OPINION NO. 71-1 SCHOOLS—SEARCH OF SCHOOL LOCKERS—Based upon their relationship with students and their concurrent ownership of school lockers, school authorities have an inherent right, and, under certain circumstances, a duty, to open and inspect all school lockers with or without the consent of the student, and with or without a validly executed search warrant; this authority exists in order that school officials may maintain discipline, prevent school property from being used for illegal or illicit purposes, prevent undesirable and dangerous matter from being introduced into the school, protect and promote the safety and welfare of the student body, and assure compliance with reasonable health and sanitary standards.

Carson City, January 11, 1971

Mr. Robert L. Petroni, Legal Counsel, Clark County School District, 2832 E. Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

This office has reviewed Attorney General's Opinion No. 643, issued February 20, 1970. That opinion was written in response to an inquiry from you concerning whether school authorities may search students' lockers, without their consent, for contraband, narcotics, and offensive and obscene materials, when in their opinion there is reason to believe that certain lockers contain such material. We have concluded that said opinion was legally unsound.

ANALYSIS

In approaching the specific legal problem of searching school lockers, two things must be kept in mind. First, as stated in *U.S. v. St. Clair*, 240 F.Supp. 338 (1965 S.D.N.Y.):

> The essential aim of the Fourth Amendment is to protect the rights of privacy in one's home and effects against arbitrary and unlawful invasion. Only unreasonable search and seizure is condemned, reasonable search is not.

Second, under NRS 392.460, members of every board of trustees of a school district, superintendents of schools, principals and teachers have concurrent power of peace officers for the protection of children in school, on their way to and from school and for the enforcement of order and

discipline among such children. Thus the Legislature has seen fit to recognize the fact that school officials and teachers are in a position of *in loco parentis* to the children they teach during school hours.

In *Moore v. Student Affairs Committee*, 284 F.Supp. 725 (1968 M.D. Ala.), the only case referred to in Opinion 643, the court, in footnote 10, stated:

> While there are obviously functional differences between the disciplinary requirements of high school and college students, no distinction can be drawn between the fundamental duties of educators at both levels to maintain appropriate campus discipline. A reasonable rate of inspection of the school property and

> premises—even though it may have been set aside for the exclusive use of the particular student—is necessary to carry out that duty.

The court then stated:

> The student is subject only to reasonable rules and regulations but his rights must yield to the extent that they would interfere with the institution's fundamental duty to operate the school *as an educational institution.* A reasonable right of inspection is necessary to the institution's performance of that duty even though it may infringe on the outer boundaries of a dormitory student's Fourth Amendment rights. (Court's emphasis.)

The court then went on to hold as follows:

> It is settled law that the Fourth Amendment does not prohibit reasonable searches when a search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security.

Thus, while it appears that there is sufficient authority within the Moore case itself to permit school officials to search student lockers, there are several other cases which have dealt directly with this problem although the factual situations surrounding the authority for the searches are varied somewhat.

In *State v. Stein,* 456 P.2d 1 (1969 Sup.Ct. Kan.), U.S. cert. den. 397 U.S. 943, the defendant and the school authority consented to a search of a locker which revealed stolen property and the school official testified that he opened the locker "on his own judgment" although at the request of a law enforcement official and without objection from the student. The court noted that the status in the law of a school locker is somewhat anomalous and that although the student may have control of his locker as against his fellow students, his possession is not exclusive against the school officials. The court held as follows:

> We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved.

In *People v. Overton,* 229 N.E.2d 596 (N.Y.Ct.App. 1967) U.S. reh. den. 393 U.S. 992, Dr. Panitz, a vice principal of the school, gave his

consent to police officers to search a locker. At trial, the prosecution admitted the search warrant which the police officers were using as authority to conduct the search was invalid, and the court noted that even without a valid warrant, the school official had a right to consent, stating:

> The power of Dr. Panitz to give his consent to the search arises out of the distinct relationship between school authorities and students. The school authorities have an obligation to maintain discipline over the students * * * Indeed it is doubtful if a school would be properly discharging its duty of supervision over the students if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker. This interest,

> together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers.

In the case of In re Donaldson, 75 Cal.Rptr. 220 (1969), a principal, after having reason to believe that a student was selling narcotics on the school premises, searched the student's locker and found marijuana. The search was conducted without the student's consent or a search warrant being obtained. The court first noted that this search was conducted by a private individual. It was not a joint operation by a private individual and law enforcement officials which may have been "tainted" with state action of such a degree as to infringe upon Fourth Amendment rights. The court held as follows:

> The conduct of a person not acting under the authority of a state is not proscribed by the Fourth or Fourteenth Amendments of the federal Constitution. There are no state standards for search and seizure by a private citizen who is not acting as an agent of the state or other governmental unit. Therefore, acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable. * * * We find the vice-principal of the high school not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures. Such school official is one of the school authorities with an obligation to maintain discipline in the interest of a proper and orderly school operation, and the primary purpose of the school official's search was not to obtain convictions, but to secure evidence of student misconduct. That evidence of the crime is uncovered and prosecution results therefrom should not of itself make the search and seizure unreasonable.

In conclusion, the court stated:

> The school stands *in loco parentis* and shares, in matters of school discipline, a parent's right to use moderate force to obtain obedience, and that right extends to the search of appellant's (the student's) locker under the factual situation herein related.

Summarizing the above cases, it appears obvious that, due to the special relationship existing between students and school authorities, the concurrent ownership of the lockers in question by both taxpayers and school authorities, and the necessity for school authorities to maintain order and

discipline on school premises, the law clearly permits school authorities to search student lockers. It may be done at any time under any circumstances, provided:

1. It is done pursuant to reasonable rules and regulations;
2. It is done to maintain discipline and protect the students from the introduction into the school of offensive and undesirable materials; or
3. It is done because the school authorities have reason to believe that a student may be engaged in illegal activity or using the school property in the form of a locker for illegal purposes or to sequester material which it is illegal to possess.

The school authorities should consider it their duty to seize any deleterious substances or material found in a student's locker, and, if possession of such material is clearly illegal, they have an obligation to turn this material over to the proper law enforcement agencies.

We share the opinion that the right of inspection of school lockers is inherent in the authority vested in school administrators and that this authority must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student body preserved.

CONCLUSION

Based upon their relationship with students and their concurrent ownership of school lockers, school authorities have an inherent right, and, under certain circumstances, a duty, to open and inspect all school lockers with or without the consent of the student, and with or without a validly executed search warrant; this authority exists in order that school officials may maintain discipline, prevent school property from being used for illegal or illicit purposes, prevent undesirable and dangerous matter from being introduced into the school, protect and promote the safety and welfare of the student body, and assure compliance with reasonable health and sanitary standards.

Accordingly, Attorney General's Opinion No. 643, issued February 20, 1970, is hereby superseded.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-2 ELECTIONS—Registration of persons 18 years and over in national elections.

Carson City, January 11, 1971

The Honorable John Koontz, Secretary of State, Department of State, Carson City, Nevada 89701

Dear Mr. Koontz:

You state that several county clerks have inquired of you as the chief election official of the State about the effect on their registration procedures of the recent decision by the United States Supreme Court on the right of persons 18 years and over to vote.

I.

QUESTION

Your specific question is whether the county clerks should begin now to accept registrations of persons of age 18 years and over.

ANALYSIS

Section 302 of the Voting Rights Act Amendments of 1970 (P.L. 91-285; 84 Stat. 314) provided that no citizen of the United States otherwise qualified to vote in any primary or general election should be denied the right to vote on account of age if such citizen were 18 years of age or older. The constitutionality of this section was before the Supreme Court in *United States v. Arizona (No. 46 Orig.)*, which held on December 21, 1970, that the Congress could fix the age of voters in national elections, such as congressional, senatorial, vice presidential and presidential elections, but that Congress could not constitutionally set the voting age in state and local elections.

Thus, Section 1 of Article 2, Constitution of Nevada, enfranchising citizens 21 years and over, is in conflict with the United States Supreme Court's pronouncement and unenforceable insofar as it attempts to limit the right to vote in national elections to persons 21 years of age and older. There is no legal necessity for state legislation to implement the court's decision in this regard.

CONCLUSION

It is incumbent upon the county clerk to register any applicant 18 years of age or older who is otherwise qualified as soon as the county clerk can establish procedures for so doing. It should be remembered that the Nevada Constitution still governs the age of voters in primaries and elections of state and local officers. In view of this, the county clerk should maintain a separate registration book or record for those registrants of 18 years but under 21 to facilitate voting at primaries and elections where both national and state and local officers are to be elected.

II.

Comment should also be made regarding Title II of the Voting Rights Act Amendments of 1970, the constitutionality of which was also upheld in the companion case, *United States v. Idaho (No. 47 Orig.)*. Section 202(d) of this Title provides that each state shall: "Provide by law" for registering all qualified residents of a state who apply, not later than 30 days next preceding any presidential election, for registration to vote for President and Vice President. NRS 293.485, providing for registration of those who have resided continuously in Nevada 6 months and in the county 30 days, and in the precinct 10 days next preceding the date of a primary or general election, does not meet the requirements of Section 202(d). Implementing legislation will be sought by this office from the 1971 Legislature.

Section 202(d) further requires each state to "provide by law" for casting of absentee ballots for President and Vice President by qualified residents of a state who may be absent from their election district on election day and who have applied for registration not less than 7 days next preceding such election and who have returned such ballots to the

appropriate election official not later than time of closing of the polls. NRS 293.315 and 293.317, as presently enacted, fulfill this requirement.

Section 202(e) of said Title further provides that if any citizen otherwise qualified to vote in a state in any election for President and Vice President has begun residence in such state after the thirtieth day next preceding such election, and for this reason does not meet the registration requirements, he shall be allowed to vote for President and Vice President in such election, either (1) in person in the state of his former residence, if he is otherwise qualified to vote there, or (2) by absentee ballot in the state of his former residence, if he meets the requirements for absentee voting in that state. Enabling legislation will be required to implement Section 202(e). This office will seek such legislation at the 1971 Legislature which, if enacted, will require another separate category of absentee voters limited solely to voting for the national offices of President and Vice President.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-3 COPYRIGHT—State publications may be copyrighted like any other publication. If not copyrighted, they are in the public domain after publication.

Carson City, January 11, 1971

Mr. Joseph J. Anderson, State Librarian, Nevada State Library, Carson City, Nevada 89701

Dear Mr. Anderson:

The Attorney General's office is pleased to submit herewith its response to your inquiry dated January 4, 1971.

QUESTION

What is the copyright status of state publications?

ANALYSIS

> The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (U.S. Const. Art. I, § 8.)

Under this constitutional authority, the federal Congress has completely preempted the field of legislation on copyrights. Congress has provided that all federal publications are in the public domain with certain exceptions. 17 U.S.C. § 8. This limitation does not apply to states.

CONCLUSION

Publications of the State of Nevada which are copyrighted in compliance with the federal copyright statute under authority of NRS 344.070

have a legally binding copyright. This requires that the works be appropriately registered with the U.S. Copyright Office and bear the proper copyright notice. All other state publications are in the public domain after publication.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-4 SCHOOL TRUSTEES—Local boards of school trustees may grant leaves of absence to school teachers to serve as Members of the Nevada Legislature, and such teachers may serve the local school districts during the periods the Legislature is not in session.

Carson City, January 26, 1971

Mr. Burnell Larson, Superintendent of Public Instruction, State Department of Education, Carson City, Nevada 89701

Dear Mr. Larson:

School teachers have been elected to the Nevada Legislature, and you have asked this office for an opinion concerning their status.

QUESTION

May a local board of school trustees grant a leave of absence to a teacher for the purpose of serving as a Member of the Nevada Legislature?

ANALYSIS

Implicit in the question is the issue of whether a teacher may serve as a teacher for compensation while he is a legislator, during the period the Legislature is not in session. There have been conflicting opinions of the Attorney General on this topic in the past. On May 9, 1955, the Attorney General issued Opinion No. 59. This opinion came to the conclusion that the local school districts were political subdivisions of the State and part of the executive branch of government, and therefore could not employ a member of the legislative branch under Article 3, Section 1 of the Constitution of the State of Nevada, which reads:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

We believe this 1955 opinion to be contrary to the vast weight of authority. Justice Carter of the California Supreme Court, in interpreting an almost identical California constitutional provision, said:

> [I]t is settled that the separation of powers provision of the Constitution, Art. 3, Sec. 1, does not apply to local governments as
>
> distinguished from departments of the state government. *Mariposa County v. Merced Irrigation District*, 32 Cal.2d 467, 196 P.2d 920, 926 (1948).

The Colorado Supreme Court, referring to an almost identical provision in the Colorado Constitution, said that it "relates to state government and is not to be applied here in matters of purely local concern such as the matters pertaining to license of a business within the city and county." *Peterson v. McNichols*, 128 Colo. 137, 260 P.2d 938, 941 (1953).

The Maryland Supreme Court comes right to the point in interpreting another similar constitutional provision, saying:

> The constitutional requirement of separation of powers is not applicable to local government. *Pressman v. D'Alesandro*, 193 Md. 672, 69 A.2d 453, 454 (1949).

New Jersey also concurs in the weight of authority in *Eggers v. Kenny*, 15 N.J. 107, 104 A.2d 10, 17 (1954).

Attorney General's Opinion No. 401, dated April 20, 1967, reaches the correct conclusion on the same principle in deciding that the Fire Chief of the City of Sparks could serve in the Legislature.

The law is correctly summarized in I Sutherland, Statutory Construction § 230 (Horack 3d ed. 1943):

> Historically the requirement of the separation of powers was never applied to local governmental organizations. Thus, not only municipal corporations but counties, townships, school districts, drainage districts, and the like are frequently organized with only a single commission with all the powers, legislative, executive, and judicial, in the commission.

The general powers of the boards of trustees of school districts are set out in NRS 386.350, as follows:

> Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children.

There is no limitation in the Constitution or the laws of the State of Nevada pertaining to the granting of leaves of absence for any purpose by boards of school trustees.

There are various limitations set out in Chapter 391 of Nevada Revised Statutes concerning the authority of boards of school trustees to hire teachers, but there is no mention of any limitation on the trustees' basic prerogative to grant leave of absence from employment where there is to be no compensation paid during leave.

CONCLUSION

Local boards of school trustees may grant leaves of absence to school teachers to serve as Members of the Nevada Legislature, and such teachers

may serve the local school districts during the periods the Legislature is not in session.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-5 FEDERAL EMPLOYEES who are not federal officers may hold civil offices of profit with the State.

Carson City, January 26, 1971

The Honorable Mike O'Callaghan, Governor of Nevada, Carson City, Nevada 89701

Dear Governor O'Callaghan:

This is in reply to your request for an opinion as to the merit of instituting quo warranto proceedings against the four Mineral County School Trustees employed by the federal government.

QUESTION

May persons who are employed by the federal government legally be trustees of county school districts?

ANALYSIS

The Nevada Constitution, in Article 4, Section 9, limits eligibility to hold civil offices of profit with the State as follows:

> No person holding any lucrative office under the Government of the United States or any other power, shall be eligible to any civil office of Profit under this State; Provided, that Post-Masters whose compensation does not exceed Five Hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office.

Attorney General's Opinion No. 670, dated July 1, 1970, finds that the office of trustee of a county school board is a *civil office of profit* where the school trustees are paid a salary for attending school board meetings. That opinion, however, did not define what was considered an *office* under the government of the United States.

The early case of *State ex rel. Kendall v. Cole*, 38 Nev. 215, 148 Pac. 551 (1915), made it clear that an employee is not always an *officer* as used in the Nevada Constitution. This carefully reasoned case cites with approval, at page 230, the following language from *Attorney General v. Tillinghast*, 203 Mass. 539, 89 N.E. 1058, 1060 (1909):

> The holder of an office must have intrusted to him some portion of the sovereign authority of the state. His duties must not be merely clerical, or those only of an agent or servant, but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by law.

In the more recent case of *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953), the Nevada Supreme Court again made a distinction between officer and employee. The court cited with approval, at page 121, the following language from *LaPolla v. Davis*, 89 N.E.2d 706, 708 (Ohio Com.Pl. 1948):

> The fact that a public employment is held at the will or pleasure of another, as a deputy or servant, who holds at the will of his principal, is held * * * to distinguish a mere employment from a public office; for in such cases no part of the state's sovereignty is delegated to such employees.

The 1967 legislative enactment of NRS 412.146 cleared up the officer-employee distinction as to Nevada National Guardsmen:

> Any officer or enlisted man of the militia of this state who receives compensation from the United States as a federally recognized member of the Nevada National Guard does not hold a lucrative office under the Government of the United States within the meaning of section 9 of article 4 of the constitution of the State of Nevada.

This distinction between officer and employee of the federal government is further illustrated by Attorney General's Opinion No. 229, dated December 11, 1956, where an Internal Revenue Service employee was held not to be an officer of the federal government.

There is no reasonable interpretation of Article 4, Section 9 of the Nevada Constitution other than that mere employees of the federal government are not intended to be swept into the narrow and specific classification of "* * * person[s] holding lucrative office under the government of the United States."

CONCLUSION

Article 4, Section 9 of the Nevada Constitution does not preclude employees, as distinguished from officers, of the federal government from holding civil offices of profit with the State or a subdivision thereof. It would be a futile effort to attempt to unseat trustees of the Mineral County School Board who are also federal employees by proceedings in quo warranto. They clearly hold their offices legally.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-6 PEACE OFFICERS; FIREFIGHTERS; RETIREMENT—Defines those who are peace officers, those who have peace officers' powers, those who are firefighters, and those who are eligible to retire at age 50. (*See also* Attorney General's Opinion No. 52, dated October 28, 1971.)

Carson City, June 30, 1971

Mr. Keith J. Henrikson, Chairman, State Fire Marshal's Advisory Board, Department of Commerce, Carson City, Nevada 89701

Dear Mr. Henrikson:

On February 1, 1971, pursuant to your letter request, we issued Opinion No. 6.

A number of requests have been received by this office to "up-date" various portions of that opinion to include the effect of the numerous enactments by the recent session of the 56th Legislature. Since the questions have been of a diversified nature, Opinion No. 6 is hereby withdrawn. This opinion replaces Opinion No. 6.

QUESTION NO. 1

Who is a peace officer, and who has peace officer powers?

ANALYSIS

The term "peace officer" is practically synonymous with "conservator of the peace."

> A peace officer is a person designated by public authority whose duty it is to keep the peace and arrest persons guilty or suspected of crime. Restatement, Torts, Section 114.

At common law, the powers of conservators of the peace belonged to sheriffs, constables, coroners, justices of the peace, and watchmen. Policemen, as such, are unknown to the common law, but they are generally considered the legal equivalent of watchmen and to have the same common law powers of arrest as watchmen, sheriffs, and other peace officers, especially when expressly authorized by statute or ordinance to conserve the peace. In some jurisdictions, however, policemen are considered as being purely creatures of statute, and as having only such powers as are conferred on them by acts of the Legislature or by municipal ordinances.

Other jurisdictions, by statute and by judicial rulings, have interpreted peace officers as being coroners and jailers (Ky.); persons especially appointed to execute criminal processes, liquor control board agents (Tex.); judges of all degrees, policemen, mayors, aldermen, etc. (Tenn.); and special policemen (Va.). The militia are peace officers when they have been activated or ordered out by the governor (Miss.).

The U.S. Congress, in the Civil Obedience Act of 1968, uses the following definition:

> The term "law enforcement officer" means any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia; and such term shall specifically include, but shall not be limited to,
>
> members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any State, or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included within the definition of National Guard as defined by such section 101(9), and members of the Armed Forces of the United States, while engaged in suppressing acts of violence or restoring law and order during a civil disorder.

Section 10735, N.C.L. 1929, defined peace officers as the bailiff of the Supreme Court, sheriffs of counties, constables, members of the state police, state detectives, marshals, and policemen of cities and towns, respectively.

The current Nevada law is reflected in NRS 169.125 as amended in 1971 by the Legislature, which defines peace officers as follows:

> 1. The bailiff of the supreme court;
> 2. Sheriffs of counties and their deputies;
> 3. Constables;
> 4. Personnel of the Nevada highway patrol when exercising the police powers specified in NRS 481.150 and 481.180;
> 5. The inspector or field agents of the motor carrier division of the department of motor vehicles when exercising the police powers specified in NRS 481.049;
> 6. Members of and all inspectors employed by the public service commission of Nevada when exercising those enforcement powers conferred by chapters 704 to 706, inclusive, of NRS;
> 7. Marshals and policemen of cities and towns;
> 8. Parole and probation officers;
> 9. Special investigators employed by the office of any district attorney or the attorney general;
> 10. Arson investigators for fire departments specially designated by the appointing authority;

11. Members of the University of Nevada System police department;
12. The State fire marshal and his deputies; [and]
13. The brand inspectors of the state department of agriculture when exercising the enforcement powers conferred in chapter 565 of NRS [.];
14. Arson investigators for the state forester firewarden specially designated by the appointing authority;
15. The deputy warden, correctional officers and other employees of the Nevada state prison when carrying out any duties prescribed by the warden of the Nevada state prison;
16. Nevada state park system employees designated by the administrator of the Nevada state park system in the state department of conservation and natural resources when exercising police powers specified in NRS 407.065;
17. Security officers employed by the board of trustees of any school district;
18. The executive, supervisory and investigative personnel of the Nevada gaming commission and the state gaming control board when exercising the enforcement powers specified in NRS 463.140;

19. The director, division chiefs, investigators, agents and other sworn personnel of the department of law enforcement assistance;
20. Field dealer inspectors of the motor vehicle registration division of the department of motor vehicles when exercising the police powers specified in NRS 481.048; and
21. The personnel of the Nevada department of fish and game when exercising those enforcement powers conferred by Title 45 and chapter 488 of NRS.

In addition to those persons defined as peace officers in NRS 169.125 we find scattered throughout the statutes the following additional persons who have been given peace officer powers, either directly, or by implication:

1. NRS 4.170 makes *justices of the peace* conservators of the peace in their respective townships and NRS 4.210 provides that where six or more persons "shall be unlawfully and riotously assembled * * * the justice of the peace shall go among them * * * and shall command them * * * to disperse." Subsection 2 of the statute provides that if the people do not disperse then the "justice *shall arrest* them." NRS 4.210 was repealed by the 56th Session of the Nevada Legislature effective February 22, 1971, pursuant to Chapter 8 of the 1971 Statutes.

NRS 268.310 and 268.320 provide that within a city *mayors and aldermen* shall perform the identical acts that NRS 4.210 requires of a justice of the peace. NRS 268.320 was repealed by the 1966 Session of the Nevada Legislature effective March 15, 1971, pursuant to Chapter 50 of the 1971 Statutes.

2. NRS 31.580 gives a *bail bondsman* the power to arrest a defendant for the purpose of surrendering him, and NRS 178.526 provides that *sureties* may arrest and surrender a defendant or by "* * * written authority, endorsed on a certified copy of the undertaking, *may empower any person* of suitable age and discretion to do so."

3. NRS 62.125 gives the *director of juvenile services* the "full power and authority of a peace officer in his judicial district," and under the Juvenile Court Act (NRS 62.120 and 62.122), *juvenile probation officers and their assistants* are given the same powers as peace officers.

4. NRS 171.116 gives a *magistrate* the power to deputize "* * * *any suitable and discreet person* to act as constable when no constable is at hand and the nature of the business requires immediate action."

5. NRS 171.126 provides statutory authority for *private persons* to make arrests for (1) "a public offense committed or attempted in his presence" or (2) "when the person arrested has committed a felony, although not in his presence" and (3) "when a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it."

6. NRS 171.132 provides that *any person* making an arrest may summon as many persons as he deems necessary to aid him therein and NRS 179.195 provides that every peace officer *or other person empowered to make an arrest* shall have authority to command assistance therein.

7. NRS 171.158 gives the power to arrest to *any peace officer of another state* who enters this State "in fresh pursuit" of a person believed to have committed a felony in the other state.

8. NRS 205.230 provides that all state, county, city and township

peace and law enforcement officials, including sheriffs, their deputies, constables, their deputies, and fish and game wardens have *statewide peace officer powers while in pursuit of rustlers.*

9. Implied peace officer power is granted to *"personnel" of the Division of State Parks* of the State Department of Conservation and Natural Resources insofar as enforcement of laws relating to the protection of designated petrified wood sites is concerned. (NRS 206.320.)

10. NRS 209.133 spells out that *the warden, his deputy* and *correctional officers* of the Nevada State Prison have the powers and privileges of peace officers when pursuing an escaped prisoner or returning an escapee to prison. *Other employees of the prison may be so empowered* by the warden when they are pursuing or returning an escapee and the employees are so empowered while transporting, escorting or exercising control over prisoners outside the confines of the prison.

11. NRS 210.270 and 210.700 give all *officers and employees of juvenile correctional institutions* powers and privileges of peace officers so far as necessary to arrest inmates who have escaped from the school. Subsection 2 of these statutes provides that the employee of the correctional institution assigned as *parole officer* shall have the powers and privileges of a peace officer.

12. NRS 212.210 gives peace officer powers to a *California correctional officer,* who has in his custody in Nevada a California prisoner whom he is transporting from one California correctional facility to another, via Nevada, insofar as that prisoner is concerned.

13. NRS 213.1097 grants full peace officer powers and authority—*in every county of the State*—to the *chief parole and probation officer and assistant parole and probation officers.*

14. In Chapter 213 of NRS a Narcotic and Dangerous Drug Division is created within the Department of Parole and Probation and NRS 213.165 grants peace officer powers to the *administrator and agents* of the division who assist local law enforcement agencies in narcotic and drug investigation.

15. NRS 331.140 gives the *superintendent of the capitol building* and grounds appurtenant thereto, and his *watchmen, and in emergencies, employees in the department,* the same power to make arrests as the police officers of Carson City.

16. NRS 370.065 gives the *tax commission, its agents,* and all peace officers *and revenue collecting officers,* the right of visitation and inspection of any place they may have reason to believe unstamped cigarettes may be kept.

17. NRS 381.221 and 381.223, in addition to naming sheriffs, the highway patrol and other peace officers, provide that *personnel of the Division of State Parks* of the State Department of Conservation and Natural Resources may examine the permit of any person and *shall seize any object of antiquity* taken, or collection made, on historic or prehistoric sites without a permit.

18. NRS 393.0718 provides that the *board of trustees of any school district may appoint a person* to have charge of the grounds, preserve order, protect school property, etc., and such person shall have the power of a peace officer.

19. NRS 407.065 gives the *State Park Administrator, rangers and employees of the State Park System* the same powers to make arrests as

any other peace officer for violation of law committed inside the boundaries of state parks or real property controlled or administered by the system.

20. NRS 423.180 directs the *Superintendent of the State Children's Home* to pursue and capture any orphan who escapes or is absent without authorization from the home.

21. In the development of public health laws and regulations summary and broad peace officer power and authority is *given to all health officers, local boards of health * * * all persons in charge of public buildings and institutions* and *all other public officers and employees,* in addition to sheriffs, constables, policemen, and marshals in NRS 439.560. *Fish and game wardens* are included in NRS 444.210, to enforce compliance with garbage and refuse disposal and NRS 456.070 gives a *health officer power to delegate* his duties to qualified representatives.

22. NRS 439.170 notes that the *Health Division "shall possess all powers necessary* to fulfill the duties and exercise the authority * * * *for the enforcement of all health laws. * * * "*

23. *Members of the Food and Drug Administration, inspectors* and *investigators, agents* and *their assistants,* and *any person working* under their immediate direction, supervision or instruction are granted peace officer immunities from prosecution while investigating food and drug law violations by virtue of the provision of NRS 454.370.

24. NRS 463.140 (4) provides that the *State Gaming Board,* the *commission* and the *executive, supervisory,* and *investigative personnel* of both the board and the commission shall be invested with peace officer powers.

25. NRS 472.040 gives the *State Forester Firewarden and his appointed paid foresters and firewardens* only the police powers necessary to enforce the laws respecting forest and watershed management or the protection of forests or other lands from fire.

26. NRS 475.070 provides that *firemen* may be "peace officers" during the time that they are engaged in actual firefighting, in that it is a misdemeanor to interfere with or disobey their lawful orders during that time.

27. NRS 475.110 grants authority to all sheriffs, their deputies, firewardens, other peace officers or *any national forest officer* to call upon able-bodied men * * * for extinguishment of fires in timber or brush.

28. NRS 488.355(1) gives every *game warden,* sheriff or other peace officer power to enforce regulations and laws relating to watercraft, subsection 2 grants those powers to designated *agents or inspectors of the State Board of the Fish and Game Commissioners,* and subsection 3 extends those powers to designated *agents or inspectors of the Health Division* of the Department of Health, Welfare, and Rehabilitation.

29. NRS 496.130 grants authority to municipalities to appoint *airport guards* or police *with full police powers.*

30. Additionally, NRS 501.349 provides that *fish and game wardens may act as peace officers* for the service of such legal process including warrants and subpoenas as may be required in the enforcement of their duties.

31. NRS 501.375 gives *every game warden* throughout the State and every sheriff and constable in his respective county full power and authority with or without a warrant "to open, enter or examine any camp,

structure, aircraft, boat, vehicle, box, game bag or other package where he has reason to believe any wildlife taken or held in violation * * * of this title * * * and to seize the same * * *" and "to seize * * * any guns, ammunition, traps, snares, tackle and other illegal devices or equipment."

32. NRS 512.180 gave the *Inspector of Mines* "full power and authority, at all hours, to enter and examine any and all mines * * *" prior to the 1971 Session of the Legislature. That session, pursuant to Chapter 81 (S.B. 254), effective March 29, 1971, gave the Deputy Inspector of Mines the same power.

33. NRS 527.050, relating to the protection of trees and flora says:

> The *state forester firewarden and his representatives, public officials charged with the administration of reserved and unreserved lands belonging to the United States,* and peace officers shall enforce the provisions of this section. (Italics added.)

34. And NRS 527.110 grants the power to confiscate trees unlawfully cut to "the *state forester firewarden, or his duly authorized agent, officials of the United States Forest Service or of the Bureau of Land Management,* and peace officers * * *."

35. NRS 527.250 makes it unlawful to use a mechanical device to harvest cones or pine nuts from piZon trees and delegates enforcement of this act to the *State Forester Firewarden and his representatives* and all peace officers.

36. For violations of water laws, NRS 533.475 vests the power to arrest in the *State Engineer and his assistants.*

37. The *State Quarantine Officer* is empowered to arrest any person violating quarantine, or suspected of such violation, by subsection (b) of NRS 554.160 (agricultural commodities) and NRS 571.140 grants power to the Quarantine Officer to enforce laws relating to the control of livestock diseases.

38. The Executive Director of the Department of Agriculture is empowered by NRS 561.225(2) to designate such department personnel as are required to be field agents and inspectors in the enforcement of NRS Title 49 (statutes relating to agriculture) and NRS Title 50 (statutes relating to animals) and while so serving such persons have peace officer powers.

39. All *inspectors and their deputies appointed by the Board of Sheep Commissioners are vested with the power and authority of peace officers* by NRS 562.500, and NRS 562.530 grants the *same powers to federal inspectors* when they are engaged in the discharge of their official duties.

40. The Junior Livestock Show Board is given the power to appoint all necessary marshals and police for the preservation of order and peace at their livestock shows by NRS 563.120. Such appointees have the same authority that peace officers of the State are vested with by law.

41. The power to issue cease and desist orders is granted to the *executive director of livestock auctions* for a violation or anticipated violation of laws relating to public livestock sales by the provisions of NRS 573.183.

42. NRS 574.040 provides that all *members, agents, and all local and district officers of qualifying societies for the prevention of cruelty to*

animals who may be authorized in writing by the trustees of such societies, approved by the district judge of the county and sworn in the same manner as peace officers, *may make arrests* for violations of Chapter 574 of NRS.

43. Summary police power is granted in NRS 581.070 and 581.090 which give the *State Sealer of Weights and Measures* (NRS 581.030 makes the Executive Director of the State Department of Agriculture the ex officio State Sealer of Weights and Measures) the power to enter without formal warrant * * *:

> Any stand, place, building or premises, or stop any vendor, peddler, junk dealer, driver of any delivery vehicle, or any person whatsoever * * *

and

> * * * the state sealer * * * shall condemn and seize, and may destroy, incorrect weights, measures or weighing or measuring devices * * *

44. The power to confiscate and remove—at the owner's expense—any diseased meat, poultry, and eggs, is granted to any sheriff, constable, policeman, or other peace officer or the *State Health Officer* in NRS 583.010, 589.070 (poultry), 583.080 (fowl), and 583.110 (eggs). The same power, as to diseased or unwholesome fruits, vegetables, or other market produce is granted in NRS 583.060.

45. The *private Investigators Licensing Board is authorized* by NRS 648.050, *to employ persons* to investigate violations of Chapter 648 of NRS *and such employees shall have the authority of peace officers.*

46. The Governor is authorized and empowered upon the application of any *railroad* company, to appoint and to commission to serve during his pleasure one or more persons—as *policemen*, who shall have the power of *peace officers*—upon the premises or property owned or operated by the company. (NRS 705.220.)

47. NRS 706.8821(2)(b) provides that persons appointed by the *Taxicab Administrator* as:

> Taxicab *field investigators* shall be peace officers. (Italics added.)

Separate and apart from the enumerated statutory grants of "peace officer" or "police" status it should be noted that:

> Broadly speaking "police power" is the right and power of the people to govern themselves; it is the inherent power of the state to enact and enforce laws for the protection of its people and the advancement of the general welfare. *People v. Biegmeyer*, 54 Misc.2d 466, 282 N.Y.S.2d 797.

Police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous businesses, occupations, or activities, and unless abused, it is not subject to constitutional restrictions.

At each level of government the chief executive officer has the power to designate peace officers, or police, in emergency situations such as local or national disasters or calamities.

CONCLUSION

It is the opinion of this office that, in Nevada at this time, peace officers and those with peace officer powers are:

1. The bailiff of the Supreme Court;
2. Sheriffs of counties and their deputies;
3. Constables;
4. Personnel of the Nevada Highway Patrol when exercising the police powers specified in NRS 481.150 and 481.180;
5. The inspector or field agents of the Motor Carrier Division of the Department of Motor Vehicles when exercising the police powers specified in NRS 481.049;
6. Members of and all inspectors employed by the Public Service Commission of Nevada when exercising those enforcement powers conferred by Chapters 704 to 706, inclusive, of NRS;
7. Marshals and policemen of cities and towns;
8. Parole and probation officers;
9. Special investigators employed by the office of any district attorney or the Attorney General;
10. Arson investigators for fire departments specially designated by the appointing authority;
11. Members of the University of Nevada System police department;
12. The State Fire Marshal and his deputies;
13. The brand inspectors of the State Department of Agriculture when exercising the enforcement powers conferred in Chapter 565 of NRS;
14. Arson investigators for the State Forester Firewarden specially designated by the appointing authority;
15. The deputy warden, correctional officers and other employees of the Nevada State Prison when carrying out any duties prescribed by the Warden of the Nevada State Prison;
16. Nevada State Park System employees designated by the Administrator of the Nevada State Park System in the State Department of Conservation and Natural Resources when exercising police powers specified in NRS 407.065;
17. Security officers employed by the board of trustees of any school district;

18. The executive, supervisory, and investigative personnel of the Nevada Gaming Commission and the State Gaming Control Board when exercising the enforcement powers specified in NRS 463.140;

19. The director, division chiefs, investigators, agents, and other sworn personnel of the Department of Law Enforcement Assistance;

20. Field dealer inspectors of the Motor Vehicle Registration Division of the Department of Motor Vehicles when exercising the police powers specified in NRS 481.048;

21. The personnel of the Nevada Department of Fish and Game when exercising those enforcement powers conferred by Title 45 and Chapter 488 of NRS;

22. Justices of the peace to the extent specified in NRS 4.170, and mayors and aldermen to the extent specified in NRS 268.310;

23. Bail bondsmen and sureties as limited by NRS 31.580 and 178.526;

24. The director of juvenile services, juvenile probation officers and their assistants;

25. The warden and staff of the Nevada State Prison, as limited by NRS 209.133;

26. Officers and employees of juvenile correctional institutions as limited by NRS 210.270 and 210.700;

27. The administrator and agents of the Narcotic and Drug Division as limited by NRS 219.165;

28. Personnel of the Division of State Parks while enforcing NRS Chapter 206 and NRS 381.221 to 381.223, inclusive;

29. The superintendent of the state capitol, his watchmen and employees as spelled out in NRS 331.140;

30. The Tax Commission, its agents and revenue collecting officers to the extent provided in NRS 370.065;

31. Custodians of school property when appointed pursuant to NRS 393.0718;

32. The State Park Administrator, rangers, and employees of the State Park System to the extent granted in NRS 407.065;

33. The Superintendent of the State Children's Home to the extent granted in NRS 423.180;

34. All health officers, local boards of health, persons in charge of public buildings and institutions, and all other public officers and employees for the purposes set out in NRS 439.560 and 439.170;

35. State health officers as set out in NRS 583.010, 583.060, 583.070, 583.080, and 583.110;

36. Persons to whom a health officer has delegated his duties pursuant to the provisions of NRS 456.070;

37. Agents and inspectors of health departments for the enforcement of laws relating to watercraft as set out in NRS 488.355(3);

38. State quarantine officers for the enforcement of duties granted by NRS 554.160(b), and 571.140;

39. Members of the Food and Drug Administration, their inspectors, agents, assistants, and persons working under their immediate direction, supervision, or instruction as limited by NRS 454.370;

40. Members of the State Gaming Board and the Gaming Commission;

41. The State Forester Firewarden and his deputies as set out by NRS 472.040(2)(a); and his representatives, NRS 527.050(3); and his duly authorized agent, NRS 527.110; and his representatives, NRS 527.250;

42. Firemen under the conditions set out in NRS 475.070;

43. Airport guards or police appointed pursuant to NRS 469.130;

44. The Inspector of Mines and his deputy for the purposes set out in NRS 512.180;

45. The State Engineer and his assistants for enforcement of the water laws;

46. Marshals and police appointed by the Junior Livestock Show Board as limited by NRS 563.120;

47. The executive director of livestock auctions as set out in NRS 573.183;

48. Personnel of societies for the prevention of cruelty to animals as limited by NRS 574.040;

49. The State Sealer of Weights and Measures as limited by NRS 581.070 and 581.090;
50. Investigators employed by the Private Investigators Licensing Board;
51. Railroad police as defined in NRS 705.220;
52. Field investigators for the Taxicab Administrator;
53. Fish and game wardens for the enforcement of NRS 205.230, 444.210, 488.355(1), 501.349, and 501.375;
54. Field agents and inspectors designated by the Executive Director of the Department of Agriculture to enforce the statutes contained in Titles 49 and 50 of NRS (Chapters 547 to 576, inclusive);
55. Inspectors and deputies appointed by the Board of Sheep Commissioners as limited by NRS 562.500;
56. Those persons specially designated in time of local or national emergency.

Limited peace officer status is given to *nonresident peace officers* by NRS 171.158 (The Uniform Fresh Pursuit Act) and NRS 212.210 (California correctional officers who have a California prisoner in their custody).

Limited peace officer status is also conferred on *public officials* charged with the administration of lands belonging to *the United States* (NRS 527.050(3)); *officials of the United States Forest Service* and *Bureau of Land Management*, NRS 527.110; and *federal inspectors*, NRS 562.530, for the purposes spelled out in those statutes.

A limited power to designate peace officers is given to magistrates (NRS 171.116) and by implication to national forest officers (NRS 475.110).

Limited *de facto* peace officer status may reach to private citizens for the purpose of making an arrest and summoning aid in connection therein. (NRS 171.126, 171.132, and 179.195.)

QUESTION NO. 2

Who is a firefighter?

ANALYSIS

There is no specific definition of “fireman” or “firefighter” in Nevada Revised Statutes. The Personnel Division of the Department of Administration uses the “Dictionary of Occupational Titles” (3d ed. 1965), compiled and published by the U.S. Department of Labor, and therein we find “fireman” or “firefighter” duties defined as follows:

> Controls and extinguishes fires, protects life and property, and maintains equipment as volunteer or employee of city, township, or industrial plant: Responds to fire alarms and other emergency calls. Selects hose nozzle, depending on type of fire, and directs stream of water or chemicals onto fire. Positions and climbs ladders to gain access to upper levels of buildings or to assist individuals from burning structures. Creates openings in buildings for ventilation or entrance, using axe, chisel, and crowbar. Protects property from water and smoke by use of waterproof salvage covers, smoke ejectors, and deodorants. Administers first aid and artificial respiration to persons overcome by fire and smoke. Inspects buildings for fire hazards and compliance with fire prevention ordinances. Performs
>
> assigned duties in maintaining apparatus, quarters, buildings, equipment, grounds, and hydrants. Participates in drills, demonstrations, and courses in hydraulics, pump operation and maintenance, and firefighting techniques. May drive firetruck. May fill fire extinguishers in institutions or industrial plants.

The following cases have held auxiliary fire department personnel not to be entitled to special "firemen benefits" as such:

The Supreme Court of Pennsylvania in *McNitt v. City of Philadelphia*, 189 A. 300 (1937), held that a *"Fire Marshal"* who did not pay monthly charges to the pension fund, did not wear a uniform, and was not under orders of the superintendent, was *not a fireman.*

In *Benner v. Retirement Board*, 23 N.E.2d 197 (Ill. 1939), the appellate court held that one who had occupied the position of telegraph repairer, assistant telegraph repairer and junior fire alarm operator for the City of Chicago and did work for both the police department and fire department but was an employee (civil service skilled labor) of the department of gas and electricity and paid money into the municipal employees pension fund, was *not a "fireman"* within the terms of a statute governing determination of retirement age.

An Ohio decision, *Thatcher v. Hogan, et al.*, 121 N.E.2d 130 (1954), held that a lineman cable splicer employed by the fire department was not a fireman and was not qualified for benefits of the firemen's pension fund. The court noted (1) that the status of fireman is determined by statutes relating thereto and not by any judicial interpretation of the word "fireman," and (2) that employees of the fire department, or bureau of such department, are not, ipso facto, firemen, and do not become eligible for pensions restricted to firemen, unless first qualified and appointed as firemen as required by law.

The Massachusetts Supreme Court in *Washington v. City of Boston*, 187 N.E.2d 802 (1963), held that fire apparatus repairmen, motor equipment repairmen, and carpenters in the maintenance division of the city fire department were not firefighters, within the statutory definition.

However, in the following cases auxiliary personnel of fire departments were held to be within the statutory definition of "fireman" or "firefighter."

In *Leffingwell v. Kiersted, et al.*, 65 A. 1029 (Sup.Ct. of N.J. 1907), a lineman, a watchman, and a veterinarian who were paid members of the Newark Fire Department were held to be firemen and entitled to membership in the firemen's pension fund.

The Supreme Court of Indiana in a 1941 decision, *Board of Trustees v. State, et al.*, 46 N.E.2d 595, held that employees of the City of South Bend who were not regular firemen but were engaged in maintaining and repairing telephone and signal service and operating fire alarm systems auxiliary to actual fighting of fires were members of the city's fire force, and under the statute were entitled to participate in the firemen's pension fund.

City of Covington v. Meyer, 376 S.W.2d 679 (Ky. 1964), held that an electrician employed by the fire department could be classified as a fireman.

A September 1968, California workmen's compensation case, *Buescher v. Workmen's Compensation Appeals Board*, 71 Cal.Rptr. 405,

held that the maintenance foreman of the Department of Conservation whose duties were to maintain in operating condition some 200 units of the Division of Forestry firefighting equipment and to be present at all fires in his district for that purpose was entitled to special death benefits usually restricted to firemen.

Two months later another California appellate court held that a dispatcher whose duty was to send crews and equipment into areas where forest fires were in progress, was entitled to special benefits, the court stating:

> The process of fire fighting includes persons performing tactical and logistic functions as well as those who physically extinguish flames. *State Employees Retirement System v. Workmen's Compensation Appeals Board*, 73 Cal.Rptr. 172.

Cain, et al. v. Heckman, et al., 253 N.E.2d 297 (Ind. 1970), followed the 1941 decision in *Board v. State*, supra, and held that, under their statute, both mechanics and personnel in the signal department who receive and dispatch fire and police calls are members of the fire force.

CONCLUSION

Since we find no statutory definition of a firefighter or fireman, or their duties, other than the allusion in NRS 617.455 and 617.457 that to qualify for special industrial insurance benefits the person must be employed *full time* in the occupation of *firefighting*, we conclude that only those persons who perform the duties set out in the "Dictionary of Occupational Titles" (noted above) are firefighters.

QUESTION NO. 3

Who is entitled to retire at age 50?

ANALYSIS

NRS 286.510 of the Public Employees' Retirement Act specifies the retirement age of police officers, firemen, and other employees. Effective July 1, 1971, police officers and firemen may retire as early as age 50. Subsection 2 of the statute specifies that any other employee may retire at age 60. NRS 286.060 reads as follows:

> "Police officers and firemen" defined. As used in this chapter "police officers and firemen" shall include guards at any of the state institutions and firewardens, other than ex officio.

The fact that peace officer powers may be conferred on various people does not necessarily mean that because a person has peace officer status either on a permanent or intermittent basis, he falls within the definition set out in NRS 286.060 and is eligible for early retirement as set out in NRS 286.510.

Illustrative of this limitation is NRS 477.015 which prohibits the State Fire Marshal and his deputies from retiring before age 60. Also, NRS 286.367 provides that volunteer firemen's eligibility for retirement occurs at age 60. It is noted that NRS 477.040 provides that assistants to the State Fire Marshal may retire at age 55, *if they are otherwise qualified.* The designated assistants in that statute appear to fall within the definition of police officers and firemen as set out in NRS 286.060.

NRS 501.349 confers limited peace officer status on fish and game wardens. Subsection 3 of that statute provides that their eligibility for retirement is age 60.

Other categories of personnel to whom the Legislature has given peace officer status but exempted and excluded from "early" retirement benefit include the narcotic personnel (NRS 213.165); school security officers (Chapter 391 et seq.); state park rangers and employees (NRS 407.065); the Gaming Board Commission and their personnel (Chapters 463-465, inclusive, of NRS); the state forestry personnel (NRS 472.040); and the field agents and inspectors of the Motor Vehicle Department (NRS 481.048).

Special attention is given to firefighters' diseases in the Industrial Insurance Act (*see* NRS 617.455 and 617.457), and it is noted that NRS 617.455 provides that disease of the lungs shall be considered an occupational disease of a person *employed in a full-time salaried occupation of firefighting* for the benefit or safety of the public, or acting as a volunteer fireman.

NRS 617.457 makes heart disease an occupational disease where a person has been employed "*in a full-time continuous, uninterrupted and salaried occupation of firefighting. * * *"* Subsection 2 of the statute grants the benefit to volunteer firemen under specified conditions.

The ancient and basic rule of statutory interpretation, *inclusio unius est exclusio alterius* (which means "the inclusion of one is the exclusion of another. The certain designation of one person is an absolute exclusion of all others." 11 Coke 58b; *Burgin v. Forbes*, 169 S.W.2d 321,

325), applied to the specific language of NRS 286.060, in our opinion limits those eligible for "early retirement to the persons named in that definition.

The Legislature certainly has the power to specify any category of peace officers within their definition. Since they named "guards at state institutions" and "firewardens" in their 1949 definition of police officers and firemen, it appears that it was their intent not to include any other category of peace officers in the "early" retirement bracket.

CONCLUSION

In the structure of the Nevada law as it now exists, it is the opinion of this office that eligibility for "early" retirement at age 50 is limited to (1) police officers or other peace officers actually engaged, full time, in police or law enforcement work; (2) firemen or firefighters whose duties come within the definition set out in the "Dictionary of Occupational Titles" quoted above; (3) guards at state institutions; and (4) firewardens (other than ex officio).

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-7 NEVADA INDUSTRIAL COMMISSION; INSURANCE; COMMUNITY COLLEGE ATHLETES—There is no statutory provision for community college athletes to be covered by workmen's compensation insurance under the Nevada Industrial Commission.

Carson City, February 2, 1971

Mr. Neil D. Humphrey, Chancellor, University of Nevada System, 100 North Arlington Avenue, Reno, Nevada 89501

Dear Mr. Humphrey:

This opinion is in response to your letter of January 11, 1971, requesting an answer to the following question:

QUESTION

Does NRS 616.081 allow athletic teams of the Community College Division to participate in the Nevada Industrial Insurance Act?

ANALYSIS

The purpose of workmen's compensation statutes is to provide security to the laboring man and his dependents by distributing the economic loss resulting from injury and death in the course of employment upon industry and the consuming public. For this reason, even though the Industrial Insurance Act is in derogation of the common law, generally requiring strict construction, it is remedial legislation and therefore should be liberally construed. *Nevada Industrial Commission v. Adair*, 67 Nev. 259, 217 P.2d 348 (1950).

Students attending educational institutions in the State of Nevada have never been determined to be "employees" within the meaning of the Industrial Insurance Act, as pointed out in Attorney General's Opinion No. 521, dated October 4, 1947.

Chapter 616 of Nevada Revised Statutes was amended in 1967 by the addition of NRS 616.081:

> 1. Members of varsity and freshman athletic teams at the University of Nevada, Reno, and at the University of Nevada, Las Vegas, while engaged in organized practice or actual competition or any activity related thereto shall be deemed for the purpose of this chapter and for no other purpose to be employees of the University of Nevada System at a wage of $50 per month. In the event of injury while engaged in practice, competition or related activity, they are entitled to the benefits of this chapter.
>
> 2. This section is for the purpose of extending insurance coverage only, and is in no way intended to affect the amateur status of the members or imply that any such members are receiving wages for participation.

The general rule is stated in 58 Am.Jur. Workmen's Compensation § 131:

> It may be stated generally that one who asserts a right to compensation under a workmen's compensation law must find his justification in the statute, based upon the language used, and that provisions not plainly written therein or necessarily implied will not be interpolated, although the act should be liberally construed to effectuate
>
> its intended purpose. In determining whether particular persons or classes of persons are covered by a workmen's compensation act, the statute as a whole, and the purpose embodied in its enactment, should be considered.

The intent of the Legislature in amending Chapter 616 is clear and direct in extending coverage of the Nevada Industrial Insurance Act specifically to University of Nevada, Reno and University of Nevada, Las Vegas. The language of the statute cannot reasonably be construed to include the Community College Division of the University System.

CONCLUSION

Although a liberal interpretation should be employed in determining who are employees within the scope of Chapter 616 of Nevada Revised Statutes, the intention of the Legislature is clear and unambiguous and the benefits of the Nevada Industrial Insurance Act do not extend to athletic teams of the Community College Division.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Gene R. Barbagelata
Deputy Attorney General

OPINION NO. 71-8 GAMING LICENSE FEES—The sheriff has inherent authority to give credit for gaming fees erroneously collected when making subsequent gaming fee collections. However, he has no authority to refund gaming fees for any reason.

Carson City, February 9, 1971

The Honorable Roy Woofter, District Attorney of Clark County, Clark County Court House, Las Vegas, Nevada 89101

Attention: George F. Ogilvie, Jr., Chief Deputy, Civil Division

Dear Mr. Woofter:

This is in response to your request for an opinion, dated January 29, 1971, interpreting NRS 463.320.

QUESTION

May that portion of the quarterly county license fees collected pursuant to NRS 463.390 which have been erroneously collected be refunded?

ANALYSIS

The pronouncement of NRS 463.320, subsection 3(a) is clear and unambiguous:

> County license fees shall be collected by the sheriff, and no license money paid to the sheriff shall be refunded, where the slot machine, game or device for which such license was issued has voluntarily ceased or its license has been revoked or suspended, or for any other reason.

It appears that in view of the subsequent distribution of the county moneys collected under the above subsection that the Legislature clearly intended the plain meaning of the statute. This statute is brought more vividly into focus when read with NRS 463.387 which sets out specific authority for refund of *State* gaming license fees only, reading as follows:

> *State* gaming license fees erroneously collected may be refunded, upon the approval of the commission, as other claims against the state are paid. (Italics added.)

Since the Legislature has forbidden refund of county license fees for any reason whatsoever, the only interpretation of the statutes is that the sheriff has inherent authority, encompassed in his authority to collect the fees, to give credit in subsequent collections for fees mistakenly collected. The fees mistakenly collected are simply advance payments toward future fees. This interpretation is consistent with Attorney General's Opinion No. 395, dated November 29, 1946.

CONCLUSION

It is therefore the opinion of this office that the sheriff has inherent authority to give credit for gaming fees erroneously collected when making subsequent gaming fee collections. However, he has no authority to refund gaming fees for any reason.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-9 SEARCH AND SEIZURE—Recovery of stolen property by law enforcement officer from pawnbroker.

Carson City, February 8, 1971

The Honorable Robert E. Rose, Washoe County District Attorney, Washoe County Courthouse, Reno, Nevada 89505

Dear Mr. Rose:

You state your office has received several inquiries from law enforcement agencies in Washoe County concerning their power to recover and hold stolen property, which has been pawned and subsequently located in a pawnshop.

QUESTION

Your specific question is whether a law enforcement officer may seize and remove stolen property from a pawnbroker in order to hold the same as evidence.

ANALYSIS

Both Amendment IV of the United States Constitution and Article 1, Section 18 of the Nevada Constitution prohibit unreasonable searches and seizures, and provide that no warrant shall issue except upon probable

cause, supported by oath or affirmation. No exceptions are made in the case of pawnbrokers.

An exception to the constitutional requirement that a warrant must be obtained prior to a search and seizure is made in cases where the evidence may be destroyed or removed before a warrant can be obtained. *Preston v. United States*, 376 U.S. 364 (1964). Such is not the case with property which has been pawned.

NRS 646.040 provides that no property which has been pawned shall be removed from the pawnshop within four days after having been received, except when having been redeemed by the owner. This section, when read in conjunction with NRS 646.030 requiring daily reports from pawnbrokers to local law enforcement agencies and NRS 646.020 permitting inspection of records and goods in pawnshops by law enforcement officials, gives ample time to a law enforcement officer to obtain a warrant for the seizure of evidence and prohibits its removal or destruction by the pawnbroker.

As a result, the "emergency" exception to the constitutional requirement is not met.

Once a law enforcement officer has lawfully obtained custody of such stolen property by warrant, the subsequent disposition thereof is provided for by statute. NRS 179.105 provides that all property taken on a warrant must be retained by the officer, subject to order of the court; and NRS 179.125 through 179.155 provides that the court may order the stolen property returned to the owner, upon proof of title.

CONCLUSION

A law enforcement officer may not seize and remove stolen property from a pawnbroker without his consent, except upon the authority of a search warrant.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Herbert F. Ahlswede
Chief Deputy Attorney General
Criminal Division

OPINION NO. 71-10 SCHOOL DISTRICT; SABBATICAL LEAVE—Sabbatical leave may be granted school teachers with pay if the board of trustees determines that it renders an educational service to the school district.

Carson City, February 16, 1971

The Honorable Robert E. Rose, District Attorney for Washoe County, P.O. Box 2998, Reno, Nevada 89505

Attention: Mr. David L. Mousel, Deputy District Attorney

Dear Mr. Rose:

This is in response to your request for an opinion concerning an apparent inconsistency between the school code and Attorney General's Opinion No. 219, dated April 27, 1965.

QUESTION

May a county school district grant sabbatical leave to its teachers, with or without compensation?

ANALYSIS

The conditions for receipt of salary by school teachers are set out in NRS 391.170:

> No teacher shall be entitled to receive any portion of the public school moneys as compensation for services rendered unless:
> 1. The teacher shall have been legally employed by the board of trustees of the school district in which he is teaching.
> 2. The teacher shall have a certificate or temporary permit to teach issued in accordance with law and in full force at the time the services are rendered.
> 3. The teacher shall have made a full, true and correct report, in the form and manner prescribed by the state board of education, to the superintendent of public instruction and to the board of trustees.

Additional limitations on the payment of salary to a teacher are set out in NRS 391.180, subsection 2:

> 2. A school month in any public school in this state shall consist of 4 weeks of 5 days each, and, except as otherwise provided, a teacher thereof shall be paid only for the time in which he is actually engaged in teaching or in *other educational services rendered the school district.* (Italics added.)

It appears that if sabbatical leave were so structured as to provide an educational service to the school district, salary at some level may be paid the teacher on leave. The statute does not designate the scope of discretion of the school board of trustees in defining "educational services rendered the school district." The paramount limitation on the board of school trustees is set out in NRS 386.350, as follows:

> Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children.

This office has recently made a thorough search of the statutes concerning granting leave to teachers without pay. The summary of this research is set out in Attorney General's Opinion No. 4, dated January 26, 1971, as follows:

> There is no limitation in the Constitution or the laws of the State of Nevada pertaining to the granting of leave of absence for any purpose by boards of school trustees.

Attorney General's Opinion No. 219, dated April 27, 1965, construes NRS 281.150 as prohibiting school teachers from being granted sabbatical leave. That opinion overlooks the fact that NRS 281.150 is addressed only to state employees. Subsection 1 reads as follows:

> 1. No department, board, commission, agency, officer or employee of the *State of Nevada* shall authorize the expenditure of
>
> public money or expend public money for the payment of educational leave stipends to any officer or employee of the *State of Nevada.* (Italics added.)

School teachers are clearly employees of county school districts, and not state employees, as pointed out in Attorney General's Opinion No. 312, dated July 11, 1941.

CONCLUSION

If the teacher meets the requirements of NRS 391.170 and the board of trustees of the school district finds that the leave renders an educational service to the school district, then sabbatical leave may be granted with pay at some level.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-11 DEATH PENALTY—Constitutionality of.

Carson City, February 22, 1971

The Honorable Arthur Olsen, Assemblyman, Nevada Legislature, Legislative Building, Carson City, Nevada 89701

Dear Assemblyman Olsen:

You state that the Attorney General of Pennsylvania has declared capital punishment unconstitutional in that state, and you now request an opinion as to the constitutionality of capital punishment in Nevada.

QUESTION

Your specific question is the constitutionality of capital punishment as provided for in NRS 200.030, section 3.

ANALYSIS

NRS 200.030, section 3, provides:

> If the jury shall find the defendant guilty of murder in the first degree, then the jury by its verdict shall fix the penalty at death or imprisonment in the state prison for life with or without possibility of parole, except that if the murder was committed by a convict in the state prison serving a sentence of live imprisonment, the jury shall fix the penalty at death or imprisonment in the state prison for life without possibility of parole. If the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

Amendment XIV of the United States Constitution provides a state shall not deprive any person of life, liberty or property without due process of law, and Article 1, Section 8 of the Nevada Constitution provides the same.

Thus constitutions of both the United States and the State of Nevada contemplate the death penalty and provide a restriction upon its imposition, that is, only by due process of law. Therefore, the death penalty per se is not prohibited by either constitution and is not unconstitutional.

Attacks have been made upon the constitutionality of the death penalty upon the ground that it is a cruel and unusual punishment in violation of Amendment VII of the United States Constitution. The Supreme Courts of both the United States and Nevada, as well as other jurisdictions, have rejected this claim.

Shooting as a mode of executing a death penalty for first degree murder is not a cruel and unusual punishment within the meaning of the *Eighth Amendment. Wilkerson v. Utah,* 99 U.S. 130 (1878).

Execution of persons, convicted of first degree murder, by the use of lethal gas does not violate the federal and state constitutions as to cruel and unusual punishment. *State v. Jon,* 46 Nev. 418 (1923).

Execution of the death penalty by use of lethal gas does not violate the Eighth Amendment as imposing cruel and unusual punishment. *Hernandez v. State*, 42 Ariz. 424, 32 P.2d 18 (1934).

That the death penalty is inflicted by administration of lethal gas does not render punishment cruel or unusual. In re Anderson, 73 Cal.Rptr. 21, 447 P.2d 117 (1968).

See also Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967), and *Duisen v. State*, …… Mo. ……, 441 S.W.2d 688 (1969).

Another attack has been made upon the constitutionality of the death penalty upon the ground that it is an unconstitutional delegation of a legislative function to a jury, the argument being that the jury must resolve basic policy questions with regard to the type of punishment to be imposed, as opposed to the extent of the punishment to be imposed. The attack is that the delegation is improper because the law does not contain standards sufficiently certain to preclude arbitrary exercise of that power by the jury or to insure a reasonable opportunity of securing redress by judicial review if that power is abused. While this issue has never been decided by the Supreme Court of Nevada, courts of other jurisdictions have rejected this contention.

The "legislative power" was exercised when the Legislature fixed the punishment for murder in the first degree. The statute does no more than empower a jury, upon consideration of all the evidence and the court's instruction, to assess the extent of punishment prescribed beforehand in accordance with the heinousness or gravity of the homicide. In performing that duty, the jury in no sense exercises "legislative power." *State v. Latham*, 190 Kan. 411, 375 P.2d 788 (1962). The Supreme Court of California reached the same conclusion when the issue was presented to it in In re Anderson, 73 Cal.Rptr. 21, 447 P.2d 117 (1968):

> Similar contentions with regard to the court's power to impose penal sentences within legislatively fixed limits have likewise been rejected in several noncapital cases. (*People v. Pryor*, 17 Cal.App.2d 147, 152, 61 P.2d 773; *In re O'Shea*, 11 Cal.App. 568, 572, 105 P. 776; *State v. Logan*, 98 Ariz. 179, 403 P.2d 279, 280; *People v. Reid*, 396 Ill. 592, 72 N.E.2d 812, cert. den. 332 U.S. 776, 68 S.Ct. 39, 92 L.Ed. 361.)

We are advised by the Attorney General of Pennsylvania that the opinion to which you refer was rendered by the outgoing Attorney General on January 19, 1971, as one of his last official acts only hours before his term expired, and was rescinded by his successor on January 27, 1971.

CONCLUSION

The death penalty, as provided for in Nevada Revised Statutes, is not unconstitutional per se; nor is it unconstitutional as a cruel and unusual punishment prohibited by the Eighth Amendment, nor unconstitutional as a violation of a constitutional provision for separation of powers.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-12 SCHOOL DISTRICTS; LEAVE—School districts may not grant teachers leave with pay for personal reasons, except as provided in NRS 391.180.

Carson City, February 23, 1971

The Honorable Merlyn H. Hoyt, District Attorney for White Pine County, County Courthouse, Ely, Nevada 89301

Dear Mr. Hoyt:

This is in response to your request dated February 10, 1971, for an opinion concerning granting teachers personal leave.

QUESTIONS

1. May boards of school trustees grant annual leave with pay during the school term?
2. Under what circumstances may a teacher be absent from teaching duties without a salary deduction?

ANALYSIS

The Legislature has carefully delineated the authority of school trustees to grant teachers leave with pay. Section 391.180 of Nevada Revised Statutes sets out the perimeter of the trustees' leave-granting authority in detail. Subsection 2 sets out the basic limitation:

> A school month in any public school in this state shall consist of 4 weeks of 5 days each, and, except as otherwise provided, a teacher thereof shall be paid only for the time in which he is actually engaged in teaching or in other educational services rendered the school district.

In addition to this limitation, subsection 4 requires the trustees to make deductions from salary for illegal absence from service:

> 4. The per diem deduction from the salary of a teacher because of absence from service for reasons other than those specified in this section shall be made on the basis of the monthly payment of such salary.

When subsection 4 is read with subsection 2, the legislative intent is clear. School trustees have no authority to grant leave with pay to teachers when they are not actually engaged in teaching or rendering an educational service to the school district. Further, if a teacher takes such unauthorized and therefore illegal leave, the trustees shall make a deduction from the teacher's salary.

There are two exceptions to the above included in NRS 391.180. Subsection 5 provides that:

> 5. Boards of trustees may pay the salary of any teacher unavoidably absent because of personal illness or accident, or because of serious illness, accident or death in his family.

This subsection also places limitations on the board's authority, depending on length of service of the teacher and other special circumstances. The other exception to subsection 2 is subsection 6, which reads:

> 6. When an intermission of less than 6 days is ordered by the board of trustees for any good reason, no deduction of salary shall be made therefor. When on account of sickness, epidemic or other emergency in the community, a longer intermission is ordered by the board of trustees or by a duly constituted board of

health and such intermission or closing does not exceed 30 days at any one time, there shall be no deduction or discontinuance of salaries.

The above two exceptions are narrow and specific. A teacher must be "*unavoidably* absent because of personal illness or accident or because of serious illness, accident or death in his family," or there must be an intermission ordered by the board of trustees, as provided in subsection 6.

Another provision for a teacher to be not engaged in teaching and still be on salary is NRS 391.280, which reads:

> All teachers, without loss of salary for the time employed, shall be required to attend the teachers' conferences held in the educational supervision district in which they may be teaching, unless they shall be excused for good cause by the superintendent of public instruction.

This provision is consistent with NRS 391.180, subsection 2. The Legislature has merely determined that attendance at educational conferences is an educational service rendered the school district.

CONCLUSION

Chapter 391 of Nevada Revised Statutes is the total scope of authority boards of school trustees have in granting leave with pay. In order to be on the payroll, the teacher must be engaged in teaching, rendering an educational service to the school district, or absent because of sickness or intermission as provided in NRS 391.180. There is no provision for granting annual leave or personal leave with pay.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-13 INDIANS—INDIGENT BURIAL JURISDICTION—State jurisdiction, or lack of it, over Indian land for civil and criminal actions in no way affects the county's responsibility for burial of indigent Indians.

Carson City, February 25, 1971

Mr. Ross Morres, Executive Director, Nevada Indian Affairs Commission, Capitol Complex, Carson City, Nevada 89701

Dear Mr. Morres:

This is in response to your request for an opinion concerning burial responsibilities of indigent Indians.

QUESTION

Your question is: Where the State does not have jurisdiction over federal Indian land, does state statute apply to county responsibilities for burial of indigent Indians residing on Indian land, who expire within the county without responsible relatives or other resources to cover the expenses?

ANALYSIS

The county is directed to provide a decent burial for anyone who dies in the county without money or estate for burial in NRS 259.180, which reads as follows:

> After the inquest, if no one takes charge of the body, the justice of the peace shall cause the same to be decently buried. The expenses of the burial shall be paid from the money deposited with the county treasurer or the estate of the deceased, as the case may be. If the deceased has no money or estate, or the money or estate of the deceased is insufficient to bear the entire cost of burial, the county in which the deceased is buried shall bear the cost of the burial in excess of any money or estate available.

This statute applies to anyone who dies within the county regardless of place of origin.

The State's jurisdiction over Indian land for public offenses and civil causes of action is controlled by NRS 41.430, section 1, which reads:

> Pursuant to the provisions of section 7, chapter 505, Public Law 280 of the 83rd Congress, approved August 15, 1953, and being 67 Stat. 588, the State of Nevada does hereby assume jurisdiction over public offenses committed by or against Indians in the areas of Indian country in Nevada, as well as jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country in Nevada, subject only to the conditions of subsection 2 of this section.

This section also allows for the Governor to exclude reservations by proclamation and to reinclude reservations.

Please note that this statute pertains only to public offenses and civil causes of action which do not encompass responsibility for burial. In 1968, Congress spoke of jurisdiction over Indians in Public Law 90-284; however, this law did not alter NRS 41.430 or speak of the problem of responsibility for burial.

CONCLUSION

The county is responsible for providing a decent burial where no one else takes charge of the body. This means that the county is to provide burial only as a last resort after all other agencies and individuals have had an opportunity to take charge of the body. This does not mean to detract in any way from the county's authority to seek reimbursement for its expenses.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-14 JUVENILES—PUBLIC WELFARE—The Welfare Division of the Department of Health, Welfare, and Rehabilitation is not liable for the medical and dental expenses involved in the care of child abuse victims. Those expenses are the legal obligation of the county in which such a child resides or is found.

Carson City, February 26, 1971

The Honorable Roy A. Woofter, District Attorney, Clark County Courthouse, 200 East Carson, Las Vegas, Nevada 89101

Dear Mr. Woofter:

This is in response to your request for an opinion regarding whether or not the Welfare Division of the Department of Health, Welfare, and Rehabilitation is liable for the medical and dental expenses involved in the care of child abuse victims under NRS 200.501 et seq.

QUESTION

In the event of parental irresponsibility, which governmental agency is obligated by law to assume financial liability for the medical and dental expenses of child abuse victims?

ANALYSIS

Under the provisions of NRS 200.502, victims (under 18 years of age) of nonaccidental infliction of physical injuries or willful neglect may be removed from the custody of their parents, stepparents, guardians, or other persons having lawful custody. Justification for such removal may also be based on NRS 62.170 which permits any peace officer or probation officer to take into his custody any child whose surroundings are such as to endanger his welfare. Although the taking into custody of child abuse victims may be based on either of the previously mentioned statutes, NRS 200.502 is the more specific of the two statutes and is contained within a group of statutes dealing exclusively with the protection of abused and neglected children and the prosecution of those guilty of such activity (see NRS 200.501 to 200.507, inclusive.) Within that group of statutes (entitled "Child Abuse and Neglect") is NRS 200.504 which sets forth, with some specificity, the duties of the Welfare Division of the Department of Health, Welfare, and Rehabilitation in regard to child abuse victims. Subsection (c) of that statute requires the Welfare Division to

provide any "social services" necessary to protect the child. This language cannot be correctly interpreted to require the Welfare Division to assume the financial obligation of medical and dental expenses of such children. Social assistance in this context envisions activity such as family or individual counseling sessions—not medical and dental care.

Even though we find no definition of the term "social services" in the Nevada Revised Statutes, the term "special services" is defined in NRS Chapter 432 (entitled "Public Child Welfare and Youth Services") and includes medical and dental care. In NRS 432.010 (subsection 3) the following definition of "special services" appears:

> "Special services" means medical, hospital, psychiatric, surgical or dental services, or any combination thereof.

This definition was added to the Nevada Revised Statutes in 1960, 5 years prior to the enactment of NRS 200.504, which requires the Welfare Division to provide social services to child abuse victims. Since medical and dental care is included in the definition of special services, it is obvious that the legislative intent in the use of the term "social services" in NRS 200.504 was to exclude such care from the purview of that statute. Additionally, NRS 432.020 specifically lists the categories of persons to whom the Welfare Division is authorized to provide special services. Child abuse victims are not included in that list. See also Attorney General's Opinion No. 240, dated February 7, 1957, in which the opinion is rendered that the Welfare Division has no authority or requirement to provide services to abandoned or neglected children unless there is an express statutory provision requiring the division to do so. Therefore, the Welfare Division is not liable for the medical and dental expenses of child abuse victims.

Under the Juvenile Court Act (NRS Chapter 62), the liability for such expenses lies with the county in which the child abuse victim resides. As previously stated, removal of child abuse victims may be based on NRS 62.170, permitting protective custody if such a child's welfare is endangered. Additional provisions of the Juvenile Court Act provide that neglected or abandoned children come within the purview of that act. For example, NRS 62.040 provides that the juvenile division of the district court has original, exclusive jurisdiction of any child (living or found within the county) abandoned or neglected by his parent(s). Also, NRS 62.240 provides for medical or other care to be provided at county expense to such children. It is further provided in NRS 62.260 that all expenses incurred in complying with the provisions of the Juvenile Court Act are to be a county charge.

CONCLUSION

It is the responsibility of the county in which a child abuse victim resides or is found to assume the financial obligation of any medical or dental care required by such a child.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Margie Ann Richards
Deputy Attorney General

OPINION NO. 71-15 GENERAL OBLIGATION BOND COMMISSION—Governing bodies may appoint alternates to serve on the General Obligation Bond Commission.

Carson City, February 26, 1971

The Honorable Merlyn H. Hoyt, White Pine County District Attorney, County Courthouse, Ely, Nevada 89301

Dear Mr. Hoyt:

This is in reply to your request for an opinion concerning the membership on the General Obligation Bond Commission.

QUESTION

Can governing bodies select alternates to serve on the bond commission when the original appointee is unable to serve?

ANALYSIS

The membership of a general obligation bond commission is established by NRS 350.002. The statute provides for the members to be "representative of" the various governing entities in the county as well as the public at large.

In Webster's New International Dictionary (3d ed. 1961) "representative" is defined as follows:

> 2. Standing for or in the place of another; acting for another or others; constituting the agent for another esp. through delegated authority.

The following definition of "representative" is used by a United States District court in Pennsylvania:

> [I]t means a person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing; * * * *Gaffney v. Unit Crane & Shovel Corp.*, 117 F. Supp. 490, 491 (E.D.Pa. 1953)

The method of selection of the representative is set out in NRS 350.002, subsection 2, as follows:

> Each representative of a single local government shall be chosen by its governing body. Each representative of two or more local governments shall be chosen by their governing bodies jointly, each governing body having one vote. Each representative of the public at large shall be chosen by the other members of the commission from residents of the county who have a knowledge of its financial structure. A tie vote shall be resolved by lot.

There is no limitation in the statute regarding appointment of alternates to the commission. The overriding consideration is that the various governing bodies be represented on the commission.

CONCLUSION

The intent of the Legislature, clearly expressed in the statute, is that the various governing bodies have representation on the General Obligation Bond Commission. This representation is not limited to any specific

individual and therefore an alternate would clearly be appropriate when the original appointee is unable to attend.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-16 STATE OFFICERS; MAYORS—CONFLICT OF INTEREST—A minimal interest held by a state officer in a private corporation, coupled with minimal participation in a transaction between that corporation and a state agency, is not violative of the common law or statutes of Nevada; a mayor is not a state officer.

Carson City, March 2, 1971

The Honorable Art Olsen, Member, Nevada Assembly, Legislative Building, Carson City, Nevada 89701

Dear Mr. Olsen:

This is in response to your request of January 19, 1971. The Colorado River Properties, Inc., a Nevada corporation, negotiated with and on May 2, 1967, executed a contract for the purchase of public land from the Colorado River Commission of Nevada (CRC). On this same day you allege that a director and a vice president of the corporation were serving as Mayor of Las Vegas and as Lt. Governor of the State of Nevada, respectively. Your question is whether either of these two men was guilty of a conflict of interest under NRS 281.220 or any other law of the State of Nevada.

QUESTION NO. 1

Is the interest of the Mayor of Las Vegas as a shareholder and a director in a private corporation which entered into a contractual relationship with a public agency a prohibited interest within any Nevada statutory provisions or the common law principle prohibiting conflict of interest situations?

ANALYSIS

Title 23 of NRS, Public Officers and Employees, makes a distinction between public officers and state officers. A public officer is defined in NRS 281.005 as "a person elected or appointed to a position which: (1) Is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state, and (2) Involves the continuous exercise, as part of the regular and permanent administration of the government of a public power, trust or duty." This definition includes a mayor as well as any state officer; however, state officers are further distinguished by statute.

NRS 281.020 provides that only state officers receive their commissions from the Governor. In addition, NRS 281.210, which prohibits nepotism, specifically includes *both* officers of the State and officers of political subdivisions from employing relatives. State and public officers are further distinguished by NRS 281.220 which prohibits only state

officers from having an interest in state contracts. NRS 281.220 provides that "It is unlawful for any officer of this state to become a contractor * * * or to be in any manner interested directly or indirectly, as principal, in any kind of contract so authorized," and "for any state officer to be interested in any contract made by such officer * * *."

In reviewing this section's predecessors it is obvious that NRS 281.220 is to be limited only to state officers. Section 4827, 1929 NCL, prohibits "any officer of the state, or member of the legislature, alderman, or member of the common council of any city in this state, or for the trustees of any city, town, or village, or for any county commissioners of any county, to become a contractor * * * or to be in any manner interested, directly or indirectly as a principal in any kind

of contract so authorized." From this legislative history alone it is clear that when the Legislature amended this section to its present form eliminating county and municipal officers they intended to prohibit only state officers from becoming interested in the employing state's contracts. The statutory history and statutory guidelines and definitions of Title 23 exempt a mayor from the classification of "state officer." Consequently, NRS 281.220 is not applicable.

NRS 281.230 specifically includes all categories of public officers and prohibits any public officer from receiving any profit or compensation in any form resulting from any contract in which the employing body is in any way interested or affected. The contract in question is between the CRC acting for and on behalf of the State of Nevada and the Colorado River Properties, Inc. The contract in no way affects the City of Las Vegas, the mayor's employer, nor does the city have any interest in said contract.

CONCLUSION FOR QUESTION NO. 1

Since a mayor is not a "state officer" within the meaning of NRS 281.220 and not subject to this statute governing state contracts, and the City of Las Vegas is not a party to the contract in question, the mayor is not affected by any of the statutory provisions prohibiting a conflict of interest.

QUESTION NO. 2

Is the interest of a state officer as both a shareholder and an officer in a private corporation which entered into a contractual relationship with a public agency a prohibited interest under any Nevada statutory provisions or the common law principle prohibiting conflict of interest situations?

ANALYSIS

Since the Lt. Governor is a state officer, it must therefore be determined whether prohibited acts have occurred. The CRC is established to represent and act for the State of Nevada in all proceedings affecting the Colorado River and related areas and interests. The five members of the CRC are appointed by the Governor and serve staggered 4-year terms. The federal Fort Mohave Act authorizes the Secretary of the Interior to convey certain public lands in Nevada to CRC. The state Fort Mohave Valley Development laws authorize the CRC to act on behalf of the State to purchase or otherwise acquire the lands in question in the Fort Mohave Valley from the federal government and then sell and dispose of the lands in accordance with rather rigid specifications established by CRC. The

CRC will not authorize land sales of small parcels for individual homesites or similar use, but will authorize sales of large areas based upon developers' master plans.

The Colorado River Properties, Inc. (hereinafter called the Corporation), a Nevada corporation, composed primarily of Southern Nevada residents interested in developing the frontage lands on the Colorado River, was organized in October 1959. At that time the Fort Mohave Act was not passed.

One of the original incorporators of the Corporation personally owned some of the river front property and was interested in developing this area for years. He conveyed this acreage to the Corporation which also acquired additional privately held lands in the vicinity. Realizing he could not develop the area alone, he approached friends who supported him by investing in the Corporation. They bought stock with the idea that the frontage land would some day be valuable.

The possibility of Congress passing the Fort Mohave Act was general knowledge when the Corporation in the early 1960s made informal preparations to acquire the acreage behind the frontage land it owned. The hard core negotiations with the CRC began in 1966 and the drafting of the contract began in 1967.

These negotiations took place following public notice in the press. They were conducted with full public awareness and notoriety as to the terms of the proposed contract and the financial participation of the Lt. Governor. The agreement was finalized May 4, 1967, and the terms thereof were subsequently modified May 10, 1968.

The Lt. Governor whose interest is here in question assumed his first public position as a Member of the Nevada Assembly in 1963 where he served until 1967 when he became Lt. Governor. He served 4 years in this position.

At the first shareholders' meeting of the Corporation in February 1960 he had been elected to the board of directors and as a vice president of the Corporation. He resigned these positions by written notice to the Corporation on December 28, 1966, but the Corporation did not immediately act upon it. On October 10, 1967, he personally attended a meeting of the board of directors to insist upon his removal. This was the only such meeting he has attended since December 1965. Since his resignation he has been totally inactive in the Corporation's affairs.

The Lt. Governor's first stock purchases were in 1959 and 1963 which equaled .006 percent of the total issue. His later acquisitions in 1965 and 1967 were options based on previous purchases and equaled .01 percent of the total issue for a total holding of .016 percent of total issue.

The Lt. Governor did not participate in the negotiations with the CRC in any manner or form, directly or indirectly, nor was he present at any of the meetings with the CRC. He did not exert any influence or participate either directly or indirectly in any of the policy decisions by the Corporation or CRC concerning the transactions in questions; nor did he contact any state official or agent or member of the CRC concerning any aspect of the transaction, nor has he received any compensation or profit in any form for any services to the Corporation.

In the present fact situation, the common law rule avoiding contracts between a state official and a corporation in which the official has an interest is preempted by statute. NRS 193.050 governs and subsection 1 thereof provides:

> No conduct constitutes a crime unless prohibited by some statute of this state or by some ordinance or like enactment of a political subdivision of the state.

Subsection 3 provides:

> The provisions of the common law relating to the definition of public offenses apply to any public offense which is so prohibited but is not defined or which is so prohibited but is incompletely defined.

The two statutes governing conflicts of interest are NRS 281.220 and 281.230. Read together they provide an adequate definition of the prohibited public offense. Consequently a conflict of interest situation must be decided under the applicable statutory provisions and not under common law principles.

NRS 281.220 reads as follows:

> 281.220 State officers prohibited from having interest in state contracts; penalties.
>
> 1. It is unlawful for any officer of this state to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature or either branch thereof, or to be in any manner interested directly or indirectly, as principal, in any kind of contract so authorized.
>
> 2. It is unlawful for any state officer to be interested in any contract made by such officer, or to be a purchaser or be interested in any purchase of a sale made by him in the discharge of his official duties.

3. All contracts made in violation of the provisions of this section may be declared void at the instance of the state or of any other party interested in such contract, except the officer prohibited from making or being interested in the contract.

4. Any person violating the provisions of this section, directly or indirectly, is guilty of a gross misdemeanor and shall forfeit his office.

(Subsection 4 was amended in 1967, but prior to the amendment a violation of this section was a felony.)

It must be emphasized that subsection 1 makes it unlawful for any state officer to become a *contractor* or to be in any manner *interested as a principal* in a contract so authorized. A contractor is one "who, for a fixed price undertakes to procure the performance of works on a large scale, or the furnishing of goods in large quantities (or) * * * undertakes to perform a job or piece of work, retaining in himself control of means, method, and manner of accomplishing the desired result," Blacks Law Dictionary, 4th ed., citing cases. Obviously he did not act as a "contractor." Furthermore, he was not interested as a "principal" because he neither negotiated nor executed the contract. A principal is defined in the law as being "the source of authority or right." Blacks Law Dictionary, supra. The relationship of a person to a corporation is determined by the incidents of the relationship as they actually exist. 19 Am.Jur.2d Corps § 1080, p. 526. In the present situation the Lt. Governor occupied his corporate position in name only during the pertinent period of time

and was not present at any of the meetings pertaining to the transactions in question. Thus he was not a "principal."

Therefore it appears that NRS 281.220 prohibits an individual from becoming a contractor while in state office, from having a direct or indirect interest as a principal in the contract authorized while in such office, and from being personally interested in a contract he makes as a state officer. This statute is not applicable to the present fact situation.

NRS 281.230, the second possible statutory limitation, is a penal statute and reads as follows:

281.230 Unlawful commissions, personal profit, compensation of public officers and employees; void contracts; penalties.

1. The following persons shall not in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind or nature inconsistent with loyal service to the people resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

* * * * *

2. Any contract or transaction prohibited by this section entered into with any of the persons designated in subsection 1, with the knowledge of the party so entering into the same, shall be void.

3. Every person violating any of the provisions of this section shall be punished as provided in NRS 197.230 [forfeiture of office] and:

(a) Where such commission, personal profit or compensation is $100 or more, by imprisonment in the state prison for not less than 1 year nor more than 10 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

(b) Where such commission, personal profit or compensation is less than $100, for a misdemeanor.

Because the drafting style is so broad, it is difficult to ascertain with any degree of certainty at which point business affairs enter into the prohibited area. The initial problem is defining the

phrase "inconsistent with loyal service to the people." This is best accomplished by determining the intent of the Legislature.

NRS 281.230 does not provide an outright prohibition of all business transactions. In order for the transactions to be valid they must not be contrary to the express provision of the statute nor contrary to the public policy of the expressed law.

Statutes prohibiting indirect or direct interests of public officials inconsistent with the public good in governmental transactions have resulted in a plethora of disharmonious decisions, but courts generally agree that the question of whether or not the interest falls within the prohibition is one of construction for the courts in view of the facts and circumstances of each case. *People v. Adduci*, 412 Ill. 621, 108 N.E.2d 1 (1952); *S & L Assoc. Inc. v. Township of Washington*, 61 N.J.Super. 312, 160 A.2d 635 (1960); *People v. Darby*, 114 Cal.App.2d 412, 250 P.2d 743 (1952).

The interest at which the prohibition is leveled is that which prevents

or tends to prevent the official from giving faithful and impartial service to the public or that which may interfere with an officer's unqualified devotion to public duty. *People v. Darby*, supra. If the official's personal interest in the contract is such that it tends in any degree to influence him in the making of a contract in his official capacity then the contract is void. This is based on the policy that the contract should be free from any influence which may directly grow out of obligations that he owes to the public at large. *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal.App. 592, 229 P. 1020 (1924). The public officer in the present situation did not enter into the contract in his official capacity on behalf of the public. Rather, the public parties who executed the agreement were the CRC (of which he was not a member) and the Governor.

Not every interest of a public official in a contract with a public agency is bad. Clearly no public official can disassociate himself so completely as to eliminate all possibility of conflicting interests, and the law recognizes this reality. The objectionable interest is that which "would be inconsistent with and repugnant to the duty of the officer to render to the public faithful and impartial service." *People v. Adduci*, supra, at 4.

It must be asked whether the official's conduct in his job is in accordance with the broad interest of the public, and whether he is subject to influences in his decision-making that move him from an impartial stance.

It cannot be reasonably said that it was the intent of the Legislature to prohibit all state officials from owning stock in corporations that transact business with the State; they would *ipso facto* become criminals if they owned stock in, for example, General Electric Company which sells its products to the State, IBM, A.T. & T. or any of the hundreds of similarly situated companies. It must be determined at what point the personal interest in the business enterprise, i.e., ownership of stock, becomes potentially harmful to his duty to the public. Since substantial numbers of our citizens including state officers own stock, the question becomes how much stock ownership in any enterprise may jeopardize the public interest. The minimal holdings here do not constitute such ownership. Furthermore, where the statutes impose criminal liability (which both did in 1967), courts have refused to find that the holding of stock alone would make an officer criminally liable, and only upon proof of a corrupt intent does the extent of the shareholder's holdings become important. *State v. Kuehnle*, 85 N.J.L. 220, 88 A. 1085 (1913), *State v. Robinson*, 71 N.D. 463, 2 N.W.2d 183 (1942).

There are cases which hold that the absence of a requirement of specific criminal intent does not apply to crimes based on public policy. *People v. Darby*, supra. However, in Nevada, statutes imposing criminal liability must be plainly written so the accused knows with certainty what he has been accused of. *Ex parte Deidesheimer*, 14 Nev. 311 (1879), and penal statutes use stricter rules in favor of the accused when being construed. *Ex parte Davis*, 33 Nev. 309, 110 P. 1131 (1910). Knowledge and intent are necessary if the crime involves moral turpitude unless the offense is malum prohibitum, which is not the case here. 22 C.J.S. Criminal Law § 30, p. 100. The crime of conflicting interests falls within the malum in se category of offenses which

requires a specific intent. Further, criminal intent or guilty knowledge are essential where a statute requires the act be done knowingly, which is one requirement under NRS 281.230(2).

Consequently, some type of criminal or corrupt intent is needed to sustain a conviction under NRS 281.230. Criminal liability is a question of fact and depends upon evidence as to interest other than the existence of owning a share of stock in a corporation. *Yonkers Bus v. Malthie*, 23 N.Y.S.2d 87 (1940); *State v. Robinson*, supra. Thus in determining whether or not there is an interest "inconsistent with loyal service to the people," one must look at the facts of the case.

It is true that contracts have been held void due to a public officer being "indirectly or directly interested" when he merely held as collateral a single share of stock of a corporation with which the city council voted to make a contract. *Foster v. Cape May*, 60 N.J.L. 78, 36 A. 1089 (1897). However, this interpretation is against the current trend of court decisions. Courts look to whether there is an allegation of fraud or unfair dealings with the state, *Davidson v. Sewer Improvement Dist.*, 182 Ark. 741, 32 S.W.2d 1062 (1930), whether the interest is substantial, *State v. Robinson*, supra, whether there is an opportunity for private advantage at the expense of the public or whether the official is placed in a situation of temptation, *People v. Adduci*, supra. Employment by a company dealing with the government is generally a sufficient interest, 47 Va.L.R. 1034 (1961).

From the foregoing analysis of the criminal law and the facts here present, it is readily apparent that there is no trace of criminal intent on the part of the Lt. Governor. There was total public disclosure at all stages of transaction. There is no suggestion of fraud. The Corporation bought land from the State at an appraised value at the same price anyone else would have paid. The Lt. Governor received no compensation; he did not own a substantial interest, nor did he perform any duties in his official capacity in connection with the transaction. *State v. Bennett*, 213 Wis. 456, 252 N.W. 298 (1934). "A showing that an officer of the Commonwealth is a mere stockholder in a corporation does not preclude the corporation from entering into a valid contract with the Commonwealth, provided such contract is not entered into on behalf of the Commonwealth by such stockholder or by a state agency with which he is affiliated." *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 221 S.W.2d 435, 439 (1949).

In view of the facts and circumstances the Lt. Governor is not guilty of a conflict of interest as it would be construed under NRS 281.230. Consequently, the contract in question is a valid, enforceable contract.

CONCLUSION FOR QUESTION NO. 2

The minimal interest of the Lt. Governor in a private corporation contracting with the State, coupled with his lack of participation in the transaction, leads to the clear and obvious conclusion that he neither was nor is in violation of the common law prohibitions or the statutory limitations of our State.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-17 STATE BOARD OF EDUCATION; REPRESENTATIVE OF AGRICULTURE—The person appointed pursuant to NRS 385.020, subsection 4, to be representative of agriculture must in truth be characteristic of that sector of Nevada's economy.

Carson City, March 11, 1971

The Honorable Virgil Getto, Member of the Assembly, Nevada State Legislature, Carson City, Nevada 89701

Dear Assemblyman Getto:

This is in response to your request for an opinion interpreting the phrase "representative of agriculture," as used in NRS 385.020, subsection 4, pertaining to membership on the State Board of Education.

QUESTION

Is a person who owns ranch acreage and is a member of a soil conservation district, but who derives all income from the ranch acreage through conducting camps, conferences, and institutes, eligible to serve as the representative of agriculture on the State Board of Education?

ANALYSIS

The statutory provision for appointment of a representative of agriculture to the State Board of Education is NRS 385.020, subsection 4, which reads as follows:

> The elected members shall appoint two members to serve for terms of 4 years, but the members so appointed shall not be residents of the same county. One of the appointed members shall be representative of labor, and one shall be representative of agriculture.

Webster, Third New International Dictionary (1961), defines "representative" as follows:

> 2: standing for or in the place of another: acting for another or others: constituting the agent for another esp. through delegated authority * * * 4: serving as a characteristic example: illustrative of a class: conveying an idea of others of the kind:

The following definition of "representative" is used by a United States District Court in Pennsylvania;

> [I]t means a person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing; * * * *Gaffney v. Unit Crane & Shovel Corp.* 117 F.Supp. 490, 491 (E.D.Pa. 1953).

"Agriculture" is defined by Webster, Third New International Dictionary (1961), as follows:

> a: the science or art of cultivating the soil, harvesting crops, and raising livestock * * * b: the science or art of the production of plants and animals useful to man and in varying degrees the preparation of these products for man's use and their disposal (as by marketing) * * *

The Idaho Supreme Court defined "agriculture" in the case of *Reedy v. Trummell*, 90 Ida. 318, 410 P.2d 654, 656 (1966), as follows:

> Agriculture is the art or science of cultivating the ground, especially in fields or in large quantities, including the preservation of the soil, the planting of seeds, the

> raising and harvesting of crops, and the rearing, feeding and management of live stock; tillage; husbandry; * * *

The Colorado Supreme Court cites Webster's definition of "agriculture" with approval in *Rocky Mountain Metropolitan Recreation District v. Hix*, 136 Colo. 316, 316 P.2d 1041, 1043 (1957).

It is clear that when the Legislature used the phrase "representative of agriculture," the person to be appointed to the position was to convey the views of the agricultural interests to the State Board of Education. The Legislature did not indulge in a broad term such as "representing agriculture," but the individual to be appointed must be "representative of agriculture." This narrower, carefully chosen language imparts the connotation that the appointee must be of the agricultural sector of the economy.

The term is not so narrow as to impose any specific requirement on the appointee. He is not required to derive any specific portion of is income from an agricultural vocation. He is not required to derive any specific organization or to be nominated by any organization. He is not required to have any specific interest in the business of agriculture or live in any section of the State.

Conversely, the fact that an appointee is a member of any agricultural organization, derives some income from an agricultural vocation, is nominated by an agricultural organization, or lives in a rural section, does not per se qualify that individual to be representative of agriculture on the State Board of Education. Chapter 548 of Nevada Revised Statutes only requires that a person be an occupier of land to be a supervisor of a soil conservation district.

The intent of the Legislature is vivid. The words "representative of agriculture" convey the image explicitly, although the phrase necessarily does not lend itself to specific definition.

In order for a person to be eligible to be appointed to the State Board of Education as the representative of agriculture, he must have rapport with Nevada's agricultural sector. The representative of agriculture must be identified with the agricultural sector through his livelihood or other special relationship. There must be adequate communications with the agricultural sector to in truth comply with the legislative intent of giving the State Board of Education the benefit of the agricultural viewpoint.

The State Board of Education is clearly acting in excess of its statutory authority when it appoints a person to the post of representative of agriculture who is not in truth representative of agriculture as defined above. A State Board of Education, sitting with an ineligible person appointed as representative of agriculture who is exercising full voting rights, is illegally constituted.

CONCLUSION

A person with no more identity with agriculture in Nevada than ownership of acreage suitable for agricultural production and membership on a

soil conservation district board of supervisors clearly cannot be "representative of agriculture" consistent with the common meaning of the language and the legislative intent.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-18 LEGISLATIVE REAPPORTIONMENT—The Legislature must reapportion at regular session if census breakdowns to enumeration districts is sufficient basis for redistricting. If Legislature desires further block statistics and these are not available during regular session, then it should reapportion in special session immediately after such figures do become available.

Carson City, March 15, 1971

The Honorable Floyd Lamb, President pro Tempore of the Senate, Nevada Legislature, Carson City, Nevada 89701

Dear Senator Lamb:

You have asked this office to answer the following question:

QUESTION

Can the Nevada Legislature, under the Constitution, meet in special session to enact legislation to reapportion and redistrict the Assembly and Senate?

ANALYSIS

Article IV, Section 5, of the Nevada Constitution states in part:

> * * * *It shall be the mandatory duty of the legislature at its first session* after the taking of the decennial census of the United States * * * *to fix by law* the number of assemblymen, and apportion them among the several counties of the state, according to the number of inhabitants in them respectively. (Italics added.)

The constitutional phrase "after the taking" of the federal decennial census presents for initial determination a subsidiary, and perhaps controlling, question. When is the 1970 federal decennial census deemed "taken" in the sense of being a sufficient basis on which to reapportion the Legislature?

If the phrase were construed literally, it could be argued that the census would have been taken and completed after its enumeration on April 1, 1970. As a practical matter, many months are required to tabulate, correlate, analyze, finalize, publish, and distribute the results of the decennial census. Congress recognized this need for time by enacting Title 13, U.S.C. § 141, which, in part, provides:

> (b) The tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight
>
> months of the census date and reported by the Secretary to the President of the United States.

The 1970 decennial census was enumerated as of April 1, and we are informed by the U.S. Department of Commerce that the preliminary census was furnished the President on December 1, 1970. These totals of the population of each state are compiled for the sole purpose of reapportioning the House of Representatives, and the Director of the Census considers the figures accurate at the time.

There is no statutory requirement for the "official" filing and distributing of the report of the census to the states. However, the Secretary of Commerce is authorized by 13 U.S.C. § 7 to:

> * * * have printed * * * preliminary and other census bulletins, and final reports of the results of [the census] * * * and may publish and distribute such bulletins and reports.

Thus, Congress contemplated the process of finalizing, publishing, and distributing the completed census returns. Though such publication and distribution is discretionary, U.S. ex rel. *City of Atlanta v. Steuart*, 47 F.2d 979 (1931), the Director of the Census has as a matter of long practice caused the printing, publication, and distribution to the states of final reports of detailed census counts in the form of bulletins.

The courts have seldom considered the effective date of a federal decennial census insofar as it is a precondition to mandatory reapportionment by the first session of a legislature after such census.

A leading case is *Cahill v. Leopold*, 103 A.2d 818 (1954). The Connecticut Constitution provided that senatorial districts should not be changed except at a session of the General Assembly "next after the completion of a census of the United States." The Supreme Court of Errors held "completion of a census" meant a census showing population figures broken down into counties, towns, and wards, and that the census was completed only when these detailed figures were released by an official authorized by law to make such publication or when the figures were available for use by the General Assembly.

The court said it was not necessary that these figures be published in book form before it became officially available, nor did the constitution require the figures to be "final;" that while final tabulations tend to greater exactitude, there was no need for the precision of perfection; and that the preliminary counts customarily released by the census bureau were sufficiently accurate for the legislature to proceed to redistrict in an intelligent manner, provided the counts were broken down into counties, towns, and wards.

However, the significance of the Leopold case lies not in the foregoing expressions, but instead is found in the following observations by the court:

> * * * The *situation would be vastly different were senatorial districts to be absolutely equal in population.* That requirement is not to be found in the amendment. The General Assembly is commanded to equate the districts as nearly as possible. In view of the provisions that *each county shall have at least one senator,* that no district shall cross county lines and that no town shall be divided unless for the purpose of forming more than one district wholly
>
> within such town, equality is impossible. The population in the districts established by the Act of 1953 runs from 40,835 to 73,726. If the use of the final figures which were before the 1953 Assembly could bring about no greater equality than that shown by the range of population just noted, the needlessness of requiring final rather than preliminary figures becomes perfectly apparent. (p. 824.) (Italics added.)

The situation in Nevada is "vastly different" from that confronting the Connecticut Supreme Court in 1954. The second paragraph of Section 5, Article IV, of the Nevada Constitution requiring each county to have at least one senator and one assemblyman was held in *Dungan v. Sawyer*, 250 F. Supp. 480 (1965), 253 F. Supp. 352 (1966), to be unconstitutional "so long as the present or comparable inequalities of population exist among the counties of Nevada." The mandate of "one man, one vote" prescribed by the *U.S. Supreme Court in Baker v. Carr*, 369 U.S. 186 (1962), requires that both the senate and assembly be reapportioned among legislative districts of substantially equal population.

Unlike the "needlessness of requiring final" figures to reapportion Connecticut's senatorial districts on a countywide basis, the Nevada Legislature might well need such final detailed census figures if it is to achieve senatorial and assembly legislative districts of substantially equal population. It is possible that the Nevada Legislature might have to reapportion itself among districts crossing county lines and city limits.

In *Carpenter v. Board of Apportionment*, 236 S.W.2d 582 (1951), the Arkansas Constitution required reapportionment on or before February 1, immediately following each federal census. The court held that the board did not have to proceed on or before February 1 following the taking of the federal census, where the official census figures by counties were not available on January 26, 1951, when the board met, notwithstanding that the board had been informed by the Director of the Census that the official statistics would be available early in March, that the preliminary figures were at hand, and that ordinarily the difference between preliminary and final counts was slight. The court, in rejecting the contention that the board proceed on the basis of unofficial enumeration, subject to final verification, correction to be made if changes should be required by the final count, stated that it would not be presumed that the intention was to require the board to act when the official data upon which its apportionment rested could not be procured.

The Opinion of the Justices, 47 So.2d 714 (1950), answered the question whether the special session of the Alabama Legislature could reapportion on the basis of the 1950 federal census, or whether such action would have to be based on the 1940 federal census. The court stated that if the 1950 federal census had been taken and ascertained within the meaning of the constitution, then the apportionment should be based on that census, but that if it had not been so taken and ascertained, the apportionment would be based on the 1940 census; that the court was without information which would enable it to take judicial knowledge that the 1950 federal census had become final as to all the counties in the state; and that as long as the enumerations which had been made in any of the counties remained tentative, the apportionment could not be made on the basis of the 1950 census.

The very recent (March 2, 1970) case of In re Interrogatories by the

General Assembly, 467 P.2d 56, aptly illustrates the importance of and practical necessity for official detailed census counts being available to a legislature for the basis of reapportioning and redistricting.

There, the 1970 Colorado General Assembly (which meets annually) adopted a house joint resolution[1] inquiring of the Colorado Supreme Court whether the 1971 General Assembly was required to revise senatorial and representative districts based on official population counts expected to be available prior to January 6, 1971, even though the official population breakdowns for census tracts, enumeration districts, and city blocks would not be available until after that date.[2] Article V, Section 48 of the Colorado Constitution provided:

> * * * each such [regular] session next following official publication of each federal enumeration of the population of the state * * * shall establish or revise * * * senatorial representative districts * * *

[1] The resolution cited legislative experience gained from the reapportionment legislation in 1963, 1964, 1965, and 1967 had shown that official population data by census tracts, by enumeration districts and by city blocks was necessary for a complete and accurate redrawing of legislative district lines in a majority of Colorado's single member legislative districts, and that until such time as the official population breakdowns for census tracts, enumeration districts and city blocks were available, the General Assembly would not have sufficient information to assure the enactment of reapportionment legislation meeting the equal protection clause of the Fourteenth Amendment.

[2] According to the resolution, the Bureau of the Census reported that the so-called "final official population counts," which included total population figures for incorporated cities and towns, unincorporated places of 1,000 persons or over, counties, and existing congressional districts, would be available by the end of December 1970. However, the Bureau of the Census further reported that official population counts for census tracts, enumeration districts and city blocks would not be available until the spring, summer and fall of 1971.

The court, en banc, held (p. 58) that the phrase "federal enumeration of the population" meant and encompassed publication of all facts and figures, including census tracts, enumeration districts, and city blocks, necessary and essential to enable the General Assembly to revise legislative district boundaries; and that the 1971 Legislature did not have to reapportion until it received definitive census figures. The court expressly adopted the rationale of the Leopold case.

The court further stated (p. 59) that if the official publication of the federal census of the state's population occurred after the 1971 Regular Session and before the 1972 session, then the 1972 Legislature should consider reapportionment based on the 1970 census.

The necessity for the Nevada Legislature to have access to and base reapportionment legislation upon complete and detailed census figures instead of using preliminary and perhaps incomplete returns is apparent. Although the Nevada Constitution does not mention "completion of a census" as does the Connecticut Constitution, nor "official publication of" the federal census found in the Colorado Constitution, the mandate of the Fourteenth Amendment that it reapportion and redistrict to achieve as nearly as possible districts of substantially equal population is no less urgent. The Nevada voter, like his Colorado counterpart, is entitled to vote and be represented in a legislative district drawn only after the Legislature has available to it all of the facts and figures necessary to redistrict into districts approximating the "one man, one vote" mandate.

We are advised that the Legislative Counsel Bureau has received census

breakdowns on the enumeration district level. An enumeration district usually consists of eight city blocks in urban areas, and does not cross city limits or township boundaries. If the Legislature deems this level of census breakdown is sufficient to redistrict as nearly as possible in compliance with the "one man, one vote" mandate of *Baker v. Carr*, supra, then it must enact reapportionment and redistricting legislation during the present 56th Regular Session.

If, on the other hand, the Legislature deems further census breakdowns below the enumeration district level, such as city and urban block census figures, essential to redistricting to provide as nearly as possible equal representative districts, then it may lawfully await the receipt of such block census data. Such is the advice given by the Colorado Supreme Court to the Colorado General Assembly (*In re Interrogatories*, supra), namely, that the Legislature redistrict only after receipt of "all facts and figures, including census tracts, enumeration districts, and city blocks" if it is to achieve an approximation of the "one man, one vote" mandate.

Should the additional block census figures be required in the judgment of the Legislature, yet not be made available by the Bureau of the Census until after the 56th Session of the Nevada Legislature adjourns *sine die*, then the Legislature must be convened in special session to enact such reapportionment legislation.

That the Legislature may, in special session, enact a reapportionment and redistricting plan is no longer open to question. The present Legislature was reapportioned by a special session in 1965, called pursuant to an order of the three-judge federal court in *Dungan v. Sawyer*, supra.

An analogous situation was presented in *People ex rel. Carter v. Rice*, 135 N.Y. 473, 31 N.E. 921 (1892). There the New York Legislature adjourned its regular session before the finalization of the census count. In holding that reapportionment could be accomplished in a special session, the Court of Appeals said:

> An extraordinary session is, nevertheless, a session of the legislature. The governor by the terms of the constitution has "power to convene the legislature (or the senate only) on extraordinary occasions." When thus convened, is not the legislature in session? And can it be for a moment correctly contended that a session thus convened is the same session which had already terminated by an adjournment without day? It is not a regular session, it is true; it is what the constitution describes it—an extraordinary session,—but yet a session of the legislature.

Should the need for a special session to consider reapportionment occur, the special session should be called immediately upon receipt of such block statistics for a date certain, so that any doubts about whether or when the Legislature is to consider reapportionment will be removed.

The timing of a special session to enact a reapportionment law is not urgent insofar as the election of Senators and Members of the Assembly is concerned, since the earliest date for filing of certificates of candidacy for the next legislative elections is the second Monday in June 1972 (NRS 293.180).

CONCLUSION

If the Legislature deems the extent to which the 1970 federal decennial census of Nevada as published to date is sufficiently definitive to provide

the basis for reapportionment, then it is under the constitutional mandate to reapportion during the present 56th Regular Session.

If the Legislature deems available census data insufficient on which to base reapportionment, then it may await the publication and receipt of such additional census data as it deems necessary to achieve a reapportionment and redistricting law commensurate with the "one man, one vote" mandate.

Should such additional data be deemed necessary in the judgment of the Legislature, yet not be made available until after the present 56th Regular Session adjourns *sine die*, then a special session should be called for the purpose of enacting a reapportionment and redistricting law immediately after receipt of such additional census data.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-19 SALES TAX—Attorney General's Opinion No. 522, dated July 2, 1968, modified to conclude that it is permissible, but not mandatory, to treat addressing by means of a mechanical device as a taxable activity.

Carson City, April 12, 1971

Mr. John J. Sheehan, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Sheehan:

At a recent meeting of the Nevada Tax Commission an officer of a company engaged in the addressing and mailing business requested the commissioners to consider revising that portion of Sales and Use Tax Ruling No. 47 which declares the imprinting of names and addresses by addressograph, data processing machines or any other mechanical device to be a taxable activity under Nevada's sales tax laws. Said declaration of taxability is based upon Attorney General's Opinion No. 522, dated July 2, 1968, which reached a conclusion that: "Printing or imprinting

names and addresses by addressograph, data processing machines or the like is a taxable activity under NRS 372.060."

QUESTION

Do Nevada's sales tax laws require the imposition of sales tax upon the activity of printing names and addresses by means of a mechanical device?

ANALYSIS

A reading of Attorney General's Opinion No. 522, dated July 2, 1968, indicates that opinion to be well-reasoned and well-documented in reaching the conclusion that charges made for addressing by means of a mechanical device are subject to sales tax. Your request for this opinion

acknowledges the apparent validity of said conclusion, but asks whether the conclusion is mandatory or merely permissible under Nevada law.

The only statute cited by Attorney General's Opinion No. 522 in reaching the aforementioned conclusion is NRS 372.060, which defines "sale" to include the printing or imprinting of tangible personal property for a consideration for consumers who furnish the materials used in the printing or imprinting. In the context of addressing, the words "printing" and "imprinting" are synonymous in that "imprint" means to print upon something. See Webster's New International Dictionary, 2d ed.

The fundamental question is whether addressing by means of a mechanical device is necessarily within the contemplation of the provisions of NRS 372.060. As stated in *State v. Vossbrinck*, 257 S.W.2d 208 (Mo. 1953), at page 210: "It is a well-known fact that the word 'printed' has a variety of meanings depending upon the connection in which it is used." Attorney General's Opinion No. 522 quoted a definition of printing which reads "the art of reproducing a design upon a surface by any process." The case from which the definition was taken (*Technograph Printed Circuits, Ltd. v. Bendix Aviation Corp.*, 218 F.Supp. 1 (D. Md. 1963)) actually involved printed circuits consisting of metal foil bonded to an insulating backing. Nevertheless, the definition is one commonly applied to the act of printing with ink on paper.

On the other hand, there is considerable authority for the proposition that "printing" refers only to the making of multiple copies, as contrasted to the making of a single original. *See Keene v. Wheatley*, 14 Fed.Cas. 180 (Pa. 1819); *Davidson Corporation v. United States*, 310 F.2d 937 (Ct.Cl. 1962); *In re News-Ledger*, 63 Cal.Rptr. 69 (1967). If this proposition represents the intent of the Nevada Legislature in enacting NRS 372.060, the making of only a single impression of each name and address on a mailing list would not constitute "printing or imprinting" in the context of the statute.

Legislative history may throw some light on the probable intent of the Nevada Legislature. Nevada's Sales and Use Tax Act (Chapter 372 of Nevada Revised Statutes), enacted by the Legislature in 1955, was substantially an adoption of the Sales and Use Tax Law then in effect in California. The provisions of NRS 372.060 that are pertinent here were adopted word-for-word from section 6006 of the Calif. Rev. & T.C. The significance of such borrowing of one state's statutes by another is set forth in the Nevada Supreme Court case of In re Walker River Irr. Dist., 44 Nev. 321, 332, 195 Pac. 327 (1921), wherein it is stated: "* * * where the legislature of one state adopts the statute of another, the act of adoption raises the presumption that the legislature of the adopting state enacted the statute in the light of the construction that had been placed upon it in the parent state."

The California construction as of 1955 (and today) was that separately stated charges for the addressing of letters or other printed matter were not subject to sales tax. California Sales and Use Tax Ruling No. 24; California State Board of Equalization Opinion Letter, dated September 28, 1951. The Nevada Tax Commission appeared to have adopted the California construction in

1955, for Nevada's original Sales and Use Tax Ruling No. 47, adopted May 23, 1955, stated, inter alia: "If printers, mimeographers and multigraphers make an additional charge for addressing, folding, enclosing, sealing and mailing letters, segregating such charge

on their invoices and in their records, tax does not apply to such additional charge." It wasn't until 1968 that the Tax Commission revised the ruling to make addressing a taxable activity.

In light of the foregoing, a revision of Ruling No. 47 to provide that the activity of printing names and addresses by means of a mechanical device is not subject to the sales tax would be reasonable, and not arbitrary and capricious. *Cf. Villa v. Arrizabalaga*, Nevada Supreme Court Advance Sheet No. 5817 (February 24, 1970).

CONCLUSION

The conclusion contained in Attorney General's Opinion No. 522, dated July 2, 1968, that "Printing or imprinting names and addresses by addressograph, data processing machines or the like is a taxable activity under NRS 372.060" is hereby modified to stand for the proposition that it is permissible, but not mandatory, to treat such activity as taxable under NRS 372.060.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Irwin Aarons
Deputy Attorney General

OPINION NO. 71-20 PLANNING COMMISSIONS, REGIONAL AND CITY AND COUNTY—Regional planning commissions may be formed in counties that do not have incorporated cities. Cities and counties may dissolve their planning commissions if their population is less than 15,000.

Carson City, April 23, 1971

Mr. William E. Hancock, Manager, State Planning Board, Carson City, Nevada 89701

Dear Mr. Hancock:

This is in response to your request of March 22, 1971 for an opinion concerning formation of regional planning commissions.

QUESTIONS

1. May counties form regional planning commissions pursuant to NRS 278.090, even though there are no incorporated cities in the county?
2. May counties abolish county planning commissions in order to form regional planning commissions?

ANALYSIS

Authority for formation of regional planning commissions is found in NRS 278.090, subsection 1, which reads:

> The board of county commissioners of any county alone or in collaboration with the governing body of the incorporated cities in the county or any of them or in collaboration with the board or boards of county commissioners of any adjacent county or counties, or the governing bodies of adjacent cities may establish a regional
>
> planning commission to consist of representatives of the county or counties or cities or region within the county or counties where the local government bodies participate in the formation of the regional planning commission.

There is nothing in this statute requiring that an incorporated city be in the regional planning district. In fact, the statute explicitly provides that a county may form a regional planning commission "alone."

The statutes explicitly further provide that a regional planning district may be formed "in lieu of separate city or county planning commissions." See NRS 278.140, subsection 1.

In counties of less than 15,000 population, creation of city and county planning commissions is optional with the governing body, as provided in NRS 278.030, subsection 2:

> Cities and counties of less than 15,000 population may create by ordinance a planning commission to consist of nine members. If the governing body of any city or of any county of less than 15,000 population deems the creation of a planning commission unnecessary or inadvisable, the governing body may, in lieu of creating a planning commission as provided in this subsection, perform all the functions and have all of the powers which would otherwise be granted to and be performed by the planning commission.

Although there is no explicit statutory procedure for dissolving the city or county planning commission in these small counties and cities, it is clear that upon a determination by the governing body that the planning commission is unnecessary, it could be dissolved. It would seem logical that a county planning commission would become unnecessary if a regional planning commission were formed with similar territory and responsibilities.

CONCLUSION

Regional planning commissions may be formed in counties that do not have incorporated cities. Cities and counties may dissolve their planning commissions if their population is less than 15,000.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-21 SALES TAX—The overall activities of an organization must be predominantly charitable in order for it to qualify for the exemption provided organizations created for charitable purposes.

Carson City, May 14, 1971

The Honorable Harry M. Reid, Lieutenant Governor, State of Nevada, Legislative Building, Carson City, Nevada 89701

Dear Sir:

You indicate that several service organizations have contacted you to question why sales tax is imposed upon their sales of such items as light

bulbs and brooms during charitable fund drives. You ask for an opinion on the question that follows.

QUESTION

Does NRS 372.325(5) exempt from sales tax those sales made by a service organization during the course of a campaign to raise funds for charitable purposes?

ANALYSIS

Certain civic organizations such as the Lions, Kiwanis, Rotary, Sertoma, and Soroptimists regularly engage in activities of a charitable nature. In order to raise funds for such charitable activities it is customary for the organizations to sell to the public various items of tangible personal property, such as light bulbs and brooms. Some members of the organizations feel that such sales are exempt from the sales taxes imposed upon Chapters 372 and 374 of Nevada Revised Statutes. The exemption provisions relied upon are worded identically and are found at NRS 372.325 and 374.330, respectively. In pertinent part, they read as follows:

> There are exempted from the computation of the amount of the sales tax gross receipts from the sale of any tangible personal property to:
>
> * * * * *
>
> 5. Any organization created for religious, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual.

Previous opinions of the Attorney General have stated that sales "by" a charitable organization are exempt the same as sales "to" such an organization, provided the sales "by" the organization are an integral part of its charitable activities. Attorney General's Opinion No. 546, dated November 12, 1968; Attorney General's Opinion No. 61, dated June 5, 1959.

In order for a service organization to be entitled to the exemption granted for sales to or by an organization created for charitable purposes, it is essential that the articles of incorporation, charter, constitution or bylaws of the organization require it to apply its funds and income to purposes deemed charitable by law. *Rotary International v. Paschen*, 153 N.E.2d 4 (Ill. 1958); *In re Dol's Estate*, 187 Pac. 428 (Calif. 1920); *Society of Cincinnati v. Exeter*, 31 A.2d 52 (N.H. 1943).

The determination of what is charitable or charity is usually made on the basis of the ordinary and common meanings of the words. The Nevada Supreme Court has approved broad definitions

of "charity." *Bruce v. Young Men's Christian Ass'n*, 51 Nev. 372, 277 Pac. 798 (1929); *Nixon v. Brown*, 46 Nev. 439, 214 Pac. 524 (1923). There is no doubt the aforementioned sales activities of these service organizations are charitable within the contemplation of the law.

Many service organizations do not qualify for the tax exemption because only a part of their overall purposes and activities are charitable; the greater portion of their activities have other purposes, such as social or self-improvement of the members. *See Sahara Grotto & Styx, Inc. v. State Bd. of Tax Com'rs*, 261 N.E.2d 873 (Ind. 1970); *Morning Cheer, Inc. v. Bd. of County Com'rs of Cecil County*, 71 A.2d 255 (Md.

1950); *Battelle Memorial Institute v. Dunn*, 73 N.E.2d 88 (Ohio 1947); *Lincoln Woman's Club v. City of Lincoln*, 133 N.W.2d 455 (Neb. 1965).

Some states have studied the question of a charitable purpose exemption from sales tax for service organizations and, while recognizing that they engage in charitable activities to some extent, have refused to allow the exemption on the ground that their primary function is social. Missouri Sales Tax Rule No. 8; Opinion of the Attorney General of North Carolina, dated July 22, 1948. Such a blanket refusal does not apply in Nevada, but the burden lies squarely on any service organization claiming the exemption to show clearly that its purposes and activities are predominantly charitable. *People v. Rockford Lodge No. 64, B.P.O.E.*, 181 N.E. 432 (Ill. 1932); *Rotary International v. Paschen*, supra.

Any change in Nevada's Sales and Use Tax requires approval by a direct vote of the people, for the act itself was approved by a referendum vote of the people. Nevada Const. Art. 19, § 1; Attorney General's Opinion No. 228, dated December 10, 1956.

CONCLUSION

A service organization is not entitled to the exemption from sales taxes provided for organizations created for charitable purposes by NRS 372.325 and 374.330 unless it can prove that its overall activities are predominantly charitable.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Irwin Aarons
Deputy Attorney General

OPINION NO. 71-22 SCHOOL DISTRICTS—County employees who are not officers may serve as trustees for the county school district.

Carson City, May 20, 1971

Mr. Dale Christopherson, Superintendent, Esmeralda County School District, P.O. Box 546, Goldfield, Nevada 89013

Dear Mr. Christopherson:

This is in response to your inquiry dated March 19, 1971 concerning county employees serving on the board of trustees of the county school district.

QUESTION

May county employees also serve as trustees of the county school district?

ANALYSIS

Attorney General's Opinion No. 4, dated January 26, 1971, points out that local government units such as counties, cities, and school districts are not considered departments of state government as used in Article 3, Section 1 of the Nevada Constitution, which reads:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the
>
> Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

It is pointed out, therefore, that this separation of powers provision of the Nevada Constitution would not apply to these local government units.

It should also be noted that NRS 281.127 pertains only to services rendered the State:

> Unless otherwise provided by law, no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered to the state, except for salaries for any ex officio duties he may be required by law to perform.

Therefore, this statutory provision does not reach county or school district employees.

The limitation on county employees serving other state political subdivisions is set out in NRS 281.230, subsection 1, as follows:

> 1. The following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind or nature *inconsistent with loyal service to the people* resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:
>
> (a) State, county, municipal, district and township officers of the state of Nevada;
>
> (b) Deputies and employees of state, county, municipal, district and township officers; and
>
> (c) Officers and employees of quasi-municipal corporations. (Italics added.)

It is the view of this office that county employment would not be "inconsistent with loyal service to the people" for a school trustee. The law encourages all citizens to exercise their full franchise. Therefore, NRS 281.230 would not be a bar to county employees serving as school trustees.

CONCLUSION

County employees who are not county officers may serve as trustees for the county school district.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-23 COUNTY COMMISSIONERS—County commissioners may set their meetings by ordinance preceding or succeeding nonjudicial days.

Carson City, May 20, 1971

The Honorable Charles Waterman, District Attorney of Mineral County, P.O. Box 1217, Hawthorne, Nevada 89415

Dear Mr. Waterman:

This is in response to your request for an opinion concerning interpretation of NRS 244.085 as amended in 1971.

QUESTION

Does the statement "next judicial day," as used in NRS 244.085, subsection 1, mean next preceding or next succeeding, or may it mean either?

ANALYSIS

On February 19, 1971, NRS 244.085 was amended by Chapter 6 of the 1971 Statutes of Nevada. The underlying purpose of this amendment was to give county commissioners more flexibility in setting their meeting dates. NRS 244.085, before amendment, read in part as follows:

> The meetings of the board of county commissioners shall be held at the county seats of their respective counties on the 5th day of each calendar month; provided:
> 1. That when such day falls upon a Sunday or legal holiday, the board shall meet upon the next *succeeding* judicial day.
> * * * (Italics added.)

Chapter 6 of the 1971 Statutes of Nevada changes this section to read as follows:

> The meetings of the boards of county commissioners shall be held at the county seats of their respective counties at least once in each calendar month, on a day or days to be fixed by ordinance, provided that:
> 1. Such day does not fall on Saturday or on any nonjudicial day, in which event the meeting shall be held on the next judicial day.

Webster's New International Dictionary (3d Edition, 1961) defines "next" as follows:

> Being the nearest; having nothing similar intervening; as a: adjoining in a series; immediately preceding or following in order * * *

CONCLUSION

In view of the legislative purpose of giving county commissioners more latitude in setting their meeting dates, it is the opinion of this office that "next judicial day" is intended to mean either succeeding or preceding, as used in NRS 244.085 only. Therefore, county commissioners are at liberty to determine whether they will meet preceding or succeeding

Saturdays and nonjudicial days so long as it is specifically set out in their ordinance as required in NRS 244.085, subsection 3.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-24 PROPERTY TAX—Procedure for Payment of Delinquencies—A county treasurer may not lawfully defer the end of a redemption period and taking by the county of a deed to delinquent property by permitting a taxpayer to pay only the oldest year's taxes, penalties and interest.

Carson City, May 28, 1971

The Honorable William *Macdonald, Humboldt County District Attorney*, Humboldt County Court House, Winnemucca, Nevada 89445

Dear Mr. Macdonald:

You have requested an opinion from this office clarifying the procedure for payment of delinquent taxes. You have advised that some counties permit a delinquent taxpayer to pay only the oldest year's delinquent tax but let the more recent one year's or two years' taxes remain delinquent, thus deferring the end of the redemption period and preventing for an additional year the taking by the county of a deed on delinquent properties. Other counties require that the oldest year's taxes plus all intervening taxes, penalties, and interest be paid in full.

QUESTION

Your question is whether a county treasurer may accept partial payment of delinquent property taxes, i.e., the oldest year's delinquency together with penalties and interest pertaining thereto, thus postponing for an additional year the end of the redemption period and conveyance of the property to the county.

ANALYSIS

The statutory plan governing property tax delinquencies, redemption and sale may be summarized as follows: The tax receiver is required, within 20 days after the first Monday in

March, to give notice of the tax delinquency in the manner prescribed by NRS 361.565. Subsection 5(d) specifically provides:

> 5. Such notice shall state:
>
> * * * * *
>
> (d) That if the amount is not paid by the taxpayer or his successor in interest the tax receiver will, on the 4th Monday in April of the current year at 1:30 p.m. of that day, issue to the county treasurer, as trustee for the state and county, a certificate authorizing
>
> him to hold the property, *subject to redemption within 2 years after date thereof, by payment of the taxes and accruing taxes, penalties and costs, together with interest at the rate of 10 percent per annum from date due until paid* as provided by law and that such redemption may be made in accordance with the provisions of chapter 21 of NRS in regard to real property sold under execution. (Italics added.)

Thereupon the tax receiver is required to issue his certificate to the county treasurer directing the latter to hold the delinquent property for 2 years, during which time it must be redeemed; and if not so redeemed as provided by law, vests in the county. NRS 361.570. The portions of that statute pertinent to this issue are these:

> 1. Pursuant to the notice given as provided in NRS 361.565 and at the time so noticed, the tax receiver shall make out his certificate authorizing the county treasurer as trustee for the state and county to hold the property described therein *for the period of 2 years after the date thereof, unless sooner redeemed.*
>
> * * * * *
>
> 3. The certificate shall state, and it is hereby provided:
> (a) That the property may be redeemed within 2 years from its date; and
> (b) That if not redeemed, the title to the property shall vest in the county for the benefit of the state and county.
> 4. Until the expiration of the period of redemption, the property held pursuant to the certificate shall be assessed annually to the county treasurer as trustee, and before the owner or his successor shall redeem such property *he shall also pay* the county treasurer holding the certificate *any additional taxes assessed and accrued against the property after the date of the certificate,* together with the interest thereon at the rate of 10 percent per annum from the date due until paid. (Italics added.)
>
> * * * * *

Upon the expiration of the period for redemption the tax receiver is required by law to convey the delinquent property to the county treasurer. NRS 361.585, subsection 1. The statute is mandatory. It provides:

> 1. *When the time allowed by law for redemption shall have expired* and no redemption shall have been made, the tax receiver who issued the certificate, or his successor in office, *shall* execute and deliver to the county treasurer a deed of the property described in each respective certificate in trust for the use and benefit of

the state and county and any officers having fees due them in such cases. (Italics added.)

Similarly NRS 361.590, subsection 1, provides:

1. *If the property is not redeemed within the time allowed by law* for its redemption, the tax receiver or his successor in office *must* make to the county treasurer as trustee for the state and county

a deed of the property, reciting in the deed substantially the matters contained in the certificate of sale and that no person has redeemed the property during the time allowed for its redemption. (Italics added.)

The statutory scheme for notice of delinquency, for certification of the county treasurer as trustee, for a period of redemption, and for ultimate deeding of delinquent property to the county is clear and unambiguous. It contemplates that delinquent property shall be deeded to the county two years from the date of notice of delinquency. The duty of the tax receiver in this respect is ministerial. No discretion is involved.

Any practice or procedure which frustrates the statutory purposes is contrary to the clear mandates of the statutes cited above and therefore unlawful. The practice of permitting a delinquent taxpayer to pay only the oldest year's taxes in order to continually avoid the property being deeded to the county but always remain two years delinquent obviously frustrates the clear purpose and meaning of the statutes. Accordingly it is unlawful. Furthermore, this practice effectively deprives the county of needed tax revenue for at least two years. Such deprivation of revenue is contrary to the interests of the county which interests the tax receiver is required by virtue of his office to serve.

This opinion concerns only the functions of the county tax receiver and county treasurer with respect to delinquent property taxes. It does not concern the conduct of any individual taxpayer. The opinion is not to be construed to intimate that an individual taxpayer may not, if he wishes, allow taxes to become delinquent, incur liability for penalties and risk loss of his property for that reason. The taxpayer who elects to pursue such a course of conduct is not deprived of the right to repurchase the property if and when it is sold pursuant to NRS 361.595; or of the right to redeem it within 90 days after notice of acquisition by a local government for public purposes pursuant to NRS 361.603.

CONCLUSION

It is the opinion of this office that a county treasurer may not lawfully defer the end of a redemption period and taking by the county of a deed to delinquent property, by permitting a taxpayer to pay only the oldest year's taxes, penalties, and interest.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 71-25 NO RETROACTIVE APPLICATION OF CREDIT FOR PRECONVICTION CONFINEMENT.

Carson City, June 8, 1971

Mr. Carl Hocker, Warden, Nevada State Prison, Carson City, Nevada 89701

Dear Warden Hocker:

You have requested an opinion from this office concerning certain provisions of Assembly Bill No. 77, amending NRS 176.055 to allow district court judges to credit time spent in confinement prior to conviction to the sentence in the Nevada State Prison. Assembly Bill No. 77 has been signed into law and became effective April 7, 1971. It is now Chapter 183, 1971 Statutes of Nevada.

QUESTIONS

1. Are the provisions of this amendment applicable to those prisoners presently serving a prison sentence imposed prior to April 7, 1971, wherein the district judge has stipulated in the judgment that they are to receive credit for time served in the county jail?
2. How is time spent in confinement prior to conviction to be credited to the prison sentence, that is:

(a) Is the credit to be given to the beginning of the sentence, in effect retarding the actual sentencing date by the amount of time granted by the court; or

(b) Is it to be deducted from the end of the sentence, thereby shortening the sentence by the appropriate amount of time granted, but retaining the original sentence date?

3. When the courts grant credit for the time in confinement prior to conviction, are the credits specified in NRS 209.285 to be credited to this time?

ANALYSIS

Question 1: There is no constitutional mandate from the United States Supreme Court requiring that a state grant credit for time spent in jail prior to conviction, *Ibsen v. Warden*, 86 Nev. 540, 471 P.2d 229 (1970); and no court may consider a request for credit of that type in the absence of a statute either permitting or requiring the giving of such credit, I*bsen v. Warden*, supra.

Prior to the effective date of Chapter 183, 1971 Statutes of Nevada (Assembly Bill No. 77), the Nevada law permitted credit for preconviction confinement only where a sentence of imprisonment in the county jail was imposed, NRS 176.055.

It is evident from reading the language of Chapter 183,1971 Statutes of Nevada (Assembly Bill No. 77), that the Legislature did not intend to give retroactive application to such law. Section 2 provides that the act shall become effective upon passage and approval and makes no reference to retroactive application; nor could the Legislature have constitutionally provided for retroactive application of such law. In Chapter 78, 1881 Statutes of Nevada, the Legislature increased the allowance of "good time" credits for prisoners under sentence in the Nevada State Prison. The Nevada Supreme Court held in *Ex parte Darling*, 16 Nev. 98, 40 A.R. 495 (1881) that:

1. The Act was in terms retroactive;
2. It was intended by the Legislature to apply to cases before, as well as after, the date when the Act took effect; and

3. The attempt to make such Act retroactive and apply to prisoners then under sentence was unconstitutional.

A similar attempt to credit retroactively by the Legislature in 1909 was held unconstitutional in an Attorney General's opinion rendered August 3, 1909, and by the Nevada Supreme Court in *Ex parte Woodburn*, 32 Nev. 136, 104 P. 245 (1909).

Question 2: NRS 176.335(3) provides the term of imprisonment designated in the judgment shall begin on the date of sentence of the prisoner by the court, and NRS 209.285(2) provides that "good time" credits shall be deducted from the maximum term imposed by the sentence. Since the statute in question was silent as to when or how the "preconviction credits" are to be credited; and the statute is clear and unequivocal as to when the term of imprisonment is to begin, such "preconviction credits" should be deducted from the maximum term imposed by the sentence, as are "good time" credits.

Question 3: NRS 209.285(1) allowing "good time" credits provides such credits be given to every convicted person who has no infraction of the rules and regulations of the *prison* recorded against him. A person confined prior to conviction in an institution other than the Nevada State Prison, is not subject to the rules and regulations of the prison and therefore not subject to the grant of "good time" credits to be compounded upon the credit for preconviction confinement.

CONCLUSION

1. The provisions of Chapter 183, 1971 Statutes of Nevada (Assembly Bill No. 77), are not to be given retroactive application and are not applicable to prisoners serving a sentence imposed prior to April 7, 1971, notwithstanding that the sentencing judge stipulated that they were to receive credit for time served in the county jail.
2. When time spent in confinement prior to conviction is ordered to be credited to the prison sentence, such credit should be deducted from the end of the sentence, thereby shortening the sentence by the appropriate amount of time granted and retaining the original sentencing date, rather than to be given at the beginning of the sentencing thereby retarding the sentencing date.
3. When the court grants credit for time spent in confinement prior to conviction, such time credit is not to be compounded with given additional credit for "good time."

Respectfully submitted,

ROBERT LIST
Attorney Gener*al*

By: Herbert F. Ahlswede
Chief Deputy Attorney General
Criminal Division

OPINION NO. 71-26 WITNESS FEES—Liability fees of witnesses subpoenaed by defendant in a criminal case lies with defendant.

Carson City, June 9, 1971

The Honorable Stanley A. Smart, District Attorney of Lyon County, Lyon County House, Yerington, Nevada 89447

Dear Mr. Smart:

You have requested an opinion from this office concerning the responsibility of the county for fees of witnesses subpoenaed by a defendant to appear and testify on his behalf.

QUESTION

Is the county liable for the fees and mileage of witnesses subpoenaed by a defendant in a criminal proceeding?

ANALYSIS

The liability for fees of witnesses called by the prosecuting attorney and by the accused in a criminal action is based on constitutional or statutory provisions and limited thereby. *Crane v. McGoldrick*, 243 App. Div. 560, 276 N.Y.S. 220 (1934). In the absence of such provisions, liability for the payment of witness fees does not exist. *Crane v. McGoldrick*, supra.

In the absence of such statute there is no liability on the part of the State to pay the costs of the accused in procuring attendance of witnesses. *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970); *Greene v. Ballard*, 174 Ky. 808, 192 S.W. 841 (1917); *Commonwealth v. McMillon*, 81 York Leg.Rec. 8 (Pa. 1967); and, this is so notwithstanding that the accused has been acquitted, *Bennett v. Kroth*, 37 Kan. 235, 15 P. 221 (1887); *State v. Whithead*, 3 Mur. 223, 7 N.C. (1819).

There is no statutory provision in Nevada requiring the State to pay the fees of witnesses subpoenaed on behalf of the accused.

CONCLUSION

A defendant in a criminal case is liable for the payment of fees and mileage for witnesses subpoenaed by him.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Herbert F Ahlswede
Chief Deputy Attorney General
Criminal Division

OPINION NO. 71-27 COUNTY HIGHWAY COMMISSIONERS; BIDS—The county is not required to bid certain highway projects done with county men and equipment.

Carson City, June 15, 1971

The Honorable Chic Hecht, 413 Fremont Street, Las Vegas, Nevada 89101

Dear Senator Hecht:

This is in reply to your letter requesting an interpretation of NRS 403.490.

QUESTION

Does NRS 403.490 require advertisement of bids and going to bid on all projects, whether or not county day labor, county machinery or county tools and equipment are used?

ANALYSIS

The bidding requirements for county roads are set out in NRS 403.490, as follows:

> 1. To perform any work or construct any superstructure under this chapter wherein an expenditure of $500 or more may be necessary, the board of county highway commissioners shall cause definite plans of such work or superstructure to be made, estimates of the amount of work to be done and the probable cost thereof, together with a copy of the specifications thereof.
> 2. Upon receipt of the plans, estimates and specifications, the board of county highway commissioners shall advertise for bids and let contracts in the manner prescribed by chapter 332 of NRS.
> 3. After submission of bids, the board of county highway commissioners may reject any and all bids and advertise anew, or the board may order the work done by day's work under the supervision of the county road supervisor.
> 4. In cases of emergency the board of county highway commissioners may let contracts for repairs in the manner prescribed by chapter 332 of NRS.
> 5. Nothing in this section shall prevent any county from opening, building, improving or repairing any public road or highway in the county by the employment of day labor, under the supervision of the board of county highway commissioners and by the use of its own machinery, tools and other equipment, without letting contracts to the lowest responsible bidder, irrespective of the probable cost of the work.

The first three subsections of this statute clearly require the county highway commissioners to prepare specifications and bid all work that will cost more than $500. Subsection 4 provides an exception for emergency repairs.

Subsection 5 provides an additional exception if a county is "opening, building, improving or repairing any public road or highway." This exception is narrower than "any work or construct any superstructure" as provided in subsection 1. The exception in subsection 5 is also limited to work done "by the employment of day labor, under the supervision of the

board of county highway commissioners and by use of its own machinery, tools and other equipment."

The meaning of the phrase "without letting contracts to the lowest responsible bidder" clearly envisions that the bidding procedure will not be entered. The phrase qualifying this makes this interpretation vivid when it says "irrespective of the *probable* cost of the work." Had the Legislature intended that the project be bid before the county could choose to do it with its own men and equipment, the Legislature would not have said "*probable* cost" but merely "lowest responsible bid" or "cost," because after bidding the cost is a certain sum.

The provision in subsection 5 was initially enacted as Chapter 191 of the 1913 Statutes of Nevada. Since that time, the statute has always been applied to exempt work done by the county men and equipment from the bidding procedure. There have been no Nevada cases construing the language of the statute here in question. The statute has been reenacted by the Legislature several times in light of this common interpretation, without materially changing the section. See Chapter 119 of the 1963 Statutes of Nevada, and Chapter 459 of the 1967 Statutes of Nevada.

CONCLUSION

The county highway commissioners are not required to advertise for bids on opening, building, improving, or repairing any public road or highway if it is done by the employment of day labor, under the supervision of the board of county highway commissioners and by the use of the county's machinery, tools, and other equipment.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-28 SCHOOL DISTRICTS; MARRIED STUDENTS—School districts may not exclude married students from participation in extracurricular activities solely because they are married.

Carson City, June 23, 1971

The Honorable Merlyn H. Hoyt, District Attorney, White Pine County Courthouse, Ely, Nevada 89301

Dear Mr. Hoyt:

This is in reply to your request of April 7, 1971, for an opinion concerning married public school students.

QUESTION

May a school exclude married students from participating in school activities, such as athletics and band, while they are in attendance in school and meet all other eligibility rules?

ANALYSIS

Please first note Attorney General's Opinion No. 44, dated April 18, 1951, which came to the well-reasoned conclusion that married students

could not be excluded from public schools solely because they are married. This early opinion we endorse as being an accurate statement of the law today. *See also Board of Education v. Bentley*, 383 S.W.2d 677 (1964 Ky.); *McLeod v. State*, 154 Miss. 468 122 So. 737 (1929).

The school trustees' powers are set out in NRS 386.350, as follows:

> Each board of trustees is hereby given such reasonable and necessary powers, not conflicting with the constitution and the laws of the State of Nevada, as may be requisite to attain the ends for which the public schools are established and to promote the welfare of school children.

The rulemaking power of school trustees is set out in NRS 386.360, as follows:

> Each board of trustees shall have the power to prescribe and enforce rules, not inconsistent with law or rules prescribed by the state board of education, for its own government and the government of public schools under its charge.

The limitation of the trustees' rulemaking power is basically that the rules must be "to attain the ends for which the public schools are established and to promote the welfare of school children."

There have been cases that have upheld a school district's regulations restricting married students' participation in extracurricular activities: *Kissick v. Garland Ind. School Dist.*, 330 S.W.2d 708 (Texas 1959); *Cochrane v. Bd. of Education*, 360 Mich. 390, 103 N.W.2d 569 (1960); *State v. Stevenson*, 27 Ohio Op.2d 223, 189 N.E.2d 181 (1962); *Starkey v. Bd. of Education*, 14 Utah2d 227, 381 P.2d 718 (1963); Bd. of *Directors v. Green*, 259 Ia. 1260, 147 N.W.2d 854 (1967); *Estay v. LaFourche Parish School Bd.*, 230 So.2d 443 (La.App. 1969).

The underlying consideration that seems persuasive in all these cases is best expressed in the Stevenson case as follows, at 189 N.E.2d 194:

> The presumption is always in favor of the reasonableness and propriety of any such rule duly adopted.

This presumption seems to be the determining factor in these several close cases. Several of the cases indicate the Fourteenth Amendment equal protection question was raised, but none of the opinions discuss the issue to any depth.

The United States Supreme Court in the case of *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), went behind the school district's regulation where it limited the students' rights under the Bill of Rights. The high court cited from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), as follows:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

It is apparent that classifying students solely on their legal status of marriage raises substantial equal protection questions. A school district would need to identify a specific evil within its responsibility and adopt a resolution aimed at correcting it, in order to justify classifying married students separate from other students in view of the recent Tinker decision.

CONCLUSION

The school district clearly has statutory authority to promulgate regulations restricting married students' participation in extracurricular activities. It is, however, the opinion of this office that such regulations would not withstand the constitutional test if brought under the scrutiny of the courts. Therefore, it is the opinion of this office that a school may not arbitrarily exclude married students from participating in extracurricular activities solely because they are married, in light of recent United States Supreme Court decisions.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-29 ELECTION LAWS—After July 1, 1971, a candidate for party nomination in primary elections must declare he has not changed his political party affiliation since September 1 prior to the closing filing date for such primary election.

Carson City, July 1, 1971

The Honorable John Koontz, Secretary of State, Capitol Building, Carson City, Nevada 89701

Dear Mr. Koontz:

You have requested the opinion of the Attorney General on what appears to you to be a possible conflict in the wording of the Declaration of Candidacy caused by the enactment of Senate Bill No. 291 and Assembly Bill No. 564 by the 56th Session of the Nevada Legislature.

QUESTION

What is the form of the Declaration of Candidacy required by NRS 293.177 after July 1, 1971, insofar as it refers to changes in a candidate's political party affiliation?

ANALYSIS

Assembly Bill No. 564 was approved by the Governor April 14, 1971 as Chapter 268. Also enacted at the 56th Session was Senate Bill No. 291, approved May 5, 1971 as Chapter 657. Neither bill provides that it becomes effective upon passage and approval. Therefore, both chapters become effective July 1, 1971. Both chapters make certain changes in the wording of the form of the Declaration of Candidacy required to be filed by NRS 293.177.

At the time the Legislature passed Assembly Bill No. 564 on April 8, 1971, NRS 293.177 required the declaration to read, in part:

> * * * I have not changed the designation of my political affiliation on any official affidavit of registration in any state since the date of the last primary election.

Assembly Bill No. 564 did not make any change in the foregoing language. It did, among other changes in election laws, change another part of the form of the Declaration of Candidacy not germane to your inquiry.

The Legislature considered and passed Senate Bill No. 291 on April 23, 1971, *subsequent* to its earlier passage of Assembly Bill No. 564. Senate Bill No. 291 expressly amended the form of declaration to read:

> * * * I have not changed the designation of my political affiliation on an official affidavit of registration in any state since September 1 prior to the closing filing date for this election.

Thus, the preceding change made by Senate Bill No. 291 is the *only* change by the Legislature and there is no conflict between the two bills.

Nor is there any conflict with NRS 293.176 caused by the enactment of Senate Bill No. 291 which merely substituted the "September 1" date to conform with the similar substitution made in the form of the Declaration of Candidacy.

CONCLUSION

This office concludes that there is no conflict between Assembly Bill No. 564 and Senate Bill No. 291 as they relate to NRS 293.176 and 293.177 and that after July 1, 1971, that portion of the Declaration of Candidacy with which we are concerned should read:

> * * * that I have not changed the designation of my political party affiliation on an official affidavit of registration in any state since September 1 prior to the closing filing date for this election; * * *.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-30 STATE BOARD OF FINANCE; STATE FUNDS—Depositary bonds of surety companies or notes secured by mortgages insured by the U.S. government or an agency thereof may not be used to secure the deposit of state funds in banks. State funds may be invested in U.S. Treasury bills.

Carson City, July 13, 1971

Mr. Robert Cameron, Financial Secretary, State Board of Finance, Carson City, Nevada 89701

Dear Mr. Cameron:

On behalf of the State Board of Finance, you have asked the following questions:

QUESTIONS

1. May the State accept depositary bonds of a surety company to secure funds deposited by the State Treasurer in banks?
2. May the State accept notes secured by mortgages insured by the U.S. government or an agency of the U.S. government, to secure funds deposited by the State Treasurer in banks?
3. May the State Board of Finance invest state moneys in U.S. Treasury bills?

ANALYSIS
QUESTION NO. 1

NRS 356.020 establishes the types of securities that may be used to secure deposits of state funds:

> 1. All funds deposited by the state treasurer shall be secured by obligations of the United States, or bonds of this state, or bonds of any county, municipality or school district within this state, deposited by the depositary bank with the state treasurer, or with a Federal Reserve bank, or, if such deposit of security will not be accepted by a Federal Reserve bank, then with any bank other than the depositary bank which will accept such bonds as a trust for the purposes hereof.
>
> * * * * *

Nowhere in this statute is there any language which allows the use of depositary bonds as an alternative approach to securing state deposits.

A latent contradiction occurs in NRS 356.210, however. This section, which is entitled "Depositary Bonds of Surety Companies," appears to set limitations on the kinds of depositary bonds which may be used to secure deposits. NRS 356.210 reads as follows:

> It shall be unlawful for any person, firm, company or corporation knowingly to deliver to any public officer of the State of Nevada or of any political subdivision thereof, or for any such public officer knowingly to accept, any depositary bond of any surety company for the security of any public moneys deposited or to be deposited by such public officer in any banking or trust company any stockholder or director of which, at the time of the execution of such depositary bond, shall be a stockholder or director in such surety company.

This contradiction may be resolved by an examination of the statutory history of both NRS 356.020 and 356.210. The original depositary legislation enacted by the State of Nevada is Chapter 104 of the 1913 Statutes of Nevada. This statute authorized the deposit of public funds in banks on certain conditions. These conditions included the payment of interest and the deposit by the depositary bank of bonds of the United States or of the State of Nevada or of any county, municipality or school district within the State of a value of at least 15 percent in excess of the amount deposited in the bank by the State. This statute waived the State's common law right of preference to state moneys in case of bank failure. *State v. Carson Valley Bank*, 55 Nev. 26 (1933); *Lothrop v. Seaborn*, 55 Nev. 16 (1933).

Chapter 34 of the 1928 Statutes of Nevada repealed certain provisions

of the then existing depositary statutes. At that time, the concept of depositary bonds of surety companies was first introduced into the Nevada statutes. The Legislature included this form of security by saying that deposits of state funds in banks "may be secured by a depositary bond given by the depositary bank and an approved surety or bonding company, the premium on such bonds to be paid by the bank. Said depositary bond, and the surety or sureties, and the form thereof, shall be approved by the Treasurer and the Board of Examiners, and shall be in an amount and penal sum of not less than the amount of the deposit."

In 1933, the provisions now contained in NRS 356.210 regarding limitations on the acceptance of depositary bonds of surety companies were added to the Nevada statutes by Chapter 98 of the 9133 Statutes of Nevada. This was done immediately subsequent to numerous bank failures and the two cases cited above, and was apparently added to impose an additional condition to those conditions imposed by Chapter 34 of the 1928 Statutes of Nevada.

In 1935, Chapter 161 of the 1935 Statutes of Nevada was enacted. The title of the chapter was:

> An Act to authorize and regulate the deposit of state moneys in banks; to provide for the securing thereof; to provide for the conversion of securities and to repeal an act entitled, "An Act to authorize the deposit of state moneys in banks in this state, and to repeal all acts and parts of acts in conflict with this act," approved February 6, 1928, as amended, being sections 7030 to 7041, inclusive, N.C.L., and all amendments thereto.

Chapter 161, in specifically enacting the depositary standards now contained in NRS 356.020, also specifically repealed the depositary bond of surety company authorization contained in Chapter 34 of the 1928 Statutes of Nevada. It also repealed amendments to the 1928 statute. While Chapter 98 of the 1933 Statutes of Nevada was not an amendment to the 1928 statute, any reference to depositary bonds of surety companies became meaningless by the repeal of Chapter 34 of the 1928 Statutes of Nevada.

The 1935 statute has been amended a number of times since enactment, while the 1933 statute has not been amended.

It is therefore our opinion that although NRS 356.210 to 356.230, inclusive, "Depositary Bonds of Surety Companies," remains in the Nevada Revised Statutes, it bears no reference to NRS 356.020, and that the depositary conditions contained in NRS 356.020 do not permit the acceptance of depositary bonds of surety companies to secure funds deposited by the State Treasurer in banks.

For further discussion, see Attorney General's Opinion No. 430 of August 9, 1967 and Opinion No. 275 of October 29, 1965.

QUESTION NO. 2

Your second question may be answered by determining whether notes secured by mortgages insured by the United States government or an agency thereof are obligations of the United States and fit within the strictures of NRS 356.020.

As defined in 18 U.S.C. § 8, obligations or other securities of the United States are as follows:

> The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

While this defines "obligations" for the purposes of enforcement of the criminal statutes, the definitions contained therein are generally applied throughout the body of the federal statutes. If notes secured by mortgages insured by the United States government or an agency thereof are to be defined as obligations of the United States, they must therefore fit within 18 U.S.C. § 8 or some other definition contained in the federal statutes.

The Federal National Mortgage Association is created by 12 U.S.C. § 1717. The Federal National Mortgage Association is a body corporate, and as a corporation is authorized to issue, upon the approval of the Secretary of the Treasury, certain obligations. 12 U.S.C. § 1719(b) states that these obligations are not guaranteed by the United States and do not constitute a debt or obligation of the United States. 12 U.S.C. § 1719(d) allows the corporation to issue and sell mortgage-backed securities. These securities are not defined as securities or obligations of the United States. They are based upon mortgages set aside by the corporation in its secondary mortgage operations and are, to the same extent as securities which are direct obligations of or guaranteed as to principal and interest by the United States, deemed to be exempt from the laws

administered by the Securities and Exchange Commission. We do not believe that these securities could be considered to be an obligation of the United States, since the Congress clearly made the corporation an independent body corporate, and only chose to treat the obligations similarly to government obligations for a limited purpose.

The Federal National Mortgage Association is also a distinct body corporate. The exemption from the laws administered by the Securities and Exchange Commission also applies to the association as if its obligations were direct obligations guaranteed as to principal and interest by the United States. The obligations, however, are not defined as obligations of the United States, but are merely treated in a similar fashion for limited purposes as obligations of the United States. We note that the government's function under these statutes seems to be that of an insurer or guarantor of certain private obligations.

We would further note that the 1971 Nevada Legislature amended NRS 355.140 to allow purchase by the State of obligations of the United States Postal Service or the Federal National Mortgage Association where guaranteed by the United States. Numerous other statutes were amended to include the right to purchase this particular kind of obligation with public moneys. NRS 356.020 was not amended, however. This may be read to indicate a legislative intent to limit depositary securities to those already contained in NRS 356.020. It is therefore our opinion that the State may not accept notes secured by mortgages insured by the United States government or agencies thereof.

QUESTION NO. 3

The United States Treasury bill is a certificate of the United States as well as an obligation or security of the United States. 18 U.S.C. § 8. NRS 355.140, subsection 1, defines bonds and certificates of the United States as a lawful investment for state funds. We believe that the State Board of Finance may invest state moneys in United States Treasury Bonds.

CONCLUSION

Your questions are therefore answered as follows:

1. No.
2. No.
3. Yes.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Michael L. Melner
Deputy Attorney General

OPINION NO. 71-31 COUNTY OF DISTRICT LIBRARY TRUSTEE—LIMITATION OF TERM—A person who has served two consecutive 4-year terms as a county or district library trustee is not eligible for reappointment as a trustee after July 1, 1971.

Carson City, July 19, 1971

Mr. Joseph J. Anderson, State Librarian, Nevada State Library, Carson City, Nevada 89701

Dear Mr. Anderson:

This is in reply to your letter of June 4, 1971 requesting an interpretation of NRS 379.020 and 379.022 as amended by Chapter 73 of the 1971 Statutes of Nevada (Assembly Bill No. 312).

QUESTION

Are the term limitations effective July 1, 1971 for county and district library trustees retroactive and how should they be applied?

ANALYSIS

The new limitation on serving as a county library trustee is found in NRS 379.020, subsection 2, as follows:

> No trustee may be appointed to hold office for more than two consecutive 4-year terms.

The new limitation for district library trustees is found in the last sentence of NRS 379.022, subsection 2, as follows:

> No person may be appointed to hold office for more than two consecutive 4-year terms.

These are limitations on the eligibility for appointment as trustees, and are in no way intended to divest any trustee of office. A person seeking

appointment or reappointment as a trustee is not eligible for reappointment if he has served two consecutive 4-year terms.

CONCLUSION

A person who has served two consecutive 4-year terms as a county or district library trustee is not eligible for reappointment as a trustee after July 1, 1971.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-32 SCHOOL TEACHERS—MILITARY LEAVE—Nevada National Guard members must, upon their request, be relieved from duties by school districts to serve under orders on training duty with the Nevada National Guard.

Carson City, July 20, 1971

Major General Floyd L. Edsall, Adjutant General, State of Nevada Military Department, P.O. Box 1120, Carson City, Nevada 89701

Dear General Edsall:

You have advised this office that certain school districts have refused to release school teachers from their duties to attend active duty training with the Nevada National Guard. These school districts have advised you that they need not comply with the provisions of NRS 412.078. You have also noted that NRS 391.180 has been amended by Assembly Bill No. 393 of the 1971 Nevada Legislature giving school districts the authority to prescribe rules and regulations for, *inter alia,* military leave.

QUESTION

Are the provisions of NRS 412.078 mandatory upon school districts?

ANALYSIS

NRS 412.078 provides as follows:

> *Public employees: Leaves of absence for military training duty.* Any officer or employee of any department, agency or institution, or of any county, city or other political subdivision of the State of Nevada, who is an active member of 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 1 calendar year. Any such absence shall not be deemed to be such employee's annual vacation provided for by law. (Italics added.)

It should first be noted that the mandatory statutory word "shall" has been used in NRS 412.078. *Ruppert v. Edwards*, 67 Nev. 200, 216 P.2d 616 (1950). The word "shall" is mandatory when it prescribes official

duties and is addressed to public officials. *Escoe v. Zerbst*, 295 U.S. 490 (1934); *Triangle Candy Co. v. United States*, 144 F.2d 195 (1944). In the instant situation official duties are being prescribed.

NRS 386.010(4) defines school districts as political subdivisions of the State of Nevada. As political subdivisions they therefore fall within the strictures of NRS 412.078.

If there is to be an exception for school districts, that exception must be statutory. The amendment to NRS 391.180 contained in Assembly Bill No. 393 which became effective July 1, 1971 does not work as an exception to NRS 412.078. The Legislature merely allowed boards of trustees of school districts the authority to prescribe "such rules and regulations for sick leave, sabbatical leave, personal leave, professional leave, military leave and such other leave as they determine to be necessary or desirable for employees." To enact regulations which deny the statutory rights granted National Guard members of NRS 412.078, the board of trustees of a school district would be acting beyond the grant of authority that now exists. Any regulation must be subservient to the statute.

The legislative mandate that National Guard members be released by public employers for National Guard service cannot be negated by a school district board of trustees.

CONCLUSION

It is therefore our opinion that Nevada National Guard members must, upon their request, be relieved from duties by school districts to serve under orders on training duty with the Nevada National Guard.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Michael L. Melner
Deputy Attorney General

OPINION NO. 71-33 LICENSING OF CHILD DAY CARE CENTERS—Senate Bill No. 337 and Assembly Bill No. 702, effective July 1, 1971, have placed on the Nevada Health Division the responsibility to license all child day care centers, except as a county or incorporated city licenses them pursuant to NRS 424.120, subsection 2, and 424.160 under Nevada Health Division approved rules and regulations.

Carson City, July 20, 1971

Mr. George E. Miller, State Welfare Administrator, Welfare Division, 201 South Fall Street, Carson City, Nevada 89701

Dear Mr. Miller:

On behalf of Welfare Board Members Jeane Boman and Donna J. Andress you've asked:

QUESTION

Under the provisions of Senate Bill No. 337, Chapter 628, 1971 Statutes of Nevada, and Assembly Bill No. 702, Chapter 479, 1971 Statutes of Nevada, effective July 1, 1971, which agency should license child day

care centers in Clark County, the State Health Division or a local agency in Clark County?

ANALYSIS

The State Welfare Division was, prior to July 1, 1971, responsible for the licensing and regulation of:

1. Foster homes pursuant to NRS 424.010 to 424.100, inclusive. NRS 424.030, subsection 1, provides:

> No person shall conduct a foster home as defined in NRS 424.010 without receiving an annual license to do so from the *welfare division* of the department of health, welfare and rehabilitation. (Italics added.)

2. Group care facilities pursuant to NRS Chapter 431. NRS 431.040, subsection 1, provided:

> No person shall operate a group care facility, as defined in this chapter, without a license from the *welfare division*. * * * (Italics added.)

3. Child care facilities pursuant to NRS 424.110 to 424.160, inclusive. NRS 424.120 provided:

> It is unlawful for any person to operate a child care facility in this state for compensation without securing and having in full force a license issued by:
> 1. The *welfare division* of the department of health, welfare and rehabilitation. * * * (Italics added.)

However, there was an exception to the licensing of child care facilities. NRS 424.120, subsection 2, allowed a county or incorporated city to license child care facilities in compliance with the provisions of NRS 424.160.

NRS 424.160 provided:

> The provisions of NRS 424.110 to 424.150, inclusive, shall not apply in any county or incorporated city where the governing body has established a licensing agency and enacted an ordinance requiring that such child care facilities be licensed by such county or incorporated city. Such licensing agency shall make such rules and regulations as may be necessary for the licensing of child care facilities, which rules and regulations shall take effect from and after their approval by the *welfare division* of the department of health, welfare and rehabilitation. (Italics added.)

Effective July 1, 1971, both Senate Bill No. 337 and Assembly Bill No. 702 transfer licensing and regulating responsibilities over all these facilities, except foster homes, to the State Health Division.

Senate Bill No. 337, Section 3, amends NRS 424.120 to read:

> It is unlawful for any person to operate a child care facility in this state for compensation without securing and having in full force a license issued by:
> 1. The *health division* of the department of health, welfare and rehabilitation; or
> 2. A county or incorporated city in compliance with the provisions of NRS 424.160. (Italics added.)

Section 7 of Senate Bill No. 337 amends NRS 424.160 to require approval of county licensing regulations by the *Health Division* instead of the Welfare Division.

However, Assembly Bill No. 702, Section 5, amended NRS 449.020 to delete the definition of a hospital. NRS 449.020, as amended, now reads:

> As used in NRS 449.020 to 449.240, inclusive, and sections 2 and 3 of this act, "health and care facility" means any institution, place, building or agency which maintains and operates facilities for the diagnosis, care and treatment of human illness, including convalescence, and *including group care, residential child care and child day care centers.* (Italics added.)

NRS 449.037 was amended by Assembly Bill No. 702, Section 8, to delete the term "hospital." NRS 449.037, as amended, now provides:

> The state board of health shall have the following powers:
> 1. To adopt licensing standards for each class of *health and care facility* covered by NRS 449.020 to 449.240, inclusive, and sections 2 and 3 of this act, after considering the recommendations of the health facilities advisory council. (Italics added.)

* * * * *

NRS 449.080, as amended by Assembly Bill No. 702, Section 13, now provides:

> Upon the filing of the application for license provided for, and full compliance with the provisions of NRS 449.020 to 449.240, inclusive, and sections 2 and 3 of this act, and the rules and regulations promulgated under NRS 449.020 to 449.240, inclusive, and sections 2 and 3 of this act, by the health division, *the health division shall issue to the applicant the license applied for*. (Italics added.)

The inclusion of "residential child care" and "child day care" centers in the definition of "health and care facility" in NRS 449.020, as amended, which applies to NRS 449.020 to 449.240, inclusive, results in an apparent conflict between the provisions of NRS 449.080 and the provisions of NRS 424.120, subsection 2, and 424.160. This is because NRS 449.080 provides that the Health Division shall issue licenses to a "health and care facility" and NRS 424.120, subsection 2, provides that a county or incorporated city which complies with the provisions of NRS 424.160 may license its child care facilities.

Therefore, the applicable rule of statutory construction would require that apparent conflicts be avoided where possible. The apparent conflict can be resolved by reading the two bills together so that Senate Bill No. 337 modifies Assembly Bill No. 702 to maintain the county or incorporated city's responsibility for the licensing of child care facilities if they meet the requirements of NRS 424.160.

CONCLUSION

Thus, the Health Division has been given, effective July 1, 1971, the responsibility to license all child care facilities, including child day care centers, except as a county or incorporated city licenses them pursuant to NRS 424.120, subsection 2, and 424.160 under Health Division approved

rules and regulations. Therefore, the local licensing agency of Clark County may license child day care centers once its rules and regulations have been approved by the Health Division.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Robert E. Holland
Deputy Attorney General

By: Henry W. Cavallera
Deputy Attorney General

OPINION NO. 71-34 PROSTITUTION—NUISANCE—ABATEMENT OF—NRS 201.380 and 201.390 do not affect or lessen duty of county commissioners (under NRS 244.360) to order abatement of prostitution as a public nuisance; it is not necessary that complainant of a nuisance be specially damaged by alleged nuisance; that the county commissioners must act on complaint of one person, if satisfied nuisance does exist, is not a delegation of the legislative power; once county commissioners have ordered district attorney to serve notice of abatement district attorney need not secure subsequent authorization of commissioners

to enforce abatement notice by court action and injunction; a temporary cessation of public nuisance within the 5-day period does not bar court action to enforce original abatement notice.

Carson City, July 27, 1971

The Honorable Stanley A. Smart, District Attorney of Lyon County, Yerington, Nevada 89447

Dear Mr. Smart:

You have informed this office that: the Board of County Commissioners of Lyon County, pursuant to written complaints demanding that all houses of prostitution in Lyon County be closed, and in accordance with NRS 244.360, entered an order directing you to notify the persons responsible therefor to abate the same; on February 23, 1971, a notice to abate said nuisance within 5 days of service was served on the owners of record of the premises complained of; on March 1, 1971, being 5 days later, excluding day of service, the Lyon County Sheriff inspected the premises in question which disclosed no evidence of prostitution being conducted thereon; continuing investigation thereafter of these premises disclosed that by April 6, 1971 the houses of prostitution were back in full operation; at the next meeting of the county commissioners of April 20, 1971, you requested permission to commence court actions against each of the houses to enforce the notice of abatement and permanently abate the nuisances; after being advised by you that the board could order such legal action, the board declined to authorize such court action and instead entered an order directing you to serve new abatement notices on each house of prostitution.

From the foregoing facts you have posed six questions for opinion by this office:

QUESTIONS

1. Do NRS 201.380 and 201.390 affect or in any way lessen the duties imposed upon the board of county commissioners by NRS 244.360 in the suppression and abatement of houses of prostitution as public nuisances?
2. Should the last sentence of NRS 40.140 be read into NRS 244.360 thus requiring a complaint from a property owner adversely affected by a house of prostitution before action is required by the board of county commissioners?
3. Does NRS 244.360 require action on the part of the board of county commissioners based upon the complaint of one individual, and, if so, is the granting of such power to a single individual a legal exercise of the legislative power?
4. Does NRS 244.360 require the district attorney to secure additional permission from the board of county commissioners to file a lawsuit seeking an abatement of a public nuisance once an original order has been entered by the commissioners directing that abatement notices be served?
5. Is it proper, under NRS 244.360, for the board of county commissioners to deny the district attorney permission to file the lawsuit directed under the provisions of that section once a request for such permission has been made by the district attorney indicating a violation of abatement notices previously served?
6. Does the temporary abatement of a public nuisance within the 5-day limitation prescribed by NRS 244.360 prevent a lawsuit against the person or persons maintaining the nuisance should the operation be recommenced at a later time, or whether under such circumstances the only alternative is to serve new notices of abatement?

QUESTION NO. 1—ANALYSIS

Do NRS 201.380 and 201.390 affect or in any way lessen the duties imposed upon the board of county commissioners by NRS 244.360 in the suppression and abatement of houses of prostitution as public nuisances?

NRS 201.380 prohibits, as unlawful, the location of houses of prostitution within 400 yards of a schoolhouse or church. NRS 201.390 prohibits such houses fronting on the principal business street or thoroughfare of a town.

The question as posed suggests the further inquiry of whether these two statutes by inference make lawful houses of prostitution located more than 400 yards from a school or church or situated on other than the principal business street or thoroughfare, and whether the county commissioners' duty to abate such houses as nuisances under NRS 244.360 is thereby removed.

This very question was answered in the negative by the Nevada Supreme Court in *Cunningham v. Washoe County*, 66 Nev. 60. There the defendant argued that the Legislature by outlawing houses of prostitution within 400 yards of a school or church or on the principal business street clearly and unequivocally repudiated the common law which made houses of prostitution unlawful wherever they might be located. The Supreme Court rejected this contention saying (at page 65):

> The maintenance and operation of a house of prostitution in question being a nuisance under the common law and being within the
>
> definition of a nuisance as found in N.C.L., Section 9051 (predecessor of Section 40.140, Nevada Revised Statutes) as being something "which is injurious to health or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" and not being authorized by statute, either expressly or by plain or clear or unequivocal or necessary implication, it was properly enjoined and restrained by the district court.

The Nevada Supreme Court concluded that:

> The penal statutes mentioned in this opinion clearly negative any implication that the legislature, by making it a penal offense to operate a house of prostitution within 400 yards of a school or church, intended so to modify existing law as to declare it lawful when operated elsewhere.

QUESTION NO. 1—CONCLUSION

NRS 201.380 and 201.390 do not therefore affect or lessen in any way the duty of county commissioners under NRS 244.360 to abate prostitution as a public nuisance.

QUESTION NO. 2—ANALYSIS

Should the last sentence of NRS 40.140 be read into NRS 244.360 thus requiring a complaint from a property owner adversely affected by a house of prostitution before action is required by the board of county commissioners?

The nuisance which the county commissioners are under a duty to abate is a nuisance as defined by NRS 40.140.

NRS 40.140 generally describes a "nuisance" as that which is injurious to health, offensive to the senses, or otherwise interferes with use of one's property. The last sentence provides that anyone whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance may bring an action to abate it and recover damages as well.

American Jurisprudence (Vol. 39, Nuisances § 2) defines a "public nuisance" as:

> Something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public.

The definition of nuisance in the Nevada statute is similar with the above definition of public nuisance. Thus, the nuisance defined in NRS 40.140 is a "public" nuisance. Prostitution is a public nuisance. *Cunningham v. Washoe County*, supra, p. 66.

It was said in *Fogg v. N.C.O. Railway*, 20 Nev. 429, that to enable the plaintiff to maintain an action to restrain a nuisance "it must be clearly shown that they have sustained, or will sustain, a special and peculiar injury, irreparable in its nature, and different in kind from that sustained by the general public * * * this rule * * * is universal." (p. 435.)

The appellant argued in the *Fogg* case that Gen. Stat. 3273 (predecessor of NRS 40.140) changed this universal rule. But the court said the statute simply affirmed the universal rule.

However, if the alleged nuisance constitutes an injury to one's health,

or is indecent or offensive to the senses, or creates an obstruction to the right of enjoyment and use of the property of individuals which is common to them, then the nuisance becomes as to them a private nuisance, constituting a special and peculiar injury, distinct from that of the public, for which they can maintain an action under the last sentence of NRS 40.140. *Fogg v. N.C.O. Railway*, supra, p. 440.

In *Farmer v. Behmer*, 100 Pac. 901, 903, the court construed § 731 of the California Civil Code (identical to NRS 40.140). It held the complaint by an abutting landowner to abate a house of prostitution charging an injury from a public nuisance, was as to the plaintiff fully shown by averments to be a private nuisance.

It is not every nuisance complained of in writing which the commissioners must abate. NRS 244.360 imposes on the commissioners the duty to abate those nuisances which are public.

The county commissioners are also required to abate a nuisance wherever they shall have knowledge "by personal observation or other satisfactory evidence" that it exists within the county.

Another source of possible satisfactory evidence and hence "knowledge" by them is the written complaint of a citizen, whether an injuriously-affected property owner or not, whether the complainant's health is injured or not.

Since the county commissioners cannot reasonably be charged with personal knowledge of conditions throughout the county, the Legislature has provided this additional method of a resident of the county informing the board that a nuisance does exist. It may or may not as to the complainant be a private nuisance. It may be both. The difference between a public and private nuisance does not consist in any difference in the nature or character of the thing complained of, but in the extent or scope of its injurious effect. 39 Am.Jur. Nuisances § 7, p. 284.

It devolves upon the commissioners, upon receipt of a written complaint, to determine if it is a public nuisance. Insofar as prostitution may be the subject of a written complaint, nothing is left to the discretion of the commissioners for prostitution is a public nuisance and a nuisance per se. *Cunningham v. Washoe County*, supra; 24 Am.Jur.2d Disorderly Houses § 10.

QUESTION NO. 2—CONCLUSION

The county commissioners must act under NRS 244.360 to abate a house of prostitution when complained of in writing by any resident of the county since prostitution is a public nuisance per se.

QUESTION NO. 3—ANALYSIS

Does NRS 244.360 require action on the part of the board o
f county commissioners based upon the complaint of one individual, and, if so, is the granting of such power to a single individual a legal exercise of the legislative power?

As already noted, prostitution is a nuisance per se and the county commissioners must act to abate it as a public nuisance solely upon the written complaint of one person *if* the commissioners shall acquire knowledge from the complaint, that prostitution does, in fact, exist within the county.

NRS 244.360 requires that the commissioners "shall have knowledge"

derived from a written complaint. The commissioners should not willy-nilly enter abatement orders based on a complaint containing nothing more than a bare assertion that a nuisance does exist. NRS 244.360 contemplates that the commissioners may secure knowledge from their own personal observation or "other satisfactory evidence."

Presumably, as reasonable men, they should cause some investigation to be made. If, as a result, they acquire knowledge that the nuisance does exist, as alleged, their discretion is at an end. The statute commands the immediate entry of order directing the district attorney to issue the notice of abatement.

It should be noted at this point that the Legislature has removed any doubts as to what disposition is to be made of a complaint by enacting Senate Bill No. 435 at the 1971 Session, which becomes effective July 1, 1971, and which provides for notice and formal hearing on the complaint.

The question further characterizes the lodging of a written complaint by one who may not be injuriously affected as the exercise of a "power" which may be an unconstitutional delegation of the legislative power.

The nature of the power involved is, of course, the police power. The State in the exercise of its police power, has authority to prevent or abate nuisances, and subject to constitutional limitations, has authority to declare what shall be deemed nuisances and to provide for their suppression. 39 Am.Jur. Nuisances § 12.

The legislative power to combat nuisances may be delegated to political subdivisions concerned with governing matters local in scope. 16 Am.Jur.2d Constitutional Law § 250.

NRS 244.360 is a complete expression of legislative will upon the control of public nuisances. It does not vest authority in anyone to prescribe what is or is not a public nuisance. Only the duty of executing the law in the manner specified therein is delegated to the county commissioners. The power to legislate on the control and suppression of public nuisance still reposes in the Legislature.

It is the nature of the legislative power, and not the liability of its use or the manner of its exercise, which determines the constitutionality of legislative delegation. 16 Am.Jur.2d Constitutional Law § 242.

QUESTION NO. 3—CONCLUSION

NRS 244.360 requires the county commissioners to act to abate a public nuisance upon the written complaint of an individual if as a result of such complaint they acquire knowledge that such nuisance actually exists within the county. That the initiative for setting into motion the abatement procedure can also be commenced by an individual complaint is not a delegation of the legislative power.

QUESTIONS NOS. 4 AND 5—ANALYSES

4. Does NRS 244.360 require the district attorney to secure additional permission from the board of county commissioners to file a lawsuit seeking an abatement of a public nuisance once an original order has been entered by the commissioners directing that abatement notices be served?

5. Is it proper, under NRS 244.360, for the board of county commissioners to deny the district attorney permission to file the lawsuit

directed under the provisions of that section once a request for such permission has been made by the district attorney indicating a violation of abatement previously served?

These questions are considered together since each is concerned with the nature and efficacy of the commissioners' order and the district attorney's notice of abatement issued in compliance therewith.

NRS 244.360 requires that the commissioners' order direct the district attorney to notify those responsible to abate the nuisance. Once the notice is prepared and served, the district attorney has complied with the order.

The statute, without further recourse to the commissioners, directs and empowers the district attorney to enforce the abatement notice in court. Had the Legislature wanted the commissioners to direct the district attorney to enforce their order by court action it would have used the word "directing" a second time instead of "the district attorney is directed."

Thus, it is not to the board but to the statute that the district attorney must look. NRS 244.360 commands him to enforce his abatement notice by court action. It would be contrary to our political system of separated powers to say that a legislative mandate depended upon the approval of a local governmental unit.

Even assuming the view of the board's order as also "directing the district attorney * * * to bring an action," there would be no need to seek further direction of the board. The necessary direction would already be in the commissioners' order.

Does the language in NRS 244.360 that such enforcement action "shall be under the control of the board * * * in like manner as other suits to which the county is a party * * *" give the commissioners any discretion in the matter? NRS 244.165 vests the board of county commissioners with the power to "control the prosecution and defense of all suits to which it is a party."

No court has held that this or similar statutes in other states vests the commissioners with absolute discretion of deciding whether or not to bring or defend an action. *State v. Central Pac. R.R.*, 9 Nev. 79, held that absent express statutory authority, the county commissioners could not agree with the defendant railroad to compromise a suit instituted by the district attorney to collect delinquent property taxes.

Other cases, *Ellis v. Washoe County*, 7 Nev. 291, *Clarke v. Lyon County*, 8 Nev. 181, and *Merced County v. Cook*, 52 Pac. 721, have construed this power to control as generally permitting the hiring of counsel to assist the district attorney. The *Ellis* case held that litigation can only be controlled by means of attorneys having authority to appear in court. In *Merced* the California Supreme Court said of a statute which not only gave the board of supervisors power "to direct and control," but also power "to employ counsel to assist the district attorney," that:

> * * * the district attorney of the county is the officer authorized by law to take charge of and conduct such litigation. He is an officer of the county elected by the people for that purpose, and no board of supervisors has the arbitrary power to displace him in the conduct of its litigation and substitute other attorneys. (p. 722.)

QUESTIONS NOS. 4 AND 5—CONCLUSION

NRS 244.360 does not require the district attorney to secure permission of the board of county commissioners to bring an action in court to enforce his notice of abatement served pursuant to direction of the order of the board. There being no legal requirement to first secure such permission an answer to Question No. 5 is not necessary.

QUESTION NO. 6—ANALYSIS

Does the temporary abatement of a public nuisance within the 5-day limitation prescribed by NRS 244.360 prevent a lawsuit against the person or persons maintaining the nuisance should the

operation be recommenced at a later time, or whether under such circumstances the only alternative is to serve new notices of abatement?

For consideration is whether or not a nuisance is deemed abated within the meaning and purview of NRS 244.360 when it ceases to exist within the 5-day period but thereafter commences again.

The statute provides that if the *notice* is not obeyed the district attorney is directed to bring an action to enforce the same. It is not the commissioners' order which is to be obeyed. Obedience to the district attorney's notice of abatement is required.

The notices of abatement served in the present cases call for the permanent abatement and permanent cessation of operation of the houses of prostitution. The notices further admonish that failure to cease operation and permanently abate the nuisance, or that the reopening and recommencement of prostitution upon the premises, will result in court action to abate the nuisance.

"Abate" means to put an end to. The notice of abatement is aimed at putting an end to prostitution on these premises—not a temporary ending—but a permanent ending. The statute contemplates a lasting abatement and the notice is in harmony with this statutory purpose.

It follows that where the same nuisance originally complained of is soon recommenced on the same premises it cannot be said to have ever been abated within the contemplation of NRS 244.360. To say that a temporary abatement within the 5-day period satisfies the statute would render it ineffectual.

True, the statute does not specify that the nuisance may be enjoined in the action. Strictly speaking, the words "abate" and "enjoin" have technically different meanings under a statute authorizing the bringing of an action to abate a nuisance. But it has been repeatedly held that under such a statute the court may enjoin the nuisance. 39 Am.Jur. Nuisances § 171.

Nor would discontinuance of the nuisance by the defendant after court enforcement proceedings are begun necessarily deprive the court of authority to enjoin the nuisance. The court may still grant the injunction depending on the good faith of the defendant and attendant circumstances. It has been held error to refuse injunction where the defendant was acting out of malice and there is nothing to show he will not repeat the nuisance if not restrained by injunction. 39 Am.Jur. Nuisances § 162.

QUESTION NO. 6—CONCLUSION

A temporary cessation of a public nuisance within the 5-day period is not the permanent abatement contemplated by NRS 244.360. A new

abatement notice is not required. The original notice of abatement may be enforced by court action.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-35 PUBLIC SCHOOLS—The test for a school's authority to discipline is the effect of the student's antisocial conduct on the order and discipline of the school.

Carson City, July 26, 1971

Mr. Robert L. Petroni, Legal Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

This is in response to your request for a clarification of Attorney General's Opinion No. 384, dated February 8, 1967, and Opinion No. 625 dated October 29, 1969.

QUESTION

May school authorities discipline students for infractions off school grounds?

ANALYSIS

Attorney General's Opinion No. 384, dated February 8, 1967, came to the following conclusion:

> It is the opinion of this office that school authorities do not have the authority to discipline, suspend, or expel a student whose designated infraction occurs off school property. To sanction such a philosophy would unduly extend the jurisdiction of school authorities into a realm that is properly that of the municipalities or political subdivisions in which the school (or schools) is located.

This opinion was followed by Attorney General's Opinion No. 388, dated February 23, 1967. This second opinion expanded the earlier conclusion to indicate that students under the authority of the school and on the way to and from school are subject to the school's discipline.

Attorney General's Opinion No. 625, dated October 29, 1969, reverted to reliance on where the act was committed in coming to the following conclusion:

> It is therefore the opinion of this office that a student should not be suspended from engaging in any school activity because of a criminal charge involving an act committed off school property, pending a determination of guilt or innocence by a court of competent jurisdiction.

The school code has several references to the school's responsibility and authority in regard to student discipline. The school has authority to

discipline students who do not comply with reasonable and ordinary rules of order in NRS 392.030:

> The board of trustees of a school district may suspend or expel or any principal or administrator may suspend from any public school within the school district any pupil who will not submit to reasonable and ordinary rules of order and discipline.

This statute does not limit the school's authority to infractions on the school property. The law does presume adoption of "reasonable and ordinary rules of order and discipline" as a prerequisite to disciplinary action.

The school personnel are vested with peace officer authority by NRS 392.460, as follows:

> 1. Members of every board of trustees of a school district, superintendents of schools, principals and teachers have concurrent power with peace officers for the

protection of children in school and *on the way to and from school*, and for the enforcement of order and discipline among such children.

2. Subsection 1 shall not be construed so as to make it the duty of superintendents of schools, principals and teachers to supervise the conduct of children while not on the school property. (Italics added.)

This statute explicitly extends the school's authority to protect children "on the way to and from school." This gives the school clear authority to discipline students for infractions of reasonable rules for protection of children en route to and from school.

The statutes do not give consideration to property lines, but more appropriately to the school's basic interest in discipline. The statutes further envision the adoption of reasonable regulations and the student's being fully aware of the regulations. "Reasonable regulations" means regulations directed particularly at accomplishing what the school has a legitimate interest in accomplishing: school discipline and order. The law is accurately summarized in 79 C.J.S. Schools and School Districts § 496, as follows:

> [T]he connection between the prohibited acts and the discipline and welfare of the school must be direct and immediate, not remote or indirect.

CONCLUSION

Schools may promulgate rules and regulations concerning conduct of students both on and off the school property, so long as they directly concern order and discipline for legitimate school functions. The school's regulations must be narrowly drawn so that they do not attempt to regulate the student's conduct while he is under the control of the parent and remote to the school's authority and responsibility for discipline.

Respectfully submitted,

ROBERT LIST
Attorney General

By Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-36 COUNTY HOSPITALS; INDIGENTS—County hospitals must give notice to the county of residence of nonresident indigents at the time of admission.

Carson City, July 26, 1971

The Honorable Charles B. Evans, Jr., District Attorney, Eureka County, Eureka, Nevada 89316

Dear Mr. Evans:

This is in reply to your request for an opinion concerning interpretation of NRS 450.400, subsection 1.

QUESTION

How long after privileges and use of a hospital have been extended to a nonresident indigent patient does the governing head of the hospital have to notify the county of the indigent's residency?

ANALYSIS

NRS 450.400 reads:

> 1. When the privileges and use of the hospital are extended to a resident of another county who is entitled under the laws of this state to relief, support, care, nursing, medicine, medical or surgical aid from such other county, or to one who is injured, maimed or falls sick in such other county, *the governing head shall immediately notify* the board of county commissioners of such county.
> 2. The notice shall be in writing and addressed to the board of county commissioners of such county.
> 3. The board of county commissioners receiving the notice shall cause such person to be removed immediately to that county, and shall pay a reasonable sum to the hospital for the temporary occupancy, care, nursing, medicine, and attendance, other than medical or surgical attendance, furnished such person.
> 4. If the board of county commissioners shall neglect or refuse to remove such person, or if in the opinion of the attending physician it is not advisable to remove such person, the governing head shall have a legal claim against the county for all occupancy, nursing, care, medicine, and attendance, other than medical or surgical attendance, necessarily furnished, and may recover the same in a suit at law. (Italics added.)

Please note that the notice *shall* be sent immediately to the commissioners of the resident county, *in writing.* It is apparent that the notice is intended to enable the commissioners of the resident county to remove the patient to the local hospital. The purposes of this provision are many, the most prominent being to bring the hospitalized person closer to his family and friends, as well as to utilize the local facilities for the purpose for which they were constructed.

The Nevada Supreme Court, in the case of *County of Lander v. Board of Trustees of the Elko General Hospital*, 81 Nev. 354, 403 P.2d 659 (1965), interpreted the statute here in question. Justice Badt considered the validity of a notice given by the Elko hospital on March 8, 1963, concerning a Lander County resident admitted on March 6, 1963. Justice Badt held, at page 358, as follows:

> The notice addressed to the Board of County Commissioners of Lander County complied in all respects with the requirements of the statute.

In this case, one of the reasons for the court's tolerance of the 2-day delay in giving notice to the resident county is the fact that there was some uncertainty as to the patient's indigency.

An additional significant holding of the Lander County case is that the original determination of indigency is to be made by the hospital. In view of this, it is apparent that in the vast majority of cases there would be no reason for the hospital to delay giving notice after the time of admission.

It would be highly questionable if a hospital could legally enforce a claim against the indigent's county of residence where the notice requirements of NRS 450.400 were not strictly met.

CONCLUSION

In view of the overall purpose of NRS 450.400 and the specific notice requirements of that statute, it is the opinion of this office that any notice given to the county of residency of indigent patients must be given forthwith upon admission unless unique or frustrating circumstances occur.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-37 SCHOOL DISTRICTS; GRANTS, CRIME COMMISSION—The Clark County School District is a "unit of general local government" for the purpose of allocating funds under the Omnibus Crime Control Act.

Carson City, July 29, 1971

Mr. Robert L. Petroni, Legal Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

The Clark County School District has made a request for a grant of funds from the State Commission on Crimes, Delinquency and Corrections under the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Omnibus Crime Control Act of 1970. It seeks to have the commission recommend that funds be allocated to the Clark County School District for the institution of programs related to juvenile parole tutoring directly connected to the Nevada Youth Training Center at Elko, Nevada, riot and vandalism control directly connected to the duties of the Las Vegas Police Department, and the detection of predelinquent juveniles within the realm of the Juvenile Court Services of Clark County. You have asked for our opinion on the following question:

QUESTION

Is the Clark County School District a unit of general local government so as to qualify for funds under grants provided under the Omnibus Crime

Control and Safe Streets Act of 1968, as amended by the Omnibus Crime Control Act of 1970?

ANALYSIS

Under NRS 386.010, subsection 4, school districts are made political subdivisions of the State. It reads:

> Each county school district created by this chapter and each joint school district which may hereafter be created is hereby declared to be a political subdivision of the State of Nevada whose purpose is to administer the state system of public education.

NRS 216.075 defines what a unit of local government is for the purposes of allocating funds under the Crime Control Act by the State Commission on Crimes, Delinquency and Corrections:

> "Unit of general local government" means any political subdivision or Indian tribe which performs law enforcement functions.

Although it appears that the Clark County School District is not a political subdivision which performs law enforcement functions, a broad reading of the federal and state statutes would indicate otherwise. The Omnibus Crime Control and Safe Streets Act of 1968 (82 Stats. 197, P.L. 90-351), Title I, Section 304, reads as follows:

> State planning agencies shall receive applications for financial assistance from units of general local government and combinations of such units. When a state planning agency determines that such an application is in accordance with the purposes stated in section 301 and is in conformance with any existing statewide comprehensive law enforcement plan, the state planning agency is authorized to disburse funds to the applicant.

Section 301(b)(6) of said act provides for furthering:

> (6) The organization, education and training of regular law enforcement officers, special law enforcement units and law enforcement reserve units for the prevention, detection and control of riots and other violent civil disorders, including the acquisition of riot control equipment.

Section 301(b)(9) of said act, as amended by the Omnibus Crime Control Act of 1970 (84 Stats. 1880, P.L. 91-644), provides for furthering:

> (9) The development and operation of community based delinquent prevention and correctional programs, emphasizing halfway houses and other community based rehabilitation centers for initial preconviction of postconviction referral of offenders; expanded probationary programs, including paraprofessional and volunteer participation; and community service centers for the guidance and supervision of potential repeat youthful offenders.

Section 601(a) of said act, as amended by the Omnibus Crime Control Act of 1970, provides:

> Law enforcement means any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or
> reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies, activities of corrections, probation or parole authorities, and *programs relating to the prevention, control, or reduction of juvenile delinquency* or narcotic addiction. (Italics added.)

The Clark County School District is proposing programs that would make it a "political subdivision * * * which performs law enforcement functions" under the provisions of the federal and state statutes. Developing and maintaining programs for the tutoring of juvenile offenders, detection of predelinquent juveniles by teachers and school officials, and training of special police units for riot and vandalism control are clearly law enforcement functions under Title I, Section 601(a) of the Omnibus Crime Control Act (which are within the stated purposes of Title I, Section 301(b)(6) and (9) so as to qualify for funds under Section 304). Moreover, the school district is the most appropriate unit of local government to initiate such programs. Its facilities,

personnel and close proximity to the problems of vandalism, school riot control and juvenile delinquency make it uniquely qualified to institute programs for training of law enforcement units, juvenile parole tutoring, and detection of predelinquent juveniles.

CONCLUSION

Since the proposed programs do serve law enforcement functions as contemplated under the above cited state and federal statutes and since the school district is a political subdivision of the State, it is the opinion of this office that the Clark County School District is a "unit of general local government" for the purpose of allocating funds under the Omnibus Crime Control Act.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Herbert F. Ahlswede
Chief Deputy Attorney General
Criminal Division

OPINION NO. 71-38 MINING CLAIMS—Certificates of location recorded after July 1, 1971, must be accompanied by the new fee and map. The fees provided in NRS 247.305 apply to claim maps to be filed by September 1, 1972.

Carson City, August 2, 1971

Miss Patricia J. Stanley, Recorder of Douglas County, P.O. Box Q, Minden, Nevada 89423

Dear Miss Stanley:

This is in reply to your inquiry of July 23, 1971, requesting interpretation of the new mining law (Chapter 680 of the 1971 Statutes of Nevada—Assembly Bill No. 766).

QUESTIONS

1. Must a person pay the new fees and file two maps as required by the new law if he has filed a location notice and done location work prior to July 1, 1971, pursuant to the old law?
2. May county recorders charge the fees provided by NRS 247.305 for recording maps required by NRS 517.230 (claim maps).

ANALYSIS

The new mining law was signed by the Governor on May 7, 1971, and became effective July 1, 1971. The requirements for filing a map and paying larger filing fees therefor also became effective on July 1, 1971. (See NRS 517.040, 517.080, 517.100, 517.140, and 517.170.)

The location certificates filed after July 1, 1971 must indicate that the location work, consisting of making the map and filing it with the fee, has been done (see NRS 517.050 and 517.080), or the maps and fees must accompany the certificates (see NRS 517.080, 517.140, and 517.170).

The Legislature has made no provision for exempting locators from the larger fee and filing of maps where they have filed a location notice prior to July 1, 1971. The filing of a location notice is purely optional with the locator, and in no way contributes to the State's requirements for a valid mining claim location.

The requirements for filing maps for claims located prior to July 1, 1971 are found in NRS 517.230. There is no provision in this statute for charging a fee. Where there is no specific provision for a recording fee, there is a catch-all provision in NRS 247.305. This provision would clearly apply to the claim maps required prior to September 1, 1972.

CONCLUSION

All mining claim locators who need to file a certificate of location after July 1, 1971, in order to complete their mining claim location, must tender the proper fees and two copies of the map as required after July 1, 1971. The fee schedule of NRS 247.305 would apply to the claim maps required to be filed by September 1, 1972.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-39 IMMUNIZATION LAWS—Only children enrolling in a public or private school within this State for the first time after July 1, 1971, must submit certificates of immunization or additional certificates of immunization when new immunization requirements are added after July 1, 1971. State Health Officer may exempt female children capable of childbearing from receiving rubella immunizations.

Carson City, August 3, 1971

Dr. John H. Carr, State Health Officer, Nye Building, Carson City, Nevada 89701

Dear Dr. Carr:

This is in reply to your request for an opinion concerning immunization of school-aged children.

QUESTION NO. 1

Do the provisions of Chapter 504 of the 1971 Statutes of Nevada (Assembly Bill No. 713), relating to the immunization of school-aged children, apply to all children who were enrolled in a public or private school within the State on the effective date of said bill, July 1, 1971, or only to those children who are enrolled in a public or private school within the State for the first time after the effective date of said bill?

ANALYSIS

The four sections of Chapter 504 of the 1971 Statutes of Nevada which are germane to the issue presented are Sections 2, 6, 9, and 13. Sections 2 and 9 and Sections 6 and 13 are identical; Sections 2 and 6 refer to public schools and Sections 9 and 13 refer to private schools.

Section 2 provides:

> Sec. 2. 1. Within 3 months after any child is enrolled in a public school within this state for the first time, his parents or guardian shall submit to the board of trustees of the school district in which the child resides a certificate or certificates stating that the child has been immunized and has received or is in the process of receiving proper boosters for such immunization or is in the process of being immunized for the following diseases:
>
> (a) Diphtheria;
> (b) Tetanus;
> (c) Pertussis, if the child is under 6 years of age;
> (d) Poliomyelitis;
> (e) Rubella; and
> (f) Such other diseases as the board of trustees may determine.
>
> 2. The certificate or certificates required in subsection 1 shall show that such required immunization vaccines and boosters were given, and shall bear the signature of the licensed physician or registered nurse who administered such vaccines or boosters. If records are not available from a licensed physician or registered nurse, a sworn statement from the parent or guardian shall suffice.

and Section 6 of said chapter provides:

> Sec. 6. If, after a child has been enrolled in a public school and before registration for any subsequent school year additional immunization requirements are provided by law, the child's parents or
> guardian shall submit an additional certificate or certificates to the board of trustees stating that such child has met the new immunization requirements.

While Section 6 refers to a child that has already been enrolled in a public school, the phrase "within this state for the first time" is not included after the phrase "public school" in Section 6, as it is in Section 2. The provisions of Section 6 do not lend themselves to the interpretation that children enrolled prior to July 1, 1971, must submit certificates of immunizations required of children entering public schools within the State for the first time subsequent to July 1, 1971, pursuant to the provisions of Section 2.

Section 6 requires that "an additional certificate or certificates" be submitted only if "additional immunization requirements" are provided by law after a child has been enrolled in a public school. The use of the phrases "additional certificates" and "additional immunizations" by the Legislature in Section 6 are indicative of its intent as to the applicability of the provisions of said section.

The term "additional" is defined in Black's Law Dictionary, Fourth Edition, as follows:

> This term embraces the idea of joining or uniting one thing to another, so as thereby to form one aggregate.

Nevada case law has held that "in an interpretation of a statute, where the intent of the legislature is in doubt, rules of statutory construction may be resorted to, among which are: (1) That entire act must be looked to; (2) that the punctuation and grammatical construction are only aids where doubt exists as to legislative intent; and (3) that act must be construed so as to meet plain, evident policy and purview of the act and bring it within the intention which the legislature had in view at the time it was enacted." *Ex parte Iratacable*, 55 Nev. 263, 30 P.2d 284 (1934), cited, *Western Pac. R.R. v. State*, 69 Nev. 66, at 69, 241 P.2d 846 (1952). Hence, reading

Sections 2 and 6 together, in light of the aforementioned definition of the term "additional" and Nevada case law, the additional immunization requirements provided by law in Section 6 after a child has been enrolled in a public school then in effect become a part of the enumerated immunization requirements in Section 2. This reasoning is also applicable to the additional certificate requirement.

Therefore, the additional immunization and certificate requirements logically refer back to the initial requirements in Section 2, and become a part thereof, in determining the applicability of the phrase "after a child has been enrolled in a public school," as used in Section 6.

A fortiori, if immunization and certificate requirements of Section 6 are in addition to the immunization and certificate requirements of Section 2, then the phrase "after a child has been enrolled in a public school" as used in Section 6 should logically be in reference to a child who has enrolled in a school for the first time after the effective date of Chapter 504 of the 1971 Statutes of Nevada, and subsequent to his enrollment, new immunization requirements have been permitted by law, thereby requiring such child to submit additional certificates. To interpret this phrase otherwise would result in children enrolled prior to July 1, 1971, being only responsible for submitting certificates for the additional immunization requirements of Section 6 and not those immunization requirements enumerated

in Section 2. Upon reading Chapter 504 (Assembly Bill No. 713) in its entirety, it is evident that this latter interpretation is clearly not within the legislative intent.

In further support of the above reasoning is the fact that in the past there has been no state law requiring that all children enrolling in a public school for the first time or children already in attendance at a public school be required to submit certificates of immunization for certain diseases as a prerequisite to enrollment or registration for a subsequent school year. The school districts within the State have had the discretionary authority in the past under the provisions of NRS 392.430 to require certain immunization requirements, including the submission of certificates in proof thereof as a prerequisite for enrollment purposes, but they have failed to so act. NRS 392.430 provides in part:

> The board of trustees of a school district shall have power:
> 1. To make and enforce necessary regulations for sanitation in the public schools and to prevent the spread of contagious and infectious diseases therein.

Therefore, in view of the fact that there has been no mandatory requirements for immunization as a prerequisite to enrollment, it is tenuous to argue that the Legislature intended by the use of the phrases "additional immunization" and "additional certificates" in Section 6, to mean that immunization and certificate requirements set forth in Section 2 are in fact in addition to existing immunization and certificate requirements and consequently apply to all students enrolled in public schools within the State even though they were enrolled prior to July 1, 1971. Instead, it is evident from the foregoing that the Legislature intended that the "additional immunization" and "additional certificates" provisions of Section 6 be in addition to the immunization and certificate requirements of Section 2.

It should be noted that the provisions of Section 2 of Chapter 504, authorize the board of trustees of a school district, at its discretion, to add any other diseases to those enumerated therein. Furthermore, as pointed out earlier, under the provisions of NRS 392.430, supra, which became law in 1956, the board of trustees of any school district within the State may require *all* children enrolled in a public school to be immunized against contagious and infectious diseases notwithstanding the provisions of Chapter 504 of the 1971 Statutes of Nevada, which apply only to those students enrolling in a public or private school within the State for the *first* time.

CONCLUSION

This office concludes that the immunization provisions of Chapter 504 of the 1971 Statutes of Nevada apply only to those children who enroll in a public or private school within the State for the first time after July 1, 1971.

QUESTION NO. 2

Does the State Health Officer, as a licensed physician within the State of Nevada, have the authority under the provisions of Sections 4 and 11 of Chapter 504 of the 1971 Statutes of Nevada (Assembly Bill No. 713) to issue a memorandum to all the school districts within the State exempting female children capable of bearing children from receiving rubella immunizations?

ANALYSIS

In response to this inquiry, this office, after conferring with members of the medical profession and conducting its own research concerning the possibility of adverse effects to children born of young girls immunized for rubella, is of the conclusion that the State Health Officer, as a licensed physician within the State of Nevada, does have the authority to issue such a memorandum under the provisions of Sections 4 and 11 of Chapter 504. Under these sections, a child may be exempt from all or part of the immunization requirements of Chapter 504, if the parents of a child present to the board of trustees a written statement signed by a licensed physician stating that the child's medical condition will not permit him to be immunized for any or specific diseases.

The State Health Officer, as a licensed physician within the State of Nevada, is then qualified to make the determination that the medical condition of a female child who is capable of conceiving is not conducive to receiving immunization for rubella because of the effect it may have on the embryo or fetus within the womb. Furthermore, the provisions of NRS 439.130 compel the State Health Officer to enforce all laws and regulations pertaining to the public health.

Even though there is, according to some medical authorities, only a 3 percent chance of deformed babies being born because the mothers were vaccinated with rubella during pregnancy, or immediately preceding pregnancy, rubella immunization of all ages is perilous indeed when the productive lives of future issues are placed in jeopardy.

The written statement requirements of Sections 4 and 11 of Chapter 504 may be satisfied by the State Health Officer supplying forms bearing his signature exempting female children capable of bearing children from receiving the rubella immunization.

CONCLUSION

The State Health Officer, as a licensed physician within the State of Nevada, does have the authority under Sections 4 and 11 of Chapter 504 of the 1971 Statutes of Nevada to issue a memorandum to all the school districts within the State, exempting female children capable of bearing children from receiving rubella immunization.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Larry G. Bettis
Deputy Attorney General

OPINION NO. 71-40 JURIES—Persons 18, 19, and 20 years of age are electors and eligible to serve on trial and grand juries as trial and grand jurors.

Carson City, August 4, 1971

The Honorable Roy Woofter, District Attorney of Clark County, Clark County Courthouse, Las Vegas, Nevada 89101

Attention: Charles E. Thompson, Assistant District Attorney

Dear Mr. Woofter:

QUESTION

You have asked whether persons 18 years of age and older may serve as jurors by virtue of their having recently received the elective franchise. It is assumed your question is directed to serving both as a trial juror and as a grand juror.

ANALYSIS

The minimum voting age was lowered to 18 years by amendment of Section 1, Article 2, Nevada Constitution, on June 28, 1971, pursuant to a special election authorized by Chapter 494, Statutes of Nevada 1971, and held on June 8, 1971. Consequently, at the time the 26th Amendment to the United States Constitution was adopted on June 30, 1971, Nevada did not deny or abridge the right of United States citizens who are 18 years or older to vote.

Section 1, Article 2 of the Nevada Constitution provides that all citizens of the United States of the age "eighteen years and upwards," and not under certain disabilities, are entitled to vote. A person eligible to vote is an elector. NRS 293.055.

NRS 6.010 provides that every qualified elector of Nevada is a qualified juror of the county of his residence, whether a registered voter or not.

A qualified juror is a person not laboring under the disabilities named in Section 27, Article IV of the State Constitution, or in Chapter 6 of Nevada Revised Statutes.

When the predecessor of Chapter 6 of Nevada Revised Statutes was first enacted (Chapter 65, 1873 Statutes) it made no distinction between trial and grand jurors regarding their being registered to vote. A jury list was required to be kept containing the names of every qualified juror of the county, whether registered or not, insofar as they could be ascertained. Both trial and grand jurors were selected from this list. All electors otherwise qualified were eligible to serve as a trial or grand juror.

Today the selection of *trial* jurors is still required to be made from qualified electors, whether registered voters or not. NRS 6.045 and 6.050. But the manner of selecting grand jurors has undergone significant change.

The Legislature in 1949 (1949 Stats., p. 513) distinguished between counties polling 1,000 votes or more (NRS 6.110) and counties polling less than 1,000 votes (NRS 6.120) at the last preceding general election in the manner of empaneling grand jurors. Left undisturbed was the provision that prospective grand jurors be selected from qualified jurors, whether or not their names were on the jury list selected by the county commissioners. This is the annual list of trial jurors selected by the county commissioners. *Parus v. District Court*, 42 Nev. 229, 234.

In 1965 the Legislature amended NRS 6.110 (1965 Stats., p. 248) to require selection of prospective grand jurors from the "county clerk's register of registered voters." NRS 6.120 has not been similarly amended. It still provides for the naming of grand jurors from the annual jury

list selected by the county commissioners, which list would contain both registered and unregistered voters.

Since the drawing of trial jurors is done in January of each year by the jury commissioner, and in those counties not having a jury commissioner, at the first regular meeting of the county commissioners, trial jury panels have been selected for the current year. No opportunity to select the names of newly-enfranchised 18-year-old and over electors will present itself before January 1972. Similar opportunity with regard to selecting grand jurors will not become available until presently-constituted grand juries are discharged in the regular course of events.

CONCLUSION

As qualified electors, persons of the ages of 18, 19, and 20 years are eligible to serve as trial jurors commencing with the drawing of the 1972 jury panels. They are also eligible to serve as grand jurors commencing with the next grand jury to be impaneled in the county of their residence, except that in counties polling 1,000 votes or more in the preceding general election, they must also be on the clerk's list of registered voters.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-41 TAXATION; REAL PROPERTY TRANSFER TAX—The real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes applies to contracts of sale of real property. (Supplemented by Attorney General's Opinion No. 45, dated October 7, 1971.)

Carson City, August 19, 1971

The Honorable Virgil A. Bucchianeri, District Attorney, Storey County, County Courthouse, Virginia City, Nevada 89440

Dear Mr. Bucchianeri:

You have requested an opinion from this office regarding the applicability of the real property transfer tax to certain transactions which have occurred in Storey County. You have advised us that a number of real estate developers are disposing of subdivided lands wherein a contract of sale is utilized. You have further advised that such transactions are increasing in number and that the county recorder is continually being faced with the determination of whether such contracts are taxable. You have indicated that the current practice is to accept such contracts for recording without collection of the tax, on the theory that legal title is not conveyed and therefore the tax does not apply. This results in considerable loss of revenue to Storey County.

QUESTION

Does the real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes apply to a contract of sale of real property?

ANALYSIS

The real property transfer tax is imposed by NRS 375.020, subsection 1, on each deed by which lands, tenements or other realty is granted, assigned, transferred, or otherwise conveyed to or vested in another person, when the consideration, exclusive of encumbrances, exceeds $100. For purposes of the imposition of the tax, "deed" is defined by NRS 375.010, subsection 1, as follows:

> "Deed" means *every instrument in writing*, except a last will and testament, *whatever may be its form, and by whatever name it may be known in law*, by which title *to any estate or present interest in real property* is conveyed or transferred to, and vested in, another person, but does not include a lease for any term of years or an easement. (Italics added.)

The italicized language clearly expresses the legislative intent that the real property transfer tax shall apply to any conveyance by any instrument in writing, in any form, regardless of its name, by which any interest in real property is transferred. The key words in the statute are "every instrument * * * by which title to any estate or present interest * * * is conveyed." It should also be noted that the only exclusions in the definition are leases for a term of years and easements. Had the Legislature intended that a contract of sale not be included within the definition of a deed for purposes of the imposition of the real property transfer tax, it would have specifically excluded such contracts.

The existing practice of accepting contracts of sale upon the rationale that normally they do not provide for the transfer of legal title until full payment of the purchase price does violence to the intent of the statute and artificially exalts form over substance. Furthermore, it assumes that there cannot be a transfer of any estate or present interest in real property in the absence of a transfer of legal title.

It is a well-established principle of real property law that a purchaser under a contract of sale acquires full equitable ownership and all emoluments of ownership except bare legal title, withheld solely for security purposes, together with the unqualified right to use and occupy the land and to pay the purchase price leading to the acquisition of legal title, to the exclusion of all others. These rights are specifically enforceable and clearly constitute an estate as well as a present interest in real property.

The real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes is in substantially the same language as the federal act which it replaces. The federal act expired by its own terms on January 1, 1968, at which time the Nevada act became effective. We are therefore aided in construction of the Nevada act by the decisions construing the federal act. See Attorney General's Opinion No. 513, dated May 16, 1968, and 26 U.S.C. § 4361. Because the federal statute was enacted as a revenue measure and because the state statute replaced the federal statute upon its expiration, it is obvious that the Nevada statute was similarly intended to be a revenue measure. The federal statute imposed

a tax upon and was intended to cover all the various kinds of instruments where, by sale, an interest in real estate is conveyed from one person to another. *Occidental Life Ins. Co. v. U.S.*, 57 F.Supp. 691 (Ct.Cl. 1944). The tax imposed by the federal statute is an excise on the privilege of selling real estate, and the tax attaches when the property is sold, the word "sold" ordinarily meaning the transfer or agreement to transfer for a consideration. *Berry v. Kavanagh*, 137 F.2d 574 (6th Cir. 1943).

For the foregoing reasons, we are compelled to conclude that the Nevada real property transfer tax applies to contracts of sale.

One final point deserves consideration:

In the event that a purchaser under a contract of sale, taxed at the time of recording of the contract, pays the purchase price in full and becomes entitled to delivery of a deed, the question arises whether recordation of that deed is subject to tax a second time. We conclude that it is not. Under these circumstances, the successful purchaser stands in the shoes of an owner of full legal title, save and except the delivery and recording of his deed. That delivery and recording is a final ministerial act which recognizes and establishes the true status of his ownership. NRS 375.090 specifically exempts such transfer of *title*, recognizing the true status of ownership of real property. The decisions construing the federal statute reach the same conclusion. *See U.S. v. Niagara Hudson Power Corp.*, 53 F.Supp. 796 (S.D.N.Y. 1944), which held that a mere transfer of legal title is not a taxable transaction under the federal act.

CONCLUSION

It is the opinion of this office that the real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes applies to contracts of sale of real property.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 71-42 PUBLIC SERVICE COMMISSION; HEARINGS—Executive Order No. 11615 does not toll the 180 day suspension period between the filing of a rate schedule and its effective date.

Carson City, September 10, 1971

Mr. Noel A. Clark, Chairman, Public Service Commission of Nevada, 222 East Washington Street, Carson City, Nevada 89701

Dear Mr. Clark:

You have requested an opinion from this office regarding the effect of President Nixon's Executive Order No. 11615 freezing prices, rents, wages, and salaries, on the proceedings ordinarily held by the Public Service Commission of Nevada in connection with the filing of rate schedules.

QUESTION

Specifically, your question is: Does the President's order toll the 180 day suspension period between the filing by a public utility of a new rate schedule and its effective date?

ANALYSIS

The applicable statutes are NRS 704.100 and 704.110, which read as follows:

NRS 704.100:

1. No changes shall be made in any schedule, including schedules of joint rates, or in the rules and regulations affecting any and all rates or charges, except upon 30 days' notice to the commission, and all such changes shall be plainly indicated, or by filing new schedules in lieu thereof 30 days prior to the time the same are to take effect. The commission, upon application of any public utility, may prescribe a less time within which a reduction may be made.

2. Copies of all new or amended schedules shall be filed and posted in the stations and offices of public utilities as in the case of original schedules.

NRS 704.110:

1. Whenever there shall be filed with the commission any schedule stating a new or revised individual or joint rate, fare or charge, or any new or revised individual or joint regulation or practice affecting any rate, fare or charge, or any schedule resulting in a discontinuance, modification or restriction of service, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own motion without complaint, at once, and if it so orders, without answer or formal pleading by the interested utility or utilities, to enter upon an investigation or, upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice.

2. Pending such investigation or hearing and the decision thereon, the commission, upon delivering to the utility or utilities affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice, but not for a longer period than 150 days beyond the time when such rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice would otherwise go into effect.

3. After full investigation or hearing, whether completed before or after the date upon which the rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice is to go into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, discontinuance, modification, restriction or practice has become effective.

The Executive Order provides for the stabilization of prices, rents, wages, and salaries. Unless renewed, it will expire November 13, 1971. Regulated public utilities are covered by that order because they are not specifically exempt.

This office has attempted to obtain guidance from the Office of Emergency Preparedness and from the Cost of Living Council with respect to the question you have asked. We have been advised by the Undersecretary of the Treasury that both the Office of Emergency Preparedness and the Cost of Living Council decline to issue any rulings or guidance, for the reason that this question is regarded by them as a state matter. In their judgment, the states should be left free to interpret their own statutes in such a manner as will best serve the intent as well as the letter of the Executive Order. It is noteworthy, however, that the Secretary of Commerce has urged boards having jurisdiction over public utilities to continue their regulatory processes during the effective period of the presidential order.

The provisions of NRS 704.100 and 704.110 are clear and unambiguous. The effect of the statute is that if no hearing is held or no order is entered with respect to proposed rate increases within 180 days after filing, the proposed schedules become effective automatically.

We have thoroughly analyzed the legal implications of an interpretation that the 180 day statutory suspension period is tolled by the Executive Order. Among these legal implications there lies the possibility that, in the face of such clear and unambiguous statutory language, a court may subsequently determine the interpretation to have been in error. If this should occur, and if the commission, in reliance on such an interpretation, had permitted the statutory 180 day period to expire without having held a hearing and entered an order, the proposed rates, as filed, would have become effective automatically. The commission would find itself in the indefensible position of having permitted proposed rates to become effective through its own inactivity. Such a determination by the courts of this State is not beyond the realm of possibility. Should it occur, it would be tantamount to a finding that the commission had failed and neglected to represent the interests of the public and by inaction had abandoned those administrative responsibilities imposed upon it by law.

CONCLUSION

This office is unwilling to risk that the utility consumers of this State be subjected to such possible automatic and arbitrary rate increases at the maximum levels sought by the utilities. We consider it to be the duty and privilege of all state agencies to cooperate to the fullest extent with any measures that hold out the promise of economic stabilization, and to that end all state and federal statutes should be reconciled so far as possible. Although the rate-making function of the Public Service Commission may be difficult to perform during the freeze, in the absence of specific federal or state authority to toll the 180 day period, it is the opinion of this office that your question must be answered in the negative.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-43 CARE OF INDIGENT SICK—In order to fulfill the obligation to provide for the indigent sick, a county may proceed under provisions of either Chapter 428 or 450 of Nevada Revised Statutes.

Carson City, September 15, 1971

Mr. Michael Fondi, District Attorney of Carson City, Courthouse, Carson City, Nevada 89701

Attention: Mr. Ralph M. Crow

Dear Mr. Fondi:

QUESTION

You requested an opinion from this office as to whether or not the procedure being followed by the Board of Supervisors of Carson City in providing for the payment to the county public hospital for the care of indigent patients is consistent with Chapter 450 of Nevada Revised Statutes, as amended in 1971, concerning a tax levy and appropriation of moneys into the county public hospital fund.

FACTS

Prior to a special election in 1965, Carson City (Ormsby County at that time) had no county public hospital. The Carson-Tahoe Hospital, at that time, was a private charitable hospital. Upon said special election, the former Carson-Tahoe Hospital passed out of existence and the Carson-Tahoe Hospital became a county public hospital operated and maintained in the manner provided by Chapter 450 of Nevada Revised Statutes.

ANALYSIS

NRS 244.009 states that, whenever used in Nevada Revised Statutes, the term "board of county commissioners" includes the Board of Supervisors of Carson City. Further, NRS 243.500 declares that the term "county" includes Carson City.

In accordance with NRS 244.160, the board of county commissioners has the power and jurisdiction to take care of and provide for the indigent sick of the county as may be provided by law.

In regard to those indigent sick who are patients at the Carson City public hospital, it appears that the Board of Supervisors of Carson City may, in order to provide for said patients, elect to proceed under the provisions of either Chapter 428 or 450 of Nevada Revised Statutes.

If the board of supervisors choose to proceed under Chapter 450, then, annually, upon request of the board of hospital trustees, the board of county commissioners "may" levy a tax for the maintenance and operation of the county public hospital as per NRS 450.240. The resolution adopted by the board of county commissioners imposing the tax for the county public hospital shall state, *inter alia,* the portion of the levy which is necessary to pay for the care of indigent patients.

NRS 450.250 provides that all moneys received for the hospital shall be deposited in the county treasury of the county to the credit to the *hospital fund* and paid out only upon warrants drawn by the board of hospital trustees upon properly authenticated vouchers of the board of trustees, after approval of the same by the county auditor. The board of trustees then has the exclusive control of the expenditures of all moneys collected and deposited to the credit of the hospital fund.

NRS 450.420 empowers the board of county commissioners to determine whether or not patients presented to the public hospital for treatment are subjects of charity. The board of county commissioners has the authority to establish the standards and procedures to be used in the determination of eligibility for indigent medical care under NRS 450.240.

The board of supervisors may choose not to proceed under the provisions of Chapter 450 of Nevada Revised Statutes, but rather to provide for all the indigent sick of the county by utilizing the provisions of Chapter 428 of Nevada Revised Statutes. This can be accomplished because the mandates of Chapter 450 do not become operative until the board of county commissioners actually levies "a tax for the maintenance and operation of the county public hospital." Absent such tax levy the board is free to comply with their obligation to provide care and support for indigents by means of Chapter 428.

NRS 428.010 establishes that every county shall provide care, support and relief to the poor, indigent, incompetent and those incapacitated by age, disease or accident.

Just as in Chapter 450, NRS 428.010 indicates that the board of county commissioners is vested with the authority to establish and approve policies and standards, prescribe a uniform standard of eligibility, appropriate funds for the purpose of caring for those persons and to appoint agents who will develop rules and regulations and administer these programs.

The board of county commissioners pursuant to NRS 428.050 shall levy an ad valorem tax for the purposes of providing aid and relief to persons enumerated in NRS 428.010. When the moneys derived from the tax levy are received, subsection 3 of NRS 428.050 contemplates that the moneys be appropriated to a county indigent fund. The main purpose of the subsection is to prohibit an interfund transfer by the board of county commissioners for the purpose of providing

resources or appropriations to the county indigent fund in excess of that obtained by the levy of the ad valorem tax, except that if there is a lack of moneys to provide the necessary medical care under Chapter 428 of Nevada Revised Statutes, the board of county commissioners shall declare an emergency and provide additional funds for medical care only from whatever resources may be available.

No violation of the prohibition against an interfund transfer occurs when payment is authorized from the county indigent fund by the board of county commissioners payable to the hospital, which subsequently deposits its receipts into the hospital fund. This conclusion is based on the fact that a county board of hospital trustees, which has exclusive control of the hospital fund, is a local government entity. Attorney General's Opinion No. 403, dated May 5, 1967. Therefore, a payment from the county indigent fund, which ultimately gets to the hospital fund, is not an interfund transfer as prohibited under provisions of subsection 3 of NRS 428.050.

In accordance with the provisions of Chapter 428 as stated, the board of county commissioners can provide relief and support to indigent persons, upon each applicant achieving the status of indigency as determined by the standards established by the board of county commissioners. This standard procedure requires the board of hospital trustees to submit application for reimbursement for any expenses incurred in rendering medical care for said indigents.

CONCLUSION

In light of the preceding, the following information is offered in response to your four-part question:

1. Under provisions of Chapter 450 of Nevada Revised Statutes, the board of county commissioners are permitted, but not compelled, to levy a tax for benefit of the hospital fund which would be under the exclusive control of the board of hospital trustees. In the event the board of county commissioners elect not to levy said tax, the county may satisfy its obligation to provide for indigent sick persons by complying with provisions of Chapter 428 and appropriating moneys into the general fund or indigent fund.

2. The board of county commissioners may submit to the Nevada Tax Commission the amount which is allocated for medical care of indigents from the general fund without adopting a resolution stating what portion of the tax levy is necessary to pay for the care of indigent patients at the county hospital pursuant to paragraph (b) of subsection 4 of NRS 450.240.

3. The board of county commissioners, pursuant to NRS 428.050, is empowered to levy an ad valorem tax for the purpose of providing aid and relief to indigents. The moneys received for this purpose are deposited in the county treasury's general fund. Then, when a demand is made and an applicant is determined "indigent" a payment is made to the hospital. Thereafter the hospital trustees are required to deposit the amount received to the credit of the hospital fund. Thus, since the county hospital is in fact a "local government" entity (see Attorney General's Opinion No. 403, dated May 5, 1967) and the hospital trustees have exclusive control of all moneys received, what appears to be an interfund transfer from the county general fund to the hospital fund does not actually occur. Even though payment is made by the board of commissioners out of the general fund pursuant to NRS 428, and the moneys received are deposited to the hospital fund pursuant to NRS 450, the deposit is made to the hospital as a separate operating entity.

4. If the tax was levied under provisions of NRS 428.050, the tax revenue therefrom should be deposited in the county general fund. If the tax was levied under provisions of subsection 3 of NRS 450.240, the tax revenue therefrom would be deposited in the hospital fund.

Respectfully submitted

ROBERT LIST
Attorney General

OPINION NO. 71-44 SCHOOL BONDS—Proceeds of school bonds may be applied at the discretion of the school trustees.

Carson City, September 30, 1971

Mr. Arlo K. Funk, County Superintendent, Mineral County School District, P.O. Box 1547, Hawthorne, Nevada 89415

Dear Mr. Funk:

This is in reply to your letter dated September 17, 1971, concerning the use of interest received from the investment of the proceeds of school bonds.

QUESTION

Shall interest earned on investments be credited to the school district's capital improvement fund or to the county's bond redemption fund?

ANALYSIS

The controlling statute on this question, as indicated by NRS 387.410, is NRS 350.648, which reads as follows:

> All moneys received from the issuance of any securities herein authorized shall be used solely for the purpose or purposes for which issued and to defray wholly or in part the cost of the project thereby delineated. Any accrued interest and any premium shall be applied to the cost of the project or to the payment of the interest on or the principal of the securities, or both interest and principal, or shall be deposited in a reserve therefor, or any combination thereof, as the governing body may determine.

The definition of "governing body" is set out in NRS 350.524 as follows:

> "Governing body" means the board of county commissioners, city council, city commission, board of supervisors, town council, board of trustees of the school district, board of directors or trustees of any other type district, or other local legislative or governing body of the municipality.

The statute indicates that the governing body can be either the county commissioners or the board of trustees of the school district. In view of the fact that school bonds are issued by the school district it seems that "governing body" is intended to refer to the board of trustees and not the county commissioners. If the board of trustees were not the governing body of school bonds there would be no rational reason for refering to them in NRS 350.524. The reference to "local governing unit" in NRS 355.175 is, by the same reasoning, the board of trustees.

It is clear from a reading of these statutes together that the use of the interest proceeds from the school bond money is discretionary with the board of trustees within the limits of NRS 350.648.

CONCLUSION

All proceeds from school bonds may be applied, within the limits of NRS 350.648, at the discretion of the board of trustees of the school district.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-45 TAXATION; REAL PROPERTY TRANSFER TAX—The real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes applies to contracts of sale of real property. (Supplements Attorney General's Opinion No. 41, dated August 19, 1971.)

Carson City, October 7, 1971

Miss Ardis Brown, Washoe County Recorder, County Courthouse, Reno, Nevada 89501

Dear Miss. Brown:

You have requested that this office supplement Attorney General's Opinion No. 41, dated August 19, 1971, in order to afford answers and guidance to a number of specific legal questions and fact situations which have arisen as a result of that opinion. Your questions will be dealt with separately, and each will be followed by our analysis and conclusion.

1. You have advised that persons have tendered for recording a contract of sale of real property which provides that the seller continue to make payments on an existing deed of trust to which the contract evidencing the sale is subject. This is a departure from the usual transaction in which a buyer under a contract assumes the performance and discharge of an existing encumbrance.

The applicable statute is NRS 375.010, subsection 4(a):

> 4. "Value" means:
> (a) In the case of any deed not a gift, the amount of the full, actual consideration therefor, paid or to be paid, excluding the amount of any lien or liens assumed.

In the situation you pose, there is no assumption by the contract buyer of an obligation to make payment on an existing deed of trust. Therefore, the value on which the real property transfer tax is to be computed is the full consideration paid for the contract.

2. What, if any, is the amount of real property transfer tax payable on the recordation of an assignment of a contract of sale, either by the buyer or the seller?

In Attorney General's Opinion No. 41, we stated, in passing, that the mere transfer of legal title by the recording of a grant deed upon the full performance by a buyer under a contract of sale is a ministerial act and not a taxable transaction. Consistent with this holding, the seller under a contract of sale holds nothing more than naked title for security purposes, and the buyer enjoys full beneficial title or equitable ownership. We believe that this reasoning in Attorney General's Opinion No. 41 is dispositive of this question. We feel that the assignment by a

contract seller is in substance not a conveyance of a present interest or estate in real property, but essentially a sale of paper. Accordingly, it does not fall within the real property transfer tax statute.

On the other hand, an assignment of a contract of sale by the buyer is a transfer of his beneficial or equitable interest, and is a conveyance of a present interest and estate in real property. As such, it is taxable in the same way as any other conveyance, the amount of the tax being computed on the value given for the assignment, less any liens assumed by the assignee.

3. What is the amount of real property transfer tax on a second or third contract of sale?

Successive contracts for sale of real property are subject to tax in exactly the same manner as an initial contract is taxed. The terms of each contract must be examined to determine whether the contracting buyer in the subsequent contract assumes the obligations of the previous contract. If he does not, the tax is computed on the full amount of consideration paid by the successive contracting buyer. On the other hand, if existing contract obligations are assumed by him, the amount of the contract price which constitutes the assumption is excluded.

4. Is a deed in lieu of foreclosure subject to tax, and if so, how is the value, for purposes of tax, to be computed.

A deed in lieu of foreclosure is subject to tax in the same manner as is any other deed. See Attorney General's Opinion No. 41 and cases cited therein. The grantor who conveys his interest by a deed in lieu of foreclosure is ordinarily a buyer in default in the payment of purchase moneys. However, until such time as foreclosure has been completed and his interest extinguished thereby, he is the owner, both beneficially and equitably, of a present interest and estate in real property. His deed in lieu of foreclosure conveys that interest. The value attributable to that deed is that which his grantee (the original seller) gives in exchange for the deed in lieu of foreclosure. In substance, what the grantee (the original seller) gives up by avoiding the foreclosure proceeding and accepting the deed in lieu of foreclosure in full satisfaction, is the right to a deficiency judgment against his defaulting buyer.

The amount by which deficiency judgments are limited is prescribed by statute. In effect, the unpaid seller is looking to the real estate alone for his security and accepting reconveyance of it as satisfaction of his security. NRS 40.459 limits the amount for which a deficiency judgment can be rendered by providing that the judgment shall not be for more than the amount by which the unpaid obligation exceeds the fair market value of the property conveyed, and never more than the difference between the amount of unpaid obligation and the amount received in an actual sale. The latter does not apply to a deed in lieu of foreclosure, because there is no actual sale.

Accordingly, we conclude that if the amount of the unpaid obligation is greater than the fair market value, conveyance by deed in lieu of foreclosure is taxable, and the amount of the tax is based on the amount by which the unpaid obligation exceeds the fair market value. On the other hand, if the amount of the unpaid obligation is less than the fair market value, conveyance by deed in lieu of foreclosure is not taxable. The reason is that the unpaid seller in the latter instance has no right to a deficiency judgment and therefore gives up nothing of value in accepting the deed in lieu of foreclosure.

In determining what is fair market value for purposes of applying the foregoing rule, the declaration of value provided for in NRS 375.050 shall be utilized.

5. Where an escrow or title company records the quitclaim deed of a defaulting buyer under a contract of sale, pursuant to specific instructions, is that recordation taxable and if so, how is the tax computed?

It is common practice for the parties to a contract of sale to deposit deeds with the title company in the following manner: The contracting seller executes and deposits a grant deed with instructions that it shall be recorded and delivered to the buyer upon full payment of the contract

obligation. The buyer, in turn, executes a quitclaim deed and deposits it with the instructions that in the event of default, the quitclaim deed may be recorded and delivered to the seller, clearing of record any interest the defaulting buyer may thereafter claim in the subject property. We regard

the recording and delivery of such a quitclaim deed to serve precisely the same function as a deed in lieu of foreclosure. Consequently, the analysis and conclusion in paragraph 4 are equally applicable to the question posed in this paragraph.

6. Where a contract was executed prior to the enactment of Chapter 375 of Nevada Revised Statutes, but presented for recording after the enactment of Chapter 375, does the real property transfer tax imposed by Chapter 375 of Nevada Revised Statutes apply?

The controlling statute is NRS 375.030, subsection 1, which reads as follows:

> 1. If any deed evidencing a transfer of title subject to the tax imposed by NRS 375.020 is offered for recordation, the county recorder shall compute the amount of the tax due thereon and, except as provided in subsection 3, shall collect such amount before acceptance of the deed for recordation.

This statute expressly provides that the tax is imposed on a transfer of title which is subject to Chapter 375. The taxable transfer occurs, if at all, when the contract is executed. The tax is collected at the time the instrument is offered for recording. A transaction prior in time to the enactment of the statute is not subject to the tax. Accordingly, no tax is due at the time that instrument is offered for recording.

7. Is an option to purchase real property subject to tax?

An option to purchase real property is nothing more than an agreement which entitles the holder of the option to purchase at a later time. It does not convey a present interest or estate in real property and is therefore not taxable. At such time as the option is exercised and the purchase completed pursuant to its terms, a taxable transfer will occur.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 71-46 ELECTIONS—Persons 18, 19, and 20 years old are eligible for election to specified county offices by attaining status of a qualified elector.

Carson City, October 12, 1971

The Honorable Roy Woofter, Clark County District Attorney, Clark County Court House, Las Vegas, Nevada 89101

Dear Mr. Woofter:

QUESTION

You have asked this office for an opinion on whether the recent enfranchisement of persons 18, 19, and 20 years old as “qualified electors” makes them eligible to hold those elective offices for which the qualifications include being a qualified elector.

Although your request is concerned with county elective offices, because of the statewide importance of this matter the opinion will be broadened to include all the state and county elective offices set forth in NRS 281.010, plus general law incorporated cities’ elective offices.

ANALYSIS

Article XV, Section 3 of the Nevada Constitution provides, in part, that "no person shall be eligible to any office who is not a qualified elector under this constitution."

Article II, Section 1 of the Nevada Constitution, as amended at the 1971 special election, provides that all United States citizens of age 18 and above are qualified electors.

Therefore, any person of age 18, 19, or 20 years is a qualified elector and eligible for any elective office if he meets any other qualification prescribed by law.

Since there is no other prescribed qualification other than being a qualified elector for the offices of county commissioner (NRS 244.020), county clerk (NRS 246.010), sheriff (NRS 248.010), public administrator (NRS 253.010), county assessor (NRS 250.010 and 250.040), county treasurer (NRS 249.010), county recorder (NRS 247.010), justice of the peace (NRS 4.010), and constable (NRS 258.010), a person aged 18, 19, or 20 at the time of his candidacy is eligible for election to any of these county offices the same as any other qualified elector.

Two county offices require other qualifications in addition to being a qualified elector. The office of district attorney requires that the incumbent also be a member of the State Bar. Supreme Court Rule 51 requires one to have attained his majority before being entitled to make application for admission to the bar. The county surveyor must also be a registered land surveyor pursuant to Chapter 625 of Nevada Revised Statutes.

One aspiring to the office of presidential elector must also be a legally registered member of the political party for which he appears on the ballot. NRS 298.020.

Candidates for the state elective offices of Governor (Nevada Constitution Art. V, § 3), Lieutenant Governor (Nevada Constitution Art. V, § 17), Supreme Court Justice (NRS 2.020), Secretary of State (NRS 225.010), State Treasurer (NRS 226.010), State Controller (NRS 227.010), and Attorney General (NRS 228.010), shall be 25 years of age at the time of their election.

Candidate for district judge must be 25 years of age at the time of his candidacy (NRS 3.060).

Senators and Members of the Assembly must be 21 years old at the time of their election (NRS 218.010).

No minimum age is specified for the State Inspector of Mines other than the minimum age of 18 years for a qualified elector. However, the incumbent must have not less than 7 years experience in mining (NRS 512.020).

Elective offices in cities and towns incorporated under general law (Chapter 266 of Nevada Revised Statutes) are next discussed. The mayor, city councilmen and municipal judges must also be taxpayers within their city and a resident thereof at least 1 year prior to their election (NRS 266.170, 266.215, 266.540).

The city attorney must also be a licensed and practicing attorney in the State and a resident of the city for at least 1 year preceding his election (NRS 266.465).

No person is eligible to any office in any city incorporated under general law, including city clerk and city treasurer in cities of the first or second class, who is not a qualified elector of the city and is in default of any obligation owed to the city (266.400 et seq.).

For any qualifications in addition to being a qualified voter to hold elective office of a city incorporated under special law, the city charter should be reviewed.

CONCLUSION

Persons of age 18, 19, and 20 years who are qualified electors are eligible for those county offices heretofore specified for which no other qualifications are required. Such persons may also hold the office of presidential elector and other county and general law incorporated city offices if they meet the additional qualifications prescribed by the Nevada statutes noted herein.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-47 TAXATION; PROPERTY TAX—The right to reconveyance of real property held by the county treasurer in trust because of tax delinquency subsists indefinitely until either of the events specified in NRS 361.585(3) occurs. The person exercising said right must pay taxes for every year up to the date of reconveyance.

Carson City, October 19, 1971

The Honorable Josephine Patterson, Treasurer of Humboldt County, P.O. Box 528, Winnemucca, Nevada 89445

Dear Mrs. Patterson:

This is in reply to your request for an opinion interpreting NRS 361.585, which provides a right of reconveyance in certain persons after

real property has been deeded to a county treasurer, in trust, because of delinquent taxes.

QUESTIONS

1. How long does the right to reconveyance provided by NRS 361.585(3) subsist?
2. How many years' taxes must be paid by a person exercising the right to reconveyance?

ANALYSIS

Each county tax receiver must give notice of tax delinquencies within 20 days after the first Monday of March of each year. NRS 361.565. The notice advises that the tax receiver, on the fourth Monday of April, will issue to the county treasurer, as trustee for the State and county, a certificate authorizing the treasurer to hold the property, subject to redemption for a 2 year period. Id. During the 2-year redemption period the property must be assessed annually to the county treasurer as trustee. NRS 361.570, 361.575. Such additional taxes must be paid before the property may be redeemed. NRS 361.570.

At the expiration of the 2-year redemption period the tax receiver must execute and deliver to the county treasurer deeds for all properties covered by the certificates, except for those which have been redeemed; the treasurer holds these properties as trustee for the State and county. NRS 361.585, 361.590. The properties so held in trust may be sold in accordance with the provisions of either NRS 361.595 or 361.603.

Acquisition of such property by local governments for public purposes is provided for by NRS 361.603. The procedure set forth in the statute calls for the local government to apply to the board of county commissioners for permission to acquire the property. If the board approves the application it must direct the county treasurer to give to the last known owner notice of the county's intent to sell. NRS 361.603(3) then specifies that: "Such last-known owner may, within 90 days of such notice, redeem the property by paying to the treasurer the amount of the

delinquent taxes, plus penalties, interest and costs." Subsection 4 of the same statute requires the county treasurer to transfer the property to the local government if the last-known owner fails to redeem the property within the 90-day period.

NRS 361.595 sets forth the procedure for all sales of property held in trust by the county treasurer other than sales to local governments for public purposes. Under this statute the board of county commissioners may order the county treasurer to sell any particular parcel of such property after the giving of notice of the sale. The sale may not be for a sales price less than the total of unpaid taxes, costs, penalties and interest legally chargeable against the property. Such sales price is the minimum permitted by law; the statute's objective is for such property to be sold for its full value, rather than merely for said minimum price. *County of Clark v. Roosevelt Title Insurance Co.*, 80 Nev. 530, 396 P.2d 844 (1964). Therefore, the board of county commissioners may exercise discretion in ordering or not ordering the property to be sold. Id. If the board orders the property sold, notice of the sale must be given by the posting of such notice in at lease three public places, including the courthouse and the property itself, for a period of not less than 20 days prior to the day of sale; in lieu of such posting the board of county commissioners may order

publication of the notice in a newspaper for a like period of time. NRS 361.595(3).

The questions here being discussed depend for their resolution upon the meaning of NRS 361.585(3), which reads as follows:

> Notwithstanding the provisions of NRS 361.595 or 361.603, at any time during the 90-day period specified in NRS 361.603, or prior to the public notice of sale by a county treasurer, pursuant to NRS 361.595, of any property held in trust by him by virtue of any deed made pursuant to the provisions of this chapter, any person who was the owner, beneficiary under a deed of trust or mortgagee under a mortgage of such property, or to whom such property was assessed, or who held a contract to purchase such property, prior to being so conveyed to the county treasurer, or the successor in interest of any such person, shall have the right to have such property reconveyed to him upon paying the county treasurer an amount equal to the taxes accrued, together with any costs, penalties and interest legally chargeable against such property.

It can be seen that the statute affords some relief to certain persons who would tend to have suffered financial loss when the property was taken over by the county treasurer. By exercising the right of reconveyance the person might mitigate some of his losses, but would not likely receive a windfall. The county (and the State), on the other hand, receives the taxes to which it had been entitled, together with costs, plus penalties and interest which tend to compensate it for the delay in receiving the taxes. This is in contrast to NRS 361.595, which is not limited to persons who probably incurred financial loss when the property was taken over by the treasurer, but, on the contrary, may be utilized by strangers to the property. Any appreciation in value of the property or difference between the property's value and the amount of taxes, etc., legally chargeable against the property is intended to be realized by the county rather than to become a windfall to a stranger to the property. *See County of Clark v. Roosevelt Title Insurance Co.*, supra.

The wording of NRS 361.585(3) seems unambiguous where it states that a person entitled to the right of reconveyance granted therein may exercise such right "at any time during the 90-day period specified in NRS 361.603, or prior to the public notice of sale by a county treasurer, pursuant to NRS 361.595, * * *." It has been recognized that the addition of subsection 3 to NRS 361.585, in 1957, served to extend the right to compel reconveyance (the right to redeem) for the periods specified in said subsection. *See Bissell v. College Development Co.*, 86 Nev. 404, 469 P.2d 705 (1970); *County of Clark v. Roosevelt Title Insurance Co.*, 80 Nev. 530, 396 P.2d 844 (1964); Attorney General's Opinion No. 17, dated March 25, 1963. Thus, said right subsists

indefinitely until public notice of sale has been given by the county treasurer pursuant to NRS 361.595 or until the expiration of the 90-day period specified in NRS 361.603. See also Attorney General's Opinion No. 24, dated May 28, 1971.

As to the question of how many years' taxes must be paid by a person exercising the right to reconveyance pursuant to NRS 361.585(3), the opinion in *County of Clark v. Roosevelt Title Insurance Co.*, supra, states at 80 Nev. 530, 535:

> Respondent contends that the consideration recited in the county treasurer's deed to it is the full consideration contemplated by the statute, namely, the taxes, penalties, costs and interest, together with taxes and interest thereon for the intervening years since the county acquired title.

While the court's opinion went on to indicate that the full value of the property was the consideration contemplated by NRS 361.595, it did not dispute the respondent's contention that taxes for the intervening years would have been payable were NRS 361.585(3) applicable. Attorney General's Opinion No. 404, dated May 5, 1967, found that NRS 361.585(3) required that taxes, penalties, charges and interest for all the years intervening until the property is reconveyed must be paid, and not merely the taxes, etc., accruing during the 2-year redemption period provided by NRS 361.565 to 361.575, inclusive.

Nevertheless, there remained uncertainty as to whether a person exercising his NRS 361.585(3) right to reconveyance had to pay taxes for all intervening years or merely for the 2-year redemption period. The 1971 session of the Nevada Legislature was aware of the uncertainty, for it amended the statute to read as set forth above. The amendment, which was approved and became effective on April 17, 1971, was initiated by Senate Bill No. 315. The minutes of the discussion of the bill by the Senate Judiciary Committee on March 24, 1971 are helpful, because in cases of doubtful construction, the discussions of the legislators on the disputed point may be restored to in ascertaining intent. *Maynard v. Johnson*, 2 Nev. 25 (1866). And ascertainment of the intent of the Legislature is the prime concern in construing a statute. *Board of School Trustees v. Bray*, 60 Nev. 345, 109 P.2d 274 (1941). Said minutes read as follows: "Chairman Monroe explained that this bill provides that the person who wants to redeem his property has to pay an amount equal to the tax on such property multiplied by the number of years since it accrued, together with costs, penalties and interest. Mr. Malone stated that Washoe County is doing that now."

From said minutes it can be seen that uncertainty existed and that the statute was amended in order to make clear that the interpretation given to the then-existing statute by Washoe County represented the intent of the Legislature. Said interpretation required that taxes for *all* years intervening until redemption had to be paid by the redemptioner. That the amendment was meant to clarify the law, rather than to change it, is confirmed by the heading of the amended statute, found at Chapter 356, 1971 Statutes of Nevada, page 639: "An Act relating to the property tax; clarifying the method of computing the payment of delinquent taxes for reconveyance of the property; and providing other matters properly relating thereto."

CONCLUSIONS

It is the conclusion of this office that, when NRS 361.603 is being utilized by a local government to acquire tax-delinquent property for public purposes, the right to reconveyance provided by NRS 361.585(3) may be exercised at any time prior to the expiration of the 90-day period which commences with the giving by the county treasurer of notice of intent to sell.

It is further concluded that, in cases not utilizing NRS 361.603, the

NRS 361.585(3) right to reconveyance subsists indefinitely until public notice of sale has been given by the county treasurer pursuant to NRS 361.595.

Finally, it is concluded that a person seeking to exercise the right to reconveyance provided him by NRS 361.585(3) must pay the taxes and applicable penalties, costs and interest for each and every year up to the date of such reconveyance.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-48 VOTING—REGISTRATION—Students and all other citizens aged 18, 19, and 20 are sui juris for all purposes related to voting and can establish a legal residence for voting purposes separate and apart from that of their parents or guardians; they may register and vote where they attend school if they are residents of such county and if they meet the statutory and constitutional requirements.

Carson City, October 20, 1971

The Honorable John Koontz, Secretary of State, Capitol Building, Carson City, Nevada 89701

Dear Secretary Koontz:

This opinion is in response to your letter of August 24, 1971 in which you ask for an opinion on the following:

QUESTION

May out-of-state students attending the University of Nevada or students whose parents are residents of one county in Nevada different from the county in which the University of Nevada is located, register and vote at the location where they are attending school?

ANALYSIS

Your question is undoubtedly prompted in large measure by the passage of the 26th Amendment to the United States Constitution as well as the amendment to Section 1 of Article II of the Constitution of the State of Nevada both of which reduce the minimum voting age to 18 years. Also to be considered in determining this question is the Voting Rights Act of 1970 which attempted to lower the voting age to 18 in all national, state and local elections. The 26th Amendment to the United States Constitution reads as follows:

> The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by any state on account of age.

In order to fully understand the scope and intent of the 26th Amendment a brief background may be helpful. On June 22, 1970 President Nixon signed into law the Voting Rights Act of 1970 (P.L. 91-285, 84

Stats. 314), Title III of which purported to lower the voting age to 18 for all federal, state and local elections. Subsequently the United States Supreme Court in the case of *Oregon v. Mitchell*, 400 U.S. 112, held that the segment of Title III which applied to nonfederal elections was unconstitutional. Congress then passed Senate Joint Resolution No. 7 on March 23, 1971, submitting the proposed constitutional amendment to lower the voting age to the states for

ratification pursuant to Article 5 of the federal constitution. On June 30, 1971, Ohio became the 38th state to ratify the 26th Amendment and as such it then became law.

Throughout the course of this opinion it must be borne in mind we are concerned here with the right to vote which has been closely and zealously guarded by courts at all levels due to the fact that it is a fundamental political right which preserves all other rights. This "political franchise of voting" was described in the early case of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as "a fundamental political right because preservative of all rights."

Several recent cases concerning voting have reaffirmed this position. The case of *Reynolds v. Sims*, 377 U.S. 533 (1964), at pages 561 and 562 stated:

> Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Similarly the case of *Wesberry v. Sanders*, 376 U.S. 1 (1964), held:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way this unnecessarily abridges that right.

A similar though brief reiteration of this position appeared in *Evans v. Cornman*, 398 U.S. 419, 422 (1970), where the court held "* * * the right to vote, as the citizens link to his laws and government, is protective of all fundamental rights and privileges."

The recent Michigan Supreme Court case of *Wilkins v. Bentley*, …… Mich. …… (No. 52953, August 27, 1971), which case directly dealt with the rights of students to register and vote held, at page 7 of the original opinion, "It can be stated without exaggeration that the right to vote is one of the most precious, if not most precious, of all constitutional rights." A similar conclusion is found in Nevada case law where, in *Lynip v. Buckner*, 22 Nev. 426 (1895), at page 438, the court held:

> The right of voting, and, of course, having the vote counted, is one of most transcendent importance, the highest under our government. That one entitled to vote shall not be deprived of his privilege by an action of the authority is a fundamental principle.

Although generally the State has a wide latitude and discretion in adopting laws under the general police power because the fundamental

constitutional right to vote is involved, the courts, under the equal protection clause of the 14th Amendment of the federal constitution, will closely scrutinize any regulation concerning voting to see that the right is not abridged or denied. The line of cases on this point has evolved certain standards among which are the fact that the interest upon which the State relies in an attempt to justify its restrictive classification must be "compelling" not merely "rational" or "legitimate." *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *Kramer v. Union Free School District*, 395 U.S. 621 (1969), *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *Castro v. Calif.*, 2 Cal.3d 223 (1970); and also that in questions concerning a fundamental constitutional right the State and not the voter has the burden of demonstrating that the classification is necessary and not in violation of the constitution. *Hadnott v. Amos*, 394 U.S. 358 (1969), *Gaston County v. United States*, 395 U.S. 285 (1969).

As noted in *Kramer*, supra, at page 626:

> Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. (For similar holdings *see Cipriano*, supra and *Harper*, supra.)

In order to apply these general constitutional holdings to the question at hand we must review the Nevada Constitution and applicable statutes pertaining to residency and voting in order to determine where students and those of the age of 18, 19, and 20 should be permitted to register to vote.

It is noted that residence for the purposes of voting is not defined in either the Nevada Constitution or the Nevada Revised Statutes. However, NRS 10.020 defines "legal residence" as follows:

> The legal residence of a person with reference to * * * any * * * right dependent on residence is that place where he shall have been actually, physically and corporally present within the state or county, as the case may be, during all the period for which residence is claimed by him. Should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absense [absence] shall not be considered in determining the fact of such residence.

It is noted that the predecessor sections to NRS 10.020 (N.C.L. 6504) specifically enumerated that the legal residence of a person "* * * with reference to his or her right to sufferage [suffrage] * * *" was to be determined as outlined in NRS 10.020. Notwithstanding the deletion of this specific reference of a right to suffrage from the current sections defining legal residence it is the opinion of this office that since the right to vote obviously depends on legal residence, NRS 10.020 and related sections pertaining to the registration of voters (NRS 293.485, et seq.) are to be used in determining residence for the purposes of voting.

Before determining where citizens aged 18, 19, and 20 may be permitted to vote it is necessary to determine whether or not they are emancipated and *sui juris* for voting purposes, and therefore capable of choosing their own residence. Although the general rule is that the residence and domicile of the minor is that of his parent or guardian the

reason for this rule is the common law assumption that a minor is not *sui juris* and therefore incapable of forming an intent sufficient to qualify him as a resident in another location. However, under the June 28, 1971 amendment to the Nevada Constitution and the 26th Amendment to the United States Constitution as well as the Voting Rights Act of 1970, it is obvious that the intent of the lawmaking bodies was that citizens aged 18, 19, and 20 were *sui juris* for purposes of voting. The right to vote is a very personal right and any requirement which would compel students, as opposed to other citizens, to register to vote in the locale of their parents' or guardians' residence rather than at the location where their individual interests lie, and from which elected political officials and officeholders will represent their interest, would fly in the face of both the spirit and intent of the 26th Amendment and the act of the citizens of this State in reducing the voting age from 21 years to 18 years.

This attempted denial would be constitutionally suspect in that it would deny those aged 18, 19, and 20 a right to establish a residence of their own for voting purposes while citizens 21 years of age and older are permitted to do so. This, in a very real sense, would be a flagrant violation of the 26th Amendment in that a right relative to voting would be denied to those aged 18, 19, and 20 (to wit: a right to choose their residence) solely on account of their age and therefore their right to vote would be abridged in clear violation of both the letter of the 26th Amendment and

the spirit of this amendment as evidenced by Senate Judiciary Committee, S. Rep. No. 92-96, 92nd Cong., 1st Sess. (Report accompanying Senate Joint Resolution No. 7 (1971), p. 14.)

In determining whether students and other citizens of the ages of 18, 19, and 20 have met the constitutional and statutory requirements for legal residence it is necessary to review residence requirements imposed upon those 21 years of age and over. To apply any different standards for those of the age of 18, 19, and 20 who are attempting to enroll to vote would violate the 14th Amendment and the 26th Amendment to the United States Constitution and also the Nevada State Constitution.

The Nevada Supreme Court has not interpreted Section 1, Article II of the Nevada Constitution or NRS 293.485 which sets forth residence requirements for voting purposes in Nevada. These have been construed by this office in Attorney General's Opinion No. 276, dated March 7, 1962. There, it was said:

> While such provisions might seem to contemplate no more than bodily presence in the state, county and precinct for the specified period of time, it is generally conceded that the term "residence," when used in the constitution and statutory provisions pertaining to elections are synonymous with the term "domicile." This means in order to acquire residence for voting purposes in a locality an intention to make such locality home, and to abandon the former one must concur with visible presence for the period prescribed by the constitution and statutes.

For a similar conclusion see Attorney General's Opinion No. 26, dated March 21, 1955, where it was stated "It is almost axiomatic in the law that the term residence for the purposes of voting is synonymous with the term domicile," and also Attorney General's Opinion No. B957, dated October 10, 1950.

Having concluded that citizens aged 18, 19, and 20 are *sui juris* for voting purposes and therefore can establish a legal residence separate and apart from their parent or guardian it is necessary to determine upon what basis they may establish this residence. A primary problem is obviously that of intention to abandon the former residence and assume a new residence. Attorney General's Opinion No. 276, supra, fairly represents the current position of this office pertaining to the establishment of residence where it stated:

> This additional requirement of intent admittedly makes measurement of the residence requirements of one seeking to vote difficult since there is no absolute criteria by which such intent can be ascertained. Each case must be determined upon its own facts, so that it would be improper and dangerously misleading to attempt to set forth any criteria in the abstract. About all that should be stated generally is that a person must have a domicile somewhere; that he cannot be domiciled in two places at once; one domicile is presumed to continue until a new one is established. In determining whether the necessary intent exists, declarations of a person seeking to vote are not controlling, and probably more consideration should be given to his intention as manifested by his acts, conduct and other factors which serve to connect him with a locality * * *

This conclusion is similar to that reached in the Supreme Court in the case of *Carrington v. Rash*, 380 U.S. 89 (1965), which case concerned the right of members of the military to register and vote in the State of Texas, where at page 95 the court held:

> The declarations of voters concerning their intent to reside in the state and in a particular county is often not conclusive; the election officials may look to the actual facts and circumstances.

The touchstone and guiding light for all registrars of voters or those serving in that capacity when it comes to registering citizens aged 18, 19, and 20, and students in particular, is that they be treated in no different manner than those citizens 21 years of age and over; and further that no additional or burdensome tests or conditions are imposed on them as a prerequisite to their securing their constitutionally granted and protected right to vote.

Under NRS 293.517, Section 1, any citizen of the county may register to vote by appearing before the proper authority and completing an affidavit of registration as well as "* * * giving true and satisfactory answers to all questions relevant to such elector's right to vote. * * *" It would be permissible to ask questions usually and normally asked of citizens 21 and over of those aged 18, 19, and 20 to determine whether or not they meet state requirements for registration. But, any requirement that citizens aged 18, 19, and 20 furnish additional information other than that required of those 21 and over would be constitutionally impermissible; as would a requirement that students and citizens of the ages of 18, 19, and 20 be compelled to answer any question if those 21 years of age and over have been registered merely on their oath or affirmation that they are in fact a resident and meet the constitutional and statutory requirements to vote in this State.

It would be patently unfair to presume that members of this class of

recently-enfranchised individuals would subvert the election process by attempting to vote at more than one location. Should dual registration actually occur adequate safeguards and criminal sanctions are imposed by NRS 293.600. This section also imposes criminal sanctions against a voter registrar who either neglects his duty or performs it in such a way as to hinder the objects and purposes of the election laws of this State.

The position that all citizens are to be treated equally when it comes to the right to register and vote is affirmed by several recent cases as well as the Federal Voting Rights Law.

In *Jolicoeur v. Mihaley,* …… Cal.3d …… (S.F. No. 22826, August 27, 1971), the California Supreme Court held that it was unconstitutional for state officials to presume that for voting purposes the residence of an unmarried minor will normally be his parents' regardless of the minor's present or intended future habitation because this conclusion treated minors differently from adults and thus violated both the equal protection and due process clause of the U.S. Constitution as well as the 26th Amendment. At page 8 of the original opinion the court stated:

> The Twenty-Sixth Amendment, like the Twenty-Fourth, Nineteenth and Fifteenth before it "nullified sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise * * * although the abstract right to vote remains unrestricted * * *" *Lane v. Wilson,* 307 U.S. 268, 275 (1939)

At page 31 of its opinion the court stated "The fundamental importance of the franchise, as both an essential and vital tool of our democracy, requires that every effort be made to apply uniform standards and procedures to all qualified voters equally."

At page 32 the court then noted that its holding was basically that the 26th Amendment required the state registrar to treat all citizens 18 years of age and older alike for the purposes related to registration and voting and stated "[w]e hold only that registrars may not specially question the validity of an affiant's claim of domicile on account of his *age or occupational status.*" (Italics added.)

Failure to treat all those attempting to secure the right to vote equally would also be in contravention of 42 U.S.C.A. § 1971(a)(2)(A) which reads:

> 2. No person acting under color of law: (A) Shall in determining whether any individual is qualified under state law or laws to vote in any election apply any standard, practice, or procedure different from the standards, practices or procedures applied under such law or laws to other individuals within the same

> county, parish, or similar poiltical [political] subdivision who have been found by state officials to be qualified to vote.

It is noted that this section applies to all forms of discrimination and differs from § 1971(a)(1) in that it is not limited to discrimination on the basis of race, color, or previous condition of servitude.

As noted in *Kramer*, supra, at pages 626 to 627:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizen an effective voice in the governmental affairs which substantially affect their lives.

A similar conclusion that all voting regulations must be equal and impartial was reached in this State in the case of *State ex rel. Whitney v. Finley*, 20 Nev. 198 (1888), at page 202, where the court stated:

> All regulations of the elective franchise however must be reasonable, uniform and impartial. They must not have for their purpose directly or indirectly to deny or abridge the constitutional right of a citizen to vote, or unnecessarily to impede his exercise; if they do they must be declared void. (Citations omitted.)

Although the court was there talking about the Legislature's power to prescribe rules and oaths to test qualifications of an elector, the court's pronouncement would be equally applicable to the conduct of a registrar attempting to control or manipulate registrations by refusal to apply the same standards to all who attempt to register and discriminating against some by imposing a higher standard merely because of their age or occupation.

The conclusion that students and all citizens of the ages 18, 19, and 20 should be treated equally was not reached without consideration of Article II, Section 2 of the Nevada Constitution and NRS 293.487, which state in part:

> No person may gain or lose residence by reason of his presence or absence while * * * a student at any seminary or other institution of learning * * *

The great weight of authority in other jurisdictions is to treat constitutional or statutory provisions of this nature as having merely a neutral effect and not being controlling one way or another as to residence. These authorities are collected in 98 A.L.R.2d 488, under the heading "Residence or Domicile of Student or Teacher for Voting Purposes." Among the conclusions reached in this annotation are these:

In construing the constitutional provision that for voting purposes no person is deemed to have gained or lost residence by reason of his presence or absence at any institution of learning the annotation states in II, § 2, at page 490:

> This has the effect of nullifying the fact of the student's physical or bodily presence as a step in determining his residence, and the courts generally treat this as a neutral factor, ascertaining his residence from the evidence of his intent. (Citations omitted.)

In II, § 5, at page 495, the annotation concludes:

> Attendance at school may be accompanied by an intent to make that place one's new home. When a student's actions and conduct in the school town manifest such an intent the courts recognize his right to vote from his college residence,

> constitutional or statutory provisions on residence of the student notwithstanding. (Citations omitted.)

The annotation also concludes at pages 497-498 in II, § 6, that students whose intentions regarding residence after completing their education are indefinite may still be permitted to vote at the location of the school when it states:

> A student who gives the most usual answer when his right to vote in a college town is challenged—that his plans as to the future residence are uncertain, and depend upon employment and other opportunities, but that he considers the town his home for the present and has no intention of returning to his parents home—will be allowed by the courts in most states to vote in his college town. (Citations omitted.)

The conclusion that a statute similar to NRS 293.487 and Article II, Section 2 of the Nevada Constitution must be treated as not placing a presumption of residency or nonresidency upon the student or imposing any additional burdens upon him in his attempt to register is reaffirmed by the *Wilkins* case, supra, which held a similar statute violated both the 14th and 26th Amendments to the federal constitution by imposing the presumption of nonresidency upon the individual seeking the voting franchise. Therefore previous Attorney General's Opinions which stated that students or other individuals enumerated in either NRS 293.487 or under Article II, Section 2 of the Constitution have an additional burden of establishing residency are hereby disaffirmed.

Henceforth, voter registrars' treatment of all members of this class of individuals who seek to register to vote should be controlled and guided by the following language found in *Chomeau v. Roth*, 72 S.W.2d 997 (1934), where the court in construing Article VIII, Section 4 of the Missouri Constitution, which contains language identical to Article II, Section 2 of the Nevada Constitution, held at page 999:

> The fact that the challenged voters were students is in and of itself not at all decisive to the case. Our Missouri constitution provides * * * that for the purposes of voting, no person shall be deemed to have gained a residence by reason of his presence, or to have lost it by reason of his absence, while a student of any institution of learning. So the constitution leaves the student much as it finds him, permitting him either to retain his original residence for voting purposes, or to take up a residence wherever his school is located if he so elects. In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home; the whole question, as in similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in light of all facts and circumstances of the case.

Illustrative of the requirement that students must be treated equally in registration is the situation where, after a student has established residency at the university for the statutorily required time, he or she should be permitted to register to vote notwithstanding the fact that they had an intention to depart from the jurisdiction temporarily over the summer vacation for the purposes of seeking employment or vacation unless it can be shown that an individual, not a student, or not of the ages 18, 19, and 20 who, due to his status or occupation absents himself from the jurisdiction over the summer interval for purposes of either vacationing or employment would also not qualify to vote within the jurisdiction. As noted in Attorney General's Opinion No. B957, supra, this office has previously ruled that one who resides in and is employed in the State for a period of

7 months but temporarily outside the State for a period of 5 months would, under applicable registration law, be considered a resident for the purposes of voting.

Similarly, NRS 293.497 which states that if a man is permanently located within the State with no intention of removing therefrom he shall be deemed a resident for election purposes regardless of the fact that his family resides without the State should be construed as being applicable to students; and the fact that the student's family resides outside the State should in no way deprive him of establishing residency for election purposes since to do so would be to discriminate against students on the basis of his age or occupation in contravention of the 14th and 26th Amendments of the United States Constitution.

The Nevada Supreme Court has consistently expressed the view that the law generally and all statutes and regulations pertaining to voting should be evenly and fairly applied. This view is evidenced by the long-held opinion in this State that the right to vote, which necessarily encompasses the requirement of registration to vote, is always construed in such a manner as to permit the greatest number of citizens to exercise this time-honored and long-protected franchise. This position is indicated by several Nevada Supreme Court cases pertaining to registration and voting. Representative of these cases are the following:

In *Boyle v. State Board of Examiners*, 21 Nev. 67 (1890), at page 71, the court stated:

> The object of these [registration] laws, as before stated, is to determine the qualification of voters. Laws of this description must be reasonable, uniform and impartial and must be calculated to facilitate and secure rather than to subvert and impede the exercise of the right.

In *Turner v. Fogg*, 39 Nev. 406 (1916), at page 414, the court noted:

> It is well-settled that election laws are to be liberally construed to enable the largest participation in all elections by qualified electors.

In *Lynip*, supra, page 439, it is stated:

> All statutes tending to limit the exercise of the elective franchise by a citizen should be liberally construed in his favor * * *

And, as this office previously stated in Attorney General's Opinion No. 155, dated August 15, 1924:

> We must remember in this and other cases, dealing with the right of an individual to vote, no technical or strict construction should be placed upon the law, if in doing so, the constitutional right of suffrage is to be defeated.

It is also to be remembered that students have numerous connections with the community where they attend school. They are subject to the State's laws and regulations and may sue or be sued in the local courts. They pay local gasoline, sales and use taxes and thus an appreciable portion of the State's revenue is derived from the taxes they pay. For census purposes, commencing in 1970, students are considered residents of the communities in which they reside while attending school and thus are

counted as being residents for the purpose of rebates of certain tax revenues to the various political subdivisions involved. Students are considered residents of their college community for the purpose of apportioning and districting the Legislature. To permit a student to be counted for the purposes of districting the Legislature but then to deny him the right to vote for members of the Legislature and other officials elected from that district may well violate the "one-man, one-vote" rulings of the Supreme Court.

To deny students the right to vote where they attend school would clearly violate the intent of the 26th Amendment as evidenced in the committee report accompanying Senate Joint Resolution No. 7 where, at page 372 of the 1971 *U.S. Code Congressional and Administrative News* (as quoted at page 13 of *Jolicoeur*, supra), it was stated:

> If the energy and idealism of the young are needed in elective politics they are needed no less at the state and local level.
>
> [¶] *Moreover many of the problems that most concern younger citizens are largely matters of local and state policy: the quality of education at all levels; the state of the environment; planning and community development. In these areas participation of the young in local and state elections is particularly appropriate and necessary, and their point of view especially valuable in devising responsible programs.* [Court's emphasis.]

In summary, voting is a fundamental constitutional right and it was the intent of both the federal and state government in amending their respective constitutions to grant the elective franchise to individual citizens of the ages of 18, 19, and 20 and that these citizens are *sui juris* for voting purposes and thus capable of establishing their own legal residence for voting purposes.

Legal residence as it is generally understood in this State for voting purposes requires a physical presence coupled with an intent to abandon the former residence or domicile and establish a new residence or domicile at the present location.

The local registrar of voters may inquire into the intent of the prospective voter; providing that questions or procedures not used to determine voting residence for those 21 years of age or over or not students are not asked of those 18 but under 21 years of age or whose occupation is a student. To do so would constitute the imposition of additional burdens or require a higher degree of proof of residency for those aged 18, 19, and 20 or whose occupation is a student and would discriminate against them in extending the right to vote in violation of both the 14th and 26th Amendments to the federal constitution.

In light of the long and proud history that this State has enjoyed in construing its laws to encompass within the elective process as large a number of citizens as possible, the registrars should register those students who meet the constitutional requirements of age and residency as previously applied to individual voters 21 years of age and over.

This opinion is entirely consistent with Attorney General's Opinion No. 168, dated August 25, 1920, wherein construing the law that no students will be deemed to have gained or lost residence while at any seminary or institution of learning, then Attorney General Fowler stated:

> My construction of the law in this respect is that, while such a student has not deemed to have lost residence, he still has the right to assert a claim to a different residence. If he, therefore, registers at a place where he is attending school, that will be recognized as valid under the laws of this state.

We believe this law as it previously applied to students 21 years of age and over is now equally applicable to students over 18 years of age and this opinion is reaffirmed.

This opinion does not mean that students must register at the location where they attend school but only that being *sui juris* for the purposes of voting they may, by complying with constitutional and statutory requirements, establish a legal residence separate and apart from their parents which legal residence would permit them to vote in the State of Nevada. This is so whether the students before coming to school in Nevada were residents of this State or of another state. Consistent with the "neutral" interpretation that residence shall not be deemed to have been gained or lost by attendance at a seminary or institution of learning, a student from Nevada who attends school outside the State or an out-of-state student attending school in Nevada does not,

merely by this attendance, gain or lose residence for voting purposes. The courts have generally held that a temporary absence at school does not in and of itself show an intent to abandon one's residence, thus, when the evidence shows that a student who has gone away to school intends to return to his former home upon the completion of his education, the courts have uniformly held that no residence is acquired in the college town for voting purposes. (See 98 A.L.R.2d 488, II, §§ 3 and 4.)

CONCLUSION

Students and all other citizens aged 18, 19, and 20 are *sui juris* for all purposes related to voting and can establish a legal residence for voting purposes separate and apart from that of their parents or guardians; they may register and vote where they attend school if they are residents of such county and if they meet the statutory and constitutional requirements.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-49 LAS VEGAS BOARD OF CITY COMMISSIONERS must reapportion itself into four commissioner election districts with the mayor to be elected at large; if districts corresponding with the residences of each current commissioner cannot be constitutionally drawn, random selection shall determine among commissioners "1" and "3" and "2" and "4" which district each will represent for balance of present term; if at expiration of a commissioner's present term he is not a resident of the district then represented, he may not stand for re-election; the board must reapportion itself not less than after each decennial census.

Carson City, October 26, 1971

The Honorable Earl P. Gripentrog, City Attorney of Las Vegas, City Hall, Las Vegas, Nevada 89101

Dear Mr. Gripentrog:

You have requested the opinion of this office on the following six questions arising out of the enactment of Senate Bill No. 662 (Chapter 648, Stats. 1971) by the 1971 Nevada Legislature which requires the governing boards of local government units to redistrict, prior to January 1, 1972, the geographical area it serves into the number of election districts identical with the number of members serving on the board.

QUESTION NO. 1

Is the City of Las Vegas exempt from the mandate of Senate Bill No. 662?

ANALYSIS

The act provides that it applies to all government units, including cities "except as otherwise specifically provided by law." Municipal corporations whose charters provide for redistricting,

and cities incorporated under general law, are expressly exempted by Section 4 of the act. Since Las Vegas is incorporated under special law, it does not come within this exemption.

The present city charter provides for election of the city commission at large and does not contain any provision or requirement for redistricting. The 1971 Legislature enacted a new charter for Las Vegas (Senate Bill No. 566; Chapter 515, Stats. 1971), effective July 1, 1973. The new charter also requires election of city commissioners at large and does not require dividing the city into representative districts.

Therefore, unless the Nevada Revised Statutes "otherwise specifically" prescribe redistricting for Las Vegas, Senate Bill No. 662 would apply.

The phrase "except as otherwise specifically provided by law" has seldom been construed. In *Lamar v. McCord*, 432 S.W.2d 753 (Ark. Oct. 21, 1968), the court stated:

> The legislative mandate cannot be misunderstood: "Except as otherwise *specifically* (court's emphasis) provided by law, all meetings * * * of the governing bodies of the municipality * * * shall be public meetings." The key word is "specifically" meaning "explicitly," in so many words. The legislature itself provided a specific exception in section 5 of the Act having to do with personnel matters. It did not see fit to provide a similar exception for
>
> meetings between the city council and the city attorney. (pp. 755, 756.)

There being no "explicit," "definite," or statement "in so many words" in either the present or proposed charter for Las Vegas that the city is to be districted, and finding no other specific provision in the Nevada Revised Statutes, this office can only conclude that Senate Bill No. 662 is applicable to the City of Las Vegas.

CONCLUSION—QUESTION NO. 1

The Board of Commissioners of the City of Las Vegas must reapportion itself pursuant to the legislative mandate of Section 4 of Senate Bill No. 662.

QUESTIONS NOS. 2 AND 3

Shall the city be divided into four or five districts, and if it should have five districts, from which district should the mayor be elected?

ANALYSIS—QUESTIONS NOS. 2 AND 3

Section 4, paragraph 1 of Senate Bill No. 662 states that the number of districts shall be identical with the number of members serving on the board. However, this section of the law must be read and interpreted in a realistic and practical manner in an attempt to implement, on a constitutional basis, the intent of the Legislature in directing reapportionment of local governments.

The Mayor of the City of Las Vegas is an elective office having broad and extensive responsibilities. The charter also requires the mayor to serve as a member of the board of commissioners. Since under the present city charter, and in particular Article III of Senate Bill No. 566 (Chapter 515, Stats. 1971), the mayor is given additional and extensive responsibility, it would be "invidious discrimination" of the type prohibited by the landmark case of *Reynolds v. Sims*, 377 U.S. 533 (1964), to permit the members of one district of the city to elect a mayor while the members of the remaining districts of the city were permitted only to vote for commissioners. This obviously would permit a special weight to a citizen's vote conditioned solely on where he lived. Such special weight has held by the Supreme Court in *Reynolds*, supra, to be in violation of the equal protection clause of the 14th Amendment.

Since the mayor is an elected official having responsibilities to the city as a whole, separate and apart from the responsibilities of the other four commissioners, the office of the mayor should be filled only by an individual who has been elected by the majority vote of all the eligible voters of the city. As noted in 18 L.Ed.2d 1537, § 4, at p. 1541, and also, 25 Am.Jur.2d Elections § 31 (Pocket Supplement), all federal courts which have considered the question have ruled that municipal governments are subject to the "one man one vote rule" where it related to election to the council.

It must be presumed that the Legislature was aware of this constitutional requirement, and, by enacting Senate Bill No. 662, intended to compel local governmental units to comply with this constitutional mandate. It must also be presumed that the Legislature did not intend to compel any local governmental unit to engage in any unconstitutional conduct in the process of complying with the requirement for forming

election districts. Therefore, it was the intent of the Legislature to require that all voters of the City of Las Vegas should have an opportunity to elect the mayor while the voters of each particular voting district shall elect one commissioner.

CONCLUSIONS—QUESTIONS NOS. 2 AND 3

The City of Las Vegas should have four election districts with one commissioner to be elected from each district and the mayor to be elected at large.

QUESTION NO. 4

Is the commissioner who represents a certain district required to reside in that district?

ANALYSIS—QUESTION NO. 4

Paragraph 2 of section 4 of Senate Bill No. 662 requiring each district to be a "single member district" is indicative of the legislative intent that each district shall be represented by an individual commissioner. The only meaningful conclusion which can be drawn is that each district is to be represented by an individual who has a substantial interest in the problems of the constituents of the district and will function effectively in promoting the best interests of the district on the board of city commissioners. A commissioner not a resident of the district he represents would not be able to put the interests of the district he supposedly represents ahead of the district where he resides. Such a system of "representation" would have an inherent conflict of interest which would defeat the purpose of representation by single-member districts.

CONCLUSION—QUESTION NO. 4

A city commissioner must reside in the district which he is elected to represent.

QUESTION NO. 5

Your fifth question is presented as follows:

Senate Bill No. 662 provides that the redistricting must be accomplished prior to January 1, 1972.

Our mayor and two commissioners have just been elected to four year terms. The other two commissioners' terms will expire in 1973 as will the city attorney and municipal judges' terms.

Would the next election in 1973 be under a redistricting plan? If so, do we follow any particular guidelines in establishing the voting districts so we are not acting arbitrarily in excluding qualified voters from voting for two commissioners in 1973?

ANALYSIS—QUESTION NO. 5

The districting provisions of Senate Bill No. 662 will have no effect on the election of judges and the city attorney. As stated in 18 L.Ed.2d 1537, § 6, at p. 1543, the one man one vote rule is not applicable to the offices of either the city attorney or municipal judge.

A more difficult problem is presented with regard to devising an acceptable method for conducting the 1973 elections. The difficulty arises chiefly from the rulings of several Supreme Court cases that no hard and fast rule for districting can be devised since what is acceptable in one

situation may not be acceptable in another. The main consideration for any districting is population equality, and, as stated at pages 474-475, in *Avery v. Midland County*, 390 U.S. 474 (1967):

> Our decision today is only that the constitution imposes one ground rule for the development of arrangements of local government, a requirement that units with general government powers over the entire geographic area not be apportioned among single member districts of substantially unequal population.

Preliminarily, it must be kept in mind that Senate Bill No. 662 provides that the presently elected city commission and mayor all serve out the full terms for which elected.

The present city charter as well as the Article V of the proposed charter designates the commissioners "1," "2," "3," and "4"; and that commissioners designated "2" and "4" are to be nominated and elected in 1973.

If a constitutionally acceptable method of dividing the city is completed and under this constitutionally valid division each commissioner is currently residing in the district from which he is to be elected there would be no problem in the subsequent elections.

But, if a constitutionally acceptable plan of districting cannot be completed, or, if the districting as completed results in more than one commissioner residing in a district this office would recommend the following procedure. The two commissioners designated "2" and "4" whose terms expire in 1973 would be eligible for election from their respective districts providing they are a resident of the "2" and "4" district which they serve or establish residency within the district before the 1973 election. If the commissioners designated "2" and "4" are not residents of the district which they serve and do not move into that district they would not be eligible to be a candidate for the office of the commission until the 1975 election when it is presumed that the office of commissioner from the district within which they reside would be up for election.

If it cannot be decided which of the present commissioners will represent which districts, then lots or some other random method of selection should be used to decide between commissioners "1" and "3" and "2" and "4" which district each will represent.

While we do not deem the above recommendation to be exclusive it is the opinion of this office that it would be an acceptable way of determining which commissioner is to represent which district. If this procedure were implemented, then any concern that the districting would result in an arbitrary action excluding qualified voters from voting for two commissioners in 1973 would appear to be unfounded since each citizen of each district would be, at the time of election of a commissioner to represent his district, have an opportunity to vote for that commissioner. Since commissioners are to be residents of the district which they serve and are to represent the district from which they are elected the fact that certain electors would not have an opportunity to vote on a commissioner who was representing a district different from that in which they resided would appear in no way to be an arbitrary exclusion.

CONCLUSION—QUESTION NO. 5

In summary, our recommendation would be as follows:
If a constitutionally valid districting plan can be devised by which

each of the current commissioners is a resident of one of the four districts created then each may stand for election as a commissioner within that district at the next election. If a constitutionally valid method of districting cannot be devised by which each of the current commissioners is a member of one of the designated districts then a random method of selection should be used to determine between commissioners "1" and "3" and "2" and "4" which district each of them will serve for the duration of their present term. If, at the expiration of a commissioner's present term he is not a resident of the district which he has just represented, then he may not stand for re-election from that district.

QUESTION NO. 6

How often would the city commission be requested to redistrict?

ANALYSIS—QUESTION NO. 6

In *Reynolds*, supra, the U.S. Supreme Court said that decennial reapportionment is a rational approach to readjustment of representation. The court also noted that while more frequent reapportionment would be constitutionally permissible and desirable that reapportionment accomplished with any less frequency than every ten years would be "constitutionally suspect."

CONCLUSION—QUESTION NO. 6

The commission for the City of Las Vegas should as a minimum, reapportion the city at least after each federal decennial census.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James H. Thompson
Chief Deputy Attorney General

OPINION NO. 71-50 SCHOOL TEACHERS—A teacher may also serve as justice of the peace so long as holding both positions is not inconsistent with loyal service to the people.

Carson City, October 26, 1971

Mr. Robert L. Petroni, Legal Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89109

Dear Mr. Petroni:

This is in reply to your request for an opinion concerning a school teacher's holding the office of justice of the peace.

QUESTION

May a school teacher serve as justice of the peace in off-duty hours?

ANALYSIS

I first call your attention to Attorney General's Opinion No. 22, dated May 20, 1971. That opinion reaches the conclusion that county employees may serve as county school trustees. This is in light of the fact that both positions are paid positions. That opinion also points out that school districts are not departments of state government as used in Article 3, Section 1 of the Nevada Constitution as follows:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

Also please note that NRS 281.127 pertains only to services rendered the State:

> Unless otherwise provided by law, no public officer or employee whose salary is set by law, whether or not he serves the state in more than one capacity, may be paid more than one salary for all services rendered to the state, except for salaries for any ex officio duties he may be required by law to perform.

The statute that speaks to your question is NRS 281.230, subsection 1, which reads:

> 1. The following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind or nature *inconsistent with loyal service to the people* resulting from any contract or other transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way interested or affected:
> (a) State, county, municipal, district and township officers of the State of Nevada;
> (b) Deputies and employees of state, county, municipal, district and township officers; and
> (c) Officers and employees of quasi-municipal corporations. (Italics added.)

It is clear from this statute that a teacher would only be precluded from also serving as justice of the peace if such service would be "inconsistent with loyal service to the people." In other words, the person may not hold the two public positions if one interferes with the duties required of the other.

In the United States Supreme Court case of *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court reinstated a teacher dismissed for exercising his constitutional rights where it was not shown that it interfered with his teaching duties. A school district would need to demonstrate that a teacher's off-duty constitutionally protected conduct substantially interferes with his teaching duties before he could be subject to dismissal or discipline.

CONCLUSION

A teacher may also serve as justice of the peace so long as holding both positions is not inconsistent with loyal service to the people.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-51 COUNTY RECORDERS; MINING CLAIMS—Recorders are only obligated to record instruments that are authorized by law or permitted by law to be recorded. Only instruments that meet the statutory requirements as proofs of labor may be recorded as such.

Carson City, October 28, 1971

The Honorable Stanley A. Smart, Lyon County District Attorney, Lyon County Court House, Yerington, Nevada 89447

Dear Mr. Smart:

This is in reply to your letter of August 27, 1971, concerning authority for recorders to reject proofs of labor offered for recording.

QUESTION

May county recorders refuse to do the ministerial act of recording proofs of labor because they are not in conformity with Nevada Revised Statutes?

ANALYSIS

There has been some misunderstanding among recorders and district attorneys concerning the authority recorders would have to refuse to record various objects. It has been considered by some that a recorder would be required to record a Chinese menu or any other inanimate object if presented for recording with a proper fee. These views are entirely inconsistent with the recording statutes.

The statute specifying the recorders' duties in respect to recording documents was initially passed in 1923 (Chapter 120, Section 4, 1923 Statutes of Nevada, page 201). The statute (NRS 247.110) has had various amendments and today reads as follows:

> When any instrument, paper or notice *authorized by law to be recorded* or filed, but not for recordation, is deposited in the county recorder's office for record or for filing, the county recorder shall:
>
> 1. Endorse upon it the time when it was received, noting:
> (a) The year, month, day, hour and minute of its reception.
> (b) The file number thereof.
> (c) The book and page where recorded or the place where filed.
> (d) The amount of fees for recording or filing.
>
> 2. Record or file the instrument without delay, together with the acknowledgments, proofs and certificates, written upon or annexed to it, with the

plats, surveys, schedules and other papers thereto annexed, in the order in which such instruments are received for record or for filing.

3. Note at the foot of the record and upon such instrument so filed or recorded the exact time of its reception, and the name of the person at whose request it was recorded or filed.

4. No recorder may refuse to record or file any instrument, paper or notice on the grounds that such instrument, paper or notice is not legally effective to accomplish the purposes stated therein. (Italics added.)

It must first be noted that the recorder is only required to record instruments "authorized by law to be recorded." There is an exhaustive list of

instruments authorized by law to be recorded found in NRS 247.120. Proofs of labor and certificates of location are included in subsection 1, as well as a catchall, as follows:

1. Each county recorder must, upon the payment of the statutory fees for the same, record separately, in a fair hand, or typewriting, or by filing or inserting a microfilm picture or photostatic copy thereof, the following specified instruments in large, well-bound separate books, either sewed or of insertable leaves which when placed in the book cannot be removed:

* * * * *

(l) Notices and certificates of location of mining claims.

(m) Affidavits or proof of annual labor on mining claims.

* * * * *

(q) Such other writings as are *required or permitted by law to be recorded.* (Italics added.)

* * * * *

Please note the catchall is also limited to "writings as are required or permitted by law to be recorded."

The liability of county recorders for wrongful acts is set out in NRS 247.410 as follows:

If any county recorder to whom an instrument, proved or acknowledged according to law, or any paper or notice which *may by law be recorded* is delivered for record, or to whom any document, instrument or paper *permitted by law* to be filed is delivered for filing:

1. Neglects or refuses to record or file such instrument, paper or notice within a reasonable time after receiving the same; or

2. Records or files any instrument, paper or notice, willfully or negligently, untruly, or in any other manner than is directed in this chapter; or

3. Neglects or refuses to keep in his office such indexes as are required by this chapter, or to make the proper entries therein; or

4. Alters, changes or obliterates any record or any filed instrument deposited in his office, or inserts any new matter therein, he is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby. (Italics added.)

This statute also carefully limits the recorders' liability for refusing to record, etc., *instruments permitted by law to be recorded.* There is clearly no liability for refusal to record documents not permitted by law to be recorded.

It should be noted at this point that false documents, etc., are not permitted by law to be recorded. In fact, it is a felony to offer to record such documents, as provided in NRS 239.330:

> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public
>
> office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than $5,000, or by both.

It is not the recorders' responsibility to determine if a document is false.

Special note should be made at this juncture of NRS 247.110, subsection 4, set out above. This subsection makes it clear that a recorder may not refuse recording of an instrument because of questions he may have of its legal sufficiency. This is far different than the recorders' responsibility to determine if the instrument may legally be recorded. A recorder clearly has the capacity to look at an instrument and determine if it is signed, dated and contains the various other items required by the statutes for the instrument; however, the recorder cannot and should not be expected to determine if the signature is genuine, the legal description accurate or the date correct. The legal sufficiency of the instrument is clearly a question for the courts.

There has been some misapplication of old Attorney General's Opinions. On December 5, 1917, Attorney General's Opinion No. 129 was issued by this office, and came to the following conclusion concerning the recording of conveyances:

> It is, therefore, the opinion of this office that County Recorders may accept, for recording, any instruments tendered for that purpose, whether or not the same have been properly acknowledged, and notwithstanding the character of the instrument.

This opinion was issued 6 years prior to the enactment of the predecessor of NRS 247.110 and did not concern the issues here. On October 29, 1954, this office issued Attorney General's Opinion No. 351, which was concerned with whether writs of attachment and decrees of distribution should be filed or recorded. This later opinion incorporated the 1917 opinion and came to the overbroad conclusion as follows:

> It is the opinion of this office that a County Recorder is not precluded from recording any instrument submitted to him for recordation provided his fees therefor are paid according to the statutory amounts.

This 1954 opinion did not require an inquiry into the predecessor of NRS 247.110 to decide the question then before the Attorney General. There is no reference to this statute in the opinion and it was evidently overlooked as evidenced by the overbroad conclusion.

Proofs of labor are accorded special consideration by the recording statutes (NRS 247.310) with respect to recording fees as follows:

> 1. Except as otherwise provided by law, county recorders shall charge the following fees for recording certificates of proof of labor on mining claims:
>
> For recording any such certificates that embrace therein one claim.....$0.50
> For each additional mining claim embraced in the certificate ..... .25

2. If any certificate shall contain more than 100 words, an additional fee of 30 cents shall be charged for each 100 words or fractional part thereof in excess of the first 100 words.

* * * * *

The statutes describe the required contents of a proof of labor at NRS 517.230, subsection 1, as follows:

1. Within 60 days after the performance of labor or making of improvements required by law to be performed or made upon any mining claim annually, the person in whose behalf such labor was performed or improvements made, or someone in his behalf, shall make and have recorded by the county recorder, in books kept for that purpose in the county in which such mining claim is situated, an affidavit or statement in writing subscribed by such person and two competent witnesses setting forth:

(a) The amount of money expended, or value of labor or improvements made, or both.

(b) The character of expenditures or labor or improvements.

(c) A description of the claim or part of the claim affected by such expenditures or labor or improvements.

(d) The year for which such expenditures or labor or improvements were made and the dates on which they were made.

(e) The name of the owner or claimant of the claim at whose expense the same was made or performed.

(f) The names of the persons, corporations, contractors or subcontractors who performed the work or made the improvements.

In order for a recorder to know if an instrument offered for recording is a proof of labor and thereby entitled to the special recording fee, he must refer to NRS 517.230, subsection 1. The recorder must determine if the instrument offered as a proof of labor contains the items listed in the statute in order to know if it is a proof of labor. The recorder must not attempt to determine if the statements are accurate or true, only that the statements are in the instrument.

CONCLUSION

Recorders are only obligated to record instruments that are authorized by law or permitted by law to be recorded. Proofs of labor are authorized by law to be recorded in NRS 247.120 and given a special recording fee in NRS 247.310. The required contents of proofs of labor are set out in NRS 517.230. Any instrument not containing the statutory minimum essentials is not a proof of labor and not entitled to recording as such.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-52 FIREFIGHTERS; RETIREMENT—All parties who perform fire protection services, including fire inspectors and persons who maintain firefighting equipment, are eligible for early retirement under the provisions of NRS 286.410, as amended.

Carson City, October 28, 1971

The Honorable Mack Fry, Member of the Assembly, 105 North Sierra Street, Suite 201, Reno, Nevada 89505

Dear Assemblyman Fry:

QUESTION

You have asked for a further analysis of our Attorney General's Opinion No. 6A dated June 30, 1971. In that opinion we defined certain categories of eligibility for early retirement under provisions of NRS 286.410, as amended by the 1971 Nevada Legislature. You have specifically asked whether mechanics who maintain firefighting equipment and fire prevention and inspection personnel are included within the early retirement provisions.

ANALYSIS

There is no definition of the word "fireman" contained in the Nevada Revised Statutes. The standard reference for job definitions used both in the public and private sector is the Dictionary of Occupational Titles (3d ed. 1965) published by the United States Department of Labor. This reference defines firefighter as:

> Controls and extinguishes fires, protects life and property, and maintains equipment as volunteer or employee of city, township, or industrial plant: Responds to fire alarms and other emergency calls. Selects hose nozzle, depending on type of fire, and directs stream of water or chemicals onto fire. Positions and climbs ladders to gain access to upper levels of buildings or to assist individuals from burning structures. Creates openings in buildings for ventilation or entrance, using axe, chisel, and crowbar. Protects property from water and smoke by use of waterproof salvage covers, smoke ejectors, and deodorants. Administers first aid and artificial respiration to persons overcome by fire and smoke. Inspects buildings for fire hazards and compliance with fire prevention ordinances. Performs assigned duties in maintaining apparatus, quarters, buildings, equipment, grounds, and hydrants. Participates in drills, demonstrations, and courses in hydraulics, pump operation and maintenance, and firefighting techniques. May drive firetruck. May fill fire extinguishers in institutions or industrial plants.

The reference in defining firefighter assigns it a classification number 373.884. The classification 373 represents fire protection. The subclassification .884 is a subclassification known as manipulating. The work performed within the 373 classification by an individual with an .884 is a subclassification (firefighter) is work requiring manipulative skills. The Dictionary of Occupational Titles description states that:

> Work activities in this group primarily involve the dextrous use of hands, handtools, or special devices to work, move, guide, or place objects or materials. There exists some latitude for judgment in selecting the appropriate tools, objects, or materials, and in determining work procedures and conformance to standards, although all these factors are fairly obvious. * * *

The requirements of a 373.884 classification are:

> Eye-hand coordination; manual and finger dexterity; spatial and form perception; a decided preference for working with the hands; the ability to work within prescribed standards and specifications; and facility in adapting to a routine.

It would, therefore, appear that since maintenance mechanics of a fire department do in fact perform assigned duties in maintaining apparatus, quarters, buildings, equipment, grounds and hydrants and since, in fact, special coordination and dexterity are involved in this maintenance, these mechanics are firefighters within the classification of 373.884 of the Dictionary of Occupational Titles.

The Dictionary of Occupational Titles, in establishing classifications, has divided the descriptions into separate areas and tasks performed by the employee. There is no requirement that all of the tasks be performed by each employee but rather the tasks are descriptive of duties expected to be performed by persons within the position. It should be noted that there is no operating subclassification under the 373 fire protection classification for parties maintaining fire apparatus, equipment, or hydrants.

A fire inspector is a separate category within the protective service occupations group classification 379. His duties are defined as follows:

> Inspects buildings to detect fire hazards and enforce local ordinances and State laws; examines interiors and exteriors of buildings to detect hazardous conditions or violations of fire ordinances and laws. Prepares report of violations or unsafe conditions. Discusses condition with owner or manager and recommends safe methods of storing inflammables or other hazardous materials. Informs owner or manager of conditions requiring correction, such as faulty wiring. Issues summons for fire hazards not corrected on subsequent inspection, and enforces code when owner refuses to cooperate. Keeps file or inspection records and prepares monthly report of activities. May perform duties of firefighter (any ind.) or fire captain.

While it is not clear that fire inspectors perform the duties of a firefighter, NRS 286.410 does not use the word “firefighter” but rather “firemen.” Since the definition of fire inspector falls within the 373 fire protection service classification which is entitled “fireman” within the Dictionary of Occupational Titles itself, it is the opinion of this office that fire inspectors are also firemen for the purposes of NRS 286.410.

CONCLUSION

It is therefore our opinion that all parties performing fire protection service are firemen who are entitled to early retirement under the provision of NRS 286.410. These parties would include fire inspectors and persons who maintain firefighting equipment.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Michael L. Melner
Deputy Attorney General

OPINION NO. 71-53 COUNTY SURVEYORS—A person may serve as county surveyor in more than one county.

Carson City, November 2, 1971

The Honorable John Koontz, Secretary of State, Carson City, Nevada 89701

Dear Mr. Koontz:

This is in reply to your inquiry concerning the possibility of the Mineral County Surveyor serving as a surveyor in another Nevada county.

QUESTION

Can a licensed surveyor who has been appointed county surveyor in one county of Nevada be appointed as county surveyor in another Nevada county?

ANALYSIS

The qualifications for the county surveyor are set out in NRS 255.025 as follows:

> No person may hold the office of county surveyor unless he is licensed as a registered land surveyor under the provisions of chapter 625 of NRS, but any person elected or appointed to the office of county surveyor before July 1, 1959, may continue to hold such office until the expiration of the term for which he was elected or appointed.

These qualifications are primarily concerned with professional competence and make no mention of any residency requirement. It is likely that in some sparsely populated counties there may be no resident registered land surveyor in the entire county.

County surveyors are paid only for work ordered by the county commissioners and do not receive a salary. There is also a provision to pay them mileage rather than giving them an automobile (see NRS 255.060). There is no restriction or conflict in Chapter 255 of Nevada Revised Statutes on an individual serving as a county surveyor in more than one county. In fact, the language of NRS 243.395 envisions that a county surveyor may represent more than one county.

If a person chooses to seek election or appointment in more than one county, if would be imperative that he comply with NRS 255.050, as follows:

> The county surveyor shall keep his office at the county seat.

Difficulties would arise if a person were to seek election to the office of county surveyor in a county in which he is not a qualified elector, but he could clearly be appointed to the office. (See Attorney General's Opinion No. 46, dated October 12, 1971.)

CONCLUSION

A person meeting the statutory qualifications for a county surveyor, and maintaining an office at the county seat of each county for which he serves, may serve as a county surveyor in more than one county.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

OPINION NO. 71-54 TAXATION; LIQUOR EXCISE TAX—Liquor sold to an instrumentality of the U.S. Armed Forces by a Nevada wholesaler is not exempt from Nevada's excise tax on liquor.

Carson City, November 23, 1971

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Sheehan:

You have requested an opinion from this office concerning the applicability of Nevada's liquor excise tax when a licensed Nevada liquor wholesaler makes sales to an open mess located on a military installation. There has been brought to your attention U.S. Army Regulation 210-65, which states in pertinent part: "Open messes are Federal instrumentalities and are immune from direct state and local taxation and regulation. Any attempt by a state or locality to tax or to regulate the acquisition or sale of alcoholic beverages by open messes * * * will be referred immediately to the appropriate staff judge advocate." An "open mess" is an officers', noncommissioned officer's or enlisted men's club, including dining and bar facilities, which is open to members and their guests.

QUESTION

Is liquor sold by a licensed Nevada liquor wholesaler to an open mess located on a military installation subject to the excise tax imposed by Chapter 369 of Nevada Revised Statutes?

ANALYSIS

NRS 369.330 and 369.333 levy an excise tax upon liquor, the tax rate depending upon the percentage of alcohol by volume. The statutory definition of "liquor" includes beer (NRS 369.040); however, "beer" itself is specifically defined in NRS 369.010. The sale of beer by licensed wholesalers to Armed Forces exchanges and officers', noncommissioned officers' and enlisted men's clubs or messes is exempted from tax by NRS 369.335. Subsection 2 of said statute authorizes any licensed wholesaler to obtain a tax credit or refund when he sells beer on which the tax has been paid to any of the Armed Forces' instrumentalities named in the statute. The rule of statutory construction, expressio unius est exclusio alterius, which means that the expression of one thing is the exclusion of another, precludes the exemption for anything but beer. Nevada's courts recognize said rule. *State v. Cole*, 38 Nev. 215, 148 Pac. 551 (1915). Therefore, any exemption or exception from the tax as to sales of liquor, other than beer, to such instrumentalities of the Armed Forces must be based on something other than NRS 369.335.

It is firmly established that a state does not have the power to tax the federal government or its agencies or instrumentalities. *County of Clark v. City of Los Angeles*, 80 Nev. 120, 390 P.2d 38 (1964). Armed Forces exchanges and officers', noncommissioned officers' and enlisted men's clubs and messes are instrumentalities of the United States government. NRS 369.335; *State v. Green*, 174 So.2d 546 (Fla. 1965). Therefore, if, in the case of a sale of liquor by a licensed Nevada wholesaler

to an open mess, the liquor excise tax would fall upon the mess, such a transaction would be immune from the tax.

The "legal incidence" of a tax is determinative of whether a tax violates the immunity of the federal government from state taxation. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954); *County of Clark v. City of Los Angeles*, supra. The "legal incidence" of a tax falls upon the party who is legally liable for payment of the tax. Id. The fact that the economic burden of a state tax falls upon the United States Government in the form of higher

prices it must pay for the goods or services being taxed does not invalidate the tax; "legal incidence" is the test. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 11 L.Ed.2d 389, 84 S.Ct. 378 (1964); *Kern-Limerick, Inc. v. Scurlock*, supra. *See also Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed.3, 62 S.Ct. 43, 140 A.L.R. 615 (1941). The legal incidence of Nevada's liquor excise tax falls upon the importer, for NRS 369.370(1) reads: "For the privilege of importing, processing, storing or selling liquors, all licensed importers and manufacturers of liquor in this state shall pay the excise tax imposed and established by this chapter." Since there are no manufacturers of liquor at present in Nevada, the legal liability for the tax falls upon the liquor importer. "Importer" is defined by NRS 369.030 as "* * * any person who, in the case of liquors which are brewed, fermented or produced outside the state, is first in possession thereof within the state after completion of the act of importation."

Attorney General's Opinion No. 40, dated June 7, 1963, answered a virtually identical question as is herein being discussed by concluding that: "The Navy Commissioned Officers Mess at the Naval Auxiliary Air Station, Fallon, Nevada, may not be required to pay the Nevada excise tax on liquor." Certainly the conclusion is correct to the extent that it means that the legal liability for payment of the tax may not be imposed directly on the mess as a tax upon the purchase of liquor by the mess. However, it is erroneous to the extent that it implies that the excise tax may not be imposed on a licensed importer as to liquor then sold to the mess. The fact that the economic burden of the tax would be passed along to the mess in the form of higher prices for the liquor does not affect the validity of the tax, as discussed above. Said Attorney General's Opinion relies upon the case of *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1 (1941), as calling for a conclusion that the legal incidence of Nevada's excise tax on liquor falls upon the purchaser. However, said case dealt with a North Dakota sales tax act which specifically declared the tax to be a debt from the purchaser to the retailer. In fact, the Supreme Court of North Dakota already had held that the legal liability for the sales tax was laid upon the purchaser, by reason of said statutory provision. As discussed above, the legal incidence of Nevada's liquor tax falls upon the licensed importer, rather than the purchaser. Therefore, Attorney General's Opinion No. 40, dated June 7, 1963, is superseded by this opinion. For an example of another state's courts upholding a liquor tax imposed upon the seller, even when the economic burden of the tax would be passed on to the United States, who was the purchaser, see *National Distillers Products Corp. v. Board of Equalization*, 187 P.2d 821 (Calif. 1948).

CONCLUSION

Liquor other than beer, sold by a licensed Nevada wholesaler to an Armed Forces instrumentality is not exempted or excepted from the State's liquor excise tax.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Irwin Aarons
Deputy Attorney General

OPINION NO. 71-55 VOTING—REGISTRATION—County clerks and voter registrars are required to accept the registration of 17-year-olds who will have reached their 18th birthday on or before the next succeeding primary, general or other election in which they

wish to vote, if these potential voters meet the other constitutional or statutory requirements to qualify as electors.

Carson City, December 21, 1971

James H. Bilbray, Esq., University of Nevada Board of Regents, 302 East Carson Avenue, Las Vegas, Nevada 89101

Dear Mr. Bilbray:

This opinion is in response to your letter of December 3, 1971 in which you ask for an opinion on the following:

QUESTION

Are the various county clerks and voter registrars of the State of Nevada required to accept the registration of 17-year-olds if the 17-year-olds will have reached their 18th birthday by the election for which they are attempting to register?

ANALYSIS

As noted in Attorney General's Opinion No. 48, dated October 20, 1971, the primary consideration in the enforcement of election laws is that all statutes and regulations pertaining to registration and voting should be evenly and fairly applied. As noted at page 12 of the original of this opinion, it has always been the position of the courts of the State of Nevada that election laws should be construed and interpreted in such a manner as to permit the greatest number of citizens to exercise the right to vote.

It is obvious that the Legislature had this philosophy in mind when they enacted Chapter 585 of the 1971 Statutes of Nevada (Assembly Bill No. 569). Section 4 of this chapter, which became effective June 29, 1971, amends NRS 293.485 and provides in paragraph 2 when commenting on the right to vote:

> This section shall not be construed to exclude the registration of eligible persons whose 18th birthday * * * occurs on or before the next succeeding primary, general or other election.

This amendment to Nevada Revised Statutes, coupled with the earlier judicial determinations, indicates clearly that it was the intent of the Legislature that 17-year-olds who will have become 18 by the election for which they are registering and who meet the other constitutional and statutory requirements should be permitted to register and vote, although they have not achieved the age of 18 at the time of their registration.

CONCLUSION

County clerks and voter registrars are required to accept the registration of 17-year-olds who will have reached their 18th birthdays on or before the next succeeding primary, general or other election in which they wish to vote if these potential voters meet the other constitutional or statutory requirements to qualify as electors.

Respectfully submitted,

ROBERT LIST

OPINION NO. 71-56 TIPS AND GRATUITIES—NRS 608.160 prohibits employers from confiscating tips or gratuities or applying them toward the statutory minimum hourly wage.

Carson City, December 22, 1971

Mr. Stanley P. Jones, Labor Commissioner, State of Nevada, Carson City, Nevada 89701

Dear Mr. Jones:

You have asked this office for an interpretation of NRS 608.160 (as amended in 1971), which pertains to disposition of tips and gratuities. On October 21, 1971, this office submitted to you an informal opinion concerning this statute. Since that informal opinion, we have acquired a great deal more information about the legislative history and legislative intent of the statute, and now issue this formal opinion on the subject.

ANALYSIS

Prior to the amendments in the 1971 Legislature, NRS 608.160 reads as follows:

> 1. Every person who takes all or any part of any tips or gratuities bestowed upon his employees, or who credits the same toward payment of his employees' wages, shall, and is hereby required to, post in a conspicuous place where it can be easily seen by the public, upon the premises where such employees are employed and work, a notice to the public that tips or gratuities bestowed on employees go or belong to the employer. Such notice shall contain the words "Notice: Tips Given Employees Belong to Management." The letters of these words shall be in bold black type at lease 1 inch in height.
> 2. Any person who takes all or any part of the tips or gratuities bestowed upon his employees without posting the notice required to be posted by subsection 1 shall be guilty of a misdemeanor.

The old statute clearly allowed employers to confiscate tips as well as apply them toward the minimum wage requirements by merely posting a notice to that effect. This statute was never held to have any application in any way to employer-employee pooling arrangements. Traditionally, the entire area of tip pooling has been a policy decision arrived at in the private sector.

The 1971 Nevada Legislature amended this old statute by deleting the portion quoted above, adding the following:

> 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 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.

Indications of legislative intent of which we have become aware have conclusively indicated that the only purpose of the amendments to NRS 608.160 was to prohibit employers from confiscating tips or using them as a credit toward the employee's minimum wage requirements. This change from the old notice requirement was the extent of the purpose of the amendments. The statute had never in the past been construed to have any application to tip pooling agreements, nor was it intended to speak to pooling agreements in the 1971 amendments. Subsection 2 was added to the prohibitions of subsection 1 merely to clarify the fact that subsection 1 did not affect employee tip pooling arrangements.

Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. *Brown v. Davis*, 1 Nev. 409 (1865); *In re Walters' Estate*, 60 Nev. 172 (1940); *Blaisdell v. Conklin*, 62 Nev. 370 (1944). Its office has heretofore recognized that this principle has been recognized by our courts so many times it has now become axiomatic. Attorney General's Opinion No. 47, dated July 31, 1931; Attorney General's Opinion No. 596, dated March 29, 1948.

CONCLUSION

NRS 608.160 prohibits employers from confiscating tips or gratuities or applying them toward the statutory minimum hourly wage. Subsection 2 merely maintains the status quo in the area of tip pooling agreements, leaving such arrangements to the private sector.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 71-57 "SO-CALLED TRAP"—A "so-called trap" is any trap set to trap people.

Carson City, December 22, 1971

Hon. Mark C. Scott, Jr., District Attorney, Elko County, Elko, Nevada 89801

Dear Mr. Scott:

This is in reply to your letter of October 28, 1971, concerning the interpretation of NRS 202.250 and the definition of a "so-called trap."

QUESTION

Does a "so-called trap" include a jaw-foot trap as commonly used in trapping coyotes?

ANALYSIS

The questionable language is found in NRS 202.250, subsection 1, as follows:

> Every person who shall set a so-called trap, spring pistol, rifle, or other deadly weapon shall be punished:
> (a) If no injury result therefrom to any human being, for a gross misdemeanor.

(b) If injuries not fatal result therefrom to any human being, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

(c) If the death of a human being results therefrom, under circumstances not rendering the act murder, by imprisonment in the state prison for not less than 1 year nor more than 10 years; otherwise, the punishment shall be as for murder.

The statutory language is not especially helpful in determining the application of this statutory prohibition to jaw-foot traps used in trapping coyotes. In 1960, subsection 2 of NRS 202.250, set out below, was added to the statute:

Subsection 1 does not prevent the use of any loaded spring gun, set gun or other device for the destruction of gophers, moles, coyotes or other burrowing rodents or predatory animals by agents or employees of governmental agencies engaged in cooperative predatory animal and rodent control work, but:

(a) No such loaded spring gun, set gun or other device shall be set within 15 miles of the boundaries of any incorporated city or unincorporated town; and

(b) Before setting any such loaded spring gun, set gun or other device on any real property permission must first be obtained from the owner, lessee or administrator thereof.

Upon reading the entire statute together, it is evident that a "so-called trap" is intended to mean a man-trap. This means that the statute intends to prohibit the use of any trap for trapping people, but that devices capable of trapping people could be used for trapping animals if used within the limitations of subsection 2.

There is additional authority for the above interpretation of the intent of NRS 202.250, subsection 1, found in NRS 503.440 through 503.580, inclusive. These provisions provide for restrictions on the use of traps indicating their use is legal if done within these restrictions. Special note should be made of NRS 503.580, as follows:

1. For the purposes of this section, "public road or highway" means:

(a) Highways designated as United States highways.

(b) Highways designated as state highways pursuant to the provisions of NRS 408.285.

(c) County roads as defined by NRS 403.170.

2. It is unlawful for any person, company or corporation to place or set any steel trap, used for the purpose of trapping animals, larger than a No. 1 Newhouse trap, within 200 feet of any public road or highway within this state.

3. This section shall not be construed so as to prevent the placing or setting of any steel trap inside, along or near a fence which may be situated less than 200 feet from any public road or highway upon privately owned lands.

This statute clearly envisions the legal use of steel traps. A No. 1 Newhouse Trap is a jaw-foot trap used for trapping muskrats and mink. A review of authorities discloses that the term "so-called trap" is unique to Nevada Revised Statutes. It appears the closest case authority for a definition that manifests the intent of the Nevada Legislature is found in the case of *Gumbart v. Waterbury Club Holding Corporation*, 28 F.Supp. 170-172 (1939), as follows:

* * * Technically a trap imports an affirmative intent or design, either malicious or mischievous, to cause injury * * *

CONCLUSION

A "so-called trap," as the term is used in NRS 202.250, does not include a jaw-foot trap when used for trapping coyotes.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Julian C. Smith, Jr.
Deputy Attorney General

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