in the courts; hence, to give full effect to this power, the commissioners must in the very outset have the power to employ counsel. Nor is it any answer to say that the law designates and provides an attorney for that purpose—the district attorney; for it is not unfrequently [sic] the case that he may be unable to attend to the business of the county, or its interests in some particular suits may be of such magnitude that the assistance of other counsel would be very desirable, or possibly indispensable. *Ellis v. Washoe County*, supra, at page 293.

In a similar case involving the ratification of a contract between the district attorney and private legal counsel in connection with the defense of Lyon County in a civil action, the Nevada Supreme Court noted that a board of county commissioners has the power to employ counsel other than the district attorney in connection with the board’s duty “to control the prosecution or defense of all suits to which the county is a party.” *Clarke v. Lyon County*, [8 Nev. 181](#), 188 (1873).

The Nevada Attorney General’s Office has previously cited both the *Ellis* and *Clarke* cases noted above and statutes similar to [NRS 244.165](#) and [244.195](#) as authority for a board of county commissioners to enter into a contract with a private attorney to assist the district attorney in handling particular lawsuits affecting or involving the county. See: Attorney General’s Opinion 42 (Nev.) December 5, 1915; and Attorney General’s Opinion 118 (Nev.) November 27, 1951.

It is significant to note that the implied power of a board of county commissioners to hire private legal counsel in connection with the board’s power and jurisdiction to control the prosecution or defense of suits to which the county is a party arises only in connection with litigation involving the county. This office has found no Nevada case law or other legal authority which would suggest that a board of county commissioners has the power, express or implied, to retain private legal counsel for the purpose of handling all legal matters that may involve the county commissioners, such as the rendering of legal opinions, the legal evaluation of accounts and claims filed against the county, or the abatement of nuisances in the county. The reason no such suggestion has appeared in the legal authorities reviewed by this office is because most, if not all, legal services required by a board of county commissioners in order to carry out their statutory duties and functions must be provided by the district attorney of the county or his office, as a

result of the statutory duties imposed on the district attorney by the Nevada Legislature pursuant to its authority under Art. 4, Sec. 32 of the Nevada Constitution.³

Among the fixed statutory duties of a Nevada district attorney with respect to the provision of legal services to a board of county commissioners are the following:

1. The district attorney must defend all suits brought against the county. [NRS 252.110](#), subsection 2.
2. The district attorney must prosecute all recognizances forfeited in district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to the county. [NRS 252.110](#), subsection 3.
3. The district attorney must commence legal proceedings to abate nuisances pursuant to an order or ordinance adopted by the board of county commissioners. [NRS 252.110](#), subsection 5.
4. The district attorney must perform any other duties as may be required by law. [NRS 252.110](#), subsection 6.
5. The district attorney must give his legal opinion to *any* county, township or district officer within the county, in any matter relating to the duties of the requesting officer. [NRS 252.160](#).
6. The district attorney must attend the sittings of the board of county commissioners, when engaged in auditing accounts and claims brought against the county and must oppose those accounts or claims as he may deem illegal or unjust. [NRS 252.170](#) and [244.235](#).
7. The district attorney must, *at all times*, give his advice when required to the members of the board of county commissioners upon matters relating to their duties. [NRS 252.170](#).
8. The district attorney must prosecute and defend all suits brought by or against a town board or a board of county commissioners under the provisions of Chapter 269, Nevada Revised Statutes. [NRS 269.145](#), subsection 2.

As is apparent from the extensive list of statutory duties noted above, a district attorney in Nevada must by law conduct and handle a substantial portion of the legal business with which a board of county commissioners would be concerned. In fact, the Nevada Supreme Court has referred to the district attorney as the “legal adviser” of the board of county commissioners in his county and has held that a district attorney cannot claim additional compensation for the discharge of the duties of a district attorney when acting in this capacity. See: *The State of Nevada ex rel. F. H. Norcross v. Shearer*, [23 Nev. 76 at pages 81-82](#), 42 pac. 582 (1895).

Therefore, it is the opinion of this office that the Elko County District Attorney would not be relieved of his statutory duty to perform the aforementioned legal services for the Elko County Commissioners, notwithstanding the current arrangement between the Board of Elko County Commissioners and their privately retained legal counsel.

It is also the opinion of this office that the implied power of the Elko County Commissioners to retain private counsel to assist them in controlling the prosecution or defense of suits in which Elko County is a party does not include the power to retain private legal counsel to perform all other legal services required by the commissioners, most of which would be included in the statutory duties of the Elko County District Attorney. In this connection, the general principle of law has been stated as follows:

* * * [A] municipal corporation may not contract for the performance of services which the law requires public officers or employees to perform, unless the authority to do so clearly appears from the powers expressly conferred upon it, or unless the

³ Art. 4, Sec. 32 of the Nevada Constitution states as follows: “The Legislature shall have the power to increase, diminish, consolidate or abolish the following county officers: County Clerks, County Recorders, Auditors, Sheriffs, *District Attorneys* and Public Administrators. *The Legislature shall provide for their election by the people, and fix by law their duties and compensation.* County Clerks shall be ex officio Clerks of the Courts of Record and of the Boards of County Commissioners in and for their respective counties. (Italics supplied.)

services required are unavailable for reasons beyond the agency's control, such as inability, refusal or disqualification of the public official to act. See: 10 McQuillin Mun. Corp. (3rd Ed.), Sec. 29.08, page 249.

With respect to local government contracts for extra legal services required on the part of local governing bodies, numerous cases have been decided in which courts have held that where a municipal corporation has regular counsel, charged with the duty of conducting all the law business in which the local government is interested, contracts for additional or extra legal services are unauthorized. The rule has frequently been applied to the engagements of attorneys by local governing boards of municipalities for the performance of services within the proper sphere of activity of the city attorney or city law department. See Generally: 10 McQuillin Mun. Corp. (3rd Ed.), Sec. 29.12, pages 259-260 and cases cited therein.

In the neighboring jurisdictions of Arizona and California, several cases have been decided in which the general principle discussed above has been applied. The case most closely on point is *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 586 P.2d 628 (1978). In this case, the Maricopa County Board of Supervisors sought a declaratory judgment that it had the right to hire private counsel to prosecute and defend the county in lawsuits and to furnish advice to it and other county officers. Under Arizona law, the county attorney was obligated to give his written opinion to county officers on matters relating to the duties of their offices and to act as the legal adviser to the board of supervisors. The trial court entered judgment in favor of the county attorney who intervened in the action. The Arizona court of appeals reversed the trial court decision in an opinion reported at 586 P.2d 640. However, the Arizona Supreme Court vacated the opinion of the court of appeals and affirmed that part of the judgment of the trial court prohibiting the practice of hiring private attorneys as the legal advisers of the board of supervisors. The pertinent portion of the Arizona Supreme Court opinion is as follows:

* * * [T]he first question to which we address ourselves is whether the Board has the power to hire "in-house" counsel independent of the County Attorney for the purpose of advising it and the various county officers relative to legal matters. Our conclusion is that it may not.

Generally, where a statute authorizes legal counsel charged with the duty of conducting the legal business of a governmental agency, contracts with other attorneys for legal services are void. So it has been said of municipalities that:

"[W]here the [municipal] corporation has regular counsel, charged with the duty of conducting all the law business in which the corporation is interested, contracts for additional or extra legal services are unauthorized. 10 E. McQuillan, [sic] Municipal Corporations, Sec. 29.12 (3rd edition)." See: 586 P.2d at 630.

In a similar California case, a California appellate court considered whether or not a school district was authorized to employ a private attorney to advise its board of trustees when the services of the county counsel were available to the trustees for this purpose. The rule enunciated by the court was that a public agency created by statute cannot contract and pay for services which the law requires a designated public official to perform without charge, unless the services required are beyond the agency's control, such as the inability, refusal or disqualification of the public official to act. The rationale stated by the court on which this rule was based appears particularly persuasive to this office:

The law will not indulge an implication that a public agency has authority to spend public funds which it does not need to spend; that it has authority to pay for

services which it may obtain without payment; or that it may duplicate an expenditure for services which the taxpayers already have provided. *Jaynes v. Stockton*, 14 Cal.Rptr. 49, 54 (Cal.App. 1961).

Because the Elko County District Attorney is not only obligated by statute, but is also ready, willing, and able to render many of the legal services now being provided to the Elko County Commissioners by its retained private legal counsel, this office is of the opinion that the law of Nevada likewise does not permit the county commissioners to spend public funds to obtain legal services that are otherwise obtainable from the district attorney. This does not suggest that there are no circumstances under which a board of county commissioners can retain private legal counsel to assist the district attorney or his staff or to provide specialized professional services for the county commission, such as those provided by bond counsel in the course of issuing local government bonds. However, any such arrangements to obtain specialized legal services should be clearly necessary to carry out an express statutory power or duty of the county commissioners and should not duplicate the services already available from the district attorney.

CONCLUSION

The Elko County Commissioners do not have the legal authority under Nevada law to hire their own continuous private legal counsel over the objection of the Elko County District Attorney, who is ready, willing, and able to render all the legal services required of him by Nevada statutes. The county commissioners do have the authority to hire counsel other than the district attorney for the purpose of litigating specific cases, though such arrangements should be made with the advice and consent of the district attorney in order to foster a spirit of cooperation between county officials which will necessarily tend to the good of the county. See: Attorney General's Opinion 79 (Nev.) July 26, 1919.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Larry D. Struve
Chief Deputy Attorney General

OPINION NO. 80-38 State Employees, Statutory Salary Limitations, Additional Types of Pay—[NRS 284.182](#) and [NRS 284.175](#), subsection 5 do not preclude state employees who are receiving the maximum salaries allowed by these sections from receiving overtime and longevity pay and perquisites. Unclassified state employees may not receive stand-by and call back pay or a special salary adjustment under the Rules for State Personnel Administration. Classified employees impacted by [NRS 284.175](#), subsection 5 may receive stand-by and call back pay but not a special salary adjustment. Overtime and longevity pay and perquisites are not part of an unclassified supervisor's salary for purposes of [NRS 284.175](#), subsection 5.

Carson City, October 15, 1980

Mr. James F. Wittenberg, Personnel Administrator, Capitol Complex, Carson City, Nevada
89710

Dear Mr. Wittenberg:

You have asked this office to answer several questions concerning the legal permissibility of paying cash compensation for overtime worked, longevity pay, call back pay, stand-by pay, pay for additional duties and rent, and/or utilities allowances¹ to those employees in the classified and unclassified service of the State whose maximum salaries are either set or restricted by statute. Before proceeding further it seems appropriate to point out that federal law does not control the payment of overtime. In 1974 Congress amended the Fair Labor Standards Act (FLSA) and embraced within the coverage of the act all employees of the State except elected officials and close advisors thereof. See 29 U.S.C. § 203(d) and (e)(2)(c). The FLSA dictates maximum work weeks for employees and overtime rates for amounts worked in excess thereof. 29 U.S.C. § 207. In *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976) the U.S. Supreme Court ruled that Congress could not constitutionally apply the FLSA overtime provisions to the states. *Townsend v. Clover Bottom Hospital and School*, 560 S.W.2d 623 (Tenn. 1978). Thus answers to the questions posed below are controlled by Nevada law.

As used in this Opinion, unless the contrary is expressly set forth, the word “employee” includes “officer” as defined at [NRS 281.005](#). “To hold otherwise would lead to absurd results. It would lead to the conclusion that all elected officials of this State and [appointed] public officers * * * are not employees within the meaning of [NRS 284.350](#) and [NRS 284.355](#), and, therefore are not entitled to annual leave or to sick leave. Such a distinction between public officers and employees has never been drawn nor do we see any reason to now make this distinction.” Attorney General’s Opinion 23 (Nev.) March 17, 1959 at page 172.

QUESTION ONE

May an employee in the unclassified service of the state validly be paid additional pay of the types noted below, if the employee’s salary currently is at the maximum specified in [NRS 284.182](#)?

ANALYSIS

For the convenience of the reader, each of the categories of additional pay for employees in the unclassified service are set forth in the succeeding paragraphs, followed by a short conclusion as to each category. A final conclusion to question one is also set forth below.

OVERTIME

[NRS 284.182](#), in pertinent part, provides that the “* * * following * * * state officers and employees in the unclassified service of the State of Nevada are entitled to receive annual salaries of not more than the approximate maximum amounts set forth following their specified titles or positions * * *.” This language is then followed by a listing of positions in the unclassified service of the State and an approximate annual salary for each position.

The question of whether or not the limitation language of [NRS 284.182](#) prohibits the payment of cash compensation for overtime worked to an unclassified employee who is receiving a salary

¹ The allowances referred to here are typically called perquisites, see for example NRS 210.460, and will be so referred to in this opinion.

in the amount specified for his position in [NRS 284.182](#) has never been addressed by the Nevada Supreme Court. However, the same question has previously been answered in an opinion of the Nevada Attorney General, Attorney General's Opinion 418 (Nev.) June 9, 1967. The question addressed in the opinion was as follows: "Can a position, the unclassified salary of which is set by Chapter 525, be paid overtime salary in addition to regular salary?" Chapter 525, a predecessor statute to [NRS 284.182](#), supra, provided, at the time the opinion was issued, as follows: "The following state officers and employees in the unclassified service of the State of Nevada shall receive annual salaries in the amounts set forth following their specified titles." In answering the above question in the affirmative, this office stated that "[t]he Legislature, in setting the salaries of unclassified personnel, is presumed to have done so on the basis of eight hours per day. Therefore, overtime can be paid to unclassified employees * * * even though the overtime payment increases the amount received by the employee beyond the line * * * salary." *Id.* at 134.

Opinions of the Attorney General, while not controlling in the courts of Nevada (see *Cannon v. Taylor*, [88 Nev. 89](#), 493 P.2d 1313 (1972)) are " 'entitled to careful consideration by the courts and quite generally regarded as highly persuasive.' *Jones v. Williams*, 121 Tex. 94, 98, 45 S.W.2d 130, 131 (1931)." *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 87, fn. 10, 95 S.Ct. 870, 877 (1975). Accord *Wenke v. Hitchcock*, 493 P.2d 1154 (Cal. 1972). Since the issuance of Attorney General's Opinion 418, supra, six other legislative sessions have been held, and the Legislature has not enacted legislation limiting the opinion

or declaring it invalid. See *State v. Schye*, 305 P.2d 350 (Mont. 1956). Such " * * * silence by the legislature may be regarded as acquiescence or approval of the interpretation placed upon statutory provisions by the Attorney General." *Terry v. Edgin*, 561 P.2d 60, 65 (Okla. 1977). Accord *State v. Schye*, supra, and *State ex rel. Jenkins v. Carisch Theaters, Inc.*, 564 P.2d 1316 (Mont. 1977). Moreover, as will be set forth below it appears that the Legislature scrutinized Attorney General's Opinion 418 and positively acted as if it correctly set forth legislative intent.

Attorney General's Opinion 418 also addressed the following question: "Can a position, the unclassified salary of which is set by Chapter 525, be paid less than the amount indicated by that statute?" Based on the language of Chapter 525, supra, this office concluded that "[t]he Legislature had the power to set the indeterminate salaries by fixing the same within a certain range, including a maximum and a minimum. Instead they chose mandatory language * * *. Therefore, we answer [the] question * * * 'No' * * *. A person in the unclassified service whose salary is set by Chapter 525 of the 1967 Statutes cannot be paid less than the amount indicated therein in the absence of legislative direction." *Id.* at 133. "Direction" came at the next legislative session. By Chapter 680, Statutes of Nevada 1969, the unclassified pay bill language was amended to read as it does not. See [NRS 284.182](#), supra, which provides for maximum, not determinate, salaries. Thus, apparently, the Legislature scrutinized Attorney General's Opinion 418 and approved of that portion of the opinion in issue here. Further indication of this apparent approval may be found in the Legislature's enactment of Section 1, Chapter 512, Statutes of Nevada 1971² which provides:

Notwithstanding any other provisions of NRS, no elected or appointed department or division head in the unclassified service, including equivalent positions in the governor's office (but excluding clerical staff), shall receive overtime pay * * *.

2 This provision is currently found at NRS 284.183.

In 1971, as today, members on the Governor's clerical staff were in the unclassified service. See Chapter 625, Statutes of Nevada 1971. If the Legislature believed that unclassified employees at the top of their salary range were precluded from receiving overtime pay because of the limitation on annual salary amounts set forth in [NRS 284.182](#), then it would appear that Chapter 512, § 1 would serve no meaningful purpose; most of the persons affected by Chapter 512 were presumably already at the top of their salary range. Instead, the Legislature undoubtedly enacted Chapter 512 because of a belief that the persons affected thereby were either receiving or could receive overtime pay and the Legislature wanted to preclude the same.

The conclusion reached in Attorney General's Opinion 418 also comports with those decisions we have been able to find from other jurisdictions.

Salary as defined in "[Webster's New International Dictionary, 2 Ed., p. 2203 is] recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services, esp. to holders of official, executive, or clerical positions; fixed compensation regularly paid, as by the year * * *." *State v. Riley*, 70 A.2d 712, 713 (Del. 1949). "Traditionally 'salary' does not seem to have encompassed situations where additional pay is given for overtime. The phrase 'time and half' pay sounds more in terms of special compensation for extra work, rather than a regular rate of compensation." *Id.* Overtime pay is compensation for additional work performed beyond the normal hours of employment and is received on an irregular basis. Therefore it is not part of an employee's "salary." *Hestand v. Erke*, 298 S.W.2d 44 (Ark. 1957). Accord *Hunter v. City of New York*, 391 N.Y.S.2d 289 (N.Y. Supp.Ct. 1976).

While [NRS 284.182](#) does not preclude unclassified employees who are receiving the maximum salaries for their positions from receiving overtime pay, there must still be a law or other authority allowing for such pay before they may validly receive the same. Attorney General's Opinion 80-31 (Nev.) September 17, 1980. For state unclassified employees, that authority is found in [NRS 284.100](#) and [NRS 284.180](#), subsection 2. Nonclerical employees of the Gaming Control Board, whom it is our understanding are unclassified, are allowed, where appropriate, overtime pay pursuant to [NRS 281.100](#) and regulations adopted pursuant to [NRS 463.080](#), subsection 6. (They are expressly excluded from the provisions of Chapter 284 by [NRS 463.080](#), subsection 4.) In lieu of overtime pay, the employee's supervisor has discretion to grant the employee compensation vacation time. [NRS 281.100](#), subsection 4. Unclassified employees not excluded from Chapter 284 are allowed overtime pay pursuant to [NRS 284.180](#), subsection 2. This statute allows "credit for overtime work directed or approved by an agency head or his representative * * *." It does not by its language require overtime cash compensation nor has the Personnel Division so construed it as applied to classified employees. See Rules for Personnel Administration, Rule III(L). [NRS 284.180](#), subsection 2 should be, whenever possible, construed consistently with [NRS 281.100](#), a statute *in pari materia*. Therefore, under [NRS 284.180](#), subsection 2, an appointing authority may grant compensatory vacation time in lieu of cash compensation for credit earned.

CONCLUSION AS TO OVERTIME PAY

An employee in the unclassified service who is not excluded by the provisions of [NRS 284.183](#) may receive overtime pay, notwithstanding the fact that the employee is receiving the maximum salary provided for his or her position by [NRS 284.182](#). However, an appointing authority has discretion to grant compensatory vacation time in lieu of cash compensation for credit earned for overtime work.

LONGEVITY PAY

Longevity pay is not referred to as pay “* * * to encourage continuity of service * * *.” [NRS 284.177](#) As originally enacted, Chapter 529, Statutes of Nevada 1973, provided:

A longevity incentive plan administered by the personnel division is hereby established for employees with 10 years or more of continuous service. Employees rated standard or better with 10 years of continuous service shall receive \$125 semiannually with a semi-annual increase of \$25 for each additional year of service up to a maximum semi-annual amount of \$250 for 15 years of continuous state service.

This provision has been amended, but insofar as is pertinent to this analysis, it remains substantively the same. Chapter 529 was presented to the 1973 Legislature by the Executive Branch because the “State of Nevada currently has no method of compensating long term career employees once they have achieved the maximum rate in their salary range * * *.” 1973 Executive Budget at page 556. The Legislature apparently agreed with the expressed need because it enacted Chapter 529.³ Thus it seems clear that the Legislature enacted this measure, *inter alia*, as a means of providing additional pay to those persons who are at the top of their unclassified pay scale. If we opined that [NRS 284.182](#) precluded the receipt of longevity pay to these persons, we would be defeating the manifest purpose of [NRS 284.177](#).

As stated above, most employees of the Gaming Control Board are not covered by the provisions of Chapter 284 of NRS. These employees, however, are also entitled to receive longevity pay pursuant to [NRS 463.080](#), subsection 6. See Nevada State Gaming Control Board Personnel Manual at page 3-4.

CONCLUSION AS TO LONGEVITY PAY

Unclassified employees receiving the maximum salaries provided for by [NRS 284.182](#) may also receive, when otherwise qualified, longevity or career incentive pay.

CALL BACK AND STAND-BY PREMIUM PAY

We need not decide whether [NRS 284.182](#) precludes an unclassified employee from receiving call back and stand-by pay.⁴ No authority exists in NRS or elsewhere in Nevada law⁵ which allows for payment of compensation of this nature to unclassified employees. “The public officer seeking payment from the public treasury must put his finger on some statute whereby payment is permitted * * *. To hold otherwise would be violative and disruptive of the budgetary scheme on which the [State] operates.” *Grossman v. City of New York*, 335 N.Y.S.2d 890, 892 (App.Div. 1972). *Grossman* was cited on an analogous issue with approval in *Rusk v. Witmire*, [91 Nev. 689](#), 541 P.2d 1097 (1975). See also Attorney General’s Opinion 80-31 (Nev.) September 17, 1980.

³ Statements by a budget office explaining various provisions to a legislature have been taken into consideration to find legislative intent. *Stiftel v. Malarkey*, 384 A.2d 9 (Del.Supr. 1977).

⁴ Gaming employees exempted from Chapter 284 of NRS are eligible for “on-call” compensation. See the Nevada State Gaming Control Board Personnel Manual at page 3-4.

⁵ Rules For Personnel Administration Rules III(J) and (K), set forth *infra*, by their terms only apply to classified employees.

CONCLUSION AS TO CALL BACK AND STAND-BY PAY

Unclassified employees may not receive call back or stand-by pay, because there is no legal authority permitting it.

PAY FOR ADDITIONAL DUTIES

It is the understanding of this office that “Pay for Additional Duties” refers to Rule III(H): “Special Salary Adjustments,” set forth *infra*. This Rule was promulgated pursuant to the Personnel Division Chief’s authority under [NRS 284.175](#). By [NRS 284.175](#), the Legislature has delegated to the Chief and to the Advisory Personnel Commission the authority to provide for the compensation to be earned by members of the classified service only.⁶ It may not be applied to the unclassified service. Therefore, consistent with our analysis above, Rule III(H) does not provide authority for the payment of “Special Salary Adjustment” to unclassified employees; and in the absence of authority permitting such compensation, unclassified employees are not entitled to receive it.

CONCLUSION AS TO PAY FOR ADDITIONAL DUTIES

Unclassified employees may not receive additional special salary adjustment pay.

PERQUISITES

In those few instances where perquisites are provided to the incumbent of an unclassified position, the Legislature has made it clear that the value of the perquisites received are not to be considered as part of the incumbent’s salary.

In addition to his salary, the superintendent [of the Nevada girls training center] shall be entitled to [certain perquisites including a residence and utilities]. [NRS 21.0460](#).

See also [NRS 210.063](#); Nevada Youth Training Center superintendent entitled to same. A provision providing for perquisites is also found at [NRS 209.181](#). This section, however, does not relate to the unclassified service because the officers and employees mentioned therein are in the classified service. [NRS 209.171](#).

Aside from the instances noted above, we are of the opinion that perquisites should not be deemed a part of an unclassified employee’s “salary” as that word is used in [NRS 284.182](#). As noted in preceding paragraphs, each unclassified employee is entitled to receive an annual salary in an amount not to exceed a specific dollar figure. The exact dollar value of the perquisites received by a particular employee would be difficult, if not impossible, to calculate. If the value of perquisites were included in the “annual salary” to be received, then, of course, this value must first be ascertained before it can be calculated how much “cash” salary the employee is to receive. Moreover, even if the value could be ascertained with certainty it can be expected that the “value” will not remain constant from month to month. Thus, the cash amount of each paycheck would probably vary. As can be seen, including perquisites in salary would create an accounting nightmare. We, accordingly, will not construe [NRS 284.182](#) in such a fashion without clear direction from the Legislature.

⁶ This authority, of course, is not unfettered. The pay plan and compensation thereunder are subject to “budgeted appropriations for salary and wage expenditures.” NRS 284.180, subsection 2.

In addition, we have found no decision from any jurisdiction that has held that an allowance or perquisite is part of a public employee's salary. *Hilligoss v. LaDow*, 368 N.E.2d 1365 (Ind.App. 1977); clothing allowance, *Kommers v. Palagi*, 108 P.2d 208 (Mont. 1940); living quarters, *Louisiana State C.S. Commission v. Louisiana Dept. of Corrections*, 251 So.2d 524, 526 (La.App. 1971); "Perquisite means 'a privilege, gain or profit incidental to an employment in addition to regular salary or wages'." *Bates v. Gulf States Utilities Company*, 193 So.2d 255 (La. 1967).

CONCLUSION AS TO PERQUISITES

Where a perquisite or similar allowance is provided to an unclassified employee, the value of same shall not be included as part of the maximum salary set forth in [NRS 284.182](#) for said employee.

CONCLUSION—QUESTION ONE

An unclassified employee is not precluded by [NRS 284.182](#) from receiving overtime pay, longevity pay, and perquisites in addition to the maximum salary for his position specified in [NRS 284.182](#). Unclassified employees may not receive call back pay, stand-by pay or a special salary adjustment, absent statutory authorization.

QUESTION TWO

May an employee in the classified service of the State validly be paid the below listed types of additional pay if the employee is subject to and his salary is at the maximum amount allowed by [NRS 284.175](#), subsection 5?

ANALYSIS

[NRS 284.175](#), subsection 5, in pertinent part provides:

* * * no employee in the classified service may receive a salary in excess of 95 percent of the salary received by his immediate supervisor if his immediate supervisor is in the unclassified service.

OVERTIME

To paraphrase an earlier opinion of this office, Attorney General's Opinion 72 (Nev.) July 16, 1959, we cannot ascribe to the Legislature an intent to discriminate against classified employees by denying them compensation afforded to similarly situated unclassified employees. Moreover, the reasoning regarding what constitutes salary, set forth above, applies with equal force here.

LONGEVITY PAY

Classified employees within the purview of [NRS 284.175](#), subsection 5 are entitled to receive longevity pay in the same manner and for the same reasons as set forth for unclassified employees.

CALL BACK PAY AND STAND-BY PREMIUM PAY

Pursuant to [NRS 284.175](#), subsection 1, the Chief of the Personnel Division is required to “prescribe regulations for a pay plan for all employees in the classified service.” Under this statute regulations have been promulgated, and Rules for Personnel Administration, Rule III provides as follows:

J. *Call Back Pay.*

* * *

1. Each time a full-time classified employee is called back to work on an unscheduled basis, by his supervisor, he shall be credited with a minimum of two hours work * * * if:

a. The work begins more than one hour after completion of the work shift, but ends more than one hour before the next scheduled work shift, provided that the time for beginning work was not set at the request of the employee; or

b. The employee is called back to work without having been so notified prior to the completion of his normal working day; or

c. The employee is called back to work on his regularly scheduled day off; or

d. The employee is called back on a holiday.

* * *

3. Call back pay shall not apply to employees receiving stand-by premium pay.

4. Excluded from the provisions of this section are administrative and executive personnel who regulate their own working hours.

K. *Stand-By Premium Pay.*

1. Classified employees shall receive Stand-by Premium Pay of five percent (5%) of their regular hourly rate for every hour they are in stand-by status.

2. An employee is in stand-by status when he is directed to:

a. Remain available for immediate contact during specified hours.

b. He is required to be prepared to work as the need arises, although the need for him to work might not arise.

* * *

These provision relate to additional compensation to be provided to classified employees who are called back to work on an “unscheduled basis” or who might be called back because the appointing authority, *inter alia*, feels that an emergency situation might develop. As can be seen this is not pay for services rendered during a “standard work period” and is therefore not part of the employee’s salary. Attorney General’s Opinion 80-31 (Nev.) September 17, 1980. Receipt of this type of additional pay by an employee impacted by the 95 percent rule would not violate [NRS 284.175](#), subsection 5.

PAY FOR ADDITIONAL DUTIES

Pay of this type is also provided for in Personnel Rule III, *supra*, at Section H.

H. *Special Salary Adjustments.*

The State Personnel Division may approve requests * * * for special salary adjustments in order to * * * give a one grade pay increment recognition to employees carrying responsibilities beyond those required for the class as a whole * * *.

As long as the employee continues to perform the additional duties, the Rule provides for additional pay to be received on a regular basis at periodic intervals. This fits within the definition of “salary,” *supra*. However, a classified employee who receives a special salary

adjustment must include such salary adjustment within the total salary limitations set forth in [NRS 284.175](#), subsection 5.

PERQUISITES

As aforesaid, perquisites do not constitute a part of the “salary” received by an employee and, therefore, should not be included for purposes of [NRS 284.175](#), subsection 5.

CONCLUSION—QUESTION TWO

Classified employees subject to and receiving the maximum salary allowed by [NRS 284.175](#), subsection 5 may validly receive in addition thereto overtime and longevity pay, perquisites, stand-by pay and call back pay but may not receive a special salary adjustment pursuant to Rule III(H).

QUESTION THREE

For purposes of calculating 95 percent of an unclassified supervisor’s salary pursuant to the classified salary limitations provided for in [NRS 284.175](#), subsection 5, what type of pay listed above should be taken into account when ascertaining the supervisor’s salary?

ANALYSIS AND CONCLUSION—QUESTION THREE

As concluded above, overtime pay, longevity pay and perquisites are not part of the supervisor’s salary as the term “salary” is used in NRS 284.182. Therefore, they should not be taken into account. Unclassified employees are not eligible for call back pay, stand-by pay and pay for additional duties, and therefore they have no application to unclassified employees.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-39 State Volunteers, Suits Based on Acts or Omissions, Defense by Attorney General—A person who performs volunteer service under the direct supervision and control of and for the benefit of the State is entitled to request a defense from the Attorney General pursuant to [NRS 41.0339](#) when a civil action is brought against that person based on any alleged act or omission relating to such service. The Attorney General shall provide such a defense if, inter alia, the Attorney General has determined that the act or omission on which the action is based appears to be within the course and scope of the public duty assumed by the volunteer, appears to have been performed or omitted in good faith, was done under the control and direct supervision of the State and furthered by State’s business.

Carson City, October 17, 1980

Mr. Howard E. Barrett, Director, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Barrett:

You recently asked this office to answer a question concerning the construction of [NRS 41.0339](#). The specific question you have asked is as follows:

QUESTION

Is a person who performs volunteer service under the direct supervision and control of and for the benefit of the State of Nevada entitled to be defended by the Attorney General when he is sued in a civil action based on an alleged act or omission relating to his voluntary service?

ANALYSIS

[NRS 41.0339](#) relates to the defense of state officers and employees who are sued in a civil action. Insofar as it is pertinent here, it provides:

The [attorney general] shall provide for the defense * * * of any officer or employee * * * of the state * * * in any civil action brought against that person based on any alleged act or omission relating to his public duties if [, inter alia, the attorney general] has determined that the act or omission on which the action is based appears to be within the course and scope of public duty and appears to have been performed or omitted in good faith.

A volunteer does not perform services to the State pursuant to appointment to a state position created by statute. Therefore a volunteer may not be deemed a state officer. [NRS 281.005](#). Thus, if a volunteer is entitled to a defense he must be deemed a state "employee" as that word is used in [NRS 41.0339](#), supra. This opinion will discuss if, and under what circumstances, a volunteer would be deemed an "employee."

The word "employee," if read narrowly, means "one who works for wages or salary in the service of an employer." *Alliance Company v. State Hospital at Butner*, 85 S.E.2d 386, 389 (N.C. 1955). A volunteer is a person who gives his services without any express or implied promise of remuneration. See Black's Law Dictionary 1747 (Revised 4th Edition 1968). In *Alliance Company* the North Carolina Supreme Court was called upon to decide whether North Carolina was liable for injuries sustained by a person caused by the negligent acts of a prison inmate who was performing services under the direction and control of one of its employees. North Carolina would only be liable if the inmate, when he caused the injury, was an "employee" of North Carolina as that word was used in North Carolina General Statutes § 143-291 which provided:

[The State is liable for] such negligence on the part of a State employee while acting within the scope of his employment * * *.

Section 143-291, as amended infra, is found in the North Carolina Tort Claims Act, Article 31 of Chapter 143. Article 31 is the section of North Carolina law wherein the State statutorily waived its sovereign immunity and consented to suit for the torts of its employees. Article 31 is analogous to [NRS 41.0305](#) to [NRS 41.039](#) because each is on the same subject matter; namely,

when the respective states will be liable for the negligent acts of their employees. In Alliance Company the court after defining “employee” as stated above ruled against the injured person because the inmate was not receiving wages or a salary and thus could not be deemed an employee. Alliance Company would, therefore, lend support for a conclusion here that a volunteer is not an “employee.” However, for the reasons expressed below we choose not to follow the Alliance Company decision.

Alliance Company was decided on January 14, 1955. By North Carolina Session Laws c.400, ratified on March 31, 1955, the North Carolina Legislature, apparently in direct response to the Alliance Company decision, amended § 143-291 to read, in pertinent part, as follows:

[The State is liable for] such negligence * * * on the part of an officer, employee, [or] voluntary * * * servant * * * of the State while acting within the scope of his * * * employment * * *.

In the preamble to the 1955 amendment the North Carolina Legislature stated that it enacted Chapter 400, supra, because it wanted “the intent and purpose of * * * Article [31] * * * perfected.” Article 31’s purpose, when enacted in 1951 by Chapter 1059 of the 1951 Session Laws, was to make North Carolina liable for negligent injuries inflicted by its employees under the same rules of law as are applicable to private entities. Preamble to Chapter 400, supra. Compare [NRS 41.031](#), infra. Thus it is obvious that the North Carolina Legislature disagreed with the construction given the word “employee” in Alliance Company, supra; the word “employee” in § 143-291 was meant to include a “voluntary servant.” As will be pointed out below, the phrase “voluntary servant” may, but not necessarily must, include a person who volunteers services to the State.

In 1965 the Nevada Legislature pursuant to Article 4, Section 22 of the Nevada Constitution,¹ partially waived its sovereign immunity and consented “* * * to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, [with certain exceptions not pertinent here].” Chapter 505 Statutes of Nevada 1965. The quoted language is now found in [NRS 41.031](#). Under the doctrine of respondeat superior—let the master answer for the wrongful acts of his servants—a private employer may be held liable for the negligence of its “employees.” What we are concerned with here is if, and under what circumstances, a volunteer acting under the direction and control of the State may be deemed an “employee” for liability purposes.

In *Meagher v. Gavin*, [80 Nev. 211](#), 391 P.2d 507 (1964), the Nevada Supreme Court held that a private employer, under the doctrine of respondeat superior, may be held liable for the negligence of a person who was not in the employ of the employer.

We hold that when an employee, without the employer’s consent, lets [the] person drive the employer’s car in furtherance of the employer’s purpose, and the employee is present, the employer is liable for the negligence of the [person]. *Id.* at 216, 391 P.2d at 510.

As the court stated in *National Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978). in elaborating upon its decision in *Meagher*, “the term ‘control’ has been applied to establish the master-servant relationship

¹ Article 4, Section 22 of the Nevada Constitution provides:

Provision may be made by general law for bringing suit against the state as to all liabilities originating after the adoption of this Constitution.

itself, the sine qua non [an indispensable requisite or condition] of the respondeat superior doctrine. Succinctly stated, the employer can be vicariously responsible only for the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the ‘employee’ is under the control of the ‘employer.’ *Martarano v. United States*, 231 Fed.Supp. 805 (D.Nev. 1964).” Thus once it is found that an employer has exercised sufficient control over a person, who would not otherwise be deemed an “employee,” that person will be deemed an “employee” or servant for vicarious liability purposes under the doctrine of respondeat superior. “One who volunteers services without an agreement for or expectation of reward *may be* a servant of the one accepting such services. [Italics added].” Restatement (Second) of Agency § 225, cited with approval in *Stebbins v. Quinty*, 364 N.E.2d 1087 (Mass.App. 1977). Equally important to the establishment of a master-servant relationship between the State and a volunteer is the acceptance of those services by the State. Therefore, if a person volunteers his services to the State and the State manifests consent to receive the services, see Restatement, *supra*, at § 221, the volunteer may be deemed a servant and the State a master. Further criteria which will also be looked at before a master-servant relationship is deemed to exist for purposes of imposing liability upon the State for the acts of the volunteer is set forth below. For purposes of the doctrine, the word servant is synonymous with employee and the word master is synonymous with employer. See: *National Convenience Stores, Inc.*, *supra* and *Jones v. Hadican*, 552 F.2d 249 (8th Cir. 1977), cert. denied 431 U.S. 941, 97 S.Ct. 2658, construing an analogous provision of federal statutory law. Thus pursuant to RNS 41.031, the State may be liable for the wrongful acts of a volunteer-servant. See Attorney General’s Opinion 80-15 (Nev.) May 5, 1980.

[NRS 41.031](#) is in that portion of NRS relating to the liability of the State, its officers and employees, [NRS 41.0305](#) to [NRS 41.039](#) inclusive. If a volunteer may be deemed an “employee” for purposes of determining the State’s liability under [NRS 41.031](#) then the other sections in that portion of NRS wherein the word “employee” is found must be read as consistent therewith. Therefore, the word “employee” as used in [NRS 41.0339](#), may include a volunteer. Moreover, this construction of the word “employee” will further the Legislature’s declared purpose when it enacted the language set forth above in [NRS 41.0339](#). This language was originally added to NRS by Section 4, Chapter 584, Statutes of Nevada 1977.² When the Legislature enacted this language into law it declared, in the preamble to Chapter 584, that:

The state [has] experienced difficulty in attracting, recruiting and retaining capable and conscientious persons to serve as * * * employees given the unresolved question of the personal liability of such persons in any actions sounding in tort arising out of any act or omission within the scope of their public duties or employment * * *.

If a volunteer may not be an “employee” as that word is used in NRS 41.0339, then whenever the volunteer is sued in tort for an alleged negligent act committed while under the direction and control of the State, in a

situation where the master-servant relationship would be deemed to exist, and resulting in injury to a third party, the volunteer will more than likely be forced to incur the expense of retaining private counsel. Given this possibility, a potential volunteer will probably refrain from rendering gratuitous services to the State. On the other hand, if the volunteer may be deemed to be an

² By Section 3 of Chapter 678, Statutes of Nevada 1979 this language was placed in a separate section of Chapter 41 of NRS and later numbered as NRS 41.0339.

employee, then the State will have the right to be named a party in a tort suit in order to protect its interests, [NRS 41.0337](#),³ and the State's liability will be limited to \$50,000, [NRS 41.035](#).⁴

The construction given here to the word "employee" within the meaning of [NRS 41.0339](#) is also consistent with the construction given the same word by the federal courts, and the courts of New York and Ohio in construing their respective tort claims acts.

As noted above, the Nevada Supreme Court in *National Convenience Stores, Inc.*, cited with approval Martarano, supra, for the proposition that the master-servant relationship is the sine qua non of the doctrine of respondeat superior, and that "control" is an important factor in establishing the relationship. In Martarano, Nevada Federal District Court Judge Thompson was called upon to decide whether a person on the State of Nevada payroll who injured a third party while acting under the supervision of federal officials was a federal "employee" as that word is used in 28 U.S.C. § 1346(b) in conjunction with 28 U.S.C. § 2674, both of which are sections of the Federal Tort Claims Act, (28 U.S.C. §§ 1346(b) and 2671 et seq.). The Federal Tort Claims Act renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2874, for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * *." 28 U.S.C. §1346(b). In holding that the wrongdoer was a federal "employee," for purposes of holding the United States liable, Federal Judge Thompson placed great emphasis on the fact that the "employee" was acting under the *control and direct supervision* of federal officials. Given the reliance of the Nevada Supreme court in *National Convenience Stores, Inc.*, supra, on Judge Thompson's opinion in Martarano, we feel that our opinion should also conclude that a servant, which as aforesaid may include volunteers, should be deemed, for the purpose herein specified, as an "employee." In accord: *McAfee v. Overberg*, 367 N.E.2d 942 (Ohio Ct. Cl. 1977) and *Washington v. State*, 23 N.E.2d 543 (N.Y. 1939).

We wish at this point to reiterate and emphasize that a volunteer will not always be deemed a servant and thus an "employee" of the State for purposes of either imposing liability upon the State under [NRS 41.031](#) or receiving a defense by the Attorney General, under [NRS 41.0339](#). For example, a person who, without assent or control and supervision by the State performs services which that person subjectively feels will be of benefit to the State, will not be deemed a servant or employee. See Restatement (Second) of Agency, § 221, supra. In order for a volunteer to be deemed an "employee" the alleged wrongful act upon which a civil action against the volunteer is based, must be done under the control and direct supervision of the State, Martarano, supra, in good faith, [NRS 41.0339](#), in furtherance of the State's business, Meagher, supra, and within the course and scope of the public duty assumed by the volunteer, [NRS 41.0339](#).

We suggest that guidelines be formulated by your department, in conjunction with our office, to advise state administrators regarding the use of volunteer services in light of this opinion.

CONCLUSION

It is the opinion of this office that a person who performs volunteer service under the direct supervision and control of and for the benefit of the State is entitled to request a defense from the

³ NRS 41.0337 provides in pertinent part:

No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any * * * employee * * * of the state * * * unless the state * * * is named a party defendant under NRS 41.031.

⁴ NRS 41.035 provides in pertinent part:

An award for damages in an action sounding in tort brought under NRS 41.031 or against [an] employee of the state * * * arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of \$50,000 * * *

Attorney General pursuant to [NRS 41.0339](#) when a civil action is brought against that person based on any alleged act or omission relating to such service. The Attorney General shall provide such a defense if, inter alia, the Attorney General has determined that the act or omission on which the action is based appears to be within the course and scope of the public duty assumed by the volunteer, appears to have been performed or omitted in good faith, was done under the control and direct supervision of the State and furthered the State's business.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Robert H. Ulrich
Deputy Attorney General

OPINION NO. 80-40 Taxation, Time Shared Condominiums, Tax Collection—Where a single condominium is divided into fifty one-week intervals conveyed in fee simple tenancies in common, the county treasurer may send one tax bill to the owners' association for real property taxes accruing on the whole unit in lieu of separate bills for each interval owner. Where taxes on such a condominium are delinquent, the entire condominium is subject to a sale for the delinquent taxes.

Carson City, November 5, 1980

The Honorable Michael S. Rowe, Douglas County District Attorney, Douglas County Courthouse, Minden, Nevada 89423

Dear Mr. Rowe:

This is in response to your written request for an Attorney General's opinion regarding the taxation of time shared condominiums.

FACTS

In your letter, you enclosed copies of a grant deed with conveys to the grantee in fee simple an undivided 1/50th interest as a tenant in common in a condominium unit. The grantee's interest is described as a "use right easement" of one week's duration. The deed reserves to the grantor exclusive right to use and occupy units and the common areas for sales, administration, development and improvement purposes. The deed also designates a "time share owners' association" as the entity to which the tax statement is to be mailed.

QUESTION ONE

Where a condominium is divided into fifty one-week time shared intervals, each an undivided fee simple tenancy in common, may the Douglas County Treasurer, acting as the ex officio tax receiver, send one tax bill to the time share owners' association for ad valorem real property taxes accruing on the entire condominium unit in lieu of separate bills for each interval owner?

ANALYSIS

At the outset we note that there is no requirement under [NRS Chapter 361](#) that a county treasurer, acting as ex officio tax receiver for taxes assessed on real property, bill any taxpayer individually. [NRS 361.480](#) provides only that upon receiving the assessment roll from the county auditor, the treasurer “shall proceed to receive taxes.” Notice to the taxpayer is furnished by publication or by posting, if no newspaper is published in the county, and need only specify the dates when taxes are due and the penalties for delinquency. [NRS 361.480](#), subsection 2.

[NRS 361.243](#) provides that condominiums, as defined in subsection 2 of [NRS 117.010](#), shall be separately assessed to the owner thereof. [NRS 117.010](#), subsection 2 defines “condominium” as follows:

2. “Condominium” means any estate in real property consisting of an undivided interest in common in portions of a parcel of real property together with a separate interest in space in a residential, industrial or commercial building or industrial and commercial building on such real property, such as, but not restricted to, an apartment, office or other portions of such real property. Such estate may, with respect to the duration of its enjoyment, be either:
 - (a) An estate of inheritance or perpetual estate;
 - (b) An estate for life; or
 - (c) An estate for years.

The above definition indicates that the owner’s separate interest is defined spatially. The duration of this separate, spatial interest may be perpetual, for life or for years. Nothing within [NRS 117.010](#), subsection 2 indicates that a temporal division of the spatial interest in a residential building, qualifies, in and of itself, as a separate “condominium” within the purview of the definition.

Inasmuch as the deed in question grants an undivided 1/50th interest to the grantee as a tenant in common “in and to the condominium hereafter described,” the grantee’s interest is 1/50th of the condominium as defined by [NRS 117.010](#), subsection 2. The aggregate of 1/50th interests equals the condominium to be taxed separately pursuant to [NRS 361.243](#), as opposed to the “project” as defined by [NRS 117.010](#), subsection 3, which consists of other condominiums that may or may not be divided into temporal interests. Accordingly, the tax liability of the individual grantee of a temporal interest in a condominium must be determined by the general rule regarding cotenants’ liability for property taxes.

In that connection, it is well settled that tenants in common are jointly liable to the taxing authority for the entire amount of tax due on their common real property. *Victoria Cooper Mining Company v. Rich*, 193 F. 314 (6th Cir. 1919); *Willmon v. Koyer*, 143 P. 694 (Cal. 1914); *Hutchens v. Denton*, 98 S.E. 808, (W.Va. 1919).

Essentially, there are two reasons for this rule. First, it is inimical to the prompt collection of revenue for the taxing authority to be required to trace all the interests that may be held in real estate and to seek to hold each owner responsible. *Bell v. Myers*, 345 A.2d 105 (Md.App. 1975). Second, a cotenant who pays the entire amount of taxes due on the common property is generally entitled to contribution from his cotenants. *Marsh v. Edelstein*, 88 Cal.Rptr. 26, 31 (1970); *Palmer v. Protrka*, 476 P.2d 185, 189 (Or. 1970). It has been held that the taxpaying cotenant acquires a lien on the subject property to enforce such contribution. *McClintock v. Fontaine*, 119 F. 448 (1902); *Hurley v. Hurley*, 19 N.E. 545 (Mass. 1889).

Thus the common law contemplates that the taxing authority may look to one source for the entire tax, leaving the various tenants in common to their own devices for adjustment of their pro rata shares.

As indicated above, the deed in question here conveys a 1/50th interest in the subject real property consisting of an exclusive “use right easement” for 7 days and 7 nights. The deed designates a “time share owners’ association” to be the recipient of the tax statement, and presumably, the entity responsible for payment of the tax. The question arises whether the grantor, who retains the remaining interest in the subject property, is a tenant in common with its grantees, with authority to designate another entity as the taxpayer. However, in view of the absence of a statutory provision requiring that a tax bill be sent at all to an owner of real property, it is not necessary to address this question. We are of the opinion that so long as the Douglas County Treasurer complies with the notice provisions contained in [NRS 361.480](#), subsection 2, it is proper to bill the time share owners’ association for all the ad valorem taxes due on a single condominium unit. In the alternative, the treasurer may also properly bill any of the tenants in common of the unit.

We are aware of only one state, Utah, which taxes time share intervals separately. This is specifically mandated by statute. Utah Code Ann. § 57-8-27, 1979 Supplement.

CONCLUSION—QUESTION ONE

It is the opinion of this office that there is no statutory authority in Nevada permitting separate taxation of temporal interests in a single condominium unit. The county treasurer may bill the owners’ association or any of the tenants in common for all of the ad valorem real property taxes on a single condominium unit, where the interval owners’ interests are in fee simple as tenants in common.

QUESTION TWO

If real property taxes become delinquent on a condominium divided into fifty one-week time shared intervals conveyed to the owners in fee simple as tenants in common, is the whole condominium subject to sale for the delinquent taxes?

ANALYSIS

For the reasons set forth in answer to question one and pursuant to [NRS 361.450](#), subsection 1, delinquent taxes on a condominium subject to temporal division into undivided fee simple tenancies in common are a lien against the whole condominium and, if not paid, subject the whole condominium to a tax sale.

[NRS 361.243](#) provides that “the tax on each condominium shall constitute a lien solely thereon.” Given our conclusion that the grantee’s 1/50th undivided interest is not, in and of itself, a condominium within the purview of [NRS 117.010](#), subsection 2 and that the aggregate of the interests equals the condominium to be assessed, it follows that the aggregate of the interest equals the condominium to which the tax lien attaches.

It has been held that it is not necessary for the taxing authority to segregate the interests of tenants in common prior to selling real property for delinquent taxes. *State v. Central Pocahontas Coal Co.*, 98 S.E. 214 (W.Va. 1919); *Hutchens v. Denton*, supra. This was so even where one tenant in common remitted his pro rate share of taxes and the sheriff mistakenly sold the property only for the amount remaining. 98 S.E. at 219, 220. Likewise, it has been held that the purchaser of real property sold for delinquent taxes obtains new and complete title to the land in fee simple

absolute. *Bell v. Myers*, 345 A.2d 105 (Md.App. 1975); *Sautbine v. Keller*, 423 P.2d 447 (Okla. 1967). The grant from the taxing authority is not limited merely to the interests of the persons to whom the property had been assessed for the taxes on account of which it was sold. 345 A.2d at 108.

By analogy, Section 7403(a) of the Internal Revenue Code confers upon the United States the authority “to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.” The federal courts, save one, in a variety of contexts, have construed this section to allow the government to sell property in its entirety where the taxpayer owns only a partial interest. *U.S. v. Trilling*, 328 F.2d 699 (7th Cir. 1964); *U.S. v. Eaves*, 499 F.2d 869 (10th Cir. 1974) (joint tenancy); *U.S. v. Kocher*, 468 F.2d 503 (2nd Cir. 1972) (tenancy in common). *U.S. v. Overman*, 424 F.2d 1142 (9th Cir. 1970) (community property). Contra, *Folsom v. U.S.*, 306 F.2d 361 (5th Cir. 1962).

In the context of the instant situation where a single condominium is broken into fifty undivided fee simple interests, if the owners’ association fails to remit the real property taxes in full, the county treasurer may ultimately sell the entire condominium upon compliance with [NRS 361.565](#) and expiration of the redemption period. In that connection, it is important to note that [NRS 361.565](#), subsection 6 mandates mailed notice to both the owner or owners and to the person or persons listed as the taxpayer or taxpayers on the roll. This appears to require mailed notice to each interval owner as tenant in common in fee simple as well as the association as taxpayer.

CONCLUSION—QUESTION TWO

It is the opinion of this office that inasmuch as the one-week intervals should not be taxed separately, it follows that the tax lien attaches to the whole condominium unit and not to the separate interests. Accordingly, if the taxes become delinquent, the entire unit is subject to sale to satisfy the delinquency.

As is apparent from the preceding analyses, Nevada’s tax statutes do not clearly address the unique problems inherent in the assessment and collection of taxes levied on time shared condominiums. Accordingly, this office suggests that officials of your county request legislative clarification of the procedure to be followed in taxing this type of property ownership. Included should be a statutory outline of the steps to be taken in notifying owners of time shared condominiums and other similar properties when tax bills are initially issued as well as when they become delinquent.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: David M. Norris
Deputy Attorney General

OPINION NO. 80-41 Appointment to Legislative Vacancy—Under [NRS 218.043](#), in appointing a person to fill a legislative vacancy in a multi-county district, the joint selection board must appoint a person of the same political party as the former incumbent. Members

of the joint selection board vote as individuals in a combined action of the joint board. The appointment to the legislative vacancy may be made by a plurality vote.

Carson City, November 20, 1980

The Honorable John C. Giomi, District Attorney, Lyon County Courthouse, Yerington, Nevada
89447

Attention: ARCHIE E. BLAKE, *Assistant District Attorney*

Dear Mr. Giomi:

The present incumbent of the Western Nevada Senatorial District intends to resign shortly in order to take a position in the executive branch of state government. The Western Nevada Senatorial District consists of Churchill, Lyon, Pershing and Storey counties. Under [NRS 218.043](#), it is the duty of the boards of county commissioners of each of these counties, acting as a joint board, to select a person to fill the impending vacancy in this legislative office. You have requested advice concerning an interpretation of this statute and have asked several questions in accordance with that request.

QUESTION ONE

Must the appointee chosen by the joint board of county commissioners be of the same political party as the person resigning the office?

ANALYSIS—QUESTION ONE

[NRS 218.043](#) provides as follows:

Were a vacancy occurs in the office of state senator or assemblyman during a regular or general session of the legislature or at a time when no biennial election or regular election at which county officers are to be elected will take place between the occurrence of such vacancy and the next regular or special session, the board of county commissioners of the county from which such person was elected *shall appoint a person of the same political party as the former incumbent to fill such vacancy.* Where the senator or assemblyman was elected from a district comprising more than one county, *such appointment* shall be made by a joint board composed of all of the county commissioners of each county within or partly within the district, under the chairmanship of the chairman of the board of county commissioners of the county whose population residing within the district is the greatest. If no person receives a plurality of the votes of the joint board, the boards of county commissioners of the respective counties shall each select a candidate, and the appointee shall be chosen by drawing lots among the candidates so selected. (Italics added.)

In the case of a vacancy in a legislative district located wholly within one county, the law is clear with respect as to who is eligible to fill the vacancy. The board of county commissioners of the pertinent county is required to fill the vacancy by appointing a person of the same political party as the former incumbent. This is specifically stated in the statute.

At first glance, the statute appears to be silent on this point with respect to a multi-county legislative vacancy. A careful reading of the statute, however, reveals that in fact this point is also specifically addressed by the statutory language. The key to the interpretation of this statute lies in the words “such appointment” found in the second sentence of the law.

The word “such” refers back to and identifies something previously spoken of, something that has gone before, something that has been specified. It always refers to a class only just previously pointed out and should be construed as referring back to a common subject. The term means that which has been previously characterized or specified; of the same class, type or sort; in the same category, similar. *Joseph L. Pohl, Contractor, Inc. v. State Highway Commission*, 431 S.W.2d 99, 105 (Mo. 1968).

The term “such” is a relative adjective referring back to and identifying something previously spoken of. It, by grammatical usage, refers to the last precedent antecedent. It is equivalent to “said” or “aforesaid,” “aforesaid,” “aforesaid,” and “same.” *Estate of Hill*, 214 Cal.App.2d 812, 29 Cal.Rptr. 814, 819 (1963); *Sharlin v. Neighborhood Theatre, Inc.*, 209 Va. 719, 167 S.E.2d 334, 337 (1969).

The term “such” always refers to something that has gone before. The word “such” is defined as “of the sort previously indicated or contextually implied; before-mentioned; previously characterized or specified; of the same kind or class as something mentioned.” *Luciani v. Certified Grocers of Illinois, Inc.*,

105 Ill.App.2d 448, 245 N.E.2d 523, 527 (1969). The term means “of that kind; of the same or like kind, identical with or similar to something specified or implied.” *C. J. Tower and Sons of Buffalo, Inc. v. United States*, 295 F.Supp. 1104, 1108 (U.S.Cust.Ct. 1969). The term means “the same as what has been mentioned.” *In re Watson’s Will*, 144 Misc. 213, 258 N.Y.Supp. 755, 776 (1932). It is a reasonable and permissible statutory construction to conclude that the word “such” refers back to a prior sentence. *Bahre v. Hogblom*, 162 Conn. 549, 295 A.2d 547, 551-552 (1972).

In this instance, the second sentence of [NRS 218.043](#) begins, “Where the senator or assemblyman was elected from a district comprising more than one county, such appointment shall be made by a joint board * * *.” Utilizing the aforesaid definitions of the term “such,” the term “such appointment” can only be taken to refer to something of a like or similar class referred to in the prior sentence. In essence the term “such appointment” can be read to mean, “the aforesaid appointment” or “the aforesaid appointment.”

The appointment which has been previously described would thus be that appointment which is described in the first sentence of [NRS 218.043](#), i.e., “the board of county commissioners of the county from which such member was elected shall appoint a person of the same political party as the former incumbent to fill such vacancy.”

Therefore, it is the opinion of this office that [NRS 218.043](#), by its use of the term “such appointment” in its second sentence, specifically refers to, and resolves, the question of whether the person to be appointed to a multi-county legislative vacancy must be of the same political party as the former incumbent.

CONCLUSION—QUESTION ONE

In the opinion of this office, under [NRS 218.043](#), in appointing a person to fill a legislative vacancy in a multi-county district, the joint selection board must appoint a person of the same political party as the former incumbent.

QUESTION TWO

Do the members of the joint selection board vote as individuals or do they vote in county commission units?

ANALYSIS—QUESTION TWO

[NRS 218.043](#) provides that the appointment to fill a vacancy in a multi-county legislative district:

Shall be made by a *joint board* composed of all the county commissioners of each county within or partly within the district, under the chairmanship of the chairman of the board of county commissioners of the county whose population residing within the district is the greatest. (Italics added.)

In researching this point, this office has been able to find only a few cases, most of them quite old, bearing on this subject. In most of the cases considering this point, where separate bodies are required to meet in joint session, it has been held that a majority of the combined membership is

sufficient for effective action, regardless even of whether there is a majority of each constituent group present. *Davis v. Claus*, 125 Ky. 4, 100 S.W. 263 (1907); *Brown v. Foster*, 88 Me. 49, 33 A. 662 (1895); *Tillman v. Otter*, 93 Ky. 600, 20 S.W. 1036 (1893); 43 A.L.R.2d 698, 727, § 11[a]. In the minority of cases where it has been held that the action of a combined body requires a majority vote in each of the constituent bodies, the decisions turned upon statutes whose wording required this result. *Elliott v. Monongahela City*, 229 Pa. 618, 79 A. 144 (1911); *Rhode Island Episcopal Convention v. City Counsel*, 52 R.I. 182, 159 A. 647 (1932); 43 A.L.R.2d 698, 728, § 12.

In this instance, [NRS 218.043](#) requires that the decision be made by a “joint board composed of all of the county *commissioners* of each county” (italics added) and not of a board composed of the *boards* of county commissions. Furthermore, the term “joint” means “united, joined or sharing with another or with others.” It means “acting together” and produced by or invoking the combined action of two or more.” *Securities Exchange Commission v. Talley Industries, Inc.*, 399 F.2d 396, 403 (2d. Cir. 1968), cert.den. 393 U.S. 1015 (1969); *Bufford v. Lucy*, 328 S.W.2d 14, 19 (Mo. 1959); *Rowe v. Bird*, 304 S.W.2d 775, 778 (Ky. 1957); *Freeman v. Smith*, 83 N.W.2d 834, 838 (N.D. 1957); *Hampton v. Commercial Credit Corp.*, 119 Mont. 476, 176 P.2d 270, 274 (1946).

In one case where a statute required the boards of supervisors of several counties to act jointly in all matters to be disposed of by joint action of the boards, a court held that the boards had to act jointly and not concurrently as separate bodies, the word joint meaning “united” or “combined” and the law contemplating that the boards must act as one body. *Schumaker, v. Edington*, 152 Iowa 596, 132 N.W. 966, 969 (1911).

Since [NRS 218.043](#) requires, in the case of filling a multi-county legislative vacancy, that the appointment be made by a joint, i.e., united, joined, undivided or combined, board composed of the county *commissioners* of each county involved, this office is of the opinion that the appointment to the vacancy should not be made by the various county boards voting as units, but by the county commissioners of all of the boards voting individually in a combined action.

CONCLUSION—QUESTION TWO

In the opinion of this office, under [NRS 218.043](#), members of the joint selection board vote to fill a legislative vacancy in a multi-county district by voting as individuals in a combined action.

QUESTION THREE

Does the selection require a majority vote or may the appointment be made by plurality vote?

ANALYSIS—QUESTION THREE

It has been generally held that a majority of the membership of a governing body constitutes a quorum in the absence of statutes to the contrary.

Raynovich v. Romanus, 450 Pa. 391, 299 A.2d 301, 304 (1973); *Savatgy v. City of Kingston*, 51 Misc.2d 251, 273 N.Y.Supp.2d 1, 3 (1966); in re Walters' Appeal, 270 Wis. 561, 72 N.W.2d 535, 539 (1955); *Clark v. City of Waltham*, 328 Mass. 40, 101 N.E.2d 369, 370 (1951). As noted above, the appointment to a vacancy in a multi-county legislative district must be taken by a joint board with the members of that board voting as individuals in a combined action. Consequently, the presence of a majority of the members of all the boards of county commissioners combined would constitute a quorum of the joint board in order for the board to take effective action under the statute.

It has also been generally held that a majority of a quorum of a governing body has the right to take any action which is within the power of the entire body unless statutes provide otherwise. *State ex rel. Roberts v. Gruber*, 231 Ore. 494, 373 P.2d 657, 659 (1962); In re Walters' Appeal, supra; *Clark v. City of Waltham*, supra, 43 A.L.R.2d 698, 716, § 8[a]; Attorney General's Opinion No. 305, dated March 8, 1966.

In this instance, there is no wording in [NRS 218.043](#) which specifically provides that a vote of less than a majority is sufficient to make an appointment under the statute. However, the statute does provide that:

If no person receives a plurality of the votes of the joint board, the boards of county commissioners of the respective counties shall each select a candidate, and the appointee shall be chosen by drawing lots among the candidates so selected.

A plurality refers to the state of being numerous. While it may perhaps mean two, it embraces any number in excess of two. *Technograph Printed Circuits, Ltd. v. Bendix Aviation Corp.*, 218 F.Supp. 1, 52 (D.Md. 1963). Black's Law Dictionary, (5th ed., 1979), at p. 1039 defines "plurality" as follows:

The excess of the vote cast for one candidate over those cast for any other. Where there are only two candidates, he who receives the greater number of the votes cast is said to have a *majority*; when there are more than two competitors for the same office, the person who receives the greatest number of votes has a *plurality*, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined, or, in other words, more than one-half of the total number of votes cast.

As can be seen, while a majority vote may be a plurality, a plurality does not necessarily require a majority vote. In the opinion of this office, if it was the intention of the Legislature that an appointment to the legislative vacancy of a multi-county district could be made only by majority vote, the Legislature would have provided, in [NRS 218.043](#), for a procedure of choosing an appointee by drawing lots only if no person received a majority of the votes of the joint board.

Instead, by using the term "plurality" in the last sentence of [NRS 218.043](#), it is the opinion of this office that, by implication, the Legislature intended that an appointment to a legislative vacancy in a multi-county district could be made by a vote received by a particular nominee that was less than a majority, but was

greater than the number of votes received by each of his competitors, i.e., a plurality. That which is clearly implied is as much a part of the law as that which is expressed. *Checker, Inc. v. Public Service Commission*, [84 Nev. 623](#), 630, 446 P.2d 981 (1968).

CONCLUSION—QUESTION THREE

In the opinion of this office, under [NRS 218.043](#), the appointment to the legislative vacancy in a multi-county district may be made by a plurality vote.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 80-42 Nevada Highway Patrol Jurisdiction on Indian Reservations—The Nevada Highway Patrol has jurisdiction on state highway rights-of-way through Indian reservations only over non-Indians and then only when there is no Indian property involved.

Carson City, December 11, 1980

S. Barton Jacka, Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89711

Dear Mr. Jacka:

This is in response to your request for definite guidelines concerning the authority of the Nevada Highway Patrol to investigate accidents and take enforcement actions in those incidents where the Highway Patrol is called upon to handle an incident or observes a violation of the traffic laws of the State of Nevada upon a state highway running through an Indian reservation.

QUESTION ONE

1. Does the Nevada Highway Patrol, acting under the authority granted by the State, have the authority to:

- (a) Investigate accidents on state highways running through Indian reservations?
- (b) Cite and/or arrest Indians observed committing traffic violations on state highways within Indian reservations and cite these violators through the nearest and most accessible justice court?
- (c) Cite and/or arrest non-Indians observed committing a traffic violation on a state highway running through an Indian reservation and cite these violators through the nearest and most accessible justice court?

ANALYSIS—QUESTION ONE

Pursuant to [NRS 481.180](#), subsection 2, the Nevada Highway Patrol has authority to investigate accidents on all primary and secondary state highways. This statutory authority has to be reconciled with the power granted to the State by Section 4, Chapter 382, Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C.A. § 311. That section provides:

The Secretary of Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the State of Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

In *State v. Tucker*, 296 N.W. 645, 237 Wis. 310 (1941), the Supreme Court of Wisconsin addressed the extent of the right of way granted to the state by the Secretary of Interior pursuant to 25 U.S.C. § 311. Defendant, an enrolled member of the Menominee Tribe, had been arrested on a portion of state highway entirely within the exterior bounds of the reservation. He was charged with failing to register his vehicle with the office of the Secretary of State as required by state statute. Defendant had hauled logs with his vehicle on the state highway from one part of the reservation to another without ever leaving the exterior bounds of the reservation. The Wisconsin Supreme Court held the following:

* * * Such a grant includes by necessary implication the right of the state to take such possession of the land as will enable it to construct and repair and police the road, and do all things necessary and incidental to the maintenance of a public highway. *Ibid.*, page 647.

Tucker was overruled by *In Re Fredenburg*, 65 P.Supp. 4, a 1946 holding by the District Court for the Eastern District of Wisconsin. There, a writ of habeas corpus was granted which discharged petitioner. The court held that the State of Wisconsin did not have jurisdiction to prosecute an enrolled member of the Menominee Tribe for driving an unregistered vehicle upon a state highway within the exterior bounds of the reservation.

“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991. There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction [jurisdiction] when it permitted the state primarily for its own convenience to establish a state highway across the reservation. The Act of

June 28, 1932, c. 284, 47 Stat. 336, 18 U.S.C.A. § 548, provided for the trial of designated crimes in federal courts when committed upon any Indian reservations and specifically designated rights of way running through the reservation as coming within the scope of that act. In the *Trucker* case the Wisconsin Supreme Court did not notice that by the Act of 1932 Congress had asserted exclusive jurisdiction in the federal courts as to crimes committed by Indians on the rights of way within Indian reservations * * *. *Ibid.* p. 6.

The Supreme Court of New Mexico followed the ruling of *In Re Fredenburg in State v. Begay*, 320 P.2d 1017. A Navajo Indian was arrested on the right of way of U.S. Highway 666 within the exterior bounds of the reservation for driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated. Holding that the state did not have jurisdiction over an Indian driving a motor vehicle on a right of way within the exterior bounds of the reservation, the court said:

* * * In the instant case when the federal government permitted the state to construct a highway across the Indian reservation it did not extinguish beneficial title in the Indians. Since the State has no jurisdiction over the Indian reservations until title in the Indians is extinguished, and the easement to the state did not affect the beneficial title, there is no basis upon which the state can claim jurisdiction. *Ibid.* p. 1020.

While recognizing “* * * the apparent ‘void’ this will leave in safeguarding the traveling public, * * *” The Supreme Court of Arizona in *Application of Denteclaw*, 320 P.2d 697, at p. 700, reached the same conclusion:

* * * The courts have repeatedly held that federal jurisdiction over offenses, either felonies or misdemeanors, committed by an Indian in Indian country is exclusive and not concurrent with state jurisdiction. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *In Re Blackbird*, D.C., 109 F. 139; *United States ex rel. Lynn v. Hamilton*, D.C. 233 F. 685; *State v. Jackson*, 1944, 218 Minn. 429, 16 N.W.2d 752. *Cf. Williams v. United States*, 1946 Ariz. 327 U.S. 711, 66 S.Ct. 278, 90 L.Ed. 962.

Traffic offenses are not an exception to the rule of exclusive federal jurisdiction, *In Re Fredenburg*, D.C. 65 F.Supp. 4; *cf. Application of Konaha*, 7 Cir., 131 F.2d 737. The former decision arose in the Federal District Court in Wisconsin and it expressly repudiates the holding in *State v. Tucker*, *supra*, which the state here relies upon. Furthermore, we point out that the *Tucker* case was decided before the 1948 revision of the Federal Criminal Code defining what is “Indian Country.”

The conclusion seems inescapable that the trial court was correct in discharging petitioner because the state courts, under the law as it now exists, do not have jurisdiction of an offense committed by a tribal Indian in “Indian Country.” *Ibid.* pp. 700, 701.

The question of whether a state has jurisdiction to arrest and try a non-Indian for a criminal offense occurring within the exterior bounds of an Indian reservation, where no Indian or Indian property is involved, was answered by the New Mexico Supreme Court in *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963). A criminal complaint had been dismissed against a non-Indian for driving on an Indian reservation while under the influence of intoxicating liquors by a district court. The Supreme Court partially overruled *State v. Begay*, insofar as that case conflicted with *You Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, and *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387. The court found that the state had jurisdiction to try the case. It cited the following:

Among other cases which have held that a state has jurisdiction to arrest and try a non-Indian for an offense against another non-Indian on an Indian reservation, or which have recognized that right are: *Draper v. United States*, 164 U.S. 240, 17 S. Ct. 107, 41 L.Ed. 419; *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869;

N.Y. *State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261; *State v. Kuntz*, (N.D. 1954), 66 N.W.2d 531; *State ex rel. Olson v. Shoemaker*, 73 S.D. 120, 39 N.W.2d 524 (1949); *Hilderbrand v. United States*, (9th Cir., 1959), 261 F.2d 354; *State v. Holthusen* (1962), 261 Minn. 536, 113 N.W.2d 180. We recognize the jurisdiction of the state courts over non-Indians who commit crimes against each other on reservation lands in *Your Food Stores, Inc., (NSL) v. Village of Espanola*, supra. See also, *Montoya v. Bolack*, supra, where the court discussed the history of congressional authorization and sanction of some jurisdiction by the states over Indian lands.

We conclude that the exercise of jurisdiction by state courts over criminal offenses on Indian reservation land, by non-Indians, against non-Indians and where no Indian property is involved would not affect the authority of the tribal counsel over reservation affairs and, therefore, would not infringe on the right of the Indians to govern themselves. *Ibid.* p. 68.

The Nevada Supreme Court reached the same finding in *State of Nevada v. Eugene Jones*, [92 Nev. 116](#), 546 P.2d 235 (1976).

CONCLUSION—QUESTION ONE(A)

The Nevada Highway Patrol pursuant to [NRS 481.180](#), subsection 2 has authority to investigate accidents on state highways running through Indian reservations. Accordingly, the State of Nevada may, in certain circumstances, exercise jurisdiction over offenses committed on an Indian reservation involving non-Indians. In order to exercise this jurisdiction with respect to offenses occurring on state highways, the Nevada Highway Patrol may perform its statutory duties within the boundaries of an Indian reservation, subject to the limitations noted in this opinion respecting Indian property and offenses involving Indians.

CONCLUSION—QUESTION ONE(B)

The cases cited in the analysis of question one make it quite clear that the State of Nevada would be interfering with the right of Indians to govern themselves if the State were allowed to exercise jurisdiction over tribal Indians committing traffic violations on state highways within the exterior bounds of the Indian reservation. The cases are explicit in their renunciation of state jurisdiction where the offense is committed by a tribal Indian within the exterior bounds of the Indian reservation. Thus, the Nevada Highway patrol may not cite and/or arrest a tribal Indian in “Indian Country” and cite the violators through the nearest, most accessible, justice court, since the court is without jurisdiction to act.

CONCLUSION—QUESTION ONE(C)

According to the holdings of *State v. Warner* and *State of Nevada v. Eugene Jones*, and the cases cited therein, the Nevada Highway Patrol has authority to cite and/or arrest non-Indians observed committing a traffic violation on a state highway running through an Indian reservation and these violations can be cited through the nearest and most accessible justice court.

QUESTION TWO

2. Do vehicles owned and operated exclusively by Indians on state highways within the boundaries of an Indian reservation, have to be registered within the State of Nevada, and if so, must they have required mandatory insurance?

ANALYSIS—QUESTION TWO

Reference should be made to analysis of question one with emphasis being placed upon the discussion of *State v. Tucker*, *In Re Fredenburg*, and *Application of Denteclaw*, with regards to the question of registration.

The Supreme Court of the United States also addressed the question of registration of Indian vehicles when the vehicles were operated exclusively on state highways within the boundaries of an Indian reservation in *Washington v. Confederated Tribes*, -US- 100 S.Ct. 2069 (1980), *Moe v. Salish v. Kootenai Tribes*, 425 U.S. 463 (1976), and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). On page 2086 of *Washington v. Confederate Tribes*, the court held:

We do not think Moe and McClanahan can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under the rubric accomplish what Moe held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

In *Wauneka v. Campbell*, 22 Ariz.App. 287, 526 P.2d 1085 (1974), the court held that to enforce the Arizona Safety Responsibility Act against reservation Indians would infringe upon the right of Indians to govern themselves because the law was enacted pursuant to the police powers of the state.

CONCLUSION—QUESTION TWO

Vehicles owned and operated exclusively by Indians on state highways within the boundaries of an Indian reservation do not have to be registered with the State of Nevada since that would infringe upon the power of Indians to govern themselves. Similarly, any attempt to impose the state required mandatory insurance upon reservation Indians operating their vehicles solely within the confines of the reservation would be an infringement of the right to self-government.

QUESTION THREE

3. Must Indians who drive only on state highways, within Indian reservations, have a Nevada driver's license? If they do not require a driver's license, then must a non-Indian possess a valid driver's license to operate a motor vehicle upon a state highway within an Indian reservation?

ANALYSIS—QUESTION THREE

In *Wauneka*, supra, the Arizona Supreme Court also held that it could not enforce its motor vehicle laws against Indians on Indian reservations absent some form of valid consent from the Indians.

Reference should also be made to analysis of question one. As far as non-Indians are concerned, reference should be made to *State v. Warner* and *State of Nevada v. Eugene Jones* and the cases cited therein in analysis to question one.

CONCLUSION—QUESTION THREE

Indians who drive only on state highways within the exterior bounds of the reservation do not need a Nevada driver's license, since to require one would be an infringement upon the Indians' right to govern themselves, absent some form of valid consent.

According to the holdings of *State v. Warner* and *State of Nevada v. Eugene Jones* and the cases cited therein, the State of Nevada has jurisdiction over non-Indians. Thus, non-Indians must possess a valid driver's license to operate a motor vehicle upon a state highway within an Indian reservation.

QUESTION FOUR

4. If it is determined that Indians cannot be cited through a justice court for violations which are committed on a state highway within an Indian reservation, then what court has jurisdiction?

ANALYSIS—QUESTION FOUR

Reference should be made to *In Re Fredenbury* and *Application of Denteclaw* in analysis of question one. These cases hold that the jurisdiction is exclusively federal. The federal government may relinquish such jurisdiction as it sees fit through congressional acts.

CONCLUSION—QUESTION FOUR

Federal courts have exclusive jurisdiction over Indian country unless by some congressional act it has seen fit to delegate its jurisdiction or it has recognized the jurisdiction of tribal courts over misdemeanor traffic violations as an aspect of the right of the Indians to govern themselves.

QUESTION FIVE

5. In those cases involving an Indian and non-Indian involved in a traffic accident on a state highway within an Indian reservation, what law enforcement agency has the authority to investigate the accident and, if enforcement action is indicated, what court should have jurisdiction if:

- (a) The violator was an Indian?
- (b) The violator was a non-Indian?

ANALYSIS—QUESTION FIVE

The Nevada Highway Patrol has authority to investigate accidents on state highways pursuant to [NRS 481.180](#). In analysis of question one, reference was made to *State v. Warner* and *State of Nevada v. Eugene Jones*. The cited portion from *Warner* points out that the state courts have jurisdiction in those areas where a non-Indian is involved and there has been no damage to Indian property.

CONCLUSION—QUESTION FIVE

Pursuant to [NRS 481.180](#), the Nevada Highway Patrol has authority to investigate accidents on state highways running through Indian reservations. If the violator was an Indian or Indian

property was involved, then federal or tribal courts would have jurisdiction. If the violator was a non-Indian, then state courts would have jurisdiction.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Larry B. Bernard
Deputy Attorney General

OPINION NO. 80-43 State Risk Manager; Placement of Insurance; Antitrust Laws—State Risk Manager may utilize the services of any licensed broker or insurance agent in Nevada, including an independent agents' association licensed in compliance with the Nevada Insurance Code, in placing the State's insurance. The placement of insurance in Nevada is regulated by the Nevada Insurance Code and to that extent is included in the McCarran-Ferguson Act (15 U.S.C. Sec. 1012) exemption to the Federal Antitrust laws and the exemption to the State Unfair Trade practice Act in [NRS 598A.040](#), subsection 3.

Carson City, December 30, 1980

Mary Finnell, Risk Manager, Risk Management Division, Department of Administration, Capitol Complex, Carson City, Nevada 89710

Re: State Insurance Purchasing Practices

Dear Ms. Finnell:

QUESTION PRESENTED

This letter is in response to your recent inquiry, in which you have asked whether the "current practice" in the Department of Administration of placing insurance (other than employee group life, accident, or health insurance) through the Nevada Independent Insurance Agents Association constitutes a possible violation of any State or Federal antitrust laws. [*Note: As explained below, the procedure used in placing insurance on behalf of the State of Nevada was affected by Chapter 365, Statutes of Nevada 1979, which created the Risk Management Division in the Department of Administration. Thus, for the purposes of this opinion, an evaluation of "current practice" in placing insurance will be based on current law, specifically the statutory duties and authority of the State Risk Manager in performing this function. To the extent current law has superseded or supplanted any preexisting practice used in placing insurance on behalf of the State of Nevada, it will be assumed in this opinion that such practice will be modified to conform to existing law, including recognition of the new statutory duties and authority of the State Risk Manager in performing this function.]

FACTUAL BACKGROUND

In evaluating the applicability, if any, of antitrust legislation to the insurance purchasing practices of your office, we have considered the information forwarded to us on November 6, 1980, from the Risk Management Division, concerning the manner in which the services of the Nevada Independent Insurance Agents Association (hereinafter NIIAA) have been utilized in placing insurance on behalf of the State. It is not clear from this information what practices and procedures will be changed as a result of the Risk Management Division's analysis currently in progress of the State's insurance programs and practices, though you have mentioned that a broker selection process is currently under consideration. The pertinent facts brought to our attention that are germane to the analysis set forth below are as follows:

1. The State Board of Finance made the initial policy decision on June 1, 1965, to place insurance on the State's property through NIIAA; and the continued use of the Association as the broker or agent to provide this service has occurred as a result of the original action by the Board of Finance. During the time the State's insurance has been placed through NIIAA, no other proposals have been submitted from other brokers or agents soliciting the State's business in placing property or casualty insurance, though proposals from other brokers are currently under review by the Risk Management Division in connection with the renewal or replacement of insurance policies expiring subsequent to the establishment of said Division.

2. No fees/commissions earned as a result of the placement of the State's insurance have been split among insurance agents participating in the program of NIIAA. Any commissions obtained have been used only to defray the costs of administration of the program and to support projects designed to benefit the "public good." Furthermore, it is the understanding of this office that all insurance agents or firms that desire to compete for the State's insurance business are allowed to do so; and any agent or firm desiring to assist the State Risk Manager in placing the State's insurance will be allowed to submit a proposal prior to a final selection being made.

3. The final decision on the purchase of particular insurance policies for the State prior to July 1, 1979 was made by the State's Placement Committee appointed by the Board of Finance, based on recommendations from NIIAA after a review of the policies available. The Nevada Insurance Commissioner served as Chairman of the Placement Committee and participated in the decisions of the Committee.

4. Since July 1, 1979, [NRS 331.182](#) through 331.188 requires the State Risk Manager, among other duties, to negotiate for, procure, purchase, and to place insurance through a licensed insurance agent or broker residing in Nevada and to continue all insurance coverages (other than employee group life, accident, or health insurance) that may be reasonably obtainable. Thus, the function previously performed by the State Placement Committee in cooperation with NIIAA has now been legislatively delegated to the State Risk Manager.

5. Nevada statutes are silent with respect to the procedure to be used in selecting a broker for the purpose of carrying out the statutory duties noted in the preceding paragraph, though the Risk Management Division is clearly not precluded from developing a broker selection process. For the purposes of this opinion only, it has been assumed that the State Purchasing Act would not apply to a broker selection process, in view of the indication in Chapter 333 of the Nevada Revised Statutes that the main thrust of this act involves the purchase of "supplies, materials and equipment." See: [NRS 333.120](#). In addition, the act was apparently considered inapplicable during the time the Placement Committee utilized the services of NIIAA in purchasing the State's existing insurance policies.

6. Though no formal agreement currently exists between the State of Nevada and NIIAA, the services provided by this Association are in the nature of professional services, including specification of bid procedures and requirements in obtaining insurance, processing policy changes, analyzing insurance premiums for cost breakdowns for use in the State's internal

charge-back system, updating property values, resolving coverage/claims questions, and processing claims to insurers.

7. During the time that NIIAA has assisted the State in placing insurance, the Nevada Insurance Commissioner has never indicated to the Department of Administration that any of the activities in placing the State's insurance have been inconsistent with any of the provisions of the Nevada Insurance Code, Title 57, Nevada Revised Statutes, which regulates trade practices in the business of insurance in this State. Since the scope of this opinion is confined to the applicability of antitrust laws, if any, to the business practices involved in placing the State's insurance, it will be assumed that the Insurance Commissioners' acquiescence in the past practices of the State in utilizing NIIAA to place insurance is indicative that these practices have complied with the State Insurance Code.

ANALYSIS

At the outset, it should be pointed out that under state law, the trade practices involved in placing the State's insurance are under the exclusive jurisdiction of the Nevada Commissioner of Insurance. See: [NRS 686A.015](#). Nevada's Unfair Trade Practice Act (Chapter 598A of NRS) prohibits certain business activities such as price fixing, division of markets, allocation of customers, and tying arrangements; but [NRS 598A.040](#), subsection 3 also provides that the provisions of this act do not apply to conduct that is expressly authorized, regulated or approved by a State statute or a State administrative agency having jurisdiction of the subject matter. Thus, the anticompetitive prohibitions in Nevada's Unfair Trade Practice Act do not appear applicable in the analysis of the practices used in connection with the placement of the State's insurance.

In contrast, Federal antitrust statutes and recent decisions of the United States Supreme Court interpreting those statutes have questioned the propriety of using State agencies or political subdivisions or municipalities to promote or engage in apparently anticompetitive activities.

The basic thrust of the Federal antitrust laws is found in the Sherman Act. The Sherman Act outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * *" and makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." See: 15 U.S.C. 1970 ed., Sections 1 and 2.

However, a well-recognized exception to the Sherman Antitrust Act is "state action" resulting in anticompetitive practices, when the activity in question is an act of government that is required by the state acting as a sovereign pursuant to a state policy to displace competition with regulation or a monopoly public service. *See generally: Parker v. Brown*, 317 U.S. 341 (1943); and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Significantly, state and local government agencies are not exempt from the Federal antitrust laws under the "state action" exemption articulated in *Parker v. Brown*, supra, simply because they are governmental entities. Rather, these agencies are exempt from the provisions of the Sherman Antitrust Act only if an anticompetitive activity is undertaken as an act of government by the state in its sovereign capacity (oftentimes expressed in the form of a statute), which evinces a clear state policy to displace competition with regulation or with a monopoly public service. *See: City of Lafayette, Louisiana, et al. V. Louisiana Power and Light Company*, 435 U.S. 389 (1978). If the state has not directed or otherwise authorized the anticompetitive practice in question as part of a state governmental scheme to effectuate a policy of noncompetition, state agencies and political subdivisions of the state would not be entitled to an exemption from the anticompetitive principles of the Sherman Act, pursuant to the "state action" doctrine of *Parker v. Brown*, supra. *See: Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); and *Cantor dba Selden Drugs Company v. Detroit Edison Company*, 428 U.S. 579 (1976).

Respecting the placement of insurance for state agencies, Nevada's statutes do not authorize the Risk Management Division to engage in anticompetitive practices. The statute simply

requires the State Risk Manager to “negotiate for, procure, purchase and have placed, through a licensed insurance agent or broker residing or domiciled in Nevada, or continued in effect all insurance coverages, other than employee group life, accident or health insurance, which may be reasonably obtainable whether from insurers authorized to transact business in this State or under the surplus lines provisions of Chapter 685A of NRS.” See: [NRS 331.184](#), subsection 3. Clearly, the Risk Manager has considerable discretion in placing insurance on behalf of the State, though nothing in the statutory scheme noted above would support a conclusion that, within the meaning of the “state action” exception to the Federal antitrust laws, the State of Nevada has articulated a policy that competition should be displaced by regulation or a public monopoly in the placement of insurance.

Accordingly, if the only consideration were whether the placement of insurance by the State Risk Manager through NIIAA to the exclusion of other licensed brokers or agents were permissible under the “state action” doctrine of *Parker v. Brown*, supra, it is doubtful that such a practice could be allowed in view of the broad mandate of the Sherman Antitrust Act noted above. As pointed out in the Missouri Attorney General’s opinion of John C. Danforth and the Arizona Attorney General’s Opinion No. 77-4 of Bruce E. Babbitt, which you forwarded to our office along with your opinion request, the establishment of an unreasonable policy designed to intentionally exclude some insurance companies or agents from the opportunity to compete for insurance business is anticompetitive and would constitute an unreasonable restraint on trade in violation of the Federal antitrust laws. Our office certainly would discourage such a practice, if it were to exist.

However, it is not clear that such a practice ever has existed or will be allowed to exist after the current evaluation of the State’s insurance program in the Risk Management Division is completed. Based on the information provided to our office, there is no suggestion that prospective applicants seeking to manage the State’s insurance business were excluded from consideration. At the time the initial arrangement with NIIAA was made, your office has indicated that no other brokers expressed a desire to assist the State of Nevada in placing its insurance. You have also indicated that this practice is currently under review in the Risk Management Division, and a broker selection process is being considered. Under current law, the State Risk Manager is authorized to utilize the services of *any* licensed broker or insurance agent in placing the State’s insurance; and presumably the selection of future agents or brokers will be based on the needs of the State and other factors that will best serve the interests of the State, as determined by the Risk Manager, without exclusion of any qualified firm or licensed broker from consideration. Thus, based on the statutory scheme now in effect, and the indication that the State Risk Manager will select a broker pursuant to this authority after completing an analysis of the State’s insurance needs for the next biennium, this office has determined there is no need at this time to opine whether the future selection of NIIAA or some other licensed agent or broker would come within the “state action” exception to the Federal antitrust laws.

Instead, this office has determined that there is another, more persuasive reason which compels the conclusion that the selection process used by the State Risk Manager in obtaining the services either of an independent agents’ association or some other licensed broker, or agent, to assist in the placement of the State’s insurance is not controlled by the Federal antitrust laws. Aside from the “state action” exception to the federal antitrust statutes enunciated in *Parker v. Brown*, supra, there is another exception to said laws, respecting the business of insurance that is the subject to State regulation. The exemption is found in the McCarran-Ferguson Act, 15 U.S.C. Sec. 1012, which states as follows:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance *to the extent that such business is not regulated by state law.* (Italics supplied.)

The McCarran-Ferguson Act goes on to provide that nothing contained in that act renders the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. The information provided by your office does not indicate that any activity involved in connection with the placement of the State's insurance since the initial arrangement was made with NIIAA has involved a boycott, or any act of coercion or intimidation. Nor is there any indication that the State Risk Manager would sanction such activity. Thus, for purposes of this analysis, these provisions of the McCarran-Ferguson Act have been assumed to be inapplicable. Furthermore, the Nevada Insurance Code prohibits the same type of activity. See: [NRS 686A.090](#).

If the placement of insurance through a licensed agent or broker is considered to be "the business of insurance" within the meaning of the McCarran-Ferguson Act, the provisions of the Sherman Act would be inapplicable with respect to this activity to the extent it is regulated by state law.

This office is of the opinion that the placement of insurance would be included within the meaning of the term "business of insurance" in the McCarran-Ferguson Act. In the case of *Group Life and Health Insurance Company aka Blue Shield of Texas, et al. v. Royal Drug Company, Inc., dba Royal Pharmacy of Castle Hills, et al.*, 440 U.S. 205 (1979), the U.S. Supreme Court held that an indispensable characteristic of the business of insurance within the meaning of the McCarran-Ferguson Act is the underwriting or spreading of risk. Note: *S.E.C. v. Variable Annuity Life Insurance Company of America, et al.*, 359 U.S. 65 (1959). The Supreme Court noted that in enacting the McCarran-Ferguson Act, Congress was concerned with the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement. These factors were at the core of the concept of "business of insurance." Since the focus of the current practice in utilizing NIIAA to place the State's insurance is to establish a relationship between the State's prospective insurers and the State as a policyholder, insofar as its needs for insurance coverage are concerned to spread the risks of loss, it would appear that similar arrangements to be made by the Risk Management Division in carrying out the duties noted in [NRS 331.184](#), subsection 3 above would qualify under the "business of insurance" exception to the Sherman Antitrust Act, as noted above.

This conclusion follows because the business of insurance is regulated by the State of Nevada pursuant to the authority found in the Nevada Insurance Code. In fact, [NRS 686A.010](#) provides that the purpose of Chapter 686A, which comprises a part of the State Insurance Code, is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the McCarran-Ferguson Act cited above. As noted above, [NRS 686A.015](#) provides that the Commissioner of Insurance in Nevada has "exclusive jurisdiction" in regulating the subject of trade practices in the business of insurance in the State of Nevada. The chapter then goes on to define and specify those methods and practices that are deemed unlawful practices in the business of insurance in this State. As noted in the Factual Background set forth above, there has been no information provided that the activities involved in placing the State's insurance through NIIAA have violated any of the provisions of Chapter 686A of the Nevada Revised

Statutes of constituted an unfair or deceptive practice in the business of insurance as determined by the Nevada Insurance Commissioner, pursuant to his authority in [NRS 686A.170](#).

Thus, the selection process used by the Risk Manager in obtaining the services of an agent or broker to place the State's insurance would be controlled by state law and not the Federal antitrust statutes. If you have any further inquiries pertaining to any current or prospective practices of placing the State's insurance through NIIAA or other licensed agent or broker, our office would recommend that you request the assistance of the State Insurance Commissioner, who has exclusive jurisdiction to enforce the applicable provisions of the State Insurance Code.

CONCLUSION

The utilization of an independent agents' association such as NIIAA, licensed as an agent or broker in compliance with the State Insurance Code, which assists the State Risk Manager in the placement of insurance for state agencies, would not be governed by the Federal antitrust laws or the Nevada Unfair Trade Practice Act, because such activity involves the business of insurance subject to state laws and the exclusive regulatory authority of the Nevada Insurance Commissioner. However, any anticompetitive activities resulting from any concerted action to commit any act of boycott, coercion, or intimidation resulting in an unreasonable restraint of or any monopoly in any business of insurance in the State of Nevada would not be permitted under the McCarran-Ferguson Act exception to the Federal antitrust laws or [NRS 686A.090](#). Absent these circumstances, the negotiation, purchase, and placement of insurance for state agencies, including the broker selection process, pursuant to the State Risk Manager's authority in [NRS 331.184](#), should comply with the provisions of Chapter 686A of NRS.

The decision of what association or firm or person should be retained to assist the State Risk Manager in placing the State's insurance lies within the sound discretion of the State Risk Manager, provided the insurance is placed through a licensed insurance agent or broker residing or domiciled in Nevada or with an insurer authorized to transact business in this State or under the surplus lines provisions of Chapter 685A of NRS.

I hope the above has been responsive to your inquiry, but please advise if there are any additional questions.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Larry D. Struve
Chief Attorney General

OPINION NO. 80-A Labor Law; Tip Pooling Arrangement—If a vote is allowed to establish tip policy, in the future it may be made a condition of employment for new employees who did not vote. An Individual employee can be bound to participate in a tip pool established by secret ballot, voice vote or general agreement but these are not necessarily the only methods which may be used in establishing a tip pool. An individual employee may be required to participate in the same manner and to the same extent as other members of his

work-peer group once a majority of his group has voted to establish a certain tip pooling arrangement.

Carson City, March 21, 1980

Mr. Richard K. McNeel, Labor Commissioner, 505 E. King Street, Room 601, Carson City, Nevada 89710

Dear Mr. McNeel:

You have requested an opinion concerning the legality of tip pooling systems among employees in hotels and casinos in the State of Nevada.

FACTS

Over the period of years, various policies and systems have developed in Nevada's hotel and gaming establishments concerning the distribution of tips among employees. One reason why such systems have been developed is to equalize the amount of tips received among employees. For example, without tip pooling, morning shift employees may receive less tips than employees on an evening shift who cater to a larger clientele. Thus, in order to benefit employees in a fair and equitable manner, tip pooling arrangements have become common in Nevada's hotel and gaming industry.

Some employers, apparently a small minority, still allow employees to keep their individual tokens or tips. One criticism of this system is that it may result in individual employees "hustling" a customer to place larger bets and therefore receive larger tips. In order to discourage this practice, and for the stated equitable reasons, a majority of hotel and gaming employers have recognized or allowed to be developed tip pooling arrangements among their employees. The genesis of these systems is often unclear, i.e., whether employers have required employees to set up tip pooling systems, or if they simply condone them once they are initiated by employees. In some cases, tip pooling arrangements have been formalized by collective bargaining agreements. Depending on the nature of the activity, numerous tip pooling systems have been developed and recognized. A few examples of the systems currently used in Nevada Casinos are:

1. Pooling of all tips received on a 24-hour basis by dealers, including boxmen, floormen, as well as keno and pit shift supervisors.
2. Pooling by certain dealers on a 24-hour basis.
3. Pooling by dealers of certain games on a shift-for-shift basis.
4. Pooling among dealers on a table-by-table basis.
5. Allocating part of the tip proceeds among those employees unable to work due to illness or injury.

As State Labor Commissioner, you have posed the following four questions:

1. Does an individual employee have the right to choose *not* to participate in a tip pool even though there has been a vote by the majority of his work-peer group to participate in such a tip pool?
2. Does an individual have a right to choose to what extent he participates in such a tip pool if there has been a majority vote by his work-peer group to establish the amounts to be contributed to this pool (i.e., can he choose to contribute 10 percent instead of 15 percent)?
3. If an individual can be bound to participate in a tip pool by a vote of his peers, must the vote be by secret ballot or can it be by voice vote or by general agreement?

4. If a vote is allowed to establish tip policy by a particular group, can it in the future be made a condition of employment for new employees who did not participate in the vote?

For purposes of analysis, we have chosen to respond to the above questions in reverse order and to consolidate your questions one and two into question three.

QUESTION ONE

If a vote is allowed to establish tip policy by a particular group, can it in the future be made a condition of employment for new employees who did not participate in the vote?

ANALYSIS—QUESTION ONE

The question, as framed, presupposes that an agreement to share tips among employees was established by a vote. Our analysis is based on this premise.

Section 608.160 of the Nevada Revised Statutes authorizes agreements by which employees may pool and divide tips and gratuities in this state. This section provides:

1. It is unlawful for any person to:

(a) Take all or part of any tips or gratuities bestowed upon his employees.

(b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this state any tips or gratuities bestowed upon his employees.

2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

[NRS 608.160](#), as amended by 1971 Legislature, was first considered by this office in Attorney General's Opinion No. 56 (Nev. 1971). In construing subsection 2 of [NRS 608.160](#), the Attorney General indicated that tip pooling arrangements were reserved to the private sector to be determined by employers and employees, subject to the prohibitions contained in Section 1.

Following the 1971 Attorney General Opinion, [NRS 608.160](#), subsection 2 was interpreted by a United States District Court in Nevada. In *Moen v. Las Vegas Internat'l Hotel*, 402 F.Supp. 157, 162 (D.Nev. 1975), *aff'd mem.* (9th Cir. May 24, 1977), Judge Bruce Thompson held that nothing in [NRS 608.120](#), subsection 2 prevented an employer from requiring an employee to pool tips with other employees as a condition of employment. The plaintiff had complained that in order to obtain and retain employment as a dealer in the defendant's casino, he was required to pool tips received by him with tips received by other dealers, which tips were then subject to division among all the dealers and other employees, such as boxmen, casino cashiers, and floormen.

The court ascertained the intent of the Legislature by looking to the language of [NRS 608.160](#) before amendment in 1971. (1939 Nev. Stats. 17, at 13). In addition, the court looked to the case law interpreting the California Labor Code, Sections 350-358, which were at the time similar in nature to the pre-1971 Nevada statute. The prior law required only that the employer post notice to the public if tips were to belong to management. The court concluded that the purpose of the statute was to protect the public from possible fraud. If the employer posted the required notice, the customer would then be aware the tips were to benefit the employer and not the employee. *Id.* at 158, 159.

The 1971 Nevada Legislature amended [NRS 608.160](#) by adding an express statutory prohibition against the taking of tips for the benefit of the employer. [NRS 608.160](#), subsection 1. However, by enacting [NRS 608.160](#), subsection 2, the Nevada Legislature implicitly recognized

the propriety of an agreement by which tips or gratuities would be divided among employees themselves. This section reads: “Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.” As the court stated in Moen, this subsection does not specify with whom such an agreement may be made. It does specify that only the employees can benefit. Id. at p. 160. The words “among themselves” do not modify the word “agreement,” but rather they modify the phrase “divide such tips.” Thus, the U.S. District Court in Moen concluded that a reasonable and proper interpretation of the statute was that nothing therein could be construed to prevent employees from entering into an agreement *with the employer or with other employees* to divide tips or gratuities among the employees. Id. at p. 160.

The court noted that this was a reasonable interpretation of the statute in view of the long history of tip pooling practices in the State of Nevada. The court further observed it is unreasonable to assume that a tip or gratuity must be considered a personal donation only to the last person in a service line who receives it. For example, in a restaurant, a busboy, as well as a waitress, contributes to the good service rendered a customer. Similarly, in a casino, the floormen, boxmen, and cashiers, all of whom are active in the play of the games, contribute to the service rendered to the player. The court thus held that it was most reasonable to assume that the customer who tips intends it to be divided among all those contributing to services rendered. Id. at 160.

In the Moen case, the plaintiff argued that there was a disputed issue of material fact with respect to whether he had been required, as a condition of employment, to agree to pool tips with other employees. The court acknowledged the existence of the dispute but concluded that the factual dispute was not a material one. Id. at 162. A logical conclusion to be drawn from this line of reasoning is that a new employee acquiesces or tacitly agrees to any tip pooling arrangement then in existence upon accepting employment in a casino in which the employer has allowed or required tip pooling arrangements among employees as a condition of employment.

CONCLUSION—QUESTION 1

If a vote is allowed to establish a tip pooling arrangement by a particular group, it can in the future be made a condition of employment for new employees in that group who did not participate in the vote.

QUESTION TWO

If an individual can be bound to participate in a tip pool by a vote of his peers, must the vote be by secret ballot or can it be by voice vote or by general agreement?

ANALYSIS—QUESTION TWO

Neither [NRS 608.160](#) before its amendment in 1971, nor after, speaks to the issue of tip pooling agreements. Tip pooling has long been a recognized practice in Nevada’s gaming industry, and today the overwhelming majority of Nevada’s casinos require it, or allow it, in one form or another. We have cited but a few of many examples of tip pooling arrangements which have sprung into existence.

Nevada’s casino industry has been subjected to a comprehensive statutory regulation by the Legislature. We must assume that the Legislature is not unmindful of the wide variety of tip pooling systems which have been developed over the years. The Legislature has chosen not to specify guidelines or procedures by which tip pooling

systems are to be established. We infer from this legislative silence that the Legislature intended to leave the establishment of tip pooling systems to employers and employees. Accordingly, in the absence of legislative guidelines or case law from which we can outline an accepted procedure, each tip pooling arrangement must be considered on a case-by-case basis. In this regard, it may be presumed that when a peer group accepts and participates in a particular method of establishing a tip pool, all employees within that peer group are bound by the method selected to establish the tip pool. Thus, if a vote is taken, an individual employee can be bound to participate in a tip pool established in this manner.

CONCLUSION—QUESTION TWO

An individual employee can be bound to participate in a tip pool established by secret ballot, voice vote or general agreement, but these are not necessarily the only methods which may be used in establishing a tip pool.

QUESTION THREE

Does an individual employee have a right to choose either not to participate in a tip pool at all or to what extent he wishes to participate in the pool even though a majority of his work-peer group have voted to establish a certain tip pooling arrangement?

ANALYSIS—QUESTION THREE

We note at the outset that the question posed assumes that the tip pooling arrangement was established by a vote of a majority of the work-peer group. Our analysis is based on that assumption.

Based on the analysis to questions one and two above, tip pooling agreements within the meaning of [NRS 608.160](#), subsection 2 can involve agreements between an employer and an individual employee as well as agreements among employees themselves. As noted, the statute is broad and does not specify when and under what circumstances agreements on tip pooling may be established. The statute simply provides that nothing therein should be construed to prevent such an agreement, apparently leaving to the employers and employees in the private sector the task of devising the methods by which these agreements are to be established and implemented.

Once a tip pooling agreement is confirmed by a majority vote of the work-peer group affected, and if participation therein is made a condition of employment for all employees by the employer, the Moen case would indicate that individual employees in these circumstances may be required to participate in the same manner and to the same extent as their work-peer group in the tip pooling arrangement. Moen, *supra*.

CONCLUSION—QUESTION THREE

An individual employee may be required to participate in the same manner and to the same extent as other members of his work-peer group once a majority of his group has voted to establish a certain tip pooling arrangement.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

OPINION NO. 80-B Nevada Industrial Insurance Act; Exclusive Remedy for Industrial Injuries; Self-Insured Employers—Self-Insured employers who comply with Nevada Industrial Insurance Act are entitled to the same protection afforded employers who contribute to State Industrial Insurance Fund.

Carson City, April 8, 1980

Mr. Claude S. Evans, Chairman, NIC Advisory Board of Review, P.O. Box 2115, Carson City, Nevada 89701

Dear Mr. Evans:

You have asked an opinion from this office as to whether self-insured employers may be exposed to liability in actions by injured employees in view of the *McAffee v. Garrett Freightlines, Inc.* decision reported in 95 Nev. Advance Opinion 131 (June 28, 1979), 596 P.2d 851.

The Nevada Industrial Insurance Act, codified in Title 53 of the Nevada Revised Statutes, provides the exclusive remedy for industrial injuries to employees if the employer is subject to its provision. *Cavagnaro v. Statewide Investigations, Inc.*, [94 Nev. 467](#), 581 P.2d 859 (1978); *Simon Service v. Mitchell*, [73 Nev. 9](#), 307 P.2d 110 (1957). See also *Jackson v. Southern Pacific Co.*, 285 F.Supp. 388 (D.Nev. 1968); *Frith v. Harrah South Shore Corp.*, [92 Nev. 447](#), 552 P.2d 337 (1976); [NRS 616.270](#) and [616.370](#). The relevant provisions of [NRS 616.270](#) provide as follows:

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

* * *

3. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided.

[NRS 616.370](#) specifically addresses the exclusive rights and remedies imposed on the employer and employee who fall within the act:

1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.

2. The terms, conditions and provisions of this chapter for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and employees coming within the provisions of this chapter.

* * *

4. If an employee receives any compensation or accident benefits under this chapter, the acceptance of such compensation or benefits shall be in lieu of any other compensation, award or recovery against his employer under the laws of any other state or jurisdiction and such employee is barred from commencing any action or proceeding for the enforcement or collection of any benefits or award under the laws of any other state or jurisdiction.

See also [NRS 616.377](#); 616.220; 617.240; 617.270.

The act does not preclude an employee from bringing a separate negligence suit against a third party such as the manufacturer of any equipment used during the course of employment or even against the Nevada Industrial Commission itself. *Outboard Marine Corporation v. Schupbach*, [93 Nev. 158](#), 561 P.2d 459 (1977); *Rush v. NIC*, [94 Nev. 403](#) (1978). In addition, the Nevada Industrial Insurance Act's exclusive remedy provision applies only to injuries and disabilities "arising out of and in the course of the employment." [NRS 616.270](#), subsection 1. [NRS 616.370](#), subsection 1. *Cummings v. United Resort Hotels, Inc.*, [85 Nev. 23](#), 449 P.2d 245 (1969). If the particular employment relationship is not included in the act or the type of injury is not compensated because of its nature, then the employee may bring a direct action against the employer. [NRS 616.060](#), [NRS 616.110](#), *Antonini v. Hanna Indus.*, [94 Nev. 12](#), 573 P.2d 1184 (1978); *Sullivan v. District Court*, [74 Nev. 334](#), 331 P.2d 602 (1958); *Las Vegas T-R Stage Line, Inc. v. Nevada Indus. Commission*, [81 Nev. 626](#), 408 P.2d 241 (1965); 81 Am.Jur. 2d, Workmen's Compensation § 53.

When the Nevada Industrial Insurance Act was enacted, it included a "grandfather clause," [NRS 616.255](#), subsection 2, allowing certain employers to continue to carry private worker's compensation insurance and the statute provided as follows:

This chapter shall not be construed to apply to:

* * *

2. Employments covered by private disability and death benefit plans which comprehend payments of compensation of equal or greater amounts for the purposes covered in this chapter, and which have been in effect for 1 year prior to July 1, 1947. [NRS 616.255](#), subsection 2.

The *McAfee v. Garrett Freightlines, Inc.* case involved an employer, Garrett Freightlines, who had been carrying private worker's compensation insurance pursuant to [NRS 616.255](#), subsection 2. 95 Nev. Advance Opinion 131 (June 28, 1979), 596 P.2d 851. In *McAfee*, the Nevada Supreme Court held that any employer, such as Garrett, who carried private worker's compensation insurance pursuant to [NRS 616.255](#), subsection 2 was left with only the usual common law contractual remedies. In other words, the Worker's Compensation Law for this State had no governing effect in such situations, even though the amounts of compensation and other benefits are measured by the law. *Id.*, [NRS 616.256](#), *United States Fidelity & Guaranty Co. v. Valdez*, 390 S.W.2d 485 (Tex.Civ.App. 1965). Since the above statute expressly states that Chapter 616 is inapplicable to such employments, the Supreme Court interpreted this provision as an intent by the Legislature to preclude such employers from the act's coverage. In addition, the court found nothing within the rest of the Nevada Industrial Act expressly granting the act's exclusive remedy coverage to employers who were grandfathered in under [NRS 616.255](#), subsection 2.

Therefore, the court held that in such cases the rights and obligations of both parties, employer and employee, were to be determined from the private policy of each employer. These private plans are comparable to voluntary worker's compensation which are purely contractual matters, not subject to the exclusive remedy law.

The decision in McAfee has raised concerns among employers within the State who contemplate self-insurance under Chapter 533 of the Statutes of Nevada 1979, also known as Assembly Bill 84. The issue raised is whether self-insured employers may be exposed to liability actions by injured employees in view of the decision in McAfee. However, Chapter 533, which adds several provisions to Chapter 616 of the NRS, specifically provides in section 3, subsection 2, that:

Sec. 3.

* * *

2. A self-insured employer is not required to pay the premiums required of other employers pursuant to this chapter and Chapter 617 of NRS but is relieved from other liability for personal injury to the same extent as are other employers.

Once employers have complied with the requirements of Chapter 533 to become “self-insured,” this express provision sufficiently incorporates them within the coverage of the Nevada Industrial Insurance Act. Section 2 and section 3, Statutes of Nevada 1979, p. 1035. This provision expressly protects self-insured employers from common law liability in the same manner in which it protects employers who contribute to the State Industrial Insurance Fund under the act.

The court in McAfee applied the general rule that where the employment is not covered within the act as in [NRS 616.255](#), subsection 2, other remedies are possible. *Antonini v. Hanna Indus.*, *supra*; *Las Vegas T-R State Line, Inc. v. Nevada Indus. Commission*, *supra*; *Sullivan v. District Court*, *supra*. However, the express provisions of Chapter 533 include self-insured employers within the act and grant them exclusive remedy benefits. Section 3, Chapter 533, Statutes of Nevada 1979, p. 1035.

Therefore, said employers are covered within the act and would not be subject to the same decision as applied to the employer in the McAfee case. Self-insured employers who have been included within other states’ worker’s compensation acts have been granted the exclusive remedy provisions of the acts by state courts. See, *Taylor v. Crosby Forest Products Co.*, 193 So.2d 809, 812 (Miss. 1967); *Denman v. Duval Sierrita Corp.*, 558 P.2d 712 (Ariz.App. 1976); *Swain v. J. L. Hudson Co.*, 230 N.W.2d 433 (Mich.App. 1975); *Carlson v. Anaconda Co.*, 529 P.2d 356 (Mont. 1974). Even the Nevada Supreme Court in the McAfee case acknowledged that when an employer is subject to the provisions of the Nevada Industrial Insurance Act, the act provides the employee’s exclusive remedy and relieves the complying employer from common law liability. *McAfee v. Garrett Freightlines, Inc.*, *supra*, at 853.

Therefore, it is the opinion of this office that the McAfee decision should have no bearing on self-insured employers who comply with Chapter 533 of the Statutes of Nevada 1979, p. 1035. The legislative intent is clear that self-insurers who conform to the enumerated requirements are to be treated in a similar manner as employers who contribute to the State Fund under the act. The courts should follow this legislative mandate and grant self-insurers the same protection they grant employers who contribute to the State Industrial Insurance Fund.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Pamela M. Bugge
Deputy Attorney General

OPINION NO. 80-C Attorney General; Representation of State Tax Commission and State Board of Equalization—It is not an impermissible conflict of interest for deputy attorneys general to represent the State Tax Commission and the State Board of Equalization, since both entities are charged by law to achieve a common objective establishment of full cash value of centrally assessed property.

Carson City, June 17, 1980

Mr. Roy E. Nickson, Executive Director, Department of Taxation, Capitol Complex, Carson City, Nevada 89710

Dear Roy:

In response to your letter of May 29, 1980, it is my belief that any concern over a possible conflict of interest between the deputy Attorneys General representing the State Board of Equalization and the Tax Commission is unwarranted. No such conflict exists as both the Tax Commission and the State Board of Equalization work to achieve the same end: both entities seek to establish the full cash value of centrally assessed property.

Under the property tax law, [NRS Chapter 361](#), with regard to centrally assessed property, the Nevada Tax Commission functions as the assessor in making the initial determination of value. The regulations adopted by the Commission under [NRS 361.320](#), subsection 5 are merely intended to “* * * show all the elements of value considered by the Nevada tax commission in arriving at and fixing the value for any class of property assessed by it.” The Commission is not empowered under this provision to be the ultimate arbiter of the value of centrally assessed properties.

The State Board of Equalization, in order to fulfill its duty under [NRS 361.395](#), cannot be bound by the Tax Commission’s valuation of centrally assessed property, just as it is not bound by the valuations placed on property by the county assessors or the county boards of equalization. The State Board of Equalization has the ultimate administrative authority and discretion to establish the full cash values of all property.

In this regard it should be noted that all persons whose property has been valued by the Tax Commission may appeal that valuation to the State Board of Equalization. [NRS 361.403](#). Appeals to the Tax Commission from actions of the State Board are forbidden. [NRS 361.325](#) subsections 4 and 5. Any centrally assessed property owner may appeal the actions of the State Board to a court of law. [NRS 361.420](#).

I am aware that the staff requirements of the Tax Commission and the State Board of Equalization are provided by the Department of Taxation. This may result in a situation where the Department employee who prepared the valuation for the Tax Commission is called on by the State Board of Equalization to change that value. The employee who is so requested by the State Board must take whatever action which the Board in its discretion believes necessary to equalize the property valuation under consideration. Again, I do not believe this would result in a conflict of interest for that employee. The Commission, Department Staff and the State Board of Equalization are, in fact, all working together to establish the full cash values of centrally assessed property.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

OPINION NO. 80-D Washoe County Fairgrounds; Management Agreement of Nevada State Fair, Inc. and Trust Obligations of Washoe County—Washoe County may lawfully execute a sublease and management agreement pertaining to Washoe County Fairgrounds, provided sublessee (Nevada State Fair, Inc.) maintains, operates and controls the fairgrounds consistent with the governmental purposes for which the property was acquired by the State of Nevada. Washoe County has primary responsibility to supervise management activities at fairgrounds to assure that the property is being used consistently with the trust noted in the lease from the State of Nevada to Washoe County.

Carson City, August 18, 1980

Mr. W. C. Behrens, Secretary-Treasurer, Nevada Junior Livestock Show Board, University of Nevada, College of Agriculture, Reno, Nevada 89507

Re: Washoe County Management Agreement with Nevada State Fair, Inc.

Dear Mr. Behrens:

This is in response to your opinion request submitted to our office on behalf of the Nevada Junior Livestock Show Board (an executive board appointed by the Governor pursuant to Chapter 563 of Nevada Revised Statutes), relating to the “trust” referred to in the 1951 Lease Agreement and amendments thereto between Washoe County, as represented by its Board of County Commissioners, and the State of Nevada, acting through its Board of Agriculture, with respect to the management, control, and proper maintenance of the Washoe County Fairgrounds in Reno, Nevada, in accordance with said “trust.” In particular, you have queried whether the recent management agreement between Washoe County and the Nevada State Fair, Inc. (a nonprofit corporation) is compatible with Washoe County’s obligations under its lease agreement with the State of Nevada. In order to respond to your inquiry, it would be helpful to set out the pertinent factual background concerning the lease and management of the fairgrounds property in question by Washoe County.

FACTS

On May 1, 1951, the Board of County Commissioners of Washoe County entered into a lease agreement with the State of Nevada by which Washoe County was granted all the right, title, and interest of the State of Nevada in and to the Washoe County Fairgrounds in Reno, Nevada, for a period of fifty (50) years. Also see: Chapter 251, Statutes of Nevada 1951. As a condition of acceptance of the grant, the parties agreed as follows:

It is expressly understood and agreed by and between the parties hereto that in accepting the grant herein made, the party of the second part [Washoe County] recognizes the trust imposed by Chapter 27, Statutes of Nevada, 1887, under and pursuant to which act the property herein transferred was acquired and thereafter

managed and operated by the party of the first part, and said party of the second part agrees to continue to manage, control and properly maintain the said property subject to said trust.

Further, and in connection therewith, the said party of the second part hereby covenants and agrees to allow the use of said premises from time to time by civic, agricultural and livestock groups and organizations for purposes connected with the promotion and betterment of agriculture and the livestock industry in the State of Nevada. Said use shall be for reasonable periods of time as shall least interfere with other uses of the said property, on terms to be agreed upon, and contemplates the use by *but not exclusively*, the following groups and organizations for the following purposes:

- a. University of Nevada, for the University of Nevada Aggie Horse Show.
- b. Nevada 4-H Club and F.F.A., for Nevada Junior Livestock Show Board.
- c. Nevada Hereford Association, for Nevada Hereford Association Show and Sale.
- d. City of Reno, for Reno Rodeo. (*Italics supplied.*) See: "Lease from the State Board of Agriculture of the State of Nevada Agricultural Society to the County Commissioners of Washoe County, Nevada," page 2, line 28 through page 3, line 22, Document No. 195600, Records of Washoe County.

The agreement was amended on August 3, 1971 by extending the term of the lease to ninety-nine (99) years, expiring on March 21, 2050. See: Chapter 295, Statutes of Nevada 1971. The agreement was also amended on March 28, 1977 by exempting a portion of the fairgrounds property from the trust obligations imposed by Chapter 27, Statutes of Nevada 1887 and by obligating Washoe County to make certain improvements on the remainder of the property. See: Chapter 52, Statutes of Nevada 1977.

Chapter 27, Statutes of Nevada 1887, appropriated \$10,000 to the Nevada State Agricultural Society for the purpose of purchasing and improving fairgrounds and for the payment of such premiums as may be offered to competitors. The statute further provided that all property acquired or improved by authority of said act "shall have the title thereof vested in the State of Nevada, and shall be for the sole use and benefit of the State." See: Section 2, Chapter XXVII, Statutes of Nevada 1887.

Though the 1887 statute noted above does not expressly mention the existence of a trust with respect to the acquisition and improvement of the fairgrounds in question, Washoe County has acknowledged in its Management Agreement with the Nevada State Fair, Inc. that this property is subject to a trust, derived from Section 2 of Chapter 73, Statutes of Nevada 1873, and Section 7 of Chapter 74, Statutes of Nevada 1885. These latter statutes circumscribed or delimited the legal authority of the Nevada State Agricultural Society and the Nevada State Board of Agriculture with respect to the acquisition of real property. The Agricultural Society was authorized to purchase, hold, and lease any land, together with buildings and improvements as may be erected thereon, in order to carry out certain corporate powers, defined as follows:

Sec. 2. In addition to the powers above enumerated, the society shall, by its name, have power to purchase, hold, and lease any quantity of land, not exceeding in the aggregate six hundred and forty acres, with such buildings and improvements as may be erected thereon, and may sell, lease, and dispose of the same at pleasure. The said real estate shall be held by such society for the purpose of erecting buildings and other improvements designed for the meeting of said society, and calculated to promote and encourage the interest of agriculture, horticulture, mechanics, manufacturers, stock raising, and general domestic industry. See: Section 2, Chapter LXXIII, Statutes of Nevada 1873.

Thus, it is apparent from the legislative authority pursuant to which the Washoe County Fairgrounds property was acquired by the Nevada State Agricultural Society on behalf of the State of Nevada that the governmental purpose for which the land in question was obtained was to promote and encourage the interest of agriculture, horticulture, mechanics, manufacturers, stock raising, and general domestic industry. This governmental purpose is recognized in the 1951 lease agreement between Washoe County and the State of Nevada noted above, in which Washoe County has specifically agreed to allow the use of the fairgrounds premises from time to time by civic, agricultural, and livestock groups and organizations for purposes connected with the promotion and betterment of agriculture and the livestock industry in the State of Nevada for reasonable periods of time as shall least interfere with other uses of the property. Accordingly, for the purposes of this opinion, it will be assumed that the fairgrounds are currently held by Washoe County in trust for the aforementioned governmental purposes.

On September 1, 1972, Washoe County entered into a lease agreement with the Nevada State Fair, Inc., a nonprofit corporation of Nevada, allowing said corporation the exclusive use of the fairgrounds premises during the first two weeks of September of each year for the purpose of conducting the Nevada State Fair. The agreement also provided for a sharing of the expenses for maintaining, operating, and improving the fairgrounds property; and the agreement also provided that major policy decisions concerning the Nevada State Fair were to be coordinated and communicated to the Washoe County Commission through the Commissioner assigned as the liaison Commissioner to the Nevada State Fair.

On January 15, 1980, Washoe County and the Nevada State Fair, Inc. entered into a Management Agreement, by which the Nevada State Fair, Inc. assumed complete control of the operations of the fairgrounds to manage, control, and properly maintain said premises from January 1, 1980 to December 31, 1983, including the authority to set fees for users of the fairgrounds, subject to the trust discussed above. In this regard, the pertinent paragraph of the Management Agreement reads as follows:

2. Declarations

a. By express statutory authority the Board and the County are empowered to control and manage real and personal property belonging to the County, to establish, improve, extend and better fairgrounds and other recreational facilities, and to contract for services.

b. The Fairgrounds is subject to the trust imposed by Chapter 27, Statutes of Nevada 1887, derived from Section 2 of Chapter 73, Statutes of Nevada 1873 and Section 7 of Chapter 74, Statutes of Nevada 1885, wherein the Fairgrounds will be used to promote and encourage the interest of agriculture, horticulture, mechanics, manufactures, stock raising and general domestic industry and generally to develop the resources and advance the material interests of the state.

c. The execution of this management agreement will result in substantial benefits being derived by county inhabitants as a whole and will promote the use of the Fairgrounds by organized groups and the general public for the holding of entertainments, sporting events, rodeos, fairs, cultural activities and similar uses. ("Management Agreement" between Washoe County and Nevada State Fair, Inc., January 15, 1980, at page 2.)

In consideration of the performance of the management and operational duties assumed by the Nevada State Fair, Inc., pursuant to the Management Agreement noted above, Washoe County agreed to pay certain sums of money and to sell or provide certain personal property, equipment, and services to the Nevada State Fair. It is also expressly provided in the Management

Agreement that nothing therein affected or modified the lease agreement of September 1, 1972 noted above.

In sum, subsequent to Washoe County's acquisition of the right to manage, control, and maintain the Fairgrounds property from the State of Nevada in 1951, the County has subleased the property to the Nevada State Fair, Inc., for its exclusive use in the first two weeks of September of each year; and it has further delegated increasing managerial and operational responsibility in the utilization of the fairgrounds for the governmental purposes connected therewith to the Nevada State Fair, Inc. The culmination of these events was the execution of the Management Agreement of January 15, 1980.

In light of this factual background, your correspondence with this office raises the following:

QUESTIONS

1. Did Washoe County violate any terms of its lease agreement with the State of Nevada, including the recognition of the "trust" imposed by Chapter 27 of the Statutes of Nevada 1887 and management of the Washoe County Fairgrounds subject to said trust, when the County executed a management agreement with the Nevada State Fair, Inc., by which the latter nonprofit corporation has established user fees for the use of the fairgrounds, and has received funds, equipment, and supplies from the County in consideration for the performance of management services, and has been authorized to exercise complete control of the operation of the fairgrounds?

2. Does Washoe County still have the responsibility for supervising the management activities of the Nevada State Fair, Inc. to assure that the Washoe County Fairgrounds is being used for the purposes for which said property was acquired by the State of Nevada, to-wit: to promote and encourage the interest of agriculture, horticulture, mechanics, manufactures, stock raising and general domestic industry?

ANALYSIS—QUESTION ONE

It is clear from the face of the lease agreement of May 1, 1951 between the State of Nevada and Washoe County that Washoe County is not prohibited from subleasing the fairgrounds premises or entering into any agreements with third parties concerning the management, control, and maintenance of said property. In fact, the 1951 lease agreement specifically contemplates that Washoe County will allow the use of the fairgrounds premises by civic, agricultural and livestock groups and organizations for reasonable periods of time as shall least interfere with other uses of the property "on terms to be agreed upon" between Washoe County and the users of the fairgrounds.

It is a well settled principle of American jurisprudence that in the absence of restrictions on the parties to a lease agreement, a tenant under a lease for a definite period may sublet the premises in whole or in part, provided the property being sublet is not used in a manner inconsistent with the terms of the original lease or is injurious to the premises. See generally: 49 Am.Jur.2d "Landlord and Tenant," Sec. 481.

Since the fairgrounds property is held by Washoe County under lease from the State, it is like other property of the county being managed, controlled, and maintained by the Board of County Commissioners of Washoe County, subject to the express conditions of the lease. The County Commission has the express statutory authority to control and manage the property of the county, both real and personal. See: [NRS 244.265](#) and [244.270](#). The Commissioners are also empowered to do and

perform all acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the Board. See: [NRS 244.195](#).

As a general proposition, the governing board of a local government has the discretion to lease publicly owned property and to make arrangements for the management, control, and maintenance of said property, provided the public interest is served thereby. See generally: 10 McQuillen, *Municipal Corporations*, Third Edition Revised, Section 28.42. In addition, the management of public property is considered to be a ministerial or administrative function of local government, which can be delegated to subordinates or third parties. See generally: 2 McQuillen, *Municipal Corporations*, Third Edition Revised, Section 10.41.

The purpose of the Management Agreement between Washoe County and Nevada State Fair, Inc. noted above appears to be an attempt on the part of the Washoe County Commission to delegate to the State Fair the administrative duties involved in managing, controlling, and maintaining the property. In this regard, Nevada State Fair, Inc. has a contractual duty to carry out the governmental purposes for which said property was acquired by the Nevada Agricultural Society, because of the specific reference in the Management Agreement to the governmental trust imposed on this property.

If the Washoe County Commission is viewed as the trustee of the fairgrounds for the purpose of assuring that the property is utilized for the governmental purposes for which it was acquired, the status of the Washoe County Commission as a trustee would not preclude the delegation of their authority to care, control, and manage the property to an agent to perform these functions, if it is done consistently with the terms and conditions of the trust. See generally: *Law of Trusts*, George G. Bogert, Fourth Edition (1963), Sec. 92, p. 239, which states the general principle as follows: "A trustee may delegate the exercise of a trust power to an agent or servant in those cases where a reasonably prudent owner of property of the same type as the trust property who was acting for objectives similar to those of the trust would employ assistance." Accordingly, arrangements for the management, control, and maintenance of the fairgrounds for the purpose of carrying out the governmental purposes for which the property was acquired lie within the sound discretion of the Washoe County Commission whether acting in their capacity as lessee or trustee of the property.

CONCLUSION—QUESTION ONE

The existence of a Management Agreement between Washoe County and the Nevada State Fair, Inc. does not violate any terms of the lease agreement between the State of Nevada and Washoe County respecting the Washoe County Fairgrounds, as long as Nevada State Fair, Inc. maintains, operates, and controls the fairgrounds property consistent with the governmental purposes for which said property was acquired. Since the Nevada State Fair, Inc. has a contractual duty to manage the property in such a way as to effectuate these governmental purposes, the establishment of user fees, receipt of county funds and property, and the exercise of complete control of the operation of the fairgrounds would not be improper per se if these functions involve normal administrative responsibilities required of Washoe County pursuant to its lease agreement with the State of Nevada.

ANALYSIS—QUESTION TWO

Though the lease agreement between the State of Nevada and Washoe County does not preclude the county from delegating management responsibilities to Nevada State Fair, Inc., Washoe County is not absolved from the responsibility of managing, controlling and maintaining the property in accordance with the trust noted in said agreement.

Generally, the right of a municipality to use property may be restricted by the fact that it is held under a trust for a particular use or purpose. See generally: 56 Am.Jur.2d, "Municipal Corporations," Sec. 546. More specifically, where a particular parcel of property is held in trust for a specific purpose or has been dedicated to a particular use, a county, like any municipal corporation, is without power to change the use of that property without specific legislative direction. See: 56 Am.Jur.2d Supp., "Municipal Corporations," Sec. 546, citing *Allied Veterans Council v. Klamath County*, 544 P.2d 190. Finally, a subletting of property by a lessee does not in any manner affect the liability of the lessee to the lessor for the performance of the terms and conditions of the lease, particularly when the lease provides that the lessee shall remain responsible and where the lessor has no control over the selection of the sublessee. See generally: 49 Am.Jur.2d, "Landlord and Tenant," Sec. 500.

These general principles indicate that Washoe County, as the lessee-trustee of the fairgrounds, bears the primary responsibility for assuring that the property is utilized for the governmental purposes for which it was acquired. If the overall management of the fairgrounds property frustrates the utilization of the property for these governmental purposes, the Washoe County Commission would have a duty to take corrective action, pursuant to its lease agreement with the State of Nevada. Obviously, whether or not management decisions made by Nevada State Fair, Inc. have had the effect of frustrating the proper utilization of the fairgrounds in accordance with the governmental trust imposed on the property involves a factual determination that must be made in the first instance by the Washoe County Commission. Ultimately, the State Board of Agriculture, which leased the property to Washoe County pursuant to legislative authorization, would have the right to insist that the property be utilized for the governmental purposes for which it was acquired by the State of Nevada.

CONCLUSION—QUESTION TWO

The Board of County Commissioners of Washoe County, as lessee-trustee of the fairgrounds property, has the primary responsibility for supervising the management activities of the Nevada State Fair, Inc. to assure that the Washoe County Fairgrounds is being used at all reasonable times for the governmental purposes for which said property was acquired by the State of Nevada, to-wit: to promote and encourage the interests of agriculture, horticulture, mechanics, manufacturers, stock raising and general domestic industry.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General

By: Larry D. Struve
Chief Deputy Attorney General

OPINION NO. 80-E Emergency Financial Assistance to School Districts; Board of Examiners—Board of Examiners may grant emergency financial assistance to any school district pursuant to [NRS 387.1245](#) upon recommendation from the State Board of Education, provided the resolution recommending such assistance demonstrates (1) a shortfall in anticipated revenues necessary to support a minimum program of education and

to meet contract obligations; and (2) the amount requested is the least necessary to provide a minimum program of education and meet contract obligations.

Carson City, November 12, 1980

Howard E. Barrett, Secretary, Board of Examiners, Blasdel Building, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Barrett:

You have asked under the conditions may the Board of Examiners grant emergency financial assistance to school districts from the State Distributive School Fund?

ANALYSIS

[NRS 387.1245](#) provides the statutory authorization for the State to grant needful school districts emergency financial assistance from the State Distributive School Fund. The board of trustees of any school district whose estimated receipts from all sources provided by Chapters 387 and 374 or NRS are less than the total anticipated receipts from such sources as noted in the final approved budget and which cannot provide a minimum program of education and meet its contract obligations may apply for such assistance. In order to apply for emergency financial assistance a school district must therefore have a “shortfall” in estimated receipts and be incapable of providing a minimum program for education and meeting contract obligations.

Once there is a shortfall in estimated receipts and the school district cannot provide a minimum education program and meet its contractual obligations, emergency financial assistance may be granted upon compliance with certain conditions and procedures. Pursuant to subsection 4 of [NRS 387.1245](#) the State Board of Education review the school district’s application for emergency financial assistance and by resolution finds “the least amount of additional money, if any, which is necessary to enable the board of trustees of the applying school district to provide a minimum educational program and meet its irreducible contract obligations.” The statute does not specifically address the issue of whether the Board of Education may find that the school district should be granted more than its shortfall if such amount is necessary to enable the school district to provide a minimum educational program and meet its contract obligations. Nevertheless, once a loss in the school district’s total estimated receipts exists the Board of Education’s duty in determining whether to grant emergency financial assistance appears to involve consideration of the school district’s ability to provide a minimum educational program and meet contract obligations. Concomitantly, if the Board of Education finds the least amount of additional money necessary for the school district to provide a minimum educational program and meet its contract obligations is more than the shortfall in estimated receipts, the Board is not limited by statute in recommending the school district be granted that amount of necessary assistance.

Such interpretation of the statute is consistent with the Nevada plan of providing state financial aid to Nevada children. In [NRS 387.121](#) the Legislature specifically stated “the proper objective of state financial aid to public education is to insure each Nevada child a reasonably equal educational opportunity.: The Legislature went on to declare a policy of providing state financial aid as follows:

Recognizing wide local variations in wealth and costs per pupil, the state should supplement local financial ability to whatever extent necessary in each school district to provide programs of instruction in both compulsory and elective subjects

that offer full opportunity for every Nevada child to receive the benefit of the purposes for which public schools are maintained.

Once the Board of Education transmits its resolution finding emergency financial assistance necessary, the Board of examiners *independently* reviews the Board of Education's resolution and may require additional justification as it deems necessary. The purpose of [NRS 387.1245](#) as indicated by its legislative history is to make apportionments for loss of revenue in certain districts. See minutes Assembly Ways and Means Committee, Nevada State Legislature, 59th Session, April 21, 1977. The statute is not an open-ended authorization for financial assistance to supplement school districts' budgets where more educational services might be beneficial. In its independent review of a resolution to grant emergency assistance it is important for the Board of Examiners to keep in mind the statute's express purpose. In those cases where the Board of Education has resolved to grant assistance in excess of the district's shortfall of estimated revenue, the Board of Examiners should review the record to determine that the amount recommended is the *least* amount of additional money necessary to enable the school district to provide a minimum educational program and meet its irreducible contract obligations, in accordance with the Board of Education's guidelines for evaluating needs for emergency financial assistance. If the Board of Examiners finds the school district has not demonstrated a shortfall in total estimated receipts, which is a necessary condition to apply for assistance, the Board may return the Board of Education's resolution and the school district's application for additional justification of loss of revenue. The Board of Examiners may also return for additional justification those applications which meet the shortfall criteria but which do not contain information necessarily showing the school district cannot provide a minimum educational program or meet its contract obligations.

Once the Board of Examiners independently review the Board of Education's resolution and determines to grant a request for emergency financial assistance, or any part thereof, it transmits its finding to the State Board of Education and the State Controller. The grant of emergency financial assistance may then be paid to the school district from the State Distributive School Fund.

CONCLUSION

The Board of Examiners may grant emergency financial assistance to any school district upon recommendation of the State Board of Education, provided the resolution recommending such assistance demonstrates (1) that there has been a shortfall in anticipated revenues necessary to support a minimum program of education and to meet the district's contract obligations; and (2) that the amount of emergency financial assistance requested is the least amount necessary to provide a minimum program of education and meet contract obligations.

Respectfully submitted,

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